

MINUTES OF COMMISSION MEETING

November 17, 2016

Present at the New Jersey Law Revision Commission meeting held at 153 Halsey Street, 7th Floor, Newark, New Jersey, were Commissioner Virginia Long (via telephone). Professor Bernard W. Bell, of Rutgers Law School, attended on behalf of Commissioner Ronald K. Chen; Professor Edward A. Hartnett, of Seton Hall University School of Law, attended on behalf of Commissioner Kathleen M. Boozang; and Grace C. Bertone, Esq., of Bertone Piccini LLP, attended on behalf of Commissioner Michael T. Cahill.

Minutes

The Minutes of the October 2016 Commission meeting, with a corrected error on page 5, were approved on motion of Commissioner Bunn, seconded by Commissioner Hartnett.

Uniform Electronic Legal Material Act

Susan Thatch presented the Draft Final Report relating to the Uniform Electronic Legal Material Act. The Report proposes enacting UELMA, which provides a useful framework to ensure the accessibility, reliability, and security of New Jersey's varied legal material. To date, UELMA was enacted in 12 jurisdictions and introduced in 7 states.

The statutory draft contained in this Draft Final Report incorporates New Jersey's existing statutory mandates into the definition of legal materials. The Draft Final Report proposes draft language that largely reflects UELMA, but also incorporates modifications addressing the concerns raised by the Commission and commenters. For example, Ms. Thatch noted that to avoid *Winberry v. Salisbury* concerns, the Draft Final Report does not include judicial materials in the definition of legal materials, but instead recommends that the New Jersey Supreme Court adopt rules to effectuate the purposes of this act as it relates to judicial legal material.

Ms. Thatch noted that the Draft Final Report also differs from the uniform act by proposing an enforcement mechanism in section 9, an action in lieu of prerogative writs. The Commission sought to find an appropriate balance between the use of government funds and the reluctance of courts to compel state agencies to produce information required by statute in the required timeframe. An action in lieu of prerogative writs is a long-standing remedy that allows citizens "to correct public misdoing and compel performance of public duty." *Garrou v. Teaneck Tryon Co.*, 11 N.J. 294, 302 (1953). With regard to state agencies, the Appellate Division's jurisdiction applies to both state action and inaction.

Commissioner Long suggested adding the following phrase in section 9 to ensure that the proposed action does not preclude existing remedies, “[i]n addition to any other statutory remedies available,” [a]ny party, including a member of the public, may institute a proceeding in lieu of prerogative writ in the Superior Court to enforce the provisions of this act. Commissioner Long observed that this language is consistent with the goals of the enforcement mechanism to provide an additional method to compel performance.

Commissioner Hartnett suggested rephrasing Section 10 to indicate that the judiciary is encouraged to adopt rules to effectuate the purposes of the act. Ms. Thatch stated that the proposed language is based on the language found in the Open Public Records Act. Commissioner Long suggested keeping the language proposed in the Draft Final Report. Ms. Tharney proposed revising the section 10 comment to read as follows, “[t]his Section is designed to encourage the Supreme Court to adopt rules consistent with the purposes of this act.”

Commissioner Hartnett also discussed the accessibility of private sector standards incorporated by reference in government statutes, codes, and regulations. It was noted that a great deal of work on the subject has been done by the ABA Section on Administrative and Regulatory Law; the ABA recently passed Resolution 112 on the subject (accessible at https://www.americanbar.org/news/reporter_resources/annual-meeting-2016/house-of-delegates-resolutions/112.html).

The Commission voted to release the Draft Final Report with the discussed changes, upon motion of Commissioner Hartnett, seconded by Commissioner Long.

Motorcycle License Plate Display

Vito Petitti discussed a Memorandum regarding the display of license plates under N.J.S. 39:3-3, reminding the Commission that a Tentative Report, released in July 2016, proposed new language offering the option of displaying motorcycle license plates horizontally or vertically, but visibly from the rear. At that meeting, the Commission had advised Staff to conduct outreach to the Division of Motor Vehicles, municipal prosecutors, and motorcycle owners’ organizations or associations. Mr. Petitti informed the Commission that, although some commenters had expressed support for the proposed language, others offered strong objections backed by substantive arguments. He asked the Commission for its guidance going forward.

Following a brief discussion regarding the appropriate language for the a proposed revision, Commissioner Bell suggested that the motorcycle license plates be “displayed along same axis as printed by the Motor Vehicle Commission.” Mr. Petitti agreed to make the requested update to the proposed statutory language and to present a Draft Final Report for the December meeting.

Uniform Common Interest Ownership Act

John Cannel informed the Commission that his Memorandum concerned the subject of community board elections. He described Senate Bill No. 2492, which had recently passed in the Senate and which he described as having the effect of bringing democracy to owners of certain units. Mr. Cannel explained that there is more consensus on the subject of elections than in other areas, and the substance of the bill is being carefully considered. He requested the Commission's guidance regarding whether to take up this part of the project.

Commissioner Long inquired as to whether Staff had spoken with the bill's sponsor, to which Mr. Cannel responded in the affirmative. Commissioner Hartnett asked about the provisions in bylaws allowing a tenant to stand in the owner's shoes, to which Mr. Cannel replied that current law does not specify what happens when co-owners disagree, and that the substantive existing provisions do not address all situations.

Under the Definitions section, paragraph s., on page 12, Commissioner Hartnett pointed out the definition of "voting-eligible tenant," which would allow tenants to vote under certain circumstances. Mr. Cannel replied that the owner could give a proxy to a tenant under existing law. One way to deal with the issue would be to require that, in case of disagreement, bylaws provide a means of resolving problems. Commissioner Bell asked about situations leading to disagreements. Mr. Cannel stated that a provision allowing tenants to stand in an unresponsive owner's shoes could benefit the absentee owners. At this time, the parties' actions are limited by the provisions of the deed and bylaws. He assured the Commission that Staff would address the issue with greater specificity during the drafting process.

Under the Amendment of Bylaws section, paragraph a., on page 3, Commissioner Hartnett noted the provision that a requirement for a greater than 2/3 majority is invalid. Mr. Cannel agreed and explained that, to have democracy, owners must be given certain powers. The purpose of the legislation is to provide more democracy, but to provide unit owners control when certain requirements are met. He added that more research was warranted. Commissioner Hart pointed out his concern regarding possible takings and contract impairment issues raised by the legislation. Mr. Cannel informed the Commission that it makes a difference whether certain provisions are found in the master deed or bylaws. Commissioner Bell cited examples of bylaws provisions subject to change.

Commissioner Hart asked whether it was unusual to use procedure to obtain substantive results, to which Mr. Cannel replied that it would be possible for an owner of a large unit to make board appointments. Commissioner Bell said it would be problematic if specific unit

owners were given the power make appointments to a board that governs every aspect of condominium ownership as a means of protecting a specific, limited interest of that specific board member. Commissioner Hartnett asked what would happen if the project diverges from the Legislature's work, to which Mr. Cannel replied that, in case it does, the Commission could address it at that time.

Commissioner Hartnett moved to continue working on the project, to which Commissioner Long seconded; the motion carried unanimously.

New Jersey Franchises Practices Act

Jayne Johnson discussed a memorandum relating to the interpretation of franchise agreement forum selection clauses under federal law. She explained that the Supreme Court case *Atlantic Marine Construction Company, Inc. v. U.S. Dist. For the W. Dist. Texas* provided guidelines regarding federal forum selection provisions and established that a court must determine whether the statutory provision is valid under state law and whether a transfer pursuant to § 1404 is proper.

Commissioner Hartnett expressed uncertainty that a transfer under § 1404 would be governed by New Jersey's Franchise Practice Act. He further explained that while the New Jersey Supreme Court took this position in *Kubis v. Sun Microsystems*, the majority opinion in *The Bremen v. Zapata Off-Shore Co.* makes the forum selection decision under § 1404 without regard to state validity. He additionally maintained that federal courts consider public convenience in a § 1404 analysis, not the state's policy against enforcement.

Ms. Johnson replied that the court in *Ocean City Express Co v. Atlas Van Lines, Inc.* still looked to New Jersey's presumption of validity, and addressed the two different questions regarding the provision's validity and transfer. Commissioner Hartnett agreed that *Kubis* would govern New Jersey courts' analysis, but expressed reservations that it would guide federal court decisions.

Commissioner Bell noted that the question of whether New Jersey law applies in federal court seems to be determined by whether it is considered procedural or substantive. He inquired whether most federal courts tend to regard these provisions as procedural, and accordingly, apply federal law. Ms. Johnson responded that not all courts perceive this as a procedural issue and noted that the Supreme Court decision in *Atlantic Marine Construction Company, Inc. v. U.S. Dist. For the W. Dist. Texas* did not address this issue. Commissioner Bell stated that it could be an issue if a California company files suit in a California federal court and the California court

ignores New Jersey state law on the grounds that it is procedural. Ms. Johnson agreed that such a scenario could pose an issue.

Commissioner Harnett noted that such a scenario seems to have been settled by the Court in *Stewart v. Ricoh Corp.* Ms. Johnson explained that some courts have subsequently analyzed these forum selection clauses as contract provisions. She advised the Commission that she would continue to research applicable case law and will speak with New Jersey attorneys familiar with franchise practice act disputes to determine how they are typically resolved.

Commissioner Bell inquired as to how many franchise agreements still have a forum selection provision rather than a mandatory arbitration provision. Ms. Johnson replied that forum selection provisions still remain prevalent. Commissioner Bell noted that if litigants cannot have New Jersey law applied, it may encourage arbitration provisions. He further stated that while New Jersey's statute seems limited to motor vehicle franchises, the New Jersey Supreme Court has expanded this provision to all franchises, so that should be reflected in N.J.S. 56:10-7. Ms. Johnson replied that the goal is to clarify the statutory language, while keeping a level playing field between franchisors and franchisees, and stated that she would proceed with this project in accordance with the Commission's guidance.

Commissioner Bell expressed concern that if the statute makes it too difficult for a franchisor to specify a judicial forum it finds convenient, that might create a strong incentive for franchisors to insist upon arbitration clauses (that would not be under the same constraints). Such a development might harm franchisees because arbitration might offer fewer protections than judicial proceedings.

Miscellaneous

The Commission meeting was adjourned upon motion of Commissioner Harnett, seconded by Commissioner Long.

