MINUTES OF COMMISSION MEETING
July 16, 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., Commissioner Albert Burstein, and Commissioner Sylvia Pressler. Professor Ahmed I. Bulbulia of Seton Hall Law School attended on behalf of Commissioner Patrick Hobbs, Professor Bernard Bell of Rutgers University School of Law attended on behalf of Commissioner John J. Farmer, Jr. and Grace Bertone, Esq. of McElroy, Deutsch, Mulvaney & Carpenter, LLP, attended on behalf of Commissioner Rayman Solomon.

Also in attendance were Connie Pascale, Esq., Legal Services of New Jersey; Matthew Shapiro, New Jersey Tenants Organization; Nicholas J. Kikis, New Jersey Apartment Association; Judge Mahlon L. Fast; Andrew Kravis, Seton Hall Law School student; Carolyn Smith Pravlik, Esq., Terris, Pravlik & Millian, LLP; Professor Frank Askin of Rutgers University School of Law and Renee Steinhagen, Executive Director of New Jersey Appleseed Public Interest Law Center.

Minutes

The Minutes of the May 2009 meeting of the Commission were unanimously approved after being moved by Commissioner Pressler and seconded by Commissioner Burstein.

Title 22A

Laura Tharney explained to the Commission that it was her understanding that the individuals who had supplied comments throughout the drafting process on behalf of the County Clerks, the Surrogates, the Sheriffs, the Special Civil Part Officers and the AOC found the draft generally acceptable at this point. She directed the attention of the Commission to the recent amendment to the Title 22A draft final report on page 20 dealing with fees that may be charged by the Surrogates. The subsection in issue 22B:2-2i.(23) pertains to "duplicating or copying of information stored on such media as microfiches, digital tapes, high density disks, optically scanned and recorded materials or any other medium used to record or preserve records". The current statutory language imposes a cost of $150 per medium recorded.

Ms. Tharney explained that initially, the language had been modified to refer to the provisions of OPRA. The Surrogates objected to that change as confusing since OPRA refers to both the legislative and executive branches, but does not specifically refer to judicial records. The language was then modified to include pertinent OPRA language without specifically referring to that statute. That change, too, was objectionable to the Surrogates because it required them to provide requested records in a medium other than that in which they were maintained by the Surrogates. Such a requirement contradicted the language of an Administrative Directive applicable to Surrogates' records. The most recent modification, reflected in the current draft, paraphrases the relevant language from the Administrative Directive to avoid any inconsistency.

Professor Bell asked if doing so effectively "freezes" the Administrative Directive, preserving it in the statute even though it might later be modified. Ms. Tharney acknowledged that it did, and that one of the goals of this modification was to include "better" language, even if it was not ideal. Commissioner Pressler suggested that, to address this concern, the language be modified to say, in subsection (23)(B) "Unless otherwise ordered by the New Jersey Supreme Court…"

After a motion by Commissioner Pressler which was seconded by Commissioner Burstein, the Commission voted unanimously to release Title 22A, as amended, as a Final Report.

UECA

Carolyn Pravlik commended the Commission for having moved the proposal to this point. She suggested a couple of minor changes. First, although she understood why the Commission chose to preserve in its entirety the current language from the Brownfield Act, on page 3, she encouraged the Commission to drop the words "in lieu of remediation" only because of the common understanding of individuals who work in this area of the law, which is that engineering and institutional controls are considered remediation, not an activity *in lieu of* remediation. She further explained that the reason the language "in lieu of remediation" is not accurate is that it is used in the context of restricted use soil remediation, which does not involve a full cleanup. Mr. Cannel suggested replacing "in lieu of remediation" with the words "remediation to an unrestricted standard". Ms. Pravlik agreed that this would be preferable.

On page 4, in the last sentence of the last paragraph, Ms. Pravlik suggested replacing the words "perceived effectiveness of a deed notice" with "preference for a deed notice". Commissioner Pressler recommended eliminating the entire sentence, which Ms. Pravlik preferred.

Commissioner Burstein inquired what was meant by the words "in conspicuous language" in the text of the proposed amendment. Ms. Pravlik explained that she meant that the language in question should appear at the beginning of the document and in a conspicuous format because the current model deed notice buries the information in an appendix. Commissioner Pressler recommended including the language: "the notice shall indicate, at its head, with specificity and in conspicuous format. . . ."

With the changes above noted, Commissioner Burstein moved and Commissioner Pressler seconded the release of the report on UECA as a final report. The motion passed unanimously.

Landlord Tenant

Marna Brown informed the Commission of Staff's need for guidance on several issues. First, with regard to distraint, the New Jersey Supreme Court, in *Callen v. Sherman's*, 92 N.J. 114 (1983), determined that the New Jersey distraint statute was unconstitutional because it deprived tenants of their property in violation of the Fourteenth Amendment. The Court determined that the due process problems could be solved by requiring a pre-distraint hearing. Mr. Cannel noted that the hearing required by the Court was clearly a pre-seizure and impound hearing. The common practice of court officers and attorneys in at least several counties, who

believe they are following *Callen*, is to seize first without a hearing and then seek a court hearing prior to the sale.

Ms. Brown explained that *Callen* provides an exception to the requirement of a pre-distraint hearing where the landlord learns that removal of the property by the tenant to defeat the landlord's rights is imminent, or the tenant waives its due process rights in the lease. Staff incorporated that exception into the draft and Ms. Brown said that she believed that Staff was constrained to follow *Callen* when revising, even though the actual practice differs from the *Callen* mandate. She sought Commission guidance since the proposed changes will affect the actual practice.

Professor Bell commented that since this is a federal constitution-based ruling, it cannot be ignored. He asked if the practice of proceeding without a pre-seizure hearing had been challenged. Mr. Cannel said that the practice is widespread and, although *Callen* is clear, it is not being followed. Commissioner Pressler said that the Legislature is not free to ignore a constitutional mandate, and the Commission must also follow *Callen*. Commissioner Pressler moved to follow Staff's recommendation regarding *Callen* on distraint. The motion was seconded by Professor Bell and unanimously adopted by the Commission.

Ms. Brown then explained that Staff had changed the terms "goods and chattels" (the property subject to distraint in the source statute) to the more modern, "tangible personal property". One commenter had suggested that the definition of property subject to distraint should be expanded to accommodate property such as electronic data, which might not be regarded as tangible. The Commission discussed the need for publicly owned property to be exempt from distraint.

Professor Bell expressed concern about expanding the scope of the statute. Commissioner Pressler suggested that Staff should go back to the terms "goods and chattels" because of the existing body of law on what is meant and not included by these terms. She emphasized that using the old terms gives one access to many years of cases. The Commission also considered whether intangibles, such as software and customers lists, could be distrained. Commissioner Pressler suggested that proprietary information, however stored, should be exempted. Chairman Gagliardi suggested that Staff leave the existing language. Commissioner Burstein asked Staff to prepare two alternate versions for review at the September meeting.

Ms. Brown advised that Staff had been working to eliminate some of the current distraint penalty provisions. Now that the statute, with the adoption of the *Callen* principles, no longer permitted nonjudicial distraint in most cases, other penalty language seemed unnecessary. As a result, Staff will further revise the penalty provisions.

With regard to the issue of landlord liens, Ms. Brown explained that the current statute provides for two liens, one in Section 42 and the other entitled the Loft Act. The Section 42 "lien" is not really a lien but a preference in payment. The Loft Act, drafted in 1933 and limited in scope to machinery or chattels of manufactures in a mill, loft or factory rental property, is a true lien that gives the lienholder nearly absolute priority. Mr. Cannel explained that Staff does not think the Loft Act serves a useful purpose any longer since, if a landlord wants the priority, the landlord can take a UCC lien. Ms. Brown explained that Staff eliminated the Loft Act in its

recent draft and wanted to make sure this was acceptable to the Commission before moving forward. The Commission approved elimination of the Loft Act.

Ms. Brown next raised the issue of "waste" and whether it should remain in the statute. The current statute allows treble damages for waste, but most waste cases are older, involving the taking of crops and the cutting down of trees. Commissioner Pressler stated that if the treble damage language were removed, the waste provisions would be unnecessary. Commissioner Gagliardi commented that before the Commission made that type of policy decision, he would like to hear from commenters regarding the continuing need for the waste statute. Ms. Brown further explained that a commenter had requested that the current subsection dealing with accidental fire be redrafted more broadly to include other types of damage for which the landlord might be insured. Commissioner Pressler said the issue was not one of insurance, but of negligence. Ms. Brown advised that for September's meeting, Staff will redraft this section retaining the use of the term "waste" and altering the language regarding accidental fire.

With regard to abandoned property, Ms. Brown explained that since the Commission's last review of this section, Staff had received additional comments from a commenter who represented commercial landlords. This commenter believes the statute should contain different time frames for residential and nonresidential properties. For example, he suggested the current 15-day time waiting period for the tenant to respond to the abandoned property notice was too long in a non-residential case, recommending, instead, 10 calendar days. Otherwise, the landlord's ability to rent the property was being held up at the landlord's expense. Commissioner Burstein said that given the nature of business operations, it might take longer to clear out the property in a non-residential case. Commissioner Pressler agreed and Mr. Cannel advised that this statute is relatively recent law and the Commission should be reluctant to change it unless it really appears to be in error. The Commission elected not to change the timeframes in the current statute.

Professor Bell recommended one change to the abandoned property section in LT: 6-6.1a. The comment to that section indicates that notice, storage and manner of sale, but not the disposition of proceeds, should be controlled by the lease rather than the statute. Professor Bell said that the explanation in the comment should be explicit in the statutory language. Staff will redraft in accordance with this suggestion for the September meeting.

Connie Pascale said that certain definitions should be omitted because the reader should be able to rely on case law and provisions of the lease for definitions of these terms. He suggested that "rent" should be undefined for the same reasons that "landlord" and "tenant" are not defined. Commissioner Pressler said that she does not think any of the definitions are helpful. Ms. Brown and Mr. Cannel felt that the terms "enforcement officer" and "service" should be defined in this Title. Mr. Cannel explained that Staff had hoped to defer consideration of the definitions section until after the revision was completed. The Commission agreed.

Mr. Pascale and Matthew Shapiro said, with regard to the term "service", that commercial couriers do not always require a signature upon delivery. They suggested that the language of the draft should reflect the need for a signature in the same way as a certified mail return receipt is required. Mr. Shapiro also asked that the use of a commercial courier be an alternative to personal service and an alternative to certified mail, as was done in LT:6-6.4(a).

Mr. Pascale commented that sections of current law continued in the draft were based on anachronistic 1877 statutes. He wanted LT:6-2.1 to clarify that a summary proceeding for eviction was distinct from an action for rent. He then expressed concern with proposed sections LT:6-2.2 and LT:6-2.3, which he described as not valid or necessary under current law. He suggested that for those situations where there was no landlord/tenant relationship, an action for ejectment would be appropriate and therefore proposed 2.2 was unnecessary. In his view, for any situation involving a landlord/tenant relationship, proposed 2.2 would be confusing because if the relationship involves a tenancy, then it is subject to the current Anti-Eviction Act. With regard to 2.3, Mr. Pascale said that "holdover tenants" in a residential context are no longer possible under the law, citing for support Judge Baime's decision in *Parkway*, Inc. v. Curry, 162 N.J. Super. 410 (Dist. Ct. Essex Cty 1978). Since tenants can now continue their tenancies indefinitely, the issue of a double penalty for a "holdover" is no longer relevant. Instead, he explained, the standard to be applied should be that set forth in *Sommer v. Kridel*, 74 N.J. 446 (1977), requiring the landlord to prove actual damages.

Professor Bell said that, unlike a "holdover" situation as in 2.3, he thought *Sommer* was a case in which the tenant signed a lease but never took possession of the premises. Mr. Pascale stated that the action was for unpaid rent and the court found a duty to mitigate damages. He said that although the facts may not be the same, the Supreme Court's rationale stands. The double rent is a penalty imposed on tenants and it has no more validity than the common law that allows a landlord to leave the place vacant. Mr. Pascale suggested that reality should be the guide and if a landlord loses nothing because the premises are re-rented, then the tenant should not be assessed double rent.

Ms. Brown pointed out that in the relatively recent case of *Lorril Company v. LaCorte*, 352 N.J. Super. 433 (App. Div. 2002), the court upheld the double rent statute to encourage tenants to leave when they say they are going to leave since the landlord expects the property to be available to re-rent after that time. *Lorril* states that the imposition of double rent gives the tenant the motivation to vacate on the date for which the tenant gives in the notice. Mr. Pascal stated that *Lorril* was incorrectly decided because a tenant cannot be evicted for giving inaccurate notice of departure. Commissioner Pressler asked why the landlord needs double rent protection. Ms. Brown said that the double rent was imposed to address the equities of the situation.

Commissioner Pressler said she found it persuasive that a tenant who stays beyond the date in the notice cannot be evicted. Professor Bell observed that if a tenant gives notice of moving out on a certain day and moves out later, it is a benefit to the tenant who holds over for three days to be charged double rent for those three days rather than incurring the next period's rent. Professor Bell said that the provision allows the tenant to leave when able to do so and, if the term of the tenancy is longer than a month, the periodic amount could be large, so a daily double rent is more reasonable.

Commissioner Pressler referred the Commission to Judge Baime's opinion in *Lorril* which supports the position that if there is a loss, the party who sustains the loss may sue the person who caused the loss. That is the appropriate remedy and double rent should not be permitted. Judge Fast suggested that if the double rent penalty is removed, a tenant's failure to comply with the tenant's own notice should be a ground for eviction. Commissioner Pressler

stated that the landlord has a built-in remedy as long as the landlord is collecting rent and that evicting the tenant does not help because by the time the tenant is evicted, the prospective tenant is likely no longer available.

Judge Fast suggested a correction to the comment in section LT:6-2.2. Ms. Brown asked if the Commission was going to eliminate that section. Professor Bell expressed his reservations about eliminating it at this point. Ms. Brown suggested that the provision remains relevant in cases of a non-residential tenant holdover. The draft language would enable the landlord to remove such a holdover without the need for an ejectment action, which can be a convoluted process. Commissioner Pressler said that the current language does not provide for "summary action", the court rules are clear, and 6-2.2 is not necessary. Chairman Gagliardi agreed with Professor Bell that this section might be relevant and should not be eliminated at this time.

With regard to LT: 6-2.5, Judge Fast asked why it was restricted to non-residential tenants. Ms. Brown said it was not intended to be so restricted. Commissioner Pressler noted that the section appeared to require the subtenant to pay rent for a period in excess of the subtenant's stay. Mr. Cannel said that he read it to mean the tenant was obligated for the amount the tenant contracted for, or the rent that was owed, whichever was less. Professor Bell said he read the language as requiring the rent for the period of the subtenancy. Commissioner Pressler said the entire section needs to be clarified and Staff will revise accordingly.

Judge Fast said that LT: 6-3.4(c) refers to personal service or "overnight commercial courier" and he did not remember any other reference to "overnight commercial courier." Mr. Cannel explained that the language had been included for extraordinary cases requiring emergency action by the landlord in order to provide for delivery as quickly as possible. Commissioner Pressler pointed out that the court rules provide for next day service by commercial courier and that language will be adopted by Staff.

Judge Fast said that LT: 6-3.13 preserved an odd distraint penalty that doubles costs but provides no attorneys' fees. Commissioner Pressler asked whether there was any fee shifting provided for in the landlord tenant law because either it should be done across the board, or not at all. Ms. Brown said that there are no fee shifting provisions. Professor Bell said that the comment could mention the unusual nature of the penalty. Commissioner Pressler asked whether a statute was needed at all to create a cause of action for wrongful distraint. Chairman Gagliardi expressed concern that if the provision was eliminated, an attorney might argue in court that repealing the section eliminated the cause of action. Mr. Cannel mentioned that Staff included a provision in the draft, LT:6-7.1, preserving all existing causes of action. Staff will draft language for the comment and the issue can be addressed at the next meeting as to whether the entire section should be eliminated or should remain but add an explanatory comment.

Mr. Kikis commented on LT:6-2.3. Although agreeing that imposing a double penalty in perpetuity is draconian, he felt there is nothing else to bind tenants to their word. He added that even if the damages to the landlord are minimal, there are damages to others, including the tenant expecting to move in. He suggested it is important to have some language in the statute that provides an incentive for a tenant to keep their word, and double rent does that. Mr. Shapiro said that the prospective tenant would get no compensation from the statute and would still have to sue the landlord. Mr. Kikis responded that the damages are hard to quantify and there can be a

domino effect, with havoc wreaked on the entire rental relationship. Professor Bell stated that traditionally there is an exception to such a penalty if there are compelling reasons the tenant has to stay, such as illness, injury, or the like. He suggested that such an exception should be included if the Commission retains the provision. Mr. Cannel also suggested that if the provision is retained, perhaps the penalty of double rent be limited to no more than one month. Ms. Bertone suggested that this circumstance may not ever really happen because tenants generally do not give these notices. Mr. Pascale, Mr. Shapiro and Judge Fast, however, all said that they had seen such notices. Professor Bell requested additional time for the Commission to consider this issue and Chairman Gagliardi said that a decision on this section would be deferred.

Commissioner Pressler said the Commission should also defer a decision on LT:6-2.2. She also noted that LT:6-3.2(a) and 6-3.3 should be combined because both contain timeframes and are presently somewhat inconsistent.

SLAPP Suits

Professor Frank Askin Director of the Constitutional Litigation Clinic at Rutgers School of Law and Renee Steinhagen of the New Jersey Appleseed Public Interest Law Center proposed that the Commission draft an anti-SLAPP bill. Professor Askin explained that SLAPP is a term coined by two professors in Denver and refers to Strategic Litigation Against Public Participation. Professor Askin described the *Lobiando v. Schwartz* case as a classic example of a SLAPP suit in New Jersey. Ms. Schwartz was sued for voicing opposition to a restaurant. She was sued but was adamant, and did not back down. As a result, she spent 15 years in court only to be denied a remedy, although the Appellate Division had attempted to provide one to her approximately ten years ago. The New Jersey Supreme Court determined, in *Lobiando*, that SLAPP plaintiffs are immune as long as they can find a lawyer to bring suit, and that SLAPP lawyers are immune so long as they do not have an independent animus behind their decision to institute the litigation.

According to Professor Askin, about half of the states have anti-SLAPP laws and the New Jersey Legislature has considered this issue, in one form or another, for approximately 20 years. Professor Askin explained that there are two main elements to anti-SLAPP legislation: a judicial procedure providing for prompt disposition and a damage remedy for the SLAPP target that is able to be filed as a counterclaim in the suit. Without such a remedy, he explained, SLAPP plaintiffs are unable to find counsel and, because of the commitment of time and resources required, few attorneys will represent SLAPP victims pro bono. Renee Steinhagen added that, in her experience, sanctions were unavailable to SLAPP victims even in a case where the plaintiff actually said that if the defendant stopped, the suit would be dismissed.

Professor Askin said that item number 3 in the packet he submitted, a prior bill draft, would be a good starting point, as would the Delaware statute, which is item 13 in the packet, and provides a broader counterclaim remedy. Ms. Steinhagen explained that she was actively involved in 2005 when legislation was proposed. The AOC intervened at that time, objecting strongly to the stay of discovery provisions contained in the bill. An essential issue is that of discovery since these suits, although resolved in favor of the defendants in the overwhelming majority of cases, tend to last for years before being resolved. In addition, any legislation on this issue should not be limited to public bodies since the issue is now a real problem in homeowners

association situations in which a resident speaks out and is then faced with a SLAPP suit. Ms. Steinhagen and Professor Askin explained that the notion of sanctions is meaningless because it does not deter attorneys, even if they know the client's malicious intent, because the courts protect the lawyers.

Commissioner Pressler suggested that there must be a way to draft a bill to provide protection in legitimate cases and avoid a *Winberry v. Salisbury* problem. Chairman Gagliardi said that the Commission would discuss this in September and that, in advance of the September meeting, Staff should provide to the Commission a cover letter from Staff and the materials supplied by Professor Askin.

Professor Bell expressed concerns about the unusual nature of the project since the Commission did not generally begin a project in an area in which there was already proposed legislation. Mr. Cannel explained that this has occurred, and gave the example of the Common Interest Ownership project. Ms. Tharney indicated that there were some significant similarities in the prior bills deemed objectionable by AOC and that it did not appear that changes had been made to address the AOC concerns. Commissioner Pressler suggested removing the cause of action against attorneys as a start.

Chairman Gagliardi said that the Commission would decide in September whether to take on the project.

Durable Power of Attorney

Ms. Brown stated that Staff believed this was a valuable project and wished to know whether the Commission approved of going forward. The Commission voted unanimously to proceed with this project.

Title 9

John Cannel advised the Commission that a meeting had been held with representatives of various entities interested in the title 9 project, particularly the issues of child abuse and neglect. When Commissioner Pressler asked about the fate of juvenile detention centers in the draft, Mr. Cannel said that he had eliminated only provisions that had no continuing viability. He said that, with regard to the issue of custody, the New Jersey Supreme Court decided a case regarding custody after the current draft was already provided to the Commission. In brief, the opinion indicated that a decision by the parents may not be second-guessed unless the child is at risk of harm. Chairman Gagliardi indicated that the Commission would revisit this issue in September.

Miscellaneous

Chairman Gagliardi noted that newly appointed Dean John J. Farmer, Jr. of Rutgers School of Law will be maintaining Profession Bell as his representative on the Commission.

The next Commission meeting is scheduled for September 17, 2009.