

MINUTES OF COMMISSION MEETING
January 21, 2010

Present at the New Jersey Law Revision Commission meeting held at 153 Halsey Street, 7th Floor, Newark, New Jersey were Chairman Vito A. Gagliardi, Jr., Commissioner Albert Burstein and Commissioner Sylvia Pressler. 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.

Also in attendance were Matt Shapiro, New Jersey Tenants Association; Donald M. Legow, Legow Management Company, LLC; Nicholas J. Kikis, New Jersey Apartment Association; and Judge Mahlon L. Fast.

Minutes

The minutes of the December 2009 meeting were approved on motion of Commissioner Burstein, seconded by Commissioner Pressler, with one change on the first page. In the first sentence of the section pertaining to Landlord Tenant the word “project” was changed to “draft”.

Uniform Debt-Management Services Act

Laura Tharney told the Commission about the January 20th letter received from the Department of Banking and Insurance advising that the Department supports the project generally but has some detailed comments and expects to provide them in the near future. Ms. Tharney asked that the Commission release the project as a tentative report with a 60 or 90 day comment period as needed, in order to elicit additional comment. Ms. Tharney explained that the feedback received so far has been limited but supportive of the project because the existing law has been described as poorly drafted and, as a result of its age, not well-suited to address some of the issues that commonly arise now.

Ms. Tharney said that she would like to start with a 60 day comment period but be able to extend the time for comments if necessary, explaining that she detailed substantive comments from the Department of Banking and Insurance that might necessitate considerable revision to the report. In addition, there might be considerable comment from other interested parties since the draft is substantially different from current New Jersey law. She also explained that there were areas of the draft that were of concern and that it would be helpful to allow time to obtain clarification or explanation of the impact those provisions might have in New Jersey.

Commissioner Pressler asked why the report called for registration, rather than licensing, as was currently required in New Jersey. Ms. Tharney explained that the word,

"registration" was derived from the uniform law. Commissioner Burstein asked about the difference between licensing and registration. Ms. Tharney said that the current statute contains very little information beyond stating that a license is required, and that the uniform law articulates detailed requirements associated with registration. Commissioner Pressler noted that registration is usually a unilateral act, but that licensing requires the approval of the licensing body. Mr. Cannel suggested that the uniform act appeared to be treating registration in much the same way that licensing is treated in New Jersey. Chairman Gagliardi agreed with Commissioner Pressler that the language of the draft should be changed to require licensing, rather than registration, but that it should be made clear that this was done not to effect a substantive change, but to maintain the effect of the uniform language while including the term as it is more commonly understood in New Jersey.

Ms. Tharney also raised the issue of the three sections of the report that are drafted in the alternative, sections 4, 5 and 9. She explained that, as currently drafted, the Section 4 allows only non-profit entities to participate in the provision of debt-management services, while 4A allows for-profit entities to do so as well. The same is true with the alternatives provided for sections 5 and 9. Chairman Gagliardi asked if the comments contained an explanation of the reason for the alternative language, and Ms. Tharney confirmed that the comments did so. The Commission approved the inclusion of alternative language for the purpose of eliciting comments on both options.

Commissioner Pressler questioned the differentiation between secured and unsecured debt. She explained that residential mortgages should not be included in the Act, but that other forms of secured debt, like appliances and car leases should be included. Commissioner Pressler stressed the unique nature of residential mortgages, because of the economic situation and the various techniques being used to salvage them, but suggested that other forms of consumer debt, secured or not, should be subject to the Act.

On motion by Commissioner Pressler that was seconded by Commissioner Burstein, the Commission agreed that the project would be released as a tentative report after the two changes requested by Commissioner Pressler were made to the document.

Landlord Tenant

Marna Brown explained that Staff had incorporated changes to the Security Deposits Chapter as suggested at the December 2009 meeting and the Commission, on motion by Commissioner Pressler and seconded by Commissioner Burstein, to release the chapter as a tentative report after its incorporation with other chapters. Section LT:4-3(e) now includes a provision proposed by Mr. Kikis on behalf of the New Jersey Apartment Association that reduced the number of notices landlords were required to provide tenants

when a security deposit is paid in installments. Section LT: 4-3(b) corrects an inadvertent error that was addressed in an earlier meeting. Section LT: 4-17(b)(2) adds caps on the surety deposit principal amount (in addition to the cost) and on both principal amount and cost when there is a combination of surety bond and security deposit. Finally, section LT: 4-17(c) incorporates Professor Bell's suggestions. Staff also will correct the typographical error in the Comment at page 5, changing the word "mew" to "new."

Professor Bell noted that LT: 4-8(b) is awkwardly drafted and should be revised to say "shall be turned over to the person or entity to which the landlord turned over the security deposit and accrued interest or earnings, in accordance with subsection a...".

Judge Fast asked whether section LT: 4-3(b), in the second sentence, should read "after the conclusion of the initial lease" rather than "in any 12-month period after the commencement of the initial lease term..." Commissioner Pressler asked whether a landlord could ask for any additional security deposit after commencement of the lease term and Commissioner Gagliardi said that language should be included to ensure that the cap on the security deposit amount never exceeds one and one half month's rent. Commissioner Gagliardi asked why the Commission would want, as a public policy matter, to statutorily discourage landlords from offering these terms to a tenant. Under the current statutory language, which permits only a 10% increase in the security deposit per year, in order to get to the desired security deposit amount, it could take years. Commissioner Pressler asked whether there was even a concern if the landlord is willing to accept the 10% increase. Mr. Kikis stated that the 10% limit is the current law and the landlords have been accustomed to this limitation. Commissioner Pressler also noted that now, with the Commission's recent revision, the tenant would be able to pay the security deposit in installments.

Commissioner Pressler asked how a landlord, without a lease provision permitting the increase, could raise the amount of the security deposit the next year, if the tenant has already signed a lease with a stated security deposit amount in year one of the lease. Mr. Shapiro said that the increase could be done at the lease renewal. Commissioner Pressler stated that the tenant has a reasonable understanding that once the tenant has paid the security deposit, it is paid for the lease term. So the issue before the Commission is raising the security deposit after the initial term of the lease. Mr. Cannel explained that, as with any rent increase, the key is reasonableness. Commissioner Pressler suggested that the Commission leave the concept exactly as it is but eliminate the confusing language, specifically the language that says "after commencement of the initial lease term". Chairman Gagliardi amended the earlier motion to release the Security Deposit Chapter with the proposed amendments as noted.

Mr. Cannel contacted the League of Municipalities regarding the exemption provision in the Landlord Registration Chapter, but has not yet received any answer. He

said that it might be too difficult to compile a list of statutes that might apply and said that determining what municipalities want is not easy; and Staff might either have to use general language or language that requires approval by the DCA.

Matt Shapiro asked if the change to the Security Deposit Chapter regarding installment plan payments meant that the tenant would receive notice only after all the installments are paid. He said this would mean the tenant would not know which bank the security deposit was in until all installments were paid. Ms. Brown said that if the Commission incorporated the change suggested by Mr. Kikis, this would be true. Mr. Shapiro said that there should be an initial notice as well as a final notice and a notice if the institution changes or the owner changes since the money belongs to the tenant and the tenant should know where it is at all times. Mr. Kikis explained that his suggestion was that the single notice would apply only if the owner was going to agree to a payment plan with the tenant, and should not impact the requirement that a landlord provide a notice if there was a relevant change in circumstances as the statute now provides. Ms. Brown advised that she would clarify this in the draft tentative report.

Mr. Shapiro also noted that there should also be a notice at the last installment so that there is confirmation that the security deposit requirement has been satisfied. Judge Fast disagreed, saying that the notice is not a receipt and although the tenant is entitled to get a receipt, that is a separate and entirely different document. Commissioner Pressler moved to make the change in the notice section so that one notice would be provided upon receipt of the first installment of the security deposit and an additional notice would be required if any changes were made as required by current law. Commissioner Burstein seconded the motion and it was approved for inclusion in the draft tentative report. It was clarified that the current statute does not require a receipt be given to the tenant upon the payment of the security deposit.

Ms. Brown explained that the Eviction Chapter was in a very preliminary form and that the goal was to preserve current law but re-order the provisions in a way that is easier to understand, is more consistent and eliminates terms that are outdated or archaic. She said that Staff has tried not to alter any protections currently available to tenants under the Anti-Eviction Act because Staff is mindful of the importance of those protections. Some basic terms were modified to make them clearer. For example, references in the statutes to an “action for removal” were changed to an “action for eviction.” The terms “warrant of removal” or “warrant of possession” (sometimes used interchangeably) were replaced with “warrant of eviction.” The term “notice to quit” was replaced with the term “notice to vacate”. Mr. Legow stated that the term “notice to vacate” was standard in the industry. Judge Fast pointed out that there are sections of the statute that refer to “holdover” or “holding over” and “continuing in possession” and the term “holdover” is really not necessary. Commissioner Pressler stated that the term “holdover” should not be eliminated from the statute because of its precedential value.

Anyone doing research in this area would use the term “holdover” so it still has a purpose.

Commissioner Pressler suggested changing the order of the articles within the chapter. The Anti-Eviction Act should come first, then the condominium provisions, followed by the residential provisions that are not included in the Anti-Eviction Act, and then finally the commercial premises provisions.

Mr. Cannel raised the issue of the provisions pertaining to individuals with developmental disabilities that are carved out of the Anti-Eviction Act. Mr. Shapiro explained that the provisions were intended to afford them more protections. Mr. Shapiro said that the unit, and not the tenant, is controlled by the provision. Under one of the provisions, a unit that is held in trust, for example, is not controlled by a “just cause” for eviction because the person who lives in the unit has to move out to make way for an individual for whom the unit is held in trust. Professor Bell questioned why this provision applied to developmental disabilities alone and not other disabilities.

Commissioner Pressler stated that Staff did a great service simply by reorganizing the statutes and putting them into consistent language.

Ms. Brown explained that there were a few substantive changes that were made which she wished to bring to the Commission’s attention. Two new grounds for eviction had been added at the suggestion of commenters. The first was noted at LT:5-1.2j, which adds a ground for eviction if a tenancy that is subsidized by the federal government violates or is contrary to a federal law or regulation. Commissioner Pressler said there is law on this issue as well as whether, under HUD rules, if a member of the resident family is convicted of drug dealing, the entire family has to move out. Mr. Kikis stated that the eviction in that case is limited by state law. Although the unit loses the federal subsidy, the tenant cannot be evicted because of the Anti-Eviction Act. The eviction eventually occurs for nonpayment of rent because once the subsidy is gone, the tenant cannot make the rent payment. Commissioner Pressler stated that this addition ground was not necessary as it was a clear consequence of state law and federal regulation.

Ms. Brown stated that the other proposed new ground for eviction, suggested by Judge Fast, appears at LT:5-1.3b. The difficulty was determining what is hazardous to a tenant. Judge Fast explained that he had contemplated examples of what was hazardous as the hoarding of garbage, excessive pets, improper overloading of electrical outlets, and lighting candles while leaving the premises unattended. Commissioner Pressler said that she would be more comfortable if the dangers were to others rather than to the tenant. There was far too much that could be deemed simply hazardous to the tenant, such as smoking too much. Commissioner Bell preferred the term “significant” or “substantial” hazard. Commissioner Pressler suggested that there should be a requirement of “clear

and convincing evidence of imminent danger”.

Mr. Shapiro asked about the meaning of the term “neighborhood” and Ms. Brown explained that it was used in several places in the Anti-Eviction Act but not defined in the current statute. Mr. Shapiro said that to affect the neighborhood, the tenant’s behavior would have to take place off of the premises. Commissioner Pressler said that she could not see how a tenant conduct in the tenant’s own residence could affect the neighborhood without affecting the other tenants. Mr. Legow said he recently had a situation where a tenant had such excess clutter that one could barely walk through the apartment. A judgment was entered against the tenant based on disorderly conduct because the unit had become a fire hazard. He questioned whether this new language was needed if it was covered under the disorderly conduct provision of the current statute.

Commissioner Pressler moved that the Commission add a very restrictive provision to grounds for eviction stating that if it clearly and convincingly appears that the conduct of the tenant is creating imminent danger to others, to the property and to the immediate vicinity, such conduct would be a basis for eviction. Commissioner Gagliardi expressed concern that the Commission would be increasing the burden of proof standard to “clear and convincing”. Commissioner Pressler felt the provision should be as restrictive as possible because of her concern with adding new grounds to the statute. Commissioner Bell said that he was not sure that the higher standard of proof makes the provision more restrictive. He preferred to say “imminent and serious danger” to make it clear that the danger has to be serious. Commissioner Pressler agreed to remove the “clear and convincing” language.

Ms. Brown discussed Judge Fast’s additional proposed new section based on the *Maglies v. Guy* case concerning succession to tenancy. The proposed new section, a copy of which was distributed at the meeting, incorporated the case law language. Ms. Brown explained the underlying facts of the *Maglies* case but extended to a limited degree in *Golden Peak*. In *Maglies*, a mother and daughter resided together. The mother was the named tenant and the daughter is not named as a tenant but made substantial contributions to the rent, and the landlord acquiesced to the daughter’s presence at the residence. When the mother died or went to a nursing home, and the daughter wished to continue to live in the unit, the court determined that the daughter was entitled to the Anti-Eviction Act protections.

Commissioner Pressler felt the third provision of the proposed statute is too narrow and should state whether the landlord has been aware or should have been aware during the tenancy of the other occupant, not whether the landlord has agreed to that occupant residing in the dwelling. Mr. Cannel asked whether the person who may be protected should be limited to a family member, as was the case in *Maglies*, or a member of the tenant’s household, as proposed in the new provision. Mr. Cannel also stated that

the requirement that the person contribute to the rent also seemed too strict a standard. Commissioner Pressler noted that the substantial contribution of the other occupant was a fact in *Maglies*, but she would take out “substantial contribution”, as it is too restrictive. Both Commissioners Pressler and Burstein suggested that if the next case did not involve a substantial contribution by the occupant seeking the protections of the Anti-Eviction Act, it was likely that the courts would find that a substantial contribution was not required. Commissioner Pressler felt that the term “family” could be as broad as “household” in some cases and Commissioner Gagliardi stated that in this day and age, the term “household” seemed more appropriate. Professor Bell noted that if the standard is a continuing and ongoing residency and the landlord has acquiesced, it really should not matter whether the occupant was a family member or not.

Mr. Cannel explained that one troubling example, however, is a revolving assortment of college students living together where a landlord is stuck with each new group of students as they change one-by-one. Commissioner Pressler stated that “continuous and uninterrupted during the course of the tenancy” is too broad. Commissioner Gagliardi noted that the term is “during” not “throughout”. Commissioner Pressler stated that the Commission should let case law develop a bit more before setting the *Maglies* standard into the statutory language. Professor Bell suggested stating general principles. By putting these in the statute, the statute would alert people to the concepts articulated in *Maglies*. Commissioner Gagliardi is in favor of providing some additional guidance if possible and did not want to give up on this proposal at this time. Commissioner Bell suggested that, at a minimum, the standard could be continuous and uninterrupted occupancy, for at least a year, along with some notion that the landlord had exhibited recognition of the occupant. Commissioner Pressler said that perhaps the approach should be the reasons for the named tenant’s departure; i.e., an exigency such as death, disability or marriage. Mr. Kikis stated that he believed a landlord should not be bound to enter into a contract with a tenant as a successor without acquiescence. Commissioner Pressler stated that all one had to show to demonstrate acquiescence was the landlord’s knowledge. Mr. Kikis argued that this was an extreme expansion of the *Maglies* case and the issue should not be codified but should be left to common law development. Commissioner Pressler stated that the real standard should be whether it would be unfair, unjust and unreasonable to evict the remaining tenant. Mr. Legow pointed out that the concept of acquiescence was a concern. With a 600 unit building, for example, the landlord is not going to know each and every occupant. So if the Commission is going to add any provision based on *Maglies*, it should require the landlord to make an affirmative act before the occupant would be given the benefit of the Anti-Eviction Act. Mr. Shapiro noted that it should not have to be an affirmative act so long as the landlord had knowledge. He also stated that he wished to have input from Mr. Pascale on this issue before the Commission reached conclusion about it.

Ms. Brown noted that there were additional issues that needed to be addressed and that she would prepare a memo for the Commission for the next meeting outlining changes to the current law now appearing in the draft.

Before leaving the eviction issues, Judge Fast asked the Commission to consider a basic concern. He said that his reason for endorsing the project initially is that there are more reasons for evicting a tenant under the Anti-Eviction Act than there were under the prior dispossession act. He thought that the additional grounds in the Anti-Eviction Act should be applied to commercial buildings and owner occupied two and three-family buildings. Ms. Brown commented that with regard to owner-occupied two and three-family buildings, Staff may agree with Judge Fast's proposal, but with regard to commercial tenancies, the grounds for eviction are generally set forth in the lease. In addition, there are not the same concerns because there is no opportunity under current law to holdover in a commercial tenancy as there is in most residential tenancies. Commissioner Gagliardi asked Staff to provide the Commission with its recommendations regarding the Judge's proposal on this issue.

Title 39

Ms. Tharney explained that the memorandum that had been provided to the Commission for this meeting was a consolidation of information that had been provided to the Commission in hurried fashion at time of last meeting. The memorandum briefly explains the comments received from MVC and Ms. Tharney indicated that the substantive comments from MVC were being incorporated and that the majority of the stylistic comments were being incorporated as well unless they returned the language to a form in which it was duplicative of other language or more cumbersome without changing the substance.

Ms. Tharney explained that the vast majority of the MVC comments on the Title 39 project had already been received, and that she had spoken with her contact at MVC and she expected that comments on two of the largest chapters still outstanding would be received by the end of January. She also explained that it was her understanding that while the balance of the comments will not be received in time to release the project in February, they should be received by the end of February so that the Commission can release a final report in March.

Chairman Gagliardi asked if someone from MVC would be present in March and Ms. Tharney said that she did not expect anyone to be present but that she would ask if the Commission wished to hear from someone. The Commission did not ask her to do so. Ms. Tharney said that as long as the timetable she described was acceptable to the Commission, she would not be providing anything further on this project until March.

Property

Mr. Cannel stated that this first draft of the report was very rough. He explained that with the exception of a chapter on deeds, much of the current law was out of date and pointed out by way of example the fact that surveys were no longer made by proprietors. Commissioner Pressler asked whether title insurers went back to the time of the proprietors when conducting title searches. Mr. Cannel explained that, based on detailed conversations he has had with Larry Fineberg of Chicago Title, it was his understanding that the revision or elimination of much of the older language is not a problem.

Mr. Cannel explained that in lieu of the proprietors' survey section, a provision consistent with an earlier Commission project, entitled the Fair Proprietary Claims Act, would be inserted to address the relatively rare situations in which a property owner needs to perfect title though a deed from the State which bought the property of the East Jersey Board of Proprietors a few years ago.

Mr. Cannel also explained that all of the old deed language is based on ornate language that existed 100 years earlier but that it does not deal with the question of what one needs to have in a form of deed. The Commission discussed the various forms of deeds and the components of each, including the warranties associated with the deeds, if any. Commissioner Pressler suggested that the statute should define warranty, quit claim and bargain and sale.

Professor Bell said that he was concerned with conveyances under a power of attorney. He pointed out that relying on the assertions of the person to whom the property was transferred does not do much good because of the concerns about the impact of that person's self-interest. Mr. Cannel agreed that the standard in the existing law is not helpful and said that the law was a way to resurrect transfers that are relatively old and conducted under a power of attorney. Professor Bell noted that the deed has to indicate that it was made by a power of attorney and asked whether the purchaser had to subscribe to the oath contemporaneously. Mr. Cannel said that the process described in the statute was generally done after the fact to clear up a defective transaction. Commissioner Burstein suggested a separate provision stating that if there is no attack on the title, the transaction is accepted as a valid transaction. Mr. Cannel stated that the law contains such a provision but it is not in this chapter so he did not revise it, but that doing so might be the best way to deal with the issue.

Commissioner Pressler asked whether there was a problem with not recording powers of attorney and Mr. Cannel said he did not believe so. Commissioner Burstein suggested that the Commission's durable power of attorney revision would render the power durable unless otherwise noted. Commissioner Pressler asked about executor and administrative deeds and whether fiduciary deeds needed to be recorded. They do not

because they are already in the county record but the deed itself would refer to them. Mr. Cannel said he would revise this chapter and provide both the revised draft and some additional chapters for the next meeting.

Title 2A - Causes of Action

Ms. Tharney explained that Chapter 6 of Title 2A contains a variety of civil causes of action, some of which were proposed for elimination on various grounds, while others were revised and the balance left untouched.

Staff did not recommend that 2A:22A-5 be changed because the New Jersey Supreme Court, when it recently considered the language, said that it was clear in its present form.

With regard to the “heart balm” sections of the statute (2A:23-1 to -7), Staff retained very limited language just so that there could be no confusion about whether removing the statutory language that eliminated the causes of action meant that the causes of action once again existed. Commissioner Pressler suggested that the language could be further limited and that all that was required to be retained was a single sentence stating that the causes of action did not exist.

The language in 2A:32-1 concerning the cause of action fraud in the inducement and fraud in the performance were altered to clarify that, contrary to the rulings in federal court, New Jersey does permit a claim for fraud in the inducement or fraud in the performance even where contractual remedies also exist.

The language at 2A:38-1 pertaining to damage to fire alarm systems was originally recommended for repeal as a result of the fact that staff was focusing on fire boxes, which were all but obsolete now. Before the meeting, however, Staff reviewed the issue in light of the fact that many municipalities still retain loud fire whistles, which are arguably covered by the language of the statute. As a result, Ms. Tharney recommended that this language be retained.

The language of 2A:41-1 was changed to eliminate pejorative terms. Commissioner Pressler said that the statute must be modified to make it clear that it contains an exception for the commitment proceeding itself.

2A:47-1 was changed to include the standard of proof, clear and convincing evidence, articulated by the Superior Court for such cases. Commissioner Pressler suggested revising the language pertaining to bringing the action in a summary manner.

Ms. Tharney explained that Sections 2A:48-1 and 48-8 were clarified and made more consistent. Chairman Gagliardi and Commissioner Pressler expressed concerns regarding the impact of Title 59, pertaining to claims against public entities. Ms.

Tharney indicated that the statutory sections in question were enacted long before Title 59, and it was suggested that the Tort Claims Act is an implied repealer of the two sections in question. Ms. Tharney was directed to review the sections in light of Title 59 and then, if appropriate, to recommend the repeal of these sections in their entirety in the next draft.

Section 2A:49-1, pertaining to recovering money or property from a municipality or a school district was initially modified, but then, after a discussion of the provisions, the Commission recommended the section for repeal in its entirety as anachronistic. Chairman Gagliardi pointed out that nothing would prevent the cause of action from being brought even in the absence of the statute, and that the statute actually made it more difficult to bring the action, rather than less.

With regard to section 2A:52-1, Ms. Tharney explained that the last sentence, making the conduct a crime, had been removed since the Commission's general position is that criminal penalties should not be imposed in a civil context. Commissioner Pressler said that the remaining language was problematic because the Rules of Court, at 4:72, contain details regarding the procedure for a change of name application, and that the statute should simply refer to the Rules.

The final sections, 2A:53-1 to 53-4 were recommended for deletion based on federal preemption.

Miscellaneous

MS. Brown described the NCCUSL Uniform Real Property Transfer on Death Act project.

The next Commission meeting is scheduled for February 18, 2010 and the circulated list of meeting dates was approved with the exception of the May meeting, which was moved from May 20th to May 13th.