REBA NEWS

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The Newsletter of the
Real Estate Bar Association for Massachusetts

Governor withdraws proposal to expand deeds excise

By Edward J. Smith

Governor Romney recently agreed to withdraw his proposal to extend the deeds excise to transfers of a controlling interest in any entity holding real estate, in part due to lobbying by REBA and other groups.

In January the Massachusetts Department of Revenue and the Romney Administration had proposed legislation to enhance revenue collections by DOR.

The official summary memorandum for House Bill 21 from DOR stated:

"Companies have often attempted to avoid the Massachusetts deeds excise by placing real estate in a partnership, limited liability company, or other entity and selling the interests in the entity rather than selling the real estate itself. The proposal would extend the deeds excise to transfers of a controlling interest in an entity holding real estate. This proposal would follow a model adopted a number of years ago by New York State. Sales of shares in a publicly-traded company would *not* be taxed under the proposal." (emphasis added)

It is the view of REBA's Legislation Committee, based upon their collective experience, that there is not widespread use of title-holding entities for the purpose of avoiding payment of deed stamps, because liability concerns associated with acquiring an interest in an existing entity outweigh the costs associated with paying the deed excise.

The committee's experience is that the use of title-holding entities and transfers of interests in those entities is driven by legitimate tax and financial concerns, and that the implementation of the proposed provisions may prevent the use of certain commonly used financing arrangements that are essential to the commercial real estate industry in Massachusetts.

For this and other reasons, REBA joined with the Greater Boston Real Estate Board and the Massachusetts Chapter of the National Association of Industrial and Office Properties to successfully oppose the expanded deeds excise proposal.

Assisting in the review of H. 21 were Greg D. Peterson of Piper Rudnick, LLP, past president of REBA, Beth H. Mitchell of Nutter, McClennen & Fish, LLP, chair of REBA's Committee on Commercial Real Estate Finance, and Julia C. Livingston of Goulston & Storrs, P.C., to whom REBA is grateful for the following comments summarizing the groups' concerns about the proposed legislation.

Continued on page 12

Attorney General to speak at Spring Seminar

Attorney General Tom Reilly, an undeclared Democratic candidate for governor, will deliver the luncheon keynote address At REBA's Spring Seminar on May 9 at the Wyndham Hotel in Westborough.

Re-elected to a second term in 2002, Reilly has, at critical moments, weighed in on many major cases and issues with public policy implications including those listed below.

Shortly after taking office in January 1999, Reilly began an exhaustive investigation into the largest public corruption case in our state's recent history. This resulted in the return of $17 million in stolen Treasury funds and the conviction and imprisonment of six individuals.

In 2000, when the state's largest HMO, Harvard Pilgrim Health Care, encountered extreme financial difficulties, Reilly put the company in receivership. Working with management and outside experts Reilly allowed the company to recover while protecting the health coverage of more than a million members.

In 2002, after investigating the proposed sale of the Red Sox by the Yawkey Trust, Reilly obtained an additional $30 million for charities in Massachusetts that ensured that the charities that stood to benefit received a fair share from the transaction.

He conducted a comprehensive 16-month investigation into the sexual abuse of children by priests of the Archdiocese of Boston. In July 2003, he issued a report that resulted in new tougher laws dealing with sexual abuse of children and mandated reporting requirements for clergy.

Attorney General Tom Reilly

Recently, the Attorney General accepted the lead role in pursuing cost recovery for the Commonwealth of Massachusetts concerning the Big Dig project.

For information on attending REBA's Spring Seminar go to www.massrelaw.org.

REBA's mentoring program drawing in new lawyers

REBA's recently launched peer-to-peer mentoring member benefit has drawn nearly 50 younger and newer lawyers to subscribe to the program.

The mentoring program, initiated by the association's Membership and Public Relations Committee chaired by Sami Baghdady is open to any REBA member. The program is designed to assist members new to the practice of real estate law.

Mentors are experienced real estate lawyers committed to providing newer lawyers with guidance to support them in their professional development.

For more about becoming a mentor or mentee go to the REBA website, www.massrelaw.org or contact REBA COO Susan Graham at graham@massrelaw.org.

Bill would eliminate 'zoning process freeze'

By Paul F. Alphen and J. Gavin Cockfield

Alphen

Cockfield

There are numerous proposals pending in the Massachusetts Legislature regarding amendments to the Zoning Act (G.L. c. 40A) and the Subdivision Control Law (G.L. c. 41 §81K- 81GG).

One current proposal is being sponsored by the Zoning Reform Working Group (ZRWG), which is made up of state legislators, municipal officials, planners, environmental and housing advocates, and interested citizens who have joined together to sponsor legislation to update state statutes regarding zoning and subdivisions.

The ZRWG is currently sponsoring a comprehensive revision of both the Zoning Enabling Act and the Subdivision Control Law known as the Land Use Reform Act (LURA), the current version of which can be found on the city solicitors and town counsel's website, http://www.massmunilaw.org.

If the statutes are to be amended, it should be the goal of the bar to help the Legislature appreciate the need to: (a) balance the rights of property owners and municipalities; (b) enact legislation that provides better planning tools for property owners and planning boards; and (c) enact legislation that is easier to interpret and apply than the current statutes. This article seeks to illustrate how just one aspect of LURA would radically change land use law in this Commonwealth.

A 'mere guide'

Under section 3 of LURA, the Zoning Enabling Act would be changed from a limitation on a municipality's zoning authority into a mere guide for town planning. Such a provision would render LURA virtually meaningless. Assuming, however, that the final version of LURA ultimately operates as a limitation on municipal zoning authority, the current law with respect to zoning freezes applicable to subdivision applications and approvals will be materially changed.

LURA proposes to eliminate the current provisions of G.L. c. 40A, §6 that freeze zoning for property at the time that a preliminary definitive subdivision application is filed and applies until final disposition of the subdivision application, and then for eight more years if approved.

Under the current version of LURA, definitive subdivision plans would only receive zoning freeze protection for the zoning in effect on the date of first publication notice of a zoning change that occurs *after the plan is approved* and then for only three years.

Potential for unfairness

The potential for unfairness and difficulty that this single provision of LURA would visit on land owners seeking approvals to develop their property is demonstrated by the recent case of *Kindercare Learning Centers, Inc. v. Town of Westford*, 62 Mass. App. Ct. 924 (2004).

In that case, KinderCare Learning Centers, Inc. proposed to construct a 10,000 square foot childcare facility in Westford. The proposed use was allowed as of right in the underlying zoning district and was dimensionally conforming.

KinderCare submitted a site plan review application (a non-discretionary review process that cannot generally result in denial of a project) to the planning board, and after seven months of review, the planning board denied site plan approval. The building inspector denied a building permit on the grounds that the planning board had denied site plan approval.

KinderCare appealed the building commissioner's denial to the zoning board of appeals, which upheld the building commissioner. KinderCare appealed the decision to Land Court.

While the matter was pending in the Land Court, and about a year after the original submission of the site plan application, a group of residents proposed a zoning amendment to limit the as-of-right size of child care facilities to 2,500 square feet, an amendment that would have effectively killed the project.

With the zoning freeze protections of G.L. c. 40A, §6 in mind, KinderCare submitted a subdivision plan for the subject land prior to the adoption of the proposed amendment. The Town Meeting thereafter

Continued on page 15

Paul F. Alphen is a partner with Balas, Alphen & Santos in Westford and is the former chairperson and current member of the Zoning and Land Use Committee of REBA. He represented KinderCare before the Westford boards regarding the matters described herein.

J. Gavin Cockfield is a partner with Davis, Malm & D'Agostine in Boston and is a member of the Zoning and Land Use Committee of REBA. He represented KinderCare before the Land Court and the Appeals Court regarding the matters described herein.

Send a letter to the editor!

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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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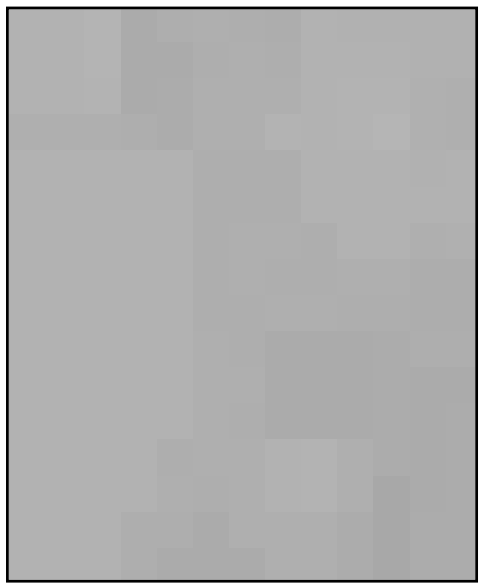
From the President's desk

By Daniel J. Ossoff



Back in the early 1980s when I joined Rackemann, Sawyer & Brewster fresh out of law school, one of my first acts was to become a member of the Massachusetts Conveyancers Association.

It was made perfectly clear to me by the more seasoned members of my new firm that membership in the MCA was an essential tool for any attorney practicing real estate law in Massachusetts. I dutifully joined the MCA, and have remained a devoted member ever since. My experience undoubtedly was similar to many other young attorneys of that era.

Today our goal for this Association must be to ensure that it remains for all of us, and for the generations of real estate lawyers who will follow us, an essential tool for real estate practice. There is no question that practice in this area has changed dramatically over the years.

My senior colleagues speak wistfully of the days when real estate loans were closed with a one page note and a two page mortgage, and nothing more. We all reflect nostalgically on the days "before" radon, Title 5, toxic mold, and terrorism lists. And as the practice of real estate law has become increasingly complex, your bar association has evolved to meet the needs of today's practitioner.

While the change in our name to the Real Estate Bar Association for Massachusetts is often cited as the most obvious example of the evolution of this organization, the most tangible evidence of how REBA has expanded the scope of its activities to meet the needs of a more complex world can be found in our several new committees. I will use this space to highlight those new committees and the opportunities they afford to REBA members active in all areas of modern real estate practice.

REBA's **Leasing Committee** began operation in the latter part of 2002 under the leadership of its current Chair, Ed Bloom of Sherin and Lodgen. In hindsight, and in light of the contributions that this committee has made to REBA during its brief existence, one might wonder why it took so long for the statewide bar association for real estate lawyers to establish a committee dedicated to an area of real estate practice as fundamental as leasing.

The Leasing Committee is comprised of several experienced practitioners who focus a significant portion of their individual practices on leasing activities. While the focus of the committee is primarily on the commercial lease arena, all aspects of commercial leasing are considered and discussed by the committee in recognition of the fact that REBA members represent tenants of small suburban retail storefronts, landlords of Boston's office towers, and everything in between.

The Leasing Committee continues to be one of the most active presenters of educational programs at REBA's spring and fall seminars. The members of the committee also monitor relevant case law and legislative activity within their area of expertise in order to keep REBA's membership up to date on recent developments. Among the Leasing Committee's current projects is a momentous effort to produce a form lease that can be used as a "one-size-fits-all" starting point for small commercial leases.

REBA's **Land Use and Zoning Committee** was also launched late in 2002 under the oversight of current REBA Treasurer Paul Alphen.

Jim Burgoyne of Fletcher, Tilton & Whipple is the committee's current chair. In addition to providing a forum to REBA members for the exchange of ideas and information among practitioners active in the zoning and subdivision arenas, the Land Use and Zoning Committee has served as the primary vehicle through which REBA has both monitored and participated in the ongoing debate regarding potential reform of Chapter 40A (the state zoning enabling act) and the Subdivision Control Law.

The committee has invited guest speakers and legislators to address its membership on timely topics such as Smart Growth (enacted in September 2004 as G.L.c. 40R), affordable housing, and the proposed Land Use Reform Act. This committee has strived to assemble a geographically diverse membership, not only to allow it to keep apprised of local zoning and land use practices statewide, but also to provide the members of the committee with a statewide network of local practitioners who can be called upon when needed.

To that end, the Land Use and Zoning Committee is actively seeking new members from all corners of the Commonwealth, keeping in mind that the ability to attend in person the meetings of the committee in Framingham is *not* a prerequisite to becoming involved.

Beth Mitchell of Nutter, McClennen & Fish heads up REBA's **Commercial Real Estate Finance Committee.**

This committee focuses on issues facing commercial lenders and borrowers, and their counsel, with a goal of becom-

Continued on page 16

Daniel J. Ossoff served as a long-time member of the Association's board before becoming REBA's 2005 president. He chairs the real estate practice group at Rackemann, Sawyer & Brewster, P.C. and lives in Andover.

Commonwealth's registries rapidly adapting to Internet age

By William F. Galvin

Since the adoption of a technology surcharge on transactions at the registries of deeds a year and a half ago, the registries have made remarkable progress in adapting the ancient practice of recording property transactions to the computer age.

At the Suffolk County Registry of Deeds in Boston, deeds are recorded and available through the Internet on a real-time basis. Thirty years of Suffolk County plans are now available on the Internet, and the work continues to scan more documents and indexes onto the Net.

A few years ago, when interest rates plummeted homeowners rushed to refinance their mortgages. That rush put enormous pressure on the registries, forcing some to add extra hours for the public's convenience. The Middlesex County South Registry of Deeds in Cambridge, for example, processed 420,000 documents in fiscal year 2003, where in fiscal year 2000 there were 290,000 documents processed.

In the three-year span, volume at the Worcester Country South Registry of Deeds in Worcester rose more than 67 percent. The increase in Boston was 53 percent, and at the Essex County Registry of Deeds in Salem, 38 percent. At the same time, budgets were reduced and the number of employees dropped.

To meet the additional volume with reduced resources, it was imperative to turn to technology and innovative alternatives. And each registry is doing just that.

In the Commonwealth's largest county, Middlesex, an innovative satellite office was set up in the Middlesex County North Registry of Deeds in Lowell. There, starting in July 2003, one could record deeds at Lowell that would otherwise have to be recorded at the Middlesex South Registry in Cambridge.

At the Lowell satellite office, there are five terminals that enable the public to check on documents and deeds filed in the Cambridge Registry.

The Hampden County Registry of Deeds set up a similar satellite office in Westfield where customers could record deeds via computer without having to go into Springfield.

The Essex County South Registry of Deeds in Salem is expected this spring to have a real-time computer system for recording and researching deeds, while a similar system will be operating at the Essex County North Registry of Deeds in Lawrence in the fall. Both registries will have more public work stations with the new system in place.

The Northern Essex Registry at Lawrence will be moving to a new building in the fall that will feature state-of-the-art computer capacity. The Worcester County North Registry of Deeds in Fitchburg is also moving this spring to a new location that will accommodate its up-to-date computer system.

In all 13 registries under the superintendence of the Secretary's Office, and in the others where the Secretary has superintendence over technological matters, the work continues to scan into the computer system already existing documents and indexes so they become accessible on the Internet.

High volume registries, such as those in Boston, Cambridge, Lowell, Salem, and Worcester are installing redundant database servers to ensure constant online service despite the usage.

All registries will have a continuity plan that protects their online services against disruption and interference.

All these continuing technological advances are designed to improve the speed and quality of service the registries of deeds provide both the general public and the specialists in land recordation.

William Francis Galvin is in his third term as Secretary of the Commonwealth. A Brighton resident, he is an attorney and former state representative. In addition to his election law experience and national leadership in investor protection, Secretary Galvin has general superintendency oversight of 13 of the Commonwealth's registries of deeds.

Tribute

Norma M. Karaian: First American-born Armenian female attorney in U.S.

By Cerise Jalelian

Long-time REBA member, distinguished attorney Norma M. Karaian (nee Yaghnor Maksoodian), passed away at the age of 100 on Jan. 16. Mrs. Karaian was considered to be the first American-born Armenian female attorney in the United States.

As a young girl, she changed her first name from Yaghnor to Norma, naming herself after the actress Norma Talmedge to "sound American." She began working at the age of 8 operating the cash register at her father's store in Providence, R.I.

She graduated from Boston University School of Law in 1925 at the age of 20 earning a certificate, but she had to wait a year to take the Massachusetts bar exam at the minimum age of 21. During that time, she worked for $15 per week in a Boston law office.

She did not look at being female as an obstacle. She just thought that everyone should be treated the same. Mrs. Karaian was really born before her time.

Boston University School of Law awarded Mrs. Karaian her Juris Doctor degree in 2003 to a standing ovation during the graduation ceremonies for the BUSL Class of 2003. In the 1990s, the Massachusetts Conveyancers Association specially honored her at an Annual Meeting.

When she began her career, she wanted to become a litigator, but women were not encouraged to be trial attorneys at that time. She became a real estate attorney in 1926, married in 1937 and in 1941 left practice to raise her three children.

In 1951, her husband, Leo J. Karaian, an organic chemist died, leaving her with three young children. She performed contract work for Hoag & Sullivan, but always put her children first. She continued contracting before joining the law firm of Rackemann Sawyer & Brewster for one year. In 1972, she moved to Gaston & Snow, where she remained until that firm closed in 1991. She continued contracting until 1993 at age 88.

At Gaston & Snow she became an expert at reviewing titles. Her projects included handling the title for construction of the Prudential Center.

Attorney George Dallas, who worked with Mrs. Karaian at Gaston & Snow, remembers her telling stories of her mother and brother escaping from Armenia during the genocide, and how she always took interest in teaching the young attorneys who worked at that firm.

Said Dallas, "I think the wealth of her life experience and her gumption were just wonderful examples, because I'm sure when she started out practice, the discrimination against women lawyers and women in the workplace was formidable and she rose above all that, found her niche and practiced law."

Mrs. Karaian volunteered for legal and

community service organizations, including serving as president of the Massachusetts Association of Women Lawyers in 1954. She purchased her first and only home in 1969 where she lived with her son

Continued on page 17

Cerise Jalelian practices in Wakefield with the law firm of Regnante, Sterio & Osborne.

State Wetlands Protection Regulations recently amended

By Charles N. Le Ray

Effective March 1, amendments to the state Wetlands Protection Regulations (310 CMR 10.000) create standards for work in resource area buffer zones and limit the bringing of adjudicatory appeals to those parties who participated in the prior conservation commission or Department of Environmental Protection (DEP) process.

The new buffer zone standards are intended to increase the protections that these areas provide to adjacent resource areas, while reducing the time spent by conservation commissions and DEP in reviewing projects with lesser impacts located farther from the resource areas.

This, in turn, is intended to allow the DEP to redeploy resources previously allocated to handling buffer zone appeals, and to focus more attention on enforcement efforts to address the illegal filling of wetlands.

By requiring prior participation as a precondition to bringing an adjudicatory appeal, the DEP hopes to reduce delays in resolving appeals and to weed out at least some of the appeals by project opponents that lack any true environmental basis.

An overview of these and other recent changes to the wetlands regulations follows.

Charles N. Le Ray practices with Goodwin Procter LLP and is a member of the firm's real estate development and permitting practice area. He has been a member of REBA's Zoning and Land Use Committee since its founding.

Buffer Zone amendments

In 1983, the DEP adopted the Buffer Zone concept as a way of protecting wetlands resource areas from adverse impacts. Since that time, the Wetlands Regulations have established a 100-foot Buffer Zone around banks, freshwater and coastal wetlands, beaches, dunes, flats, marshes, and swamps.

Within the Buffer Zone, all but the most minor activities are presumed to alter the adjacent area subject to protection under the Wetlands Protection Act, G.L.c.131, §40, and, therefore, to require the filing of a Notice of Intent with the local conservation commission. The closer that work within the Buffer Zone is to the associated resource area, the more likely the work is to affect adversely the protected resource area, by altering runoff, soil characteristics, topography, hydrology, temperature, or the amount of light received.

However, until now the Wetlands Regulations have not included performance standards to guide local conservation commissions (or the DEP in response to a request for a Superseding Order of Conditions) in evaluating work within the Buffer Zone. In the intervening years, nearly half of Massachusetts' municipalities adopted local wetlands bylaws or ordinances.

Many of these established some form of Buffer Zone standards, often in the form of no-disturb areas along the inner portion of the zone (closest to the resource areas). However, a recent study found that the average median distance between approved projects and resource areas in municipalities with local wetlands regulations was only 27 feet. The average median distance in municipalities relying solely on the state wetlands regulations was 14 feet. It was against this backdrop that DEP adopted the Buffer Zone amendments.

The recent amendments establish a simplified review process, set forth at 310 CMR 10.02(2)(b)2, for work within the outer half of the Buffer Zone. The DEP's stated intent was that simplified review would (i) steer development away from the resource areas and (ii) ease the administrative burden on local conservation commissions and the DEP by eliminating the need for Notices of Intent and Orders of Conditions for work meeting certain standards.

To qualify for simplified review, work must be outside of and more than 50 feet from the resource area, and must not border on an Outstanding Resource Water (*i.e.*, certified vernal pool, public water supply, or certain Areas of Critical Environmental Concern).

The Buffer Zone also must not contain estimated wildlife habitat identified in the most recent Estimated Habitat of State-Listed Rare Wetlands Wildlife of the Natural Heritage and Endangered Species Program. The proposed work must include the installation and maintenance of erosion and sedimentation controls at the limit of work or at least 50 feet from the protected resource area, whichever is greater.

Storm water must be handled in accordance with the standards set forth in the DEP's Storm Water Management Policy, and the conservation commission must concur that the standards will be met.

In response to public comments, the DEP added several additional eligibility requirements for simplified review projects, designed to further ensure that they will not have adverse impacts on protected resource areas. Simplified review is not available where the ground slope within the buffer zone exceeds 15 percent

The proposed work must not result in impervious surface in the buffer zone in excess of 40 percent of the outer 50 feet of the buffer area, or the existing conditions before the work, whichever is greater. The prohibition against altering the inner 50 feet of the buffer zone expressly prohibits the placement of storm water management systems within the inner area as part of a simplified review project. Finally, DEP limited simplified review to the buffer zones of inland resource areas, i.e., excluded coastal buffer zones from the process.

Under the simplified review process, the proponent of work within the Buffer Zone must file an Abbreviated Notice of Resource Area Delineation (ANRAD) with the local conservation commission, along with the usual application fee and abutter notifications. The applicant also must submit a self-certification stating that the proposed work will comply with all of the simplified review project standards.

If the conservation commission confirms the delineation, and concurs that the DEP's Storm Water Management Policy standards will be met, an Order of Resource Area Delineation will issue. The order must be recorded before the work begins.

If the conservation commission does not concur, or if the project does not satisfy all of the simplified review standards, then the applicant must file a Notice of Intent or Request for Determination of Applicability. When requested to issue a Superseding Order of Resource Area Delineation for a sim-

Continued on page 14

Wetlands Regulations Amendments

Adjudicatory appeal amendments

The Wetlands Protection Act does not specify who may bring an adjudicatory appeal of a superseding Order of Conditions, Determination of Applicability, or Notice of Resource Area Delineation issued by DEP.

Consequently, the state Administrative Procedure Act (G.L.c. 30A) requires only that adjudicatory appeals rights be given to persons whose legal rights, duties, or privileges would be determined by the proceeding or who otherwise had a constitutional right to participate. However, the DEP long had allowed any party authorized under the Act to seek superseding determinations to also bring a subsequent adjudicatory appeal.

The preface to the recent amendments states in part that, "The Department's extension of appeal rights beyond the minimum requirements has led to delays in resolving appeals and questions about the legitimacy of appeals that appear to lack a true environmental basis."

With the recent amendments, requests for adjudicatory hearings are limited to the applicant or landowner, the conservation commission, any person aggrieved who previously participated in the proceedings, any abutter who previously participated, or any 10-residents group if at least one member previously participated.

In an earlier draft of the amendments, DEP had proposed to eliminate appeals by abutters who are not also aggrieved, but, based on comments received during the review period, the DEP decided to allow abutters with previous participation to appeal regardless if they were aggrieved. Previous participation means the submission of written information to the conservation commission prior to the close of the public hearing, requesting a Superseding Order or Determination, or providing written information to DEP prior to the issuance of a superseding decision.

Any person requesting an adjudicatory hearing must include with the notice of claim sufficient written facts to demonstrate status as a person aggrieved, an abutter, or a 10-residents group, and documentation of previous participation. The amendments provide that DEP may dismiss requests for hearings which do not include all necessary information.

Other amendments

The wetlands regulations allow conservation commissions to authorize work involving the loss of up to 5,000 square feet of bordering vegetated wetlands. The recent amendments added language to guide the commissions in exercising this power, directing them to consider the magnitude of the alteration, the significance of the project site to the interests of the Wetlands Protection Act, and the extent to which adverse impacts (losses) can be avoided, minimized, or mitigated.

Where adverse impacts cannot be avoided or minimized, conservation commissions are to consider the extent to which mitigation measures, including replication or restoration, are provided to contribute to the interests of the Act. The recent amendments also added a reference to the DEP's 1996 Storm Water Management Policy, codifying the DEP's intent that applicants and conservation commissions apply the standards to all projects.

As part of the amendments, the DEP also developed maps showing, and in several cases relocating, the mouths of coastal rivers, i.e., the jurisdictional boundaries of associated riverfront areas.

The Wetlands Protection Act's re-

Continued on page 14

Sheriff's sales: Notice-of-sale requirements

By Ward P. Graham

In this article, I will focus on the notice-of-sale portion of REBA Title Standard No. 20, LEVY OF EXECUTION BY SALE (a/k/a "the Sheriff's Sale Title Standard").

That portion of the Sheriff's Sale Title Standard was introduced as part of an amendment to that title standard in May 2000, which makes passing on sheriff's sale titles much easier than before but which, based on the number of phone calls I receive involving sheriff's sale titles, seems to have evaded the attention of many practitioners.

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

Since May 15, 2000, Title Standard No. 20 has provided as follows:

"A title based on a levy of execution is not on that account defective if title into the judgment debtor is acceptable, and:

A. (1) there was compliance with the procedural requirements of M.G.L. c. 236 which may be evidenced by full and detailed recitations in the sheriff's deed as to the required elements; (2) more than one year has passed; and (3) notice by personal service or mail has been given to the record owner and all junior creditors of record as of the date of the sale; or

B. more than 21 years have passed since the recording of the sheriff's deed and the record discloses no evidence of any action to redeem or set aside the conveyance; or

C. there is of record a decree confirming the validity of the sale under M.G.L. c. 237."

The introductory clause and Items A (1), B and C are essentially the same as in the prior version of the title standard.

Items A (2) and A (3) were added by the amendment and are the items upon which this article will focus.

Previously, in passing on a sheriff's deed title, not only did an attorney have to make sure that all the appropriate statutory prerequisites were met,[1] but it was also necessary to either wait 21 years to see if any kind of challenge was made to the sheriff's sale or find on record (or put on record) a Writ of Entry pursuant to M.G.L. c. 237 or some other court judgment affirming the sheriff's sale or the title derived from it.

This was the case despite that M.G.L. c. 236, §33 provides the debtor a right of redemption from the sale for only one year. This limited period for redemption was recognized with the addition of Item A (2) to the Sheriff's Sale Title Standard, which allows for reliance on the passage of the one-year period without redemption occurring, so long as the other elements of paragraph A are met.

Due process concerns

Being in the nature of a forfeiture proceeding, however, sheriff's sales have traditionally been suspect on the basis of due process concerns, even though they are conducted pursuant to an execution issued by a court after a judgment for the creditor in an underlying debt action.

Undoubtedly, that is at least part of the reason for the 21-year waiting period that is still retained in paragraph B of the title standard.

Those concerns, too, were addressed in the revised title standard by the addition of Item A (3) on the basis of two cases cited at the end of the title standard: *Teschke v. Keller*, 38 Mass. App. Ct. 627, 650 N.E.2d 1279 (1995) and *Bahnan v. PHNB Realty, Inc.*, 48 Mass. App. Ct. 909, 719 N.E.2d 518 (1999), *rev. den.* 430 Mass. 1115, 724 N.E.2d 709 (2000).

Section 27 of G.L. c. 236 has always provided for delivery of notice to the debtor as one of the procedural criteria for a sheriff's sale and that is one of the procedural prerequisites listed in the Comment to the Sheriff's Sale Title Standard. *See* endnote 1.

Notice that the requirement is to deliver notice to the *debtor*. What is missing from both the statute and the listing of prerequisites in the title standard is a requirement that notice be given to junior interest holders, including mortgagees or intervening titleholders. That omission was the subject of the *Teschke*[2] and *Bahnan*[3] cases and has been addressed in Item A (3) of the revised title standard in providing for notice to not just the *debtor*, but also to the *record*

Continued on page 18

Anti-money laundering programs on horizon for 'persons' involved in real estate closings

By Beth H. Mitchell and Alexa H. O'Keefe

Mitchell

O'Keefe

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In the wake of the Sept. 11, 2001 terrorist attacks, Congress enacted the USA PATRIOT Act (United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act).

Title III of the USA PATRIOT Act, known as the International Money Laundering and Anti-Terrorist Financing Act of 2001, amended the Bank Secrecy Act of 1970 (BSA) by requiring that all financial institutions establish minimum anti-money laundering (AML) programs.

Title III incorporates and amends the definition of "financial institution" contained in Section 5312(a)(2) of the BSA (31 C.F.R. §103.110 (2005)), and included in the definition of financial institutions are "persons involved in real estate closings and settlements."

Since the enactment of the USA PATRIOT Act, federal regulators have attempted to develop regulations that would impose AML program requirements on persons involved in real estate closings and settlements but, to date, final regulations have not been issued for this form of financial institution. (*See* Kevin L. Shepherd, *The USA PATRIOT Act: The Complexities of Imposing Anti-Money Laundering Obligations On The Real Estate Industry*, 39 Real Prop. Prob. & Tr. J. 403, 406 (Summer 2004)). Developments regarding such regulations may be tracked at http://www.fincen.gov/.

Section 352 of the USA PATRIOT Act requires that all financial institutions establish an AML program within a statutorily mandated period of time. Although "persons involved in real estate closings and settlements" are not currently subject to these program requirements (31 C.F.R. 103.170 (2005)), other financial institutions are obligated to comply, including banks, savings associations, registered brokers and dealers in securities, futures commissions merchants, casinos, money services businesses, operators of credit card systems, and mutual funds.

The AML program must include, at a minimum: "(A) [T]he development of internal policies, procedures, and controls; (B) the designation of a compliance officer; (C) an ongoing employee training program; and (D) an independent audit function to test programs." (*See, e.g.*, 31 C.F.R. 103.130 (2005)).

Because the phrase "persons involved in real estate closings and settlements" is not defined or elaborated upon in legislative history, the Treasury Department's Financial Crimes Enforcement Network (FinCEN) must define this phrase. On April 10, 2003, FinCEN issued an advance notice of proposed rulemaking in an effort to solicit feedback from the real estate community on imposing AML requirements on persons involved in real estate closings and settlements.

FinCEN received numerous responses to the advance notice. A common theme among these responses was that the imposition of the Section 352 AML program requirements on real estate lawyers would seriously compromise the attorney-client privilege and the duty of client confidentiality.

Continued on page 20

THE REAL ESTATE BAR ASSOCIATION
for Massachusetts
50 Congress Street, Suite 600, Boston, MA 02108
(617) 854-7555 (800) 496-6799 FAX (617) 854-7570

Spring Seminar 2005

Wyndham Westborough Hotel
5400 Computer Drive
Westborough, MA 01581

Monday, May 9, 2005
8:30 a.m. – 4:00 p.m.

www.massrelaw.org

THE MORNING SESSIONS

Billing and Ethics

Homesteads…

Litigating Title Problems and Disputes

"Sticks and Carrots" An update on Ch. 40B and a Preview of Ch. 40R

Zoning Endorsements and Zoning Opinion Letters

THE AFTERNOON SESSIONS

Recent & Pending Legislation: Summary and Highlights

Recent Developments in Massachusetts Case Law

CONTINUING EDUCATION COMMITTEE CHAIR

Pamela Butler O'Brien, Esq.

REGISTRATION for REBA'S Spring Seminar, May 9, 2005

Complete this form, include the appropriate fee and return to REBA Educational Foundation, Attn: 2005 Spring Seminar, 50 Congress Street, Suite 600, Boston, MA 02109-4075 or FAX to: (617) 854-7570.

		By 4/22	After 4/22
_____	YES, please register me. I am a REBA member in good standing.	$ 135	$ 160
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_____	YES, my firm/organization wants to reserve ____ tables (seats 10). Firm/organization name_____ (Please attach registration form for each person at the table)	$ 1,350	$ 1,600
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NEW SECTION: PLEASE COMPLETE: thank you
SELECT YOUR LUNCHEON: Surf and Turf____ Chicken ____ Veggie____ Fish____

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

_____ Homesteads . . . (Brecher, Simon, White)
_____ Litigating Title Problems and Disputes (Hurley, Gottlieb)
_____ "Sticks and Carrots": An Update on Ch. 40B and a Preview of Ch. 40R (Ruzzo)
_____ Zoning Opinion Letter or Zoning Endorsement? (Stein, Lane)
_____ Billing and Ethics (Bolan, Tyrell)

DRIVING DIRECTIONS

For additional information, telephone the hotel at 508-366-5511.

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

FROM WORCESTER: Route 9 East to Computer Drive/Research Drive Exit . Take a right at the first set of lights onto Research Drive, head straight through the third set of lights, Drive 1/2 mile and the hotel is on the left at the top of the hill.

FROM I-495 NORTH OR SOUTH: Exit 23B (Route 9 West) to Computer Drive/Research Drive Exit, Bear right at the end of the ramp, Drive 1/2 mile and The hotel is on the left at the top of the hill.

SCHEDULE OF EVENTS

8:30am - 4:00pm
Registration Desk and Exhibits Open

9:00am - 11:45am
THE MORNING SESSIONS
Most sessions will be repeated.

9:00am to 9:45am
11:00am to 11:45am
Homesteads…
Arthur Brecher, Esq.; Michelle Simons, Esq.; Anne White, Esq.;
This is a practical session that will provide conveyancers with answers to frequently-asked questions, and address potential pitfalls for attorneys relating to homesteads. Panelists, Michelle Simons and Arthur Brecher will identify the different types of homesteads and homestead protections, both possessory and monetary; review the effects of mortgages, and other recorded documents upon a recorded homestead under the current law in Massachusetts; and, when and how to effectuate subordinations and terminations of a homestead. Panelist Anne White, with expertise in bankruptcy law, will discuss the most recent Massachusetts cases affecting the relationship between and effects of bankruptcies upon homestead rights and protections.

9:00am to 9:45am
10:00am to 10:45am
Litigating Title Problems and Disputes
Brian M. Hurley, Esq.; Edward A. Gottlieb, Esq.
What do you do when title is either not insurable or you want good record and marketable title not just insurable title? Attorneys Brian Hurley and Ed Gottlieb, two members of the new REBA Real Estate Litigation Committee, will discuss judicial remedies available to resolve title problems and disputes. Topics will include complaints for registration and confirmation, actions to try titles, actions to quiet title, and declaratory judgment actions.

10:00am to 10:45am
11:00am to 11:45am
"Sticks and Carrots": An Update on Ch. 40B and a Preview of Ch. 40R
Robert M. Ruzzo, Esq.
The Affordable Housing Committee will present an overview of current developments under Mass General Laws Chapter 40B – historically the single most important affordable housing tool, as well as a look at Chapter 40R – a potentially potent housing tool in its own right – and the newly promulgated Chapter 40R regulations.

9:00am to 9:45am
10:00am to 10:45am
Zoning Opinion Letter or Zoning Endorsement?
Sophie Stein, Esq.; David B. Lane, Esq.
Do I need a Zoning Opinion Letter to get a Zoning Endorsement? David Lane from Lane, Lane & Kelly will discuss zoning opinion letters and the increasing trend of zoning certificates from a practitioner's viewpoint. Sophie Stein from Old Republic Title Insurance Company will review the zoning endorsement to the lender's title insurance policy, what it covers, and what is required of the title agent prior to issuing this endorsement.

11:00am to 11:45am
Billing and Ethics,
James S. Bolan, Esq.; Jane Tyrell, Esq.
Jane Tyrell will speak on IOLTA compliance with attention to the new IOLTA Guidelines and what they mean for conveyancing practice. James Bolan will speak about client conflicts in the context of real estate closings and preventing malpractice. This seminar is invaluable for new and experienced conveyancers alike.

11:45 to 12:45pm
"The Exhibitors Hour" OR "Meet REBA's ADR Neutrals"
Your Choice: A dedicated time to our favorite exhibitors. Enjoy their treats and give-aways and get your questions answered in person.
OR: For those of you who want a quieter time, visit the Captain's Lounge and meet some of REBA's Dispute Resolution neutrals. The setting will be quiet and informal.

12:45pm - 2:20pm
Luncheon

1:20pm - 1:40pm
REBA President's Remarks
Daniel Ossoff, Esq., President
Presentation of the Richard B. Johnson Award

1:40pm to 2:00pm
Keynote Address
Attorney General, Tom Reilly

2:00pm to 2:20pm
REBA Business Meeting
Clerk's Report
Treasurer's Report
Title Standard Committee Report
Forms Committee Report

2:20pm - 2:30pm
Refreshment Break and Exhibits

2:30pm - 4:00pm
THE AFTERNOON SESSIONS

2:30pm - 3:00pm
Recent & Pending Legislation:
Summary and Highlights
Robert H. Kelley, Esq. and Edward J. Smith, Esq.

3:00pm - 4:00pm
Recent Developments in Massachusetts Case Law
Philip K. Lapatin, Esq.

GENERAL INFORMATION

- Premium credit for professional liability insurance may be given for attending properly documented continuing legal education programs.
- Continuing Legal Education credit can be made available in other New England states. Contact the Real Estate Bar Association (REBA) for specific details.
- Registration for REBA's 2005 Spring Seminar is open to REBA members/associates in good standing, their guests and non-members/associates (for an additional fee). Everyone attending the REBA 2005 Spring Seminar must register. The Registration Fee includes the cost of the morning and afternoon sessions, the seminar written materials and the luncheon. We are unable to offer discounts for persons not attending the luncheon portion of the program.
- Please submit only one registration form per person. Additional registration forms are available at our website@ www.massrelaw.org or by emailing Nicole Cohen at cohen@massrelaw.org. Confirmation of registration will be sent to all registrants by email or mail.
- Registrations with the appropriate fee should be sent by mail or fax to arrive prior to April 22, 2005 to guarantee a reservation at the Spring Seminar. Registrations received after April 22, 2005 are subject to an additional processing fee of $25. Registrations cancelled in writing on/after April 22, 2005 are subject to a processing fee of $25. No other refunds will be permitted. Substitutions of registrants attending the program are welcome and may be made at any time. Written materials will automatically be mailed to "No Shows" at four to six weeks after the program.
- The use of cell phones and pagers is prohibited in the meeting rooms during the programs.

Governor withdraws proposal to expand deeds excise

Continued from page 1

Transfers of life estates, easements and leasehold interests

The legislation defined "interest in real property" to include a life estate, perpetual easement or leasehold or sublease interest with a term of more than 49 years. By adding these partial interests in real estate, the legislation would have imposed significant administration and valuation burdens that outweigh the benefit of the additional tax revenue.

For instance, life estates are of an uncertain duration. The legislation did not indicate how to attribute an appropriate value to the unknown term of the life estate. The parties to this transaction, often initiated at the behest of an elderly relative, would bear significant additional costs, as well as delays in the transfer, in determining an appropriate value.

Moreover, since life estates and leases will terminate at some point (often unknown at the time the interest is created), the legislation also creates a potential double taxation, by taxing the interest both when it is created and when it terminates.

Determination of controlling interest

Although the legislation purported to apply only to transfers of controlling interests, the determination of controlling interests is unrelated to actual control. In a corporation, each stockholder may have a vote, but this is not the case in partnerships or limited liability companies (LLCs).

Most real estate is owned in partnerships and LLCs. The allocation of profits and losses in these entities is not necessarily identical to the allocation of decision-making authority, and often varies from year to year.

The control test for partnerships in H. 21 is "50% or more of the capital, profits, or beneficial interest" in the entity. In a partnership there is very often a difference between the percentage ownership of capital interests, the percentage ownership of profits interests, and the percentage ownership of voting interests.

Moreover, there are very often differences between the ownership of profits from ordinary operations and profits from capital transactions. This will result in confusion and increased legal and accounting costs in ordinary transactions.

Additionally the ownership percentages in a partnership may depend on how much the profit is. For example, where the value of the Massachusetts real property increases to the point that one partner's percentage of profits flips from 10 percent to 60 percent, deeds excise tax would appear to be due even though there was no change in the identity of the partners and no transaction of any kind.

This is an unworkable, impractical trap. There will be no way to know when this has happened and, therefore, no way to avoid penalties. If the value of the property subsequently falls and then rises again, the problem reoccurs.

Tax credit deals

Multiple assessments of the deeds excise tax would be imposed in tax credit deals, which are often used to finance the creation of affordable housing. For example, in a typical low-income housing tax credit deal, the real property is initially owned by a partnership which has a 99 percent general partner and a 1 percent temporary limited partner who is a placeholder only.

The partnership buys the real property, and the deeds excise tax is paid. Subsequently, often a year or more later, as a part of the construction loan closing, a tax credit investor is admitted to the partnership as a 99.99 percent limited partner having no voting rights and very limited (if any) participation in sale and refinancing and property management decisions.

This limited partner is interested solely in the tax credits, rather than the underlying real property. These transactions cannot afford to pay the deeds excise tax a second time when the tax credit investor is admitted. This situation would occur in historic preservation, brownfields redevelopment, and other transactions which involve partnership/ground lease structures.

H. 21 jeopardized the financing techniques for generating new affordable housing in Massachusetts, contrary to other public policies of the

Continued on page 13

Continued from page 12
Commonwealth.

Non-real estate transactions

If an entity with substantial non-real estate business activity also owns a relatively small amount of Massachusetts real estate and the ownership of the entity is sold because it "goes public," or is sold to another business entity, non-real estate transactions would be disadvantaged.

The business would be forced to allocate value between its real estate and non-real estate assets, and then further allocate value to its Massachusetts real estate, to effectuate its business transaction. At a minimum, the deeds excise tax should not apply where the Massachusetts real estate is not the sole asset of the business.

Multi-state transactions

Similarly, many real estate businesses own real estate in more than one state. If any of the real estate is located in Massachusetts and members of the business transfer interests for legitimate business reasons, the business would have to incur substantial costs in determining the relative value of the Massachusetts real estate for excise tax purposes.

H. 21 would have had the unintended consequence of making Massachusetts less attractive for business investment due to these additional administrative and transactional costs.

Recording of stamp form

By its terms, H. 21 was designed to impose excise taxes on transfers of unrecorded interests in real estate, such as transfers of shares of stock, partnership interests and LLC membership interests.

Section 116 of H. 21 required that in the case of such a transfer a "stamp form" to be promulgated by the DOR would be recorded to evidence the payment of the excise tax. This provision goes beyond any current requirement regarding the payment of excise taxes with respect to the transfers of beneficial interests in nominee trusts.

REBA joined with the Greater Boston Real Estate Board and the Massachusetts Chapter of the National Association of Industrial and Office Properties to successfully oppose the expanded deeds excise proposal.

By requiring the recording of the "stamp form" with the Registry of Deeds, the legislation would confuse the record title to real estate, by referencing of record the ownership interests of persons or entities that do not hold a record title interest in the property.

It appears unlikely that the Massachusetts Land Court would approve of such a recording with respect to registered land within the Commonwealth. Even if it did, however, this recording would clog the registries with confusing information and would expose persons and entities that have limited liability under the laws of the Commonwealth to frivolous lawsuits related to their interest in real estate.

Having taken the step of eliminating the need for such persons and entities to be identified with filings at the Massachusetts Secretary of State's office, it would be inappropriate to now provide the same, or more, information at the Registry of Deeds.

Edward J. Smith serves as legislative counsel to REBA.

State Wetlands Protection Regulations recently amended

Buffer Zone amendments

Continued from page 6
plified review project, the DEP will limit its review to the accuracy of the delineation and the requirements subject to confirmation under the simplified review regulations, e.g., compliance with the Storm Water Management Policy.

So that the simplified review process will not be used to segment a project otherwise requiring an Order of Conditions, the amendments provide that no subsequent Notice of Intent or Request for Determination of Applicability may be filed for work within the inner 50 feet of the buffer zone during the three-year term of the Order of Resource Area Delineation allowing work in the outer 50 feet, or until the applicant receives a Certificate of Compliance for such work, whichever occurs later.

Finally, the simplified review amendments are subject to a sunset clause, and will lapse on March 1, 2008. Unless the DEP extends or makes permanent the simplified review process, applicants proposing work in the buffer zone after that date will be required to file a Request for Determination or Notice of Intent.

For projects not eligible for simplified review, the amendments establish narrative criteria for evaluating work within the Buffer Zone. These include the extent of the work, the proximity of the work to the resource area, and the characteristics of the buffer area.

For example, the presence of steep slopes or the absence of vegetation within the Buffer Zone may increase the potential for adverse impacts on the adjacent resource area. The Wetlands Regulations now make clear that conservation commissions may limit the scope and location of work within the Buffer Zone as necessary to avoid alteration of resource areas, and may require erosion and sedimentation controls during construction.

Commissions also may require the establishment of a clear limit of work before construction begins and the preservation of natural vegetation adjacent to the resource area. Where the buffer zone already has been developed extensively, conservation commissions are invited to consider measures such as the restoration of natural vegetation adjacent to the resource area.

Other amendments

Continued from page 7
quirement that an applicant for an Order of Conditions provide notice to abutters when a Notice of Intent is filed now is codified in the wetlands regulations. Applicants must notify all abutters, as identified on the tax list, by certified mail, return receipt requested, or by certificates of mailing.

The applicant must provide the conservation commission with proof of mailing at the beginning of the public hearing, so that the commission may determine whether the applicant has complied with the notice requirement. The DEP will dismiss appeals based on allegations of failure to provide notice, absent a clear showing by the appealing abutter that the applicant failed to notify the abutter.

Enforcement provisions were strengthened to state explicitly that continuing violations, such as the failure to remove illegal fill or to restore resource areas, constitute violations of the Wetlands Protection Act and the wetlands regulations. The regulations now give the DEP and conservation commissions the right to enter private property to enforce the Act, subject to constitutional limitations.

Finally, the ability of abutters or other third parties to appeal DEP's granting of variances from the wetlands regulations has been narrowed, in favor of a public comment period after notice in the Environmental Monitor followed by a public hearing, before DEP grants a variance.

Bill would eliminate 'zoning process freeze'

Continued from page 2

adopted the zoning change, and the planning board denied approval of the definitive subdivision plan. KinderCare appealed the denial of the subdivision plan.

In *KinderCare Learning Centers, Inc., et al. v. Westford, et al.,* L.C. Misc. Case # 284997 and L.C. Misc. Case # 286435, Land Court Chief Justice Peter W. Kilborn ruled that denial of site plan approval was in excess of the local board's authority, that the subject property had the benefit of the section 6 zoning freeze and that Kindercare was entitled to its requested building permit.

The town disputed that the property had zoning freeze protection because approval of the subdivision had been denied, and the town appealed the Land Court's judgment ordering the issuance of the building permit.

Ultimately, the Appeals Court held that the land shown on a subdivision plan was protected from zoning changes while the plan was pending before the planning board and while the appeal of the denial of subdivision approval was pending before the courts. The source of what has now become known as a "process freeze" is found in the seventh paragraph of G.L. c. 40A, §6, which states:

"Disapproval of a plan shall not serve to terminate any rights which shall have accrued under the provisions of this section, provided an appeal from the decision disapproving said plan is made under applicable provisions of law. Such appeal shall stay, pending either (1) the conclusion of voluntary mediation proceedings and the filing of a written agreement for judgment or stipulation of dismissal, or (2) the entry of an order or decree of a court of final jurisdiction, the applicability to land shown on said plan of the provisions of any zoning ordinance or by-law which became effective after the date of submission of the plan first submitted, together with time required to comply with any such agreement or with the terms of any order or decree of the court."

If the Land Use Reform Act were adopted in its current form, municipalities or abutters that do not favor a proposed project could easily thwart development efforts by a simple amendment of the zoning by-law or code to prohibit or inhibit the proposed project.

Landowners often spend many months and many thousands of dollars seeking approvals for projects. If LURA were adopted in its current form, municipalities or abutters that do not favor a proposed project could easily thwart development efforts by a simple amendment of the zoning by-law or code to prohibit or inhibit the proposed project.

All the time and money expended would be wasted if the landowner could not avail itself of the current zoning freeze protections of the Zoning Enabling Act.

In addition to the loss of the "process freeze," LURA proposes reducing the zoning freeze for approved subdivision plans from the current eight-year freeze to only a three-year freeze after approval.

Such a period does not provide adequate time to build out a larger subdivision. A three-year zoning freeze for subdivisions would force developers to build out at much faster rates of development, thereby thwarting the expressed purpose of LURA to advance "orderly and sustainable growth."

From the President's desk

Continued from page 3

ing the preeminent resource for REBA members on emerging trends and industry intelligence in all aspects of commercial real estate lending.

The Commercial Real Estate Finance Committee kicked off 2005 with a presentation by Janel Krolman of Holliday Fenoglio Fowler, LLP, on current trends in commercial finance. Future meetings will focus on authority and enforceability opinions, CMBS loans, and inter-creditor agreements.

The committee is also focusing on legislative activity that may be of interest to practitioners in this area, including certain Department of Revenue proposals that may impact more sophisticated types of lending activities, and is exploring networking opportunities for its members.

The Commercial Real Estate Finance Committee is seeking members who actively practice in this area and who would like participate in its monthly meetings and other activities. The goal of this committee is to assemble as diverse a group as possible, including both large firm lawyers and those practicing in smaller firms or in solo practice, in order to be able to best address the needs and concerns of all REBA members in this practice area.

The **Litigation Committee** of REBA is co-chaired by former REBA President Diane Tillotson of Hemenway & Barnes and Larry Heffernan of Robinson & Cole. The Litigation Committee is designed to provide a "home" for attorneys who devote a significant portion of their practice to real estate and land use litigation and related activities.

Although other statewide bar associations represent well the interests of litigation attorneys generally, the REBA Litigation Committee alone is dedicated to meeting the unique needs of those attorneys who practice before the Land Court and the other courts of the Commonwealth on matters pertaining to the title to real estate, zoning appeals, and other matters involving the ownership and development of real property.

One particular goal of the Litigation Committee is to serve as a vehicle for facilitating the exchange of information and ideas with the Land Court. In January of this year, the committee hosted a very successful conference and reception with the justices of the Land Court, which provided a forum for the discussion of the court's recently adopted time standards and new single calendar system.

The Litigation Committee is also actively involved in REBA's educational activities, and will be presenting a program at the REBA Spring Seminar on "Litigating Title Problems and Disputes."

One of REBA's newest committees is the **Affordable Housing Committee**, co-chaired by Kurt James of Sherin and Lodgen and Robert Ruzzo, who is deputy director of Mass Housing. In launching this committee, REBA's leadership recognized that the provision of affordable housing is one of the most difficult and complicated issues which the Commonwealth faces today.

REBA's Affordable Housing Committee maintains an active schedule of meetings at which guest speakers share their expertise on various issues confronting practitioners actively involved in the affordable housing field. This Committee also provides REBA's Legislation Committee and Legislative Counsel with much-needed "in-house" expertise in this area so that REBA may more effectively provide input on proposed legislation that may impact upon the development and siting of affordable housing.

With the able leadership of its co-chairs and other experts in the field who are actively involved on the committee, REBA's Affordable Housing Committee serves as an invaluable resource to lawyers across the state involved in the housing and development field. I hope that many of you will be able to attend Bob Ruzzo's presentation at the Spring Seminar on current developments under Chapter 40B and a look at the new Chapter 40R.

The final new committee formed by REBA in recent years is the **Residential Conveyancing Committee**, co-chaired by Marvin Kushner of Kushner & Sanders and Tom Bussone of Segal, Edelstein, Bussone & Fallon. Unlike the other new REBA committees, which represent an extension into new practice areas, the Residential Conveyancing Committee was created to provide an additional forum through which the residential conveyancer can become actively involved in REBA.

Through Marv's and Tom's efforts, the Residential Conveyancing Committee has hit the ground running, and has already provided significant input and support to other REBA committees as well as to the REBA Political Action Committee in areas that are of particular interest and concern to the residential conveyancer, such as REBA's proposed mortgage discharge bill and issues and legislative activities related to the unauthorized practice of law.

Those who practice in the residential conveyancing field should expect to hear more from the Residential Conveyancing Committee over the coming months as it continues to expand the scope of its activities and to reach out to REBA's "core constituency" in the residential conveyancing field.

To borrow an overused phrase from a well-known Detroit advertising campaign – "this is not your senior partner's bar association." As real estate practice has expanded in scope and complexity, REBA has expanded its own committee structure to meet the needs of today's practitioner, and it will continue to do so.

Among various additional initiatives under consideration by REBA's Board of Directors is an Environmental Committee. And we are also exploring opportunities to better serve REBA's many non-attorney associate members who support our practices as paralegals and title examiners.

We welcome ideas from our members as to other ways that we can serve the full community of real estate practitioners in Massachusetts. Of course, we can best serve our members if our members become involved in REBA. All of our new committees welcome the participation of additional members.

Explore REBA's website (www.massrelaw.org) to find out more about what these committees are up to and when they will be meeting, then call the REBA office or email a committee chair and ask to become involved. The efforts of a few have resulted in enormous changes in REBA over the last several years. The efforts of many are needed for REBA to continue to be that essential tool that will allow all of us as real estate practitioners to be the best we can be at what we do and, most importantly, to better serve our clients.

I hope to see many of you at the Spring Seminar on May 9 at our new location at the Wyndham Westborough Hotel. In addition to the usual wonderful menu of breakout sessions, legislative and case law updates, and exhibitors, we are excited to have Attorney General Tom Reilly as our keynote speaker. It promises to be a great event.

Thank you all for your support of REBA.

Tribute

Norma M. Karaian

Continued from page 5
until the day she died.

She also received numerous legal and honorary awards from the mayors of Providence and Boston and from the governors of Massachusetts and Rhode Island, and from the Armenian Bar Association, Armenian Law Society, Boston Bar Association and Massachusetts Bar Association.

In 1993, she was honored with the Leading Women's Award from the Patriot Trails Council of the Girl Scouts. A book award is presented annually by the Jalelian family at the Watertown High School awards ceremony in her memory to high school students of Armenian descent who are interested in the law.

In September 2004, family and friends celebrated her 100th birthday at Pier 4, ending the evening with a dance to Nat King Cole's "Unforgettable," which she was.

Mrs. Karaian leaves a son, John, and daughter, Marilyn Hollisian, both of Watertown and a daughter, Lenore, of Waltham.

Expressions of sympathy may be made in her memory to St. James Armenian Church in Watertown, or to the Norma Karaian Endowed Fund at Boston University School of Law, 765 Commonwealth Avenue, Boston, MA 02215.

REBA membership list available for rental

REBA makes its membership list available to selected vendors and others to keep members apprised of educational offerings, products and services which relate to any aspect of real estate law.

Content must be approved by the REBA staff. The list is licensed in electronic format only.

All or any component of the list can be licensed. A specimen of the license agreement can be found on the REBA web site, www.massrelaw.org. For more information regarding mailing list rentals, contact Nicole Cohen, REBA's administrative assistant at cohen@massrelaw.org.

Sheriff's sales: Notice-of-sale requirements

Continued from page 8
owner and *junior creditors*.

In particular, support for the wording of Item A (3) as a criterion for title counsel and conveyancers to rely on can be found in the following quote from the *Bahnan* case:

"This court in *Teschke v. Keller*, 38 Mass. App. Ct. 627, 650 N.E.2d 1279 (1995), held that a sheriff's sale conducted pursuant to G.L. c. 236, §28, without actual notice to a junior mortgagee violated its due process rights afforded by the Fourteenth Amendment to the United States Constitution. The judge correctly rejected Bahnan's attempt to narrowly confine *Teschke* on the basis that this case does not involve a junior mortgage interest.

"In *Teschke,* we relied on *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 103 S. Ct. 2706, 77 L.Ed.2d 180 (1983), in which the Supreme Court stated that "[n]otice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party ... if its name and address are reasonably ascertainable." See *Teschke v. Keller*, supra at 633, 650 N.E.2d 1279." *Bahnan,* 48 Mass. App. Ct at 910.

Further support, with one little caveat, comes from a Supreme Judicial Court case decided about a year after *Bahnan*: *Town of Andover v. State Financial Services, Inc.*, 432 Mass. 571, 736 N.E.2d 837 (2000).

In that case, an action was brought by a taxpayer to vacate a tax title foreclosure proceeding more than four years after the decree was entered. The plaintiff alleged there was improper service because certified mail notice was provided rather than in-hand service, and, for reasons discussed in the case, the taxpayer never actually received the notice. The SJC revisited the issue of the kind of notice to be afforded a taxpayer in a tax title foreclosure proceeding.

The court properly rejected the position of the taxpayer, citing, *inter alia*, the seminal U.S. Supreme Court notice/due process cases of *Mullane v. Central Hanover Bank & Trust Company*, 339 U.S. 306 (1950), *Mennonite*, supra, and *Tulsa Professional Collection Servs., Inc., v. Pope*, 485 U.S. 478 (1988).

The SJC said that it agreed with the basic principle expressed in those cases that due process requires "notice reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *State Financial Services, Inc.,* 432 Mass. at 574.

The SJC went on to say: "[N]otice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable." *Id.,* quoting from *Mennonite*, 462 U.S. at 800.

In the *State Financial Services* case, the SJC makes it clear that these principles of due process do not require in all instances in-hand service by a sheriff or constable, even where a judicial tax lien foreclosure proceeding is involved. At a minimum, however, certified (or registered) mail is necessary.

Regular first class mail is not enough. In discussing the notice provisions of the tax title foreclosure statute (G.L. c. 60, §66), the court notes with favor that the statute provides for certified mail notice.

By requiring certified mail, as opposed to first class mail, our notice statute not only satisfies due process, but also provides greater assurance to our property owners that notice will actually be received. Compare G.L. c. 60, §66 and G.L. c. 4, §7, Forty-fourth, with *Mennonite,* 462 U.S. at 800. *See also Weigner v. City of N.Y.*, 852 F.2d 646, 650-51 (2nd Cir. 1988) (recognizing certified mail's superiority to regular first class mail for providing notice).

Sending notice by certified mail with a return receipt increases the likelihood the letter will reach its intended recipient. *See Weigner*, 852 F.2d at 650. (explaining advantages of certified mail).

Notice requirements

Turning to the notice requirements under the sheriff's sale statute, G.L. c. 236,

Continued on page 19

Continued from page 18
§28, it should be noted that, in addition to posting and publishing notice of the sale, the sheriff is required to deliver notice to the debtor "if found within his precinct."

The fact that there is no provision in the statute for notice to others who have junior liens or other interests in the subject property has been addressed by the *Teschke* and *Bahnan* cases. What those cases didn't address is what form of notice to the debtor is required in the event in-hand service by the sheriff can't be accomplished, and what form of notice will be required to be sent to junior lien holders or other parties with interests in the subject property.

In view of the SJC's discussion in the *State Financial Services* case of certified mail as meeting *minimum* due process requirements, it seems quite likely that, if faced with this question, Massachusetts courts will require that notices under G.L. c. 236, § 28 be provided by certified mail. Accordingly, it may be necessary to revisit the provision in Item A(3) of the Sheriff's Sale Title Standard allowing for reliance on regular mail notice in passing on a title derived from such a sale.

Now that the appellate courts have provided guidance as to who is entitled to notice of a sheriff's sale and what form of notice will be required in addition to those set forth in the sheriff's sale statute if in-hand service cannot or is not made, the question arises from the standpoint of a title examiner or conveyancing attorney as to *how* to establish compliance with both the procedural requirements and the notice requirements of the statute for purposes of record title.

The Sheriff's Sale Title Standard helps with that determination. Comment No. 2 of Title Standard No. 20 states: "Evidence of compliance with the procedural and notice requirements should be preserved for the record by an affidavit under the provisions of M.G.L. c. 183, §5B."

Alternatively, as pointed out in Caveat No. 1 of the title standard, if the sheriff's return contains a detailed enough description of his or her actions, the return may be used to establish some or all of the requirements. For those interested parties provided certified mail notice of a sheriff's sale, cautionary conveyancing attorneys and title counsel may also ask for copies of the so-called "green cards" (certified mail return receipt cards) in order to verify actual receipt whenever possible.

Keep in mind, however, that, fortunately, actual receipt of notice is not a constitutional due process requirement, as discussed in the *State Financial Services* case and the cases cited therein, but it provides immeasurable comfort to conveyancing attorneys and title counsel when it happens.

Endnotes

[1] These are derived primarily from sections 27, 28 and 49A of G.L. c. 236 and are listed in the Comment to the title standard as follows:

The procedural requirements of M.G.L. c. 236 include:

(a) a sale by public auction to the highest bidder;

(b) an officer's return;

(c) a sheriff's deed recorded within three months after the sale, if there was any intervening conveyance by the debtor;

(d) written notice of the time and place of sale (i) delivered by the officer to the debtor 30 days at least prior to sale, (ii) posted in a public place in the town where the land lies and two adjoining towns in the same county, and (iii) published once in each of three successive weeks, the first not less than 21 days prior to sale in a newspaper published in the town where the land lies;

(e) a deed recorded within six years of levy or any bringing forward of the same.

[2] In *Teschke*, the Appeals Court, analogizing (as did the Land Court) to notice of tax sale cases, primarily *Christian v. Mooney*, 400 Mass. 753, 511 N.E.2d 587 (1987) and the renowned *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983), concluded that the failure to provide personal notice to mortgagees of record prior to the sheriff's sale (in this case, well more than 30 days prior) was a violation of due process and invalidated the sale despite the statutory posting and publishing.

[3] In *Bahnan*, the Appeals Court addressed the situation in which a titleholder downstream from the debtor, whose deed was recorded after the execution but almost two months prior to the sheriff's sale, received no personal notice of the sale and, again, found such failure to be constitutionally deficient.

Anti-money laundering programs on horizon for 'persons' involved in real estate closings

Continued from page 9

Specifically, the inclusion of real estate attorneys within Section 352 AML program requirement would: (1) impose on real estate attorneys a duty to conduct basic due diligence on the identity of their clients, which would cause clients to feel distrustful of their attorney and would discourage clients from communicating fully and frankly with their attorney; and (2) impose on real estate attorneys a de facto obligation to report questionable transactions to law enforcement authorities – thus conflicting with the longstanding rules of client confidentiality and attorney-client privilege. Shepherd, 39 Real Prop. Prob. & Tr. J. 403, 430.

Proposed 'best practices' model

Although final regulations have not been issued for "persons involved in real estate closings and settlements," an argument has been made that, rather than impose AML program requirements on the real estate industry and incur the attendant risks, FinCEN should encourage the real estate industry, including lawyers, to develop and implement "best practices" to ward against money laundering. *Id.* at 434.

This self-policing model would not infringe on the attorney-client privilege and the duty of client confidentiality and would avoid imposing an additional, but duplicative and burdensome, federal regulatory requirement on real estate lawyers.

Components of a best practices model could include the following:

- Cooperation with professional and trade associations involved in the real estate closing and settlement process to develop educational programs to assist their members in detecting and preventing money laundering activities in their respective practices.
- Development of strategies to sensitize the real estate closing and settlement community on money laundering and the different guises it may take.
- Development of meaningful and cost-effective procedures designed to detect and prevent money laundering in the closing and settlement process.

Proposed financial interm ediaries alternative

If FinCEN is unwilling to exempt an entire occupation from the Section 352 AML program requirements, the financial intermediaries test proposed by the American Bar Association's Real Property Section and the ABA Gatekeeper Task Force may be a workable solution to this issue.

This standard recognizes that participants in a real estate closing and settlement who, acting as financial intermediaries, actually handle the receipt and transmission of cash proceeds through accounts that they control in the act of closing a commercial real estate transaction, should be subject to the Section 352 AML program requirements. *Id.* at 437.

The financial intermediaries standard would create a bright line test for lawyers. Those who "touch the money," i.e., those who choose to handle the receipt and transmission of funds for a real estate closing and settlement, should be subject to these requirements, regardless of occupational title or license.

Proposed reliance on due diligence by others

AML due diligence currently exists in the closing process, particularly because traditional financial institutions, already subject to extensive and effective AML and anti-terrorism financing requirements, usually are involved in the transmission of the closing and settlement proceeds.

These financial institutions act as an important and critical check on money laundering activities in the real estate industry. *Id.* at 432. To the extent FinCEN imposes the Section 352 AML program requirements on persons involved in real estate closings and settlements, FinCEN may consider the American College of Real Estate Lawyers' proposal of allowing persons to rely on the AML due diligence performed by others.

Under this approach, one of the parties to a real estate closing and settlement would provide a written confirmation to the other parties that the appropriate AML due diligence had been undertaken, and the other parties would be entitled to rely reasonably on this confirmation. (ACREL Comment Letter to the Financial Crimes Enforcement Network (June 9, 2003).)

Implementation of AML program requirements

If and when the Treasury Department imposes AML program requirements on persons involved in real estate closings and settlements, such policies are likely to include the items listed below.

- Internal policies and procedures: Institutions and persons involved in real estate closings and settlements will need to develop written policies, procedures and controls that apply to existing and prospective clients to help detect and prevent money laundering activities. These policies, procedures and controls will vary from entity to entity depending on the nature of the real estate activity and the types of accounts maintained.
- Compliance officers: The institution will need to designate a compliance officer who has knowledge of and understands the anti-money laundering regulations. The compliance officer should be responsible for keeping informed of recent developments in the area of anti-money laundering regulations and reviewing the publications of the Financial Action Task Force and the Financial Crimes Enforcement Network.
- Employee training: The institution should provide a program to train employees to recognize signs of possible money laundering activities and to educate them about the firm's procedures for handling suspicious activities.
- Independent audits: Independent audits of policies, procedures and employee training should be conducted to determine if the institution and its employees are in compliance with the AML procedures. Such audits should be conducted on an annual basis.