MINUTES OF COMMISSION MEETING

February 17, 2022

Present at the New Jersey Law Revision Commission meeting, held via video conference, were: Chairman Vito A. Gagliardi, Jr.; Commissioner Virginia Long; Commissioner Andrew O. Bunn; Professor John K. Cornwell, of Seton Hall University School of Law, attending on behalf of Commissioner Kathleen M. Boozang; and Grace Bertone, of Bertone Piccini, LLP, attending on behalf of Commissioner Kimberly Mutcherson.

Minutes

The Minutes of the January 20, 2022, meeting were unanimously approved by the Commission on the motion of Commissioner Bunn, seconded by Commissioner Long.

Receivership Act

The Multifamily Housing Preservation and Receivership Act (Receivership Act), governs the grounds, procedures, and requirements for appointing a receiver to rehabilitate certain multifamily buildings that have fallen into disrepair. The Receivership Act, specifically, N.J.S. 2A:42-117 provides that a building shall be eligible for receivership if one of two statutory conditions exists.

Whitney Schlimbach advised the Commission that in *Manufacturers and Traders Trust Company v. Marina Bay Towers Urban Renewal II, LP*, 2019 WL 5395937 (App. Div. 2019), the Appellate Division addressed whether a court has discretion to appoint or deny a receiver when the conditions identified in N.J.S. 2A:42-117 exist. In *Manufacturers*, a hurricane-damaged housing project was the subject of lengthy financial litigation during which a group of tenants alleged habitability problems and sought the appointment of a receiver, which was denied. The tenants appealed, and argued that the plain language of the statute requires the appointment of a receiver when the statutory conditions are met.

The Appellate Division noted that N.J.S. 2A:42-117 contained an internal ambiguity. The court pointed out that language in a related section, N.J.S. 2A:42-123, is permissive in the same situation, and provides that if certain conditions are established a court "may" appoint a receiver. Ms. Schlimbach advised the Commission that there is nothing in the legislative history of the Receivership Act that suggests a legislative intent to require the appointment of a receiver. Ultimately, the Court determined that the legislative history favors a permissive rather than a mandatory reading of N.J.S. 2A:42-117.

To determine whether the language of N.J.S. 2A:42-117 should be mandatory or permissive, Staff reviewed each provision of the Receivership Act and reached out to knowledgeable individuals and organizations familiar with this area of law. Ms. Schlimbach noted that the court's powers related to a receivership are described permissively throughout the Act with

very few exceptions. In addition, she indicated that she has not received any objection to the proposed modifications from any interested party.

On February 13, 2022, Commissioner Bell sent comments to Staff via electronic mail in advance of the meeting since a scheduling conflict precluded his attendance. He asked Staff to consider the format used in the internal references in the proposed language of the statute. Ms. Schlimbach stated that the decision to use "b.(1) or b.(2)" rather than "(b)(1) or (b)(2)," was intended to maintain consistency with the format used in the existing statute. The ultimate decision regarding the format of the internal reference is made by the Commission.

Commissioner Bell also noted that the language in N.J.S. 2A:42-117(c) states that "[a] court, upon determining that the conditions set forth in subsection a. or b. of this section exist, *based upon evidence provided by the plaintiff* . . . ." He questioned whether this language suggests that only the plaintiff's proofs are considered in these situations. Ms. Schlimbach noted that there is no additional case law in which receivership determinations are discussed in any detail, nor does the legislative history provide context or explanation for this drafting decision. She added that the discussion in *Manufacturers*, as well as other statutes in the Receivership Act, seem to indicate that this language relates to the burden that must be carried by the plaintiff, rather than imposing a limit on the evidence presented or considered during proceedings.

Ms. Schlimbach advised the Commission that proposed language in the Appendix modifies the mandatory "shall" contained in the last paragraph to the permissive "may," so that it is consistent within the section, the Receivership Act as a whole, and the legislative history of the Act.

Commissioner Long concurred with Commissioner Bell and inquired why the phrase "*based upon evidence provided by the plaintiff*" was not removed from the statute in the Appendix. Commissioner Bunn joined Commissioners Bell and Long and added that the language was confusing. Laura Tharney responded that the comments of Commissioner Bell were received by Staff after filing day. She said that Staff did not want to unilaterally make a substantive change to proposed language without hearing from the Commission.

Commissioner Bunn stated that the language of the statute may be anachronistic. He suggested that a judge should consider all evidence that is presented in receivership matters. He opined that Staff should examine this language before the Report is finalized. The Commission determined that Staff will engage in additional research regarding this language before the Commission takes further action on this report.

Personal Conveyance

Samuel Silver presented a project concerning Personal Conveyance, which was last considered at the January 2022 Commission meeting. Mr. Silver thanked William Yarzab, Street Smart NJ Coordinator with the North Jersey Transportation Planning Authority, who brought the

project to Staff's attention, as well as Jim Hunt from the NJ Bike and Walk Coalition, for their communications with Staff on this issue.

N.J.S. 39:4-92.4 was enacted in August 2021, to protect pedestrians and other "vulnerable road users" from the possibility of being injured by motor vehicles while using New Jersey roadways. Injuries to these users of New Jersey's roads has been a concern as a result of increasing injuries and fatalities. A New York Times article from February 14, 2022, noted that, in 2021, New Jersey had its highest number of pedestrian fatalities in more than 30 years. In enacting the statute, which becomes effective March 1, 2022, New Jersey joined 42 other states and the District of Columbia in requiring that motor vehicles leave either a minimum distance or a safe distance, ranging from three to four feet, when passing a bicyclist. Mr. Silver advised that the statute also requires that a motor vehicle must approach pedestrians, bicycles, scooters, and any other lawful conveyance with due caution.

Mr. Silver noted, however, that the absence of a statutory definition of personal conveyance means that the term may be subject to competing interpretations of what constitutes a lawful personal conveyance for purposes of violating the statute. Staff conducted a 50-state survey to see how other states approach this issue. In Kansas, the term personal conveyance is not defined, but it is used in the context of personal transportation. The Kansas statute prohibits a state agency from reimbursing its employees for loss sustained when the employee uses their personal conveyance for state business. Additionally, 42 states have enacted safe passing statutes to protect bicyclists, and 14 states protect road users other than bicyclists, although no two statutes set forth a list of identical road users. Finally, three states (Utah, Vermont, and Washington) use the term "vulnerable users" to refer to persons traveling on roadways using an enumerated mode of transportation. Mr. Silver said that since Utah's statutes were the most comprehensive, they served as the template for the proposed modifications to the New Jersey statute set forth in the Appendix.

Mr. Silver described the purpose of the modifications in the Supplemental Appendix as creating a legal framework to protect vulnerable users of the roadways, as well as a less arbitrary standard for enforcement, while also raising awareness of the importance of safe road practices. Mr. Silver also mentioned that Commissioner Bell's thoughtful comments to Staff on February 13, 2022, have been incorporated into the Supplemental Appendix.

The proposed modifications are modeled on the Safe Passage Statute and provide protection to operators once they leave their vehicles. First, Mr. Silver addressed the pedestrian section, noting that the proposed modifications to subsection a. eliminate the definition section completely and substitute the term vulnerable user of a roadway, and that subsection a.(1) provides the first part of the definition of a vulnerable user of the roadway, focusing on pedestrians.

Next, Mr. Silver explained that in subsections a.(1)(A) through (E), protection is provided to different categories of individuals who have left their vehicles or are present on the roadway. This group includes: first responders; operators of highway maintenance and emergency service vehicles operated by the State, authority, county or municipality; utility workers; property maintenance workers; and any other person lawfully on the roadway for work or recreation.

Subsections a.(2)(A) to (E) set forth devices as outlined in the original statute, including bicycles, low-speed bicycles, low speed electric scooters, wheelchairs and electric wheelchairs. The next four subsections, a.(2)(F) – (I), set forth other personal mobility devices and include the corresponding statutory reference in which those devices may be found. Mr. Silver then described the modifications to subsection b., in which subsections have been added and the term pedestrian and personal conveyance have been replaced with the term vulnerable user of the roadway, where applicable. Subsections c. and d. remain unchanged.

Commissioner Bunn observed that although the term "vulnerable user of a roadway" is not a term he favors, he supports adopting useful language from laws in other states addressing the same issues. Chairman Gagliardi agreed the term was cumbersome but suggested that alternatives might be presented during the comment period following the release of the Tentative Report.

Commissioner Long asked why the statute is broken down to address each category of protected individuals rather than proposing a definition of pedestrian that would cover everyone. Mr. Silver explained that pedestrian is defined in the statute simply as a person afoot, to the extent there is any ambiguity as to the term "afoot," identification of the protected individuals and activities might help avoid competing interpretations. He added that the modifications were modeled as closely as possible on the format of the existing statute and sought to include those individuals set forth in the Safe Passage statute.

Commissioner Bunn suggested that the definition could be modified in a way that is more concise but that encompasses those categories that the current modifications articulate individually. He said, for example, that perhaps a pedestrian could be defined as someone "not within a motor vehicle." Mr. Silver expressed concern that this could imply that the individual was in a motor vehicle at some earlier point. Commissioner Bunn stated that the goal of the statute is to protect people who do not have the protection of a motor vehicle while on the roadway, and conceiving of the definition in this way may result in a more concise statute that addresses categories of protected individuals that may, as yet, be unanticipated.

Chairman Gagliardi asked whether any other states have handled the issue in the way that Commissioner Bunn suggested. Mr. Silver offered to refer back to the research on other state's statutes to with Commissioner Bunn's suggestions. Chairman Gagliardi asked the Commissioners

if anyone preferred Mr. Silver take a different approach than conducting this research and returning to the Commission with a recommendation.

Laura Tharney asked the Commission to clarify whether it would like Staff to conduct the review with the aim of modifying only the definition of pedestrian in the statute currently under consideration, or the definition in the definition section in N.J.S. 39:1-1. Chairman Gagliardi stated that he was not intending to foreclose any possibility but would like to have the benefit of the additional analysis.

Jim Hunt of the New Jersey Bike and Walk Coalition indicated that although the term vulnerable user of the roadway may seem unfamiliar, it is beginning to be used by the advocacy community for these issues across the country. Chairman Gagliardi thanked Mr. Hunt for his comments and encouraged him to communicate his input to Mr. Silver.

The Commission agreed to take no action on the project until Staff has conducted additional research and presented the findings at an upcoming meeting.

Inmate

On August 2, 2021, New York enacted comprehensive legislation to replace the word "inmate" with the term "incarcerated individual." There has been a shift in the field of criminal justice that recommends a change from terms characterized as "dehumanizing" and "stigmatizing" to those that focus on the individual's identity and capacity for growth.

Samuel Silver explained that currently there is no Uniform definition for the term inmate in New Jersey's statutes. The term includes persons sentenced to state prison or ordered into pre-trial or investigative detention or in a state prison or county jail is an inmate. Persons confined to a correctional facility are also considered inmates, and any person who has been sentenced as an adult to a term of incarceration is considered an inmate.

The term is found in 250 statutes spanning 16 Titles. The term is defined only in Title 30, which deals with Institutions and Agencies. Within Title 30, "inmate" is defined in four different ways in five statutes. Beginning in 1973, the Interstate Corrections Compact referred to an inmate as a male or female offender who is committed, under sentence to, or confined in a penal or correctional institution. In 1976, Department of Corrections (DOC) was created and the term "incarcerated person" was used for the first time. According to the legislative history, the statute creating the DOC was to intended to create an environment for incarcerated persons that should encourage the possibilities of rehabilitation and reintegration into the community. In 1979, the term became gender neutral, and an inmate became a person sentenced as adult to a term of incarceration. In 1995, the term evolved to include "any person sentenced to imprisonment or ordered to pretrial or investigative detention in a state prison or county jail." In 1996, the statute pertaining to the provision for medication to incarcerated persons defined incarcerated person as a person in the custody of the DOC. In 2019, the Isolated Confinement Restriction Act used the term

"person confined in a correctional facility." Legislation introduced in the current legislative session, S1111, concerns Medicaid eligible incarcerated individuals who are awaiting pre-trial release determinations, are being released after a period of determination, or are undergoing inpatient hospital treatment.

Mr. Silver noted that a 50 state-survey on this topic revealed that 46 states use the term "person in custody" and that states use a variety of other terms, including inmate.

Commissioner Bunn asked whether any of the references to "persons in the custody of DOC" includes a person in a local jail overnight. He noted that whichever term that the Commission decides to use should cover every level of custody in any facility and said that he is not sure whether it can be done uniformly because there are situations in which a person could be held involuntary in various types of facilities such as psychiatric hospital. He said that it may be appropriate to modify the term depending on the context in which it is used. Commissioner Cornwell said that a person who is being detained in a mental health facility would not be called an inmate, but would be considered a person being detained. A person held overnight in a local jail pending charges would be considered an inmate because of the punitive nature of the detention. He noted because of these different situations, he shared Commissioner Bunn's concern about whether there should be a global definition.

The Commission authorized further research and outreach on this project.

Workers' Compensation

In N.J.S. 34:15-7, the New Jersey Workers' Compensation Act authorizes an employer to assert certain defenses to compensation claims, including that an employee's injury or death occurred during recreational or social activity. Compensation is called for if the activity was a regular incident of employment, and it produced a benefit to the employer beyond improvement to employee health and morale. Whitney Schlimbach discussed with the Commission a Memorandum proposing a project to clarify the scope of the "recreational or social activities" defense to a workers' compensation claim in N.J.S. 34:15-7, as discussed in *Goulding v. N.J. Friendship House, Inc.*, 245 N.J. 157 (2021).

In *Goulding*, an employer held its first annual Family Fun Day for its clients and asked employees to volunteer. The Plaintiff, an employee. volunteered to cook at the event. While there, she fell and injured her ankle. She subsequently filed a workers' compensation claim. Both the compensation court and the Appellate Division denied her claim on the grounds that she was injured during a recreational or social activity that did not satisfy the two-pronged exception set forth in N.J.S. 34:15-7.

On appeal, the Court considered whether an employee, injured while volunteering at an event for her employer's clients, was barred from collecting workers' compensation by the "social and recreational activities" defense. The New Jersey Supreme Court found that the threshold determination that the activity was "social or recreational" was not met. The Court added that even

if the event did qualify for that defense, it was a regular incident of employment and produced benefit to the employer beyond improving employee health and morale.

Before 1979, employees were entitled to compensation if their injury arose out of and during the course of employment. In the event that a worker was injured, the court would consider five factors: (1) whether the activity was customary; (2) employer's encouragement or subsidization of the activity; (3) whether the employer had control over the activity; (4) whether employees were influenced or compelled to participate; and (5) whether the employer expected or received a benefit from the employee's participation. The threshold determination - whether the injury was caused by "recreational or social" activity - is not defined.

In *Lozano v. Frank DeLuca Constr*., 178 N.J. 513 (2004), an employee was injured driving a go-cart at a customer's private home after he had refused to operate the vehicle and his supervisor ordered him to do so. The Supreme Court determined that although the activity was social or recreational in nature, it was rendered work-related as a matter of law when the employee was compelled to participate by his employer.

The *Goulding* Court concluded that the nature of the employee's activities at an event and not the character of the event, determines whether it qualifies as a "recreational or social" activity under the statute. The Court held that because the employee attended the Family Fun Day event to facilitate it, not to participate in it, it was not a social or recreational activity as to her and compensation was not barred.

The *Goulding* Court also addressed the two-pronged exception, finding that even if Family Fun Day *did* qualify as a recreational or social activity, compensation was not barred. The Court determined that the employee was a cook who volunteered as a cook at the event. In addition, the employer was actively involved in and had control over the event, which was intended to be annual and therefore was deemed customary. Finally, the employer received the intangible benefits of promoting itself and fostering goodwill in the community and also received a benefit from the experience enjoyed by its clients and their families.

Ms. Schlimbach advised the Commission that there is no pending legislation that addresses this subject matter.

The Commission authorized further research and outreach on this project.

Human Trafficking

Laura Tharney discussed with the Commission a Memorandum recommending that the Commission conclude its work in the area of human trafficking. Ms. Tharney briefly outlined the history of the Commission's work in this area. She explained that most of the Commission's active work in this area was done some years ago, resulting in the release of a Final Report in June of 2016. That Final Report dealt with the limited issues of entity liability and forced or coerced sexually explicit performances.

Staff worked in with the New Jersey Commission on Human Trafficking (CHT), which was created in 2013 and was intended to consist of 15 members covering a broad range of experience and expertise in the human trafficking area. The CHT indicated support for the Commission's narrow clarification of the law contained in the 2016 Report.

In January of 2020, the Commission considered an Update Memorandum on this subject. At that time, Staff was asked to contact the CHT to discuss the intersection of the work of both Commissions.

Ms. Tharney explained that she recently had the opportunity to meet with one of the Commissioners from the CHT. She was advised that the CHT is not actively working on recommendations for statutory change at the present time, but rather is focusing on non-law enforcement initiatives in the human trafficking area.

The CHT representative indicated that the Commission appreciated the outreach and will contact the NJLRC moving forward if they would like the NJLRC to consider work on a particular aspect of the human trafficking statutes, or if an opportunity to work collaboratively presents itself. In the meantime, the CHT has no objection to the NJLRC concluding its work in this area.

The Commission agreed to conclude work in this area.

Cost of Living Adjustments

Chairman Gagliardi noted that it has been five years since the Staff of the New Jersey Law Revision Commission has had a cost-of-living adjustment (COLA). On the motion of Commissioner Bunn, seconded by Commissioner Bertone, the Commission unanimously approved a COLA adjustment for Commission Staff.

Adjournment

Ms. Tharney provided a brief update regarding the status of bill review, the hiring of students for the spring and summer, and the ongoing distribution of the Commission's recently-released Annual Report.

The meeting was adjourned on the motion of Commissioner Bertone, seconded by Commissioner Bunn.

The next Commission meeting is scheduled for March 17, 2022, at 4:30 p.m., in person, at the offices of Porzio, Bromberg & Newman. P.C., in Morristown.