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REBA news
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Stewart Title advises agents on witness-only closings

BY DOUGLAS W. SALVESEN

In September, Stewart Title Guaranty Company sent a legal bulletin to all of its agents in across the country advising them that witness-only closings now constitute a *per se* violation of Massachusetts law.

The bulletin, drafted by Stewart Title's Legal Services Department, provides a succinct analysis of that portion of the Supreme Judicial Court's decision in *The Real Estate Bar Association of Massachusetts, Inc. v. National Real Estate Information Services,* 459 Mass. 512 (2011), in which the court held that only an attorney can effectuate a real estate transaction in Massachusetts. Quoting portions of the decision, the bulletin spells out for Stewart Title's agents the central role that attorneys must play in all conveyances,

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MORE PHOTOS ON PAGE 2.

Speakers Jennifer Maggiacomo and Michael Ring didn't disappoint with their presentation on Probate Real Estate & the New Code.

REBA's Annual Meeting & Conference launches a new venue!

With 650 attendees and a record-breaking ten breakout sessions, the 2011 REBA Annual Meeting & Conference was moved to the Best Western Royal Plaza Hotel in Marlborough, the largest Massachusetts hotel outside of Boston! REBA continues to offer valuable accredited continuing legal education and networking opportunities at their semi-annual conferences!

PHOTOS BY PAUL CHINAPPI

2011 REBA President, Edward M. Bloom accepting a gift from 2011 REBA President-Elect, Christopher S. Pitt

PRESIDENT'S MESSAGE

Interesting times? You bet!

BY EDWARD M. BLOOM

In my first president's message, I wrote about the challenge of "living in interesting times." As my year as presidency winds down, I realize that I didn't know the half of it. This term has been more than just interesting; it has been intellectually rewarding, personally satisfying, and legally historic.

Ed Bloom

- Only seven days into the new year, the SJC issued its *Ibanez* decision, causing grave upheaval in the financial markets. Rejecting REBA's suggestion in its amicus brief to apply Judge Keith Long's Land Court decision only prospectively, the SJC holding immediately created a serious title problem in Massachusetts with respect to the thousands of mortgage foreclosures that occurred prior to *Ibanez*. And the SJC *Bevilacqua* decision in October, on which many pinned their hopes of an amelioration of the harsh effect of *Ibanez*, clearly provided little relief or direction to the real estate bar and the real estate industry.
- In March, the culmination of REBA's six-year long goal to reform the Massachusetts homestead statute was achieved when the comprehensive revisions became effective. In light of the extensive changes to the ancient law, the bar needed guidance in understanding and operating under the modifications. In response,

See BLOOM, page 4

REBA elects 2012 officers and board members

Chris Pitt is president; Mike MacClary is 2012 president-elect

The Real Estate Bar Association elected new officers and members of the board of directors at the group's annual meeting in November. The new board members will assume their duties on Jan. 1, 2012.

In accordance with the association bylaws, 2011 president-elect Christopher S. Pitt will automatically take the group's helm in January. A lawyer with the Boston office of the New England regional firm of Robinson & Cole LLP, Pitt concentrates in commercial and residential real estate. He has served REBA as chair of the group's Title Standards Committee which promulgates title and practice standards that are the benchmark resource for Massachusetts Conveyancers. Pitt is a graduate of Williams College and Boston University Law School. He and his wife, Dottie, live in Milton. Away from the practice of law, Chris sings with the Oriana Consort, plays a weekly pickup game of ultimate Frisbee and has recently joined the Appalachian Mountain Club's White Mountain 4,000-Footer Club.

Voted in as 2012 president-elect, Michael D. MacClary is a partner at Burns & Levinson LLP. He concentrates his practice in commercial real estate, conveyancing and commercial leasing. He has specific knowledge of zoning and permitting issues, complex title maters and commercial loan documentation. For a number of years, he co-chaired REBA's continuing education committee before joining the executive committee as the association's treasurer. MacClary graduated from Wesleyan University with a bachelor's degree in 1993 and from Suffolk University School of Law, *cum laude,* in 1998. He serves on the board of directors of the Middlesex County Human Services Association. He lives in Lexington with his wife, and

See ELECTION, page 2

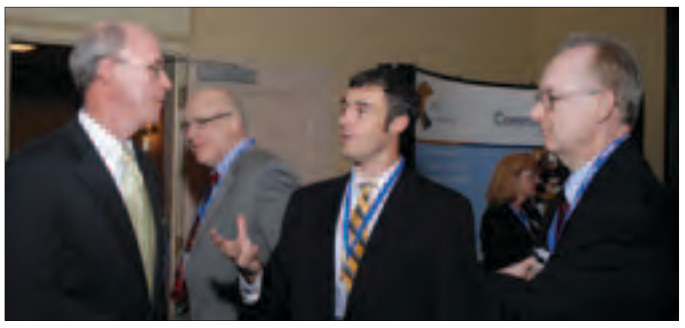
The Hon. Robert J. Cordy of the Massachusetts Supreme Judicial Court addresses the attendees during the 2011 REBA Annual Meeting & Conference at the Best Western Royal Plaza Hotel in Marlborough. Cordy was the event's keynote speaker.

PHOTOS BY PAUL CHINAPPI

2011 REBA President-Elect, Christopher S. Pitt.

Big spot for big event

650 attendees flock to 2011 Annual Meeting & Conference, held at Marlborough's Best Western Royal Plaza Hotel



2011 REBA President-Elect, Christopher S. Pitt; 2011 REBA Treasurer/2012 REBA President-Elect, Michael D. MacClary; and REBA Legislative Counsel, Edward J. Smith.

ELECTION: 2012 officers, board announced

CONTINUED FROM PAGE 1

two school-age children.

REBA's 2012 Treasurer will be Michelle T. Simons, longtime co-chair of the association's residential conveyancing committee and a founder of REBA's program of county regional affiliate bars. A partner in the Newton firm of Brecher, Wyner, Simons & Bolan LLP, she heads the firm's residential conveyancing practice group, representing lending institutions and mortgage companies as well as individual purchasers and sellers of real estate.

Longtime Essex County conveyancer Christopher L. Plunkett was elected clerk of the association, joining REBA's executive committee. In addition to real estate law, his practice includes estate planning, probate administration and representing small businesses. Plunkett is the founder and chair of REBA's regional affiliate group in Essex County, he and his family reside in Topsfield.

Chris Pitt

Mike MacClary

Michelle Simons

Chris Plunkett

Boston attorney Nancy Weissman was newly-elected to co-chair the REBA title standards committee with Richard Serkey.

New at-large members of the board include Marshfield lawyer Michael Brust, who practices with Stanton & Davis; Diane Rubin of Prince Lobel Glovsky & Tye LLP; and Vickie Donahue, a partner at Cain Hibbard Myers LLP in Pittsfield. Rubin also co-chairs REBA's condominium law and practice committee with Clive Martin, and Donahue co-chairs the commercial real estate finance committee with Wendy Fiscus.

STEWART TITLE: Bulletin on witness-only closings

CONTINUED FROM PAGE 1

including interpreting the legal status of property being conveyed and determining whether title to the property is marketable. The bulletin notes that the responsibility for both the actual transfer of title and the transfer of the mortgage loan proceeds must be given to the attorney. The bulletin concludes that witness-only closings clearly violate the law in Massachusetts. A copy of the Stewart Title bulletin can be found on REBA's website, www.reba.net.

While the illegality of witness-only closings in Massachusetts is not necessarily news to Massachusetts real estate conveyancers, it is to many lenders and real estate professionals outside the commonwealth, where customs and practices differ. Therefore, Stewart Title's push to educate its multi-state agents and stop these practices in the commonwealth is important.

The bulletin largely resulted from the efforts of Stephen R. Dinsmore, Stewart Title's Northern New England Agency Services district manager. Dinsmore, a strong supporter of REBA's campaign to eradicate the unauthorized practice of law from Massachusetts conveyances and protect the public good, has followed the ups and downs of the REBA case closely. When the SJC issued its decision in May rejecting witness-only closings, Dinsmore recognized its importance and forwarded a copy to Stewart Title's Legal Services Department.

Doug Salvesen

Dinsmore notes that Stewart Title recognizes that conveyancing practices vary significantly by region. Earlier this year, it had established the Northern New England District (Massachusetts, New Hampshire, Vermont and Maine), which Dinsmore manages. After reviewing the REBA decision, Stewart Title's National Office agreed that all of its agents should be advised of the decision to understand that simply using attorneys to oversee the settlements of real estate transactions was no longer enough.

Stewart Title's bulletin, and Dinsmore's role in bringing it about, was quickly applauded by REBA. "This is a major breakthrough for REBA and Massachusetts lawyers," said Bob Moriarty, co-chair of the association's Practice of Law by Non-Lawyers Committee. "A national title insurance underwriter has, for the first time, acknowledged our position on witness closings and the need for substantive participation by an attorney."

Co-chair of REBA's litigation committee, Doug Salvesen has served for 20 years as counsel to the association's Committee on the Practice of Law by Non-Lawyers. He is the architect of REBA's success in the recent SJC decision, *REBA vs. NREIS*. Doug can be contacted by email at dws@bizlit.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.

MENTORING STATEMENT
To promote the improvement of the practice of real estate law, the mentoring of fellow practitioners is the continuing professional responsibility of all REBA members. The officers, directors and committee members are available to respond to membership inquires relative to the Association's Title Standards, Practice Standards, Ethical Standards and Forms with the understanding that advice to Association members is not, of course, a legal option.

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COMMENTARY

REBA is hopping on the social networking bandwagon

BY PAUL F. ALPHEN


Paul Alphen

In the movie "The Social Network," the Mark Zuckerberg character frequently explained that much of the success behind the speedy growth of Facebook across college campuses was that Facebook was "cool," and he attempted to protect its coolness. Is Facebook still cool now that almost every business in the country has a Facebook page? General Mills, Honda, McDonald's, the U.S. Army, the corner pizza place, the 40th Reunion Committee for Wayland High … virtually everybody can become the virtual friend of everybody else. It's crazy. And, perhaps in time it will be replaced by something else, just like social networking sites that came before.

Meanwhile, REBA noticed that other bar associations were using social networking to keep their members up-to-date on the activities of the bar, and the younger and younger-thinking members of REBA were using social networking media to keep in touch and contact one another. Having read that 72-year-old U.S. Supreme Court Justice Stephen Breyer is on "the Facebook" and on "the Twitter," was the straw that broke the camel's back. So, we may be jumping on the bandwagon just before it drives off the cliff, but we are jumping on nevertheless.

We may be jumping on the social media bandwagon just before it drives off the cliff, but we are jumping on nevertheless.

The next time you visit the REBA website (www.reba.net) you will notice links to Facebook, the REBA Blog and LinkedIn. We are still in the developmental stages of our social networking sites, but here's the plan: The Facebook site will be used for posting news relevant to real estate and transactional practitioners as well as upcoming REBA seminars, committee meetings, events and special offers. Once fully operational, news and updates will be sent to your Facebook page. We plan to prevent comments from being posted from outside the organization to prevent the posting of inappropriate comments and to prevent parties from seeking legal advice through the site. When we set up our LinkedIn page, members will be able to connect and communicate with other members. A typical LinkedIn profile contains contact information and education and experience information of the user. It also provides users with a way to share important updates regarding their business activities or case law. Like Facebook, we will set up our LinkedIn page to control the content and prevent abuse.

Finally, REBA has a blog. You can find it at http://rebama.blogspot.com, or click the link on the REBA website. It may not be as entertaining as the Boston College sports blogs, and thus far the authors have not been as prolific, but as it develops and grows we hope that members will visit the site from time to time and post comments. The REBA office will monitor comments daily to minimize the potential for inappropriate comments (a constant concern as we enter the social networking arena). The blog authors have attempted to post information that will be of interest to some REBA members, and, in some cases, report on case decisions or regulatory information that may not be universally known. Sometimes the posts will pertain to practice horror stories, so that we can be reminded that we do not walk alone. If you like, you can subscribe to receive notice of new postings in one of your email accounts. I encourage you to take a look at the blog and post some comments; your comments will only ignite the intellectual fires of the authors and compel them to come up with more frequent and more interesting information to add to the site.

If you have been paying attention to my ruminations in these pages, you now want to remind me of all of the criticism that I have dished out aimed at electronic social networking over the years. Well, I still believe that nobody ever got smarter using Twitter, but I also agree with the saying attributed to Mark Twain (a version of which appears on the outside wall of one of the buildings at Suffolk University) that knowledge without experience makes us pharisaical. Perhaps by connecting online with our brothers and sisters in the bar we can share many more collective experiences more readily, and I would like to think we can do it by occasional, quick visits to our social networking sites, while waiting for a train, or during a commercial, or some otherwise lost time. Please do not linger at the Facebook site. Move along, please.

REBA's president in 2008, Paul Alphen currently chairs the association's long-term planning committee. A frequent 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.

BLOOM: That was the year that was

CONTINUED FROM PAGE 1

REBA's Title Committee created six new forms for immediate use and REBA's Spring Meeting in May provided an excellent education program to assist practitioners with the intricacies of the new Homestead Act.

- In April, REBA scored a huge win at the SJC in the *NREIS* decision when the court emphatically held that Massachusetts is an "attorney" state with respect to real estate closings and an attorney must be substantively involved in the closing or settlement of all real estate sales or mortgage transactions. The court's holding clearly abolished "witness and notary" closings, which REBA has opposed for many years.
- REBA also saw the disturbing tendency of some Registries of Deeds to reject certain documents for recording, based on the registry's "good-faith belief" that such a document may cloud the title, even though there is no legal basis for such a determination. This rejection, particularly with respect to so-called "robo-signed" instruments, caused an exchange, in August, of position papers between REBA and John O'Brien, the Register of Deeds for Essex South in Salem. While the matter remains unresolved, REBA's position was communicated to the Secretary of State, the Attorney General, the Land Court and the Association of Massachusetts Registers and Assistant Registers of Deeds. As of this date, none of the other 20 registry districts has followed O'Brien's practice of rejecting documents for recording using his personal standard of "subjective good faith belief."
- Throughout 2011, the foreclosure crisis has continued unabated and there have been many bills filed to address the problem, including bills calling for all future mortgage foreclosures to be judicial foreclosures, thus abolishing the Massachusetts practice of non-judicial power of sale foreclosures; bills requiring mandatory mediation of mortgage loans in default; and bills attempting to solve the title problems arising from *Ibanez* and *Bevilacqua.* At the very beginning of 2011, I created a President's Task Force on Mortgage Foreclosures to monitor these bills and advise the board of directors about them. REBA has been significantly involved in the public discussions surrounding these bills. The task force is currently creating a position for REBA to take on the foreclosure bill that the Massachusetts Bar Association's Foreclosure Task Force has proposed. We have also had meetings with the Attorney General's Office and the Land Court to discuss some of the proposed legislation.

Of particular interest is how often I have been approached by the media to comment on cases and proposed legislation that have been generated by the foreclosure morass. My take on this development is that REBA's visibility as a major player in the real estate industry has grown by quantum leaps and we have become the pre-eminent organization to approach for all legal matters involving real estate. The media's continued reference to REBA spokesmen in their various articles only enhances REBA's reputation.

It has occurred to me, in watching and commenting on the responses from the courts, state officials and certain members of the bar to the turmoil in the real estate market, that there is a parallel on-going dynamic with the response to the terrorist attack of Sept. 11, 2001. As a result of the tragic consequences on that date, the government enacted many laws, rules and regulations to protect the safety of Americans from future attacks. But thoughtful people have questioned how much of our constitutional safeguards were we willing to sacrifice in the name of our collective security.

Likewise, in an attempt to protect homeowners and punish the financial institutions that created the foreclosure crisis, how many basic legal principles, such as freedom of contract, black letter title rules and standard conveyancing practices, are we willing to overturn to achieve these goals? It is a question worth posing, because "all the king's horses and all the king's men" will not be able to restore these bedrock principles that govern real estate conveyancing, once they are destroyed.

Finally, I have been overwhelmed by the positive responses I received whenever I asked for assistance from any REBA member. As president, I represent the organization and, as such, my request to undertake a time-consuming task is a petition from REBA. But, while I would like to think that the always affirmative and generous consents were the result of my personality, I know that the responses were a sign of allegiance to the office I hold and the organization I represent.

I have enjoyed immensely my year in office, made so much easier by REBA's competent and professional staff, headed by Peter Wittenborg, and REBA's Board of Directors, consisting of some of the most capable and dedicated lawyers I have ever encountered. I have had to learn an entirely new set of skills that I didn't generally use in practicing law, such as dealing with the media; learning to moderate my language since I represent a varied group of people and not just myself; and public speaking and public writing that is very different from the lecturing I have done. It has been an honor to be president this year and I thank you for the experience. I think I'll even miss it.

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.

MARKETING FOR REAL ESTATE LAWYERS

Strong relationships breed success

BY DAVID M. DATZ

Before becoming an attorney, I was a personal trainer. Many of my clients worked in the real estate industry, which captured my curiosity and led to many conversations. Many of my most cherished relationships were nurtured from that experience, including the first real estate agent and loan officer with whom I ever worked. Even my accountant was my client and now I am his.

These people introduced me to clients and others from whom they knew that I would benefit by meeting.

That core group of referral sources, trusted advisors and mentors became what I now refer to as my "talent stars." They provide superior service, value and most importantly integrity. They are an experienced team of professionals who value relationships and consistently make me look and feel good.

These are the people on whom I depend, enjoy doing business with and trust with my own clients.

I met lending specialist Ann through a long-time client who was considering working with her to obtain financing for a condo that the client was contemplating buying.

I made the usual, "Will we be able to close the loan?" cold call and was informed that the lender had a small list of designated attorneys and we were not on it. I invited Ann to our office with the intention of winning her over. She won me over.

Take steps today to strengthen and build the relationships that you already have. The value of long-term working relationships are the core of all of our business successes.

Ann and I taught each other about our businesses. We introduced our teams. I know the unique loan products that her company offers and have found many clients who have benefited by her services. She knows who our target audience is and which of her clients could benefit by hiring us.

I introduced Ann to my talent stars. She reciprocated, and has become one.

I continue to work with the first loan officer, the first real estate agent, the first title insurance company, plot plan company, accountant and bookkeeper that I did business with since starting my practice almost 13 years ago.

Take steps today to strengthen and build the relationships that you already have. The value of long-term working relationships are the core of all of our business successes. Sharing long-term working relationships with new relationships insures everyone's success.

Here are a few ideas you can implement immediately to strengthen your relationships:

Make a list of all of the people who refer business to you.

Make a list of all of the people who you really enjoy doing business with and trust to provide the level of service and integrity that your own clients enjoy.

The people who show up on both lists are your talent stars. Let them know it. Take one of them out to lunch this week. Refer someone to them. If you can't refer a client to them, then refer them to someone from who they could benefit.

Make a list of clients who would not do a transaction without you. Send them a personal "thank-you" note thanking them for their business and continued support. All of these people are essential to your continued success and growth.

Do you need a great insurance agent? Let me introduce you to a friend of Ann's.

"Marketing for Real Estate Lawyers" will be a recurring column in REBA News.

David Datz is the founder of David Marshall Datz, P.C. where he practices Residential, Commercial Real Estate and Estate Planning Law. David is currently on the board of the association's Real Estate Conveyancing Committee. He can be reached at david@datzlawoffices.com.

New version of MassLandRecords site becomes default

BY RICHARD P. HOWE JR.

Early in July 2009, the new version of MassLandRecords, the website that hosts the digital land records of many of the commonwealth's registries of deeds, made its debut. Since then, customers visiting the site automatically reached the "classic" version with the option to click through to the new one. Not many did. Consequently, when the two versions changed places on Oct. 1, 2011, having the new version appear by default came as a shock to many users. Consequently, it is appropriate to share the story of how this change came about.

Dick Howe

In the summer of 2002, Middlesex North became the first registry of deeds in Massachusetts to install the ACS computer system. Other registries followed at regular intervals. MassLandRecords went online soon after that, hosted first by ACS and then by the Secretary of State's office. The initial reaction to the website was mixed. Customers appreciated the 24/7 access, but they also complained about the site's functionality. Why couldn't the website work more like the in-registry search application (called "20/20"), they asked.

One of the biggest differences between 20/20 and MassLandRecords was the way search results were returned. A search of "John Smith" on 20/20 would yield an alphabetized list of all instances of all variations of that name. You could scroll down through the entire set of results or, by clicking on the top of one of the columns, sort the data by document type, address, or any other variable. Clicking on a line of data made the corresponding document image fully visible in an adjoining window.

The new look of the MassLandRecords site.

On MassLandRecords, the same search yielded only a single entry for each variant of the name ("John A. Smith," then "John Smith Jr.," for example) with a number to the right indicating how many separate documents contained that particular variant of the name. Clicking on the "John A. Smith" line opened all of the entries containing that name. To view entries for John Smith Jr., you had to retrace your steps and do the same process over again. Expanding the entries to display additional data required more clicks and there was no ability to re-sort the results of a particular search.

On Jan. 25, 2007, the ACS Users Group (representatives of all registries of deeds in the commonwealth that use the ACS system) met in Worcester to recommend changes to MassLandRecords. After a series of meetings throughout 2007, the group requested that the website's functionality be made to mirror that of the 20/20 search system.

That was not the only change requested. Registry users can be divided into two categories: "real estate professionals" such as lawyers, paralegals, brokers, appraisers – people who deal with real estate for a living; and "casual users" such as a home owner looking for a copy of a deed, a genealogist researching the history of a residence, or anyone else who uses MassLandRecords once or occasionally. We found that many casual users apparently thought it necessary to enter something in every available field of the MassLandRecords search screen. Doing that, however, made the query too restrictive and often eliminated the very document the user was searching for. To cut down on this "over population" problem, the ACS Users Group recommended that MassLandRecords be divided into a "basic" section that minimized the number of query fields and an "advanced" section that would display all the traditional query fields for professional users.

In the spring of 2008, ACS made its initial demonstration of the "new" MassLandRecords. After a year of testing and modifications, the new version was made available to the public in the summer of 2009.

Despite having worked well in a test environment, a hard-to-diagnose conflict between the new application and the infrastructure it operated upon made the initial performance of MassLandRecords unacceptably slow. The speed of performance problem was quickly resolved, however, and the new version soon was working exactly as intended. The new MassLandRecords always remained live and available to the public, but the old version stayed as the default site with users having to opt into the new. That's how things stood on Oct. 1, 2011 when the two versions swapped places.

See MASSLANDRECORDS, page 11

ALTA review: The most common commercial endorsements

BY MELANIE E. KIDO

In 2006, ALTA rewrote its standard policy, resulting in the decertification of the 1992 policy and the introduction of a whole new set of policies for use in commercial transactions. The current policy in use is the 2006 form. This article gives a general overview of the most frequently requested commercial endorsements in local transactions and their purposes. With that being said, please note that there is no set "laundry list" of endorsements that "must be" issued in every commercial transaction. The lender should provide you with its list of required endorsements in its closing instructions.

Each title insurance company has its own set of underwriting requirements for the issuance of these endorsements and should be contacted for prior authorization before issuing any of the following endorsements.

The Access and Entry Endorsement (ALTA 17-06) insures legal access, both pedestrian and vehicular, to a named public street, that the street is physically open and maintained, and that the insured has a right to use existing curb cuts.

The Access by Easement Endorsement (ALTA 17.1-06) insures legal access, both pedestrian and vehicular, by means of an insured easement parcel to a named public street, that the street is physically open and publically maintained, and that the insured has a right to use existing curb cuts.

There is no set "laundry list" of endorsements that "must be" issued in every commercial transaction.

The Contiguity Endorsement (ALTA 19.1-06) insures that the lots described in Exhibit "A" constitute one contiguous parcel with no strips, gaps or gores.

The Doing Business Endorsement (ALTA 24-06) insures that enforceability of mortgage will not be denied for failure of Lender to qualify to do business in the state where land is located.

The Commercial Environmental Protection Lien Endorsement (ALTA 8.2-06) insures the priority of the lien of the insured mortgage over any environmental protection lien filed with the Clerk of the United States District Court for the district in which the land is located or recorded in the public records established under state statutes at date of policy for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without knowledge, except those liens set forth in Schedule B of the policy.

The Fairway Endorsement is the only endorsement to be addressed by this article which is not an ALTA form. By way of background, in the 1985 case of *Fairway Dev. Co. v. Title Ins. Co. of Minnesota*, 621 F.Supp. 120, 125 (N.D. Ohio 1985), the U.S. District Court of Ohio held that upon a change in the identity of the partners of a general partnership, the partnership dissolved and as a result, the owner's policy of title insurance was terminated. Hence, the "birth" of the Fairway Endorsement which insures that policy coverage shall not lapse by reason of the admission, withdrawal, or change in the percentage interest of a partner of a partnership or member of an LLC provided that the partnership or limited liability company has not been dissolved pursuant to state law. With the rewrite of the ALTA policies in 2006, the definition of "insured" was expanded to include "successor to an insured by dissolution, merger, consolidation, distribution or reorganization" or "successor to insured by conversion to another kind of entity". ALTA believed this was an adequate means to address the coverage provided by the Fairway Endorsement and thus, has no intentions of creating an ALTA equivalent to the Fairway Endorsement. Nonetheless, we are still frequently requested to issue the Fairway Endorsement as a result of the general sense in the marketplace that the definition of "insured" remains too overbroad.

The First Loss Endorsement (ALTA 20-06), which applies when insuring more than one parcel, insures that loss will immediately trigger the company's liability without first requiring the lender to accelerate the debt or pursue remedies against other collateral.

The Land Same as Survey Endorsement (ALTA 25-06) insures that the insured land as described in Exhibit A is the same as that shown on the survey.

The Restrictions, Encroachments & Minerals (f/k/a Comprehensive) Endorsement (ALTA 9-06 or 9.2-06) insures that: covenants, conditions and restrictions (CC&Rs) will not impair the lien of the mortgage; there are no violations of CC&Rs unless listed as exceptions; future violations of CC&Rs will not impair the mortgagee's lien or its title in case of foreclosure; future violations of CC&Rs will not result in forfeiture or reversion of owner's title; there are no encroachments onto or from adjoining land unless listed as exceptions; there will be no forced removal of any listed encroachment; and there will be no damage to improvements from exercise of listed easements.

The Tax Parcel Endorsement (ALTA 18-06 or 18.1.06) insures that the tax parcel containing the insured land contains no land other than that described in Exhibit A.

The Usury Endorsement (ALTA 27-06) insures that the lien of the mortgage will not be invalid or unenforceable by reason of a court determination that the loan secured thereby is usurious under M.G.L. ch. 271, §49 at the date of policy.

The Utility Access Endorsement (ALTA 17.2-06) insures against damages due to the loss of use of water, gas, electric,

See ALTA, page 11

SJC approves 10-citizen suit alleging MEPA violations

LUKE H. LEGERE

The Massachusetts Supreme Judicial Court (SJC) ruled in August that a group of 10 citizens challenging a project proposed in the Middlesex Fells Reservation have the right to a trial to determine whether the project's proponents (Fellsway Development, LLC) and the state Department of Conservation and Recreation (DCR) illegally segmented the project to avoid review under the Massachusetts Environmental Policy Act (MEPA).

The case is known as *Ten Persons of the Commonwealth v. Fellsway Development, LLC,* 460 Mass. 366 (2011). The SJC decision was eagerly awaited for an answer to the question whether and to what extent citizen groups have the right to sue a project proponent to challenge a MEPA decision from the Secretary of the Executive Office of Energy and Environmental Affairs (EOEEA).

The reservation is 2,575 acres of wooded parklands and historic parkways, controlled by the DCR. Fellsway purchased an approximately 40-acre private parcel within the reservation in 2000, which most recently had accommodated a hospital. Fellsway introduced several alternative proposals for the site, which has access off of a four-lane parkway running through the reservation.

Fellsway in 2000 submitted an environmental notification form under MEPA for its first proposal. The secretary determined that the redevelopment fell within the jurisdiction of MEPA (due to the state permits that it would require, including a permit from the DCR for road construction necessitated by the estimated 8,920 additional vehicle trips per day that the project would create). The secretary ordered the mandatory filing of an environmental impact report.

In 2005, Fellsway filed a notice of project change under MEPA. Although the project had changed, it would still require permits from the DCR to construct roadway alterations. The secretary ordered a supplemental final environmental impact report (SFEIR).

Fellsway pledged to pay $1.8 million into an escrow account to be used by the DCR, within three years, to undertake roadway improvements within the reservation. In exchange, the DCR would issue a declaration that the project required no permit or financial assistance from the DCR.

In 2007, Fellsway again revised the project to, among other things, eliminate all proposed alterations of the parkway. Fellsway argued, therefore, that it did not require any permits to proceed (because DCR regulations required a permit only for direct physical roadway alteration).

The DCR responded to the secretary that, regardless whether Fellsway needed a DCR permit, traffic mitigation construction on the parkway was necessary to prevent "public safety risks directly posed by development of the project." In other words, if Fellsway would not perform the road improvements itself, the DCR would be forced to do the work. The secretary concluded that the project still was within MEPA jurisdiction and mandated that the developers prepare an SFEIR.

Fellsway filed suit seeking a declaration that MEPA jurisdiction was not triggered by its latest project iteration. Ultimately, however, the DCR and Fellsway entered into a memorandum of understanding (MOU) to settle their differences.

Under the Fellsway-DCR MOU, Fellsway pledged to pay $1.8 million into an escrow account to be used by the DCR, within three years, to undertake roadway improvements within the reservation. In exchange, the DCR would issue a declaration that the project required no permit or financial assistance from the DCR.

The MOU was contingent on securing an advisory opinion from the EOEEA secretary that the project was not subject to MEPA jurisdiction. This the secretary issued.

Specifically, the secretary concluded that the project successfully avoided state permitting requirements or indirect financial subsidies, and was not subject to MEPA jurisdiction if Fellsway executed and performed under the MOU. The secretary decided that the DCR's roadway improvements would require review under MEPA, but that the MOU did not violate the anti-segmentation provisions of the MEPA regulations as Fellsway's project and the DCR's roadway improvements did not comprise a "common plan."

The citizen plaintiffs filed a complaint in the Superior Court to enjoin project construction and invalidate the secretary's advisory opinion. Their complaint alleged that the project would cause damage to the environment in violation of MEPA. It sought declaratory judgment and injunctive relief under the Citizen Suit Statute, G.L. c. 214, §7A. The Citizen Suit Statute confers standing on 10 Massachusetts citizens, and/or any municipality, to sue to enforce state and local laws intended to prevent damage to the environment.

The Superior Court dismissed the case for lack of subject matter jurisdiction and failure to state a claim upon which relief could be granted.

On appeal, the SJC decided that the citizens' case against the project proponent and the DCR had been improperly dismissed by the Superior Court. In this respect, the lower court was reversed and the case remanded for trial under the Citizen Suit Statute to enforce MEPA.

A key ruling is that the DCR remains as a defendant in the suit. The MOU, by which the DCR agreed to accept a private financial contribution in exchange for performing road improvements to mitigate the project's impacts, was enough to qualify the DCR as a project "proponent" under MEPA.

While ordering trial for alleged illegal "segmentation," the SJC decision does negate the plaintiffs' efforts to use the Citizen Suit Statute or Declaratory Judgment Statute to sue the secretary. In other words, the Superior Court properly had dismissed the claims against the secretary for lack of subject matter jurisdiction. Thus, as commonly understood for many years, it remains nearly impossible to challenge the secretary directly for a decision that a project does not require an environmental impact report.

For real estate practitioners, this decision means that clients proposing projects subject to MEPA review must proceed cautiously through the proper channels. Be extra careful whether, when and how to negotiate mitigation measures, their funding, and escape from MEPA. Attempting to avoid MEPA jurisdiction by paying a state agency to assume responsibility for a portion of a project, for instance, likely will leave both developer and state agency vulnerable to legal attack.

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COMMENTARY

REBA opposes House Bill 2766

Editor's Note: REBA's Legislative Counsel, Ed Smith, offered the following testimony before the Legislature's Joint Committee on Financial Services on Nov. 10, 2011.

Proposed House Bill No. 2766 would make three dramatic changes to existing Massachusetts law. The changes, if enacted, would impact the state of record title to real estate in a fundamentally negative way, causing additional uncertainty and unnecessary and wasteful litigation.

First, the bill reverses the existing presumptions regarding mortgage rescissions. Proposed House Bill No. 2766 requires a lender to file a lawsuit to defend against a borrower's notice of rescission; if the lender fails to defend its position in court within 120 days of receiving a borrower's rescission notice, the rescission is deemed valid, and simply by waiting another twenty days the borrower may void the mortgage and the underlying debt. The proposed change in law will not only create a tidal wave of lawsuits from lenders protecting their position – thereby taxing our already overburdened judicial system – but also encourage many cases which will be filed by borrowers seeking to quiet title after having purportedly rescinded the loan. It is highly likely that both sets of lawsuits brought on by this change will be contentious and costly. The bill, which also lowers the standard of review for claims brought under the Massachusetts Consumer Credit Cost Disclosure Act, is an unwarranted boon to those individuals who want to eliminate their mortgages without meeting their contractual obligations and an unwarranted burden on our court system.

Second, the bill makes fundamental unwelcome changes to the standards for recording certain documents pertaining to real estate. Proposed House Bill No. 2766 appears to provide that the failure to record a mortgage renders not only the mortgage, but also the underlying debt, invalid as to anyone not having personal knowledge of the transaction. The change serves no valid purpose and only enhances the likelihood that the debt itself will be the subject of a judicial challenge. The bill also provides that the only acceptable form of notary clause is the one promulgated by the governor under executive order; precludes the use of other forms that are acceptable in the state where the document is being executed; and most egregiously, requires that mortgage discharges, assignments and subordinations be executed under pains and penalties of perjury by an individual

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with personal knowledge and written authority to sign the document. Effectively speaking, this set of changes would ensure that the vast majority of mortgage-related documents will fail to meet recording standards in Massachusetts, and the issuance of proper discharge and assignment paperwork will be delayed unnecessarily. As a result, borrowers throughout the Commonwealth will find their property titles littered with undischarged mortgages requiring extensive follow-up with old creditors and potential litigation to fix the problem. The damage that will be caused as a result of these unnecessary changes in recording standards is enormous and completely avoidable.

Third, Proposed House Bill No. 2766 would require a mortgagee to be not only the holder of the mortgage but also the holder in due course of the underlying promissory note. This change has several negative effects. Most notably, it refers to off-record documentation to establish an entity's status as mortgagee, because promissory notes are not recorded with the county Registries of Deeds as are mortgages and mortgage assignments. The primary beneficiaries of this proposed change in the law are the self-styled "foreclosure defense attorneys," some of whom seek only to delay and hinder foreclosures that are contractually and factually defensible. Proposed House Bill No. 2766 would allow these attorneys to continue mounting challenges to foreclosures based solely on conjecture about documents that are not part of the record title. Rather than provide certainty and clarity, the change would extend the existing confusion in the housing market and delay its recovery.

In conclusion, Proposed House Bill No. 2766 would cause a proliferation of unnecessary litigation and create myriad new title problems. The bill ought not to pass, and the committee should issue an adverse report.

MASSLANDRECORDS

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In the immediate aftermath of the Oct. 1 switch, many users expressed frustration, even anger – a reaction that was not unexpected. During my tenure as register of deeds, the initial reaction of some percentage of our users to every technological change we have implemented has tended towards the negative. However, once users grow comfortable with the new way of doing things, the objections fade away and change is embraced. The best example of this is MassLandRecords itself. The primary reason we sought to change it in the first place was because of user discontent. Unfortunately, in the time it took to deploy the new version, those same users had grown comfortable with the system they initially disliked.

This is not to say that the new MassLandRecords is perfect, because it's not. There have been some issues with printing, particularly with the latest Apple operating system. There have also been credible reports of the system slowing during peak operating hours. As I write this, resolutions of both problems are said to be imminent with a software modification to address the printing problem and additional bandwith and server capacity to improve performance. As other issues arise, they will be dealth with promptly, as well.

Bearing a closer resemblance to the 20/20 system and simplifying the site for casual users were not the only objectives of the change in MassLandRecords. The new system is written in modern code that gives us more flexibility moving into the future. The new MassLandRecords will allow us to keep pace with not only technology, but with how we use technology. The old system was locked in time. It may have worked satisfactorily now, but its shelf life was rapidly coming to an end.

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.

ALTA

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telephone and sewer utilities presently servicing the insured premises by reason of the lack of an easement or other legal right to provide such utilities for the service of the insured premises.

The Zoning Endorsement (ALTA 3-06 or 3.1-06) insures district (vacant or improved land) and uses (vacant or improved land) and with respect to improved land only, also insures against removal or alteration of any structures because of violation of dimensional requirement of zoning ordinance.

Once again, prior to the issuance of any of these endorsements, you should contact your local underwriter for prior authority.

Melanie Kido is vice president and associate senior underwriting counsel for Stewart Title Guaranty Company in Boston. She can be contacted at mkido@stewart.com.


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