

Defeat of effort to allow non-lawyers to handle closings highlight of busy legislative year

By Edward J. Smith



A year ago at this time I was pleased to report on a successful legislative hearing at the State House on H180, which would have permitted the performance of real estate closings by business corporations, notwithstanding the holding in the case of *Massachusetts Conveyancers Association v. Colonial Title & Escrow*, decided by the Superior Court in 2001.

Testimony by the MCA's trial counsel in that case, Douglas Salvesson, persuaded the Joint Committee on the Judiciary not to recommend such legislation.

This past winter, the Office of Chief Legal Counsel to Governor Romney proposed new regulations to govern the duties and responsibilities of notaries public in the Commonwealth. Included was the following provision (as ultimately promulgated in Executive Order No. 455): "A notary public who is not an attorney licensed to practice law in Massachusetts, or who is not directly supervised by an attorney, shall not conduct a real estate closing and shall not act as a real estate closing agent."

While REBA was gratified to see this endorsement by the Executive Branch of the Superior Court holding, certain other provisions that were proposed in the Draft Executive Order were not received as well by REBA.

Led by REBA President Chris Kehoe and legislation chair Bob Kelley, REBA lobbied successfully to modify objectionable language, including the requirement that every notary public maintain a bound Journal of official acts. The Governor's Office of Chief Legal Counsel agreed to make the Journal provision "a best prac-

tice," but not a legal requirement, for lawyers and their employees who are notaries public.

Mortgage Discharges, Assignments

REBA recognizes that the matter of unrecorded mortgage discharges and assignments is perhaps the most vexing problem for conveyancers handling residential mortgage closings. (That is in part why we were able to persuade the Legislature to grant a four-month reprieve from the higher recording fees for mortgage discharges in 2003.)

REBA President Chris Kehoe requested the legislation committee to meet with representatives of lenders and title insurers, to draft legislation that would address a number of problems with discharge practice. There ap-

provements borrowed from other states and from the current draft of a proposed uniform act by the National Commissioners on Uniform State Laws.

The text of the legislation, S.2386, and a Fact Sheet appear on REBA's website at www.massrelaw.org. The legislation is before the Joint Committee on Banks and Banking.

Other Bills Supported by REBA

REBA is pleased to report that H.743, to enact a good and clear record and marketable title act (Landowners Title Protection Act) has been recommended by the Joint Committee on the Judiciary. Also recommended by the Judiciary Committee are S.983, to facilitate registration at the Land Court of instruments executed on behalf of a corporation, and H.744, to require a recital of the names and addresses of owners of land taken by eminent domain to be included in the instrument of taking.

S.6, a REBA bill to make the execution requirements for subordination of a mortgage conform with those for mortgage discharges and assignments, was recommended by the Joint Committee on Banks and Banking. Another REBA-supported bill recommended by the Banks and Banking Committee is H. 2731, which requires written payoff statement to be provided by a mortgagee or servicer within five days of a request by the mortgagor or his designee. At the time of this writing, H. 2731 is before the House Committee on Bills in Third Reading, while S.983 and S.6 are before the Senate Committee on Bills in Third Reading.

State Tax and Child Support Liens

The Romney Administration filed H.4485, DOR legislation that would have extended the current six-year liens for state taxes or for child support to be of indefinite duration, and created a central registry at the state Department of Revenue for said liens in lieu of

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pears to be a consensus for an approach by which the mortgage servicer and record holder of a mortgage would be given notice, at the time of the payoff, that the lawyer paying off the mortgage will discharge it by affidavit if a discharge is not received within a specified period of time.

The idea is that by giving the parties in interest advance notice, a closing attorney ought to be able to make this a normal part of the release of mortgage liens after a closing. Omnibus legislation has been filed to include this provision, as well as several other im-

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REBA rolls out three new committees

At the Real Estate Bar Association's Spring Seminar on May 10 in Framingham, REBA President Chris Kehoe announced the rollout of three new REBA Committees to serve the Association's growing membership.

An Affordable Housing Committee, a Litigation Committee and a Commercial Real Estate Finance Committee will be formally launched in September.

"These three new committees demonstrate our expanded scope and broader mission as REBA reaches out to real estate lawyers and other real estate professionals in fields and concentrations beyond traditional title-related practice," Kehoe said.

The Affordable Housing Committee will be co-chaired by Kurt James and Robert Ruzzo. Kurt James leads the affordable housing and community development law practice group at Sherin and Lodgen LLP in Boston.

Bob Ruzzo, a lawyer and long-time Association member, serves as Deputy Director of MassHousing, formerly known as the Massachusetts Housing Finance Agency (MHFA), an independent agency dedicated to creating and preserving affordable housing opportunities across Massachusetts.

The goals of the Committee are to acquaint and educate REBA members and others on emerging initiatives on developing and financing housing. The group will also participate on behalf of the Association in the Beacon Hill dialogue on all housing-related legislation, particularly G.L. c.40B reform. The Committee will serve as a legal resource in the housing and development field for lawyers across Massachusetts. Both James and Ruzzo formerly co-chaired the Affordable Housing Committee of the Real Estate Section of the Boston Bar Association.

The Litigation Committee will be co-chaired by Diane Tillotson, a former Association President and a partner in the Boston firm of Hemenway & Barnes,

and Lawrence P. Heffernan, a partner at Robinson & Cole LLP, a regional firm with offices in Boston, New York, New London, Hartford, Greenwich, Stamford and Sarasota, Florida.

This committee, comprised of civil litigators sharing a common interest in trial advocacy, will participate in REBA's educational offerings, focusing on litigation in all trial and appellate courts, both state and federal.

The group will also become a forum for discussion and exchange of ideas leading to the improvement of individual trial skills as well as an advocate for expanding the jurisdiction and streamlining the operation of the Land Court.

Beth H. Mitchell, a partner in Boston-based Nutter, McClennen & Fish, LLP will chair the Association's new Commercial Real Estate Finance Committee. The goal of this group is to become the pre-eminent resource for REBA members and others on emerging trends and industry intelligence in all aspects of commercial real estate lending.

The Committee will address issues of concern to both commercial borrowers and commercial lenders. It will provide input to REBA on legislative initiatives that bear on the commercial lending practice.

The Committee will also support REBA's growing educational programs in the commercial real estate finance practice area.

The Real Estate Bar Association for Massachusetts, formerly known as the Massachusetts Conveyancers Association, is New England's fastest-growing bar association. REBA's lawyers and other real estate professionals share a 150-year tradition of professionalism and excellence in advancing the practice of real estate law. REBA is also the Massachusetts leader in combating the unauthorized practice of law.

For more about REBA go to www.mass-relaw.org.

Susan Graham tapped as chief operating officer

Susan A. Graham of Amesbury recently joined the Real Estate Bar Association as Chief Operating Officer where she will be in charge of office and staff management, implementation of member services as well as all programs and event planning.

Graham, who recently celebrated the birth of her first grandchild, served in a wide variety of capacities at The Provident Bank, an Amesbury-based community bank. Her service at the bank included head of retail banking, compliance officer, director of human resources and executive secretary to the Bank's CEO and Board of Directors.

At REBA she will also serve as COO of the Association's affiliates, REBA Dispute Resolution, Inc. and the REBA Educational Foundation, Inc.

She can be reached at REBA's 50 Congress Street headquarters in Boston at graham@massrelaw.org.



Susan A. Graham

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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



As I reach the midpoint in my term as president of the Real Estate Bar Association for Massachusetts, it's appropriate to reflect on what we have accomplished in the first six months of this year and on what remains to be done.

It has been a busy and exciting year for REBA. We have devoted our energy to working on the Governor's Executive Order, filing important legislation, forming new committees, enhancing our partnership with Massachusetts Lawyers Weekly and reenergizing the residential conveyancing bar.

I would like to thank Governor Mitt Romney, his counsel, Dan Winslow, and Dan's assistant, Judi Goldberg, for listening to our concerns about the governor's preliminary Executive Order regulating the conduct of notaries public in Massachusetts. We at REBA are especially pleased that the governor's counsel, working with the Board of Bar Overseers, promulgated within the Executive Order a significant protection for consumers in the Commonwealth, namely that independent notaries public cannot hold themselves out as having the ability to conduct real estate closings in Massachusetts.

We are also grateful to the governor and his counsel for exempting lawyers from the requirement of keeping a notary journal, in recognition of the unique place that lawyers hold in our society. As

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.

lawyers, we are subject to the oversight of the Supreme Judicial Court of Massachusetts and the Board of Bar Overseers, both of which regulate our conduct and provide sanctions for lawyers who do not act responsibly and ethically in their practices.

The exemption from the journal requirement demonstrates the governor's understanding of the practicalities associated with the day-to-day practice of law.

I am pleased to report that REBA's Omnibus Discharge Legislation has been filed as Senate Bill No. S.2386. The bill, which took almost a year to draft, is jointly sponsored by the following members of our Legislature: Senator Andrea F. Nuciforo, Jr. (Senate Chairman, Joint Committee on Banks and Banking); Senator Steven C. Panagiotakos (Vice chairman, Senate Committee on Ways and Means); Representative Robert A. DeLeo (Chairman, House Committee on Bills in Third Reading); Representative Christopher G. Fallon (House Vice chairman, Joint Committee on the Judiciary); and Representative James D. Vallee (House Chairman, Joint Committee on Criminal Justice). I would like to thank each of them for taking a leadership role in this important area of consumer protection.

There is a great deal left to be done to enact this significant legislation, which will relieve consumers and closing attorneys of one of the most vexing problems facing them on a daily basis: incorrect and missing mortgage discharges.

Public hearings will be held on this legislation in the next few weeks and after that, I will be calling on all of the members of REBA to contact their senators and representatives to urge passage of this critical and long-awaited legislation. The bill is currently before the Joint Committee on Banks and Banking, jointly co-chaired by Senator Andrea Nuci-foro and Representative John Quinn.

The other members of the committee are: Senator Brian A. Joyce; Senator Robert S. Creedon, Jr.; Senator Robert O'Leary; Senator Steven A. Tolman; Senator Robert L. Hedlund; Representative David M. Torrisi; Representative Philip Travis; Representative Edward G. Connolly; Representative Robert J. Nyman; Representative Walter F. Timilty; Representative Michael F. Kane; Representative Michael A. Costello; Representative Joyce A. Spiliotis; and Representative Daniel K. Webster. Please call or write to them, especially if you are one of their constituents, and urge them to focus on passage of this bill.

This bill appears to be the best opportunity we will have to help clear and sta-

bilize the record title to consumers' homes in Massachusetts and to deal with the issues created primarily by out-of-state lenders, who are not familiar with mechanisms for properly releasing mortgage liens in Massachusetts.

Just recently, I had a conversation with a lender representative on the West Coast, trying to convince this individual to issue a Mortgage Discharge for a client of mine who is selling his home on July 1 and paid off his mortgage in March 2004. I explained that the lender has an obligation to release the mortgage lien within a reasonable time after payoff of the lien.

The person I spoke with at the lender's office told me that Massachusetts law does not apply to a California lender because it is not in Massachusetts; that its time frame for releasing this lien was 60-90 days; and that there were no exceptions, even when a home was being sold.

I must admit that I was rendered virtually speechless at the callous indifference that came through the phone. It was only the suggestion of litigation to the department supervisor that put the mortgage discharge on a "30-day track." Because this was the servicer of the original mortgagee, there is not even a guaranty that the discharge we will receive will be correct.

The Omnibus Mortgage Discharge Legislation proposed by REBA would solve this problem by imposing penalties on lenders who do not fulfill their obligations and easing the requirements for attorneys to discharge mortgages by affidavit. I implore all of you to contact your senators and representatives to share with them just one of the many horror stories you have encountered in your own practices. Please do it now, as we may not have this opportunity again.

Since the beginning of this year, REBA has established three important new committees within the organization.

I would like to welcome the Real Estate Litigation Committee, which will be co-chaired by former REBA President Diane Tilotson and Larry Heffernan. I am also happy to report that Beth Mitchell has agreed to chair the Commercial Finance Committee, and, finally, that Bob Ruzzo and Kurt James have agreed to co-chair REBA's new Affordable Housing Committee.

Each of the chairs, in launching their committees, will bring new energy and insight to REBA, and you will read more about these committees and their goals elsewhere in this edition of REBA News. I look forward to helping the new committees get off to a good start in Sep-

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Right of first refusal has limited use where premises are packaged with other properties

By Caroline Woodward



The Supreme Judicial Court's decision in *Uno Restaurants, Inc. v. Boston Kenmore Realty*, 441 Mass. 376 (2004), highlights the limited utility of a right of first refusal, and may have

the effect of diminishing the ability of a holder of a right of first refusal to realize his anticipated benefits where the subject premises is sold in a package with other properties.

Case Facts

Uno Restaurants, Inc. ("Uno"), successor in interest to Hamiltonian Company, Inc., leased approximately 11,200 square feet of first floor and basement space in a building in Kenmore Square, Boston known as the Buckminster Hotel, for use as a restaurant and lounge.

The lessor and owner of the building was Boston Kenmore Realty ("Boston Kenmore"). The lease, executed in 1984, provided that, in the event the Buckminster Hotel building was converted into condominiums, the tenant would have a right of first refusal to purchase the unit comprising the premises leased by Uno "at the initial purchase price set upon said Space or upon the same term[s] and conditions offered by any other party for the said space." *Id.* at 379.

Caroline Woodward is a partner at Sherin and Lodgen LLP where she practices in the Real Estate Department. Woodward is a member of REBA's Leasing Committee and Title Standards Committee.

The lease gave the tenant 30 days to respond to any written notice of a purchase price set by the landlord, and a further 30 days to enter into a purchase and sale agreement with the landlord on terms offered by a third party.

While the lease contained no provision addressing allocation of any purchase offer made on the entire building, uncontested parol evidence offered at trial by a witness for Uno's suggested that the parties had an "understanding" that if the entire building were to be marketed, the price for the unit would be 9.3 percent of the overall price, this being the percentage allocated to the demised premises in the tax escalation clause in the lease.

Boston Kenmore converted the building into 133 residential and commercial condominium units in 1986, and retained ownership of all the units. Pursuant to the Master Deed, the leased premises became Unit 103 of the condominium, with a percentage interest of 15.9 percent. Uno acquired the lease from Hamiltonian Company, Inc., with Boston Kenmore's consent, in 1987. In 1995, Boston Kenmore offered Unit 103 to Uno for \$1,500,000, which Uno declined.

In 1997, an unsolicited \$8,000,000 offer for the entire building, including Unit 103, was made by Coles Holdings, Ltd. Boston Kenmore rejected the offer, stating that any offer made for the building would have to be separated into two offers, one for Uno's unit because of the right of first refusal, and the other for the remaining units in the building.

Coles made a second offer of \$2,800,000 for Unit 103 and \$5,200,000 for the remaining units. Boston Kenmore

accepted the offer for Unit 103, but negotiated the purchase price for the remaining units to a final price of \$11,200,000. The two agreements were tied together by language stating, "If the 'time for performance'

for the purchase of Unit 103 was delayed, then the 'time for performance' for Coles to purchase the 132 remaining units would be similarly delayed." *Id.* at 380.

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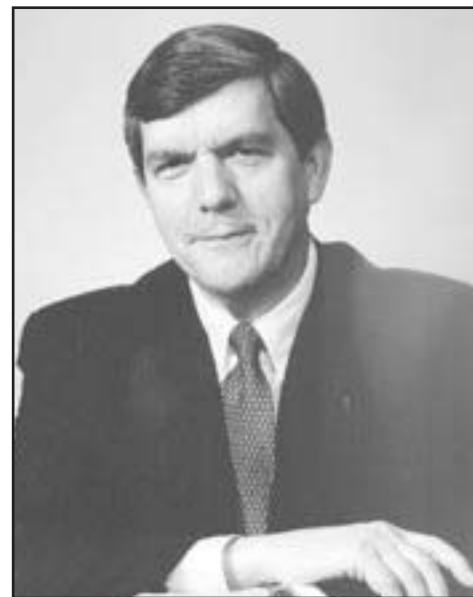
ABA President-Elect Michael Greco keynote speaker at upcoming annual meeting

Michael S. Greco, slated to lead the 400,000-member American Bar Association in 2005, will deliver the luncheon keynote address at the REBA Annual Meeting on Monday, Nov. 15, 2004 at the Wyndham Westborough.

"Mike Greco is perhaps the most thoughtful and eloquent spokesman for the legal profession in our time," said Jon Davis, a member of the REBA Board of Directors who will introduce Greco at the Annual Meeting. "He has a keen understanding of the aspirations and nobility of our profession at its best."

The all-day Annual Meeting will include the following morning break-out programs.

- Title Insurance Claims;
- Employment Law for Small Firms;
- Elder Law and Conveyancing;
- Commercial Real Estate Finance; and
- Stress Management for Real Estate Lawyers.



Michael S. Greco

Details and registration for the REBA Annual Meeting will be available on line at www.massrelaw.org and will be published in the fall issue of the REBA News.

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'Predatory lending' a priority for lawmakers

By Joel A. Stein



Although there is no clear definition for "predatory lending," it is now a high priority issue with consumer groups, the U.S. Congress and state legislatures throughout the country.

Although no definition exists, it seems that predatory lending falls under the category of "I'll know it when I see it." Predatory or abusive lending practices can include:

1. Making a loan to an individual without regard to the individual's ability to repay.
2. Repeatedly refinancing a loan within a short period of time and charging high points and fees with each refinance.
3. Packing a loan with single premium credit insurance products, such as cred-

A former president of the Association, Joel Stein chairs the Title Insurance and National Affairs committee of REBA. He practices with Friedman & Stein, P.C. in Braintree.

it life insurance, and not adequately disclosing the inclusion, cost or any additional fees associated with the insurance.

4. Charging excessive rates and fees to a borrower who qualifies for lower rates and/or fees offered by the lender.

5. Excessive mortgage broker compensation.

6. Bill of consolidation home equity loans, which promise to reduce the monthly debt payment, but instead trade short-term debt for long-term debt.

7. Balloon payments. The borrower may believe that he is paying down the loan after making monthly payments, but will find that at the point the balloon payment becomes due, he may owe almost as much as he borrowed originally.

8. Equity stripping. This results from a loan amount that is more than the borrower can financially handle, knowing the borrower will be likely to default. A foreclosure will result in stripping the homeowner of the equity he has earned over the years.

New Definition Of 'High Cost Mortgage'

The Predatory Lending Consumer Protection Act of 2002 introduced in the U.S.

House of Representatives, amended the "Home Ownership Equity Protection Act" (HOEPA) by tightening the definition of a "high cost mortgage."

According to the amendment, the new definition is as follows:

1. First mortgages with APRs that exceed treasury securities by six percentage points;

2. Second mortgages with APRs that exceed treasury securities by eight percentage points; or

3. Mortgages with total points and fees payable by the borrower exceed the greater of 5 percent of the total loan amount, or \$1,000.

The bill revises the definition of points and fees to be more inclusive. It allows for two bona fide discount points outside of the 5 percent trigger.

In Massachusetts, House Bill H-4606 entitled "An Act Prohibiting Abusive Practices in Home Mortgage Lending" was introduced in 2003 and provides the following:

The statute amends Section 6 of Chapter 167E by inserting the following paragraph:

"16. No home mortgage loan, other than a reverse mortgage, may contain a payment schedule with regular periodic

payments such that the result is an increase in the principal amount."

The Bill also adds Chapter 167I entitled "Predatory Home Loan Practices."

The statute defines "high cost home mortgage loan" as a home mortgage loan that meets one of the following conditions:

(i) the annual percentage rate at consummation will exceed by more than six percentage points for first-lien loans, or by more than seven percentage points for subordinate-lien loans, the yield on U.S. Treasury securities having comparable periods of maturity to the loan maturity as of the 15th day of the month immediately preceding the month in which the application for the extension of credit received by the lender;

(ii) excluding up to two bona fide discount points, the total points and fees exceed the greater of 5 percent of the total loan amount or \$400.

A lender shall not originate a high cost home mortgage loan without first requiring the prospective high cost home mortgage borrower to complete a credit counseling program.

A lender may not make a first or subse-

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Unit owners must work together to enforce condo claims for defective design and construction

By Chris Caputo



While a person's home may be his or her castle, we in the Boston area often find ourselves living in a condominium building with several other people, thereby sharing our "castle" with strangers.

Given the exigencies of condominium ownership, it may be difficult to motivate this group of similarly situated strangers into concerted action when legal issues arise with respect to the physical condition of the common areas (in which each unit owner possesses an ownership interest pursuant to G.L. c.183A).

However, where issues of defective design or construction of the common areas arise, concerted action is precisely what is required in order for the condominium owners to preserve their rights against the developer and the various contractors and design professionals that might be legally responsible for the defects.

In *Cigal v. Leader Development Corp.*, 408 Mass. 212 (1990), the Supreme Judicial Court noted that an individual unit owner may pursue a developer for a breach of contract related to defects in the construction of his or her unit.

The rationale behind this principle is

Chris Caputo, counsel to the Boston office of Robinson & Cole LLP, concentrates his practice in construction and surety law. He recently received an award for dedicated service from the American Bar Association Forum on the Construction Industry.

reasonably clear. To the extent that the unit owner purchased the unit from the developer, he or she, not the condominium association, was a party to that contract. However, G.L. c.183A §10(b)(4) provides that the association of condominium owners established pursuant to

and construction and for a breach of the relatively newly recognized implied warranty of habitability.

In *Albrecht v. Clifford*, 436 Mass. 706 (2002), the SJC held that an implied warranty of habitability attaches to the sale of new homes in the Common-

of the individual units being uninhabitable, the association, pursuant to *Berish*, is the proper plaintiff to advance the claim rather than the owner of the impaired unit.

Claims against the condominium developer and the general contractor responsible for the construction of the facility (as well as any trade subcontractors hired by the general contractor) will be governed by the three-year statute of limitations and six-year statute of repose imposed by G.L. ch.260 §2B.

When presented with a potential claim for defective design or construction, the association's first task must be to prevent the claims from being barred by applicable statutes of limitation and repose. The statute of repose for construction related tort claims operates as an absolute bar to any cause of action regardless of the date on which the claim is discovered by the putative plaintiff. It runs six years from either the opening of the improvement for use or the substantial completion of the project and the taking of possession by the owner.

However, the statute of limitations for construction claims bars claims after three years and its limitation period commences to run on the date on which the defect is discovered or should have been discovered in the exercise of reasonable diligence. As such, the statute of limitations may run on a claim, which will therefore be time-barred, prior to the end of the six-year repose period. G.L. c.260 §2B will also control implied warranty claims related to the construction contract.

Great care must be taken to meet the statutory requirements. An immediate factual analysis of the accrual date of the

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Concerted action is precisely what is required in order for the condominium owners to preserve their rights against the developer and the various contractors and design professionals that might be legally responsible for the defective designs or construction defects in common areas.

the chapter shall "conduct litigation and . . . be subject to suit as to any course of action involving the common areas and facilities . . ."

Therefore, where the common areas of a condominium are impaired by defective design or construction, the association itself is the proper party to pursue an action arising out of the construction and design of a condominium facility.

The principal causes of action to be pursued by a condominium association against developers, builders and design professionals will be for negligent design

wealth. *Berish v. Bornstein*, 437 Mass. 252 (2002), decided by the court less than two months after *Albrecht*, extended the implied warranty of habitability cause of action to claims involving condominium units on the principle that the mere fact that new construction is performed in connection with a condominium as opposed to a single family residence should not abridge the rights of the condominium homeowner.

The builder cannot disclaim this warranty. Where the breach of warranty is manifest in the common areas of the condominium and results in one or more

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SJC ruling dramatically alters rights between landowners and easement holders

By Ed Bloom



On June 15, 2004, the SJC dramatically altered Massachusetts real estate common law regarding the right of a landowner to relocate an easement that burdens its land. The Real Estate Bar Association (and The Abstract Club) filed an amicus brief in which they urged the SJC to adopt the very position that the SJC ultimately took in rendering its decision.

In the case of *M.P.M. Builders, LLC v. Dwyer*, 442 Mass. 87 (2004), the court was asked to decide whether a landown-

Edward M. Bloom is a partner at the Boston firm of Sherin and Lodgen LLP, and is a member of REBA's Board of Directors and the chair of its Leasing Committee. He wrote the amicus brief on behalf of REBA in the case of M.P.M. Builders, LLC v. Dwyer.

er might change the location of an easement without the consent of an easement holder. It has been widely assumed that the common law of Massachusetts provided that, once the location of an easement has been fixed, it cannot be changed without the consent of both the landowner and the holder of the easement.

To clarify the law and to address present-day realities, the SJC adopted as the common law of Massachusetts the modern rule proposed by the American Law Institute in the Restatement (Third) of Property (Servitudes) Section 4.8(3), which provides that: "Unless expressly denied by the terms of an easement..., [a landowner] is entitled to make reasonable changes in the location or dimensions of an easement at the... owner's expense to permit normal use or development of... [its property], but only if the changes do not (a) significantly lessen the utility of the easement (b) increase the burdens on the owner of the easement in its use and enjoyment or (c) frustrate the purpose for which the easement was created."

Decision Of Great Importance

This decision is of great importance to landowners who, in the development of their property, discover ancient rights of way or other similar easements that will prevent or significantly impair their ability to develop their property. Prior to the case, a recalcitrant easement holder who simply refuses to consent to a relocation of its easement could veto the development and prevent maximization of the use of the landowner's property.

The rule espoused by the Restatement and now adopted by the SJC perfectly balances the rights of the easement holder to benefit from the easement with the needs of the landowner to be able to use its property in a way that maximizes its value.

Massachusetts is faced with a dwindling supply of developable land. Coupled with a surge in the demand for housing, this scarcity has caused housing costs to soar, forcing people to leave the Commonwealth and adversely affecting the economy.

Common Problem

The facts of the case decided by the SJC are quite illustrative of the problems landowners have been facing under the existing common law of Massachusetts. In this case, the landowner, M.P.M. Builders, received municipal approval to subdivide and develop its property into seven house lots. Dwyer, an abutting landowner, owned a right of way across the landowner's property which would prevent the landowner from constructing three of the seven planned house lots.

The landowner, at its sole cost and expense, offered to relocate the right of way in a manner that would still provide Dwyer with the access he needed but would allow unimpeded construction by the landowner of the three house lots. Dwyer objected to the proposed relocation stating his preference "to maintain [his] right of way in the same place that it has been and has been used by [him] for the past 62 years."

In order to resolve the problem, the

Continued on page 24

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RESPA reform efforts continue

By Joel A. Stein



As noted in the Spring 2004 issue REBA News, in late March 2004 HUD withdrew its proposed regulation which would have replaced the existing good-faith estimate regime, altered the treatment of the yield-spread premium on the HUD-1 settlement statement, and, most important to the title industry, included a packaging proposal.

On May 20, 2004, Secretary-Designate Jackson told the House Financial Services Committee that he would move forward on RESPA reform after an internal review and consideration of some questions that the Office of Management and Budget had proposed in its review.

At the time the rule was withdrawn, Secretary-Designate Jackson stated that his plans were to "revise the rule if necessary, and to re-propose the rule requesting additional comments after I have had the opportunity to brief members of Congress and meet with consumer and individual groups."

Although it presently appears that no further action will be taken before the November election, it is also evident that there are underlying concerns throughout all trade organizations and lender groups that the consumer issues which the regulation attempted to address still need to be dealt with and that lender groups and consumer groups are interested in packaging.

Although it presently appears that no further action will be taken before the November election, it is also evident that there are underlying concerns throughout all trade organizations and lender groups that the consumer issues which the regulation attempted to address still need to be dealt with and that lender groups and consumer groups are interested in packaging.

A former president of the Association, Joel Stein chairs the Title Insurance and National Affairs committee of REBA. He practices with Friedman & Stein, P.C. in Braintree.

Bundling Is The Future

Bundling appears to be the future of the marketplace. However, it is possible that packaging of loans may be achieved without the need for further HUD regulations.

The HUD regulation failed for a number of reasons. The Mortgage Bankers Association, the natural constituency of HUD, was divided between its larger volume lender members and its smaller members that believed that the packaging of loans placed them at an unfair disadvantage, as they would not be able to provide the same volume discounts as larger the lenders.

The title industry felt strongly that HUD should have considered a two-package approach that would have included one for the borrower in a refinance transaction and one in a buy/sell transaction, whether or not it included a loan. The title industry further believed that no matter what form of packaging was adopted, there should be no Section 8 exemption and any discounts, which resulted from the packaging, should be passed along to the consumer.

The HUD regulation failed to distinguish between refinance situations and buy/sell transactions. The National Association of Realtors, with one million members, made it clear that they sup-

ported ALTA's two-package proposal that would allow parties other than lenders to act as the packaging entity.

it report, valuation or appraisal and loan information in an electronic form acceptable to the lender/consumer. This will require any vendor who wishes to be part of a bundling operation to deliver its information in an electronic manner acceptable to the packager.

Moving other vendors' products into a bundle will require control of the timing. Failure by a vendor to deliver its portion of a package on time will destroy the nature of the bundling. The packager will need to have control over each of the vendor's pricing and technology. Each vendor will need to deliver its package to the bundler in an electronic form the bundler can integrate into its system.

Although it may be difficult for agents to develop packaging on their own, it appears that settlement agents have certain advantages, including a close relationship to the customer and home builders, familiarity with local customs and contact with brokers in buy/sell transactions. Agents also have close relationships with the title insurance industry that may be in the position to "plug" agents into packages.

The marketplace is open for settlement service providers who develop or take part in packages, and attorneys in this state will have to be flexible and open to change. The economic implications of packaging are an unknown, and it is certainly a possibility that lenders will attempt to squeeze the price charged by its vendors.

Discount Passed On To Consumers?

The question remains unanswered as to whether the discount the packager receives from its vendors must be passed to the consumers. Under the proposed regulation, it is believed that there is no requirement for the discount to be passed to the consumer; it would appear that under the RESPA rule, it would be considered a violation for the packager to retain the rebate or discount.

Certainly lenders in the buy/sell transactions are at a disadvantage as they come onto the scene after the broker and occasionally after the attorney. It is clear that real estate agents will be a major factor in packaging in the buy/sell market.

Concerning bundling, the future is clouded, but certainly the mood of the title industry is more positive than it was several months ago. To a certain extent, the future of bundling will be determined by the actions of the entire industry, including settlement attorneys, as we try to alleviate consumer concerns and the concerns of HUD without requiring additional regulation.

The marketplace is open for settlement service providers who develop or take part in packages, and attorneys will have to be flexible and open to change.

The major lenders made it clear that the HUD must preempt state laws in order for packaging to work while consumer groups claimed that the preemption of state law would destroy the value of packaging. Consumer groups also have expressed concern that HUD failed to address predatory lending in the RESPA rule. Consumer groups also expressed their support for a guaranteed mortgage package only if it included an interest rate and closing cost guarantee.

ported ALTA's two-package proposal that would allow parties other than lenders to act as the packaging entity.

In addition, the FTC did a consumer testing of HUD's disclosure form for mortgage broker payment, the so-called yield spread premium, and found consumers in more than 50 percent of the test cases were choosing the higher priced loan.

In March 2004, at the confirmation hearing for Secretary Designate Jackson, his nomination was placed on hold. About the same time, 250 congressmen sent a letter to the Office of Management and Budget urging HUD to reconsider and, if necessary, republish its Rule.

As to the immediate future of bundling, it would appear that a number of lenders are already packaging their loans, particularly in the equity line and second mortgage situations where the loans are closed in-house and no title insurance is required. In these situations, the lender can provide the borrower with a set amount for closing costs, with the only possible variation being the cost of recording fees for discharges of prior mortgages.

Technology is an integral part of bundling. In order to bundle, the party providing the package must be able to deliver all services, including title, cred-

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Potential pitfalls in special permit applications

By Paul F. Alphen



Sometimes it seems that zoning by-laws (which vary from municipality to municipality) are too esoteric for lay people to fully comprehend and appreciate. Similarly, some attorneys who do not

regularly practice in the area of land use regulation may not appreciate some of the eccentricities of the law.

When I first entered private practice, I had the benefit of over 10 years experience in state and local government, most recently as the town administrator

Paul Alphen is a partner in the law firm of Balas, Alphen & Santos in Westford, where much of his practice pertains to land use regulation. He regularly appears before land use boards representing residential, commercial and industrial developments within towns along Route 495 and the Merrimack Valley. He serves on the REBA Board of Directors and is Chair of its Land Use Committee.

in the town in which I practice. One of my first clients desired to expand his non-conforming dwelling and I advised him that it would be helpful to research the history of the zoning by-law as it applied to his house because there was the potential that his house was not *lawfully* pre-existing.

The Town did not maintain a comprehensive record of the history of zoning changes and I summarized how I would conduct the research.

A month or so later I ran into the client and he explained that in order to avoid additional legal fees, he had attempted to research the zoning history himself and was upset that he had spent days trying to determine the applicable zoning.

I explained to him that I had never anticipated that he would perform the research by himself and that because of my familiarity with the Town's records I could have conducted the research in a few hours. It was an important lesson in my early legal career. One has to be cautious about encouraging lay people to perform steps that are best performed by an attorney with appropriate experience.

Specialized Knowledge Needed

I was reminded of this lesson when I received a call from a colleague who was concerned about a recent conversation that he had had with a client. The client and an abutter both had pre-existing non-conforming lots, both lots having insufficient frontage. Both lots also had non-conforming dwellings that encroached upon the front yard setback requirement. The neighbors wished to complete land swaps and reconstruct each of their homes so that the new homes would conform with the applicable setback requirements; but the lots would continue to be non-conforming with regard to lot frontage.

The attorney advised the client of the necessity of having an Approval Not Required plan prepared; the need for approval by the Board of Health of the septic system; the need for complete estimates from the various contractors; the potential for a Special Permit from the Board of Appeals to reconstruct a home on a non-conforming lot; and the need for a comprehensive agreement between the two lot owners.

The attorney prepared a proposed land swap agreement and sent it to the client.

Weeks later the attorney heard that the client and his neighbor had prepared and filed their own Special Permit Application.

When the attorney asked the client why they had chosen to proceed with the Special Permit Application prior to the exchange of the land swap agreements, the client responded that he was trying to control legal fees and that the Building Inspector had informed him that it was unnecessary to engage an attorney to apply for the Special Permit.

The attorney followed up with a cautionary letter to the client and the attorney asked me if I thought he was being too persnickety.

I responded that it is the rare layperson that can comply with all of the statutory requirements regarding a Special Permit Application. Defects in the application could render the Special Permit invalid, or susceptible to challenge upon appeal. Naturally, there are other concerns about the parties proceeding with land swaps without the prerequisite agreement between the parties.

For example, a Special Permit application will be defective if the application

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Overcoming obstacles to planning

By Robert C. Adams



We've all had similar experiences of planning, whether in the workplace or in organizations, whether as participants or observers. Senior-level people go on a "planning retreat" to a confer-

ence center or hotel.

They meet, discuss "bold new ideas" and "plan the future." There's excitement in the air at the retreat, even though others "back home" may be more doubtful than eager about the probable outcomes.

The result is "The Plan." Thick three-ring binders containing "The Plan" are distributed, (though often only to a privileged few). From time to time other planning activities follow (sometimes at mid-winter retreats in warm places to reinforce the importance of planning). These result in updates to "The Plan" and one subsequently hears the sound of those three-ring binders being opened, old pages removed, new pages inserted, binders snapped shut. Then back on the shelf goes "The Plan."

No one denies the value of having a plan in an organization, whether it's a legal practice, a software company, or a museum. The future will always be unknown, the past behind us, and the present constantly in flux. The very notion of having "a plan" just seems to make sense. No one gets ahead by saying, "Who needs a plan? Let's just drift into the future and see what happens."

Yet as soon as the suggestion of planning arises, the response is Pavlovian – an involuntary cringing at the notion of spending time to develop or update "The

Plan." Why is this? Why does planning, which is clearly recognized as a virtue and a necessity, result in reactions ranging from boredom to cynicism? Why does planning seem to ring hollow? Why is it the subject of Dilbert cartoons?

I think there are several reasons why planning fails to engage us. One is our prior experience. Often planning is announced with great fanfare and excitement and expectations are kindled. When planning fails to produce tangible results, it creates frustration instead. Consistent frustration ultimately gives way to cynicism.

Another reason is the process itself.

the constant demands for action.

If we face a choice about whether to plan or not, we think of the decision this way: "I can plan and create a huge backlog of work for myself, or I can avoid it and at least keep my head above water."

Finally, planning is messy. It means talking with other colleagues about what "might be" or "ought to be" instead of talking about what "is". It means trying to find the right words to describe our own ideas or goals for the organization. It means having to disagree publicly because of differences of opinion or, de-

that sits unopened on a shelf, then we need other ways of defining our planning expectations.

One way to consider a plan is to think of it as solution to a problem. Another is to consider it as the answer to questions. Whether it's a solution or an answer, a plan is first and foremost a decision about something to be done, about action to be taken. "Here's what we're going to do..." or "Here's what we've decided..." should be the first words in every plan, whether printed in a formal document or scratched out on a legal pad.

This viewpoint can be helpful because it begs a couple of important questions that need answers.

If a plan is a solution to a problem, then one first has to frame and understand the problem before developing the solution. If the plan is an answer to questions, one has to first decide what those are.

The advantage of starting with problems or questions – it doesn't matter which, provided participants agree on them – is that it helps direct the planning activity and the expected output. Developing a plan doesn't become an end in itself but rather provides an actionable solution to a problem or an answer to key questions.

We want success. We want to help set goals, solve problems, and provide answers about where we should go and how we should get there. None of us will invest energy and emotion, even if we're forced to invest time, in an activity that seems only to be an end in itself. We will, however, invest ourselves if it's clear why it's necessary, if we know that through planning we can meet the challenges posed by problems and answer important questions.

The next time someone says, "We need a plan," don't cringe reflexively. Ask them what problems the plan will solve. Or what specific questions it will answer. Don't ask why a plan is needed. Instead, ask what a plan will *do*. When they can answer that question, they'll have your respect and your participation.

The next time someone says, "We need a plan," don't cringe reflexively. Ask them what problems the plan will solve. Or what specific questions it will answer. Don't ask why a plan is needed. Instead, ask what a plan will do.

Everyone has experienced planning that consists mostly of "thinking outside the box" or "brainstorming ideas" or "blue-sky thinking." But a list of novel ideas or unusual approaches isn't the same thing as developing a plan. Too often that output, whether conceived "inside" or "outside the box," never materializes in a way that impacts the organization's current activities.

Still another difficulty with planning is that it is in fact an intrusion into the normal flow of work. (This is often reinforced by having the participants leave the normal boundaries of workplace time and space and go "on retreat.") The interruption of routine produces anxiety because it uses up already scarce time needed for

pending on the need for tact and diplomacy, swallowing our words and nodding dumbly in agreement even when we know we don't mean it. It's a very *human* process.

Overcoming Reluctance To Plan

So how can we overcome our on reluctance to plan and also motivate others to give more than lip service to planning? One way might be to think differently about what the output of planning ought to be.

Yes, in a simple way the expected output is "a plan," but unfortunately that usually conjures up the image of a document that's venerated but never used. If people assume that the output will be little more than an irrelevant document

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Affordable Housing Committee update

The Real Estate Bar has a 150-year tradition of excellence advancing the practice of real estate law in Massachusetts. Starting in September, REBA will be extending this mission with of an Affordable Housing Committee (AHC) to be co-chaired by Robert Ruzo, Deputy Director of MassHousing, and Kurt James, a partner at Sherin and Lodgen LLP.

The goals of the REBA AHC will be to educate attorneys to lead and educate attorneys to serve the Massachusetts affordable housing community. This leadership and this service will come at a time when affordable housing needs are felt in communities throughout Massachusetts and when affordable housing policies are at or near the top of the agendas of most local, state and federal legislators and administrators.

Among our priorities will be to keep our members current on new housing development and financing programs, case law decisions and state and federal legislation. We intend to hold monthly brown bag lunches and plan other continuing legal education forums

to provide opportunities for attorneys to hear from other practitioners, experts in the field and legislators regarding recent changes and proposals that will affect the practice of affordable housing law in Massachusetts.

Prospective topics for the fall could include examination of the legal and poli-

programs including its \$100 million Priority Development Fund and transit oriented development initiatives and an analysis of expected changes to Chapter 40B and to budget provisions such as the Municipal Incentives for Smart Growth Zoning.

In addition, members of the AHC will

con Hill. In addition to the continuing debate surrounding Chapter 40B and the Land Use Reform Act, possible new initiatives could include a green building tax credit and establishment of a homeless court to assist homeless individuals convicted of misdemeanors transition back into society.

Finally, the AHC will serve as a legal resource in the housing and development field communities in order to leverage the abilities of existing organizations. This will include partnering with other organizations such as the Lawyers Clearinghouse for Affordable Housing and Homelessness to expand the availability of pro bono assistance for homeless individuals, non-profits involved in affordable housing development and towns seeking assistance in using governmental resources in local strategic planning.

We look forward to an exciting and productive first year working with other REBA Committees and the affordable housing community. If you are interested in joining the AHC please contact REBA Executive Director Peter Wittenborg at wittenborg@massrelaw.org.

The goal of the committee will be to lead and educate attorneys to serve the Massachusetts affordable housing community at a time when affordable housing needs are felt in communities throughout the state.

cy implications surrounding the disposition of church land by the Archdiocese of Boston, case studies of the recently enacted District Improvement Financing (DIF) law, a review of new MassHousing

assist in filing amicus briefs in relevant court cases, such as the recent *Ardenmore* decision, and participate on behalf of REBA in the affordable housing policy and legislation dialogue on Bea-

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Major challenges facing title insurance industry

By Tom Flynn



There have been many challenges facing the title insurance industry and real estate practitioners in recent years, many of which threatened the future of the industry and the livelihood of real estate practitioners in this state. I would like to briefly address some of the major challenges we're facing.

hood of real estate practitioners in this state. I would like to briefly address some of the major challenges we're facing.

Mortgage Impairment Insurance

Mortgage impairment insurance has been touted as an alternate product to title insurance. It has been introduced in a number of states, most notably California. The proponents of this product claim that it provides many of the same coverages as traditional title insurance at a reduced price.

However, such claims are inflated at best. These products are risk assumption products insuring against liens impairing the lien priority of the insured mortgage but no title search is required prior to issuance of the "policy." The biggest proponent of this alternate product has been Radian Guaranty, Inc. in promoting their Radian Lien Protection Product (RLP) and it's purported low-cost to consumer borrowers.

However, the RLP does not provide a

Thomas Flynn is Vice President and New England Division Manager for Stewart Title Guaranty Company. He has been with Stewart for over nine years and has been in the title insurance industry in Massachusetts for over 21 years. He serves on the REBA's Title Insurance and National Affairs Committee.

number of the coverages that traditional title insurance provides, such as coverage against defects and encumbrances on the title to the mortgaged property, the validity and enforceability of the insured mortgage, unmarketability of the title and a legal right of access to and from the mortgaged property.

Fortunately, for both lenders and borrowers, to date the title insurance industry and the various state Departments of Insurance have been successful in limiting the sale of this product, primarily on

nia to allow them to be licensed to sell these products. If that legislation passes, we may hear from the Radians of the world once again.

RESPA Reform

As you know through REBA and other sources, RESPA reform is currently on the back burner to a certain degree. Nonetheless, there is an overall sentiment that some type of reform will be introduced again in the near future.

The changes proposed to date had

future, we will have to be vigilant to see whether such provisions as "kick-backs," "incentives" and "skimming" are proposed again and, if in the same kind of anti-consumer-choice form, oppose them.

Extended Coverage Owner's Policies

Title insurance at times seems to be nothing more than a necessary evil to consumers. However, more and more as of late, various title insurance products have been created or enhanced to address the needs of consumers and enhance the overall value of title insurance.

A prime example of this is the Extended Coverage Owners policies that have been available for a while in the industry but have become more the norm only recently. This policy adds numerous coverages for the consumer, some of which are beyond the scope of what we have known as traditional concepts of title insurance, such as coverages that involve subdivision, zoning, and survey issues as well as certain post policy matters.

These policies are of such value to residential owners that it is important for all real estate practitioners to become familiar with them and to offer to their clients or their lender's borrowers.

Demands Of National Lenders

There is also heavy pressure from national lenders to provide the necessary services in a closing transaction faster, cheaper and from one source. This creates quite a challenge on the local level to accomplish this and keep everyone involved in the process.

With the demise of government-mandated bundling or packaging, the marketplace has stepped in and we are beginning to see some national lenders initiating bundled settlement services programs. It is too early to tell how successful these programs will be and how much of the marketplace such programs will affect, but it is yet another thing for all of us to keep an eye on.

Conclusion

Times are certainly changing and like other industries we'll all have to adapt and respond to an evolving marketplace. One of our biggest challenges will be to ensure that the marketplace does not perceive us to be just another closing expense, and does not pressure us to compromise the quality and value that our particular service provides to the parties to any real estate transaction.

One of our biggest challenges will be to ensure that the marketplace does not perceive us to be just another closing expense, and does not pressure us to compromise the quality and value that our particular service provides to the parties to any real estate transaction.

the basis that this product is a title insurance product (albeit very limited in coverage) and the companies issuing these products are not licensed to do so.

After a lengthy administrative and judicial review of the issue, the California Department of Insurance so ruled last year.

Be aware, though, that Radian and other companies wishing to cash in on this type of product have since been promoting legislation in Califor-

potentially adverse effects on all of us involved in the lending, title and closing process because of the requirement for "bundling" or "packaging" of the various components of title and settlement services. It would also have a potentially negative impact on consumers as well as they would have their choices of providers in the real estate transaction limited.

When and if we do see a new version of RESPA "reform" at some point in the

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ALTA adopts new form title insurance policy endorsements

By Lawrence F. Scofield



(Editor's note: In the Spring 2004 issue of REBA News, the author addressed Endorsements 14 and 15 and their various subparts of the new, primarily commercial, endorsements promulgated by the Title Insurance Forms Committee and adopted by the Executive Committee of the American Land Title Association at its October 2003 annual meeting. In this article, the author analyzes Endorsements 16-19.)

Larry Scofield, a 25-year veteran of the real estate and title industries, has recently been appointed Vice President and New England States Manager of The Talon Group, a division of First American Title Insurance Company currently operating in key markets across the US. For more information on The Talon Group go to www.talongroup.biz.

By standardizing the most common commercial endorsements the ALTA Executive Committee intended for benefits to flow to insureds as well as insurers. Customers requesting these endorsement forms may rely on the coverage being consistent from company to company, state to state, and region to region.

By using common endorsement language, judicial decisions interpreting each endorsement will have greater precedent from state to state. Less time will be spent negotiating over exact language. Though in some circumstances it may be necessary to modify standard endorsement language to fit specific circumstances unique to a transaction or series of transactions, nevertheless, it is valuable to have well-considered coverage and language in standardized forms useful in the vast majority of circumstances.

Some of the following endorsements contain bracketed language that is optional language. It may or may not be used depending upon specific circumstances and individual company practice. In drafting these Forms, the Committee took great pains to use words and phrases consistent with those used in practice.

Endorsement Form 16

Mezzanine Financing to an Owner's Policy:

1. The Mezzanine Lender is:

and each successor in ownership of its loan ("Mezzanine Loan") reserving, however, all rights and defenses as to any successor that the Company would have had against the Mezzanine Lender, unless the successor acquired the indebtedness as a purchaser for value without knowledge of the asserted defect, lien, encumbrance, adverse claim or other matter insured against by this policy as affecting title to the estate or interest in the land.

2. The insured:

(a) assigns to the Mezzanine Lender the right to receive amounts otherwise payable to the insured under this policy, not to exceed the outstanding indebtedness under the Mezzanine Loan; and

(b) agrees that no amendment of or endorsement to this policy can be made without the written consent of the Mezzanine Lender except as provided in Section 12(a) of the Conditions and Stipulations.

3. The Company does not waive any defenses that it may have against the insured, except as expressly stated in this endorsement.

4. In the event of a loss under the policy, the Company agrees that it will not assert the provisions of Exclusions from Coverage 3(a), (b) or (e) to refuse payment to the Mezzanine Lender solely by reason of the action or inaction or knowledge, as of Date of Policy, of the insured, provided:

(a) the Mezzanine Lender had no knowledge of the defect, lien, encumbrance or other matter creating or causing loss on Date of Policy.

(b) this limitation on the application of Exclusions from Coverage 3(a), (b) and (e) shall:

(1) apply whether or not the Mezzanine Lender has acquired an interest (direct or indirect) in the insured either on or after Date of Policy, and

(2) benefit the Mezzanine Lender only without benefiting any other individual or entity that holds an interest (direct or indirect) in the insured or the land.

5. In the event of a loss under the Policy, the Company also agrees that it will not deny liability to the Mezzanine Lender on the ground that any or all of the owned

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Examining tax titles and title references and descriptions

By Ward Graham



In this Title Standard Spotlight article, we're going to depart a little from an in-depth analysis of an entire title standard as in the past and focus on portions of two title standards that interrelate: Item (2) of Title Standard No. 4, Tax Titles, and Item 1 of Title Standard No. 27, Title References and Descriptions. In addition, this will be a two-part "miniseries," so you'll have to come back next time for the exciting conclusion.

Tax Titles

In order to have a good tax title, Title Standard No. 4 (2) establishes that, among other things, you need to have a description of the tax title property that "is sufficient to convey title."

Well, what does that mean? None of the Comments to Title Standard No. 4 give us any guidance. Where can we turn? Item 1 of Title Standard No. 27 is a good start. That portion of Title Standard No. 27 recites:

"In order to convey a good title, a description of a parcel of land must be capable of referring to only one parcel. A description is not sufficient to convey title if the land is described as part of a tract without a specific description of its location within the tract."

Coincidentally, the sole case cited in the Comment in support for this provision of Title Standard No. 27 is a case involving a tax title, *McHale v. Treworgy*, 325 Mass. 381, 90 N.E.2d 908 (1950).

Indeed, *McHale* is a frequently cited case on the issue of descriptions both involving tax titles and otherwise. Like many other areas of the law, however, cases both before and after *McHale* can go either way on the sufficiency of a description depending many times on subtle factual distinctions.

In this article, we'll compare some of those cases so see how they fit with Title Standard No. 4 (2) and Title Standard No. 27.

Ward Graham is New England regional counsel for Stewart Title Guaranty Company. He serves on REBA's Title Standards Committee and Legislation Committee. He is the principal draftsman of REBA's recently filed mortgage discharge legislation.

To start with, cities and towns customarily take property for non-payment of taxes by a description that is by reference to lots on their assessor's plans. Sometimes, the descriptions may include references to title vesting deeds, references to lots on recorded plans or plans in other public records, abbreviated metes and bounds descriptions (rarely do you find full metes and bounds descriptions used). Not a problem.

But sometimes, the descriptions are much more abbreviated, such as a mere reference to a lot or parcel with no plan or title references or a reference to a parcel being a portion of a larger parcel without any additional references establishing what portion it is. The latter types of descriptions are very problematic but any description in a tax title must be reviewed with care because, while a description might be acceptable for tax title purposes, it may not be adequate for "conveyance" purposes.

Given that the customary practice in tax taking situations is to use a description that refers to a lot on the assessor's plan, is that also good enough for conveyance purposes under Title Standards 4 (2) and 27? As stated in Section 244 of Park, Real Estate Law, 2nd ed., 28 Mass. Prac. § 244 (West Publishing, 1981), "Where there is a reference to a plan in a deed, the courses, distances and lines as there set forth are regarded as the description by which the limits of the grant are ascertained. The plan is thereby incorporated in the deed. [Citations omitted.]"

Note that Park doesn't say anything about the plan being recorded at the Registry of Deeds. Nonetheless, because we are taught that a title examination does not have to include a search of records outside the Registries of Deeds and Probate, there remains a question even today in some conveyancers' minds as to whether the reference to a lot on an assessor's plan, being a plan not recorded at the Registry of Deeds, can form the basis for a sufficient title to real estate that has been the subject of a tax title.

Many years ago, in *Larsen v. Dillenschneider*, 235 Mass. 56, 126 N.E. 363 (1920), the Supreme Judicial Court established the rule that assessor's plans may be relied upon for description purposes the same as a recorded plan.

In explaining this rule, the Court put it this way: "Now it is a well-settled rule of construction that where a plan is referred to in a deed, as containing a description of an estate, the courses, distances and other particulars, appearing upon the plan, are to be as much regarded, in ascertaining the true description of the es-

tate, and the intent of the parties in making it, as if they had been expressly recited and enumerated in the deed. *Morgan v. Moore*, 3 Gray 319, 322 (1855); *Fox v. Union Sugar Refinery Co.*, 109 Mass. 292, 296 (1872)."

Manifestly a reference in a deed, assessment or advertisement to a lot by number on a plan recorded in the Registry of Deeds would be a sufficient description. It has been held that references to instruments or plans not then but later recorded were sufficient for descriptive purposes in a deed. *Robinson v. Brennan*, 115 Mass. 583 (1874); *Blaney v. Rice*, 20 Pick. 62, 32 Am. Dec. 204 (1838). References in deeds to plans apparently never made a matter of record have been held incorporated into the deeds and binding upon the parties. *Lunt v. Holland*, 14 Mass. 149 (1817); *Magoun v. Lapham*, 21 Pick. 135 (1838).

An assessor's plan, which shows the particular lot in connection with all neighboring lands, affords a definite and accurate description. It is easily found. It is open to public inspection at reasonable times under rational limitations. G.L. c.35, §17. As a practical matter it affords quite as certain and accessible information to anybody in interest as does a plan in the registry of deeds.

Reference to such a plan reaches the main end sought by advertisement in tax sales, which is to enable the owner and prospective bidders to locate the land to be sold with substantial certainty. *Conners v. Lowell*, 209 Mass. 111, 120, 95 N.E. 412, Ann. Cas. 1912B, 627 (1911); *Williams v. Bowers*, 197 Mass. 565, 84 N.E. 317 (1908); *Bemis v. Caldwell*, 143 Mass. 299, 9 N.E. 623 (1887).

Larsen, supra, at 57-58. This creates an exception to the usual rule that a title examination need only be limited to searching records at the Registries of Deeds and Probate. Thus, for purposes of Title Standard No. 27, reference to a specific lot on an assessor's plan incorporates the description of that lot into the instrument as though set forth by metes and bounds and area, at least to the extent those elements of a description are shown on the plan.

If an ambiguity or discrepancy appears in some particular between the description set forth in the tax title instruments and the description of the lot as shown on the plan referred to, the usual rules of construction come into play.

Sufficiency Of Description

Let's take a look at some of the cases that have grappled with the sufficiency of a description for tax title purposes.

We start with *Conners v. City Of Low-*

ell, 209 Mass. 111, 95 N.E. 412 (1911). Like most cases in which the validity of a tax title is being challenged, there were a number of issues raised in the challenge to the tax titles in this case, including, for our purposes, a challenge as to the descriptions used. This case is instructive because it involved takings of several parcels and some of the descriptions, while meager, were deemed sufficient but others were not.

The Court starts its analysis with the notion that "[a]lthough the terms of a tax deed need not show actual compliance to a technical nicety with the minute particulars of statutory requirements in making the sale itself, yet they must satisfy a reasonable mind without resort to extrinsic evidence that a valid cause of sale in fact existed." *Id.*, at 115-116. The Court then reviewed the recitals in the taking instruments and tax deeds, including the forms of description used in the various takings involved in the case.

In one group of takings the lots involved were "described in the deeds by lot numbers, the street and side of street on which they were located, and the name of all abutting owners, with the general points of compass on which the land of abutting owners lay, but without further designation by metes and bounds, and without reference to any plan upon which the lot as numbered may be found." *Id.*, at 120.

The Court recited a sample description as follows: "three thousand seven hundred fifty-five (3755) sq. feet of land, more or less, being lots 549-550 on the east side of Tanner Street with land now or formerly of Woonsocket Institution for Savings on the north and south, Merchants Street on the east, and Tanner Street on the west." *Id.*

Despite the omissions from the descriptions of a reference to a plan or precise metes and bounds, the Court found that "[w]hile this description reached nearly to the line of indefiniteness, it is on the whole sufficient." *Id.*

The Court explained its conclusion that such a description was sufficient as follows:

"It gives data enough to enable one to make a reasonable identification of the property. It indicates a parcel of specified area, rectangular shape, lying between two streets and between lots of other defined owners, presumably a portion of a large tract subdivided into smaller parts. Practically the same information is conveyed in the instances when the rear of the lots bound, not upon a street, but upon another named owner. As a matter of common knowledge it is a kind of description not infrequently

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found in deeds, especially of land in the country. To require a greater particularity would impose upon the tax collector the necessity of an expensive survey in many cases. While the descriptions in a tax advertisement must be such as to enable both owner and bidder from its terms to locate with substantial certainty the land to be sold, it need not be so detailed as to point out visually its precise boundaries so that an utter stranger unacquainted with the locality and ignorant of the neighbors could find it without inquiry." *Id.*

As will be seen in later cases, the failure to recite precise metes and bounds has never been found, in and of itself, fatal to a tax taking or tax deed. In *Conners*, though, the failure to refer to a particular plan in a description including a recitation as to certain lots was saved by the fact that sufficient bounding references to abutting owners and streets gave enough information for the taxpayer and anyone else interested to determine which precise parcel was involved.

Note, also, that, even with all the information that was provided, the Court still felt that this form of description almost fell below the minimum level of definiteness.

The case of *City Of Boston v. Boston Port Dev. Co.*, 308 Mass. 72, 30 N.E.2d 896 (1941) is very similar except that, in that case, there were also references to plans upon which certain enumerated lots were shown and as to another parcel not shown on a plan, there were not only abutting street and owner references, but also square footage and a deed reference were recited. Clearly, these situations would satisfy Item 1 of Title Standard No. 27 and, therefore, Item (2) of Title Standard No. 4.

As to other parcels that were the subject of the challenged tax sales, the Court did find that the descriptions, while similar to those described above, fell below the minimum level of definiteness.

In the case of these parcels, the descriptions included the lot numbers, the street, the side of the street on which they were located and the area. However, in these instances, not only was there no reference to a plan where the lots might be shown, but also there was no reference to other information by which one could specifically locate the parcel, such as abutting monuments (other than the street) or abutting landowners. Despite the fact that there was a plan on record and a plan at the city engineer's office by which the lots could have been identified, neither plan was referred to and the Court held that this type of description is insufficient.

The Court stated:

"It differs from those discussed [above] in that the names of no abutting owners were given, nor was there anything to show the shape of the parcel. The designation of it by a lot number without naming the plan or showing where it might be found or giving any other descriptive circumstance was too indefinite. . . . These deeds were therefore invalid on their face and on inspection show that they convey no title. . . . A tax deed stands or falls on its own unaided merits. It must be delivered and recorded within thirty days from the sale. Its worth is to be determined as of that date. It cannot be supplemented or changed by subsequent instruments. Its errors and inaccuracies cannot be corrected, nor can its defects be supplied from any source.

rors or irregularities in the proceedings of the collector which are neither substantial nor misleading." The application of this section was fully discussed in the oft-quoted case of *City Of Fall River v. Conanicut Mills*, 294 Mass. 98, 1 N.E.2d 36 (1936) and is a major reason for the more deferential standard applied in later decisions reviewing the adequacy of tax title descriptions.

Rather than a description issue, the *Conanicut Mills* case dealt with issues related to the postponement of the subject tax sale to a time beyond the statutory limit of seven days as then provided in G.L. c.60, §44. Nonetheless, the court's discussion of background and effect of the "neither substantial nor misleading" sentence added to c.60, §37 is worth keeping in mind when dealing with tax

St.1915, c. 237. See now G.L. c.60, §64, et seq. This clause appeared in section 17 of the 1915 act.

After that revision the sale no longer transferred title at once to the purchaser, but gave him merely a lien that could be enlarged into a complete title only after proceedings in court for foreclosure of the right of redemption. Sections 1, 3, 4.

The Court in *Jenney v. Tilden*, 270 Mass. 92, 94, 169 N.E. 669, stated:

"Those changes in the statutes might be thought to give additional protection to the taxpayer, so that the former strictness could be relaxed. This does not mean that the amendment which now appears at the end of the present section 37 (see St.1935, c. 269) renders useless or nugatory all those requirements of law failure to observe which could be found to be neither substantial nor misleading, but it does mean that when this part of section 37 applies, such requirements become directory in character and cease to be conditions precedent to a valid sale. . . . Whether an error or irregularity is substantial or misleading must be decided according to the circumstances of each case." *Id.*, at 99-100. [Emphasis added.]

It is the latter statement, often quoted in later tax title cases, that puts us in a position, in some instances, of having to analyze a particular tax title description that looks like one of these marginal cases in order to determine if the description is nonetheless sufficient and free from an error which is "neither substantial nor misleading."

As for the determination as to whether an error or irregularity is substantial or misleading is fact driven "according to the circumstances of each case," *Id.*, at 100. In close call situations, the conveyancer may not feel comfortable making the determination and the determination may have to be made by a fact finder, i.e., either a judge or a jury.

In such a situation, it is important to keep in mind, also, that the burden of proof on the issue of whether an error or irregularity is neither substantial nor misleading is on the municipality or on one claiming under the tax title. *Bartevian v. Cullen*, 369 Mass. 819, 823, 343 N.E.2d 851 (1976); *Pass v. Town Of Seekonk*, 4 Mass. App. Ct. 447, 450, 351 N.E.2d 219 (1976).

(This is the end of Part I of this article. With this background, in Part II we will take a look at several tax title description cases to get a feel for where the courts may draw the line between a sufficient tax title description and a deficient one. Please return to the fall issue of the REBA News for the spellbinding conclusion of "Tax Titles and Descriptions.")

In order to have a good tax title, Title Standard No. 4 (2) establishes that, among other things, you need to have a description of the tax title property that "is sufficient to convey title." Well, what does that mean? Where can we turn? Item 1 of Title Standard No. 27 is a good start.

When by its terms it is obvious that it does not convey a title, it fails utterly to affect the rights of the original owner." *Conners*, *supra*, at 122-123.

Thus, as you can see, some seemingly minor factual distinctions between one description and another can take a minimally sufficient description and render it insufficient. On the other hand, *Conners* represents a stricter approach to tax title descriptions than do later cases. At the same time, the case remains instructive with respect to what constitutes a "description sufficient to convey title" for purposes of Title Standard No. 4 (2) and is often cited in later cases dealing with the adequacy of descriptions, particularly for tax titles.

One thing to keep in mind when reviewing tax title cases is that some of them, like *Conners*, predate a major change in the statutes. In particular, G.L. c.60, §37, was amended in 1915 to add a sentence providing, "No tax title shall be held to be invalid by reason of any er-

title description issues as well.

In general, tax laws are construed strictly in favor of the taxpayer. *Collector of Taxes of Boston v. Revere Building, Inc.*, 276 Mass. 576, 177 N.E. 577, 79 A.L.R. 112. Before the enactment of what is now that part of section 37 just quoted, this principle had been carried so far in relation to tax sales of real estate that failure to comply with statutory requirements, even in minute particulars, invalidated the sale. *Charland v. Home for Aged Women*, 204 Mass. 563, 567, 91 N.E. 146, 134 Am.St.Rep. 696; *Shurtliff v. Potter*, 206 Mass. 286, 92 N.E. 331; *Conners v. Lowell*, 209 Mass. 111, 95 N.E. 412, Ann.Cas.1912B, 627; *Koch v. Austin*, 225 Mass. 215, 114 N.E. 308.

The purpose of the enactment was to mitigate the severity of this rule as to errors and irregularities that were neither substantial nor misleading. It was part of an important revision of the law by which fundamental changes were made in the effect of sales for collection of taxes.

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From the President's desk

Continued from page 3
tember 2004.

I continue to be grateful to our friends at Massachusetts Lawyers Weekly for the partnership that we have forged this year. I would like to especially thank Jeff Baskies, David Yas, Paul Boynton, Scott Ziegler and Jason Scally for helping to nurture and grow our relationship while we implement REBA's strategic plan to make REBA the strongest and best real estate bar association in this country. I hope that all the members of REBA appreciate the significant opportunity that Lawyers Weekly has offered us in publishing REBA News.

I am also especially grateful to David Yas for selecting our Executive Director, Peter Wittenborg, to join the editorial board for Massachusetts Lawyers Weekly. Peter will share his seasoned per-

spective on the many significant issues that affect real estate in Massachusetts with the editorial board and readers.

Finally, I would like to report on the first REBA Opinion Leader Conference that was held in May to discuss the unique issues that affect residential conveyancers in Massachusetts. By all accounts, the evening was a great success and included presentations by Joel Stein on national issues, such as RESPA reform; Ed Smith, our legislative counsel, on pending legislation; and by Jon Davis on issues concerning the unauthorized practice of law. Many prominent real estate attorneys and title underwriters attended this event.

The energy and enthusiasm from the Opinion Leader Conference have led to discussions about the formation of the Residential Conveyancing Committee. On

June 11, 2004, Peter Wittenborg, President-elect Dan Ossoff and I met with Marvin Kushner and Tom Bussone, who have agreed to co-chair the new committee.

The mission of the committee will be to serve as support and to act as an advocate for real estate lawyers with a practice concentrating on representing residential lenders. This group will work closely with the association's Title Insurance and National Affairs Committee, the Legislation Committee and the Practice of Law by Non-Lawyers Committee to give a strong and consistent voice to Massachusetts lawyers in residential conveyancing practice.

I am very grateful to Marv and Tom for accepting this leadership challenge and for organizing and reenergizing the Residential Conveyancing Bar to focus on many of the issues that affect closing at-

torneys on the local and national level.

Tom and Marv will be spending the rest of this year organizing the committee and holding preliminary meetings, with an expected launch date for the new committee in January 2005. In the meantime, if you have any ideas, or would like to volunteer time to the committee, please feel free to contact Marv or Tom at their offices.

It has been a busy and dynamic year so far but much still needs to be accomplished. I would like to leave you with one final thought. Many of us have dreamed of a time when missing and incorrect discharges would be simply a memory, as opposed to a daily problem. Please help me realize this dream by contacting your senators and representatives now. Don't wait for someone else to do it. Remember the old adage: "If you want something done right, do it yourself." Thank you.

Unit owners must work together to enforce condo claims for defective design and construction

Continued from page 6

potential causes of action relative to construction, particularly with respect to those defects that impact the common areas, must be undertaken.

The statute of limitations begins to run when the plaintiff has notice that an injury has occurred and is not delayed until the plaintiff is aware of all of the facts giving rise to the cause of action. As such, a condominium association's knowledge of the existence of the defects rather than the cause or remedy for such defects (or knowledge of the identity of the potential defendants) will ordinarily trigger the statute.

This may be problematic for a association in that construction defects may be observed by certain condominium owners but are not promptly communicated to the individual or individuals that are responsible for the prosecution of the association's claims. While courts may be hesitant to dismiss a significant matter on the basis of the running of the statute of limitations, it is critically important that the association develop close communication with each of the unit owners so that any discoverable common area claim is reported to the association and acted upon in a timely fashion.

Building defects that become known during construction present an additional consideration, as the association responsible for pursuing the claims will

generally not yet have been formed at that point. It would therefore be unfair to allow the statute to commence to run during construction.

If discovery of such defects occurs prior to substantial completion, the three-year statute of limitations for claims to be advanced by a condominium association is triggered by the election of *independent* managers to the association (as opposed to board members appointed by the developer).

In *Beaconsfield Townhouse Condominium Trust v Zussman, et al.*, 49 Mass. App. Ct. 757, 761 (2000), the Massachusetts Appeals Court made clear that by "independent" it means persons "other than [the developers] or their employees." In some cases, a sophisticated condominium will be comprised of several secondary condominiums.

The date the statute of limitation commences to run for common area claims in the secondary condominium units may vary according to the dates of the election of independent managers for each such secondary condominium. If coordinated action is being considered by the primary and secondary condominium associations, litigation strategy must be dictated by the *most imminent statute*.

After the initial identification of the potential construction claims has been made and the accrual dates have been

analyzed, it will be necessary to isolate any particularly technical issues with which consultant assistance will be necessary. If there is any risk that the statute of limitation poses a threat to a construction related claim, overtures must be made to the developer, contractor and the design professional of record immediately to execute tolling agreements.

Demand should be made upon the developer and the general contractor to remedy any defective construction, neutralizing any potential failure to mitigate defense that either could raise if litigation is ultimately instituted. Accordingly, estimates should be obtained as quickly as possible for the comprehensive program of remedial work that the association will be required to undertake to the extent that neither the general contractor nor the developer is prepared to remedy the items of defective construction.

These estimates will likely provide a starting point for any subsequent negotiations with the developer or the general contractor. Again, as the association assesses its potential damages, every effort should be made to communicate with the unit owners so that each potential item of damage can be quantified.

In the event that it is necessary to institute a lawsuit or lawsuits against the developer, contractor or design professional, technical experts ought to be re-

tained by the time the complaint is filed, if not sooner. Construction litigation is document intensive and construction experts are quite useful during document discovery.

An expert will be most effective if he or she has been retained and has reviewed the alleged construction defects in a comprehensive and detailed fashion prior to the inception of paper discovery; issues identified by the expert will help frame the scope of any discovery requests and will provide focus for the reviewers of the copious documents likely to be produced.

Statutory deadlines like those imposed by M.G.L. c.260, §2B will deprive a condominium association of a judicial remedy for expensive construction defects for which the contractor or architect would otherwise be responsible. The association's fact-finding and claim analysis must start as soon as is reasonably possible in order to promptly identify all known or knowable construction defects to assess the potential impact of the three-year statute of limitations and six-year statute of repose on its claims.

Such early planning will also likely increase the association's likelihood of success on the merits of its claims for negligent design, construction, and breach of the implied warranty of habitability if the case is ultimately tried.

Right of first refusal has limited use where premises are packaged with other properties

Continued from page 4

While the broker who presented Coles' offers to Boston Kenmore was related to Boston Kenmore's president, no evidence was presented at trial indicating that there was any collusion between Coles and Boston Kenmore with respect to allocation of the purchase price or any attempt to defeat the right of first refusal.

Furthermore, Coles testified that it allocated the purchase price between Unit 103 and the remaining units based on its own calculations of the value of the respective units, rather than on an objective appraisal. Boston Kenmore did have an appraisal completed for Unit 103, but only after the purchase and sale agreement was executed. The appraisal showed the value of Unit 103 to be between \$2,300,000 and \$2,800,000.

Once the purchase and sale agreements were executed, Boston Kenmore gave the appropriate written notice to Uno of Coles' offer to purchase Unit 103, including the purchase price and a copy of the purchase and sale agreement. Uno responded by "purporting to exercise its right of first refusal by offering to pay \$1,390,200 for Unit 103." *Id.* at 381.

Uno stated in its notice that the \$2,800,000 purchase price represented an "inflated allocation" of the total purchase price to Unit 103, that was intended to deny Uno its right to exercise the right of first refusal. Uno further stated that the implied covenant of good faith and fair dealing required Boston Kenmore to protect Uno's ability to exercise its right of first refusal effectively.

Like Coles, Uno offered no evidence that its offer was based on the appraised market value of Unit 103 or any ratio that the appraised value of Unit 103 bore to the remainder of the building, but rather its offer represented 9.93 percent of the aggregate purchase price for Unit 103 and the building, based on the ratio of the assessed value of Unit 103 to the assessed value of the entire building.

Uno commenced a civil action to enjoin the sale to Coles and, after injunctive relief was denied, Boston Kenmore proceeded to close on the sale of Unit 103 and the remaining units to Coles. Uno continued its action against Boston Kenmore, seeking contract damages for a breach of the right of first refusal and the covenant of good faith and fair dealing, and also alleging a G.L. c. 93A violation.

A jury found in favor of Uno on the count of breach of the covenant of good faith and fair dealing, and also found that Coles' offer was not bona fide and awarded Uno \$350,000 in damages (less than the \$750,000 in damages that Uno's "ex-

pert economist" had opined to).

The trial judge further found that there had been no collusion between Boston Kenmore and Coles, that their transaction was arm's length, and that there was no Chapter 93A violation. Both parties appealed these rulings and the SJC took the case on direct appellate review.

Court's Reasoning

The Court (rejecting the 93A claim) first distinguished between a right of first refusal and an option to purchase, opining that a right of first refusal merely requires a seller to disclose to the holder of such right any genuine bona fide offer to purchase the subject premises. The Court found that so long as Coles intended to be bound by its offer, such offer was bona fide.

The Court, citing *Mucci v. Brockton Bocce Club, Inc.*, 19 Mass. App. Ct. 155, 158 (1985), rejected Uno's argument that Coles' offer was not bona fide because the offer for the remaining units in the building was contingent on the sale of Unit 103, and determined that Coles, with no contractual relationship with Uno, had no obligation to submit an offer within the limits of what Uno might have been willing to pay.

In fact, the Court stated that Coles was a competitor for the property, and "[n]othing precluded Coles from trying to outbid Uno by offering a price that Uno was unlikely to match." *Id.* at 384. So long as Coles was willing to close on its offer, the offer was bona fide.

The Court then turned to the alleged breach of the covenant of good faith and fair dealing, addressing Uno's contention that Boston Kenmore had an obligation to re-allocate the purchase price Coles offered for the entire building based on the relative values of Unit 103 and the remainder of the building.

The Court stated that while the covenant of good faith and fair dealing is implied in all contracts, it "may not . . . be invoked to create rights and duties not otherwise provided for in the existing contractual relationship . . ." *Uno* at 385. The Court stated that had Uno desired some degree of certainty with regard to its right of first refusal, Uno could have bargained for it.

The Uno lease required only that Uno be notified of any offer and did not contain any requirements or methodology for allocating an offer made on the entire building between Unit 103 and the other units. While Boston Kenmore may have had an obligation to allocate a certain percentage to Unit 103 of any purchase price Boston Kenmore set for the building, it was not obligated to re-allocate an unsolicited offer made by a third party.

Accordingly, the Court found that Boston

Kenmore's sole duty was to notify Uno of the offer in accordance with its terms. Because (i) Boston Kenmore had not set a price for the building, (ii) Coles' offer was unsolicited, and (iii) there was no evidence that Boston Kenmore attempted to influence Coles' allocation of the price of Unit 103, Boston Kenmore did not breach any obligation to Uno.

The Court recognized that had there been evidence of a gross degree of disproportion between the purchase price for Unit 103 and that for the other units, a breach of the covenant of good faith and fair dealing might have been found. However, the Court declined to opine as to this issue because no evidence of such disproportion was presented.

If an appraisal of all the units in the building (evidence of which was not offered) had disclosed an obvious egregious disproportion in allocation of the purchase price, the Court may have seen fit to find a breach of the covenant of good faith and fair dealing. Similarly, it appears clear that had the Court found sufficient evidence of collusion between

Boston Kenmore and Coles, it may have come to a different conclusion.

Nevertheless, the Court's ruling demonstrates the limited value of a general right of first refusal. The Court pointed out that a prospective purchaser has no obligation to offer a fair market price; and the existence of a right of first refusal serves to encourage the buyer to offer the highest possible price. The Court stated, "[r]ights of first refusal provide the weakest protection of all possible option arrangements." *Id.* at 389, citing *Miller v. LeSea Broadcasting, Inc.*, 87 F.3d 224, 226 (7th Cir. 1996).

The Court's ruling in this case has applicability not just in the condominium setting but also in any lease containing a right of first refusal.

As more and more properties are bought and sold as part of multi-site package deals and multi-property sale lease-back transactions, the lease drafter representing a tenant holding a right of first refusal should consider including explicit requirements as to purchase price allocation in the event the subject property is included in a multi-property transaction.

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- ☐ \$ 195 Voting Member (Attorneys admitted to Massachusetts Bar)
Year Admitted to the Massachusetts Bar _____ And BBO# _____
- ☐ \$ 125 Voting Member (Attorneys admitted to Mass Bar w/i last 3 years)
Year Admitted to the Massachusetts Bar _____ And BBO# _____
- ☐ \$ 195 Associate
Profession: Paralegal, Librarian, Title Examiner, Surveyor, Other: _____
- ☐ \$ 75 Full-time Law Student
(Include photocopy of current student ID card.)
- ☐ \$ 10 Optional: Imprinted 3-ring binder.
Large enough to hold all of the REBA Standards & Forms

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Please send this completed application with appropriate fee to:

Real Estate Bar Association for Massachusetts

50 Congress Street, Suite 600

Boston, Massachusetts 02109-4075

Tel: (617) 854-7555 or (800) 496-6799 Fax: (617) 854-7570

Defeat of effort to allow non-lawyers to handle closings highlight of busy legislative year

Continued from page 1

recording at registries of deeds, subject to data access by terminals at the registries. REBA objected to these provi-

sions, as presented.

The Joint Committee on Taxation instead recommended H. 4728, to include REBA-recommended conformance of state lien

provisions with federal law. The central DOR registry continues to be under study.

REBA president-elect Dan Ossoff served as chair of the legislation com-

mittee until this year, when he turned over the reins to Bob Kelley. The 2003-2004 term has been a varied and active one for the committee.

Status report of the 2003-2004 Massachusetts legislative session

Through REBA's Legislation Committee and Board of Directors a significant number of pending bills are reviewed and positions taken on behalf of REBA. Technical advice is also made available to the Massachusetts House and Senate from time to time. **Changes in bill status since the last update are shown in bold type.**

For copies of legislation visit the Legislature's website: www.state.ma.us/legis.

Priority List

- S. 6 Makes execution authority requirements for subordination of mortgage parallel with those for assignment or discharge of mortgage. Status: Joint Committee on Banks and Banking recommended ought to pass; Senate Committee on Bills in Third Reading. (REBA position: support)
- S. 118 Requires expanded disclosures by sellers of residential property and exonerates brokers and lenders from liability in the absence of actual knowledge. Status: Joint Committee on Commerce & Labor. (REBA position: oppose)
- S. 983 Facilitates registration at the Land Court of instruments executed on behalf of a corporation. Status: Joint Committee on the Judiciary recommends ought to pass; **Senate Committee on Bills in Third Reading.** (REBA position: support)
- S. 985 Establishes a 50-year limitation on sand rights and other profits à prendre, subject to extension, except that in no case shall any such interest in land expire any earlier than three years from the legislation's effective date. Status: Joint Committee on the Judiciary rec-

- S. 1011 Prohibits any claim other than for fraud against any attorney rendering a title opinion or any prior record owner, by subrogation or otherwise, on behalf of a title insurer that has paid a claim. Status: Committee on the Judiciary recommends further study. (REBA position: oppose)
- S. 1857 Proposes 50-year statute of limitations under MGL c.40, §54A relative to statutory restriction on land in or appurtenant to old railroad rights-of-way. Status: Joint Committee on Transportation recommends further study. (REBA position: support)
- S. 1949 Supplemental Appropriations Bill, which included increases in recording fees and authorized the use of single-member LLC's in Massachusetts. Status: St. 2003, c.4, which included REBA-supported provisions to: make recording/registration fees for unregistered land and registered land uniform; simplify calculation of fees (i.e. no more per-page fees for deeds and mortgages); establish a \$5 surcharge on fees to be dedicated to registry technology and operating needs; delay effective date by 120 days (i.e., July 14, 2003) for fee increases for mortgage discharges, releases and assignments; establish a Registries Advisory Board, including all registers of deeds. Two REBA representatives and representatives of other registry constituencies (e.g., banks, mortgage companies, title insurers, real estate brokers) to advise both county and state registers concerning technology plans.

- S. 2386 REBA's omnibus mortgage discharge reform bill, co-sponsored by Senators Andrea Nuciforo and Steven Panagiotakos and Representatives Robert DeLeo, Christopher Fallon and James Vallee. Status: **Referred to the Joint Committee on Banks and Banking**
- H. 177 Requires a mortgagee that has received payment in accordance with its payoff statement to record the discharge of mortgage. Status: Joint Committee on the Judiciary recommends further study.
- H. 180 Permits certain corporations to perform real estate closings, notwithstanding statutory prohibition on the practice of law by non-attorneys. Status: Committee on the Judiciary recommends further study (H. 4609). (REBA position: oppose)
- H. 743 Enacts a good and clear record and marketable title act. (Landowners Title Protection Act). See also S. 966. Status: Joint Committee on the Judiciary recommends ought to pass. (REBA position: support)
- H. 744 Requires a recital of the names and addresses of owners of land taken by eminent domain to be included in the instrument of taking. See also S. 960. Status: Joint Committee on the Judiciary recommends ought to pass; House Committee on Steering & Policy. (REBA position: support with amendments)
- H. 2731 Requires written payoff statement to be provided by a mortgagee or servicer within 5 days of a request by the mortgagor or his designee. Status: Joint Com-

- mittee on Banks and Banking recommends ought to pass; **House Committee on Bills in Third Reading.** (Similar provision appears in S. 2386, above)
- H.4400, §§ 224, 225 (as appearing in House FY2004 Budget) incorporated H. 3732 Governor's Message to expand the scope of the state's lien for medical assistance benefits (MassHealth) to include joint property and other non-probate estate property of a decedent recipient. Status: St. 2003, c. 26, §§ 329, 330. (amended to include REBA's technical amendments limiting the lien to the decedent's *interest* in real property and protecting record titleholders.); effective date postponed to July 1, 2004. See St. 2003, c.140, § 110. **House and Senate have voted to reinstate former limitation to probate estate, as an amendment to FY 2005 State Budget, effective July 1, 2004.**
- H.4485 Extends 6-year liens for state taxes or child support to indefinite duration; and creates central registry at state Department of Revenue for said liens in lieu of recording at registries of deeds, subject to data access by terminals at the registries. See §§ 21-23, 25, 51, 66, 67. Status: Joint Committee on Taxation **recommended H. 4728, to include REBA-recommended conformance of state lien provisions with Federal law.** (REBA position: oppose H. 4485, as drafted.)

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Executive Order No. 455
by Governor Romney

Regulates conduct and duties of notaries public, **as revised, effective May 14, 2004. Establishes the keeping of a Journal by notaries public, but only as a "best practice" for lawyers and for those employed by lawyers. See also amendment to FY 2005 State Budget, which exempted attorneys and their staffs from the Journal requirement.** (REBA position: opposed to the Journal requirement for attorneys and their employees.)

Other Legislation

- S. 103 Proposes new Massachusetts Business Corporations Act. Status: St. 2003, c.127, approved November 26, 2003. (REBA recommended title-related amendments, which were included.)
- S. 946 Establishes a Western Division of the Land Court, sitting in Worcester. Status: Joint Committee on the Judiciary
- S. 964 Legislation relative to notice of contract under M.G.L. c.254 and dissolution of mechanics liens. Status: Joint Committee on the Judiciary.
- S. 965 Legislation to relax the statute of limitations for use violations under G.L. c. 40A, § 7. See also H. 742. Status: Committee on the Judiciary.
- S. 995 Increases the homestead exemption to \$500,000. Status: Joint Committee on the Judiciary recommended ought to pass; passed by the Senate; House Committee on Steering & Policy; **also approved by the Senate as an amendment to the Senate version of the FY 2005 State Budget.**
- S. 1056 Creates an estate of homestead by operation of law and without the need for a recorded instrument. See also H. 1319. Status: Joint Committee on the Judiciary recommends further study.
- S. 1118 Requires construction mortgage lien holders to fund advances for subcontractors, notwithstanding recording of mechanics lien. Status: Joint Committee on the Judiciary recommends further study.

- S. 1140 Establishes new procedural requirements in foreclosing residential mortgages, including expanded notice of debtor's rights; right to cure up to one day prior to the conduct of the foreclosure sale; non-responsibility of debtor for mortgagee's legal fees if default is cured within 60 days of mortgagee's notice of intent to foreclose; requirement of court approval for foreclosure sale conducted earlier than 180 days after notice of intent to foreclose; requirement of a court determination of fair market value of the property foreclosed in any suit for deficiency; and post-foreclosure accounting requirements, including relative to price upon any resale by foreclosing mortgage holder within 18 months. Status: Joint Committee on the Judiciary recommends further study.
- S. 1245 Sustainable Development Act. Status: Joint Committee on Natural Resources. See also H. 4039: **Joint Committee on Local Affairs recommends ought to pass.**
- S. 1250 Proposes a Massachusetts Land Use Reform Act. Status: Joint Committee on Natural Resources. See also S. 1174: **Joint Committee on Local Affairs recommends ought not to pass. NOTE: Section 103 of Senate version of FY 2005 State Budget includes new M.G.L. c. 40R, which provides for local option to authorize communities to elect "smart growth" overlay districts with state incentives.**
- S. 1251 Livable Communities Act. Status: Joint Committee on Natural Resources.
- S. 2045 Recodifies certain statutory authority of the Commissioner of Banks in determining the powers of state-chartered banks, including by reference to the Gramm-Leach-Bliley Act of 1999. Status: Joint Comm. on Banks and Banking recommended ought to pass; **passed by the Senate, with amendments; House Committee on Ways and Means.**
- S. 2076 Gives legal effect to electronic signatures on contracts and other documents; and authorizes governmental agencies to convert documents to electronic

storage. Status: St. 2003, c. 133, approved November 26, 2003.

H. 191 **Requires notice by a planning board to interested parties of actions taken under § 81U of G. L. c. 41; and requires applicants seeking approvals thereunder by reason of failure of a board to act, to notify the board and interested parties, in either case in time for appeals to be filed. Status: Joint Committee on Local Affairs recommends ought to pass.**

H. 381 Converts a Section 1 homestead to a Section 1A homestead by operation of law when the person who has filed the Section 1 declaration of homestead reaches age 62. Status: Joint Committee on the Judiciary recommends further study.

H. 893 Prohibits the use of plans prepared by unlicensed persons who purport to provide engineering or land surveying services. Status: Joint Committee on Government Regulations recommends ought to pass; House Committee on Bills in Third Reading.

H. 1322 Establishes a recitation of statutory powers for fiduciaries having legal title to or control over real or personal property for which there are environmental issues requiring action by the fiduciary. Status: Joint Committee on the Judiciary recommends further study.

H. 2192 Clarifies rights of mortgagees in assignments of rents and profits in real property. Status: Joint Committee on Banks and Banking recommended ought to pass; House Committee on Bills in Third Reading.

H. 2733 Requires as a precondition to foreclosure of a mortgage on property owned by an individual age 62 or more, that a representative of the mortgagee, accompanied by an elders agency representative, visit the property and explain the terms and conditions of the foreclosure. Status: Joint Committee on Banks and Banking recommends ought to pass; House floor action pending.

H. 3963 Establishes an Environmental Appeals Board for review of DEP

proceedings. Status: Passed by the House and Senate; returned by the Governor with an amendment that substitutes the text of H. 3990; no further action.

H.1891 Provides new regulation of notaries public, in part to curb the unauthorized practice of law. Status: Joint Committee on the Judiciary recommends further study. See also Romney Administration Executive Order No. 455, above.

H. 4059 **Expands zoning protection for lawful, non-conforming single-family and two-family dwellings. Status: Joint Committee on Local Affairs recommends ought to pass.**

H.4217 Filed by the State Secretary, legislation to authorize the use of electronic notarization of instruments; passed by the House and Senate; vetoed by Governor. (Veto Message, H. 4503, pending before the House for potential override vote.) See also Romney Administration Executive Order No. 455, above.

H.4240 Omnibus legislation to amend M.G.L. c. 40B, to promote affordable housing and community planning. Status: Recommended by the Joint Committee on Housing and Urban Development; **passed by the House as H. 4715; Senate Committee on Ways & Means.**

H.4320 Provides that the acquisition of a new homestead estate shall not "defeat" or "discharge" a previous homestead of record. Status: Joint Committee on the Judiciary recommends further study (REBA position: opposed as drafted.)

H.4595 Directs the State Secretary to promulgate regulations for the conduct of notaries public and the performance of their official duties; and requires certain disclosures in advertising by non-attorney notaries public. Status: Joint Committee on the Judiciary recommends ought to pass; **passed by the House.**

Robert H. Kelley, chairman of the REBA Legislation Committee and Edward J. Smith, REBA legislative counsel, compiled this status report.

Potential pitfalls in special permit applications

Continued from page 9

materials do not contain the certification of the town clerk required at the time of filing by G.L. c. 40A, §9. Even where towns provide instructions to applicants, the instructions do not always include the requirement that the town clerk certify the submission of the application. Therefore, it is easy for a layperson to miss the requirement.

Procedural Steps Need To Be Followed

The leading handbook on zoning in Massachusetts states, "Failure to observe the filing procedure set forth in the statute may have the effect of removing the matter from the jurisdiction of the granting authority." *Handbook of Massachusetts Land Use and Planning Law*, 2nd Ed., Bobrowski, Mark, Aspen Law & Business (2002) at page 298.

There is significant case law to support the proposition that failure to meet the procedural requirements for filing an application will render the permit invalid. For example, the Supreme Judicial Court stated: "Since the notice did not meet the standards of §17, the board's action in granting the permit was invalid and of no effect." *Rousseau v. Building Inspector of Framingham*, 349 Mass. 31, 37, 206 N.E.2d 399, and cases cited. See also *Planning Board of Peabody v. Board of Appeals of Peabody*, 358 Mass 81, 260 N.E.2d 738 (1970).

The Supreme Judicial Court in *Galagher v. Board of Appeals of Falmouth*, 351 Mass 410, 221 N.E.2d 756 (1966), stated: "Because of the lack of required notice, the action by the selectmen was invalid and without effect." See also *Kane v. Board of Appeals of City of Medford*, 273 Mass. 97, 104, 173 N.E. 1; *Rousseau v. Building Inspector of Framingham*, 349 Mass. 31, 36-37, 206 N.E.2d 399."

The court went to say, "a defect in the general notice to the public cannot be overcome by the appearance of some citizens and the absence of objection to the notice. All citizens are entitled to the statutory notice and the opportunity to be heard after it is given. Compare *Pitman v. City of Medford*, 312 Mass. 618, 623, 45 N.E.2d 973 (defect in notice to certain persons all of whom appeared).

"In the *Rousseau* case, *supra*, objection to the defective notice to an individual was made at the hearing. There is no basis for contending that the hearing by the Falmouth Board of Appeals cured the defect. The Board of Appeals had no power to exercise the judgment granted to the Selectmen and did not purport to do so.

"Because of this jurisdictional defect

the substantive issue was not before the court. Nevertheless, as that important issue has been fully argued, we state our views thereon. See *Wellesley College v. Attorney Gen.*, 313 Mass. 722, 731, 49 N.E.2d 220; *Paul, Livoli, Inc. v. Planning Bd. of Marlborough*, 347 Mass. 330, 336, 197 N.E.2d 785."

If an applicant is fortunate enough to receive a Special Permit, and the decision is not appealed, the failure to obtain the town clerk's certification may be cured by G.L. c.40A, §17, which states that the judicial review afforded by the statute is an exclusive remedy.

G.L. c.40A, §17. states: "[N]otwithstanding any defect of procedure or of notice other than notice by publication, mailing or posting as required by this

performed attorney can provide significant value to the Board of Appeals process. Failure to comply with statutory requirements could create costly and potentially irreversible damage.

Sometimes it seems that zoning by-laws (which vary from municipality to municipality) are too esoteric for lay people to fully comprehend and appreciate. Similarly, some attorneys who do not regularly practice in the area of land use regulation may not appreciate some of the eccentricities of the law.

When I first entered private practice I had the benefit of over ten years experience in state and local government, most recently as the town administrator in the town in which I practice. One of my first clients desired to expand his non-con-

forming dwellings that encroached upon the front-yard set-back requirement. The neighbors wished to complete landswaps and reconstruct each of their homes so that the new homes would conform with the applicable set-back requirements; but the lots would continue to be non-conforming with regard to lot frontage.

The attorney advised the client of the necessity of having an Approval Not Required plan prepared; the need for approval by the Board of Health of the septic system; the need for complete estimates from the various contractors; the potential for a Special Permit from the Board of Appeals to reconstruct a home on a non-conforming lot; and the need for a comprehensive agreement between the two lot owners. The attorney prepared a proposed landswap agreement and sent it to the client. Weeks later the attorney heard that the client and his neighbor had prepared and filed their own Special Permit Application. When the attorney asked the client why they had chosen to proceed with the Special Permit Application prior to the exchange of the landswap agreements, the client responded that he was trying to control legal fees and that the Building Inspector had informed him that it was unnecessary to engage an attorney to apply for the Special Permit. The attorney followed up with a cautionary letter to the client and the attorney asked me if I thought he was being too persnickety.

I responded that it is the rare lay person that can comply with all of the statutory requirements regarding a Special Permit Application. Defects in the application could render the Special Permit invalid, or susceptible to challenge upon appeal. Naturally, there are other concerns about the parties proceeding with landswaps without the prerequisite agreement between the parties.

For example, a Special Permit application will be defective if the application materials do not contain the certification of the town clerk required at the time of filing by MGL Chapter 40A, Section 9. Even where towns provide instructions to applicants, the instructions do not always include the requirement that the town clerk certify the submission of the application. Therefore, it is easy for a layperson to miss the requirement. The leading handbook on zoning in Massachusetts states that "Failure to observe the filing procedure set forth in the statute may have the effect of removing the matter from the jurisdiction of the granting authority." *Handbook of Massachusetts*

Continued on page 21

It is the rare layperson that can comply with all of the statutory requirements regarding a Special Permit Application.

chapter, and the validity of any action shall not be questioned for matters relating to defects in procedure or of notice in any other proceedings except with respect to such publication, mailing or posting and then only by a proceeding commenced within ninety days after the decision has been filed in the office of the city or town clerk, but the parties shall have all rights of appeal and exception as in other equity cases."

A 1986 Supreme Judicial Court decision reviewed the meaning of the above portion of Section 17, and determined that the 90-day appeal period described in the statute was "intended to limit the time for filing a challenge to an action of a board on the ground that a defect in procedure or notice had deprived the board of jurisdiction over the matter." *Cappuccio v. Zoning Board of Appeals of Spencer*, 398 Mass 304, 496 N.E.2d 646 (1986).

Of course, there are other potential traps that could ensnare a lay applicant, including the failure to properly reference the correct zoning provisions applicable to the Special Permit (or Variance) application. The curative provisions of Section 17 may not resolve such a defect.

In summary, when one considers the cost of real estate today, and the importance of protecting one's home, an ex-

forming dwelling and I advised him that it would be helpful to research the history of the zoning by-law as it applied to his house because there was the potential that his house was not lawfully pre-existing. The Town did not maintain a comprehensive record of the history of zoning changes and I summarized how I would conduct the research.

A month or so later I ran into the client and he explained that in order to avoid additional legal fees, he had attempted to research the zoning history himself and was upset that he had spent days trying to determine the applicable zoning. I explained to him that I had never anticipated that he would perform the research by himself and that because of my familiarity with the Town's records I could have conducted the research in a few hours. It was an important lesson in my early legal career. One has to be cautious about encouraging lay people to perform steps that are best performed by an attorney with appropriate experience.

I was reminded of this lesson when I received a call from a colleague who was concerned about a recent conversation that he had had with a client. The client and an abutter both had pre-existing non-conforming lots, both lots having insufficient frontage. Both lots also had

Continued from page 20

Land Use and Planning Law, 2nd Ed, Bobrowski, Mark, Aspen Law & Business (2002) at page 298. There is significant case law to support the proposition that failure to meet the procedural requirements for filing an application will render the permit invalid. “Since the notice did not meet the standards of §17, the board’s action in granting the permit was invalid and of no effect. *Rousseau v. Building Inspector of Framingham*, 349 Mass. 31, 37, 206 N.E.2d 399, and cases cited. *Gallagher v. Board of Appeals of Falmouth*, 351 Mass. 410, 414, 221 N.E.2d 756.” *Planning Board of Peabody v. Board of Appeals of Peabody*, 358 Mass 81,260 NE 2d 738 (1970).

See *Gallagher v. Board of Appeals of Falmouth*, 351 Mass 410, 221 NE2d 756 (1966), which stated: “Because of the lack of required notice, the action by the selectmen was invalid and without effect. *Kane v. Board of Appeals of City of Medford*, 273 Mass. 97, 104, 173 N.E. 1. See *Rousseau v. Building Inspector of Fram-*

ingham, 349 Mass. 31, 36-37, 206 N.E.2d 399. A defect in the general notice to the public cannot be overcome by the appearance of some citizens and the absence of objection to the notice. All citizens are entitled to the statutory notice and the opportunity to be heard after it is given. Compare *Pitman v. City of Medford*, 312 Mass. 618, 623, 45 N.E.2d 973 (defect in notice to certain persons all of whom appeared). In the *Rousseau* case, supra, objection to the defective notice to an individual was made at the hearing. There is no basis for contending that the hearing by the Falmouth Board of Appeals cured the defect. The Board of Appeals had no power to exercise the judgment granted to the Selectmen and did not purport to do so. Because of this jurisdictional defect the substantive issue is not before the court. Nevertheless, as that important issue has been fully argued, we state our views thereon. See *Wellesley College v. Attorney Gen.*, 313 Mass. 722, 731, 49 N.E.2d 220; *Paul, Livoli, Inc. v. Planning Bd. of Marlborough*, 347 Mass. 330, 336,

197 N.E.2d 785” *Gallagher v. Board of Appeals of Falmouth*, 351 Mass 410, 221 NE2d 756 (1966).

If an applicant is fortunate enough to receive a Special Permit, and the decision is not appealed, the failure to obtain the town clerk’s certification may be cured by MGL Chapter 40A, §17, which states that the judicial review afforded by the statute is an exclusive remedy:

“...notwithstanding any defect of procedure or of notice other than notice by publication, mailing or posting as required by this chapter, and the validity of any action shall not be questioned for matters relating to defects in procedure or of notice in any other proceedings except with respect to such publication, mailing or posting and then only by a proceeding commenced within ninety days after the decision has been filed in the office of the city or town clerk, but the parties shall have all rights of appeal and exception as in other equity cases.” MGL Ch 40A, §17.

A 1986 Supreme Judicial Court deci-

sion reviewed the meaning of the above portion of Section 17, and determined that the ninety (90) day appeal period described in the statute was “intended to limit the time for filing a challenge to an action of a board on the ground that a defect in procedure or notice had deprived the board of jurisdiction over the matter.” *Cappuccio v. Zoning Bd of Appeals of Spencer*, 398 Mass 304, 496 NE2d 646 (1986).

Of course, there are other potential traps that could ensnare a lay applicant, including the failure to properly reference the correct zoning provisions applicable to the Special Permit (or Variance) application. The curative provisions of Section 17 may not resolve such a defect.

In summary, when one considers the cost of real estate today, and the importance of protecting one’s home, an experienced attorney can provide significant value to the Board of Appeals process. Failure to comply with statutory requirements could create costly and potentially irreversible damage.

For REBA Members

To place an order for any of these items: note the quantity; enclose a check for the appropriate amount; clearly print your name and mailing address; and return to
REBA, 50 Congress Street, Suite 600, Boston, MA 02109-4075, or fax to 617-854-7540, attn: Pam.

Seminar Syllabi:

Quantity

Ethical Lawyering (05/00) \$10.00 _____
Includes new Registry of Deeds Indexing Standards and Land Court Guidelines to Registered Land.

2001: A Commercial Space Odyssey (05/01) \$10.00 _____
Includes documents for voluntary withdrawal from the registration system; many forms and checklists for commercial developments.

Condominiums: Deja Vu All Over Again? (11/01) \$10.00 _____
Includes the Colonial Title decision as well as trends in mixed-use condos.

As the Economic World Turns: (05/02) Free _____
Strategies for a Changing Environment
Includes info on avoiding litigation in new construction; resolving construction

disputes and mechanics liens; limiting real estate tax liabilities; foreclosures.

Not in My Back Yard: (11/02) \$25.00 _____
Addressing Competing Interests in Real Estate Practice
Includes index on roads and ways cases; info on indoor air contamination and mold related issues.

2003 Spring Seminar (05/03) \$30.00 _____
Includes dangerous lease issues for the unwary; tips for representing clients before zoning boards; and information on the new dam safety legislation.

2003 Annual Meeting (11/03) \$40.00 _____
Includes an analysis of the GBREB commercial lease form; conservation real estate law; and compliance issues for conveyancers.

(All of the above items are in limited supply and are sold on a first come/first served basis. None will be reprinted. If any item is out of stock, your check will be returned. All sales are final.)

Standards & Forms Binder \$10.00 _____
This (empty) 3-Ring Binder is large enough to hold the REBA Standards & Forms. Imprint on spine and cover.

NAME: _____
FIRM: _____
ADDRESS: _____

CITY: _____
STATE: _____ ZIP: _____
TEL: _____
FAX: _____
E-MAIL: _____

ALTA adopts new form title insurance policy endorsements

Continued from page 13

ership interests (direct or indirect) in the insured have been transferred to or acquired by the Mezzanine Lender, either on or after the Date of Policy.

6. The Mezzanine Lender acknowledges:

(a) that the amount of insurance under this policy shall be reduced by any amount the Company may pay under any policy insuring a mortgage to which exception is taken in Schedule B or to which the insured has agreed, assumed, or taken subject, or which is hereafter executed by an insured and which is a charge or lien on the estate or interest described or referred to in Schedule A, and the amount so paid shall be deemed a payment under this policy; and

(b) that the Company shall have the right to insure mortgages or other conveyances of an interest in the land, without the consent of the Mezzanine Lender.

7. If the insured, the Mezzanine Lender or others have conflicting claims to all or part of the loss payable under the Policy, the Company may interplead the amount of the loss into Court. The insured and the Mezzanine Lender shall be jointly and severally liable for the Company's reasonable cost for the interpleader and subsequent proceedings, including attorneys' fees. The Company shall be entitled to payment of the sums for which the insured and Mezzanine Lender are liable under the preceding sentence from the funds deposited into Court, and it may apply to the Court for their payment.

8. Whenever the Company has settled a claim and paid the Mezzanine Lender pursuant to this endorsement, the Company shall be subrogated and entitled to all rights and remedies that the Mezzanine Lender may have against any person or property arising from the Mezzanine Loan. However, the Company agrees with the Mezzanine Lender that it shall only exercise these rights, or any right of the Company to indemnification, against the insured, the Mezzanine Loan borrower, or any guarantors of the Mezzanine Loan after the Mezzanine Lender has recovered its principal, interest, and costs of collection."

This endorsement may be used either with an existing Owner's Policy or a new Owner's Policy in a transaction where an entity owns the land and is borrowing money. The entity may be giving a mortgage on the land and providing a loan title insurance policy for the mortgage.

There may also be a mezzanine loan given either to the same lender making the real estate loan or to a totally different lender. The mezzanine loan is made to the partners, members, or shareholders

(equity holders) of the owning entity in exchange for a pledge of the equity holder's interest in the entity.

Since the real value of the equity holder's interest in the entity is based upon the ownership by that entity of the real estate, the mezzanine lender wants to make sure there is an Owner's Policy in place and that the mezzanine lender is somehow connected to the protections afforded by that policy. The mezzanine lender does not have an insurable interest in the real estate owned by the entity so an owner's policy cannot be given to the mezzanine lender.

The mezzanine is not being granted a separate mortgage on the real estate to secure repayment of the mezzanine loan, so a Loan Policy will not work either. Since the entity has or is obtaining an owner's policy, the mezzanine lender will request this endorsement to the Owner's Policy. The effect of issuing this endorsement is to assign to the mezzanine lender the right to receive payments otherwise payable to the insured under the policy.

The mezzanine lender is not an insured but it stands to receive payments that would otherwise go to the insured in settlement of a claim. If there is a title problem with the land and the insurer decides to settle the claim, it would make that payment to the mezzanine lender before the insured.

The mezzanine lender should also obtain a UCC title insurance policy with appropriate endorsements from one of the title insurers that offers that product so it is insured against loss if the equity holders do not own the equity in the entity and the mezzanine lender's security interest in the equity does not attach or have the priority as insured. This endorsement does not provide any UCC protections. This endorsement provides mezzanine lender greater coverage under certain circumstances than the Owner's Policy because it contains "nonimputation coverage" and "fairway coverage" that are not typically part of the owner's coverage.

This endorsement also has a signature block for the insured to consent to issuing this endorsement that assigns to the mezzanine lender the benefits the insured would otherwise receive for payment of loss. This poses the same issue discussed regarding the Form 15.1 endorsement. Make sure the consent block is signed by the insured.

This endorsement to the Owner's Title Insurance Policy, together with a UCC title insurance policy covering the ownership of and security interest in the equity holder's interest in the entity is something that all mezzanine lenders will need to have well-rounded coverage.

Endorsement Form 17

"(Access and Entry) to either an Owner's or Loan Policy

The Company insures against loss or damage sustained by the insured if, at Date of Policy: (i) the land does not abut and have both actual vehicular and pedestrian access to and from [insert name of street, road, or highway] (the "Street"), (ii) the Street is not physically open and publicly maintained, or (iii) the insured has no right to use existing curb cuts or entries along that portion of the Street abutting the land."

This endorsement provides superior access coverage than that provided by any ALTA policy because it provides coverage for loss (a) if the insured doesn't have both actual vehicular and pedestrian access to and from a specifically identified street or road, and (b) if the street is not physically open and publicly maintained.

Additionally this endorsement provides coverage for loss if the insured has no right to use the existing curb cuts or entries off of the street onto the land. This is much better coverage than the other non-ALTA endorsements that have been in the marketplace for years. Our customers should welcome this coverage. When this endorsement is issued, special underwriting may be required.

Endorsement Form 18

"(Single Tax Parcel) to either an Owner's or Loan Policy

The Company insures against loss or damage sustained by the insured by reason of the land being taxed as part of a larger parcel of land or failing to constitute a separate tax parcel for real estate tax purposes."

This endorsement provides that the land described in the policy is a single and separate tax parcel and not part of a larger parcel of land. It should be relatively easy to issue from an underwriting perspective.

Endorsement Form 18.1

"(Multiple Tax Parcel) to either an Owner's or Loan Policy

1. The Company insures against loss or damage sustained by the insured by reason of:

those portions of the land identified below not being assessed for real estate tax purposes under the listed tax identification numbers or those tax identification numbers including any additional land; the easements, if any, described in Schedule A being cut off or disturbed by the non-payment of real estate taxes or assessments imposed on the servient estate by a governmental authority."

The Form 18.1 is similar to Form 18 but deals with multiple tax parcels included

within the legal description of the land. This endorsement protects the insured against loss if the land specifically identified is not assessed for real estate tax purposes under the tax identification numbers listed in the endorsement or if those tax numbers include any other land other than what is identified. This coverage should be relatively easy to underwrite.

Endorsement Form 19

"(Contiguity-Multiple Parcel) to either an Owner's or Loan Policy

The Company insures against loss or damage sustained by the insured by reason of:

(1) the failure [of the _____ boundary line of Parcel A] of the land to be contiguous to [the _____ boundary line of Parcel B] [for more than two parcels, continue as follows: "; of [the _____ boundary line of Parcel B] of the land to be contiguous to [the _____ boundary line of Parcel C] and so on until all contiguous parcels described in the policy have been accounted for]; or

(2) the presence of any gaps, strips or gores separating any of the contiguous boundary lines described above."

This endorsement is for use where the land described in the policy is made up of several separately described parcels that to have contiguous boundaries. What boundary of a given parcel is contiguous to what boundary of another? There may be strips, gaps, or gores between the respective contiguous boundaries.

This endorsement insures against loss if the boundaries described in the endorsement are not contiguous and if there are any strips, gaps, or gores separating the contiguous boundaries described in the endorsement. Many contiguity endorsements that have been in the industry for years do not adequately describe the coverage sought or given. Whether a survey will be required to give this coverage is something that each underwriter will have to determine based upon his or her underwriting standards.

Endorsement Form 19.1

"(Contiguity-Single Parcel) to either an Owner's or Loan Policy

The Company insures against loss or damage sustained by the insured by reason of:

(1) the failure of the land to be contiguous along its _____ boundary line to [describe the land that is contiguous to the "land" as defined in the policy by its legal description or by reference to a recorded instrument – e.g. "... that certain parcel of real property legally described in the deed recorded as Instru-

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ment No. _____, records of _____ County, State of _____]; or

(2) the presence of any gaps, strips or gores separating the contiguous boundary line described above."

This endorsement is issued only when there is a single parcel described in the policy and the insured wants coverage that the land described in the policy is contiguous to some other land that is not described or insured in the policy.

It is necessary for the endorsement to

describe the adjacent uninsured parcel and describe what boundary of the insured land is contiguous to what boundary of the uninsured parcel described in this endorsement. This endorsement also provides coverage if there are any strips, gaps, or gores separating the two parcels along the contiguous boundaries described.

What's Next?

While the creation and adoption of these new forms will help move our industry forward, our task is not yet com-

pleted. The Forms Committee is also working on some other endorsements as well as policy revisions, which hopefully will be completed and approved for adoption by the ALTA Board of Governors in the near future.

There is another access endorsement dealing with access to a public street over a private easement. Yet another deals with first-loss issues. We are also working on mobile home issues and modifications to the ALTA Form 7 endorsement. We are also working on a major revision to the

ALTA 1992 Loan Policy that will give even better coverage to our insureds.

As the needs and demands of our customers change with time, it is very important for the industry to keep moving forward with the development of new and innovative forms. The ALTA Forms Committee will continue to be responsive to those needs.

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'Predatory lending' a priority for lawmakers

Continued from page 5

quent high cost home mortgage loan unless the lender reasonably believes that at the time the loan is consummated, that the borrower will be able to make the scheduled payments to repay the obligation.

The high cost home mortgage loan shall not contain any provision for prepayment fees or penalties.

The high cost home mortgage loan shall not include the financing of points and fees in excess of 5 percent of the total loan amount or \$800, whichever is greater.

A high cost home mortgage loan shall not contain a provision that increases the interest rate after default.

A high cost home mortgage loan shall not contain a scheduled payment that is more than twice as large as the average of earlier scheduled payments.

A high cost home mortgage loan shall not contain a demand feature that permits the lender to terminate the loan in advance of the original maturity date, except in specific circumstances such as fraud by the consumer or failure by the consumer to meet repayment terms of the agreement for an outstanding balance.

A lender shall not charge a borrower a fee or other charge to modify or amend a high cost home mortgage loan.

A high cost home mortgage loan shall not include terms pursuant to which more than two periodic payments required under the loan are consolidated and paid in advance from the loan proceeds provided to the borrower.

No lender shall make a high cost home mortgage loan that provides for mandatory arbitration or limits the right of the borrower to seek judicial relief.

A lender shall not pay a contractor under a home improvement contract from the proceeds of a high cost home mortgage loan unless the loan is jointly made to the borrower and contractor or at the election of the borrower through a third party escrow agent.

The statute further provides that any person who purchases or is assigned a

high-cost loan shall be subject to all affirmative claims and defenses. There are specific situations where the subsection shall not apply.

Section 18 of the Bill requires the lender making a high-cost home mortgage loan to obtain a declaratory judgment in a court of competent jurisdiction prior to invoking a non-judicial power of sale.

The declaratory judgment must pro-

vide that the lender is the proper party in interest to invoke the power of sale or other remedy and that the grounds for exercising the power of sale or other remedy have been fully satisfied.

In this case, the borrower will have the right to assert in the proceeding the nonexistence of a default or any claim or defense to the foreclosure, including violations of this Chapter 167L.

The REBA Legislation Committee is following the bill pending in the Legislature that would prohibit abusive home mortgage lending practices, and will offer input on sections impacting foreclosure and conveyancing issues.

No prepayment fee or additional penalty of any kind shall be payable by a mortgagor if the mortgage note is paid in full after 36 months from the date of the note.

The proposed Section 56 also notes that whenever a prepayment penalty may be charged on a mortgage loan, the lender shall provide to the borrower at settlement a disclosure statement that describes the prepayment penalty; sets forth the circumstances in which a prepayment penalty will be assessed; and states the amount of the prepayment penalty that would be required if the loan was paid in full within 36 months of the date of the note.

Chapter 183 is amended by striking out Section 59 and inserting a new Section 59 which states that there will be no late charge or late payment penalty unless such penalty is authorized in the loan documents. It further states that no mortgagee may assess a late charge for any payment paid within 15 days or, in the case of a bi-weekly mortgage, paid within 10 days from the date such payment is due. Further, no penalty may exceed

3 percent of the amount of principal and interest overdue.

Chapter 183, Section 66, is amended by eliminating add-ons that a lender may finance such as life or disability insurance.

Chapter 183 is further amended by adding Section 69, 70 and 71.

The new Section 69 prohibits a mortgagee from charging simple interest on a mortgage loan. Simple interest is defined as interest, which is computed on the principal balance of a mortgage loan from time to time outstanding.

As payments are received, interest is charged for the number of days since the last payment with the remainder of any payment, if any, applied to the principal balance.

Section 70 notes that a lender making a home mortgage loan shall report both the favorable and unfavorable payment history of the borrower to a national recognized consumer credit bureau at last annually if the lender regularly reports information to a credit bureau.

Section 71 provides that the lender shall not compensate, coerce or intimidate an appraiser for the purpose of influencing the independent judgment of the appraiser with respect to determining the value of real estate to be covered by a mortgage loan.

Section 2 of Chapter 255D is amended by adding a paragraph which provides that any person who sells or agrees to sell goods or services or both or merchandise certificates and such sale is secured by a mortgage shall first obtain from the Commissioner a license under Chapter 255E.

Section 8 of Chapter 255E is amended by requiring mortgage lender that has made 50 or more home mortgage loans in the last calendar year to be examined for its compliance with fair lending laws.

The REBA Legislation Committee has been following the course of this legislation and will offer input particularly on those sections which impact foreclosure and conveyancing issues.

SJC ruling dramatically alters rights between landowners and easement holders

Continued from page 7

landowner filed an action in the Massachusetts Land Court seeking a declaration from the court that it had the right to relocate the easement, but the Land Court judge ruled against the landowner stating that, once the location of an easement has been fixed, it cannot be changed without the consent of the easement holder. The landowner appealed

the decision and sought direct appellate review by the SJC.

In rendering its decision, the SJC made it clear that, if the parties are unable to reach a meeting of the minds on the relocation of an easement, the landowner may not resort to self-help remedies. Instead, the SJC ruled that the landowner should seek a declaration from a court that the proposed re-

location meets the criteria set forth in the Restatement Rule and the easement holder would then have an opportunity to demonstrate to the court whether the proposed alterations will cause it damage.

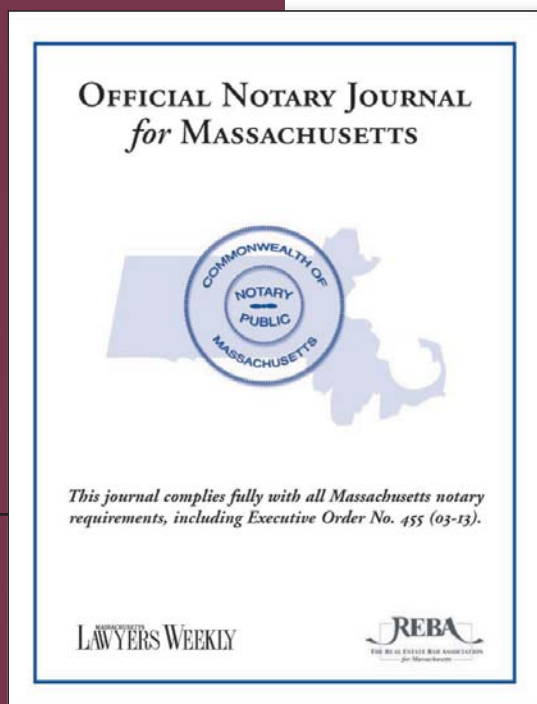
The holding of this case will not affect any existing easement that specifically provides it cannot be relocated without the easement holder's consent and does

not prevent parties to any future easement from incorporating consent requirements into their agreement at the time the easement is created.

In addition, under existing Massachusetts common law, an easement holder may not unilaterally relocate an easement and nothing in this decision changes that obvious and sensible restriction on an easement holder's rights.

The Official Notary Journal for Massachusetts

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