House approves funding for the CPA.
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New underground tank storage rules are coming.
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REBA news
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REBA files new lawsuit on the unauthorized practice of law

On April 27, REBA filed an action in Suffolk Superior Court against a non-lawyer settlement service provider, National Loan Closers, Inc., and a number of lawyers who continue to perform "witness only" closings in violation of *Real Estate Bar Ass'n for Massachusetts, Inc. v. National Real Estate Information Services*, 459 Mass. 512, 946 N.E.2d 665 (2011). The filing followed a unanimous vote of the REBA's board of directors.

"'Witness only' closings violate the letter and the spirit of laws prohibiting the unauthorized practice of law in Massachusetts, violate the Good Funds Law, place homebuyers and mortgage lenders at risk, erode the public's confidence in the commonwealth's recording and registration system, and deprive the Massachusetts IOLTA program of thousands of dollars of revenue," said Chris Pitt, REBA president.

"Although most lenders, title companies and title insurers now recognize that 'witness only' closings are not permitted in the commonwealth, there are still some who persist," said Tom Moriarty, co-chair of the Committee on the Practice of Law by Non-Lawyers. "There is no justification for these unlawful practices to continue and title insurers, title companies and the attorneys who participate in 'witness only' closings should stop."

For a copy of the complaint, visit REBA's website, reba.net.

COURT: LANDLORDS ASK TOO MUCH WITH AMENITY FEES

BY COLLEEN M. SULLIVAN

A recent federal court decision found that amenity use fees charged by landlords may be illegal, creating a significant new liability issue for owners of larger apartment complexes.

Under Massachusetts law, a landlord is entitled to charge first and last months rent, a security deposit, and a fee for changing locks before a new tenant moves in. But the law states that a landlord may not "require a tenant or prospective tenant to pay any amount in excess of," those fees, prior to the start of the lease.

Hermida v. Archstone is a recent case in federal district court and the first of its kind to deal with this particular issue. Tenants Maeve and Jefflee Hermida were soon-to-be residents of Unit 302 at 4 Archstone Circle in Reading, property owned and developed by national apartment operator Archstone. Prior to moving in, in addition to a prorated first month's rent, they were also charged an upfront fee of $475 to access the property's shared amenities – a pool, gym and an outdoor grill.

They argued that the $475 fee charged prior to the commencement of their lease wasn't explicitly permitted under the security deposit law that states any additional fees or penalties were prohibited. As a result, the amenity use fee wasn't legal, they said.

Judge William Young agreed, writing in his decisions, "Courts have held that the language of [the security deposit law] is unambiguous and strict

See AMENITY FEES, page 9

COMMENTARY

Tell us how you became a REBA member

BY PAUL F. ALPHEN

We would like to take this opportunity to welcome our readers to share their interesting stories of how and why they became members of REBA or the Massachusetts Conveyancers Association. We hope to receive enough stories to regularly include them in *REBA News*, to acquaint members with one another, to entertain and possibly inspire us to invite more new members to the association. My story is below, but I am sure there are better, and shorter, stories out there. We look forward to hearing from all of you.

Paul Alphen

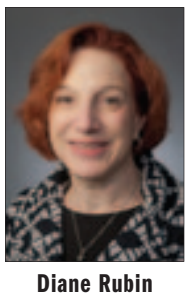
I spent 10 years working in state and local government while attending graduate school. I especially enjoyed my position as the town administrator in Westford, despite its residency requirement. While in law school, my desire to eventually qualify for a mortgage caused my professional goals to shift from federal law enforcement to private practice. As my godfather the judge told me: "You don't choose your practice area, your clients will choose it for you." Ultimately, to fulfill my primary career goal of not having to commute more than three miles, I jumped at the chance to join a Westford firm, which had a booming practice in real estate development and conveyancing. The partners were experienced conveyancers who were very diligent in their practices. They taught me about the six-day work week and the 16-hour work day. They taught me how to read country titles and how to take a pile of title exams home each night so I could read them through the 11 o'clock news. They taught me to maintain strong relationships with our title examiners, to respect Phil Nyman and similarly skilled members of the Lowell Bar, and to

See ALPHEN, page 9

Going smoke-free: A tale of two condos

A tale of two condos

Clive Martin



Diane Rubin

BY CLIVE D. MARTIN AND DIANE R. RUBIN

Within the last year our condominium clients, Millennium Place North High-Rise and Harbor Towers, both affluent high-end condominium communities in downtown Boston, have taken the unprecedented step of amending their governing documents to impose a building-wide no-smoking rule, not merely on the common areas, but in the individual units, too.

We thought a brief outline of the practical steps our clients took to reach this end would be useful to other practitioners with condominium clients.

See SMOKE-FREE, page 10

COMMENTARY

Affordable housing, at a price

BY SCOTT VAN VOORHIS

It's never a good time to throw millions of taxpayer dollars down the rat hole, but especially not now as state and city governments scramble to keep teachers in the classroom and police officers on the street.

But that is exactly what is happening in Worcester, the Bay State's perennial second city, where a slew of "affordable" housing projects are coming on line at the staggering cost of several hundred thousand dollars per unit.

It's a boondoggle, a train wreck or however else you want to phrase it – and it's being financed in part through millions in various federal and state subsidies, including tax credits aimed at preserving historic buildings.

Don't get me wrong – it's a worthy cause. But good intentions aside, there is no excuse for throwing precious public dollars away.

"Why should the federal and state government be spending money like this?" asked Worcester Auditor James DelSignore of the sky-high cost of building affordable apartments in the city. "It is ridiculous."

The redevelopment of the former Hadley furniture building in Worcester into affordable apartments left taxpayers with a huge bill and not much else.

FOOTING THE BILL

Taxpayers have footed the bill for more than $21 million in low-income housing tax credits across 10 different projects in Worcester over the past few years, aimed at working-poor renters who can afford only a few hundred dollars in rent each month.

State government has chipped in as well, shelling out another $5.2 million in historic tax credits on a pair of projects that featured rehabs of older buildings, including a 1920s-era furniture factory.

Given the brutal realities of our state's high-priced housing market, it's the kind of housing we need more of, not less. But the payback for all this public investment has been nothing short of abysmal, with just 240 units to show for it.

The most notorious example is the Hadley, a 45 unit affordable housing project carved out of the old Hadley-Burwick building on Main Street.

That project cost $543,000 per unit to build. The median price of a single-family home in Worcester last year was $155,000, according to information obtained from The Warren Group, publisher of *REBA News*.

And before declaring bankruptcy, the developer sucked in $12.5 million in low income federal tax credits and another $3 million in state historic preservation tax credits.

See AFFORDABLE, page 6

Avoiding Internet check scams

BY JAMES S. BOLAN

Scam One: Referrals via the Internet: You get an email from a lawyer asking you to take on a matter in your locale to collect a debt, pay a debt, arrange for a contract, deal with a lease issue – whatever! The reason given for the referring lawyer to make this referral varies – illness, not her area of practice, not a matter in his jurisdiction, etc. So, you do what everyone does – you look up the lawyer and see if he/she is a real person. He is.

Jim Bolan

You send a reply email saying you'd be glad to assist. You run a conflict check on the name of the prospective client and the "other company." They are real companies. Per your usual (and perhaps soon to be mandatory) protocol, you email out an hourly fee agreement for review and execution. It is signed and sent back with a retainer check. You write back a thank-you. The client, a [fill in the nationality] corporation sends to you a cashier's check (often drawn on Citibank) in glorious color, with an elegant cover letter indicating that it is an anticipated payment on an outstanding contract to be paid to the "other company" for [fill in the blank] services rendered. The client wants to go through a lawyer in case there are any issues to resolve and negotiate.

You deposit the check into IOLTA. You confirm on the bank's website that the funds are not on hold and are available. You then get an email from the client indicating that they would like you to wire out the money ($256,342.29, for example) in the name of the "other company." The check has cleared. You wire out the funds. Eight days later, your bank contacts you to say the check bounced. The account it was drawn on is no good. You are out $256,342.29, in someone else's money drawn on your IOLTA account.

There are several things you can do to prevent such a theft:

- Call the "referring" lawyer. His email account had been hacked; in the case I cite, it was impossible to figure out when. He didn't send that initial solicitation.
- Call the client, even if it is in Australia. They'd been hacked, as well.
- Call Citibank and ask them whether the account is valid. It won't be.
- Ask yourself, what are you doing for so little work? Why does someone need to hire a lawyer to channel money for a settled or about-to-be-settled matter?

Most of these scams involve a claim to assist in arranging for payment on a contract claim or a divorce payout. It just doesn't ring true if you think about it.

Scam Two: Theft by Smart Phone: At a real estate closing, the seller gets a proceeds check, leaves with it and a few minutes later comes back and asks if closing counsel would, instead of a check, wire the proceeds to the seller's account. The seller returns the proceeds check and closing counsel obliges and sends the wire. It turns out that the seller had used a "smart phone app" to deposit the check wirelessly to his account and then returned the now already negotiated check to closing counsel. Upon receipt of the wire, the seller was, cleverly, paid twice! Closing counsel now has to explain to everyone, bar counsel and insurers included, how a double payment was made, let alone try to recapture that excess amount.

It is not easy to prove such an action is attempted theft. You would need to call the bank and see if there has been a deposit and clearance against your IOLTA account, but attorneys often don't think of doing that. That is what a stop payment is the best course if you intend to reissue and wire out against an issued check. Merely taking the issued check back and voiding may not be enough.

The after-the-fact advice is:

- Never leave anyone alone with checks.
- Never reissue payment once it is made at a closing,
- If you do, stop payment first on the issued check if a wire will be used instead.

Any of these steps would have prevented these scams. Do not let either the frenetic pace of practice or a yen for convenience lure you into letting down your guard. Take the extra step and it will save you more than you can imagine.

Jim Bolan is a partner with the Newton law firm of Brecher, Wyner, Simons, Fox & Bolan, LLP, and represents and advises lawyers and law firms in ethics, bar discipline and malpractice matters. He can be reached at jbolan@legalpro.com.

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MISSION STATEMENT

To advance the practice of real estate law by creating and sponsoring professional standards, actively participating in the legislative process, creating educational programs and material, and demonstrating and promoting fair dealing and good fellowship among members of the real estate bar.

MENTORING STATEMENT

To promote the improvement of the practice of real estate law, the mentoring of fellow practitioners is the continuing professional responsibility of all REBA members. The officers, directors and committee members are available to respond to membership 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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A lifeline for the Community Preservation Act?

BY EDWARD J. SMITH

In April the Massachusetts House approved significant revisions to the state's Community Preservation Act, voting unanimously for an amendment to the fiscal 2013 state budget that would increase flexibility for cities and towns to raise and use CPA funds. Dedicating surplus revenue from the current fiscal year's budget also makes supporters hopeful of doubling state funding to cities and towns for community preservation.

The Community Preservation Act, i.e. Mass. G.L. c.44B, (the CPA) was first enacted in 2000. Its central purpose 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 must approve a surcharge on real property of not more than three percent of the real estate tax levy against real property in the municipality, with certain exceptions. Once adopted at the local level, a community can then access matching funds from the state through the CPA trust fund, which derives its funds from all CPA recording fee surcharges – generally $20 per instrument – collected at registries of deeds throughout the commonwealth.

DECLINE IN REGISTRY TRANSACTIONS

When the CPA was first adopted, the state match from the trust fund was 100 percent. With 148 cities and towns now participating, and the dramatic decline in real estate transactions – and recording fees – the state match for the current fiscal year had dropped to only about 22 percent. CPA supporters have eyed another state funding source, specifically to authorize the commissioner of revenue to approve annual increases in the CPA recording fee surcharges in order to increase the overall state matching funds.

Ed Smith

> The tide started to turn when municipal revenues were further strained by other priorities and CPA proponents organized more effectively.

REBA has not favored the dedication of recording fees, i.e. user fees, to non-registry purposes. When the CPA was passed, its seed money, through the 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 state matching money was benefiting only those few communities. As we suspected, the downturn in real estate transactions highlighted a somewhat dubious policy of relying on an unpredictable, indeed unstable, funding source for community preservation. For several years the Coalition for Community Preservation filed legislation to authorize a CPA surcharge of up to $70 per instrument, even while voters in many towns were voting down local adoption of the CPA.

CPA NOT POPULAR IN CITIES

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. While 148 cities and towns 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. Coalition legislation (S.1841, H.765) would address this limitation and allow the use of CPA funds for recreational uses on existing fields and parks. This legislation would permit local option on other funding sources and allow broader use of funds to support affordable housing.

This parallel legislation would cap the recording fee surcharge at $50. However, House leadership has not favored increases in either taxes or fees, despite the sponsorship of the coalition's bill by 116 legislators, representing 58 percent of the combined memberships of the House and Senate – an impressive total under most circumstances. Under the House budget amendment the state money, though not guaranteed, could potentially double the amount of state funding available by allocating up to $25 million in surplus revenue from the fiscal 2012 budget to the community preservation trust fund. Supporters of the amendment, sponsored by Ways and Means Committee Vice Chairman Rep. Stephen Kulik (D-Worthington), hope that it would make the CPA more attractive to cities and towns by expanding the acceptable uses for CPA funds, and by giving them more flexibility in how they raise funds.

MORE DISCRETION FOR MUNICIPALITIES

The revisions approved by the House would allow cities and towns to use CPA funding to rehabilitate existing parks, playgrounds and athletic fields, rather than only build new ones, and support community housing through homeowner assistance programs and the like. The new bill would permit local option for other funding sources, and authorize the adoption of a commercial and industrial property tax exemption on the first

See PRESERVATION ACT, page 8

Get ready for new state underground storage tank rules

BY ANI E. AJEMIAN

In accordance with federal regulations (per the Solid Waste Disposal Act, as amended by the Energy Policy Act of 2005), as of Aug. 8, 2012, facilities with underground storage tanks (USTs) will be required to have a Class A, B, and C operator on staff. To satisfy the federal regulation, on Feb. 3, 2012, the Massachusetts Department of Environmental Protection (MassDEP) developed emergency regulation 310 CMR 80.00, Underground Storage Tank (UST) Operator Training, which outlines the new requirements for owners and operators of USTs (as defined therein) in Massachusetts (the UST Regulations).

Under the new regulations, owners and operators of UST systems must train their Class A, B and C operators, or ensure that they are properly trained, in accordance with state and federal guidelines. A Class A operator may be the owner or operator of the facility, an employee, or a contractor and demonstrate a *general* knowledge and understanding of both the state and federal regulations. Class B operators also may be the owner or operator of the facility, an employee or a contractor, and must establish an *in-depth* knowledge and understanding of the state and federal regulations and the workings of UST systems in their care, including their operation and maintenance. The Class C operator, most likely trained by the Class A or B operator, will have specific knowledge of the UST system(s), emergency procedures, and how to respond to alarms.


Ani Ajemian

Most states are satisfied with operators completing a training program to comply with the applicable knowledge requirements, but for the Class A and B designation, the MassDEP approach takes certification a step further. In order to validate their training, Class A and B operators must also pass an online exam (and pay a fee). In part, this examination concerns the federal and state requirements for proper and safe operation of UST systems and emergency response techniques. The examination will also address, but is not limited to: tanks and piping; regulated substances stored; leak detection; spill prevention; overfill prevention; emergency response procedures; financial responsibility; registrations, licenses and permits; and UST testing requirements. Given that the obligation to ensure operators are properly trained is applied to the owners and operators of UST facilities, MassDEP expects that the new regulation will result in a saving of resources for the department. MassDEP instead will focus on administering the exam.

Certain exemptions do apply. For example, heating oil tanks and small tanks for emergency generators are exempt. Specifically, this carve-out applies to UST systems that: are part of certain stormwater or wastewater treatment systems; hold hazardous wastes listed under M.G.L. c. 21C (except those systems holding waste oil); contain *de minimus* concentrations of regulated substances; contain radioactive material; are part of an emergency generator system at a nuclear power generation facility; are comprised of consumptive use tanks (heating oil); are used for landfill leachate; consist of farm or residential tanks of 1,100 gallons or less used for the storage of motor fuel; are comprised of equipment or machinery that contain regulated substances for non-consumptive operational purposes (such as hydraulic lift tanks and electrical equipment tanks); are used as emergency spill or overflow containment UST systems; or hold a capacity of 110 gallons or less (often used for emergency generators). Owners should take care to review the UST Regulation exemptions carefully. If a UST system is deemed out of compliance, MassDEP may require the Class A or B operators to retake the exam.

There are certain noteworthy quirks in the UST Regulations. One person may serve as the Class A, B and C operator for a facility (so long as they obtain certification by the August 2012 deadline). In the alternative, each operator class can be assigned to different or even multiple individuals. One person can be designated operator for multiple facilities. Regarding Class C operators, the UST Regulations provide that they "shall be the owner or operator of the facility or an employee of the owner or operator." Finally, Class A and B operators certified outside the commonwealth are not entirely exempt; they must demonstrate they were trained in accordance with the UST Regulations and pass the Massachusetts-specific portion of the exam.

The UST Regulations were enacted as an emergency regulation in order to allow sufficient time to train operators and for Class A and B operators to sit for the exam. Following the August 2012 deadline, the regulated community should take note of any supplemental regulation enacted by MassDEP to revise or expand on the existing law.

Ani Ajemian is an associate in the real estate department of Sherin and Lodgen LLP. She focuses on environmental, real estate and land use law, and can be reached at aajamian@sherin.com.

Appurtenant easements: Has substance caught up with form?

BY DAVID C. UITTI

Until recently, Massachusetts law concerning appurtenant easements has been as predictable as death and taxes: They may not be altered, severed, or transferred separately from the parcel of land that enjoyed the benefit of the easement *unless permitted* by the written instrument that created the easement. This rule of law dates back well over a century to cases like *Philips v. Rhodes*, 48 Mass. 322 (1843) and *Brown v. Thissell*, 60 Mass. 254 (1850), and it has been followed time and time again, including in much more recent cases like *Schwartzman v. Schoening*, 41 Mass. App. Ct. 220 (1996), *Hamouda v. Harris*, 66 Mass. App. Ct. 22 (2006), and numerous Land Court decisions.

Massachusetts courts have historically enforced and looked to the strict form of the written instruments that created the appurtenant easements, and prohibited parties from taking unilateral actions with respect to appurtenant easements that are not expressly authorized by those written instruments.

Change may be in the air. In recent years, there have been some indications that a strict reliance on the precise form of the written instruments creating appurtenant easements may be giving way, at least somewhat, to a more liberal and expansive view that allows for unilateral action by one party to an easement with respect to relocation, and perhaps even severance and transfer of the appurtenant easement.

For example, in 2004, the Supreme Judicial Court issued its decision in *M.P.M. Builders, LLC v. Dwyer*, 442 Mass. 87. In that case, the court permitted the owner of a servient estate – i.e., the parcel of land burdened by an appurtenant right-of-way easement – to unilaterally change the location of the easement within the servient estate without the consent of the easement holder under certain conditions. The easement holder argued form and the age-old common law to the court, i.e., that once the location of an easement has been defined, it cannot be changed except by mutual agreement of the parties. The court, in finding in favor of the servient estate holder, adopted §4.8(3) of the Restatement (Third) of Property (Servitudes) (2000) which in relevant part provides that an easement may be unilaterally relocated by the servient estate holder, subject to certain conditions, "[u]nless *expressly denied* by the terms of an easement[.]" (Emphasis added). This is a subtle, but significant shift away from prior appellate cases that have set forth the common law standard of, albeit in somewhat different circumstances, looking to whether the written instruments that created the easement *expressly permit* the proposed alteration to the easement. See (ITALIC)*Schwartzman v. Schoening*, 41 Mass. App. Ct. 220, 224 (1996) and *McElligott v. Lukes*, 42 Mass. App. Ct. 61, 64 n.3 (1997).

In *M.P.M.*, the court reasoned that §4.8(3) would allow for the proper development of the servient estate, maximize the over-all property utility by increasing the servient estate's value, and minimize the cost associated with maintaining an easement while still preserving the purpose and benefit of the easement for the easement holder. The court concluded that "[r]egardless of what heretofore has been the common law, we conclude that §4.8(3) of the Restatement is a sensible development in the law and now adopt it as the law of the commonwealth."

See EASEMENTS, page 8

File retention policies, chapter three

BY HENRY J. DANE

Last July, we outlined the ethical considerations relating to the preservation and disposition of attorneys' files based on the Rules of Professional Conduct 1.15 (Trust Property) and 1.16 (Declining or Terminating Representation). In the March 2012 issue, I reviewed the steps necessary to dispose of files which you do not wish to retain. This final installment reviews some reasons that an attorney may wish to retain certain client files (or copies) even though the originals may have been returned to the client or have undergone authorized destruction.


Henry Dane

Here are some considerations with regard to the continuing retention of files (or copies):

Original documents with intrinsic value: You need to retain documents such as wills, trusts, deeds, executed agreements, releases, promissory notes and the like unless and until they are delivered to the client in a secure and documented manner with proper receipts or other evidence of delivery. Especially for documents in this category, regardless of delivery to the client, it is prudent to retain copies of the documents along with the receipts or other evidence of delivery. In Massachusetts, a copy of an executed will may be filed for probate.

Client service and continuing relationship with the client: A closed file or a closing binder is likely to be lost or thrown out by the client, who may call you years later when he needs a copy of the settlement statement or his neighbor claims that the swimming pool is on his property. I sometimes think that the most valuable service we provide to our clients is not legal skill, but our services as archivists and file clerks.

Use of materials in files as samples or templates: Old files are a useful source of reference because of recurring issues and the ability to recycle correspondence, documents and pleadings. It is hard to anticipate what documents may be needed in the future, but I frequently return to old files for documents and research memos.

Malpractice claims and ethical complaints: The need to address these issues affects even the most diligent attorney. It is very difficult to defend or protect yourself against complaints if only the opposing party has access to the file. Although the Massachusetts statute of limitations on malpractice claims is three years, because of the "discovery" rule, as a practical matter, in many situations (especially title issues), there is no real statute of limitations.

Problem solving and follow-up for mortgage lenders and title companies: Contacts with mortgage lenders and title insurance companies indicate (surprisingly) that they have no specific requirements with regard to file retention, nor are they willing to accept copies of closing documents other than the closing package (in the case of lenders) or a copy of the title policy (in the case of title insurance companies). However, in the event of a title claim or an undischarged mortgage (for example), the first thing that the title company asks for is a copy of the closing file, the payoff letter and a copy of the check or wire confirmation.

> Regardless of delivery to the client, it is prudent to retain copies of the documents along with the receipts or other evidence of delivery.

Mortgage fraud and compliance issues with federal requirements: A representative of the U.S. Attorney's office in Boston stated at the REBA spring conference last year that it would constitute obstruction of justice for an attorney to destroy documents once an attorney had knowledge that there may be an investigation in progress. It is hard to know what the U.S. Attorney's office may consider "knowledge" for these purposes. It was further indicated that records of mortgage transactions should be retained for at least five years with reference to possible prosecution and six years for IRS purposes. He said that the preference of his agency was that they be retained "preferably forever."

IRS record-keeping requirements: The minimum retention requirement of the IRS is three years, but where there is a potential issue relating to unreported income, the period is six years. If there is a possible claim with regard to a fraudulent return or failure to file, the period of retention is "not limited." (IRS Publications 552 (rev. 2011) and 583 (rev. 2007))

Other miscellaneous statutes of limitations: The limitations period on contracts is six years, the period on notes and contracts executed under seal is 20 years, and a mortgage does not become "obsolete" for 35 years.

Evidentiary issues: If your client may become involved in litigation over a transaction, you need to consider potential issues arising under the Best Evidence Rule in either retaining original documents or instructing your client with regard to original documents returned to him.

If you retain original records for all of the relevant periods referred to above, it is very likely that a) you will no longer be unable to locate your client to return his file or obtain his consent to destroy it; and b) your client will no longer have any interest in the matter. If you return the originals in a more timely manner, but retain copies, the copies, if on paper, will take up as much room as the originals and with a considerable labor cost.

Fortunately, in most cases, there is a practical solution: the creation of electronic copies, which will be the subject of our next installment.

A member of REBA's Ethics Committee, Henry Dane practices with the firm of Dane, Brady & Haydon LLP in Concord. He can be reached by email at hdane@danelaw.com.

The impact of 81 Spooner Road, Brookline

BY THEODORE C. REGNANTE AND PAUL J. HAVERTY

Ted Regnante

Paul Haverty

On April 8, 2005, the Brookline building commissioner issued a building permit allowing the construction of a single family house located on Spooner Road in Brookline, setting off a string of litigation resulting in two separate decisions of the Supreme Judicial Court, one decision of the Appeals Court, and multiple Land Court decisions addressing issues relating to standing, infectious invalidity and the propriety of floor area ratio (FAR) requirements. These decisions will likely be cited widely in coming years.

The saga of 81 Spooner Road began with the endorsement of an approval not required (ANR) plan by the Brookline Planning Board. The ANR endorsement divided the existing single lot containing 22,400 square feet of land into two lots, one containing 10,893 square feet (which included the existing house), and the other vacant lot containing 11,648 square feet, subsequently called 71 Spooner Road. As the lots complied with lot area requirements, and the proposed house on 71 Spooner Road complied with setback requirements, the Brookline building commissioner issued a building permit for the construction of a new house on 71 Spooner Road.

Unhappy abutters requested that the building commissioner revoke the permit, claiming that both the new structure at 71 Spooner Road and the existing structure at 81 Spooner Road did not comply with applicable FAR requirements. The building commissioner denied the request. The abutters appealed to the Brookline Board of Appeals, which overturned the building commissioner's decision regarding 71 Spooner Road, but not 81 Spooner Road. Both the developer and the abutters appealed to the Land Court.

In their appeal to the Land Court, the developer included a claim against the town of Brookline, pursuant to G. L. c. 240, § 14A, challenging the FAR requirement in the Brookline zoning bylaws, claiming that such provisions violated G. L. c. 40A, § 3, which prohibits the regulation of interior areas of single-family residential structures. The case was *81 Spooner Road, LLC v. Town of Brookline*, 452 Mass. 109, 110 (2008). After review of the legislative history of G. L. c. 40A, § 3, the SJC stated that "[w]e conclude that regulation of the bulk of a building by considering its internal area, as through the use of a floor-to-area ratio, is a generally recognized and accepted principle of zoning." The court went on to state that "[w]e further conclude that the Legislature was well aware of this principle when it treated 'size' and 'bulk' as discrete terms … and intended regulation by bulk to include consideration of internal area." This decision by the SJC allowing the use of FAR requirements for single-family houses thus protects one of the main tools used by municipalities to protect against mansionization.

Once the action brought pursuant to G. L. c. 240, §14A was resolved, the appeal brought pursuant to G. L. c. 40A, § 17 was litigated in the Land Court. The main issue for review by the Land Court was whether the endorsement of the ANR plan creating the lot at 71 Spooner Road resulted in a nonconformity to 81 Spooner Road, thus leaving 71 Spooner Road unbuildable due to the concept of "infectious invalidity." Upon review, the Land Court found that the abutters had standing to bring its appeal, that the abutters' appeal was timely, and that 71 Spooner Road was not a buildable lot based upon the concept of "infectious invalidity."

On appeal, the Appeals Court found that the abutters had standing to bring their claim in the case *81 Spooner Road, LLC v. Zoning Bd. of Appeals of Brookline* 78 Mass. App. Ct. 233, 242-243 (2010). The Appeals Court also reviewed the issue of the timeliness of the appeal brought by the abutters. The developer had claimed that the abutters had actual notice of the issuance of the building permit, and therefore should have filed an appeal within 30 days of the issuance of the building permit, pursuant to the holding of *Gallivan v. Zoning Bd. of Appeals of Wellesley*, 71 Mass. App. Ct. 850 (2008). The Appeals Court disagreed, finding that there was nothing within the record indicating that the abutters had actual notice of the issuance of the building permit, therefore they were within their rights to appeal the denial of their request for zoning enforcement pursuant to G. L. c. 40A, § 8. Finally, the Appeals Court also found that because the creation of the lot for 81 Spooner Road resulted in a nonconformity regarding the

FAR of the existing house at 81 Spooner Road, the lot located at 71 Spooner Road was rendered unbuildable due to the doctrine of infectious invalidity. As noted by the Appeals Court, a property owner "may not form a new building lot by dividing an existing conforming lot if as a result the latter is rendered nonconforming by such division." The developer then appealed the decision of the Appeals Court to the SJC, which granted further appellate review on the issue of standing. In the case *81 Spooner Road, LLC v. Zoning Bd. of Appeals of Brookline*, 461 Mass. 692 (2012), the SJC noted that the abutters were parties in interest entitled to a presumption of standing. The SJC stated that "[t]he crux of the present dispute is what evidence a defendant must produce, in the context of summary judgment, to rebut successfully the presumption of standing."

The abutter, relying upon the presumption of standing, provided no substantive evidence of harm beyond their own claim that they would be harmed by the increased density which would result if a violation of the FAR requirements were allowed. The developer presented no affirmative evidence that the abutters would not suffer harm as a result of the increased density, instead relying upon the deposition testimony of the abutters to attempt to overcome the presumption of standing. The SJC held that "the developer did not show, through such deposition testimony, that the [abutters] had no factual basis for their claim of harm, namely, the overcrowding of the 71 Spooner Road lot that negatively affected the density of the neighborhood."

The SJC went on to clarify when reliance upon deposition testimony alone was sufficient to overcome a presumption of standing, and when additional information is required. The HAC noted that "where plaintiff acknowledges during discovery a lack of substantive evidence to establish a legally cognizable injury, a defendant may rely on those admissions to rebut the plaintiff's presumption of standing, rather than presenting independent evidence that would warrant a finding of no aggrievement." However, the SJC found in this case that "the developer did not show, through such deposition testimony, that the [defendants] had no factual basis for their claim of harm, namely the overcrowding of the 71 Spooner Road lot that negatively affected the density of the neighborhood."

Thus, the SJC has made it clear that a simple allegation that a proposed development violates applicable density requirements is sufficient to uphold a challenge to the presumption of standing, absent the submittal of any affirmative evidence by the defendant to the contrary. This decision represents a significant clarification on the law standing as it relates to zoning appeals and is a clear signal to those persons challenging standing to include in the record independent expert testimony rebutting injury claims raised by abutting owners.

It is quite rare that a single, small development could produce significant case law on such a wide variety of issues.

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Affordable? Maybe not

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Touted as a lynchpin in Worcester's $1 billion downtown redevelopment when it was unveiled in 2006, today the Hadley is surrounded by empty storefronts, with a parking lot where promised condos and other new development was supposed to go.

It's such a disaster, in fact, that one city councilor recently seriously suggested the city would have been better off bulldozing the building and replacing it with a McDonald's.

INEFFICIENT SPENDING

Other Worcester housing developments have featured the same toxic combination of high costs and high public subsidies.

While it's hard to beat the Hadley's half-a-million-dollar-per-apartment price tag, the cost to build a half dozen other new subsidized housing projects in Worcester range from $299,000 to well over $400,000 per unit.

A local nonprofit converted a May Street factory into 46 units of low income rental housing, scooping up $2.9 million in federal tax credits and nearly another $2 million in state historic preservation tax credits.

Here again, the costs were staggering, weighing in at a $414,000 per unit.

These are the kinds of costs typically associated with building large suburban homes or even downtown luxury condos, not subsidized apartments.

And we are just talking about tax credits here. All these projects received millions more in low-cost financing from city and state agencies.

It's hard to argue against building affordable housing – after all we live in a state that consistently ranks near the top nationally in terms of home prices. Moreover, in a state that is as rich in history as Massachusetts, preserving historic buildings will always be a concern.

Artists envisioned the area around the redeveloped Hadley building in Worcester as a vibrant street scene. It is anything but.

But what about a little common sense when it comes to deciding where – and how – to invest our increasingly scarce public dollars?

Just think about the $542,000 per unit blown on Worcester's Hadley project.

There are surely more efficient housing developers, both public and private, who could have built ten apartments somewhere else for the cost of one at the Hadley.

Do the math. Instead of 45 units in a struggling project that has just added to downtown Worcester's problems, we could have had 450 low-cost apartments on a new site somewhere else.

Now what sounds like a better use of taxpayer dollars?

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Easements: Restrictions relaxing?

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In 2000, the American Law Institute published the Restatement (Third) of Property (Servitudes) which addresses, among other things, appurtenant easements. Section 5.6 provides the basic rule of law that "an appurtenant easement may not be severed and transferred separately from all or part of the benefited property," subject to some exceptions. Section 5.6(2) lays out some of these exceptions, which include permitting the unilateral severance and transfer of an appurtenant easement from the dominant estate "*[u]nless contrary* to the terms of the servitude" and unless the severance and transfer increases the burden on the servient estate. (Emphasis added). Once again, the Restatement shifts the analysis from whether the written instrument that created the easement *expressly permits* the action to whether the instrument *expressly prohibits* the action. The latter unquestionably allows for more maneuverability.

In 2009, the Land Court analyzed §5.6 in the context of parties to certain mill power appurtenant easements that had been severed and transferred to another dominant estate for a term of years by the parties' mutual agreement, but without a formal amendment of the written instruments that created the easements. *Pacific Mills Acquisition LLC v. Essex Company*, 2009 WL 1846310 (Piper, J.). Consistent with §5.6(2), which the Land Court stated was "controlling," the court focused much of its holding on its finding that the terms of the written instruments that created the appurtenant easements "did not prohibit" the severance and transfer. Once again, this appears to be a continuance of the subtle, yet significant, shift away from longstanding Massachusetts common law, and towards the more liberal view espoused by the Restatement (Third) in general. The Land Court, in dicta, also underscored §5.6(2) by going so far as to suggest that a severance and transfer of an appurtenant easement that did not increase the burden on the servient estate could be done unilaterally by the easement holder. To date, no other Massachusetts Court has followed or criticized §5.6(2).

What does this all mean? What we may be witnessing is a movement by the courts away from longstanding Massachusetts common law and the strict adherence to the form of the written instruments that created the appurtenant easements, to a more liberal and expansive view that allows for more unilateral action by only one party to an easement. Stay tuned.

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PRESERVATION ACT

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$100,000 of property value, similar to the current residential exemption.

In addition to a real estate tax surcharge of not less than one percent of the real estate tax levy, other revenue sources, if approved by a local legislative body, may include, but not be limited to, hotel excise taxes, linkage fee and inclusionary zoning payments, the sale of municipal property, parking fines, existing dedicated housing, open space and historic preservation funds, and gifts from private sources for community preservation purposes. Under the House-passed legislation total funds committed to CPA purposes from these sources may not exceed 3 percent of the real estate tax levy, less exemptions. Also by its terms, the total state contribution for each city and town may not exceed the actual amount raised by the city or town's surcharge on its real property levy, plus other allowable municipal sources.

Though state tax collections are running about $87 million below projections through March, and no additional state funds are guaranteed by the legislation, CPA advocates are hopeful that new funding from surplus revenue from fiscal year 2012 would be available for fiscal year 2013.

"In an improving economy, we're very hopeful there will be a significant amount of funding to do these projects," said Stuart Saginor, executive director of the Community Preservation Coalition.

"It's really a job creation bill and another form of local aid," said Robert Durand, a former House and Senate member and the author of the original Community Preservation Act. Saginor said that, after trying to get a bill through the House and Senate over the past three sessions, there is "tremendous excitement" among communities for the increased flexibility to raise and use CPA funds, and that the changes will make the program more attractive to the 203 municipalities that have not yet adopted the CPA.

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Amenity fees illegal?

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compliance is required." Even though the total amount Archstone charged, including the amenity fee, was less than it was legally allowed, because the law "prohibits the landlord form charging up-front any amount in addition to those enumerate provisions, Archstone … exceeded the charges allowed by the Security Deposit Statute."

TOLD YOU SO

As a practical matter, the ruling may merely require some administrative re-jiggering. The security deposit law says nothing about usage fees charged to a tenant after they begin a lease. Simply making sure to charge any usage fee after tenants move in rather than before ought to solve any problems raised by the ruling for future tenants.

But according to Matthew Lynch, a partner at Nixon Peabody's Boston law office, any landlord who doesn't make that switch right away could be in hot water. Until now, there's been no ruling on this specific issue, Lynch says, and in that case, courts are often inclined to be lenient.

But now that this case is out there, any judge reviewing a similar case may well "say 'you should have known,'" Lynch said, and that opens up a landlord to "treble damages and attorneys' fees."

Since it's mostly owners of larger buildings and complexes with common swimming pools, gyms and the like who charge such fees, that may well be enough to entice a plaintiff's attorney to attempt a class action suit involving multiple tenants.

"It's a case we're watching with interest," said Greg Vasil, CEO of the Greater Boston Real Estate Board. Given that the decision was made in federal court, it might still be possible for a Massachusetts state court to rule differently on the issue. Since the law in question is a Massachusetts state law, the Supreme Judicial Court would have the final word on the issue.

Attorneys for Archstone could not be reached for comment on whether they plan to appeal.

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ALPHEN

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call Lou Eno (also a Westford resident) if I had an especially complicated title issue. Within days of joining the firm, while memorizing the *Massachusetts Conveyancers Handbook* from cover to cover, I was told that I would become a member of the Massachusetts Conveyancers Association; the firm paid for my membership and attendance at the spring and fall meetings, and kept my binder of MCA standards, practices and forms up to date and organized. I never had a choice about joining the MCA.

It is too bad that every transactional attorney cannot attend REBA board meetings and experience first-hand the care that goes into running the association.

I have been happily paying my own dues for decades, and enjoying membership more and more each year. Becoming a member of the board of directors has significantly increased my appreciation of the association and its members. Eleven years ago I attended my first board of directors meeting. After the meeting, I called my wife, Nan, from the car and exclaimed: "The board members are all the well respected old guys [and women] who teach all the seminars at MCA and MCLE!" Nan replied, "Well, at least you're now an old guy."

It is too bad that every transactional attorney cannot attend REBA board meetings and experience first-hand the care that goes into running the association. I know that some members think that REBA could do more, and some think REBA tries to do too much; but it is not for lack of thoughtful consideration. As much as they would like, the Amicus Committee cannot submit briefs on behalf of all of those who submit requests; but when they do, they have done great work. It can also take years of committee work and board deliberations simply to craft a new title or ethical standard. Regardless of the topic, the board members try to do whatever it takes to improve the quality of the profession. Our efforts to prevent the unauthorized practice of law have, at times, become almost overwhelming. I feel certain that almost every board member has, at one time or another, contemplated the option of just packing it in and allowing the association to become a passive membership organization. But, as the topic is dissected and debated, it becomes clear that it would be a disservice to our members, and the profession, to stay on the sidelines.

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.

Millennium and Harbor Towers go smoke-free

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BACKGROUND: THE TWO CONDOMINIUMS

Millennium North High-Rise Condominium (Millennium) is a 132-unit high-rise luxury condominium in the north building of the Millennium Place Condominium on Avery Street, part of the Ritz-Carlton Boston Common complex. It shares the north building with another independent residential condominium, the North Low-Rise Condominium, which has 63 residential units. Both associations initiated smoke-free policies, making the entire north building at Millennium Place smoke-free in all 195 units and all common areas.

Harbor Towers has two condominium associations, each with 312 units on the waterfront in Boston. Following careful consideration and lengthy outreach to unit owners, both Harbor Towers associations voted to go tobacco smoke-free.

CURRENT SMOKERS: TO GRANDFATHER OR NOT TO GRANDFATHER?

The Millennium board put the in-unit smoking ban to a unit owners' vote. Unit owners chose *not* to give a grandfather option to current owners or renters who smoked, until owners sold their units or renters' tenancies ended. The board considered that a grandfather option would effectively vitiate the ban's purpose. Many owners complaining of second-hand smoke infiltrating their units from neighbors' units agreed.

The Millennium board also knew that it needed active and vocal supporters within the Millennium community to get a non-smoking amendment voted into effect. The aggrieved second-hand smoke-suffering owners had the biggest incentive to campaign in favor. The opposite was equally true – a vote that would grandfather present smokers until their lease ended or the unit sold might alienate the very group of people likely to be most active and motivated in promoting a smoking ban.

But at Harbor Towers, the boards decided to implement a grandfather clause in the new smoke-free environment, prohibiting smoking for all persons who became residents or occupants of Harbor Towers subsequent to the date of the amendment. In part, the boards acted out of a sense of fairness to existing unit owners and tenants. They also wanted to avoid conflicts and litigation that would surely arise if they sought to enforce the smoking ban against existing unit owners and tenants. Lastly, they wanted to avoid a direct challenge to the legality of going smoke free without a transition period.

THE LANGUAGE OF THE BANS

Millennium used the following language in its by-laws amendment vote:

> The managers hereby amend, add to and change said by-laws by the insertion of the following new Article IXA after Article IX thereof:
>
> *Smoke-Free Policy.* Effective September 1, 2011 there shall be no smoking anywhere on the Premises of the Millennium Place North High-Rise Residential Unit, including without limitation the Units thereof, the Common Elements and Limited common Elements thereof, and any General Common Element and Limited Common Elements of the Primary Condominium located at 1-3 Avery Street.
>
> *Smoking Defined.* Smoking shall be defined for the purpose of this Article as the carrying or possessing of any lighted cigarette, cigar, pipe or other tobacco or non-tobacco product which is designed to be combusted and inhaled.
>
> Under the association's bylaws, violations of the no-smoking ban, like any condominium document violation, can be fined, with the fines constituting common charges on the unit; and if the violations continue the board has the right to enjoin, abate or remedy the violation by appropriate legal proceeding, the expenses of which become a common charge against the unit.
>
> Harbor Towers' amendment to its by-laws and master deed is as follows:
>
> a. The smoking of tobacco or tobacco products is prohibited: (A) at all times in all those Common Elements of the Condominium that are within the Building; (B) from time to time in those Common Elements that are outside the Building and are designated by the Trustees as smoke free areas; and (C) at all times within each Unit, and on any balcony adjacent thereto to which there is direct access from such Unit, by all persons who become residents or occupants thereof subsequent to the date hereof, and by their invitees.
>
> b. Each lease executed, and each informational package provided to any potential purchaser of a Unit, after the date hereof shall contain in bold print notice of the foregoing. The following language shall be sufficient for such purpose:
>
> THE SMOKING OF TOBACCO OR TOBACCO PRODUCTS IN THE COMMON ELEMENTS OF THE BUILDING, SUCH COMMON AREAS OUTSIDE THE BUILDING AS THE TRUSTEES FROM TIME TO TIME DESIGNATE AS SMOKE FREE AREAS, AND IN EVERY UNIT (INCLUDING ON ANY BALCONY ADJACENT THERETO TO WHICH THERE IS DIRECT ACCESS FROM SUCH UNIT) BY ANY PERSON WHO BECOMES A RESIDENT OR OCCUPANT THEREOF, INCLUDING HIS OR HER INVITEES, AFTER MARCH 20, 2012, IS PROHIBITED BY SECTION 10E OF THE MASTER DEED AND SECTION 5.11E OF THE DECLARATION OF TRUST OF THIS CONDOMINIUM. VIOLATION OF THIS PROHIBITION WILL BE SUBJECT TO SEVERE SANCTIONS AS THE TRUSTEES MAY DEEM APPROPRIATE IN THEIR DISCRETION.
>
> c. The Trustees shall have the power to enforce the foregoing by fines or otherwise, as they in their reasonable discretion shall deem appropriate.

PRACTICAL STEPS

Education – A nonbinding poll is the easiest mechanism for a board to establish the strength of feeling in the building, and the likely support for various approaches to the smoke-free initiative: a ban on renters smoking, a grandfather clause allowing current smokers to smoke until sale of the unit, or a full-scale building-wide ban. At Harbor Towers, two previous attempts to go smoke free without grandfathering failed to garner sufficient votes to amend the master deed and by-laws, but they raised awareness and paved the way for the third and successful vote.

The biggest source of smoking activity at Millennium, and the focus of most complaints, were most often young people, and/or from parts of the world where smoking carries no social restrictions or stigma.

Grandfathering – As already mentioned, a grandfather clause allowing current owners or renters to continue smoking may create a loophole in the smoke-free policy that renders it useless to protect residents currently suffering from second-hand smoke. On the other hand, an amendment that doesn't include a grandfather clause may doom it to defeat and may create immediate headaches, conflict and litigation because existing unit owners and tenants are unlikely to stop smoking and "kick the habit" simply because of a condominium by-law amendment. In the end, the decision must depend on local conditions.

A ban on renter smoking only may not be entirely effective – The biggest source of smoking activity at Millennium, and the focus of most complaints, were most often young people, and/or from parts of the world where smoking carries no social restrictions or stigma. Long before the board contemplated a building-wide smoking prohibition, it had banned smoking in rental units by means of the following implementation protocol:

> In order to ensure that each Unit Owner is able to use and enjoy his or her Unit in a manner that does not adversely affect other Unit Owners' use and enjoyment, as required by Section 8G of the Master Deed of the North-High Rise Residential Condominium dated July 17, 2001 and recorded with the Suffolk County Registry of Deeds in Book 26689, page 001 ("the Master Deed"), smoking in Rental Units is subject to the following rules to be monitored by the Ritz-Carlton Director of Residences (DOR).
>
> - Effective Sept. 1, 2010, upon the commencement of each new lease term (including the renewal of an existing lease term), smoking shall be prohibited in all Rental Units. All new lease agreement for any Rental Unit shall include language expressly prohibiting smoking in the Rental Unit.
> - For purposes of the foregoing Implementation Protocols, "Rental Unit" shall mean a Unit rented or leased by the Unit Owner pursuant to Section 8B of the Master Deed.
> - In addition to the rights reserved to the Board of Managers of pursuant to Section 14.2 of the By-Laws of the Association, the Board shall have the power to levy a fine of $100.00, charged to the Unit Owner, for every complaint or notice that a tenant is in violation of the provisions of this Implementation Protocol.

In practice, it soon became apparent that many in the target demographic were simply willing to pay the fines for smoking as and when the fines were levied upon the unit owners. Certain leases contained clauses to the effect that tenants would have to pay fines levied on the unit as a result of tenant behavior. Moreover, although the board informed all leasing agents and brokers of the rental unit smoking restriction, the experience was that either the agent or the prospective tenant did not take it seriously.

At Millennium, one investor owner claimed that the rental smoking ban was an interference with her property rights and that it restricted her rental market. She had a five-year lease with a tenant who smoked incessantly, refused to quit, and was the subject of many complaints regarding second-hand smoke. The lease called for the tenant to pay any fines assessed on the unit. The tenant simply paid smoking fines that ultimately became quite substantial. This owner's argument was that when she bought the unit and leased it to her tenant, there was no rental smoking ban, and the ban and repeated fines was an interference with her beneficial contractual relationship with her tenant. The board was prepared to bring a lawsuit involving a common law nuisance claim as well as a claim that the smoking activity in the unit violated the bylaws, since it adversely affected other residents' use and enjoyment of their units. Fortunately, the owner and the tenant agreed to terminate the lease early and without penalty, after which the owner found a new non-smoking tenant, averting the expected lawsuit.

In contrast, one of the benefits of a grandfathering approach such as Harbor Towers' is that as rental units turn over, the units will smoothly transition to smoke-free units without enforcement challenges. Realtors must be educated about the new smoke-free amendments. Most rental activity is conducted through leasing agents, who may or may not emphasize the restriction when they describe or show the units; and since some of their leasing work is done with intermediaries of the prospective tenant, the existence and credibility of the ban may simply not register with the actual unit resident. The lesson: Make all brokers and leasing agents in your area aware of the restriction, and tell them your board takes violations seriously.

The process needs a committed board and an effective committee – A smoke-free campaign cannot be haphazard or half-hearted. Education and outreach are the keys to success. Unit owners will appreciate the health and financial benefits of going smoke free once they become informed, particularly by studies that indicate sale and rental prices increase for smoke-free housing. The proponents need to mobilize and actively spread the word. The Millennium board formed a steering committee which appointed floor captains to lobby for votes by knocking on doors, speaking with neighbors, and contacting absentee owners.

Likewise, at Harbor Towers, the boards made personal contact with unit owners, convened informational meetings and created space on the condominium website for a dialogue among unit owners. These efforts raised awareness of the vote and provided answers to frequently asked questions.

GIVE A LONG LEAD-TIME BEFORE THE VOTE

Under *Johnson v Keith*, 368 Mass. 316 (1975) and the cases following regarding the effectiveness of condominium use amendments, a smoking ban implemented after the recording of the condominium's original governing documents has to be effectuated by an amendment to the master deed and/or declaration of trust or by-laws. Millennium required a unit owner vote and a 67 percent majority. Harbor Towers required a 75 percent vote of the beneficial interest in each tower.

To get such voter turnout from a usually non-responsive population, set the vote date several months in the future. Voting can be done by mail or email to encourage participation of absentee owners, as long as it is consistent with the condominium documents.

THE PUSHBACK

You're reducing the value of my property – Some owners claim that a smoke-free building reduces their investment's value, making the unit harder to sell or rent. Sound data to the contrary indicates that a smoke-free building *increases* the value of individual units. The Public Health Advocacy Institute at Northeastern University is a source of helpful statistics and information on this score. At Millennium and Harbor Towers, we had Chris Banthin, the director of the institute, present his data to the unit owners. If your condominium is contemplating a smoke-free vote, you should be prepared to counter fears of those who think it will negatively impact values. In the final analysis, it's probably a matter of location and demographics – which in the case of our clients in downtown Boston, favored the argument that smoke-free raises values.

The building's HVAC doesn't work – Second-hand smoke has many ways to travel around a building. Smokers often claim that the condominium's heating and ventilation systems are faulty, or its air circulation not balanced, or its pipes, ducts and window cavities unsealed. But it's not at all clear that in converted buildings, or even in new construction, engineering fixes can cure the smoke transmission problem or offer a complete fix to the annoyance caused by second-hand smoke. The only definitive way of ending the problem of an asthma sufferer or cancer survivor being bothered by a neighbor's smoke, or of stopping smoke from a neighboring unit infiltrating into a child's adjacent bedroom, is by imposing a smoke-free rule on the entire building.

Air cleaners and filters – In our experience, air cleaners are rarely if ever successful in eliminating the problem of second-hand smoke infiltrating into neighboring units.

Smoking on the balcony – At Millennium, the balconies are limited common areas, which are made non-smoking in the original master deed and by-laws. Harbor Towers also prohibits balcony smoking. Balcony smoking does not alleviate a smoking problem, as the smoke drifts into other units through balcony doors.

I hate smoking, but I won't dictate what someone can or can't do in their own home. – This Libertarian reaction to a smoke-free vote is often widespread. Even non-smokers may vote against a condominium smoking ban because they are averse to restricting other individuals' rights within their own homes. We believe that such rights must give way to neighbors' rights not to encounter adverse health impacts. Grandfathering does not impact existing unit owners and renters, and all new unit owners and tenants *choose* to live in a smoke-free condominium.

The Appeals Court recently stated in *Old Colony Village v. Preu*, 80 Mass App Ct 728 (2011) that it recognizes the importance of balancing the needs of condo owners and the rights of individual unit owners. We think that the balance tips, and an individual owner's rights must give way, when the exercise of those rights adversely affects a neighbor's health.

ENFORCEMENT: IT AIN'T OVER TILL IT'S OVER

Even after the amendment is voted on, passed, recorded and publicized throughout the building, there are *still* those who continue to smoke. At Millennium, the repeat offenders are usually male, young, affluent and from a part of the world where no stigma is attached to smoking.

Faced with persistent non-compliance with the smoking ban by a minority of unit owners or renters, and with no lessening in the volume of complaints from residents suffering the effects of this minority's second-hand smoke in their units, Millennium had no option but to sue these offenders in Suffolk Superior Court and seek injunction against them individually. The court granted a preliminary injunction, which has been served on the defendants. So far, it appears there is compliance with the injunction. So, for the first time in its 10-year history, the north building at Millennium Place is currently wholly, completely and truly smoke-free.

Clive Martin, Robinson & Cole LLP, and Diane Rubin, Prince Lobel & Tye LLP, are the co-chairs of REBA's Condominium Law and Practice Committee. Clive can be reached at cmartin@rc.com and Diane can be reached at drubin@princelobel.com.

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