

MINUTES OF COMMISSION MEETING
May 13, 2010

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, Commissioner Albert Burstein and Commissioner Edward J. Kologi, Esq. Professor Ahmed I. Bulbulia of Seton Hall Law School attended on behalf of Commissioner Patrick Hobbs and Professor Bernard Bell of Rutgers University School of Law attended on behalf of Commissioner John J. Farmer, Jr.

Also in attendance were Nicholas J. Kikis of the New Jersey Apartment Association, Donald M. Legow, Esq. of Legow Management Company, LLC, and Bruce E. Gudin, Esq. of Levy, Ehrlich & Petriello.

Minutes

The Minutes of the April 15, 2010 meeting were approved on motion of Commissioner Bunn, seconded by Commissioner Burstein.

Landlord Tenant

Marna Brown advised that Connie Pascale and Matt Shapiro were unable to attend and that Mr. Pascale had suggested that many of his concerns might be better addressed in a “working session” with Staff. The Commission approved such a working session to take place in June so that any changes to the draft resulting from that session could be addressed by the Commission at the July meeting.

Ms. Brown raised Mr. Pascale’s concern regarding the new grounds for eviction set forth in section LT:5-2.4, two of which were included at Judge Fast’s suggestion. One of those grounds involved imminent danger that a landlord must address, which had previously been discussed by the Commission and which pertained primarily to a landlord’s concerns about health and safety. The other new ground was based on a material misrepresentation in a tenant application. The remainder of LT:5-2.4, i.e., regulation of alcoholic beverages and prostitution, are bases for eviction under existing law, but are not currently found in the Anti-Eviction Act. Mr. Pascale stated that the Anti-Eviction Act provides exclusive grounds for eviction from residential rental premises and superseded any additional grounds as they pertain to residential tenancies. Mr. Pascale also was concerned that LT:5-2.4 was overbroad.

Commissioner Bunn asked whether all of the grounds in LT:5-2.4 involved determinations that require a judicial decision and Ms. Brown said that they did. Commissioner Bell suggested the inclusion of limitation on the time within which action may be taken by a landlord after the landlord becomes aware of the material

misrepresentation. Commissioner Kologi questioned the language requiring that the landlord rely upon the misrepresentation to the landlord's detriment and Commissioner Bunn suggested that materiality is the issue. Commissioner Bell asked whether there were limitations on the questions that could be asked by a landlord in a lease application and asked what happens if an applicant lies in response to illegal or otherwise improper questions.

Bruce Gudin said that one example of a material misrepresentation is a situation in which a tenant provides a false social security number and, as a result, the landlord's credit check is inaccurate. Commissioner Kologi asked whether the landlord would have been required to actually check the tenant's credit and therefore rely on the misrepresentation. Mr. Gudin stated this was customary. Mr. Cannel stated that detriment to the landlord meant at least that damages were suffered by the landlord. Commissioner Bell stated that reliance to a landlord's detriment meant entering into a lease with someone the landlord otherwise would not have. Commissioner Bunn suggested that the word "detriment" therefore was not needed.

Chairman Gagliardi said that landlords should have swift remedies against tenants who lie on applications. The Commission discussed the window of time within which action might be taken for such misrepresentation, and Mr. Cannel suggested a 90-day timeframe. Commissioner Kologi said that discovery rule issues might arise. Mr. Gudin explained that a remedy exists for such misrepresentation even under the current statutes, but it is costly; it involves the initiation by the landlord of an action for fraudulent misrepresentation in the Chancery Division.

Chairman Gagliardi stated that the Commission was in agreement that Staff can omit the reference to detrimental reliance because of the other significant hurdles in place. Commissioner Bunn stated that the time limit should be tied to discovery, perhaps six months after discovery.

Mr. Gudin raised additional examples of misrepresentations upon which landlords rely, such as falsely responding to an inquiry about Megan's Law registration or having a pet. A landlord would, however, effectively waive a right to judicially terminate the lease if the landlord failed to act upon the misrepresentation. An example of this is having knowledge for a year that the tenant had a pet in violation of the lease but not acting upon that knowledge. Mr. Cannel said that some misrepresentations may be material, inclusion on the Megan's Law list, for example, but still inappropriate to ask on a lease application. Commissioner Bunn suggested that, in such a case, the tenant's defense would be that the misrepresentation is not material because the question is unlawful. Ms. Brown said that certain factual issues could not be decided in a summary proceeding in landlord tenant court, since there is no opportunity for discovery in eviction proceedings.

Commissioner Burstein suggested that the less the Commission delves into the substantive issues in this area, the better it will be for the project, because this is such a contentious area of the law. Commissioner Bunn asked whether the statute should provide that the “material misrepresentation” must be in response to a lawful question. Commissioner Kologi reiterated Commissioner Bunn’s earlier comment that the situation in question is analogous to a person lying on an insurance policy. Commissioner Bell said that asking if a tenant is a member of the communist party is not unlawful, but a misrepresentation in response to such a question should not be the basis for termination of the lease. Chairman Gagliardi suggested that no judge would find that to be material and Commissioner Bell said that the standard is subjective materiality to the landlord. Commissioner Bell suggested that perhaps the material misrepresentation should be limited to the financial capability of the tenant and compliance with a published policy of the landlord. Commissioner Bunn added that the material misrepresentation must be in response to a lawful question.

Commissioner Burstein asked whether even the issue as limited by the Commission suggestions would be beyond the scope of a summary proceeding and Mr. Gudin responded that landlord tenant courts regularly make these kinds of determinations. Chairman Gagliardi said that the issues in question should be left to judges, explaining that although the views expressed during the meeting have merit, they cannot be readily codified and that removing the word “detriment” may be the extent of the change that should be made by the Commission. Commissioner Burstein noted that if LT:5-2.4 were removed completely, there are already remedies available in the Superior Court, where the litigants are afforded a full-blown hearing with discovery and he proposed the removal of LT:5-2.4 from the revision.

Chairman Gagliardi asked the guests whether they would agree with removal of this section from the revision. Mr. Gudin stated that judges abhor forfeiture and the landlord tenant laws are generally applied in a manner protective of the tenant. He said that his primary concern was the organization of the statutes governing landlord tenant relations in one section of the statute. He suggested that the landlord tenant judges have demonstrated that they are capable of protecting the citizens of this state. In the absence of LT:5-2.4, Mr. Gudin said that landlords could challenge the misuse of a residence as a brothel, for example, by stating that such a use violated the lease. Commissioner Bell said that it would be a disservice to deny landlords a summary dispossession remedy for a situation in which the tenant lies about the tenant’s identity and favored retaining LT:5-2.4, but he was not convinced that subsection d. should omit the words “to the landlord’s detriment”. He suggested that Staff should try again to draft this section. Chairman Gagliardi agreed and suggested that Staff look at other states’ provisions to see if they have attempted to solve similar problems.

Ms. Brown asked whether the form of the notices drafted based on the

Commission's prior direction met with Commission approval and the Commission approved the notices. Mr. Cannel explained that Staff had learned some new things regarding the tenant relocation provisions from DCA that afternoon that would be addressed in future drafts. Ms. Brown again expressed Mr. Pascale's view that providing an offset for rent when reimbursing the tenant for relocation expenses was an incorrect decision by the Commission.

Title 39

Laura Tharney explained the actions taken in response to the Commission's requests for information at the April meeting. She indicated that the Regional Administrator for the National Highway Traffic Safety Administration concurred with Staff's interpretation of the statutory and case law in the pre-emption area. Staff's interpretation was that where a federal motor vehicle safety standard exists, found in the Code of Federal Regulations in Section 571, it trumps all non-identical state standards. The Commission authorized Ms. Tharney to include her proposed language for both the statute and the Comment sections in the Final Report.

With regard to the application of Title 39 provisions to driving on quasi-public property, Ms. Tharney explained that she had reviewed the statutory sections proposed by police officers throughout the State in response to the Commission's request for recommendations. She divided them into two categories: statutory sections that are, by their terms or by the terms of related sections, limited to application on public property and statutory sections that are not so limited. Ms. Tharney recommended that the Commission add language to the first group of statutory sections selected by the officers to make it clear that they apply on quasi-public property. She did not recommend that the second group of statutory provisions be modified. Doing so would contradict the long-accepted approach to Title 39 interpretation which holds that unless the language of the statute specifically limits its application to public property, the statute is not so limited.

The Commission considered the impact of the *State v. Bertrand* case, in which the Court characterized as quasi-public a parking garage that was not available to the public. The Commission also discussed the question of whether police would issue a ticket to a parent teaching a son or daughter how to drive in a mall parking lot. Ms. Tharney explained that, although she had not asked police officers about that specific issue, it was her expectation based on comments from officers in response to other issues that the officers would prefer that a parent not allow a child too young for a permit to drive a motor vehicle on quasi-public property generally. The Commission also discussed the application of the proposed definition of quasi-public property to a gated community and whether it would fall within or outside of the definition. Ultimately, the Commission approved Ms. Tharney's proposed definition of quasi-public property and, with one exception (39:4-97.1) approved the modification of the statutory language as

recommended in the Memorandum prepared for the May meeting.

Ms. Tharney indicated that she had preliminarily reviewed the statutes of other states and had spoken with police officers and municipal court judges concerning the dollar thresholds included in the statutes that impose a duty on a motorist to take action in the event of an accident, as the Commission's requested. Ms. Tharney said that she presented this issue at a meeting of the State Traffic Officers Association and, after a detailed discussion, approximately two-thirds to three-quarters of the officers present at the meeting voted to leave the statutory thresholds at their current level. Conversations with thirteen of the fifteen Presiding Municipal Court Judges revealed that ten of the thirteen also recommended no change to those thresholds. Ms. Tharney explained that many police officers told her that, with regard to the reporting of accidents, it was better to have more data, rather than less.

The Commission members expressed concerns about the fact that the dollar thresholds were low and no longer accomplished the goal initially intended by the Legislature, but ultimately directed Staff to leave the threshold dollar figures untouched.

Finally, the Commission discussed the provisions pertaining to horses and horse-drawn vehicles. Ms. Tharney said that she was pleased to receive suggestions from mounted police officers from Newark, Asbury Park, Morris County, Union County, and Rutgers University. She explained that the officers with whom she spoke were not only willing to provide commentary on the section that was troubling to the Commission at the last meetings, but offered to review and comment on the entire chapter pertaining to horses. She revised the draft to incorporate the comments she received from the officers.

The Commission selected option 2 as amended by Commissioner Bunn with regard to the equipment removal provision found at 39A:33-HDV-1, subsection g. He suggested that it must be made clear in the first clause from what object the horse is being removed. The Commission found the other changes recommended by the officers to be acceptable based on the explanation in the Comments and at the meeting and Staff will incorporate them into the report.

Commissioner Bunn moved that the Title 39 project be released as a final report and the motion was seconded by Commissioner Bell and unanimously adopted by the Commission.

Durable Power of Attorney

Ms. Brown, after confirming that the Commissioners had received the most current revised language, noted the four changes from the prior draft. These changes included the revised language in section 20.7 and the new section on agent resignation.

In addition, Peggy Sheehan Knee suggested that if powers of attorney are to be recorded, the option of including an agent's e-mail address and telephone number could be problematic because of the privacy issues. Staff recommended adding language that if the power is to be recorded, the preparer may choose not to include this information.

Both Commissioner Bunn and Commissioner Bell questioned to whom the word "intended" referred in the definition of "third party". Ms. Brown suggested that the definition state "intended by the agent or principal" as only those parties would have intended the power to be honored, accepted or relied upon.

Commissioner Bunn moved to release the report in final form, seconded by Commissioner Bell.

Extension of Facilities

Richard Angelo proposed a new project in response to the decision of the Court in *In re Centex Homes, LLC*, 411 *N.J. Super.* 244 (App. Div. 2009). In *Centex*, the Court brought attention to a discrepancy between the language of *N.J.S.* 48:2-27 and the manner in which courts have read and applied the statute. The statute says that the Board of Public Utilities "may" order a utility to extend service. The courts, however, have customarily read the language as mandatory if the preconditions of the statute have been met. Staff recommended a single word revision to the statute from "may" to "shall" to make the language of the statute consistent with the outcome of the cases.

Commissioner Bell asked if such a change would improperly allow the case law to override an agency determination. He suggested that it appeared that, in *Centex*, the agency did exactly what agencies are supposed to do – reconcile differing statutory schemes and consider policies that may impact service extension. Commissioner Bell said that while the BPU should not arbitrarily refrain from ordering a utility to extend service if the statutory preconditions have been met, if some other relevant policy conflicts with the granting of an extension, the BPU should retain the discretion to not order it. He added that an agency's rulemaking process affords interested parties an opportunity to comment in attempts to resolve differences between statutory schemes that the Legislature has not addressed, while the statute does not.

Commissioner Bell asked Staff to draft a presumption into the statute. This would allow the BPU to retain discretion, but if the preconditions of the statute are met, then a presumption would favor an order to the utility to extend services. The BPU could consider separate State policies that impact the statutory provision in question but are not expressly contemplated by that section of the statute. Commissioner Bulbulia expressed support for Commissioner Bell's view, noting that when dealing with public utilities, the public interest is a significant factor and environmental considerations are inevitably present.

Commissioner Bunn disagreed. He noted that the BPU has limited jurisdiction and that its focus is on regulating utilities. Commissioner Bunn suggested that, in *Centex*, the BPU acted outside of the scope of its authority by considering and attempting to implement smart growth policies in an area in which it lacked the expertise possessed by other agencies. Commissioner Bunn agreed with the outcome reached by the Appellate Division in *Centex*.

In light of the difference in views held by Commission members, Chairman Gagliardi directed Staff to prepare a draft with alternative provisions for consideration by the full Commission at the next meeting.

Payment of Municipal Taxes Pending Appeal

Alex Fineberg proposed a new project in response to the New Jersey Tax Court's decision in *Trebour v. Randolph*, 25 N.J. Tax 227 (N.J. Tax Ct. 2009). In that case, the language of N.J.S. 54:3-27, requiring a taxpayer to pay all taxes "assessed against him" in order to sustain an appeal of an assessment, created uncertainty as to whether the taxpayer merely must be current on taxes for the property subject to the appeal or current on taxes for all of the taxpayer's properties. Staff recommended revision, adopting the court's decision that read the statute as merely requiring a taxpayer to be current on taxes due on the property subject to an appeal. The court's decision, Mr. Fineberg explained, was based on the wording of similar statutes (N.J.S. 54:5-6, 5-7, and 5-21) and case law supporting the principle that taxes are levied against property, not persons.

Mr. Fineberg explained that the only complex issue in this project related to subsection d. Although not the subject of *Trebour*, Staff decided that the current statutory language should be clarified but more research is required to determine its meaning, including contacting authorities on municipal taxation. Staff drafted the current revisions based on the understanding that "rate of discount" refers to a municipality's ability to set a fixed discount for payment of taxes in advance in accord with N.J.S. 54:4-67. Mr. Fineberg was unaware if any municipalities actually do so. Alternatively, subsection d. could be surplusage overlooked in legislative amendments subsequent to 1918. Only one case, decided in 1937, touched on the language in question, and its interpretation hinged on wording since repealed.

Commissioner Bunn objected to the use of the word "whose" in subsections a. and b. of Staff's draft and the term will be replaced in the next draft. Commissioner Bell suggested "property subject to the assessment", which Mr. Fineberg will incorporate in the draft provided for next month's meeting.

Title 9 -- Custody

John Cannel explained that he had changed the length of time during which a parentage determination could be challenged based on the Commission's request at the April meeting. He also mentioned that a recent court decision raised an issue that had not yet been considered, which was sibling visitation in a situation in which one sibling was being adopted but not the others. Mr. Cannel explained that the decision was that the adoptive parent, like any other parent, should be able to decide who has access to the child. However, the case raised the issue of the standard for granting sibling visitation when the child is not in the custody of a parent which is not addressed in existing law. The draft before the Commission has been amended to provide for such cases.

Commissioner Bell first suggested that there was a problem with the numbering in a certain section of the statute; Mr. Cannel will make those corrections. Commissioner Bell also said that since there was not currently a provision for a presumption in regard to sibling visitation in 9:2A-5, he wondered if the language of that section should be extended. Mr. Cannel said that the only current presumption was in subsection d., but if the Commission wished to extend the law, the language could be modified. Commissioner Bell suggested that he would include a presumption in favor of sibling visitation if the siblings had regular communication in the preceding five years. Staff will revise the language and Chairman Gagliardi said that the idea of including a sibling visitation provision is significant enough that it should be reviewed by the full Commission at the next meeting.

Miscellaneous

The next Commission meeting is scheduled for June 17, 2010.

Ms. Brown and Mr. Cannel discussed the Assembly hearing on bill A410 pertaining to Construction Lien Law.