REBA NEWS

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The Newsletter of the
Real Estate Bar Association for Massachusetts

SJC clarifies scope of 'growth control' zoning bylaws

By Diane C. Tillotson

"Under all is the land. Upon its wise utilization and widely allocated ownership depends the survival and growth of free institutions and of our civilizations. [T]he interests of the nation and its citizens … require the creation of adequate housing, the building of functioning cities, the development of productive industries and farms, and the preservation of a healthful environment."

The above quote is taken from, of all sources, the preamble to the Code of Ethics and Standards of Practice of the National Association of Realtors. It expresses, in somewhat aspirational form, the goals of most communities in enacting and adopting comprehensive plans and workable zoning bylaws.

It fails to capture, however, the frustration most communities experience in attempting to meet the need to house and provide municipal services for a growing population with frequently inadequate funds, while at the same time attempting to preserve open space and agricultural land.

The conflict inherent in a municipality's attempts to balance and address these conflicting interests through its zoning bylaws was addressed in two separate cases decided in the past several months by the Supreme Judicial Court: *Zuckerman v. Town of Hadley*, 442 Mass. 511 (2004), decided Aug. 24, and *Homebuilders Association of Cape Cod, Inc. v. Cape Cod Commission*, 441 Mass. 724 (2004), decided May 19.

Both cases were argued the same week and both address the constitutional validity of bylaws that restrict, in one way or another, the number of building permits for single family residences that may be issued by a town in a given year.

In the *Zuckerman v. Town of Hadley* decision, the court declared unconstitutional a rate-of-development bylaw of unlimited duration. In contrast, the court in *Homebuilders Association of Cape Cod, Inc. v. Cape Cod Commission* upheld a bylaw imposing an annual cap on the number of building permits issued.

The *Town of Hadley* case

Martha Zuckerman owned a 66-acre parcel of land in an agricultural-residential use district in the Town of Hadley that was able to accommodate a subdivision of approximately 40 single-family homes.

Zuckerman filed a suit in the Land Court pursuant to G.L.c. 240, §14A challenging the validity of a rate-of-development bylaw restricting the number of building permits in a way that generally required the development of a residential subdivision to be spread over a period of up to 10 years.

The bylaw, first enacted in 1988, had been in effect for 15 years and it was undisputed in the record that the town intended the restriction to be of unlimited duration. The preamble to the bylaw said the provision was intended to preserve the Town of Hadley's agricultural land and character and to "phase in" population growth so as to enable the town to plan for expansion of its public services within the fiscal constraints of Proposition 2?.

The SJC began and ended its analysis with the question left open in the case of *Sturges v. Chillmark*, 380 Mass. 246 (1980), where the court did not address the validity of bylaws of *unlimited* duration restricting the rate of development within a municipality. In *Sturges* the court did hold that a municipality may impose "reasonable time limitations on development" where the restrictions are temporary and enacted to provide the municipality with the ability to control growth while en-

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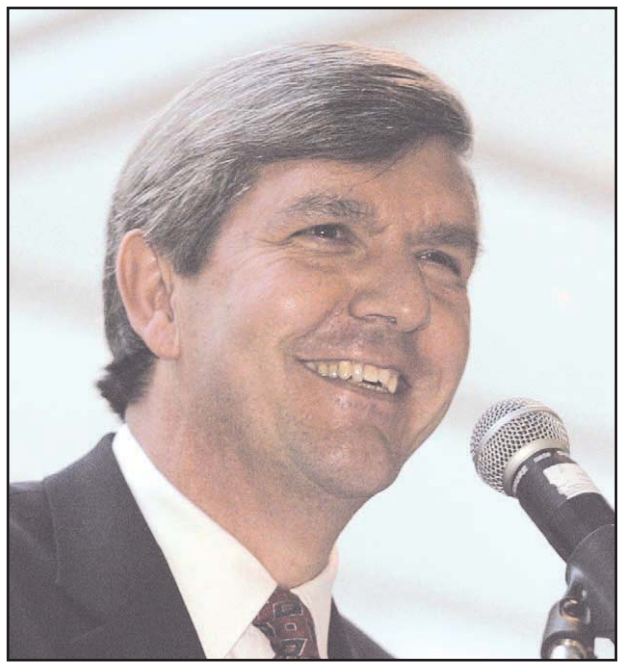
Diane C. Tillotson is a partner in the Boston firm Hemenway & Barnes and concentrates her practice in the area of land use permitting and litigation. She is the co-chair of REBA's Real Estate Litigation Committee and a former president of REBA. She successfully represented the plaintiff in Zuckerman v. Hadley.

ABA president-elect to speak at REBA annual meeting



MICHAEL S. GRECO
Boston attorney to head ABA

Michael S. Greco, president-elect of the 405,000-plus member American Bar Association, will deliver the luncheon keynote address at the Real Estate Bar's Annual Meeting on Monday, Nov. 15 at the Wyndham Hotel in Westborough.

"Mike Greco is perhaps the most thoughtful and eloquent spokesman for the legal profession in our time," said Jon Davis, a long-time REBA Board member. "He possesses a keen understanding of the aspirations and nobility of our profession at its best."

A partner with Kirkpatrick & Lockhart, LLP in its Boston office, he is a trial lawyer with more than 30 years of litigation experience. Prior to joining Kirkpatrick & Lockhart he was a partner at the former

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What's in this issue…

New state program revolutionizes mortgage insurance

By Robert M. Ruzzo

MassHousing's new MIPlus™ is an innovative mortgage insurance product that has the potential to revolutionize the mortgage insurance industry.

But wait, before explaining how, let's go back in time to discover why such a revolution is overdue.

History tells us that an entrepreneurial conveyancing attorney created the private mortgage insurance industry in 1957. One can almost imagine Attorney Karl laboring away in his Milwaukee office, bristling at the requirements of the bureaucratic government insurance programs of the Federal Housing Administration. Perhaps it was a dark and stormy night.

Out of Karl's frustration and subsequent innovation was born a private mortgage insurance company, MGIC, which would serve as an alternative to FHA programs, and the rest, as they say, is history.

That history, however formidable, has not been without controversy. While private mortgage insurance has opened the door of home ownership opportunities to countless American families, critics have questioned at what cost this opportunity has been secured and have subjected the seemingly Byzantine business practices of the industry to increased scrutiny.

Mortgage insurance fund

At MassHousing, the state's affordable housing bank, we have embarked on a somewhat different strategy. Confronted by a dramatic curtailment of private mortgage insurance availability during the severe real estate recession of the late 1980s and early 1990s, MassHousing elected to form its own Mortgage Insurance Fund ("MIF") as part of an effort to quietly rewrite the history of the private mortgage insurance industry. Indeed, Massachusetts is one of only six state housing finance agencies to have its own MIF.

The MIF operates as a financially independent, self-sustaining business entity within MassHousing. Since its creation in 1988, the MIF has insured over $1 billion in mortgage loans to low- and moderate-income home buyers in Massachusetts, nearly all of whom are stretching to buy their first home.

In recent years, the MIF has moved beyond merely filling a missing void and has raced ahead with a number of programmatic innovations. Under G.L.c. 167E(2)(c), lenders are offered relief from the down payment requirements imposed by statute for a mortgage loan that is "underwritten in accordance with mortgage loan programs of public instrumentalities created by the state for the purpose of financing and expanding the supply of residential mortgages for affordable housing."

Seizing the opportunity provided by the statute, MassHousing, working with the Office of the Commissioner of Banks, created the Municipal Mortgage Program in 2001, which enables police, teachers, firefighters and other public service employees to buy a home in the community where they work with no money down by utilizing financing provided by local community banks.

Another recent innovation, the "Take the T Home" program recognizes that regular riders of public transportation can afford to borrow more for a home, because they have lower transportation costs than other borrowers. Again, borrowers are able to secure 100 percent financing at competitive rates and terms, with expanded underwriting ratios that allow up to 45 percent of a borrower's income to be allocated for monthly housing and other monthly debt.

Mindful of MassHousing's mission, the MIF has introduced a discount on the insurance it offers to borrowers earning 80 percent or less of the HUD median income (in the city or town where they are buying a home). This 20 percent discount saves the average borrower $30 a month on their monthly payment. This translates into the ability to obtain $5,000 more on a mortgage.

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Robert M. Ruzzo is deputy director of MassHousing, the state's affordable housing bank. A long-time member of REBA, Bob is co-chair of the association's newly launched Affordable Housing Committee.

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for Massachusetts

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Mission Statement

To advance the practice of real estate law by creating and sponsoring professional standards, actively participating in the legislative process, creating educational programs and material, and demonstrating and promoting fair dealing and good fellowship among members of the real estate bar.

Mentoring Statement

To promote the improvement of the practice of real estate law, the mentoring of fellow practitioners is the continuing professional responsibility of all REBA members. The officers, directors and committee members are available to respond to membership inquiries relative to the Association's Title Standards, Practice Standards, Ethical Standards and Forms with the understanding that advice to Association members is not, of course, a legal opinion.

Endorsement Statement

While the Real Estate Bar Association for Massachusetts accepts advertising in its publications and educational offerings, it endorses no products or services.

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From the President's desk

By E. Christopher Kehoe

The change of the seasons is of course a perfect metaphor for life itself. Fall is traditionally the time of harvesting the fruits of a year's worth of labor, and I would like to use this, the final column I will be writing as the president of REBA, to reflect back on the seeds that were sown at the beginning of the year, the progress of their growth, and their prospects for the future.

As president-elect in 2003, I made a list of things to accomplish as president. I wanted to implement the strategic plan conceived and nurtured by my predecessors. I hoped to see an increase in membership as a result of it. I dreamed of being able to design a solution to the plague of missing discharges in the Commonwealth. I also expected to face the types of unanticipated challenges that we all face in our professional lives.

I am glad to report the strategic plan is well underway. This year we have added four new committees: Residential Conveyancing, Commercial Finance, Real Estate Litigation, and Affordable Housing. I am grateful to the folks who suggested these committees and to the men and women who have stepped up to chair them. Their efforts are already starting to bear fruit and you will hear more of their activities in the coming months.

By broadening the scope of the mission of REBA to serve every real estate lawyer in the Commonwealth and by offering new and interesting committees appealing to the specialists among us, we have added more than 300 members so far in 2004, and I expect that number will increase by year end. I was particularly struck by a new member of the Real Estate Litigation Committee who remarked to me at the inaugural meeting last week: "Before this committee was constituted, people like me had no opportunity to meet and network with our peers on the pressing issues confronting our area of practice."

I fully expect that each of these new committees will serve as a similar forum for their own unique constituencies and also provide a source of ideas for future breakout sessions at our Spring Meeting and our Annual Meeting in November. REBA's two meetings each year also reflect the sentiment that all real estate practitioners need an opportunity to network and learn with and from their peers.

Once again, I have to thank Pam O'Brien for putting together a fabulous program for our Monday, Nov. 15 meeting at the Wyndham in Westboro. As I mentioned in my remarks last spring, we have outgrown our former space and in order to provide a less crowded forum for our members, educators and exhibitors, we have moved to what we hope you will agree is a better and more comfortable environment. Please make sure to look at the program syllabus published in this same edition of REBA News. Our last two meetings were attended by more than 500 of our peers, and I hope to see you there.

Another initiative was to become involved with a program begun by Sen. Marian Walsh, the assistant majority leader for the state Senate. When I visited Sen. Walsh earlier this year to discuss our Omnibus Mortgage Discharge Legislation, I remarked that her office reminded me a little bit of Filene's Basement because she had racks of suits and professional dresses in various locations. When I inquired, she told me about her program entitled "Suits for Success" which she launched in order to provide professional attire to men and women doing job interviews when making the transition from halfway houses to permanent employment.

Sen. Walsh wanted to make sure that they looked their best at the interview. I was so taken with the idea that I discussed it with the Executive Committee of REBA and we decided that at our annual meeting (and I hope this will become an annual event) we would work with Sen. Walsh's office to have boxes at the door for people to donate gently used suits for men and women. I hope you will take a look in your closet and consider bringing one suit or dress to the annual meeting on Nov. 15. It's a great cause, and I bet you'll feel good if you do it.

In addition to meeting with Sen. Walsh about the Omnibus Discharge Legislation, our Legislative Counsel Ed Smith and I, along with several of the officers of REBA, have attended at least 40 political events this year in an effort to advance our legislative agenda. Legislative issues locally and nationally have become critically important to REBA's members. Therefore, access to the Legislature and its members makes all the difference in achieving our goals.

I can't believe how much I have learned about the legislative process and the importance of REBA's PAC, which I am sorry to say is fiscally exhausted after a busy legislative year. REBA's directors and Executive Committee have given generously to the PAC as have many of our members, but our needs have never been greater.

In addition to working on our discharge legislation, we are also actively working to prevent the passage of House Bill 180, which would allow out-of-state corporations to come into Massachusetts to conduct closings without the benefit of an attorney.

Furthermore, we recognize the need to work with our congressional delegation to ensure our interests are protected in Washington. This takes time, which our Board of Directors is willing to give, but it also takes money, which is why I am turning to you for contributions. Please do not underestimate the critical nature of this request. Without your help, we will not be able to advance our legislative agenda, and that will affect each and every one of you, your practices and your clients.

I am also pleased to report that through the efforts of our Legislative Committee and the directors and officers of REBA we have made progress in advancing my dream of passing a comprehensive mortgage discharge bill. We are currently negotiating the final points with the Massachusetts Mortgage Banker's Association and the Massachusetts Banker's Association. I am hopeful that we will find a compromise leading to the passage of this legislation this year.

One of the challenges that I did not expect to face this year was the requirement for keeping a notary journal. As you are all aware, after several months of friendly negotiations with the Governor's Office, the Governor's Executive Order was revised to take into account some of the

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Chris Kehoe is a partner in the Boston office of Robinson & Cole LLP. He is a member of the American Land Title Association, the Real Estate Finance Association and the real estate sections of the American Bar Association, the Boston Bar Association and the Massachusetts Bar Association. He lives in Hingham.

Massachusetts courts continue to narrow standing for claims based on traffic impact

By Daniel P. Dain

The Massachusetts Appeals Court in *Nickerson v. Zoning Board of Appeals of Raynham*, 53 Mass. App. Ct. 680 (2002), ruled that the plaintiff lacked standing under G.L.c. 40A, §17 based *only* on his use of a road where increased traffic could be expected.

Since that ruling, trial court judges in Massachusetts have continued to limit the standing of individuals claiming traffic negatively impacts them.

In *Nickerson,* the Raynham Zoning Board of Appeals granted Wal-Mart a special permit. The plaintiff – who lived a mile from the proposed development site – on appeal argued that construction of the Wal-Mart would exacerbate traffic on Route 44, which he used frequently.

But the Appeals Court ruled that "the plaintiff's interest is not substantially different from that of all of the other members of the community who are frustrated and inconvenienced by heavy traffic on Route 44." *Id.* at 683-84.

The court quoted *Boston Edison Co. v. Boston Redev. Auth*., 374 Mass. 37, 63 n.17 (1977) where the Supreme Judicial Court stated that it had "grave doubts about granting standing" to a non-abutter located one-third of a mile from the development site.

This article looks at how Massachusetts courts since *Nickerson* have treated the use of feared traffic impacts as a basis to establish standing in zoning appeal cases.

Pre-*Nickerson* cases

The right to appeal under Chapter 40A is limited to those persons "aggrieved" by a zoning board decision. While abutters and abutters to abutters within 300 feet of a proposed development enjoy a rebuttable presumption of standing, as well as potentially compelling complaints about noise, light, etc., those who live more remotely to a proposed development typically must rely on concerns like increased traffic in an attempt to establish aggrieved person status.

Yet courts have sensibly limited the class of plaintiffs who may be heard to complain about potential impacts from developers. Only where the plaintiff can articulate specific, non-speculative facts establishing a legally cognizable injury that will be "'*special and different* from the concerns of the rest of the community,'" may the plaintiff proceed. *Bell v. Zoning Board of Appeals of Gloucester,* 429 Mass. 551, 554 (1999) (quoting *Barvenik v. Aldermen of Newton*, 33 Mass. App. Ct. 129, 132 (1992)) (emphasis added).

The rationale is that where the community as a whole may generally feel potential impacts, the local zoning board is in the best position to balance the needs of the community against those of the developer. The courts should be made available only to those with injuries distinct from the particular plaintiff.

In examining the "special and different" requirement here the alleged impact is traffic-related, courts have typically looked first at the distance the plaintiff lives from the proposed development.

The traffic impact on direct abutters – those obviously living closest to a proposed development – was examined by the SJC in *Marashlian v. Zoning Board of Appeals of Newburyport*, 421 Mass. 719 (1996). The SJC held that the Superior Court had not abused its discretion in finding that plaintiff abutter's showing that a proposed new hotel would result in "increase[d], if minimal" traffic on the street, was sufficient to confer standing. However, the SJC did not discuss how such an impact would be "special and different" from those of the community at large.

At the other end of the spectrum is *Nickerson*. The Appeals Court found that

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Daniel P. Dain is senior counsel for real estate and land use litigation at Goodwin Procter in Boston.

REBA assists statewide technology initiative at registries

By Gregory N. Eaton and Edward A. Rainen

EATON

RAINEN

We are now all aware that the Legislature passed Chapter 4 of the Acts of 2003, which increased the fees for recording documents at the various registries of deeds within Massachusetts.

In addition to the increase in recording charges, the Legislature included a $5 surcharge for each instrument recorded "for the purpose of automation, modernization, operation and technological improvements at the registry of deeds."

After collection, the surcharge was to be forwarded to the "registers technological fund," but only for funds collected beginning March 15, 2003, through June 30, 2008. Funds collected after July 1, 2008, are to be forwarded to the general fund.

At the time of passage of Chapter 4 of the Acts of 2003, various registries were in a state of crisis. Steep budget cuts by the Legislature causing staff reductions at the registries, coupled with the very low mortgage interest rates that substantially increased the number of real estate closings in the state, fueled the need for the surcharge to help the registries weather the storm.

Through the efforts of REBA and other organizations, the legislation included the formation of the Secretary of State Technology Advisory Committee, which was created to supervise the Registry Technological Fund. The committee is comprised of the Secretary of State, the registers of each registry district, two representatives from REBA and one representative each from the Massachusetts Association of Realtors, the Greater Boston Real Estate Board, the Massachusetts Land Title Association, the Massachusetts Bankers Association and the Massachusetts Mortgage Bankers Association.

The committee has been charged with creating a plan for specific recommendations for use of the registries' technology fund monies.

The $5 surcharge added to all instruments recorded is dedicated to separate technology funds: one for the county registries (Berkshire North, Berkshire Middle and Berkshire South Registry of Deeds, Hamden Registry of Deeds, Norfolk Registry of Deeds, Plymouth Registry of Deeds, Bristol Registry of Deeds, Barnstable Registry of Deeds, Dukes Registry of Deeds and Nantucket Registry of Deeds); and one for the State Registry of Deeds (Franklin Registry of Deeds, Hampshire Registry of Deeds, Worcester North and South Registries of Deeds, Middlesex North and South Registries of Deeds, Essex North and South Registries of Deeds and Suffolk Registry of Deeds).

The REBA Board of Directors nominated Ed Rainen and Gregory N. Eaton, the current co-chairs of the REBA Registries Committee, to represent the association on the Technology Advisory Committee.

The Advisory Committee met three times and produced its initial report on June 5, 2003. A copy of that report has been produced on the REBA website, and members are encouraged to review the report.

The registers of deeds and/or their staff attended the Advisory Committee meetings. During the meetings, the registers discussed what was needed for their particular registry to alleviate the crisis generated by the Legislature's cuts and increased business, and what the registries would need in the future. Each register provided the committee with reports/requests for their short-term needs, as well as their long-term goals.

With the approval of those requests, funds were made available to the various registries to address each registry's particular needs toward "automation, modernization, operation and technological improvements" as allowed under the

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Gregory N. Eaton is a partner with the firm of Oakley, O'Sullivan & Eaton, P.C., in Andover. He is currently on the REBA Board of Directors, and co-chairs its Registries Committee. He is also president of the Merrimack Valley Conveyancers Association.

Edward A. Rainen practices with his wife, Shelly, specializing in title examination under the firm name of Rainen Law Office, P.C., in Boston. He is on the REBA Board of Directors and co-chairs the Registries of Deeds Committee, as well as being a director of the Massachusetts Association of Bank Counsel, Inc., and the Abstract Club.

SJC clarifies 'grandfathering' under G.L.c. 40a, §6

By Thomas O. Moriarty Jr.

Many court battles turn on the precise interpretation of ambiguous and sometimes obscure legal phrases. But sometimes the language of a statute means precisely what it says.

In the recent decision in *Marinelli v. Bd. of Appeals of Stoughton*, 440 Mass. 255 (2003), the Supreme Judicial Court found the plain language of G.L. c. 40A, §6 to be quite clear in a suit questioning whether a parcel of land was grandfathered and therefore exempt from zoning changes.

The Court effectively held, among oth-

A partner with Marcus, Errico, Emmer & Brooks, P.C., in Braintree, Tom Moriarty is a member of REBA's recently launched Litigation Committee. This article originally appeared in the Vol. 6, No. 3 edition of the Massachusetts Bar Association Section Review. It is reprinted here with permission.

er things, that the common lot exemption set forth in §6, which "does not apply to more than three" adjoining lots, is not lost simply because an owner may have owned more than three adjoining lots at the time of the zoning change.

In relevant part, G.L. c. 40A, §6 provides:

"Any increase in area, frontage, width, yard of depth requirement of a zoning ordinance or by-law shall not apply for a period of five years from its effective date … to a lot for single and two family residential use, provided [that] … such lot was held in common ownership with any adjoining land and conformed to the existing zoning requirements as of [January 1, 1976] … provided further that the provisions of this sentence shall not apply to more than three of such adjoining lots held in common ownership."

As discussed further below, the SJC also endorsed a straightforward and practical method of applying these provisions when more than three lots are in play.

Factual background

Livio Marinelli owned the contested lot (Lot C) and at least three others, all approximately 25,000 sq. ft. in size, located in a Stoughton subdivision. The zoning rules in place when Marinelli acquired the properties required a minimum lot size of 25,000 sq. ft. for the construction of a single-family home. However, in 1996, the town amended its zoning by-law to increase the minimum lot size requirement to 40,000 sq. ft.

Livio transferred Lot C to a realty trust in February 1996, but he was still the owner of record when the new zoning rules took effect, as the February 1996 deed had not been recorded.

A few months later, Livio's son, Fred, signed a purchase and sale agreement to purchase the lot from the trust, contingent on his ability to obtain a permit to build a single-family home.

The Stoughton Building Department denied the permit, claiming the parcel did not meet the new lot size requirements. The Board of Appeals upheld that decision, but the Land Court reversed, ruling that the lot was entitled to grandfather protection under the zoning law and that the old lot size requirement (25,000 sq. ft.) should apply.

The board appealed the Land Court decision and the SJC took the case directly on its own motion to resolve the dispute over how the statutory language should be interpreted.

On appeal, the Board of Appeals argued that because Marinelli owned more than three adjoining lots, none were exempt from the zoning change. Land Court Judge Karen Scheier, who heard Marinelli's appeal, concluded that the plain language of the statute should apply, and that language permitted only one interpretation: Where a plan includes more than three commonly owned lots, only three of them are eligible for grandfather protection.

The SJC agreed with that reading. Writing for the court, Justice Robert J. Cordy explained, "By its plain language, the provision does not exclude owners of four or more lots from the protection of Section 6 outright; it merely limits the number of lots for which any owner can ob-

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Reconsidering force majeure clauses in the wake of increased acts of terrorism

By Cathryn A. Reynolds and Alexander P. Steffan

REYNOLDS

STEFFAN

Sept. 11 changed many things in American life both great and small. One change is the threat of terror attacks on the places where we work and live.

America has adapted in many obvious ways, such as new security checks at offices and airports, for instance. But we are adapting to our changed world in less obvious ways as well, including the way we allocate risk among contracting parties.

Most contracting parties have begun to rethink their contract provisions, particularly their force majeure clauses, in an effort to allocate the risk of another major terror attack. While progress has been made, it is interesting to ask if what has been done is enough and whether clients have an adequate contractual regime to protect their interests in the event of a terrorist attack.

How force majeure clauses work

In all contracts, including leases, force majeure clauses excuse a party's failure to perform if the failure is caused by certain enumerated events. The types of events that excuse performance are usually those beyond the control of the non-performing party and cause them a hardship.

The premise is that since a party could not predict and prepare for such an event it would be inequitable to force the party to perform during the occurrence of such an event. The occurrence of a force majeure event would not necessarily excuse performance of the contract entirely, but may excuse performance during the continued existence of the force majeure event and for a reasonable amount of time thereafter.

Additionally, the excused party may have other obligations imposed upon it by the occurrence of the force majeure event, such as an obligation to notify the other party and an affirmative obligation to use good faith efforts to mitigate the impact of the event.

There are standard events that appear in most force majeure clauses. A standard force majeure provision will excuse a failure of performance caused by or arising out of acts of God, the elements, war, or certain third parties, such as suppliers and carriers, shortages of raw materials and supplies, riots and civil disturbances. Other force majeure events are highly negotiated between the contracting parties and may be specific to the type of contract and the type of services being provided by and to the parties.

In commercial property leases, the force majeure clause is often used to excuse the landlord's failure to deliver useable space or maintenance services. While the force majeure clause will excuse the landlord's non-performance, most force majeure clauses do not excuse the tenant's obligation to continue to pay rent.

The tenant may negotiate to include language that prevents an occurrence occasioned by landlord's negligence, willful actions, or breach of contract as being recognized as a force majeure. The tenant can also insist that, notwithstanding the occurrence of the force majeure event, landlord make a "good faith effort" to perform its contractual obligations, or may insist upon rent abatement until the situation is rectified.

In addition, force majeure clauses may be superceded by the use of a "casualty clause" that allows a commercial tenant to quit and surrender possession of its

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Cathryn A. Reynolds and Alexander P. Steffan are associates in the business law group of Robinson & Cole.

Confronting the 'unpleasantness' of planning

By Robert C. Adams

Books, manuals, and consultants offer straightforward advice about the steps involved in planning. Whether you're seeking to develop a major plan for the future of your practice or addressing a couple of key problems in the firm, it's easy to find a progression of steps designed to result in some sort of resolution.

The process described is logical enough and, indeed, often results in at least a written document that is intended to guide an organization. Plans don't always work out, though, and, when they don't, the result can be finger pointing or skepticism about the whole notion of planning. Neither is healthy.

While no one can predict a fail-safe implementation of a plan, there are several questions that, if asked or kept in focus during the process, can help insure the soundness of the results. Unfortunately the questions involved also create a certain unpleasantness.

These questions can be misinterpreted as nay saying or negative. They can surface disagreement that needs to be resolved. The can challenge a spirit of consensus, which at its worst is a kind of "group think."

The concepts can be thought of as two pairs. The first pair consists of assumptions and consequences. A plan is based on assumptions and generates consequences, both predictable and unpredictable.

It's the assumptions and unpredicted consequences that are important here. The other pair consists of success and failure, two sides of the same coin. Success is assumed as the result of planning but not always clearly defined. Failure as a possibility is seldom discussed and even more rarely defined.

Yet discussing each of these four concepts, while it may make the process longer and a bit more agitating, can also produce a plan that has a higher probability of success.

Rule #1: Articulate assumptions

Whenever we develop a plan – a set of decisions or solutions – we are making assumptions. They may be assumptions about clients, the environment, the marketplace, the services or products we offer.

Decision-making rests ultimately on assumptions. It is of critical importance, therefore, to understand what those assumptions are and to consider how valid or not they may be.

We're reluctant to discuss assumptions because time may prove us wrong. It takes courage to answer the question, "What assumptions are we making?" It takes still more to ask, "Are these assumptions valid?" And it takes supreme courage to ask, if the plan does not work as supposed, "What assumptions did we make that were incorrect and why?"

Rule #2: Identify unpredictable negative consequences

When a plan is implemented, it will have consequences, both predictable and unpredictable. Some of the consequences may be negative and some positive.

Predictable positive consequences are what we expect the plan to achieve. Predictable negative consequences simply require a bit of extra planning. For instance, the plan may require laying off people, a negative consequence but one for which we can plan specifically. Similarly there can be unpredictable positive consequences, a bonus for the firm.

The hard task is identifying unpredictable negative consequences. What might go wrong? How likely is it? How will we deal with it? For instance, might a key person leave, taking with him or her long-term clients of value, if a reorganization is implemented?

Rule #3: Define success

Part of planning is defining success, usually done by setting measurable goals. Often these are financial, but there should be other goals as well. The simple question as a starting point is, "What are we trying to accomplish here," a question that will have multiple answers. Then comes the more difficult question, "How will we

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Robert C. Adams works with clients to address issues of planning, organizational change and business. He can be reached by e-mail at RAdamsConsulting@aol.com.

Examining tax titles and descriptions: Part II

By Ward P. Graham

Welcome back to the exciting conclusion of Tax Titles and Descriptions, a review of the interplay between Item (2) of Title Standard 4 (Tax Titles) and Item 1 of Title Standard No. 27 (Title References and Descriptions).

When we left the story in the last issue of the REBA News, we were discussing the impact on tax title description issues of the 1915 amendment to G.L c. 60, §37 providing that, "No tax title shall be held to be invalid by reason of any errors or irregularities in the proceedings of the collector which are neither substantial nor misleading."

We learned from *City Of Fall River v. Conanicut Mills,* 294 Mass. 98, 1 N.E.2d 36 (1936), that the determination as to whether an error or irregularity is substantial or misleading must be decided according to the circumstances of each case.

We also learned from *Bartevian v. Cullen,* 369 Mass. 819, 823 (1976) and *Pass v. Town Of Seekonk,* 4 Mass. App. Ct. 447, 450 (1976), that the burden of proving that an error or irregularity is neither substantial nor misleading is on the municipality or whoever is claiming under the tax title.

Wide latitude

With that said, however, the courts do give some pretty wide latitude to the tax collector. The case of *Town Of Franklin v. Metcalfe*, 307 Mass. 386 (1940), is interesting in that the description was not so much in dispute but rather the dispute related to the instrument from which the description was used for the taking.

The description was as follows: "Land Main and West Central Streets with buildings thereon being the same premises described in deed from Edwin H. Downes, Deputy Sheriff, to Bertha Bachner dated May 12th, 1934, and recorded with Norfolk County Registry of Deeds, Book 2028, Page 63, and supposed to contain about 29,040 square feet." *Id.*, at 387.

The litigated issue related to the fact that the description was not based on chain of title deeds into the taxpayer before the assessment, but rather was based on a Sheriff's Deed that was recorded in 1934, two years after the tax year involved (1932) but prior to the demand and taking.

Nonetheless, the court found that such a description did not affect the validity of the taking. *Id.*, at 389-90. Such a description should also comply with Title Standards No. 27 and 4, although the uncertainty about the square footage might need to be resolved.

In *Lowell v. Boland,* 327 Mass. 300 (1951), the description at issue was "29,421 square feet of land, more or less, situate on Dutton Street, as shown on Plan I 17 in office of city engineer." *Id.,* at 301. Relying on the "neither substantial nor misleading" language from G.L.c. 60, §37, and the guiding principles followed in prior tax title description cases, the court agreed with the trial judge's finding that "the descriptions were sufficiently accurate to satisfy the requirements of the statute." *Id.*, at 302. [Emphasis added.]

Crucial to this determination, however, were the facts that (1) the description referred to a plan located in the city engineer's office,[1] (2) the plan showed a small portion of Dutton Street, and (3) the plan showed only one lot on the street with that same area.

In cases like *Lowell v. Boland*, in which the challenged descriptions have been upheld, the courts usually find the descriptions to be "sufficiently accurate." In other words, while the descriptions may have been incomplete or somewhat vague, ultimately, they were accurate in describing the correct property. In addition to the cases previously discussed, *see, e.g., City Of Lowell v. Marden & Murphy, Inc.,* 321 Mass. 597 (1947);[2] *Town Of Lenox v. Oglesby,* 311 Mass. 269 (1942);[3] *City Of Boston v. Lynch,* 304

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Ward Graham is New England regional counsel for Stewart Stewart Title Guaranty Company. He serves on REBA's Title Standards Committee and Legislation Committee.

REBA
THE REAL ESTATE BAR ASSOCIATION
for Massachusetts

Annual Meeting Seminar

Wyndham Westborough
5400 Computer Drive
Westborough, MA 01581

Monday, November 15, 2004
8:30 a.m. – 4:00 p.m.

www.massrelaw.org

THE MORNING SESSIONS

Employment Law for Lawyers

Estate and Medicaid Planning Impacting Real Estate

Handling Commercial Real Estate Financings

Stress Management for Real Estate Lawyers

Title Insurance Claims - Myths, Methods and Mistakes

THE AFTERNOON SESSIONS

Recent & Pending Legislation: Summary & Highlights

Recent Developments in Massachusetts Case Law

CONTINUING EDUCATION COMMITTEE CHAIR

Pamela Butler O'Brien, Esquire

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Complete this form, include the appropriate fee and return to REBA Educational Foundation, Attn: 2004 Annual Meeting Seminar, 50 Congress Street, Suite 600, Boston, MA 02109-4075 or FAX to: (617) 854-7570.

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BREAKOUT SESSION PREFERENCES: please rate (1-5) order of your preference:

_____Employment Law for Lawyers, (Wilson, Reuben, Ward, Neal)

_____Estate and Medicaid Planning Impacting Real Estate (Ryan, Cushing)

_____Handling Commercial Real Estate Financings (McCarthy, Mitchell)

_____Stress Management for Real Estate Lawyers (Bowe)

_____Title Insurance Claims - Myths, Methods and Mistakes (Heffernan, Looney, Butler O'Brien)

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For additional information, telephone the hotel at 508-870-5965.

FROM BOSTON: Follow the signs to the Massachusetts Turnpike (I-90) West, Take Exit 11A (Route 495 North), Take Exit 23B (Route 9 West) to Computer Drive/Research Drive Exit (First Exit off Route 9) bear right at the end of the exit, Drive 1/2 mile and the hotel is on the top of the hill.

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Wyndham Westborough
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REBA
THE REAL ESTATE BAR ASSOCIATION
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Monday, Nov 15, 2004
8:30 a.m. – 4:00 p.m.

SCHEDULE OF EVENTS

8:30am - 4:00pm

Registration Desk and Exhibits Open

9:00am - 9:45am
or
10:00am - 10:45am
or
11:00am - 11:45am

THE MORNING SESSIONS
Most sessions will be repeated.
Refer to schedule at registration.

Employment Law for Lawyers
David B. Wilson, Esq.; Catherine E. Reuben, Esq.; Beverly I. Ward, Esq.; Anthony Neal, Esq.
"En casa de herrero, cuchillo de palo": (*In the house of the ironworker, the knives are made of wood)*
You are a sole practitioner or a partner in a small firm. You may be well versed in the aspects of real estate law that comprise your practice, but how much do you know about the laws and regulations affecting you and your clients as employers? As your firm grows from one lawyer to a hard-working group of lawyers, paralegals and support staff, employment law issues can take more and more of your time, and can lead to costly learning experiences. You may know a lot about real estate law, but you know you have a lot to learn when it comes to employment law.
Come listen to experienced employment law practitioners discuss these and other common employment law issues faced by legal practices from different perspectives. Management side attorneys Catherine E. Reuben and David B. Wilson, whose clients include several law firms, will discuss these issues from the perspective of the employer. Employee-side Attorney Anthony Neal will present on these issues from the employee's perspective, and also from his perspective as an employer in his own legal practice. MCAD counsel Beverly Ward will give the perspective of the Massachusetts Commission Against Discrimination (MCAD), which has handled numerous cases involving legal practices. Join us for this highly practical and interactive seminar.

Estate and Medicaid Planning Impacting Real Estate
Robert H. Ryan, Esq.; Leo J. Cushing, Esq.
Attorneys Robert H. Ryan of the Law Firm of Bove & Langa, P.C. and Leo J. Cushing of the Law Firm of Cushing and Dolan, P.C. will review and discuss various planning techniques utilized for Estate ad Medicaid Planning which involve real estate. This session will provide attorneys with examples and insight into the rationale for deeds involving life-estates, powers of appointment, and title held in trust. The panelists will also discuss the drastic consequences that can result if the title is changed without consideration being given to the underlying Estate or Medicaid plan.

Handling Commercial Real Estate Financings
Marijo McCarthy, Esq.; Beth H. Mitchell, Esq.
You are an experienced real estate attorney who handles many residential loan closings for a local bank. One day, a loan officer of the bank calls and asks you to handle the closing of a $2 million loan on a small office building in the suburbs. - This program will explain some of the differences between handling loan transactions for residential and commercial loans and will provide practical tips on how to efficiently conduct commercial loan closings. The speakers will review a typical closing checklist, the due diligence review process, and samples of the key loan documents. The program will also address the roles, responsibilities and concerns of borrower's counsel and lender's counsel.

Stress Management for Real Estate Lawyers
Barbara Bowe, LICSW
Lawyers Concerned for Lawyers, Barbara J. Bowe, LICSW presents Managing Stress: The Inside Job. The focus will be on looking at stress from a variety of perspectives, ie professional, personal, family, cultural and medical. We will also examine strategies and coping techniques to minimize the impact of stress on your functioning and well-being.

Title Insurance Claims - Myths, Methods and Mistakes
Lawrence P. Heffernan, Esq.; Thomas Looney, Esq.; Pamela Butler O'Brien, Esq.
Do title insurance companies ever pay claims or is this just a scam to make money for attorneys? Whom do title insurance companies hire as counsel, and why? How does representing an insured or an insurer differ from representing any other real estate litigant? Panelist Lawrence P. Heffernan, Esq. will speak from the perspective of representing the insurance company. Thomas M. Looney, Esq. will describe the intricacies of representing an insured when hired to do so by the title insurance company. Pamela Butler O'Brien, Esq. will answer that elusive question - Do title insurers every pay? - and she will describe the handling of claims from an insurer's perspective.

11:45am to 12:45pm

The Exhibitors Hour
NEW! 30 Exhibitors this year! Look for the REBA Booth where you can call your representative to support the REBA sponsored Mortgage Discharge Bill. Also, Senator Marian Walsh will have a booth to collect clean mens' and womens' suits in support of her "Suits for Success" project.

12:45pm - 2:20pm

Luncheon

1:20pm - 1:40pm

REBA President's Remarks,
E. Christopher Kehoe, Esq., President

1:40pm to 2:00pm

Keynote Address
Michael S. Greco, President Elect, American Bar Association

2:00pm to 2:20pm

REBA Business Meeting
Clerk's Report
Treasurer's Report
Title Standard Committee Report
Forms Committee Report
MCA Name Change Vote

2:20pm - 2:30pm

Refreshment Break and Exhibits

2:30pm - 4:00pm

The Afternoon Sessions

2:30pm - 3:00pm

Recent & Pending Legislation:
Summary and Highlights;
Robert H. Kelley, Esq. and Edward J. Smith, Esq.

3:00pm - 4:00pm

Recent Developments in Massachusetts Case Law
Philip K. Lapatin, Esq.

GENERAL INFORMATION

- Premium credit for professional liability insurance may be given for attending properly documented continuing legal education programs.
- Continuing Legal Education credit can be made available in other New England states. Contact REBA for specific details.
- Registration for REBA's 2004 Annual Meeting Seminar is open to REBA members/ associates in good standing, their guests and non-members/associates (for an additional fee). Everyone attending the REBA 2004 Annual Meetings Seminar must register. The Registration Fee includes the cost of the morning and afternoon sessions, the seminar written materials and the luncheon. We are unable to offer discounts for persons not attending the luncheon portion of the program.
- Please submit only one registration form per person. Additional registration forms are available at our website@ www.massrelaw.org or by emailing Nicole Cohen at cohen@massrelaw.org.
- Confirmation of registration will be sent to all registrants by email or mail. Name badges and a list of registrants will be distributed with program materials.
- Registrations with the appropriate fee should be sent by mail or fax to arrive by Oct. 29, 2004 to guarantee a reservation at the Annual Meeting Seminar. Registrations received after October 29, 2004 are subject to an additional processing fee of $25. Registrations canceled in writing after October 29, 2004 are subject to a processing fee of $25. No other refunds will be permitted. Substitutions of registrants attending the program are welcome and may be made at any time. Written materials will automatically be mailed to "No Shows" after the program.
- The use of cell phones and pagers is prohibited in the meeting rooms during the programs.

SJC clarifies scope of 'growth control' zoning bylaws

Continued from page 1

gaging in planning studies.

The court in *Sturges* surmised that the necessary planning studies and their implementation could take a period of 10 years to complete. Premising its decision on its understanding that the town would proceed with the studies in good faith, the court noted that "a very different case would be presented if it were determined that the town was not proceeding with the necessary studies which were said to be the basis for the enactment of the rate of development bylaw." 380 Mass. at 259, n.16.

The *Hadley* case was the "very different case" anticipated by the court in *Sturges*.

In *Hadley*, the record was clear that although the Town of Hadley had engaged in two planning studies, it did not adopt many of the measures recommended in the studies that it undertook, including the adoption of a comprehensive land-use plan, an overhaul of its zoning bylaws to include a cluster development bylaw, and bylaws increasing minimum lot sizes or the hiring of a full time planner.

Significantly, the record in *Hadley* included the observation in one of the studies that the rate of development bylaw was frustrating, rather than furthering, its stated objective of preserving the town's agricultural land and character.

Observing that while classic zoning bylaws "keep the pig out of the parlor, *see Euclid v. Amber Realty Co.*, 272 U.S. 365, 388 (1926), rate of development bylaws tell the farmer how many new pigs may be in the barnyard each year," the SJC concluded that while a town may utilize zoning bylaws to allow "breathing room to plan for the channeling of normal growth," that breathing room may not be converted into a "choke hold against further growth."

In reviewing the *Hadley* record, the court concluded that 15 years was "more than ample time" for the Town of Hadley to have completed whatever studies were necessary to formulate a plan to preserve agricultural resources and its rural character.

The SJC found, as had the Land Court, that there is no statutory bar to the adoption of the rate of development bylaw and focused its attention on the constitutional inquiry of whether the bylaw was rationally related to a legitimate zoning purpose.

Concluding that it does not serve the "general welfare of the Commonwealth" to permit one particular town to deflect population growth onto adjoining communities, the court found that neither the desire for enhanced fiscal management nor the constraints imposed by Proposition 2? presented a proper basis for enacting a bylaw aimed at controlling the rate of growth for the indefinite future.

The *Home Builders Association* case

In *Home Builders Association of Cape Cod, Inc. v. Cape Cod Commission*, the court upheld a zoning bylaw imposing an annual cap on the number of residential building permit issued within the Barnstable District of Critical Planning Concern ("DCPC") and distinguishing between building permits issued for affordable housing dwelling units and those issued for market rate units.

The court's analysis centered on the Home Builders Association's contention that designation of the entire Town of Barnstable as a DCPC was invalid under St. 1989, c.716, the act establishing the Cape Cod Commission.

The court found that nothing in the Act prohibited the designation of an entire town as a DCPC, which is defined under the Act as "a geographic area of Cape Cod identified by the Commission as requiring special protection."

Among the criteria relevant in determining eligibility for designation are the presence of significant natural, coastal, scientific, cultural or other resources; the presence of substantial areas of sensitive ecological conditions rendering the area unsuitable for development; and the presence or proposed establishment of a major capital public facility or area of public investment.

The SJC found sufficient evidence in the record to support the designation of Barnstable as a DCPC and the validity of its implementing bylaws, including evidence that there was a need to protect the local and regional water supply and the sole source aquifer over which the entire Town of Barnstable is located.

The court devoted several pages of its opinion to detailing the process of nominating Barnstable as a DCPC, which included (i) a public hearing before the Cape Cod Commission; (ii) the approval of the guidelines for development established by the Commission; and (iii) the designation's subsequent approval by the Barnstable County Assembly of Delegates, which included representatives of all 15 municipalities of Barnstable County.

The court concluded that the legislative record contained ample findings to establish a link between uncontrolled building on potentially buildable lots and adverse environmental impacts to the region's water supply and other natural resources, such as the contamination of shellfish beds containing the internationally renowned Cotuit oysters in Barnstable's coastal embayment from the nitrogen discharged from area septic systems.

Further analysis

Significant in both the *Town of Hadley* and *Home Builder's Association* cases was the court's willingness to examine in detail the legislative record and rationale articulated for the bylaw in question and to seriously examine the link between the articulated purpose and limitation or burden imposed on landowners by the bylaw's enactment.

Municipalities considering the adoption of growth control bylaws of any type would do well to study carefully these two rulings. Consistent with the holding in the *Town of Hadley* case, bylaws that impose building caps of unlimited duration will be struck down if challenged absent unusual circumstances. Neither the fiscal constraints imposed by Proposition 2? nor the general desire to maintain the rural character of a community will suffice to justify this type of bylaw.

The *Town of Hadley* decision leaves undisturbed, however, the *Sturges* holding recognizing the validity of growth controls of limited duration to give a municipality breathing room to study specific issues and implicitly encourages a focus on regional planning. Notably, the court's observation concerning the impacts of a bylaw such as Hadley's on the surrounding communities was central to its finding that the bylaw is inconsistent with the general welfare.

In contrast, the bylaw upheld in the *Home Builder's Association* case was the result of a planning effort that included comprehensive environmental studies linking the impact of residential growth on specific and unique natural resources and included an assessment of regional impacts.

The cataloging of these resources by regional planning agencies coupled with the active participation of city and town planners from all communities within a region sharing similar resources and problems will ultimately result in bylaws that are more equitable to landowners and better achieve the long-term preservation of natural and financial resources.

The court's opinions in these two cases also provide considerable guidance to landowners and their counsel seeking to challenge bylaws.

In both cases, the record in terms of the legislative findings purporting to support the bylaw's enactment and the evidence establishing the efficacy of the bylaw in achieving its stated goal were of paramount importance to the court.

The decisions suggest that the SJC will not merely accept at face value an articulated rationale for a challenged bylaw, but will carefully examine the supporting evidence to determine whether the bylaw in question meets the constitutional standard of being reasonably designed to accomplish its stated purpose.

Confronting the 'unpleasantness' of planning

Continued from page 8

measure that?" and the invariable follow-up "Are those the right measurements?"

It's important to define success clearly because even before the plan is implemented, there needs to be a reality check on whether the plan will actually lead to success. A clear understanding of success makes it easy to evaluate a plan in theory before it's implemented. More importantly, it makes it easier to evaluate the plan while it's being implemented.

Planning books and manuals rightly stress the importance of evaluation. Unfortunately most of us don't like to be criticized and so we avoid as much as possible the process of hard evaluation.

Rule #3: Define failure at the outset

It's hard to motivate people to talk about the prospects of failure. No one wants to be the voice in the crowd to ask, "What if this doesn't work?"

That person, we smugly judge, is the ultimate naysayer. Yet a part of planning requires addressing failure. As in each of these "unpleasant" tasks, addressing failure during the planning process can forestall much greater discomfort and embarrassment afterwards.

A simple way to address failure is to ask, "How will we know if the plan isn't working?"

We should identify warning signs that things aren't going as expected. We should assess probability versus possibility. Anything is possible but not everything is probable.

Defining failure and its warning signs can allow a firm to decide when to "pull the plug" on an initiative, when to stop and re-assess.

It's easier to save face when a plan isn't working by changing the definition of success, a kind of "revisionist history," but in the long-run time, energy, morale, and money can be wasted at great cost to the common good of the organization.

Planning is a challenge to individuals and to companies. It's no wonder that asking unpleasant questions is avoided. Yet by asking questions about assumptions and consequences, about success and failure, during the planning process, enduring the "unpleasantness" they bring, we can increase the likelihood that our plan will be successfully implemented and the desired results achieved.

REBA to launch lawyer-mentoring program

REBA's Membership and Public Relations Committee is preparing to launch in the first quarter of 2005 a mentoring program intended to assist members new to the practice of real estate.

"REBA members are experienced real estate lawyers who are committed to providing newer lawyers with guidance to help them in their professional development," said Sami Baghdady, Committee Chair. "The REBA mentor will be available to discuss real estate-related matters and to provide guidance. Our mentor program is intended to be flexible, informal and to develop collegiality among the participants. The parties may meet, talk over the telephone, or communicate by email as they choose."

Areas of real estate law in the program include residential buyer/seller representation; residential lender representation; commercial buyer/seller representation; commercial lender representation; residential landlord/tenant; commercial landlord/tenant; condominium law; environmental matters; zoning and land use; real estate litigation; and foreclosure practice.

REBA mentors will agree to serve for a period of six months. Applications for the mentoring program can be obtained by contacting Susan Graham at REBA, graham@massrelaw.org or by telephoning her at 800 496-7699.

Send a letter to the editor!

Peter Wittenborg, Executive Director, REBA
50 Congress St., Suite 600, Boston, MA 02109-4075 or
wittenborg@massrelaw.com

New state program revolutionizes mortgage insurance

Continued from page 2

So much for evolution. Now comes the revolution. Since its inception, the mortgage insurance industry has offered solid financial protection to lenders. However, the consumer received a benefit that was far more ephemeral. Indeed, in the eyes of industry critics, the borrower was financially committed to a long-term lender protection policy that offered no tangible benefit to that borrower's "bottom line."

New chapter

On July 1, MassHousing opened a new chapter in the history of mortgage insurance by combining conventional mortgage insurance protection for lenders with a new consumer benefit known as "mortgage payment protection" that pays borrowers up to $2,000 per month in principle and interest payments in the event a borrower becomes unemployed. The benefits can last up to a total of six months and be paid out anytime over the first 10 years of the mortgage term. Best of all, this new benefit comes at no additional cost.

Why offer such a product? Experience tells us that fear of unemployment, along with the specter of unanticipated home repair expenses, constitute two of the largest psychological barriers to home ownership for otherwise qualified borrowers. The benefit borrowers receive is designed to reduce delinquencies and foreclosures that can occur when a borrower loses their job for an extended period of time. Fewer defaults mean fewer mortgage insurance claims.

On July 1, MassHousing opened a new chapter in the history of mortgage insurance by combining conventional mortgage insurance protection for lenders with a new consumer benefit known as "mortgage payment protection" that pays borrowers up to $2,000 per month in principal and interest payments in the event a borrower becomes unemployed.

MassHousing's MIPlus™ covers a term (10 years) twice as long as alternative mortgage insurance products that private companies are beginning to offer. It is also an all-inclusive product; all income-eligible borrowers who qualify for mortgage insurance automatically receive mortgage payment protection.

Every income-qualified consumer (and every real estate attorney) should be familiar with the benefits of MIPlus™. Home financing for low- and moderate-income homebuyers will never be the same and mortgage insurance has changed forever.

ABA president-elect to speak at REBA annual meeting

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Boston law firm of Hill & Barlow. He has also served as an arbitrator or mediator in complex business disputes.

He has chaired a number of ABA committees, including the Standing Committee on the Federal Judiciary and the Section on Individual Rights & Responsibilities. After the terrorist attacks on Sept. 11, 2001, he served on the ABA Task Force on Terrorism and the Law, which provided an analysis the of legislation that resulted in the USA Patriot Act, and helped develop ABA policy regarding the use of military tribunals to try suspected terrorists.

Greco has represented Massachusetts in the ABA House of Delegates since 1985. Greco will be the 129th president of the American Bar Association and the fourth ABA president from Massachusetts.

He has also served as president at the Massachusetts Bar Association, the New England Bar Association and the New England Bar Foundation. Greco is a member of the Board of Directors of the New England Council, and since 1998 has served as chair of the ground breaking Creative Economy Initiative, a regional economic/cultural development effort designed to attract investment in New England's creative economy.

His public service activities include 10 years on the Board of Overseers of the Newton-Wellesley Hospital and vice-chair of the Massachusetts Board of Bar Overseers. He also served for eight years on the Executive Committee of Gov. William F. Weld's Judicial Nominating Council, and as a member of Sen. John F. Kerry's Commission on (Federal) Judicial and Prosecutorial Appointments. He also served for two years as president of the Board of Trustees of Massachusetts Continuing Legal Education, Inc.

Greco is also a member of the American Law Institute (ALI).

He graduated from Princeton University on 1965 and prior to law school taught English for two years at Phillips Exeter Academy in Exeter, N.H. He received his J.D. from Boston College Law School in 1972 where he was editor-in-chief of the Boston College Law Review and president of his class. After law school he spent a year as clerk to Leonard P. Moore on the 2nd U.S. Circuit Court of Appeals and a year as a fellow at the Institute of Comparative Law, University of Florence, Italy.

REBA assists statewide technology initiative at registries

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statute. With the help of these funds, registries have been able to increase their staff and improve equipment.

The Worcester and Cambridge registries have new computer equipment, and there is online access to the records of the Secretary of State in Franklin, Hampshire, Worcester North and South Registries, the three Berkshire Registries, Middlesex North and South, Suffolk and Essex North and South Registries.

The County Registries with online access to records are Barnstable, Bristol South, Hampden, Nantucket, Plymouth and Norfolk. There is also off-site access to the records of Bristol North and Fall River Registries.

Agenda items for the committee to review at its meeting held Sept. 29 included: Electronic recording, document formatting standards and fee disparities among registries.

In addition to continuing to work with the Technology Advisory Committee, the REBA Registries Committee envisions having a seminar for registry staff in an effort to enhance document indexing consistency among the various registries of deeds and in conformance with the indexing standards of the Massachusetts Association of Registers and Assistant Registers of Deeds.

A prior seminar held for the registry staff was successful in reviewing the indexing at various registries and the indexing standards of that association. During the prior seminar, discussions revealed the need for updating the indexing standards.

The Registry of Deeds Committee will offer its assistance to the Association of Registers and Assistant Registers of Deeds in updating indexing standards and implementing those standards at the various registries to increase uniformity among them.

Both Plymouth County Registries and Middlesex South Registry have implemented satellite offices to allow off-site recording of instruments. Presently, only unregistered instruments may be recorded in Brockton and Rockland in Plymouth County and in Lowell for Middlesex South Registry.

The satellite offices have been very well received, and it is hoped other registries would be receptive to satellite offices for recording. Additionally, corporate certificates of legal existence are now available to be picked up at the Middlesex North Registry of Deeds when ordered online through the Secretary of State's office. The instructions are available on the Middlesex North Registry of Deeds' website.

The REBA Registries Committee will be scheduling regular meetings and invites all those interested in serving on the Committee to contact Edward Rainen or Gregory N. Eaton.

Hotline established to report unauthorized practice of law

In response to increasing member concern about witness closings conducted by out-of-state lenders and others, REBA has set up an unauthorized practice of law e-mail hotline: *upl@massrelaw.org*.

REBA members who encounter or observe possible violations of Massachusetts law can respond by e-mail directly to the association's Committee on the Practice of Law by Non-Lawyers.

All responses will be held in confidence. Documents supporting any alleged UPL claims can be faxed to REBA at (617) 854-7670.

From the President's desk

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practical issues that confront attorney notaries on a daily basis. We were therefore pleased and gratified that the Governor's counsel, Dan Winslow, revised the order to provide an exception for attorneys from the requirement of keeping a notary journal, for which I am grateful every time I conduct a closing.

In looking ahead to the end of 2004, I would like to thank Peter Wittenborg, our executive director, and Susan Graham, our chief operating officer, for implementing the vision of REBA's Board of Directors. I would also like to thank each of our board members for their diligence in 2004. Until you have attended one of our directors meetings, you really would not understand just how dedicated and hard working REBA's directors are on your behalf.

I would also like to thank my law firm, Robinson & Cole LLP, for allowing me the time this year to act as the steward of REBA and to follow in the footsteps of my former partners, Fosdick Harrison and Denis Maguire and my former associate, Ruth Dillingham – all past presidents of this association.

Finally, to president-elect Dan Osoff, I wish you the best of luck. I will be there to support you in 2005, and I trust that you will have an experience similar to my own which has been the finest professional experience of my life. Thank you.

Massachusetts courts continue to narrow standing for claims based on traffic impact

Continued from page 4

a member of the community living a mile from the proposed development could not establish a "special and different" injury, even if the plaintiff frequently used the roads likely to be impacted by the proposed development.

Thus, as of the Appeals Court's decision in *Nickerson*, it appeared that there was a line that existed somewhere between the distance of a direct abutter and a mile away, such that if the plaintiff lives closer to the proposed development than the line, the plaintiff could state a claim for standing based on traffic, but a plaintiff living further away could not.

The SJC's 1977 observation in the *Boston Edison* case, quoted in *Nickerson*, about "grave doubts" about a plaintiff living a third of a mile away may have given the traffic standing line further definition.

Post-*Nickerson* cases

Even abutters must articulate specific, non-speculative, facts to establish standing based on traffic concerns. Several post-*Nickerson* cases have held abutters to the requirement that they articulate specific, non-speculative, facts to establish an impact from traffic as a basis for standing.

For example, in *Chin Kwee Quek v. Armendo,* No. 03-2262A (Super. Ct. June 30, 2004) (Agnes, J.), Superior Court Judge Peter Agnes held that because the plaintiff-abutter could offer no more than "unsubstantiated opinions" that the proposed development would "contribute to traffic problems" on the street, plaintiff lacked standing.

By contrast, in *Quigly v. Mulhern*, Misc. Case No. 281991 (Land Court May 1, 2003) (Piper, J.), abutters offered specific facts that made an inference of increased traffic reasonable. Land Court Judge Gordon H. Piper said it was reasonable to conclude that an expansion of Winchester Hospital's emergency department would exacerbate an existing problem of hospital traffic queuing on plaintiff's street, and using residents' driveways to turn around while searching for parking.

Similarly, in *Brida Realty, LLC v. Planning Board of the Town of Holliston,* No. 995920 (Super. Ct. Nov. 1, 2002) (Graham, J.), Superior Court Judge R. Malcolm Graham said the fact that the plaintiff-abutter and the developer shared the same driveway was sufficient to establish that concerns about increased traffic using the shared driveway was a special and different injury. The judge observed, "[t]he general public, which does not abut the [proposed development] property, would not incur those impacts."

In non-abutter cases, the courts have continued to draw the line closer beyond which plaintiffs cannot establish a "special or different" traffic-related injury. Several non-abutter cases have demonstrated the courts' skepticism that members of the community living remotely from the proposed development can establish "special or different" injury related to increased traffic.

For example, in *Moot v. Planning Board of the City of Cambridge*, Misc. Case No. 292244 (Land Court Sept. 15, 2003) (Trombly, J.), a group of housing advocates in Cambridge appealed a zoning decision by the planning board that would have permitted Forest City, developer of University Park in Cambridge, to proceed with a development in one corner of University Park.

The planning board and Forest City (represented by the author of this article) moved for summary judgment on standing grounds, presenting excerpts from the depositions of each of the plaintiffs.

Focusing on the plaintiff living closest to the proposed development, Land Court Judge Charles W. Trombley Jr. found that although the plaintiff was an abutter to University Park (although not directly across the street from the proposed site), her concerns about traffic on her street were insufficient.

"Other than a general concern of increased traffic on Brookline Street, plaintiff Lynch is unable to articulate any harm that is specific to her," Trombley wrote.

Similarly, in *Henry v. Andover Planning Board*, Civ. Action No. 03-0047D (Super. Ct. April 8, 2004) (Riley, J.), plaintiffs appealed a special permit for the construction of an office/warehouse building.

To establish standing, plaintiffs, one living as close as a half-mile from the project, offered evidence that the proposed development would increase traffic on the streets on which plaintiffs lived. They argued that that their injuries were distinct from the rest of the community because they lived on the roads that would be most affected by the potential increase in traffic.

But Superior Court Judge Patrick J. Riley found that while at least one plaintiff lived closer than the plaintiff in *Nickerson*, plaintiffs could not meet the requirements for standing.

Greater guidance

Thanks to these post-*Nickerson* trial court cases, we have greater guidance from the courts as to when a plaintiff can satisfactorily claim aggrievement from increased traffic. Cases like *Moot* and *Henry* appear to mean that unless one lives on the street of the proposed development, concerns about increased traffic are likely not to be sufficiently special and different from those generally felt by the community.

Yet, cases like *Chin Kwee Quek* and *Quigly* mean that abutter status alone is not sufficient to make a claim of increased traffic "special and different." Rather it must be accompanied by showings specific to the plaintiff, such as interference with plaintiff's driveway by likely users of the proposed development.

SJC clarifies 'grandfathering' under G.L.c. 40a, §6

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tain such protection."

Irregular results

The Board had argued that its more restrictive interpretation reflected a recognition that owners of many lots are better able to configure them to comply with increased lot size requirements. But the SJC countered that the town's position would produce "irregular and inequitable results – of which this case is a prime example."

Applying the town's reasoning, the court noted, if Marinelli had owned four buildable lots originally, he would have had only two buildable lots after the zoning change. But had he owned only three lots initially, all three would have been protected from the new zoning rule. "If the legislature intended such a result, it would have said so with greater clarity," the court concluded.

Although this is a case of first impression, the SJC's decision reflects a straightforward interpretation of the statute that is certainly welcome, but not particularly surprising.

The Board did raise a legitimate issue concerning the application of the statute in determining which of the lots would be among the three exempt. The Land Court answered the question by holding that once three of the commonly held lots receive the benefit of the common lot protection, no additional lots are eligible for protection. That is, a first come, first served approach.

The SJC endorsed this approach holding that as the subject lot was "among the first three to seek a building permit" the Land Court Judge correctly ruled that the common ownership grandfathered protection of §6 was applicable.

A question of standing

Among the many arguments the Stoughton Appeals Board advanced against Marinelli's appeal was the contention that Marinelli lacked standing to appeal the zoning decision. According to the Board, Marinelli's purchase and sale agreement was invalid because only one member of the realty trust had signed it. Because he did not own or have a valid interest in the parcel, the board said, Marinelli was not a "person aggrieved" and thus did not have the required standing to bring his suit.

This argument directly raised the question of what amount or nature of evidence is necessary to rebut the presumption of standing. The decision appears to provide the first clear and unequivocal holding by the SJC on the question.

The Court held that in order to rebut the presumption of a plaintiff's standing, a defendant must offer evidence warranting a finding contrary to the presumed fact.

The SJC found that Marinelli, as an applicant, was entitled to a presumption that he had standing. As Marinelli's standing was premised upon the purchase and sale agreement, the analysis translated into a presumption that Marinelli's purchase and sale agreement was valid and that he had an interest in the subject locus.

It was not enough for the board to highlight potential deficiencies in the purchase and sale that supported Marinelli's interest. The board, in order to rebut the presumption, had to offer evidence warranting a finding that he did not have the claimed interest in the subject lot (i.e., that the purchase and sale was invalid).

Therefore, both the nature of the presumption in a zoning case and the evidence necessary to rebut same have been clarified. The presumption of aggrievement clearly means that the fact or facts upon which a plaintiff relies in support of standing are presumed to be true. In order to rebut a presumption, a defendant must do more than challenge standing with additional evidence. A defendant must be able to "offer evidence warranting a finding contrary to the presumed fact."

It is interesting to note, however, that the board did not challenge Marinelli's ability (or standing) to act as applicant. The board challenged Marinelli's standing to appeal the Board's decision to the Land Court.

While Marinelli maintains the outcome would have been identical in this case, it is clear that the analysis would have been significantly different as Marinelli would not have benefitted from any presumption in connection with a challenge to his ability to act as applicant.

Marinelli was a plaintiff applicant in this case. The court's analysis may be limited by this fact. However, there appears to be no reason this analysis regarding the quantum of evidence necessary to rebut the presumption of standing would be different where a plaintiff is an abutter. If so, this unequivocal holding may make it more difficult to effectively rebut the presumption of standing in certain zoning cases.

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REBA members who wish to participate in this free member benefit may contact REBA's Information Technology Manager, Bob Gaudette, at *gaudette@massrelaw.org*. All inquiries received at REBA headquarters are referred to this web page.

Practice concentrations include: affordable housing; commercial leasing; commercial real estate finance; land use and zoning; real estate litigation; title insurance; title examination; residential conveyancing; and environmental law.

Attorney General Reilly to speak at Spring Seminar

Attorney General Thomas F. Reilly will deliver the luncheon keynote speech at the REBA Spring Seminar on Monday, May, 9, 2005 at the Wyndham Westborough.

A 1970 graduate of Boston College Law School, he was elected Attorney General in 1998.

Examining tax titles and descriptions: Part II

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Mass. 272, 275 (1939).[4]

In some cases in which the descriptions have been deemed insufficient, even in the face of the savings language of G.L.c.60, §37, the underlying basis was that the description was incomplete or vague to the degree that the court could not determine what property was being described. *See, e.g., McHale v. Treworgy*, *supra*, and *City Of Springfield v. Arcade Malleable Iron Co.*, 85 Mass. 154 (1934), both discussed below.

In other cases, it was determined that the tax taking instruments described land that the person assessed did not own, *Holcombe v. Hopkins*, 314 Mass. 113 (1943), or for which the taxpayer could not be properly taxed, *Lancy v. Boston*, 186 Mass. 128 (1904)("when an easement [in this case a railroad easement] in land taken for a public use involves practically the exclusive possession and control of the property by the public, and leaves the original owner [of the underlying fee] with no right of substantial value, the property is exempt from taxation"). [5]

More recent case

A more recent case dealt with a situation in which closer comparison of the tax title description with the record chain of title descriptions of the assessed party's property revealed that the property in controversy was not actually included in the description used for the taking. *Sheriff's Meadow Foundation v. Bay-Courte Edgartown, Inc.*, 401 Mass. 267 (1987).[6]

In *McHale*, the property involved had once been a larger lot shown on a recorded plan[7] as "Lot 18 Unit 4." But the lot had been split up and a portion of it had been conveyed to a relative of the owner by a deed with a metes and bounds description together with a recital that the property conveyed was a part of Lot 18 Unit 4 shown on the plan.

The description used in the tax title instruments was as follows: "George Wolfe:[8] 19,340 square feet of land, more or less, with the buildings thereon being part of lot numbered 18, Unit 4, on a plan of land entitled, 'River Pines' and recorded in said Registry [Middlesex North District], Plan Book 52, Plan 10 [the Smith plan]." *Id.,* at 383. [Footnote added.]

Notwithstanding the savings language of G.L.c.60, §37, and the fact that the portion of the lot that was conveyed was conveyed by a description that included a metes and bounds description and a recital that it was a portion of the larger original lot, the SJC found the tax title description to be insufficient, stating, "In our view this described no land at all and therefore conveyed no land." *Id.*, at 385.

Presumably, the description of what remained could have been determined with a reasonable degree of certainty by title examination and calculation. Nonetheless, this type of description was insufficient even for tax title purposes.

Similarly, in *City Of Springfield v. Arcade Malleable Iron Co.*, *supra,* the property was described as a "lot of land containing about 202,864 square feet with building thereon situate on the easterly side of Page Boulevard and adjoining estate now or formerly of other land of said Arcade Malleable Iron Company." *Id.,* at 155.

The trial court found that "[a] proposed purchaser could not tell, the owner did not understand, nor, with the examiner's report before me, can I ascertain what the tract of land was that was described as being situated on the easterly side of Page Boulevard adjoining estate now or formerly of other land of the Arcade Malleable Iron Company and containing about 202,864 square feet." *Id.* The SJC upheld that finding.

Martha's Vineyard case

Contrast these cases with the case of *Krueger v. Devine*, 18 Mass. App. Ct. 397 (1984). In *Krueger*, the description used for a 1927[9] tax taking was "Leona M. Savage – land at South Beach[10] consisting of a tract of 39 acres." *Id.*, at 399. [Footnote added.]

As the Appeals Court stated earlier in the case, "That the description was not precise is beyond peradventure; the question is whether it was so insufficient as to constitute an irregularity which is 'substantial' or 'misleading' within the meaning of G.L. c. 60, § 37, as amended by St. 1976, c. 322. See *Springfield v. Schaffer*, 12 Mass. App. Ct. 277, 279 (1981)." *Id.*, at 398.

Concluding that the description in the valuation list, in the notice of sale, and in the tax deed was sufficiently accurate to withstand attack, the Appeals Court quoted the findings of the Land Court judge as follows:

"Edgartown at the brink of the Great Depression was a town with a population small in number and a large undeveloped acreage. There was local awareness of the … ownership by Leona Savage … The history of the chain of title to land of the South Beach Company as shown on [a plan received as exhibit 29] and of the description on the valuation list bear a striking resemblance. The correlation between the area assessed and the record title impels the conclusion that the thirty-nine acres (with the dwelling house and barn) represent the area set off to Gerald J. Savage [Leona's husband and a predecessor in the chain of title] in the partition … The townspeople were familiar with the Savage property and aware of the partition piece. Mrs. Savage could have been in no doubt as to what was intended since she previously had redeemed the property from a prior taking for the non-payment of taxes. This case is unique to its time and locality and is a product of an era which has now passed." *Id.*, at 400.

The Appeals Court discussed other findings by the Land Court judge that it found significant in this case:

"The judge also found that drawing a more precise description would have required the town to hire a title examiner and surveyor at a time when the number of professional people on the island was limited. Although she thought the description in the valuation list and notice 'minimal,' the Land Court judge found that, in the circumstances, the description was reasonably accurate and fairly designated the property for those interested. *Conners v. Lowell*, 209 Mass. 111, 120 (1911); *Franklin v. Metcalfe*, 307 Mass. 386, 389 (1940); *Lowell v. Boland*, 327 Mass. 300, 302 (1951). As to the capacity of the description in the valuation list and the notice of taking to inform the taxpayer of what land was to be sold, the judge inferred that capacity from Leona Savage's redemption of the property when it had been previously the subject of a tax taking. There was testimony that the description, in its shorthand way, would have described the partition parcel to islanders in the 1920's. Indeed, the descriptions of three other parcels ad-

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vertised together with the locus as up for tax sale were equally minimal. *Id.*, at 400-01. [Footnotes omitted.]

Although affirming the Land Court judge's findings and conclusion, the Appeals Court cautioned that, even with this factual background supplementing the record, "[a] finding that the rudimentary description here employed was sufficient – at least to the degree that its insufficiency was neither substantial nor misleading – may not have been inevitable, i.e., there was conflicting evidence." *Id.,* at 401.

In aid of resolving the conflict, the Appeals Court found that it was appropriate for the Land Court judge to consider "the rural and sparsely settled nature of Edgartown at the time of the tax title proceedings, and the information imparted to property owners even by crude descriptions [citation omitted] … the taxpayer's relative sophistication (she and her husband held real estate for investment), the taxpayer's previous redemption,… and the taxpayer's long acquiescence in the tax taking.[11] Compare *Pass v. Seekonk*, 4 Mass. App. Ct. 447, 451 (1976)." *Id.*

In addition, without much discussion, the Appeals Court also upheld the Land Court judge's determination that the description in the tax deed given in 1928 to a successful bidder at the tax sale (which described the property as "Land at South Beach consisting of a tract of 29 acres," *Id.,* at 399-400, where the tract was really 39 acres as described in the assessment and taking instruments) was merely a scrivener's error and not fatal.

Distinction with a difference

Thus, like most any other concept in real estate law, what seems like a simple concept of what constitutes a sufficient description for purposes of a tax title under Title Standards No. 4 and 27 is not always clear. There is sometimes a distinction between what is good record title for purposes of conveyance and what the courts will determine is a sufficient description for purposes of upholding a tax title.

Even in a situation such as discussed in the *Krueger* case, you may have a description adequate for tax title purposes that is not sufficient for record title purposes. In such instances, as the *Sheriff's Meadow* case points out, it is imperative to compare the record title description(s) of the tax title property in the assessed taxpayer's chain of title prior to the tax taking to determine if (1) any discrepancies between the two exist and (2) if those discrepancies can be resolved on the face of the instruments themselves or resort to extrinsic evidence is necessary.

If the descriptions match or are facially consistent and meet the requirement of Title Standard 27 (1) ("a description of a parcel of land must be capable of referring to only one parcel"), you've likely complied with Title Standard No. 4 (2), which, for tax title purposes, requires a "description… sufficient to convey title."

On the other hand, a tax title description that appears vague on its face or varies from the chain of title prior to the taking and requires extrinsic evidence to support it may yet prove to be sufficient, but the resolution of the discrepancy may require a trip to the courthouse. In that event, because, as pointed out earlier, the proponent of the tax title has the burden of proof, be prepared to present as much factual evidence as possible on the issue of whether (1) the description used was sufficient to identify the subject parcel and (2) that any facial ambiguity was, nonetheless, neither substantial nor misleading under the facts and circumstances of the particular case.

[1] In support of the validity of the use of a reference to a plan located in the city engineer's office, the court cited the case of Larsen v. Dillenschneider, 235 Mass. 56 (1920), which is the case we discussed in Part I of this article that established the validity of the use of an off-record assessor's plan as an appropriate plan reference.

[2] Descriptions of three out of four parcels described by area and located northerly (2) and southerly (the other 2) of Jackson St. were sufficient because "locations of the [three distinct] parcels in the assessment book were sufficient to locate them." Id., at 599. As to the fourth parcel, however, it was made up of two parcels previously taxed separately and, as such, "the whole tract could not be sold as a whole for nonpayment of the combined tax upon the [two] parcels." Id., at 602.

[3] Assessment and taking of land designated merely as "No. 7-8" sufficient when combined with very particularized description of the various buildings separately assessed and located on the particular land.

[4] The specific descriptions used were not recited in the case but the court stated, "The description of the lots, though meagre (sic), were not insufficient on their faces. A person visiting the streets and numbers stated would find there lots containing the square feet stated." Id., at 275.

[5] These two cases would also be support for Item (1) of Title Standard No. 4 requiring that a proper party be assessed.

[6] In this case, while there was some discussion of the title history dating back to the early 1800s, the precise tax taking descriptions and their relationship to the property owned by the party assessed were not set out in the case but the SJC noted that the Land Court judge found, upon the evidence, that the takings did not encompass locus.

[7] Referred to in the case as "the Smith Plan."

[8] George Wolfe was the owner of the larger lot and the grantor in the deed conveying a portion of it to a relative by the name of James F. Wolfe.

[9] Significant to the Land Court judge as well as the Appeals Court, was that there was an earlier tax taking in 1918 for nonpayment of 1916 and 1917 taxes which the assessed taxpayer redeemed in 1924, three years prior to the taking at issue in the case.

[10] The case involves land in Edgartown on Martha's Vineyard, which also becomes significant in the analysis.

[11] "The taxpayer lived until 1978,… fifty years had gone by, and a significant number of conveyances out from the original tax deed had occurred [with no action on the part of the taxpayer to redeem or challenge]." *Id.*, at 402.

Reconsidering force majeure clauses in the wake of increased acts of terrorism

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rental space, and be relieved from further rent obligations, when its space is rendered "untenantable or unfit for occupancy" for longer than a certain period.

Are standard force majeure clauses enough?

Most lawyers have reviewed force majeure clauses with renewed interest since Sept. 11. And while it has been a frequent change to add "acts of terror" to the enumerated events, it is worthwhile examining why reliance on the phrase "act of war" is misplaced in the event of a terrorist attack.

President George Bush generally refers to the events of Sept. 11 as an "act of war" and our subsequent actions as part of a "war on terror." Despite President Bush's description of the attacks, the United States was not itself at war at the time of the attacks.

Additionally, there is significant case law developed over the past 25 years (mostly in the insurance law area) indicating courts will narrowly construe the phrase "act of war" to mean hostilities between entities with significant attributes of sovereignty. Indeed, we commonly think of war as occurring between nations, rather than as something propelled by a group of insurgents.

Courts have also rejected the acts of guerilla groups as acts of "war" for insurance purposes. Acts performed by a group of terrorists, rather than a sovereign entity, is probably not an "act of war." This means that the "act of war" exception to performance of contract obligations is likely not applicable to acts of terrorism.

There are also other events enumerated in force majeure clauses that most likely will not excuse performance of contract obligations due to terrorist attacks. Courts examining their meaning in insurance cases have in fact not broadly interpreted words such as "insurrection" and "hostilities," which seem rather generic and prone to broad interpretation. Courts have interpreted the term "hostilities" as narrowly as the term "war."

And courts have interpreted "insurrection" as a violent uprising for the specific purpose of overthrowing the existing government. Violence without such intent, regardless of whether achievement of the intended purpose was realistic or not, will not suffice as an insurrection. Again, these standard force majeure events may not be applicable to acts of terrorism.

Drafting changes

The simplest, and most often made, change to standard force majeure provisions is to include "acts of terrorism" as an enumerated force majeure event. The phrase "acts of terrorism" may be further qualified by adding the language "whether actual or threatened."

Expanding the definition of terrorism to include *threatened acts of terrorism* is helpful to clients since false alarms are

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Reconsidering force majeure clauses in the wake of increased acts of terrorism

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nearly as prohibitive to the flow of business as the actual attacks. Making the *threat* of terrorism a force majeure event also allows clients to err on the side of safety (for example, closing shop for a number of days following a bomb or biological scare to completely search a building) rather than risk the lives and well-being of employees due to the potential threat of lawsuits if a contract is not completed on time.

The term "terrorism" has become a household word for U.S. citizens since Sept. 11, but it is not a word which has been interpreted and subject to judicial scrutiny. Without the additional comfort of judicial interpretation, it may be necessary to broaden force majeure provisions beyond the addition of an "acts of terrorism" phrase.

Another phrase that has emerged more frequently in force majeure provisions is "acts of a public enemy." It may also be possible to provide clients with protection by adding the phrase "or other causes similar to those enumerated" at the end of the list of force majeure events. This "catch-all" phrase should help capture events that are related to the type of events specified but which defy exact definition.

A corollary of the terrorist attacks has been the threat of biological warfare; stories of the proliferation of anthrax dominated the headlines for weeks after Sept. 11 and the fear of other biological and radioactive threats loom. We have learned of businesses being evacuated and mail and machinery being quarantined while testing is performed to evaluate the biological risks to humans. As a result of the changing face of warfare, the terms "epidemics" and "quarantines" may also be appropriate additions to the list of enumerated force majeure events.

Leases and force majeure and casualty clauses

For landlords and tenants alike one of the greatest risks might not be a catastrophic loss like the World Trade Center, but rather a smaller attack that contaminates a building thus rendering it briefly unusable and forever undesirable.

At one extreme, the tenant can bear all the risk associated with this scenario. This would be the outcome if the lease only contained an up-to-date force majeure provision and no casualty clause excusing the tenant in the event the space becomes "unfit."

At the other extreme, the landlord can bear significant risks. For example, the New York/New Jersey Port Authority risked significant liability after the 1993 World Trade Center attack. Some tenants sought to invalidate the Port Authority's force majeure defense to non-performance based on an exception to the force majeure clause for a "party's negligence, willful actions or breach of contract."

The tenants contended – based on a 1986 security report – that the Port Authority was on notice about possible car and truck bomb risks. Its prior notice of such risks opened the Port Authority to a credible claim of negligence for not taking better precautions. Although a court did not ultimately decide the theory advanced by the tenant in this landlord/tenant dispute, it serves as a reminder that in our changed world, every landlord is on notice for a wide range of terrorist activities.

Tenants can protect against such risks by insisting upon inclusion of a well-drafted casualty clause. In leases, a casualty clause allows a tenant to surrender possession of its space, and be relieved of paying further rent, when its space is rendered unusable.

A casualty clause should cover (a) how soon after a casualty event the determination will be made regarding whether the leased space is unusable, and (b) how long will be allowed for reconditioning of the leased space before the tenant may break the lease. Depending on the type of business a commercial tenant engages in, the triggers for a casualty clause may need to be drafted to address the particular needs of the tenant.

Tenants who use leased space to produce products intended for consumption are a special case. They may benefit from a casualty clause that permits them to vacate the lease if conditions affect, or threaten to affect, the integrity of the product. Such a clause may be particularly helpful due to the threat of biological warfare scares.

Most parties have begun to rethink their contract provisions, particularly their force majeure clauses, in an effort to allocate the risk of another major terror attack.

Other contract changes

Force majeure provisions are not the only contract provisions that are being reexamined in light of the increased terrorist threats. Material adverse change provisions in purchase agreements are also being revisited.

Material adverse change (MAC) provisions provide an escape hatch for a potential acquirer, allowing it to pull out of a contemplated transaction if certain material adverse changes occur between the signing of the contract and the closing of the purchase.

The potential usefulness of MAC clauses was highlighted in certain high profile transactions following the Sept. 11, 2001 terrorists' attacks. One of those transactions involved USA Networks Inc., which had agreed in July 2001 to merge with National Leisure Group, Inc., a cruise and vacation company.

After the terrorist attacks USA Networks sued National Leisure in an attempt to void their proposed merger. USA Networks claimed that the Sept. 11 terrorist attacks, as well as National Leisure's loss of a large client, had triggered the material adverse change clause contained in their merger agreement. The lawsuit would have provided the first judicial interpretation of whether the terrorist attacks are justification for ending a merger pursuant to a material adverse change clause.

At the end of October 2001, USA Networks agreed to settle the suit. The week prior to settlement, National Leisure's sales rebounded to pre-attack levels and it was expected that National Leisure would post a large percentage gain over its year 2000 sales.

It has been speculated that National Leisure's gain in sales may have prompted USA Networks to settle the dispute, since a high-profile Delaware case from earlier in 2001 held that a material adverse change clause is not triggered by a *temporary* decline in business.

In its Oct., 10, 2001 edition, the Wall Street Journal reported that investment bankers and law firms alike have expanded their material adverse change clauses to include such events as "acts of terrorism" and stock exchange closures within the category of events that allows a party to walk away from a deal without liability.

More recent articles from other sources have reported the continuing trend of broadening force majeure and MAC provisions. Conversely, some commercial sellers are insisting that these events be explicitly identified as the types of events that will *not* allow a buyer to renege on the deal.

In the arena of real property purchases, prospective purchasers of sensitive locations may want their material adverse change clause to be expanded to take into account the discovery or threatened existence of biological contaminants within the location to be purchased, or the receipt of terrorist threats involving such location.

Although it may be difficult to negotiate the inclusion of such clauses over a seller's objections, these additions to a standard MAC clause may protect the prospective purchaser in the event that terrorist threats are made, or a biological scare is suffered, during the time between signing the purchase agreement and closing.

Again, in light of the recent attacks, buyers and sellers are being forced to reconsider their contract language and now regard terrorism as a potential "deal breaker."

Conclusion

We have the ability to protect our clients by drafting broader, and, in light of recent events, more appropriate, force majeure clauses – clauses that reflect the new era of warfare. Without such protection, our clients may be forced to perform their contractual obligations when the business world has been disrupted by terrorist acts.

If our clients are unable to perform under such circumstances, they could be faced with a claim for breach of contract and potential liability for damages. Due to the unfortunate events of recent years, we have seen first hand how acts of terrorism can wreak havoc on the commercial world. The occurrence of terrorism is unpredictable.

What is predictable is that our clients may benefit from a terrorism clause in their force majeure provisions and that as diligent attorneys we can help provide our clients with that protection.