LOUISIANA STATE LAW INSTITUTE

MEETING OF THE COUNCIL

November 15, 2019

Friday, November 15, 2019

Persons Present:

Bergstedt, Thomas M.
Braun, Jessica
Breard, L. Kent
Brister, Dorrell J.
Castle, Marilyn
Comeaux, Jeanne. C.
Crigler, John D.
Curry, Kevin C.
Cromwell, L. David
Davidson, James J., III
Davrados, Nick
Dawkins, Robert G.
DiLeo, Anthony
Dimos, Jimmy N.
Doguet, Andre'
Domingue, Billy J.
Forrester, William R., Jr.
Gregorie, Isaac M. "Mack"
Hamilton, Leo C.
Hargrove, Joseph L., Jr.
Hash, Endya L.
Hayes, Thomas M., III
Haymon, Cordell H.
Holdridge, Guy
Janke, Benjamin West
Jewell, John Wayne
Leighton, Maggie
Little, F.A., Jr.
Lovett, John
Maloney, Marilyn C.
Manning, C. Wendell
Mengis, Joseph W.
Neilson, Nickie
Norman, Rick J.
North, Donald W.
Philips, Harry "Skip", Jr.
Price, Donald W.
Richardson, Sally Brown
Roussel, Randy
Ryan, Graham
Sole, Emmett C.
Talley, Susan G.
Taranto, Todd
Tate, George J.
Thibeaux, Robert P.
Title, Peter S.
Trtan, Kim
Veron, J. Michael
Waller, Mallory
Weems, Charles S., III
White, H. Aubrey, III
Wilson, Evelyn L.
Ziober, John David

President Susan G. Talley called the November 2019 Council meeting to order at 10:00 a.m. on Friday, November 15, 2019, at the Louisiana Supreme Court in New Orleans. After asking the Council members to briefly introduce themselves, the President called on Mr. Randy Roussel, Reporter of the Common Interest Ownership Regimes Committee, to present materials on the Planned Community Act.

Common Interest Ownership Regimes Committee

The Reporter began his presentation by reminding the Council of the directive in Senate Concurrent Resolution No. 104 of the 2014 Regular Session and of the prior approval of some material in 2016 and 2017 when the Committee was under the direction of Professor Christopher Odinet. Mr. Roussel also noted that the definitions will continually develop as he presents the complete Planned Community Act to the Council. He then directed the Council's attention to Section 2.1(D) on registry and indexing for discussion.

Mr. Roussel explained that the Committee drafted this Subsection to establish uniformity after learning of the varying practices by clerks of court throughout the state. The Reporter discussed the rationale for placing the burden on the person filing the documents to direct the clerk regarding indexing, but the Council decided this was not good statewide policy. The Council then engaged in a lengthy discussion in an attempt to collapse this Subsection for brevity, but soon recognized possible consequences for title examiners and extra expenses for developers. The Council also questioned the clarity

regarding the formation and naming of the association relative to the filing of the declaration. The last concern prior to recommittal of Subsection D was the use of the term "security interest," and it was suggested that "security right" is the proper term. Hearing all of these concerns, the Reporter readily agreed to engage in further discussion at the Committee level.

During the discussion of Section 2.1(D), the Reporter also agreed to clarify in Subsection A that in a leasehold planned community, the ground lessee is the proper person to execute the declaration. The Reporter made a note to have the Committee carefully examine other possible rights of leaseholders granted by the Act, including the granting of servitudes. The following was approved:

2.1. Creation, alteration, and termination of a planned community

A. A planned community is established by the execution of a declaration by all owners of the immovable property to be affected or by the lessee in the case of a leasehold planned community. The declaration shall be effective against third persons when filed for registry in the conveyance records of each parish in which any portion of the immovable property is situated.

In Section 2.2, the Reporter noted that the Council previously adopted everything except Paragraph A(7). During this discussion, the Council recommended defining or changing the term "legal description" over concerns that the term "legal" has precise connotations. The Reporter stated that the intent is for the description to provide enough detail for third parties, and coupled with the survey, enough consumer protection. Admittedly the term is subjective jargon, but a perfect description is not intended and may not even be possible for additional movable property that the developer does not yet own and may never own. The Council suggested substituting "valid", "written", or "reasonable" for "legal" but ultimately adopted the Subsection as presented. The Reporter then suggested a clarification to Paragraph A(9) to address any timing concerns previously raised with the formation of the association, and the following was approved:

2.2. Contents of the declaration

A. The declaration shall contain all of the following:

* * *

(9) The name of the association formed in accordance with Section 3.1.

Although Section 2.3 had already been approved, the Council quickly discussed and adopted the following change to Subsection E to clarify that by operation of law, any conveyance of a lot includes the membership interest in the association:

2.3. Allocation of common expense liabilities, common surpluses, and voting rights in the association

* * *

E. The conveyance, encumbrance, judicial sale, or other voluntary or involuntary transfer of an ownership interest in a lot includes the membership interest and any other rights in the association appurtenant to that lot.

Moving to Section 2.4 regarding the exercise of development rights, the Reporter explained the importance of this provision for consumer protection purposes. It is imperative that the developer make adequate disclosures but retain flexibility for economic and market fluctuations. Subsection C provides for rolling seven-year periods for the exercise of a development right to add additional immovable property, identified in the declaration, to the planned community. The Reporter further explained that the filing

of a new plat which shows the addition of immovable property to the planned community interrupts the initial seven-year period that started with the filing of the declaration. The result is that as long as the declarant files a new plat every seven years, he can exercise his development right to add additional immovable property in perpetuity because the seven-year period restarts each time a new plat is filed. The Council was concerned that the proposal confuses the law of interruption and suspension if the true intention is to add an additional seven years to the period each time a plat is filed. The example given was that three years after the filing of the initial declaration, the declarant files a plat to add additional immovable property. Under the proposal, the declarant now has ten years in which to file another plat to gain an additional seven years. Some argued that perhaps the declarant should only have seven years from the date of the new plat, regardless of how many years have passed since the filing of the initial declaration. The Council thereafter adopted the following:

2.4. Exercise of development rights

* * *

C. Development rights to add additional immovable property may be exercised only within seven years after the date of the filing of the initial declaration. The submission of an application for approval of a plat of subdivision pursuant to R.S. 33:113 shall suspend the running of the seven-year period, except that the suspension is considered never to have occurred if the application is denied and any appeal period has expired, or if the developer voluntarily withdraws or abandons the application or a plat of subdivision that is the subject of the application prior to filing the plat for registry. If a plat is approved, the seven-year period shall be interrupted and shall commence to run anew on the date on which the plat of subdivision is filed for registry. This Section does not extend the term for the exercise of development rights imposed by the declaration pursuant to Section 2.2(A)(7).

The Reporter next asked the Council to focus on Section 2.4(E) of the materials, which had previously been recommitted. The Reporter referred to this as the golf course rule and noted that Texas recently passed a law to codify a case that required a developer to operate a golf course at a loss rather than allowing him to withdraw it from the planned community. The Council questioned why conveyance of a lot is required to be to an unrelated purchaser and the Reporter explained that this will prevent a declarant from simply transferring a lot to a subsidiary or straw purchaser. After more discussion, the Council asked the Committee to define "unrelated purchaser" and advised that the Tax Code may provide inspiration.

2.4. Exercise of development rights

* * *

E. If pursuant to Section 2.2(A)(7) the declaration provides that all or any portion of the immovable property within the planned community is subject to a right of withdrawal by the declarant none of the immovable property may be withdrawn after a lot has been conveyed to an unrelated purchaser, without a supermajority vote. A declarant may withdraw all or any portion of immovable property within the planned community in accordance with this Part only if the property has not been conveyed to the association.

The Council then turned to Section 2.6(A)(4) to discuss what the plat is required to show for leasehold planned communities. It was noted that all leases expire or terminate at some point, and the definition of leasehold planned community reiterates the notion, so the proposal was shortened in the following manner:

2.6. Plats

A. Each plat shall be clear and legible and shall show all of the following:

* * *

(4) In the case of a leasehold planned community, a complete property description of all immovable property subject to a lease.

The Reporter next asked the Council to engage in a policy discussion regarding the approval of more burdensome amendments to the declaration in accordance with Section 2.11(C) and provided background information regarding the different voting requirements contained in the proposal depending upon if an action is administrative or fundamental. The Council questioned whether the voting requirement was by lot or by member and then asked the Reporter to consider adding specific language to clarify that the provisions in this Act are default rules which may be contracted around in the declaration. Conversely, the Committee was also instructed to discuss ways to uniformly provide mandatory requirements that may not be changed in the declaration. The Reporter specifically asked the Council to consider what is the correct number of votes and to what extent a declarant may make changes to the planned community when he owns a supermajority of the lots. Further, if the declarant has only sold one lot, should that lot owner have the ability to veto all proposed changes?

More specifically related to Section 2.11(C) and the imposition of more burdensome use restrictions and existing uses, the Council suggested that the Committee include force majeure provisions and other grandfathering provisions in present law. The Reporter did inform the Council that the Committee looked to zoning regulations for guidance. The Council remained concerned about an owner's duty if he wants to sell the lot after a more burdensome restriction has been adopted. The example given was a lot with a two-family home and the passage of a restriction allowing only single-family homes. The Council wondered if the lot owner is required to reconstruct his two-family home prior to selling to a third party. The Reporter explained that the proposal was taken from a new Montana law that attempts to address concerns related to Airbnbs and provides that nonconforming uses are vested until the property is sold to a third party, but the Committee has continued debating and weighing property rights and owner rights.

Next, the Council engaged in a lengthy discussion concerning the proper percentage to be used. For example, does this proposal mean that the first 20% of lot owners who buy into a planned community are at risk for the restrictions to be unilaterally changed by the declarant? The Council first expressed a desire to protect the first 20% but then realized that under that policy a single owner could control the entire community. They acknowledged that that one owner is still planning by the initial rules, but flexibility is needed for market exceptions. Other members felt that disclosure is the key and as long as the risk is expressed in the declaration, the "buyer beware" adage suffices. Based on this discussion, the Reporter asked the Council whether the percentage should be the minimum and should the declaration be allowed to require a higher percentage. The Council voted in favor of this notion. The Council did not vote on whether the declarant should have the authority to reduce the required percentage.

The next policy vote was on whether each matter requires a vote of the owners and the declarant together or separately. In other words, are the lots owned by the declarant considered in the required percentage? The Council voted to require a percentage of the whole, not separate percentages, and a two-step approval procedure of the total number of lots and the number of lots not owned by the declarant.

Another issue discussed was the time period. The Committee favored allowing the continued nonconforming use after a more burdensome restriction is adopted if the nonconforming use has been occurring for at least six months prior to the change. The Council quickly agreed that if a nonconforming use ceases for six months, the lot owner

cannot resume the use and thereafter must comply with the new restriction. However, a more detailed discussion ensued relative to a force majeure exception, blighted property, construction delays, and insurance claims. The Reporter noted that the six-month time period was borrowed from zoning and that his research of other state law revealed that there is no national standard, but one year is generally the longest period. He also noted that this period will not be able to be contracted around in the declaration or may only be increased, not decreased.

The final issue was whether a nonconforming use may continue in perpetuity and therefore be passed to a successor. The Council generally agreed that as long as the use does not stop, the mere sale of the lot should not suddenly require compliance with a more burdensome restriction. The Council also noted that such a policy may result in the property being taken out of commerce due to financing issues. The Reporter thanked the Council for the guidance on these issues and noted that the Committee will redraft Section 2.11 for presentation at a future meeting.

At this time, Mr. Roussel concluded his presentation, and the Friday session of the November 2019 Council meeting was then adjourned.

LOUISIANA STATE LAW INSTITUTE

MEETING OF THE COUNCIL

November 16, 2019

Saturday, November 16, 2019

Persons Present:

Bergstedt, Thomas M.
Breard, L. Kent
Brister, Dorrell J.
Cromwell, L. David
Davrados, Nick
Dawkins, Robert G.
DiLeo, Anthony
Dimos, Jimmy N.
Doguet, Andre'
Domingue, Billy J.
Gregorie, Isaac M. "Mack"
Hayes, Thomas M., III
Kunkel, Nick
Kutcher, Robert A.
Maloney, Marilyn C.
Mengis, Joseph W.
Norman, Rick J.
North, Donald W.
Ryan, Graham
Sole, Emmett C.
Tate, George J.
Thibeaux, Robert P.
Waller, Mallory
Weems, Charles S., III
White, H. Aubrey, III
Wilson, Evelyn L.
Ziober, John David

President Susan G. Talley called the Saturday session of the November 2019 Council meeting to order at 9:00 a.m. on Saturday, November 16, 2019, at the Louisiana Supreme Court in New Orleans. She then called on Mr. Emmett C. Sole, Chairman of the Alternative Dispute Resolution Committee, to begin his presentation.

Mr. Sole explained that his goal for the day was to update the Council on what the Alternative Dispute Resolution Committee had done to that point and what its plans were going forward. He noted that the Committee had recently been somewhat reconstituted, with Mr. Anthony DiLeo serving as Reporter. Mr. Sole stated that the Committee was initially formed around 2009 to deal with conflicts between the Civil Code and the Louisiana Binding Arbitration Law. He noted that the Committee decided to replace the Louisiana Binding Arbitration Law with a Louisiana-specific version of the Revised Uniform Arbitration Act (RUAA). Prior to accomplishing this objective, however, the Committee's Reporter passed away, and Dean Sherman took over as Reporter before later retiring after having made two presentations to the Council.

Mr. Sole explained that, after a brief hiatus, the Committee restarted its work with Mr. DiLeo at the helm. The Chairman also added that although the Committee initially began as the "Arbitration Committee," it had since expanded its horizons to include mediation as well. He explained that the Committee's plan was to first complete its arbitration project before then moving to mediation. Mr. Sole listed the 2021 legislative session as a goal for the completion and proposal of the Committee's arbitration legislation. He explained that the current Committee was working from the prior iteration's draft, reviewing and revising the work as necessary. Mr. Sole then introduced the Committee's two Co-Reporters, noting that Mr. Anthony DiLeo would be handling the arbitration project, and Professor Bobby Harges of Loyola Law School would be leading the way on mediation. Mr. Sole emphasized that Mr. DiLeo was doing great work and that the Committee was lucky to have him.

Mr. DiLeo, thanking the Chair for his kind words, noted that he would not be covering anything substantive during his presentation, but would instead be giving a "30,000 feet" view of the Committee's plans. After providing the Council with a bit of background information about himself, the Reporter gave an overview of Louisiana arbitration law. He noted that the structure of Louisiana arbitration law had not been changed since 1946, despite the publication of RUAA in 2000 and 646 reported arbitration decisions in Louisiana and 88 United States Supreme Court cases dealing with arbitration

in that time. Emphasizing the recent importance of arbitration, the Reporter added that the United States Supreme Court had decided 19 arbitration cases in just the past two or three years. All of this, Mr. DiLeo explained, illustrated the speed at which the field of arbitration was moving, in spite of Louisiana's outdated and unchanging arbitration law. To further support this point, he noted that the American Arbitration Association (AAA) had issued more than 6 million arbitration awards, including about 1,000 per day this year. Mr. DiLeo added that most other states had recently updated their arbitration laws, including 18 states having adopted RUAA and 35 having adopted parts of RUAA. He further listed Delaware's "rapid rule" as something the Committee would consider.

The Reporter explained that Louisiana's Civil Code articles dealing with arbitration were inconsistent with the more specific provisions of the Louisiana Binding Arbitration Law. He further opined that these bodies of law used archaic language, referring, for example, to arbitrators as "umpires". Moving to RUAA, Mr. DiLeo gave an overview of some of the uniform law's additions, noting, importantly, that it fills the gaps where procedural rules are not adopted by contract. He added that RUAA rarely affects the application of substantive law, as the reach of the United States Constitution's commerce clause is so great in the arbitration context that the Federal Arbitration Act nearly always applies. Mr. DiLeo emphasized that clarity in this area – that is, which procedural rules apply – would be hugely beneficial to the state. The Reporter then noted that he would take any questions that the Council might have.

Mr. Sole, for the Council's benefit, began by asking what benefit to commerce might result from a revision to Louisiana's arbitration laws. Mr. DiLeo explained that such a revision would add much-needed predictability and consistency to the law. He noted that many industry folks were scared to go into arbitration in Louisiana given the current state of unpredictability. In this context, Mr. DiLeo further noted a string of FAA decisions from the 1980s and 90s that clarify that states are free to adopt their own procedural rules as they see fit. He added that, through some form of RUAA, this would be the Committee's goal and noted that during this process, the Committee planned to eliminate the inconsistent Civil Code and Louisiana Binding Arbitration Law provisions.

A Council member then asked whether the Committee planned to address the issue of enforceability (notably, in the consumer context). The Reporter answered that there was a RUAA provision dealing with enforceability, but further noted that the question as a whole had a considerable "judicial gloss." Nevertheless, he clarified, the Committee did indeed intend to address the issue. Mr. DiLeo additionally explained that in this context, parties often argue procedural or substantive unconscionability, referencing a Louisiana Supreme Court decision that allowed the question to be decided by courts. He further noted that someone had to decide the question of whether the dispute is itself arbitrable, explaining that in some instances, the court decides while in others, the arbitrator decides. Mr. DiLeo added that arbitration clauses are often severable, and accordingly, courts oftentimes must await decisions on issues such as fraud in the inducement. He noted that without the adoption of a set of procedural rules, courts would be forced to decide at the outset whether there was indeed fraud present.

Another Council member inquired as to whether RUAA contained procedural rules sufficient to fill the gaps mentioned previously by Mr. DiLeo. The Council member further wondered whether it would be possible to adopt such rules without doing damage to the civil law. Taking the latter of these questions first, the Reporter answered in the affirmative, explaining that the Committee planned to give the provisions it drafted some "Louisiana flavor" so as to maintain consistency with the state's civil law tradition. With such changes, Mr. DiLeo forecasted that there would be little controversy in the adoption of these provisions. Returning to the Council member's first question, the Reporter opined that, at the very least, it would certainly reduce the room for argument and dispute in the context of what procedural rules were applicable. He further emphasized that he intended to take the issue quite seriously, as he believed arbitration to be "here to stay." He further referenced a decision by the United States Fifth Circuit from a few months prior in which the court warned a party against wasting the time of the court and the parties with frivolous challenges. Mr. DiLeo explained that the ruling gave specific examples, under the FAA and RUAA, of grounds on which arbitration decisions could be challenged. Accordingly,

he concluded, such procedural rules would certainly be a strong step in the right direction as far as frivolous challenges go. Mr. DiLeo added his own strong belief that the adoption of RUAA would assist parties in getting what they bargained for and prevent arbitration from becoming a mere extension of the litigation process.

Mr. Sole then asked the Reporter if he would discuss the background work that the Committee had done to this point. Mr. DiLeo referenced a number of charts that had been prepared comparing RUAA to the Louisiana Binding Arbitration Law and noted that the background research conducted had been quite exhaustive. A Council member next asked whether the Committee would be revisiting the trust issue that it had previously considered. Mr. DiLeo answered in the negative, noting that the three involved Committees had previously issued a joint report deciding the issue. Another Council member asked Mr. DiLeo to clarify the structure of the provisions that the Committee planned on utilizing. Mr. DiLeo explained that the Committee planned to remove all reference to arbitration from the Civil Code and move such substantive law to the Revised Statutes. The Council member was satisfied with this answer.

After a brief overview of the Committee's plans moving forward, Mr. DiLeo concluded his presentation, and the November 2019 Council meeting was adjourned.

Jessica Braun

Nick Kunkel