

MINUTES OF COMMISSION MEETING

July 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 Virginia Long. Professor Bernard W. Bell, of Rutgers Law School, attended on behalf of Commissioner Ronald K. Chen; Grace C. Bertone, Esq., of Bertone Piccini LLP, attended on behalf of Commissioner John Oberdiek; and Professor Edward A. Hartnett, of Seton Hall University School of Law, on behalf of Commissioner Kathleen M. Boozang (attended via telephone).

J. David Ramsey, Esq., of Becker & Poliakoff, representing Community Associations Institute (CAI), was in attendance.

Minutes

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

Uniform Common Interest Ownership Act

John Cannel summarized a Memorandum proposing a total redraft of the ULC's termination provision, characterizing the end product as "a great deal of simplification." J. David Ramsey, Esq., of Becker & Poliakoff, representing Community Associations Institute (CAI), asserted that he and Mr. Cannel had reached agreement on all issues. Mr. Cannel circulated to the Commissioners a handout featuring the newly redrafted Section 2-118 of UCIOA, entitled "Termination of Common Interest Community," and listed several areas of interest.

Commissioner Long asked Mr. Cannel to explain the difference between the old and new versions of subsection d., to which he responded that, in a few circumstances, termination agreements could provide unit owners with the right to purchase. Mr. Cannel provided an example to illustrate his point. Commissioner Bunn then asked about undersized lots; Mr. Cannel replied that variances and approvals would have to be obtained. Mr. Ramsey added that, in certain situations, the sole purpose of a homeowners association is to determine the ownership of a street. Mr. Cannel stated that, with the termination of the homeowners association, only the building could be owned by the unit owner in those situations. Commissioner Long inquired as to the difference between "a unit" and "all units." Mr. Cannel replied that the difference is enormous and there is an issue regarding how to structure a dissolution. He added that, in subsection c., "shall" would be replaced with "may." Commissioner Bunn then asked whether the process was mandatory. Mr. Cannel replied in the affirmative, that a "clearing situation" was intended, and that the 80 percent requirement is a form of protection.

Regarding subsection d., Commissioner Bunn observed that houses could satisfy all zoning requirements, but a condominium would not. Mr. Cannel stated that there would be

disagreement because some people will keep their houses but not the rest of the property. Mr. Ramsey added that the 80 percent vote would be an overwhelming vote. Commissioner Bunn observed that a 100 percent vote will not work. Mr. Cannel offered that the statutory provision could be redrafted so as to apply to a single unit and clarified that the relevant timeframe for the valuation was at the time of termination.

Commissioner Hartnett noted that some number of single family homes could be overwhelmed by large numbers of single units. In response, Mr. Cannel pointed out that the fact of a single holdout gives bargaining power, and also that he thought the issue of whether to give power to holdouts was still unresolved. He informed the Commission that, on termination, sale proceeds are paid to owners on the basis of fair market value only. Mr. Cannel pointed out that the Commission could determine whether sufficient measures were in place. Commissioner Hartnett asked whether a holdout could still be forced out. Mr. Ramsey explained that, when a condo ownership is terminated, all remaining owners become tenants in common. But with a homeowners association, where the lot meets zoning requirements, the agreement can provide for holdouts.

Commissioner Bunn asked whether property could be taken for fair market value. Mr. Cannel said it could happen and the power of the homeowners association is similar to eminent domain. He added that common interest communities are in a gray area. Mr. Ramsey noted that certain rights are given up as a combined interest owner. Commissioner Bell pointed out that there are differences with eminent domain. Mr. Cannel stated that, when we limit restrictions we must analogize to eminent domain, comparing combined ownerships to municipal government. Mr. Cannel asked the Commission whether it recommended allowing holdout situations. A discussion ensued regarding the 80 percent threshold, concluding with general agreement that it was appropriate.

Commissioner Bunn asked for clarification of the language, “any limited,” in the proposed subsection f. Mr. Cannel explained the calculation of fair market value plus allocated interest and comment elements. He assured Mr. Ramsey that the redraft would include a savings clause.

Chairman Gagliardi asked the Commission whether it would prefer to see the final language prior to release as a Final Report, to which all responded in the affirmative.

State v. Rose

Brian Ashnault discussed a potential project for the Commission regarding the aggravated assault statute, N.J.S. 2C:11-4, the legislative intent behind which was discussed in an aggravated manslaughter case, *State v. Rose*. Mr. Ashnault summarized the case facts and explained that, while the statute establishes two elements for aggravated manslaughter – recklessly causing death and extreme indifference to human life – *Rose* and other case law provides a third element involving the probability of death. Mr. Ashnault requested permission to

conduct research and outreach to determine whether it would be prudent to revise the statute so as to include a third element for aggravated manslaughter.

Chairman Gagliardi inquired as to the need for a project in this area, and Mr. Cannel explained that there are strong arguments on both sides of the issue. On one hand, since legal practitioners in this area already know the state of the law and potential violators are not likely to read statutes, revision might not be unnecessary. On the other hand, statutes should be written as clearly as possible, and therefore a revision would be warranted. Commissioner Bell questioned the wisdom of the defendant's legal theory in *Rose*. A discussion followed regarding the third element, ending with consensus that the actual meaning of "higher probability" in this context is "more likely than not." The Commission agreed that further research was warranted.

Magic Petroleum v. Exxon Mobil Corp.

Jon Aunio began by summarizing a Memorandum regarding the New Jersey Supreme Court decision in *Magic Petroleum v. Mobil Corp.*, involving the application of contribution claims to final damages. Mr. Aunio explained that the New Jersey Spill Compensation and Control Act (the "Spill Act"), which requires all dischargers of hazardous waste material contributing to a contamination be held jointly and severally liable, authorizes private parties to engage in actions for contribution when the Department of Environmental Protection (DEP) holds one party liable for cleanup costs. In *Magic Petroleum*, the Supreme Court overturned the Appellate Division ruling, holding that parties are not required to obtain written approval from the DEP regarding a remediation plan prior to filing a claim. In addition, the Court held that parties may file a claim for contribution prior to the DEP's final determination. Also, while a trial court may not be able to address final damages, the court is permitted to allocate liability without the DEP's findings. Mr. Aunio requested authorization to perform outreach and additional research regarding the need to obtain written consent from the DEP for contribution claims.

Commissioner Long stated that she did not believe there was an issue with the statute, observing that the Supreme Court interpreted N.J.S. 58:10-23.11f.a.(2)(a) according to its plain language. Commissioner Bunn commented that this area of law is highly specialized and encouraged Staff to conduct outreach before proposing statutory revisions. Commissioner Bell agreed and added that, due to the strong regulatory oversight in environmental law, Staff should also explore the role of administrative law in this area before statutory drafting is considered.

Chairman Gagliardi directed Staff to conduct outreach in furtherance of the project.

State v. Luzhak

Lauren B. Jones discussed a Memorandum regarding *State v. Luzhak*, a case addressing whether convictions for driving while intoxicated ("DWI") in another state would qualify as the

predicate offense required for a conviction pursuant to 2C:40-26. Ms. Jones requested that the commission grant authorization for additional research into the area to determine if revision would be appropriate.

Chairman Gagliardi asked what type of research would be necessary, and whether this is a potential sentencing issue. Commissioner Bell stated that the treatment of in-state versus out-of-state criminal offenses is presumably a larger issue in criminal law. Commissioner Long noted that the opinion does not appear to consider the doctrine of lenity and the strict construction of the penal code. With respect to the absence of statutory language regarding out-of-state DWIs, John Cannel discussed the tendency to assume the legislature purposely excluded such language from a statute, but noted that DWI may be different based on public concern and policy. Laura Tharney added that penalties for DWI differ among states and that while most states classify DWI as a criminal offense, in New Jersey DWI is treated as a motor vehicle violation.

Commissioner Bell inquired about the role of the Driver License Compact (“DLC”) in this decision. Ms. Jones responded that the DLC is an interstate compact which provides that each state will give effect to charges reported by other states. Commissioner Bunn stated that it would be useful to have additional research on each state’s participation in the DLC; Commissioner Bell added that it would be helpful to understand New Jersey’s obligations under the DLC. Commissioner Bunn recommended further research regarding potential effects on younger drivers and commercial licensees, and consideration of potential federal preemption issues. The Chairman directed Ms. Jones to conduct additional research in this area.

Expungement

Susan Thatch discussed a Revised Draft Tentative Report regarding N.J.S. 2C:52-4.1, which governs the expungement of juvenile adjudications. She explained that this draft deletes subsection (a) in its entirety pursuant to a commentator’s suggestion and the Commission’s previous direction.

Ms. Thatch informed the Commission that various knowledgeable and helpful comments have been received on this project. Ms. Thatch discussed feedback from Legal Services, which commended the Commission’s efforts but expressed concerns about the reference to “special probation” contained in the proposed N.J.S. 2C:52-4.1a(2). Ms. Thatch explained that she understood that concern and will conduct further research to determine whether it is appropriate to delete this reference.

Ms. Thatch stated that several prosecutors provided comments and are generally supportive of this ongoing project to clarify the existing statute and maintain consistency with adult expungement eligibility and procedures.

Commissioner Bell observed that the modified language in proposed N.J.S. 2C:52-4.1b added clarity, but he noted that language should be included to address charges which may be dismissed following the “completion of a supervisory treatment or other diversion program.”

Commissioner Bunn inquired as to the nature of Legal Service’s concern with the term “special probation” and Ms. Thatch replied that special probation is the term used for drug court adjudications which, pursuant to N.J.S. 2C:35-14(m), have a shorter waiting period for expungement.

Commissioner Bunn noted that N.J.S. 2C:52-2 fails to reference the other statutes addressing expungement of adult indictable offenses, and similarly N.J.S. 2C:42-4 fails to reference other statutes which address expungement of juvenile dispositions or issues involving expungement of juvenile dispositions. Commissioner Gagliardi suggested revisions to clarify the existing provisions, identifying the applicable rule or provision.

Commissioner Bunn observed that attorneys specializing in other areas of practice, who provide pro bono counsel to individuals seeking expungements, may not be aware of the interplay of the various statutes involving expungements. Ms. Thatch responded, when asked about the availability of resources for pro se applicants, that there are pamphlets and other materials available, but the process is difficult to navigate for pro se applicants, due in part to the circumstantial nature of each application.

Commissioner Bunn observed that, while it may be ideal to merge the various expungement statutes, it would not be practical. Instead, he recommended alerting members of the public and the bar, particularly those who do not concentrate in criminal practice, of the additional statutes, by including references in each provision to the other statutes addressing expungements of adult offenses or juvenile dispositions.

Commissioner Bunn applauded Staff’s work on the project, observing that the proposed changes will benefit members of the public and the bar. The Commission voted to hold the project, allowing Staff to incorporate the suggested revisions.

Motorcycle License Plate Display

Vito Petitti discussed a Draft Tentative Report related to Motorcycle License Plate Display, which included a comparison of all states’ license plate display statutes. He pointed out that there are many similarities between the various statutes and some unique statutory language in a few. Mr. Petitti noted that the Report proposed revisions to the existing N.J.S. 39:3-33, based on language from Florida and Illinois to directly address the concern articulated by traffic officers who commented during the preliminary phase of the project.

Mr. Petitti acknowledged concern expressed by Commissioner Bell at the last meeting regarding traffic stops and assured the Commission that Staff would be sensitive to related comments and feedback and requested permission to release the Report as a Tentative Report.

Commissioner Long inquired whether the statute should just require that the license plates be displayed horizontally. Mr. Petitti replied that, apparently, some motorcycles can't mount the plates horizontally either because of the frame of the motorcycle or as a result of owner modifications. He suggested that the statute require that the plates be legible, clear and visible from the rear of the motorcycle.

Commissioner Bell asked whether vertically mounted license plates are vertically oriented. Mr. Petitti replied that the plates would remain horizontally oriented, but still readable. Commissioner Bunn noted that because the current law is silent on the issue, implicitly, there is an option on how to display the license plate. Mr. Petitti concurred and added that police officers are unsure whether to write a ticket for vertically displayed license plates.

Commissioner Bell stated that if New Jersey currently only issues horizontally oriented motorcycle license plates, perhaps they should consider issuing vertically oriented plates as well. Mr. Petitti replied that police officers are chiefly concerned with making sure the plates are visible. Commissioner Bell stated that he liked the language contained in the Draft Tentative Report, but suggested that the proposed language should state that the license plate may be displayed either horizontally or vertically.

Mr. Petitti informed the Commission that he had not yet spoken to the Division of Motor Vehicles or prosecutors about this proposed modification. Commissioner Long suggested that he also solicit feedback from motorcycle owners' organizations or associations.

The Commission voted unanimously to release the Draft Tentative Report upon the motion of Commissioner Long, seconded by Commissioner Bell.

Anti-Eviction Act

Jayne Johnson presented a memorandum in response to the Supreme Court decision in *Cashin v. Bello*, where the Court held that a converted garage constitutes a building under N.J.S. 2A:18-61.1(l)(3). Ms. Johnson provided additional legislative history concerning the "owner-occupied premises" exceptions under the Anti-Eviction Act, which permits the "owner of a building of three residential units or less" to remove a tenant, if the owner intends to personally occupy one of the units.

Ms. Johnson provided research concerning the amendments to N.J.S. 2A:18-61.1(l) and the provisions in other jurisdictions which address removal of a tenant in owner-occupied premises. Ms. Johnson stated that she anticipated receiving formal comment based on the positive feedback the memorandum has already generated. Ms. Johnson noted that, based on the

input received, Staff will propose draft language reflecting the Supreme Court's interpretation of N.J.S. 2A:18-61.1(l)(3). The Commission encouraged Staff to continue outreach and work on the project.

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