REBA NEWS

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*The Newsletter of the*
*Real Estate Bar Association for Massachusetts*

# Conveyancers face challenges in the new decade

By Martin A. Loria and Joel A. Stein

### Ibañez

As previously reported, the case of U.S. Bank National Association, *Trustee v. Ibañez*, invalidated a foreclosure where the foreclosing entity did not hold the mortgage of record at the time of the first publication pursuant to G.L.c. 244 §14. The decision calls into question REBA Title Standard No. 58, entitled "Concerning Out of Order Assignments." The impact of the decision on mortgage discharges based on out of order assignments is uncertain.

To date, there have been no decisions on how to proceed when a title is based on a foreclosure that fails to comply with the *Ibañez* decision. It is clear that if the current owner has an owner's title insurance policy, the company that issued the policy would allow an agent to issue title policies to proposed owners and lenders. Otherwise, it is important to understand that taking title from a foreclosure which violates *Ibañez* would, at best, result in your purchaser being a holder of the mortgage rather than a holder of the fee interest.

One suggestion that I heard from a title insurance company employee is to have an owner who purchased from a foreclosure that is invalid pursuant to *Ibañez* record a Certificate of Entry, which would allow their interest as mortgagee to ripen after three years of uninterrupted possession. Although it doesn't provide immediate relief and still leaves open the question of the validity of junior liens, it is the only proactive suggestion that I have heard to date.

### Four unities

A concerned call from a fellow conveyancer resulted in my revisiting the issue of the "four unities." In this instance, the conveyancer has previously prepared a deed from "A" and "B," as tenants in common, to "A" and "B," as joint tenants.

"A" had since died, and when "B" went to sell the property, the bank attorney required a probate for "A." Despite the fact

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Kristen A. Zampell of Regnante, Sterio & Osborne received a pro bono publico award from REBA 2009 President Steven M. Edwards at the association's annual meeting and conference in November. Zampell is one of 40 REBA members participating in a volunteer program to counsel homeowners threatened with foreclosure. REBA members are also active in the Bankruptcy Court Volunteer Mediation Project.

# From the President's desk

By Thomas O. Moriarty

The Real Estate Bar Association has been in existence for over 150 years. Over the decades, REBA has sustained and carefully and incrementally expanded its mission, evolving into *the* bar association for real estate and transactional lawyers in Massachusetts.

During REBA's 150-year existence the real estate industry, like all industries, has experienced predictable periods of growth and decline. These market cycles have provided the association and its members with both significant opportunity for professional development and substantial challenges in meeting our goals and objectives.

In the last few years the practice of real estate law in the commonwealth has been beset by challenges well beyond those cyclical market conditions. Despite the economic climate and the challenges it has brought, the undeniable constant over the years has been the association's unwavering dedication to its mission and its members.

REBA, at any and every given time in its history, has set the standard for the practice of real estate law and the foundation for its growth and development in Massachusetts. REBA has wielded both shield and sword in preserving the integrity of that practice.

If any part of this message en-

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# Condominium tax changes repealed

Changes to the Massachusetts tax code in 2008 designed to close some loopholes for business trusts inadvertently "reclassified" condominium associations as corporations for tax purposes.

The effect of this — beginning with tax year 2009 — was to expose association reserves to a "net worth" tax and increase the tax rate on other income. When the leadership of REBA's Condominium Law Committee became aware of this, they sought out Department of Revenue legal staff and others to rectify the situation. In a relatively short period of time, attorneys were able to convince the DOR and the Legislature to effectively restore condominiums to their prior tax status.

Many REBA members represent condominium associations in their affairs. In our view it does not make sense to treat condominium associations as business trusts. They are not in business to turn a profit, but simply to provide services to their member unit owners. This legislation is especially important to smaller condominium associations, which typically do not have legal and accounting professionals to provide guidance about tax filing and computation requirements. In fact, many would otherwise have no cause to file federal or state tax returns.

One caveat to the legislation applies to mixed-use condominiums. Certain qualification tests must be met in order to file a Form 1120-H (which then allows the continued filing of a Mass. Form 3M). One of those tests requires that at least 85 percent of the square footage in the development must be used for residential purposes. If that threshold is not met, the association may be required to file a Federal Form 1120 and a Mass. Form 355, and be subject to the corporate tax rules in Massachusetts.

The legislation, St. 2009, c. 166, §§20, 25 and 46, is effective for taxable years beginning on or after Jan. 1, 2009.

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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.


Massachusetts Attorneys Title Group recently made a $40,000 contribution to support REBA's efforts to end the practice of law by non-lawyers in the commonwealth. From left: REBA President Thomas O. Moriarty; REBA COO Nicole Cunningham; and MassATG founder Tom Bussone, co-chair, REBA Residential Conveyancing Committee

# Are lawyers subject to new consumer legislation?

By Edward J. Smith

The meltdown in financial markets has generally been viewed as a consequence of the devaluing of assets held by institutions that were invested in derivatives and other sophisticated instruments traded on Wall Street.

The securitization of mortgages has become a fact of life in the national marketplace of residential lending. Regulators and legislators have set their sights on measures that they hope will prevent a recurrence of similar financial disasters. Another goal of these officials is to establish greater protections for home mortgage borrowers and other purchasers of consumer financial products.

On Jan. 1, 2010, a new and improved GFE/HUD is being rolled out for use by residential lenders and settlement agents, and lenders, title insurers and conveyancers have been busy readying themselves.

Further, on Dec. 11, 2009, the U.S. House of Representatives passed the Wall Street Reform and Consumer Protection Act. Authored by Rep. Barney Frank, the legislation seeks to provide greater oversight of over-the-counter derivatives and large interconnected financial firms that are "too big to fail." Other topics include executive compensation, hedge funds and SEC oversight — none of which can be addressed adequately in this article.

According to the press release of Frank's Committee on Financial Services, the bill also "outlaws many of the egregious industry practices that marked the subprime lending boom, and it would ensure that mortgage lenders make loans that benefit the consumer." The bill "would establish a simple standard for all home loans: institutions must ensure that borrowers can repay the loans they are sold."

The Frank bill would create the Consumer Financial Protection Agency, devoted to protecting consumers from "unfair and abusive financial products and services." Subject to its supervision would be certain specified "financial activities," including "providing real estate settlement services." The title insurance industry succeeded in getting their business exempted from the term "financial activities." Further, REBA is working to insure a robust exemption for transactional lawyers providing legal services to their clients.

After a series of floor amendments, there is an exclusion for the practice of law, except that an individual who "provides legal advice or services related to preventing a foreclosure shall be subject to this title unless such person provides foreclosure prevention services in connection with: (a) the preparation and filing of a bankruptcy petition; or (b) court proceedings to avoid a foreclosure."

Does that mean that an attorney representing a borrower in the negotiation of a short sale or modification on behalf of the borrower would be subject to the CFPA? A lawyer should be able to assist a borrower in those ways as well without having to register with the new Federal agency.

Massachusetts attorneys are required to maintain licensure with the Supreme Judicial Court. An extensive body of regulation of attorneys protects consumers: BBO registration; Code of Professional Conduct for lawyers; errors and omission insurance coverage; BBO disciplinary function; and Clients' Security Board function.

REBA believes it unnecessary to include attorneys within the scope of the regulation of the proposed federal statute. The House legislation is now before the U.S. Senate.

*REBA's eyes and ears on Beacon Hill, Ed Smith has served as the association's legislative counsel for over 20 years. He practices law in Boston, with a concentration on transactional matters and civil litigation. Ed can be reached by e-mail at ejs@ejsmithrelaw.com.*

# Hold on to the ball

By Paul F. Alphen

We expect our athletes to be perfect. (This column has nothing to do with golfers, by the way.) When Randy Moss dropped a few passes, the sports pontificators and the talk show shut-ins immediately became certain that Randy was not trying hard enough. When Kevin Garnett had a few less-than-spectacular-games at the start of the season, the same pontificators were certain that his knee was not completely healed. Our heroes become goats as soon as they fail to meet our expectations of perfection.

The real world is different, however, and unfortunately it would appear that our collective expectations regarding the quality of work in the business environment has declined over the past few decades.

For example, when some mortgagees decided to apply little or no effort toward properly discharging mortgages after some hardworking families had paid them in full, REBA and our friends worked with the Great and General Court, leading to the enactment of G.L.c.183, §55(g) and the related statues that can be used to correctly discharge mortgages.

Numerous REBA title standards have been adopted over the years to fill the gaps created by those who have failed to perform up to the caliber of players like Wes Welker. In my opinion, we hit bottom about a year ago when conveyancers were pressured to look the other way when lenders who had foreclosed on property failed to obtain proper powers of attorney or corporate votes or other required documents from the entity that held the mortgages.

Attorneys were asked to believe that "Acme Bank National Association as Trustee for the Registered Certificate Holders of Blackacre Commercial Mortgage ***Funding I*** Corporation Mortgage Pass-Through Certificates, ***Series 1997-C1***" was the same as "Acme Bank National Association as Trustee for the Registered Certificate Holders of Blackacre Commercial Mortgage ***Funding II*** Corporation Mortgage Pass-Through Certificates, ***Series 1997-C3***."

Perhaps the tide has shifted, however, with the Land Court decision, *U.S. Bank v. Ibanez*. REBA has had to temporarily suspend Title Standard 58 pertaining to Out of Order Recording of Mortgage Discharges and Assignments.

It is our understanding that the decision will be appealed, but meanwhile it has put quite a few titles in question without any immediate answers. It also may cause some introspection and cause us to question the recent emphasis on expediency at the expense of quality.

Those who have experienced the thrill of receiving a notice of a title claim or the absolute joy of being cross-examined know that in the end the quality of your work will be judged by the ultimate "Monday morning quarterbacks."

Your work will be judged by lawyers, judges and/or juries who will apply the highest standards. They will have the benefit of looking back over time and judging you based upon your ability to follow every law, every regulation, every practice standard and every rule of professional conduct with the utmost precision.

It is hard to say "no" to home buyers and home sellers who have their moving vans packed and their change of address cards mailed. But that is exactly what we have to do from time to time, and that is why we get paid those huge $550 fees to perform closings. Professional football players may be paid $8 million per year, and when they drop the ball they are criticized by fans and the sports media (and perhaps their coaches). When we drop the ball, there is much more at stake.

*A frequent and welcome commentator in the pages of REBA News, Paul Alphen serves as treasurer of REBA and co-chair of the long-term planning committee. When not following local sports teams, particularly his beloved B.C. Eagles, he practices law in Westford with a concentration in land use regulation. Paul can be reached by email at paul@lawbas.com.*

# Special permits are still special – the impact of the Lobisser decision

ALPHEN

BURGOYNE

Le RAY

**By Paul F. Alphen, James M. Burgoyne and Charles N. Le Ray**

On June 22, 2009, the Supreme Judicial Court clarified the meaning of language in Section 9 of the Zoning Act, G.L.c. 40A, concerning the lapse of special permits. That language provides that:

"Zoning ordinances or by-laws shall provide that a special permit granted under this section shall lapse within a specified period of time, not more than two years, which shall not include such time required to pursue or await the determination of an appeal referred to in section seventeen, from the grant thereof, if a substantial use thereof has not sooner commenced except for good cause or, in the case of permit for construction, if construction has not begun by such date except for good cause."

In *Lobisser Building Corp. v. Planning Board of Bellingham*, 454 Mass. 123, 907 N.E.2d 1102 (2009), the SJC reversed a decision of the Land Court holding that a special permit for the construction of an 84-unit condominium project lapsed when construction was suspended, ultimately for approximately 18 years.

In 1985, the Bellingham Planning Board granted the original developer a special permit, which limited the rate of build-out to 21 units per year, that is, required at construction to occur in at least four phases.

The Bellingham Zoning Bylaw provides that special permits lapse after 12 months unless substantial use thereof, or construction, has begun, except for good cause. Forty-one units were built by 1988, after which construction ceased.

In 2006, the condominium association and a new developer, Lobisser Building Corp, sought to modify the special permit to build 21 units in Phase III. The Bellingham Planning Board denied their request on the ground that the special permit had lapsed when construction ceased.

On appeal, the Land Court held that the special permit had lapsed under G.L.c. 40A, §9 and the Bellingham Zoning Bylaw. The court held that the substantial use or construction test applied to each phase of construction, not to the overall special permit. The decision did not make clear whether the court determined that substantial use or construction for all phases had to begin in the first year, notwithstanding the special permit's prohibition against starting the second or later phases in that year, or if the test was to be applied to each of the four phases in four successive years.

The defendant, Bellingham Planning Board, was represented by Attorney Jason R. Talerman and Lobisser Building Corp. was represented by Thomas O. Moriarty, president-elect of REBA. Three amicus curiae briefs were filed in support of the plaintiffs, including one from REBA and The Abstract Club, co-authored by James M. Burgoyne and Charles N. Le Ray, co-chairs of REBA's Land Use and Zoning Committee and Paul F. Alphen, former chair of the Committee and past president of REBA.

Had the Land Court's decision been upheld, special permit granting authorities might have felt empowered to interpret G.L.c. 40A, §9 as requiring that construction of every phase of a multi-phase project begin within two years, or such shorter lapse period as might be specified by the local zoning code. Additionally, had the decision been allowed to stand, it would have been difficult for construction lenders or their counsel to determine the period of validity of a special permit in advance of full construction, which could seriously (further) chill the construction finance mar-

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*Paul Alphen, Jim Burgoyne and Charles Le Ray authored the joint REBA /Abstract Club Amicus Curiae brief in the Lobisser case. They are all members of REBA's Land Use and Zoning committee. Alphen, who practices with the firm of Balas, Alphen & Santos in Westford, can be reached at paul@lawbas.com. Burgoyne is a director of the Worcester-based firm of Fletcher, Tilton & Whipple and can be contacted at jburgoyne@ftwlaw.com. Le Ray is a founding partner of Brennan, Dain Le Ray, Wiest, Torpy & Garner in Boston. He can be reached at cleray@bdlwtg.com.*

# Superior Court judge limits liability under G.L.c. 93, §70

By Robert T. Gill and Jennifer L. Markowski

GILL

MARKOWSKI

In a recent Superior Court ruling arising from a title dispute, *Mercuri v. Newhouse, et al.*, MICV2005-04338 (Oct. 30, 2009), Judge Garry V. Inge addressed two important issues affecting closing attorneys: 1) a closing attorney's legal obligations when certifying title to the buyer; and 2) a closing attorney's potential liability when giving advice to non-clients.

With respect to the first issue, Inge narrowly construed G.L.c. 93, §70 to hold that a closing attorney's only obligation to the buyer is to render a title certification to the mortgaged premises; the statute does not impose a competency standard. On the second issue, he permitted the buyer's legal malpractice claim against the closing attorneys to survive summary judgment as there was evidence suggesting the closing attorneys had provided the buyer with advice that could have created an implied attorney-client relationship.

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*A partner at the firm, Bob Gill co-chairs REBA's Ethics Committee and concentrates his practice on a wide range of complex civil litigation matters. Bob can be contacted by e-mail at rgill@peabodyarnold.com.*

## The dispute

The buyer's claims in *Mercuri* arose from a post-closing dispute between the buyer and the owner of an abutting private way. Unbeknownst to the buyer or the closing attorneys, the driveway for the buyer's property was located on the way. Within days of the closing, the neighbors were entangled in a contentious dispute.

Two years and $30,000 in legal fees later, the buyer filed suit against the closing attorneys alleging the attorneys should have discovered and alerted her to the problem. The buyer claimed, among other things, that the attorneys committed legal malpractice and improperly certified title under G.L.c. 93, §70.

She complained that the certification certified only that she held "good and sufficient record title to the mortgaged premises" when it should have referenced the adjacent private way on which the driveway was located and/or contained an exclusion exempting the private way from the title search. The attorneys moved for summary judgment on the basis that once they rendered the title certification they fulfilled their obligations under G.L.c. 93, §70. Furthermore, they argued the only duty they owed was to their client — the lender.

## The claim under G.L.c. 93, §70

With respect to the alleged statutory violation, the buyer claimed the alleged failure to properly address the private way was a dereliction of the closing attorneys' obligations under G.L.c. 93, §70, which provides, in relevant part: "an attorney acting for or on behalf of the mortgagee *shall render a certification of title to the mortgaged premises to the mortgagor and to the mortgagee*." (Emphasis supplied.)

Since on its face, the statute requires only that certificate is rendered — not that it is competently or correctly rendered — the question for Inge was whether the statute, absent an explicit requirement, nonetheless imposed a competency standard on closing attorneys.

Inge, relying on two earlier Superior Court decisions, declined to read into the statute any additional requirements. He held that the attorney's only obligation is to "render a certification of title to the mortgaged premises." His decision comports with plain language of the statute and is consistent with the general rule that a closing attorney's only duty is to his client — the lender.

## The legal malpractice claim

Although Judge Inge found the closing attorneys had only limited obligations under G.L.c. 93, §70, he nevertheless left the door open for the buyer to pursue a legal malpractice claim against them because he found there was evidence suggesting the closing attorneys had provided the buyer with legal advice and, if a fact-finder were to determine the attorneys had indeed provided advice, an implied attorney-client relationship might have been created.

His decision on this point is contrary to the usual rule that a closing attorney owes a duty only to the lender and serves as a reminder that advice — even casual advice — given outside the scope of the closing can sometimes be the basis for an implied attorney-client relationship.

The basic rule in Massachusetts is that an attorney owes a duty only to his own client. "Where there is no attorney/client relationship there is no breach or dereliction of duty and therefore no liability." *DeVaux v. American Home Assurance Co.*, 387 Mass. 814, 817 (1983). Accordingly, courts regularly dismiss claims by non-clients against attorneys for lack of duty. See *Logotheti v. Gordon*, 414 Mass. 308, 312 (1993). This same rule has been applied in the context of real estate closings. See *Page*

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# Tank Talk: underground storage tanks in real estate transactions

By David P. Horowitz and Gary M. Roberts


HOROWITZ


ROBERTS

Most would agree that knowledge is power and a picture is worth a thousand words. The Massachusetts Department of Environmental Protection entrée into the management of underground storage tanks makes these clichés all the more important. Why?

## Out of sight, out of mind

Disclosure of the presence of USTs is standard practice during real estate transactions. However, the compliance status of active USTs is not typically disclosed. Third-party UST inspections will offer a new insight into the compliance status of storage vessels that are out of sight and often out of mind.

What can real estate professionals do to protect their clients from potential issues associated with USTs? Investigate the property's historic fuel source. Look for signs of abandoned pipes — there may be an abandoned UST. Review the state's database and request copies of the 3rd-party inspection results — ask for the FP289 forms. Stop by City or Town Hall — there may be UST records available.

## The rest of the story

In 1988, in an effort to protect the source of drinking water for most Americans, the Environmental Protection Agency promulgated regulations that required owner/operators of USTs to upgrade or replace them. The EPA required that USTs be upgraded to include overfill prevention, overspill protection, and corrosion prevention.

The EPA allowed owner/operators of USTs ten years to implement these upgrades. By December 1998, many owner/operators had removed USTs and installed above-ground tanks (save for commercial gasoline dealers). However, the EPA estimates that there are still 610,000 active USTs in the U.S.

The Massachusetts UST program, approved by the EPA in 1995, that protects the environment from leaking underground chemical and petroleum product storage tanks, was transferred from the Department of Fire Services to the DEP on July 1, 2009. In its Performance Partnership Agreement with the EPA, the DEP has committed over the next three years to:

- assess the extent to which tanks are in compliance with existing registration, design, testing and reporting requirements;
- identify and promulgate programmatic changes needed to improve compliance rates and streamline program implementation;
- build the capacity within and outside of DEP to implement the program; and

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*The authors are among 190 seasoned professionals at Tighe & Bond, a civil engineering firm with offices in Massachusetts and Connecticut.*

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# Massachusetts Attorneys Title Group Bolsters REBA's Unauthorized Practice of Law Mission


*Pictured (left to right): REBA 2010 President Tom Moriarty, Chief Operating Officer Nicole Cunningham and Tom Bussone, of MassATG.*

MassATG today made a $40,000 contribution to support REBA's unauthorized practice of law (UPL) initiatives and the Association's ongoing UPL litigation against National Real Estate Information services,which is now on appeal to the First Circuit.

"Our affinity partner, MassATG, stands shoulder-to-shoulder with REBA in our struggle to combat the practice of law by non-lawyers," said Tom Moriarty, REBA's 2010 president. "I urge every member to learn more about MassATG and how each of us can support REBA's mission by going to www.MassATG.com."

"By joining MassATG, you are supporting REBA's fight without taking money from your own pocket," said Tom Bussone, founder of MassATG. "We hope to double our donation next year but we need the help of every REBA member to reach this goal."

In addition to today's contribution, MassATG donated $40,000 in 2008.

# 2009 Annual Meeting and Conference


# Planning and Chapter 40B

By Kathleen M. O'Donnell

At REBA's Annual Meeting and Conference this past November, Secretary of Housing and Economic Development Gregory P. Bialecki and State Permit Ombudsman April Anderson Lamoureux reviewed the Patrick administration's efforts to encourage local land use planning. The administration's stated goals for such planning are: economic development; housing; open space protection; water management; and energy management. Among the provisions of the proposed Land Use Partnership Act are amendments to chapter 40A that would provide certain benefits to communities that adopt land use plans.

Two recent decisions of the Housing Appeals Committee address the balancing act between the need for affordable housing and local planning objectives as expressed in a town's master plan.

In *28 Clay Street Middleborough v. Middleborough Zoning Board of Appeals* (HAC No. 08-06, Sept. 28, 2009), the developer appealed the zoning board's denial of its application to build 250 mixed-income rental units on a 12.5 acre site in an area set aside by the town for commercial development.

The question before the HAC was whether the zoning board was correct in finding that local concerns outweighed the demonstrated need for affordable housing. In its denial, the board said that the project would interfere with the town's planned traffic improvements; furthermore, that the project was inconsistent with the town's long term planning for the site and its surroundings.

Over the years, the HAC has rendered decisions addressing the weight given to a community's master plan. A properly drafted and adopted municipal master plan has provided some defense against projects deemed inappropriate by a town. In this decision, the HAC outlined the evidence that a board must present in order for the HAC to consider the master plan as sufficient defense for a denial of a comprehensive permit.

The HAC has established a three pronged test: 1) the plan must be "bona fide"; that is, properly adopted and still viable; 2) the plan must promote affordable housing; and 3) the plan must have been implemented in the area proposed for the project. Of particular interest to the HAC is whether the plan, once adopted, has actually been followed by the town and has actually produced affordable housing. A "no" answer to any of these questions will result in the HAC's refusal to consider the project in the light of the municipality's master plan.

The HAC found that Middleborough began working on a master plan in 1981 to address the expected growth from the construction of Route 495. Commercial zoning districts were created and conditions established under special permits were incorporated into later plan amendments so that the plan remained a living document. DHCD provided funds for the preparation of a community development plan and an affordable housing plan. The board provided evidence of the steps the town had taken to carry out the plan's objectives and the progress the town had made to create opportunities for affordable housing.

In the area of the proposed project, the master plan called for commercial development. The zoning code had been amended to encourage such development and permits and approvals had been issued. The board demonstrated that the construction of a residential project in the middle of a partially constructed commercial subdivision would defeat the town's 20-year effort to develop commercial activity in this location. The HAC upheld the board's denial.

Local planning in Lunenburg was not given the same deference in *Hollis Hills v. Lunenburg Zoning Board of Appeals* (HAC No. 07-13, Dec. 4, 2009). Lunenburg's board submitted the town's master plan, its wastewater management plan and a DHCD-approved affordable housing plan in support of its denial of an application for a comprehensive permit to construct 146 condominium units on approximately 33 acres of land.

Pulling out its three-pronged test, the HAC found firstly that the town's plans were bona fide; that is, properly adopted and implemented; and secondly, that the plans promoted the development of affordable housing. Unfortunately, the HAC decided that the town had failed the third part of the test — that the plans had actually been implemented in the area where the project would be built.

A further problem was the fact that the board could not show that the town's affordable housing plan had produced actual results, because the housing plan had been approved just days before the developer's application was filed. One site selected for affordable housing was instead permitted for a self storage facility, while another was developed for market rate, not affordable, housing.

**A properly drafted and adopted municipal master plan has provided some defense against projects deemed inappropriate by a town.**

The board argued that the project would undermine the objectives of its wastewater management plan, but the HAC found that while portions of the planned sewer improvements were constructed, the construction in the area of the project did not comply with the plan. The sewer improvements requested by the developer were determined by the HAC to be consistent with the town's planned expansion of its sewer system.

In reviewing the plans submitted by the board, the HAC found that the proposed project was in line with the goals expressed in these plans and would not "undermine" or "infringe" on local concerns. These local concerns did not, in this case, outweigh the need for affordable housing.

These two decisions tell us that with proper planning and implementation, a community can take more control over the placement of 40B projects and direct development to those areas of the town that are appropriate for such projects, i.e. near transportation, retail centers, etc. Clearly, master plans can help a board — and the HAC — determine whether local needs should be considered in the review of a project.

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# A surge in suburban orders of notice

By Richard P. Howe Jr.

Since Labor Day, the number of orders of notice recorded here at the Middlesex North Registry of Deeds is up 83 percent from the same time last year. While periodic spikes in foreclosure activity may be old news to some, the statistics from this fall present something very different. The current increase is suburban — not urban — based.

Like most other cities in the commonwealth, Lowell has been hit hard by foreclosures during the past two years. While the towns in this registry district — Billerica, Carlisle, Chelmsford, Dracut, Dunstable, Tewksbury, Tyngsborough, Westford and Wilmington — have had their share of foreclosures, the bulk of troubled properties have been in the city. This might be changing.

During September, October and November 2009, the number of orders of notice filed for property in the nine towns in the Middlesex North District rose 121 percent from the same three months in 2008, while the order of notice recordings for the city of Lowell rose only 58 percent over the same period.

To better understand the recent surge in suburban orders of notice, I scrutinized the properties involved in three of the district's towns and recorded my observations.

From Sept. 1 to Nov. 30, there were 66 orders of notice recorded for property in the towns of Billerica, Chelmsford and Tewksbury. Of these orders of notice, 22 were of mortgages that were used to purchase the property ("purchase mortgages") and 44 were of mortgages that were obtained sometime after the homeowner had purchased the property ("refinanced mortgages").

Of the 22 purchase mortgages that had orders of notice recorded, six were accompanied by second mortgages obtained in tandem with the first mortgage on the day the property was purchased. For five of these six properties, the amount of the first and the second mortgages combined constituted 100 percent of the purchase price of the property. Of the rest, nine mortgages constituted between 90 and 99 percent of the purchase price, while the remaining seven constituted less than 90 percent of the purchase price.

Except for a single mortgage from 1994, all of the rest were obtained in connection with recent purchases, with one from 2003, four from 2004, nine from 2005, six from 2006 and one (thus far) from 2007. Besides the six properties that had second mortgages obtained at the time of purchase, five others had subsequent "equity loans" averaging $77,000 each.

The 44 refinanced mortgages that had orders of notice recorded this fall paint a more complex picture. The average person in this category purchased the home in 2000 for $244,000, financing $200,000 at the time of purchase but subsequently refinancing at least twice.

On average, the mortgage that resulted in the order of notice being recorded was in the amount of $283,000 and was obtained in late 2005. So while the typical homeowner in this situation only financed 78 percent of the purchase price of the home, the refinanced mortgage constituted 116 percent of the original purchase price and represented a 42 percent increase in the homeowner's indebtedness. In addition, in 19 cases — nearly half — the homeowner had obtained an equity loan in the average amount of $80,000 that was junior to the mortgage associated with the order of notice.

Grouping these refinanced mortgages by the purchase date of the property presents a slightly different picture. In 14 of the 44 refinanced mortgages with orders of notice from autumn 2009, the homeowner purchased the property prior to 2000. The average purchase price of these homes was $122,666, while the mortgage associated with the order of notice (typically the sixth mortgage by the homeowner on that property) was for $240,679, an amount nearly double the original purchase price of the property. In addition, six homeowners also had equity loans averaging $51,000 that were junior to the problem mortgage.

In 10 of the 44 refinanced mortgages, the homeowner purchased the property sometime between the start of 2000 and the end of 2002 (the refinance boom commenced around here in 2003, which is why that year is a cutoff date in this analysis). The average purchase price of these homes was $265,490, while the mortgage associated with the order of notice (typically the fourth mortgage by the homeowner on that property) was for $323,072, an amount nearly 22 percent higher than the original purchase price of the property. In addition, five of these 10 homeowners also had equity loans averaging $101,000 that were junior to the problem mortgage.

In 20 of the 44 refinanced mortgages, the homeowner purchased the property in 2003 or thereafter. The average purchase price of these homes was $318,665, while the mortgage associated with the order of notice (this was typically the third mortgage on the property including the purchase mortgage and any subsequent equity line) averaged $292,828 — only 92 percent of the original purchase price. In addition, eight of these 20 homeowners had equity loans averaging $57,000 that were junior to the problem mortgage.

Aside from the 14 homeowners who had purchased their properties prior to 2000 and then refinanced to extract cash far in excess of the original purchase price of the property thanks to rising home values, these statistics defy simple stereotype. Only a fraction of those whose difficulties arose from purchase mortgages used 100-percent financing to buy their homes. Several who refinanced after purchasing their homes in this decade and who are now in financial difficulty had already refinanced to mortgages of less than the original purchase price of the home.

In light of these circumstances, there appears to be nothing reckless about the actions of these homeowners; instead, these looming suburban foreclosures represent a new phase of the financial crisis — one in which the cumulative effect of unemployment, underemployment and stagnant home values combine to nudge individuals and families firmly entrenched in the middle class onto the roster of those who have lost their homes to foreclosure.

*Dick Howe has served as register of the Middlesex North District Registry of Deeds since 1995. He frequently contributes to REBA News with thoughtful and analytical articles about the residential and commercial real estate markets in northern Middlesex County. Dick can be contacted at Richard.howe @sec.state.ma.*



# The Governor's Council needs change

By Jason A. Panos

The Governor's Council (also known as the Executive Council) was formed more than 240 years ago as a true citizens' body designed to protect the people of the Massachusetts Bay Colony from the rule of the King of England.

The body was later brought forward in the Massachusetts Constitution, adopted in 1780. Currently, the Governor's Council membership is elected directly by the citizens from each of eight districts throughout the commonwealth. It has the power, among other things, to confirm the governor's judicial appointments at every level.

On Jan. 9, 2009, Sen. Bruce Tarr, R-Gloucester, and I co-authored and filed legislation with the Legislature that, once adopted, will dramatically change the way by which we confirm judges at every level. The legislation is designated Senate Bill No. 1457, commonly known as the Governor's Council Reform Act. Already, a bi-partisan group of legislators have signed on as sponsors of the bill, the text of which is accessible at www.mass.gov/legis/billsrch.htm.

The bill will make the Governor's Council accountable to the citizens who elect them through an open and transparent process, ensuring the ability of each citizen to have their voice heard. Specifically, it will:

- require open hearings subject to the Commonwealth's "Open Meeting Law";
- require the use of the Internet to make available the same information the council members use to confirm judges; and
- require the council to file annual reports to the governor and Legislature, ensuring that all branches of government function with accountability to one another.

On Oct. 8, 2009, Sen. Tarr and I testified regarding the governor's Council Reform Act before the Joint Committee on State Administration and Regulatory Oversight, where the bill is currently being considered. Through this process, you have a chance to play an important role by contacting the members of this legislative committee at (617) 722-1643 or (617) 722-2140.

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# Special permits are still special – the impact of the Lobisser decision

Continued from page 6

ket in Massachusetts.

The SJC found that the Land Court had determined that the special permit lapsed when one year passed and "substantial use 'of the type that would preserve development rights to phases III and IV under the special permit has not commenced.'"

No construction of roadways, common areas or infrastructure for the final phases had commenced prior to the expiration of the lapse period (or since!) The SJC ruled that only the "commencement of substantial use or construction," not both, is necessary to avoid a lapse. The SJC took pains to explain that the word "or" is disjunctive in this context and either the commencement of construction OR commencement of substantial use of the special permit, and not each phase of the project, is all that is required to avoid a lapse.

However, the court distinguished between a lapse of a special permit by way of the statute and expiration of rights under a permit by condition, which the board had power to limit but chose not to. Seasoned practitioners sometimes ask the permit granting authority to define in the decision the activities that must be accomplished within a particular time period to avoid a lapse of the special permit.

Previously, the leading case on the subject was *Bernstein v. Chief Building Inspector of Falmouth*, 52 Mass. App. Ct. 422 (2001), wherein the Appeals Court held that despite an extended pause in construction before commencement of the fifth phase of a condominium project pursuant to a special permit, "where a developer anticipates completing work in stages, has begun construction within two years, and a 'substantial use' has commenced, authority to complete the project continues absent express language to the contrary in the permit."

In *Bernstein*, however, the developer had constructed a septic system for the delayed fifth building during the two-year lapse period. Thus, *Bernstein* left unanswered the question of later phases for which neither use or construction begins within two years (or a shorter period specified by local zoning) of the issuance of a special permit.

In *Lobisser*, the SJC further refined the standard created within the *Bernstein* decision by concluding that " … nothing in the statute suggests that substantial use or construction for each phase of the project had to begin within one year. Indeed, reading the statute this way would make no sense."

Furthermore, the court stated that "nothing in §9 indicates that each phase of the project is subject to its own lapse period. Once a special permit for a project, phased or otherwise, has been approved, all that the statute requires is that substantial use or construction commence within the applicable lapse period, which cannot exceed two years."

Perhaps the most powerful expression by the court is found in the following statement: "Here, where construction of the project began within one year of special permit approval and where the special permit contains no time limit, there is no basis to conclude that the special permit has lapsed," citing *New Seabury Corp. v. Board of Appeals of Mashpee*, 28 Mass. App. Ct. 946, 948 (1990).

REBA and the Abstract Club argued in their amicus brief that, "By requiring developers to frontload the costs of infrastructure for future phases into the initial phase(s), such a rule will deter the creation of large-scale, phased residential (or commercial) projects, thereby encouraging smaller, discrete projects that, in the aggregate, consume more land and provide fewer opportunities for affordable residential development."

The brief also pointed out that this reading of section 9 was unlikely to lead to the "warehousing" of permits, as failure to continue construction through to completion as continuously and expeditiously as is reasonable would leave a project subject to subsequent zoning changes under Section 6 of the Zoning Act.

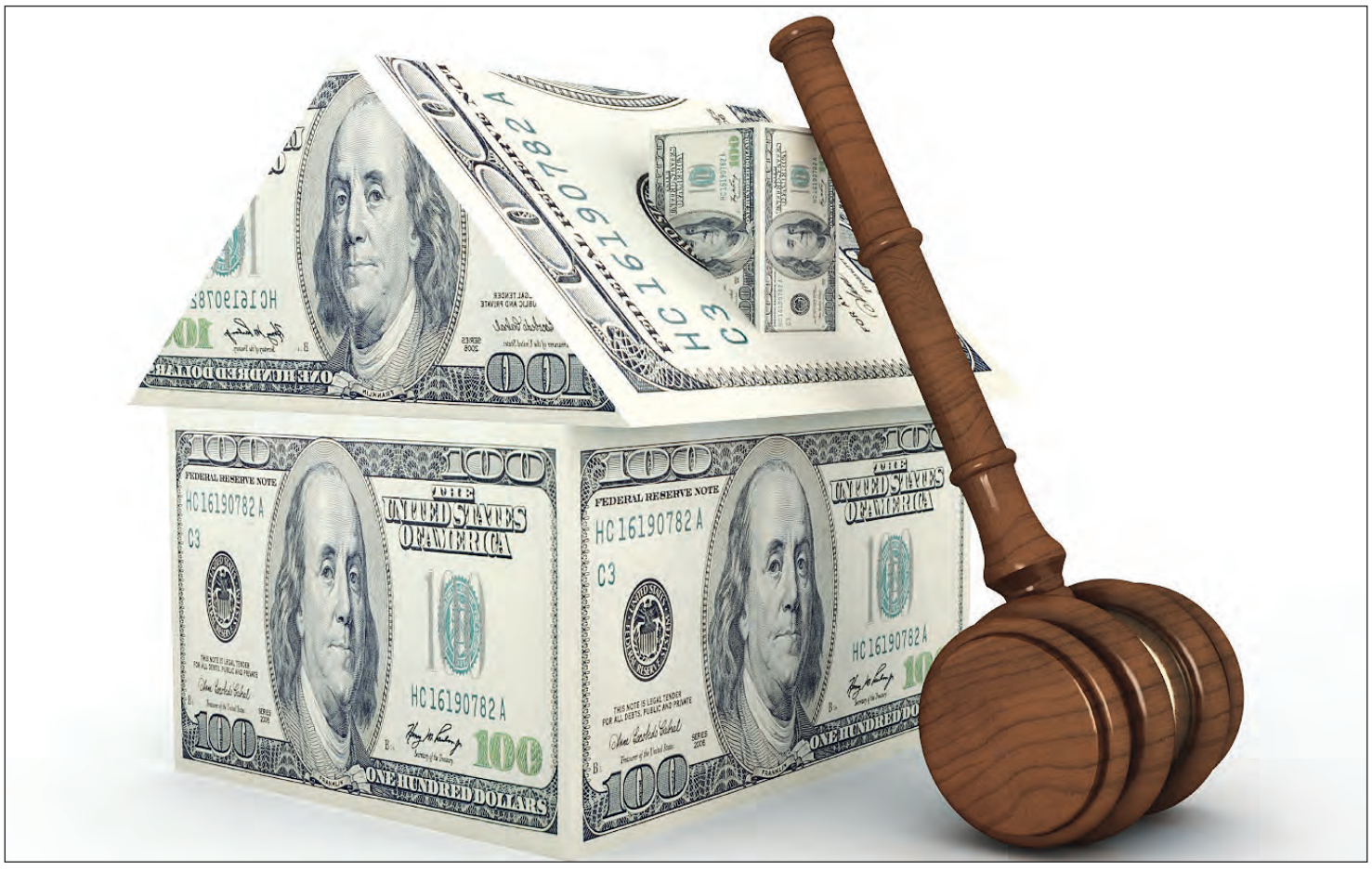
Typically, an application for a special permit is only the first stop along the land use permitting gauntlet. It is a logical first stop because if the proposed use is not allowed as a matter of right, it would be wasteful to expend significant sums on environmental scientists, engineers, architects, attorneys and loan applications without first having obtained permission to bring the proposed use to the subject land.

Once the special permit is issued, an project proponent often must seek an Order of Conditions from the Conservation Commission; obtain site plan approval or definitive subdivision approval; obtain necessary permits for road openings; submit an Environmental Notification Form to the Massachusetts Environmental Policy Act Office; obtain permits related to the provision of water and sewer, which often requires significant engineering by the applicant and substantial review time by the Department of Environmental Protection; satisfy the requirement of the Natural Heritage and Endangered Species Program; and submit the necessary documentation to a lender and complete applicable borrowing requirements.

Having to work toward completion of these processes and to begin construction of all project phases within two years would have been the death knell for larger phased projects.

# Fair cash value in connection with real estate auctions, bulk sales and real estate tax abatements

By Saul J. Feldman



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The most common reason to file and obtain a tax abatement is that the local board of assessors has put an assessed value on the property that exceeds the fair cash value of the property.

The issue is: What is the fair cash value of the property?

It seems clear to me that an arm's-length auction of condominium units in a condo community to buyers establishes the fair cash value for each unit, whether sold at or after the auction.

Assessors often refuse to accept that an auction is a valid way to establish fair cash value. They generally think of an auction as a "fire sale" of condominium units. In fact, I believe that an auction can be a good determination of the market.

The method used in assessing condo units that a developer is trying to sell is the comparable sales method. An auction meets each of the requirements of this method. Each unit is similar to the other units with adjustments for size, location and number of rooms. Auctions are actual sales, not just opinions of value.

Many boards of assessors have in the past refused to consider foreclosures as having any significant bearing on establishing fair cash value.

However, an auction of many units in a condominium is different than a foreclosure sale of a single condo unit. For example, in a 20-unit condominium complex, the sale by auction of 10 of the units to 10 different and unrelated buyers certainly establishes the value of the sold and unsold units.

In a case before the Appellate Tax Board, the ATB stated:

"Fair cash value means fair market value, which is defined as the price at which a willing seller and buyer will agree if both of them are fully informed and under no compulsion." *Boston Gas Co. v. Assessors of Boston*, 334 Mass. 549, 566 (1956).

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The ATB and our courts interpret compulsion very narrowly. Compulsion has been defined as "duress, fraud or imperative need for immediate cash at a cost that would preclude a free market." *Epstein v. Boston Housing Authority*, 317 Mass. 297, 300 (1944). While there is compulsion in a foreclosure, I opine that in an auction of multiple condominium units, there is no compulsion.

Rather than sell one unit per month for many months, the developer has decided to use an auction to market all of the units at the same time and move on. For example, we did all of the legal work for an auction at the end of 2008. Approximately one-third of the units sold at the auction. The master deed was recorded in January 2009. We closed all of the units in 2009, both those that we put under agreement at the auction and those that we put under agreement after the auction. Clearly, the auction determined the value of all of the units.

The "tax date" in Massachusetts for fiscal 2010 (that is, July 1, 2009, to June 30, 2010) is Jan. 1, 2009. Assessors must determine fair cash value as of that date. In the event that an auction was held in 2008 and 10 of the 20 condominium units in a building were sold at that auction, it seems to me that the auction in fact determines the fair cash value of all 20) units as of Jan. 1, 2009.

An auction is a very efficient way of determining market value. It brings the entire market together at the same time and in the same room. Some people argue that by its very nature the auction causes people to bid below market. Others argue that the excitement of an auction causes people to over-pay. I submit that the bidding process at an auction produces the fair cash value of the property.

I am not going to discuss in detail whether a bulk sale of condominium units is as good evidence of fair market value as an auction of units to multiple buyers. I believe that a bulk sale of condo units between a willing seller and a willing buyer is also very good evidence of value. Bulk sales usually are between sophisticated real estate buyers and sellers, unlike auctions where the buyers could be novices. For that reason, I believe that a bulk sale of condominium units is likely to produce the fair cash value of the property as often as the bidding process at an auction.

# Conveyancers face challenges in the new decade

Continued from page 1

that this scenario is frequently utilized to transfer title from two people as tenants in common to themselves as joint tenants or tenants by the entirety, at least one title insurance company insists that this grant violates the "four unities" of a joint tenancy.

The essence of joint tenancy is that two or more persons take and hold the title as if together they constitute one fictitious person. The company argues that this violates the principle that you cannot convey title to yourself and further violates G.L.c. 4 §6, clause 4th. Although their view is in the minority, it represents an issue that should be considered when preparing a deed between related parties.

### Short sale letters

The recent economic downturn and consequent foreclosure crises have created new issues affecting the closing process, some of which are potentially title-related.

We have seen the proliferation of "short sales" throughout Massachusetts. This form of loan payoff occurs when the outstanding loan balance of the seller's first (and possibly second) mortgage exceeds the proposed sales price.

After protracted negotiations with the lender, the seller may come to terms with the mortgagee/servicer who, as a condition of releasing the lien and allowing the transaction to proceed, agrees to take less than the full outstanding loan balance, subject to various underwriting conditions. These transactions may take a few months to finalize and the potential buyer may or may not be able to wait out the process, including payment of additional fees to extend the loan commitment. When the seller's lender does agree to terms, a payoff letter is issued containing numerous conditions.

**The recent economic downturn and consequent foreclosure crises have created new issues affecting the closing process, some of which are potentially title-related.**

The conveyancer representing the buyer's lender (or buyer, if a cash transaction) must exercise all due diligence and caution in reviewing the terms of the payoff letter. Unlike the standard loan payoff letter in a normal transaction, a short sale payoff letter has conditions allowing the lender to revoke its payoff.

Most common among these provisions is what is known as a "lookback" provision: essentially, that the lender has received the payoff tendered by the conveyancing attorney and may subsequently refuse to issue a discharge if the property is re-conveyed within 30 days of the closing or another arbitrary date. In addition, this provision allows the lender to withdraw if it suspects fraud by any of the parties.

The issue the conveyancer has, of course, is that he or she has no control over the transaction once the loan closes. In the event that the new buyer/borrower transfers the property to a third party for additional consideration, or even the same consideration, the original seller's mortgagee may determine that the entire transaction was fraudulent. This leaves the conveyancer in the unenviable position of having closed, recorded, released finds and written a title insurance policy — and having no recourse against anyone. The seller is long gone, the borrower/perpetrator is gone and the title insurer is exposed.

The issue that we are faced with is whether or not the conveyancing attorney will have any control over the situation or simply refuse to close the loan. Certainly, one can attempt to verify the trustworthiness and veracity of his or her buyer/borrower, but, as we all know, this may not amount to very much.

An attempt can also be made with the seller's lender to delete the offensive language from the payoff letter. This may also be met with limited success. These transactions should not be closed unless the title insurer has agreed to the terms of the short sale letter so that they can fully evaluate the risk.

One remedial provision is to insert a restriction in the deed from the seller to the buyer prohibiting any transfers within the period of time for which the seller's lender has a review period. At least this should insure that there are no legitimate lender financed record transfers within the period of time when the lender may look at the title on their own. With the simplicity of online access, the seller's lender certainly may look at title prior to issuing the discharge.

In addition to the frequently encountered "lookback" provision, the conveyancer may also find requirements that the HUD must be pre-approved within a certain period of time and that additional loan documents may need to be executed by the seller for the amount of debt reduced at closing but to be paid later. The instructions of the lender must be followed exactly, as noncompliance with any of the terms will constitute grounds for their refusal to accept a payoff and issue a subsequent discharge.

### Homesteads

In light of the various U.S. Bankruptcy Court and Massachusetts Land Court decisions affecting foreclosures, the issue of unreleased homesteads is becoming paramount.

The situation arises where the mortgagor, subsequent to acquiring title and prior to a refinance, declares a homestead. Frequently, the subsequent mortgage contains the automatic release. Various national lenders often add the marital status to the granting language on the first page. Consequently, there may be a homestead filed by the sole property owner followed by a mortgage which says "a married person". If the conveyancer who closes the refinance does not obtain the signature of the non debtor spouse, this person may have a homestead right in the property.

The issue arises when the mortgage is foreclosed and, of course, there is no release of the homestead. If there were a subsequent or a second or third transfer involved, the issue would not be apparent, as the premises would presumably not be occupied by the original non debtor spouse. However, when title derives from the foreclosing lender, one has no knowledge as to whether the property is occupied or not, as often the bidder at the auction cannot enter. Consequently, the conveyancer should consider obtaining affidavits from the foreclosing attorney to the effect that at the time of the auction, the premises were vacant, in as much as the abandonment of the property would terminate the homestead rights of the non-debtor spouse.

### Natick municipal lien certificates

REBA has been contacted by several conveyancers who expressed concern that they were being charged $365 by the town of Natick for a residential condominium municipal lien certificate. The condominiums in question, Nouvelle at Natick and 79 East Central Street, were created through the combining of several previously separately assessed parcels. The town counsel has referenced G.L.c. 40 §22F, entitled "License Fees, Service Charges; Acceptance of Action" which, in part, reads as follows:

"Any municipal board of officer empowered to issue a license, permit, certificate, or to render a service or perform work for a person or class of persons, may, from time to time, fix reasonable fees for all such licenses, permits, or certificates issued pursuant to statues or regulations wherein the entire proceeds of the fee remain with such issuing city or town, and may fix reasonable charges to be paid for any services rendered or work performed by the city or town or any department thereof, for any person or class of persons; provided, however, that in the case of a board or officer appointed by an elected board, the fixing of such fee shall be subject to the review and approval of such elected board."

The question remains as to whether a charge of $365 for a municipal lien certificate is "reasonable." Certainly, a substantial amount of work is involved to create the first municipal lien certificate for a newly developed condominium, which may be the result of combining several different parcels.

In the case of Nouvelle at Natick, the condominium is a portion of the Natick

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*Joel Stein co-chairs REBA's title insurance and national affairs committee and is a frequent speaker and author on regulatory matters relating to real estate transactions. A former president of the association, he received the association's highest honor, the Richard B. Johnson Award, in 2007. Stein, who practices in Norwell, can be reached at joel@steintitle. com.*

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Mall. However, there are 215 units in the residential condominium. A charge of $365 for the first municipal lien certificate to issue for each unit would result in a total charge of $78,475.

Conveyancers should also make their lenders aware of this situation. A $365 charge for a municipal lien certificate that is not disclosed on the GFE will almost certainly result in a problem at the closing table.

## RESPA

There exists a great deal of concern in the conveyancing community regarding cost reflected in Line 1101 of the new HUD-1. As I am writing this in December, there is some uncertainty as to how loan originators will treat the bundled fee amount that must be provided to them by attorneys.

Some conveyancers have expressed concern that a typical charge for obtaining a mortgage discharge (in the case of a refinance) that is not included in the set bank fee will fall by the wayside. The fee that the attorney provides to the loan originator must include an estimate of typical fees the attorney incurs when doing a refinance or a sale.

The plot plan is also a charge that will also be included in Line 1101 costs. Most lenders and title insurers no longer require plot plans. You will need to talk to the title insurance company to see what it requires in the case of issuing an enhanced owner's policy.

Concerning recording fees, a registered/recorded transaction will probably result in a violation in the tolerance, while recording a deed and two mortgages on both the recorded and registered side will result in $475 in additional fees. Although tax stamps are typically not an issue, as they are seller paid, an interfamily transaction as part of a refinance might cause a problem if consideration is to be shown on the deed, or even if a recording fee for a new deed is incurred.

A new GFE can be issued if there has been a change of circumstance, although I am not certain if that phrase has been truly defined. Also be aware that the new Truth-In-Lending Rules exist alongside the new RESPA Rules. Therefore, if there is a one-eighth-point change in the APR, a new Truth-In-Lending Statement will be required. This is a totally different issue from whether a new GFE is required.

Finally, if there is a violation of the tolerance provisions, the lender has 30 days to make payment to the borrower. At that point, a new HUD-1 needs to be prepared and a credit to the borrower needs to be shown on the HUD-1. It is uncertain now as to whether a separate closing will need to take place, or whether the lender will simply have a new HUD-1 mailed to the borrower.

There is much that could be said about the new RESPA Rules; however, at this point it is best to see how everything plays out in the next few months. Look for REBA to have a seminar on the new rules at our main meeting.

# Tank Talk: underground storage tanks in real estate transactions

Continued from page 8

• implement the program.

Prior to the DEP inheriting the UST Program, the DFS had implemented a 3rd-party UST Inspection Program with the goal of inspecting every UST in the commonwealth by Aug. 7, 2010, and every three years thereafter.

The DFS modified the Fire Prevention Regulations to require that 3rd-party inspectors be registered professional engineers, licensed site professionals or others independently approved by the Fire Marshal. These measures were enacted to meet the requirements of the Underground Storage Tank Compliance Act that was part of the 2005 Federal Energy Policy Act.

The EPA estimates that there are over 10,700 active USTs in the commonwealth. The vast majority of these USTs are used to store gasoline and diesel fuel at commercial gas stations. However, many of the USTs store fuel oil for facility heating, fleet fueling and standby generator usage. There are 142 approved 3rd-party UST inspectors. On average, each inspector will need to inspect over 75 USTs in order to meet the August 2010 deadline.

## Knowledge is power

The DEP maintains an online database that lists USTs that have been registered with the local fire departments and Fire Marshal's Office. The database is available at http://db.state.ma.us/dep/ust/ustQueryPage.asp.

Inspection results for over 65 tanks inspected in 2009 indicate that the information included in the database is rarely accurate. Query results often include USTs that have been previously removed or closed. In some instances, active USTs with current local permits or registrations do not appear in the database.

## A picture 'would be' worth a thousand words

Third-party UST inspectors are not able to observe USTs as part of their inspections (the tanks are buried underground). Therefore, inspectors are tasked with piecing together operating information about the USTs from various sources. These sources include:

• design drawings or as-built drawings, available occasionally for installations at municipal and institutional facilities;

• UST monitoring systems — fuel management and leak detection systems are typical appurtenances for USTs;

• installation pictures, which are rarely available;

• UST inventory records, which are required but often not present;

• release reporting and investigation documentation, which are relevant only if a spill has been identified and properly addressed;

• observation of spill buckets, which are often neglected and filled with water, oil or debris; and

• observation of overfill prevention devices, which are often missing or inappropriately installed or designed.

## Considerations

The 3rd-Party Inspection Program does not apply to those USTs that are considered "consumptive use." Consumptive-use tanks store fuel oil used exclusively for heating and hot water on the premises. Therefore, inspection results may not be available for all USTs. USTs at residential sites will surely not have an inspection history.

The mere presence of USTs represents a depreciating influence on real estate values due to the perceived source of potential contamination. However, alternatives often represent significant challenges. Conversion to natural gas-fired heating systems may not be an option due to the lack of a suitable gas supply. Conversion to an aboveground storage system may not be practical due to aesthetic issues, space constraints or local regulations/bylaws.

# From the President's desk

Continued from page 1

dures it should be this: No single development has the force to dislodge this organization from its foundation or to cause its retreat from the field.

Longevity is not, however, an end in itself. Our collective goals must drive our efforts and guide our hands. REBA provides its members with an unmatched opportunity for legal education and professional development. Our bi-annual meetings, special events and weekly e-news updates keep members abreast of developments in the industry and in the profession. REBA's many committees, chaired by some of the most well-known and well-respected practitioners in their fields give our members opportunities to exchange ideas with like-minded professionals who share a desire to reach their highest potential.

The REBA Handbook of Standards and Forms ensures that our members possess the practical direction and guidance they need to address real world issues in the practice of real estate law.

*Tom Moriarty is a partner and chair of the litigation department at Marcus, Errico, Emmer & Brooks in Braintree. He focuses his practice on real property with an emphasis on community associations. Tom is co-chair of the REBA Litigation Committee and REBA's designee to the Joint Bar Committee on Judicial Nominations. He can be reached at (617) 843-5000, ext. 137, or by e-mail at tmoriarty@meeb.com.*

In addition, our voice is one of the most respected on Beacon Hill. REBA Legislative Counsel Ed Smith, who has served REBA for more than 20 years, is a fixture at the State House. Our members are heard not only through the legislation that REBA introduces, but also through our vigilance in tracking and digesting thousands of bills filed in every legislative session. Furthermore, the development of vibrant regional affiliates affords REBA an opportunity for outreach and strong grassroots support for our legislative initiatives.

It goes without saying that REBA has been and will continue to be a champion in the fight against the unauthorized practice of law in Massachusetts. Today our litigation against NREIS is pending in the 1st U.S. Circuit Court of Appeals. REBA is committed to protecting consumers by preserving the critical role of the attorney in the conveyancing process.

The Massachusetts Bar Association and the Boston Bar Association have both joined that commitment, lending their weight and support to our effort by agreeing to file amicus briefs in the NREIS case. REBA's effort in this regard continues beyond the lawsuit by educating our members and all real estate practitioners of the risks associated with witness-only closings.

Ultimately the fight against the unauthorized practice of law will not be won or lost in a single case. Protecting the consumer by preserving the role of the lawyer in the closing process requires constant vigilance, and REBA remains committed to that endeavor.

At REBA, we rely on our loyal members to provide the intellectual and financial ability to meet our charge. If you are an active, dues-paying member I thank you for your support and encourage your continued participation. Member attendance at the bi-annual meetings, committee meetings and special events gives REBA its vitality.

Of course, the financial support of our members is critical to our mission. Without your financial support, REBA could not deliver member services, maintain its presence on Beacon Hill or fight the unauthorized practice of law. Support REBA's efforts by renewing your membership in 2010 and by encouraging your colleagues to do likewise. If you know a real estate practitioner who is not a member of REBA, ask him or her to join.

In addition, by supporting REBA's affinity partners, you increase the value of their relationship with REBA and help secure their continuing support for the organization and its mission. REBA's affinity relationship with First Indemnity Insurance Group affords you the opportunity to obtain a professional liability policy uniquely tailored to the needs of the real estate and transactional bar at very competitive rates.

In 2009, REBA affinity partner Massachusetts Attorneys Title Group donated $40,000 to support our fight against the unauthorized practice of law. When you join MassATG and support REBA's other affinity partners, you support REBA.

At no time in REBA's history have we been better positioned to shape the future of the practice of real estate law in a real and lasting way. As with most great undertakings, we have assumed certain risks and incurred substantial costs. I believe these risks and costs were inevitable, as the alternative — inaction — can never be accepted.

As a real estate practitioner in Massachusetts you are part of a culture of excellence. You practice in a jurisdiction with the highest professional and ethical standards, a jurisdiction that has consistently placed the interests of the public above the interests of competing commercial enterprises that would compromise those protections for perceived efficiencies and dubious economies of scale.

REBA welcomes the responsibility and burden of developing and preserving the highest standards of professionalism in the practice of law. We have met that goal in good times and in bad by remaining true to our mission, educating and serving our members and, most recently, recognizing and confronting head-on those aligned forces that threaten these standards.

We have been doing that job for over 150 years. With your continuing support and the support of our many dedicated members, there is no reason 2010 should be any different.

# Superior Court judge limits liability under G.L.c. 93, §70

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*v. Frazier*, 388 Mass. 55, 62 (1983).

In *Mercuri*, the closing attorneys relied upon this basic rule and argued that they had no duty to the buyer, as there was no attorney-client relationship. In support of their position, they noted that the buyer had signed the G.L.c. 184, §17B form acknowledging that the closing attorney represented only the lender.

Although the buyer did not dispute that the attorneys were the lender's attorneys, she argued that they acted as her attorney, too. She presented evidence that she hired the attorneys to represent her during the negotiation of the purchase and sale agreement and that at various times leading up to the closing, the attorneys had assured her that she owned the land at issue.

She also presented evidence suggesting that even after moving into the house, she had ongoing communications with one or both of the closing attorneys about the abutting private way. On this record, Inge determined that there was an issue of fact regarding the existence of an implied attorney-client relationship, which precluded summary judgment from entering for either party.

## Conclusion

Although Judge Inge's decision provides a clear (and narrow) interpretation of G.L.c. 93, §70's requirements, it also serves as a cautionary tale about giving casual advice or making representations to a non-client in connection with a real estate transaction. This is particularly true when the advice is beyond the scope of what would normally occur during the closing, i.e., negotiating terms of the sale or making representations about the property. Such advice can result in an unintended attorney-client relationship with unintended consequences.

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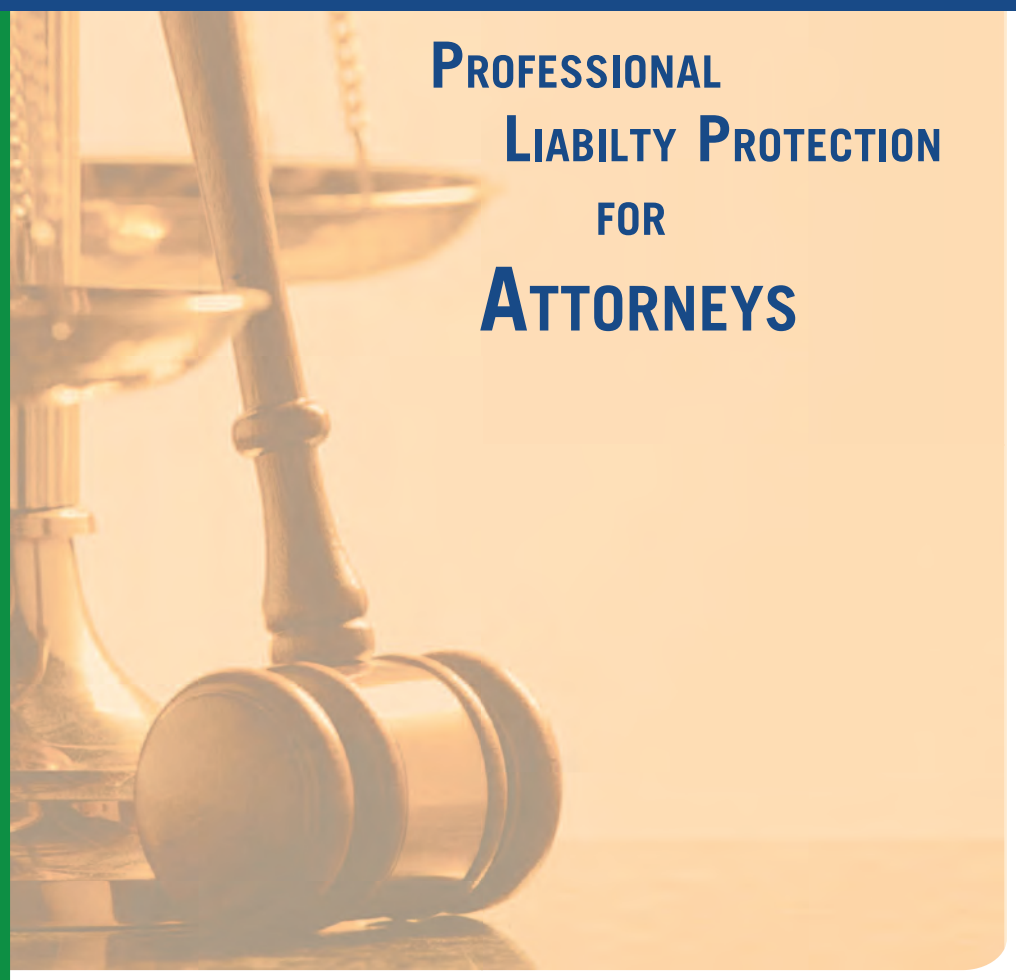

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