

MINUTES OF COMMISSION MEETING

June 16, 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 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, representing Community Associations, Institute (CAI), also attended the meeting.

Minutes

The amended Minutes of the May 2016 Commission meeting were approved and the actions of the May 2016 meeting were ratified unanimously on motion of Commissioner Long, seconded by Commissioner Bunn.

Human Trafficking

Susan Thatch presented a Draft Final Report which clarifies that forced sexually explicit performances are a human trafficking crime pursuant to N.J.S. 2C:13-8. She noted that the Commission previously considered this Draft Final Report and requested greater detail regarding how other jurisdictions statutorily prohibit these forced sexual performances. She further explained that while the proposed revisions take the most modest approach to prohibiting this type of coercive behavior, research contained in prepared chart illustrates that the majority of jurisdictions addressing sexually explicit performances include it within a broader definition of particular conduct.

Chairman Gagliardi invited the Commission's comments, and Commissioner Long expressed approval in the proposed solution to the issue, as written. Commissioner Bunn asked whether the recruiting of a person to perform must necessarily be forced, to which Ms. Thatch replied in the affirmative, pointing out various examples of the coercion used by traffickers. Commissioners Hartnett, Bunn, Bell, and the chairman discussed various ways to describe "overcoming free will."

Commissioner Bell moved to approve the Draft Final Report as a Final Report, seconded by Commissioner Suarez; the motion passed unanimously.

Expungement

Susan Thatch presented a Revised Draft Tentative Report regarding the expungement of juvenile adjudications in light of the New Jersey Supreme Court decision, *In re. D.J.B.* Ms. Thatch noted that the Court held that the final sentence of N.J.S. 2C:52-4.1(a) applies only to the expungement of juvenile adjudications and that juvenile adjudications do not constitute “prior crimes” barring the expungement of an adult conviction in the future.

Ms. Thatch noted that she had received feedback from one expungement legal practitioner and two county prosecutors. She explained that one Acting Assistant Prosecutor agrees with the deletion of subsections (b)(4) and (b)(5), but also believes that subsection (a) should be deleted in its entirety. Ms. Thatch further discussed another Assistant Prosecutor’s concerns regarding the expungement of a juvenile record in cases where a non-expungeable adult conviction exists. John Cannel pointed out to the Commission that juvenile records are sealed and expungement in such cases probably would not matter. Commissioner Bunn observed that the Legislature had intended to remove such impediments to employment. The Commissioner went on to say he was intrigued by the deputy attorney general’s comments regarding combining the two provisions so as to simplify the statute, but the unnecessary words are concerning, and it would help eliminate confusion.

Commissioner Gagliardi suggested Staff gather additional information and to follow up with a Tentative Report to be released at the July meeting. Commissioner Hartnett commented that, while the disposition of subsection (4) makes sense, there is a concern with subsection (5). He asked whether, under N.J.S. 2C:52-4.1b.(2), a diversion in lieu of a conviction would be expunged, noting that the formation of subsection (5) could be to ensure that some diversions are not expunged. Laura Tharney asked whether subsection (5) should be folded into subsection (2), to which Commissioner Hartnett replied in the affirmative.

Uniform Common Interest Ownership Act

John Cannel presented a Memorandum outlining changes to the Tentative Report proposed by Joyce Murray, Esq. and David Ramsey, Esq. Mr. Cannel highlighted the changes Ms. Murray suggested to section.

Mr. Ramsey then noted that the Tentative Report failed to include Section 1-112, entitled “Unconscionable Agreement or Term of Contract.” He stated that the exclusion was not problematic since existing New Jersey statutes address unconscionable agreements.

Mr. Ramsey then invited the Commission to consider section 2-10 – Creation of Common Interest Ownership. Mr. Ramsey noted that this provision will supersede the existing requirements under the Condo act. Mr. Ramsey added that the deed is not enough, recording of the deed creates the common interest community and recording provides notice. Mr. Cannel observed that the Planned Real Estate Development (PRED) requires preparation of a deed but does not require its recording. Mr. Ramsey noted that all common interest communities are not subject to PRED. Mr. Ramsey and Mr. Cannel discussed the concerns arising from the current recording requirements.

Commissioner Bunn observed that as drafted the provision does not account for the event of a filing or clerical error, where under the principles of equity, a common interest ownership will still be created. Justice Long observed that the Commission is not ready to take a position on this issue. Chairman Gagliardi requested Staff to continue working with Mr. Ramsey and the other commenters to propose draft language which addresses the concerns raised.

Mr. Ramsey then referred to Section 2-117, subsection f., where he proposed changing the statutory language to conform to the notice requirement change by Fannie Mae from 45 days to 60 days. Mr. Ramsey also noted in subsection (c)(2), that although the added language reflects a standard familiar to those practicing in this area of law, it may not be familiar to many who will view the proposed statute. Mr. Cannel agreed to add explanatory language in the comments.

Mr. Ramsey followed by further identifying issues with subsection (c). Mr. Ramsey questioned whether the Commissioners will approve language requiring less than 100 percent owner approval to terminate a common interest community. Mr. Ramsey proposed 80 percent, and along with Mr. Cannel explored hypotheticals where either 80 or 100 percent may cause concern or create a benefit. Mr. Ramsey noted that 100 percent approval may prevent redevelopment, if one owner “holds out.” In some cases, requiring 100 percent approval may thwart plans to improve or maintain the property, and possibly encourage sub-standard housing. Commissioner Bunn noted that it would be helpful to consider researching how other jurisdictions address this issue.

Chairman Gagliardi requested that Staff bring the results of the state survey, along with an updated Report the next time Staff presents this project.

New Jersey Open Public Records Act

Susan Thatch discussed a memorandum about a potential project involving the New Jersey Open Public Records Act’s mandatory attorney fee award provision. She explained that the memo provides additional background information on this area and greater detail about pending legislation. In particular, she noted, Senate Bill 1046 proposes revisions that do not

make the award of attorney fees discretionary, but would prohibit an attorney fee award in certain situation in which the record does not exist. She further explained that the bill also permits public entities to recover reasonable litigation costs and attorney's fees as a means to combat frivolous OPRA requests. Chairman Gagliardi advised Susan to proceed with project and keep an eye on the Bill for any substantive change.

Sidewalk Tort Liability Act

Jayne Johnson presented a memorandum discussing sidewalk tort liability in New Jersey, where judicial precedent overturned the common law rule and established a distinction between commercial and residential property owners to maintain abutting sidewalks. She stated that the Supreme Court, in *Stewart v. 104 Wallace Street, Inc.*, 87 N.J. 146, 151 (1981), held that commercial property owners are liable for injuries on the sidewalks abutting their property when the injury results from the owner's negligent failure to maintain the sidewalks; and in the three decades following the *Stewart* decision, cases emerged involving properties which are not distinctly residential or commercial, but instead are classified as mixed use or as a hybrid form of ownership. She explained that recently the Appellate Division called on the Supreme Court or the Legislature to clarify this "gray area" concerning the classification of properties with mixed use or a hybrid form of ownership. Ms. Johnson stated that Staff seeks approval from the Commission to further identify through outreach whether statutory revisions will best address the concerns raised in this area of the law.

Commissioner Suarez agreed that this area is confusing because various courts have reached conflicting determinations. Commissioner Hartnett inquired whether a petition for certiorari had been filed and Ms. Johnson replied that there was no record of appeal.

Commissioner Bell noted that each situation is *sui generis* and it may be difficult to establish a rule when each property is different. He further stated that he was unsure whether a bright line rule would be appropriate as these liability determinations are generally case specific situations. Commissioner Bell inquired about how revising the statute will create clarity in cases where there is no bright line rule distinguishing residential from commercial properties. Ms. Johnson stated that the drafting may involve a set of factors or statutory scheme similar to sections of the Anti-Eviction statute referenced by the Appellate Division, in *Zheng v. Santos*.

Commissioner Bunn further suggested that establishing factors may help to clarify the statute. Commissioner Bell stated that proposing an administrative or executive agency to designate a property as either commercial or residential may be considered to provide clarity and address the expectation of the parties.

Commissioner Long stated that the courts have struggled with this issue over the years. She agreed that it would be worthwhile to consider revising the statutory language because the courts have, thus far, been unable to provide the clarity needed in this area of the law.

Chairman Gagliardi stated that this is a quintessential Commission project and falls squarely within the Commission's mandate. Commissioner Bunn agreed and further commented that the project has a manageable scope.

The Commission authorized the project to proceed and Chairman Gagliardi directed Ms. Johnson to perform additional research and outreach as necessary.

Motorcycle License Plate Display

Vito Petitti informed the Commission that there is a great deal of interest from the law enforcement community to revise the language of N.J.S. 39:3-33, which requires automobile plates to be horizontally displayed on the rear of the vehicle, but is far less specific with respect to motorcycle plates. Commissioner Long inquired about the origin of the project. Mr. Petitti said that at a monthly meeting of traffic enforcement officers which he attends, many officers found that the display of motorcycle license plates lacks uniformity throughout the State, and as a consequence motorcycle license plates are often difficult to see from the rear of the vehicle. Mr. Petitti discussed other state statutes, which are often more specific regarding plate display and could instruct revision of New Jersey statutes. He requested the Commission's authorization to propose statutory language, following further research and outreach, that would clarify N.J.S. 39:3-33 and establish a uniform display of motorcycle license plates.

Commissioner Bell inquired about the intent of the proposal and expressed that he would be concerned if the proposal sought to create a measure which invites stopping a motorist who under the existing statute would not be subject to a stop, without some other traffic-related violation. Mr. Petitti stated that, while more specific statutory language might expand grounds for reasonable suspicion to initiate a traffic stop, the comments received thus far were limited to concerns regarding inconsistent placement of motorcycle license plates and the associated enforcement issues.

Chairman Gagliardi presented the project to the Commission for approval. The Commission voted unanimously for Staff to proceed with the project.

Miscellaneous

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