

MINUTES OF COMMISSION MEETING

November 19, 2015

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; 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, was also in attendance.

Minutes

The Minutes of the October 2015 Commission meeting were unanimously approved on motion of Commissioner Long, seconded by Commissioner Bunn.

Retroactive Child Support Orders

Vito Petitti addressed the Draft Final Report concerning Retroactive Child Support Orders, informing the Commission that no additional comments had been received since the October meeting and requesting that the Commission release the Final Report.

Commissioner Hartnett asked whether the Commission had resolved the issue raised during the September meeting concerning enforcement of child support orders as proposed in the Tentative Report. Mr. Petitti replied that the proposed revisions to the judgment statutes ensure that enforcement of judgments would be left to the discretion of the trial judge making the order. Justice Long noted that she still finds the use of the term “arrear” problematic in this context, but acknowledged its common use in this area. Commissioner Bell proposed language in the comments section of the Final Report noting the approach taken by other states and that there appears to be no federal regulation or guiding document prohibiting the adoption of the Commission’s proposed position.

The Commission voted unanimously to release the Final Report with Commissioner Bell’s proposed modifications on motion of Commissioner Bunn, seconded by Professor Bell.

Expungement

Susan Thatch discussed a Memorandum and Draft Tentative Report regarding the Commission’s ongoing expungement project. She explained that the Memorandum provides some additional information requested by the Commission regarding the expungement process in

practice. According to information gathered from outreach to an active expungement practitioner, juvenile adjudications can be expunged contemporaneously with an adult conviction irrespective of the uncertain language of 2C:52-4.1(4) and (5). Ms. Thatch noted that, in terms of legislative history, subsections (4) and (5) were not part of the 1980 juvenile expungement bill as initially introduced, but were added during by the Senate Judiciary Committee without statement. She also informed the Commission of an unpublished appellate opinion which briefly acknowledged the practice of awarding these contemporaneous expungements.

Commissioner Bell asked whether a second expungement is possible for either an adult or juvenile expungement, to which Ms. Thatch replied in the negative. She noted that the law now prohibits a second criminal record expungement, although multiple juvenile adjudications may be expunged at once, providing they meet certain requirements.

On motion by Commissioner Long, seconded by Commissioner Bell, the Commission voted unanimously to release the Report.

Special Needs Trust

Jayne Johnson discussed a Draft Tentative Report proposing revisions to N.J.S. 43:16A-12.1a and a number of other statutory sections pertaining to the designation of pension beneficiaries for State-administered retirement programs, based on the Supreme Court's decision in *Saccone v. Bd. of Trustees of Police and Firemen's Retirement Sys.* The proposed statutory changes impact the Police and Firemen's Retirement System as well as more than 50 statutory provisions governing other State-administered retirement programs.

Chairman Gagliardi confirmed with Ms. Johnson that the Report will be distributed during the comment period, and noted that, if comments are not received during that timeframe, the Commission will continue to advance the project based on the holding of the New Jersey Supreme Court.

The Report was released on a unanimous vote after a motion by Commissioner Bunn, seconded by Commissioner Long.

Uniform Common Interest Ownership Act

John Cannel discussed a Memorandum regarding the Uniform Common Interest Ownership Act, explaining that, during the course of his outreach, he identified two particular areas of the draft that require consideration by the Commission.

The first area is Section 1-105, which describes unit ownership in a cooperative as personalty. Mr. Cannel explained that New Jersey's existing law views co-op ownership as a

hybrid form of stock ownership and lease. He said he accordingly removed subsection (a) of the Uniform Act so as to allow co-ops to be handled on a situational basis.

The Commission recognized J. David Ramsey, Esq., who maintained that it is preferable to define a co-op interest as personalty, explaining that some New Jersey bankruptcy courts have created the hybrid discussed by Mr. Cannel, and this formulation has made it difficult for co-op associations to collect certain debts. He noted that other states have different views on co-op interests, but he would prefer to regard the interest as personalty, or alternatively, to let the courts decide.

Mr. Cannel stated that New Jersey does not have many co-op associations, and noted that much of the Uniform Act does not work well for co-op interests. He suggested that one approach would be to remove co-ops from the Uniform Act entirely; however, that would maintain the status quo in this area, which is an almost complete absence of governing law.

Mr. Ramsey noted that the Co-op Recording Act is not operational in nature, and it would be a mistake to exclude co-ops from a New Jersey common interest ownership act. He suggested that issues presently arising in co-op properties would be helped by provisions of the Uniform Act.

Commissioner Bunn pointed out that co-ops can probably be included in the act, but exempted from certain inapplicable provisions. Mr. Cannel noted that the Uniform Act contains exceptions in certain provisions due to the differences between condominiums and co-ops. He informed the Commissioners that previous bills addressing common interest ownership have exempted co-ops as a matter of political judgment. Mr. Ramsey noted that co-ops have historically been exempt from realty transfer taxes and including them in the law could impact that exemption.

Commissioner Bell inquired as to whether any current law governs co-ops, to which Mr. Ramsey responded that some provisions of Planned Real Estate Development Act are applicable, such as the requirement for open meetings, but that co-op associations are not subject to statutory law as extensive as the Condominium Act and there is no law governing their operation. Mr. Cannel added that common interest ownership dwellings function halfway between a corporate and governmental entity. Commissioner Bell stated that it may be a good idea to have some governing law, even if separately from those laws governing condominiums.

Mr. Cannel stated that this draft reflects Commissioner Long's prior observation that most of the important law surrounding co-ops won't be addressed by and is beyond the scope of the first phase of the project. He added that the law governing co-ops will remain a fractured system for some time.

Commissioner Bunn stated that it is important for the Commission to try to create uniform rules across various forms of property ownership to the greatest extent possible, and that the Commission should strive for maximum certainty and clarity in addressing these issues.

Chairman Gagliardi agreed that this is an important consideration. Commissioner Bell stated that this is theoretically true, with all other things being equal. Chairman Gagliardi noted that the desire for uniformity is consistent with the Commission's mission.

Mr. Cannel informed the Commission that Section 2-117 is the second area requiring attention, noting that, while he has maintained the language of the Uniform Act, he is concerned that this section contains provisions specifically requiring higher voting margins for changes to a master deed or declaration which affect an individual unit, but is silent regarding higher voting margins for changes which may affect common interests.

Mr. Ramsey stated that a property interest can't be taken away without an individual's consent, but perhaps this section could be clarified. Commissioner Hartnett asked whether subsection (d) potentially addresses this concern, to which Mr. Cannel responded that he found the wording unclear, but acknowledged that a clarification of "allocated interest" in subsection (d) could be an appropriate remedy.

Commissioner Long asked Mr. Ramsey whether non-property rights could be implicated in these situations. Mr. Ramsey responded that something such as the right to use a fitness club would be a non-property right and could theoretically be taken away and said that additional examples likely exist.

Mr. Cannel also noted concerns about the provision requiring "reasonable protection" for prior uses contained in subsection (f). He suggested that perhaps this provision should hew more closely to the traditional concept of nonconforming use. Commissioner Long asked why use restrictions should not just apply prospectively. Mr. Cannel replied that it would make important changes difficult to implement; Mr. Ramsey added that some general welfare regulations need to be applicable across the board and should not be grandfathered.

Commissioner Bunn stated that while it is impossible to have a statute that addresses every conceivable circumstance, the Commission's proposal should develop an architecture or a mechanism that will allow decisions to be made in a uniform manner. Mr. Cannel agreed that the nature of the statutory language will provide guidance to a court. Commissioner Hartnett added that the concept of nonconforming use may not apply, as an association may need to amend the deed to address situations previously un contemplated. He said also that any revised language should not be too strong, citing the example of common law nuisance.

Mr. Ramsey commented that the statutory proposal should not change present law, which recognizes that an individual purchasing a common interest property knows that the rules are subject to change and governed by the community.

Mr. Cannel stated that Section 2-117 also sets a supermajority voting requirement of 80% and noted that this voting percentage may not be possible to achieve in large associations. Mr. Ramsey suggested that the voting percentage should be based upon the number of individuals voting. For example, he explained, amendments involving use restrictions might require a

quorum of a certain percentage of the community, and the affirmative vote of 2/3 of those participating. There could, he noted, be a higher percentage required for use restrictions, and a lower percentage for non-use restrictions.

Chairman Gagliardi asked whether different sized associations should have different voting requirements and stated that all owners should be notified of an upcoming meeting and the issues to be decided. Mr. Cannel said that it may be possible for owners to use proxies. Chairman Gagliardi requested additional information regarding how surrounding states handle co-op properties.

Commissioner Hartnett asked whether it would be prudent to have different quorum requirements for associations of different sizes, similar to what is done in government. Commissioner Bunn asked whether small units are exempted from these provisions. Chairman Gagliardi asked why the rules should be the same for all types of associations. Mr. Cannel responded that exemptions have not been determined and any exemptions may be subject specific. Mr. Ramsey stated that the rules of governance should depend not only on the size of the building or association, but also on the nature of the association. He also noted that Section 2-117 serves as a default provision; it would not supplant an association's adopted governing documents.

Commissioner Bell considered whether the possibility of electronic voting contemplates the quorum and voting requirements and asked whether it is important for owners to participate in deliberations. Mr. Ramsey responded that deliberations among board members is important, but may be less so for owners. Commissioner Bunn noted that electronic voting can be important for associations with a large number of seasonal owners. He suggested that the act make electronic voting permissible, but not mandatory.

Chairman Gagliardi thanked Mr. Ramsey and advised Mr. Cannel to move forward with the drafting in keeping with the Commission's recommendations. Mr. Cannel responded that he would continue to address other issues with involved stakeholders and would bring additional considerations to the Commission's December meeting.

Bulk Sales Act

Amy Huber discussed a potential project regarding the New Jersey Bulk Sales Act and asked the Commission to consider whether it might be appropriate to modify one of its provisions. This issue was brought to the attention of the Commission by a member of the public with experience in real estate closings.

Ms. Huber explained that the relevant statutory provision, N.J.S. 54:50-38, requires a purchaser to notify the bulk sales unit of the Division of Taxation prior to the completion of the sale, transfer or assignment in bulk of any part or the whole of a person's business assets. She stated that the purpose of the notice is to ascertain whether the seller owes any taxes and to

protect the buyer from liability for payment of the seller's taxes. Ms. Huber explained that the law provides an exemption when the seller, assignor or transferor is an individual, estate, or trust. She further explained that an "individual" is defined as a single person, or a married or civil union couple.

Ms. Huber described the process of notification by the buyer, which must take place within ten business days of closing, and the reply from the Division of Taxation, which should take place ten business days after receipt of notice. She said the statute is said to be problematic because it has been deemed to apply to the sale of all one or two family dwellings, thereby increasing the cost and complexity of home sales, and sometimes resulting in delays of the sales.

Ms. Huber indicated that the notice requirement of the Bulk Sales Act is now applied differently to parties who are arguably similarly situated – it imposes a substantial penalty and unnecessary burdens for the average person involved in a home sale simply because they fall outside of the scope of the current exemption. She asked the Commission for authorization to engage in further research and outreach in order to determine whether it would be appropriate to expand the scope of the exemption slightly to address the issue raised.

Commissioner Bertone agreed that the Bulk Sales Act requirements can be burdensome in various situations and said that this would be a good project for the Commission. The Commission authorized Staff to perform further research and outreach in this area.

Miscellaneous

The December meeting was rescheduled from December 17th to December 10th as a result of a scheduling conflict.

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