REBA NEWS

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The Newsletter of the
Real Estate Bar Association for Massachusetts

To help thwart foreclosures in Boston, REBA has partnered with the city of Boston and Citizens Bank to launch a pro bono program. From left: Anthony Lopez, senior program manager HBA with the city of Boston, Department of Neighborhood Development; REBA President-Elect Stephen M. Edwards; Boston Mayor Thomas M. Menino; Kurt A. James, co-chair of the REBA Affordable Housing Committee; Joseph P. McBride, REBA Pro Bono coordinator; REBA Office Manager Nicole Cunningham; and William Cotter, deputy director HBA with the city of Boston, Department of Neighborhood Development

Mortgage fraud: closing attorneys beware

By Robert T. Gill and Jennifer L. Markowski

On March 7, 2008, the Wall Street Journal reported that "the number of American homes entering foreclosure rose to the highest level on record in the fourth quarter of 2007" (Sara Murray and Sudeep Reddy, Housing, Bank Troubles Deepen, Wall St. J., March 7, 2008, at A1). The significant increase in foreclosures clearly has a direct impact on attorneys who maintain a real estate practice.

In our practice we have seen that the foreclosure crisis also has an indirect impact that has not yet been fully realized. As foreclosures rise and lenders lose money, evidence continues to emerge that a contributing factor to the foreclosure crisis is mortgage fraud. If lenders begin looking for ways to recoup their losses, they may look to the attorney who closed the transaction. Therefore, for a closing attorney, it is important to know that these scams exist and to understand how they are accomplished so that the attorney can choose to avoid transactions that are tainted by fraud. Recognizing and avoiding fraudulent transactions will minimize the risk that a lender will file suit or assert a claim against its attorney, claiming he was negligent in failing to discover the fraud and failing to appropriately advise the lender.

GILL

MARKOWSKI

Cash back at closing

One common mortgage fraud scheme is known as "cash back at closing." This scheme puts money into the buyer's pocket after the closing. The scheme is designed to defraud the lender into loaning more money than the house is worth so that the buyer can walk away from the transaction with money in hand — sometimes a lot of

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Pro bono opportunity: foreclosure prevention initiative

Led by the Real Estate Bar Association's affordable housing committee, the association has launched a pilot program to provide pro bono advice to qualifying homeowners facing foreclosure.

The pilot program includes Citizens Bank, the city of Boston's Department of Neighborhood Development and the Lawyers' Clearinghouse on Affordable Housing and Homelessness.

Participating lawyers have been offered training and additional training sessions will be offered at the REBA spring conference on May 5, 2008, at the DCU Center in Worcester.

"Our goal is to offer a pro bono opportunity for our members that is tailored to their skills, their resources and their availability," said REBA President Paul Alphen. "This program is a welcome vehicle to satisfy the SJC goal of 25 hours of pro bono publico assistance each year."

Citizens Bank is leading a five-bank consortium that has pledged $140 million to support homeowners threatened with foreclosure.

Members who wish to participate or learn more about the program should contact Joe McBride at mcbride@reba.net.

Economist to address Spring Conference

Jeffrey C. Fuhrer, Executive Vice President and Director of Research for Boston's Federal Reserve Bank, will deliver the luncheon keynote address at the Real Estate Bar Association's Spring Conference on Monday, May 5, 2008, at the DCU Center in Worcester.

"Given the current turmoil in the housing market as well as the mortgage and credit markets, we want to educate and inform our members and guests," said REBA President Paul Alphen.

Fuhrer's recent journal publications treat the importance of habit formation in consumer spending decisions, the persistence of inflation, the interaction between monetary policy and long-term interest rates, and the failure of new rational expectation models to explain business cycle fluctuations. Fuhrer holds an A.B., summa cum laude, from Princeton University and M.A. and Ph.D. degrees in economics from Harvard University.

What's in this issue…

A Supplement to Massachusetts Lawyers Weekly

NREIS lawsuit moves to discovery phase

By Lawrence R. Kulig

The lawsuit filed last year by the Real Estate Bar Association against National Real Estate Information Services ("NREIS") has now moved into the discovery stage.

Both REBA and NREIS recently produced thousands of pages of documents to each other during January and February. Most notably, REBA has obtained and is in the process of reviewing approximately 150 loan files produced by NREIS, and reflecting a random sampling of purchase transactions, refinancings and home equity loans closed by NREIS during the period of 2004-2007. REBA intends to use these loan files and the information contained therein regarding NREIS' business practices as it proceeds to conduct depositions over the upcoming months.

REBA's lawsuit, which has been discussed in prior columns, was commenced in March 2007, and transferred to the U.S. District Court, where it has been assigned to Judge Joseph L. Tauro. REBA alleged that NREIS, a Pittsburgh-based settlement services provider, is engaged in the unauthorized practice of law in the manner in which it closes loans secured by residential properties in Massachusetts. NREIS has filed a counterclaim asserting that its activities are protected under the Commerce Clause of the United States Constitution.

In December 2007, counsel for both parties appeared before Tauro to negotiate a discovery schedule for this year. The first step in that discovery process was the mutual exchange of documents. That process is now nearing completion. Including the 150 NREIS loan files, counsel for REBA has reviewed approximately 10,000 pages of NREIS documents containing valuable information about their business practices.

Pursuant to the court's scheduling order, the next step in the process is for the parties to conduct depositions. REBA anticipates noticing the depositions of key NREIS employees responsible for managing the loan closing process, starting in March. REBA is seeking to ascertain how NREIS conducts various parts of the settlement process, including the review of title, and determine what services, if any, REBA retains Massachusetts attorneys to handle.

REBA also anticipates that NREIS will proceed to conduct the depositions of present and former REBA officers as part of its defense strategy.

REBA's goal is to conduct depositions during the summer months and, thereafter, be in a position to file a motion for summary judgment later this year. REBA is seeking an injunction against NREIS' violation of the UPL statute, as well as legal precedent and authority, which may be applied against other potential violators.

Larry Kulig is a senior counsel at Holland + Knight, where his practice focuses on commercial litigation including disputes involving real estate and closely-held businesses. Kulig, together with Ben McGovern and Gael Mahoney, comprise REBA's litigation counsel in the NREIS action. Larry can be e-mailed at lawrence.kulig@hklaw.com.

REBA abolishes condo unit plan requirement

By Edward J. Smith

Gov. Deval L. Patrick has signed into law Chapter 13 of the Acts of 2008, REBA-filed legislation that eliminates the need to attach a verified copy of the floor plans of a condominium unit to the first deed out for each particular unit.

One rationale for the legislation, approved Jan. 25, 2008, was to avoid duplication and attendant costs. Another reason was the risk of misplaced reliance upon a version of plans that, by inadvertence, might be different from the official plans that accompanied the recorded master deed.

Most practically, the cost and inconvenience of needing to locate the surveyor or engineer and re-execute a confirmatory deed is an occurrence that happens too often in a later transaction with the subject property. Even if the developer uses one or more of the units as collateral for financing — a not infrequent occurrence — the mortgage (which is technically a "deed") should have had the unit floor plans attached. Unfortunately, lenders and others sometimes fail to recognize this requirement or simply forget to comply.

It is useful to a buyer to receive the verified copy of plans, "certifying that they show the unit designation …, and that they fully and accurately depict the layout of the unit, its location, dimensions, approximate area, main entrance and immediate common area to which it has access, as built." The simple fact, however, is that the consumer should look to the master deed for reliance. The plans requirement in G.L. c.183A, §9 poses too many pitfalls for the conveyancer, as well as the consumer.

Effective April 24, 2008, Chapter 13 shall apply to all condominium unit deeds, whether recorded prior to, on or after that date. REBA acknowledges the support for the legislation that was provided by the member companies of the Massachusetts Land Title Association, as well as by the co-chairs of the Joint Committee on Housing, Sen. Susan C. Tucker, D-Andover, and Rep. Kevin G. Honan, D-Boston.

Ed Smith, REBA's longtime legislative counsel, is a thoughtful observer and commentator on the culture and folkways of Beacon Hill. He can be e-mailed at edwardjsmith@veizon.net.

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

By Paul F. Alphen

Elsewhere in this issue of REBA News we report on recent developments in the law and announce programs at our Spring Conference. The scope of these articles and programs defines the broad reach of today's Real Estate Bar Association, extending far beyond the world of the stereotypical green-eye-shade-wearing conveyancer. Our committees focus on the practice areas and the needs of litigators, commercial leasing practitioners, housing court practitioners, zoning and land use specialists, title examiners and paralegals.

Currently serving as president of the association, Paul Alphen was a founding chair of REBA's Land Use and Zoning Committee. He resides in Westford with his wife and two sons, both in college. Alphen's e-mail address is paul@lawbas.com.

REBA is now the bar association serving the interests of a wide group of transactional lawyers, civil litigators and adjacent professionals.

A few of you have commented that REBA spends too much time and effort on preventing the unauthorized practice of law in the area of residential conveyancing. Do we have an exaggerated commitment to the residential real estate bar? Of course. While residential conveyancers are our first love, our efforts to preserve the integrity of the bar are anything but myopic.

I need not define for you the term "slippery slope." Those who wish to allow every Tom, Dick and Harriet to perform residential closings also have commercial closings in their gun sights. Our adversary in federal court litigation, National Real Estate Information Services, has recently launched a division to perform commercial transactions.

A residential closing is more complicated that it looks. A single closing is an orchestra of numerous smaller transactions, many of which have the potential for defalcation, fraud and abuse. A moderately busy conveyancer deposits millions of dollars a week into his/her IOLTA account. A closing includes offering legal advice to consumers embarking on their single largest transaction of their lives. If it wasn't obvious from the national savings and loan crisis of the late '80s, the current mortgage crisis should make it patently obvious to anyone that consumers, if mislead or misinformed, can unwittingly unravel the financial fabric of our nation.

Title examination in Massachusetts is both and art and a science. The recorded land system assumes that the title examiner performed a diligent examination of the record, and the closing attorney reviewed the title abstract and prepared or reviewed the transaction documents. While we support efforts to make recent land records available online (at times it is very helpful and saves time and gasoline) we also know that the system is imperfect and a proper title examination requires intimate knowledge of the inside of the registries. Litigators and other non-real estate practitioners have begun to encounter offshore entities performing legal research and document preparation, even local zoning opinions.

As someone who has spent the better part of 35 years hanging around town halls in Massachusetts, I know that it usually takes searching through cartons hidden underneath the second floor stairwell of the Town Hall Annex to prepare a responsible comprehensive commercial zoning opinion. Supporting a multi-million dollar commercial transaction in Massachusetts based on a legal or zoning opinion drafted by someone who doesn't own all-season-radials is a guarantee of future trouble.

The current national mortgage crisis is a prime example. Shortcuts within important financial transactions can have far-reaching and unfortunate implications for the financial services industry and even the structure of our national economy. Or, as an old-time green-eye-shade-wearing conveyancer one told me: "Anything worth doing is worth doing right."

Send a letter to the editor!

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Smoke-free condominiums: the wave of the future?

By Edmund A. Allcock

Cities and towns across the country continue to broaden the war on smoking.

In October 2007, the city of Belmont, Calif., enacted a landmark city ordinance banning smoking in all condominium and apartment complexes located within the city. In Hawaii, the attorney general issued an opinion stating that nothing in state or federal law prohibits privately owned condominiums or apartment complexes from renting to nonsmokers exclusively or adopting smoke-free policy for the property. Utah sponsors a Smoke Free Law Project that provides sample anti-smoking policies in leases and condominium documents.

This latest evolution in the war on smoking is now taking the shape of smoke-free condominiums. This evolving battle in the smoking war is controversial, since condominium boards rarely attempt to extend their authority beyond the common areas and into the unit.

In March, there was breaking news that a posh high-rise 118-unit condominium complex located in Minnesota passed a by-law amendment (by a 77 percent to 23 percent vote) banning smoking in all units. While there has been surprising little publicity on this issue in Massachusetts, numerous Massachusetts condominiums have gone smokeless. The question for Massachusetts lawyers is whether such a ban is legal and, if so, how to best effectuate such a ban.

The only reported case in the country directly on point is a 2006 Colorado District Court decision. In that case, a Colorado District Court judge upheld a by-law amendment enacted by the Heritage Hills Condominium prohibiting smoking anywhere within the boundaries of the four-unit community. Owners of two of the units complained of smoke seeping into their units from one of the four units, occupied by heavy smokers.

When extensive efforts to prevent the smoke from infiltrating the units proved unsuccessful, three of the four unit owners approved an amendment to the condominium declaration, prohibiting smoking anywhere in the community. Litigation ensued, alleging that the association acted capriciously, lacked the authority to prohibit legal activities within residential units, and had not proven that secondhand smoke (rather than simply the smell of smoke) was actually seeping into the other units.

The Colorado Court rejected all of their arguments, ruling that:

"The efforts by other owners to mitigate the smoke before enacting the by-law demonstrated that the association had not acted 'capriciously.' The association properly based its authority to ban smoking on the anti-nuisance provision in the condominium declaration, which allows the association to prohibit 'any practice which interferes with the peaceful possession and proper use of the property by its residents."

Second-hand smoke qualifies as a nuisance, and "the issue of whether there was actual smoke or simply a smoke smell is irrelevant..."

As for the plaintiffs' right to smoke in their own home, the Colorado court noted that smoking is not a right protected by the Constitution. The court noted that Colorado, like many other states following the noted trend, has adopted laws designed to protect citizens from the adverse health effects of secondhand smoke in indoor areas. The association's authority to restrict activities inside residential units is further strengthened in this case, as the Colorado court noted, "where plaintiffs' private activities are impacting so negatively on the remainder of the com-

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Ed Allcock is a partner in the Braintree-based firm of Marcus, Errico, Emmer & Brooks, where he concentrates in the area of complex real estate and condominium litigation. He is an active member of REBA as well as the New England Chapter of the Community Associations Institute (CAI). He currently chairs the Massachusetts Attorneys' Committee for the CAI. Ed can be emailed at eallock@meeb.com.

AG's mortgage regulations concern conveyancers

By Joel A. Stein

This past November, Attorney General Martha Coakley filed regulations entitled "Regulations Under Chapter 93A — Mortgage Lenders and Brokers," which regulations were revised on Dec. 18, 2007. The effective date for all parts of the regulations was Jan. 2, 2008. These regulations update and amend 1992 mortgage broker and lender regulations.

According to the Attorney General's Office, "In 2007, it is now clear that certain widespread acts and practices in the area of residential mortgage lending continue to unfairly harm consumer."

These regulations, which define unfair or deceptive acts or practices, apply to all mortgage loans that are secured by a mortgage on a one-to-four family owner occupied dwelling. Reverse mortgages, open-end equity lines of credit, and reduced rate mortgages originated under affordable housing programs are excluded.

The regulations apply to "mortgage brokers" and to "mortgage lenders." A mortgage lender is defined as "any person engaged in the business of making mortgage loans or issuing commitments for mortgage loans." A mortgage broker is defined as "any person, who for compensation or gain, or in the expectation of compensation or gain, directly or indirectly negotiates, places, assists in placements, finds or offers to negotiate, place, assist in placement, or find mortgage loans on residential property for others." The persons who are exempt from licensing under M.G.L. c. 225(e) s. 2 are excluded from this definition.

The regulations define new "unfair or deceptive acts or practices," including certain advertising practices (Section 8.04), mortgage disclosures (Section 8.05), and prohibited practices (Section 8.06). The five unfair or deceptive advertising practices that appear in Section 8.04 were previously adopted in 1992. Section 8.05 initially included two disclosure forms, both of which where deleted by the revised version of the regulations, dated December 18, 2007.

Section 8.053 provides under Section 9 that it is an unfair or deceptive act or practice for a mortgage lender to fail to provide any documents or disclosures required by any state or federal law.

This section also notes that the following will be considered unfair or deceptive acts or practices:

a. To fail to give to the borrower legible copies of the mortgage deed, promissory note or settlement when completed or at the time of closing; and
b. For a mortgage broker or lender to conceal or fail to disclose to the borrower any fact relating to the loan transaction, disclosure of which may influence the borrower not to enter into the transaction with the broker or lender.

Section 8.06 includes 18 practices which constitute unfair or deceptive acts. These practices include the following:

a. For a mortgage broker or lender to make any representation or statement of fact that the representation or statement is false or misleading or has the tendency or capacity to be misleading or if the mortgage broker or lender does not have sufficient information upon which a reasonable belief in the truth of the representational statement could be based;
b. For a mortgage broker or lender to procure or negotiate for a borrower a mortgage loan with rates or other terms which significantly deviate from industry-wide standards or which are otherwise unconscionable;
c. For a mortgage lender to act also as

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Joel Stein chairs the association's Title Insurance and National Affairs Committee and is a frequent commentator on regulatory matters. In 2007, he was given the Richard B. Johnson Award, the association's highest honor. His e-mail address is jstein@steintitle.com.

An encounter with the SJC's 'Bjorkland' decision

By Michael S. Giaimo

Great Aunt Tillie, who lived in a lovely, colonial-style home in an "upscale" suburb of Boston, passed away and left her property to your client, Max, who then took a job in Boston with a financial services company and is moving to the area with his family.

The lot has beautifully landscaped grounds. But the house, even with 2,400 square feet of living space, seems pretty small to your client. The single garage in which Tillie kept her Volvo wagon all those years will barely fit the family's Audi SUV, and certainly not Max's new Hummer, in which he plans to commute to Boston, or the third car he expects to need when his oldest child turns 16.

The bedroom closets aren't "walk-in," and only a single bathroom serves each floor. There is no master suite with Jacuzzi, the kitchen is merely functional, and there's no good place to install a wide-screen TV and sound system. The ceilings seem low, too, at only seven and one half feet — Max's two teenaged sons are almost six feet tall already — pretty soon they'll be scraping their heads.

But the location is top notch, and the town has good schools.

Max proposes an expansion that meets his family's needs. The expanded house will have 3,800 square feet of interior living area and a three-car garage, along with a deck overlooking an in-ground pool. The architect, who has designed a number of large houses in the town, has confirmed that it will satisfy each of the setback, height and other dimensional requirements of the local bylaw. Max asked his building contractor to apply for a building permit, but the contractor responded that he couldn't until your client went to the Board of Appeals for a special permit and something called a "Section 6 finding." When Max asked him why, the contractor said something about Aunt Tillie and non-conformity and "the second except clause of the first paragraph."

Max comes to your office, wondering whether he should get another contractor. "Sure, Aunt Tillie was a bit eccentric, but I thought Massachusetts was a pretty tolerant place," he exclaims.

"The contractor is right," you reply, after hearing more of the facts, "and it's not your aunt's non-conformity that he's talking about, it's the house, which is on only a 3/4 acre lot. After it was built, the town changed the zoning to require that residential lots have at least an acre. That makes Aunt Tillie's house non-conforming and you will need permission from the Zoning Board to expand it."

You further explain about the first paragraph of Section 6 of Chapter 40A, which says that new zoning requirements will not apply to existing structures, but will apply to any reconstruction, structural change or extension of a structure, *except* for changes to a single or two-family house that do not increase the nonconforming nature of the structure — the "second except clause" that the contractor mentioned.

"Let me get this straight," says Max, "my house won't be any bigger or closer to the lot lines than houses are allowed to be in a residence zone, but just because Aunt Tillie didn't own quite enough land, the zoning board can decide whether I get to build it? That can't be the law. That's downright un-American. I'll sue them if they don't approve it — I'll take them to the highest court in the state."

That's when you break the news that the Supreme Judicial Court said exactly that, just this January, in *Bjorkland v. Board of Appeals of Norwood*. The plaintiff in *Bjorkland* owned a one bedroom, one bath, one-story home with a shed on 3/4 acre in a one acre zone. The house had only 675 square feet of living space. The plaintiff proposed to replace it with

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Mike Giaimo is a partner in the Boston office of Robinson & Cole, serving as managing partner of the firm's Boston office. He concentrates his practice in land use, environmental and real estate law with a focus on development permitting, regulatory compliance and transactional issues. He is a member of the REBA Land Use and Zoning Committee. Mike can be e-mailed at mgiaimo@rc.com.

The 2008 ALTA expanded coverage policies

By Jonathan S.R. Anderson

Part I in a series

The American Land Title Association (ALTA) has approved two new expanded coverage title insurance policy forms: the Homeowner's Policy of Title Insurance for a One-to-Four Family Residence (the expanded coverage owner policy) and the Expanded Coverage Residential Loan Policy. The policies bear a revision date of Jan. 1, 2008.

While similar to the existing versions of the ALTA expanded coverage policies, the 2008 Homeowner's Policy and the 2008 Expanded Coverage Loan Policy update coverage provisions to take advantage of the improvements previously introduced in the 2006 Standard Policies. The 2008 Homeowner's Policy and 2008 Expanded Coverage Loan Policy also contain terms and conditions that have been revised to include some of the other provisions appearing in the 2006 Standard Policies. Beyond these changes, the 2008 Expanded Policies continue to insure over more risks than are usually insured against in the 2006 Standard Policies, when the 2006 policies are not amended by endorsement.

Jon Anderson is a senior title counsel with CATIC and has been with CATIC for more than 20 years. He is a member of the Forms Committee of the American Land Title Association (ALTA), and he is also a member of the Real Property Section and a former chair of the Affordable Housing and Homelessness Committee of the Connecticut Bar Association. Jon can be e-mailed at janderson@caticaccess.com.

Homeowner's policy coverage provisions

The 2008 Homeowner's Policy looks very much like the existing Homeowner's Policy, which was last revised in 2003. Its plain-language format is designed to be clear and understandable to the insured owner. Toward that end, it has an Owner's Information Sheet, Table of Contents and Owner's Coverage Statement. The information sheet and coverage statement summarize the various parts of the insurance policy and emphasize the fact that the policy coverage is limited by other provisions. The Table of Contents allows the insured to see where, within the policy, the specific provisions are located. Like its predecessor, this policy makes it clear that it applies only to a one-to-four family residence and only if each insured is a natural person.

The coverage is delineated in the covered risks. As stated, the 2008 Homeowner's Policy contains some updated coverage provisions originally seen in the 2006 Standard Owner Policy. For example, Covered Risk 6 in the Homeowner's Policy insures against defects in title, and then lists some of the possible defects. This list is very similar to the list of defects in Covered Risk 2(a) of the Standard Owner Policy and includes unauthorized transfers, invalid powers of attorney, improper recordings and defective judicial or administrative proceedings. The 2008 Homeowner's Policy also insures against loss if title is unmarketable, if title is owned by someone other than the insured and if the property lacks actual (pedestrian and vehicular) access. There is express coverage against loss due to any lien for unpaid real estate taxes or assessments imposed by a governmental authority.

Like the 2006 Owner's Policy, there is coverage against loss due to violations of government regulations, or the enforcement of any other governmental police power, when a notice of violation or enforcement has been recorded in the public records. There is also coverage against loss resulting from a taking by eminent domain, either when a notice of the taking has been recorded in the public records, or when the taking occurs before the issuance of the policy and is binding on an insured without actual knowledge. This is the coverage that appeared in the older policies as exceptions to certain exclusions, and when ALTA approved the 2006 Standard Policies, one obvious improvement was the transfer of this "hidden coverage" from the Exclusions to the Covered Risks. Now the 2008 Homeowner's Policy contains this im-

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REBA authors comprehensive homestead reform

By Lisa J. Delaney

The Real Estate Bar Association, together with the Boston and Massachusetts bar associations, has drafted a new Homestead Statute which, if enacted, will have a major impact on real estate and other practitioners in the commonwealth.

Lisa Delaney is a partner at Carvin & Delaney in Braintree, practicing real estate and conveyancing law. She may be reached at ldelaney@carvindelaney.com. Mike Goldberg, Erica Bigelow and Lisa are members of the REBA Homestead Subcommittee of the Legislative Committee and the three principal drafters of the proposed Homestead Statute. Mike is a partner at Cohn Whitesell & Goldberg, and may be reached at goldberg@cwg11.com. Erica is the owner of Erica P. Bigelow, P.C., and may be reached at ebigelow@epblaw.com.

The draft bill has been submitted to the Legislature with the goal that it be enacted into law this session. The proposed statute is a comprehensive amendment to the homestead statute, prepared over the last two years by the Homestead Subcommittee of REBA's Legislation Committee, with extensive input from the BBA's Bankruptcy and Real Estate sections.

The goal for the proposed statute is to modernize, clarify and in some areas expand homestead protection, without removing or limiting rights presently held by homeowners or creditors. The proposed statute also seeks to resolve issues under the existing statute that have been particularly troubling for the Bankruptcy Court, where many of these issues arise, while balancing the relative rights of both homeowners and creditors.

REBA believes the proposed statute will assist conveyancing, bankruptcy, creditor and estate planning counsel in a number of ways. Major changes to the Homestead Statute include:

- A definition section, which includes that family shall mean the homeowners, their spouses and their minor children who occupy or intend to occupy the declared home as their principal residence;
- Express provision that property held in trust may have a homestead declaration protecting the trust beneficiaries, ending the debate whether the existing statute includes trust ownership;
- Expand the definition of home to include manufactured homes. The present statute has a anomalous provision that an elderly or disabled declaration under section 1A may be in a manufactured home, whereas non-elderly or non-disabled homestead under section 1 does not mention manufactured homes;
- Modernize the document signature procedure by requiring that all married co-owners execute the declaration of homestead rather than one spouse declare for the benefit of the family. The proposed statute also requires the declaration identify the owner's spouse who resides in the home as their principal residence if the spouse is not also a co-owner of the home;
- Require that homeowners declare and sign their own homestead declarations, which eliminates the outdated provision allowing homestead creation within a deed executed only by the seller;
- Express provision that all mortgages automatically subordinate the borrower's prior recorded homestead. Refinances will no longer require obtaining the signature of any non-owner spouse nor state borrower's marital status, as the subordination is automatic upon the mortgage execution by all the homeowners. Mortgage clauses, either terminating or waiving homestead, shall be deemed a subordination only and lenders may not require a homestead release in connection with the making or recording of any mortgage;
- Eliminate the requirement of homestead reservation in "re-titling" deeds by providing that deeds among owners or family members, or in and out of trust, will not terminate the homestead;
- A "relation-back" rule that provides a

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Foreclosures in Lowell: a closer look

By Richard P. Howe Jr.

The incidence of home foreclosures in Lowell rose dramatically in 2007. In 2006, there were 93 foreclosures in the city; in 2007 there were 283. This year, there will be even more. To help understand what happened, I scrutinized 247 of the Lowell foreclosures, capturing information about the owner's purchase of the property, the mortgage used to finance the purchase and any additional mortgages on the property.

Here is what I found:

1. In almost every case, the buyer at the foreclosure auction was a national lender, usually the one that had made the loan that was being foreclosed. Large, national entities appear again and again as both the foreclosing party and the buyer at the foreclosure auction. In only 12 cases (less than 5 percent) was the buyer at auction a private individual. Local banks were the foreclosing lender in just two cases.
2. Fifty-seven percent of the foreclosures were of the mortgage used to purchase the property. A clear distinction in the Lowell foreclosures was between the mortgage used to purchase the property and a subsequent mortgage that resulted from one or more refinancings of the property. Of the 247 cases studied, 141 (57 percent) involved the foreclosure of the purchase mortgage; the other 106 (43 percent) involved a refinanced mortgage.
3. In 66 percent of the purchase mortgage foreclosures, the property buyer borrowed the entire purchase price. Of the 141 foreclosed purchase mortgages, 94 (66 percent) put no money down but borrowed either all of the purchase price (in 83 cases) or more than the purchase price (in 11 cases). Only in 48 cases (34 percent) did the borrower put any of his own money towards the purchase of the property. In 17 of those cases, the cash contribution was less than $10,000; in another 15 the contribution was between $10,000 and $20,000. In only 16 cases did the buyer contribute more than $20,000 to the purchase of the property.
4. In 72 percent of the purchase mortgage foreclosures, the amount borrowed was split between a first and second mortgage from the same lender. The majority of all of these transactions involved second mortgages. In only 39 instances (28 percent) did the buyer borrow the purchase price of the property with just one mortgage. In 102 cases (72 percent), the amount borrowed was split between a first and a second mortgage. (In this analysis, the amounts of these first and second mortgages have been combined to give a "purchase mortgage" figure that more accurately reflects the amount borrowed to buy the property.)
5. The average foreclosure auction took place within two years of the purchase of the property by the borrower. The borrowers in these 141 foreclosures didn't wait long to get into financial distress. The average foreclosure deed was recorded 28 months after the property was purchased. While this may not seem like a short period of time, remember that foreclosure deeds are typically recorded 30 to 60 days after the auction occurs and the auction doesn't occur until three to six months after the lender decides to proceed to foreclosure.
6. The amount obtained at the foreclosure sale was $53,000 less than the amount the borrower owed the lender. As for the price realized at the foreclosure sale, on average it was $52,832 less than the amount the borrower owed the lender. In 127 cases, the amount the property was purchased for at auction was less than the amount of the mortgage being foreclosed. In only 14 cases did the consideration on the foreclosure deed exceed the mortgage amount.
7. Forty-three percent of the Lowell foreclosures involved refinanced mortgages. Of the 247 foreclosures studied, 106 (43 percent) involved refinanced mortgages. The average refinanced mortgage property owner was typically on his fourth mortgage at the time of foreclosure, although there were several "serial refinancers" (four owners had eight mortgages, one had nine, one had 10, and another had 14).
8. Refinanced mortgages were foreclosed almost seven years after the borrower purchased the property. In the 106 foreclosures of refinanced mortgages, the average borrower had originally purchased the property nearly seven years before the foreclosure occurred. The mortgage that was foreclosed was obtained nearly five years after the property was purchased and was the fourth mortgage that borrower had on the property. The time from the mortgage that was ultimately foreclosed to the foreclosure deed was 29 months, suggesting that if a borrower was going to get into trouble, it would happen very quickly — certainly within 18 months — of the problem mortgage being obtained regardless of whether it was a purchase mortgage or a refinance.
9. In refinanced mortgage foreclosures, the borrower owed the lender $75,000 more than he had paid for the house when he purchased it. As for the money involved in the refinanced mortgage foreclosure, the borrower had purchased the home for $75,000 less than the amount borrowed on the mortgage that was ultimately foreclosed. Additionally, 38 of these borrowers had another mortgage, junior to the one being foreclosed and averaging $50,000, outstanding on the property at the time of the foreclosure.

While every community is different, this detailed analysis of one city's foreclosures might shed some light on what is happening elsewhere in the commonwealth. Understanding the details — the ratio of first-time owners who put no money down to established residents who financed their way into a housing crisis, for example — is a precondition to crafting a workable response.

The data held at your local registry of deeds may help answer these questions.

A regular and welcome contributor to REBA News, Dick Howe is register at the Middlesex North District Registry of Deeds in Lowell. Dick can be e-mailed at richard.howe@sec.state.ma.us.

2008 SPRING CONFERENCE

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

BREAKOUT SESSIONS

Defending Borrowers in the Foreclosure Process

Nuts & Bolts: Lien on Me

When Joint Ownership Goes Sour

De-Stressing Distressed Properties

Taking Title out of Foreclosures

I Am, I Said: Common Legal Opinion Issues

Legislative Update of Recent & Pending Legislation: Summary & Highlights

Recent Developments in Massachusetts Case Law

CONTINUING EDUCATION COMMITTEE CHAIRS

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

Be sure to visit the lounge area, located on the third floor of the DCU Center, across from the Junior Ballroom. Refreshments will be served and complimentary gifts will be available while supplies last.

Complimentary Valet Parking Available

- or -

Parking Validated for the Worcester Municipal Parking Garage and all other garages up to $5

REGISTRATION for REBA'S Spring Conference

Complete this registration, include the appropriate fee and return to REBA Foundation, Attn: 2008 Spring Conference, 50 Congress Street, Suite 600, Boston, MA 02109-4075 or FAX to: (617) 854-7570.

	By 4/28	After 4/28
❑ YES, please register me. I am a REBA member in good standing.	$ 195	$ 220
❑ YES, please register me as a guest.	$ 235	$ 260
❑ NO, I am unable to attend, but would like to purchase the Conference materials and a CD of the sessions. (Order by 5/8/08. Please allow four to six weeks for delivery.)	$ 190	$ 190
TOTAL	$_____	$_____

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

❑ Please charge the total amount listed above on my ❑ MasterCard ❑ Visa ❑ American Express

Card Number: _____ Expiration date ____/____

Signature: _____

Register Online at www.reba.net

Name: _____ Esq. (yes or no): _____
Nickname for Badge: _____ Firm/Org: _____
Address: _____
City: _____ State: _____ Zip: _____
Phones: Office: _____ Cell: _____ Fax: _____
Email: _____

PLEASE COMPLETE:
SELECT YOUR LUNCHEON: ❑ Surf and Turf ❑ Chicken ❑ Vegetarian ❑ Fish

PLEASE COMPLETE:
BREAKOUT SESSION PREFERENCES: please rate (1-8) order of your preference:

_____ *When Joint Ownership Goes Sour* (McDonnell, Furman, Bolan)
_____ *De-Stressing Distressed Properties* (deSousa, Creed, Winki)
_____ *Taking Title Out of Foreclosure* (Moran, Fitzsimmons, Gurvits, Stein)
_____ *Defending Borrowers in the Foreclosure Process* (Parker, Healey, Loria)
_____ *I Am, I Said: Common Legal Opinion Issues* (Boldys, Brown)
_____ *Nuts & Bolts: Lien on Me* (Barton, Weissman)
_____ *Legislative Update of Recent & Pending Legislation: Summary & Highlights* (Smith, Kehoe)
_____ *Recent Developments in Massachusetts Case Law* (Lapatin)

DRIVING DIRECTIONS

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

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

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

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

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

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.

Defending Borrowers in the Foreclosure Process

Jean M. Healey, Esq.; Martin A. Loria, Esq.; Nina M. Parker, Esq.

The downturn in the housing market and the ongoing subprime mortgage crisis has led to many Massachusetts homeowners facing foreclosure. What recourse does a borrower have once a lender begins the foreclosure process? This session explores approaches to defending borrowers in Massachusetts facing foreclosure, including claims against lenders under the Massachusetts Consumer Protection Act, identifying potential Truth in Lending violations, and consideration of filing for bankruptcy to permit time and opportunity for loan workouts. Whether you are considering participating in REBA's pro bono program defending borrowers facing foreclosure, or a general real estate practitioner seeking better familiarity with potential defenses to foreclosure, this session will provide helpful perspective on representing clients in troubled economic times.

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

Nuts & Bolts: Lien on Me

Elizabeth J. Barton, Esq.; Nancy M. Weissman, Esq.

A conveyancing attorney has to be able to recognize liens that are on title reports that are not mortgages, and must also know how to remove these encumbrances. This program will inform you how to differentiate between liens and exceptions to title, as well as how to distinguish dischargeable liens from liens that expire by statute. Our discussion will start with some common liens, such as condominium liens, estate tax liens, notices of contract, attachments, executions, lis pendens and tax takings, and discuss how to obtain their releases or discharges. We will also talk about how to determine when liens have expired by statute. The goal of the session is to provide the conveyancing attorney with the information needed to discharge or remove liens in order that a closing may proceed on schedule.

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

When Joint Ownership Goes Sour

Robert E. McDonnell, Esq.; Mark S. Furman, Esq.; James S. Bolan, Esq.

Joint ownership of real property is not always a smooth ride. When a joint investment does not turn out as planned, or for a host of other reasons, disputes can arise between co-owners, whether tenants-in-common or co-venturers. These disputes over jointly-owned property produce tricky legal quandaries for the parties, and for the lawyers representing them. Our seasoned panelists have been down the road of these disputes and will share with you approaches to resolving disputes, or at least breaking up the combatants, and avoiding being rewarded for your efforts with a claim for legal malpractice, or a missive from the Board of Bar Overseers, in the process.

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

De-Stressing Distressed Properties

Lisa Caryl deSousa, Esq.; James F. Creed, Jr., Esq.; The Hon. Jeffrey M. Winik

Lenders, owners and residents have been experiencing the fallout from the rise in foreclosures in Massachusetts and are looking to their counsel for help in dealing with foreclosed and abandoned buildings. This interactive session features presentations and discussion about actions to be taken to address these situations, including post-foreclosure evictions and civil actions to protect residents and buildings, including receiverships. The law in this area is rapidly changing, expanding the liability of management agents and re-defining the relationships between residents and owners, so it is important to keep up to date on current law and practice. Experienced practitioners will share practical tips regarding these actions to help you properly advise your client.

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

Taking Title out of Foreclosures

Julie T. Moran, Esq.; D. Bruce Fitzsimmons, Esq.; Eugene Gurvits, Esq.; Joel A. Stein, Esq.

We are all well aware that the number of foreclosures has increased drastically in recent months. Our experienced panel will provide guidance to conveyancers when they confront the many issues that arise when reviewing titles of foreclosed properties. These issues include review of the foreclosure documents, including powers of attorney, authority documents and green cards, as well as issues due to bankruptcies and condominium liens. The panel will discuss title insurance concerns, such as undischarged prior liens and sellers that will not execute mechanics' lien affidavits. Also, the panel will address other topics such as how the Mortgage Discharge Bill helps (or hurts) in regard to authority issues, and the impact of the new Mortgage Reform regulations.

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

I Am, I Said: Common Legal Opinion Issues

Walter Boldys, Esq.; Thomas Howard Brown, Esq.

Opinion letters by borrower's counsel addressed to the lender are routinely used in commercial mortgage transactions. REBA's Commercial Real Estate Finance Committee has developed a standard form of legal opinion letter regarding authority and enforceability, to aid the real estate practitioner. This program will introduce the Opinion Letter and will discuss it from the perspective of the lender and the borrower.

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

Legislative Update of Recent & Pending Legislation: Summary & Highlights

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

You won't want to miss this twice yearly update from REBA's long-time Legislative Counsel, Ed Smith and the Chair of the Legislation Committee, Chris Kehoe on the recent and pending legislation on the Hill. Ed Smith gives us up-to-date going's on up on the Hill, affecting REBA members and Chris Kehoe discusses the inner-workings of REBA's Legislation Committee. Topics will include pending legislation on: former tidelands and c. 91 licenses; regulation of notaries and witness closings; condominium topics, mortgage foreclosures, proposed c. 40B repeal, the Mass. homestead law and other timely issues.

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.

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 Richard B. Johnson Award**
Recipient, **Philip S. Lapatin, Esq.** of Holland + Knight

2:00 p.m. - 2:30 p.m. **Keynote Speaker**
Jeffrey C. Fuhrer, Executive Vice President and Director of Research at the Federal Reserve Bank of Boston

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

GENERAL INFORMATION

- Premium credit for professional liability insurance may be given for attending properly-documented continuing legal education programs.
- Continuing legal education credit can be made available in other New England states. Contact The Real Estate Bar Association (REBA) for specific details.
- Registration to REBA's 2008 Spring Conference is open to REBA members/associates in good standing, their guests and non-members/associates (for an additional fee). Everyone attending the 2008 Spring Conference must register. The Registration Fee includes the cost of the morning and afternoon sessions, the seminar written materials and the luncheon. We cannot offer discounts for persons not attending the luncheon portion of the program.
- Please submit only one registration per person. Additional registration forms are available on our website www.reba.net or by emailing Joe McBride at mcbride@reba.net. Confirmation of registration will be sent to all registrants by email or mail. Name badges and a list of registrants will be available at the registration desk.
- Registration with the appropriate fee should be sent via website, mail or fax to arrive prior to April 28, 2008 to guarantee a reservation at the Spring Conference. Registrations received after April 28, 2008 will be subject to a late registration processing fee of $25. Registrations cancelled in writing before April 28, 2008 will be honored but will be charged a processing fee of $25. No other refunds will be permitted. Registrations cancelled on or after April 28, 2008 will not be honored, however, substitutions of registrants attending the program are welcome and may be made at any time. Seminar written materials will automatically be mailed to "No Shows" within four to six weeks after the program.
- The use of cell phones and pagers is prohibited in the meeting rooms during the programs and luncheon meeting.

REBA authors comprehensive homestead reform

Continued from page 8

later recorded homestead in the same home by the same homeowner, or their spouse or ex-spouse, will not terminate the first homestead, and the later recorded homestead will relate back to the earlier recording date for the purpose of lien priorities. This clarifies those situations where the same homeowner has recorded more than one declaration, or where a homestead declarant moves out after divorce and the spouse remaining in the house records a new homestead. This also clarifies priorities if a homeowner should attain age 62 or become disabled and later declares under section 1A;

- Clarification that other than elderly or disabled declarations, the owners of a home held as joint tenants or tenants by the entirety together hold a whole and unallocated homestead exemption amount; whereas a home owned by tenants in common allocates the exemption amount by the owners' respective percentage interests;
- Express mechanism for spouses or other joint tenants, one or more of whom is elderly or disabled and one or more who is not, to declare harmonious homestead declarations under both sections 1 and 1A without either declaration terminating the other. The proposed statute also sets out the exemption calculation and allocation for this dual-rule homeownership;
- Removal of the outdated provision that the remarriage of a widowed person terminates the spousal rights created by the deceased spouse's homestead declaration. The proposed statute continues the homestead for as long as the now remarried person resides in the home as their principal residence. And, if they and the new spouse should record a new declaration in this same home, it will also relate back to the earlier declaration for the purpose of lien priorities;
- Clarification that a person may only hold a homestead estate in one home at a time. The proposed statute provides a homeowner is bound by the declaration statement of principal residence and specifies that a homestead declaration on a new home will terminate an earlier homestead for other property. If the same person simultaneously declares on more than one home, and a later homestead is invalidated, the earlier homestead declaration will not be reinstated; however the homeowners will then be protected by the new "automatic homestead" if the home is their principal residence;
- Permit spouses validly hold homestead rights in separate homes if in fact they do not reside together, but limiting both estates together to a single exemption amount;
- Expand the list of events which terminates homestead, including listing required signatures on termination documents and stating the event and effect of abandoning the home. The proposed statute specifies active military service shall not be deemed an abandonment which terminates homestead rights; and
- Extend homestead protection to both sales and insurance proceeds. This allows continuing homestead protection in proceeds if homeowners sell a home and set up temporary rental housing before closing on a replacement home. This also allows repair or rebuilding after a casualty with the homestead protection transferring to the insurance proceeds until the home is habitable. Temporary housing in a manufactured home during the re-build will not terminate the homestead protection.

Homeowners who now enjoy rights under the existing homestead statute will not be affected by the new law. The proposed statute includes a section maintaining all existing homestead rights after the proposed statute is enacted without requiring the recording of new homestead declarations, and provides those rights shall thereafter be construed in accordance with the new statute.

In addition to these and other provisions, the proposed statute also has a new section creating an automatic homestead exemption of $125,000 for those homeowners who do not have recorded homestead declarations for their principal residence, an amount which is consistent with the Bankruptcy Code for homesteads obtained within 1,215 days prior to filing for bankruptcy.

REBA believes that this baseline automatic exemption amount will provide important protection to those who may not be aware of the homestead statute or have the benefit of counsel, without interfering with the reasonable expectations of parties providing credit to individuals in Massachusetts. In fact, throughout the drafting process, REBA and its fellow bar organizations have been careful to balance the interests of homeowners and creditors under the homestead law.

All provisions of the proposed statute apply equally to both declared and automatic homestead exemptions, other than the requirements for a written, signed and recorded declaration. There is not an elderly or disabled automatic homestead exemption, as those declarations require a written and recorded statement of age or disability.

REBA has worked closely with the BBA in the development of the legislation, which also enjoys the support of the MBA. We believe that the revised Chapter 188 represents a fair and balanced law for homeowners and creditors. We thank all those who have assisted in this process, including Judiciary Committee Senate Chairman Robert S. Creedon Jr., D-Brockton, and his House counterpart, Rep. Eugene L. O'Flaherty, D-Chelsea.

The final version of the proposed statute will be available on REBA's website this spring.

Berkshire County lawyers challenge recording fees

By Jonathan B. Sabin and Stanley E. Parese

Stanley E. Parese (left) and Jonathan B. Sabin

G.L. c. 262, § 38 establishes recording fees "For entering and recording any paper…and indexing it and for all others duties pertaining thereto." On Jan. 28, 2008, the Appeals Court decided Patriot Resorts Corporation v. Register of Deeds, et al., No. 06-P-725, which addressed the correct method of calculating recording fees (and surcharges) for an assignment which assigns multiple mortgages.

Registers contend that such an assignment is a "multiple document" (a phrase not appearing in § 38), which justifies multiple recording fees and surcharges. The registers' practice has been to charge $75 for each mortgage assigned. Patriot contends that such an assignment is a single "paper" for which a single recording fee (and a single set of surcharges) should be charged. The Appeals Court, in a 2-1 decision, agreed with Patriot.

Patriot is a Florida-based time-share developer. In 2001, Patriot developed its first Massachusetts resort, in Berkshire County, known as "Vacation Village in the Berkshires." Time-shares are interests in real property under G.L. c. 183B. Patriot routinely takes back purchase money notes from time-share purchasers. The notes are secured by mortgages which purchasers grant to Patriot. Patriot, in turn, routinely assigns the mortgages to its lender as collateral for credit extended to Patriot.

Patriot's management was shocked to learn of the cost of recording an assignment instrument in Massachusetts. In Patriot's home state of Florida, the fee to record a 10-page assignment assigning 200 mortgages is $282.50 ($10 for the first page, plus $8.50 for each additional page, plus $1 per marginal reference after the first four). The Massachusetts price (including surcharges) to record the same document under the registers' method of calculation was $6,006 prior to 2003, and is now $15,000. The authors examined the language of §38 and concluded that the registers' method was not consistent with the language of the statute. Litigation ensued.

The litigation

The Superior Court ruled in favor of the commonwealth based upon the additional effort associated with recording and indexing a multiple-mortgage assignment. The Appeals Court reversed, noting that "the additional effort…lies principally in the number of marginal references required," and that the version of §38 in effect in 2002 provided a $1 charge per-marginal reference, and thus provided additional fees for the additional effort. The registers were, in effect, collecting $30 for each marginal reference, rather than the statutorily prescribed $1 (and are now collecting $75). The commonwealth argued that, in addition to marginally referencing the assigned mortgages, the registers were required to index the individual names of the mortgagors as grantors of the assignment. The court rejected this argument (citing G.L. c. 36, §25), noting that the ownership of the mortgage is traced by the marginal references. It is not clear on what basis the commonwealth argued that a mortgagor, having once granted a mortgage to Patriot could again be considered — and indexed — as a grantor for a second time of the same mortgage. One cannot grant that which one has already granted.

The court noted that the commonwealth did not make "any attempt to ground the registers' practice in the fee schedule prescribed by the statute." In other words, one will look in vain for the phrase "multiple document" in §38. The court held that, "Contrary to the register's characterization of the assignment as comprising multiple assignments, it is a single instrument of assignment, from a single assignor to a single assignee. That it conveys a number of separate assets does not alter its character as a single instrument of conveyance any more than would occur in the case of a deed which conveys a number of discrete parcels of land, or a collateral assignment of leases conveyed incident to he financing of a large shopping center." (Footnote omitted.)

Legislative response

As the Appeals Court noted, the major task associated with processing a multiple-mortgage assignment relates to marginal referencing. In 2003, the Legislature abolished marginal reference fees at the same time it dramatically increased recording fees. In 2003, the fee to record a deed went up fourfold (from $25 to $100) and the fee to record a mortgage went up seven and one half times (from $20 to $150). The registers claim that the Appeals Court's interpretation will cause an economic "loss" on assignment transactions.

As the Appeals Court noted, however, the funds collected by the registries go to the General Fund, not the registries. Any legislative examination of this issue should determine whether current Registry revenues, under the current fee schedule correctly applied, cover the statewide cost of operating the registries. If they do, there is no concept of "loss" involved; instead, there is a surplus. The questions become: How much does the commonwealth want to "gain" by operating the registries and at what price does the "gain" come?

Any legislative attention to Patriot should include consideration of policy implications beyond the commonwealth's desire to raise revenue from Registry operations for the General Fund. Patriot Resorts — one company with a single resort project — has invested tens of millions of dollars, created hundreds of jobs, infused millions in marketing dollars, and generated significant tourist spending in Berkshire County. The underlying deed and mortgage recording fees alone from this single project — which fees were in no way challenged or questioned in the litigation — have brought millions of dollars into the General Fund and will continue to do so. As Massachusetts struggles to reinvent itself as a post-industrial economy in which tourism is to play a vital role, the commonwealth would be short-sighted to continue to levy taxes disguised as exorbitant fees on an industry it should be trying to cultivate.

The timeshare resort industry is not what it was 20 years ago. Major players include the likes of Disney, Marriott, Westin, Hyatt and Ritz Carlton. A governmental fee is supposed to represent reasonable compensation for the services provided by a governmental entity. The sums the registers have been charging to record assignments bear no rational relationship to the services provided. Patriot has paid as much as $57,600 to record one assignment. That same document would have cost $1,148 to record in Florida. The cumulative effect of payment differentials of that magnitude amounts to millions of dollars over the life of a timeshare project. That fact is not lost on the resort development industry.

The Legislature should consider whether it wants to kill geese that lay golden eggs.

Jay Sabin and Stan Parese practice in Williamstown and are principals in Parese & Sabin. The firm concentrates on real estate development and commercial transactions. The firm is a member of the American Resort Development Association (ARDA) and Jay Sabin serves on the group's New England legislative committee. Jay can be e-mailed at sabin@pslawoffice.com; Stan can be e-mailed at parese@pslawoffice.com.

AG's mortgage regulations concern conveyancers

Continued from page 5

a mortgage broker directly or indirectly in the same mortgage loan transaction;

d. For a lender to fail to disburse funds in accordance with any commitment or agreement with the borrower;

e. For a mortgage lender to charge a prepayment fee which violates M.G.L. c. 183 s. 56, which significantly deviates from industry-wide standards or is otherwise unconscionable;

f. For a mortgage lender or broker to fail to give the borrower or his/her attorney the time and reasonable opportunity to review every document signed by the borrower and every document which is required pursuant to these regulations, and other applicable laws, rules and regulations prior to disbursement of mortgage funds;

g. For a mortgage broker or lender to accept any attorneys' fees in excess of the fees which have been or will be remitted to the attorneys;

h. For a mortgage broker or lender to refuse to permit the borrower to be represented by the attorney of his or her choice. Nothing contained herein shall limit the lender's right to choose its own attorney which shall be paid for by the borrower;

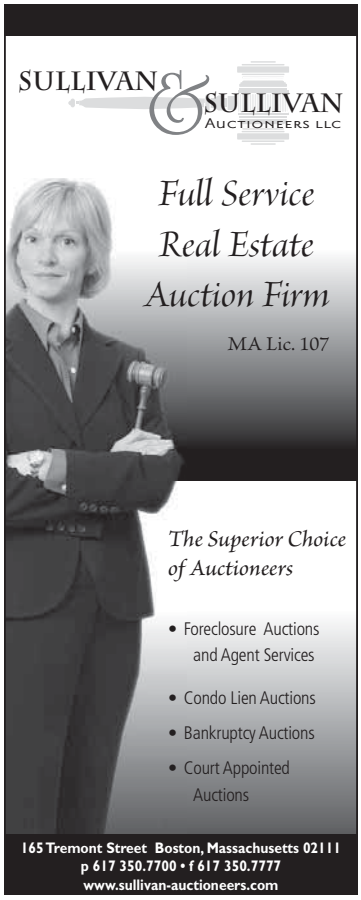
i. For a mortgage broker to arrange or a mortgage lender to make a mortgage loan unless the mortgage broker or lender based on information known at the time the loan is made, reasonably believes at the time the loan is expected to be made that the borrower will be able to repay the loan based upon a consideration of the borrower's income, assets, obligations, employment status, credit history, and financial resources, not limited to the borrowers equity in the dwelling which secures repayment of the loan;

j. For a mortgage lender or broker to process or make a mortgage loan without documentation to verify the borrower's income (a so-called "no documentation," "no doc," "stated income" or "limited documentation" loan) unless the broker or lender, as applicable, first provides a written document to the borrower, which must be signed by the borrower in advance of the closing, and which: a) identifies the borrower's income and the source of the income; and b) provide detailed information if true that by applying for a mortgage loan of a no or limited documentation basis, the customer will pay a higher interest rate or increased charges or have less favorable returns for the mortgage loan;

k. For a mortgage broker to process, make or arrange a loan that is not in the borrower's interest; and

l. For a mortgage lender to use a pricing model for its mortgage loans which treat borrowers with similar credit criteria and bona fide qualification criteria differently or make a mortgage loan when all of the cost features of the mortgage loan are based on criteria other than the borrower's credit and other bona fide qualification criteria.

These prohibited practices might cause apprehension for the closing attorney, who will not have the necessary information to determine that the mortgage broker or lender has complied with the required practices. Certain of these guidelines, such as the prepayment penalty, which is governed by G.L. c. 183 § 56, can be easily reviewed; while others, such as whether the mortgage broker has arranged a loan that is not in the borrowers interest, are too subject and are well outside the area of concern or expertise of most conveyancers. The attorney will need to look to the lender to provide written assurances that the lender and the mortgage broker have complied with these regulations.



The 2008 ALTA expanded coverage policies

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provement as well.

The 2008 Homeowner's Policy contains many of the same Covered Risks that appear in the existing (2003) ALTA Homeowner's Policy. For example, the 2008 Homeowner's Policy insures against loss if someone other than the insured claims an interest in the property because of forgery, fraud, duress, incompetency or incapacity.

The new Homeowner's Policy insures against loss if someone else has an encumbrance on the insured's title, but there are additional coverage provisions insuring against loss when someone else claims to have more specific interests in the property arising out of leases, contracts, options, mortgages, judgment liens, state or federal tax liens, homeowners' or condominium association liens or mechanics' liens. It is important to remember that this coverage can be limited or eliminated if these interests are accepted in the policy's Schedule B.

There is also protection against loss caused by restrictions. There is coverage if someone else tries to limit the use of property because of a restriction. While the mere existence of the restriction may not cause a loss under the policy if that restriction is listed in the exceptions, the insurer is liable if the insured's title is lost because of a pre-existing violation of a restriction, or if the insured is forced to remove or correct an existing violation of a restriction, even if the restriction being enforced is excepted in Schedule B. The policy also insures against loss resulting from the attempted enforcement of discriminatory restrictions.

The new policy insures against loss if someone else claims an easement in the property, so long as the easement is not included in the Exceptions. Even if the easement is excepted in Schedule B, however, the policy covers loss if the use or maintenance of the easement damages the insured's existing structures, or if the insured is forced to remove an existing structure because the structure encroaches into an existing easement or setback line.

The Homeowner's Policy contains extensive coverage for loss resulting from the effect of zoning and subdivision laws. There is coverage if the insured cannot use the property as a single-family residence because that use violates zoning. The policy also covers loss incurred if the insured is forced to remove or remedy an existing structure because the structure violates an existing zoning law or regulation. If an existing subdivision violation makes it so the insured is either unable to obtain a building permit, unable to enforce an agreement to sell, lease or mortgage the property, or forced to correct or remove the subdivision violation, the 2008 Homeowner's Policy will indemnify the insured for the resulting losses.

At least two other provisions protect against the risk of loss due to forced removal or remediation. The 2008 Homeowner's Policy, like the existing version, covers losses due to the forced removal or remediation of existing structures (other than boundary walls or fences) if any portions of the structures were built without obtaining a proper building permit. Similar, but somewhat more extensive, coverage is given if any structures encroach onto adjoining land.

Practitioners should note that the forced removal coverage for loss resulting from the violation of, or noncompliance with, government laws or regulations is subject to both a deductible amount and a maximum dollar limit of liability referred to in the policy's Schedule A. When loss results from the forced removal of a structure that encroaches onto neighboring property, the limits apply only when the encroaching structure is a boundary wall or fence.

There is other coverage relating to encroachments as well. The policy covers losses when an insured is prevented from enforcing an agreement to purchase, lease or mortgage the property because a neighbor's structure encroaches onto the insured property. And there is post-policy encroachment coverage for loss caused when a neighbor builds a structure (other than a boundary wall or fence) that encroaches onto the insured's land, even though the offending activity occurs after the issuance of the policy.

The 2008 Homeowner's Policy, like its predecessor, insures against loss incurred when the residence with the address shown in the policy's Schedule A is not actually located on the land described in the policy (the "land"); and the map attached to the policy does not show the correct location of the land. There is also coverage if there is damage to existing improvements (including landscaping) because of the future exercise of mineral rights, even if those rights are excepted in Schedule B.

Finally, there is express creditors' rights coverage similar to what is present in the 2006 Standard Owner Policy. The insured is protected against loss in the event someone else claims an interest in the insured's title because a court order invalidates a prior transfer under federal bankruptcy, state insolvency or similar creditors' rights laws.

Conclusion to Part I

The difference in the coverage between the 2008 ALTA Homeowner's Policy and the existing (2003) ALTA Homeowner's Policy can be summarized as follows:

- The covered risks have been revised to incorporate the improvements and additional coverage available in the 2006 Standard Owner Policy. One such improvement is the transfer of the coverage, which was previously "hidden" as exceptions in the policy's exclusions, to various provisions in the covered risks. There is now express coverage for loss caused by violations of public regulations, enforcement of governmental police power, and takings by condemnation. Another improvement taken from the 2006 Standard Policy is the reference to specific risks in the coverage provision insuring against defects in title. Additional coverage provisions shared with the 2006 Standard Owner Policy include insurance over any lien for taxes and assessments imposed by a governmental authority that are due but unpaid at date of policy and a covered risk providing express creditors' rights coverage.
- The balance of the covered risks offers protection similar to the extensive coverage provided by the existing (2003) ALTA Homeowner's Policy. Remember that, as noted on the Owner's Information Sheet and the Owner's Coverage Statement in the policy, the insurance is limited by the policy's exclusions and conditions, as well as any deductible amount and maximum dollar limit of liability shown in the policy's Schedule A, and the exceptions in the policy's Schedule B.

While this has been a review of the covered risks present in the 2008 ALTA Homeowner's Policy, a complete review must include the rest of the policy's provisions. In Part II of this series, we will examine the remaining terms and conditions of the new homeowner's policy.

The curmudge only conveyancer: ruminations on the foreclosure crisis

By Paul F. Alphen

Did you see the article in The Boston Globe reporting that mortgages lenders are looking for taxpayer assistance to bail them out of the mortgage crisis? According to the article, "…Bank of America suggested a new 'Federal Homeowner Preservation Corporation' that would buy up billions of dollars in troubled mortgages at a deep discount, forgive debt above the current market value of the homes, and use federal loan guarantees to refinance the borrowers at lower rates."

Did you see the article in The New York Times about the fifth annual conference of the American Securitization Forum in Las Vegas… "a celebration of the financial wizardry that supposedly turns risky mortgages and other loans into gilt-edged securities?" A money manager at the event, originally responsible for creating the overvalued securities and selling them to Wall Street, was bragging that he was buying the downgraded securities now at 10 to 15 cents. It seems that some people can have their cake and eat it too.

Did you see the recent 60 Minutes Sunday telecast about the mortgage crisis and how it has negatively impacted land values in California? The reporter interviewed homeowners who were in the process of losing their homes to foreclosure. When the reporter asked the first couple if they had consulted with an attorney prior to signing the mortgage documents, they responded with a flat "no." When the reporter asked the second couple how they could justify reneging on their promise to pay back the note forcing the mortgagee to foreclose, the woman responded that she had promised to pay back the lender if the value of her home continued to rise, not if the value decreased.

What gives?

I bet there are many out there who remember the lessons of college real estate law professors (i.e. the late-great Vinny Harrington at Boston College). Remember being taught about saving a down payment, buying the worst house in the best neighborhood, working to increase the value of your home, and not treating your home as an investment tool? Remember the lessons about establishing good credit and maintaining good credit? Remember learning in high school or college economics class that our economic system depends upon fair play and responsibility?

Perhaps its time for me to write (again) to my senators and representatives in Washington and ask them to treat tax money as if it was paid by hardworking men and women. I bet most of you ate a lot of peanut butter and tuna fish to be able to afford your tuitions, buy your first home or cover business expenses. Millions of hardworking Americans make sacrifices everyday to support their families, pay their bills and pay their taxes. I hope our elected representatives in Washington respect the hardworking taxpayers while they ponder what should be done about the latest mortgage crisis.

The Globe asked readers if homeowners should be allowed to use bankruptcy protection if their homes are foreclosed, and one reader responded by saying that foreclosed homeowners should be forgiven because the lenders will get their money back from a federal bailout. Apparently the reader did not give much thought to where the federal government gets "bailout money," but more importantly, it is sad to think that the general public believes there is no need for personal or institutional accountability because the government will bail everyone out.

We are mindful that many unfortunate folks were misled into signing notes that they could not afford, and, therefore, there is no easy solution to the overall problem. I like to tell my sons that you don't get extra credit for making the right decisions, but I would hate to be penalized for making the right decisions.

Currently serving as president of the association, Paul Alphen was a founding chair of REBA's Land Use and Zoning Committee. He resides in Westford with his wife and two sons, both in college. Alphen's e-mail address is paul@lawbas.com.

A remembrance of Bernie Greenhood: 1918-2007

By Ruth A. Dillingham

Bernard L. Greenhood, better known as "Bernie," passed away this past June in Florida at age 89. His name and reputation are legendary to those of us who had the pleasure of knowing him. For those among the readers who did not know Bernie, we hope to do him justice with this obituary, and for those of you who did know him, we hope this thumbnail sketch will resonate with you, inspire a laugh, perhaps a tear, and will remind us of the joy that was Bernie.

Jane writes as his daughter and protégé. Ruth writes as a grateful young attorney who recalls that Bernie was the first person at the "old" Suffolk Registry (of 5th floor Pemberton Square fame) to say hello to her and became fast friends. Bernie's eagerness to mentor Ruth and countless others was not limited to title examination; he introduced Ruth to her husband Robert Curran, urged her to take her first job as a conveyancer at Harrison and Maguire, and taught her the subtle differences between a tasty corned beef sandwich at Purcell's and savory Romanian pastrami at the Hungry Traveler.

Ruth Dillingham, known and loved by all as "Ruthie," is the only person who has served as president of the Real Estate Bar Association and president of the Massachusetts Mortgage Bankers Association. She serves as special counsel at First American Title Insurance Company. She writes, lectures and teaches on title insurance and legal and lending compliance matters throughout New England. Ruth can be e-mailed at rdillingham@firstam.com.

Jane recalls frequent visits at the family's house in Newton that coincided with the dinner hour (her mom, Bernie's late wife, Bea, was a renowned cook and gracious hostess). Attorneys just beginning their careers, as well as seasoned conveyancers, would arrive hoping to review a complex title just completed, and were often invited to stay for a sumptuous dinner.

Bernie began his career in his father's practice with elder brothers Alfred and Ernest at 18 Tremont St. in Boston, but shortly thereafter enlisted in the Army where he served in the infantry, arriving in Normandy shortly after D Day, ultimately becoming the sole survivor of his company. Immediately following the war he served for the JAG in Paris, perhaps establishing the affinity for the country that Jane now enjoys.

Returning from France, Bernie married Beatrice and settled in Newton where they raised their daughters, Victoria, now of Atlanta, and Jane. It was at that time when Bernie established his expertise, title examiner extraordinaire, from Worcester to Barnstable, later carving his niche in the first row of seats at the Suffolk Registry.

Admittance to the Registry has always been free, however, a "session" with Bernie often had a price, listening to a joke from the infamous raconteur, Scottish, Irish, Italian, French and Jewish accents perfected, with the delivery of the punch line given at just the right moment, even if it meant the delay of a recording. One could not rush perfection.

Towards the end of his career, then REBA President and friend Kathleen O'Donnell created a mentoring award for Bernie in recognition if his enthusiastic love of teaching everything from the basics to the complexities of title, or, as Bernie saw it, the joys of title examination.

Although it may sound contrived, it is the undeniable truth — Bernie was the last of an era, but his legacy will continue every time one of us "experienced" conveyancers lends a helping hand to those new to the career.

Thank you, Bernie, from all of us who learned not only how to examine a title, but how to relish life.

An encounter with the SJC's 'Bjorkland' decision

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a two-story, three-bedroom house with 3,600 square feet of living space and a two-car attached garage. The new house would meet all the dimensional requirements of the zoning bylaw. But the SJC held that expanding the house on its nonconforming lot would, nonetheless, as a matter of law, "increase the nonconforming nature of [the] structure" within the meaning of the second "except" clause of the first paragraph of G. L. c. 40A, § 6. *Bjorkland* followed an earlier decision in a case called *Bransford v. Zoning Bd. of Appeals of Edgartown*, 444 Mass. 852 (2005), which reached the same conclusion.

"But Aunt Tillie's lot already contained a home when the lot size requirement changed. Isn't the non-conformity the fact that the lot is developed at all? Why should it matter whether the house later increases in size?" asks Max.

"Some of the justices did see it just that way," you reply, "but not quite enough of them." In fact, Justice Robert J. Cordy authored a dissenting opinion in both *Bransford* and *Bjorkland* in which he made that exact point. As he put it in *Bransford*, "a 2,400 square foot structure on an undersized lot is equally as nonconforming as a 1,200 square foot structure on the same size lot. It is lot size, not building size, that is at issue." In *Bransford*, he was joined by justices Martha B. Sossman and Roderick L. Ireland, and their three votes split the court evenly on the issue. Two years later, in *Bjorkland* new justices Margot G. Botsford and Judith A. Cowin joined justices John Greaney and Francis X. Spina and Chief Justice Margaret H. Marshall in a 5 to 2 majority. To quote the *Bjorkland* majority opinion, the effect of this new alignment was to alter "the equipoise created by the *Bransford* decision" unless and until the Legislature chooses to change the statutory language.

"OK, so I have to go to the Zoning Board for permission to expand the house. They're probably pretty reasonable people," Max says, missing the wince that briefly crosses your face. "They certainly see that Aunt Tillie's house is a lot smaller than almost all of the new houses that have been built in the town during the past several years, and even after my expansion, it still won't be as big as some of the houses nearby. What kinds of things can they consider in deciding whether to let me go forward?"

You explain that the sole question for the zoning board is whether the expanded house will be substantially more detrimental to the neighborhood than the existing house.

"Not a problem," says Max. "The new house will raise property values because it's newer and bigger and will be nicer looking. It will be used as a single family home, and it won't be any taller or closer to the street or the lot line or bigger in any dimension than the zoning allows, so it how could it be 'detrimental' to the neighborhood at all, let alone 'substantially more' detrimental?"

"That's certainly a reasonable view," you respond. But you note that in *Bjorkland* the zoning board had decided that a larger house would indeed be "substantially more detrimental to the neighborhood" because it "would not be in keeping with the rural character and aesthetics of the neighborhood" and "would add noise and light . . . would eliminate open space and screening; and . . . lead to the parking of motor vehicles along, or next to, a narrow country road, . . . all to the detriment of the neighborhood and the safety and welfare of its residents and persons using" the street on which it was located. You also note that in *Bransford* the "substantially more detrimental" finding was upheld based on the new house being larger in terms of footprint, living area and height and having more living area than the average house nearby, and the terrain being flat and having "few trees or vegetation to buffer homes from one another." You go on to observe that the zoning board in Aunt Tillie's town is supposed to be pretty tough, and that if standards like those can be used to justify a "substantially more detrimental" finding, even in the absence of general performance standards for noise, light, minimum open space requirements, or landscaping, you have no doubt that the zoning board will be able to seize on something it can use in Max's case to justify finding that the proposed house would be detrimental to the neighborhood.

You read to Max the *Bjorkland* court's observation that "many municipalities do not welcome the building of structures that represent the popular trend of 'mansionization[.]' . . . especially . . . when the structures involve reconstruction on nonconforming lots. The expansion of smaller houses into significantly larger ones decreases the availability of would-be 'starter' homes in a community, perhaps excluding families of low to moderate income from neighborhoods. Municipalities may permissibly exercise their police power to attempt to limit these potential adverse effects."

"I'm not a lawyer, but I do know something about economics," Max says. "What's going on here is that towns and cities are trying to force the owners of houses on undersized lots to bear the burden of maintaining a stock of smaller, less costly houses, even where the housing market would encourage, and local zoning would otherwise allow, the construction of bigger houses. And the court is letting them do that."

"It certainly seems that way from the *Bjorkland* decision," you reply. "What's more, the court may even be helping them to do that. After *Bjorkland,* couldn't a community concerned about "tear down" *mansionization* simply increase the minimum lot sizes by some modest amount in already developed areas, and then take a highly restrictive approach to requests for Section 6 findings in connection with teardowns? That would seem to be a court-sanctioned way to stop the teardown trend in its tracks."

"I bet that would make for some interesting zoning hearings," Max noted, "but didn't the towns that are facing these problems help to drive up the cost of land and housing in the first place by restricting the supply of buildable land through anti-growth policies like requiring larger lot sizes for new subdivisions? And wouldn't a fairer way to create more affordable housing be for the town to identify locations where that housing can be built and make it easier for people to build it?"

"That certainly would make sense also," you respond. "But it would also require strong planning and political consensus and might involve spending tax dollars. Besides, that's not all that's going on here. Don't take offense, but many people who sit on zoning boards and planning boards react badly to people like you who move in from other places with big plans, driving expensive cars and wanting to change things in a way that seems threatening to people who have been around longer. And it doesn't have to be that much longer. I've seen situations where the person living in the biggest house in the neighborhood is the one who is the most opposed to someone nearby expanding her own home."

Max gulps. "Is there really no way to avoid having to go in front of the zoning board?"

"Well," you reply, "you might try arguing that *Bransford* dealt with a doubling in size, and in *Bjorkland* the new house would have been five times the size of the old one. So the court has not squarely ruled on whether an expansion that did not double the size would automatically be considered an intensification of the lot size non-conformity. On the other hand, if a house on a non-conforming lot is considered to be a non-conforming house, it's difficult to see how the statutory language 'shall not increase the non-conforming nature of the structure' could support a principled distinction based on the size of the proposed increase. The house is either bigger or its not. Despite this, though, the *Bjorkland* decision listed certain improvements which, 'because of their small- scale nature . . . could not reasonably be found to increase the nonconforming nature of a structure, and . . . as matter of law, would not constitute intensifications' of a lot size non-conformity. The court listed 'the addition of a dormer; the addition, or enclosure, of a porch or sunroom; the addition of a one-story garage for no more than two motor vehicles; the conversion of a one-story garage for one motor vehicle to a one-story garage for two motor vehicles; and the addition of small- scale, proportional storage structures, such as sheds used to store gardening and lawn equipment, or sheds used to house swimming pool heaters and equipment."

"That list won't get me very far with what I'm looking to do," Max says. "Although I do find it ironic that in a single decision the court upheld municipal regulation of undersized lots for the purpose of preserving affordable housing stock, and also apparently created a private zoning right to build a shed for a swimming pool heater on the same lots." Max thinks a minute and says "I can tell you, though, that I'm really glad we didn't buy the vacant lot down the road from Aunt Tillie's that we were considering. We thought at one point of selling Aunt Tillie's house and building on that lot instead, but that lot only has 30,000 square feet also, so I guess we would have faced the same need for zoning relief there too. Instead I hear a 40B developer has purchased it, and the neighbors and zoning board are battling it out with him."

"Actually, you should have bought it," you explain. "A vacant non-conforming lot that has never been built on, was in separate ownership from abutting parcels when the zoning changed, and meets certain other requirements, is covered by the fourth paragraph of Section 6, not the first paragraph. As long as you met setback and height requirements, you would have been able to build your dream house there without even needing to go to the Zoning Board. In fact, you might have built an even bigger house if you wanted to."

As Max walks out of your office, it seems that he is about to cry.

Mortgage fraud: closing attorneys beware

Continued from page 1

money. In many cases, the buyer does not intend to make payments on the mortgage. He is simply looking to get money from the closing and anticipates that the lender will foreclose on the home.

The so-called cash back at closing scam is accomplished with some variation, but usually involves the participation of several parties to the transaction. For example, the transaction might go something like this: The seller offers his property for sale for $300,000. The seller is then introduced to a buyer, who claims he is willing to pay $400,000 for the house. The only catch is that the buyer wants to get $100,000 back at closing. The buyer works with a mortgage broker, who helps him falsify his loan application to make him appear as though he is less of a credit risk. Among other things, the loan application overstates the borrower's income and falsely claims that the house will be owner occupied when the buyer has no intention of living there. The mortgage broker then retains an appraiser, whom he knows will appraise the property for the asking price even though the asking price is significantly higher than the fair market value of the property. Not knowing about the scam, the lender agrees to loan money to the buyer.

Under the scenario, much of the material information that the lender will rely upon in deciding whether to loan the buyer money is false. The home will not be the buyer's primary residence, the true purchase price is $300,000 — not $400,000 — the buyer makes less money than stated in the application, and the appraisal has no basis in true market conditions. Additionally, the lender is never told of the cash back at closing arrangement.

At closing, the lender, through its attorney, distributes the loan funds which go to benefit the participants in the fraud. The seller's mortgage is paid off and the seller receives the proceeds from the sale. The seller then pays the buyer $100,000. The mortgage broker makes a commission, which is higher than if the property had been sold at fair market value, and the appraiser receives its funds as well as the goodwill of the broker who will continue to send business his way.

Who's harmed by cash back at closing scams?

Although the participants to the scheme see an immediate financial gain, the harm may take longer to materialize, but is far more devastating. Assuming that the participants in the fraud repeat the scam in the same geographic area, in the beginning, the fraudulent transactions dramatically (and falsely) increase home prices. Months and years after the scams, however, those houses will sit abandoned and will be foreclosed upon. The deteriorating buildings coupled with the rise in foreclosures will significantly lower surrounding home values. The lenders who are forced to foreclose on the properties will take substantial losses. It should come as no surprise if lenders begin looking for creative ways to recoup their losses.

Closing attorneys should be aware of these scams because where there is harm, a lawsuit or claim may follow. By the time the lender realizes what has happened, the parties to the scam may be long gone or may be judgment-proof. The next logical place for the lenders to turn is the closing attorney. Whether a lender will try to recover its losses will likely vary depending on the lender's knowledge of the scam, the extent of the loss, the number of losses and many other intangible factors.

It is not yet apparent whether these types of lawsuits will emerge in significant numbers, but the potential claim is something to bear in mind when conducting closings. It is important to proceed with the knowledge that these types of scams exist, and to understand how they are accomplished so that they can be avoided.

Trust your instinct. If something seems amiss, it probably is, and you should consider passing on the transaction.

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Smoke-free condominiums: the wave of the future?

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munity that they chose to join."

The decision is significant because it is the first of its kind, but its application is obviously limited since it is not an appellate level decision and was heavily fact specific.

Massachusetts courts, jurists and juries may be inclined to follow the logic in the Colorado case. In fact, in 2005 a Boston Housing Court jury ruled that a South Boston couple could be evicted from their rented water-view loft for heavy smoking, even though smoking was allowed in their lease. The jury found that the couple's heavy smoking violated a more general clause banning "any nuisance; any offensive noise, odor or fumes; or any hazard to health."

Although the verdict, like the Colorado case, is not binding on other courts, it certainly suggests that people living in Massachusetts are not inline to tolerate second hand smoke.

Associations and their practitioners that decide to ban smoking should do so by amending their bylaws, rather than by drafting a regulation prohibiting smoking in residences and common areas. It is doubtful that a simple rule or regulation (as opposed to a bylaw amendment) would survive judicial scrutiny since it regulates the interior of a unit. See Johnson v. Keith, 368 Mass. 316 (1975).

Obviously, a bylaw amendment is more difficult to enact (since it typically requires the approval of at least 75 percent of unit owners and sometimes more, while a board can adopt a rule by majority vote), but a bylaw is also easier to defend. Owners challenging a bylaw must prove that it is arbitrary and capricious; owners challenging a rule must demonstrate only that it is "unreasonable" — a much lower legal threshold to clear.

In all likelihood, the bylaw would be difficult to challenge if imposed by the developer at the time of the creation of the condominium, since all purchasers of condominium buy with knowledge of the smoking prohibition. See Noble v. Murphy, 34 Mass.App.Ct. 452 (1993) ("persons who contemplate acquisition of a condominium unit can choose whether to buy into those restrictions").

Whether imposed by the developer or a subsequent condominium board, the Condominium Act provides a strong basis for the imposition of rules, regulations and bylaws designed to protect the peaceful enjoyment of the use of units. See G.L. c. 183A § 11(e).

Savvy condominium boards and practitioners desirous of passing anti-smoking bans are probably best advised to include a grandfather provision for existing smokers. Not only does that make it easier to pass the amendment, but it reduces the risk of legal challenge from existing smokers and future purchasers (who buy with notice of the restriction). A grandfather provision was crucial to the passage of the smoking ban at the Minnesota condominium.

Of course, appeasing smokers does not solve the health and safety problems caused by secondhand smoke, and potentially puts the association at risk of liability from non-smoking unit owners. Either way, practitioners should stay tuned, as litigation testing these issues is sure to follow.