

LOUISIANA STATE LAW INSTITUTE

MEETING OF THE COUNCIL

March 6, 2020

Friday, March 6, 2020

Persons Present:

Braun, Jessica
Breard, L. Kent
Castle, Marilyn
Crigler, James C., Jr.
Crigler, John D.
Cromwell, L. David
Davis, Monette M.
Dimos, Jimmy N.
Doguet, Andre'
Domingue, Billy J.
Foil, Franklin J.
Forrester, William R., Jr.
Garofalo, Raymond E., Jr.
Gregorie, Isaac M. "Mack"
Hamilton, Leo C.
Handy, Christopher R.
Haymon, Cordell H.
Herring, Jimmie C.
Hester, Mary
Hogan, Lila T.
Holdridge, Guy
Jackson, Brian A.
Jewell, John Wayne
Kunkel, Nick

Kutcher, Robert A.
Lee, Amy Allums
Manning, C. Wendell
Medlin, Kay C.
Nedzel, Nadia E.
Norman, Rick J.
North, Donald W.
Philips, Harry "Skip", Jr.
Roussel, Randy
Saloom, Douglas J.
Seicshnaydre, Stacy E.
Stuckey, James A.
Surprenant, Jeffrey
Talley, Susan G.
Tate, George J.
Thibeaux, Robert P.
Title, Peter S.
Tucker, Zelda W.
Vance, Shawn D.
Veron J. Michael
Weems, Charles S., III
Wilson, Evelyn L.
Ziober, John David

President Rick J. Norman called the March 2020 Council meeting to order at 10:00 a.m. on Friday, March 6, 2020 at the Lod Cook Alumni Center in Baton Rouge. After asking the members of the Council to briefly introduce themselves, the President called on Mr. Charles S. Weems, III, Reporter of the Constitutional Laws Committee, to begin his presentation of materials.

Constitutional Laws Committee

Mr. Weems began by providing some background information on the Committee and its function, noting that the Committee identified provisions that had been determined to be unconstitutional and recommended that these provisions be repealed, revised, or studied by the Law Institute, or that a validity note be added by the printer. After a brief overview of the Committee's prior reports, the Reporter stated that the present report dealt with only eight "new" unconstitutional provisions and explained that the report was divided into three sections: one containing provisions included in prior reports but not yet addressed by the legislature, one containing provisions not included in prior reports, and one containing provisions included in prior reports and addressed by the legislature. Mr. Weems added that the provisions were ordered according to the relative importance of the body in which they are found, with provisions of the Constitution appearing first, followed by provisions of the Codes and finally provisions of the Revised Statutes.

The Reporter then moved to the substance of his presentation, asking the Council to turn its attention to page 24 of the materials to take up the second section of the report containing provisions included in prior reports but not yet addressed by the legislature. Noting that there were 33 such provisions and that the Committee's recommendations had not changed, he asked the Council to approve this section of the report in globo. A motion was made and seconded to approve the second section of the report, and the

motion carried. Mr. Weems moved next to the appendix, which contained provisions included in prior reports and addressed by the legislature. He noted that this portion of the report contained two pieces of information for each provision – the Committee's original recommendation and the ultimate outcome – and asked again for the Council's approval in globo. A motion was made and seconded to approve the appendix in its entirety, and the motion carried.

Next, Mr. Weems asked the Council to turn its attention back to the beginning of the report, now addressing its first section, which contained provisions that had not been included in any prior report. He explained that the first provision was Article IX, Section 9 of the Louisiana Constitution creating the First Use Tax Trust Fund. The Reporter noted that the first use tax itself had been deemed unconstitutional in *Maryland v. Louisiana* and was subsequently repealed, leaving only the attendant constitutional provision setting out what was to be done with the proceeds of the tax. He further explained that the Committee's recommendation was to direct the printers to add a validity note following the provision, noting the *Maryland v. Louisiana* decision and the subsequent repeal of the first use tax. A motion was made and seconded to approve the Committee's recommendation, and the motion passed with all in favor.

The Reporter then directed the Council's attention to Code of Civil Procedure Article 3662 regarding possessory actions. He explained that a prior version of the provision was held unconstitutional in *Todd v. State* and that subsequent amendment did nothing to cure the issue. In particular, he continued, the sixty-day period in Paragraph (A)(2) was held to be a prescriptive period and thus unconstitutional as applied against the state. Mr. Weems added that the Committee would save its final recommendation until the Possessory Actions Committee could weigh in, and thus simply recommended for now that the Law Institute direct the printers to add a validity note following the article noting the *Todd v. State* opinion. A motion was made and seconded to approve this recommendation, and that motion carried.

The Reporter moved to Code of Criminal Procedure Article 843 regarding the recording of proceedings. He explained that a prior version of the article, which stated that in certain circumstances, the court shall record the proceedings upon motion of the court, the state, or the defendant, had been held unconstitutional in *State v. LeBlanc* on the grounds that the language "on motion of the court, the state, or the defendant" was unconstitutionally restrictive. Because the 2001 amendment of the provision did not eliminate the offending language, Mr. Weems explained, the Committee's recommendation was that this language be deleted. In response to a Council member's question concerning to what the "other misdemeanor ..." language referred, the Reporter answered that the Committee's thought was that the reference to "ordinance" might be a misdemeanor. The Council member was satisfied with this answer, and a motion was made and seconded to approve this recommendation. The motion carried.

Next, Mr. Weems asked the Council to turn to R.S. 9:2948 regarding bond for deed and the homestead exemption. He explained that the provision was held unconstitutional in *Wooden v. Louisiana Tax Commission* as bond for deed owners were ineligible for the homestead exemption. Mr. Weems added that, in spite of the *Wooden* court's somewhat lukewarm rebuff of the principle described in R.S. 9:2948, the legislature subsequently added a Paragraph B to Civil Code Article 477 that more explicitly attempted to provide a homestead exemption to bond for deed purchasers. He further explained that a 2004 amendment to the Louisiana Constitution made explicit the *Wooden* court's prohibition on the grant of the homestead exemption to bond for deed purchasers. Accordingly, Mr. Weems noted, the Committee's recommendation was to repeal R.S. 9:2948 in its entirety and to delete Paragraph B of Civil Code Article 477, proposals that had previously been approved by the Council upon recommendation of the Law Institute's Property Committee and were included in House Bill No. 126 of the 2020 Regular Session. A motion was made and seconded to approve these recommendations, and that motion carried.

The Reporter then turned to R.S. 14:87 concerning abortion, noting that a prior version of the statute was held unconstitutional in *Sojourner T v. Edward* and that certain constitutionally offensive provisions remained after the statute was revised in 2006. Accordingly, Mr. Weems explained, the Law Institute recommended in its 2016 report that

the legislature direct the Law Institute to direct the printers to note the *Sojourner T* decision at R.S. 14:87. The statute was again amended during the 2018 Regular Session, and the Reporter noted that the effectivity of these newly added provisions, which in relevant part provided for stricter abortion restrictions, was made contingent upon the U.S. Fifth Circuit Court of Appeals upholding a similar law passed in Mississippi. Mr. Weems then explained that, in light of *Jackson Women's Health Organization v. Dobbs* – in which the Fifth Circuit upheld a district court's invalidation of the aforementioned Mississippi law – the Committee was recommending that the existing validity note regarding R.S. 14:87 be retained and that an additional validity note concerning the effectiveness of R.S. 14:87 in light of *Jackson Women's Health Organization v. Dobbs* be added. A motion was made and seconded to approve this recommendation. Before the vote was held, a Council member suggested a minor amendment to the validity note to make more precise the citation to *Jackson Women's Health Organization v. Dobbs*. This suggestion was accepted as a friendly amendment, after which the motion to approve the recommendation passed.

Mr. Weems turned next to R.S. 14:22 regarding public intimidation and retaliation. He explained that a previous version of this provision, which made certain "threats" illegal, was held unconstitutionally broad for its inclusion of threats to take lawful actions. As a result, the legislature sought to remedy this constitutional deficiency, amending the provision to follow the language the court used in *Seals v. McBee*, specifying that the prohibition extended only to "extortionate threats, or true threats[.]" which were terms defined in the statute. The Reporter explained that the Committee's recommendation was simply to include language stating that the Committee found the amendment to be sufficient. In response, a Council member asked whether the Committee had any concern or had considered that the statute as amended was still unconstitutionally vague. Mr. Weems specified that vagueness was highlighted by the *Seals* court as a potential concern and was a concern that the Committee shared, but that it was the Committee's opinion that such concern was beyond the scope of its charge, as it did not pertain to the issue on which the statute was struck down. The Council member noted his understanding that the issue of vagueness might be beyond the Committee's purview, but nevertheless argued that the language of the note to the legislature seemed to overstate the extent to which the new version of the statute was constitutionally sufficient. The Council member reasoned that, because the *Seals* court expressed concerns about vagueness, the recommendation should take pains to avoid implying that such concerns were addressed by the changes. Mr. Weems accepted this argument and prompted the Council for suggestions on how to cure the issue. The following revision was suggested: "The Law Institute found the amendment to be consistent with seeks to follow the court's holding opinion in *Seals v. McBee*, and as a result, However, the constitutionality of the amendment has not been ruled upon by the courts and no further recommendation with respect to R.S. 14:122 is being made at this time." A motion was made and seconded to adopt this amendment, and after this motion passed, another motion was made and seconded to approve the Committee's recommendation as amended. This motion likewise carried, and the recommendation was approved.

Mr. Weems then turned to R.S. 47:33 regarding credit for taxes paid in other states. He noted that Paragraph (A)(4) of the statute provides that the credit is only allowed if the other state in question provides a reciprocal credit. He further explained that a situation arose in which a Louisiana taxpayer had income in Texas, a state *without* such credit, and that this taxpayer was thus being taxed twice. The Reporter further noted that an earlier version of the statute was held unconstitutional in *Smith v. Robinson*, and that this holding was later limited in applicability to only Paragraph (A)(4) of the statute. Subsequent amendments to the statute did not cure the constitutional deficiency. Accordingly, Mr. Weems explained, the Committee was recommending that the legislature repeal R.S. 47:33(A)(4) in its entirety. A motion was made and seconded to approve this recommendation, and the motion carried with all in favor.

Finally, the Reporter asked the Council to turn its attention to R.S. 47:337.102. He explained that this statute provided for the creation of and other matters related to the Louisiana Uniform Local Sales Tax Board, which was set up to be funded by sales and use taxes. Mr. Weems noted that the board's funding mechanism was held unconstitutional in *West Feliciana Parish Gov't v. State* because the voters had approved

the sales and use tax only with respect to other uses, and use of the tax to fund the board had been imposed after the vote. Accordingly, the Reporter explained that the Committee recommended that R.S. 47:337.102(l) be repealed in its entirety. A motion was made and seconded to approve this recommendation, and that motion passed.

Having obtained approval of the entirety of the Constitutional Laws Committee's Biennial Report, Mr. Weems thanked the Council and concluded his presentation. The President then called on Mr. Randy Roussel, Reporter of the Common Interest Ownership Regimes Committee, to begin his presentation of materials.

Common Interest Ownership Regimes Committee

The Reporter explained to the Council that he would begin with Section 3.4 on declarant control, in Subpart C of the materials, and would return to the provisions in Subpart B after the Committee examined the proposals that had been recommitted by the Council.

The Reporter next provided background information to frame the discussion of Section 3.4, including the fact that most developers wish to maintain control of the association for adjustments due to market conditions until the sale of the very last lot. He also noted that the Committee decided to keep declarant rights combined even though some other states allow for separation. The Council quickly adopted Subsections A, B, and D without discussion. The Council questioned the notice requirement in Subsection C and the relationship with the provisions of Section 3.9 on calling meetings. After working with the Reporter, the following was approved:

3.4. Declarant control of the association

A. The declaration may provide for a period of declarant control of the association, during which a declarant, or persons designated by the declarant, may appoint and remove the officers and members of the executive board. A declarant may voluntarily surrender the right to appoint and remove officers and members of the executive board before the period ends. In that event, the declarant may require, during the remainder of the period, that specified actions of the association or executive board, as described in a recorded instrument executed by the declarant, be approved by the declarant before they become effective.

B. Regardless of the period provided in the declaration, a period of declarant control terminates as follows:

(1) If the right to add additional immovable property to the planned community was not reserved in the declaration, one hundred and twenty days after the date that seventy five percent of the total number of lots in the planned community are transferred to lot owners other than the declarant or declarant's affiliates.

(2) If the right to add additional immovable property to the planned community was reserved in the declaration, upon the expiration of the time period provided in Section 2.4(C) if the declarant timely exercises his right to add additional immovable property.

C. Except as otherwise provided in Section 2.14(E), a special meeting of the association shall be held for the purpose of electing the executive board at least thirty days prior to the termination of the period of declarant control. The meeting notice shall be given, in accordance with Section 3.20, no more than sixty days and no fewer than thirty days before the date of the meeting. The executive board shall consist of at least three members, each of whom shall be a lot owner or a representative of a lot owner that is a juridical person. If a quorum is not present at the meeting, then it may be adjourned and reconvened by the association the next day, at which time those lot owners who are present shall constitute a quorum

for purposes of electing the executive board. Unless the community documents provide for the election of officers by the lot owners, the executive board shall be entitled to elect the officers. The executive board members and officers shall take office upon the termination of the period of declarant control.

D. Notwithstanding the provisions of this Section, in no event shall the period of declarant control of a master association terminate until all periods of declarant control for all planned communities subject to the master association have terminated.

Next, the Reporter introduced Section 3.5 for discussion. The Council debated the policy of extinguishing the rights that are not transferred to a successor declarant and the difference between the termination of the rights and the remaining underlying obligations. The Reporter explained that the policy is intended to eliminate the creation of multiple declarants. The example given involved a bank requiring the right to enforce the assessment of dues as collateral, but not wanting to have to build all of the promised amenities. It was noted that the right to have the pool built is terminated as a special declarant right, but it vests in the lot owners, and the obligation can be enforced against the original declarant. The next issue involved a motion to move the language of the Comment into the proposed statute and a motion to delete the Comment altogether. The Reporter pointed the Council to the Uniform Common Interest Ownership Act and Section 4.5 of this proposal and noted that the concept is included in the consumer protection Part. After the Reporter accepted a few friendly amendments to the provision and the Comment, the following was approved:

3.5. Transfer of special declarant rights

A. Special declarant rights may be transferred only by an instrument evidencing the transfer recorded in every parish in which any portion of the planned community is situated. Upon transfer of special declarant rights, the transferor is not relieved of any obligation or liability arising before the transfer. A transferor has no liability for any act or omission of, or any breach of a contractual obligation arising from the exercise of a declarant right by, a successor declarant.

B. In the event of partial transfer of special declarant rights, those special declarant rights not transferred terminate on the effective date of the transfer. The transferee of partial rights is only responsible for those obligations related to the special declarant rights that were transferred.

C. A person who succeeds to special declarant rights is subject to the obligations and liabilities imposed by this Part or the community documents with respect to those special declarant rights transferred, except for any of the following:

(1) Misrepresentations by a previous declarant.

(2) Breach of any fiduciary obligation owed to the executive board by a previous declarant or his appointees.

(3) Any liability or obligation imposed on the transferor as a result of his acts or omissions after the transfer.

D. Nothing in this Section subjects any successor to a special declarant right to any claims against or other obligations of a transferor declarant, other than claims and obligations arising under this Part or the community documents.

Revision Comments – 2020

Lack of privity does not deprive any lot owner of standing to maintain an action to enforce any obligation of the transferor. See Section 4.5(C).

Moving along, Mr. Roussel explained that Section 3.6 addresses the termination of contracts entered into prior to the election of the executive board. The Reporter explained that this provision, taken from the Uniform Common Interest Ownership Act, is intended to be more generous for breaking contracts that were unfairly entered into by the developer with an affiliate. One Council member suggested that the provision is imposing a prescriptive period that does not otherwise exist for contracts that are unconscionable to a party, and several other members questioned the meaning of "not bona fide." In response, the Council and the Reporter agreed to reword Subsection A and add Subsection C. The following was adopted:

3.6. Termination of contracts

A. During the first two years after the executive board elected by the lot owners pursuant to Section 3.4(C) takes office, the following contracts entered into by the association may be terminated without penalty, provided that no fewer than ninety days notice is given to the other party and the contract was entered into before the executive board took office:

(1) Any management, maintenance, or employment contract.

(2) Any other contract with the declarant or an affiliate of the declarant that is unconscionable to the lot owners at the time it was entered into.

B. The provisions of this Section do not apply to a lease that, if terminated, would terminate the planned community or reduce its size.

C. Nothing in this Section shall impair the ability of the association to rescind or annul a contract under other provisions of law.

In Section 3.7, the Reporter reworded Paragraph A(2) for clarity, and with little discussion, the following was approved:

3.7. Bylaws

A. The bylaws of the association shall provide for all of the following:

(1) The number of members of the executive board, which shall be no fewer than three.

(2) The method of electing a president, treasurer, secretary, and any other officers specified.

(3) The qualifications, powers and duties, terms of office, and manner of electing and removing executive board members and officers and filling vacancies.

(4) The powers that the executive board or officers may delegate to other persons or to a managing agent.

(5) The officers who may prepare, execute, certify, and record amendments to the community documents on behalf of the association.

(6) Any provision necessary to satisfy requirements in this Part or the community documents concerning meetings, voting, quorums, and other activities of the association.

B. The bylaws may provide for any other necessary or appropriate matters, including matters that may be adopted as rules, relative to managing the business and regulating the affairs of the association and the planned community.

The Reporter then directed the Council's attention to Section 3.8 and explained that this provision prohibits the declarant from charging fees for the upkeep of property that is not association property. The Council questioned whether the access through a lot owner's property for necessary repairs by the association to common areas is a servitude. The consensus after debate was that this type of access does not rise to the level of a servitude and is better equated to access for a lessor to make repairs. With no changes made, the Council adopted Section 3.8 as presented.

Moving to the requirements for calling and holding association and executive board meetings, the Council discussed Section 3.9. The Council considered the importance of allowing owners the ability to speak at association meetings but not turning executive board meetings into general meetings by allowing public comment. Owners, however, are permitted to attend executive board meetings. Although anything can be discussed at special meetings, only those posted items may be voted on. The Council also changed the language so that the community documents may provide an alternative procedure to Robert's Rules of Order for conducting meetings. A member suggested limiting executive sessions of meetings to only when good cause is shown, but the motion failed to receive a second. The following was adopted:

3.9. Meetings

A. The following requirements apply to association meetings:

(1) The association shall hold an annual meeting in accordance with the bylaws. In the absence of a provision in the bylaws, an annual meeting shall be held upon the giving of not more than sixty days nor fewer than ten days' notice in accordance with Section 3.20.

(2) The association shall hold a special meeting to address any matter affecting the planned community or the association if its president, a majority of the executive board, or lot owners having at least twenty percent, or any lower percentage specified in the bylaws, of the votes in the association demand that the secretary call a meeting. The secretary shall call the meeting within thirty days after receiving notice of the lot owners' demand. Only matters described in the meeting notice required by Paragraph (3) of this Subsection may be considered at a special meeting.

(3) The association shall notify lot owners of the time, date, and place of each annual and special meeting not more than sixty days nor fewer than ten days' before the meeting date. Notice may be given by any means provided in Section 3.20. The notice shall state the items on the agenda, including the following:

(a) The general nature of any proposed amendment to the community documents.

(b) Any budget changes.

(c) Any proposal to remove a member of the executive board or an officer elected by the association.

(4) The minimum amount of time in which notice shall be given in accordance with Paragraph (3) of this Subsection may be reduced or waived by the executive board for a meeting called to address an emergency.

(5) Lot owners shall be given a reasonable opportunity to comment regarding any matter affecting the planned community or the association.

(6) The community documents may allow for meetings of the association to be conducted by telephonic, video, or other conferencing process, if the meeting notice states the conferencing process to be used.

(7) Meetings of the association shall take place at the planned community or at a place convenient to it.

(8) Except as otherwise provided in the community documents, all meetings of the association shall be conducted in accordance with the most recent edition of Roberts Rules of Order Newly Revised.

B. The following requirements apply to meetings of the executive board and committees of the association authorized to act for the association:

(1) Meetings shall be open to the lot owners except during executive sessions. The executive board and committees may hold an executive session only during a regular or special meeting of the board or committee. No final vote or action may be taken during an executive session. An executive session may only be held to do the following:

(a) Consult with an attorney concerning legal matters.

(b) Discuss existing or potential litigation, mediation, arbitration, or administrative proceedings.

(c) Discuss labor or personnel matters.

(d) Discuss contracts, leases, and other commercial transactions to purchase or provide goods or services currently being negotiated, including the review of bids or proposals, if premature general knowledge of those matters would place the association at a disadvantage.

(e) Prevent public knowledge of a matter if the executive board or committee determines that public knowledge would violate the privacy of any person.

(2) For purposes of this Section, a gathering of executive board members at which the board members do not conduct association business is not a meeting of the executive board. The executive board and its members may not use incidental or social gatherings or any other method to evade the open meeting requirements of this Section.

(3) During the period of declarant control, the executive board shall meet at least two times per year. At least one of those meetings shall be held at the planned community or at a place convenient to it.

(4) The executive board shall establish procedural rules to permit participation by a lot owner in the event that he is directly impacted by an agenda item or is requested to attend by the executive board.

(5) Unless the meeting is included in a schedule previously provided to the lot owners or the meeting is called to address an emergency, the secretary or other officer specified in the bylaws shall give notice of each executive board meeting to each board member and to the lot owners. The notice shall be given at least ten days before the meeting and shall state the time, date, place, and agenda of the meeting.

(6) If any materials are distributed to the executive board before the meeting, copies of those materials shall be reasonably available to lot owners, including posting on the association's website, except that the board need not make available copies of unapproved minutes or materials that are to be considered in executive session.

(7) The executive board may meet by telephonic, video, or other conferencing process if the meeting notice states the conferencing process to be used.

(8) Except as provided in Paragraph (3) of this Subsection, in lieu of meeting, the executive board may act by unanimous consent as documented in a record signed by all executive board members. The secretary shall promptly give notice to all lot owners of any action taken by unanimous consent. After termination of the period of declarant control, the executive board may only act by unanimous consent to undertake ministerial actions or to implement actions previously taken at a board meeting.

(9) All actions taken by the executive board that do not comply with this Section are nevertheless deemed valid unless and until set aside by a court. A challenge to the validity of an action of the executive board for failure to comply with this Section may not be brought more than sixty days after the minutes of the meeting at which the action was taken are approved or notice of that action is provided to lot owners, whichever is later.

(10) Except as otherwise provided in the community documents, all meetings of the executive board and the committees of the association shall be conducted in accordance with the most recent edition of Roberts' Rules of Order Newly Revised.

The last Section discussed by the Council was Section 3.10, which sets forth quorum requirements. The Council questioned the meaning of Subsection B, and a member wondered if the votes allocated to the association are automatically cast in the same proportion. Other members questioned why this Subsection is under quorum and not voting. The Reporter agreed to change this Subsection to provide for the allocation to count toward a quorum and to move the substance to Section 3.11 on voting. However, once the provision is moved, the Council would like the Committee to reconsider whether the intent is to require the association to cast all of its votes the same or whether, if 1/3 of owners vote in favor, the association has to split its 2/3 voting power into 1/3 for and 1/3 against. Another member read the provision to mean that the votes of the association are cast by the executive board, so the issue is one of allocation and not casting of votes. The Reporter and the Committee agreed to review the Uniform Common Interest Ownership Act and present its recommendations concerning this issue to the Council at a later date. The Council approved the following:

3.10. Quorum

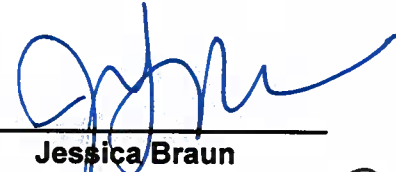
A. Unless the bylaws otherwise provide, a quorum is present throughout any meeting of the association if lot owners entitled to cast twenty percent of the votes in the association are present in person or by proxy at the beginning of the meeting, or have cast absentee ballots that were solicited in accordance with Section 3.11(C)(3) and delivered to the secretary in a timely manner, or are present by any combination thereof.

B. Votes allocated to lots owned by the association shall be counted toward a quorum.

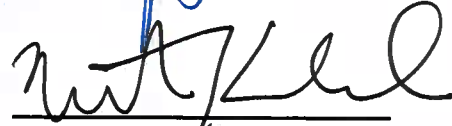
C. Unless this Part or the community documents specify a larger number, a quorum of the executive board is present for purposes of determining the validity of any action taken at a meeting if individuals entitled to cast a majority of the votes on that board are present at the time

a vote regarding that action is taken. If a quorum is present when a vote is taken, the affirmative vote of a majority of the board members present is the act of the executive board unless a greater vote is required by this Part or the community documents.

At this time, Mr. Roussel concluded his presentation, and the March 2020 Council meeting was adjourned.



Jessica Braun



Nick Kunkel