

MINUTES OF COMMISSION MEETING

October 20, 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. and Commissioner Andrew Bunn. 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 Michael T. Cahill.

Ms. Alida Kass, Esq., Chief Counsel, N.J. Civil Justice Institute, was also in attendance.

Minutes

The Minutes of the September 2016 Commission meeting were approved on motion of Commissioner Bunn, seconded by Commissioner Hartnett.

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

Susan Thatch discussed the Draft Final Report proposing revisions that clarify that the bulk sale tax exemption contained in N.J.S. 54:50-38 applies to properties owned jointly by one or more individuals, trusts, or estates. The Report proposes adding subsection 2(a)(ii) to address ownership by more than one party, allowing for multiple, individual, non-commercial owners of property who are currently excluded by the statute.

On a motion by Commissioner Bunn, seconded by Commissioner Hartnett, the Commission voted unanimously to release the Final Report.

Sales and Use Tax Exemption, N.J.S. 54:32B-8.28

Ms. Thatch reviewed the Draft Final Report proposing a revision to clarify the definition of the term “bus” in N.J.S. 54:32B-8.28 in accordance with the Appellate Court decision, *Air Brook Limousine v. Director, Division of Taxation*. She explained that the Draft Final Report proposes a statutory definition of “bus” similar in structure to the definition of “limousine” contained in N.J.S. 54:32B-8.52, and incorporates the Appellate Division’s interpretation of the word “bus” in accordance with its ordinary meaning.

Ms. Thatch informed the Commission that Staff’s outreach generated no substantive comments. Commenters noted generally that the issues here may be “case-specific” and may not be regarded as widely problematic.

Commissioner Bunn observed that buses are sometimes chartered so as not to come under the “used exclusively” clause of the proposed definition, and asked about the potential impact of the proposed new language, asserting that their tax status should not change by virtue of a charter. Chairman Gagliardi asked about the impact of the language “used almost exclusively.” Commissioner Bunn suggested “used primarily.” Commissioner Hartnett asked how the court’s decision led to the proposed language, and why there should be different definitions for “bus” and “autobus,” to which Ms. Thatch responded that the proposed revision is an attempt to construe “bus” in accordance with its ordinary and well understood meaning, consistent with the Appellate Division’s opinion. Discussion ensued as to the differences between “omnibus” and “autobus,” to which Ms. Thatch added that “autobus” is not used because Air Brook had a credible claim that the ordinary meaning of “autobus” is not a “bus.”

Laura Tharney noted that the use of “autobus” in this context might inadvertently bring limousines into the category in question, which the project sought to avoid. Commissioner Hartnett asked about jitney buses, which Mr. Cannel described as very informal, privately owned buses, which claim to be part of interstate commerce and thus do not seek local licenses. Commissioner Bunn pointed out that, under the court’s opinion, jitney bus operators would pay taxes.

Chairman Gagliardi reminded the Commission that the project’s original intent was to codify the court’s decision. While Staff had succeeded in codifying the court’s opinion, a decision must be made as to whether it would be appropriate to address the issue of how to classify jitneys. Commissioner Bell noted that jitney buses are sometimes used for schools and other various concerns. He also expressed reservations regarding the codification of appellate opinions as they relate to agency decisions, particularly when some of the outstanding issues were not addressed by the opinion. The Chairman suggested postponing the release of a Final Report pending further research regarding jitneys and the provision of additional information to the Commission for consideration of this issue.

New Jersey Franchise Practices Act

Jayne Johnson discussed a Revised Draft Tentative Report proposing limited modifications to the New Jersey Franchise Practices Act (NJFPA) in response to the case law considering forum-selection provisions under N.J.S. 56:10-7.3, and the gross-sales threshold in N.J.S. 56:10-4.

Ms. Johnson explained that, following the decision in *Kubis & Perszyk Associates, Inc. v. Sun Microsystems, Inc.*, 146 N.J. 176 (1996), the Commission has monitored the case law considering forum-selection clauses under the NJFPA. Following recent federal decisions where

the forum-selection clauses of franchise agreements governed by the NJFPA were presumed invalid, the Commission proposed limited modifications to extend the anti-waiver provision under section 7.3 for motor-vehicle franchises to all franchises governed by the NJFPA.

Ms. Johnson then introduced Ms. Alida Kass, Esq., Chief Counsel, N.J. Civil Justice Institute, who was present to offer support of the revisions concerning the gross sales threshold and the removal of language which conflicted with the Federal Arbitration Act. Ms. Kass also suggested additional language to allow recognition of valid forum-selection clauses which are bargained for in good faith, under the proposed section 5.1. Ms. Kass stated that since motor-vehicle franchises are a unique subset of agreements, the anti-waiver provision under section 7.3 should not be extended in full measure to franchise agreements in other sectors. Ms. Johnson stated that she would conduct additional outreach to refine the scope of the proposed revisions.

The Commission agreed unanimously to hold the project for further consideration of the issues raised, and additional outreach.

Hand-held Devices

Vito Petitti discussed a Memorandum providing supplemental information relating to N.J.S. 39:4-97.3, which prohibits the use of hand-held devices while driving. Mr. Petitti reiterated the two main areas of concern raised by members of the public and described in a previous Memorandum: the use of devices while stopped in traffic and the fact that the applicable statutory language neither permits nor prohibits dialing a cell phone while driving. He then summarized the results of Staff's research on the subject of other states' anti-texting statutes.

Chairman Gagliardi inquired whether Staff was able to get a sense of how these situations are being handled in municipal courts, and specifically, whether people are exploiting the statutory language to have tickets dismissed. Mr. Petitti responded that he had not yet been in contact with municipal courts and has only received the perspective of law enforcement. Ms. Tharney stated that limited anecdotal responses indicate that individuals attempt to rely upon the Court's interpretation in the unreported case of *State v. Malone* to have a summons dismissed.

Commissioner Hartnett suggested that it is possible the legislature specifically decided not to criminalize the use of devices while stopped in traffic or dialing while driving. Commissioner Bunn stated that the *Malone* case is an unpublished Appellate Division decision that is not precedential, and that the Commission must determine whether this is a real problem in other situations.

Commissioner Bell noted that the statutory language isn't particularly clear so it may be beneficial for the Commission to recommend clarification. Commissioner Bertone agreed. Commissioner Hartnett stated that the language is, in fact, clear because if a car is stopped at a traffic light, it is not moving.

Commissioner Bell asked whether legislative history indicates whether the legislature intended to prohibit texting while in a stopped vehicle. Mr. Petitti stated that it may be inferred from the committee statement sentence which discusses "driving." Commissioner Bunn expressed the view that there is no ambiguity in the language because the Legislature specifically chose the word "moving." Commissioner Bell noted that this statute implicates an individual's responsibilities while driving a vehicle, wherein there is an obligation to operate safely whether moving or stationary.

Commissioner Hartnett cautioned that the Commission should not conflate the concept of a "moving" vehicle with the *Malone* decision and should also consider the treatment of other devices built into a vehicle. If recommended revisions focus on activating or deactivating, the Commission will need to think about other items such as GPS, etc. Commissioner Bunn noted that devices built into cars may raise federal preemption issues. Commissioner Bell added that the National Highway Traffic Safety Administration (NHTSA) may have issued regulations or provided other guidance on these issues.

Chairman Gagliardi suggested that it is necessary to see how municipal court judges are handling to determine whether the statutory language is problematic – disparate treatment between municipal courts, for example, might suggest a need for revision. He indicated that the statute should not be revised based upon the Commission's views regarding safety, but rather upon legislative intent and outreach response. Chairman Gagliardi suggested that Staff conduct outreach to municipal prosecutors, chiefs of police, and bar subgroups for municipal court defense attorneys to determine whether the Commission may be able to clarify the statute without imposing policy views.

Uniform Common Interest Ownership Act

John Cannel began a discussion of the Draft Final Report by informing the Commission that there were two open issues: one easy and one difficult. The easy issue involved a choice between "may" and "shall" near the top of page 24 of the Report.

Commissioner Hartnett advised the use of "shall," citing an example in which the use of "may," would result in a neighborhood of single family homes forming an association empowered to sell to a developer. Commissioner Bunn agreed that using "may" would render the

paragraph meaningless. He recommended use of the phrase, “shall provide that the owner may retain ownership of that unit.”

As to the issue he characterized as difficult, Mr. Cannel invited the Commission’s attention to a choice of three phrases at the top of page 11 (“inconsistent with any of those Acts,” “that conflict with any of those Acts,” and “that create a real possibility of conflict with any of those Acts”), saying the language may never be perfect and that the suggested wording has been used before.

Commissioner Bell stated that the third choice (“real possibility”) is not useful; there needs to be case-specific language. Commissioner Hartnett suggested that the first option (“inconsistent with”) might be the best. Commissioners Bertone and Bunn said that the second (“that conflict”) was appropriate because the real issue was conflict. Commissioner Hartnett noted that a non-obstante (i.e., notwithstanding) clause would be appropriate. Mr. Cannel agreed that the second option would work.

Commissioner Bunn moved to release the Final Report with Commissioner Hartnett’s second, and unanimous Commission approval.

Miscellaneous

Ms. Tharney briefly mentioned the progress of the bill pertaining to the Uniform Military and Overseas Voters Act, and Ms. Johnson noted the progress of the bill pertaining to pejorative terms.

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