REBA NEWS

Spring 2006
Vol. 3, No. 2

The Newsletter of the
Real Estate Bar Association for Massachusetts

House Speaker DiMasi to give keynote address at REBA's Spring Seminar

House Speaker Salvatore F. DiMasi will deliver the luncheon keynote address at REBA's Spring Seminar on Monday, May 8 at the DoubleTree Westborough Hotel (formerly Wyndham) in Westborough.

DiMASI

DiMasi, a practicing attorney, has served in the Massachusetts House representing the Third Suffolk District for over 25 years. A lifelong resident of Boston's North End, Speaker DiMasi graduated from Christopher Columbus High School, earned a B.S. in accounting from Boston College and a J.D. from Suffolk University School of Law.

He served as an assistant district attorney in Suffolk County prior to his election to the House in 1978. Prior to assuming the duties of House Speaker in 2005, DiMasi served in a variety of leadership positions including Assistant Majority Whip, Majority Whip and Majority Leader.

He is a member of the Knights of Columbus, Sons of Italy as well as the American, Massachusetts and Boston bar associations. DiMasi and his wife, Deborah, have two children, Ashley and Christian.

Lawmakers approve bill modernizing mortgage discharge statutes

Governor expected to sign new measure into law

By Elizabeth J. Barton and Edward J. Smith

BARTON

SMITH

The Massachusetts discharge statutes have long been in need of modernization. In 2003, REBA was invited by the Legislature to work on a comprehensive overhaul of residential real estate mortgage satisfaction practice.

A top priority of then-REBA president Christopher Kehoe, the legislation proved to be a prodigious undertaking for the REBA Legislation Committee, chaired first by Daniel J. Ossoff then Robert H. Kelley.

Ward Graham, assisted by REBA Legislative Counsel and other REBA members, was the principal draftsman. Legislative sponsors of S. 2278 included Sen. Andrea Nuciforo, chair of the Joint Committee on Financial Services, as well as Senators Steven Panagiotakos, Scott Brown and Dianne Wilkerson, and Representatives Christopher Fallon, David Torrisi, Michael Costello and Robert Coughlin.

REBA representatives worked tirelessly to make improvements to S. 2278 through numerous meetings with staff and members of the Massachusetts Bankers Association, Massachusetts Mortgage Bankers Association, Massachusetts Credit Union League, Massachusetts Land Title Association and the Massachusetts Registers of Deeds and Assistant Registers

Continued on page 22

Editor's note: This is the first of a two-part article. The second part will appear in the July 2006 issue of REBA News. *The bill has been approved by the Legislature and is awaiting signature by Gov. Romney. The bill would become effective 180 days after his signature.*

Beth Barton is title counsel for CATIC, a different kind of title insurer, in the firm's Wellesley office. She also serves on the Association's Commercial Real Estate Finance Committee. Beth can be reached at bethbarton@catic-e.com. Ed Smith has served as the Association's Legislative Counsel for over 20 years and is a regular speaker at REBA's Spring Seminar and Annual Meeting. Ed can be reached at edwardj-smith@verizon.net.

First American Title donates $35K to fight TAVMA bill

REBA President Robert J. Moriarty Jr. (right) accepts a $35,000 donation from First American Title Insurance Company to help REBA's effort to defeat House Bill 904. Pictured (from left) are First American representatives Peter C. Norden, regional vice president, and Rhonda P. Norden, vice president and state manager.

First American Title Insurance Company, the market leader in the title insurance industry in Massachusetts, recently donated $35,000 to help the Real Estate Bar Association's efforts to defeat House Bill 904. This pending legislation, sponsored by TAVMA (Title/Appraisal Vendor Management Association), would permit non-lawyers to conduct commercial and residential real estate closings in Massachusetts

The TAVMA legislation, sponsored by Rep. Paul Kujawski (D-Worcester), would overturn existing Massachusetts case law defining the settlement of real estate transactions as the practice of law. According to records on file with the Secretary of State's office, TAVMA and its allies have expended over $200,000 in the last two years on lobbying fees alone. "At First American, we are committed to attorney-centered closings and the needed system of checks and balances which benefit the home-owning public," said Peter C. Norden, senior vice president for First American. "We put our money where our mouth is."

REBA President Robert J. Moriarty Jr. in a letter to First American wrote, "This donation will support REBA's efforts to insure that lawyers across Massachusetts will continue to

Continued on page 19

What's in this issue…

Assessing whether a lot is 'buildable' often a complex question

By James M. Burgoyne

It is no secret that during the past few years, the value of a parcel of real estate suitable for single family home development in Massachusetts has increased at a pace which is unparalleled in modern history.

The demand for new residential housing has continued unabated, largely due to reasonable mortgage interest rates. Shortages in the available supply of approved or "buildable" lots, however, has led to an increased focus on the development of "grandfathered" lots by builders as well as homeowners to meet the demand.

Undoubtedly, the most common zoning question faced in the day-to-day practice of a land use attorney or zoning practitioner concerns the issue of whether an existing vacant lot or parcel of land that does not conform to current zoning dimensional requirements is "grandfathered" as a "buildable lot" for zoning purposes.

The reasons for the inquiry vary. Builders, real estate brokers and investors are always on the hunt for property. Owners are finding that with assessed values increasing, the real estate tax burden of owning an apparently "buildable lot" adjacent to their existing home is too much to handle.

Local assessors often rely on old subdivision plans or local zoning provisions to conclude that vacant land is "developable" and tax it accordingly. Some clients who may have inherited a property with surplus adjacent land, or who simply wish to sell and downsize their homes, are increasingly attempting to maximize their returns in the hot market by selling off adjacent lots for development.

In some cases, property owners are seeking to create or develop a vacant lot for use by their children who are otherwise frozen out of the market by today's prices.

Predictably, the clash between the owner who attempts to retain the value of the lot he has been "paying taxes on for years" and abutters or town officials seeking to restrain new development in established neighborhoods has led to frequent litigation with unpredictable results.

'Grandfathering' a complex question

As discussed below, whether a vacant lot is "grandfathered" for building purposes is a complex question that involves a detailed analysis. The result can turn on many factors.

The Massachusetts Zoning Act has always contained provisions exempting certain classes of vacant building lots from zoning amendments that would otherwise operate to prevent a "once valid building lot" from being rendered unbuildable.

These protections for vacant lots are in G.L.c. 40A, §6. This statute contains two sentences exempting certain qualifying isolated lots or groups of up to three contiguous lots from increases in zoning dimensional requirements, which would either prevent them from being built upon, or would require them to be "merged" for zoning purposes with adjacent land.

The "isolated lot" exemption provides that "any increase in area, frontage, width, yard, or depth requirements of a zoning ordinance or by-law shall not apply to a lot for single and two-family residential use which at the time of recording or endorsement, whichever occurs sooner, was not held in common ownership with any adjoining land, conformed to then existing requirements and had less than the proposed requirement but at least five thousand square feet of area and fifty feet of frontage."

As long as the lot met the modest area and frontage requirements, "conformed to then existing requirements," and was not held in common ownership with adjacent land, the statute protected the lot from a subsequent dimensional zoning amendment that would render it unbuildable for single or two-family use.

While the protections afforded to vacant lots by Section 6 are the minimum

Continued on page 24

Jim Burgoyne is a partner in the Worcester office of Fletcher, Tilton & Whipple, P.C. practicing in the areas of environmental litigation, land use planning and permitting, construction law, and commercial and business litigation. In addition to chairing the REBA Land use and Zoning Committee he is Town Moderator for Lancaster and a serves as a member of the Lancaster Board of Appeals. He can be reached at jburgoyne@ftwlaw.com.

REBA
THE REAL ESTATE BAR ASSOCIATION
for Massachusetts

REBA News is an official publication of the Real Estate Bar Association for Massachusetts, Inc.

50 Congress Street, Suite 600
Boston, Massachusetts 02109-4075
Tel: (617) 854-7555
(800) 496-6799
Fax: (617) 854-7570

President
Robert J. Moriarty Jr., Esq.

President-Elect
Sami S. Baghdady, Esq.

Immediate Past President
Daniel J. Ossoff, Esq.

Clerk
Paul F. Alphen, Esq.

Treasurer
Thomas Bussone II, Esq.

Executive Director
Peter Wittenborg, Esq.

Editor
Peter Wittenborg, Esq.

Managing Editor
Susan A. Graham

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, Inc. accepts advertising in its publications and educational offerings, it endorses no products or services.

www.reba.net
Please note that the website address has changed and all active members have been notified of login information. Contact REBA for more information at cohen@reba.net.

From the President's desk

By Robert J. Moriarty Jr.

The Real Estate Bar Association has achieved remarkable progress and growth in the last several years. As I write this, we are in the final stages of a three-year effort to adopt a comprehensive legislative reform of discharging real estate mortgages in Massachusetts – "The Dream" as we refer to it at REBA.

This legislation will streamline and ease the now too difficult and often vexing process of mortgage satisfaction. I know that commercial and residential practitioners alike applaud this initiative.

Our all-day Spring Seminar on Monday, May 8 at the DoubleTree Hotel in Westborough (formerly the Wyndham) will feature several educational sessions offering an overview of this new mortgage discharge process. Our luncheon keynote speaker will be Speaker of the House of Representatives Salvatore F. DiMasi, a longstanding friend of the Association. We welcome his remarks on public policy concerns and pending legislation.

Speaker DiMasi's willingness to take time out of his busy schedule to speak to our members is further evidence of the growing importance and effectiveness of the Real Estate Bar on Beacon Hill.

We have learned much from the process of shepherding The Dream through the Legislature. We have become attuned to the need of supporting and interacting with the members of the House and Senate and making our concerns known.

This is not a once-a-year "Walk to the Hill," but a year-round, daily process. With thoughtful tactical advice from our longtime Legislative Counsel, Ed Smith, and through donations from our REBA Political Action Committee, we have elevated our presence and standing at the State House. No bar association and few trade associations have as effective a voice.

The legislative process requires the methodical, deliberative assemblage of coalitions of various interest groups. With The Dream we have brought together lawyers, bankers, mortgage lenders and title insurance underwriters with our friends and allies on Beacon Hill.

We are applying what we learned from The Dream to our fight against House Bill 904 and the efforts of TAVMA and its corporate allies who want non-attorneys to conduct commercial and residential closings in Massachusetts.

On Feb. 28, we participated in a hearing of the Joint Committee on the Judiciary. Two panels testified in opposition to the TAVMA bill. Chris Kehoe, Michelle Simons and Conrad Bletzer testified for REBA. Mike Gagnon from Old Republic Title, Rich Hogan from CATIC, and Peter Norden from First American, testified on behalf of the title insurance industry.

All were effective spokespersons advocating the central role of the attorney in protecting the consumer in the closing process. We are particularly grateful to Massachusetts Bar Association President Warren Fitzgerald for his appearance, support and eloquent testimony. While our testimony was well-received, we know our battle will be long and hard-fought.

REBA will do whatever it takes to fight House Bill 904 … but what can you do?

First, each of us must strive to be the very best lawyer that we can be. Every day our clients entrust us with their affairs and their money. We must remain scrupulous, honest and attentive to our clients. And we must be diligent in insuring that every other attorney in the process maintains that high level of honesty and integrity. When any lawyer violates our ethical and legal standards, it is a mark against us all.

Another is to give back to our community. Lawyers share a great tradition of serving others, often with little recognition or appreciation. At the REBA Spring Seminar on May 8 we will present our first Denis Maguire Community Service Award to a member of REBA who has unstintingly given to his community in different and varied efforts, unrelated to the law and without any illusion of personal benefit to him. We must continue to serve others.

REBA members have traditionally participated in helping low and moderate income home buyers. This is an area where we can apply our professional real estate expertise to serve others. We are working with our Affordable Housing Committee to institutionalize that program.

In another area, the co-chairs of our REBA Litigation Committee met with Chief Justice Karyn Scheier of the Land Court to discuss representation of those who may have legitimate claims, but lack the means to seek justice. This is an initiative that we hope to support and expand in the coming years.

Finally, each REBA member must also support the REBA Political Action Committee. Our out-of-state adversaries can draw on very substantial corporate resources and we must counter their influence with grassroots efforts by participating in political fundraisers and becoming involved in all levels of the legislative process.

This column affords me with an opportunity to thank those who have made substantial contributions to REBA or to our PAC. I hope that you have all seen the featured stories about these contributions on the front page of our website and in *REBA News*, but they deserve further recognition.

On behalf of all REBA members we thank CATIC, particularly Rich Patterson and Anne Csuka, and First American Title, particularly Peter and Rhonda Norden, for their very substantial corporate donations to REBA. We also particularly thank a group of First American lawyer-agents who have collectively pledged more than $50,000 to our PAC or to REBA.

The funds contributed by these two companies and these agents will help us to fund the fight against House Bill 904.

If you, as a REBA member, have not made your contribution this year, I urge you to donate or pledge a contribution to the PAC. Your contribution will be greatly appreciated and well used.

Thanks to all of you for making REBA what it has become. I look forward to seeing you all at our REBA Spring Seminar on May 8.

A founding partner of Marsh, Moriarty, Ontell & Golder, P.C., Bob is a long-serving member of the Association's Title Standards Committee from 1984 through 2003. He concentrates in commercial and residential title matters including the review of title abstracts, title reports, title insurance commitments, title certifications and the resolution of title issues on behalf of title insurance underwriters, law firm clients, developer clients and institutional lenders. He is a graduate of Boston College and the University of Connecticut School of Law. He can be reached at rmoriarty@mmoglaw.com.

TAVMA opposition on Beacon Hill

In a packed State House hearing room, a panel of REBA witnesses recently testified against the TAVMA Legislation (House Bill 904) before the Legislature's Joint Committee on the Judiciary. House Bill 904, sponsored by the Pittsburgh-based Title / Appraisal Vendor Management Association, would permit non-lawyers to handle commercial and residential real estate transactions in Massachusetts.

REBA Legislation Committee Co-Chair Chris Kehoe (center left), Residential Conveyancing Co-Chair Michelle Simons (center right), and Brighton attorney Conrad Bletzer Jr. (far left) testified at the hearing. Daniel Sullivan (far right), a homeowner from Hull, participated in the REBA testimony. Sullivan and his wife Kathleen recently purchased a home in Hull using an out-of-state non-lawyer settlement company. Over a year after the closing they learned that their title deed had never been recorded.

Representatives from the title insurance industry also testified in opposition to the legislation. Richard A. Hogan, legislative and regulatory counsel for CATIC, Peter C. Norden, regional vice president for First American Title, and Michael Gagnon, vice president and Massachusetts state counsel for Old Republic National Title Insurance Company, spoke against the legislation.

REBA expands headquarters

REBA has leased additional space at our 50 Congress St. headquarters in Boston to serve the Association's growing membership. The new space will include additional conference and breakout rooms for REBA's subsidiary, REBA Dispute Resolution, as well as office space for mediators and mediation staff.

There will be new offices for REBA Information Technology Manager, Bob Gaudette, and REBA Member Service Administrator, Joe McBride. A new larger conference room with built-in AV functionality will feature a wall of portraits of Association presidents from the 1970s to date.

Conference room, meeting room and office space at 50 Congress Street is available to all REBA members at no charge as a member benefit. The entire space is Wi-Fi enabled. To reserve space for a meeting or closing, contact Joe McBride at mcbride@reba.net.

Send a letter to the editor!

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

Child support liens revisited

New legislation creates loophole

By Ward P. Graham

This is a follow-up to my article in the January 2006 issue of *REBA News* discussing the child support lien statute (G.L.c. 199A, §6). In the January article, I parenthetically mentioned that legislation was pending that would increase the child support lien period from six to 10 years.

That legislation passed as St. 2005, c. 163, §45, with an effective date of Dec. 8, 2005. However, as it turns out, the legislation extended the lien duration period under §6(b)(5), but did not address the period related to the perfection of the lien against after-acquired property under §6(b)(3). In addition, the legislation still did not address a potentially lucrative source of after-acquired property for a child support obligor: inherited property.

Ward Graham is New England Division Counsel of Stewart Title Guaranty Company in Boston. He serves on the Association's legislative committee and he can be reached at wgraham@stewart.com.

What the recent legislation *did* change

In order to extend the previous six-year child support lien period from six years to 10 years, the new legislation stated that the word "six" is replaced with the figure "10." The lines where this change is made is within §6(b)(5) of c. 119A, which deals with the duration of a child support lien and the refiling of the lien to extend it. As a result of the change, the relevant portion of §6(b)(5) now provides:

"The lien shall expire upon either termination of a current child support obligation and payment in full of unpaid child support, or upon release of the lien by the IV-D agency. In any event, a lien under this chapter shall expire *10 years* from the date on which such lien was first perfected; provided, however, that such lien may be extended for additional periods of *10 years* each by recording or registering, within the one year next before the expiration of the unexpired lien, a further notice of the lien, as provided in subparagraph (3), without affecting the priority of such lien." [Emphasis added.]

What the recent Legislation didn't change

Unfortunately, the amending legislation only changed the lien duration periods under §6(b)(5) and overlooked the existing six-year "perfection" period provided in §6(b)(3). This creates a potential loophole for perfection of a filed notice of child support lien against property later acquired by a child support obligor.

As was discussed at length in the prior article, it is important to keep in mind that, unlike other state tax liens, the lien duration period under §6(b)(5) starts running from the date the lien is "first perfected," not the date upon which an assessment occurs or the lien first arises.

Also, this may not even be the date upon which the lien is filed because of the provisions of §§6(b)(1) and 6(b)(3) regarding the attachment and perfection of a previously filed, unexpired lien against after-acquired property of a child support obligor.

Under §6(b)(3), "perfection" of a filed child support lien occurs either (1) when the notice of lien is filed if the obligor owns an interest in real estate in that county at that time, or (2) in the case of *after-acquired property*, upon the recording or registration of the deed or other instrument by which the support obligor acquires the property after the notice of lien was filed, but *within six years* of the filing of the notice.

As pointed out in the previous article, when the lien perfection period under §6(b)(3) and the lien duration period under §6(b)(5) were both six years before the amending legislation, conveyancing attorneys and title examiners needed to be aware that the initial lien period (even without any refiling) *as to after-acquired property* might last as long as 11 years, 11 months and 29 or 30 days after the initial notice of lien was filed. This is be-

Continued on page 21

Statewide electronic recording still needs work

By Richard P. Howe Jr.

The following message – "Electronic recording queue currently contains 1 payload - please process as soon as possible" – has appeared more than 1,400 times on recording terminals at the Middlesex North Registry of Deeds during the past nine months.

Each appearance of this alert signals the arrival of a new document to be recorded as part of the electronic recording pilot program underway at the Lowell Registry. The experience of processing so many documents has suggested further steps that should be taken before electronic recording is widely used in the Commonwealth.

Mechanically, the system works quite well. Authorized submitters create electronic images of documents to be recorded, enter data about those documents on a secure website and then transmit an electronic "payload" consisting of the document image and the related data to the registry, prompting the above message to appear at the recording counter.

In response, a registry clerk opens the electronic recording window which displays the scanned document image on one side and the indexing data previously entered by the submitter on the other. After verifying the quality of the image and the accuracy of the data, the clerk either "records" or "rejects" that payload. All fees are paid by an electronic transfer of funds to the registry's bank account.

Dick Howe is register of deeds in the Middlesex North District Registry in Lowell. He can be reached at richard.howe@sec.state.ma.us.

During the coming months, the Massachusetts Registers of Deeds Association and Secretary of the Commonwealth William Galvin will begin the construction of the legal and technological infrastructure needed to carry the high volume of electronic recordings coming in the future.

Although the computer system handles incoming electronic recordings with ease, the registry's business practices have had to change substantially to accommodate this new method of recording.

For example, we have chosen to have all recording terminals receive electronic recordings, viewing such submissions as virtual customers whose documents should be integrated with those presented by walk-in customers. But to fully and fairly implement this approach, we must first develop some type of queue management system that assigns each customer a place in line regardless of whether the customer is standing in the registry or submitting documents electronically from a remote location.

While adapting registry business practices certainly presents a challenge, the most significant impediment to full implementation of electronic recording is something outside the registry of deeds.

Thus far, all of the technical aspects of electronic recording, both on the submitter side and the registry side, have been handled by ACS, the company that provides Middlesex North and twelve other Massachusetts registries with computer systems.

In 2002 when the state selected a standard computer system for a number of registries, an ACS system that included an electronic recording component was chosen. Since another division of ACS also recruits and services submitters of electronically recorded documents, it made sense to test the system with a single vendor handling the technical aspects of both submission and reception.

But there are many other companies that provide electronic recording services for submitters and there are still a variety of different computer systems in the various registries of deeds. What is needed is a central office that accepts submissions from many different companies and transmits such submissions to the correct registry in a format that will flow directly into that registry's computer system.

Logically, this organization would fall within the Secretary of the Commonwealth's office and would be staffed either by state employees or contracted to a company that was not involved in either the submitter side or the registry side of the process.

Besides performing the critical and highly technical function of synchronizing submissions from diverse systems with equally diverse registry computers, this office would be responsible for promulgating and enforcing regulations governing the overall electronic recording process. The regulations should, among other things, define the minimum criteria to become a submitter of electronic documents, and also set standards for security, authentication and encryption. The new regulations must be in place before wider access is allowed.

These days, the record hall at the Middlesex North Registry is a lonely place. The lack of users is only partly attributable to the current real estate market. A much larger factor is the ability of registry customers to do the bulk of their research online at our website, www.lowelldeeds.com. What started as a convenient way to retrieve an occasional document has become for many the primary method of title research.

Electronic recording stands ready to transform the traditional recording process just as registry websites have transformed the title examination process. Once it is made widely available, electronic recording will grow faster than anyone has yet imagined.

To support this growth, the state must have in place a solid infrastructure that ensures the reliability and security of the system. During the coming months, the Massachusetts Registers of Deeds Association, working in conjunction with Secretary of the Commonwealth William Galvin, will begin the construction of the legal and technological infrastructure needed to carry the high volume of electronic recordings that will occur when the use of this technology becomes standard procedure for the conveyancing bar.

CORCORAN
BROKERAGE

Introducing Corcoran Brokerage's Lawyer to Real Estate Agent Referral Registry.

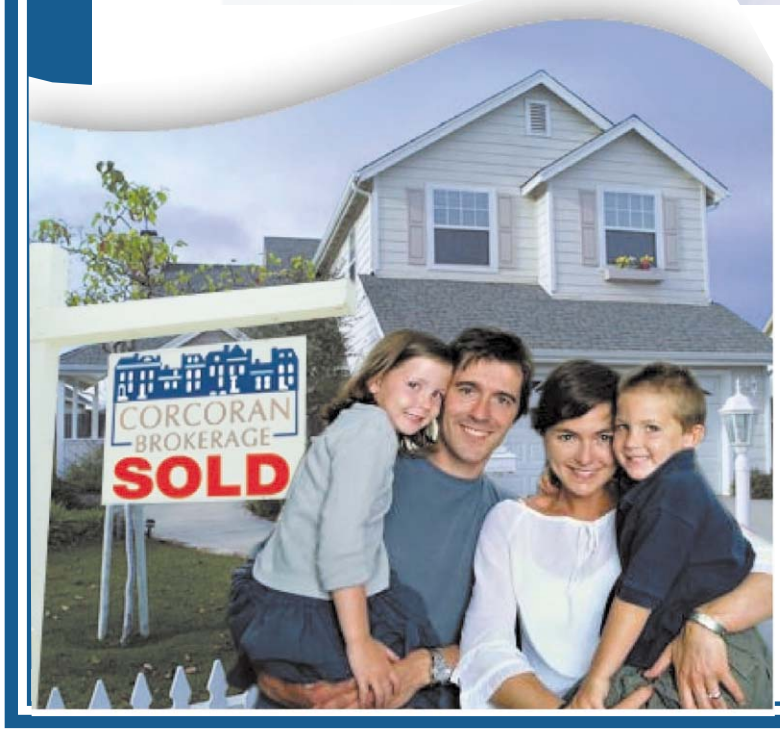
The Lawyer to Real Estate Agent Registry is a mutually beneficial program in which you can increase your revenue by simply referring home buyers and sellers to Corcoran Brokerage. At Corcoran, many agents are also lawyers and seasoned real estate professionals.

Know someone who is selling a home or condo? Refer the listing through this Registry and receive a **flat referral fee of $2,000.00**. Know someone looking to buy a home? Refer them to the Registry and receive a **flat referral fee of $500.00**.

Put your Real Estate Broker license to work without worrying about long hours, rigid work, brokerage fees, hourly billing, schedules or office red tape.

It's simple, profitable, social and smart!

It’s not too late! Even if you missed the information sessions call us today for more information.



Contact Info:

617-898-1LAW (1529)
781-799-4077 (cell)
www.corcoranbrokerage.com

Office Locations:

25 West Street, Boston
500 Granite Avenue, Milton
75 Adams Street, Milton Lower Mills

"We Do Your HOME Work"

Housing Appeals Committee decision trumps parallel abutter appeal

By Theodore C. Regnante and Paul J. Haverty

REGNANTE

HAVERTY

Ted Regnante is a partner in the Wakefield firm of Regnante Sterio & Osborne. Regnante has represented numerous applicants for comprehensive permits throughout Massachusetts, and served on Gov. Romney's Housing Appeals Advisory Committee. Regnante is also a member of the REBA Board of Directors. Paul Haverty is an associate at Regnante Sterio & Osborne. Haverty has also represented numerous applicants for comprehensive permits throughout Massachusetts. Prior to joining the firm, Haverty was a law clerk for Land Court Chief Justice Karyn Scheier. He is a member of the REBA Affordable Housing Committee.

A recent Superior Court decision has introduced a new dynamic in appeals of comprehensive permit decisions pursuant to G. L.c. 40B, §§20-23.

Judge Christopher J. Muse in *Taylor v. Board of Appeals of Lexington* (Middlesex Superior Court No. 03-0746, Dec. 1, 2005) held that a decision of the Housing Appeals Committee (HAC) in an appeal relating to regional planning issues brought by a developer under G.L.c. 40B, §22, trumps appeals brought by abutters under G.L.c. 40A, §17.

This case has been appealed to the Appeals Court by the abutters. Given the important issues contained in the appeal, the Supreme Judicial Court may take direct appellate review.

Lexington Project

In January 2002, Rising Tide Development, LLC (Rising Tide), submitted to the Lexington Board of Appeals (the Board) an application for a comprehensive permit pursuant to G.L.c. 40B, §§20-23 for the construction of 48 condominium units on 3.6 acres of land in Lexington.

During the hearing process before the Board, Rising Tide voluntarily reduced the density of the project to 36 units. On Feb. 7, 2003, the Board unanimously granted the comprehensive permit to Rising Tide, but among other conditions, reduced the density of the project to 28 units.

Rising Tide appealed the Board's decision to the HAC pursuant to G.L.c. 40B, §22, claiming the density reduction rendered the project uneconomic. Additionally, an abutters group appealed the Board's decision to the Superior Court, pursuant to G.L.c. 40A, § 7, claiming the Board's decision even at the reduced density was improper. Chapter 40B creates a dual appellate procedure, allowing aggrieved developers to appeal to the HAC while aggrieved abutters can appeal to the Land Court or Superior Court.

The HAC Appeal

The main issue before the HAC in Rising Tide's appeal was whether the conditions imposed by the Board rendered the project uneconomic. *Rising Tide Development, LLC v. Lexington Bd. of Appeals,* No. 03-05 (Mass. Housing Appeals Comm., June 14, 2005). Because the HAC found that the reduction in density rendered the project uneconomic, it proceeded to the next step in the analysis, which was to determine whether the conditions were consistent with local needs.

The HAC allowed an abutter group to participate in the hearing process, and in its decision allowed the group's Motion to Intervene, but only as related to the issue of density.

The HAC went on to find that the density for the project was appropriate and in character with the neighborhood. It also found that the proposed buildings would not be unduly intrusive due to their bulk and setback from adjoining yards. The HAC noted that the proposed buildings would comply with local zoning regulations for building height, and that the proposed setbacks would be greater than the setbacks of the existing structures on the site, which were proposed to be demolished.

For these reasons, among others, the HAC held that the proposed buildings would not have a significant impact upon the abutters. The Board has appealed the decision of the HAC to the Superior Court pursuant to G. L. c. 30A, § 14.

Superior Court case

The Superior Court case filed by the abutter group was stayed until the HAC decision was issued. Following the HAC

Continued on page 23

Title insurance industry facing government scrutiny

By Joel A. Stein

The recent series of enforcement actions by state regulators has resulted in a request by Michael Oxley, chair of the U.S. House of Representatives' Financial Services Committee, to the Government Accountability Office to examine the title insurance industry.

In a letter to Comptroller General David Walker posted on the Financial Services Committee's website, Oxley noted:

"As housing prices have soared in various parts of the country, the cost of title insurance has become an increasing burden on many consumers. Questions about the need and price of title insurance are of particular concern to those consumers who are required to buy a new policy every time they refinance their mortgage loans, a common practice in this time of historically low interest rates.

"The Financial Services Committee is concerned about recent investigations by state regulators revealing that title companies have made payments for referrals to developers, mortgage lenders, and real estate agents in violation of the Real Estate Settlement Procedures Act (RESPRO). Other investigations have revealed abuses of reinsurance agreements that have forced title companies to pay millions of dollars in settlements, and have uncovered anti-competitive practices within the title industry.

"Accordingly, the Committee requests that the Government Accountability Office (GAO) examine and address the following questions:

- Analyze the title insurance market to determine what factors impact the price of the product, including the associated claims, title search, overhead, and marketing costs;
- Determine the number of title insurers, their market share, how the product is marketed and sold, the extent to which title insurance is a nationwide business, and to what extent consumers benefit from a competitive title insurance marketplace; and
- Examine the relationship between title insurers, realtors, lenders, and home builders for anti-competitive practices and investigate potential barriers to entry in the market."

As previously reported in *REBA News*, numerous title insurance investigations took place in 2005. These investigations have continued into this year in Massachusetts, as well as Florida, Washington, Hawaii, Oklahoma, Minnesota, Michigan, Georgia, Tennessee, New York, Utah, and other states.

In Colorado, nine title insurers were investigated for alleged kickback schemes, and in California, Fidelity National Financial and First American Title Insurance Company agreed to pay a total of $22.7 million to consumers. These investigations have resulted in articles being published in a number of online publications, including a CNN.com in an article headlined "Title Insurance: Are You Getting Ripped Off" and a Mercury News.com article entitled "Title Insurance Prices Inflated, Study Says".

California example

The California Insurance Commissioner, John Garamendi, has followed up the statewide investigation by requesting Birny Birnbaum, former Chief Economist of the Texas Department of Insurance, to study whether a reasonable degree of competition exists in California title insurance and escrow markets.

Birnbaum determined that the scope of the analysis of competition would include business activity related to title insurance escrow services and other activities related to the provision of title insurance. He also determined the type of competition at issue was price competition. The conclusion was that a reasonable degree of competition does not exist in the four phases of the business of title insurance in California:

1. title search, examination of commitment;
2. issuance and servicing of title insurance policies;
3. escrow and closing; and
4. other services.

Concerning title insurance, the study noted that a few title insurers account for

Continued on page 20

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. Joel can be reached at jastein@friedmanstein.com.

Revised ALTA policy forms on the horizon

By Edmond R. Browne Jr.

The American Land Title Association (ALTA) is in the final stages of the first comprehensive revision to its standard loan policy in nearly two decades.

This article is intended to provide a brief overview of the proposed new policy forms and not a comprehensive analysis. More information on the draft forms is located at ALTA's website (www.alta.org). The proposed policies will be presented to ALTA membership for adoption this fall.

With the exception of the changes to the creditors' rights exclusion in 1992, the loan policy hasn't had a major revision since 1987.

Corresponding changes to the short form residential loan policy and commitment forms as well as the owner's policy are also being proposed. While past policy form revisions have focused on responding to legal and legislative developments, the current proposals focus more on providing clarity on the title insurance risks being undertaken and generally making the policies easier to understand.

The review process has been ongoing for more than two years and the ALTA Title Insurance Forms Committee has received input and comments from a wide range comments from practitioners, lenders, government agencies and academics in preparing the proposed policies.

Coverages are clearer

One of the most significant changes is that the policy form states more clearly what risks are insured. This is accomplished by opening the policy with a clear delineation of the covered risks. In addition, some affirmative coverages in the current loan policy are "buried" in the exclusions.

Providing coverage in an "exclusion to an exclusion" has been confusing to insureds, and to some courts as well, which have questioned whether coverage that does not exist in the insuring clauses can be derived from the exclusions.

As a result, the familiar eight insuring clauses have been expanded and clarified. The new insuring clauses that have been added to the loan policy make it clear that the policy expressly covers:

- impairment of the lien from such events as forgery, fraud, undue influence, incompetency, incapacitation or impersonation;
- failure of any person to authorize a transfer or conveyance;
- failure of proper execution, acknowledgement, notarization or recordation;
- execution under a falsified, expired or invalid power of attorney;
- failure to be properly filed, recorded or indexed in the public records;
- or a defective judicial or administrative proceeding.

The new covered risks also include built-in survey and gap coverage. Schedule A has been revised to include check boxes for incorporation by reference of selected ALTA endorsements.

'Boilerplate' changes

Counsel and insured lenders alike will be interested in the changes to the "boilerplate" conditions and stipulations. For starters, a number of significant changes have been made to the definitions. The proposed policy expands the definition of "insured" to include successors' various transfers between affiliated entities. Of particular interest is the revised definition of "Amount of Insurance and Determination and Extent of Liability Clause" that (a) provides for an increase in the policy amount by 10 percent where the title insurance company exercises its right to defend the title and is unsuccessful, and (b) allows the insured lender the option to measure damages as of the date the claim was made or at the time

Continued on page 19

Edmond R. Browne Jr. is vice president, legal and industry relations, at CATIC in Rocky Hill, Conn. He is a member of the ALTA Title Insurance Forms Committee and was formerly general counsel at ALTA. He can be reached at edbrowne@catic-e.com.

New ALTA/ACS survey requirements now in effect

The new 2005 Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys became effective Jan. 1, 2006. These new 2005 Requirements modify and update the previous 1999 Requirements in a number of ways. A copy of the new 2005 Requirements can be found at ACSM.net.

Below are some of the changes:

- **Same surveyor, not just firm, required to revise or update a prior survey**. If the surveyor who performed a survey has since left a firm, the firm cannot revise or update the survey without re-analyzing the survey.
- **Listing, not depicting, zoning dimensional requirements**. The optional inclusion of zoning dimensional requirements (e.g., setbacks) should be listed only, and not depicted, since depiction can involve interpreting zoning bylaw provisions, which is a legal matter not within the surveyor's purview. The surveyor's source for the zoning information must be disclosed.
- **Distance to nearest intersecting street now optional**. This is no longer a base requirement. It has been moved to an optional Table A item.
- **More accuracy for distance from building to boundary**. Accuracy requirements for this measurement have been increased to be the same as the overall accuracy requirement for the survey.
- **Ways of access**. Ways of access to or across the property other than driveways and alleys, such as adjoining waters, pathways or trails, must be shown.
- **Evidence of earthmoving, street relocation, landfill**. A new note to Table A states that these optional Table A items are only for use on projects for HUD.
- **Record and new perimeter descriptions on face of survey.** The record description and any new perimeter description must appear on the face of the survey. The surveyor may explain significant discrepancies on the face of the survey or in an attachment.
- **Burial Grounds**. The language clarifies that a surveyor need not research the location of burial grounds, just show physical evidence of their presence.
- **New Nomenclature for Accuracy Standards**. Former language regarding "Positional Tolerance" and "Positional Uncertainties" has been replaced with "Relative Positional Accuracy." The new nomenclature is intended to correspond better with the accuracy nomenclature of the newer technologies being increasing used (e.g., GPS). The actual accuracy standard itself remains the same (0.07 ft. or 20mm, plus 50 parts per million of the distance measured).
- **"In My Professional Opinion."** This language has been added to the certification to clarify that there is a professional standard of care, the breach of which gives rise to liability with respect to the certification (concerns of E & O insurers led to this insertion).

Mark Your Calendars!

REBA 2006 Spring Seminar
May 8, 2006
DoubleTree Westborough Hotel

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 2006

DoubleTree Westborough Hotel
formerly the Wyndam Westborough Hotel.
5400 Computer Drive, Westborough, MA 01581

Monday, May 8, 2006
8:30 a.m. – 4:00 p.m.

THE MORNING SESSIONS

Bankruptcy Code Amendments Affecting Real Estate

The Shifting Sands of Massachusetts Beach Rights

Conveyancer's Toolbox

Hot Issues in Condominium Developments

Overview of REBA's Omnibus Mortgage Discharge Legislation

Reverse Mortgages

THE AFTERNOON SESSIONS

Recent & Pending Legislation: Summary and Highlights

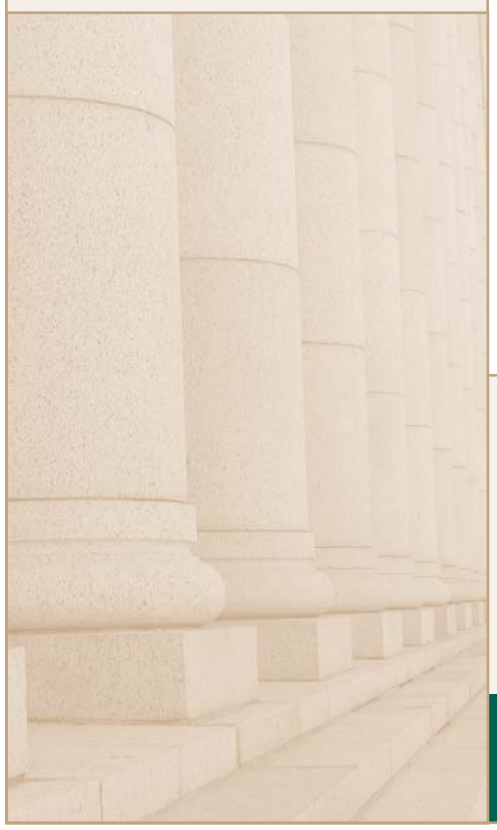
Recent Developments in Massachusetts Case Law

CONTINUING EDUCATION COMMITTEE CHAIRS

Stephen M. Edwards, Esq.

Sophie Stein, Esq.

VALET PARKING PROVIDED



REGISTRATION for REBA'S Spring Seminar, May 8, 2006

Complete this form, include the appropriate fee and return to REBA Foundation, Attn: 2006 Spring Seminar, 50 Congress Street, Suite 600, Boston, MA 02109-4075 or FAX to: (617) 854-7570.

NEW! Register Online at www.reba.net

		By 4/28	After 4/28
_____	YES, please register me. I am a REBA member in good standing.	$ 135	$ 160
_____	YES, please register me as a guest.	$ 175	$ 200
_____	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
_____	NO, I am unable to attend, but would like to purchase the seminar materials and an audiotape of the sessions. (Order by 05/08/06. Please allow four to six weeks for delivery.)	$ 130	$ 130
	TOTAL	$_____	$_____

_____ I have enclosed a check for the total amount listed above

_____ Please charge my _____ MasterCard or _____ Visa for the total amount listed above.

Card Number: __ __ __ __ -__ __ __ __-__ __ __ __-__ __ __ __ Expiration date ____/____

Signature: _____

Name: _____ Esq. (yes or no): _____

Nickname for Badge: _____ Firm/Org: _____

Address: _____

City: _____ State: _____ Zip: _____

Phones: Office: _____ Cell: _____ Fax:_____

Email: _____

SECTION: PLEASE COMPLETE: thank you

SELECT YOUR LUNCHEON: Surf and Turf____ Chicken ____ Vegetarian____ Fish____

SECTION: PLEASE COMPLETE: thank you

BREAKOUT SESSION PREFERENCES: please rate (1-6) order of your preference:

_____ *Conveyancer's Toolbox Essentials* (Baghdady, Keshian, Krone)

_____ *Bankruptcy Code Amendments Affecting Real Estate* (Hoffman, Goldberg)

_____ *Overview of REBA's Omnibus Mortgage Discharge Legislation* (Dillingham, Graham, Kehoe)

_____ *The Shifting Sands of Massachusetts Beach Rights* (Englander, Heffernan, Moriarty)

_____ *Hot Issues in Condominium Developments* (Galvin, Moskowitz)

_____ *Reverse Mortgages* (Cannon, Downey)

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.

DoubleTree Westborough Hotel
formerly the Wyndam Westborough Hotel.
5400 Computer Drive, Westborough, MA 01581

THE REAL ESTATE BAR ASSOCIATION *for Massachusetts*

Monday, May 8, 2006
8:30 a.m. – 4:00 p.m.

SCHEDULE OF EVENTS

8:30 a.m. - 4:00 p.m. **Registration and Exhibits Open**

9:00 a.m. - 12:45 p.m. **THE MORNING SESSIONS**

9:00 a.m. - 9:45 a.m. ***Conveyancer's Toolbox Essentials***

Sami S. Baghdady, Esq.; Dick Keshian, Esq. & Michael P. Krone, Esq.

A successful and efficient real estate lawyer relies on tools and resources that serve as valuable aids to practice. These include technology, software and internet resources, dog ear-ed treatises and resource books or CDs, and professional relationships with title examiners, surveyors, title insurance professionals and other lawyers. Whether you are newer to the practice and looking to build your own practice "toolbox", or an experienced practitioner looking for new ideas about valuable resources (and to share a few of your own), you will benefit from our very esteemed panel's leadership of this discussion of tools and resources that are valuable aids to the conveyancer's practice.

9:00 a.m. - 9:45 a.m.
10:00 a.m. - 10:45 a.m. ***Bankruptcy Code Amendments Affecting Real Estate***

Melvin S. Hoffman, Esq. and Michael J. Goldberg, Esq.

The Bankruptcy session will just provide an update on the impact of bankruptcy on real estate, particularly leases, homesteads, sales free and clear of liens. Speakers will also address changes in practice as a result of the new Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

9:00 a.m. - 9:45 a.m.
11:00 a.m. - 11:45 a.m.
12:00 a.m. - 12:45 p.m ***Overview of REBA's Omnibus Mortgage Discharge Legislation***

Ruth A. Dillingham, Esq.; Ward P. Graham, Esq. & E. Christopher Kehoe, Esq.

REBA's omnibus real estate mortgage discharge reform legislation is the culmination of a three-year effort by the Association's leadership in a successful collaboration with Registers of Deeds, industry trade groups including the Massachusetts Bankers Association (MBA), the Massachusetts Mortgage Bankers Association (MMBA) and the Massachusetts Credit Union League, as well as the title insurance industry.

This bill, bringing penalties for noncompliance in the Commonwealth into line with the majority of other states, also adopts certain provisions of the Uniform Residential Mortgage Satisfaction Act. REBA's goal was to resolve the numerous vexing problems in commercial and residential mortgage release practice.

Ward Graham, the bill's draftsman, as well as former REBA Presidents, Chris Kehoe and Ruth Dillingham, will present a broad overview of this detailed legislation. In August and September the REBA Educational Committee expects to host detailed workshop programs across Massachusetts which will include new forms and title standards.

10:00 a.m. - 10:45 a.m.
11:00 a.m. - 11:45 a.m. ***The Shifting Sands of Massachusetts Beach Rights***

Edward S. Englander, Esq.; Lawrence P. Heffernan, Esq. and Thomas O. Moriarty, Esq.

As second homeowners and retiring baby boomers look to the sea, as development continues to press waterfront communities, and as property values in those communities escalate, beach rights have become a frequent source of controversy and litigation. Our panel of veteran real estate litigators, Edward S. Englander, Lawrence P. Heffernan and Thomas O. Moriarty, will review Massachusetts' unique law of beach rights and the theories and claims that affect beach ownership and use including the law of accretion and erosion and implied and prescriptive easements. They will also provide practical tips for transactional attorneys so that they can answer that age old question: How do I get to the beach?

10:00 a.m. - 10:45 a.m.
11:00 a.m. - 11:45 a.m. ***Hot Issues in Condominium Developments***

Robert J. Galvin, Esq. and Samuel B. Moskowitz, Esq.

Over the past several years lawyers throughout MA are taking more creative approaches to the formation of condominium developments whether they be residential, commercial or mixed-use. This discussion will focus on the issues surrounding these creative techniques and provide guidance to counsel for developers, lenders and buyers in how to see, understand and avoid potential problems.

12:00 p.m. - 12:45 p.m. ***Reverse Mortgages***

Robert T. Cannon, Esq. and George Downey, Esq.

A Reverse Mortgage is an important, safe, and easy way to supplement a senior's income. It is a federally-insured mortgage that a senior does not have to pay back for as long as they live in their home. Reverse mortgages have been growing in popularity as seniors use the tax free income to supplement their fixed income. Rob Cannon and George Downey are both experts in the field and will give practitioners a primer on this relatively young and rapidly growing federal program, debunk common misconceptions, and discuss the myriad of regulations that govern it.

12:00 p.m. - 12:45 p.m. **The Exhibitors' Hour**

12:45 p.m. - 2:20 p.m. **Luncheon**

1:20 p.m. - 1:40 p.m. **REBA President's Remarks**

Robert J. Moriarty, Jr., Esq.

1:40 p.m. - 2:00 p.m. **Keynote Speaker**

Salvatore F. DiMasi, Speaker of the House of Representatives

2:00 p.m. - 2:20 p.m. **REBA Business Meeting**

Clerk's Report
Treasurer's Report
Committee Reports

2:20 p.m. - 2:30 p.m. **Refreshment Break and Exhibits**

2:30 p.m. - 4:00 p.m. **THE AFTERNOON SESSIONS**

2:30 p.m. - 3:00 p.m. **Recent & Pending Legislation: Summary and Highlight**

E. Christopher Kehoe, Esq. and Edward J. Smith, Esq.

3:00 p.m. - 4:00 p.m. **Recent Developments in Massachusetts Case Law**

Philip S. 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 2006 Spring Seminar is open to REBA members/associates in good standing and their guests and non-members/associates (for an additional fee). Everyone attending the REBA 2006 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.reba.net or by emailing Nicole Cohen at cohen@reba.net. 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 28, 2006 to guarantee a reservation at the 2006 Spring Seminar. Registrations received after April 28, 2006 are subject to an additional processing fee of $25. Registrations cancelled in writing before April 28, 2006 will be honored, but charged a $25.00 processing fee. No other refunds will be permitted. Registrations cancelled in writing on or after April 28, 2006 will not be honored but substitutions of registrants attending the program are welcome and may be made at any time. Written materials will automatically be mailed to "No Shows" within four to six weeks after the program.
- The use of cell phones and pagers is prohibited in the meeting rooms during the programs.

Affordable housing covenants legislation needed

By Peter B. Farrow

Not quite 100 years ago, someone had the idea of standardizing the essential elements of conveyancing through statutory definitions of terms such as "warranty covenants" and "quitclaim covenants" in deeds, and "mortgage covenants" along with the companion "statutory condition" and "statutory power of sale" in mortgages.

These statutorily defined terms became fundamental to Massachusetts conveyancing, and we now take them so much for granted that, very likely, few of us can remember consulting the statute to see even what they mean.

Today another property interest – the affordable housing restriction – is coming into ever wider use, particularly as more communities adopt the Community Preservation Act. It is time to provide a similar statutory structure for this increasingly important property interest.

Under the sponsorship of Citizens Housing and Planning Association, a group of attorneys who practice in this area have drafted proposed new sections of G.L.c. 183 to add the terms "statutory housing covenants", "statutory housing conditions" and "statutory housing power to sell" to the existing collection of statutorily defined conveyancing terms.

To illustrate, in language mirroring the "statutory condition" of mortgages, the proposed "statutory housing condition" requires the owners to live in the house as their principal residence, to pay all debt secured by the property, not to encumber the property beyond its affordable value and to convey the property only to another eligible household as their principal residence.

Part of the utility of a mortgage that includes the statutory terms is having the benefit of clearly established, functional remedies for breach as set out in G.L.c. 244 – with foreclosure leading the list, entry typically acting like a statute of limitations against defects in the foreclosure sale, and court proceedings available when needed.

A similar need for remedies exists in the event the statutory housing covenant is not being honored. The legislative proposal includes a new Chapter 244A that tailors the mortgage remedies of sale, entry and court action to the context of the housing covenant in language that seeks clarity and simplicity by incorporating the provisions of Chapter 244 wherever possible. Indeed, this new set of remedial rights will be familiar almost before one has used them for the first time.

Just as Chapter 183 also sets out statutory forms for deeds, mortgages and other conveyancing documents that of themselves are sufficient to convey the property interest in question, the statutory housing proposal includes similar forms allowing statutory housing covenants, with the accompanying housing conditions and power to sell, to be set out with simplicity and clarity either within a deed or in a separate instrument.

Of course, few, if any, attorneys draft mortgages that consist only of the statutory terms (even though such a mortgage would be valid and enforceable). Instead, we typically find "mortgage covenants", "statutory condition" and "statutory power of sale" appearing as centerpieces in a wide variety of mortgage documents because, while they ensure a valid mortgage, they do not stand in the way of the draftsperson adding the other provisions the transaction requires.

One anticipates the same result with the "statutory housing covenant" and its companion "statutory housing condition" and "statutory housing power to sell". While these terms will likely appear commonly (once attorneys are aware of them) in affordable housing restrictions, and by themselves will be sufficient to create a working, enforceable restriction, the common practice more likely will be to embed them in a longer document that states additional terms and conditions.

The task at hand for the wider community of real estate attorneys, along with others interested in affordable housing restrictions, is to review, discuss, comment on, and improve the existing draft proposal in preparation for its submission to the Legislature before the next legislative session begins.

REBA will be an important forum for that discussion.

With an office in Concord, Peter Farrow provides real estate and related legal services to municipal and state government agencies, nonprofit organizations, commercial developers, corporations and individuals. A longstanding member of REBA, he is also active in the Real Estate Section of the Boston Bar Association. He can be reached at pfarrow@peterbfarrow.com.

'Unidentified' lien can still encumber property

By Richard M. Serkey

Conveyancers and title insurers have learned, to their chagrin, that liens have been held to encumber property even if they have not been indexed properly by the registry, or have been untimely recorded by the registry. *See National Lumber v. Lombardi*, Appeals Court 04-P-727, Sept. 9, 2005.

More recently, a Superior Court judge held that a self-prepared lien statement – which failed to identify the property owner and therefore could not possibly be found in the grantor index under the property owner's name – can nonetheless also encumber property. *See Chelsea Restoration Corporation v Yakshamkin, LL, et al.* (Suffolk Superior Court No. 05-2433, Nov. 11, 2005).

Chelsea Restoration Corporation (CRC), appointed as a temporary receiver of unregistered property, was entitled to a priority lien under G.L.c.111, §127I, for the amount ($48,337) it spent in relocating the property's tenants and repairing the property.

Section 127I provides that "no such lien shall be effective unless recorded in the registry for the county in which the property is located."

CRC prepared and then recorded its lien statement, which identified the lien claimant (CRC), the property address, and the civil action in which CRC had been appointed temporary receiver, but which inexcusably failed to identify the owner of record of the property. As a result, the lien statement was not indexed in the grantor index under the name of the property owner.

The property owner, after sequential transfers to related alter egos, mortgaged the property for $595,000 to Greenpoint Mortgage Funding, Inc. Greenpoint had neither actual nor constructive knowledge of CRC's lien.

CRC claimed that its lien statement trumped Greenpoint's mortgage, while Greenpoint claimed the opposite. The Superior Court agreed with CRC, denying Greenpoint's motion to dismiss CRC's complaint to enforce its lien.

The court held that the statute "does not contain any requirement that the lien list the property owner's name – it simply states that the lien must be recorded." The court was not persuaded by Greenpoint's argument that under G.L.c.184, §25, CRC's lien statement was not "recorded in due course" because of its failure to name the property owner prevented it from being indexed in the grantor index under the name of the property owner

The Court instead held that, while G.L.c.184, §25 does free land from an indefinite reference set forth in a recorded instrument, it does not free land from a recorded instrument itself, even if that instrument, by failing to name the property owner, is rendered "indefinite" to the point of being "invisible" at the registry of deeds.

Unless the conveyancer has off-the-record knowledge of the condition of the property putting him/herself on notice of a CRC-type of lien, this decision could be a title insurer's worst nightmare.

The conveyancer may wish to add an exception to his/her certification for "any instruments not listed in the grantor index under the name of the property owner," but doing so will still be cold comfort to a title insurer.

A member of the Association since 1974, Richard Serkey practices with Winokur, Serkey and Rosenberg, P.C. in Plymouth. He serves on the REBA Title Standards Committee. He can be reached at rserkey@wwsr.com.

Near disastrous flood in Taunton reveals effective disaster planning in action

By Edward A. Rainen and Carrie Rainen

ED RAINEN

CARRIE RAINEN

Before dawn the morning of Oct. 18, 2005 David Simas got a call from Robert Nunes the mayor of Taunton.

Simas, register of the Bristol North Registry of Deeds, was told by Nunes that the 173-year-old Whittendon Dam on the Mill River in Taunton was threatening to burst. The mayor exclaimed, "Your building is right in the middle [of potential flooding] – do what you can to protect the records!"

Simas recalled, "When the mayor called, we had no idea when, or if, it was going to go. He just said 'do what you have to do.' We didn't know if we'd be hit by a wave from the river."

The registry is located on Court Street in Taunton and is situated in a geological bowl. The river is about 50 feet from the steps of the 100-year-old courthouse housing the registry. The Federal Emergency Management Agency (FEMA) has determined that the front door of this building is in a flood zone. Periodically, the Mill River overflows, and in 1968, downtown Taunton and the registry building were flooded when the dam gave way.

After the call from the mayor, Simas and a handful of other registry employees began working in the basement of the Taunton Registry at 5 a.m. The basement houses approximately 3,000 record books containing land records from 1686 to 1985, 500 archival plan books and atlases, and 83,000 original Registered Land documents.

At the time of the flood warning, the basement was also the home of the registry's main computer servers, which stored several million images of land records.

While all the books in the registry, including those on the basement level, were backed up, either digitally and/or on microfilm, Simas was afraid for the safety of those not yet digitized.

"[The] microfilm is very old, and when you look at the quality of the image, it is completely ineffective," Simas said. The bookshelves were elevated three and a half feet off the ground. In shifts, employees carried heavy old books upstairs. and up the stairs. One weighed over 100 pounds – a big, black monster. Three of us carried it upstairs."

But Simas was most concerned for the preservation of the original registered land documents. Only 50,000 of those records were scanned into digital format and backed up. The digitized documents were moved higher off the floor. Unscanned documents were brought up to the registry's main level.

The computer servers were another issue, altogether. The indexing and imaging servers contained millions of records.

"The first person I called after I hung up with the mayor was Lynne [Ferreira, head of information technology]," recalled Simas. "She walked us through turning off and disconnecting the servers, and then we wheeled them down the hall

The Mill River eventually stabilized and the danger passed without flooding. Simas and staff effectively planned for and implemented their disaster plan, which was to scan everything, find an off-site location, set up a duplicate computer system, and send everything to the off-site location.

About a year ago, after looking at degraded microfilm backups of records, the registry staff began an aggressive operation to scan their paper records and create digital back up. "Every piece of paper from 1686 to date is to be scanned," Simas said. This process is close to completion. Their next scanning project will be the entry books the registry is required to keep.

Additionally, the servers have a new, permanent home on the registry's main level. "The safest part of the registry in terms of flooding is here," said Simas.

Registry staff is also finalizing an Internet-accessible database. Simas anticipates that the website will be operating by July 1.

At activation, he expects images available for every recorded and registered land document and plan. The grantor-grantee indexes are being scanned in Adobe PDF format so each index page can be viewed on-line as if one were looking at the original book.

The second part of the Taunton disaster plan, requires a satellite location. Simas's analysis, indicted that "55 percent of our work emanates from the greater Attleboro area." The registry set its sights on the old Attleboro post office building, containing approximately 6,000 square feet.

The registry hopes to have a fully operational branch office for off-site recording beginning in September.

The registry's goal is for "redundant back up in real time," Simas explained. "If someone records a document here in Taunton, it ends up on the image server, and the duplicate and image are stored in the Attleboro server and vice versa. We will move any and all documents, archival in nature, there."

The Attleboro satellite will serve as both a means of preserving paper records, and as a location for post-disaster recovery, where the registry can be re-established if its primary home was damaged or demolished.

There was no known damage to Registry records from the 1968 flood, probably because the smaller number of record books fit in the registry proper. Daily transactions create new books, and older books move to the basement.

Unlike some registries, Taunton continues to produce bound paper record books. "We asked the examiners and the bar, 'should we stop printing?' And they said no. They still feel a greater comfort level that the books are there," explained Simas.

"Digital is unproven – how long it lasts and the medium used to call up the image. I have a greater confidence level that when the microfilm fails, and the digital fails, there is a book."

In his office, Simas opened a drawer and pulled out a decaying piece of paper.

"Look what my 7-year-old daughter found," he said excitedly. It was an original deed dated March 17, 1737.

The age of the registry and its proximity to the Mill River makes preservation of original historic records difficult. Taunton is not the only registry that fears an impending catastrophe. A disaster can occur at any time, in any form, and destroy every record of property ownership.

A longstanding member of the REBA Board of Directors, Ed Rainen currently serves as co-chair of the Association's Legislation Committee. He can be reached at erainen@aol.com. Carrie Rainen, a third-year student at New England School of Law, is currently interning for Judge Dorothy Gibson in the Middlesex Probate and Family Court.

Writing the perfect work letter exhibit for leases

By John F. Pilkington

It is difficult to gauge the course of the current real estate market. We continue to receive mixed messages on space availability making it difficult to ascertain whether market conditions have once again reverted to favoring the seller in stead of the buyer

Seeing as the tides of this buyer/seller phenomenon have a direct effect on client leverage and lease strategies, it behooves legal professionals to pay closer attention.

Lease exhibits are becoming increasingly critical in providing clients with a lasting term advantage and perfecting the work letter can pay off in dividends for both client and counsel.

This approach allows the legal professional to emerge in a leadership role during the transaction. Writing the perfect work letter enables you to protect your client, defer risk, and educate the entire transaction team on the inherent challenges in program design, construction and facility operation. Be assured that this value-added approach will create repeat business and ensure legal counsel's involvement for every aspect of your client's real estate activities.

John Pilkington is president and founder of A/E/C Solutions, Inc. a Framingham-based provider of consulting and management services for all aspects of space acquisition, relocations, and design and construction operations. He recently spoke at an open meeting of the REBA Commercial Leasing Committee. Pilkington can be reached at jpilington@aec-solutions.com.

Perfecting the work letter allows the legal professional to emerge in a leadership role during a lease transaction.

Mergers, acquisitions and recent foreclosures of long-standing legal institutions are forcing surviving practices to seek a competitive advantage. Successful firms achieve this through providing value added services, extended engagements, and increased revenue for their firms.

Whether representing interests of buyers or sellers, legal practices must expand their knowledge of site due diligence and embrace the concept of defining core/shell conditions. The work letter provides us with the means to document these terms.

Leases quite often place emphasis solely on rent-related terms and conditions. Since rent is constant and for most pro forma, lawyers with a narrow focus subject their clients to risks and cost premiums incurred during construction and post-occupancy facility operation.

The provision of supplemental exhibits

Continued on page 18

Writing the perfect work letter exhibit for leases

Continued from page 17

and design documentation may further define the client's program, but they consistently fail to address integration with existing site conditions and infrastructure.

One example describes an office program that requires a $40 square-foot buildout. Without due diligence and a strong work letter to define how the space is delivered at closing, the program is immediately subjected to an additional $10-$20 per square foot at the holder's expense.

Unforeseen cost drivers related to demolition, proprietary vendors, utility isolation, provisions for 24/7 systems, antiquated fire alarm systems and lack of maintenance amenities could have been deferred if identified in the work letter exhibit.

Every site has variances in infrastructure and amenities offered. Performing work letter due diligence is the only way to measure the hidden cost drivers inherent in all buildings.

There is a simple systematic approach used to ensure work letter exhibit efficiency that does not require an engineering degree.

Demolition. Define how the site is to be delivered and make considerations for options that address either "as-is" or vacant shell condition.

Structure. Inquire if the structure can support the proposed program without significant upgrades to building steel/concrete and identify buyer/seller responsibilities. This would include categories such as structural bearing loads, the need for stairs, and structural upgrades to support equipment, dense file storage, and libraries.

Envelope. Simply ensure that the site is water tight and explore the age and condition of roof and windows. If it can be determined that life cycles have been exceeded, identify buyer/seller responsibilities for replacement or negotiate the values.

Interiors. Define the starting point of program construction and include terms for wall responsibility, public or shared egress space, conditions of walls and floors and material specification standards.

Utilities. Inquire if available utilities (HVAC, electric, plumbing, sprinkler) can support the proposed program. This is typically defined in terms of air (CFM – cubic feet per minute), water (GPM – gallons per minute), and electricity (Watts SF – wattage per square foot). State whether services will be dedicated, shared, and who bears the costs to segregate. Set parameters that ensure existing equipment is in good working order and identify amenities for emergency and 24/7 services.

Life Safety. Since regulatory codes are regional, ensure compliance for emergency egress, smoke evacuation and building classification. At older sites explore the capacity of the fire alarm system to determine if upgrades are required. In Massachusetts the Americans with Disabilities Act now requires fire alarm strobe lights to be synchronized. Local fire departments will enforce this prior to issuing certificates of occupancy.

Accessibility. Ensure site compliance with the with Americans with Disabilities Act and include terms not limited to door widths, hardware with lever handles, level floors, ramps, railings, stairways, toilets, vertical transportation, and brail signage.

Logistics. Make provisions for the following: funding and cash flow controls; document approval milestones; temporary utility usage during construction; establish the host regulation procedures and related building fees; identify delivery and loading constraints; ensure trade jurisdictional harmony; confirm desired hours of building operations; state any proprietary vendors; and define ongoing facility maintenance responsibilities.

Additional resources for due diligence information are best found in the form of as-built documents, or through the advice of service professionals and specialty consultants such as project management firms, industry affiliations, contractors, engineers, architects, and brokers.

First American Title donates $35K to fight TAVMA bill

Continued from page 1

offer service to consumers and businesses in real estate transactions that adhere to the highest standards of professional standards. Our adversaries, TAVMA and the other sponsors of House Bill 904, are strong and well-funded with many corporate allies nationwide.

"As a small, non-profit bar association," the letter continued, "REBA must instead rely on the annual dues and individual contributions from our lawyer-members and others. This is truly a 'David versus Goliath' battle."

Thomas Bussone II, REBA's treasurer, added, "We are delighted with this contribution, which sets the bar for other underwriters. If every underwriter could match the generous donations of First American and CATIC, we would have a level playing field in our battle with TAVMA and its corporate allies."

Revised ALTA policy forms on the horizon

Continued from page 10

the claim is to be paid.

The purpose of this change is to address lender concerns about the additional costs they incur while a title matter is being litigated.

The draft policies also simplify the process for filing a claim.

In addition, the arbitration clause has been substantially revised. Under the new provisions, either party will be able to unilaterally invoke arbitration if the policy is $2 million or less.

Both parties must agree to arbitrate disputes exceeding this amount. This is an increase from the $1 million threshold in the current policy. The parties will be subject to the Title Insurance Rules of the American Land Title Association, not the American Arbitration Association. This is in response to the industry's dissatisfaction with the AAA rules and the way they have been administered.

Directory of Real Estate Services

Send a letter to the editor!

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

Title insurance industry facing government scrutiny

Continued from page 9

the majority of title insurance sales at both the statewide and the county levels in California. Three title insurance groups accounted for 77.4 percent of the market at the statewide level.

The study notes that the title insurance and escrow markets are characterized by "reverse competition" where the marketing of the products is directed at real estate agents, mortgage brokers and the lenders who steer or direct the home purchaser or borrower to particular title insurers, title companies and escrow companies.

Residential consumers have little market power because title insurance and escrow services are required for the closing of a real estate transaction resulting in "inelastic" demand. In a reverse competitive market, expenses are inflated as title insurers compete for the producers of title insurance.

The study found intense competition among title insurers and title companies for title officers, escrow managers and sales people who have established relationships with real estate brokers, lenders, home builders and mortgage brokers.

The study noted few title insurance entrants and few title company entrants over the period of 2000 to 2005, and further found that the new entrants were controlled business arrangements whose addition to the market did not result in greater price competition.

The study further noted numerous examples in California of illegal rebates and kickbacks in which the title insurer or the underwritten title company provides money, free services or other things of value to a real estate agent, a lender or home builder in exchange for business referrals.

These illegal rebates and kickbacks, a consequence of reverse competition, show that the title insurance and escrow charges are excessive and that some portion of the overcharges pass from the title company or title insurer to the referrer of business.

That study also found that the markets for escrow and closing services presented similar problems as those for title insurance. In northern California, escrow and closing services are performed by the same entity providing title insurance services, while in southern California, escrow is performed at both independent escrow companies and controlled escrow companies that are also title companies. The cost of escrow services is actually higher in southern California than in northern California, despite the fact that there are a greater number of businesses offering escrow services.

In California, title insurance policies are sold by underwritten title companies, the equivalent of a title agent in Massachusetts. There are both affiliated underwritten title companies and non-affiliated underwritten title companies in California. The title insurance company may also sell insurance directly.

Once a title order is opened, the underwritten title company will search the title records and issue a preliminary report about the title. In most of California, the title search is completely electronic. According to the report, in most residential transactions, the title search will look to find the most recent real estate transaction and concentrate on the period from the last transaction forward.

The result of this preliminary report is sent to the customer. It is essentially a commitment to issue a title insurance policy and should include any problems identified with the title.

The bulk of the title insurance premium goes to expenses, as opposed to claim payments. A. M. Best reports the title insurers paid an average of 4.6 percent of premium for claims and claim settlements from 1995 to 2004, compared to around 80 percent for the property casualty industry. According to this report, the typical premium split in California is 8 percent to 12 percent for the title insurer and 88 percent to 92 percent for the underwritten title company.

The percent of gross title premiums retained by title insurers in California is much less than the percentage retained by the same title insurers in other states. The difference in agent retention may be the result, in part, from the typical underwriting agreement in California, which provides that underwritten title companies will reimburse the title insurance company up to $5,000 for any title insurance claim.

The price for escrow services, or what we in Massachusetts might call settlement services, differed both by county and by the amount of the closing. The fees charged by different title insurance companies were also substantially different. The escrow fees ranged from $530 in San Francisco for a $250,000 closing to $1,400 in Los Angeles for the same closing.

Fees ranged from $700 in Fresno for a $1 million closing to $2,500 in Los Angeles for the same closing. Other services that were available for an additional fee included the preparation of deeds, affidavit of death of joint tenant, beneficiary statement, power of attorney, subordination, etc.

The study further notes that as title insurance and escrow revenue have grown dramatically from 1995, the cost of production for title insurance over the same period should have declined due to a number of factors, including automation, improved technology and increased volume. It is also noted that there have been few rate changes by title insurance companies in response to changing real estate activity.

When the number of real estate transactions soared, revenue per transaction jumped because of rising home prices and production costs dropped because of enhanced technology and perfection of title for millions of properties.

The California Land Title Association filed a response to the Garamendi study by its Vice President and Legislative Counsel, Craig Page, together with a statement by Michael Miller, a casualty actuary. Page noted that there have been numerous new products, filings and rate reductions by the title companies during 2000 to 2004. He also noted that the California Department of Insurance issued licenses to nearly 100 title companies doing business in the State of California and posts county by county rates for many of these companies on the Department's own website for consumers to review.

Page also noted that although the Birnbaum report attacks the profit margin of title companies, the report itself shows underwritten title companies earning net profit margins of only about 11 percent and 8 percent during 2003 and 2004, respectively, which were the best years ever for the entire title insurance industry.

Massachusetts settlement

Although on a smaller scale than the west coast investigations, Massachusetts got its first taste of RESPA enforcement when a settlement agreement was reached on Nov. 15, 2005, between 1-800 East-West Mortgage Company and the U.S. Dept. of Housing and Urban Development.

In its investigation, HUD determined that beginning Jan.1, 2002, East-West requested and received tickets and premium seats at Boston Red Sox baseball games, New England Patriots football games and restaurant gift certificates in exchange for the referral of business. East-West had to remit $150,000 to the U.S. Treasury as part of the settlement agreement.

The payment of kickbacks and the split of the title insurance premium remain hot issues for the title insurance industry throughout the country. In Massachusetts, we have seen a number of schemes, which attempt to split the premium by having lenders or mortgage brokers provide "services" – such as ordering the title and the plot plan for which they will be reimbursed. These various schemes are more difficult to employ in an attorney state such as Massachusetts, where the settlement agent is not only independent of the lender, the seller and the broker, but is also an attorney who should be more concerned with the ethical charges resulting from a RESPA violation.

The success of House Bill 904 would allow large corporations with direct connections to lenders and brokers to close loans and would facilitate the payments of referral fees and kickbacks.

Child support liens revisited

Continued from page 5

cause, under §6(b)(3), the lien did not perfect as to after-acquired property until the deed or other instrument creating the interest was recorded any time within six-years of the date the notice of lien was filed and, once perfected, under §6(b)(5), the lien then ran another six years without a refiling having to occur.

Under the amending legislation, because the six-year period in §6(b)(3) did not change, the initial lien against property acquired within that six-year period would have a potential life of up to 15 years, 11 months and 29 or 30 days. Had the amending legislation also changed the perfection period under §6(b)(3) to 10 years, the initial after-acquired property lien period would have been as much as 19 years, 11 months and 29 or 30 days, again, even without refiling.

Gap between lien perfection and lien duration

The other effect of leaving the lien perfection period under §6(b)(3) at six years is to create an anomalous situation in which the filed lien would last for 10 years as to property held at the time of the filing of the notice of lien or property acquired within six years of such filing, but the lien would not "perfect" as to property acquired by the child support obligor *more than six years after the lien was filed but before refiling*.

Further, since the lien would not have been perfected as to such property, it would seem that the obligor could sell or transfer the property before the Division refiles (which probably would not occur until sometime during the 9th year after the lien was filed) and claim that the property is free of the lien because it never "perfected."

Of course, if the obligor waits until the refiling occurs, then the property would be owned by the obligor at the time of the refiling and the lien would then "perfect." This is obviously an unintended result of the amending legislation.

Overlooking collection from after-acquired property by inheritance

Even after the recent amending legislation, §6(b)(3) continues to overlook inherited property – a potentially lucrative and probably more common source of after-acquired property from which to collect child support arrearages.

As quoted above, §6(b)(3) provides that a child support lien perfects as to after-acquired property "upon the recording or registering of the instrument by which such interest is obtained in the registry of deeds or registry district . . . where the notice of the lien was filed within six years prior thereto."

Typically, such instruments will include deeds and, perhaps, trusts (although the latter are becoming less and less common due to the increasing use of trustee's certificates pursuant to G.L.c. 184, §35). Notice that there is no mention of documents filed with the Registry of Probate, nor any probate proceedings by which a child support obligor could acquire interests in property after a child support lien is filed.

Certainly, running an obligor in the Registry of Deeds or Probate would not, in most cases, reveal a probate of the person through whom the obligor has obtained title to real estate by inheritance. However, when the estate or the obligor goes to sell or mortgage the property, the closing attorney's title examination would normally include running the heirs or devisees back 10 years for various after-acquired property liens.

A filed child support lien against an heir or devisee would then be discovered. Absent a valid disclaimer of the interest by the obligor pursuant to G.L.c. 191A, the closing attorney would undoubtedly require the fiduciary or obligor to deal with the lien before or as part of the sale or mortgage transaction involving the child support obligor's interest in the property. That would likely result in contact with the Child Support Enforcement Division of the Department of Revenue to resolve the lien.

Corrective legislation

According to a representative of the Child Support Enforcement Division, the loophole involving the six-year after-acquired property period in §6(b)(3) will likely be addressed by corrective legislation in the very near future. As to the issue of adding provisions to the statute to enable the perfection of liens and collection against inherited property, the Division would very much like to address that issue and we may very well see future legislation to fill that gap as well.

Lawmakers approve bill modernizing mortgage discharge statutes

Continued from page 1
of Deeds Association.

At deadline, approval by Gov. Romney appeared imminent.

The new law adds basic definitions that bring the statute up to the current state of doing business with a variety of lending institutions located all over the world. The efficiencies of different business systems are acknowledged, in particular permitting reliance upon different forms of electronic communication.

Maintaining the integrity of the land records system is the principal goal, even in bringing the Massachusetts statute up-to-date with current national lending practices.

Law rewritten

The legislation replaces G.L.c. 183, §§54-55. The draftsmen believed that the piecemeal nature of prior amendments made the statutes in some cases unclear, and generally not as effectual as intended. For that reason they elected to rewrite certain provisions entirely.

The revised G.L.c. 183, §54 begins by acknowledging new technology, updating real estate definitions and adding terms. It makes photocopies or faxed copies of authority documents in transmitting any "request, demand or notice" acceptable for the purposes of §§54-55. It allows faxed or other electronic transmission confirmation of bank wire transmissions, and broadens the definition of a "discharge."

Under the old G.L.c. 183, a discharge was defined as: "a deed of release or written acknowledgement of payment or satisfaction of the debt or obligation secured by a mortgage or the conditions therein contained, or, in the case of a partial release issued by a mortgage servicer or noteholder pursuant to this section or section fifty-four C, a partial release evidencing that a payment has been made pursuant to the debt or obligation secured by such mortgage or the conditions therein contained."

Under the new G.L.c. 183, a discharge is defined as: "a duly executed and acknowledged deed of release of a mortgage or other written instrument that, by its terms, discharges or releases a mortgage or the lien thereof *or* acknowledges payment or satisfaction of a mortgage or the debt or obligation secured by a mortgage or the conditions therein contained, or, in the case of a partial release, a duly executed and acknowledged instrument that, by its terms, discharges or releases a mortgage or the lien thereof from less than all of the property encumbered by said mortgage."

It's important to note that the new definition of a discharge specifies the need for execution and acknowledgement for the releasing document, and that the new definition expands the meaning of a discharge to allow for the discharge or release of a mortgage or a lien without acknowledging the payment of the underlying debt.

Other changes in the law include:

- The definition of the term "mortgagee" has been shortened, and now refers to the holder of a mortgage and not a "mortgage deed." The requirement that all assignments of the mortgage must be properly recorded remains a key element in the definition of "mortgagee."
- The modifier "federally related" has been removed from the definition of a "mortgage servicer," and the new definition maintains the requirement that the servicer must provide a payoff statement, whether or not the servicer is the record mortgagee.
- A definition of a "mortgagor" is now included in §54.
- An oral statement of the payoff amount is no longer acceptable, narrowing the definition of a "payoff statement." The definition has been expanded to include a facsimile or other electronic transmission as an acceptable payoff statement, and now provides that the mortgagee, mortgage servicer or note holder may indicate the portion of the unpaid balance of the loan that must be paid in order to issue a partial release of a mortgage.
- The definition of the word "servicing" is broadened in the new statute by deleting the words "federally related" as a modifier for the words "mortgage loan." Now the regulations will apply to the receipt of payments and the allocation of those payments to the loan for all mortgages, not merely federally related loans.
- The specific segment of §54 that sets out the requirements to discharge a mortgage has been expanded and clarified. The first line of the paragraph states who may discharge a mortgage, and now allows for an heir of the mortgagee to discharge a mortgage, in addition to an executor, administrator, successor or assignee. Another addition is allowing a c.183, §5B affidavit to be used to corroborate the authenticity of a discharge and the execution of the signature on the discharge if the acknowledgement of the execution does not comply with c. 183, §§34-41.

Unless an assignment is recorded prior to the recording of a deed of release or acknowledgement of payment, the deed of release, payment acknowledgement or discharge is conclusive evidence that the mortgage is discharged.

The specific segment of §54 that sets out the requirements to discharge a mortgage has been expanded and clarified.

New language in the statute now allows for an assignment of a mortgage to be recorded after the discharge, e.g., if the holder of record was not correct when the discharge was recorded, an assignment may be recorded afterward, to correct the record evidence of the holder of the mortgage. REBA Title Standard #58 has allowed this practice since 1995.

The requirements for the information to be contained in a discharge, however, remain the same, i.e., street address of the property, book and page number or Land Court document number, *and* recording date of the mortgage, as well as name of the original mortgagor. The failure to include such information, however, does *not* affect the validity of the discharge.

Section 54C

Chapter 183, Section 54C has long been the only alternative for discharging a mortgage, or rectifying an incorrectly discharged mortgage, when the original mortgage holder is unavailable or uncooperative.

The provisions of Section 54C are arduous, and often nearly impossible to accomplish. The most difficult of the provisions to fulfill include obtaining copies of cancelled payoff checks, and obtaining affidavits both from the mortgagor *or* an owner of record for three years after the mortgagor deeded out *and* an affidavit from the attorney who paid off the mortgage.

The words "federally related" are no longer included as a modifier for the word "mortgage," causing the statute to apply to *all* 1-4 family residential mortgages in Massachusetts.

The old statute offered only one way to show that a mortgage servicer had the power to discharge or assign a mortgage. A servicing agreement, or the equivalent of a power of attorney, had to be recorded to evidence the servicer's authority to service the mortgage. The proposed new statute is more practical and adds documents that are more easily obtainable to establish the power of a mortgage servicer to issue a discharge, in addition to the servicing agreement or a power of attorney.

The new statute allows the proof of a servicing agreement to include: (i) a written payoff statement issued to the mortgagor (including facsimiles or other electronic transmission); (ii) a servicing notice letter sent to the borrowers; or (iii) other documents evidencing the mortgage servicer's authority to service the mortgage.

These documents must be recorded with a c. 183, §5B affidavit, which shall include the recording information for the mortgage being discharged. Photocopies of the listed documents may be used, but must have a certification of authenticity by the mortgagee or a Massachusetts attorney who has seen the original.

The proposed new c. 183, §54C contains two more provisions that update the real estate attorney's ability to back up the transfer of mortgage documents. Notes are often endorsed to a new holder, who is not the holder of the mortgage.

Under the modernized §54C, the original note which has the transfer of ownership information included on it, may be attached to the discharge, as proof of the authority to discharge. A copy of the note, also with the transfer information on it, may also be recorded, but it must have authentication language from the note holder, or be accompanied by a Massachusetts attorney's certification that it is a true copy.

The third addition to c. 183, §54C to assist in supporting the validity of a mortgage discharge is the recording of an affidavit by the mortgagor which affirms: (i) the mortgagor's inability to obtain any of the above listed documents; (ii) the payments made; (iii) why the mortgagor made payments to the mortgage servicer or holder; and (iv) evidence of the payments such as billing statements, or other written acknowledgment of payment from the servicer or note holder.

If the mortgagor is not the current owner, and cannot be located, an option similar to the old c.183, §54C (A) 2b is contained in the proposed c. 183, §54C, with more reasonable requirements. The new owner of record must have held title for only one year (formerly three), and the

Continued on page 23

Housing Appeals Committee decision trumps parallel abutter appeal

Continued from page 8

decision, Rising Tide filed a motion for summary judgment seeking the dismissal of the abutter appeal because the HAC had already ruled on the regional planning issues contained in the abutter appeal.

The abutters argued that their separate appellate route pursuant to G.L.c. 40A, §17 is specifically provided for in G.L.c. 40B, §21, therefore the legislative intent was to allow this type of appeal to proceed – even if duplicating issues determined by the HAC.

The Superior Court noted that a developer's appeal to the HAC and an abutter's appeal to the Superior Court are both reviewed *de novo*. Therefore, neither appellate route offers greater advantage over the other.

The abutters claimed their appeal of the HAC decision under G.L.c. 30A, §14 is on the record, resulting in a more difficult burden of review. Rising Tide pointed out, however, that the decision of the HAC becomes the decision of the Board if no action is taken within 30 days, therefore, the 40B appeal renders moot the 40A appeal.

The Superior Court agreed with Rising Tide, holding that "[w]hen the plaintiffs and developers filed simultaneous appeals of the Board's decision granting the 28-unit Project under 40A and 40B respectively, the HAC's decision became final as to both appeals under the plain meaning of the statute."

The court went on to state that "the HAC's final determination as to the regional planning issues under 40B thereby trumps any zoning appeals under 40A because the legislature's intent in creating the statute was to encourage communities to develop affordable housing for low and moderate income families and to prevent exclusionary zoning."

The court also said that "once the HAC determines that the Board's decision is 'consistent with local needs' and 'not otherwise uneconomic,' its final decision is binding for both appeals under Ch. 40A and 40B."

Analysis

The Superior Court was faced with the familiar problem created by the dual appellate track contained in G.L.c. 40B. The court's dilemma was further exacerbated by the fact that the HAC decision altered the underlying nature of the abutter appeal, as the HAC approved a 36-unit project, whereas the abutter appeal was of an approval of a 28-unit project. This dichotomy is a common result of the dual appellate track contained in Chapter 40B, and the Superior Court decision represents a best-effort attempt to rectify the inherent conflict in the statute.

While we believe that the Superior Court's decision represents the proper approach in squaring the conflict contained in the dual appellate track contained in Chapter 40B, it is not certain that this interpretation will be upheld on appeal. Therefore, a legislative change revising Chapter 40B to direct all appeals of comprehensive permit decisions to the HAC, and, thereafter, further appeals to the Superior Court pursuant to Chapter 30A, is the best solution to this problem.

The issue was discussed by the Housing Appeals Committee Advisory Committee appointed by Gov. Romney in 2003, but no consensus on the issue was reached. Until a single appellate route is created, the courts will continue to be faced with questions on how to proceed with dual appeals of identical issues brought in different forums, which may potentially lead to the application of inconsistent evidentiary standards.

This approach unnecessarily burdens the creation of affordable housing in Massachusetts, while offering no additional substantive protections to abutters, whose regional planning concerns may be addressed as easily by the HAC as they can by the Superior Court. While opponents to moving abutter appeals to the HAC may cite concerns about the frequency in which the HAC rules in the favor of developers, there is no evidence to suggest that abutters have fared any better in appeals to the Superior or Land Court than have the boards of appeal in appeals to the HAC.

The statutory mandate in favor of Chapter 40B developments creates this result no matter which forum hears the appeal.

Until a single appellate route is created, the courts will continue to face questions on how to proceed with dual appeals of identical issues brought in different forums, which may potentially lead to the application of inconsistent evidentiary standards.

MORTGAGE DISCHARGE

Continued from page 22

attorney who paid off the mortgage must supply an affidavit (formerly the cancelled check was required) containing the details of the payoff which are spelled out in detail in the new statute.

Section 54D

Chapter 183, Section 54D is a new section, and should be one of the most valuable to closing attorneys. This new provision establishes a procedure for obtaining payoff statements, detailing the parties able to request those statements, the parties responsible for providing them, the dates within which the payoff information must be provided and a payment on the mortgage made, and a penalty for failure to provide a payoff statement.

The payoff statement must enable the mortgagor to conclusively make full payment as of a certain date no more than 30 days from the request. It must be written, and may be transmitted by facsimile or other electronic transmission.

The payoff statement must be given within five days of receipt of the request, in written form, and may be delivered by facsimile or other electronic transmission. The payoff statement must specify the exact amount due to fully pay off the secured debt on the specified date, or an amount sufficient to obtain a partial release.

Information on a method for determining the per diem amount if the payment is not made on the specified date must also be supplied as part of the payoff statement. If payment is made in compliance with the terms of the payoff statement, the party receiving the payment must comply with G.L.c. 183, §55(a), discussed below. The lender may charge for issuing more than one payoff statement during a six-month period.

The penalty imposed by the proposed §54D for the failure to provide a payoff statement within the required five-day time period is the greater of $500 or the mortgagor's actual damages, plus attorney's costs and fees.

Section 55

Chapter 183, Section 55 is also completely replaced. One of the most notable changes is the addition of penalties for the lack of compliance with the statute. Until the passage of this bill, real estate attorneys had no means to enforce their requests for a timely discharge as required by the statute.

Section 55(a) (1) requires the recipient of the full payment of a mortgage to cause within 45 days of such receipt: (i) the recording of a proper discharge *and* provision of a copy of the discharge to the closing attorney, along with the recording information; or (ii) the provision of a proper, recordable discharge to the closing attorney.

It is no longer acceptable for the lender to provide only a copy of the discharge and evidence that the discharge was sent to the Registry of Deeds. The lender must also verify that the discharge has been recorded, by providing the recording information. If the lender does not record the discharge, but forwards it to someone other than a closing attorney, the lender must attach a copy of the specific recording instructions, as recited in c. 183, §55(a) (2).

Section 55 reiterates the requirements that are spelled out in the proposed new Section 54 as to *record* proof that the entity signing and acknowledging the discharge is authorized to do so, if the entity is not the record holder of the mortgage.

This proof may be supplied by (1) recording information for the documents to demonstrate the authority of the signing entity; or (2) attaching such documentation to the discharge; or (3) providing the closing attorney with the recordable discharge and the recordable documentation (as specified in c.183, §54) necessary to establish the authority to discharge the mortgage.

Assessing whether a lot is 'buildable' often a complex question

Continued from page 2

levels of protection a municipality must afford to vacant lots, many communities have enacted local zoning provisions that afford even more liberal treatment to grandfathered lots than the Zoning Act requires.

For example, some communities have maintained historical zoning provisions that grandfathered any lots "lawfully laid out by plan or deed" or other similar language, without regard to minimum size or frontage established by Chapter 40A.

In some cases, communities have later decided to eliminate these local grandfathering provisions and defaulted to Section 6, in many cases with or without apparent regard for the effect those enactments may have on existing lots.

Undoubtedly, the most common zoning question faced by land use attorneys and zoning practitioners is whether a vacant lot or parcel of land that does not conform to current zoning dimensional requirements is "grandfathered" as a "buildable lot" for zoning purposes.

The *Rourke* case

This situation was recently encountered in *Rourke v. Rothman*, 64 Mass. App. Ct. 599 (2005). In *Rourke*, the Appeals Court considered the fate of a lot that had seemingly existed as a buildable lot in the town of Orleans since 1915. The lot was laid out on a recorded plan in 1915 consisting of 8,000 square feet of land, with 80 feet of frontage. Orleans first adopted a zoning bylaw in 1954.

Although the bylaw required a minimum of 15,000 square feet and 100 feet of frontage, it contained an exemption allowing one building to be erected on any lot that, "at the time this by-law is adopted, either is separately owned or contains five thousand [5,000] square feet."

In 1961, the bylaw was amended, increasing the minimum lot size to 20,000 square feet and 120 feet of frontage, but retaining the same exemption. Because the lot was held in common ownership with one or more adjoining lots from 1949 to 1970, it did not qualify for the isolated lot protection under Chapter 40A, but it was protected under the local bylaw, which required only that the lot have a minimum area of 5,000 square feet.

In 1970, the lot was sold. For the first time since its creation, the lot was separately owned from any adjoining land. Although the lot did not contain the minimum area required for a building lot under the dimensional requirements set forth in the bylaw, there was no question that it was "buildable" under the local bylaw which had protected any lot which "existed" as of the first adoption of zoning regulation 1954 and had at least 5,000 square feet.

In 2001, the lot was purchased by Rothman for $330,000, a significant sum of money for a house lot, even in a desirable Cape Cod town. Understandably, Rothman wanted assurance that the lot was buildable. Before he purchased the lot, the Orleans building inspector had written two letters, one to the seller's attorney and the second to Rothman himself, concluding that the lot was buildable.

Facing challenge by abutters, the Building Inspector later reversed his decision. On appeal, both the Orleans Board of Appeals and later the Land Court found that Rothman's lot had lost its grandfathered status.

In 1971, Orleans adopted a zoning amendment that deleted the bylaw's more liberal local grandfather provision, replacing its language with a provision allowing development of nonconforming lots for "single residential use" provided that the lot or parcel complied "with the specific exemptions of …Chapter 40A of the General Laws."

Although at the time of the 1971 amendment, the lot had more than 5,000 feet and 50 feet of frontage and was not held in common ownership with adjacent land, the question of whether the lot met the Section 6 statutory exemption turned on the requirement of Section 6 that the lot *"conformed to then existing requirements*."

Although the lot did not contain the minimum dimensions for residential lots as of 1971, it was a buildable lot under the bylaw in effect immediately before the amendment because it complied with the requirements for the exemption.

Both the Land Court (12 LCR 189) and the Appeals Court interpreted "then existing requirements" to which the lot must have "conformed" to be the minimum area and frontage requirement in effect for new building lots despite the fact that the lot was then undeniably protected by the local exemption.

The Appeals Court concluded "that conformance with the 'then existing requirements' refers to the minimum dimensional requirements contained in a zoning by-law, not to those requirements as exempted by the grandfather provision of the by-law. In sum, c. 40A, § 6, does not grandfather local bylaw grandfather provisions."

One result of this seemingly harsh decision is that in retrospect, Rothman's predecessors likely paid real estate taxes to the Town of Orleans for over 30 years for a lot that the Court decided had actually been unbuildable since the 1971 zoning amendment deleted the local exemption. Was this the result intended by the voters of Orleans when they amended the bylaw in 1971?

In December, 2005, the Supreme Judicial Court granted Rothman's petition for further appellate review. In the coming months, the court will wrestle with whether a zoning amendment can or should have the effect of immediately transforming a buildable lot to an unbuildable lot, regardless of whether the lot's status was reliant solely on a local exemption, when a long line of cases have interpreted the statutory purpose of Section 6 to protect "once valid building lots" from the application of amendments that would render such lots unbuildable.

There are certainly other factors which make the ultimate outcome of *Rourke* of interest to the real estate bar and the public at large. Having paid $330,000 for the lot after two written determinations by the local zoning enforcement officer that the lot was "grandfathered," Rothman finds himself, at the moment, after four years of appeals and litigation, the owner of a vacant, unbuildable lot of questionable value to anyone.

If nothing else, *Rourke* dramatically illustrates that lot owners or prospective purchasers must be very skeptical of claims or assumptions that a lot is "grandfathered." No one can rely on the opinions of assessors, brokers and even building inspectors who administer the zoning bylaws.

The law seems well settled that actions for damages will not lie against municipal officials based on erroneously issued permits or zoning determinations. *Rourke* illustrates that determining whether a nonconforming lot is grandfathered requires careful examination of the lot's origin, its history of ownership with adjacent land, and a careful study of the history of all zoning enactments and their interplay with the Zoning Act. This usually can only be reliably done by an attorney who is knowledgeable and experienced in this area and who can identify the many pitfalls and minefields which can be encountered with zoning issues in real estate transactions.