REBA NEWS

Spring 2007
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The Newsletter of the
Real Estate Bar Association for Massachusetts

Foreclosure lessons in 'Strayton' prove timely

By Melvin S. Hoffman, Esq.

Judge Robert Somma of the United States Bankruptcy Court for the District of Massachusetts recently entered a preliminary injunction prohibiting Champion Mortgage Company from completing a foreclosure sale of a Natick condominium unit in which it held a second mortgage.

Somma's decision in *Strayton v. Champion Mortgage,* 2007 Bankr. LEXIS 177 (2007), is of importance to any lender or attorney who deals with foreclosures.

The Straytons were indebted to Champion on a home equity loan secured by a second mortgage of their condominium. In August 2005, the Straytons defaulted on the loan to Champion and, over the next year or so, a series of negotiations and forbearances between the parties ensued.

In August 2006, while forbearance negotiations continued — apparently, along with defaults as well — Champion elected to foreclose its mortgage. A foreclosure sale by public auction took place on Sept. 27, 2006. Four qualified bidders attended the sale. The successful bid was $130,000 subject to the outstanding first mortgage debt of approximately $100,000.

Prior to the closing of the sale to the successful bidder, Mr. Strayton filed a Chapter 13 petition in the Bankruptcy Court and sued Champion, seeking to invalidate the foreclosure sale as a sale not in compliance with Massachusetts law and also as a fraudulent transfer (a sale for less then reasonably equivalent value).

In granting the debtor's motion for a preliminary injunction, Somma found that there was a likelihood that the debtor would succeed on the merits of his action to invalidate the foreclosure sale. Based on the findings, Somma concluded that Cham-

Continued on page 24

Long-time board member and former association president Joel A. Stein received REBA's Richard B. Johnson Award at the 2006 Annual Meeting and Conference. The award, named for Dick Johnson, association president in 1971 and 1972, is REBA's highest honor, a lifetime achievement award. From left are: E. Christopher Kehoe, former president and co-chair of the group's Legislation Committee; Stein; and Robert J. Moriarty Jr., REBA's 2006 president

REBA unveils 'short list' of legislative goals for 2007-2008

By Edward J. Smith, Esq.

The term of the 185th General Court of the Commonwealth, 2007-08, is already two months old. Legislation that was filed seasonably, in December 2006, is being numbered by the House and Senate clerks and referred to appropriate committees.

Nearly 4,000 House bills and over 2,100 Senate bills make up the non-budgetary "wish lists" of legislators and their constituents.

REBA has introduced five bills of our own. We expect also to support a few that were filed independently of REBA.

REBA's Legislation Committee, co-chaired by E. Christopher Kehoe and Edward A. Rainen,

Continued on page 22

FDIC board member Curry to speak at Spring Conference

Former Massachusetts Commissioner of Banking Thomas J. Curry will deliver the luncheon keynote address at REBA's Spring Conference on Monday, May 7, at the DCU Center in Worcester.

Curry was highly regarded during his time as a Massachusetts regulator. He took office on Jan. 12, 2004, as a member of the Board of Directors of the Federal Deposit Insurance Corporation for a six-year term.

Curry serves as chairman of the FDIC's Assessment Appeals Committee.

Curry also serves as chairman of the NeighborWorks® America Board of Directors. NeighborWorks® America is a national non-profit organization chartered by Congress to provide financial support, technical assistance and training for community-based neighborhood revitalization efforts.

CURRY

Prior to joining the FDIC's Board of Directors, Curry served five Massachusetts governors as the commonwealth's commissioner of banks from 1990 to 1991, and from 1995 to 2003. He served as acting commissioner from February 1994 to June 1995. He previously served as first deputy commissioner and assistant general counsel within the Massachusetts Division of Banks.

He entered state government in 1982 as an attorney with the Massachusetts' Secretary of State's Office.

Curry served as the chairman of the Conference of State Bank Supervisors from 2000 to 2001. He served two terms on the State Liaison Committee of the Federal Financial Institutions Examination Council, including a term as committee chairman.

He is a graduate of Manhattan College, summa cum laude, where he was elected to Phi Beta Kappa. He received his law degree from New England School of Law.

What's in this issue…

A Supplement to Massachusetts Lawyers Weekly

New permitting ombudsman outlines goals

Nathaniel Stevens, Esq.

Gregory P. Bialecki, the commonwealth's first permitting ombudsman, spoke recently at the Boston Bar Association about his goals and plans for the newly created position which he assumed on Feb. 1.

Previously, he has been a partner at the Boston offices of both DLA Piper Rudnick and Hill and Barlow, with over 20 years of experience in real estate development and permitting in Massachusetts.

Bialecki began his address by clarifying what his role is not: to change the fundamental legal or regulatory scheme in Massachusetts; to be the permitting czar; or to issue permits if they're not timely issued.

Bialecki says his power, really, is the power of persuasion; to get local and state agencies, boards and authorities to act differently, specifically, to be more efficient and better coordinated. His objective is to "streamline" permitting and provide consistency and predictability to make the state competitive with other states as well as other countries.

To make permitting more predictable, he has set a goal of six months for all local and state permits to be issued. In streamlining permitting, he does not intend to forego any public involvement or stomp on "local concerns," though he recognizes the tension of those two goals. He aims for a faster, simpler, more understandable and coordinated (inter-municipal, regional and state-local) process.

The MEPA process provides a good forum to accomplish these goals, he believes. Bialecki would like state agencies to be more involved in the MEPA process, so as to have the big policy issues decided before application for individual permits are filed at state agencies.

His experience and observation is that agencies do not grapple with and decide policy issues raised by a project until after the MEPA process, and then only after the developer has spent lots of time in the permitting process. He believes such policy issues can be decided without a full permit application being filed.

Bialecki also wants his office to offer "one-stop shopping" for developers. Reminding us that there is no office or single contact to call in the commonwealth to determine what state and local community requirements must be met, he would like to fulfill that role. He is encouraging communities to set up similar "one-stop" shops.

As for the day-to-day activities that will help reach those goals, Bialecki said that they generally revolve around three areas.

The first is providing one-on-one assistance to projects.

The second is conducting affirmative outreach. Bialecki has been contacting each project proponent appearing in the last two Environmental Monitors to introduce himself and see how he can help. He acknowledged that learning about non-MEPA projects will be a bit more difficult because of the lack of a central database. He invited proponents or their attorneys to contact him.

The third is working with state agencies to increase predictability, consistency and coordination. He will also look at non-regulatory programs, such as financial and other incentives offered by the state.

Presently, the Massachusetts Permit Regulatory Office consists of Bialecki and April Anderson, deputy director. Anderson spoke briefly on G.L.c. 43D, which creates the Expedited Permitting Program that municipalities have the option of adopting. The Expedited Permit-

Continued on page 24

Nathaniel Stevens is an associate with McGregor & Associates. Since being admitted to the Massachusetts Bar in 1996, he has assisted with a diverse range of environmental and land use related matters at the firm. He is a graduate of Vassar College and Suffolk University Law School (cum laude), and has a M.S. in natural resource policy and planning from the University of Michigan's School of Natural Resources. Stevens can be reached at nstevens@mcgregorlaw.com.

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

From the President's desk

By Sami Baghdady, Esq.

The Title Appraisal Vendor Management Association (TAVMA) has again this year filed its legislation to permit corporations and non-attorneys to conduct residential and commercial real estate closings in Massachusetts.

Sponsored by Rep. Paul Kujawski of Webster, House Bill 1551, entitled "An Act Relative to the Practice of Law," provides that corporations and their agents may draft deeds, mortgages, leases, purchase-and-sale agreements and may represent lenders at closings.

In a second significant development, REBA's recently-filed action against National Real Estate Information Services, Inc. (NREIS), the national closing services provider based near Pittsburg, Pa., has been removed by the defendant from Suffolk Superior Court to U.S. District Court.

Represented by a national law firm, NREIS claims that restricting real estate closings to lawyers would violate the commerce clause of the U.S. Constitution.

TAVMA's behind-the-scenes involvement in the defense of this litigation is evident.

These outsiders who want to infiltrate the Massachusetts closing market have moved aggressively.

How has REBA responded?

First, in a joint effort with the Massachusetts Bar Association, REBA has established a task force to define the practice of law in Massachusetts. Chaired by retired Appeals Court Judge Rudolph Kass, the task force's mission is to formulate a recommendation to the Supreme Judicial Court on what precisely constitutes the practice of law. Kass' committee will draw a clear line on what practices are limited to members of the bar and, consequently, subject to the oversight and regulation by the Board of Bar Overseers.

I am grateful to Judge Kass for his enthusiasm and commitment in leading this effort.

Second, if NREIS claims that the current practice of real estate conveyancing by lawyers violates the U.S. Constitution, REBA will respond to that challenge in federal court.

As lawyers, we were trained in property law as a part of our mandatory curriculum in law school. Property law was a necessary study to pass our bar exam and to be licensed to practice law in the commonwealth.

It is a mockery of our profession when a foreign corporation alleges that the creation of legal rights in real estate violates the U.S. Constitution if it constitutes the practice of law.

Three years of law school and the bar exam drive me to argue passionately that the practice of real estate law must be restricted to the lawyer.

What do you suppose drives the foreign corporation to argue that the practice of real estate law should not be "monopolized" by lawyers?

In a number of other related initiatives, REBA is offering seminars on professionalism in the law aimed at less experienced real estate lawyers. The first seminar will be offered at our Spring 2007 meeting of the members in May as a breakout session and will provide instruction on how to avoid ethical missteps.

REBA is also providing mentoring by experienced practitioners to its newer members. This successful program now has over 75 participating mentees. We encourage experienced real estate lawyers to participate as mentors.

REBA's Paralegal and Title Examiners Committee is planning educational programs for the paraprofessional. Title examiners, for example, have no educational requirements, yet perform a vital function to the process of buying and selling real estate. PTEC's educational program will address this concern.

Finally, at the association's Spring Conference, the REBA Ethics Committee will propose for passage by the membership an ethical standard precluding a lawyer's participation in witness closings. This proposed ethical standard will parallel a recent ethical opinion on this subject.

Our duty as professionals is not to ourselves, but to our clients and the public we serve. This tradition of service is what distinguishes our profession from many other professions and vocations — a person with a degree in business administration, for example, is trained foremost in how to efficiently manage a business with the motivation of financial gain. And, this commitment to service is precisely why the practice of real estate law must remain with the lawyer.

The public has too much at stake, and at a minimum, the consumer deserves the benefit of the lawyer's professionalism.

Founder of Baghdady Law Offices with locations in Arlington and Worcester, Sami Baghdady concentrates in commercial and residential real estate law, zoning and land use, leasing, as well as business and corporate law. He has served on the REBA Board of Directors since 1999, chairing the association's Membership and Public Relations Committee since 2000. He led the Committee's 2004 launch of the REBA peer-to-peer mentoring program, a popular member benefit. He also established the association's successful state-wide lawyer advertising program, which promotes the role of the real estate lawyer in the conveyancing process. He can be contacted at sami@baghdadylaw.com.

Mark Your Calendar!

REBA SPRING CONFERENCE

Monday, May 7, 2007

See details on pages 12 -13

REBA seeks photo of former association president

The Presidents Conference Room in REBA's headquarters offices at 50 Congress Street includes photos of all association presidents from the mid-1950s with the exception of Bruce Zeiser, who served as president for a two-year term in 1975 and 1976.

Zeiser was a Wellesley resident who also represented Wellesley in the Legislature.

Anyone who can help us locate a photo of Zeiser will be rewarded.

REBA urges transparency in attorneys' use of trade names

REBA has requested that the SJC's Standing Advisory Committee on Rules of Professional Conduct amend the rules to ensure that a lawyer's use of a trade name, like "Apple Tree Title, LLC," does not mislead the public to think it is dealing with a non-lawyer.

The failure of a lawyer to plainly identify himself or herself as a lawyer creates a number of potential serious problems. Individuals and companies dealing with these entities likely do not know that they are "clients" of a lawyer or law firm and that the entities owe them fiduciary obligations not owed to ordinary business customers.

In addition, these "clients" would not necessarily know that these entities are required to adhere to the Rules of Professional Conduct in all of their interactions, that monies held by the entities must be placed in IOLTA accounts, that complaints against them can be submitted to the BBO, or that the Client Security Fund is available to them for any claims of defalcation.

This issue is particularly troublesome for real estate attorneys. First, while conveyancing is the practice of law in Massachusetts, many states outside of New England permit non-lawyers to close loans. Therefore, if the lender is from out-of-state, it may incorrectly assume that the entity it has retained is not a law firm.

Second, because the lender is often the party to the residential real estate transaction that chooses the law firm to close the loan, the other parties to the transaction, who are also less sophisticated than the lender, likely will not focus on the qualifications of the entity chosen by the lender. Consequently, the home buyer and seller may not know that the individual responsible for closing their transaction is an attorney.

The states differ in the use of trade names by attorneys. A number of states strictly forbid attorneys from using trade names under any circumstances because the use of trade names is considered to be inherently misleading. Other states permit lawyers to use a trade name, provided that the name of one of the lawyers in the firm is included.

Presently, the Massachusetts Rules of Professional Conduct allow the use of trade names provided that the names are not misleading.

Although the rules themselves do not prohibit trade names like "Apple Tree Title," the comments to Rule 7.5 suggest that there must be some clear indication in the name that the entity is a law firm.

The comments provide two examples of acceptable trade names that are not misleading. In each of those examples, "ABC Legal Clinic" and "Springfield Legal Clinic," the trade name plainly discloses that the entity is a law firm. Consequently, individuals and business dealing with these entities have reason to know that these entitles are engaged in the practice of law.

In light of the comments to Rule 7.5 and the significant potential for harm to the public, REBA has requested that the Standing Advisory Committee amend the rules to require that any lawyer or law firm using a trade name be required to take affirmative steps to assure that their clients, and other persons dealing with the lawyer, know that the lawyer or law firm is, in fact, a licensed Massachusetts lawyer and law firm.

Judgment expected in legal action against notaries

In November 2006, REBA filed an action in Suffolk Superior Court against notaries public who were performing "witness only" or notary closings (*The Real Estate Bar Association For Massachusetts, Inc. v. Sharon Ann Trainor, et al.,* Civil Action No. SUCV2006-4633).

The Superior Court granted a preliminary injunction, enjoining the defendants from participating in a residential real estate closing unless they were supervised by an attorney.

Since that time, the defendants have either defaulted or agreed to the entry of a consent decree in which they are "enjoined from conducting closings of real estate transactions, presiding over the execution by mortgagors of loan and real estate title documents, notarizing any documents at the closing of a real estate transaction or participating in any other way in any real estate conveyances, except as an employee and under the supervision of an attorney licensed to practice law in the Commonwealth."

REBA expects that a final judgment will be entered against the defaulted defendants in the next few months.

In addition, REBA's counsel has notified other notaries public who are advertising their willingness to perform "witness only" or notary closings on various websites that such activities violate Massachusetts law and put them at risk of similar legal action.

Presently, most of these notaries public have indicated to REBA that they will no longer participate in any real estate closings except under the supervision of an attorney.

If you are aware of a non-lawyer notary public performing witness only or notary closings in Massachusetts, please contact REBA at upl@reba.net.

REBA unveils Staples plan

REBA has done it again.

2007 is a year of global review with regard to the benefits offered to REBA members. One of the first of many new benefits rolled out this year is the newly-forged Staples Business Advantage pricing plan, exclusively for REBA members.

This plan uses the aggregate buying power of our 3,000 members to reduce the prices of all the office supplies offered by Staples to any REBA member who decides to take advantage of this program. Already, several hundred members have begun saving money and operating their offices more efficiently with this program.

Specific savings usually range from 18 to 60 percent, depending on the item. For instance, a toner cartridge for a black and white printer would normally cost $130 through Staples. With the new program, the price has been dropped to $103, a savings of 21 percent. Other examples would be saving 55 percent on hanging file folders, 38 percent on Post-It notes, 18 percent on three-ring binders and 41 percent on most writing implements.

Staples Business Advantage offers next day delivery on orders placed before 5 p.m., a personal account manager, free delivery on orders over $30 and the extension of the corporate pricing to any one of the 1,800 worldwide retail stores for those emergency purchases.

Orders can be placed through an easy-to-use, award-winning website or over the phone through your dedicated customer care manager. All of this, combined with simple billing and a hassle-free return process, makes ordering essential office supplies that much easier.

To learn more abut the program, log on to www.reba.net and click on the Staples Business Advantage logo.

Staples Business Advantage is a $16 billion division of Staples, Inc., using the buying power of large business groups to leverage competitive pricing. Staples, Inc., #137 on FORTUNE'S Top 500 list, retains the title of the largest office supply company on the planet.

Conveyancing Leadership Council launched

SIMONS

KUSHNER

A former chair of REBA's Residential Conveyancing Committee, Marvin W. Kushner now serves as the first chair of REBA's new Conveyancing Leadership Council. He practices with Kushner Sanders Ravinal in Wellesley. He can be reached at mkushner@ksrlaw.com. Michelle T. Simons co-chairs the association's Residential Conveyancing Committee and also serves on the group's Strategic Planning Committee. She practices with the firm of Brecher, Wyner, Simons, Fox & Bolan in Newton. Her email address is msimons@legalpro.com.

By Michelle T. Simons, Esq. and Marvin W. Kushner, Esq.

In January 2007, REBA's Residential Conveyancing Committee, under the leadership of Michelle Simons and Stefan Nathanson — with support from president-elect Thomas Bussone II — launched a new initiative: the Conveyancing Leadership Council.

The genesis of the new group began with REBA's immediate past president Bob Moriarty. He believed that the association's Residential Conveyancing Committee generated so much energy responding to legislation affecting conveyancing practice that an expanded outreach group was needed.

As a result of Bob's suggestion, the RCC began to evaluate and identify a number of conveyancing attorneys who could become a valuable asset in our efforts to combat the practice of law by non-lawyers as well as several other issues currently affecting our day-to-day real estate practices.

The committee decided to intentionally limit the size of the CLC to 150 lawyers. Membership would be by invitation only. The group unanimously agreed that Marvin W. Kushner would lead the group.

In selecting invitees, the committee reviewed factors such as reputation, experience, willingness to establish contact with legislators, as well as an overriding commitment to support the association.

We believe that the CLC will become the 'gold standard' of commitment to REBA.

The committee also wanted to use the council as a resource for new ideas and an incubator of new initiatives. In return, the members of the CLC would be kept apprised of REBA activities on an ongoing basis via special e-mails, private receptions and other communications.

Initial recruitment meetings were scheduled in Plymouth, Sturbridge and Newton to articulate the council's goals and how best to achieve them. Attendance at the three meetings was very encouraging, and over 100 REBA members agreed to join the CLC.

A common thread at these early meetings was the declining level of professionalism and civility among lawyers in real estate transactions. Several attendees believed that REBA could improve the climate of professionalism within the transactional bar.

We believe that the CLC will become the 'gold standard' of commitment to REBA and to the highest level of professionalism. This is a small, committed group that plans to meet two or three times a year, but will work diligently behind the scenes to advance the interests of the conveyancing bar while serving and protecting home buyers and homeowners across the commonwealth.

Small-business loan programs offer advantages

By James J. McKenzie, Esq.

While lawyers practicing in the commercial lending field are familiar with the various types of commercial loans offered by local and national lenders, many are not familiar with the 7(a) and 504 programs offered by the U.S. Small Business Administration (SBA).

The 7(a) program is a loan guarantee, while the 504 program is a direct loan funded by means of a debenture issued on a monthly basis by the SBA. The SBA website, www.sba.gov, has a more complete description of these and other SBA loan programs and forms.

The 7(a) loan program is used by participating lenders, usually commercial banks. The loan is made directly by the lender but guaranteed by the SBA up to 85 percent of the loan amount. It is attractive to the lender, as the SBA guarantee reduces risk, and it is attractive to the borrower because it permits them to obtain financing which they may not otherwise be able to secure.

The guarantee is up to 85 percent for loans of $150,000 or less and 75 percent for loans in excess of $150,000 the maximum loan amount is $2 million. The interest rates on 7(a) loans are set by the participating lender, but by SBA regulation, cannot exceed prime plus 2.25 percent if the loan has a maturity of less than seven years and prime plus 2.75 percent if the loan has a maturity of seven years or more.

For loans that are less than $50,000, the interest rate can be as high as prime plus 4.7 percent if the loans carry a maturity of seven years or more. Variable rate loans are allowed, but must be pegged to either the lowest prime rate or the "SBA optional peg rate."

Loan maturities are established by the lender subject to caps established by the SBA. As with most commercial loans, they are based upon the borrower's ability to repay, the purpose of the loan proceeds, and the useful life of the asset being financed.

The caps set by the agency are 25 years for real estate and equipment and usually seven years for working capital.

For other fixed assets, the maturity date is generally limited to the economic life of the asset but, again, subject to the 25-year cap.

In order to make the 7(a) loan program self-sustaining, the agency charges both a guarantee fee and a servicing fee for each loan that is disbursed based on the guaranteed portion of the loan. Most lenders pass on the guarantee fee to the borrower, but the annual service fee cannot be charged to the borrower.

Loans under the 7(a) program are intended to be an economic stimulus. They provide term financing for businesses that might not otherwise be made and at competitive rates. They are attractive to commercial lenders because the lender receives the comfort of the federal guarantee. They are attractive to borrowers, particularly smaller start-ups who would not otherwise be able to obtain commercial financing at competitive rates and terms for a long-term maturity.

The 504 loan provides affordable, long-term, fixed-asset financing to small and medium-size businesses through the sale of government-guaranteed bonds. The public policy purpose of this program is to encourage local and community-based economic development. It is attractive because it provides long-term financing at a fixed rate which, in many cases, is a below market interest rate.

The 504 loan is a direct loan made through an SBA debenture. These loans are put together by Certified Development Companies authorized by the agency.

CDC's are generally non-profit corporations that operate in either a local or statewide area to provide financing for small businesses. Sometimes they are affiliated with a local chamber of commerce or development agency.

A 504 loan must be made in connection with loans from a commercial lender because by regulation, a 504 loan cannot finance more than 40 percent of a project cost. In addition, the borrower must contribute at least 10 percent of the project cost. The remaining 50 percent is obtained from the commercial lender. The structure, therefore, in the typical 504 transaction, is a 50/40/10 percent ratio.

Generally, the maximum 504 loan amount is $1.5 million. The limit is increased to $2 million when meeting a public policy goal as defined in the regulations or $4 million for a business classified as a "small manufacturer" that either creates or retains one job per $100,000 financed by the 504 loan or improves the economy of the locality or community where it is located by meeting the established public policy goals.

The 504 program is attractive to commercial lenders because they receive a first collateral position in the asset being financed, yet they are only obligated to fund 50 percent of the project cost. As with the 7(a) program, this allows lenders to undertake projects that they might not otherwise do without the 504 loan.

They are attractive to borrowers because they provide long term financing at a fixed rate of interest, which is quite often below the market interest rate. In addition, in most circumstances, 504 loans are both transferable and assumable.

The debentures that fund these loans are issued monthly for either 10 or 20 years depending upon whether they finance real estate or machinery and equipment. They may be used to purchase or improve land and buildings, construct new buildings or renovate existing buildings, or purchase machinery and equipment.

The 504 loans are secured by the assets which they finance, such as real estate or machinery and equipment. The security taken by the SBA is second in priority to that of the commercial lender that provides the 50 percent financing. Generally, the personal guarantee of any owner whose has 20 percent interest in the project property is also required.

Other advantages of the 504 program are that certain soft costs associated with the loans, such as the CDC's attorneys' fee and the underwriting and lending fees, may be included in the loan proceeds and financed over the term of the loan. This lessens the financial drain on the borrower, allowing it to finance those costs over a period of time, rather than having to expense them, thereby preserving capital.

Borrowers benefit by obtaining 40 percent of the financing needed for their projects at a below-market interest rate, which is fixed for a long term and is transferable and assumable, if they decide to sell their business.

As with the 7(a) program, the use of a 504 loan allows projects to be financed that otherwise might not be.

A long-time member of REBA, Jim McKenzie practices in Norfolk County with a concentration in commercial and residential real-estate financing, real estate, representation of small businesses, estate planning and administration of estates. He serves on the association's Commercial Real Estate Finance Committee, and he can be reached at jjmcke@verizon.net.

Brownfields 101: from analysis to cleanup

By Ileen Gladstone and Julie Pruitt Barry, Esq.

GLADSTONE

BARRY

Revitalizing contaminated properties into housing, mixed-use or job-producing economic development happens when the stigma of those properties are removed.

Expedited cleanup opens the door to revitalizing urban cores and town centers while relieving some of the pressure to develop outlying green space.

The term "brownfields" describes properties with certain common characteristics. Typically, they are abandoned, or for sale or lease; they may have been commercial or industrial, and they are either known to be contaminated or haven't been assessed due to fear of unknown contamination.

Redevelopment of brownfields means thinking about and planning for contamination during all phases of a project: due diligence, acquisition, design and construction.

Due diligence

Environmental due diligence begins with an ASTM Phase I study, focused on identifying and characterizing significant potential environmental, health and safety liabilities associated with past and current practices at the facility or from off-site sources.

The Phase I study typically includes a site history, site reconnaissance and a regulatory review to identify the potential for "Recognized Environmental Concerns" (RECs).

The site history is a review of readily available historical documents such as aerial photographs, street atlases, municipal building records and fire-insurance, geologic and topographic maps.

Site reconnaissance identifies visible signs of hazardous substances management or contamination.

Regulatory compliance and database review may identify known historic releases of oil or hazardous materials and the regulatory status of those releases.

If the Phase I study identifies RECs, a Phase II investigation is often conducted to confirm the presence of oil or hazardous materials, and typically includes sampling of soil, surface water and groundwater, chemical analysis of the samples, and evaluation of the data.

The goal of the Phase II investigation is often to more precisely understand the environmental risks that may need to be managed, and the associated costs.

Acquisition

Once a property is known to be contaminated, its presence is often a consideration in acquisition. The purchase price of a property may be reduced to offset the cost of the cleanup. The current owner may be required to clean up the property or set aside funds to cover those costs.

These cleanups are risk based, meaning the cleanup goals and associated costs are established based on how the property will be used. Usually the less sensitive the use of the property, the less cleanup is necessary.

Cleaning up an industrial property for reuse as a commercial building often requires less cleanup than for residences. The cleanup reflects how the property will be used, now and in the future, and this use is locked in by a deed restriction known as an "activity and use limitation." A property that has already been cleaned up through the state process — the Massachusetts Contingency Plan — may already have an AUL, limiting its use and affecting its value.

Design

The type, location and extent of contamination can affect the project pro-

Continued on page 23

Ileen Gladstone, P.E., LSP, LEED AP, is a vice president at Boston-based GEI Consultants, Inc., one of the nation's leading geotechnical, environmental engineering, and water resources firms. She can be reached at igladstone@geiconsultants.com. Julie Pruitt Barry is a partner at Nutter, McClennen & Fish, and co-chair of the firm's Land Use Practice Group. She can be reached at jpbarry@nutter.com.

Maximizing tax-deferral benefits under §§1031 and 121

By Paul Savery and Jon Christianson, Esq.

What does investing in real estate have in common with the game of Monopoly? Winning at both requires acquiring the most valuable real estate by trading less desirable properties for better-producing real estate assets.

For Massachusetts taxpayers, it is much easier to finish a winner by understanding how to combine the tax-deferral benefits of an Internal Revenue Code §1031 exchange with the tax-exclusion benefits on the sale of a principal residence under IRC §121.

As many legal advisors know, a taxpayer may exclude from income a portion of the gain resulting from a sale of the taxpayer's principal residence. Under §121, a married couple is permitted to exclude $500,000 of gain, and a single taxpayer may exclude $250,000.

To qualify for the home-sale exclusion, the taxpayer must have owned the property and used the property as the taxpayer's principal residence for any two of the most recent five years (determined with reference to the sale of the principal residence). The exclusion may only be claimed once every two years.

Based upon the foregoing rule, many taxpayers have pursued a strategy that involves converting appreciated investment property into a principal residence, living there for two years, and thereafter selling the property as a principal residence. In doing so, the taxpayer was able to eliminate capital gain on the sale of the appreciated property up to the amount of the permitted exclusion in as little as two years. Congress recently acted to restrict, but not eliminate, the ability of these taxpayers to eliminate deferred gains attributable to prior exchange transactions.

In 2004, Congress amended §121 to provide that in cases where a taxpayer acquires investment property in a tax deferred exchange under §1031, and thereafter converts the property into a principal residence, the exclusion from gain resulting from the sale of the taxpayer's principal residence will not apply if the sale occurs during the five-year period commencing on the date the property was originally acquired (See IRC §121(d)(10)). Absent the five-year rule, a taxpayer could defer gain on business or investment property in a §1031 exchange, and, after converting the property received in the exchange to a principal residence, reduce or eliminate that gain by excluding it under the home-sale exclusion. Thus, gain from business or investment property that was only meant to be deferred under §1031 would be permanently excluded under a provision that was meant to apply only to a taxpayer's principal residence.

The limitation under §121(d)(10) prevents a taxpayer from sheltering all or part of that deferred gain under the home-sale exclusion, unless they hold the property received in the exchange (that was converted to a principal residence) for at least five years. As long as the sale of the taxpayer's principal residence occurs more than five years after the date of the acquisition of the residence, the §121(d)(10) limitation does not apply and gain (other than gain resulting from accumulated depreciation) may be excluded under §121 assuming that the sale otherwise satisfies the requirements for the home-sale exclusion, such as the two-year use requirement. Accordingly, with proper planning, §121 still provides an opportunity to eliminate gain inherent in appreciated investment properties.

Savvy property owners can use two tax code sections to acquire the desirable "Boardwalk" and "Park Place" properties and win the investment game.

As previously mentioned, the amount that may be excluded under §121 is limited to $500,000 for married couples and $250,000 for single individuals. Given the recent increase in the value of investment real estate, and with the new five-year wait between the acquisition of property converted to a residence and its sale, many taxpayers are faced with gains far in excess of amounts that may be excluded under §121. Moreover, by converting the residence from an investment property to a principal residence, the taxpayer eliminates the potential to exchange the property under §1031, or do they?

In Revenue Procedure 2005-14, the Internal Revenue Service explains how a taxpayer may treat property that would qualify for the §121 home-sale exemption partially as investment property and partially as principal residence. In other words, a sale of a residence may be given split treatment; a portion may be treated as held primarily for investment, (which portion would be eligible for exchange under §1031), and a portion that would be treated as the taxpayer's principal residence.

A transaction may be treated as a split transaction under one of two scenarios. First, a taxpayer may have property that is treated as investment property as of the date of the sale, but had previously used it for a principal residence two or more years during the previous five years. Second, the property may consist of acreage that is not associated with the residence itself. In either case, the property qualifies as investment property in part, and as a principal residence in part.

In allocating between the portions of the property associated with the taxpayer's residence, the taxpayer should rely upon the advice of a competent tax advisor. In the event of an audit, the IRS may review the basis upon which the allocation is made to determine if the allocation is reasonable. By allocating, however, a taxpayer may be able to not only exclude gain under §121, but also defer gain on the investment property by doing a §1031 exchange.

Unlike playing Monopoly, New England taxpayers do not have to depend upon a roll of the dice to pass "GO" and collect more real estate. Savvy property owners can use two tax code sections to acquire the desirable "Boardwalk" and "Park Place" properties and win the investment game.

Paul Savery is a division manager and Jon Christianson, Esq. is in-house counsel for Asset Preservation, Inc., a leading national Qualified Intermediary for §1031 tax-deferred exchanges. Questions regarding exchanges can be directed to them at (866) 394-1031 or at paul@apiexchange.com.

Amendments eliminate 'Chapter Land' laws' ambiguities

By Deborah A. Eliason, Esq.
and Dorothy Nelson Stookey, Esq.

STOOKEY

ELIASON

On March 22, the amendments to the so-called Chapter Land statutes, G.L.c. 61, 61A and 61B took effect.

The amendments, Chapter 394 of the Acts of 2006, put forward by Sen. Pamela P. Resor, were developed after a lengthy collaborative process involving representatives of the farming and forestry communities, land trusts, municipalities, assessors and the executive branch of state government.

More than a dozen meetings were held and drafts were circulated for comment over many months in an attempt to craft a bill that was satisfactory to this diverse group and likely to be passed, despite numerous failed prior attempts at amending the statutes.

The statutes provide a favorable tax classification for land that is held and used in accordance with the statutory requirements, that is for forest (Chapter 61), agricultural and horticultural (Chapter 61A), and open space and recreational purposes (Chapter 61B).

The recent amendments clarify and codify practices that have developed based upon a fair reading of the statutes, interpretations by the Department of Revenue and case law, and eliminate some ambiguities in the statutes.

As with any statutory amendments, although many questions have been answered, others will be raised. Many minor and more subtle changes have been made that should be closely analyzed whenever such a transaction arises.

The original statutes, adopted in 1973, authorized Chapter Lands to be assessed at less than their development value. Landowners who took advantage of the favorable tax classification committed to maintaining the land in accordance with the statutory requirements for a specified amount of time, and incurred a financial penalty upon early removal from classification. In addition, the landowner agreed to provide the municipality in which the property was located with a 120-day right of first refusal to purchase the land in the event it was sold for or converted to a residential, industrial or commercial use while it was classified as Chapter Land.

The ROFR was subject to assignment by the municipality to a qualified nonprofit conservation organization. Under the statutes, the process and requirements for triggering and exercising the ROFR were unclear, and inconsistencies among the three statutes also led to confusion and numerous legal challenges. The amendments are an attempt to clarify the statutory requirements and to establish a more uniform and efficient administration of land subject to the statutes.

By far, the most significant change in the statutes is the clarification of the ROFR provisions. The amendments increase the time period during which the ROFR is effective, outline the parties' responsibilities in the event of a sale or conversion, define a bona fide offer and elaborate on the assignment process. They also give the municipality or assignee access to the property and clarify due diligence rights and timing. The amendments have extended the duration of the ROFR by one year.

Addressing the question of the landowner's responsibility when delivering a notice of intent to sell or convert Chapter Land for another use, the amendments specify in far greater detail the documentation that must be included with the notice of intent.

Perhaps one of the most important changes to the statutes is the inclusion of a definition of a bona fide offer. This has been an often litigated issue and one in which municipalities have been particularly vulnerable.

For the purpose of a Notice of Sale, the amendments define a bona fide offer as "a good faith offer, not dependent upon potential changes to current zoning or conditions or contingencies relating to the potential for, or the potential extent of, subdivision of the property for residential use or the potential for, or the potential extent of development of the property for industrial or commercial use, made by a party unaffiliated with the landowner for a fixed consideration payable upon delivery of the deed."

This language makes it clear that a purchase and sale agreement containing a purchase price that fluctuates depending upon the number of lots or units actually permitted or presupposes changes to the current zoning does not constitute a bona fide offer under the statutes.

Although a developer may be willing to invest in the costs associated with due diligence without knowing the outcome of the permitting process, it may be re-

Continued on page 17

Deborah A. Eliason recently joined the national land use and environmental law firm of Beveridge & Diamond, P.C. as of counsel concentrating in the area of real estate law. Previously, she practiced real estate law for 16 years with Kopelman & Paige, P.C. She can be reached at deliason@bdlaw.com. Dorothy Nelson Stookey is Regional Counsel to the New England office of The Trust for Public Land, a national nonprofit land-conservation organization. Her email address is Dorothy.stookey@tpl.org.

2007 SPRING CONFERENCE

THE REAL ESTATE BAR ASSOCIATION for Massachusetts

DCU Center *(formerly the Worcester Centrum)*
50 Foster Street Worcester, MA 01608
www.dcucenter.com 508-929-0124

REGISTRATION for REBA'S Spring Conference

Complete this form, include the appropriate fee and return to REBA Foundation, Attn: 2007 Spring Conference, 50 Congress Street, Suite 600, Boston, MA 02109-4075 or FAX to: (617) 854-7570.

NEW! Register Online at www.reba.net

		By 4/27	After 4/27
_____	YES, please register me. I am a REBA member in good standing.	$ 195	$ 220
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SECTION: PLEASE COMPLETE: thank you
BREAKOUT SESSION PREFERENCES: please rate (1-8) order of your preference:

_____ *Top New Features of ALTA's 2006 Policy Jackets* (Browne, Franco)
_____ *Essential Differences between Subleases and Leases* (Carney, Granoff, Holiday, Strauss)
_____ *Top Mistakes that Drive Examiners Nuts* (Greenhood, Welch)
_____ *Professionalism and Ethics in the Closing Process* (Antonakes, Gurvits, Hellman, Vecchione)
_____ *Environmental Law for Residential Conveyancers* (Blaine, Cox, McGregor)
_____ *Useful Insurance Knowledge for the Closing and Beyond* (Antonelli, Atchue)
_____ *Recent & Pending Legislation: Summary and Highlights* (Smith, Rainen)
_____ *Recent Developments in Massachusetts Case Law* (Lapatin)

DRIVING DIRECTIONS

For additional information, telephone the DCU center at 508-929-0124.

FROM BOSTON: Take Rt. 90 W. Get off at Exit 10 (Auburn). After the tollbooth, bear left at the fork. Take Rt. 290E and get off at Exit 16. Left at bottom of the ramp. At 3rd set of lights (Major Taylor Boulevard) the DCU is on your left.

FROM POINTS WEST: Take Rt. 90 E to Exit 10 (Auburn). After the tollbooth, bear left at the fork. Take Rt. 290E and get off at Exit 16. Left at bottom of the ramp. At 3rd set of lights (Major Taylor Boulevard) the DCU is on your left.

FROM SOUTH: Take Rt. 495N and take Exit 25B. Take 290 W and take exit 16. Right at end of ramp. At 3rd set of lights (Major Taylor Boulevard) the DCU is on your left.

FROM NORTH: Take 495 S and take Exit 25B. Take 290 W and take exit 25B. Take Rt. 290 W and take exit 16. Right at end of ramp. At 3rd set of lights (Major Taylor Boulevard) the DCU is on your left.

THE BREAKOUT SESSIONS

Top New Features of ALTA's 2006 Policy Jackets

Essential Differences between Subleases and Leases

Top Mistakes that Drive Examiners Nuts

Professionalism and Ethics in the Closing Process

Environmental Law for Residential Conveyancers

Useful Insurance Knowledge for the Closing and Beyond

Recent & Pending Legislation: Summary and Highlights

Recent Developments in Massachusetts Case Law

CONTINUING EDUCATION COMMITTEE CHAIRS

Stephen M. Edwards, Esq.
Sophie Stein, Esq.

Parking Validated by REBA

SCHEDULE OF EVENTS

8:30 a.m. - 3:00 p.m. **Registration and Exhibits Open**

9:00 a.m. - 1:00 p.m. **THE BREAKOUT SESSIONS**

9:00 a.m. - 9:45 a.m.
10:00 a.m. - 10:45 a.m.

Top New Features of ALTA's 2006 Policy Jackets —

Edmond R. Browne, Jr.; Marie L. Franco

After several years of deliberations, the American Land Title Association adopted a new lineup of policy forms last year. The 2006 policies, endorsements and closing protection letters are working their way into the marketplace. Do you know how the new forms differ from the current forms? Learn the new "players" and how to choose the best lineup for your clients from a panel of title industry experts.

9:00 a.m. - 9:45 a.m.
10:00 a.m. - 10:45 a.m.

Essential Differences between Subleases and Leases —

Robert M. Carney; Peter Granoff; Michael Holiday; Michael S. Strauss

This breakout session will focus on various critical legal and practical issues and concerns relating to subleases and subleasing. Often times subleasing transactions are more complex and difficult than a direct lease because of the need to conform the sublease (and expectations of the subtenant), or at least deal with, the terms and conditions of the overlease (and the requirements of the overlandlord). This multi-party, multi-document situation can provide unique aspects not typically found in a typical direct lease transaction. The discussion will include a brief overview of the common law governing subleases along with sublease issues from the perspectives of the overlandlord, sublandlord and subtenant, including the necessity and effect of an overlandlord's consent, as well as the various approaches to incorporate the provisions of the overlease into the sublease.

9:00 a.m. - 9:45 a.m.
10:00 a.m. - 10:45 a.m.

Top Mistakes that Drive Examiners Nuts —

Jane L. Greenhood; Colby D. Welch

Title examiners encounter correctable mistakes on a daily basis, many of which are due to practitioners' lack of understanding of the Land Court Standards and REBA's Practice Standards. The presenters will discuss the complaints commonly heard from title examiners, such as errors associated with drafting and formatting of documents or facing the examiner when they are recording or filing the papers with recorded or registered land desks. The presenters represent both the practitioner and examiner perspective and will encourage questions from the audience in a hope to educate both attorney and examiner on some of the nuances of a successful conveyancing practice.

9:00 a.m. - 9:45 a.m.
11:00 a.m. - 11:45 a.m.

Professionalism and Ethics in the Closing Process —

Stephen L. Antonakes; Eugene Gurvits; David N. Hellman; Constance V. Vecchione

Each real estate closing presents a particular set of factual and legal circumstances that must be shepherded by the closing attorney. The attorney's conduct and problem solving efforts are informed by an array of legal requirements and ethical and professional conduct standards. Closing table disputes, settlement statement disclosure, closing administration mechanics, funds accounting, duties of representation, statutory requirements, professional standards and office management practicalities commonly do not all align nicely, creating dilemmas and practice challenges for the closing attorney. Our panel will share from their diverse hands-on perspectives -- bar discipline, lender regulation, title insurance claims, and REBA ethics issues -- the ethical and dilemmas currently presenting themselves to closing attorneys, and give guidance on identifying and handling them in a prudent and practical manner.

10:00 a.m. - 10:45 a.m.
11:00 a.m. - 11:45 a.m.

Environmental Law for Residential Conveyancers —

Cheryl A. Blaine; Robert D. Cox, Jr.; Gregor I. McGregor

Environmental issues can affect any closing from a large shopping center to the small house on a pond. Nationally known experts on environmental law present an introduction to the types of problems that can trip up your deal.

11:00 a.m. - 11:45 a.m.

Useful Insurance Knowledge for the Closing and Beyond —

Joseph M. Antonellis; Earl V. Atchue, Jr.

Insurance: Don't Leave Home (or the Closing) Without it". Earl V. Atchue, Jr., a well recognized Worcester County insurance agent, and Attorney Joe Antonellis, an experienced closing attorney, will provide a detailed presentation on what the closing attorney needs to know beyond purely having an insurance binder in his/her possession. The discussion will cover: insurance company underwriting concerns; credit scoring; special risks (coastal properties, dogs, swimming pools, etc.); replacement value vs. market value; does co-insurance really matter; and umbrella policies. Additionally, it will provide the attendees with the specifics of what to look for in insurance coverage when closing on an individual condominium unit, which can be a trap for the unwary. Mr. Atchue and Attorney Antonellis will use a fast paced and interactive method to make this seminar both informative and lively. Protect yourself and your client and add value to the advise you are supplying to your clients by attending.

11:00 a.m. - 11:45 a.m.

Recent & Pending Legislation: Summary and Highlights —

Edward J. Smith; Edward A. Rainen

You won't want to miss this twice yearly update from REBA's longtime Legislative Counsel, Ed Smith and the co-chair of the Legislation Committee, Ed Rainen on the recent and pending legislation on the Hill. Ed Smith gives us up-to-date going's on up on the Hill, affecting REBA members and Ed Rainen discusses the inner-workings of REBA's Legislation Committee.

12:00 p.m. - 1:00 p.m.

Recent Developments in Massachusetts Case Law —

Philip S. Lapatin

Phil Lapatin draws a huge crowd with this session every meeting. Now, you won't have to stay late to hear him. His new timeslot is right before luncheon. His session, Recent Developments in Massachusetts Case Law is a must hear for any practicing real estate attorney. Due to standing room only at our Annual Meeting, we will project a live video feed from Phil's session to a second breakout room.

1:15 p.m. - 2:40 p.m. **Luncheon Program**

1:20 p.m. - 1:30 p.m. **REBA President's Welcome - Sami S. Baghdady, Esq., President**

1:30 p.m. - 1:45 p.m. **REBA Business Meeting**

1:50 p.m. - 2:20 p.m. **Keynote Speaker**

Thomas J. Curry, Director of the FDIC.

Adjournment

GENERAL INFORMATION

- Premium credit for professional liability insurance may be given for attending properly documented continuing legal education programs.
- Continuing Legal Education credit can be made available in other New England states. Contact the Real Estate Bar Association (REBA) for specific details.
- Registration for REBA's 2007 Spring Conference is open to REBA members/ associates in good standing and their guests and non-members/associates (for an additional fee). Everyone attending the REBA 2007 Spring Conference must register. The Registration Fee includes the cost of the morning and afternoon sessions, the seminar written materials and the luncheon. We are unable to offer discounts for persons not attending the luncheon portion of the program.
- Please submit only one registration form per person. Additional registration forms are available at our website@ www.reba.net or by emailing Nicole Cohen at cohen@reba.net. Confirmation of registration will be sent to all registrants by email or mail.
- Registrations with the appropriate fee should arrive by April 27, 2007 to guarantee a reservation at the 2007 Spring Conference. Registrations received after April 27, 2007 are subject to an additional processing fee of $25. Registrations cancelled in writing before April 27, 2007 will be honored, but charged a $25.00 processing fee. No other refunds will be permitted. Registrations cancelled in writing on or after April 27, 2007 will not be honored but substitutions of registrants attending the program are welcome and may be made at any time. Written materials will automatically be mailed to "No Shows" within four to six weeks after the program.
- The use of cell phones and pagers is prohibited in the meeting rooms during the programs.

Back up and running: county registries prepare for the worst

By Carrie Rainen, Esq.

The prior installment of this series dealt with disaster recovery in Massachusetts' state-run registries. The county-run registries have also prepared and planned for emergencies.

In 1827, fire burned the Barnstable Registry of Deeds, destroying all but one of the 94 record books. According to legend, most documents were subsequently re-recorded, as the registry was ordered to accept deeds for re-recording for free through May 1829.

However, "the effect of the loss is being felt to this day," as Register Jack Meade is unsure all records destroyed in that fire were re-recorded.

Barnstable has a greater percentage of registered land than other counties. In Meade's opinion, this may be due to the 1827 fire, as missing records forced many to clear their title by land registration. Meade acknowledged title examinations are likely to "run into a brick wall" around 1827 "due to missing records."

"History is effectively lost," he said.

To prevent further loss, Meade's staff digitally scanned all documents from 1704 forward. These are available on the BROWNtech software-based website. All current certificates of titles, including encumbrance memoranda, are online.

Carrie Rainen is a recent admittee to the Massachusetts Bar. She practices with her father, Edward Rainen, and mother, Shelly Rainen. She has worked in the registries of deeds since she was old enough to push the button on the photocopy machine.

According to Meade, the registry is close to database replication if a disaster were to strike.

"There are extensive systems in place to … re-create the registry in 24 hours," he said. "We put just about every record we have in a computer database."

The registry backs up nightly and uses streaming image data to save daily information. "The entire registry of deeds is on data-tape," Meade said. "We can even re-create the recording programs."

In Norfolk County, Register Bill O'Donnell made it his mission to modernize and make the registry more efficient. He recognizes the registry could be affected by a variety of calamities. Thus, a disaster recovery plan was conceived to back up documents and implement recovery due to operational shut down.

Documents from 1793 are microfilmed on 35mm or 16mm film, and sent to Iron Mountain's New York facility. Iron Mountain also provides off-site storage for Plymouth and Dukes counties.

New data is backed up on magnetic tapes, then sent to an Iron Mountain facility in Rhode Island. Following emergency shut-down, Iron Mountain will deliver backup to a designated "hot site" within three hours of notification.

"The decision … was that the backup had to be stored off-site. It didn't make sense to store it in this building," said O'Donnell.

Recorded documents are scanned to digital media, backed up on tape and microfilm, and then uploaded to the Internet. Unlike several other registries, Norfolk still produces bound paper record books and indexes "should the system shut down."

Separated by the Atlantic Ocean from 20 other Massachusetts registries is the Dukes County Registry of Deeds on Martha's Vineyard.

Dukes, along with the Nantucket and Bristol-Fall River registries, purchased the commonwealth's preferred software from ACS, but is otherwise independent from state control and oversight. Dukes' records are backed up digitally or on microfilm. Since the conversion to ACS, all documents are digitally backed up internally and to the secretary of state's system.

Register Dianne Powers' next step is to scan prior to 2004, which is presently backed up on microfilm. However, budgetary concerns make "back-scanning" a lower priority.

Regardless of global warming issues, the island registries are likely to be more susceptible to hurricanes than other registries. The registry does not have an independent disaster recovery plan, though the County Commission is creating one.

"It is in two portions: the first being 'Continuation of Government' and the second being 'Continuation of Operating Procedures.' I expect … [to] have a working document within the next few months," said Powers.

John R. Buckley Jr., register of deeds of Plymouth County, has disaster concerns few registers would imagine. His registry is near a nuclear power plant and he must plan for the unthinkable.

In the wake of 9/11, and last year's incursion at the Lynn LNG facility, Buckley believes we need "improvement to every system when you realize the dangers out there. You have to keep those [possibilities] in mind and update these disaster recovery plans."

He is aware that, while damaged registry records have an immediate impact on commerce, a loss of history is also at stake. Book 1, Page 1 was written by William Bradford, second colonial governor of 'Plimouth' Colony, and is considered the first register of deeds in Plymouth.

The registry has updated the disaster recovery plan beyond the immediate recording of documents. "This is something that needs … to be refined," Buckley said. "T]he fact that we can record documents [off-site] is only one step to … set up an operation in a different location. Updating our disaster recovery plan will bring into place regular testing of the microfilm stored off-site, and other practices for refining and retuning how we shift from Plymouth to Brockton."

The registry has computer software for land-records research, developed internally and accessible on the Internet for a fee, by the minute, and free of charge at all three registry offices. The back up, including tapes and electronic transfer of data to a server in the Brockton registry satellite several times daily, is a part of on-going operations. In addition to microfilm stored with Iron Mountain, the registry keeps a duplicate set in its vault.

Recorded land documents back to 1685 are imaged and available online or at the registry. A project to scan colonial documents back to 1620 is underway. Approximately 200,000 Land Court documents will be outsourced for scanning.

"A fifty-year reviewable title search is the goal," Buckley explained. "[W]e want to get everything scanned — highway books, taking books, railroad books, etc."

Plymouth, Norfolk and Barnstable counties have designated alternative sites to relocate to in the event of a disaster. Each plan includes contingencies for events affecting either the building or the city, and methodologies for contacting the various registry vendors to minimize downtime.

"We still continue to think about better ways to implement these ideas," said O'Donnell. "You can't rest on what you developed already; you need to be constantly thinking ahead. In a few years, we're going to have to come up with a new phase of improvements."

Local bar groups join forces with REBA

Following REBA's grassroots programs across the commonwealth in 2005 and 2006 to educate members of the bar about the legislation introduced by the Title Appraisal Vendor Management Association (TAVMA), a number of local real estate bar groups have emerged. These are self-identifying groups of local conveyancing and real estate lawyers looking to county bar associations to support REBA's various initiatives on the practice of law by non-lawyers.

A group of 70 real estate practitioners in Hampden County have banded together as the Hampden County Real Estate Bar Association. The group's leaders will participate in REBA's newly-created Conveyancing Leadership Council. The Hampden group has elected officers and meets periodically. They have also raised funds to support their unauthorized practice of law concerns.

Hampden County lawyers who are interested in joining this "Mini-REBA" should e-mail Fred Geoffrion Jr. at ageoffrion@prodigy.net.

In February, Philip C. Nessralla Jr., a REBA member in Brockton, spoke to the executive committee of the Plymouth County Bar Association to consider an affiliation with REBA. The affiliation would offer support and mentoring; becoming a resource for Plymouth County real estate lawyers at all practice levels. Nessralla noted that a network of REBA affiliations among local and regional bar associations would enhance the influence of real estate lawyers throughout the commonwealth.

To learn more about this Plymouth County grassroots group, e-mail Phil Nessralla at pcn@nessrallalaw.com.

A similar local group is forming in Barnstable County. Cape Cod real estate lawyers who want to participate in this networking and information-sharing group should e-mail Centerville real estate lawyer and longtime REBA member Ted Schilling at law@cape.com.

REBA leaders and staff are available to meet with and support these emerging local bar groups.

Send a letter to the editor!

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

DelVecchio, White join REBA Dispute Resolution

Two recently-retired Superior Court judges, Suzanne V. DelVecchio and Catherine A. White, have joined the panel of neutrals for REBA Dispute Resolution, a subsidiary of the Real Estate Bar Association.

Separately, REBA Dispute Resolution has been approved for a three-year term for court-connected dispute resolution services by the Superior Court, Housing Court and Land Court.

DelVECCHIO

"We are delighted that these two experienced judges have joined our program," said REBA/DR President Bob Hoffman. "We now have more options for our clients seeking dispute resolution services in the business and real estate areas."

"Now that REBA/DR has been approved to provide dispute resolution services in the Superior Court and the Housing Court, in addition to the Land Court, the recruitment of judges White and DelVecchio will bring depth to our panel and offer more choices for our clients," said Peter Wittenborg, REBA/DR's treasurer.

DelVecchio served on the Superior Court bench from 1985 through 2006. She served as chief justice of the Superior Court from 1999 through 2004 and founded the court's pioneering business session.

From 1990 to 1992 she served as the court's regional administrative justice for Plymouth County. DelVecchio also teaches at Boston University School of Law. Prior to her appointment to the bench, she served as president of the Massachusetts Association of Women Lawyers and secretary of the Massachusetts Academy of Trial Attorneys.

A graduate of Wheaton College and Boston College Law School, she received her mediation training at Commonwealth Mediation and Conciliation, Inc.

DelVecchio received honorary Doctorate of Law degrees from Suffolk University Law School and New England School of Law.

She is also the recipient of numerous other awards, including the Brass Gavel Award, presented by The Plymouth County Bar Association in 1990; the Judicial Merit Award, presented by Massachusetts Academy of Trial Laws in 1993; the Distinguished Jurist Award, presented by Massachusetts Association of Women Lawyers in 1993; the Distinguished Jurist Award from the Essex County Bar Association in 2000; the Jurist of the Year Award from the Justinian Law Society in 2000; the Leadership Award from the Middlesex County Bar Association in 2002; the Alumnus of the Year Award from Boston College Law School in 2004; and the Outstanding Alumna Award from Wheaton College in 2004.

WHITE

White joined Cetrulo and Capone in 2006 in an of-counsel position after nearly two decades of service on the Superior Court.

During her term on the bench, she served on the court's Alternative Dispute Resolution subcommittee, as well as the advisory committee for the Judicial Institute.

As a judge, she was honored in 2005 by the Massachusetts Academy of Trial Attorneys with the Judge of the Year Award, and, in April 2006, she was given the Judicial Excellence Award by the Massachusetts Judges Conference.

White holds an undergraduate degree from Trinity College, an M.A.T. from Yale University and a J.D. from Northeastern University School of Law.

She has been a member of the Northeastern University Board of Trustees since 1990.

Mark Your Calendar!

REBA SPRING CONFERENCE

Monday, May 7, 2007

See details on pages 12 -13

Amendments eliminate 'Chapter Land' laws' ambiguities

Continued from page 11

luctant to take on this cost if there is a possibility that a municipality will exercise its ROFR after it has expended significant funds to obtain the necessary development.

The amendments also clarify the conversion process and the division of responsibility relative to obtaining an impartial appraisal, and they establish a process that may include up to three appraisals.

In the case of a conversion, the municipality has an option to purchase the land at full and fair market value determined by an impartial appraisal performed by a certified appraiser hired at the expense of the municipality or its assignee. The amendments require that the original appraisal be completed and delivered to the landowner within 30 days after the notice to convert to the municipality.

The amendments are far from perfect, leaving many ambiguities. While they may raise further questions to be answered by the courts, they go a long way in responding to issues that have plagued transactions involving Chapter Land. When reviewing a Chapter Land transaction, one should carefully examine each section to ensure compliance.

The writers, who have been involved on behalf of municipalities and a nonprofit conservation organization, welcome the amendments and are hopeful that many of the uncertainties, particularly of the ROFR process, have been eliminated by the amendments. Resor's office has already been made aware of some of the ambiguities existing in the amendments and it is likely that a representative group will be convened in the future to discuss how best to address and repair problems that municipalities, land conservation organizations and others experience with the amendments.

The writers welcome comments about the amendments and would be pleased to pass along comments and concerns to the appropriate recipients, in order to make the statutes work even better.

Scenes from the

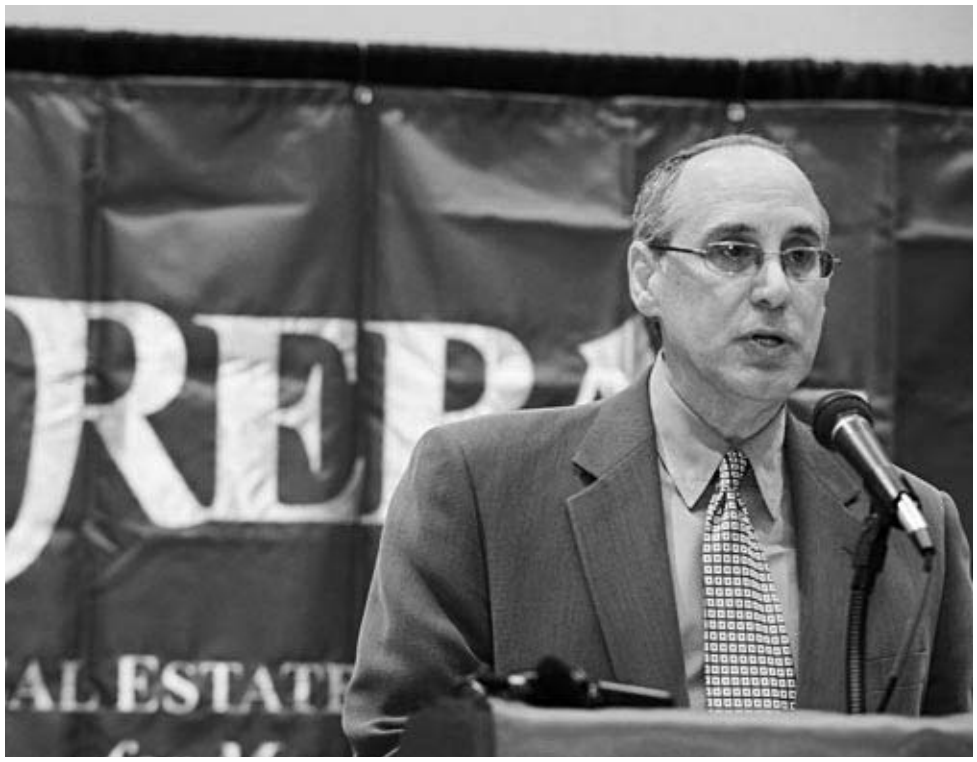
PHOTOS BY LISA KESSLER

REBA 2006 Annual Meeting

Continued on page 20

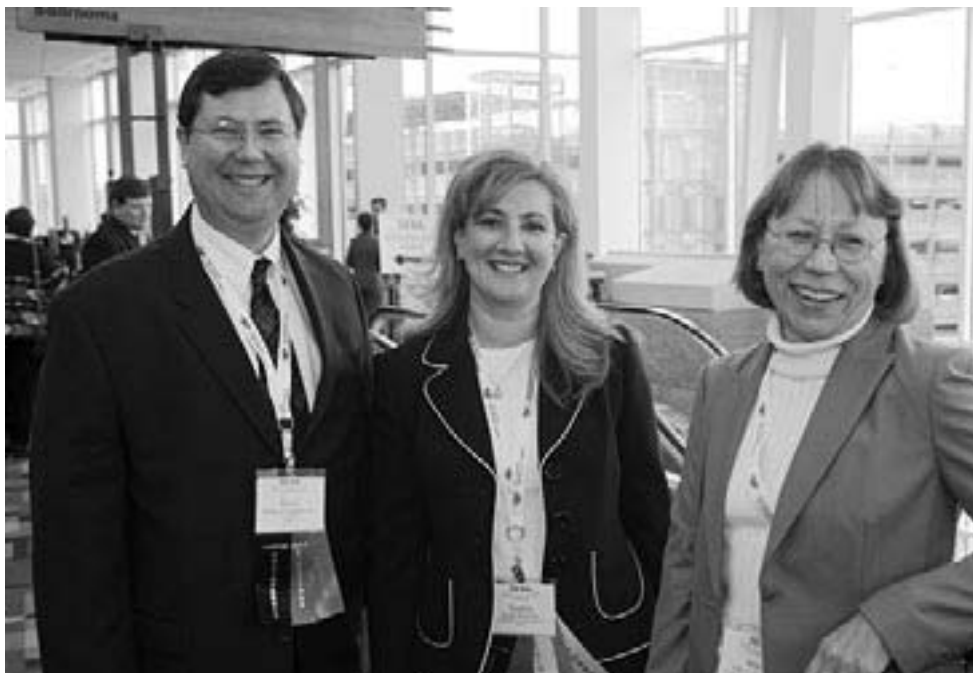
Additional scenes from the

Continued from page 19



PHOTOS BY LISA KESSLER

REBA 2006 Annual Meeting



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REBA unveils 'short list' of legislative goals for 2007-2008

Continued from page 1

both of Boston, have determined that the best way to be effective on behalf of REBA members is to have a "short list" of objectives over the two-year term, mindful as ever that few bills eventually make their way into law.

The Title Abstract Vendor Management Association (TAVMA) once again has introduced legislation to permit non-attorneys to draft contracts and conduct real estate closings in the commonwealth. This term's bill, H. 1551, will be vigorously opposed by REBA.

Technology surcharge monies extended

Quick out of the chute already was a supplemental appropriations bill that became the vehicle to continue the dedicated technology money from the 2003 special $5 surcharge on recordings at the registries of deeds. Chapter 20 of the Acts of 2007 was approved by Gov. Deval L. Patrick on March 7.

REBA did support continuation through June 2011 of this revenue stream, recommending that free web-based access to land records be expanded to all 21 registries.

Web access to indices and recorded instruments is a matter of convenience to REBA members, but never an adequate substitute for a title search.

According to an unofficial survey by the REBA Registries Committee, there is no free web access to document images in Plymouth and Bristol-Fall River. Bristol North (Taunton) still does not have any web-based access at all.

New REBA legislation

Among the legislation being introduced by REBA are:

REBA's Legislative Counsel Edward Smith is in private practice in Boston. He has previously served as legislative counsel to the Massachusetts Academy of Trial Attorneys, general counsel for the Massachusetts Bar Association and counsel to the Committee on the Judiciary of the Massachusetts General Court. He has been a panelist for Massachusetts Continuing Legal Education and is a regular contributor to REBA News. He earned a B.A. in political science at Northeastern University and received his J.D. from Suffolk Law School.

• H. 1643, which would "simplify and modernize certain requirements for filing of registered land instruments"

This measure, in two sections, would amend G.L.c. 185, §52 to clarify a procedure for withdrawal of land from registration when creating a condominium. Due to improvidently drafted language in St. 2000, c. 413, Land Court staff are of the opinion that the organic documents for the condominium have to be reviewed for compliance with registration before the land may be de-registered.

The proposed legislation provides that the court approve the petition for withdrawal and endorse a notice of withdrawal subject to the condition that the master deed shall be presented for recording in the registry of deeds, and "upon such recording of the master deed and filing of the judgment of withdrawal and entry on the memorandum of encumbrances of the certificate of title, the subject premises shall be so withdrawn."

Section 2 of H. 1643 would amend G.L.c. 185, §62 to provide that an instrument affecting registered land that is sufficient under G.L.c. 156B, §115 may be accepted for filing without presentation of evidence of corporate authority or corporate existence.

Section 115 has long permitted third parties acting in good faith to rely on instruments that purport to be executed on behalf of a corporation. Some at the Land Court have been concerned with the implications of §115 for the state-backed Assurance Fund. Section 2 of H. 1643 would hold harmless the Land Court's Assurance Fund by making null and void any registered land instrument executed on behalf of a corporation by a person falsely purporting to be the president, vice president, treasurer or assistant treasurer.

The Land Court also supports passage of H.1643.

• H. 1642, codifying in the General Laws the professional standards applicable to notaries public that were promulgated in revised Executive Order 455 (03-13), by former Gov. Mitt Romney

The purpose of the executive order was to respond to a growing number of complaints of abuses by certain notaries public, particularly in their dealings with members of the state's immigrant communities.

The Romney administration was concerned with the absence of explicit standards of conduct and explicit executive prerogative in the event of serious misconduct by a notary public.

When first promulgated in 2003, the executive order prompted a great deal of comment, and indeed controversy. It was substantially revised as a result of comments from REBA and others.

H. 1642, among its provisions, clarifies that non-attorney notaries may not conduct real estate closings, and provides that attorneys and legal staff are not required to maintain a journal of notarial acts.

Both bills are sponsored by Judiciary Committee House Chairman Rep. Eugene L. O'Flaherty, D-Chelsea. Identical Senate bills, S. 879 (registered land) and S. 877 (notaries), are sponsored by Committee Senate Chairman Sen. Robert S. Creedon Jr., D-Brockton.

• S. 878, clarifying state homestead law

Also sponsored by Creedon on behalf of REBA is an omnibus bill to clarify the many inconsistencies and ambiguities that have arisen in G.L.c. 188, the Massachusetts Homestead Law, as it has been amended and judicially interpreted (primarily by the U.S. Bankruptcy Court) on a piecemeal basis over the years.

This legislation, S. 878, joins numerous other bills that seek to amend G.L.c. 188, including automatic homestead legislation.

• H. 1040, recommending changes to the Omnibus Mortgage Discharge Law

Another REBA bill, H. 1040, recommends a number of technical changes to last year's Omnibus Mortgage Discharge Law, St. 2006, c. 63. Sponsored by Rep. James M. Murphy, D-Weymouth, the legislation addresses and clarifies a number of issues that have arisen since Chapter 63 took effect on Oct. 1, 2006.

• H. 1246, seeking amendment to G.L.c. 183A, §9

The fifth REBA bill, H. 1246, sponsored by Joint Housing Committee House Chairman Rep. Kevin G. Honan, D-Boston, is legislation to amend G.L.c. 183A, §9, to dispense with the present requirement to append a copy of the unit floor plans to each first unit deed out in a condominium.

REBA's Legislation Committee believes that the requirement has little practical benefit since a full set of plans is always part of the master deed. The frequent need for confirmatory recordings when the plans are omitted from a first unit deed is something that conveyancers are familiar with.

REBA recommends that the legislation apply to unit deeds past and future.

Mortgage foreclosure relief

Finally, giving relief to home mortgagors affected by recent adjustable rate increases — especially in the sub-prime category — has been getting a great deal of media attention.

A spike in home mortgage foreclosures has prompted the filing by a number of legislators of at least two bills, which have been referred to the Joint Committee on Housing.

H. 1237, whose lead sponsors are Honan and Boston Mayor Thomas Menino, has provisions for the licensing of mortgage originators; the creation of a Mortgage Foreclosure Prevention Fund, funded by a $500 recording-fee surcharge whenever a foreclosure deed and affidavit are presented for recording or registration, to provide emergency loans of up to $25,000 for qualified mortgagors; the requirement of pre-foreclosure notice to a mortgagor of the availability of counseling and loan assistance from the Mortgage Foreclosure Prevention Fund; and the requirement of a built-in, 60-day moratorium on foreclosure if the mortgagor has registered for counseling with an approved "foreclosure counseling agency."

H. 1290, whose lead sponsor is Rep. David Torrisi, D-North Andover, would provide more generous cure rights for mortgagors in default, create greater duties for mortgage servicers to save homes from foreclosure, and establish a $10 million home preservation fund from a legislative appropriation.

Similar legislation, S. 747, has been filed by Sen. Jarrett Barrios, D-Cambridge.

Both bills will be reviewed by REBA's Legislation Committee.

Brownfields 101: from analysis to cleanup

Continued from page 9

gramming and should be considered during project design; the earlier the better.

An effective strategy for brownfield sites is to incorporate the cleanup directly into redevelopment.

When there is a plan on how a property will be used, the environmental investigation and remediation strategy can often be designed in light of these plans.

Cleanup can often be done as part of project construction, saving both time and money. Environmental and geotechnical investigation can be combined. Excavation for foundations, basements or underground parking often provides adequate site cleanup.

The location and types of contamination may influence where building or parking is located, and buildings and parking lots may be located to encapsulate contamination, minimizing the cost of soil excavation and disposal.

Technologies, such as sub-slab depressurization systems, can be designed directly into new buildings to eliminate exposure to harmful vapors.

Construction

The risk of construction on contaminated properties can be managed by collecting good information during project planning and design, and communicating that information with the contractor.

Contract documents should clearly define both the owner and contractor's responsibilities for managing contaminated soil and groundwater during construction, and should provide the contractor with information regarding the type and quantity of contamination, requirements for regulatory compliance, soil management and health and safety. Obtain a comprehensive cost for soil management and disposal as part of the contractor bidding or negotiations process and include contingencies for all types of soil contamination.

Even with good planning and information, expect surprises when doing underground construction, such as underground storage tanks and additional areas of contaminated soils.

Liability protection and financial incentives

To make it easier to reuse and revitalize contaminated properties, Massachusetts passed the Brownfields Act, Ch. 206 of the 1998 Mass. Acts & Resolves, which significantly amends the state Superfund Act, G.L.c. 21E, providing liability protection and financial incentives for owners and prospective buyers who are cleaning up contaminated properties.

The act also allows for cleanup to be done as part of project construction and redevelopment — a significant benefit to developers and lenders — creates a new category of persons exempt from liability for contaminated properties, and provides liability endpoints for eligible persons once they meet DEP cleanup standards for oil or hazardous material releases.

An "eligible person" is an owner or operator who did not own or operate the site at the time of the release and did not cause or contribute to the contamination. Eligible persons are protected from claims by the commonwealth for response action costs and natural resource damage, and from third party claims for contribution, response action costs, and property damage under Chapter 21E and common law, when a permanent cleanup or remedy operation status (ROS) has been achieved at the site.

Owners and operators who transfer a site are protected from certain liability to the commonwealth and third parties for post-transfer violations, provided an AUL is part of the permanent solution or ROS.

The act also creates a Brownfields Covenant Not to Sue provision (G.L.c. 21E, §3A(j); 940 CMR 23:00), which extends liability relief under administrative

An effective strategy for brownfield sites is to incorporate the cleanup directly into redevelopment.

or judicially approved settlements to current and prospective owners who are redeveloping contaminated properties but are not eligible for statutory relief, including those responsible for causing or contributing to the contamination.

In 2006, the Legislature restored $30 million in funding to provide financial incentives for brownfields cleanup, and revived and expanded the expired tax credit for sites in economically distressed areas. The Brownfields Redevelopment Fund, administered by MassDevelopment, offers loans for assessment and cleanup of brownfields located in EDAs. State subsidized environmental insurance is available through the Massachusetts Business Development Corporation.

More information is available at the following websites:

- www.mass.gov/dep/cleanup/brownfld.htm
- www.ago.state.ma.us/sp.cfm?pageid=1230
- www.massdevelopment.com/development/brownfields_intro.aspx
- www.mass-business.com/site/site-massbiz/content/brownfields.

Foreclosure lessons in 'Strayton' prove timely

Continued from page 1

pion's foreclosure appeared to violate Massachusetts law.

The Bankruptcy Court's ruling

Somma found that Champion had given default and foreclosure notices to the debtor and his wife by registered mail and had published legal notice of the foreclosure sale for three consecutive weeks, all as required in G.L.c. 244, §14.

However, Somma also found that while Champion had run display advertisements of the foreclosure sale in a Sunday edition of the Boston Herald, the display ads were "bulk ads" in which a number of sales were included in the same ad.

He also found that Champion had failed to: obtain a current appraisal of the condominium, market the condominium, contact any broker for an evaluation or market information about the condominium, or seek the debtor's permission for prospective buyers to inspect the unit.

Somma also observed that the condominium, which sold at foreclosure for the equivalent of $230,000, had a fair market value of $325,000. Based on the findings, Somma concluded that Champion appeared to have violated Massachusetts law.

Legal framework

In *BFP v. Resolution Trust Corporation*, 511 U.S. 531 (1994), the U.S. Supreme Court endeavored to establish consistency throughout the country with respect to foreclosure sales where the sale price was significantly below fair market value.

Cases such as *In re Ruebeck*, 55 B. R. 163 (Bankr. D. Mass. 1985), had resulted in a widely accepted view that unless a foreclosure sale realized at least 70 percent of the fair market value of the foreclosed property, the sale could be subject to attack as a fraudulent transfer under Bankruptcy Code §548.

In *BFP*, the Supreme Court, once and for all, rejected *Ruebeck* and its progeny, holding that reasonably equivalent value within the meaning of Bankruptcy Code §548 had nothing whatsoever to do with fair market value, but rather that "reasonably equivalent value, for foreclosed property, is the price in fact received at the foreclosure sale, so long as all the requirements of the State's foreclosure law have been complied with."

While Somma did not discuss the *BFP* decision in his opinion in *Strayton*, it would appear that he was focusing on the Supreme Court's qualifying language "so long as all the requirements of the State's foreclosure law have been complied with."

Champion may have complied scrupulously with G.L.c. 244, §14, but that was not enough, according to Somma.

The Supreme Judicial Court, in *Williams v. Resolution GGF OY*, 417 Mass. 377 (1994), held that in addition to the statutory requirements, a mortgagee "must act in good faith and must use reasonable diligence to protect the interests of the mortgagor." *See also, Snowden v. Chase Manhattan Mortgage Corp. et al.,*17 Mass. L. Rep. 27 (Sup. Ct. 2003).

According to Somma, it appeared that Champion's conduct leading up to its foreclosure sale did not constitute reasonable diligence.

Conclusion

Even though *Strayton* was decided on a motion for preliminary injunction, and thus a different result could ultimately obtain after trial or on subsequent appellate review, the case is nevertheless of importance to lenders as a stark warning about the risks of non-compliance with state law requirements to act in good faith and use reasonable diligence to protect the interests of borrowers during the foreclosure sale process.

It is clear from the *Strayton* decision that a crescendo of due diligence lapses, rather than a single omission, prompted Somma to find that Champion most likely had failed to exercise reasonable diligence.

It is obvious from a reading of Somma's decision that Champion's cause was not advanced by either its customer service procedures, involving an "ever-changing cast of loan officers," or the testimony of its lawyer and auctioneer, described by the court as "not helpful … more than usually self-serving and, in at least one instance, deliberately obtuse."

It is hard to guess how many of the neglected due diligence criteria enumerated by Somma, had they been complied with by Champion, would have tipped the scales in its favor.

Clearly, a current appraisal of the property should be standard operating procedure for foreclosing lenders. Commercial or display advertising should be considered carefully on a case by case basis to achieve maximum effectiveness as a marketing tool. Procedures should be established for dealing with borrowers post-default. The situation where a borrower is relegated to telephone-touchtone hell or to an endless parade of entry-level customer service representatives may no longer be tolerated.

As the number of foreclosure sales in Massachusetts increases, there undoubtedly will be further enlightenment from the federal and state courts as to the standards of good faith and due diligence incumbent upon foreclosing lenders.

In the meantime, the lessons of *Strayton* are well worth absorbing.

A long-time member of the association, Mel Hoffman chairs the bankruptcy and insolvency practice group at Looney & Grossman. He is also contributing editor to the MCLE publication, Real Estate Title Practice in Massachusetts.

New permitting ombudsman outlines goals

Continued from page 2

ting Program gives municipalities the ability to promote commercial development on pre-approved parcels by offering expedited local permitting. Cities and towns that accept the provisions of Chapter 43D are eligible for state grants to help improve the local permitting process.

Several communities are investigating whether to adopt the Chapter 43D program, which was recently revised. One priority development site has been designated in Worcester. The regulations for the Expedited Permitting regulations were issued Dec. 1, 2006 and may be found at 400 CMR 2.00.

Many questions followed Bialecki and Anderson's speech, mostly from attorneys. Bialecki dismissed the paradigm of two sides and the development community having "won" by removing smart growth concepts from the Expedited Permitting law. He said the Patrick administration will not take one extreme, but instead, take a middle ground while guiding discussions on permitting issues.

Bialecki also remarked that while he cannot — and will not — offer assurances to a developer that permits will be issued; he likewise cannot promise a permit will not be appealed.

He has met with several administrative magistrates from the Division of Administrative Law Appeals and several Land Court judges, even though he has no explicit authority over them.

He maintains that many appeals in the DALA concern policy issues that should be dealt with up front, before the permitting process. He believes this would help decrease the length of time it takes to receive decisions.

Bialecki said he looks forward to working with the various land-use constituencies on his goals over the eight years in which he hopes to be in his position.