REBA NEWS

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The Newsletter of the
Real Estate Bar Association for Massachusetts

From the President's desk

By Paul Alphen

There was once a rule of thumb in economics that the nation's economic climate would always improve during a presidential election year. Today we are learning that many of our old rules of thumb have fallen by the wayside. Institution after institution has failed to fulfill its responsibilities and our expectations. We are all directly affected by the many systemic failures that created today's mortgage and credit crisis, now resulting in a plunging economy. We know that many of you face unprecedented business challenges, and that some of you struggled to pay bar dues in 2008. However, I am pleased to report

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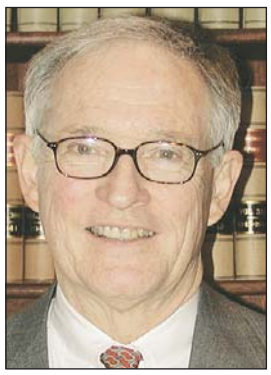
Representatives of REBA and the BBA met in late August with Rep. Robert A. DeLeo, D-Winthrop, chairman of the House Committee on Ways and Means, to discuss homestead reform legislation. The legislation is also supported by the Massachusetts Bar Association. From left: E. Christopher Kehoe, co-chair of the REBA Legislation Committee; Edward J. Smith, REBA legislative counsel; Rep. DeLeo; Michael J. Goldberg, REBA Legislation Committee member and one of the bill's principal draftsmen; Douglas B. Rosner, co-chair of the Bankruptcy Section of the BBA; and Deborah Gibbs, BBA director of governmental relations. The new homestead law will be a featured in a break-out session at REBA's annual meeting and conference on Monday, Nov. 3. Rep. DeLeo is a longtime member of REBA.

Judge Armstrong joins REBA Dispute Resolution



ARMSTRONG

Retired Appeals Court Chief Justice Christopher J. Armstrong has joined the panel of neutral mediators of REBA Dispute Resolution, an affiliate of the Real Estate Bar Association.

"We could not be more pleased that Judge Armstrong will join our growing program," said REBA/DR president, Hon. Mel L. Greenberg (ret.). "His considerable experience on the appellate and trial court bench will be a great asset to our clients."

"REBA/DR is not just for real estate any more," said REBA's Executive Director Peter Wittenborg. "Judge Armstrong will bring greater depth to our panel, particularly for business and public land use issues, and offer more options for our dispute resolution clients."

Until his retirement in 2006, Armstrong served on the Appeals Court bench as an associate justice from 1972 and as chief justice from 2000 to 2006. He was instrumental in seeking and obtaining from the Legislature an expansion of the Appeals Court from 14 to 25 justices, eliminating a long-standing case backlog. Prior to joining the Appeals Court, Armstrong served as assistant legal counsel to Gov. John A. Volpe, assistant attorney general under Elliot Richardson and chief counsel to Gov. Francis W. Sargent. Armstrong graduated from Yale College in 1958 and Yale University School of Law in 1961.

Condo Law Committee launched

In response to interest from condominium law practitioners, REBA President Paul Alphen has authorized the launch of a new committee, Condominium Law and Practice. The group will be co-chaired by Clive D. Martin of Robinson & Cole and Diane R. Rubin of Holland & Knight. The group will focus on educating REBA members and others on both the basics and emerging trends in the field of condominium law with a particular emphasis on issues affecting condominium associations.

"The group will be a resource for real estate litigators and transactional lawyers practicing in all areas of condominium law," Alphen said. "Under Diane and Clive's leadership, this group will become a home for all condominium lawyers."

The group's inaugural meeting last month included a panel discussion focusing of the differences between the Uniform Condominium Act and the current law, G.L.c. 183A. The program was moderated by Robert Galvin. Hon. Rudolph Kass (ret.), one of the law's original draftsmen in the late 1960s, offered a historical overview. Steven Y. Chow, a member of the Massachusetts Commission on Uniform State Laws, discussed the Uniform Act.

MARTIN

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For more information or to become a member of the committee, contact Joseph McBride at mcbride@reba.net.

What's in this issue…

A Supplement to Massachusetts Lawyers Weekly

Hampden County Real Estate Section combats ever-evolving threats to the practice

By Douglas J. Brunner

The Hampden County Real Estate Section initially organized in 2000 when many of us, led by attorney Richard Goldman, were alarmed over a Maine lender with local ties becoming a title insurance agent. "Not in our neighborhood," we proclaimed and informally met to discuss strategies for fighting this new threat.

Fortunately, the lender's idea fizzled, as did our enthusiasm for membership in yet another organization. Job done! Business dramatically improved with the progression of the new millennium and we were too busy closing on houses to worry about problems somewhere else. Then, two years ago, just as our real estate practices were slowing down, lenders again explored how to improve their bottom lines by slashing our fees and taking the title insurance premiums away from us. Other national lenders went a step further by promoting witness closings, which used notaries or made us glorified paper shufflers.

Our members today are more cognizant that threats to our real estate practices will not go away. They may take different forms, but lenders, particularly national lenders, do not appreciate the way we do business in Massachusetts and believe attorneys only get in the way of smooth and profitable closings. Today, protecting our profession requires an ever-vigilant group that is informed and prepared to act.

Today, protecting our profession requires an ever-vigilant group that is informed and prepared to act.

We joined as a section of the Hampden County Bar Association last year, making our group more visible and using their resources for reaching more members. Our goals are to keep our membership informed on current issues and educated about the changing practice.

We spoke at the attorney general's hearings on the subprime crisis held in Springfield and make ongoing efforts to present our views about the housing market to the local media. For many of our monthly meetings we bring in speakers to educate us about the current market trends and foreclosures. Creating an attorney-authored Hampden County purchase and sale agreement, our group is encouraging the early introduction of attorneys into real estate transactions. We have also sponsored realtor events and are working with the local board to encourage realtors to work more closely with attorneys for the benefit of buyers and sellers.

Our members support the efforts of REBA in fighting the unauthorized practice of law, which we fully understand affects all of us no matter where we practice in Massachusetts.

A longtime member of REBA, Doug Brunner is one of the founders of the Hampden County Real Estate Section, sometimes known as a "mini-REBA." He concentrates in real estate, probate and business law. Doug can be reached by e-mail at djb@titlebound.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.

From the President's desk

PAUL ALPHEN

Continued from page 1

that we have received a significant number of 2009 renewals from REBA members who took advantage of our discount offer by renewing their memberships while registering for the Nov. 3 annual meeting and conference. We are grateful for your response.

Our Continuing Education Committee, ably headed by Sophie Stein and Mike MacClary, has produced programs at the annual meeting and conference of interest to a wide variety of practitioners. Our job is to make REBA membership invaluable to your practice. And our goal is to make each conference better than the one before, providing our attendees with information and resources to support a wide spectrum of legal practice concentrations. We welcome your feedback on how we can improve these twice-yearly conferences … as well as all of our member benefits and services.

These strong member renewals and conference registrations are vitally important as the current economic downturn has overlapped our stepped-up efforts to combat vigilantly the unauthorized practice of law. We have succeeded in obtaining judgments against notary closings and injunctions against non-attorney notaries performing real estate closings. We will be unrelenting in this battle and we seek the unstinting support of every real estate practitioner.

At the risk of sounding like a broken record, REBA is now engaged in the biggest battle of its 150-year history, a costly federal court litigation against the National Real Estate Information Services, a key member of the Title/Appraisal Vendor Management Association, to eliminate non-lawyer closings. TAVMA has characterized REBA before committees of the Massachusetts Legislature as a "trade group" acting in pure self-interest to protect its own turf.

But you know the truth.

You know that REBA doesn't make a dime performing real estate closings. For more than 150 years REBA has stood for the development of professional standards and practices that allow our members to perform orderly transactions that protect consumers and maintain the integrity of the land recording/registration systems. Our members may make fees performing closings, but as you know, our legal fees have not kept pace with inflation and there is no evidence to support the assertion that it costs more for a Massachusetts attorney to close a loan than a non-attorney.

It is extremely regrettable that no other bar association, nor any government agency, will step up to the plate to challenge a well-financed, resourceful national organization engaged in the unauthorized practice of law in Massachusetts. We know that permitting non-lawyers to perform residential closings will open the door to non-lawyers performing commercial closings, offering estate planning counsel and providing other legal advice and services. The erosion of the lawyer's professional role ultimately will harm consumers and encourage the kind malfeasance that triggered the subprime mortgage crisis. Collectively, we have the duty to maintain the integrity of the bar and to stop the unauthorized practice of law.

NREIS is a worthy adversary. The discovery process has been long and tedious. They have deposed many members of our board of directors. While our attorneys are confident that we will prevail, it may take a million dollars or more to pursue the case.

But what option do we have?

Today, your membership in REBA is more important than ever. While dues help REBA provide the professional support and educational services that you have enjoyed for years, your dues also keep the pressure on NREIS, TAVMA and other groups seeking to erode the standards of our profession.

If you have not already done so, please renew your membership. More importantly, encourage a colleague to join REBA. We need your continued membership in 2009 and thereafter to support REBA's efforts to protect the integrity of the practice of law for all lawyers.

The current president of REBA, Paul Alphen is a partner in the Westford firm of Balas, Alphen & Santos, where he concentrates in residential and commercial real estate development and land use regulation, administrative law, real estate transactional practice and title examination. He is active in the Westford community, and has served on numerous town committees and is currently the chair of the town's Highway Garage Building Committee. He can be reached by e-mail at Paul@lawbas.com.

REBA announces new affinity partnership with Massachusetts Attorneys Title Group

REBA President Paul Alphen announced an affinity partnership with Massachusetts Attorneys Title Group to support the association's efforts to combat the unauthorized practice of law. The announcement was received with appreciation by the REBA board of directors at a meeting in early September.

"This partnership with MassATG is based on a simple premise," Alphen said. "MassATG has made a strong commitment to support REBA's UPL efforts by pledging $40,000 to REBA's UPL efforts this year and a substantially greater amount in 2009 and 2010.

"This very exciting affinity program is non-exclusive and is designed not to disturb or disrupt any relationships of REBA members with other title insurance underwriters doing business in Massachusetts," Alphen added. "In fact, we look forward to their continued participation and continued support."

"Whenever you write a MassATG policy you will help MassATG support REBA's work opposing the unauthorized practice of law in Massachusetts," said Tom Bussone, president of the Massachusetts Attorneys Title Group.

For more information about MassATG and how to become an agent, go to www.massatg.com. For more information about REBA, go to www.reba.net.

Unprecedented Chapter 40B activity at SJC results in several significant decisions

By Theodore C. Regnante and Paul J. Haverty

REGNANTE

HAVERTY

The Supreme Judicial Court over a period of two days in February heard oral arguments on seven separate cases involving appeals of comprehensive permit decisions made pursuant to G.L.c. 40B, §20-23. This unprecedented activity has resulted in a number of significant decisions which provide much-needed clarity to a statutory scheme which can too often be opaque even to the most seasoned practitioner. Unfortunately, the procedural posture of some cases prevented the SJC from addressing the substantive merits, while the language of the statute itself limited the ability of the SJC to provide the clarity to the process desired by practitioners.

The first decision issued by the SJC was on an appeal of a Housing Appeals Committee decision ordering the grant of a sight-line easement over a parcel of land owned by the Groton Electrical Light Department. (*Zoning Bd. of Appeals of Groton v. Housing Appeals Comm.*, 451 Mass. 35 (2008)) The HAC had ordered the grant of the easement in reliance on a previous SJC decision (*Board of Appeals of Maynard v. Housing Appeals Comm.*, 370 Mass. 64 (1976)) which suggested that the requirement for town meeting approval could, in appropriate circumstances, be disposed of as part of a Chapter 40B approval process. Id. at 39. The Superior Court, hearing the matter pursuant to a Chapter 30A appeal brought by the board, agreed with the HAC, noting that the minimal right being surrendered by the town (the easement only required that vegetation on the town-owned property be maintained to provide a sight-line to allow adequate sight distance for the project access road) was outweighed by the regional need for affordable housing.

The SJC disagreed, holding that Chapter 40B does not allow the HAC "to order a municipality to convey an easement," and that the requirement for town meeting approval is a state law which may not be waived as part of a Chapter 40B process. Id. at 39-41.

The SJC distinguished this case from the Maynard case, noting that the Maynard case involved the extension of the municipal sewer system, and did not "involve or authorize the transfer of an interest in municipal land in the form of a mandated easement." Id. at 41. The SJC's holding is thus limited to the proposition that the HAC may not require a municipality to convey an interest in land, no matter how minor an interest. The holding does not limit the ability of the HAC to order municipalities to grant any and all local permits typically required as part of the land development process in the municipality.

The next decisions from the SJC were two cases featuring conflicting Superior Court decisions regarding the proper time for determining whether a municipality has met its 10 percent affordable housing minimum pursuant to Chapter 40B. In *Zoning Bd. of Appeals of Canton v. Housing Appeals Committee*, 451 Mass. 158 (2008), the Superior Court had held that the HAC lost jurisdiction to hear an appeal brought by a developer pursuant to G.L.c. 40B, §22 when the town of Canton exceeded its 10 percent affordable housing minimum while the developer's appeal was pending at the HAC.

In reaching its determination, the Superior Court found invalid a Department of Housing and Community Development regulation setting the time for determining consistency with local needs (which includes the 10 percent requirement) at the time the decision of the board of appeals is filed with the municipal clerk. Id. at 159. However, another Superior Court, faced with the same question of whether the HAC loses jurisdiction to hear an appeal once a town has exceeded its 10 per-

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Update on climate change issues in Massachusetts

By Ruth H. Silman

Climate change is receiving much attention, including in legal circles. This article summarizes a number of recent developments in Massachusetts related to climate change.

Regional Greenhouse Gas Initiative

Ten Northeastern states are participating in the Regional Greenhouse Gas Initiative, a multi-state compact to develop a regional CO_2 cap-and-trade program that first stabilizes and then reduces CO_2 emissions from fossil-fuel-fired power plants 10 percent by 2018.

The RGGI states have agreed to auction 100 percent of the allowances instead of allocating some or all of the allowances to regulated facilities without charge. The auction also allows non-regulated entities to purchase the allowances for investment purposes. The first auction was scheduled for Sept. 25.

Of the 10 states, six (Connecticut, Maine, Maryland, Massachusetts, Rhode Island and Vermont) will participate in the initial auction of 12.5 million allowances of CO_2. The remaining allowances (over 175 million) will be auctioned in a series of future quarterly auctions, the next two of which have been scheduled for December and March. Once Delaware, New Hampshire, New Jersey and New York complete the necessary rulemaking proceedings, those states will participate in subsequent auctions.

Massachusetts Green Communities Act

On July 2, Gov. Deval L. Patrick signed The Green Communities Act of 2007 into law. See "An Act Relative to Green Communities," Chapter 169 of the Acts of 2008. The legislation is a comprehensive, multi-faceted energy reform bill that encourages energy and building efficiency, promotes renewable energy, creates green communities, implements elements of RGGI and provides market incentives and funding for various types of energy generation.

Global Warming Solutions Act

Patrick signed The Global Warming Solutions Act on Aug. 8. See "An Act Establishing the Global Warming Solutions Act," Chapter 298 of the Acts of 2008. The act requires reductions in greenhouse gases from all sectors of the economy of 10 to 25 percent below 1990 levels by 2020 and 80 percent by 2050. The legislation empowers the Executive Office of Energy and Environmental Affairs to regulate greenhouse gases from all sources in the state.

The act requires EOEEA to adopt interim emissions limits for 2020, 2030, and 2040, and to promulgate regulations to reach those interim limits, particularly with respect to reducing energy use, increasing efficiency and encouraging renewable energy development in the energy generation, buildings, and transportation sectors. EOEEA must assess various strategies and must report on the implementation of the global warming regulations at least every five years.

DEP must monitor emissions by establishing an emissions registry and reporting system, including all emissions from electricity generation consumed in Massachu-

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Ruth Silman is an energy and environmental partner in Nixon Peabody's Boston office who leads the firm's Climate Change team. Nixon Peabody LLP is a full-service law firm with more than 700 attorneys in 18 offices across the U.S. and abroad. The firm assists its energy, industrial and financial clients to meet the challenges and opportunities emerging from regulatory and corporate responses to climate change. Like its clients, Nixon Peabody is working to reduce its own carbon footprint and to reflect sustainable principles.

New condominium guidelines demand more from lenders, community associations

By Seth Emmer

An already difficult condominium market is likely to become more challenging for buyers, sellers and especially for lenders as a result of new underwriting guidelines adopted recently by Fannie Mae and mirrored, in key respects, by Freddie Mac. In addition to tightening the qualifying standards for condominium buyers, the new rules will require lenders to assume more responsibility for reviewing the finances of community associations and will, as an indirect result, push community associations to focus more intently on their budgets and their reserve policies than many have tended to do in the past.

Full reviews required

For lenders, the most significant procedural change is the virtual elimination of the streamlined "spot" loan approval process through which Fannie and Freddie have provided automated reviews of condominium loans originated for sale to them. (This article is based on an analysis of Fannie Mae's policy announcement, but as noted earlier, Freddie Mac's new requirements are essentially the same.)

Fannie's new rules will require full project reviews for loans to individuals purchasing units (for primary residences or second homes) in new condominium developments and for loans to investors buying units in both new and established communities.

Lenders financing multiple loans in existing communities — defined as more than one loan in a given community within a year — will have to subject those loans to a full project review as well. Spot loans — single loans in existing communities — will be allowed only for borrowers making a minimum down payment of 10 percent, another significant change from the former policy, which allowed 100 percent financing for some condominium loans.

Clearly, Fannie wants lenders to perform full-scale rather than limited reviews on most of the condominium loans the company buys. The company also wants communities to be primarily owner-occupied. Fannie will not approve an investor loan unless at least 51 percent of the units are owned or (in a new development) under contract to owner-occupants or second-home owners.

Under the full project review now required for most condominium loans, lenders must verify and warrant to Fannie that: the community association has an "adequate" budget; the budget contains a line item allocating 10 percent of annual revenues for the association's reserves; the association has available funds equaling the deductible under the association's master insurance policy; and no more than 15 percent of the common area fees are delinquent by more than one month.

Limits on delinquencies

All of these changes are significant for lenders, but the delinquency limit is likely to be the most problematic. Community associations in Massachusetts and nationwide are already struggling with rising delinquencies and foreclosures, exacerbated by a weakening economy and restrictive lending policies that had already begun to tighten before Fannie announced the new guidelines. Even with an aggressive collection policy in place, it takes time for a community association to collect delinquent payments or to foreclose on delinquent owners.

In Massachusetts, associations can't even begin the collection process under the state's super lien statute until an owner has fallen two months in arrears. The full impact of the delinquency cap is unclear, but at a minimum, this policy seems to be at odds with federal and state efforts to stimulate the sagging housing market.

In addition to making it more difficult to sell condominiums, the new guidelines will increase the paperwork and expand the potential liability for lenders, who must now warrant on each condominium loan sold to Fannie Mae that the community association meets all of Fannie's legal requirements. In a follow-up memorandum clarifying this policy, Fannie Mae explained that for new condominiums, lenders must submit a formal written opinion from an attorney verifying that the association's documents are in compliance, but for existing communities and smaller developments (two to four units), Fannie said, the attorneys' re-

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Seth Emmer is a partner in the Braintree law firm of Marcus, Errico, Emmer & Brooks, specializing in community association law. An active member of the Community Associations Institute, Emmer has served as a trustee of that organization and as a dean of its College of Community Associations Attorneys. He has also chaired the Attorneys Committee for CAI at both the national and regional levels. Seth can be reached by e-mail at semmer@meeb.com.

Update on HUD's new RESPA rules

By Joel A. Stein

Last March, HUD released a new proposed rule to reform the more than 30-year-old rules of RESPA. The proposed rule was accompanied by a report detailing the results of its consumer testing of new disclosures, and a nearly 600-page regulatory impact analysis.

HUD's economic analysis estimates that with the changes proposed in this rulemaking, there will be an average consumer savings of $518 to $670 per transaction. HUD believes that the new rule will result in reduced costs paid to small businesses, particularly those small businesses who are serving as the settlement agent.

Much of the rule is directed towards clarifying and firming up the good faith estimate. HUD has proposed that mortgage brokers and lenders provide consumers with a standard GFE. HUD believes that by more openly disclosing the key elements of the loan and by controlling fee inflation, consumers will be provided with enough information to allow them to shop more effectively for the lowest cost loan.

The proposal would allow a loan originator to collect a fee limited to the cost of providing the GFE, including the cost of an initial credit report as a condition of providing the GFE to the prospective borrower. HUD requires the standard GFE to include: the interest rate and mortgage amount; whether the interest rate and principal balance will increase and by how much; and whether the loan has a prepayment penalty or balloon penalty.

The proposed GFE would consolidate closing costs into major categories to prevent junk fees and prominently display total estimated settlement charges on the first page so the consumer can easily compare loan offers. In addition, HUD's new proposed rule would establish tolerances specifying which charges can and cannot change at settlement. If a fee changes, HUD proposes to limit the amount it can change to no more than 10 percent. HUD also proposes to modify the HUD-1 settlement statement to help consumers compare the anticipated charges on the GFE and their actual charges. The GFE also will require that lender payments to mortgage brokers (i.e. yield spread premiums) be disclosed.

The new GFE will include an informational section alerting the borrower to the fact that he or she may be required to pay property taxes, homeowner's insurance, flood insurance, condominium fees and other charges.

Despite much discussion that the GFE and HUD-1 settlement statement should mirror each other for easy comparison of estimated and actual costs, the new GFE is four letter-sized pages and the HUD-1 settlement remains two legal-sized pages with different placement for cost and fees, making comparison of the fees difficult.

The new rule will revise Section 8 of RESPA by altering the definition of "a thing of value" to exclude discounts negotiated by settlement service providers based on negotiated pricing arrangements, providing that no more than the reduced price is charged to the borrower and disclosed on the HUD-1/1A. The rule permits loan originators to use average cost pricing and sets two specific methods that loan originators may use to calculate an average price for a particular settlement service.

This alteration will allow settlement service providers to discount their fees to the lender; however, as opposed to the bundling proposals that we have seen in the past where the settlement service provider could retain the difference between the discounted fee and the fee charged to the consumer, the discount must now be passed along to the consumer.

This volume discount will allow average cost pricing, including such items as FEDEX fees. An agent who lists the same amount charged for each closing for a FEDEX fee will not be violating RESPA, as long as it is based on the actual average of six consecutive proceeding months.

A controversial idea set forth in the new HUD rule is the concept of a closing script to be read aloud by the settlement agent to the borrowers at the closing, who will also be provided a written copy of the script. The script is meant to ensure that the settlement agent not only compares the borrower's estimated and actual charges, but will details the key terms of the loan. The closing script must explain the following: the comparison between the loan terms and settlement charges estimated on the GFE and those on the HUD-1; whether the tolerances have been met; and the loan terms for the specific mortgage loan as stated on the mortgage note and

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A former president of the association, Joel Stein co-chairs the Title Insurance and National Affairs Committee. He is the recipient of REBA's highest honor, the Richard B. Johnson Award, a lifetime achievement award, He can be reached by e-mail at jstein@steintitle.com.

Foreclosures: the increase in claims against closing attorneys and what you can do about it

By Robert T. Gill and Jennifer L. Markowski

GILL

MARKOWSKI

Foreclosures in Massachusetts continue to occur at historic levels, leaving many borrowers searching for ways to save their homes.

The Warren Group, which tracks real estate in Massachusetts, reported that in the first seven months of this year, 7,804 foreclosure deeds have been filed, which far exceeds the 3,902 foreclosure deeds filed during the same time period in 2007.

As the number of foreclosures rises so too will the number of claims challenging the lender's right to foreclose. Although the lender is the usual target in these types of lawsuits, our experience is that sometimes the borrower also asserts a claim against the lender's closing or foreclosing attorney or the lender asserts its own third-party claim against its attorney. While there are precautions attorneys can take to reduce the risk of such a claim and there are often strong defenses to the types of claims asserted in these cases, there is simply no absolute way to prevent the claim from being asserted. However, it is helpful to be aware of what kinds of claims have been appearing and will continue to appear as the number of foreclosures continues to grow.

Many claims arise from technical and procedural challenges to the foreclosure process. In these cases, the borrower alleges the lender "wrongfully foreclosed" on the property. Failing to identify and properly serve notice to all interested parties, failing to abide by the filing and service deadlines and failing to properly publish notices are just a few of the challenges that can be raised.

In other cases, borrowers make claims that the foreclosing lender has not established it has standing to assert rights over the property. Standing issues can arise where the loan has gone through numerous assignments or has been bundled and sold on the secondary market. It is therefore important to verify that the assignments are properly documented and that the lender has standing to foreclose on the property.

In other situations, borrowers allege that the lender violated provisions of the Truth in Lending Act. Where there has been a truth in lending violation and the transaction at issue was a refinance transaction, a borrower has three years from the date of the refinance to assert a claim for rescission of the loan. If the borrower is successful, not only does he avoid foreclosure, but he receives the added benefit of living in the home, payment-free, for up to three years.

Other borrowers challenge the loan itself, alleging the lender engaged in predatory lending practices by providing the borrower with a loan the terms of which were unfair and deceptive or by providing misleading marketing information about the true terms of the loan. In these cases, borrowers may seek equitable relief to try to avoid foreclosure and to modify the terms of the loan being foreclosed upon.

These are just a few of the types of claims we have seen and expect to continue to see borrowers raise when faced with a foreclosure. Although the types of cases outlined above generically describe claims borrowers have asserted against lenders, in each of these types of cases, we have seen either the borrower or the lender, or both, assert claims against the closing and/or foreclosing attorney. There are many legal defenses available in these

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A partner in the firm of Peabody & Arnold, Bob Gill concentrates his practice in the area of professional liability, representing lawyers, accountants and other professionals. He has also served as a hearing committee member for the Board of Bar Overseers. Bob can be contacted by e-mail at rgill@peabodyarnold.com.

Jennifer Markowski, also with Peabody & Arnold, is developing her practice in civil litigation and insurance defense matters. Jennifer can be contacted by e-mail at jmarkowski@peabodyarnold.com.

The Massachusetts Energy Reform Act

By Gregor I. McGregor

In late June, the Legislature finalized and sent to Gov. Deval L. Patrick authorizing and mandating comprehensive energy reform. It took effect the day that Patrick signed it, July 2, with a so-called emergency preamble. The Green Communities Act, as it is titled, dramatically overhauls the commonwealth's energy strategy, increasing investments in energy efficiency and renewable energy and decreasing reliance on fossil fuels.

Patrick declared as he signed the Act, "Climate change is the challenge of our times, and we in Massachusetts are rising to that challenge."

The Environmental League of Massachusetts, on behalf of The Massachusetts Climate Coalition, which labored many years to gain passage of meaningful, substantive reform, described the Act as laying "a strong foundation for a transition from fossil fuels to clean, renewable energy sources."

The Conservation Law Foundation of New England hailed the Act as "a tremendous advancement that comes not a moment too soon, given rising energy prices and the climate crisis."

The Boston Globe observed that the new law "does away with long-standing obstacles to building renewable power projects in Massachusetts and making homes and businesses more energy efficient."

Even business leaders hailed the new law as helping to stabilize electric rates, sell solar power to utility customers, solidify state priorities, and set the stage for more certainty in state policy.

Joining the governor for the signing ceremony at the Museum of Science were Speaker of the House Salvatore F. DiMasi, who authored the bill and gave energy reform priority in the House this year, President of the Senate Therese Murray, Energy Committee Co-Chairs Sen. Michael Morrissey and Rep. Brian Dempsey, EOEEA Secretary Ian Bowles, and many environmental leaders.

The Act is a bold new direction. To note just a few important policy changes, the GCA: requires electricity providers significantly increase investments in energy efficiency and demand management programs; requires that 15 percent of Massachusetts energy sales to consumers come from clean, renewable energy sources by 2020; requires that new development comply with strict building energy codes; establishes a Green Communities program to provide financial assistance to cities and towns for energy efficiency and conservation projects; and requires that 100 percent of pollution allowances estimated under the Regional Greenhouse Gas Initiative be auctioned and the proceeds used primarily for efficiency measures.

The GCA includes requirements that municipalities adopt energy-efficient building codes. It also: provides for long-term contracts for the purchase of renewable energy; allows metering in two directions (net-metering, meaning that if a facility generates power via solar, wind, etc. in surplus, it can be sold back to the grid); allows municipalities to own renewable energy facilities and provides authority to issue bonds to finance construction; provides for as-of-right siting for renewable or alternative energy facilities both generating and manufacturing for qualified green communities in designated areas; and further encourages communities to develop clean energy resources by providing up to $10 million per year to municipalities in assistance.

Finally, the GCA establishes the Regional Greenhouse Gas Initiative Auction Trust Fund and requires that 80 percent of auction proceeds go to energy efficiency programs.

Energy generators, distributors and consumers should be aware that the GCA codifies the Office of the Ratepayer Advocate under the attorney general to intervene in proceedings affecting ratepayers. Consumer advocates should also note that the GCA directs the Board of Registration of Home Inspectors, the State Board of Building Regulations and Standards, the

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Greg McGregor co-chairs REBA's Environmental Law Committee and is a frequent contributor to REBA News on environmental law matters. He also serves on the Real Estate and Environmental Law Curriculum Advisory Committee of MCLE. He can be contacted at gimcg@mcgregorlaw.com. This article is adapted from a publication of the Massachusetts Association of Conservation Commissions whom we thank for this courtesy.

Massachusetts enacts historic Ocean Management Act

by Deborah A. Eliason

On May 28, Gov. Deval L. Patrick signed the first in the nation Ocean Management Act into law. See Chapter 114 of the Acts of 2008. The act became effective on Aug. 26. The legislation requires the development of a comprehensive management plan for roughly all of the state-controlled waters of Massachusetts. The intent of the act is to balance natural resource preservation with traditional and new uses of the ocean, including renewable energy.

The act places the ocean waters and ocean-based development of the commonwealth located within the ocean management planning area, as described in the act, under the authority of the Secretary of Energy and Environmental Affairs.

The act requires the secretary, in conjunction with the Ocean Advisory Commission and the Ocean Science Advisory Council, established pursuant to the act, to develop an integrated Ocean Management Plan by Dec. 31, 2009 and a draft OMP by July 2009. The act provides for significant public input before final adoption of the OMP. Upon the secretary's adoption of an OMP, all certificates, licenses, permits and approvals for any proposed structures, uses or activities in the OMPA shall be consistent, to the maximum extent practicable, with the OMP.

In sum, the OMP is intended to address the following: the commonwealth's goals, siting priorities and standards for use of its ocean waters; (the preservation and protection of traditional uses of the ocean; the identification and protection of special, sensitive or unique estuarine and marine life and habitats; and the identification of appropriate locations and performance standards for new activities, uses and facilities within the OMPA.

One of the most significant impacts of the act is that, upon adopting the OMP, it amends the Ocean Sanctuary Act, G.L.c. 132A, §15, to expressly allow the siting of renewable energy facilities within all ocean sanctuaries except the Cape Cod Sanctuary, provided the facility meets certain criteria. The act also places the ocean sanctuaries described in G.L.c. 132A, §13 under the care, oversight and control of the Office of Coastal Zone Management.

The act is seeking to strike a balance between the competing interests vying to make use of the ocean. The act establishes an Ocean Advisory Commission to be comprised of 17 members, including state legislators, industry representatives, environmental organizations and governmental planning agency representatives, to advise the secretary on the development of the OMP. It also establishes a nine-member Ocean Science Advisory Council to assist the secretary in creating a baseline assessment of the OMPA and obtaining scientific information necessary for the development of the OMP. The council will be comprised of scientists from academic institutions, private, non-profit organizations (at least one of whom will be designated by the Massachusetts Fishermen's Partnership) and government agencies.

Upon adoption of the OMP, all certificates, licenses, permits and approvals for any proposed structures, uses or activities in the OMPA shall be consistent, to the maximum extent practicable, with the OMP. For example, all new liquefied natural gas terminals, offshore wind and tidal energy facilities, sand and gravel mining operations, desalination plants, and deepwater aquaculture will be reviewed to ensure maximum compliance with the OMP. Projects that have received approval prior to the effective date of the act are not subject to the OMP.

The act expressly states that it does not alter the jurisdictional authority of the Division of Marine Fisheries and it provides limitations on the regulation of commercial and recreational marine uses through the OMP. The act states that it shall not be construed to prohibit the transit of commercial fishing or recreational vessels in state ocean waters and provides that commercial and recreational fishing are allowable uses within the OMPA, subject to the exclusive jurisdiction of the division.

Any component of a plan which regulates commercial and recreational fishing

Continued on page 20

Deborah Eliason is of counsel in the Boston office of Beveridge & Diamond, an environmental, land use and litigation law firm. Her practice focuses on real estate transactions, including acquisitions, dispositions, leasing and financing of real property. She can be contacted at deliason@bdlaw.com).

Update on adverse possession involving ouster

By Brett D. Carroll and Jennifer L. Antoniazzi

ANTONIAZZI

CARROLL

The potential acquisition of rights in land owned by another through long term use, more commonly known as adverse possession, is the frequent subject of legal disputes. While the elements that must be satisfied to sustain a claim of adverse possession are well known, the manner in which these elements may be satisfied is not always as clear.

This is especially true in the case of land owned by co-tenants: multiple individuals jointly owning a piece of real estate and having equal and co-extensive rights of possession, use and alienation. In this context, Massachusetts courts require that the adversely possessing co-tenant "oust" his fellow co-tenants in order to sustain a claim for adverse possession. Although Massachusetts cases have repeatedly analyzed the concept of ouster, the facts necessary to satisfy this requirement remain elusive.

Recently, the Land Court provided further clarification on the issue of ouster by identifying what constitutes ouster in a case where the adversely possessing co-tenant's predecessor in title entered the property without a deed and where the collective possession totaled less than 30years in *Pepe v. DeSanctis*, No. 309219, 2007 WL 1954435 (Mass. Land Ct. July 6, 2007).

This decision established that the lack of a deed or the possession of land for less than 30 years did not automatically prevent a finding of ouster by a co-tenant. *Pepe* involved a dispute between the plaintiff, the current "owner" of residential property in East Boston, and the defendants, a surviving son of the original owners and the estate of another son. See id., at *1, 3-5.

The defendants claimed an interest in the property arising from the estate of Santina DeSanctis, an estate that was probated in the late 1970s. See id. The defendants did not claim an interest in the property until August 2004. See id., at *5-6. One of the plaintiff's predecessors in title, Joseph DeSanctis, did not enter the property by deed; rather, Mr. DeSanctis' exclusive right to the property was acknowledged by his co-tenants, his brothers, during the probate of their mother's estate. See id., at *3-6.

In addition, the court found that the plaintiff and his predecessors in title had adversely possessed the property for nearly 25 years prior to the defendants asserting any claim to the property. See id.

The Pepe decision sheds some light on the case law concerning adverse ouster. The court clearly ruled that that "[a]n exclusive, uninterrupted period of 30 years generally suffices, but a period of as little as 20 years may also establish ouster depending upon the circumstances." See id., at *5.

The court determined that the plaintiff and his predecessors in title "always acted as if they owned the property outright. The defendants thought the property was [the plaintiff's predecessor in title] (indeed, they assented to his sole ownership when they signed the first and final account in the Probate & Family Court proceedings), they *never* went to the property except as invited guests, and they *never* asserted an ownership claim until nearly 25 years after the Probate & Family Court judgment." See id., at *6.

The court concluded that the acts of ownership of the plaintiff and his predecessors in title "coupled with the defendants' knowledge for more than twenty years that those acts were done under a claim of sole ownership, ousts the defendants' claims as a matter of law." See id.

This case re-enforces the idea that the existing case law concerning ouster is not meant to be interpreted as establishing a "bright line" rule.

Instead, the Pepe decision emphasizes that the central focus of an ouster analysis should be the nature of the possession in question as well as the length of possession. Moreover, this decision clearly stated that the absence of en-

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Brett D. Carroll is a partner in Holland & Knight's Boston office, where he concentrates his litigation practice in state and federal courts on title and real property disputes in residential and commercial claims as well as products liability and defense of medical negligence claims. He may be reached at brett.carroll@hklaw.com.

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BREAKOUT SESSIONS

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Will Mean for Your Clients

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Can Do Condos

Eminent Domain Takings

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Recent Developments in
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_____ *Be It Ever So Humble…What the New Homestead Legislation Will Mean for Your Clients* (Bigelow, Delaney, Goldberg)
_____ *How to Avoid Mixed-Use Mayhem: Can Do Condos* (Martin, Rubin, Wiener)
_____ *Eminent Domain Takings* (Masterman, O'Donnell)
_____ *What's New in Foreclosures?* (Moran, Rivera, Wyche)
_____ *Get off the Right of Way! Right Away!* (Creedon, Hovey)
_____ *Title Insurance Claims - Causes, Prevention & the Attorney-Agent's Role* (Campbell, Graham, Gurvits, Looney)
_____ *Recent Developments in Massachusetts Case Law* (Lapatin)

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SCHEDULE OF EVENTS

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

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

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

What's New in Foreclosures?

Julie Taylor Moran, Esq.; Mayte Rivera; Hilary A. Wyche, Esq.

In the current economic environment, foreclosures continue to dominate the real estate scene in Massachusetts. This session will present an overview of the status of residential foreclosures and highlight the new developments in the Massachusetts foreclosure practice and the latest case law, as well as the discussion by the Division of Banks of the legal and practical issues surrounding the administration of recently-enacted M.G.L. c. 244, §35A and the 90-day right-to-cure database.

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

Be It Ever So Humble…What the New Homestead Legislation Will Mean for Your Clients

Erica P. Bigelow, Esq.; Lisa J. Delaney, Esq.; Michael J. Goldberg, Esq.

In the 2007-2008 legislative session, REBA's comprehensive Homestead legislation overhauled our antiquated Homestead statute. Join the bill's drafting team for an in-depth review of the issues created by decisions interpreting the existing statute, what the new law does to address those issues, and to learn how to offer your clients the most up-to-date protection.

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

Eminent Domain Takings

James D. Masterman, Esq.; Kathleen M. O'Donnell, Esq.

Recent decisions such as Devine v. Nantucket and Kelo v. City of New London have challenged a municipality's use of the power of eminent domain. This session will offer an explanation of the procedures followed by municipalities in exercising the right of eminent domain, review the requirements for proper notice and the pitfalls of not doing it correctly. One of the leading experts in the field of eminent domain will explain the impact of the taking and the rights of the affected landowner.

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

Get off the Right of Way! Right Away!

Kevin T. Creedon, Esq.; William V. Hovey, Esq.

This session will explore (a) the universe of persons and entities entitled to use particular easements, (b) what factors should be taken into account in determining the width of an easement which is silent as to this aspect, (c) how to determine if an easement is being "overloaded" or "overburdened" and (d) how to use easements to solve zoning issues. It will also explore the extent to which title insurance coverage is available as to various types of easements as well as the types of affirmative coverage and endorsements which can be issued with respect to such easements.

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

Title Insurance Claims - Causes, Prevention & the Attorney-Agent's Role

Jeffrey A. Campbell, Esq.; Ward P. Graham, Esq.; Eugene Gurvits, Esq.; Thomas M. Looney, Esq.

Every declining real estate market cycle brings a tsunami of new title insurance claims…and new insights and lessons on claims prevention. Our panel of claims attorneys will discuss the current round of new title insurance claims and offer counsel on how to avoid and prevent claims during the underwriting process. We will also focus on the role of the policy-writing agent in keeping routine claims from becoming total disasters.

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

How to Avoid Mixed-Use Mayhem: Can Do Condos

Clive D. Martin, Esq.; Diane R. Rubin, Esq.; David L. Wiener, Esq.

Even though the residential market is experiencing a downturn, developers continue to permit and construct mixed-use condominiums in Boston and elsewhere in Massachusetts. These projects are becoming more complex with residential, hotel, commercial and retail uses sited on small parcels with shared parking, MEP systems and other common elements, all of which create challenges in the design, structuring and management of mixed-used projects. This session will explore some of the interesting issues that practitioners face with mixed-use condominiums in the representation of developers, lenders, buyers/owners, commercial tenants and condominium associations.

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

Recent Developments in Massachusetts Case Law

Philip S. Lapatin, Esq.

Phil Lapatin draws a huge crowd with this session every meeting. Now, you won't have to stay late to hear him. His 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 previous seminars, we will project a live video feed from Phil's session to a second breakout room. Phil recently received the Association's highest honor, The Richard B. Johnson Award.

1:15 p.m. - 2:40 p.m. **LUNCHEON PROGRAM**

1:20 p.m. - 1:30 p.m. **REBA President's Welcome**

Paul F. Alphen, Esq., President

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

1:45 p.m. - 2:00 p.m. **Presentation of the Denis Maguire Community Service Award**

Receipient, **Michael P. Healy, Esq.** of Healy & Associates

2:00 p.m. - 2:30 p.m. **Keynote Speaker**

Attorney General, Martha Coakley

2:40 p.m. **Adjournment**

Keynote Speaker…
Attorney General, Martha Coakley

Attorney General Martha Coakley, our 2008 luncheon keynote speaker, is well known to REBA members. Attorney General Coakley's office has taken the lead to address the subprime lending crisis, issuing first-in-the-nation consumer protection regulations for the mortgage lending industry, pursuing landmark litigation against some of the most egregious lenders in the country, and working with local bar associations to organize a group of attorneys to work pro bono with borrowers facing foreclosure to work out modifications. Her office also continues to work with other Attorney Generals across the nation to urge lenders and servicers to enter into loan modification programs.

She has dedicated the last 20 years of her life to public service. Prior to her election as Attorney General she served eight years as Middlesex District Attorney. She holds a B.A degree, cum laude, from Williams College and a J.D. from Boston University School of Law. She lives in Medford with her two Labrador retrievers, Jackson and Beauregard, and her husband, Thomas F. O'Connor, Jr.

Recent SJC decision promotes cleanups of contamination

By Arthur P. Kreiger and Hetal S. Dhagat

KREIGER

DHAGAT

In *Bank v. Thermo Elemental Inc.*, 451 Mass. 638 (2008), the Supreme Judicial Court recently decided several significant issues under Chapter 21E, providing further incentives for parties to clean up oil and hazardous material contamination. The decision also reinforces that indemnification agreements should be drafted carefully.

In *Bank*, trustees who owned industrial property found trichloroethylene in the groundwater, cleaned it up with the assistance of counsel as well as environmental consultants, sued the former lessees for contractual indemnification and to recover their response costs under Chapter 21E, Section 4, and won a substantial judgment. This article examines the issues raised by the lessees and addressed by the SJC.

Under a 1963 lease, the trustees had leased the property to a series of lessees between 1963 and 1988, including Thermo Jarrell Ash Corporation in 1986 to 1988. In 1988, TJA signed a lease termination agreement with the following provision:

Lessee shall … indemnify … [Lessor] against any claim … arising out of any release of hazardous materials arising out of Lessee's use or activities … during the term of the Lease ... This provision shall not impose any requirement on Lessee … with respect to conditions existing on, under or around the Premises prior to the Lease commencement date.

There was no evidence that TJA had released the TCE at the site. Nevertheless, the jury found for the trustees on their indemnification claim.

The trial judge granted judgment NOV to TJA, finding that the indemnification provision unambiguously applied only to releases of hazardous materials in 1986 to 1988. However, the SJC found the indemnification provision ambiguous. The first sentence limits TJA's liability to claims "arising out of lessee's use or activities." However, the second sentence, absolving the lessee of liability for conditions "prior to the Lease commencement date", which was 1963, implies that TJA would be liable for releases after that date. (The SJC also held that extrinsic evidence, such as testimony about the drafting attorney's intent, should not be used to determine whether the provision is ambiguous. Such evidence should be used only as an "interpretive guide" after the judge finds the contract ambiguous.)

Finding the provision ambiguous, and finding sufficient evidence for the jury's interpretation of it, the SJC vacated the judgment and reinstated the jury verdict for the trustees.

Turning to the Chapter 21E claims, the lessees argued that the trustees were barred from recovering any of their $700,000-plus response costs under Section 4 because they had failed to comply with the Massachusetts Contingency Plan in two minor respects (omission of a scope of work from a report and continuation of response actions after a waiver of approvals expired), which the SJC found did not affect the cleanup. The lessees relied on language in Section 4 that DEP's authority to conduct response actions does not preclude private response actions "provided … [those actions are] conducted in accordance with the [MCP]."

The SJC rejected that argument based on the statutory provision entitling any person who undertakes a "necessary and appropriate" response action to contribution from responsible parties for the "reasonable cost" of the response action, subject to the pre-suit procedural requirements of Section 4A. It found only those three conditions on a private cost recovery claim: the response action must be "necessary and appropriate"; the cost must be "reasonable"; and Section 4A must be followed.

Thus, although the MCP "helps to define the contours" of a necessary and appropriate response action, "exact compliance with every detail of the MCP [is not] a condition precedent to recovery of any response costs." The SJC noted that a contrary holding could discourage cleanups, because the ability to recover cleanup costs from responsible parties would be jeopardized by any slight MCP misstep. That would undermine two purposes of Chapter 21E: to compel prompt and efficient cleanups and to ensure that polluters pay.

The lessees appealed from the jury's award of $90,000 in legal fees incurred in the planning and management of the response actions (distinct from fees for the litigation). The SJC held that those fees could be considered legitimate response costs as long as they are "reasonable, necessary and appropriate" and closely tied to the response actions, noting that nothing in the statute excludes response costs simply because they reflect legal services. It upheld the award of those fees to the trustees. (Anderson & Kreiger filed an amicus curiae brief for REBA and the Abstract Club urging that result.)

The lessees also appealed from the trial judge's the award of $1.1 million in litigation fees under Chapter 21E, Section 15, which authorizes an award of reasonable fees to any party "who advances the purposes of this chapter." The SJC held that Section 15 requires only that a plaintiff has sought reimbursement under Section 4 and did not contribute to the release of hazardous materials, with the prerequisites for recovery under Section 4 that the plaintiff gave sufficient notice of the claim and participated in negotiations in good faith under Section 4A (as well as that the response actions were necessary and appropriate, as discussed above). The SJC upheld that award, finding all those requirements met.

The SJC's interpretation of Chapter 21E all should promote private cleanups of contamination. Its holdings encourage parties to clean up contamination, knowing that they may be able to recover their costs from responsible parties as long as the response actions were necessary and reasonable; promote well-planned and managed cleanups by encouraging parties to engage counsel when appropriate, knowing that the cleanup-related fees may be recoverable as response costs; and encourage the pursuit of responsible parties by increasing the chance of recovering the fees for that litigation.

Art Kreiger authored the association's amicus brief in the Bank case. A partner and co-founder of the Cambridge-based firm Anderson & Kreiger, he concentrates in environmental and land use law. He serves of the panel of neutrals of REBA Dispute Resolution, REBA's alternative dispute resolution subsidiary. Art can be contacted by email at akreiger@andersonkreiger.com.

Hetal Dhagat, an associate at Anderson & Kreiger, represents clients on a variety of environmental issues. She can be contacted at hdhagat@andersonkreiger.com.

Easy transactions with new homestead statute

By Lisa J. Delaney

A comprehensive revised Homestead Statute passed the Senate (S. 2653), and is now with the House, and if enacted will simplify all residential closings and estate planning. The new statute was drafted with the goal of modernizing, clarifying and expanding rights presently enjoyed by both homeowners and creditors, without reducing present statutory protections. The new statute also minimizes transactional details for both real estate closings and new homestead declarations.

Purchase

Each new deed will create an automatic $125,000 homestead without the need for a separate declaration, and the exemption amount may be increased to $500,000 upon recording a declaration either at the time of the deed or any time thereafter. Both the automatic and declared homestead exemptions benefits the owner(s) and any non-titled spouse and their children, who occupy or intend to occupy the home as their primary residence. The proposed statute clarifies and expands the definition of an owner and specifically includes life tenants and trust beneficiaries.

New declarations under §1 will now be signed by all owners who wish to declare homestead in their primary residence. If title is in a married couple, they will both sign the declaration, ending the outdated statutory provision that one signature binds the full family. If title is in only one spouse, he or she alone may still declare homestead for the family.

The new statute provides that spouses may not reside together and allows for the signature of only the owner who will actually live in the home without requiring the signature of a co-owner spouse who lives elsewhere. The new statute anticipates the changing family; future spouses who move into the home will receive the benefit of an existing homestead. Similarly, spouses who separate or divorce and permanently move out of the home will be deemed to have abandoned the homestead, without affecting the continuing homestead rights of the former spouse who stays in the home, or future rights should that former spouse remarry and the new spouse takes up residence in the home.

With an eye towards assisting future transactions, the declaration must state the marital status of each declarant, include the spouse's name, and state if that spouse will reside at the premises or elsewhere, without requiring the disclosure of the non-resident's spouse's private address within the document.

There are no major changes from the existing statute when declaring an elderly or disabled homestead under section §1A, though if the title is in more than one owner who qualifies for this exemption, they may both sign one document, and the proposed statute provides it shall be recorded as a single instrument and not charged a multifunctional recording fee. The single recording fee is also available to §1 declarations both for titles owned by spouses married to each other and for all other forms of co-tenancies.

Sale

The new statute incorporates recent case law into the drafting, and expands the list of documents which terminate the homestead. The statute clarifies that termination occurs upon the execution of a deed or release by all spouses benefited by the homestead. The statute provides that the declaration of a homestead on other property will terminate the rights of all spouses who can claim the benefit in the replacement home. And the statute provides that the abandonment of the home will terminate that party's homestead right, exempting active military service as an act of abandonment.

The statute anticipates that families may sell the family home without purchasing a replacement home, such as in the case of moving in with family or in an apartment, and continues homestead protection in the sale proceeds until either a replacement home is purchased or the expiration of one year, whichever comes first. This provision follows recent case law, and the rationale that homestead is both a possessory right as well as a monetary benefit, and that a sale alone will not abandon the monetary homestead rights.

The one-year duration was provided as a balance to the rights of creditors and also as measurable timing for final abandonment. Similarly, the proposed statute allows that a fire or other casualty requiring reconstruction and temporary relocation is not an intended abandonment of the homestead, and provides that the homestead shall remain in the title and in any insurance proceeds for up to two years or until the family purchases replacement property, whichever comes first. The statute reflects that families often move into trailers located in the side yard during reconstruction, and specifically exempts such a trailer as being a "replacement home."

Intrafamily and other "retitling" deeds are also specifically exempt from terminating an existing homestead. Spouses will be able to convey between themselves, as will those holding title as trustee/beneficiary or as life tenant/remaindermen, without the need to reserve or otherwise mention the homestead rights within the deeds, nor concern themselves with the exact persons executing the retitling deeds.

Property owned in trust will follow two signature rules. Declarations shall be signed only by the trustee. The trust beneficiary must occupy or intend to occupy the home as a primary residence as an "owner" under the statute. The trustee may reside elsewhere, yet as the legal record title holder, the trustee declares the homestead for the beneficiary. But, the termination may be a deed or other document executed by the trustee, or a release or other document executed by the beneficiary, or the abandonment by the beneficiary.

As with the present statute, closing counsel will still need the signatures of all sellers who declared homestead as well as the signature of their non-title spouse who also reside in the sale home as their principal residence. The proposed statute allows an affidavit to be recorded with the deed or at any future time which sets forth the seller's marital status, or that the spouse does not reside at the premises as their primary dwelling, or other such fact that will assist others in determining that the signatures on the deed or other separate release are sufficient to terminate all homestead rights of this family.

Refinance

Refinances will be the easiest transaction under the proposed statute. The new statute provides that all existing homesteads automatically subordinate to any new mortgage executed by the property owners without the need for subordination language in the mortgage or a separate subordination document. The subordination will occur even if the terms of the mortgage specify a counterintent. The subordination will alter only the priorities between the homestead and the new mortgage, without affecting priorities enjoyed by any other creditor.

Unlike the present statute, a refinance will no longer require the countersignature of any non-title spouse, providing a modern comprehension that title is sometimes in only one spouse's name for marital or financial reasons.

Occasionally, mortgages are entered by less than all of the fee simple owners, such as title owned as tenants in common, a marital issue, or even a closing error. The automatic subordination will apply only to the homestead rights of the parties who executed the mortgage, and their non-title spouse, if any, but will not affect the rights of any spouse in title or any other co-owner who did not also execute the mortgage.

Subsequent declaration

The proposed statute provides that a subsequent declaration in the same home by the same family will not terminate an earlier recorded declaration, while the later recorded declaration will "relate back" to the earlier homestead for determining lien priorities. This departs from the existing statute which has caused many families to lose valuable homestead priorities after having recorded multiple homesteads in the same home.

The relation-back rule also applies if an initial $125,000 automatic exemption is later increased by declaration, or if an owner later files an elderly or disabled homestead in the same home. The proposed statute provides creditor protection by differentiating that only the lien priorities will relate back to the initial homestead creation, but that the amount of exemption during any prior period shall not also be increased to the new declaration's exemption amount.

The full text of S. 2653 is available at www.mass.gov/legis. Click text of Senate Bills, and input S. 2653.

Lisa Delaney is a partner at Carvin & Delaney in Braintree, practicing real estate and conveyancing law, and is a member of REBA's Legislative Committee and Registry of Deeds Committee. She is also a member of REBA's Homestead Sub-Committee and one of the principal drafters of the proposed Homestead Statute, S. 2653. She may be reached at ldelaney@carvindelaney.com.

Unprecedented Chapter 40B activity at SJC results in several significant decisions

Continued from page 4

cent requirement, expressly declined to follow the reasoning of the Canton Superior Court, and upheld the validity of the DHCD regulation. (*Taylor v. Housing Appeals Comm.*, 451 Mass. 149 (2008).)

Faced with these two diametrically opposed decisions, the SJC granted direct appellate review of both cases. Ultimately, the SJC issued decisions which upheld the decision of the Taylor court and overturned the decision of the Canton court.

The SJC's decision in the Canton case did not contain an in-depth discussion of the issues, instead relying upon a citation to the Taylor case issued on the same day. In the Taylor decision, the SJC stated that the DHCD's regulation setting the time for determining consistency with local needs at the time the comprehensive permit decision is filed with the municipal clerk "is consistent with the language of the act and is rationally related to its purposes."

Thus the SJC upheld the Superior Court decision in the Taylor case, and overturned the Superior Court decision in the Canton case. In upholding the DHCD regulation, the SJC noted that a prior version of the regulation had set the applicable date at the time the comprehensive permit application was filed with the local board of appeals.

The SJC, in a footnote, indicated that it may prefer the original regulation, noting that this change places a burden on developers, and stating that "[h]ad the calculation date remained the pre-1991 date of application, a developer would know at the outset whether the decision of the zoning board of appeals would be appealable." Id. at 156 [FN 8]. This language in the SJC's decision is significant, as subsequent to the hearing at the SJC on the Taylor and Canton cases, but prior to the issuance of the decisions on these cases, the DHCD promulgated new regulations, including a regulation changing the date for determining consistency with local needs to the date of the filing of the comprehensive permit application. 760 CMR 56.05(3). The language of the Taylor case indicates stromgly that the revised DHCD regulation setting the time for determining consistency with local needs will be upheld if challenged.

The development in the Taylor case was the subject of another recent SJC decision, this one on an appeal brought by abutters to the project, *Taylor v. Board of Appeals of Lexington*, 451 Mass. 270 (2008). Because the HAC had already ruled on the appeal brought by the developer pursuant to G.L.c. 40B, §22, which overturned the decision of the Lexington Board of Appeals, the developer brought a motion to dismiss the complaint brought by the abutters, on the grounds that the ruling by the HAC rendered moot the appeal of the original decision.

The Superior Court agreed, and granted the motion to dismiss. However, the abutters appealed, and the Appeals Court reversed. (*Taylor v. Board of Appeals of Lexington*, 68 Mass. App. Ct. 503 (2007)) The developer appealed to the SJC, and the SJC reversed the decision of the Appeals Court and affirmed the Superior Court's decision. (*Taylor v. Board of Appeals of Lexington*, 451 Mass. 270 (2008).)

However, the SJC, reviewing the claim that the interests of abutters can be adequately represented by allowing intervention at the HAC, noted that the HAC is limited to either affirming the decision of the board or granting the relief sought by the applicant. The SJC expressed concern that the rights of abutters may not be adequately represented in situations where an appeal brought pursuant to G.L.c. 40B, §21 and G.L.c. 40A, §17 is rendered moot by a decision made pursuant to G.L.c. 40B, §22. Accordingly, the SJC determined that abutters may bring an appeal pursuant to G.L.c. 40A, §17 of the "operative" comprehensive permit resulting from the HAC decision, which would either be granted by the local board of appeals on remand, or if the board fails to act within 30 days, the decision of the HAC becomes the comprehensive permit pursuant to the terms of G.L.c. 40B, §23.

This decision thus creates a right to appeal HAC decisions pursuant to G.L.c. 40A, §17, despite the plain language of G.L.c. 40B, §22. The SJC's decision appears to limit the issues which may be addressed in this additional appeal, however, as the SJC stated "[t]o the extent that the issues raised in the developer's administrative appeal, those issues were addressed de novo by the HAC, and, pursuant to G.L.c. 30A, by the judge. The abutters have had their opportunity to be heard on those issues." Thus it appears that only issues not addressed as part of the HAC decision (and any subsequent review pursuant to G.L.c. 30A) may properly be the subject of a subsequent appeal brought pursuant to G.L.c. 40A, §17.

It is significant to note that prior to the issuance of the SJC's decision in *Taylor v. Board of Appeals of Lexington*, the DHCD promulgated new regulations regarding intervention into HAC cases. The new regulations explicitly allow intervention by any person "who would have standing as a person aggrieved to appeal the grant of a special permit in accordance with M.G.L.c. 40A, §17." 760 CMR 56.06(2)(b). Thus any person having standing to appeal pursuant to G.L.c. 40B, §21 and G. L.c. 40A, §17 will also have standing to intervene in the HAC appeal. This new regulation is significant, because the SJC decision states that an appeal brought pursuant to G.L.c. 40B, §21 will be automatically stayed when appeal is also filed pursuant to G.L.c. 40B, §22. Thus abutters appealing to the trial court will be provided notice that the HAC appeal is pending, and that the abutter should move to intervene to protect its substantive rights. It can be argued that the failure of an abutter to move to intervene in the HAC hearing constitutes a waiver of any issue which could have been finally determined by the HAC if it had intervened. As the SJC noted in its decision, one of the purposes of Chapter 40B is to streamline the permitting process; therefore, abutters should not be allowed to artificially extend the process by declining to participate in the HAC hearing, despite having the right to intervene, and having notice of the appeal.

The SJC issued decisions recently on two additional Chapter 40B cases, both of which featured significant substantive issues which were not addressed by the SJC because the cases were not properly before it procedurally.

In the first case, *Town of Hingham v. Department of Housing and Community Development*, 451 Mass. 501 (2008), the town of Hingham filed a declaratory judgment action against the Department of Housing and Community Development, seeking to challenge the number of affordable housing units listed on the Subsidized Housing Inventory kept by the DHCD. The town had previously approved a continuing care retirement community which contained among other units, 1,750 rental apartment units. However, all residents of the community were required to pay an entrance deposit, ranging from $195,000 to $435,000, in addition to monthly rental fees.

The DHCD determined that this arrangement was not consistent with typical rental developments, and informed the town that only 25 percent of the units would be countable on the town's SHI. The SJC upheld a decision of the Superior Court dismissing the town's complaint, noting that the town had failed to show an actual controversy and had failed to exhaust its administrative remedies. The SJC cited 760 CMR 31.04(1)(a) in stating that "the SHI merely carries a presumption of correctness and that a party, including a town, may introduce evidence to rebut the presumption at the later proceeding."

The SJC thus held that the proper action for the town would have been to hold a formal hearing on any comprehensive permit application, and if the town believed it was over its 10 percent housing obligation, deny that permit and wait for the developer to appeal to the HAC, at which point would have been the proper time to challenge the SHI. Since the SJC did not address the important substantive issues involved, it is likely that this case will resurface at the appellate level once the administrative review process has been properly completed.

In *Town of Wrentham v. West Wrentham Village*, LLC, 451 Mass. 511 (2008), the SJC was again presented with a premature appeal of an issue regarding the counting of units on the SHI. In this case, the town appealed a decision of the HAC which determined that

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Ted Regnante and Paul Haverty submitted an amicus brief to the SJC on both the Canton and Taylor cases on behalf of both REBA and the Citizen's Housing and Planning Association.

300 units located in a development center managed by the Department of Mental Retardation were not properly counted in the town's SHI, as the town claimed they should be.

The HAC overturned a decision of the Wrentham Board of Appeals denying the project and remanded the matter to the board for a full hearing (because the Board, believing it had met its 10 percent affordable housing requirement, had denied the project without holding a hearing on the merits). The Town of Wrentham, acting through the board of appeals, appealed to the Superior Court pursuant to both Chapter 30A and also seeking a declaratory judgment.

For the reasons discussed in the Hingham case, the SJC rejected the declaratory judgment claim. The SJC also upheld the Superior Court's dismissal (also upheld by the Appeals Court, *Town of Wrentham v. Housing Appeals Comm.*, 69 Mass. App. Ct. 449 (2007)) of the Chapter 30A complaint, stating that the ruling of the HAC was not a final decision of the agency, as the matter was remanded to the board for a full hearing. In addition to citing traditional exhaustion of remedies case law, the SJC noted that allowing such interlocutory appeals of HAC decisions would frustrate the intent of Chapter 40B to streamline the permitting process for affordable housing developments. While the decision of the HAC in both the Hingham and Wrentham cases were clearly the proper decisions, it is unfortunate that the substantive issues in these cases could not have been resolved, as they involve important questions regarding how the SHI is compiled.

The final case decided by the SJC was *Board of Appeals of Woburn v. Housing Appeals Comm.*, 451 Mass. 581 (2008), which examined the authority of the HAC to treat a decision issued by a local board of appeals with conditions which significantly reduced the number of units in a proposed development as a "constructive denial" rather than as an approval with conditions.

The HAC, in reviewing a comprehensive permit decision issued by the Woburn Zoning Board of Appeals granting a comprehensive permit with numerous conditions, including one condition which reduced the number of units in the project from the requested 640 units to 300, determined that the conditions imposed by the board did not render the project uneconomic. However, the HAC did not end its analysis there, noting that the reduction in units was not linked to any legitimate issues of local concern. The HAC then issued a decision approving 420 units, a decision which both parties appealed to the Superior Court.

The Superior Court upheld the HAC's determination that the conditions imposed would not render the project uneconomic, but remanded the matter to the HAC to determine whether the conditions imposed by the board, given the drastic reduction in the number of units, acted as a functional equivalent of a denial of the project. On remand, the developer submitted evidence showing that a 540-unit project could be constructed without impacting local needs, and the HAC agreed finding that the decision constituted a constructive denial, and issuing a decision approving 540 units. After the Superior Court upheld the HAC's decision, the SJC granted direct appellate review.

The SJC disagreed with the HAC and the Superior Court, citing G.L.c. 40B, §22, to note that "[d]emonstrating that the conditions render a project uneconomic is, therefore, a necessary element of the developer's prima facie case for relief." The SJC went on to state that "[a]bsent such a showing, the board is not required under the act or the department's regulations to demonstrate that its conditions are consistent with local needs."

The Court further stated that once the HAC found the conditions imposed by the board did not render the project uneconomic, "its inquiry should have ended there." The majority opinion raises real questions about whether or not a board of appeals may impose conditions upon a comprehensive permit that are unquestionably illegal, arbitrary and capricious, and such conditions may not be disturbed by the HAC.

It is unlikely that the SJC could have intended that a board may impose conditions that directly violate Chapter 40B or other applicable laws so long as such conditions do not render a project uneconomic. For instance, conditions which violate fair housing laws or which usurp the regulatory authority of the subsidizing agency will not likely be allowed to stand, even if such conditions are not found to render a project uneconomic. To take the issue to the absurd, a literal reading of the majority decision would allow a board to impose a condition requiring a developer to paint each board member's house, and if such clearly illegal condition did not render the project uneconomic, the developer would be unable to appeal. It is unlikely that developers will be willing to continue to develop affordable housing pursuant to Chapter 40B if it becomes clear that they will not be allowed to appeal illegal, unreasonable, arbitrary and capricious conditions imposed by boards of appeal.

While the majority opinion in the Woburn case raises concerns, Chief Justice Margaret H. Marshall, in a concurring opinion, voiced many of these concerns, and noted that the concurrence was based upon the fact that the DHCD had not "promulgated regulations to address the issue presented in this case." Marshall went on to state that in situations where a project is significantly reduced in size without justification, and where the project would be otherwise consistent with local needs, the "HAC should have the authority to consider whether the project is effectively uneconomic under appropriately promulgated regulations."

In response to the suggestion raised by the chief justice, the DHCD has updated the definition of "Reasonable Rate of Return" in its Comprehensive Permit Guidelines to include language stating "[a] condition imposed by the board to decrease the number of units in a project by five percent or more shall create a rebuttable presumption that the developer will not be able to achieve a reasonable rate of return."

Hopefully, this language will be sufficient to satisfy the SJC even though it is contained in guidelines rather than in regulations. The best result would be if the Legislature would address this problem as well as the other issues raised in the SJC cases through corrective legislation; however, it is unlikely that there is sufficient consensus in the Legislature at this time to pass such legislation.

Update on adverse possession involving ouster

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trance by deed or possession for less than 30 years did not prevent a finding of ouster in this case. The presence of other equally exclusive acts of ownership such as assented to probate accounts combined with, at a minimum, nearly 25 years of possession were sufficient to oust the plaintiff's co-tenants. Thus, as seen in *Pepe*, an individual may oust his cotenants and put them on notice of his claim to sole ownership, even though those acts occur over a period of less than 30 years.

Update on climate change issues in Massachusetts

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setts. The legislation creates an advisory committee to assist EOEEA in overseeing emissions reductions measures.

Massachusetts Greenhouse Gas Emissions Policy and Protocol

In 2007, EOEEA promulgated the Massachusetts Greenhouse Gas Policy and Protocol, which is implemented by the Massachusetts Environmental Policy Act Unit. The policy broadens the term "damage to the environment" to include greenhouse gas emissions from certain projects already subject to MEPA review.

The policy does not expand MEPA jurisdiction; rather, it adds requirements to projects undergoing MEPA review. The policy requires a proponent to identify and quantify greenhouse gas emissions from proposed projects and to identify measures to avoid, minimize and mitigate greenhouse gas emissions.

The first step is to quantify greenhouse gas emissions from the baseline project. Next, a proponent must quantify greenhouse gas emissions from alternatives to the project. Then the proponent must compare the baseline to each project alternative and explain the rationale. Finally, although there are no specific numerical greenhouse gas emission limits or numerical greenhouse gas emission reduction targets, a proponent must commit to and quantify the impact of emissions reduction mitigation measures (the policy includes an appendix that lists suggested mitigation measures). These emissions reduction mitigation commitments are enforceable through Section 61 Findings issued by state agencies.

The Massachusetts Energy Reform Act

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EOEEA and the Energy Efficiency Council to develop regulations to require documents to be provided to buyers at the time of closing outlining the procedures and benefits of a home energy audit.

The GCA also effects many legal changes. Most notably it amends Chapter 21A of the General Laws by adding a section that requires the Secretary of the EOEEA to design and implement a bidding process for competitive procurement of electric generation.

Massachusetts General Law Chapter 25A is amended by the addition of sections to: establish a Green Communities Program within the Division of Green Communities to provide technical and financial assistance in the form of grants and loans to municipalities and other local governmental bodies qualifying Green Communities; direct DOER to design and implement a competitive procedure for the procurement of electric generation from clean energy generating facilities on behalf of municipalities seeking assistance with the procurement; authorize a public agency to contract for the procurement of energy management services for a term of 20 years or less; allow local government bodies to contract for the procurement of energy management services; allow a state agency, building authority, or local governmental body to contract for energy conservation projects that have a total project cost of $100,000 or less; and allow a state agency, building authority or local governmental body with a total project cost of less than $100,000 to acquire photovoltaic panels and associated equipment for onsite use of energy generated by these panels.

Update on electronic recording

By Richard P. Howe Jr.

The use of electronic recording is increasing. This summer, the Plymouth and Hamden registries of deeds joined Middlesex North in offering the service to customers. In Lowell, we have electronically recorded more than 10,000 documents — about 12 percent of our daily intake — since we began our pilot program back in June 2005. During the past three years, the list of concerns about e-recording has grown smaller. Here are a few that remain.

Memorandum of understanding

With electronic recording, the registry of deeds delegates some of its responsibility for authentication of documents to the customer. For walk-in recordings, for example, the registry will only accept an original document. With electronic recording, the registry receives only an electronic image and has no way of knowing whether that image was created from an original document or from a photocopy. Consequently, the submitter is responsible for ensuring that the document scanned is an original. While there is currently a clear understanding by all parties that the customer has that responsibility, in the future the delegation of this and other responsibilities to the customer must be expressly memorialized in a standard memorandum of understanding between the customer and the registry.

Customer qualifications

Because electronic recording places more responsibility on the customer, there should be limits placed on who is permitted to be a customer. Access to electronic recording should probably be restricted to certain classes of people or entities such as attorneys, banks and title insurance companies. Identifying and defining eligible classes is an unfinished task.

Queuing system

In the past, I sometimes heard registry staff say that electronic recording would be treated "just like mail," meaning that it would be recorded as quickly as possible, but would be set aside to wait on walk-in customers. Today, everyone understands that electronic recording must be treated as a virtual walk-in customer. To ensure that electronically-submitted documents are not allowed to languish unprocessed at registries, the electronic recording industry has turned to a variety of queuing systems that integrate walk-in customers and electronic recordings in an electronic waiting line.

While such a system has some merit, it is by no means a perfect solution. The queuing systems currently available do not identify the locus of or the parties to a document higher in the queue, so the gap in the pre-recording rundown would not be eliminated by using such a queue. There is also a risk that large, institutional customers would swamp the system with dozens of electronic recordings submitted simultaneously. If you arrive in person at the recording counter with a single document seconds after Big Mortgage Company transmits 50 mortgages (as the big companies routinely do by regular mail even today), a queuing system will force you to wait a very long time before getting on record, since the registry could not deviate from the order of documents set by the queue.

Although it's a close call, I now believe that a queuing system of the type now available is more trouble than it's worth. Even without electronic recording, the idea that the first document to reach the recording counter is the first to get on record is a bit of myth at registries with multiple recording terminals or satellite offices. The entire recording industry is quite comfortable with the risks the current system contains. Adding electronic recording to the mix will increase that risk only slightly if at all.

Time of recording

Another risk that exists apart from electronic recording is the "National Lumber" problem. In *National Lumber Company v. Lombardi*, 64 Mass. App. 490 (2005), the Appeals Court held that a mechanic's lien was deemed to be recorded at the time Fedex delivered the document to the registry of deeds, not at the time the registry actually recorded the document in its computer system.

By this holding, a mortgage that was delivered to the registry at 9 a.m. would have priority over a deed for the same property that was recorded at 9:01 a.m., even though the envelope containing the mortgage had not yet been opened. The same situation might occur with electronic recording. If a dozen documents were submitted electronically after hours on Monday, they would be stacked up in the registry's computer awaiting processing on Tuesday morning. National Lumber might deem those documents already to be on record and would give them priority over a walk-in document that was entered into the registry's recording system as the first document of the day.

Rather than wait for further litigation on this issue, the registers of deeds are drafting a suggested amendment to G.L.c. 36 that would specifically state that a document is deemed to be recorded when it has been entered into the computer system at the correct registry of deeds.

While there are other issues related to electronic recording, the ones I have discussed above are currently the most compelling to those of us who are actually doing electronic recording. If you wish to comment about these or other concerns related to electronic recording, please send me an email at lowelldeeds@comcast.net.

A regular and welcome contributor to REBA News, Dick Howe is register at the Middlesex North District Registry of Deeds.

New condominium guidelines demand more from lenders, community associations

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view "need not rise to the level of a formal written legal opinion."

Distinction without a difference

In theory, Fannie seems to be suggesting that the review for existing communities will be less extensive; in practice, however, this will be a distinction without a difference. No lender is going to warrant compliance for a new or existing development without obtaining an attorney's written opinion on which to rely; no attorney is going to provide that written opinion — whatever it's called — without performing the analysis of the condominium documents necessary to offer an informed assessment, and they are going to charge lenders for that work. Having the attorney who represents the association or who prepared the original documents perform the review may reduce the cost, but there will be legal fees involved and lenders will almost certainly pass those expenses along to borrowers, increasing the cost of condominium loans.

Community associations will also feel the impact of the new condominium standards, in two ways. First, they will have to respond to requests from lenders seeking to verify that they have the "adequate" budget, 10 percent reserve allocation, and deductible funding the new rules require. (It's not clear how lenders will determine that an association's budget is "adequate," but at a minimum, they will probably want copies of the budget and most recent reserve study, plus some fairly detailed background information explaining the community's reserve policies and its reserve replacement history.)

Second, the new condominium policies will require community associations not just to provide information about their policies, but in many cases, to adopt policies they don't currently have, requiring them to analyze infrastructure needs, maintain reserves, and have available funds to cover their insurance deductible. Among these, the reserve requirement will likely prove most challenging.

Most communities don't have anything approaching "adequate" reserves, some don't have any reserves at all, and few, if any, have line items in their budget specifying that 10 percent of their annual revenues will be allocated for the reserve account. But here's the critical bottom line: Lenders selling loans to Fannie and Freddie will not finance units in condominium communities that do not meet the 10 percent-of-budget reserve requirement. Associations may be able to win a waiver if they can demonstrate that their reserve study supports a lower reserve to budget ratio. But Fannie Mae is serious about the reserve requirement and associations are going to have to be serious about it, too.

Arguably, the new underwriting standards for condominiums will require lenders and community associations to do things they should have been doing all along. Associations may become stronger financially, lenders may adopt more prudent policies, and everyone — lenders, associations, condominium buyers and sellers — may eventually end up in a better place as a result. But the trip from where we are to where these policies are driving us is going to be bumpy at best, and it is unlikely that anyone is going to enjoy the ride.

New model forms for real estate litigation

HOVEY

ENGLANDER

The association's Real Estate Litigation Forms Subcommittee has proposed seven new forms for ratification by the association's membership at the annual meeting and conference on Nov. 3. The proposed forms have been posted on the REBA website, www.reba.net, for comment from members.

The proposed forms constitute the first wave of what will be a full set of litigation model forms which will be of assistance to real estate litigators at all levels and in all trial courts of the commonwealth. When ratified by the membership, the proposed forms will be incorporated into the REBA Handbook of Standards and Forms, a "crown jewel" of REBA membership. Every member receives an updated handbook on CD at renewal time.

The forms are the work of Bill Hovey, a former president of the association, Ed Englander, Denis Chicoine and Bob Mangiaratti. The proposed forms include the following: Complaint for Judicial Review under G.L.c. 240, §17; Petition to Require Action to Try Title under G.L.c. 240, §1-5; Complaint to Establish Title under G.L.c. 240, §6-10; Complaint in the Nature of Certiorari Following Approval of ANR Plan Endorsement; Complaint to Establish Easement Rights; Complaint for Slander of Title; and, Petition to Partition. The proposed forms also include specimen answers and affirmative defenses.

Massachusetts enacts historic Ocean Management Act

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must be developed, promulgated and enforced by the division pursuant to G.L.c. 130; however, the OMP may include provisions that, while they are not primarily directed at the regulation of fishing, may have an impact on commercial and recreational fishing. In such cases, the act requires that these components minimize negative economic impacts on commercial and recreational fishing, and if a component has a reasonably foreseeable impact on fishing, it shall be referred to the division for evaluation.

The division is charged with developing and recommending, if possible, suggestions or alternatives to mitigate or eliminate any adverse impacts an OMP component may have on commercial and recreational fishing. It will be interesting to see how the secretary and the division balance the competing interests and how these provisions of the act are implemented and ultimately interpreted by the courts.

The act also establishes a dedicated fund to be known as the Ocean Resources and Waterways Trust Fund. The fund will be comprised of revenue from legislative appropriations and authorizations, other fund appropriations or grants, income from fund investments and ocean development mitigation fees. The fund will be used primarily to mitigate the impacts of ocean development projects on marine habitat, marine resources and public navigation. Amounts not specifically designated under the act shall be used for environmental enhancement, restoration and management of ocean resources. Unexpended funds will be available for use in subsequent fiscal years.

The goal of the Ocean Management Act is to establish a comprehensive plan to manage development in and the use of Massachusetts ocean waters. It is not intended to create a new bureaucracy or permitting process, but instead seeks to provide uniform guidance to the current regulatory agencies in their review of ocean uses and projects. The act provides for significant public input and parties with an interest, economic or otherwise, in the OMP should take advantage of this process to ensure that their interests are duly considered.

Congress adopts H.R. 3221, Housing and Economic Recovery Act of 2008

By Richard Hogan

The housing crisis currently gripping the United States has policymakers in Washington scrambling to find solutions. Elected officials are dealing with a dramatic increase in the number of foreclosures, falling housing values, the collapse of financial institutions and a lack of liquidity in financial markets. In response to these concerns, Congress on July 26 gave final approval to H.R. 3221, The Housing and Economic Recovery Act of 2008. President Bush signed the legislation on July 30.

The Housing and Economic Recovery Act represents an omnibus effort to respond to the housing crisis in a comprehensive manner. This bill makes a number of changes to the tax code, modernizes the Federal Housing Administration, expands lending regulators' powers, provides more liquidity in financial markets, and offers cash assistance to help borrowers. This article summarizes the major components of the legislation.

Tax code changes
First-time home owner's tax credit

The new law provides for a tax credit of up to $7,500 to first-time home buyers who are defined in the law as those who haven't owned a home in the previous three years. The tax credit is capped at 10 percent of the purchase price of the home but can be no more than $7,500 and is phased out for higher-income homeowners. Eligibility is limited to those homeowners who bought their homes after April 8, 2008, and before July 1, 2009. The tax credit must be paid back over a 15-year period.

Deduction of taxes for non-itemizers

Homeowners who pay property taxes but do not itemize may take an additional standard deduction for real property taxes, up to $500 for single filers and $1,000 for couples filing jointly for 2008.

Changes in Fannie Mae, Freddie Mac and the Federal Home Loan banks
New regulator

The act establishes a new entity, the Federal Housing Finance Agency, as the regulator for Fannie Mae, Freddie Mac and the Federal Home Loan Banks, and grants the Agency broad regulatory power. The principal duty of the Agency is to oversee the "prudential" operations of each regulated entity.

Liquidity

The law gives the Treasury Department temporary authority, until Dec. 31, 2009, to lend money to Fannie Mae and Freddie Mac or buy their stock to avert a collapse of one or both of the mortgage giants.

Increase in size of home loans

H.R. 3221 permanently raises the limit on the loans that Fannie Mae and Freddie Mac can buy to up to $625,000 in the highest-cost areas in the country. Also, the law allows Fannie Mae and Freddie Mac to buy loans 15 percent higher than the median home price in certain cities.

FHA changes
Modernize FHA

H.R. 3221 appropriates $25 million to the FHA to improve technology and add staff. The new law also allows the FHA to insure loans for riskier borrowers as compared to present law and permanently increases the size of loans the agency may insure, currently set to revert to $362,790 by the end of the year, to $625,000 in the highest-cost areas. The law requires lenders to show how high a borrower's payment could rise under the terms of a mortgage.

Seller payment of down payment

Under present law, a borrower needs to make a down payment of at least 3 percent to get an FHA-insured mortgage. The 3 percent cannot come from the seller but sellers can donate the money to companies such as Nehemiah or AmeriDream who in turn can give it to the borrower. Effective Oct. 1, 2008, H.R. 3221 bans these down-payment assistance programs.

Foreclosure relief
Hope for homeowners

The FHA will be required under the law to establish a program for borrowers who are at risk of foreclosure. This program, which is voluntary for borrowers and lenders, will begin on Oct. 1, 2008 and conclude on Sept. 30, 2011. Specific rules will be written by the FHA. It is estimated that the program could help up to 400,000 homeowners.

Borrowers who are currently paying a mortgage loan, for the borrowers' residence, that was originated before Jan. 1, 2008, and who can demonstrate that they can't afford to make the mortgage payments, can contact their lender or another FHA-approved lender to apply for the program. Monthly mortgage payments, including principal, interest, taxes and insurance, must be at least 31 percent of monthly income, as of March 1, 2008.

Lenders who agree to participate in the program must agree to forgive all of the debt above 90 percent of the home's current appraised value. Lenders also must make a payment to the FHA in the amount of 3 percent of the principal of the loan.

If the homeowner sells the home or refinances the loan less than a year after refinancing into the FHA loan the FHA will get all of the house price appreciation. The FHA's reimbursement decreases over the next five years but ends up at 50 percent of the house price appreciation.

$3.9 billion in grants

The law aims to prevent blight in extremely hard hit areas of the country by providing $3.9 billion in grants to states, counties and towns so that homes can be bought and rehabilitated. HUD is charged with developing a formula for distributing the funds within 60 days.

TILA reform

Under the new law, Truth in Lending Act disclosures must be delivered seven days prior to the closing of the loan. The act also requires that disclosures include examples of how payments would change based on rate adjustments.

Conclusion

This legislation is certainly one of the most far-reaching pieces of legislation that has been adopted in more than a generation. The purpose of this bill is to stabilize the housing market so that it may recover as soon as possible. It remains to be seen whether the legislation will accomplish this goal.

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Foreclosures: the increase in claims against closing attorneys and what you can do about it

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types of cases, especially where the borrower is asserting a direct claim against the closing attorney who, as a general rule, owes no duty to the borrower.

Should you find yourself involved in a dispute between the borrower and the lender, even though you may have valid legal defenses to the claims, there is no guarantee that you will not be dragged into such a lawsuit. However, there are steps you can take to minimize exposure and to strengthen your defenses.

The best preventative measure is to develop reasonable procedures for ensuring statutory compliance, to carefully follow those procedures, and to document compliance. If a claim is asserted against you, it can be very useful for your attorney to present immediately documentary evidence showing that all procedures were properly followed.

You should also contact your insurance broker when you suspect a claim may be in the works, even if you have not been made a party to the action, but have been served with a subpoena. Some insurance companies provide coverage for subpoena testimony and will assign you an attorney.

In sum, as foreclosures continue to occur in record numbers, borrowers and their attorneys will continue to look for ways to either avoid or delay the process. They will challenge the foreclosure process and the lending practices through litigation in which the closing and/or foreclosing attorney will often be a witness or a party. Although there is no way to avoid these lawsuits, establishing clear and reasonable policies and procedures, documenting compliance with those procedures and promptly notifying your insurer of any potential claims will go a long way toward aiding in the defense of any such claim should it arise.

Update on HUD's new RESPA rules

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related settlement information.

The closing script is comprised of nine categories: introduction, loan description, interest rate, payment, late payment, pre-payment penalty, balloon loan, closing costs and acknowledgment.

HUD's argument for the closing script, which would require a face-to-face reading, notes that the addendum will be prepared by the settlement agent and would have to reflect accurately the loan documents and related settlement information provided by the lender. The settlement agent would be required to read the addendum aloud to the borrower at the settlement. The addendum would compare the loan charges and settlement charges estimated on the GFE with those on the HUD-1, and would describe in detail the loan terms for the specific mortgage loan as stated in the mortgage note and related settlement information. The length of the addendum would vary depending on the specifics of the borrower's loan.

The comment period concluded in June. For a copy of REBA's comment letter, go to www.reba.net.

Since the comment period ended, HUD has faced substantial opposition to the rule, including a letter from 243 members of Congress asking for the rule to be withdrawn in favor of a joint RESPA/TILA rulemaking with the Federal Reserve Board. HUD has since filed a second version of the proposed rule to the Office of Management and Budget for Review.

Send a letter to the editor!

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NAIC continues investigation of title insurance industry

By Richard A. Hogan

The National Association of Insurance Commissioners, a group made up of U.S. state insurance departments, is continuing to examine the title insurance industry. To perform this analysis the NAIC formed the Title Insurance Working Group, comprised of members of many state insurance departments, to study issues related to title insurers and title insurance agents, including the impact of current real estate settlement practices on policyholders.

The group states on its website that it will study whether the title insurance industry is undertaking additional financial risks at the request of institutional lenders and owners, as well as study the issuance of mortgage impairment products by non-title insurers to determine whether such products should be classified as title insurance.

Additionally, the group will monitor the developments of the U.S. Department of Housing and Urban Development relative to proposed changes to the Real Estate Settlement Procedures Act and provide comments to HUD or to the U.S. Congress if necessary. It will also review the Title Insurers Model Act, which was last revised in 1995, and consider issues submitted by consumer representatives during the review, including: whether mono-line laws and regulations needlessly diminish competition; whether greater price competition among title insurers can be encouraged; whether prices should be reduced for refinances; whether fee padding and charging consumers fees for third party services that the title insurers are getting free or at a much lower cost is detrimental to consumers; and whether it is appropriate for Realtors® to include provisions in their contracts to sell that require the buyer to utilize a particular title entity.

The Title Insurance Working Group will examine captive reinsurance arrangements that title insurers maintain and determine if they are legitimate reinsurance transactions, or simply gimmicks to avoid the application of laws that would prohibit rebating, and, if necessary, make recommendations for needed reform.

The group will study affiliated business arrangements (ownership arrangements between and among settlement providers and title entities) to determine what types of arrangements are legitimate and what types of arrangements are "shams," i.e., those structured mainly to capture referral business and provide kickbacks to settlement providers, and that do not perform essential core title services.

Finally, the group will study the appropriateness of title insurance rates in light of the current competitive environment; in particular, it will determine what constitutes appropriate justification for rates, determine the effect that affiliated business arrangements should have on rates and determine the feasibility of interactive rate comparisons among title entities to enhance competition.

The last meeting of the group was on June 1 and was chaired by Mo Chavez, New Mexico superintendent of insurance. Representatives from the following state insurance departments were in attendance: New Mexico, California, Alaska, Arkansas, Colorado, Florida, Georgia, Indiana, Maryland, Minnesota, Missouri, Nevada, New York, Texas, Utah and Washington.

Also in attendance was Ed Miller from the American Land Title Association as well as representatives from most of the national title insurers. In addition, staff members from other insurance departments were also present. After a free-flowing discussion that centered on rate regulation, consumer education, agent regulation and an industry response, the meeting adjourned.

It seems clear that the interest that the NAIC is showing towards the title industry is a result of many of the misdeeds committed by title insurers. Another reason for the scrutiny is a recently released study issued by the U.S. Government Accountability Office that declared that "In the states we visited, we found that regulators did not assess title agents' costs to determine whether they were in line with premium rates; had made only limited efforts to oversee title agents (including ABAs involving insurers and agents); and, until recently, had taken few actions against alleged violations of anti-kickback laws. In part, this situation has resulted from a lack of resources and limited coordination among different regulators within states."

The next meeting of the Title Insurance Working Group will be at the September meeting of the NAIC in Washington. The chair indicated that he will probably schedule at least one conference call in the interim. It is anticipated that the group will report its findings to the NAIC in the next year or so.

Rich Hogan is the legislative and regulatory counsel for CATIC. In that role, Hogan monitors legislation in Congress and throughout New England. Before joining CATIC, Hogan worked in Congress. Rich is a member of REBA's Title Insurance and National Affairs Committee. Rich can be contacted by e-mail at richhogan@catic-e.com.

Images from REBA Spring Conference 2008