

MINUTES OF COMMISSION MEETING

December 19, 2019

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 O. Bunn; Commissioner Virginia Long (via telephone); Commissioner Louis N. Rainone (via telephone); Professor Bernard W. Bell, of Rutgers Law School, attending 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 Bertone, Bertone Piccini, LLP, attending on behalf of Commissioner Kimberly Mutcherson.

Minutes

With the modifications recommended by Commissioner Bell, and on the motion of Commissioner Bell, which was seconded by Commissioner Long, the Minutes from the November 19, 2019, meeting were unanimously approved by the Commission.

Definition of “Tumultuous”

Samuel Silver discussed with the Commission a Draft Final Report regarding the terms “public” and “tumultuous” as used in the New Jersey Code of Criminal Justice and discussed in *State v. Finneman*, 2017 WL 4448541 (App. Div. 2017). In *Finneman*, the defendant created a disturbance at a local pharmacy. When asked to move along by the local police, he became irate and continued to shout obscenities.

Mr. Silver explained that section a. of the disorderly conduct statute does not define the word “public.” Similarly, section a.(1) does not define the term “tumultuous.” The language set forth in the Appendix reflects the language approved by the Commission during the May 16, 2019, meeting.

In response to outreach by Staff, the Commission received comments from both the Mercer and Monmouth County Prosecutors. The Mercer County Prosecutor confirmed that in 2016 there were 13,021 arrests made in New Jersey for disorderly conduct, making this the most frequently investigated and charged crime in the State. To deter unlawful behavior and ensure that law enforcement is acting lawfully, the Mercer County Prosecutor expressed an interest in clearly defining the terms in the statute. The Monmouth County Prosecutor observed that the proposed modifications describe the same conduct using more understandable language and they eliminate the unconstitutional “offensive language” provision. He did, however, suggest that the word “annoyance” not be removed from the statute.

Commissioner Cornwell asked that the Commission consider the use of the phrase "...or recklessly creating a risk thereof..." as it appears in section a. of the Appendix. He explained that a person acts recklessly, as defined by the Model Penal Code, "if he is aware of a substantial risk that a certain result will occur as a result of his actions." As a result, the use of the phrase, "...creating a risk..." is duplicative. Commissioner Cornwell suggested that the sentence be revised to reflect that "[a] person is guilty of a petty disorderly persons offense, if with purpose to cause public inconvenience or alarm, or with purpose to cause a risk thereof, he or she..." engages in the behaviors enumerated in subsections a.(1) – (3).

After a brief discussion, the Commission agreed that section a, subsection (1), should read that a person who "[t]hreatens violence or engages in fighting or other violent behavior..." is guilty of a petty disorderly persons offense.

Considering the modifications made to the proposed language, Chairman Gagliardi inquired whether additional outreach was necessary. Mr. Silver observed that the proposed changes were grammatical and did not alter the nature of the project. Laura Tharney suggested that after amending the Appendix to reflect the changes requested by the Commission, Mr. Silver could recirculate the report to the stakeholders. Commissioner Long commented that this was a difficult project that was well thought through.

With the modifications proposed by the Commission, and on the motion of Commissioner Bunn, which was seconded by Commissioner Long, the Commission unanimously voted to release the Report as a Final Report.

De Minimis Quantity Exemption

Samuel Silver discussed with the Commission a Draft Final Report recommending modifications to N.J.S. 13:1K-9.7 to permit a qualified former owner or operator of an industrial establishment to apply for a De Minimis Quantity Exemption (DQE) after the revocation of a "no further action" letter, as discussed in *R&K Associates v. N.J. Dep't of Env'tl. Prot.*, A-41771-T1, 2017 WL 1316169 (App. Div. 2017).

After briefly discussing the facts of *R&K Associates v. N.J. Dep't of Env'tl. Prot.*, Mr. Silver noted that the issue before the Court was whether former owners of industrial sites have standing to claim a DQE under the Industrial Site Recovery Act (ISRA). The Appellate Division acknowledged that the Legislature wanted to streamline the regulatory process and promote certainty in the sales of industrial sites. In addition, the Court noted that the Department of Environmental Protection (DEP) could rescind a "no further action" (NFA) letter whenever the applicant was no longer in compliance with ISRA. The Court therefore found that the term owner as set forth in the statute included both current and former owners.

Mr. Silver explained to the Commission that outreach for this project included stakeholders who were knowledgeable and interested in this subject matter, including: the New Jersey

Department of Environmental Protection; the Office of the Attorney General; the leadership of the Environmental Law section of the New Jersey State Bar Association; environmental remediation professionals; and private practitioners. Staff received no objection to the proposed modifications set forth in the Appendix to this Report.

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

Definition of “Widow”

John Cannel presented a Draft Final Report proposing no further action regarding the definition of “widow” as used in N.J.S. 54:4-3.30, which provides a property tax exemption to certain widows of deceased veterans. In July of 2019, the Appellate Division of the Superior Court of New Jersey heard the appeal in the matter of *Pruent-Stevens v. Township of Toms River*, 458 N.J. Super. 501 (App. Div. 2019). The Appellate Division addressed a widow’s eligibility for the veteran’s property tax exemption under N.J.S.A. 54:4-3.30. In reversing the decision of the Tax Court, the Appellate Division held that once a widow, or widower, remarries, that individual permanently loses his or her eligibility for the disabled veteran’s property tax exemption.

Mr. Cannel recalled that during the July 18, 2019, Commission meeting, the Commissioners unanimously agreed to conclude this project without a recommendation. Commissioner Long questioned why the Commission was not seeking to amend the statute to reflect the decision of the Appellate Division in *Pruent-Stevens*. Laura Tharney advised the Commission that there were numerous bills in the Legislature regarding property tax exemptions, and that although Staff has not been in contact with the Legislature on this issue, it was her recollection that a bill may have been enacted in this area and she will check on its status. Chairman Gagliardi noted that Staff will have a clearer understanding of the status of the legislation on this subject after the session ends.

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

Bail Jumping

Samuel Silver discussed with the Commission a Draft Final Report proposing modifications to New Jersey’s bail jumping statute, N.J.S. 2C:29-7, as discussed in *State v. Emmons*, 397 N.J. Super. 112 (App. Div. 2007) and *State v. Morris*, 2018 WL 4701675 (App. Div. 2018).

In *State v. Emmons*, the defendant failed to appear in court and remained a fugitive for approximately one year. Upon his arrest he was charged with bail jumping and subsequently indicted. The defendant ultimately pled to both offenses, reserving his right to appeal the constitutionality of the bail jumping statute. The Appellate Division determined that the

affirmative defense in the bail jumping statute is unconstitutional. As written, the statute creates an inference that a defendant must proffer a lawful excuse for his non-appearance, thereby violating the Fifth Amendment. Furthermore, the affirmative defense requires the State to prove that the defendant “knowingly” failed to appear in court. The same statute requires the defendant to prove by a preponderance of the evidence that he did not “knowingly” fail to appear in court. This requirement, the Court determined, has the potential to confuse jurors.

In *State v. Morris*, the defendant is alleged to have violated his probation. After appearing in Court, the defendant was ordered to undergo a drug test and then return to the courtroom – he did not. After being charged with bail jumping for his failure to return to court, the trial court judge dismissed that indictment. The Appellate Division reversed the order of the trial court and determined that the defendant’s failure to appear constituted bail jumping.

Mr. Silver advised the Commission that Staff distributed this Report to interested and knowledgeable commenters, including: the Office of the Attorney General; the New Jersey Municipal Prosecutor’s Association; each County Prosecutor; the New Jersey County Prosecutor’s Association; the Office of the Public Defender; the New Jersey Association of Criminal Defense Attorneys; the Criminal Practice Section of the New Jersey State Bar Association; private practitioners in the field of criminal law; the New Jersey League of Municipalities; The New Jersey State Association of Chiefs of Police; and, the New Jersey Police Traffic Officers Association.

The County Prosecutor’s Association of New Jersey (CPANJ) provided the Commission with thoughtful comments regarding the proposed modifications to the statute. The CPANJ did not object to the replacement of the term “person” with the word “individual.” In addition, no objection was interposed to the replacement of the phrase “any offense” with the expression “underlying offense.” Furthermore, the CPANJ did not oppose the removal of language regarding the affirmative defense. These modifications, along with the structural modifications, were approved of by the CPANJ. The Prosecutor’s Association, however, asked the Commission to consider the removal of the affirmative defense completely in order to avoid the reoccurrence of the issue raised in *Emmons*. Finally, they asked that the language in subsections a.(2) and a.(3) be removed because the “failure to appear at a specified time and place” adequately conveys these requirements.

The Commission engaged in a discussion regarding the proposed modification of the statute. Commissioner Cornwell commented that the language of subsection a. makes sense. Commissioner Bunn opined that the language regarding the affirmative defense, set forth in subsection b., should reference the requirements of subsection a.

Subject to the modifications requested by Commissioner Bunn and on the motion of Commissioner Bell, which was seconded by Commissioner Bunn, the Commission unanimously voted to release the project as a Final Report.

Charitable Registration and Investigation Act

Samuel Silver discussed with the Commission a Draft Final Report proposing modifications to selected statutes within the Charitable Registration and Investigation Act (CRI) (N.J.S. 45:17A-18 *et seq.*) after a review of the Model Protection of Charitable Assets Act.

New Jersey has a long history of protecting the public from fraud and deception. In 1971, the Legislature enacted the Charitable Fundraising Act. This Act was subsequently repealed in 1994 and replaced with the Charitable Fundraising Act. Subsequently, New Jersey enacted the Charitable Registration and Investigation Act. New Jersey's most recent statutes on this subject matter were enacted to increase the Attorney General's ability to collect and disseminate information regarding a New Jersey Charity. In addition, the CRI authorizes the Attorney General to act against those who defraud or abuse the public's generosity.

Mr. Silver said that the modifications to the current New Jersey Statutes involve reportable events; actions or proceedings; and, exemptions from registration. In connection with the proposed changes, Staff sought comments from the following stakeholders: the Department of Community Affairs; the Business Law Section of the New Jersey State Bar Association; the New Jersey Center for Non-Profits; and, private practitioners. Staff received no objection to the proposed modifications.

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

Property Tax Refund

Jennifer Weitz discussed a Draft Tentative Report proposing modifications to N.J.S. 54:4-54, to clarify that a municipality must refund property taxes mistakenly paid, as discussed in *Hanover Floral Co. v. East Hanover Township*, 30 N.J. Tax 181 (2017).

In *Hanover Floral*, the Tax Assessor mistakenly listed the Plaintiff as the owner of the adjacent lot and thereafter sent tax bills to the Plaintiff. The Plaintiff mistakenly overlooked the error on the tax bill and continued to pay the incorrect assessment from 2001 to 2011. In December of 2012, upon realizing the error, the Plaintiff filed suit against the Township to obtain a refund from the Township of East Hanover. The Tax Court ruled that the refund of overpayment of taxes is mandatory, despite the use of the word "may" in the statute. The refund, however, was subject to a three-year statute of limitation.

Ms. Weitz advised that she conducted an initial outreach with the Tax Assessors in both Somerset and Monmouth Counties. In addition, she had the opportunity to speak with attorneys in private practice who specialize in this field. Ms. Weitz noted that all commenters indicated their support for this project, which would replace the permissive language that appears in the statute with mandatory language. This modification, she stated, would be consistent with the Tax Court's

decision in *Hanover Floral*. In addition, the commenters agreed that a three-year statute of limitations applies to all such refunds. The statute of limitations ensures that municipalities are not inundated with refund requests dating back years. In addition, this limitation recognizes that taxpayers have a responsibility to check their tax bills, to ensure accuracy.

Commissioner Cornwell inquired whether the proposed “refund” provision set forth in subsection e. of the Appendix begins to run when the property owner has constructive knowledge of the error in the tax documents. Ms. Weitz replied that the time period set forth in this section commences when the taxpayer notifies the municipality of the overpayment. Commissioner Rainone opined that the language relating to the statute of limitations should be consistent with the property tax statute concerning tax appeals. Chairman Gagliardi inquired whether the language should reflect three years prior, or the tax year in which the governing body has been notified by the taxpayer of the error and two years prior, for a total of three years. Commissioner Bunn concurred with Commissioner Rainone that the language of the property tax statute should be utilized in this instance.

Subject to the modifications requested by Commissioner Rainone and on the motion of Commissioner Bell, which was seconded by Commissioner Cornwell, the Commission unanimously voted to release the project as a Final Report.

Local Land and Building Law - Lease

Samuel Silver discussed with the Commission a Draft Final Report to repeal N.J.S. 40A:12-24, which does not require a governmental unit to seek public bids before leasing public property not needed for public use to a private person.

The issue, which was brought to the attention of the Commission by a practitioner in this area of the law, is that the Local Land and Building Law (LLBL) contains two separate statutes that permit a governmental entity to lease public property to a private person if it is not needed for public use. In *Sellitto v. Boro. of Spring Lake Heights*, 284 N.J. Super. 277 (App. Div. 1995), the Court noted that N.J.S. 40:12-14 and N.J.S. 40:12-24 were enacted on the same day. In the absence of any legislative history for either of these two statutes, the Court decided to read the statutes in line with the Local Public Contracts Laws which were also enacted on the same date. Ultimately, the Court indicated that section 24 of the LLBL serves no practical purpose.

In connection with this Report, Staff sought input from knowledgeable and interested stakeholders, including: the League of Municipalities; the New Jersey Association of Counties; the Local Government Section of the New Jersey State Bar Association; the New Jersey Institute of Local Government Attorneys; Municipal Counsel; and, all 21 County Counsel. No objections to the proposed modifications were received by the Commission Staff. Rather, Staff received support for modifications proposed to the LLBL from those who did respond.

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

Miscellaneous

Laura Tharney advised the Commission that the tentative 2020 meeting dates have been circulated among the Commissioners. After a brief discussion, to accommodate the schedule of the Commissioners and the Staff, the tentative meeting date of January 16 was moved to January 23, 2020, at 10:00 a.m.

Ms. Tharney was pleased to report that two bills, based on the work of the Commission, had moved through both houses of the Legislature. One of those bills, involving the Common Interest Ownership Act, seemed to be on the Governor's desk.

Ms. Tharney also informed the Commission that Staff had recently completed an article regarding the canons of statutory interpretation for publication in the Seton Hall Legislative Law Journal.

Adjournment

The meeting was adjourned on the motion of Commissioner Bell, which was seconded by Commissioner Long. The next Commission meeting is scheduled to be held on January 23, 2019, at 10:00 a.m.