

## **MINUTES OF COMMISSION MEETING**

**October 18, 2018**

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 Louis N. Rainone; Professor Bernard W. Bell, of Rutgers Law School, attended on behalf of Commissioner David Lopez; Professor John K. Cornwell, of Seton Hall University School of Law, attending on behalf of Commissioner Kathleen M. Boozang; and Grace C. Bertone, Esq., of Bertone Piccini LLP, attending on behalf of Commissioner Michael T. Cahill.

### **Minutes**

Chairman Gagliardi asked that “of” be inserted before Commissioner Cornwell’s name as it appears in the fourth paragraph of page three. Commissioner Cornwell noted that his surname name was inadvertently spelled with an “a” in one instance and requested that the correct spelling be reflected in the Minutes. Finally, Chairman Gagliardi asked that the “New Business” portion of the Minutes be changed to reflect that Professor Hartnett is no longer serving as the designee of the Dean, and that Professor Cornwell is now serving on the Commission as a representative of Commissioner Boozang. With these amendments, the Minutes of the September 20, 2018 Commission meeting were unanimously approved on the motion of Commissioner Bertone, which was seconded by Commissioner Cornwell.

### **Definition of Material**

On September 20, 2018, the Commission unanimously voted to release a Final Report regarding the Definition of Material in the Insurance Fraud Statue. The Final Report reflected the request of a stakeholder to remove language from the definition that they believe suggested that an insurance company was required to rely upon the representations made by a defendant in order for that person to be convicted of insurance fraud. Commissioner Bell noticed an inconsistency in the proposed language.

Samuel Silver stated that during the prior meeting, he had been focused on removing “inaccurate facts clause” and did not recall the breadth of stakeholder’s request. On September 26, 2018, while preparing the Final Report, he realized his error. On September 27, 2018, he contacted Commissioner Bell and apologized for error. In addition, Mr. Silver sent language that reflected the corrective language suggested by Commissioner Bell during the September 20, 2018 meeting. Commissioner Bell was kind enough to review the language and advise Mr. Silver that he did not have an objection to the *new* language.

Mr. Silver apologized to the Commission for having to take the time to revisit this issue, and requested that the Commission consider the revisions and release this Report.

On the motion of Commissioner Cornwell, which was seconded by Commissioner Bell the Commission unanimously voted to release the project as a Revised Final Report.

### **Definition of Aggravated Recklessness**

John Cannel presented a Tentative Report proposing that a definition of aggravated recklessness be added to the New Jersey Code of Criminal Justice. He began by noting that there are four classes of culpability in the New Jersey's Criminal Code - purposely, knowingly, recklessly, and negligently. The mental state for "aggravated recklessness," in which the actor demonstrates recklessness under circumstances manifesting an extreme indifference to the value of human life is not defined in N.J.S. 2C:2-2b.

Mr. Cannel briefly discussed the instances in which the modifier "aggravated" has appeared in the New Jersey Criminal Code. He observed that the leading cases on this subject, in New Jersey, distinguish aggravated recklessness in terms of the likelihood of the result. The crime of aggravated manslaughter, therefore, requires a higher degree of recklessness than that required for ordinary manslaughter because there is a probability of death rather than a possibility of death. He advised the Commission that some of the case law focuses specifically on whether the defendant behavior manifested itself as an extreme indifference to human life. Mr. Cannel then discussed the interplay between the modifiers of "aggravated" and "reckless."

The case law, according to Mr. Cannel, is relatively coherent on this topic, but he noted that case law was not a substitute for a clear, legislative standard. The absence of a standard for the fifth culpability state, aggravated recklessness, has the capacity to cause confusion. Mr. Cannel suggested that the Commission consider a standard by which a defendant consciously disregards the probability that the material element exists or will result from his conduct. He continued that the risk must be of such a nature and degree that its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the defendant's situation.

Commissioner Bell observed that the term aggravated recklessness had been omitted from the first paragraph of the draft language and asked that this be corrected before the release of the Draft Tentative Report. Commissioner Cornwell stated that a parallel term to aggravated recklessness may be "grossly reckless" or "gross recklessness." Mr. Cannel noted that the common parlance in New Jersey included the use of the term "aggravated."

With the correction requested by Commissioner Bell and on his motion, seconded by Commissioner Cornwell, the Commission unanimously voted to release the report as a Tentative Report.

### **Autonomous Vehicles**

On August 20, 2017, Staff received a request from a Commissioner to review the status of New Jersey's autonomous motor vehicle legislation to determine whether the State is employing the "best practices" in this area of law.

Mr. Silver said that Staff reviewed: the position of the federal government; each state's statutes; legislation pending in the State of New Jersey; and the work of the Uniform Law Commission in this area.

Pending federal legislation, referred to as "AV START" (S1885) would permit 100,000 autonomous vehicles to occupy the roadways throughout the United States. If enacted, S1885 would override any state laws pertaining to autonomous vehicles. Due to a series of accidents involving autonomous vehicles and pedestrians in early 2018, however, this bill was the subject of a "Senatorial hold." The result was the proliferation of state law in this area to fill the void left in the absence of meaningful federal regulation in this area.

The states' statutes now constitute what Mr. Silver described as "a patchwork of regional rules that vary widely." On March 05, 2018, the New Jersey Senate introduced S2149 – a bill to address the testing and use of autonomous vehicles. This bill covered four specific topics: licensure; human involvement; insurance, and safety. The approach taken by the Uniform Law Commission on this topic, though, relates specifically to states that are ready to deploy this technology.

Mr. Silver explained to the Commission that this area of law implicated several other areas of law. He continued that automated vehicle technology may have an impact on: interstate commerce, full faith and credit, roads and infrastructure, traffic safety laws, post-production technological modifications, licensing, and commercial use.

Given the constant evolution of this area of law, Mr. Silver requested authorization to speak with the sponsors of New Jersey's automated vehicle legislation and to continue to monitor this issue. Commissioner Rainone recommended that Staff contact Senator Declan O'Scanlon and inquire whether he would like the Commission to share its findings on this subject as he sponsored a bill authorizing testing and use of autonomous vehicles. Chairman Gagliardi, with the approval of the Commissioners, encouraged Staff to engage in legislative outreach and continue to monitor this issue.

## **Special Improvement Districts**

Rachael Segal, a Legislative Law Clerk, discussed with the Commission her Memorandum concerning Special Improvement Districts. A Special Improvement District (SID) is defined as an area within a municipality, designated by an ordinance, as an area where a special assessment is to be imposed for the purposes of promoting the economic and general welfare of that district and the municipality. For a SID to be adopted, the municipality must find that the area would benefit from being a SID, that a district management corporation would provide administrative and other services to benefit those businesses, employees, residents and consumers, and that it is in the best interests of the municipality and the public.

*Friends of Rahway Business, LLC v. Rahway Municipal Council* arose when, in 2014, Rahway enacted an ordinance to expand its existing SID to include all nonresidential and non-public properties in the city, as well as residential properties with more than four units. In response, the affected property owners created Friends of Rahway Business, LLC, to challenge the ordinance.

The Trial Court found that the Legislature did not intend for a SID to encompass an entire city. The Court determined that the legislative intent was for SIDs to cover specific regions within a larger municipality. The City appealed the trial court's ruling and argued that the size of a SID was not relevant. In response, the Plaintiff's cross-appeal was joined by and 4 *amici*.

The Appellate Division concluded that the SID statute did not prohibit a citywide SID; rather, that it suggested that the SID be a small, designated area within a municipality. In addition, the Appellate Division found that the City of Rahway had not presented evidence to satisfy the SID requirements.

Commissioner Rainone advised that he has been the City Attorney for Rahway for 35 years and provided some background information about SIDs based on his experience.

The Commission briefly discussed the inclusion of multi-family residential buildings in SIDs in response to a question on the topic from Commissioner Bertone. Commissioner Bell then observed that this was an area of law in which sophisticated individuals are operating. After reading the statute, Commissioner Bell concluded that it was clear and that the case law in this area is reasonably accessible to those who are looking for it. Chairman Gagliardi concurred with Commissioner Bell's analysis, noting that this was not an area of law that could benefit from Commission work at this time.

The Commission advised Staff to take no further action with respect to this project.

### **Meaning of "Widow"**

Rachael Segal next discussed with the definition of "widow" in the context of N.J.S. 4:4-3.30. Ms. Segal informed the Commission that this statute, commonly referred to as the

Exemption Statute, provides for a total property tax exemption for permanently disabled veterans. This exemption was eventually extended to the veteran's widow provided she resided in the home and did not remarry. Notably absent from the statute, however, is the definition of "widow" or "widowhood" nor is there any mention of remarriage.

The absence of these statutory definitions was at issue in *Prudent-Stevens v. Twp. of Tom's River*. In *Pruent-Stevens*, a military widow who later remarried was denied a property tax exemption. The basis for this denial, as argued by the municipality, was that the Plaintiff lost her status as a widow when she remarried. After examining common law definitions, brochures issued by the State, and previous definitions of "widow" promulgated by the New Jersey Legislature, the Appellate Division held that that an individual remains a widow of her husband even after she remarries.

Ms. Segal advised the Commission that there are currently fourteen bills relating to N.J.S. 54:4-3.30 pending in the Legislature. A review of each bill confirmed that none of them define the term widow, widower, widowhood, or widowerhood. Ms. Seagal also pointed out that none of these pending bills appear to have been introduced based on the Tax Court's decision in the Pruent-Stevens case. Given the lack of a statutory definition, Ms. Segal sought Commission authorization to conduct additional research and outreach to determine if defining "widow" or "widower" in N.J.S. 54:4-3.30 would aid in the statute's interpretation.

Commissioner Rainone suggested that the Commission explore making the statute gender-neutral given how both men and women could lose a veteran spouse.

Commissioner Cornwell stated that this is a good project for the Commission to undertake given the ambiguity in the statute. Commissioner Bell concurred with Commissioner Cornwell's assessment of this project. Chairman Gagliardi also concurred and Staff was authorized to proceed with further research and outreach in this area of law.

### **School Board Reclassification**

Mr. Silver explained that, in New Jersey, the Members of a Board of Education may either be appointed by the Mayor or elected by the citizenry. The method of selection the members of the board may be changed by way of a referendum.

In *City of Orange Twp. v. City of Orange*, the municipality held a referendum to change the manner in which its school board members were selected. The Plaintiff filed a complaint and order to show cause to enjoin the city from altering the selection method from appointment to election. The trial court agreed with the Plaintiff that the public question was deficient and that the interpretive statement was dubious, and voided the results of the election.

One year later, the City again placed the school board selection process on the ballot. The same Plaintiff challenged the appearance of this referendum on the ballot under N.J.S. 18A:9-4,

which provides that the issue of reclassification is prohibited from appearing on a ballot within four years after an election has been held and during which this issue was passed on by the voters.

The Trial Court noted that the statute does not specifically contemplate the ramifications of an effectively vacated election, and focused on whether an election shall have been held. The Court considered the voided election results to be meaningless and therefore that the election was not held.

Commissioner Bell stated this issue made sense for a project. Although Chairman Gagliardi concurred with Commissioner Bell's assessment of the project he noted that this issue may not arise very frequently because there are only eighteen school districts in New Jersey whose Boards of Education are appointed by the mayor. Nevertheless, he concluded, that the law in this area could still benefit from further clarification.

The Commission authorized Staff to engage in additional research and outreach in this area.

### **Mandatory Refund of Taxes Mistakenly Paid to a Municipality**

Jennifer Weitz presented a Memorandum, prepared by former Legislative Law Clerk Wendy Llewellyn, discussing whether a municipality has discretion regarding whether or not to refund property taxes paid by mistake.

During the conveyance of Lot 100 from a developer to Hanover Township, the owner of neighboring Lot 98, Hanover Floral, acquired a portion of Lot 100 through adverse possession. Lot 100 was then split, and the adversely-possessioned portion was incorporated into Hanover Floral's Lot 98, while the rest of Lot 100 remained under the ownership of the developer and was dedicated to the Township. In 2001, the Tax Assessor mistakenly listed Hanover Floral as the owner of the reconfigured Lot 100 and began sending tax bills for Lot 100 to Hanover Floral. Hanover Floral paid those bills, believing them to be for that portion of Lot 100 they had acquired through adverse possession. After realizing the mistake during a subsequent title search in 2011, Hanover Floral brought the mistakenly-paid taxes to the attention of the Township's Tax Assessor, who admitted that Hanover Floral had been mistakenly assessed for all of Lot 100. The Tax Assessor informed Hanover Floral that they would need to file a tax appeal, and the Township continued to bill Hanover Floral for taxes on Lot 100.

Hanover Floral filed a complaint for a refund of those taxes they had mistakenly paid and the Tax Court determined that the Township was required under N.J.S. 54:4-54 to refund all of Hanover Floral's mistakenly-paid taxes from 2009 onward, which encompassed those taxes that were mistakenly paid within the three-year statute of limitations. The relevant portion of N.J.S.

54:4-54 states that “[w]here one person has by mistake paid the tax on the property of another supposing it to be his own, the governing body after a hearing, on five days’ notice to the owner, *may* return the money paid in error...[emphasis added].”

The Township argued that the use of the permissive “may” indicates that it had discretion as to whether or not to refund Hanover Floral for mistakenly-paid taxes, but the Tax Court rejected that argument. Although the overpayment spanned a number of years, however, the Tax Court determined that it was bound by the three-year-limitation on the refund of mistakenly-paid taxes identified by the Appellate Division in *Cerame v. Township Committee of Middletown*.

Commissioner Cornwell supported a project in this area, suggesting that the fact that the Township declined to address its own error was problematic, and Commissioner Bertone agreed that a result other than the one reached by the Court in this case was unfair to an innocent taxpayer.

Commissioner Rainone suggested that an important question was “who made the mistake?” and asked about the impact on the sale of tax sale certificates. After a discussion about the manner in which the problem could have arisen, Chairman Gagliardi said that, given the obvious interest in the project, Staff should engage in preliminary research and outreach and then report back to the Commission.

### **Definition of “Under the Influence”**

Joseph Pistrutto presented a Memorandum addressing the definition of “under the influence,” a term that has been defined through case law but is not explicitly defined in New Jersey’s DWI statute (N.J.S. 39:4-50). He explained that in *State v. Siervo*, the Defendant pled guilty to a DWI and refusal to take a breathalyzer test (“Refusal”). Seven years later, Defendant applied to the municipal court to vacate his guilty pleas. The municipal court denied his petition and on appeal to the Law Division, his request for post-conviction relief was again denied as time-barred.

Although Defendant’s motion for post-conviction relief was denied by the Court as untimely, the Court also noted the lack of a definition for “under the influence” in the DWI statute. The Court pointed out that the New Jersey Supreme Court has generally understood this phrase to refer to a deterioration of a person’s physical or mental condition. In *Siervo*, the Appellate Division stated that although the case was properly disposed of by applying the procedural rules for vacating previous convictions, the municipal court judge did not ask the defendant about what kind of physical or mental condition he was under while operating his vehicle. The Court appeared to believe that additional specificity regarding what constitutes “under the influence” might have led the municipal court to inquire further of the Defendant at the time of his plea and obviated the need for extended litigation.

Commissioner Cornwell noted that in view of potential changes to the law permitting the use of recreational marijuana, there may very well be an increase in the number of people driving under the influence of that substance, which will have to be addressed in New Jersey – suggesting that the problem is likely to emerge before the technology is available to address it.

Commissioner Rainone noted the absence of anything like a Breathalyzer for other substances that an individual can be under the influence of. He also pointed out the complication of the interplay between federal and state law in this area – the federal law applying to CDL drivers, for example.

The Commission generally expressed concern about the impact of medical marijuana, and various other aspects of the issue, and authorized Staff to engage in research and outreach in this area - expanded to address issues relating to cannabis.

### **Adjournment**

The meeting was adjourned on the motion of Commissioner Cornwell, seconded by Commissioner Bell.

The next Commission meeting is scheduled to be held on November 15, 2018 at 10:00 A.M.