

MINUTES OF COMMISSION MEETING
December 17, 2009

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 Bell of Rutgers University School of Law attended on behalf of Commissioner John J. Farmer, Jr., and Grace C. Bertone, Esq., of McElroy, Deutsch, Mulvaney & Carpenter, LLP, attended on behalf of Commissioner Rayman Solomon.

Also in attendance were Connie Pascale, Esq. from Legal Services of New Jersey; Donald M. Legow from Legow Management Company, LLC; Nicholas J. Kikis from the New Jersey Apartment Association; Judge Mahlon L. Fast; Lawrence J. Fineberg, Esq., on behalf of the NJ State Bar Association, Real Property, Trusts and Estate Law Section; and Patrick T. Collins, Esq. of Franzblau Dratch, P.C., on behalf of SureDeposit.

Minutes

The minutes of the November meeting were approved on motion by Commissioner Bunn, which was seconded by Professor Bell.

Title 9 Children

John Cannel explained that, on the day of the meeting, Staff received a letter by fax from the Department of Human Services, Division of Family Development. The letter advised that the Department had concerns regarding the report and requested that the Commission carry the project to a future meeting to allow them time to formally express their concerns. Chairman Gagliardi directed Staff to indicate that the Commission would grant the request to delay consideration of the report but would set a date certain on which to do so, either at the January or February meetings, based on the time required to obtain the Department's responses and modify the report as necessary.

Landlord/Tenant

Marna Brown indicated that Staff revised the draft as directed by the Commission at its November meeting and requested Commission approval to incorporate those revisions in the report to be released when the entire title is compiled.

Changes were made to sections LT:3-7 and LT:3-11. Commissioner Bell asked whether, in section LT:3-11, the language which currently reads "state statute" should be modified to include "and ordinance". Mr. Cannel said that Staff removed the reference to "ordinance" because, if not supported by a statute, municipalities should not be permitted to create ordinances in this area. A registration procedure presently exists for identifying property owners and locating them for matters of suit. A municipality should not be permitted to institute a procedure

that overlaps with the registration statute. Commissioner Bell asked whether the Commission should specify the general purposes of the statute and Commissioner Bunn said that the failure to do so creates an opportunity for mischief. Mr. Cannel explained that there were arguments on both sides of the issue but that it was not a problem to state that the registration statute was intended to identify the landlord and others who maintain property. He did suggest that the difficulty associated with increased specificity of the draft language is that the more detail provided regarding the purpose of the statute, the more opportunity exists for a municipality to say that its purposes are slightly different and therefore not precluded. Staff is aware that registration needs to be part of rent control regulation, but did not know when else registration may be required and, as a result, any list drafted would not be exhaustive. Commissioner Bunn suggested that the Commissioner of the Department of Community Affairs (DCA) be consulted to create a list. Mr. Cannel said that the statute could say that approval by DCA is required for anything other than rent control by the municipality and that he could contact the League of Municipalities regarding this issue. Commissioner Bunn said that if the League gave Staff a list to include in the statute it would provide much-needed clarity.

Ms. Brown explained the two items received by Staff on the day of the meeting and distributed to the Commissioners for their review. One was a letter from Matt Shapiro of the NJ Tenant's Organization. Mr. Shapiro was unable to attend the meeting and he requested that his comments be distributed. Most of his comments had been discussed at prior meetings. The other letter was from the Department of Banking and Insurance (DOBI) in response to an inquiry by Staff as to whether the rates for surety bonds were regulated in New Jersey. The DOBI said that surety bond rates were not regulated because surety bonds were in a "special risk" category exempt from regulation under the *Commercial Deregulation Act of 1982*, N.J.S. 17:29AA-3(k).

Ms. Brown discussed sections LT:4-7c; LT:4-8; and LT:4-17e of the proposed Security Deposit Chapter that were revised after the November meeting. Section LT:4-7c. was clarified by Staff and the comment was revised to include references to the Appellate Division cases discussed at the November meeting. Ms. Brown suggested that the phrase "unless the annual notice is also serving as notice of the change of account or institution" which already appears at the end of LT:4-7c.(2) should also appear at the end of LT:4-7c.(3). Section LT:4-8 was redrafted to address the issue of interest that is not posted at the time of the conveyance of the property. Section LT:4-17e. was revised to limit the effect of the penalty to specific types of landlord conduct in response to concerns that applying the penalty broadly to all violations of the chapter would be too draconian.

In addition, in response to the Commission's request, section LT:4-3 now includes an option for tenants to pay their security in installments. This provision appeared more appropriate for inclusion in section LT:4-3 rather than section LT:4-17. Ms. Brown also explained that Staff attempted to address issues raised by Mr. Collins, in his letter submitted to the Commission in advance of the meeting.

Commissioner Bell asked whether the language “offered by the landlord” was necessary in subsection LT:4-3d. and e., and whether it makes any difference who initiates the option. He suggested that the language read “the landlord and tenant agree.” Staff will modify the language accordingly. Commissioner Bell also suggested that in section LT: 4-17c.(3)(C), pertaining to tenants’ liability for damage if a payment in lieu of a security deposit is made, language should be added stating “unless the damages exceed the amount that would have been due under the security deposit”. Such language would mean that once a landlord accepts payment in lieu of a security deposit, the landlord cannot claim damages for anything less than the amount that would have been provided for a security deposit, protecting the tenant up to the level of the security deposit. He said that the restriction regarding willful damage, however, should remain. Ms. Brown said that although Staff changed the language in that same section from “commence a legal action” to “obtain a judgment”, the language should really contain reference to both options. Commissioner Bell suggested the language “seek to obtain a judgment”. Commissioner Gagliardi suggested that appeared to solve the problem, but said that Judge Pressler might have a comment on this issue and wanted the draft to be reviewed once more.

Mr. Collins said he was appreciative that his memorandum was given consideration by the Commission and some of his comments incorporated. His primary concern was with the double damages model and the landlord’s exposure resulting from an excessive premium charge. Mr. Collins noted that a landlord would not benefit from a surety’s non-compliance with the premium cap and that the landlord would have no control over a surety’s inadvertent violation of the premium charge. He suggested that exposing the landlord to a penalty purely as a result of surety error was not fair. Judge Fast asked how frequently surety bond proposals to tenants occur, suggesting that this seemed to be a significant change in the law for something that was not all that frequently used. Mr. Collins responded that although New Jersey is a small market for landlord surety bonds because of the limited number of institutional landlords, these surety bonds have been offered in New Jersey for about 10 years on an unregulated basis. During that time period, he was aware of only one complaint by a tenant who was unclear about how the bond worked.

Mr. Collins explained that the surety bond option is a convenience for tenants. If there is a \$3,000 security deposit, for example, for \$500 a tenant could buy a bond. If there is a claim by the landlord for less than \$3,000, the claim is filed directly with the surety. Although the surety could pursue the tenant for the amount it paid, those amounts are small enough that it is not anticipated that it will happen and it is not common. The tenant does not get the premium back at the end of the lease term; it is an upfront nonrefundable payment.

Mr. Legow said that because of the penalty provision, he, as a landlord, would not use the surety bond option because if the surety company makes a mistake, he would have to pay a huge penalty even though he would not have received any benefit from it. Ms. Brown said that the penalty applied to a very limited range of landlord conduct and reviewed the conduct set forth in

the draft. She explained that limitation on the types of conduct to which the penalty applied was intended to limit any draconian effect. Mr. Cannel also noted that a landlord would need to know what the premium is before offering it to the tenant and requiring that the landlord be aware of the premium did not seem burdensome. To extent a landlord is deceived by the surety company, the landlord has an action against the surety company. Mr. Collins explained that SureDeposit was not onsite with the landlord and just provided the paperwork which the landlord then processed.

Connie Pascale suggested that lower income tenants are at the mercy of what the landlord wants them to do. If a landlord says he will not accept a security deposit and wants a surety bond, the tenant will buy from whatever company the landlord steers them to. He said that the statutory provisions should protect tenants from the economic and real world consequences of the landlord's choice. Mr. Pascale said that if the landlord is required to pay a penalty as a result of the actions of the surety company, the landlord should be able to take action against the surety company.

Commissioner Gagliardi asked Mr. Pascale whether he objected to the surety option or perceived the penalties as not severe enough. In response, Mr. Pascale said that there are fewer affordable apartments than there used to be and a surety bond should not be an option unless the tenant comes in with it on his own. Mr. Pascale said that with security deposits, tenants get their money back while with surety bonds they do not. He suggested that lower income tenants need to get their money back because they earn so little income and they need that returned deposit in order to rent their next apartment. Mr. Collins suggested, however, that if a person has enough money to pay rent but cannot come up with the security deposit, that person could potentially come up with 1/6 of the security deposit, the amount required for a surety bond. He said that, in the context of lower income tenants, a significant percentage might find a true choice of a surety bond to be extremely beneficial.

Ms. Brown explained that the provision was included to provide tenants with additional options as suggested by Commissioner Bell at an earlier meeting. Commissioner Bunn noted that the real issue seems to be whether a penalty should be imposed on the landlord for something that is the surety company's error. He asked whether the draft intended to impose the penalty on the landlord for something that might be the fault of the surety. Ms. Brown said that was not the intent and that the language had been included to prevent the landlord from overreaching. Mr. Cannel suggested that the landlord has more ability to control the issue than the surety company since the landlord knows what the maximum amount of the security deposit will be. He said that in a small number of cases it will be purely the surety company at fault rather than the landlord and, in those cases, the landlord can make a claim against the surety.

Ms. Brown indicated that Mr. Shapiro's letter raised two new issues. First, Mr. Shapiro pointed out a typographical error in section LT:4-3b which will be corrected. The other new

issue he raised was the issue of the premium cap. The option of combining a security deposit with a surety bond would require the language setting the cap to be adjusted accordingly.

Mr. Pascale objected to any change in the statute saying that a tenant will not be provided with a separate copy of the certificate of registration document since he suggested that it takes only a fraction of a second to generate such a document and the failure to do so greatly weakens the benefit of the Registration Act. He also objected to the language pertaining to a failure to cure. Mr. Pascale suggested that the issue in *Princeton Hill* had nothing to do with the landlord's ability to cure and that the changes made to this section by the Commission gave the landlord no reason to correct any errors until the tenant informs him that there is a problem. He described this as an enormous unjustified change in the law not supported by *Princeton Hill*, suggesting that it turns the current law on its head and that tenants should be encouraged to apply their deposits if the circumstances warrant it.

Mr. Kikis said that two of the provisions in the draft were included in the current statute and he did not view the changes made as a hardship. He suggested that it is not a hardship for the tenant to notify the landlord of an inadvertent error and allow the landlord to correct it. He also requested that since language was added to allow the security deposit to be paid in installments, that the landlord, in keeping with past modifications to the statute, only be required to give one notice to the tenant. He also asked that in section LT:4-8b., the seller be permitted to give security deposit interest to the tenant directly so that the new landlord could start fresh. These changes will be made in another draft of sections LT:3-11, LT:4-17, LT:4-3 and LT:4-8.

Title 2A Capias Writs

Commissioner Bell pointed out a minor typographical error on page 4, noting that in the first full paragraph on that page, reference was made to 1997 and then to 2007. Both references should be to 2007 and the correction will be made by Staff. Professor Bell also suggested that the section of the report pertaining to the constitutional deficiencies of the writs should be stronger since the writs pose very serious due process problems. Laura Tharney explained that the report language reflected the balance between the concerns of the Commission and the fact that the Courts have upheld the writs. Professor Bell suggested that since incarceration is such a serious deprivation, additional language, including the basic framework of constitutional analysis, should be added to support the position taken by the Commission. The Commission, on motion by Commissioner Bertone and seconded by Commissioner Bell, approved the release of the report in its final form after the additional language is approved by Professor Bell.

Title 39

Chairman Gagliardi said that, in his view, this project is one of the more significant in his more than a decade as a member of the Commission because it has the potential to affect nearly every person in New Jersey. As a result, he expressed concerns about releasing the project as a

Final Report without the Commissioners having an opportunity to review the memoranda provided by Staff and with several Commission members unable to be present at the meeting. Ms. Tharney said that holding the report would allow additional time to receive the last of the comments from MVC. She said that she would be in contact with MVC regarding the timing of additional comments and explained that there was only one remaining individual at MVC working on the project. Commissioner Bunn suggested that if the report was not going to be released before the first of the year, then waiting another month or two would not have a significant impact.

Chairman Gagliardi asked if the entire report could be ready for release in March and Ms. Tharney said that it could. Ms. Tharney asked if the Commission wanted to release the project as a single report or as multiple reports and the Commission consensus was to release it as a single report. The target date for release will be February and Ms. Tharney will report to the Commission regarding the status of the project in January.

Durable Power of Attorney

Ms. Brown explained that the changes proposed by Mr. Fineberg and the concerns raised by the State Bar Elder and Disability Law sections at the November meeting were incorporated into the tentative report. References to HIPAA were added, the definition of “disability” was changed and the definition of “signature” now mirrors the definition adopted in the recording statute. References to “notice” were harmonized with references to “knowledge”, and those references now stated “notice or knowledge” throughout the draft.

A few outstanding issues remain to be addressed. The banking community, for example, informed Staff that the Social Security Administration does not recognize powers of attorney to control benefits and that a payee representative must be appointed. In addition, Staff was informed that the Surrogates do not recognize a POA to renounce appointment as executor. Ms. Brown said that she recognizes that these issues remained to be addressed, suggested that additional comments may raise other issues, and asked that the Commission release the report in tentative form with a 90-day comment period. Such a comment period would give the full Elder and Disability Law Section of the Bar time to consider the report since Ms. Brown had been advised that the report would be reviewed at the Section’s February meeting.

Ms. Brown did, however, ask for Commission input on two issues immediately. The first issue is whether including the name and title of the preparer of the power of attorney should be a requirement for its validity. Commissioner Bunn asked whether this was current law and Mr. Cannel explained that this was only required on a deed but not on a POA. Mr. Cannel expressed his concern that perhaps it should be an option but not a requirement since two witnesses and a notary were already required. Commissioner Bunn agreed that this should not be a requirement, and the process should not be made insurmountably difficult. The consensus was that it might be

useful to consult the preparer where there is a problem, but including the name of the preparer should not be a recording prerequisite. Staff will revise the language accordingly.

The second issue concerns the rejection of a power of attorney by a financial institution. This is addressed on page 13, in subsection d. The pertinent language is contained in the current law, but has been expanded in the draft to apply to all financial institutions. It states that if the financial institution rejects a power of attorney, the institution must notify the agent in writing by certified mail that the power has been rejected and the reason for rejection. A banking commenter was upset about this provision and explained that most rejections were done in person or on the phone and that the requirement of a written rejection was unnecessary and onerous. Ms. Brown, however, noted that a number of other commenters said that this was an important requirement, especially when dealing with large out-of-state financial institutions.

Commissioner Bunn asked what the consequence was for not complying and Ms. Brown advised that there was none specified. Commissioner Bertone explained the difficulty of obtaining an answer from a financial institution and that it was frequently necessary to go up the chain of command to bank's counsel to get approval. Ms. Brown noted that an earlier version of the revised statute contained a provision, similar to the one now found in New York's statutes, that provided a summary proceeding for resolution of the issue of whether a power of attorney was enforceable and valid. The earlier draft also provided a penalty, but commenters suggested that the provision be removed because the legislation would not be enacted if it contained such a provision. The Commission directed Staff to include the summary proceeding provision in the tentative report. The provision should provide an avenue for determining the validity and acceptance of the power of attorney, without any damages, akin to a declaratory judgment proceeding. The Commission unanimously agreed to release the report as a tentative report, subject to the approval of Commissioner Bertone on this reinserted provision.

Miscellaneous

Ms. Brown updated the Commission on the status of bills introduced regarding the construction lien law final report and the uniform trade secrets final report. Mr. Cannel reported on the status regarding adverse possession.

The next Commission meeting is scheduled for January 21, 2010, at which time the Commission will adopt a calendar for the remainder of 2010.