

MINUTES OF COMMISSION MEETING

December 10, 2015

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. and Commissioner Andrew Bunn. Professor Bernard W. Bell, of Rutgers Law School, attended on behalf of Commissioner Ronald K. Chen; and Professor Edward A. Hartnett, of Seton Hall University School of Law, attended on behalf of Commissioner Kathleen M. Boozang.

J. David Ramsey, Esq., of Becker & Poliakoff, was also in attendance.

Minutes

The Minutes of the November 2015 Commission meeting were unanimously approved on motion of Commissioner Bunn, seconded by Commissioner Hartnett.

Uniform Common Interest Ownership Act

John Cannel discussed a Memorandum outlining the sections of the Uniform Common Interest Ownership Act (UCIOA) requiring additional discussion among interested parties. He began with the definition of “common interest community,” which has been drafted as a compromise position and clarifies the UCIOA’s definition. Mr. Cannel also noted that Section 2-117 regarding the Amendment of Declaration is largely derived from a bill brought before the New Jersey Legislature in 2005, but that he has also included certain limitations contained in UCIOA.

The Commission recognized Mr. J. David Ramsey, Esq., who stated that the drafted definitions were generally acceptable because they do not do too much violence to those contained in UCIOA. Chairman Gagliardi asked the Commissioners for any comments they might have regarding the drafted definitions. Commissioner Hartnett noted that he found the language of 1-103(a) unclear and Mr. Cannel responded that while it may be somewhat unclear, the inclusions contained in 1-103(b) were intended to assist with clarification.

Commissioner Bunn stated that the definition of “common interest community” may depend on the definition of “declaration” used therein. Mr. Ramsey replied that a declaration is any instrument creating a common interest community. Mr. Cannel stated that these communities usually have been set up via a Master Deed, rather than a Declaration, and noted that the UCIOA was not intended to be retroactive. He further explained that this draft seeks to provide structure for both existing and future common interest communities in a sensible manner.

Commissioner Hartnett expressed concern that the phrase addressing “limitations on restraints on alienation” contained in Section 2-103 (b) could be problematic if one considers a covenant a restraint on alienation. Mr. Ramsey stated that many items contained in a common-

interest ownership deed could be considered a restraint on alienation, but the difference lies between lawful and unlawful restraints. He added that it is an unlawful restraint if owners can't determine if they can sell the property and that it might be helpful to clarify this section to allow typical restraints. Mr. Cannel agreed that some restraints are appropriate and will revise this section accordingly.

Regarding Section 2-117(b), Commissioner Bunn asked if the draft provides for consequences if a new owner board fails to reexamine the association's bylaws within 24 months after assuming control. Mr. Cannel replied that this section was taken from the 2005 bill. Commissioner Bell suggested changing the language from "shall" to "may." Commissioner Bunn agreed that it may be prudent to create a window of time in which amendments are more liberally permitted.

Chairman Gagliardi suggested generally that a series of subheadings could help the section read more clearly.

Mr. Ramsey expressed concern with Section 2-117(c)(1) addressing Limitations on Amendments, stating that he is not looking to modify the existing law that states that an individual buys the property subject to certain terms which may change. He noted that there is law throughout the country indicating that an individual purchases the sort of properties that would be covered by this Act subject to the right of the majority to make certain changes to the underlying property rights. Mr. Cannel replied that the concept of a property right can be nebulous, but that it might be possible to modify the language to address reasonable regulations. It was suggested that "affect" in the first line of c.(1) should be "effect" but that such a term might be too broad, and something like "diminish" might be more appropriate. Commissioner Hartnett noted that subsection (f) on page 10 of the draft might be useful as it references units that "would be affected by the amendment." Mr. Cannel agreed that the language could be clarified to permit regulation but also protect owners' unit rights, including deeded property rights and use rights to common elements or limited common elements.

Commissioner Hartnett inquired whether Section 2-117(c)(2) addressing non-conforming uses is consistent with the concept of common law nuisance. Mr. Cannel replied that the UCIOA was intentionally left vague on this issue. Mr. Ramsey noted that almost every deed contains a covenant regarding nuisance or annoyance. Commissioner Bunn asked whether this protection of previously permitted uses should also apply to limited common elements. Mr. Ramsey responded that the limited common elements are still part of the common elements and are subject to regulation by the board.

Chairman Gagliardi asked if the Commission had provided sufficient guidance and Mr. Cannel responded that he will continue to move forward with this project, making changes in accordance with the comments received. Chairman Gagliardi thanked Mr. Ramsey for his attendance and commentary.

Definition of “Victim of Domestic Violence” – N.J.S. 2C:25-19d (PDVA)

Jayne Johnson discussed a Draft Final Report which indicates that no recommendation for statutory change in this area of the law should be proposed at this time. The Report determines that the recent enactment of the Sexual Assault Survivor Protection Act of 2015 addresses the issues expected to be covered by the Commission’s project.

In April 2014, the Commission authorized a project to clarify the definition of “victim of domestic violence,” as provided in N.J.S. 2C:25-19d. The project considered revising the definition to reflect the broad judicial interpretation of the relationship that must exist between the victim and the offender to satisfy the threshold definition of “victim of domestic violence” under the New Jersey Prevention of Domestic Violence Act (PDVA). During the course of the project, highly publicized incidents of domestic violence and sexual assault were covered by local and national media, prompting increased scrutiny of the existing New Jersey statutes in this area of the law. Subsequently, several state legislators proposed measures to ensure the safety and well-being of individuals who are threatened with or encounter sexual violence.

The prompt action of the New Jersey Legislature led to the passage of the Sexual Assault Survivor Protection Act of 2015 (SASPA), which was signed into law by the Governor on November 9, 2015. The SASPA authorizes emergency, ex parte protective orders to safeguard individuals who are victims of nonconsensual sexual contact, sexual assault or lewdness, but are not covered under the PDVA.

Chairman Gagliardi stated that with the enactment of the SASPA, the project is moot and the Report should indicate that no recommendation for statutory change will be provided by the Commission in this area of the law. Commissioner Bunn agreed and suggested adding language to clarify that the Legislature has acted in this area and, in deference to that action, the Commission does not recommend any action in this area of the law at this time. Commissioner Hartnett stated that the existing language of the Report indicates that the Commission is not providing a recommendation in this area of the law, but modifying the language of the Report may clarify this position.

The Commission voted unanimously on motion of Commissioner Hartnett, seconded by Commissioner Bunn, to release the Final Report with the proposed modifications.

Driver’s License Penalty Provisions (N.J.S. 39:3-10)

Vito Petitti discussed a Draft Final Report regarding Driver’s License Penalty Provisions under Title 39, explaining that the Commission undertook the project because of the 2014 *State v. Carreon* case, in which a driver with multiple unlicensed driver convictions received both a fine and jail time. The Appellate Division in *Carreon* held that the Legislature intended for never-licensed drivers caught driving to be fined or imprisoned, but not both. Mr. Petitti noted

that the Court had difficulty applying the plain text meaning of the statute and had to look to the Legislature's intent, which he then summarized.

Mr. Petitti informed the Commission that a Tentative Report had been circulated among members of the law enforcement community with an explanation that the Report contained a proposed reformatting of the statute's structure but not substantive changes to its language, which was calculated to make it more understandable. Staff received only supportive comments; all of which agreed that, while the existing language is already clear to law enforcement officers, the proposed revisions tend to make it more so.

Commissioner Bunn noted the inadvertent omission identifying the court in footnote 1, which will be corrected by Staff. Commissioner Hartnett questioned whether the structure of the language describing the penalty for violating the statute was common in 2C penalty provisions or other Title 39 provisions. Mr. Petitti stated that during the course of his research he did not encounter a recurrence of this statutory phrasing. Commissioner Bunn asked whether the proposal presented any conflicts with the Commission's broader Title 39 project. Ms. Tharney stated that Staff considered possible conflicts and determined that, with the narrow focus of the proposed revisions, the Report did not conflict with that older project.

The Commission voted unanimously on motion of Commissioner Bunn, seconded by Commissioner Hartnett, to release the Final Report with the correction identified.

State v. Bessey (N.J.S. 2C:33-7b)

Susan Thatch began by noting that Staff had presented a previous Memorandum regarding *State v. Bessey* and N.J.S. 2C:33-7b at the September meeting.

Ms. Thatch referred to a chart contained within the latest Memorandum identifying the disorderly persons offenses found within Title 2C, and she pointed out that many of those offenses have a mens rea requirement. She concluded that the Commission could choose among five different options to move forward with the project.

Chairman Gagliardi asked the Commission whether there was consensus regarding the five options, to which Commissioner Bunn responded that the first option (monitoring case law that interprets the mens rea requirements of disorderly person offenses and refraining from moving forward presently) could be immediately struck, and that the Commission must at least choose the second option (to propose a narrow modification of N.J.S. 2C:33-7b, which more clearly incorporates the "knowing and willfully" mens rea requirement specified by the court in *Bessey*). Commissioner Bunn said that the last option (considering the concept of overcriminalization in New Jersey as a whole, evaluating statutory offenses for clarity in both the required mental elements and the forbidden conduct, and compiling a comprehensive report detailing areas of concern) might exceed the Commission's mandate.

John Cannel informed the Commission that only disorderly conduct offenses, with confinement of six months or less, were being considered. He explained that, regarding constitutional issues, confinement of six months or more requires a jury trial. Ms. Thatch pointed out that, although other states that did not follow the Model Penal Code are experiencing problems, New Jersey follows the Model Penal Code. Mr. Cannel continued that there is no agreement regarding how to deal with disorderly persons, providing the example of an underage purchase of tobacco products. He said that there is no defense for accepting a fake ID, that businesses are held to a higher standard, and that it is not at all clear that all offenses on the chart should have a mens rea.

Commissioner Bunn asked whether disorderly persons offenses are too disparate to impose a uniform mens rea requirement, to which Ms. Thatch replied affirmatively, explaining that doing so could cause problems. Mr. Cannel suggested that Staff could draft a presumption that addresses mens rea, but there would have to be exceptions.

Commissioner Bunn offered an example of an employer who fails to pay wages when due and asked whether violators would go to jail for six months, to which Commissioner Bell asked whether there must be a general exception. Chairman Gagliardi said there is no exception in the statute for nonpayment during a hurricane, for example. Mr. Cannel said the statute was designed for depression-era situations involving workers who suffered when owners closed businesses. Commissioner Bunn observed that there are unpredictable events that could cause breaches of contract, and even criminal acts are considered. Mr. Cannel told the Commission that criminal laws are easiest to draft, therefore there are many such laws.

Commissioner Hartnett asked why not try, for existing disorderly persons, to use a default where possible, because a knowing standard should clearly say so. Mr. Cannel suggested looking at the municipal ordinances, many of which are punished as disorderly person offenses. Commissioner Bell asked whether it was appropriate to put mens rea requirements on those that don't have them. Commissioner Hartnett expressed a preference for fixing existing issues in Title 2C, but not to touch other titles. Going forward, he said, a "knowing" standard must be specified. Chairman Gagliardi asked whether it would be workable to have a presumption outside of Title 2C. Ms. Thatch responded that, while it would be workable, there are issues. For instance, some of the offenses are quasi-criminal; others are regulatory in nature. Commissioner Bell suggested that the Commission could always expand the scope of the project if the proposals seemed to work within the context of Title 2C. If not, the scope of the project could be limited to that Title only.

Commissioner Hartnett asked about Mr. Cannel's concerns for only new disorderly persons statutes going forward, to which Mr. Cannel replied that Staff would be comfortable with a broader scope after additional research.

Regarding *Bessey*, Commissioner Bell asked whether the mens rea requirement applied to the refusal only, or whether it applied to the lawfulness or unreasonableness of an order. According to Mr. Cannel, mens rea normally applies to every element of the offense.

Commissioner Bell asked whether the Commission should consider adding language such as “if such request is lawful and not plainly unreasonable”.

The Commission determined that Ms. Thatch would add mens rea requirements to those offenses identified in the chart that did not presently include one, and that were not regulatory in nature. The scope of the project at this time will not include ordinances or disorderly persons offenses that are not included in Title 2C. In addition, the project will involve the creation of a default mens rea provision for Title 2C (which would apply in the absence of a specific mens rea requirement unless otherwise specified). Chairman Gagliardi also requested a report from Staff regarding a sense of the scope and challenges of going beyond Title 2C. Ms. Thatch will proceed accordingly and will look at other statutes for potentially useful language.

Uniform Limited Partnership Act (ULPA)

John Cannel discussed a Draft Final Report relating to the Uniform Limited Partnership Act, which had been circulated among members of a committee of the New Jersey State Bar Association. Mr. Cannel informed the Commission that limited partnerships are diminishing in importance and Staff received no feedback from potential commenters.

Commissioner Bell made a motion to release a Final Report, which was seconded by Commissioner Bunn, and approved by the Commission with Commissioner Hartnett abstaining.

Miscellaneous

Laura Tharney indicated that Mortgage Recording had moved through both houses of the Legislature and was sent to the Governor, and that Adverse Possession had moved through the Senate and was scheduled to be considered by the Assembly on December 17th, and that there had not yet been any action on the Uniform Interstate and Family Support Act (on which action is required before April of 2016 or federal funding may be in jeopardy).

The January 2016 meeting is scheduled for Thursday, January 21, 2016 at 10 a.m.

The Commission meeting was adjourned upon motion of Commissioner Hartnett, seconded by Commissioner Bell.