2011 SPRING CONFERENCE

Turn inside for views from this year's conference

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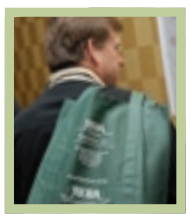

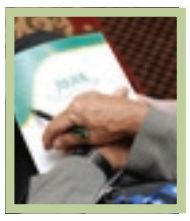

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REBA news

THE NEWSPAPER OF THE REAL ESTATE BAR ASSOCIATION

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PRESIDENT'S MESSAGE

REBA's huge win with SJC

BY EDWARD M. BLOOM

On my initial reading of the Supreme Judicial Court's April 25 decision in *The Real Estate Bar Association of Massachusetts, Inc. v. National Real Estate Information Services*, I was disappointed with the fact that, based on the paucity of the records in the case, the SJC could not specifically pinpoint various discreet activities of NREIS as constituting the unauthorized practice of law. However, on a more careful second reading of this very complex, layered and detailed opinion of the SJC, I concluded that REBA had won a major victory for the homeowners of Massachusetts and the real estate bar.

Ed Bloom

> The court refused to follow the lead of some states that do not require any attorney to conduct real estate closing, insisting that an attorney must be substantively involved in the closing or settlement of real estate transactions.

To begin with, the SJC emphatically determined that Massachusetts is an "attorney" state in connection with all real estate closings. It completely rejected the notion of "witness or notary closings," where NREIS hires an attorney to be present at a real estate closing, who knows nothing about the transaction and is acting simply as a glorified notary public. In fact, the court stated that any attorney who would act in such a limited role would be violating his or her professional and ethical responsibilities.

See SJC, page 7

The John Adams Courthouse in Boston, home of the state Supreme Judicial Court.

PHOTO: CHRISTINA P. O'NEILL

INSIDE

REBA v. NREIS has had a long journey through the courts since REBA first filed suit. Inside, get a quick glance at where the case has gone and where it might be headed next. **PAGE 7**

COMMENTARY

Ruminations on becoming a dirt lawyer

BY PAUL F. ALPHEN

I recently had the opportunity to address a group of law students who were contemplating a career in real estate law. I did not tell them to become dentists, as a friend of mine had suggested. I told them some of the same things that I have told my son Chris, who will be entering law school in the fall (except, to be truthful, until recently I had not encouraged either of my sons to pursue law as a career).

I told Chris not to base his decision not to become a real estate attorney upon that one day that he spent in my office when he was in second grade. I am aware that he has repeatedly referred to that experience as the most boring day of his life. It's really not that bad.

Paul Alphen

It is hard to provide career advice when we have no idea how the economy is going to look three days from now, never mind 30 years from now. Three decades ago, it did not appear that a career in government could result in being in the top 10 percent of wage earners, plus the ability to retire early with great pension and health care benefits. I especially enjoyed some of my old law enforcement buddies going out of their way to bring this to my attention recently, on the occasion of the retirement of a 56-year-old police chief.

The private sector certainly has its ups and downs, and the downs can be scary. Not everybody is cut out to own their own business; it's not for the timid. I think that by osmosis my sons have learned from their parents many of the lessons that we learned from our own parents, who also owned small businesses:

- That the following words do not exist in the family lexicon: bonus; overtime pay; expense account; business travel; grievance; pension; Mercedes-Benz.
- That you do not need CNN to measure the state of the economy. Our kids experienced the cycles of the economic world firsthand, and they were reflected in the varied quality of their summer vacations, and in the number of Sox games they attended each year.

See DIRT LAWYER, page 6

CONTRACT LAW

Mechanics' liens now extended to 'design professionals'

BY THOMAS L. GUIDI

Massachusetts law has long provided for a lien on an owner's property in favor of those to whom a debt is due for furnishing labor or materials in connection with the erection, alteration, repair or removal of a building or structure pursuant to an agreement with or consent of the owner of such property.

While the law (commonly known as the Mechanics' Lien law and currently embodied in Massachusetts General Laws Chapter 254) applies to contractors, subcontractors and suppliers, until recently it has been limited to those involved in providing labor or materials employed directly in construction or demolition activities.

Tom Guidi

In January, Gov. Deval Patrick signed legislation (Chapter 424 of the 2010 Massachusetts Acts and Resolves) championed by the Massachusetts chapter of the American Institute of Architects and the Boston Society of Architects, amending Chapter 254 to extend to "design professionals" the benefits of the Mechanics' Lien law.

Unlike the existing law, which provides a lien for claims arising under both written and oral contracts, the lien in favor of design professionals is available only in cases where the design professional has a written contract either with the owner of the property or with another person acting for, on behalf of, or with the consent of the owner. The written contract must be for professional services relating to the proposed or actual erection, alteration, repair or removal of a building, structure or other improvement to real property.

Unlike the existing law, which provides a lien for claims arising under both written and oral contracts, the lien in favor of design professionals is available only in cases where the design professional has a written contract either with the owner of the property or with another person acting for, on behalf of, or with the consent of the owner.

The term "design professional" is defined in the legislation as a person licensed or registered in Massachusetts as an architect, landscape architect, professional engineer, licensed site professional or surveyor, and any entity that is authorized under the laws of the commonwealth to practice any of the foregoing professions.

"Professional services" are defined as services customarily and legally performed by or under the supervision or control of design professionals in the course of their professional practice and include programming, planning, surveying, site investigation, analysis, assessment, design, preparation of drawings and specifications, construction administration and related services.

Consistent with existing law, a new Section 2C provides that in order to acquire such a lien, a design professional must record a notice of contract at the registry of deeds where the records pertaining to the land involved are recorded. The notice can be recorded any time after the contract is executed whether or not the erection, alteration, repair or removal of the building, structure or other improvement to which such professional services relate has been or is ever commenced or completed.

However, to be effective, a notice of contract must be recorded no later than the earlier to occur of (a) 60 days after the recording of a notice of substantial completion and (b) 90 days after such design professional or any person working by, through or under him last performed professional services on the project.

A new Section 2D also makes a similar lien available to a person providing professional services under a written subcontract with a design professional who is entitled to enforce a lien under the new law. To acquire such a lien, a qualifying subcontractor must also file a notice of contract within the time parameters set forth above.

Also consistent with existing law, the lien in favor of a design professional is dissolved unless, within 30 days after the last day that a notice of contract could be recorded with respect to the design services in question, the design professional records a statement of account, setting forth the amount then due or to become due. The new legislation retains the existing rule that the proceeds of any property sold to satisfy mechanics' liens are to be distributed among the lien holders in proportion to the amounts due to each, regardless of the date that each lien holder filed a notice of contract.

However, the new legislation amends Section 21 to provide that if property subject to multiple mechanics' liens is not of sufficient value to satisfy all such liens, then the claims of design professionals shall be satisfied only after the claims of parties holding traditional mechanics' liens are satisfied.

The new law goes into effect on July 1, 2011. It will certainly help architects and other design professionals get paid for their services. It may even reduce the amount of litigation brought by design professionals since they will be able to establish a lien on the owner's property without filing a lawsuit. On the other hand, the expanded lien will be another potential title issue for residential and commercial owners, lenders and purchasers.

Thomas Guidi is a partner at Hemenway & Barnes LLP in Boston where he chairs the Real Estate Practice Group. His practice includes all aspects of commercial real estate and financing. He is a member of the MBA Property Law Section Council. Guidi can be reached at tguidi@hembar.com.

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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.

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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 inquires relative to the Association's Title Standards, Practice Standards, Ethical Standards and Forms with the understanding that advice to Associations members is not, of course, a legal option.

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COMMERCIAL REAL ESTATE

Bishop v. TES Realty Trust

Yes, you have to repair it, no matter what the lease says

BY JOHN T. RONAYNE

In *Bishop v. TES Realty Trust* (2011), which was decided by the Supreme Judicial Court in March, the court found that G.L. c.186 §19 applies to commercial landlords and overrides any contrary terms of a lease. This decision could have a substantial and potentially disruptive impact on the allocation of maintenance responsibilities and exposure to tort liability between landlord and tenant under existing and future commercial leases.

Under common law, and under Massachusetts statutes as applied prior to *Bishop*, commercial landlords had very limited responsibility for maintenance and repairs within a leased premises unless the lease specifically provided to the contrary. The tenant took the leased premises as they were, except for latent defects of which the landlord was aware. The landlord was required to maintain common areas, but only to the extent necessary to keep them in the same condition as they were when the tenant leased its premises.

John Ronayne

Tort liability to third parties, absent specific repair provisions in the lease, was based on who had control of a particular area, basically, tenant within the leased premises and landlord in the common areas. Even if the landlord was required by the lease to maintain the leased premises, in order for the tenant or a third party to recover tort damages within the leased premises, it was not enough to show that the landlord had failed to make necessary repairs, it was necessary to show that the landlord had actually made repairs, but made them negligently (and if the landlord wasn't required to make the repairs, but did so gratuitously, the standard was gross negligence).

In the common areas, the landlord did have to meet a "reasonably foreseeable" standard as to third parties, but was liable to tenants only if injury resulted from some new defect which had arisen since the tenant leased its premises. (The tort standard for tenants in the common areas was strengthened in 1972 by G.L. c.186 §15C, which precluded the landlord from using the "same as it was when leased" defense if the defect from which an injury arose was a building code violation.)

These common law rules originally applied to all tenancies, both residential and commercial, but starting in the late 1960s, both the courts and the Legislature moved to provide greater protections to residential tenants. In the courts, this process culminated with *Boston Housing Authority v. Hemmingway* (1973) – implied "warranty of habitability" as to residential premises – and with *Young v. Garwacki* (1980) – residential landlords liable for reasonably foreseeable injuries within the leased premises, whether or not the landlord had any obligation under the lease to maintain the leased premises.

However, throughout the period in which these enhanced common law protections for residential tenants were being developed, and most recently in *Humphrey* v. *Byron* (2006), the SJC explicitly recognized the substantial differences between residential and commercial tenancies and the impracticality of trying to extend residential rules to commercial situations. The common law rules for commercial tenancies remained much the same as they had always been.

During the same period, predominantly in 1972, the Legislature adopted a number of provisions to strengthen the rights of tenants, among which was G.L. c. 186 § 19. By their terms, many of these remedial provisions apply only to residential tenancies, but some are not so limited, and can be read to apply to all tenancies. G.L. c. 186 § 19 falls within this latter category, but prior to *Bishop*, there had been no SJC case that specifically determined that G.L. c. 186 § 19 applies to commercial tenancies (and there was some feeling, unsupported by the wording of the statute, that perhaps it did not). Any uncertainty has now been dispelled.

G.L. c. 186 § 19 provides that a landlord who receives notice by registered or certified mail from a tenant of "an unsafe condition not caused by the tenant" is required to "exercise reasonable care to correct the unsafe condition," provided that no notice is required for any area not under the control of the tenant (e.g., common areas, structural and service portions of a building). The statute goes on to provide that if the tenant or anyone else who is rightfully on the premises is injured "as a result of the failure [of the landlord] to correct said unsafe condition within a reasonable time," the injured party has a right of action in tort against the landlord.

The application of c.186 §19 to commercial tenancies in which the landlord has responsibility under the lease to maintain the leased premises, or even when the maintenance responsibilities are not specified, is not good news for landlords, but it can't really be said to be unfair or contrary to the intention of the statute. The problems arise when an attempt is made to apply this provision to situations where the tenant and not the landlord, is the one responsible for repair and maintenance of the leased premises, which was the case in *Bishop*.

This is often the case with commercial tenancies, and almost always when a tenancy covers an entire building, for good reasons. In situations where the tenant controls the entire building, the tenant is the party who is most familiar with the current state of the building and best situated to maintain it. In such cases, the landlord may have little contact with the building and little capacity to make repairs.

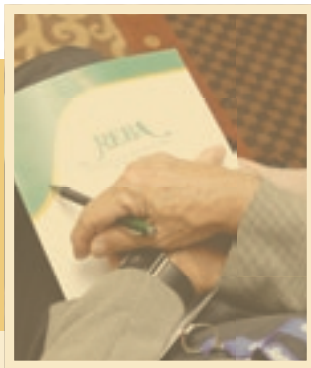
Beyond that, there are certainly situations, such as manufacturing facilities, in which it could be very awkward, and possibly dangerous, for the landlord to attempt repairs without detailed knowledge of the machinery, substances and processes within the facility. In cases such as these, the application of c, 186 §19 yields a result which is contrary to the words of the lease and the intentions and expectations of the parties. It may actually encourage the creation of the unsafe conditions that the statue is intended to prevent by diluting the exposure of tenants to the potential consequences of a failure to meet their repair responsibilities. At a minimum, it substantially muddies many situations where the rules governing the responsibilities and potential liabilities of the parties had long been thought to be settled.

From a financial point of view, a whole sector of the commercial real estate industry is based on triple net leases under which the landlord is, in essence, an investor, whose willingness to participate (and the economics of the lease transaction) are based on the premise that landlord will have no responsibility for the management of the property and no real exposure to tort liability. *Bishop* may impair this source of funding for the real estate industry or increase its costs. Many other questions come to mind. What will this do to the costs of insurance? Will it require landlords to maintain a greater involvement when it would be more efficient to rely upon the tenant, and thereby increase both landlord's and tenant's costs? What impact will the application of c.186, §19 have on indemnity obligations? At a minimum, landlords will certainly want to make sure that their leases provide broad self help rights, specific mechanisms for recovering costs quickly, with interest, and perhaps substantial service charges for doing the tenant's work.

Was this necessary? Not really. In *Bishop*, the court brushed aside, with scant consideration, an interpretation that would have allowed the application of c.186 §19 to commercial tenancies where it could serve a constructive purpose but avoided many of these problems. By its own terms, §19 does not apply to unsafe conditions "caused by the tenant."

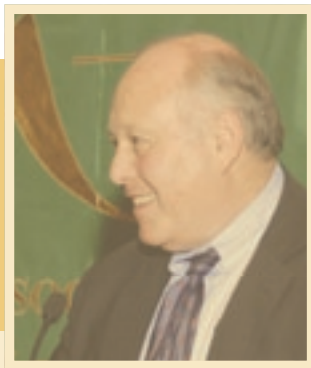
When a lease specifically provides that the tenant and not the landlord has the obligation to maintain the leased premises, and an unsafe condition arises because the tenant has allowed the premises to deteriorate, it is perfectly reasonable to say that the condition was caused by the tenant. The court's principal reasons for rejecting this reading were that it would be contrary to the words and the spirit of the statute, that it would create a waiver of c.186 §19, which would be void under the statute, and that in any case, the application of c. 186 §19 to situations in which the tenant is responsible under its lease for the maintenance of the leased premises wouldn't become a problem because the tenant would never dare to send the required notice. In fact, the words of the statute do lend themselves to a contrary reading, and it is difficult to understand how the application of an exception specifically provided by the statute could constitute a waiver. Moreover, maintenance responsibilities are typically standard for various categories of leases (entire buildings,

See *BISHOP* page 11



THE REAL ESATE BAR ASSOCIATION'S

2011 SPRING CONFERENCE



Scenes from the conference

PHOTOS BY PAUL CHINAPPI

Over 500 members, exhibitors and guests attended REBA's all-day Spring Conference under sunny skies in early May. Following seven hour-long morning break-out sessions, the conference luncheon honored Marilyn Dupuis, who has examined real estate titles at the Plymouth County Registry of Deeds for nearly 60 years. REBA also recognized retiring Land Court Associate Justice Charles W. Trombly Jr. Trombly, appointed to the bench in 2002, has worked in various capacities at the Land Court for 58 years.

ABOVE: Land Use and Zoning Committee Co-Chair Charles Le Ray spoke at a session on transfers and preservation of complex project entitlements.

ABOVE: Massachusetts Attorneys Title Group head Tom Bussone was recognized for the group's contribution to REBA's efforts to combat the practice of law by non-lawyers.

ABOVE: Land Court Chief Justice Karyn Scheier congratulates conference honoree Marilyn Dupuis.

LEFT: Conference honoree Marilyn Dupuis displays a certificate from the Massachusetts Senate recognizing her nearly 60 years as a title examiner in Plymouth. Dupuis is pictured with REBA President Ed Bloom (left) and Plymouth County Register of Deeds John Buckley (right).

ABOVE: Head table guests, from left to right: REBA board member Mary K. Ryan; Mike MacClary, treasurer; Michelle Simons, clerk; Tom Moriarty, immediate past president; and Ed Bloom, president.

ABOVE: Phil Lapatin, now in his 33rd year at REBA's twice-yearly conferences, discusses recent developments in Massachusetts' decisional law.

LEFT: Following the SJC decision in *REBA vs. NREIS*, the association's benchmark ruling on the unauthorized practice of law, the program included an hour-long discussion of the case with president Ed Bloom, counsel Doug Salvesen and past president Tom Moriarty.

LEFT: Julie Moran ponders an inquiry from a member at the break-out session "Post-Foreclosure Titles in the Post-*Ibanez* Age."

ABOVE: Former Land Court Clerk Kendra Berardi shares a laugh with the court's Chief Title Examiner, Ed Williams, and retiring Associate Justice Charles W. Trombly Jr. Trombly, retiring from the Land Court bench, was honored at the association's spring conference.

BELOW LEFT: Former REBA president Steve Edwards congratulates Jon Davis on success in *REBA vs. NREIS*, the association's landmark SJC case on the practice of law by non-lawyers. Davis, recipient of the association's highest honor for lifetime achievement, the Richard B. Johnson Award, in 2002, has co-chaired the REBA practice of law by non-lawyers committee for over 20 years.

ABOVE: Land Court Associate Justice Charles W. Trombly Jr. with REBA President Ed Bloom.

ABOVE: Michelle Simons, co-chair of the association's residential conveyancing committee, thanks CATIC and Massachusetts Attorneys Title Group for their support.

LEFT: Andrew Kaeyer, Bruce Bagdasarian and Beth Mitchell hosted the program on understanding commercial real estate finance in today's market.

LEFT: John Buckley, Plymouth County register of deeds, was an honorary guest at the conference.

RIGHT: Andover conveyancer Greg Eaton shares a lighter moment with CATIC's Trish McGrath.

DIRT LAWYER

CONTINUED FROM PAGE 1

- That the work day ends only after the Planning Board adjourns, or after the pile of title reports have been read and cleared off the kitchen table.
- And, that some residents can get pretty upset when a new daycare facility is proposed in their neighborhood, even to the degree of hanging the project attorney in effigy.

On the other hand, being a small-town attorney means that your friends are your clients, and your clients become your friends. It means that you have the chance to personally welcome a lot of new residents to town as they purchase their dream homes. You have the opportunity to help them through the twists and turns of the purchase and closing process, and you sometimes perform minor miracles. It means that other small businesspeople will reach out to you for your counsel, and you will have the opportunity to guide them in good times and in bad. There is something very rewarding about earning the trust of others and helping them with difficult business decisions that have serious financial implications.

Being a small town practitioner means that you don't have to ask permission to leave work early to attend your kids' basketball and football games. It also means that you can occasionally take a mid-week ski day or fishing trip, and you can be home for dinner most evenings (even if you have to run back out again to a board meeting). You probably will not become financially wealthy as a small town lawyer. But if you define "wealth" by the quality and quantity of your friends, the opportunity to make a difference in the lives of others and by your relationship with your family, then it's not a bad deal.

So, add becoming a real estate lawyer to your potential career goals. Like many areas of practice, your days often include hearing stories of deals gone terribly wrong; and the stories are better than most of the fodder found on TV. Then, without a script, producers, directors or a budget, you are expected to craft a happy ending. It's not as easy as it looks, and it's not as boring as Chris believes.

REBA's president in 2008, Paul Alphen currently chairs the association's Long-Term Planning Committee. A frequent and welcome commentator in these pages, he is a partner in Balas, Alphen and Santos, P.C., where he concentrates in commercial and residential real estate development and land use regulation. Alphen can be reached at paul@lawbas.com.

SJC: Commonwealth's highest court sides with REBA

CONTINUED FROM PAGE 1

The court refused to follow the lead of some states that do not require any attorney to conduct real estate closing, insisting that an attorney must be substantively involved in the closing or settlement of real estate transactions.

"The closing is where all parties in a real property conveyancing transaction come together to transfer their interests, and where the legal documents prepared for the conveyance are executed. … The closing is thus a critical step in the transfer of title and the creation of significant legal and real property rights. Because this is so, we believe that a lawyer is a necessary participant at the closing to direct the proper transfer of title and consideration and to document the transaction, thereby protecting the private legal interests at stake as well as the public interest in the continued integrity and reliability of the real property recording and registration systems. … In other words, many of the activities that necessarily are included in conducting a closing constitute the practice of law and the person performing them must be an attorney. … [W]e consider a closing attorney's professional and ethical responsibilities to require actions not only at the closing but before and after it as well."

While finding that many of NREIS's specific activities may not constitute the practice of law, such as ordering a title examination or disbursing mortgage funds, the court warned that in the first instance, delivering title services may constitute the practice of law when provided in conjunction with giving legal advice or providing legal opinions about the quality of title, and in the second instance, the court raised the specter that NREIS's activities in disbursing mortgage funds may not comply with the Good Funds Statute (G.L. c. 183, §63B). In addition, while the court found that NREIS's recording of the relevant documents at the appropriate registry of deeds does not constitute the practice of law, it again warned that a post closing "rundown" of title to ensure that no encumbrances have been placed on the property prior to recording may constitute the practice of law as part of an overall determination of marketability of title.

One can only come away from a reading of the SJC's opinion with the strong belief that the business model of NREIS and other settlement service companies of its ilk operating in Massachusetts cannot avoid running afoul of the unauthorized practice of law statutes, about which the SJC emphatically said: "[L]imiting the practice of law to authorized members of the bar is not to protect attorneys from competition but rather to protect the public welfare."

PHOTO: COURTESY MASSACHUSETTS SUPREME JUDICIAL COURT

Supreme Court Justice Margot Botsford authored the 34-page SJC opinion delineating the role that a Massachusetts closing attorney must play in a real estate conveyance.

PHOTO: CHRISTINA P. O'NEILL

Attorney Doug Salvesen of Yurko, Salvesen & Remz, P.C. successfully argued the case before the SJC.

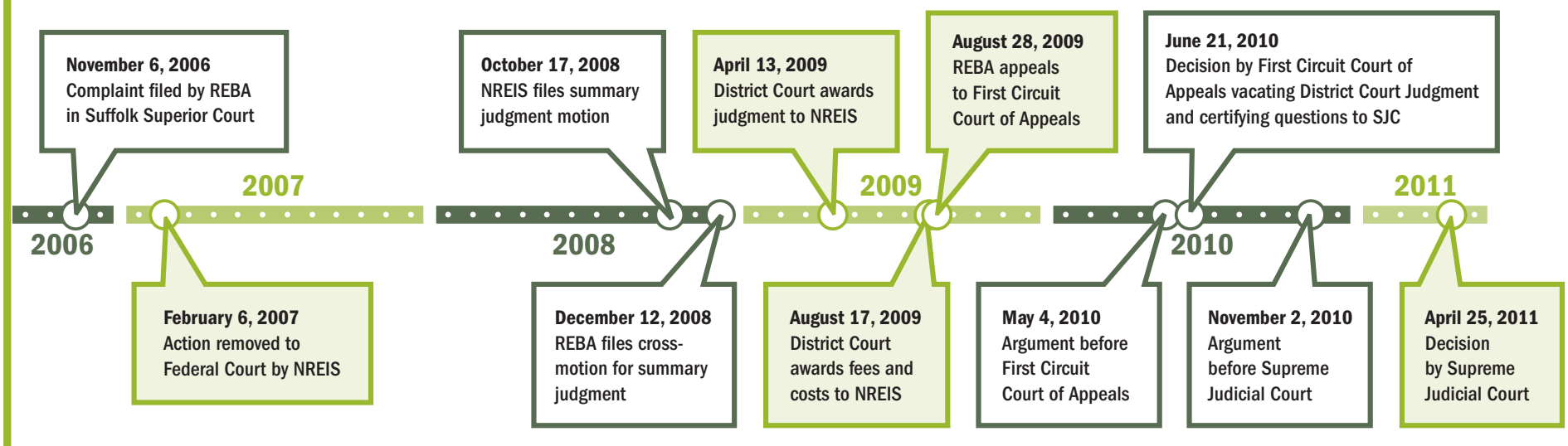
For this victory, REBA members owe a huge debt of gratitude to REBA's legal counsel and the prime architect of our triumph, Doug Salvesen, as well as to his REBA advisors, Bob Moriarty, Sam Baghdady, Steve Edwards, Paul Alphen, Tom Moriarty, Jon Davis and Mary Ryan. We are also grateful to the many bar associations, the Attorney General's Office, the registries of deeds and many others who filed *amicus* briefs with the SJC supporting REBA's position. Unlike the nightmare scenario in the movie "It's a Wonderful Life," this decision ensures that the Bedford Falls in which Massachusetts lawyers now live will not turn into Pottersville.

A partner at Sherin and Lodgen LLP, Ed Bloom has chaired the REBA leasing and amicus committees, and is currently president of REBA. He was recently named as a member of the American College of Real Estate Lawyers. He can be reached at embloom@sherin.com.

REBA v. NREIS: Where it's been, where it's going

In the case of *The Real Estate Bar Association of Massachusetts, Inc. v. National Real Estate Information Services,* the state Supreme Judicial Court has ruled that a closing attorney must be present at each real estate transaction in Massachusetts, in order to direct the proper transfer of title and consideration and to document the transaction.

The case now moves back to the First Circuit Court of Appeals. If the parties do not resolve it voluntarily, the First Circuit will consider the effect of the SJC decision, including the question of whether federal jurisdiction remains over any part of the case.



GRAPHIC: NATE SILVA | SOURCE: DOUG SALVESEN

TECHNOLOGY

Technology of the future is already at the Registry of Deeds

BY RICHARD P. HOWE, JR.

One of my most important responsibilities as register of deeds is to keep current on the latest technology and to try to discern how that technology might be best employed at the registry. This is a real challenge, because the pace of technological change during the past two decades has been staggering. Still, technological change tends to be evolutionary, so the early variants of much of tomorrow's technology are already with us today.

ELECTRONIC RECORDING

At Middlesex North, the first electronic recording occurred back in 2005. Today, this method accounts for 20 percent of all recordings, with submitters evenly divided between large institutions filing batches of discharges and early adopters in the local bar who do full closings electronically. Once all registries implement this technology, the volume of usage will only go up.

Dick Howe

The submitter group with the largest e-recording growth potential is governmental entities. The real savings here will come from what used to be called Level III electronic recording. By that method, no paper document is created prior to recording. Instead, properly formatted data from the submitter's computer, secure and authenticated, flows to the registry computer where it first appears as a document image at the point of recording.

MASS.GOV

The capabilities of MassGIS are underutilized by the state's registries of deeds. With overhead imagery of the entire Commonwealth and shape files for nearly all of its parcels, MassGIS could be an invaluable asset to every real estate researcher in Massachusetts.

Whether it's IRS liens or municipal tax takings, the current practice of the submitters taking data that already exists on computers, then printing it on paper, then physically transporting that paper to the registry where the data is rekeyed into the registry's database, makes little sense from an efficiency standpoint. With only a handful of software providers for municipalities and registries, synchronizing the computer systems should be a relatively easy and affordable undertaking.

GIS INTEGRATION

MassGIS is an amazing agency, the capabilities of which are underutilized by the state's registries of deeds. With overhead imagery of the entire Commonwealth and shape files for nearly all of its parcels, MassGIS could be an invaluable asset to every real estate researcher in Massachusetts. Because MassGIS receives regular updates from every local assessor, its database already contains the street address, as well as the deed book and page, of nearly every parcel. Since these two fields already exist in the registry's own database, linking the two together should be a relatively easy task. With that, anyone viewing a deed on the registry website could simply click a "view parcel" button to display the corresponding parcel map/overhead photograph from MassGIS, while a visitor to the GIS site could reach the deed and related registry documents by reversing the process.

GIS-BASED PLAN INDEX

I have always been dissatisfied with the utility of our plan index. With the name of the owner who commissioned the plan, the surveyor's name, and the names of all streets depicted, the plan index defies precise searching. Most times, finding a relevant plan requires finding its plan book/plan number somewhere in the property description section of the deed. A plan index that was map-based, rather than data-based, would be more helpful.

Last year Middlesex North retained Boston-based Applied Geographics Inc. to create a tool that allows us to depict each recorded subdivision plan as a transparent rectangle overlaid on a Google-type map that resides at MassGIS.

See REGISTRY OF DEEDS, page 11

CONSTRUCTION LAW

Sewer improvements pose taxing problem for developers

BY CHARLES N. LE RAY

To obtain project approval, the developer of a subdivision, office park, or large commercial building may be required to extend or improve the municipal sewer system.

This may mean constructing an on-site sewer collection system or sewer extension to connect to the municipal system. Or it may involve helping to eliminate existing inflows of storm water or infiltration of groundwater which reduce the municipal system's capacity to receive sewage or contribute to sewer overflows during storms. Negotiations between developers and permitting authorities over the nature and extent of the construction or contribution can be prolonged and contentious.

Charles Le Ray

Two recent Appeals Court decisions establish some parameters for this dialogue.

NORTH ADAMS DECISION

In a January 2011 decision, *North Adams Apartments Limited Partnership v. North Adams*, the Appeals Court addressed what compensation is due when a private sewer system is taken for public use. In 1992, the developer and owner of an apartment complex and residential subdivision spent $136,540 to construct a sewer extension and pump station to connect to the city's sewer system.

In 2005, the North Adams city council took the sewer system by eminent domain, for $10,000. The owner claimed valuation should have been based on a depreciated replacement cost of $271,370 or, using income capitalization, based on $235,000 in estimated sewer tie-in fees from neighboring properties over the next five years.

The Appeals Court held that a private sewer system is no different from any other private property, and cannot be taken without just compensation. However, the court found that this owner had suffered no measurable loss. After the taking, the owner's properties continued to be served by the system, but the owner was relieved of maintenance and repair obligations; future earnings from tie-in fees were speculative.

The court also found that the owner built the system as part of its housing investment, with the costs recouped through apartment rents and the increased value of subdivision homes connected to municipal sewer, rather than to individual Title 5 systems.

> The likely lack of a significant damages award if the municipality later takes a private sewer system leaves developers with little reason not to transfer ownership from the start.

Absent particular reasons to retain ownership, such as the need to preserve flexibility for future phases, the likely lack of a significant damages award if the municipality later takes a private sewer system leaves developers with little reason not to seek to transfer ownership – and maintenance obligations – from the start.

SAUGUS DECISION

In another January 2011 Appeals Court decision, *Denver Street LLC v. Saugus*, four developers of multifamily residential projects in Saugus had challenged the town's infiltration and inflow (I/I) reduction contribution charges.

The town's I/I problems had resulted in sewer overflows during storm events since 1986. Saugus entered an administrative consent order with the Department of Environmental Protection in 2005, requiring the town to identify and eliminate I/I sources as a condition of allowing new connections to its sanitary sewer system. In response, Saugus adopted a program under which the town allowed an applicant to purchase the right to connect to the town's sewer system by making an I/I "reduction contribution" based on the project's projected sewer flows.

To determine whether the charge was a permissible fee or an impermissible tax, the Appeals Court applied a three-factor test. A fee must be:

- In exchange for a particular governmental service which benefits the party in a manner not shared by other members of society;
- Paid by choice, meaning that the fee could be avoided by not utilizing the service; and
- Collected to compensate the government entity providing the services, not to raise revenues.

The Appeals Court found that the developers could avoid the charge by abandoning their plans. The court also

See SEWER IMPROVEMENTS, page 11

ENERGY POLICY

State's energy policies may increase upfront development costs

BY STEPHANIE A. KIEFER

In the final days of 2010, the Executive Office of Energy and Environmental Affairs (EEA) released the Massachusetts Clean Energy and Climate Plan for 2020.

This 130-plus page report was issued in accordance with the Global Warming Solutions Act (GWSA) of 2008. The GWSA requires the EEA to reduce 1990 greenhouse gas emission levels statewide between 10 percent and 25 percent by 2020.


Stephanie Kiefer

The EEA opted for the most aggressive target – a 25 percent reduction by 2020.

To accomplish this across-the-board reduction in the upcoming decade, the EEA looked at five different categories for reduction efforts: buildings; electricity supply; transportation; non-energy emissions; and cross-cutting policies. The approach, as announced by former EEA Secretary Ian Bowles is a "portfolio of policies," with multiple policies addressed to each sector.

On a pragmatic level, however, the Commonwealth's announced plan seeks the largest reduction from the building sector. Specifically, the EEA is targeting the building sector to reduce greenhouse gas emissions by a total of 9.8 percent – roughly 40 percent of the overall targeted 25 percent reduction.

To achieve its goal within the next decade, the EEA has proposed a plethora of new and expanded measures to reduce building greenhouse gas emissions.

STRETCH CODE CONTROVERSY

One of the proposals entails expanding the EEA's building energy code policy. Under existing policy, the Commonwealth has already committed to adoption of the 2009 International Energy Conservation Code (IECC). Likewise, the Board of Building Regulations and Standards has approved a local option "stretch" energy code that has been adopted by approximately 60 communities in Massachusetts.

The local-option "stretch code" – unlike traditional building codes that prescribe the installation of specific energy measures – is a performance-based code. It mandates a percentage reduction in total building energy use, allowing developers to make their own design choices on how to achieve that reduction.

The stretch code, as it currently exists, is somewhat controversial. The Homebuilder Association of Massachusetts has objected to the stretch code, which it contends would return the Commonwealth to a fragmented building code process, without uniformity on a statewide basis, increasing costs to homebuilders and homeowners alike.

The proposed expanded policy would transition the existing code entirely to a performance-based code by the end of the decade for all communities, going beyond the current IECC. The EEA acknowledges that upfront design and construction costs are likely to increase under the expanded energy code policy, but contends that the developer can realize a return on the investment, by differentiating the construction as a high-performance building.

But the mortgage market is still tight. And recent housing market reports are not yet showing a rising demand for new construction. Instead, the Federal Reserve's January survey on bank lending practices demonstrated continued tight lending conditions in the fourth quarter of 2010. Also, in December 2010, both multifamily construction spending was down.

The EEA is also looking for "deep" energy efficiency improvements in existing buildings. This involves retrofitting buildings with greater insulation, performance windows and leak prevention. The improvements exceed the standards of existing energy efficiency retrofit programs. The effort is being launched as a pilot project with utility companies, offering rebates to homeowners, as well as training and technical support.

While programs, policies and incentives to increase energy efficiency in existing construction are a necessary element of greenhouse gas emission reduction, many homeowners can't afford the significant upfront costs of a "deep energy" retrofit in this economy.

The focus on deep energy efficiency may miss the mark for a more uniform pathway that promotes a less intense energy efficiency policy, in which a greater number of households may be reached.

The 2020 Clean Energy/Climate Plan is a forward-thinking approach to tackling the mandated reduction in greenhouse gases on many levels. To be effective in our present economy, however, the state has to be mindful of the struggling development community.

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SOLAR ENERGY

Mastering Massachusetts' solar market

BY ANI E. AJEMIAN

Solar projects in Massachusetts are on the rise. Projects are growing in number and sophistication, and state and federal funding for grants, credits and other incentives continue to be replenished. Despite the increase in solar projects, maneuvering the market of renewable energy certificates remains a confusing prospect for many solar proponents. Yet understanding this niche market is key to understanding all components of a solar project, start to finish, financing to completion.


Ani Ajemian

In 2010, the state kicked off its Solar Renewable Energy Certificate Carve-Out Program in an effort to incentivize large-scale solar photovoltaic projects in Massachusetts. Administered by the Massachusetts Department of Energy Resources (DOER), the Carve-Out Program takes a market-based approach in an effort to promote the development of solar photovoltaic projects across the Commonwealth.

In order to offset the environmental impact of electrical generation by conventional means and to create demand for solar projects, the state mandated compliance obligations under the program: all regulated and competitive retail electricity suppliers serving the Massachusetts load (or load-serving entities) need to generate or purchase a percentage of environmental attributes, commonly referred to as SRECs. One SREC is created each time a solar energy system generates one megawatt of power. To put this measure into perspective, one megawatt has been estimated to equal the energy consumed by up to 900 homes in a year (this estimate can vary greatly by state).

Once created, SRECs are deposited into an account managed under the NEPOOL Generation Information System (GIS), based on verified meter readings. SRECs may be purchased by load-serving entities to meet regulatory compliance requirements, purchased by those voluntarily off setting their carbon footprint, or even retired by those most dedicated to supporting renewable energy initiatives.

The Carve-Out Program contains an auction component administered by DOER, with the purpose that all SRECs generated in a given year will be purchased by load-serving entities (or other eligible parties). Dubbed the "Massachusetts Solar Credit Clearinghouse," solar PV generators can deposit unsold SRECs, which are then sold on the open market. Entities can pick up SRECs from the clearinghouse to meet their own compliance shortfalls, but on a short schedule: these certificates expire in two years. The shelf life is meant both to incentivize long-term dedication to solar and keep the market vital. In the alternative, load-serving entities that do not meet their SREC requirements have to make up the difference by purchasing an alternative compliance payment, with pricing set by DOER.

When a solar project deposits eligible SRECs into the auction account, DOER re-issues the SRECs, which then can be purchased for compliance purposes for the next two compliance years at a fixed rate. Revenues received from the auction are paid to the projects that originally deposited SRECs into the auction account, minus a fee of 5 percent. Pricing fluctuates based on market forces; supply of SRECs is determined by the number of solar projects, the more there are, the more SRECs exist for purchase and the lower the price.

Project proponents may find their SREC market knowledge tested when seeking financing. Many solar developers are not directly involved in the solar market by trade, so they often enter into contracts with solar brokers, or aggregators, who contract with solar developers to purchase their SRECs and then sell them on the market. Lending institutions financing solar project development often require that these contracts be long-term in order to provide cash flow, security and stability.

However, a changing market and fluctuating energy demands can make securing long-term contracts a challenge. In order to manage the associated risks, long-term contracts often include a premium to cover market fluctuations. In the alternative, system owners with sufficient capital to develop and construct a project on their own may seek to fund their project through spot transactions. Spot transactions are entered into on a more short-term basis, generally at higher prices.

The Carve-Out Program reflects a clear commitment by the state to solar energy, and with increasing regulatory requirements for entities to integrate renewable energy practices, market activity will increase as well. As solar proponents embark on new projects, understanding the SREC market is an integral piece of the solar puzzle.

Ani Ajemian is an attorney with the real estate and environmental groups at Sherin and Lodgen LLP. She can be reached at aeajemian@sherin.com.

ENVIRONMENT

Brownfields tax credit extension falls short

BY DOREEN M. ZANKOWSKI

The Massachusetts Brownfields tax credit program was due to expire this year. Last August, however, the Legislature voted to extend the program through 2013.

The two-year extension offers both good and bad news.

The good news is the Brownfields tax credit is extended. The bad news, however, is the extension is simply not enough time for development projects to obtain necessary permits, complete designs, conclude remediation, and ultimately be remediated to Massachusetts Contingency Plan standards for proper closure and filing for the tax credits.


Doreen Zankowski

Notwithstanding Brownfields' developers' frustration with only a two-year extension, the Commonwealth arguably has the best package of incentives for the redevelopment of Brownfields of any state in the nation.

The extension offers qualifying property owners and operators a rebate of up to 50 percent of eligible environmental response costs. The rebate is offered in the form of a tax credit, which may be sold for cash.

This extension offers significant benefits to developers, commercial businesses, property owners, and not-for-profit organizations – all of whom may be eligible for the credits.

Further benefits of the Commonwealth's Brownfields program include:

LIABILITY RELIEF

The Brownfields Act exempts "eligible persons" from liability for contribution, response costs, and property damages claims, unless the liability arose contractually. An eligible person is an owner or operator who did not own or operate the site at the time of the release, and who did not cause or contribute to the contamination of the site. To benefit from the liability exemption, the site must achieve a permanent clean-up or remedy operation status. If the site contains only soil contamination, the owner must remediate the soil contamination to the extent of his/her property boundary pursuant to Massachusetts Department of Environmental Protection standards.

If the property includes groundwater or surface water contamination, the owner must remediate all groundwater and surface water contamination to MassDEP standards. The liability protection extends to all subsequent property owners, provided they maintain the regulatory compliant status of the property, including any ongoing remediation remedies.

Others who may qualify for liability relief include: downgradient property owners, tenants, redevelopment authorities and community corporations, provided they did not cause or contribute to the contamination.

> A two-year extension of the Brownfields tax credit is simply not enough.

Secured lenders, governmental bodies and charitable trusts are also exempt from liability, subject to certain requirements and restrictions.

CONTRIBUTION PROTECTION

The Act provides what some may call incentives to non-eligible persons who perform voluntary cleanups and resolve their liability issues with the Commonwealth through an administrative or judicially approved settlement. MassDEP favors the use of administrative consent orders, even in this situation. In the event of a successful negotiation and settlement with MassDEP, such a party is eligible for contribution protection.

COVENANTS NOT TO SUE

Current and/or prospective owners or operators of sites where the proposed redevelopment will contribute to the economic or physical revitalization of a community may be eligible to receive a Brownfields covenant not-to-sue agreement. The 15 cities and towns in Massachusetts with the highest poverty rates receive the highest priority for the covenants. The priority listing then trickles down to economically distressed areas, and then to Brownfields sites in remaining communities in Massachusetts.

GRASSROOTS EFFORTS NEEDED

The Legislature got it right by extending the Brownfields tax credit. We need, however, to continue the grassroots efforts to convince our legislative leaders that the program must be continued and extended beyond 2013.

Business owners, developers, and industry experts got it done in 2010 for a program that was about to expire in 2011. We cannot wait until 2012 to seek a further extension of the 2013 sunset clause. Development projects take years to get out of the ground.

A two-year extension of the Brownfields tax credit is simply not enough, and the Brownfields tax credit must remain available to all types of Brownfield sites, including former solid waste facilities that have been remediated under the Massachusetts Oil and Hazardous Material Release Prevention and Response Act, or to its standards.

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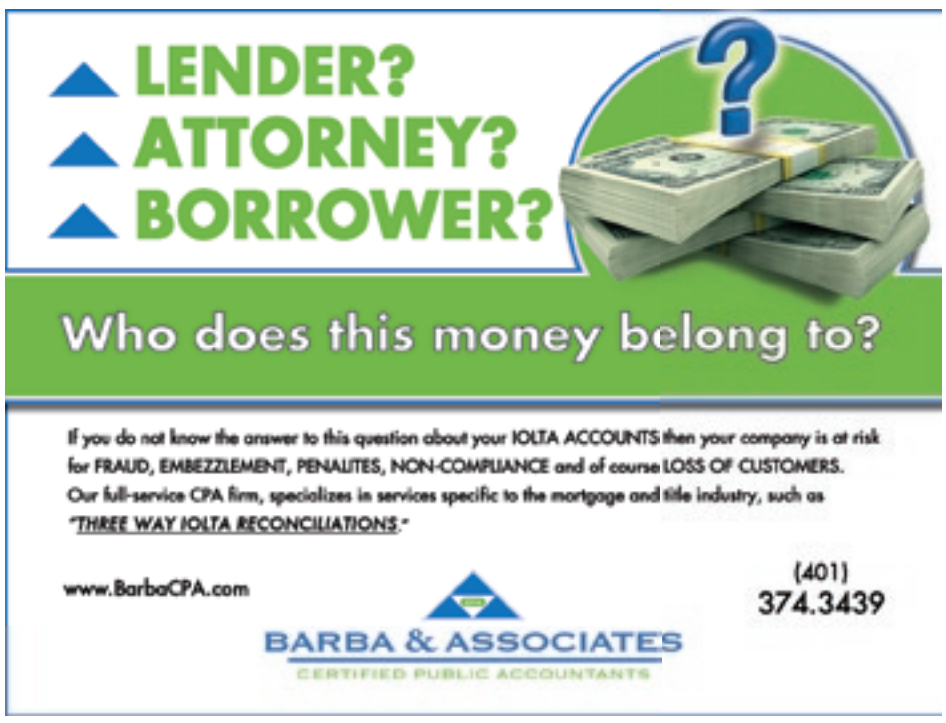

REGISTRY OF DEEDS

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By clicking on this rectangle, the identifying information about that plan pops up. (Eventually, the image of the subdivision plan will pop up, too.) Once we've completed plotting all of our recorded subdivision plans, a task being done entirely in-house, we will launch a web-based user interface that will allow users to identify every subdivision plan that depicts a particular point on the ground simply by locating that point on this Google-style mashup.

CHAIN OF TITLE

The title examination process is long established and works quite well, so there is little cause to change it. Still, not everyone who does research at the registry is doing a title exam. For these non-traditional registry users, linking together documents that relate to the same parcel of land might work better. Already are already using existing technology to link related documents together. Our current computer system has a nimble "marginal reference" feature that allows you to easily create a hyperlink between two documents. Intended to connect discharges and mortgages, for several years we have routinely added the title reference contained in newly recorded deeds to this marginal reference feature. This minor outlay of effort creates a useful hyperlink between the new and the prior deeds in the chain of title. While this practice has some present use, I believe its true value will be realized sometime in the future.

Also under consideration is a full-text search capability similar to that used in Google Books. That application would search for words in the text of scanned images rather than in the index. While not intended as an index substitute, such an application would have enormous utility for every registry user.

CONCLUSION

The above offers just a small glimpse into the technological future of the Registry of Deeds. These new ideas are not intended to replace the traditional mission of the registry, but to supplement it. As we move more and more into an information-based economy, our land records become an increasingly valuable resource. Through the prudent adoption of new technology, the Registry of Deeds will be able to meet the information needs of the new economy.

A frequent contributor to *REBA News*, Dick Howe has served as register of the Middlesex North District Registry of Deeds since 1995. He writes a blog on public records issues and concerns, which can be found at www.lowelldeeds.com. He can be contacted at richard.howe@sec.state.ma.us.

SEWER IMPROVEMENTS

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found that every Saugus inhabitant benefited from infiltration/inflow repairs to the dilapidated sewer system, not just those who paid the "contribution." Furthermore, it said, the I/I charges did not compensate Saugus for expenses incurred in connecting new users, but were used to fix longstanding deficiencies unrelated to the addition of new users.

Therefore, the court held, because Saugus's infiltration/inflow reduction contribution program failed the first and third factors, it was an illegal tax. On March 2, the Supreme Judicial Court agreed to hear Saugus's appeal of the decision; the town's brief is due on April 19.

Several other Massachusetts municipalities have I/I programs similar to Saugus's. If the SJC also finds that the sewer connection charges imposed under these programs are illegal taxes those communities, like Saugus, may be faced with assessing improvement fees on all sewer users, or imposing moratoria on new sewer connections, or both if they cannot rely on developers to fix municipal problems. Other communities require developers to undertake or fund specific I/I mitigation projects in exchange for being allowed a new sewer connection. Under the three-factor test, these requirements may also be a tax by another name.

Until the deficient municipal sewer systems are improved, developers of larger projects may find that constructing on-site, private wastewater treatment plants is an easier – or the only – way to obtain project approval in those cities and towns.

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BISHOP

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retail, office, manufacturing, etc.) based on long-standing expectations and practices in the real estate industry.

It is unlikely that these responsibilities would be manipulated to undercut the rights of tenants under c.186 §19; in most cases, that would be the tail wagging the dog. And it is not a serious response to say that despite the many foreseeable problems it would cause, and despite the fact that the words of the statute permit a contrary reading, the Legislature really did intend to give rights under c.186 §19 to commercial tenants who had undertaken responsibility for the maintenance of the leased premises because it thought that they would never dare to use them.

The "caused by the tenant" exception in c.186 §19 was not briefed by either party in *Bishop* and was raised by the defendant only in oral argument. It may be that on next encounter, with the benefit of greater focus and a more thorough treatment from counsel, the SJC could find its possible to distinguish between tenants who have affirmatively undertaken maintenance responsibilities and those who have not, and thus avoid the problems created by a broad brush application of c.186 §19 to all commercial leases. In the meantime, landlords should be aware of G.L. c. 186 §19 as applied by *Bishop* and of the necessity of responding with reasonable efforts in a timely manner if a tenant notice arrives, whatever the lease says.

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