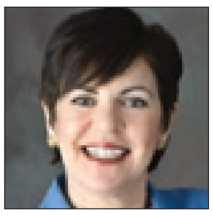
Liability for non-disclosure in commercial real estate transactions



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Will pending changes save the Community Preservation Act?

PAGE 1

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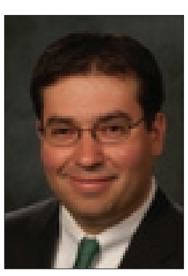
ZONING LAW

# New SJC standing decision raises bar for abutter zoning appeals

BY DANIEL P. DAIN

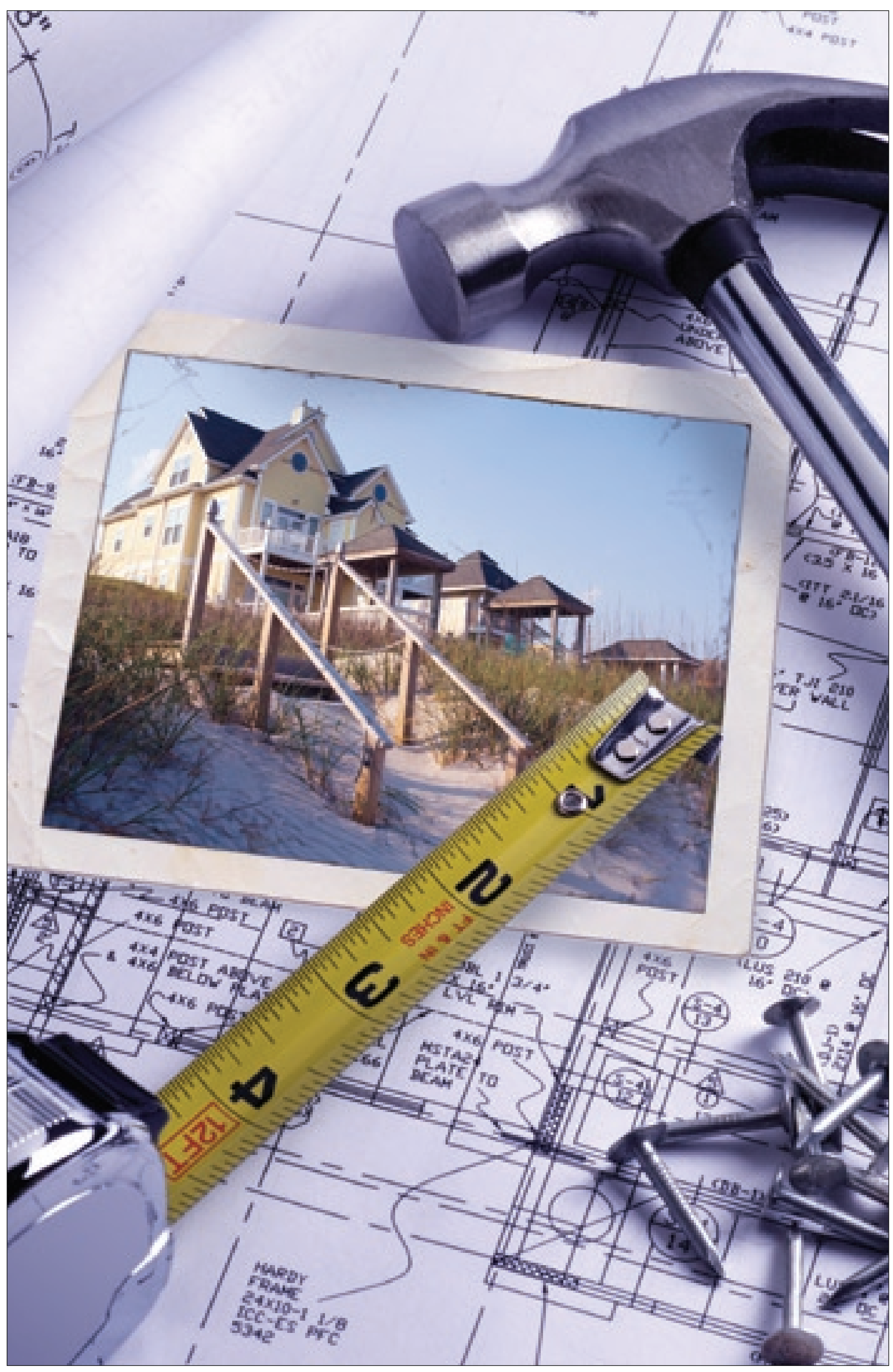
Every three to four years, the Supreme Judicial Court addresses the issue of project-opponent standing in zoning appeals under General Law chapter 40A, section 17, each time adding to the jurisprudence on the issue. The March 2011 *Kenner v. Zoning Board of Appeals of Chatham* decision is the most recent addition. In it, the SJC worried that an overly permissive standing threshold would threaten to "choke the courts with litigation over myriad zoning board decisions" and therefore articulated a standard that would allow the Superior Court and Land Court to act as legitimate gatekeepers to zoning litigation. In doing so, however, the SJC left several questions unanswered, providing issues likely to be addressed the next time the SJC addresses standing.



Dan Dain

The lightning-rod issues concerning standing arise out of language in the Zoning Act that limits appeals to the courts from local zoning determinations only to those persons "aggrieved" by such decisions. In providing such a limitation on zoning appeals, the Legislature made a policy decision that the courts should not be available as a quasi-super-zoning body, there to ensure that local boards "get it right" in every instance. In general, local boards are in the best position to weigh the costs and benefits on the community of zoning determinations. Only when a zoning entitlement risks injuring particular citizens in ways "special and different" from harm of a project to the community in general is it appropriate for a court to step in and review the local decision.

See SJC, page 6



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The jury's still out on the determination of whether the protection of views from private property is a zoning interest.

COMMENTARY

# Is this the new reality?

PAUL F. ALPHEN

I hope you had a happy Father's Day. Father's Day reminds me of going to baseball games with my sons. There is nothing like spending a warm evening in a major league park with your kid (regardless of his or her age). When at a game, you know that for the next three hours you will be surrounded by the timeless sights, sounds and smells of America's favorite pastime. Nobody will ask you any difficult questions, nor request that you perform any heavy lifting. My cell provider has also cooperated by providing lousy cell and web service at Fenway. At the ballpark, the world slows down and you can take time to appreciate the simple things in life, just as our fathers and grandfathers did during the past 100 years.

Paul Alphen

Life is not so relaxing during the workday, however. These days when I ask fellow practitioners "How are things?" I usually get fairly similar answers. I hear stories of commercial lease negotiations wherein weeks go by from the time tenant's counsel sent his/her redline of the lease to the time landlord's counsel responds. I hear stories of purchase and sale agreements with multiple extensions of the closing dates; stories of "short sale" agreements that never close; and stories of commercial P&S negotiations that end at an impasse over miniscule issues. I also hear about clients that are interested in pursuing a particular development, but just cannot pull the trigger. As attorneys we are used to playing the role of "expediter," but nobody seems to be in much of a hurry these days.

We got used to operating at 100 miles per hour. A few years ago it was routine

See NEW REALITY, page 7

# Title insurance agents facing increased regulation across nation

BY JOEL A. STEIN

In 2010, the National Association of Insurance Commissioners (NAIC) initiated plans to develop an agent data call. Reacting to claims by the U.S. Government Accountability Office (GAO) that it could not properly analyze title insurance premium costs, the NAIC, working through its statistical plan working group, created a data call that it believes will provide regulators with the information they require, without creating an unreasonable burden for title agents.

Joel Stein

The NAIC will provide guidance to state commissioners on how to implement the plan, and a current version of the guidelines includes sections that should be included in any regulation adopted by a state. However, approval of the plan by the NAIC will not necessarily result in the regulations being adopted by the State Insurance Department of the Commonwealth of Massachusetts.

The American Land Title Association (ALTA) was actively involved with the process and has encouraged that data collection be on a "go-forward" basis and that reporting be "simple and achievable." However, it is acknowledged that the more data available, the better, so the question of whether the data will be collected only on a go forward basis has not been decided.

Agents in Texas and New Mexico are already required to report data, and in those states, the data is used to promulgate title insurance rates. Frank Pellegrini of ALTA does not believe that the proposed data call needs the same level of information, although the information sought is extensive, including number of policies issued, number of canceled orders, amount of premium, premium split, salaries, rent, title plan costs, claims losses and deductibles to insurers.

See TITLE, page 4

COMMERCIAL REAL ESTATE LAW

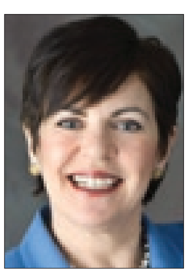
# Liability for non-disclosure in commercial real estate transactions

BY MARIANNE E. BROWN

Sellers in the commercial real estate market may think they are immune to potential liability for fraud and unfair and deceptive trade practices under M.G.L. Chapter 93 A.

After all, most commercial transactions involve sophisticated parties, acting at arm's length and with an equal bargaining position. There is no duty to disclose, and the buyer has the opportunity to perform due diligence. The seller need only sit back, and wait for the closing, take the money and all is well. No need for the seller to beware.

What can go wrong? This article will explore pitfalls that may beset even the most cautious commercial seller. We will show that in the case law, the distinction between a non-disclosure, which is not a problem, and a half truth, which can be considered fraud, can be fine indeed. The seller may make a decision not to disclose a defect under the pressure of a looming closing date, on the hope that nothing will go wrong.


Marianne Brown

If that non-disclosure is found to be a "half truth" amounting to a misrepresentation and unfair business practice, the cost of litigation – even if successful – is likely to exceed any negotiated change which might have resulted from the disclosure. At a minimum, the seller should consult counsel in making an informed decision about such questions.

### THE LAW IN A NUTSHELL

Mere nondisclosure will not support a cause of action for misrepresentation. A party to a transaction is under no duty to "speak for the information of the other party," but if he does speak, he is bound "to speak honestly and to divulge all the material facts bearing upon the point that lies within his knowledge." Partial disclosure or half-truth may be tantamount to fraud under certain conditions.

The plaintiff must also establish that its reliance on the seller's silence was reasonable. In a commercial real estate transaction, the buyer of the real estate has an opportunity to perform due diligence on the property, and the seller should not be held liable for the buyer's failure to conduct due diligence. In that event, the seller may have an argument that the claim of "reliance" by a sophisticated seller upon an alleged misrepresentation was not reasonable.

G.L. Chapter 93A, known as the Massachusetts Consumer Protection Act, bars unfair and deceptive trade practices. Chapter 93A does not define the term "unfair," but certainly the reach of the statute is broader than a claim of fraudulent non-disclosure. Courts have developed a standard under which the "objectionable conduct must attain a level of rascality that would raise an eyebrow of someone inured to the rough and tumble of the world of commerce."

Only a fiduciary has a duty to disclose under Chapter 93A § 11, and business transactions conducted at arms' length, where there is no disparity in the parties' relationships, do not give rise to a fiduciary relationship.

Therefore, under Chapter 93A, there is no affirmative duty to make voluntary disclosures. However, the Attorney General's Consumer Protection Division has issued regulations which warn sellers not to fail to disclose information when the non-disclosure has the capacity to deceive buyers in any material respect, including regarding "construction, durability, reliability, [etc.]." (See 940 C.M.R. §§ 3.05(1) and 3.16.)

Unlike a claim for fraud, a claim under Chapter 93A can lead to an award of attorney's fees and also treble damages, where the wrongful conduct is found to be willful and knowing. It is a fair assumption that a nondisclosure which is actionable as fraud may also be found to be unfair and deceptive under Chapter 93A.

**Cases cited in this article include:**

- *Nei v. Boston Survey Consultants, Inc.,* 388 Mass. 320 (1983)
- *Kannavos v. Annino,* 356 Mass. 42, 48 (1969)
- *Trifiro v. New York Life Ins. Co.,* 845 F.2d 30 (1st Cir. 1988)
- *Nei v. Burley,* 388 Mass. 307, 313 (1983)
- *Levings v. Forbes & Wallace, Inc.,* 8 Mass. App. Ct. 498 (1979)
- *Friedman v. Jablonski,* 371 Mass. 482, 485 (1976)

### THE LAW IN APPLICATION

How does this law apply in the real world? Let's look at the facts of a few reported real estate cases involving non-disclosure, to see if we can make sense of the legal standards. Perhaps the case law will provide some guidance to help sellers grapple with decisions regarding the non-disclosure of information in commercial real estate transactions.

In *Kannavos v. Annino*, 356 Mass. 42 (1969), the sellers of the real estate had converted the single family home into multi-unit apartments, in knowing violation of the local zoning laws. The sellers made no affirmative misrepresentations to the buyers, but they had advertised in the local papers that the property was income property for multi-family use. The court found that the advertisement created the clear impression that the property was properly zoned, and the seller was found liable.

In *Urman v. South Boston Savings Bank*, 424 Mass. 165, (1997), the court ruled that the seller did not need disclose a toxic waste problem on a nearby property.

However, the court acknowledged that disclosure of off-site conditions may be required if both "unknown and not readily observable by the buyer" and affecting "the habitability, use, or enjoyment of the property." Can clear guidance be gleaned from this case?

### ADVICE FOR THE COMMERCIAL SELLER: SELLER BEWARE

Litigation is a risky and expensive undertaking that all commercial sellers should wish to avoid. If you are contemplating the non-disclosure of information which could be relevant to the buyer you should ask several questions:

Has the buyer asked me to supply the information I am considering keeping secret?

Have I given the buyer any false impression regarding this information?

Is there any information in the public domain or available to the buyer that might lead it into a false sense of security regarding this information?

If the answer to any of these questions is yes or maybe, the seller should weigh the risks carefully before proceeding with the decision to remain silent. If the information would clearly be a factor in the buyer's decision to buy, or the price he is willing to pay, it is important for the seller also to ask: Am I truly comfortable that the information is otherwise available to the buyer, and that he should have discovered it himself through ordinary due diligence?

If so, the seller will have a legal argument that the buyer's reliance on its silence was not reasonable. But there are no guarantees that the disgruntled buyer, upon learning later that he didn't know the whole story, won't sue anyway.

At that point, the seller may learn yet another lesson: that there are rarely clear winners in commercial litigation.

Marianne Brown is a commercial litigator with offices in Arlington. She is a member of REBA's Real Estate Litigation Committee. She can be reached via email at Marianne@marianne-brown.com.



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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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PRACTICE MANAGEMENT

# File retention policies ease clients' minds, your file cabinet

BY JOHN T. RONAYNE

The question of how long client matter files and materials must be retained before they can be disposed of confronts most lawyers at some point. The problems it presents are much more manageable if you establish a file retention policy and give notice of that policy to clients.

The only sources of official guidance in Massachusetts on file retention are the Rules of Professional Conduct, in particular Rule 1.15 and Rule 1.16(e), and a 2001 article entitled "Trash Talking" by Daniel C. Crane, Esq. then in his capacity as bar counsel, available (as are the Rules of Professional Conduct) on the website of the Board of Bar Overseers (www.mass.gov/obcbbo).

John Ronayne

Rule 1.15 covers "trust property," which includes both trust funds (not included in this discussion), and any other items of a client or a third party held by a lawyer in connection with a representation. These items would commonly include items of inherent monetary or personal value (e.g., jewelry, negotiable instruments, family pictures), as well as documents creating ongoing legal rights and obligations, such as original wills and settlement agreements. Trust property is required to be promptly delivered to the client, and there is no process we can suggest by which trust property can be otherwise disposed of in the absence of specific instruction from the client.

In all cases, file materials should be disposed of in a manner that preserves client confidentiality, preferably by secure shredding or incineration.

Rule 1.16 (e) covers essentially everything except trust property that might be in a lawyer's file, including all papers and documents provided by the client, all investigatory or discovery documents, all papers filed with a court, and (contrary to urban legend) all lawyer's work product. "Lawyer's work product" is defined in Rule16(e)(6) as "documents and tangible things prepared in the course of the representation of the client by the lawyer or at the lawyer's direction by an employee, agent or consultant ... Examples include … legal research, records of witness interviews, reports of negotiations, and correspondence."

Under Rule 1.16 "a lawyer … must make [the foregoing items] available to a former client, within a reasonable time following the client's request for his or her file." Other than requiring that a file may not be disposed of so soon that it would prejudice the client (see Rule 1.16 (e)(7)) or defeat the client's right to request a turnover of the file, there is nothing specific in Rule 1.16 about how long a lawyer must retain the file. Nor does the six year provision for retention of records of client funds in Rule 1.15 apply directly to these file materials. In the absence of further official guidance, the following suggestions may be helpful:

Create (and follow consistently) a written file retention policy spelling out the steps you intend to follow, in order to both inform clients of their rights and your intentions, and to protect yourself against claims that materials in your files were destroyed to avoid disclosing them in later litigation against you or your client or in some other context. The retention policy should inform the client of their right to request their file materials after the termination of the engagement, and further inform them that if you have not received that request within some stated period of time after the termination, you reserve the right to dispose of the file without further notice. The period must be reasonable both in term of the client's needs and the firm's. The statute of limitations for contract actions in Massachusetts is six years from the breach, and three years from the act (or later discovery) for malpractice. Also remember that particular clients, e.g. banks or title insurance companies, may have their own retention policies that may impact your policy respecting their files.

See FILE RETENTION, page 10

## SCENES FROM THE CONFERENCE

**LEFT:**
Former REBA board member and Andover conveyancer Greg Eaton, shares a lighter moment with Trish McGrath, director of business development at CATIC's Wellesley office.

**BELOW:**
Kevin Atwood and Tom Bussone of Massachusetts Attorneys Title Group applauding at the association's spring conference recognition of Land Court Associate Justice Charles W. Trombly, Jr.

PHOTOS BY PAUL CHINAPPI


# TITLE: More regs for insurance agents

CONTINUED FROM PAGE 1

According to the proposed draft of the data call, the financial section seeks income and expenses that are typically required on a tax return. The income is divided into premium written and remitted, closing income, title examination income, search income, investment income and "all other" income.

The data call does include a section concerning the confidentiality of the data. This section reads in part, "Due to the sensitive nature of individual agent data, including income, expense and loss experience, it is strongly recommended that regulators keep individual responses on the stat plan confidential. While such data may already be protected as proprietary, financial, or other sensitive information, it is highly recommended that states determine whether they can hold the stat plan information confidential, and enact any statutory or regulatory amendments necessary to do so. However, nothing herein should be construed as attempting to limit the sharing or publication of aggregate data, since such publication may in fact make important disclosures regarding the experience of title agents in a particular geographic area or business demographic (i.e. by county, state, or by agency type)."

One reason for the urgency on the part of the NAIC to have its plan approved is that New York and Pennsylvania introduced data calls in 2010. The Pennsylvania Department of Insurance requested data from 498 agents across the state, which represents about 20 percent of all title insurance agents in the state. Those selected ranged from the largest to the smallest. According to the Department of Insurance, the object of the study was to examine the expense aspect of title insurance rates with regard to agents' expenses.

Objections to the institution of the data call have been raised by the Pennsylvania Land Title Institute, which objections include the cost of compliance, the inexperience with previously providing such data and bad timing due to the implementation of the new HUD-1. There is also concern that the failure on the part of an agent to respond may result in the revocation of the agent's license.

New York, like Massachusetts, does not require licensure of its title insurance agents, and the Department of Insurance required all title insurance underwriters to collect income and expense data from all independent agents for 2009. The New York data call related only to title insurance premiums, so those agents with separate businesses did not need to be included. As to the issue surrounding attorney agents, Richard Patterson, president of CATIC, said since "the great majority of attorney title agents issue title insurance commitments and policies through their law firms, it is essential that the NAIC make clear that the data being requested as part of its data call, relates only to a law firm's title insurance activities and not to its non-title insurance activities. If we can develop an instrument that collects such data, we believe that everyone will be well served."

Also in New York, a second attempt

CONTINUED ON PAGE 5

## SCENES FROM THE CONFERENCE

**REBA 2009 president Steve Edwards congratulates Jon Davis on the association's success in unauthorized practice of law litigation before the SJC. Davis had chaired REBA's practice of law by non-lawyers committee for nearly 20 years.**

PHOTO BY PAUL CHINAPPI

**CONTINUED FROM PAGE 4**

was made to introduce a New York Title Guaranty Authority. This authority would offer "guarantees" of real property title in the state and the fees collected would be used to pay all claims, maintain reserves and meet administrative costs. Participating abstractors and attorneys would need to pay a fee to participate and would be subject to guidelines of the authority including the maintaining of liability insurance and abstract plants. Whether this is seen as a supplement to title insurance or a replacement is not clear from the legislation.

In May 2009, the state of Texas enabled HB 4338, entitled "an Act relating to Title Insurance Agents and Title Insurance Companies." The act, which became effective on Sept. 1, 2009, impacts the regulation of title agents, a number of which failed during the mortgage crisis over the past two years. Those changes are wide sweeping: Affecting abstract plants, the treatment of "impaired" agents, educational and financial reporting requirements, the treatment of funds held for the benefit of the title insurance company and the handling of a guaranty file.

In most cases, an agent applying for an initial license must show evidence that the agent and its management personnel have successfully completed a professional training program. The statute further requires the insurance commissioner to adopt a professional training program. Other programs must be offered by the state bar, an accredited college or university, a title insurance company or statewide title insurance association, a public school system in the state or an individual accredited by one of these entities.

The new financial requirements are extensive and detailed; allowing a title insurance company to provide information to and receive information from the commissioner about a financial matter that would call into question the solvency of an agent that the company appointed. The act further requires a title insurance agent on a quarterly basis to provide the department a copy of the agent's quarterly withholding tax report furnished by the agent to United States Internal Revenue Service. The agent must also provide to the department proof of payment of the amount shown on the report.

In a section entitled "unencumbered assets," the act requires the agent to maintain unencumbered assets in excess of liabilities exclusive of the value of abstract plants. Assets include cash, material, fixtures, equipment, computer and software and other assets that do not have any lien against them.

The amount of unencumbered assets required depends on the population size of the county in which the agent maintains its principal office. There are exemptions for agents that have held a license for at least three years as of Sept. 1, 2009; however, the amount of unencumbered assets held by that agent must increase over the years as specified in the act.

The act further provides that the funds held by a title insurance agent that are owed to a title insurance company, another title insurance agent or a direct operation arising from a division of premium, are to be considered held in trust. However, the section does not require that the funds be held in a separate account or be subject to the audit of the department. The act provides for an annual audit of escrow funds to be accompanied by a certification by a certified public accountant that the title insurance agent has the appropriate unencumbered assets in excess of liabilities.

Finally, the act deals with possession of guaranty files. It specifically requires that a title insurance company may not enter into a new contract or agreement, or amend an existing contract or agreement, with an individual, firm, association or corporation to act as the company's agent, unless the contract or agreement contains a requirement that any lease, storage agreement or other contract entered into by the agent contains specific language guaranteeing access to title insurance files to the Texas Title Insurance Guaranty Association and certain title insurance companies. This supersedes any landlord's lien on any other property or the right to deny the association or a title insurance company access to the premises.

Joel Stein, of the Law Office of Joel A. Stein in Norwell, co-chairs REBA's Title Insurance and National Affairs Committee. He can be reached via email at jstein@steintitle.com.

# SJC: Abutters must prove harm

CONTINUED FROM PAGE 1

Thus, over time, the courts have adopted rules for when a project-opponent can be considered "aggrieved" by a local zoning decision so as to give the courts jurisdiction over objections to the grant of a zoning entitlement. (Note that when a project-proponent is denied a zoning entitlement, the applicant is always considered a person "aggrieved" by the denial). Standing law, as developed, entails essentially a two-step analysis, the first step requiring an inquiry into whether the nature of the harm alleged is a concern of zoning laws, and, if so, the second then looking at the quality and quantity of the evidence of actual harm presented by the project-opponent. It is on the second of these two inquiries that the SJC's decision in *Kenner* broke the most ground.

In that case, a family proposed reconstructing their house along the waterfront in Chatham on pilings to lift it above the flood plain and to comply with FEMA regulations. The proposed new house would be seven feet taller than the existing house. Neighbors who lived inland and up an incline appealed the permits, arguing that the new house would block their view over the existing house. After visiting the properties, the Land Court ruled that any impact on the neighbors of the additional seven feet would be minimal and therefore they lacked standing. The Appeals Court reversed, concluding that the Land Court should have stopped its analysis once the neighbor-plaintiffs articulated a claim of aggrievement. The SJC took the case on further appellate review and reinstated the Land Court's decision.

On the neighbors' claim of diminished view as a basis for standing, the SJC addressed the quantum of injury necessary to establish standing. The SJC distinguished between an "impact" from a project and a "harm" from a project. The neighbors had claimed at trial only that they would be impacted by the proposed new house, but had not demonstrated a risk of actual injury. That a proposed project may block a view is an impact from the project, but more is needed to establish an injury. The plaintiffs had failed to offer any such evidence.

Furthermore, even if there had been some injury from the diminished view, the Land Court's finding that any such injury that the plaintiffs might have claimed would be minimal meant that such injury was not sufficient to establish standing. The SJC explained that to prove actual injury, a plaintiff must introduce "objective" evidence that it will be "truly and measurably harmed." How much harm? "The adverse effect on a plaintiff must be *substantial enough* to constitute actual aggrievement *such that there can be no question* that the plaintiff should be afforded the opportunity to seek a remedy." (Emphasis added.) Clearly, this standard raised the bar for plaintiffs to establish standing in zoning litigation. However, the newly articulated standard does raise some questions, such as what it means for there to be "no question" that the plaintiff should be afforded the opportunity to be in court.

The SJC decision raised additional questions with respect to the first step in the standing analysis, the issue of whether the nature of an articulated harm is zoning-related in the first place and thus can provide a basis for standing. In the *Kenner* case, the nature of the alleged harm was diminished view (of the

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The neighbors had claimed at trial only that they would be impacted by the proposed new house, but had not demonstrated a risk of actual injury.

ocean). The extent to which diminished views can provide a basis for standing is a battleground issue in zoning litigation, particularly on Cape Cod, where homeowners are seeking to update old waterfront cottages. In general, courts have held that aesthetic or view-based harms are not the concern of zoning and hence cannot provide a basis for standing. The SJC, in the 2001 case *Martin v. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints*, involving a challenge to a proposed new Mormon Temple in Belmont, recognized an exception to the general rule, where the local zoning code specifically recognizes the protection of views as a zoning interest.

The SJC did not, however, enunciate a rule as to what exactly a local zone must say in order to transform the protection of views into a local zoning concern sufficient to provide a basis for standing. In the *Martin* case, the Belmont zoning code directed the Special Permit Granting Authority to take into account "views from … developed properties," language, the SJC held, which was sufficient to permit neighbors to use diminished views from their home as the articulated harm in step one of the standing analysis. In the *Kenner* case, by contrast, the Chatham zoning code did not mention views from private homes, but rather spoke about "neighborhood visual character, including views, vistas, and streetscapes." At first, the SJC seemed to allow that the diminished views could be considered a zoning concern under Chatham's zoning code, observing that under the relevant language, a plaintiff seeking to use views as the nature of the harm in the standing analysis, would need to show harm to *both* private views and to the "neighborhood visual character." It is a little hard to discern the SJC's reasoning on this point in *Kenner*. The Chatham zoning code says nothing about protecting private views (something the Land Court has found necessary in other cases, such as in *Saylor v. Chatham ZBA*.

Further, requiring a plaintiff to show harm to a neighborhood's visual character in order to establish standing would seem to conflict with another standing principle – that the alleged harm must be "special and different" from any harm that may be felt by the community in general. Perhaps with these issues in mind, the SJC later in its *Kenner* decision seemed to reverse course and conclude that Chatham zoning code did not protect private views: "the Kenners' view of the ocean is not an interest protected by the town of Chatham's zoning bylaw…"

Since *Kenner* was decided, there have already been two Appeals Court standing decisions concerning views that demonstrate that further guidance from the SJC may be needed. In the May 2011 decision in *Marhefka v. ZBA of Sutton*, the Appeals Court reversed a Land Court decision that had found that the Town of Sutton's zoning code did not recognize diminished views as a zoning interest. The Appeals Court reasoned that the intent to protect views from private property is inferable from the Sutton zoning code's regulation of density and dimensions, even if such protection is not explicitly spelled out. This analysis does not make sense. The SJC has long held that the protection of views is not, in general, a zoning concern under the Zoning Act. As such, the protection of views cannot be inferable, as a matter of logic, from general zoning regulations that arise out of the Zoning Act, such as controls on density and dimensions. Only where the local zoning code specifically calls out the protection of private views, as the code did in Belmont in the *Martin* case, can one conclude that there is an intent to make private views a zoning concern in a particular municipality.

A different panel of the Appeals Court, two weeks later in the May 2011 case of *Schiffenhaus v. Kline*, took up whether views can be the basis under Truro's zoning code. The Appeals Court noted that Truro's zoning code itself was silent on the issue, but incorporated by reference the town's comprehensive plan. That plan noted that "long and broad vistas, sights of harmonious and distinctive architecture, and views of historic and culturally important sites" were "part of the heritage of Truro." The Appeals Court compared this language to the language about considering neighborhood visual character in Chatham from the *Kenner* case and observed that to establish standing based on views in Truro, a project-opponent would need to establish harm to both private views and the types of "broad vistas" that were part of Truro's "heritage."

It is hard to discern guidelines for trial courts to follow in determining whether a local zoning code reflects an intent by a municipality to make the protection of views from private properties a zoning interest. Should courts look for language that directly protects private views as in the *Martin* case, that may impliedly do so from the regulation of density and dimensions as in the *Marhefka* case, or that speaks only about broad community concerns, such as in *Schiffenhaus*? It will be interesting to see if the SJC takes either *Marhefka* or *Schiffenhaus* up on further appellate review. In light of the frequency with which these types of disputes arise, the lower courts would benefit from the SJC articulating a clear rule for them to follow.

Dan Dain is the chairman of the real estate development boutique law firm Brennan, Dain, Le Ray, Wiest, Torpy & Garner, P.C. in Boston. Dan is a litigator with a focus on zoning appeals, and a member of the REBA Litigation Committee. He represented the Chatham Zoning Board of Appeals in the *Kenner v. Chatham* ZBA case. He can be reached via email at ddain@bdlwtg.com.

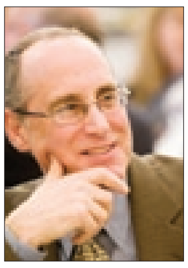
CONSUMER PROTECTION

# Know before you owe

BY JOEL A. STEIN

The Bureau of Consumer Financial Protection (CFPB), created by the Dodd-Frank Wall Street Reform and Consumer Protection Act, was created to exist as an independent bureau within the Federal Reserve System to promote transparency for mortgages and other financial products and to create and enforce clear rules that will allow consumer to understand costs and features of financial products.

According to the U.S. Department of the Treasury, the CFPB will look out for people as they borrow money or use other financial services by:


Joel Stein

- Implementing and enforcing federal consumer financial laws.
- Reviewing business practices to ensure that financial services providers are following the law.
- Monitoring the marketplace and taking appropriate action to make sure markets work as transparently as they can for consumers.
- Establishing a toll-free consumer hotline and website for complaints and questions about consumer financial products and services.

On Sept. 17, 2010, Elizabeth Warren was named by President Barrack Obama to be the Assistant to the President and Special Advisor to the Secretary of the Treasury on the CFPB.

House Republicans are presently pushing several bills to change and limit the power of the agency, while in the Senate, Warren's expected nomination as its first director is being challenged.

Nevertheless, on May 18, 2011, the CFPB fulfilling its mandate to combine the Truth in Lending and Good Faith Estimate forms, announced the program, "Know Before You Owe" under the slogan "Time to simplify mortgages."

The CFPB has posted two designs on its website, www.consumerfinance.gov/knowbeforeyouowe, and is requesting input from consumer and real estate professionals from the beginning of the process, in hopes of answering the following questions:

- Would this form help consumers understand the true costs and risks of a mortgage?
- Could lenders and brokers clearly and easily explain the form to their customers?
- What would you like to see improved on the form? Is there some way to make things a little bit clearer?

The goal of the Know Before You Owe project is to create a new combined form by next year which will allow consumers to answer: Can I afford this mortgage and can I get a better deal somewhere else?

Both forms include two pages, the first page entitled "Loan Estimate" and the second "Loan Estimate Details." Both include essentially the same information, although the formatting is substantially different.

The testing will include in-person interviews with borrowers in English and Spanish, in six cities: Albuquerque; Baltimore; Birmingham, Alabama; Chicago; Los Angeles; and Springfield, Massachusetts. There will be five rounds of testing and revision through September. The agency will then further refine the draft form into a final proposed version by next summer.

Mortgage Bankers Association President and CEO David Stevens said he found Warren's approach to the process "refreshing," and further stated, "The real issue will be the details in the regulations surrounding them. Do they get rid of the onerous aspects of tolerances? What do they do about the Yield Spread Premium? Those are two questions at least. It does appear that the process will be very open and collaborative, which is very 'un-government-like.'"

The goal of the Know Before You Owe project is to create a new combined form by next year which will allow consumers to answer: Can I afford this mortgage and can I get a better deal somewhere else?

Stevens characterized the forms as a step in the right direction, and said:

"Making mortgages easier to understand for prospective borrowers has been a long-term priority for the mortgage industry and we are pleased to see the initial prototypes take a step in that direction. One of the challenges this effort inevitably faces is trying to strike the right balance between simplification and providing as much information as possible to help borrowers make the most informed choices. Previous attempts at revising the forms have struggled with this paradox and this is going to be a focus of everyone involved in this effort."

Stevens said the CFPB staff has "obviously put a lot of thought into the new forms" and that the MBA looks forward to participating in the review and revision process alongside consumers.

"One of MBA's primary goals will be to make certain that not only do the new forms provide consumers with the information they need in a simple, clean way, but also that they can be implemented into lenders' operations and systems with a minimum of disruption," he said.

So just as conveyancers and lenders are coming to grips with the new GFE forms promulgated in 2010, it appears that the GFE form will be replaced with a new form combining it with a revised Truth in Lending Statement.

Joel Stein, of the Law Office of Joel A. Stein in Norwell, co-chairs REBA's Title Insurance and National Affairs Committee. He can be reached at jstein@steintitle.com.



## THE NEW REALITY

CONTINUED FROM PAGE 1

to receive a proposed agreement by email and immediately review and revise it and forward the redline version by email. We would receive further revisions from the other side almost instantly, and the process would proceed quickly to execution. We became accustomed to being in constant electronic communication with clients and counsel, and it was expected that we would respond immediately to an email. Now, we are still expected to respond immediately to an email, but we can wait a week or more staring at our computer screens waiting for a response from the other side's counsel. Some days it seems that our time would have been better spent skipping work and escaping to Fenway.

We have to rethink the way we practice. There is no way that we are going to turn back the hands of time and return to the days when a client had to schedule an appointment to see his/her lawyer for purposes of drafting a new deed, followed by a trip to the registry to find the old deed, and then a day or two to draft it in long hand, and finally a secretary would type the new deed. Now clients call and they want to stay on the phone to get an instant answer to questions like: "Is a deed in lieu of foreclosure treated the same as a foreclosure for purposes of Chapter 61A?" A friend told me about a client who sent over a 55-page commercial lease and instructed the attorney to spend no more than an hour reviewing it. The client had held on to the agreement to the last minute so that he could limit the billable time to one hour. There has got to be a happy medium someplace.

Is this the new reality? There are hundreds of theories on how business will change in the future. Time will prove that most of the theories are wrong.

Is this the new reality? There are hundreds of theories on how business will change in the future. Time will prove that most of the theories are wrong.

These things I do know: 1. Just as it is true that "They aren't making any more water front property" (except in Dubai), they aren't making any more real estate in Middlesex County, and prices will eventually increase; 2. So long as people continue to fall in love and form families, there will be a need for more housing; 3. There are still great opportunities for new growth in enterprises such as health care, energy and internet security; 4. Parents will continue to go off to work each day to make a better life for their kids; 5. Lawyers are a necessary and integral part of every real estate closing in Massachusetts; and 6. The world is not coming to an end. Hang in there.

REBA's president in 2008, Paul Alphen currently chairs the association's long-term planning committee. A frequent and welcome contributor to 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. Paul can be reached at paul@lawbas.com.

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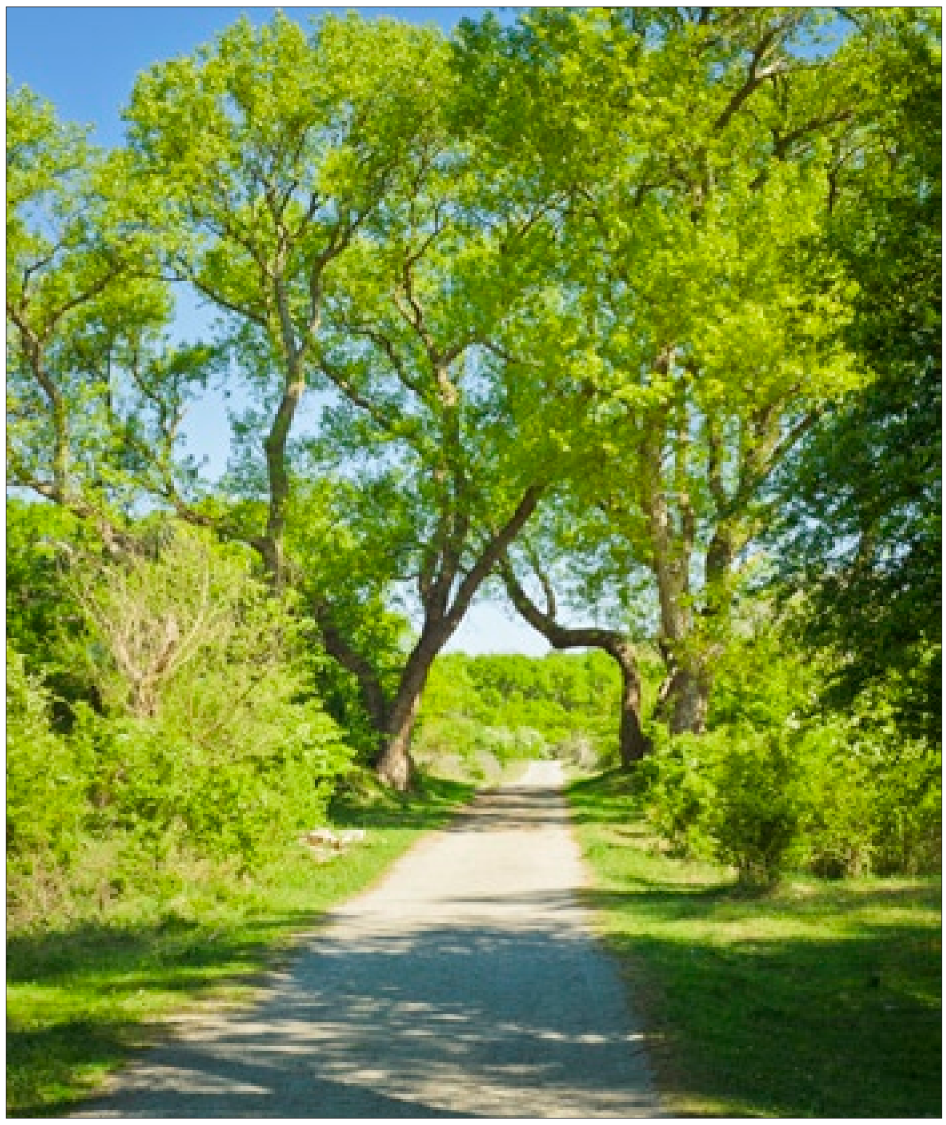
MUNICIPALITIES

# Will pending changes save the Community Preservation Act?

BY EDWARD J. SMITH



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In a recent news story in the *Cape Cod Times*, certain Cape Cod towns are seeking state legislative support to authorize new taxes on private vacation rentals and real estate sales in a continuing effort to increase municipal income. Home-rule petitions from Brewster, Eastham, Provincetown and Yarmouth would expand room occupancy taxes to vacation rentals, and a home-rule petition from Provincetown proposes a new 0.5 percent real estate transfer fee.

Ed Smith

Under state law, hotels, motels, lodging houses and larger bed-and-breakfasts assess room occupancy taxes with proceeds split between the state and the town. For some Cape towns, the proceeds of the current tax are said to amount to more than $1 million annually. Reportedly, the town of Brewster could gain $500,000 annually in revenue with the broadened occupancy tax. Eastham projects a similar increase in tax receipts from the same change in the occupancy tax. Provincetown voters have sent the Legislature two home-rule petitions: one to broaden the room occupancy tax, and the other to impose a real estate transfer fee on most buyers. The town says that the real estate transfer fee alone could bring at least $400,000 annually in new revenue.

It is no wonder that cities and towns want new revenue sources during difficult fiscal times. Balancing the state budget is the paramount issue on the agenda in the current term of the Massachusetts General Court. No one believes that even "level funding" of local aid will be enough to meet shortfalls that threaten municipal budgets across the state. Even if the aforementioned measures advocated by Cape Cod towns are approved – which remains in doubt – these types of proposals offer little or no hope for most other communities.

## NEW LEGISLATION

To support certain unmet municipal needs, a coalition of cities and towns and allied nonprofits has proposed amendments to the state's Community Preservation Act (Mass. G. L. c.44B), which was enacted by Chapter 267 of the Acts of 2000. The central purpose of the CPA was to provide dedicated funding for local historic preservation and the acquisition of open space and affordable housing. Under current law, participating cities and towns have to approve a surcharge on real property of not more than 3 percent of the real estate tax levy against real property in a town, with certain exceptions. Once adopted at the local level, a community can then access matching funds from the state through the CPA trust fund. The money in this trust fund comes from all CPA recording fee surcharges – generally $20 per instrument – that are collected at all registries of deeds.

When the CPA was first adopted in 2000, the state match was 100 percent. With 147 cities and towns now participating, and the severe decline in real estate transactions – and recording fees – the projected state match for October 2011 has been projected to be only 25 percent. The coalition's current legislation (S.1841, H.765) proposes two solutions to increase CPA funding: an annual adjustment by the commissioner of revenue to the CPA recording fee surcharge from $20 per instrument to a maximum of $50; and local options to include other revenue in the local CPA fund, i.e. hotel/motel excise taxes, local meals tax, linkage fees, tax title revenue, and other such funds. With the increase in recording fees, the coalition says that this new revenue would underwrite a guaranteed 75 percent state match of funds for participating communities.

REBA has not favored the dedication of recording fees, i.e. user fees, to non-registry purposes. When the CPA was passed in 2000, the seed money for CPA purposes through a small recording fee surcharge represented the best among several bad options. Perhaps the legislature felt that registry consumers might not complain about such charges on a HUD-1. However, when only a few towns adopted the CPA, the result was that the state matching money was benefiting only those few communities. As we suspected, the dramatic downturn in real estate transactions highlighted a somewhat dubious policy of relying on an unpredictable, indeed unstable, funding source for community preservation. Undaunted, for several years the Coalition for Community Preservation filed legislation to authorize a CPA surcharge of up to $70 per instrument, even while the voters in many towns were voting down local adoption of the CPA.

The tide started to turn when municipal revenues were further strained by other priorities and CPA proponents organized more effectively. In addition, the legislature passed amendments to the CPA to make it easier to use local revenue for popular local projects like preserving town archives or funding affordable housing trusts. Although 147 cities and towns

See COMMUNITY PRESERVATION ACT, page 10

## SCENES FROM THE CONFERENCE

**Chris Pitt of Robinson & Cole LLP, introduces proposed REBA forms for use with the new homestead law. Currently president elect, Pitt will lead the association in 2012. Chris can be reached by email at cpitt@rc.com.**

PHOTO BY PAUL CHINAPPI

## FILE RETENTION

CONTINUED FROM PAGE 3

Include in your retention policy a statement of when you consider an engagement closed (e.g., when the last bill is sent).

Give each new client a copy of your file retention policy. If there is a formal engagement letter (always a good idea), the file retention policy should be referenced in the engagement letter as a condition of the engagement, and a copy should be included with the letter. If there is no engagement letter, the file retention policy should be provided to the client at the outset of the engagement, either with some customary package of materials or by itself, with, again, a statement that it is a condition of the engagement.

Give each new client a copy of your file retention policy. If there is a formal engagement letter (always a good idea), the file retention policy should be referenced in the engagement letter as a condition of the engagement, and a copy should be included with the letter.

If, for some reason, notice of the file retention policy was omitted when the file was opened, it should be given at some later point before disposition of the file, bearing in mind that as time passes, it may become harder to find a good address for the client. Do so when the engagement is complete and the file closed, since at that point, you will almost always remain in touch with the client and can include your notice with the final bill or with the package of documents that frequently goes to a client at the end of an engagement.

At the point at which you are closing a file and consigning it to storage, it makes sense to review the file and dispose of duplicate and other superfluous materials that take up space unnecessarily, and to flag for later reference any items that might constitute "trust property," which must be retained indefinitely. When you actually decide to dispose of a file, all of the materials must be reviewed again to determine if the file contains trust property, and if it does, you should pull the trust property before the balance of the file is disposed of. In all cases, file materials should be disposed of in a manner that preserves client confidentiality, preferably by secure shredding or incineration.

John Ronayne is a partner in the real estate group at the Boston office of Robinson & Cole LLP, where he focuses primarily on commercial leasing. He is the co-chair of the REBA Leasing Committee. He can be reached via email at jronayne@rc.com.

## COMMUNITY PRESERVATION ACT

CONTINUED FROM PAGE 9

have now adopted the CPA, it has been less popular in cities, in part because they don't have open space to preserve, and because mayors have been reluctant to raise real estate taxes. A decision by the Supreme Judicial Court in *Seidman v. City of Newton*, 452 Mass 472 (2008) meant that communities could not use CPA funds to restore deteriorated parks and recreational fields, unless they were first acquired with CPA money. The coalition bill would address this limitation and allow the use of CPA funds for recreational uses on existing fields and parks. To make the CPA more attractive to cities, the new bill would permit local option on other funding sources, authorize the adoption of a commercial property tax exemption (similar to the residential one already in the statute), and allow broader use of funds to support community housing through homeowner assistance programs and the like.

Lead sponsors of the coalition legislation (S.1841, H.765) are Sen. Cynthia Stone Creem (D-Newton) and Rep. Stephen Kulik (D-Worthington). Cosponsors include 114 other legislators, representing 58 percent of the combined memberships of the House and Senate – an impressive total. The legislation has been recommended by the Joint Committee on Community Development and Small Business and is now before House Ways and Means.

A practicing real estate lawyer, Ed Smith has served as legislative counsel to the association for over 20 years. He can be reached at ejs@ejsmithrelaw.com.

NONPROFIT NEWS

# REBA teams with Boston Community Capital in SUN Initiative

REBA has teamed with Boston Community Capital (BCC) in BCC's Stabilizing Urban Neighborhood (SUN) Initiative, which is designed to stop the foreclosure-related displacement in Massachusetts and to prevent the neighborhood destabilization caused by vacant and abandoned properties. REBA members have volunteered their services *pro bono* for homeowners to purchase their foreclosed or pre-foreclosed properties.

BCC, a nonprofit community development financial institution, established the SUN Initiative in the fall of 2009 to address the foreclosure crisis in the neighborhoods hardest hit by foreclosures.

SUN buys occupied properties in foreclosure from the banks and mortgage companies through short sales or at auction. SUN then sells the homes back to their former owners or tenants, passing along 75 percent of the savings achieved through a discounted purchase price. The remaining 25 percent funds loan loss reserves that help secure the investments of SUN funders. Since its inception, SUN has been able to purchase distressed properties at an average discount of 53 percent off the original mortgage amounts, so SUN clients are able to significantly reduce their housing debt. On average, SUN clients' monthly housing expense is reduced from approximately $3,000 to about $1,700.

SUN financing is designed to meet the needs of low-income borrowers. All mortgages are 30-year, fixed rate, with no prepayment penalty. The payment plan requires automatic biweekly deduction of payments from the borrower's bank account. A reserve account is established to supplement a mortgage payment shortfall or needed improvements to the property approved by SUN. Bi-weekly payments translate, in effect, into 13 monthly payments, or an extra month's payment each year. At the end of each year, this additional payment is either used to pay down the principal balance or is deposited into the reserve account.

In order to avoid moral hazard, SUN strictly screens applicants and only assists homeowners who have had a loan-related, economic or personal hardship. SUN also includes a zero-percent, zero-amortizing, shared appreciation second mortgage, which limits return to the borrower to a share of eventual appreciation equal to the principal balance of the new mortgage, divided by the outstanding principal balance of the foreclosed mortgage. For example, if the homeowner's prior mortgage was $300,000, and BCC is able to purchase the property and resell it to the occupant for a purchase price of $150,000, BCC will place a shared appreciation second mortgage on the remaining $150,000, or 50 percent of the prior mortgage balance. In the event of resale, the homeowner will be entitled to 50 percent of appreciation over his or her BCC first mortgage. If the property sells for $250,000, the homeowner will repay BCC's $150,000 first mortgage, and will split the remaining $100,000 with BCC, 50-50. In the case of tenants, who had no prior mortgage or foreclosure, BCC does not include a shared appreciation second mortgage.

SUN works closely with a wide range of partners across the community, such as Greater Boston Legal Services, Harvard Legal Aid, City Life/Vida Urbana and HUD-approved foreclosure counseling agencies to accomplish its goal of helping homeowners stay in their homes. The support of REBA provides valuable representation to ensure the borrowers have a complete understanding of the mortgage transaction, which is vital to the success of the program. SUN has successfully purchased distressed properties from every major mortgage servicer and lender in the country and from most of the smaller mortgage companies. The program has bought properties from and has working relationships with Bank of America, Wells Fargo, Chase, FHA, Fannie Mae, Litton, GMAC, Ocwen, Saxon and many others.

The SUN Initiative provides working families and individuals facing eviction due to foreclosure with the opportunity to remain in their homes with mortgages they can afford. With REBA's partnership, BCC looks forward to expanding SUN to reach even more families in Massachusetts.

For information about BCC's SUN Initiative, please call (617) 933-5880 or go online at www.SunHomeHelp.org. To participate in REBA's *pro bono* partnership with BCC, contact Kathy Schreck at kschreck@auramortgage.com.

## REBA *PRO BONO* OPPORTUNITIES

**Here are the *pro bono* programs currently offered by REBA. Our goal is to establish *pro bono* opportunities for REBA members that are tailored to their skills, their resources, and their availability, while satisfying the SJC goal that every lawyer provide 25 hours of *pro bono* public assistance each year. For more information about the REBA *pro bono* programs, or to learn more about how you can volunteer your services, contact Andrea Hardy at hardy@reba.net.**

### Department of Neighborhood Development

The Association's Affordable Housing Committee teamed up with the City of Boston Department of Neighborhood Development (DND) to provide *pro bono* legal counsel to qualifying homeowners facing foreclosure. This program is available to homeowners whose income does not exceed 120 percent of the area mean income for the Boston area. DND will prescreen applicants and refer qualifying homeowners to REBA.

REBA has an immediate need for any lawyers willing to donate their time and a specific need for lawyers whose practice experience includes Federal Bankruptcy Court experience, particularly on Chapter 7 matters, lender renegotiation, TILA and/or RESPA issues. Multilingual lawyers are particularly welcomed.

### Boston Community Capital

REBA has teamed up with Boston Community Capital (BCC) in their Stabilizing Urban Neighborhoods Initiative (SUN), which provides support to families affected by the foreclosure crisis in Massachusetts. SUN is designed to stop the displacement of families before evictions occur and to prevent the neighborhood destabilization caused by vacant and abandoned properties.

We invite all REBA members to volunteer their services as a *pro bono* attorney for homeowners to purchase their foreclosed or pre-foreclosed properties. We anticipate receiving one-to-two case referrals per month. It is unlikely that any one REBA volunteer would handle more than one or two *pro bono* matters in the course of a year.

Visit www.bostoncommunitycapital.org for more information on the Stabilizing Urban Neighborhoods Initiative. Contact Kathy Schreck to volunteer at kschreck@auramortgage.com or (617)933-5876.

### Bankruptcy Court Volunteer Mediation

Members of the Real Estate Bar Association can volunteer to mediate borrower/lender residential foreclosure issues in the context of federal bankruptcy proceedings. The REBA/Bankruptcy Court foreclosure mediation project is a perfect opportunity for our lawyer members to use their real estate skills, on a *pro bono* basis, to help Massachusetts homeowners facing the loss of their homes.

Chief Judge Frank J. Bailey of the U.S. Bankruptcy Court for the District of Massachusetts welcomed REBA's volunteer effort, as so many individual bankruptcy cases involve mortgage-related disputes that would be better addressed by mediation than litigation.

### Department of Justice

The United States Attorney's Office Mortgage Fraud group has asked REBA members for *pro bono* support for tenants or property owners who have become unwittingly involved in mortgage fraud cases. These buyers and renters, innocent collateral victims of fraud, often learn that their property or condominium unit is subject to foreclosure with little or no advance notice.

The U.S. Attorneys' Office cannot give legal advice, and in any event, is not generally familiar with real estate law. REBA has agreed to provide independent representation to these individuals by assigning them a *pro bono* REBA member volunteer. We anticipate receiving one-to-two case referrals per month. It is unlikely that any one REBA volunteer would handle more than a single *pro bono* matter in the course of a year.

This program will provide our members with an opportunity to collaborate with the U.S. Attorneys' Office, while providing much needed legal assistance to mortgage fraud victims.