

**MINUTES OF COMMISSION MEETING**  
**October 16, 2008**

Present at the New Jersey Law Revision Commission meeting held at 153 Halsey Street, 7<sup>th</sup> Floor, Newark, New Jersey were Commissioner Andrew Bunn, and Commissioner Albert Burstein.

**Guests**

Also in attendance were Lawrence Fineberg, Esq. of Chicago Title Insurance; Derel Stroud; Thomas J. Perry, Esq., of Golub & Israel, P.C.; Timothy Duggan, Esq., of Stark & Stark; Gary Forshner, Esq., of Stark & Stark; and David Gordon, Esq., of Wilentz, Goldman & Spitzer.

**Minutes**

The Minutes of the September 18, 2008 meeting were accepted as submitted.

**Title 39**

Laura Tharney provided the Commission with a brief update on the Title 39 project, advising of her October 2, 2008 meeting with the MVC Staff attorneys. She explained that she had been pleased to hear that the MVC had completed its line-by-line review of the draft report. Ms. Tharney explained that there were three areas of concern to the MVC attorneys who had reviewed the project including the license, permits and identification chapter, the license plate chapter, and the equipment provisions. Based on her discussions with the MVC attorneys, the plan is to review and incorporate the remaining comments from the MVC and then to set up another meeting to discuss those areas of concern.

Commissioner Bunn asked if the MVC had reviewed the revised penalty provisions of the draft. Ms. Tharney explained that they had and that they were taking no position on the changes. As a part of their review, the MVC attorneys highlighted the penalty provisions that represent a substantive change in the current law. The attorneys explained, however, that it was their view that Legislature and not the MVC establishes penalties; they confined their review to noting changes in the law.

Commissioner Burstein asked if contact had been made with the Legislature yet. Ms. Tharney said that she had not made contact with the Legislature since she did not know when she would receive the remaining comments from MVC and thus could not yet determine when the project might be in a more complete form. She explained that preliminary contact had been made with the Office of Legislative Services in order to obtain style and formatting information so that when the project is released to OLS it will be in a compliant format. Mr. Cannel added that based on the contact with OLS, it appears that the Law and Public Safety Committee will be the one to handle the project upon its release.

## **Title 22A**

Laura Tharney advised the Commission that a meeting had been scheduled with representatives from the Constitutional Officers Association of New Jersey at which time she anticipated receiving comments from the County Clerks, the Surrogates and the Sheriff's Officers on the Title 22A project. She indicated that she would incorporate any comments into the next draft provided to the Commission.

## **Poor Law**

John Cannel explained that he had received a telephone call in July advising him that Department of Human Services would have difficulty providing comments within the time period set by the Tentative Report and requesting that the Commission hold off on its review of the project at this meeting. Mr. Cannel indicated that he had explained that the Commission would likely agree to extend the comment period for a short period of time, but would be reluctant to do so indefinitely. The Commission discussed the situation and it was determined that Mr. Cannel should advise interested commenters that the comment period would be extended until December 1, 2008. Commissioner Bunn asked whether Staff had a sponsor in the Legislature for this project and Mr. Cannel said that there was not yet a sponsor. Commissioner Burstein noted a typographical error on the third line of the cover page, and suggested that the word "was" should be omitted.

## **Uniform Trade Secrets Act**

Marna Brown advised that positive feedback had been received since release of the tentative report on this project from people who had earlier participated in the process. She noted that the deadline for feedback was early December and it is anticipated that the Commission will address the release of a final report at its December meeting.

## **Pejorative Terms**

Marna Brown brought to the attention of the Commission issues that required clarification. First, she explained that sections 40:11A-22.2 and 40A:9-154.9 were duplicative, virtually identical in text. The first statutory section pertains to parking authority law and the second is part of the title pertaining to officers and employees. Ms. Brown asked whether one should be recommended for repeal since they are virtually identical. The Commission decided to retain both sections since the issue of repeal exceeded the scope of the project.

Ms. Brown next brought to the attention of the Commission the gender requirement that remained a part of section 30:4-1(d) (the statute regarding the requirements for members of institutional boards). Inquiring whether the Commission wanted to remove this gender requirement, Ms. Brown said that although no one had requested that it be removed, it appeared to be anachronistic. Since it was unclear whether the requirement had continuing significance,

the Commission determined that it should remain unchanged at this time. Ms. Brown also raised the issue of two sections which contain references to other sections that have since been repealed and asked the Commission how this should be handled. Commissioner Burstein suggested that this was more in the nature of a technical change and that the outdated references can and should be removed.

In a final note, Ms. Brown advised the Commission that the Governor's Council on the Prevention of Mental Retardation had voted to change its name legislatively to the Governor's Council on the Prevention of Developmental Disabilities. The Council had agreed that the term "mental retardation" has pejorative overtones, but it was concerned that the term "intellectual disabilities" was not a clinical diagnosis and was likely to become unacceptable in a few years. Accordingly, the Office of the Prevention of Mental Retardation and Developmental Disabilities, part of the Department of Human Services, was also changing its name and proposing legislation that would identify the prevention of intellectual disabilities as a priority for prevention activities.

The Commission released this project as a tentative report.

### **Construction Lien Law**

Marna Brown explained that Gary Forshner and Tim Duggan, both attorneys from Stark & Stark attending on behalf of the New Jersey Builders Association, had arrived prior to the meeting to discuss this project with Staff. Ms. Brown noted that some of their concerns thereafter had been addressed by Staff but any remaining issues would be presented to the Commission. The presentation by Mr. Duggan and Mr. Forshner was in accordance with the October 14, 2008 memorandum they had provided which was distributed to the Commissioners prior to the meeting.

Mr. Duggan first addressed the definition of "lien fund", explaining that over time the "lien fund" concept had been heavily litigated. Mr. Duggan wanted to make sure it was clear that the "lien fund" represented the maximum dollar amount of exposure for the owner. Commissioner Burstein noted a comment Staff had received from an architect concerned about the ultimate lien amount because of an inability to determine a sum certain. Mr. Forshner explained that current section 2A:44A-11, pertaining to amendments of lien claims, addressed situations where the lien amount may change over the course of the project. Mr. Duggan said that an architect or similarly situated party was obliged to closely monitor the project to remain aware of the changing contract dollar amount. Mr. Forshner added that courts regularly determine the contract price based on the percentage of job completion. Mr. Duggan also suggested that architects might be better able to address this issue during contract negotiation.

Mr. Forshner next addressed the issue of including providers of security services within the definition of "services". This would entitle security services providers to file construction liens. He was concerned that permitting this change was a slippery slope because it would then

open the door to a parade of service providing individuals and entities who also would like to be able to file construction liens, including accountants, design/marketing professionals and insurance providers. Mr. Forshner expressed concern about whether security services added value to the construction project in the same manner as parties now permitted to file liens. The underlying concept of the construction lien law is that if you are adding to the value of the land, you should be afforded protection. The addition of security services would change the intent of the law and potentially result in a much larger group of permissible lien filers. Mr. Forshner also noted that there are two types of security services. The first protects the job against vandalism and the second protects residents. He suggested that if the Commission chooses to include security service providers, the definition of “security services” should not include security which protects residents.

With regard to the proposed changes to section 2A:44A-3 that pertain to the assessment by a community association against individual unit owners, Mr. Forshner remarked that he believed an understanding had been reached with Staff. One significant issue still outstanding, however, is whether the claimant has to file a claim against every individual unit owner if the entity contracting for the work is a community association. Mr. Forshner suggested that the ability to require an assessment of all individuals in a community raises due process issues. There is an unintended consequence in the current draft that requires an assessment almost immediately upon a lien claim being filed. He asked that if the Commission is leaning in this direction, that it clarify that assessment is nothing more than a post-judgment enforcement provision.

Mr. Cannel explained that Staff did not believe there was a due process concern. When considering the issue of whether a lien filed against a condo or other homeowners association also would have to be filed against the individual unit owners, Staff elected to permit filing simply against the association. Not every unit owner is required to be notified in much the same way as not every stockholder is required to be notified about an action against the corporation. Before unit owners can be assessed, the procedures required by the master deed must be followed.

Commissioner Burstein asked on whom the burden of notice to unit owners should be placed. Mr. Forshner responded that claimants could ultimately choose the remedy for enforcement of their lien claims. If the association had a bank account, the claimant could pursue the funds in that account. If the association had no property, however, the only way to get paid would be by an assessment process. Commissioner Burstein asked whether, in that case, Mr. Forshner would require a claimant to give notice to all unit owners regardless of how many unit owners there were. Mr. Forshner replied that the choice was the claimant’s but if the claimant chose not to put the unit owners on notice, the claimant would have to waive the opportunity to recover the money through assessment, but would retain all of its other rights, including the right of the lien itself. Mr. Cannel suggested that these situations should not be treated differently from any other situation in which enforcement of a money judgment is sought.

Mr. Forshner next addressed section 2A:44A-6 d. pertaining to “final completion”. He explained that if the term was not defined in the statute, the courts will have to define it, which will result in considerable litigation. He suggested to Staff that the term can be defined by the contract itself, or, if not in the contract, by tying completion to an event such as the issuance of a certificate of occupancy (CO) or other document indicating inspections and approvals had been completed. Ms. Brown advised the Commission that the word “final” had been eventually added to the existing statute at the suggestion of commenters who also believed strongly that the word should not be defined at all. Staff had decided to leave the term undefined at the insistence of the majority of commenters. In light of the considerable debate concerning this issue, Ms. Brown suggested that Staff would prepare and provide for the next Commission meeting a memo summarizing the various comments that have been received. Commissioner Burstein suggested that any definition of “final completion” would have to be broad enough to encompass the various aspects of a project for which a CO is not issued. If you are the plumber on the job, for example, the issuance of the CO is not the final completion of *your* part of the job. Commissioner Bunn noted that “final completion” could be defined in just those terms.

Mr. Forshner then stated that the revised language for section 2A:44A-11, regarding amendment to a lien claim, seemed to address the bulk of his concerns, but he would let Ms. Brown know. He also noted that the change he had requested for section 2A:44A-16 had already been made in the October draft.

Mr. Duggan raised a concern regarding section 2A:44A-21 pertaining to the residential construction contract arbitration requirements. He wanted the statute to include a mechanism to deal with inconsistencies that arise between the lien claim, the lien fund and the bonding of the claim/fund. He gave an example of a very large project in which lien claims totaled 4 to 5 million dollars when the lien fund was only 1 million dollars. In that situation, the bonding requirement was for an amount far more than the total amount actually due. He is concerned about avoiding inconsistent results, as well as the problem of excessive liens and bonding requirements resulting from duplicative claims. Mr. Duggan explained that, in his experience, if one party on a large sophisticated job files a lien claim, all other parties will also file. All parties want to be sure that they are at the table and don’t lose an opportunity to be paid and if all parties are not at the same table, at the same time, it is possible to end up with multiple arbitration proceedings and diverging awards.

Ms. Brown said that she was waiting to hear further from the American Arbitration Association on this very issue. Mr. Cannel suggested that the issue of excess bonding could be minimized by clarifying in the statute that the maximum amount of the bond necessary is the amount of the lien fund required. Mr. Cannel also suggested that it might help if the statute provided that the same arbitrator should decide all claims related to the same job.

Mr. Duggan acknowledged that his proposed changes to sections 2A:44A-30 and 33 had been addressed in the October revision. Ms. Brown advised the Commission that it had been

suggested to Staff that section 30 should contain a 13-month time period instead of a 12-month time period since section 2A:44A-15 affords the claimant one year from the time of the last work provided to bring an enforcement action. The Commission agreed that the 13-month time frame made sense. Staff also acknowledged Commissioner Burstein's concern that references to calendar days should be consistent throughout the statute.

Mr. Fineberg noted the need to clarify an unintentional ambiguity in section 2A:44A-22 b.2 pertaining to the mortgage recorded after the filing of a lien having priority. He also noted that section 2A:44A-16 appeared redundant in light of the changes to section 2A:44A-24. Ms. Brown explained that Staff was not yet ready to eliminate section 16 entirely. She asked the meeting attendees to comment on that issue. Commissioner Bunn said that it may be difficult to eliminate the section because of case law references.

Mr. Perry, who had provided comments on Staff's proposed definition of security services prior to the meeting, thanked the Commission for its consideration. No decision was made on this issue at this time. Ms. Brown did note that the inclusion of the word "actual" in the proposed definition was necessary because the current definition of "improvement" included "actual or proposed changes to real property."

Finally, Mr. Gordon, representing the interests of the NJ Chapter of the NAIOP, introduced himself as a participant in the drafting of the original statute. He had four issues of concern that he wished to present to the Commission, although other issues had been presented in writing to Staff. First, with respect to the proposed new definition of "filing" which requires the county clerks to index a document no later than 7 days after it is lodged for record, Mr. Gordon expressed concern that the failure to index on time might be construed as constructive filing of the document. Mr. Gordon also questioned the insertion of the last sentence of section 2A:44A-6(b). After discussion in which the Commission determined that the concept reflected in that sentence was adequately addressed elsewhere, the Commission decided to eliminate the sentence. With regard to section 2A:44A-7b., Mr. Gordon argued that the language in each part of this subsection should mirror the other. Commissioner Bunn noted that the language said "improperly served" in one subsection and "unserved" in the other. As this could be confusing, it was suggested that "improperly served" should be used in both places.

Finally, Mr. Gordon questioned why sections 2A:44A-9.1(b)(1) and (b)(2) refer to "good-faith" payments, while section 2A:44A-9.1 (c), which lists certain types of payments not made in good faith, makes no mention of that fact. Ms. Brown remarked it is irrelevant whether subsection c. payments were made in good faith because the noted items cannot reduce the lien fund. The Commission determined that any reference in (b) to "good faith" should be eliminated.

### **Miscellaneous**

The next meeting of the Commission is scheduled for November 20, 2008.