REBA NEWS

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The Newsletter of the
Real Estate Bar Association for Massachusetts

DiMasi: 'I will work to make sure House Bill 904 does not advance this year'

Below are the prepared remarks of Massachusetts House Speaker Salvatore F. DiMasi offered at REBA's Spring Conference on May 8 in Westborough. Over 650 REBA members and guests attended the keynote presentation.

Thank you for inviting me to speak to you this afternoon. There's a reason why the Real Estate Bar Association for Massachusetts is New England's fastest growing bar association – President Bob Moriarty's leadership and commitment to professionalism and excellence.

As an attorney and a former chairman of the committees on Judiciary and Banks and Banking, I have first-hand knowledge about the issues you care about. When I became Speaker, I pledged to open up and reform the legislative process.

I wanted to listen to members and empower them with the responsibilities that go hand-in-hand with leadership. Their concerns – and your concerns – have been heard and will continue to be heard so that, together, we can better serve our citizens and the Commonwealth. In the last year, several House committees have traveled across the state to get input from citizens in order to develop comprehensive pieces of legislation.

The listening tours, as we like to call them, were inspired in part by a famous Mark Twain

Continued on page 24

LISA KESSLER

House Speaker Sal DiMasi gave keynote address at Spring Conference

SAVE THE DATE

REBA's 2006 Annual Meeting on Nov. 7 in Worcester

The REBA Board of Directors has voted to hold the 2006 Annual Meeting on Tuesday, Nov. 7 at the DCU Center in Worcester. Members planning on attending this meeting should mark their calendars now.

The DCU Center includes four large breakout rooms, each with a capacity of 200 or more. In addition, there is a separate ballroom for the Annual Meeting luncheon that will comfortably hold over 700 guests. The DCU Center also boasts ample space for over 50 exhibitors.

"This location will permit us to expand our educational offerings with additional break-out sessions," said REBA President-Elect Sami Baghdady. "We have outgrown our former venue in Westborough. While the DCU Center is about ten minutes' drive further west, it will serve our continued growth for the balance of this year. Our hope, in 2007, is to host our Spring Conference in Worcester and our Annual Meeting at a site in the metropolitan Boston area."

Legislation modernizes mortgage discharge practice

By Elizabeth J. Barton and Edward J. Smith

BARTON

SMITH

Beth Barton is title counsel for CATIC, a different kind of title insurer, in the firm's Wellesley office. She also serves on REBA'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 Conference and Annual Meeting. Ed can be reached at edwardjsmith@verizon.net.

The real estate bar at last has the power to enforce requests for a discharge *or* supporting documentation that has not been received within 45 days of the lender's receipt of payment of the mortgage. The entity that has accepted payment of a mortgage, pursuant to its payoff statement, must record or provide a proper discharge and/or supporting documentation (assignments, mergers, and servicing agreements).

If the appropriate party fails to issue the discharge or documentation within 45 days of receiving payment, the mortgagor is entitled to damages of $2,500 or the actual damages sustained by the mortgagor, whichever is greater, plus attorney's fees and costs.

The draftsmen of the legislation recognized that not every failure of a mortgagee or servicer to provide or record the

Continued on page 23

REBA completes expansion of headquarters

REBA has recently completed the expansion and remodeling of its offices at 50 Congress Street in the heart of Boston's financial district.

The newly configured space includes five conference and breakout rooms to meet the needs of REBA Dispute Resolution, the Association's subsidiary. Two additional conference rooms are available elsewhere in the building. This expanded space will permit REBA Dispute Resolution to host three mediations at the same time.

There is also a new *Presidents Conference Room,* will full A/V

Continued on page 3

What's in this issue…

REBA membership approves Title Standard No. 72

By Edward A. Rainen

At the May meeting of The Real Estate Bar Association for Massachusetts, the general membership voted to approve Title Standard No. 72, entitled, "Mortgage Instruments – Identification of Nominor (MERS)."

The organized bar recognized, in the varied opinions of respected practitioners, that there was disagreement on how to deal with the Mortgage Electronic Registration Systems, Inc.'s contractual methodology for internal transfers of mortgage related instruments. Could a recorded mortgage running in favor of "MERS as it is Nominee for Bank of America, N.A." be properly discharged by, "MERS as it is Nominee for Wells Fargo Bank, N.A."?

The comment to the Standard sets forth the factual background: "MERS was created by the real estate finance industry to manage off-record transfers of interests in mortgage obligations among its members and to eliminate the need to prepare and record assignments when members trade mortgage loans. MERS members designate MERS as nominee for the lender in the mortgage or an assignment of the mortgage recorded in the land records and electronically track changes in ownership of the mortgage loans over the life of the loans on the MERS® System…."

The standard itself, states: "A recorded instrument executed only by Mortgage Electronic Registration Systems, Inc. (MERS) discharging, assigning, partially releasing, subordinating, modifying or amending a mortgage, which is held of record by MERS, either as original mortgagee or as assignee of said mortgage, is not on that account defective, whether or not a 'Lender' is designated or defined in the instrument whereby MERS acquires such interest and regardless of whether the same lender, if designated in the acquisition instrument, or any lender, is recited in the subsequent instrument, provided that said subsequent instrument is otherwise satisfactory under G.L. c.183, §54B."

Since Massachusetts is one of the several states following the so-called "Title Theory of Mortgages," instruments that transfer legal title, such as assignments, partial releases and discharges, are of great significance. The off-record trading and transfer of mortgage instruments where MERS serves only as a nominee, is not consistent with Principal-Agency law as we know it in Massachusetts.

The MERS contractual system facilitates the behind-the-scenes change of identity of the holder of the mortgage (the Principal). In the MERS system, the only constant is the identity of the Agent (MERS).

In a sense, the MERS system is little different than the workings of the New York Stock Exchange, where millions of shares are traded each day by professionals, held in a "street name" by the brokerage house, which has electronic ledgers tracking the ownership rights of the actual purchasers.

REBA believes that Title Standard No. 72 is consistent with the philosophy expressed in Land Court Guidelines to the Registry Districts No. 42 which states, in pertinent part:

"[T]he holder of the mortgage on the Encumbrance Sheet will be listed as Mortgage Electronic Registration System, Inc., without any reference to the institution for which MERS is holding the mortgage."

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.

REBA
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for Massachusetts

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Mission Statement

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

Mentoring Statement

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

Endorsement Statement

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

www.reba.net

From the President's desk

By Robert J. Moriarty Jr.

"No individual, other than a member in good standing of the bar of this Commonwealth, shall practice law, or by word, sign, letter, advertisement or otherwise, hold himself out as authorized, entitled, competent, qualified or able to practice law ...." M.G.L., c.221, §46A.

Wherever we look the role of the lawyer in our society is being marginalized.

The reservation of the practice of law to members of the bar is under constant attack. The Federal Trade Commission (FTC) equates lawyers with those who would sell coffins over the Internet. Our own brothers and sisters at the bar endorse, for a fee, Internet companies preparing legal documents based upon online form questionnaires.

Corporations from across the country want to conduct real estate closings in Massachusetts. Some of us pretend to be something other than a law firm in the belief that that out-of-state lenders or settlement service providers will use their services.

When I became president of REBA I pledged to advance the work of those who came before me fighting the unauthorized practice of law. REBA has a rich heritage as a leader in this area as evidenced by the *Closings, Ltd.* (1993) and *Colonial Title & Escrow, Inc.* (2001), trial court cases where we were successful. Our work in this area is often not visible to our membership.

Let me shine a light on how REBA is fighting this battle.

President-elect Sami Baghdady, Peter Wittenborg and I recently met with our counterparts at the Massachusetts Bar Association – President Warren Fitzgerald, President-Elect Mark Mason and Executive Director Marilyn Wellington to invite the MBA to reconsider the adoption of a definition of the practice of law.

This proposal was advanced by REBA before, but had not come to fruition. They have agreed to work with us in this area and stand shoulder-to-shoulder with us on the practice of law by non-lawyers. Their presence at our Spring Conference – along with MBA General Counsel Martin Healy – is testimony to their support of REBA.

Recently, a delegation from REBA met with Commissioner of Banks Steven Antonakes to relate REBA's concerns with respect to continued and ongoing consumer harm caused by out-of-state lenders violating the Good Funds Statute and to express our concerns about how largely unregulated "Witness Closings" skirt this law.

We at REBA frequently hear instances of consumer inconvenience, delay and harm from these practices. We have pledged to bring this information to the Commissioner so that he may take appropriate action. We invite all lawyers – REBA members and non-members alike – to share in this effort by forwarding information to REBA when you become aware of problems in a witness closing. The exclusion of attorneys from the process directly harms citizens of the Commonwealth. We will continue to work with the commissioner and his staff on educational programs and seek enforcement actions in this area.

Not a week goes by that REBA does not receive reports of a new scheme for non-lawyers to control the real estate closing process. Our long-time counsel in this area, Doug Salvesen, vigilantly puts violators on notice explaining in detail why the closing process is the practice of law in Massachusetts. These letters are often effective, but not in every instance. Again, we rely upon our members and others to report these matters to REBA so that we can take whatever appropriate action may be available.

Finally, Jon Davis and REBA's Practice of Law by Non-Lawyers Committee with the support of Doug Salvesen, have begun a comprehensive strategic review of the various future approaches to fight the unauthorized practice of law including:

- Continuing efforts with the MBA and ultimately with the Supreme Judicial Court to seek a comprehensive SJC-sanctioned definition of what is and what is not the practice of law. This approach has been an effective vehicle in a number of other jurisdictions.
- New legislative initiatives to clarify the practice issues as they relate to real estate closings.
- Reaching out to the regulators and enforcement authorities including the Attorney General's office as well as banking, bar and insurance regulators to be certain that all laws and regulations are appropriately enforced.
- Additional strategic litigation initiatives.

We will not shrink from this task.

REBA has been in the forefront of the fight against House Bill 904 and its allies who want corporations to conduct commercial and residential real estate closings. We will fight these legislative attacks, and we will educate our members and the public that only licensed and trained professionals should practice law. We can accept no less.

I hope that you all have a wonderful, busy summer; we at REBA will continue to work on your behalf throughout the season.

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. Bob can be reached at rmoriarty@mmoglaw.com

REBA completes expansion of headquarters

Continued from page 1

functionality, that can accommodate over 30 guests. The conference room features a display of portraits of prior REBA presidents. REBA 2006 President Bob Moriarty will host a reception for all prior REBA presidents on Sept. 13.

The headquarters' offices, which are fully Wi-Fi enabled, also include fully-equipped private offices available at no fee to any out-of-town REBA member needing work space while in Boston. Conference room and meeting room space is also available to any REBA member at no charge. To reserve a conference room or an office contact Joe McBride, member service administrator at mcbride@reba.net.

Mechanic's lien may live on despite order dissolving it

By Richard E. Gentilli, Thomas M. Looney and Ward P. Graham

GENTILLI

LOONEY

GRAHAM

Richard Gentilli and Thomas Looney are both principals at Bartlett Hackett Feinberg P.C. where they represent title insurers, lenders and corporate clients in connection with real estate and business litigation. Ward Graham is New England Division Counsel of Stewart Title Guaranty Company in Boston. He serves on REBA's legislative committee.

Chapter 254 of the Massachusetts General Laws governs the creation and dissolution of a mechanic's lien in Massachusetts. Under the statutory scheme, a number of different procedures can create a mechanic's lien depending on the relationship of the lienor to the general contractor and owner of the property.

Because of the serious consequences a mechanic's lien may have on financing of a project or on the sale of the affected real estate, Chapter 254 also provides ways to obtain a discharge of a lien. The most familiar of these is "bonding off" the lien.

In addition, Section 15A of the statute provides a summary procedure by which an aggrieved party can obtain a judicial discharge of a defective mechanic's lien. It is this procedure and its strange effect on title that will be discussed in this article.

Section 15A provides in part that an owner, contractor, or mortgage holder, who is aggrieved by a defective mechanic's lien "may apply to the superior court for the county where such land lies or in the district court in the judicial district where such land lies, for an order . . . summarily discharging of record the alleged lien or notice as the case may be. . . . Upon granting or denying the application, the court shall enter a final judgment on the matter involved or expeditiously order such further proceedings as are just."

The party seeking the summary discharge of a defective mechanic's lien under Section 15A must file a separate action rather than simply file a motion in the mechanic's lien enforcement action.

Summary proceeding should result in death of lien

If a mechanic's lien appears to be defective because the lienor has failed to conform to the stringent requirements of Chapter 254, the aggrieved general contractor or owner can invoke the summary procedure to discharge the lien under Section 15A. The party challenging the mechanic's lien typically will file a verified complaint and obtain an order scheduling a hearing on the application to discharge the lien on relatively short notice.

The purpose of Section 15A is to provide a swift remedy for parties aggrieved by the wrongful assertion of a lien so as to minimize the adverse consequences caused by the lien. If the court is convinced that the mechanic's lien is defective because the lienor did not meet the statutory requirements to establish a valid lien, the court will order the lien dissolved.

The successful challenger should then duly record the order discharging the lien at the appropriate registry of deeds. Once the order is recorded, the defective lien is discharged and the lien should no longer disturb the title. Does a discharge under the summary procedure kill the mechanic's lien, or does the lien live on?

Life after death?

Like a zombie from a B-movie, the mechanic's lien can continue to haunt an owner of property even after the mechanic's lien has been successfully discharged by the summary procedure of Section 15A. If the putative lienor files a timely appeal of the order dissolving the lien, the now-dissolved lien will continue to operate as a cloud on title, even if the order discharging the lien has been recorded.

If that is the result, then what has been accomplished by the "summary" procedure in Section 15A of the statute? Unfortunately, the statute itself does not give any insight into whether an appeal of a dis-

Continued on page 22

Conservation restrictions – A primary land use tool

By William G. Constable

A long time client calls, saying that she has just been approached by a local land trust to permanently preserve her land, with the promise of a great tax deduction and permanently reduced property taxes, while still owning her property.

An agitated home builder client calls. Someone claims that a portion of his development site contains habitats for some turtle, and now two regulatory bodies say that he must permanently restrict a portion of the site.

An enlightened developer client has just received approval for a cluster subdivision, and now must permanently restrict the open space within its project.

The astute attorney receiving these calls has mentally reached into M.G.L. c.184, §§31-33, which describes the substance and procedures for granting conservation restrictions within Massachusetts. A conservation restriction (CR) is a conveyance by the owner of land to: (a) a charitable organization whose purposes include conservation of land or water or (b) any governmental body, for the purpose of natural, scenic, agricultural, forest or public recreation use, limiting construction of improvements and land alterations which adversely affect the conservation purposes of the CR.

CRs are an increasingly important tool for conservationists, municipalities, and regulators to permanently conserve natural resources, important landscapes and community character.

CRs in Massachusetts

Title to the property remains with the owner and, unless specifically provided otherwise, no public access or other possessory interest is transferred except as necessary for the grantee (the "holder" of the CR) to monitor and enforce the restriction. The Executive Office of Environmental Affairs (EOEA) estimates that approximately 3,500 CRs have been granted in Massachusetts, protecting about 85,000 acres of land. While most CRs are held by local, regional or statewide charitable land trusts, many are also held by municipal conservation commissions and EOEA.

Section 32 of Chapter 84 of the Massachusetts statutes describes the approval process by which CRs are able to remain enforceable despite the passage of time or the failure of the holder to have the benefit of privity or any appurtenant rights. All CRs must be approved by EOEA prior to execution, and all CRs (except those to be granted to state agencies) must have approval of the chief executive officers of the municipality in which the land sits.

Note that most other states authorize similar restrictions (usually called "conservation easements"). However, Massachusetts is the only state that requires government agencies to approve the restrictions. The same statute also provides for slightly different approvals for similar, but less frequently used, preservation restrictions, agricultural preservations, watershed preservation restrictions, and affordable housing restrictions.

EOEA's review of CRs has traditionally focused on verifying that the CR contains significant public benefit and is well drafted. Local officials tend to address local natural resource and land use needs as well as the local municipal impact of the CR. Although CRs must be considered by local assessors and by their nature usually reduce the property tax assessments, open space requires minimal public services, and surrounding properties frequently increase in value due to the nearby protected open space.

Continued on page 22

A long-time member of the Real Estate Bar Association, Buzz Constable is executive vice president of A. W. Perry, Inc., a commercial real estate investment, development and management firm founded in 1884, where he has worked for over 20 years. He also serves as president of the Lincoln Land Conservation Trust and on the Steering Committee of the Massachusetts Land Trust Coalition. He can be reached at LLCT@lincolnconservation.org.

Protecting privacy at the Middlesex North Registry of Deeds

By Richard P. Howe Jr.

A front page story in the May 30 edition of the New York Times ("Technology and Easy Credit Give Identity Thieves an Edge") tagged Phoenix as the identity theft capital of the nation, suggesting that the easy availability on the Maricopa County Recorder's website of millions of pages of official documents, some containing social security numbers, was a contributing factor.

Although I have long been a staunch advocate of making all land records freely available online, I also feel a compelling obligation to protect personal privacy. To assess the extent of the risk posed by the records of the Middlesex North Registry of Deeds, I decided to measure how many social security numbers were embedded in our documents, all of which are available online at www.lowelldeeds.com.

To obtain this information, we examined two groups of record books page by page looking for social security numbers. The first sample was from Jan. 1, 1995 to June 30, 1995. Each of the 186 books in this group contained approximately 160 documents in 350 pages.

Social security numbers appeared in 911 of the 29,760 documents in these books. Of the 911 documents with social security numbers, 323 involved federal tax liens, 192 involved Massachusetts tax liens, 199 were death certificates and 197 were mortgages.

The second group we examined was from Jan. 1, 2000 to March 31, 2000. Each of the 138 books in this group contained approximately 125 documents in 300 pages (we had switched to a smaller format book).

The 17,250 documents in this sample included 316 with social security numbers. Of the 316 documents, 30 involved federal tax liens, 145 Massachusetts tax liens, 108 death certificates and 33 mortgages.

Together, these samples indicate that 2.6 percent of our documents contain social security numbers. While that percentage may seem small, when applied to the 1.8 million documents recorded since 1980, it means that 47,000 social security numbers have been recorded in just the past 25 years.

The good news is that we have eliminated the flow of new social security numbers into our records by refusing to record documents (other than tax liens) that contain social security numbers. And the IRS and the Department of Revenue are doing their part. The documents sent to us by both agencies since the beginning of 2006 use only the last four digits of the taxpayer's social security number.

But that still leaves all the social security numbers that have already been recorded. Thus far, we have taken a passive approach to this problem, waiting for the customer to notify us of the presence of a social security number in a particular document before doing anything about it. (Out of deference to the IRS and the Department of Revenue, we have avoided removing social security numbers from tax liens).

Once notified by a customer, however, we have immediately redacted the social security number using rather low-tech methods. Two copies of the document are printed. On one, the social security number is crossed out with a black marker and the document is rescanned, replacing the original version on our website. The unaltered copy is placed in a traditional filing cabinet to be held in perpetuity in case the full social security number is ever needed.

While this process has been effective – of the mortgages in our sample, 16 percent already had the social security numbers blacked out due to customer notifications – we must get even more aggressive about eliminating the thousands of social security numbers lurking in our system. Hopefully we will discover some computer software (and the funding to purchase it) that will allow us to automate this process.

In the meantime, we have ordered a case of black magic markers and will attack this problem manually by eliminating all but the last four digits of social security numbers found in our records, tax liens included, by going through our documents page by page.

Identity theft is nothing new. Twelve years ago someone stole my credit card from a gym locker and used it to buy $3,000 worth of golf clubs before I discovered the loss. But our digital era allows all of us – law abiding citizens and criminals alike – to work more efficiently, making it essential that everyone strive to reduce the risk of cyber crime. Since the financial services industry is now the dominant sector in our economy and possesses all the associated political influence, it is unlikely that any comprehensive, consumer friendly legislation that will safeguard our electronic identities will be enacted anytime soon. For now, the Middlesex North Registry of Deeds, at least, will do what it can to reduce the risk of identity theft.

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.

'Affiliated business arrangements' permitted in limited situations

HUD clamps down on 'sham' kickbacks

By Joel A. Stein

An "affiliated business arrangement" (AfBA) – defined in Section 3 (7) of RESPA (12 U.S.C §2602) – does not violate Section 8 of RESPA if it meets certain statutory conditions.

RESPA defines an affiliated relationship as one existing among business entities where (i) one entity has effective control over the other by virtue of a partnership or other agreement; or (ii) is under common control with the other by a third entity; or (iii) where an entity is a corporation related to another corporation as parent to subsidiary by an identity of stock ownership.

RESPA generally prohibits payment of referral fees, unearned fees or kickbacks, as well as the splitting or sharing of fees or charges made or received providing "real estate settlement services". However, Section 8 (c) (4) of RESPA states that an affiliated business doesn't violate the statute as long as the three following requirements are met:

- The AfBA owner that refers business to the AfBA must provide a written disclosure on a separate sheet of paper to each consumer who is referred to the AfBA no later than the time of the referral.
- The customer being referred to an AfBA must not be required to use the AfBA, i.e., the consumer's use of an AfBA may not be required as a condition to the availability of any other settlement service for which the consumer will pay.
- No payments, other than a return on ownership interest or payments otherwise permitted under the statute, may be received under the AfBA. Any payments made must be for services rendered or must constitute a return on ownership interest.

Joel Stein served as REBA president in 1994 and has chaired the REBA Title Insurance and National Affairs Committee for over 10 years. He practices with Friedman & Stein, P.C. in Braintree. He is a serious pianist and classical music aficionado. He can be reached at jastein@freidmanstein.com.

What is a bona fide settlement service provider?

In 1996, HUD issued a statement entitled "Policy Statement on Sham Controlled Business Arrangements" to determine whether entities are bona fide providers of settlement services or sham business arrangements that do not qualify for AfBA exception to Section 8 of RESPA.

In order to satisfy HUD's criteria, the AfBA must consider the following:

1. Does the new entity have sufficient initial capital and net worth, typical in the industry, to conduct the settlement service business for which it was created? Or is it undercapitalized to do the work it purports to provide.

2. Is the new entity staffed with its own employees to perform the services it provides? Or does the new entity have "loaned" employees of one of the parent providers?

3. Does the new entity manage its own business affairs? Or is an entity that helped create the new entity running the new entity for the parent provider making the referrals?

4. Does the new entity have an office for business separate from one of the parent providers? If the new entity is located at the same business address as one of the parent providers, does the new entity pay a general market value rent for the facilities actually furnished?

5. Is the new entity providing substantial services, i.e., the essential functions of the real estate settlement service, for which the entity received a fee? Does it incur the risks and receive the rewards of any comparable enterprise operating in the market place?

6. Does the new entity perform all of the substantial services itself? Or does it contract out part of the work? If so, how much of the work is contracted out?

7. If the new entity contracts out some of its essential functions, does it contract services from an independent third party? Or are the services contracted from a parent, affiliated provider or an entity that helped create the controlled entity? If the new entity contracts out work to a parent, affiliated provider or an entity that helped create it, does the new entity provide any functions that are of value to the settlement process?

8. If the new entity contracts out work to another party, is the party performing

Continued on page 20

LIS PENDENS UPDATE

Uncertainties accompany opening salvo of real estate litigation

By Phillip B. Posner

The 'Memorandum of Lis Pendens' is a statutory device for providing record notice of litigation that involves a claim of right of the 'title to' or 'the use or occupation of' real estate.

Recent amendments to the statute (M.G.L. c.184, §15) and several recent trial court decisions raise questions and pose challenges for conveyancers and real estate litigators alike.

Although not technically a 'lien', the recording of a Memorandum of Lis Pendens has a practical impact similar to a real estate attachment: It may 'chill' an owner's ability to sell, mortgage or lease her real property at its full value.

Phil Posner is associated with the Beverly firm of Metaxas, Norman & Pidgeon, LLP practicing in the areas of real estate, environmental and land use transactions, permitting and litigation. He can be reached at pposner@mnplaw.com.

The mechanics

A plaintiff who seeks a Lis Pendens is required to file a verified complaint or other complaint containing a unique 'certification.' The plaintiff must certify that she (1) has read the complaint, (2) the facts stated in the complaint are true, and (3) no material facts have been omitted from the complaint. The complaint itself must name as defendants all owners of record and any party in occupation under a written lease.

Prior to 1985, a Lis Pendens could simply be drafted and recorded by the plaintiff's attorney. This may be one of the origins of some clients' requests to simply "throw a lien on record" in connection with real estate disputes. In order to stem abuse of the statute, a 1985 amendment to the statute required – as a prerequisite to recording – the endorsement of the Lis Pendens by a trial court judge.

Prior to the 2002 amendments, a verification of the allegations in a complaint that a challenge to "title" or "occupancy" of real estate was at issue was a sufficient factual basis for endorsement of the Lis Pendens by the judge.

The 2002 amendments provided four important changes to the statute: (i) an alternate remedy of 'temporary equitable relief' in lieu of an endorsement of the Lis Pendens; (ii) specific rules regarding the endorsement of the Lis Pendens pursuant to an ex parte motion; (iii) the provision for a 'special motion to dismiss' the entire action if the action was determined to be 'frivolous' by the trial court; and (iv) a provision that a court may not endorse a Lis Pendens in connection with some 'land use litigation' matters, including zoning appeals and wetlands regulations disputes.

The statute now requires a specific finding by the trial court judge, upon an ex parte motion for approval of a Lis Pendens, that (1) the defendant is not then subject to the jurisdiction of the court, or (2) there is a clear danger that the defendant, if notified in advance of the endorsement of the Lis Pendens, will convey, encumber, damage or destroy the property or the improvements thereon.

To be recorded, the Lis Pendens must be accompanied by affidavit stating that the plaintiff's attorney has served notice of the allowance of the motion by certified mail addressed to all parties to the action (M.G.L., c.184, §15(b)).

Prior to the 2002 amendment, upon motion a court would make a finding that the subject matter of the action constituted a "claim of title" or "occupancy." Upon making such a finding the court was obliged to endorse the Lis Pendens.

At this stage of the litigation, the court did not make any judgment or determination of the merits of the claims. *See Sutherland v. Aolean Development Corp.*, 399 Mass. 36 (1987).

Special motion to dismiss

However, the 2002 amendment permits a defendant to challenge the merits of the plaintiff's case through the mechanism of the special motion to dismiss.

Continued on page 21

Brokers and lawyers: Partners in closing the deal

BUSSONE

SIMONS

One of the true rewards of the real estate business is long-lasting and successful relationships. All too often, important workplace relationships today are defined by confusing terms such as "authorizing agent" and "outside vendor" and "dotted line reports"

The all-time worst is "FTE" – the Full-Time Equivalent. Who sees themselves as simply a full-time equivalent?

These impersonal words and terms underscore differences instead of shared interests – revealing a business environment that is marred by too many less-than-ideal relationships. One of these three-word titles we have noticed lately in our industry is "settlement service provider."

It's hard to believe these euphemistic words describe folks who are supposed to work together and collaborate to succeed.

Where we work we use one simple word that matters most – "partner." We have *partners* at work, and it's an important distinction. They are the *people* with whom we work, the *people* to whom we feel *accountable*, and most importantly, the *people* with whom we want to *grow*.

For lawyers, the word "partner" describes an ideal working relationship. And that's how we feel about our relationships with many lenders and brokers. We are partners in an industry that needs partners, but doesn't always recognize this.

(Editor's note: These remarks were delivered by REBA's Tom Bussone and Michelle Simons at New England Mortgage Showcase 2006, the annual meeting of the Massachusetts Mortgage Association on May 23 at Boston's Seaport Hotel.)

Real estate transactions are complicated, even for seasoned experts. And Massachusetts state law is designed to protect the broker's customers, both buyers and refinancing homeowners, in these transactions. Our job is to protect your customers before, during and even after the closing.

Protecting your customer is our prevailing interest. And as such, we are licensed and regulated, and our law practices are even designed to protect you as well – with the Client's Security Board reimbursement funds as well as the requirement that every lawyer carry malpractice insurance.

These additional layers of protection are not offered by settlement service providers. Also, the personal liability that every lawyer assumes, directly certifying title under M.G. L., c.93, §70, is a strong and compelling incentive to insure that the mortgage is properly recorded and that prior liens have been properly released.

Unlike lawyers, closing companies have no personal or direct liability for title mistakes. They simply move this risk to their title insurance underwriter. Consequently, they have far less motive to achieve an error-free product for the lender. The bottom line is that out-of-state closing companies are unregulated, and have no fiduciary duty to you. The result: mortgages and titles that are *not perfected* for the mortgage lender.

Compliance, compliance, compliance

Lawyers keep brokers' deals in compliance, protecting their investors and firms from penalties and deals that fail to close. When closing documents are not properly recorded, fees are not properly disclosed or fees change at the closing table without notifying lender – lenders and brokers could pay a price.

Recording your mortgages

Massachusetts is a "first in line" recording system. When a deed or mortgage does not get recorded correctly and in a timely manner, a Pandora's Box could be opened. We don't need to tell you how this will affect the now fast-expanding foreclosure market when a lender discovers that an equity line is in first posi-

Continued on page 19

Thomas Bussone II is the treasurer of REBA and a founding partner of Segal, Edelstein, Bussone & Fallon, a Beverly-based firm. Michelle T. Simons is co-chair of REBA's Residential Conveyancing Committee. Simons is a founding partner of the Newton-based firm of Brecher, Wyner, Simons, Fox & Bolan LLP where she chairs the firm's residential conveyancing department.

Effect of senior recorded homestead on foreclosure of junior mortgage: A primer

By Lisa J. Delaney

A homestead may be declared either by a single person or by one spouse for the marriage. The second spouse needn't sign the declaration, and case law holds a second signature is ignored as superfluous. The one signature protects and vests a homestead estate in both spouses.

A homestead is subordinated to a later recorded mortgage by a single subordination document signed by all vested with the homestead estate. The single document could be the mortgage or a separate subordination document.

Lisa J. Delaney is a partner at Carvin & Delaney LLP in Braintree. She is an active member of REBA, serving as a mentor, and also on the Registries Committee. Lisa may be reached at ldelaney@carvindelaney.com.

The controlling statute (M.G.L. c.188, §1) does not require or prefer one over the other. The statute also does not require specific subordination language, and, therefore, the generic homestead waiver language in a FNMA mortgage creates a subordination of homestead.

There are no subordination issues when title is owned by a single person or when both spouses are in title, as their execution of the FNMA-style mortgage creates a subordination of the full homestead estate.

However, if only one spouse holds title, the non-title spouse must execute the same subordination document as the in-title spouse. This could be either a countersignature on the mortgage or both spouses together signing a separate subordination document.

Although there is no case law on point, the industry consensus is the subordination will fail if the two spouses sign two different subordination documents, even if the two documents are signed simultaneously and together evidence an intent to subordinate the homestead. This follows a literal interpretation of §§ 6-7 of the statute, which define subordinations and releases in "a mortgage", "a deed" or "a release" but not in separate documents by each party vested with a homestead estate. Different subordination rules apply for a §1A Elderly or Disabled Homestead in the statute, which are not discussed in this article.

Potential subordination problems

Subordination problems also occur if title is vested in only one person whose marital status is not stated. Foreclosure counsel must determine if that person was married at the time of mortgage execution by either consulting with initial closing counsel, or requesting a copy of the original mortgage application which will include the borrower's marital status. There is no subordination problem if a sole title owner subsequently married, as the later marriage is junior in time to the mortgage.

The only practice point for a foreclosure involving an in-title and non-title spouse who have properly subordinated the homestead, is that the non-title spouse must be maintained on the foreclosure notice list since that individual is vested with a junior homestead estate. This also applies if the mortgage was executed by a single person who subsequently married, provided the new spouse is known to foreclosure counsel either from the records at the registry of deeds or listed in the lender's records. (*See* M.G.L., c.244, §14.)

Not all mortgages use the FNMA form or otherwise contain homestead subordination or waiver language. This issue is governed by the combined effects of Chapter 188, §§ 6-7 discussed in *Atlantic Savings Bank v. Metropolitan Bank and Trust Company*, 9 Mass.App.Ct. 286, 400 N.E.2d 1290 (1980), and *In Re Melber*, 315 B.R. 181 (2004).

Section 6 of the statute requires the mortgage to "contain[e] a release" of homestead. Section 7 provides a home-

Continued on page 19

RESIDENTIAL CONVEYANCING COMMITTEE

Four new subcommittees launched

By Michelle T. Simons and Marvin W. Kushner

SIMONS

KUSHNER

The Residential Conveyancing Committee was created two years ago by then-REBA President Chris Kehoe, who believed this segment of the REBA membership had been underserved by the Association. The committee was created to reach out to traditional conveyancers, while supporting other initiatives within REBA and broadening membership throughout the Commonwealth.

Another goal was to increase rank-and-file member involvement on several important issues, to support our profession and to protect the practice of the traditional real estate conveyancer.

The Residential Conveyancing Committee has and will be involved in the fight against House Bill 904 and any similar legislation. Our committee effectively rallied the conveyancing bar to raise funds for this fight. With our group's help, REBA engaged a special legislative counsel and crafted a long-term plan to establish a stronger voice and more influential role on Beacon Hill to oppose non-lawyer settlement providers.

The Committee took this message on the road in 2005, speaking at meetings of local and regional bar associations across the Commonwealth. The Committee knew that this message was too important for an e-mail or mailing. Instead we created a PowerPoint-supported program and undertook speaking engagements across the state.

As a result of this outreach to local bar groups across the state, REBA has gained several hundred new members. In response to this growth we have launched four new subcommittees: (1) Practice Standards/Forms; (2) Practice of Law; (3) Member Relations; and (4) Government Relations.

The Practice Standards /Forms subcommittee, chaired by Brookline-based conveyancer, Alan B. Sharaf, was created with the primary task of maintaining and updating the Association's long-standing and well-regarded practice standards and forms. Currently this group is drafting a book of over 20 forms to help real estate lawyers and others understand and use the new mortgage discharge law in their day-to-day practice.

Ward Graham, New England Region Counsel at Stewart Title Guaranty Company, is a key member of this subcommittee and has taken the lead in drafting these much-needed forms.

REBA, with the generous sponsorship from several title insurance underwriters as well as the Southern New England School of Law, has scheduled 10 two-hour workshop programs in locations across the state, entitled *A User's Guide to the New Mortgage Discharge Law.* These workshop programs are free to all REBA members. For more information, go to www.reba.net.

Our new Government Relations Subcommittee is chaired by Conrad Bletzer Jr., who practices in Brighton This subcommittee will also support REBA's now strong voice on Beacon Hill with political fundraising and contributions to REBA's political Action committee.

With generous contributions from members and donations from title insurance underwriters, REBA has engaged The Brennan Group, a premier Beacon Hill lobbyist, to supplement the work of long-time Legislative Counsel Edward J. Smith. In addition, REBA has engaged Holland & Knight to help us to reach out to the executive branch. Both lobbyists will assist us with the many issues affecting our day-to-day conveyancing practices.

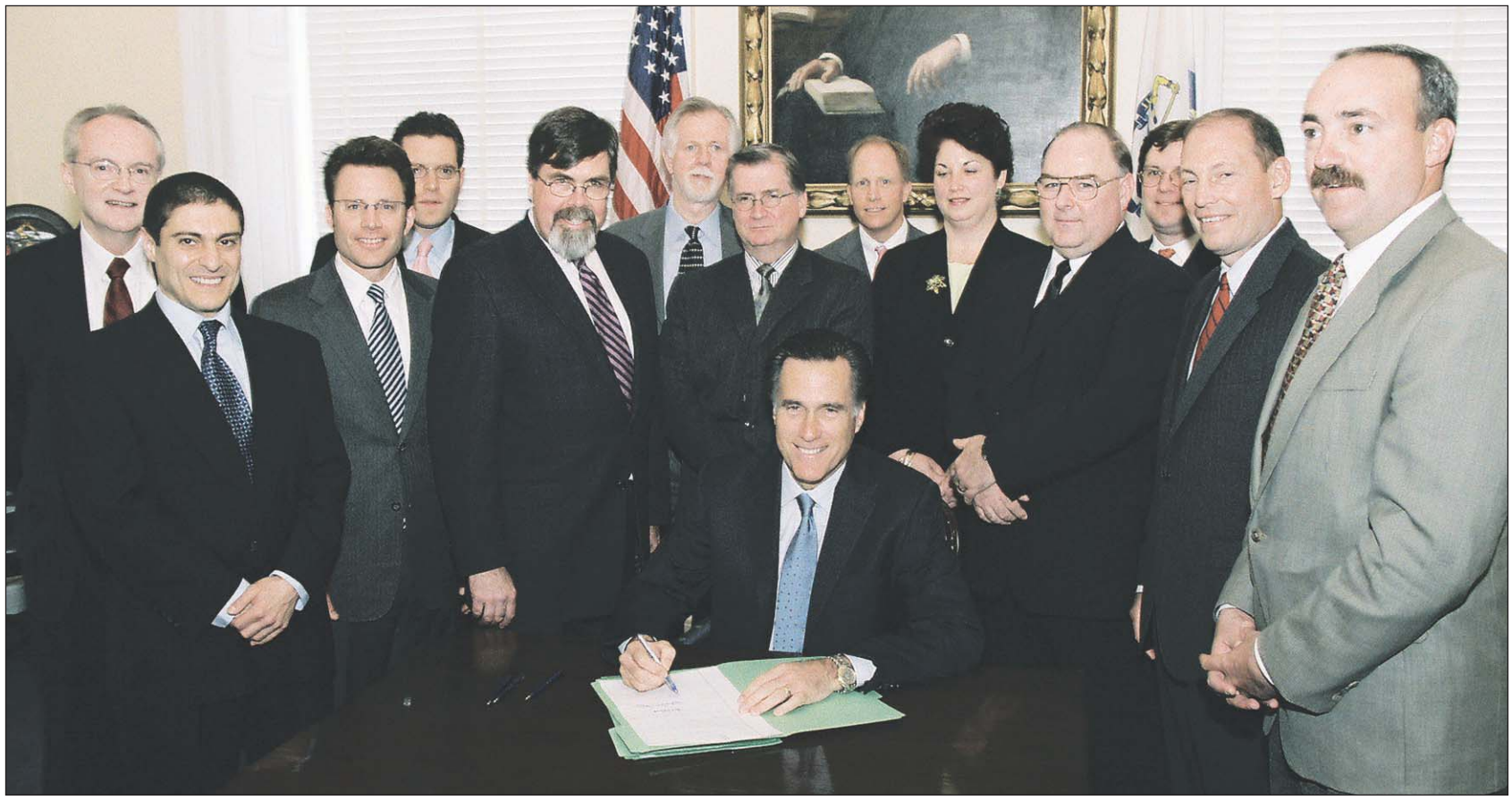
The Practice of Law subcommittee, co-chaired by Steven Kellem and Stefan Nathanson, was created to support the Association's long-established Practice of Law by Non-Lawyers Committee, chaired for over 15 years by Marshfield real estate lawyer and former REBA President, Jon S. Davis. This group will be a resource and conduit for conveyancers to report questionable actions that they may encounter in their daily practices. Kellem and Nathanson's subcommittee will gather information and direct it to the Practice of Law by Non-Lawyers Committee and the Committee's long-time counsel, Doug Salvesen.

Continued on page 21

Michelle Simons and Marvin Kushner co-chair REBA's Residential Conveyancing Committee. Simons is a founding partner of the Newton-based firm of Brecher, Wyner, Simons, Fox & Bolan LLP where she chairs the firm's residential conveyancing department. Michelle can be contacted at msimons@legalpro.com. Kushner, a member of the Massachusetts bar for nearly 50 years, is a partner in the Wellesley-based firm of Kushner, Sanders Ravinal LLP. He can be reached at mkushner@ ksrlawfirm.com.

EVENTS

Backers of mortgage discharge reform bill join REBA at signing ceremony



PHOTOS BY LISA KESSLER

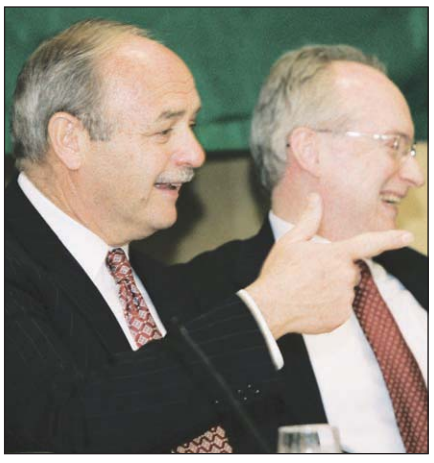
Gov. Mitt Romney recently signed Chapter 63 of the Acts of 2006, which modernizes mortgage discharge practice, surrounded by REBA leaders, legislators and legislation supporters. Pictured above (from left) are REBA Legislative Counsel Edward J. Smith; REBA President-Elect Sami S. Baghdady; Joint Financial Services Committee Co-Chair and the law's sponsor, Sen. Andrea F. Nuciforo Jr.; REBA member and legislation advocate Rep. Barry F. Finegold; REBA Legislation Committee Co-Chair E. Christopher Kehoe; REBA President Robert J. Moriarty Jr.; legislation supporter Rep. Christopher G. Fallon; Gov. Mitt Romney; Massachusetts Mortgage Bankers Association Executive Director Kevin M. Cuff; Massachusetts Credit Union League General Counsel Mary Ann B. Clancy; REBA Legislation Committee member and new law's draftsperson Ward P. Graham; Massachusetts Bankers Association Director of Legislative Policy Jon K. Skarin; Massachusetts Registers of Deeds Association President John R. Buckley; and Massachusetts Mortgage Bankers Association's Board Chair John Battaglia.

Images From REBA's Spring Conference







Legislative Update

Through REBA's Legislation Committee and REBA's Board of Directors, a significant number of pending bills are reviewed and positions taken on behalf of REBA. Technical advice is also made available to the Massachusetts House and Senate from time to time.

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

Below is a list of bills pertinent to REBA members. This list was prepared by Edward J. Smith, REBA's legislative counsel. The Legislation Committee is co-chaired by Ed Rainen and Chris Kehoe.

Priority List

S. 577 Makes execution authority requirements for subordination of mortgage and certain powers of attorney consistent with those for assignment or discharge of mortgage (i.e. no recorded vote necessary for signatory's authority.) Status: **Incorporated by amendment to S. 2278, *infra*** (REBA position: support)

S. 2278 REBA's omnibus mortgage discharge reform bill. Status: Passed by the Senate and House, as amended; **St. 2006, c. 63.** (REBA position: support)

S. 894 Facilitates registration at the Land Court of instruments executed on behalf of a corporation. See also H. 793. Status: Committee on the Judiciary (REBA position: support)

S. 921 Enacts a good and clear record and marketable title act. See also H.762. (Landowners Title Protection Act). Status: Committee on the Judiciary (REBA position: support)

S. 1891 Proposes 50-year statute of limitations under MGL c.40, §54A relative to statutory restriction on land in or appurtenant to old railroad rights-of-way. Status: Joint Committee on Transportation (REBA position: support)

S. 2104 Authorizes the recovery of attorneys fees in the enforcement of certain conservation-related and affordable housing restrictions by municipalities and certain other holders of restrictions. See also H. 4143. Status: Joint Committee on the Judiciary; **text incorporated into Senate amendment to H. 4968 and passed by the Senate; see H. 4968 *infra.*** (REBA position: support)

H. 795 Establishes a 50-year limitation on sand rights and other profits à prendre, subject to extension, except that in no case shall any such interest in land expire any earlier than three years from the legislation's effective date. Status: Joint Committee on the Judiciary (REBA position: support)

H. 904 Permits certain corporations to perform real estate closings, notwithstanding statutory prohibition on the practice of law by non-attorneys. Status: Joint Committee on the Judiciary (REBA position: oppose)

H. 2606 DOR "tax loopholes bill" bill. See also H.21. Includes provisions to apply the deeds transfer excise tax to transfers of less than fee title interests in real estate and transfers of controlling interests in any entity that holds real estate. Status: Not included in final bill. REBA position: opposed to expanded deeds excise. It also includes a provision to establish a lien on other taxpayer real property in the case of grantor trusts and "disregarded" entities. Status: Passed with REBA amendment to require identification of the particular record title holder on such state tax liens (**St. 2005, c. 163, § 18**). It also includes a measure to extend a six-year duration of recorded liens for child support to 10 years, subject to extension, consistent with the duration of state tax liens. Status: **St. 2005, c. 163, §45**

Other Legislation

S. 149 Requires the Commonwealth to reimburse cities and towns that adopt "smart growth" districts under M.G.L. c. 40R, for the added education costs to school districts that result from increased housing production. Status: **St. 2005, c. 141.**

S. 166 Livable Communities Act. Status: Joint Committee on Community Development & Small Business

S. 168 Proposes a Massachusetts Land Use Reform Act. See also H. 3544. Status: Joint Committee on Municipalities & Regional Government jointly with the Joint Committee on Community Development & Small Business.

S. 859 Establishes a Western Division of the Land Court, sitting in Worcester. Status: Joint Committee on the Judiciary

S. 917 Creates an estate of homestead by operation of law and without the need for a recorded instrument. See also S. 856. Status: Joint Committee on the Judiciary

S. 922 Requires a recital of the names and addresses of owners of land taken by eminent domain to be included in the instrument of taking. See also H.763. Status: Joint Committee on the Judiciary (REBA position: support)

S. 923 Legislation relative to notice of contract under M.G.L. c.254 and dissolution of mechanics liens. See also H. 764. Status: Joint Committee on the Judiciary

S. 1078 Establishes new procedural requirements in foreclosing residential mortgages, including expanded notice of debtor's rights; right to cure up to one day prior to the conduct of the foreclosure sale; non-responsibility of debtor for mortgagee's legal fees if default is cured within 60 days of mortgagee's notice of intent to foreclose; requirement of court approval for foreclosure sale conducted earlier than 180 days after notice of intent to foreclose; requirement of a court determination of fair market value of the property foreclosed in any suit for deficiency; and post-foreclosure accounting requirements, including relative to price upon any resale by foreclosing mortgage holder within 18 months. Status: Joint Committee on the Judiciary

S. 1169 Expands zoning protection for lawful, non-conforming single-family and two-family dwellings. Status: Joint Committee on Municipalities and Regional Government

S. 1171 Legislation to relax the statute of limitations for use violations under MG.L. c.40A, §7 Status: Joint Committee on the Judiciary

S. 1245 Sustainable Development Act. Status: Joint Committee on Environment, Natural Resources & Agriculture

S. 2152 Requires installation of ap-

Continued on page 17

Defining 'fair value' of condominiums

POINT: Flexible proposal would update standards

By Peter B. Farrow

When Massachusetts General Laws Chapter 183A, enabling condominiums, was enacted in 1963, rental affordable housing was an emerging market but homeowner affordable housing remained in the future.

That it was not envisioned by Chapter 183A is reflected in the elegantly simple (indeed, rather vague) statutory standard of "fair value" for establishing unit percentage interests. Today, affordable homeownership is a growing and significant part of the condominium market, and developers and their counsel have implemented variations in determining percentage interest that test the limits of the "fair value" criteria, on occasion requiring litigation to validate the condominium. It is time for Chapter 183A to catch up with and address these market-driven issues.

A proposal to tailor the "fair value" standard to today's condominium market has been prepared by Citizens Housing and Planning Association that will: (i) provide flexibility in establishing sensible and equitable percentage interests in condominiums, particularly those with deed-restricted affordable units; (ii) build on the Appeals Court's decision in *Podell v Lahn (*1995 Mass. App. Ct. LEXIS 496) regarding use of "equivalents" to establish fair value; and (iii) provide, if the master deed fails to, the means to readjust percentage interests when a deed restriction that was used to determine the percentage interest of a unit expires.

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.

Proposal seeks flexibility

The proposal seeks to support creation of condominiums in an increasingly diverse market, and avoid challenges to those that were founded on useful, but different or innovative, readings of "fair value", as the Appeals Court did in *Podell*.

The proposal does not change how the existing "fair value" standard has been used in the ordinary case, and the requirement that the relationship between "fair value" and percentage interest be "approximate" is not disturbed. The proposal only seeks to enable increased flexibility, in response to evolving markets, in the ways in which percentage interest can be determined in new or unusual circumstances under the umbrella of "fair value".

In *Podell*, presented with testimony that percentage interests had been based on unit areas rather than unit values, the Appeals Court recognized unit area as an equivalent to "fair value" and held that determining percentage interest by unit area fell within the statutory "fair value" umbrella.

The proposal expands on this by allowing the master deed to "take into account equivalents such as approximate unit area or construction cost, including factors among units such as unit location,

Continued on page 18

COUNTERPOINT: Proposal is ambiguous

By Edward A. Rainen

The Citizens Housing and Planning Association's proposal to use alternative criteria for calculating condominium percentage interests has wide-ranging implications for condominium law and affordable housing.

The Association's initiative purports to balance monthly maintenance expenses so similar units – whether designated "affordable", or "market-rate" – pay the same. This burden-shifting creates problems where a project's ratio of affordable units exceeds 25 percent.

On its face, the proposal sounds fair and reasonable by making affordable owners pay their "fair share" and eliminating subsidies by market-rate owners.

Since affordable owners' monthly housing expenses (debt service, taxes, insurance and maintenance) are capped, isn't CHAPA's proposal "win-win"? There is no free lunch.

Condominium unit owners are assigned a percentage interest in the common areas, based upon "fair value", which become the mathematical basis for maintenance charges. This system is similar to the progressive income tax where the wealthy subsidize the less affluent.

In the condominium context, "wealth" is defined by the relative fair values of the units. Clearly, the actual cost to light and heat hallways, power elevators, or maintain lawns and parking areas is roughly equal for all similarly sized units in the building. Certain condominiums were permitted an "unbalanced" mix of 50 percent affordable units, increasing the maintenance subsidy, so that savvy brokers steered market-rate buyers from projects with excessive expenses.

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.

Affordable housing isn't philanthropy

There is no philanthropy involved in affordable housing because a developer is permitted to bypass existing zoning restrictions on density, and build additional market-rate units while selling affordable units at discount as a *quid pro quo*. When an affordable unit owner resells his unit, restrictions limit the profit realized such that the "fair value" of the affordable unit is in relation to its original purchase price.

Ultimately, market-rate units, whose initial prices aren't discounted and whose resale prices aren't restricted, subsidize maintenance – with little pain where the percent of affordable units is small.

In "unbalanced" condominiums, the expense disparity is severe between units that are otherwise comparable. One way to equalize maintenance charges between similar units, yet remain within the affordable unit's monthly expense cap is to mathematically back in to a deeper discount on the purchase price. To be fair to a developer, and permit a reasonable profit, more market-rate units would be permitted. At some point, a community will suffer from increased density.

"Fair value" isn't defined in M.G. L. c.183A, but is an ephemeral concept that, at its heart, can only be measured by acquisition price. *Podell vs. Lahn*, 38

Continued on page 18

New regs transforming application of Massachusetts Endangered Species Act

By Gregor I. McGregor

Regulations promulgated by the state in 2005 are fully in effect and are transforming how the Department of Fisheries and Wildlife (DFW) and its Natural Heritage and Endangered Species Program (NHESP) log, map, review, and permit work affecting endangered species and their "priority habitat."

These rules go far beyond the prior and still operative DFW rules about "fish and game" and DEP rules about HNESP review and comment on some notices of intent pending before Conservation Commissions affecting "estimated habitat."

These new rules implement powers under the Massachusetts Endangered Species Act, flesh out procedures, and close some loopholes recognized in a few court cases since 2002.

Here is a bare summary of these revised regulations. They are so significant that there are now three (not two) components of a proper real estate "due diligence" for a development project and its permitting: (i) oil and hazardous material (OHM), (ii) wetlands resource areas, and now (iii) priority habitat.

Worse case, these can be "deal killers." At least they trigger critical government approvals and public participation in permitting.

Greg McGregor co-chairs with Mary Ryan REBA's Environmental Law Committee. A frequent contributor to REBA News, he is a founding partner of McGregor & Associates, P.C., a Boston-Boston based law firm specializing in environmental law. Greg can be reached at gimcg@mcgregorlaw.com. The author thanks his associate, Luke Legere, for his research and biologist David Klinch of ENSR for his insights.

2005 Revised Regulations

1. *Definition of "take" has been revised to read*: "Take, in reference to animals, means to harass, harm, pursue, hunt, shoot, hound, kill, trap, capture, collect, process, disrupt the nesting, breeding, feeding or migratory activity or attempt to engage in any such conduct, or to assist such conduct, and in reference to plants, means to collect, pick, kill, transplant, cut or process or attempt to engage or to assist in any such conduct. **Disruption of nesting, breeding, feeding or migratory activity may result from, but is not limited to the modification, degradation, or destruction of Habitat**." (Newly added language in bold).

2. *Definition of "project or activity" has been included, and encompasses (but is not limited to)*: "grading, excavating, filling, demolition, draining, dumping, dredging or discharging; the erection, reconstruction or expansion of any buildings or structures; the construction, reconstruction, improvement or expansion of roads and other ways; the installation of drainage, sewage and water systems, or; the destruction of plant life."

3. *Definition of "Priority Habitat" has been included, and provides that*: "Priority Habitat means the approximate geographic extent of Habitat for state listed species as delineated by the Division pursuant to 321 CMR 10.12." The delineation of Priority Habitat by Division is based on records of listed species within the last 25 years and contained in the Division's Natural Heritage and Endangered Species Program database.

4. *The performance standard referred to as "Net Benefit" is defined as follows:* "Net Benefit means an action, or set of actions, that contributes, on its own or in the context of other actions, significantly to the long-term conservation of a State-listed Species and that the conservation contribution to the impacted State-listed Species exceeds the harm caused by a proposed Project or Activity."

5. *The term "record owner" is defined as:* "any person or entity holding a legal or equitable interest, right, or title to real property, as reflected in a written instrument or recorded deed, or any person authorized in writing by any such person."

Practice tips

1. New and revised definitions should help to clarify some previously gray areas that had been illustrated by case law, such as:

A. Revised definition of "take" in regulations should more effectively foreclose an applicant's argument that "mere alteration of a habitat is not a take." Clearly, the revised definition indicates that a "Take" may result from "modification, degradation or destruction of Habitat." This revision codifies the Superior Court holdings in the *WRT* and *Capolupo* decisions.

B. The new definition for "Priority Habitat" encompasses "the approximate geographic extent of Habitat for state listed species." It does not distinguish between species categorized as "endangered," "threatened," or of "special concern." This appears to close the loophole noted in *WRT*, where the regulations formerly allowed regulation of significant habitats only when "endangered" or "threatened" species were present.

C. The broad definition of "Project or Activity" should clarify the types of work and conduct subject to regulation, which is a key to understanding jurisdiction.

D. Definition of "Priority Habitat" clarifies the scope of the revised regulations. The Natural Heritage Atlas illustrates both Priority and Estimated Habitat for the entire Commonwealth.

2. The new filing requirements and procedures clarify the filing process, but you need to be alert to an overlap with the Massachusetts DEP's Wetlands Regulations.

A. Under MESA, project proponents must file directly with NHESP for all nonexempt projects or activities (see 321 CMR 10.14) proposed within a Priority Habitat. This is independent of the requirement to submit a copy of a required Notice of Intent for a project located in an Estimated Habitat for Rare Wildlife (required under the Massachusetts DEP's Wetlands Regulations).

B. Although the revisions to the MESA Regulations do not directly impact the DEP Wetland Regulations (which prohibits short or long-term adverse impacts on the habitat of rare or endangered species), it is important to be cognizant of the different performance standards in these sets of regulations, and to understand what circumstances trigger them.

3. The process for designation of Priority Habitat has been more clearly defined, and allows procedures for appealing delineation.

Continued on page 17

Legislative Update

Continued from page 14

proved carbon monoxide detectors in residential property. Status: **St. 2005, c. 123.**

S. 2200 Purports to reverse recent holding by the Land Court re: M.G.L. c.260, §31, so as to prevent the acquisition of title by adverse possession of land or interests in land taken or acquired by the Commonwealth or any political subdivision by "purchase, gift, grant, eminent domain, tax taking or otherwise" and held for "any public purpose."(purports to be retroactive to December 1987) Status: Joint Committee on the Judiciary

H. 648 Omnibus revision of the Massachusetts Homestead Act. Status: Joint Committee on the Judiciary

H. 737 Relative to the Uniform Durable Power of Attorney Act. Status: Joint Committee on the Judiciary

H. 739 Relative to the spousal elective share. Status: Joint Committee on the Judiciary

H. 808 Filed by the Secretary of State, this bill would authorize the use of electronic notarization of instruments. Status: Joint Committee on the Judiciary

H. 853 Establishes a recitation of statutory powers for fiduciaries having legal title to or control over real or personal property for which there are environmental issues requiring action by the fiduciary. Status: Joint Committee on the Judiciary

H. 956 Provides that the acquisition of a new homestead estate shall not "defeat" or "discharge" a previous homestead of record. Status: Joint Committee on the Judiciary (REBA position: opposed as drafted)

H.1823 Provides for a stay of mortgage foreclosure proceedings in any action filed during, or within 90 days after, a service member's active duty in the armed forces when the service member's ability to comply with the obligation is materially affected by active duty in the armed forces. Status: Joint Committee on the Judiciary

H.1838 Provides for a $100 fine for a mortgagee to fail to record a discharge upon receipt of the mortgage payoff. Status: Joint Committee on the Judiciary

H. 3553 Legislation to relax the statute of limitations for use violations under M.G.L. c.40A, §7. Joint Committee on the Judiciary

H. 3748 Proposes adoption of the Uniform Real Property Electronic Recording Act. Status: Joint Committee on the Judiciary

H. 4968 Bill to expedite the land use permitting process and the resolution of related disputes. The bill includes a new Permit Session of the Land Court to decide certain permitting-related appeals; it also restricts 10-citizen interventions in Chapter 91 licensing and municipal harbor plan approvals; it allows local zoning approvals to take effect and owners to proceed at risk pending any appeal; and, subject to local acceptance, makes changes to M.G.L. c.43D for "priority development sites." Status: Passed by the House; amended by the Senate to eliminate provisions for the Land Court Permit Session and for permit issuance notwithstanding a pending appeal, and to incorporate provisions of S. 2104, REBA bill on restrictions, *supra*; pending before the joint House-Senate conference committee. Senate bill is S. 2571.

Mass. Endangered Species Act continued from page 16

A. Mapping of Priority Habitat will be based upon the totality of the circumstances, as reflected by records in the NHESP database, scientific evidence, sightings, environment conducive to support of habitat, etc. The Natural Heritage Atlas will be the authority for the existence and location of Priority Habitats.

B. DFW will review its designations of Priority Habitat every two years.

C. "Record Owner" of property, as defined in the regulations, may seek to have a voluntary assessment to delineate Priority Habitat on her property (321 CMR 10.13). A "Record Owner" also may seek reconsideration of designation of priority habitat (321 CMR 10.12), as well as denial of a project due to a determination that it will constitute a "Take," (321 CMR 10.18), or denial of a Conservation and Management Permit (321 CMR 10.23)).

The DFW has 30 days from receipt of a Request for Reconsideration of Priority Habitat delineation to make available to the Record Owner its records supporting the designation. The DFW has 45 days following receipt of a completed application for a Request for Reconsideration to issue a decision in response. And the DFW's decision is subject to administrative and judicial review (321 CMR 10.25).

D. The NHESP is responsible for developing the Massachusetts BioMap Project, which is intended for use as an assessment tool to identify the areas most in need of protection to conserve the Commonwealth's biodiversity. Started in 2000, the goal of creating the BioMap is the promotion of strategic land protection by mapping the areas that provide suitable long-term habitat for plants and animals. According to NHESP, the BioMap project has not been updated since 2002. It may be used as a resource in mapping, but will not likely be definitive.

4. Constructive Approval is now a fact of life in DFW project reviews.

A. DFW has a 30-day review period, following receipt of a completed application, to issue a File Number to the project.

B. Within 60 days after a file number is issued, the DFW must issue a decision in writing. Two 20-day extensions are possible. The decision will state whether the project will constitute a Take, or will not constitute a Take provided conditions are met.

C. If no decision is issued within this total 100-day period, the project receives Constructive Approval.

D. For conservation and management permits (which essentially allow for a "Take" to occur so long as the project is performed pursuant to an approved Conservation and Management Plan), the DFW must issue a decision within 30 days of receiving an application, with two 30-day extensions possible.

E. If no decision on the conservation and management permit application is rendered within that 90-day period, the permit is constructively approved.

F. You should be familiar with those types of projects or activities in Priority Habitats that are exempt from review under the new regulations (321 CMR 10.14), as well as those types of projects that *are not exempt* from review.

G. The regulations provide for financial or in-kind contributions toward the development and/or implementation of an off-site conservation recovery and protection plan for impacted species, designed to meet the long-term Net Benefit performance standard in lieu of mitigation at site. (321 CMR 10.23(3)). Practically speaking, this means that a proposed project that substantially alters or destroys Priority Habitat may be allowed to proceed in exchange for funds to be used for off-site mitigation.

It's a new world of wildlife protection out there. There are new rules, procedures, standards, fees, and property restrictions with important implications for public and private property and projects.

Defining 'fair value' of condominiums

POINT: Flexible proposal would update standards

Continued from page 15

amenities, and access to common areas of value to a limited number of unit owners" in determining percentage interest under the "fair value" standard (which, it seems, some have already done).

As to affordable units, the proposal allows choice, in determining percentage interest, "of whether and how to weigh a restriction imposed on one or more, but fewer than all, units by covenant, agreement or otherwise." Whether and how to address a mix of market and affordable units in a sensible and equitable way can vary among projects, and choice the key to a good result for any particular project.

Allow choices to suit specific circumstances

In each case, the proposal seeks to allow choices that best suit the circumstances at hand by saying that making these choices does not risk invalidating the condominium.

One can readily see that some disclosure is in order. It has been standard practice (although perhaps not required by Chapter 183A) to state in the master deed that percentage interests are based on fair value. Consistent with this, the proposal requires master deeds filed after Jan. 1, 2007 to "state generally such equivalents, factors or determinations" as were used in determining fair value.

This phrasing puts people on notice, but without setting a standard of disclosure so specific that validity of the condominium might hang by the thread of how the disclosure is phrased. Use of those equivalents, factors or determinations in existing condominiums would be validated regardless of disclosure, and no disclosure (other than what present law might mandate) would be required in plain vanilla situations where percentage interest reflects nothing more than fair market value.

Finally, some deed restrictions making units affordable expire at the end of a stated term, and many are at risk of termination due to mortgage foreclosure, in either case returning the unit to market rate status. In these situations, equity suggests readjusting percentage interests to reflect that change, a matter now left entirely to the master deed and infrequently (perhaps rarely) addressed.

The proposal creates a statutory mechanism for re-adjustment by 75 percent vote of unit owners and 51 percent of first mortgagees, using on the "silence is consent" procedure already existing, if the master deed fails to provide a means of readjustment.

This proposal seeks to facilitate Chapter 183A in its task of enabling creation of residential condominiums in an increasingly diverse and expanding sector of the Commonwealth's housing market.

COUNTERPOINT: Proposal is ambiguous

Continued from page 15

Mass. App. Ct. 688 (1995), speaks eloquently to this proposition. Clearly, square footage must be an *element* of the "fair value" equation.

The court explained that a Florida statute determines percentage interest strictly on square footage, yet held:

"The approximate relation of the fair value of a unit to the aggregate fair value of all the units often reduces itself to a process of dividing a unit's floor area by the aggregate floor areas of all the units in the condominium. … The computation process does not exclude the possibility, however, that in setting the percentage interests, units of the same size but with better locations in the condominium development, may be ascribed a higher 'fair value.' Units possessed of 'facilities which, although common [are] of value only to a limited number of unit owners . . .' may have a higher market value and, therefore, warrant a higher percentage interest in the common areas. It is also possible … that units which have amenities superior to those in the original buildings may be assigned a higher percentage interest." (citations eliminated)

Bill is ambiguous

CHAPA's bill is ambiguous, at best, and at worst is intentionally misleading. Section 1 states: "Determinations of fair value that are based on *or* take into account equivalents such as approximate unit area *or* construction cost, *or* factors among units such as unit location, amenities, and access to common areas of value to a limited number of unit owners, and determinations of whether and how to weigh a restriction imposed on one or more, but fewer than all, units …, shall not thereby be invalid; but such … determinations made on or after January 1, 2008, *shall be generally stated* in the master deed." (emphasis added).

Should not "or" be "and?" As drafted, a developer chooses criteria to establish value, and then hides behind a general statement as to how that decision was reached. The burden on potential affordable unit plaintiffs to identify a developer's reasoning for selecting one element over another would be extraordinarily difficult to overcome.

Peter Farrow's article boldly speaks to the deception. He writes: "One can readily see that *some disclosure is in order*. It has been standard practice (although perhaps not required by Chapter 183A) to state in the master deed that percentage interests are based on fair value. Consistent with this, the proposal requires master deeds filed after January 1, 2007 to 'state generally such equivalents, factors or determinations' as were used in determining fair value. *This phrasing puts people on notice, but without setting a standard of disclosure so specific that validity of the condominium might hang by the thread of how the disclosure is phrased. Use of those equivalents, factors or determinations in existing condominiums would be validated regardless of disclosure*, and no disclosure (other than what present law might mandate) would be required in plain vanilla situations where percentage interest reflects nothing more than fair market value." (emphasis added).

I disagree. We need a standard of practice that puts all on notice and sets a standard of disclosure that is specific.

When developers build affordable housing, they make economic choices, both for themselves and those who ultimately purchase their product. Developer's choices should not result in greater expense, or diminished usage by the very people affordable housing programs were designed to assist, nor should it pervert zoning into whatever the bureaucrat wants it to be today.

The creation of affordable housing by providing bunches of carrots to developers, can result in piles of sticks for the rest of the neighborhood.

Effect of senior recorded homestead on foreclosure of junior mortgage: A primer

Continued from page 10

stead may be terminated by a deed signed by the homestead declarant and spouse, if any, which does not reserve the homestead estate.

A Massachusetts mortgage is a deed, subject to the rights of redemption. Therefore, a mortgage that does not contain a homestead waiver or subordination executed by either a single person or by both spouses vested in homestead will effectively terminate the homestead estate.

However, most title insurance underwriters prefer treating these facts as creating a subordination. This does not alter the foreclosure procedure, other than maintaining the non-title spouse on the notice list. However, this will create an issue if the sale generates a proceeds overage and there are other junior creditors, as the order of payment priorities differ if the homestead was subordinated or terminated.

It is therefore recommended foreclosing counsel not decide between subordination or termination and either pay all proceeds into court and file an interpleader action, or otherwise obtain a court order as to priorities before paying the proceeds overage.

Homestead can retain senior priority

The only fact pattern where the homestead retains senior priority is a mortgage signed only by an in-title spouse without a separate recorded document of subordination signed by both the in-title and non-title spouses. Foreclosing counsel should file a claim both on the title insurer of the mortgage to be foreclosed and/or on initial closing counsel.

The policy should be reviewed as to whether the homestead is listed as senior title encumbrance. The title company may deny the claim if the homestead is so listed. But the denial should not be accepted, as the title company would have issued a closing insurance protection letter indemnifying the lender in the event the closing attorney does not follow all closing instructions, which usually includes closing the mortgage in first priority position.

The unsubordinated homestead automatically dissolves without the need for a recorded termination if the in-title and non-title spouses and their minor children move from the premises, as homestead remains valid only for so long as the property is the primary family dwelling. *See* §§ 3-4 of the statute, which provide the homestead remains in effect if the parents have moved or are deceased providing their minor children otherwise remain in the home.

An unsubordinated prior senior homestead followed by a completed mortgage foreclosure and a family remaining in possession would be a case of first impression and undoubtedly spark litigation, study and debate for years.

Brokers and lawyers: Partners in closing the deal

Continued from page 9

tion over their million dollar lien.

Out-of-state settlement service providers routinely take weeks to record. Local lawyers, who understand that Massachusetts is a 'first-to-record' jurisdiction, are far more responsive, usually recording within 24 hours or less.

All deals are local

Only a local partner can help brokers sort through our unique local system, a world of state and local tax liens, "super priority" condominium liens and unpaid municipal betterments. Liens are potential threats to deals, often lurking just below the surface. Brokers need local contacts and local knowledge to search out any liens and defuse them in advance, another valuable role played by your legal partner.

All real estate law is *local* law, idiosyncratic and varying greatly from state to state. With a local lawyer in the picture (rather than a far-away out-of-state settlement provider) a lender or mortgage broker is far more likely to avoid problems and traps for the unwary unfamiliar with local law and practice – such as our unusual Registered Land system in Massachusetts. Folks in California cannot fathom our Torrens system!

From probate to divorce, estates, trusts, corporate and bankruptcy law, there are hundreds of statutes, regulations and potential legal pitfalls, and they all vary greatly from state to state. Your real estate lawyer is your specialist who understands how the local laws and practice affect real estate.

When all is said and done, brokers and lawyers are partners in a business where relationships matter. And the Commonwealth's regulatory process reinforces this partnership, making us accountable to each other – and jointly responsible for generating and closing problem-free deals.

Like most successful partnerships, ours is based upon reciprocal value. Brokers provide the deals, and attorneys provide the broker, their investors and their customers with the knowledge and skills to successfully close these deals.

So when you hear the ongoing debate on Beacon Hill about replacing real estate lawyers with "settlement service providers", remember they're just another one of those three words. Do you want to entrust your deals to someone who serves up closing documents like a fast food restaurant?

Or do you want a *real* partnership with a professional who understands the law and serves your business goals?

'Affiliated business arrangements' permitted in limited situations

Continued from page 7

any contracted services receiving a payment for services or facilities provided that bears a reasonable relationship to the value of the services or goods received? Or is the contractor providing services or goods at a charge such that the new entity is receiving a "thing of value" for referring settlement service business to the party performing the service?

9. Is the new entity actively competing in the market place for business? Does the new entity receive or attempt to obtain business from settlement service providers other than one of the settlement service providers that created the new entity?

10. Is the new entity sending business exclusively to one of the settlement service providers that created it (such as the title application for a title policy to a title insurance underwriter or a loan package to a lender?)? Or does the new entity send business to a number of entities, which may include on of the providers that created it?

Conditions to qualify as an affiliated business

Even if an entity is a bona fide provider of settlement services, it still must meet three conditions of the RESPA controlled business arrangement exception in order for the AfBA to pass statutory muster.

There must be:

- a written disclosure of the existence of the AfBA, including a written estimate of the settlement services provider's charges and a signature line for the consumer to acknowledge receipt of the disclosure;
- no requirement that the consumer use the settlement service to which he/she is being referred; and
- no payment or any other thing of value received by the referral partner except for fees for work actually performed or a return upon the ownership interest in the AfBA.

Section 3500.15 of Regulation X provides further understanding of the AfBA concept, as do the policy statements issued with the 1996 Final Rule.

When assessing if a payment is a return on ownership interest or a payment for referrals or settlement service business, HUD will consider the following questions:

1. Has each owner or participant in the new entity made an investment of its own capital, as compared to a "loan" from an entity that receives the benefits of referrals?

2. Have the owners or participants of the new entity received an ownership or participant's interest based on a fair value contribution? Or is it based on the expected referrals to be provided by the referring owner or participant to a particular cell or division within the entity?

3. Are the dividends, partnership distributions, or other payments made in proportion to the ownership interest (proportional to the investment in the entity as a whole)? Or does the payment vary to reflect the amount of business referred to the new entity or a unit of the new entity?

4. Are the ownership interests in the new entity free from tie-ins to referrals of business? Or have there been any adjustments to the ownership interest in the new entity based on the amount of business referred? Responses to these questions may determine whether an entity meets the conditions of the CBA exception. If an entity does not meet the conditions of the CBA exception, then any payments given or accepted in the arrangement may be subject to further analysis under Section 8 (a) and (b) (12 U.S.C. §§2607 (a) and (b).

A number of affiliated business operations have appeared in Massachusetts and there appears to be increasing pressure from lenders and brokers on attorneys to get a "piece" of the title insurance premium. The lender or broker may suggest to the attorney that an entity be created to handle certain settlement services and in return receive payment for providing those services.

The entity may order title, schedule closings, and obtain payoffs and be paid a portion of the closing fee for such services. In other situations, a newly created entity will prepare the title insurance commitment and write the policy and will collect the full premium.

Before you allow yourself to be forced into an affiliated business operation you should be certain that the operation meets all of the above requirements. Note in particular that the *Colonial Title* decision deemed the following activities to be the "practice of law" in Massachusetts:

1. Evaluating title to real estate to determine the interest created, transferred or terminated and communicating that evaluation to any interested party to a residential real estate transaction.

2. Evaluating and ensuring that parties to a real estate transaction have complied with their agreements.

3. Preparing, drafting or reviewing legal documents that affect title to real estate or affect the obligation of the parties to the real estate transactions.

4. Explaining at the closing any documents relating to the interest in the real estate being created, transferred or terminated and relating to the agreement of the parties.

5. Issuing title certification or policy of title insurance premised on *Colonial's* evaluation of title to real estate.

6. Holding oneself out to lenders, title insurance companies or members of the public as willing and able to perform the functions listed in paragraphs 1-5 immediately above.

7. Representing lenders as their closing agents.

Finally, note that HUD's positions on AfBAs are less than clear. While they are not prohibited generally, sham arrangements, which will foster the payment of kickbacks, *will* be prohibited. Part-time employees always are a signal that the affiliated business may not be legitimate.

In addition, if the newly created entity is not providing substantial services and the fee is out of line with the services provided, you may not violate RESPA, but you may be leaving yourself open to a class action.

WORKSHOPS

Series of real estate mortgage discharge workshops scheduled

REBA's Continuing Education Committee has announced the final schedule for a series of 12 two-hour workshops on the recently-enacted real estate mortgage discharge law, Chapter 63 of the Acts of 2006.

The new law – which takes effect Oct. 1 – overhauls every aspect of the real estate mortgage discharge process. The programs will include over 25 practice forms for use with the new law. A title insurance underwriter will sponsor each workshop.

Below are the workshop dates, locations, and sponsors:

- Aug. 16, North Dartmouth (sponsored by Southern New England School of Law);
- Sept. 7, Peabody (Old Republic);
- Sept. 12, Natick (Stewart Title);
- Sept. 14, Newton (First American);
- Sept. 19, Boston (Chicago Title);
- Oct. 3, Lenox (CATIC);
- Oct. 4, Holyoke (CATIC);
- Oct. 12, Andover (First American);
- Oct. 18, Braintree (Fidelity Title);
- Oct. 24, Worcester (Land America);
- Oct. 25, Hyannis (Land America); and
- t/b/a, Plymouth (Stewart Title).

Additional workshop programs have been planned but not yet scheduled for Andover, Mansfield and Plymouth. For a complete schedule of dates, times, sponsors, faculty and locations of each workshop go to www.reba.net.

These free programs are open to all REBA members, as well as agents of each workshop's title insurance underwriter sponsor. Members of the Massachusetts Mortgage Bankers Association, the Massachusetts Bankers Association, and the Massachusetts Credit Union League are also invited to these programs. These lender trade associations collaborated with REBA in the three-year legislative effort to enact the landmark bill.

Registration for each free program will open four weeks prior to the scheduled workshop.

Uncertainties accompany opening salvo of real estate litigation

Continued from page 8

If the case is deemed to be 'devoid of any arguable basis in law,' or if the case is subject to dismissal based on a valid legal defense such as the statute of frauds, the special motion to dismiss should be granted and the moving party awarded its costs and reasonable attorneys' fees (M.G.L., c.184, §15 (c)).

The motion is directed to the claim or action and not to the Lis Pendens itself. *See Fafard Real Estate Development v. Metro-Boston Broadcasting, Inc.* 345 F. Supp 147 (D. Mass. 2004). In the absence of a clear emergency, it may be prudent to avoid the use of ex parte motions for approval and instead pursue motions to be heard upon notice to all parties.

In *Waters v. Cook*, Land Court No. 312953 (2005 WL 2864806), the court analyzed the split of opinion in the trial courts on the appropriate standard of review of a special motion to dismiss. In *Millennium Real Estate, LLC v. Giambro*, 2005 WL 1009798 (Mass. Supr. March 11, 2005), a special motion to dismiss was granted using "the same standards as preliminary injunctive relief because both sanctions would impose the same practical effect on real property." *Id.* at 5.

Other courts have used another, arguably lower, "summary judgment standard" (i.e., a dispute of material facts would prevent granting the special motion) as the benchmark for review. *See e.g. Trolio v. Friedman*, 2005 WL 1683601 (Mass. Supr. May 3, 2005).

The statute's lack of clear guidance regarding the award of 'temporary equitable relief' versus the endorsement of a Lis Pendens may produce similar divergent results until the Supreme Judicial Court or the Legislature clarifies the meaning or the language of the statute, which contains no clear standard as to when a Lis Pendens or equitable relief should be granted.

In *Millennium*, the Superior Court reasoned that the statute "require[s] the court to decline Lis Pendens relief if it determines that preliminary injunctive relief would furnish an adequate remedy." However, this analysis appears unsupported by the text of the statute.

Until clarification is provided, in addition to filing a verified complaint, affidavits and a memorandum of law that address the standards for granting preliminary injunctive relief should be filed together with a motion for endorsement of a memorandum of Lis Pendens.

The motion, affidavits, legal memorandum and related exhibits must detail the irreparable harm to be suffered by the moving party, the risk of such harm in light of the moving party's reasonable likelihood of success on the merits of the case, and how the requested relief will either preserve the status quo among the parties or otherwise provide appropriate equitable relief.

It is well to remember the maxim that 'real estate property rights are unique' and that money damages are often deemed insufficient to compensate a party who is deprived of the title or use of her land.

Four new subcommittees launched

Continued from page 11

The Member Relations Subcommittee, chaired by Susan B. Larose, was set up to assist and support the Association's well-established Membership & Public Relations Committee, chaired by REBA's President-Elect, Sami S. Baghdady, and the Continuing Education Committee, co-chaired by Stephen M. Edwards and Sophie Stein. This subcommittee will help identify areas of need for educational programs and provide educational resources to the conveyancing community including lawyers, paralegals and title examiners. This Subcommittee will assist in creating more educational seminars throughout the year for the conveyancing bar with plans to take these programs on the road throughout the Commonwealth.

We hope the Residential Conveyancing Committee will soon be designated the Residential Conveyancing Section to give a strong and consistent voice to the conveyancing bar. This would be REBA's first 'Section.'

These subcommittees are open to all REBA members. If you are interested in joining any of these subcommittees and become a part of the solution, please contact the subcommittee chairs directly. For their contact information please e-mail REBA staffer Nicole Cohen at cohen@reba.net.

Mechanic's lien may live on despite order dissolving it

Continued from page 4

charge under Section 15A should continue to cloud the title. Should conveyancers be concerned about a mechanic's lien that has been discharged but which is the subject of an appeal? If the appeal is successful, should the mechanic's lien then be resurrected and given retroactive application? There are a number of points of view to consider in this issue.

On the one hand, the lien is a creation of statute and the statute provides how and when it can be dissolved. Once dissolved, the lien should cease to have any effect whatsoever. This would be similar to a real estate attachment that has been discharged by a court.

Under this scenario, the lien would no longer be in the chain of title and a purchaser of the real estate would take the property free and clear of the dissolved lien. If an appellate court later determines that the dissolution was erroneously issued, the claimant would theoretically have to establish a new lien on the property, effective as of that date, but with no retroactive application. If the real estate was conveyed in the interim, they are "out of luck."

This approach may at first seem harsh as it appears to effectively eliminate a claimant's rights of appeal. But a putative lienor is not without a remedy.

A claimant could seek to have the dissolution order stayed pending appeal, or seek to obtain and record a lis pendens on the property to protect their perceived rights on appeal. If these measures are requested quickly, the claimant can protect itself, but must make at least some showing that its appeal has merit.

A different way to view the appeal of an order discharging a mechanic's lien is to view it as a notice, which suspends or, in effect, stays the effect of the discharge (despite the court's order) until all appeal rights have been exhausted or abandoned. Rather than looking at the mechanic's lien like a real estate attachment, this "notice-of-pending-appeal-of-discharge-of-lien" approach (which seems to be followed by some conveyancers) treats the appeal of the mechanics lien discharge order as more like a lis pendens.

Seen in that light, the lien continues to constitute a cloud on title until the appeal is over, on the theory that if the discharge order were to be reversed on appeal, the mechanics lien would be resurrected *nunc pro tunc* into the chain of title and encumber the property as of its original recording date. Under this analysis, a conveyance during the pendency of the appeal would be potentially subject to the reinstated mechanic's lien, which would continue to encumber the land even as against a purchaser or mortgagee for value.

Presumably, therefore, a title examiner would always have to check the court docket to review the status of case where a judicially discharged lien appears in the chain of title. Under this view, even with a favorable trial court ruling, a bond may need to be posted to permit the sale of the real property at issue. That result would render the "summary" discharge procedure under Section 15A "summary" only with respect to the first step in such a process, as the lien would continue to encumber the title for years until a final ruling is entered on appeal.

Unsettled area of law

No case law or title standard specifically addresses this dilemma. Compare REBA Title Standards No. 63, 64 and 65. Chapter 254 does not give any clear guidance on this issue. Nor does Rule 62 of Mass.R.Civ.Proc. or Rule 6 of Mass.R.App.Proc., although a successful motion under either of these rules by the appellant to stay the order would clarify the issue in that instance.

However, there is nothing clearly in either rule that would compel the appellant to file such a motion in order to get the benefit of a stay pending appeal, or that would clarify that, failing to do so, the appellant *does not* get the benefit of a stay or a *nunc pro tunc* reinstatement of the lien if the appeal is successful.

It will be left to future court decisions or legislation to decide whether a mechanic's lien discharged under Section 15A is dead, alive, or floating along the River Styx somewhere in between because of an appeal of the discharge order.

Conservation restrictions – A primary land use tool

Continued from page 5

CRs have many uses

As noted above, CRs have many uses. While originally used primarily as a means by which land owners could extinguish development rights as a contribution to open space protection, CRs are increasingly purchased (using public or private funds, or both), and may be granted as part of regulatory approvals for development.

Zoning boards, conservation commissions, the Massachusetts Natural History and Endangered Species Program, and the Department of Environmental Protection now use CRs to ensure compliance with regulatory approvals or enforcement actions. The Community Preservation Act (M.G.L. c. 44B) requires that land acquired with CPA funds be encumbered with a CR or one of the other types of restrictions described in M.G.L. c.184, §31.

Charitable contributions of CRs must also meet the Internal Revenue Service's requirements that the restriction be a permanent "qualified conservation interest" described in §170(h) of the Internal Revenue Code and related regulations. The IRS has specific requirements not only for the nature of the real estate interest conveyed, but also for the qualifications of the donee organization and the valuation of the charitable contribution.

The requirements for valuing the charitable contribution state in part that the valuation must be undertaken by a qualified appraiser, and that the value of the contribution must be adjusted for any increased value to adjacent property controlled by the donor. Across the nation, the IRS has recently increased its scrutiny of such contributions, seeking overstated valuations and situations in which there is insufficient public benefit to meet the requirements of a qualified conservation interest under IRS regulations.

No federal tax deduction may be received where the conveyance is a regulatory requirement or a quid pro quo for a development approval.

Of particular note to the real estate bar is M.G.L. c.184, §33, which provides that a municipality may file with its registry of deeds a "public restriction tract index" on which the §31 restrictions are identified. The author is aware of no such index having been created. Although all of the CRs approved under M.G.L. c.184 have been recorded within the past 40 years, and while CRs customarily require that notice of the CR is included in each subsequent deed conveying the property, the time will soon be upon us when today's customary title practices might not uncover a CR granted more than a half century before.

At that time, it appears that title practices will have to change to either longer title searches, review of an EOEA index of CRs, or review of public restriction tract indexes for each municipality of the state.

Other related topics of interest are beyond the scope of this article, including applicability of Article 97 or the charitable trust and public trust doctrines, cy pres applications, and various limitations on standing and enforcement of CRs.

Resources for additional information include EOEA's Division of Conservation Services (at mass.gov), the Massachusetts Land Trust Coalition (at massland.org), and the national Land Trust Alliance (at lta.org).

Mark Your Calendars!

REBA 2006 Annual Meeting
Tuesday, November 7, 2006
DCU Center, Worcester

Legislation modernizes mortgage discharge statute

Continued from page 1

necessary instruments of release should create liability for the full penalties – if the responsible party provides the necessary documentation and the required recording fees within 30 days of a written demand, except that a mortgagor shall still be entitled to "such actual damages as the mortgagor reasonably establishes are attributable to the failure to comply" in the first instance.

Some lenders expressed concern that liability may attach even when they complied with their responsibilities to provide or present for recording a proper discharge, but which never got to record due to the failures of registry staff, third party contractors, borrowers or even closing attorneys, any of whom might be culpable for a missing discharge (or assignment) in a given instance.

Therefore, subsection (c) of Section 55 provides that a mortgagee or servicer that receives a written demand for recordable documentation shall have no liability, if (a) it can reasonably demonstrate by documentation or other evidence from its files that the discharge and any required supporting documentation and recording fees were sent to the closing attorney or other person transmitting the payoff within the prescribed time period; or (b) in the event that such records are no longer available, "such compliance is reasonably demonstrated by showing that the mortgagee or servicer …. has established reasonable procedures to achieve compliance with its obligations, that such procedures are routinely followed and have become an established business practice."

In either case, however, a mortgagee or servicer must provide to a mortgagor or an authorized person acting on its behalf a confirmatory discharge within 30 days after receipt of the written demand.

The draftsmen believe that this financial incentive to provide a confirmatory discharge in a timely manner would be useful in other circumstances in which no discharge has been recorded but where there is evidence that a payoff has been received by the mortgagee or servicer.

The parallel responsibility of a closing attorney to promptly record discharges and assignments duly received by his office is another feature of the legislation. New subsection (d) of Section 55 provides that a closing attorney who receives the original discharge would be held to a similar standard as the lender or servicer who accepts payment.

The responsibility of the closing attorney who has received a proper discharge (and other necessary documentation of authority) must record within 45 days, and failure to do so will result in liability for the greater of $2,500 or actual damages, plus reasonable attorney's fees and costs.

The closing attorney's liability would be limited to actual damages sustained by a mortgagor if, within 30 days of receipt of a written demand either to record such discharge or to provide it to the mortgagor or to another attorney closing a transaction on the mortgaged property, he either records the discharge or provides it to the mortgagor or the other attorney making the demand, together with any recording fee previously withheld from the mortgagor's funds.

Improved discharge by affidavit

The old Chapter 183, Section 55 provided for only one remedial solution if the closing attorney was unable to obtain a discharge when there is evidence that the mortgage debt was paid: an affidavit, issued by a Massachusetts attorney, with evidence attached to show that the mortgagee received payment. This evidence had to include a copy of the cancelled payoff check, often onerous or impossible to obtain.

The new Chapter 183, Sections 55(g) and (h) provide for more than one remedial solution for the inability to obtain a discharge. An affidavit from an attorney is the first remediation available under Section 55(g)(1) for prior mortgages with less onerous requirements than in the previous statute. The affidavit must state that:

- it is made by a Massachusetts attorney;
- it is made on behalf of the mortgagor or her assigns;
- whether the attorney could determine if a written payoff statement was provided by the lender;
- the affiant has ascertained that the mortgagee, mortgage servicer, or note holder has received full payment of the indebtedness secured by the mortgage, and the affiant is in possession of documentary evidence of the payment, which may include (i) a cancelled check; or (ii) bank confirmation of a wire transfer; or (iii) written confirmation by an attorney that the lender verbally acknowledged payment; or (iv) a M.G.L. c.183, §5b affidavit by the closing attorney who transmitted the payoff, certifying that the payment was not rejected or returned;
- more than 45 days have elapsed since the payment was received; and
- the closing attorney has not received either the discharge or evidence that the discharge was recorded and the lender was given 45 days notice of the affiant's intention to record the affidavit.

The affiant attorney must provide notice to the lender that he or she intends to record a discharge by affidavit, and that the lender will be subject to the liabilities and remedies under this section unless the lender provides a discharge.

In Section 55(g)(2), the legislation explicitly includes the discharge-by-affidavit option for current mortgages pursuant to a notice that may accompany the transmittal of a mortgage payoff by a closing attorney. In this way, a current mortgagee can be put on notice at the point of receipt of a payoff that a discharge by affidavit may be recorded if the mortgagee does not provide or record the required discharge within the statutory 45 days.

For residential mortgages, recording a note marked "paid" by the holder is now record proof of payment, as provided in new Section 55(h), providing a second method to discharge an undischarged mortgage.

New Section 55(i) of Chapter 183 codifies the ability of an attorney to rely on the recital of a merger of entities, or the change of name of a corporate entity within the discharge of the mortgage, as proof of the merger or change of name. This provision mirrors a Minnesota statute.

(Editor's note: This is the second of a two-part article. The first part appeared in the April 2006 issue of REBA News. On April 13, Gov. Mitt Romney signed into law Chapter 63 of the Acts of 2006, a reform measure that modernizes the Massachusetts mortgage discharge procedures and other mortgage-related practices in the closing process. This part of the article addresses the new remedies for enforcing the law.)

Judicial remedies

Another statute, M.G.L. c.240, §15, is also completely replaced, with new standards for discharging mortgages in the Land Court or the Superior Court, and shortened waiting periods for applying for such discharges.

The legislation also shortens the statute of limitations to exercise a power of sale for obsolete ("older") mortgages in M.G.L., c.260, §33, from 50 years to 35 years, unless the maturity date is stated in the mortgage, in which case five years would be added to that date. In either case, the term may be extended up to five years at a time, if the extension instrument is recorded prior to expiration of the term. And M.G.L., c.260, §35 is also updated to include registered land mortgages within the scope of Section 33 of the chapter.

Other changes

Historically, Section 54B of Chapter 183 authorized a discharge or assignment of a mortgage to *any* officer of an entity that holds record title to the mortgage without a recorded vote authorizing the officer to so act. The current revision to Section 54B extends this authority to include the power to sign an instrument of subordination, non-disturbance, recognition or attornment, as well as a power of attorney, for the purpose of foreclosing a mortgage.

Also included in the legislation is the repeal (sought by the Massachusetts Bankers Association) of certain provisions in M.G.L., c.184, §§17B-D that were believed to be duplicative of federally-mandated disclosures that lenders are required to give to consumers. Retained is the required disclosure by lenders that the mortgagee's attorney represents the interests of the mortgagee, and that the borrower may wish to have personal counsel in the mortgage transaction.

Except for those amendments to Chapter 184, which took effect July 1, Chapter 63 shall take effect Oct.1, and "shall apply to all mortgages, whether recorded prior to, on and after the effective date hereof, except that, as to any mortgage the term of which as a result of [the shortened statute of limitations in Sections 33 and 35 of Chapter 260] … would expire within one year after the effective date … , said term shall be extended for a period of one year from the effective date…."

DiMasi: 'I will work to make sure House Bill 904 does not advance this year'

Continued from page 1

quote. He said, "I never learned anything while I was talking so I'll shut up and listen." This "listen and learn" philosophy really reflects my leadership style and how I approach my role as Speaker.

The 2005-2006 legislative session has been one of the most productive sessions in recent memory. Progress has been made on many fronts – most notably in the areas of economic development and health care.

Before I get to these accomplishments, I would like to take a moment to highlight two initiatives that are of particular interest to the Real Estate Bar Association (REBA). First, as many of you may know, legislation to modernize the mortgage discharge statutes became law on April 13, 2006. I know that getting this law on the books has been a priority for REBA for some time.

Many of you worked with the Legislature to see Senate Bill 2278 through to passage. I commend you for your efforts and am pleased to report that this law brings Massachusetts law in line with current national and international lending practices.

In contrast to S.2278, I am well aware that REBA does not want to see House Bill 904 signed into law – and for good reason. H.904 would allow corporations or agents of corporations to handle real estate closings. Proponents claim that allowing non-attorneys to assist homebuyers will bring closing costs down. They say it's a pro-consumer initiative that's long overdue.

You know and I know that buying a home is the single largest investment most families ever make. And they deserve every possible legal protection afforded to them by Massachusetts law through every step of the way. H.904 would sanction an unregulated and unsupervised process. This bill threatens to strip consumers of critical safeguards and add to the cost of buying a home.

Additionally, it would drain critical funding from the Massachusetts Legal Assistance Corporation. The Legislature created MLAC 20 years ago to provide civil legal assistance to poor and low-income citizens across the Commonwealth. Last year, we appropriated $8.56 million for MLAC legal aid.

This year the budget the House passed at the end of April increases MLAC funding by nearly $1 million, bringing its FY'07 total to $9.47 million. IOLTA accounts, funded in large part by real estate attorneys, supplement MLAC state funding and represent a critical financial underpinning of civil legal aid programs.

If H. 904 were to become law, it would have grave consequences for homebuyers and MLAC clients alike. Removing attorneys from real estate closings would deplete IOLTA accounts and, as a result, seriously impair MLAC's ability to continue to provide the services that open the doors of justice for so many of the Commonwealth's citizens.

The Committee on Judiciary held a public hearing on H.904 in February. I know that members of REBA testified in opposition to the bill. I've met with REBA on this issue. You should know that I am opposed to H.904 as well and will work to make sure it does not advance this year.

A bill that *will* advance this year addresses valid concerns about excessive regulations in the state of Massachusetts, as well as build on the House's considerable economic development achievements. The House unveiled a sweeping streamlined permitting bill in March and I am working to bring it to the floor in the next couple of weeks.

In North Carolina, permitting takes two to six months. In Massachusetts, the same process takes up to three years. And to think that 10 taxpayers suits can cause further delays. This is bad for business, bad for the economy and bad for the overall quality of life here in the Commonwealth.

The House bill proposes two comprehensive and innovative reforms.

First, it creates a new division of the trial courts to focus exclusively on land use and environmental appeals. Second, it eliminates 10 taxpayer suits in waterfront developments while maintaining appropriate recourse for impacted communities and abutters. These two provisions will go a long way toward reducing needless delay, cutting through red tape and drastically improving the predictability of doing business in Massachusetts.

Additionally, the legislation seeks to:

- Create a Massachusetts Permit Regulatory Office to assist companies in the process of locating to Massachusetts;
- Require participating communities to act on building permits within 180 days;
- Employ regional permitting specialists to walk businesses through the process; and
- Eliminate the backlog of Department of Environmental Protection appeals and require magistrates to issue a written decision within 90 days of a hearing's conclusion.

I believe that the House bill establishes a user-friendly process that promises to attract new development. Working together, we will help existing businesses expand and show promising start-ups that the future is bright here in the Commonwealth.

And now, on to the issue that I'm sure you've heard a lot about – health care reform. Believe me when I say this was truly a moment when opportunity and obligation intersected. My colleagues and I focused so much time and energy on this issue because costs were rising uncontrollably and a growing number of Massachusetts residents were uninsured.

We had an opportunity to help people and once again have Massachusetts set an example for the rest of the nation to follow. The law will cover 95 percent of the state's 550,000 uninsured residents over three years.

It's complicated and intricate but based on one principle that's easy for everyone to understand – shared responsibility. The House embraced this principle early on. I told my members that the Massachusetts Constitution says: "The body politic is formed by a voluntary association of individuals: it is a social compact…that shall be governed by certain laws for the common good."

LISA KESSLER

House Speaker Sal DiMasi

Everyone is asked to participate in this law and take responsibility. Everyone – individuals, state and federal government, employers, providers and insurers – all have to be part of the solution.

This law restores and expands MassHealth benefits for the poor and disabled. It requires individuals to get insurance but helps them with subsidies and affordable products. It provides fair and equitable financial support for our hospitals, doctors and community health centers, the institutions and people who are the backbone of our health care system.

It provides for a more efficient health care system by improving the quality of our care and containing its costs. At the end of the day, it's a blueprint for providing affordable quality insurance to virtually every man, woman and child in the Commonwealth. As we enter in to the implementation stages, I know that it will take perseverance, diligence and a strong sense of purpose to make this work.