Judge Cutler to speak at Land Use meeting
PAGE 2

Columnist Paul Alphen says Boston's future is looking brighter.
PAGE 3

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REBA news
THE NEWSPAPER OF THE REAL ESTATE BAR ASSOCIATION
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ALTA counsel offers insider's view of CFPB at Annual Meeting & Conference

STEVE GOTTHEIM

Steve Gottheim, regulatory and legislative counsel for American Land Title Association (ALTA), will deliver the luncheon keynote address at REBA's all-day Annual Meeting & Conference on Monday, Oct. 29, 2012, at the Best Western Royal Plaza Hotel in Marlborough.

ALTA is the trade association and national voice of the abstract and title insurance industry. As ALTA's regulatory point person in Washington, Steve has been involved in crafting the proposed rule and disclosures recently issued by the Consumer Financial Protection Bureau for comment. Steve will offer a detailed insider's view of the political process leading up to the promulgation of the 1,200-page draft rule.

Steve is a graduate of the University of Maryland – College Park and the University of Maryland Law School. He was a Capitol Hill staffer working as a legal fellow for the Senate Banking Committee during passage of the Emergency Economic Stabilization Act of 2008. In his spare time his interests include cooking, tennis and his beloved New York Mets.

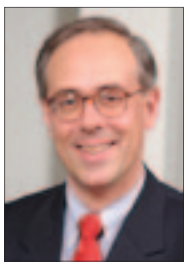
For more information about the REBA Annual Meeting & Conference, turn to page 6.

To register for REBA's Annual Meeting & Conference, go to www.reba.net.

Economic Development Act of 2012

Highlights for land use, environmental, municipal and development attorneys

BY GREG D. PETERSON



GREG PETERSON

On Aug. 7, 2012, Gov. Deval Patrick signed into law the Economic Development Act, Chapter 238 of the Acts of 2012. The act expands and extends a number of existing programs to support infrastructure development and enhance competitiveness, provides new funding and adds new programs supporting economic development.

EXPANDING AND EXTENDING THE PERMIT EXTENSION ACT

Under the act, applicable permits have been expanded to include any permit in effect at any time between Aug. 15, 2008, and Aug. 15, 2012 (a two-year expansion of the scope of permits affected). The period of time for which applicable permits are extended has been increased from two years to four years.

This impacts not only state permits (wetlands order of conditions and groundwater discharge permits) but also local permits (special permits and local wetlands orders of conditions) and regional permits. In essence, virtually any property development permit is within the scope of the Permit Extension Act (40B Comprehensive Permits are the notable exception).

The Executive Office of Housing and Economic Development (EOHED) has updated its Permit Extension Act FAQ website to reflect the new law.

See EDA, page 8

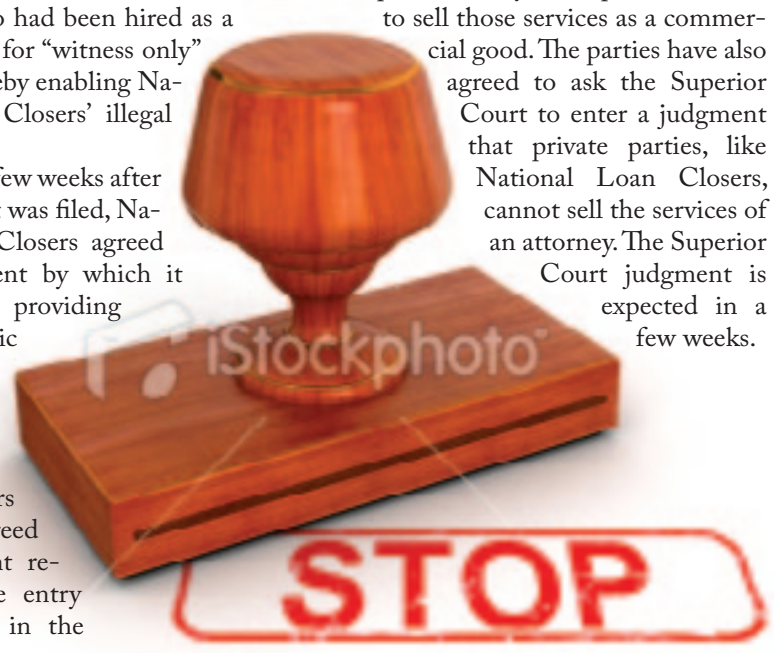
REBA shuts down out-of-state notary closing company

REBA's continuing battle to end the unauthorized practice of law recently secured an agreement from National Loan Closers, Inc., one of the country's largest providers of "professional notaries" for witness closings, to stop doing business in Massachusetts. In a "witness only" closing, which are not permitted in Massachusetts, the individual presiding over the settlement of the real estate transaction acts only as a witness to the transactions and not as an attorney.

National Loan Closers, which is based in Cincinnati, Ohio, advertised itself as "the nation's leader" in providing "professional notaries and attorneys for your mobile and witness closings." It maintains a database of "signing agents," including notaries public and some attorneys, who are willing to preside over "witness only" closings. National Loan Closers' notary management systems, known as "My Closing Tracker" and "Closing Board," together with its notary public database, are used by title companies and mortgage lenders across the country to locate and hire notaries public for "witness only" closings.

After REBA learned that National Loan Closers was providing notaries public for "witness only" closings in Massachusetts, REBA sued in Superior Court in April 2012 to enjoin the practice. *The Real Estate Bar Association for Massachusetts, Inc. v. National Loan Closers and Linda L. Audet*, C.A. No. SUCV2012-01609.) REBA also sued Linda Audet, one of the Massachusetts attorneys who had been hired as a notary public for "witness only" closings, thereby enabling National Loan Closers' illegal practice.

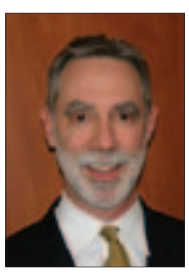
Within a few weeks after the complaint was filed, National Loan Closers agreed to a settlement by which it would stop providing notaries public in the commonwealth. REBA and National Loan Closers have also agreed to file a joint request for the entry of judgment in the Superior Court. The Superior Court will be asked to recognize that notaries public are public servants performing public duties by administering oaths, taking acknowledgements, issuing subpoenas, and acting as independent witnesses in a variety of situations. Private parties, like National Loan Closers, cannot aggregate the services of notaries public, or any other public officials, to sell those services as a commercial good. The parties have also agreed to ask the Superior Court to enter a judgment that private parties, like National Loan Closers, cannot sell the services of an attorney. The Superior Court judgment is expected in a few weeks.



A dual in the sun

REBA Ethical Standard No. 4: Attorney Acting in Dual Capacity as Attorney and Real Estate Broker

BY JAMES S. BOLAN



JIM BOLAN

In May 2012, the Real Estate Bar Association adopted a new ethics standard, No. 4, to memorialize the policy that "an attorney shall not act as both attorney for a party in a real estate transaction and as a real estate broker to a party in the same transaction." The purpose of this article is to highlight the reasons for the standard and the potential risks for not appreciating its effect.

The comments to Standard No. 4 note, first, a lawyer's general fiduciary duty under Mass. R. Prof. C. Rule 1.3 to zealously represent one's client within the bounds of the law. A concomitant to that duty is the obligation, under Rule 1.7(b) not to represent a client if that representation "may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

- the lawyer reasonably believes the representation will not be adversely affected; and
- the client consents after consultation."

If a lawyer is acting as a broker in the same transaction in which she/he is acting as counsel, then it is not possible that the representation will not be adversely affected. As a part of the reasons cited in the comment to the new standard, lawyers need to be aware of

See DUAL CAPACITY, page 2

Englander joins State Land Surveyor Board

ED ENGLANDER

Gov. Deval Patrick has appointed longtime REBA member Ed Englander to the 10-member Board of Professional Engineers and Land Surveyors.

The board establishes, monitors and enforces quality standards for the engineering and land surveying professions. The board regulates the practice through a code of regulations which includes rules of professional responsibility. The group also serves as a gatekeeper for licensing new land surveyors and engineers.

"The board serves the engineering profession – as well as the general public's welfare – in much the same way that our Board of Bar Overseers and our Board of Bar Examiners acts for the legal profession," Englander said. "It is an honor to serve as the public's representative in the board."

A member of REBA's Litigation Committee, Englander is a veteran litigator with more than 30 years of experience. He possesses particular expertise on rights in the intertidal zone and beach disputes. In addition, Englander is litigation counsel to the Boston Redevelopment Authority on an array of land use and contract cases, including zoning, affordable housing, urban renewal, discrimination and Chapter 121A. He also represents the Hull Redevelopment Authority on a contract matter. Englander is a partner in the Boston law firm of Englander, Leggett & Chicoine P.C. and can be contacted at eenglander@elcpc.com.

Land Court Judge Judith Cutler to speak at land use meeting

Land Court Associate Justice Judith C. Cutler will address a luncheon meeting of the REBA land use and zoning committee at 12:00 noon on Tuesday, Oct. 2, 2012. The luncheon program, which is open to all REBA members, will be hosted by Greg D. Peterson, committee co-chair, at Tarlow, Breed, Hart & Rogers, P.C. at 101 Huntington Ave. (fifth floor), in Boston.

Cutler, appointed to the bench in 2009, was a principal in the Boston law firm of Kopelman & Paige, P.C., where she represented municipalities in a variety of land use matters including zoning, subdivision control, public and private ways and affordable housing.

To register for this program, please contact Andrea Morales at morales@reba.net.

Avoiding dual capacity in Massachusetts

CONTINUED FROM PAGE 1

the extensive limitations under Rules 1.6 and 1.8.

Rule 1.6 codifies a lawyer's duty to maintain the confidentiality of information provided by a client: "A lawyer shall not reveal confidential information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b)."

Combined with that requisite is the language set forth in Rule 1.8(b) that a "lawyer shall not use confidential information relating to representation of a client to the disadvantage of the client or for the lawyer's advantage or the advantage of a third person, unless the client consents after consultation, except as Rule 1.6 or Rule 3.3 would permit or require."

In combination, the risk both that one would not be able to zealously represent the interests of one's client because the desire to get paid a broker's commission fundamentally interferes with the obligation to provide independent legal advice and judgment to and on behalf of the client. See, for example, *Matter of Lake* (lawyer failed to disclose conflict in serving as estate's real estate broker and attorney resulting in some limited harm to estate); and *Matter of Lupo*, in which the attorney was also the broker. In that instance, issues also arose under Rule 1.8(a): "A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client unless:

- the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;
- the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
- the client consents in writing thereto."

Even if one were able to conclude that the relationship would not be adversely affected, one could not obtain "informed consent" through "consultation." Consultation is defined as that which "denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question." (See Rule 1.9.) In the ultimate, REBA has concluded that the risk of serving two masters is such that informed consent can never be fully and fairly obtained, even if it could be sought.

I would also extend the obligation and risk to situations where another person connected or related to the attorney, such as a spouse, should not participate as a broker in a transaction in which the lawyer represents a party without full disclosure of the relationships and the nature of the fees and commissions to be obtained. In these circumstances, the attorney benefits from the income derived by the spouse resulting from a commission. Without full disclosure, the client will not be able to appreciate that the tug and pull of the desire to generate income via one's spouse is sufficient to make a client wonder if the lawyer is fully engaged on behalf of the client or whether his/her attention and fiduciary duty is adversely affected by the "second master's" voice. See, for example, *Matter of Stanton* lawyer handled the probate of an estate and his wife was the broker on the sale of estate property. Her financial interest in the completion of the sale created a conflict for the lawyer)

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.

REBA
THE REAL ESTATE BAR ASSOCIATION
for Massachusetts

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www.reba.net

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.

Standard bulk postage paid at Boston MA, 02205. Postmaster: Send address changes to REBA, 50 Congress St., Boston MA, 02109

COMMENTARY

You don't know what you got til it's gone

BY PAUL F. ALPHEN

PAUL ALPHEN

A few years ago my two sons and I took a tour of the brand new Yankee Stadium while in NYC for a Celtics–Knicks game. After the tour we decided to swing by the relatively new Citi Field, home of the NY Mets, in the hard-to-describe Willets Point section of Queens. While driving over the Triborough Bridge, my oldest son Paul asked: "How long would it take to see a game in every Major League ballpark?" My sons can read me like a book, and Paul knew the response before I said: "Let's find out."

We had a head start at that point, and now we have been to 17 out of 30. This year we went to Citi Field (again), PNC Park in Pittsburgh, Comerica Park in Detroit, and Progressive Field in Cleveland (for about the seventh time). We always make a point of visiting museums, neighborhood restaurants and other points of interest in each city we visit.

We all anticipated that Detroit would be less appealing than during our last visit to the city in 2003 for the North American International Auto Show. We were correct. According to the Bureau of Labor and Statistics, the unemployment rate in the greater Detroit area is 10.2 percent. Downtown is quiet but for scam artists and never-use-the-meter cab drivers. To its credit, on game day we could not get a reservation at Roast, a restaurant run by Food Network star Michael "Iron Chief" Symon.

Cleveland was a surprise, however. My son Chris and I have been to Cleveland for a wide variety of Red Sox and Celtics games, primarily prior to three years ago. According to the Bureau of Labor and Statistics, the unemployment rate in greater Cleveland is 9.0 percent. The unemployment rate manifested itself in the form of numerous empty not-so-old office towers in the heart of downtown. Walking around the city on a Friday afternoon, we saw little evidence of active commerce (with the exception of those headed to the Indians–Red Sox game). How many completely vacant office towers have you walked past in the heart of downtown Boston lately? Perhaps none. According to the Bureau of Labor and Statistics, the unemployment rate in the Boston-Cambridge area is only 5.8 percent.

Earlier this year *The Boston Globe* reported that the pace of construction of office buildings had increased substantially at the end of 2011. According to the CoStar Group, there were 4,893,834 square feet of office space under construction at the end of the second quarter of 2012. Things are beginning to improve, and construction is not limited to downtown. Even out here in the Route 495 hinterland, a variety of major commercial projects are under construction in Littleton and Westford.

The moral of the story: Greater Boston is in pretty good shape, things are slowly getting even better, be happy you don't live in Detroit, and get out to Cleveland now to visit the Rock and Roll Hall of Fame before hotel prices go back up.

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

Trio of cases breathes new life into old easements

BY GORDON M. ORLOFF

Massachusetts courts appear to be joining the popular zombie trend by declaring long-dormant easements undead. This is a bit of a reversal, as just a few years ago things didn't look so good for old easements. In 2009, the Appeals Court considered an unused easement in *The 107 Manor Avenue LLC v. Fontanella*, 74 Mass. App. Ct. 155 (2009). That case addressed the ongoing viability of an easement in a paper street created in a 1940 subdivision. The street was never constructed or used as such, and a stone wall on the plaintiff's property had blocked the paper street since the time that the easement was created. A stockade fence of unknown origin also blocked the easement, and the easement area was used by parties as part of their respective lawns.


Gordie Orloff

The Appeals Court recited the settled law that abandonment of an easement is a question of intention to be ascertained from the surrounding circumstances and the conduct of the parties, and that mere nonuser of an easement is not enough to establish an intent to abandon.

However, the Appeals Court relied on the easement holders' use of another way for access, their lack of any steps to remove the stone wall or stockade fence blocking access to the easement and their use of the paper street as part of their own lawn as evidence of an intention to abandon the easement. Accordingly, the majority reversed a Land Court summary judgment in favor of the easement holders and ordered that summary judgment enter against them. Significantly, the Appeals Court stated that its conclusion that the easement was abandoned was "consistent with the trend toward allowing the elimination of useless easements generally."

In his dissent, Justice Scott L. Kafker pointed out that proof of intent to abandon must be by "acts by the owner of the dominant estate conclusively and unequivocally manifesting either a present intent to relinquish the easement or a purpose inconsistent with its further existence," quoting *Dubinsky v. Cama*, 261 Mass. 47, 57 (1927). Kafker noted that easement holders have the right to enter onto the burdened estate to improve an easement, and that the record showed only that the easement holders had not yet chosen to exercise their right to do so.

He also observed that the majority's holding represented "a departure from Massachusetts law that risks creating uncertainty in an area in which certainty and predictability are significant and valuable forces."

This summer, Kafker's view have come to the fore in three cases. These cases also provide a good review of various aspects of easement law.

CATER V. BEDNAREK

First, in mid-June, the Supreme Judicial Court (SJC) decided *Cater v. Bednarek*, 462 Mass. 523 (2012). The way at issue in *Cater*, which was created by deed in 1899, makes the 1940 easement in *Fontanella* look fresh-faced by comparison. What's more, the 1899 deed didn't specify the location of the easement, the easement went over lots that had been subdivided, and no one had created a way on the ground or otherwise used the easement since its creation. The Caters purchased the vacant land in Truro benefitted by the easement in 1979, and then filed an action in Land Court in 1998 seeking to establish that they had a right to build a road on the easement.

The owners of the land burdened by the easement argued that the easement had been extinguished long ago by abandonment or estoppel. They apparently did not appeal the Land Court's rejection of their abandonment claim because there was no evidence of any conduct by the Caters' predecessors showing an abandonment. Instead, on appeal the burdened owners relied on the doctrine of estoppel.

The SJC recognized that an easement may be extinguished by estoppel, and adopted the elements required for a finding of estoppel set forth in Restatement (Third) of Property (Servitudes) § 7.6 (2000), titled, "Modification or Extinguishment by Estoppel." The SJC held that, in order to show extinguishment of an easement by estoppel, there must be a communication by the easement holder – including through silence – to the landowner burdened by the easement of the holder's intent to modify or terminate the easement, in circumstances where it's reasonable to foresee that the burdened party will substantially and detrimentally rely on that communication. The SJC noted that silence alone may communicate an intent to modify or terminate an easement, but only where one, the easement holder knows that the burdened party intends to develop his property in a manner "fundamentally inconsistent" with the continued existence of the easement; and two, it is foreseeable that the burdened party will interpret that silence as assent and proceed with the development.

However, the SJC rejected the estoppel argument on the facts before it. Although in *Cater* the burdened land was developed, it had not been developed in a way that was inconsistent with the Caters' deeded right of way. The SJC also concluded that, because the Caters' parcel was landlocked (except on one side where there is water), an easement over the burdened property is the shortest route to a public street. Therefore, it would not have been reasonable for the burdened owners to infer from the holder's silence an intention to terminate that route.

RICHARDS V. JACKSON

In late June, the Appeals Court affirmed another Land Court decision that opened a 29-acre wooded parcel for development. *Richards v. Jackson*, 82 Mass. App. Ct. 1104 (2012). Richards bought the parcel in 2001 and (represented by my colleague, Don Pinto) filed suit in 2007 to establish legal access. The Land Court had ruled that an 1840 division of family land in Tisbury, on Martha's Vineyard, created an easement by necessity over adjoining land to reach a nearby public way. Justice Alexander H. Sands reviewed the law of easements by necessity:

"An easement by necessity may be implied if the court can conclude that the grantor and grantee would have wanted to create such easement had they considered the matter. … Proponents bear the burden of proof to show that an easement by necessity exists. … Proponents must show (1) common ownership between the dominant and servient estates, i.e. that unity of title existed; (2) unity of title was severed by conveyance; and (3) necessity arising from that severance, all considered 'with reference to all the facts within the knowledge of the parties respecting the subject of the grant, to the end that their assumed design may be carried into effect.'"

Sands concluded that Richards had provided evidence to satisfy each of these factors and held that an easement by necessity had been created in 1840.

In a Rule 1:28 Decision, the Appeals Court affirmed the Land Court decision. Adding insult to the injury already suffered by the burdened defendant, the Appeals Court emphasized that the fact that the Land Court did not specify the location of the easement was not a problem:

"[A]lthough the trial judge determined that the easement was located "from Locus to Stoney Hill Road over the Jackson Parcel," he made no more specific findings regarding the exact placement of the easement. However, "[t]he mere fact that the precise location is undefined does not negate the existence of the right of access."… Furthermore, "the parties are free to locate a previously undefined right of access, or in the absence of agreement by the parties as to its location a court may fix the bounds of a right of way not located by the instrument creating it."

LEAHY V. GRAVELINE

July brought yet another decision involving an old easement. In *Leahy v. Graveline* 82 Mass. App. Ct. 144 (2012), the plaintiffs, who own non-waterfront subdivision parcels in Hyannis, filed a case in Land Court claiming that they had implied and prescriptive easements to use a nearby beach on Lewis Bay. The defendants, who own lots on the beach, argued that their right to use the beach was exclusive. The Land Court sided with the plaintiffs, ruling that the circumstances surrounding a 1929 transaction – in which the then-owner of a large tract that included both sides' properties sold lots adjoining the beach – created an implied easement in favor of the non-waterfront properties to continue using the beach. The Appeals Court affirmed.

Despite the fact that the original deeds at issue did *no*t contain language granting a beach easement, both courts found evidence of the owner's intent to grant the beach easement in large part due to newspaper advertisements from the 1890's which referred to all the lots in this development as "shore lots" featuring a "[c]ool breeze all the time, good bathing, boating and fishing, nice beach, no undertow, shade trees on several of the lots." The Appeals Court affirmed the Land Court, finding that these ads established a "common scheme for a vast subdivision with exceptional beach and bathing facilities," and that "the existence of the beach was an important feature in [the owner's] attempt to sell the nonwaterfront lots located in the … subdivision." The Appeals Court also upheld the Land Court's ruling that the implied easements created in 1929 had not been abandoned (because some of the easement holders had used the beach) or extinguished by virtue of adverse possession by the defendant (because it had not expelled others from the beach and its uses were not irreconcilable with the easement holders' rights).

Each of these cases has different facts – and the facts in a particular case remain critical in establishing easements and determining whether they have been abandoned or otherwise extinguished. That said, the 2012 cases may demonstrate a different orientation toward easements than that shown by the majority in *Fontanella*. That majority focused on eliminating unused easements. In contrast, this summer's crop of cases looks to preserve easements and the value that they create in the benefitted parcel. These new cases remind us that easements which may have been inactive for decades, or even centuries, are not necessarily dead. To the contrary, careful and persistent lawyers may unearth and, if required, use litigation to breathe new life into easements in order to add real value to their clients' land.

Gordie Orloff has been practicing real estate and land use litigation at Rackemann, Sawyer & Brewster since the mid-1980s. He has been a lecturer on easements and other real estate topics for MCLE and is a member of REBA's Litigation Committee. He is a contributor to the blog Massachusetts Land Use Monitor, which reports on new developments in real estate and land use law. Full copies of all of the cases referenced in this article are available by clicking on the topic "Easements" at massachusettslandusemonitor.com. Orloff can be reached at gorloff@rackemann.com.

New Tax Rules Catch CRE Industry By Surprise

Temporary Regs May Crimp Property Owners' Bottom Lines

BY JONATHAN FARRELL AND PATRICK BEVINGTON

New repair versus capitalization regulations have some property owners scratching their heads, while others are still unaware of the temporary regulations they should now be following. From an accounting perspective, however, significant changes in the tax treatment of property repairs and improvements could have a direct impact on the bottom line this year and in future years for those in the real estate industry.

Under new temporary regulations issued by the Internal Revenue Service, projects ranging from the installation of a new roof to the replacement of an aging furnace will likely no longer be deductible. Instead, such projects will have to be capitalized and depreciated, thus diluting the tax advantages of many property improvements.

The new temporary regulations came as a bit of a surprise to the real estate industry. Although these rules have been under review for nearly a decade, absence of clear guidelines previously allowed property owners to claim many improvements as repairs, making the total cost deductible in a single year. Last year, for example, a new roof that cost $200,000 may have been claimed as a deductible expense, creating a tax savings of $80,000 for a taxpayer in the 40 percent bracket. That cash could have gone back into the company or been used elsewhere. This year, the same project must be capitalized and depreciated over a 39 (commercial) or 27.5 (residential) year period. This results in only a $2,000 or $3,000 current tax savings.

The result is that companies may be facing larger tax bills and feeling the impact on their bottom line. There are, however, some significant planning opportunities, thanks to provisions that allow taxpayers to write off items that were replaced before being fully depreciated.

The rules may say a new roof is to be depreciated over 39 years, but it is unlikely that any roof will last that long. Under the new temporary regulations, taxpayers who can determine the value of the old roof can now write off the remaining carrying value when that roof is replaced.

Taxpayers who capitalized rather than deducted their repairs and improvements may now be able to reach back and deduct the remaining carrying value as an expense. The challenge is determining the value of the item that has been replaced, whether it was a roof, a furnace, electrical wiring or a security system. This will change the way companies internally account for everything.

Purchasers of a building who in the past typically never bothered to identify the cost of individual components of that building should now track everything. For real estate, the IRS definition of a unit of property is very specific, including a building, its structural components and nine separate building systems ranging from elevators to plumbing.

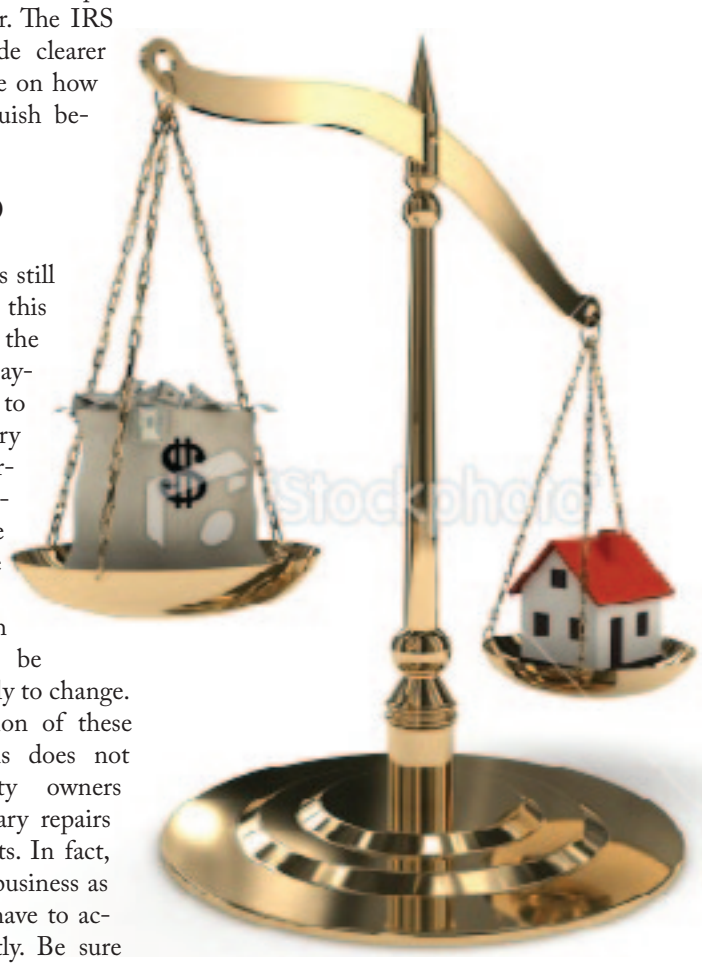
The IRS still has some work to do on these temporary regulations, particularly when it comes to determining whether something is a repair or an improvement. Unfortunately, there are lots of cases where the distinction between an expense and a deduction is less clear. The IRS is expected to provide clearer guidance in the future on how taxpayers can distinguish between the two.

TAKE HEED

Because the IRS is still seeking comment on this particular aspect of the regulations, some taxpayers may be tempted to ignore the temporary rules until the final version is approved. However, the major issue – determining the definition of a unit of property for which improvements must be capitalized – is unlikely to change.

The implementation of these temporary regulations does not mean that property owners should forego necessary repairs or delay improvements. In fact, they should conduct business as usual. They will just have to account for it differently. Be sure to consult your advisor regarding the new regulations as part of your planning.

CPAs Jonathan Farrell and Patrick Bevington are advisors in the real estate practice group at DiCicco, Gulman & Company in Woburn.



2012 Annual Meeting & Conference

Monday, October 29th 2012 • 7:30 A.M. – 3:00 P.M.

Best Western Royal Plaza Hotel

181 Boston Post Road West, Marlborough, MA

Schedule of Events

7:30 A.M. – 8:30 A.M. **Registration and Exhibitors' Hour**
8:30 A.M. – 1:15 P.M. **BREAKOUT SESSIONS**

8:30 A.M. – 9:30 A.M. **Salon A**
9:45 A.M. – 10:45 A.M. **Salon A**

Priority, Enforcement & Foreclosure of Condominium Liens

Robert W. Anctil; Henry A. Goodman; Dean T. Lennon

Our speakers will review condominium priority lien enforcement procedure under MGL c. 183A. The seminar begins with a review of the procedure set forth in the statute to obtain a priority lien and of the related practical considerations. In part two, the ins and outs of condo lien foreclosures will be discussed in detail. The final segment of the seminar will review recent case law interpreting the condo statute and some of the difficulties faced by condominium lawyers as a result of those decisions.

8:30 A.M. – 9:30 A.M. **Salon B**
9:45 A.M. – 10:45 A.M. **Salon B**

Recent Legislation Affecting Real Estate Lawyers

Elizabeth J. Barton; Roger D. Donoghue; Francis J. Nolan

This legislative update will incorporate recent revisions to the MUPC, the foreclosure legislation and the community preservation act, as well as any other state house news and updates. They panel will also discuss legislation to fix the SJC's Bishop case, which interpreted c. 186, s. 19 as applicable to commercial landlords, making them liable in tort for unsafe conditions that tenants were obligated to repair.

8:30 A.M. – 9:30 A.M. **Salon C**
9:45 A.M. – 10:45 A.M. **Salon C**

Recent Trends in Eminent Domain Takings

Joseph S. Callanan; James D. Masterman; Kathleen M. O'Donnell

Our speakers will provide a general overview of eminent domain takings, including the statutory basis and authority for this significant governmental power, the substantive legal standards that must be met to authorize a taking, the procedural steps involved in effecting the taking, compensation and remedies available to property owners, issues involved in calculating condemnation awards, and strategies and defenses that property owners can employ in challenging eminent domain takings (or to maximize their compensation). We will also include a discussion of recent trends in the use of eminent domain powers.

8:30 A.M. – 9:30 A.M. **Salon D**
9:45 A.M. – 10:45 A.M. **Salon D**

Putting *Eaton* into Practice – A Practical Skills Session

Eugene Gurvits; Robert J. Moriarty Jr.

Join us for a walk through the holding of the *Eaton* case, an outline of the new practical requirements and procedural steps for lenders when foreclosing on a mortgage, and what title and conveyancing attorneys representing purchasers of, or issuing policies on, foreclosed properties, must look for in reviewing and evaluating the title. The program will cover, among other things, new title insurance underwriting standards for compliance with the *Eaton* decision, as well as proposed REBA form of affidavits that lenders must record to evidence compliance.

11:00 A.M. – 12:00 P.M. **Salon D**

Basics of Mechanics Liens – A Practical Skills Session

Bradley L. Croft; Charles E. Schaub Jr.

This nuts and bolts session on Mechanics Liens will include a statutory overview and will also cover the technical procedures for creation/perfection. Our speakers will also discuss how to address and dispose of them as a matter of title, liens of leasehold improvement contractors, and more.

8:30 A.M. – 9:30 A.M. **Salon E**
11:00 A.M. – 12:00 P.M. **Seminar Room**

Zoning Special Permits and Variances

Paul F. Alphen; Brian C. Levey

Our speakers will address the legal standards, process, and practical strategies for obtaining special permits and variances. The program will cover the general legal standards for special permits under G.L. c.40A, s. 9, and the substantial discretion afforded to local special permit granting authorities (SPGAs) in granting or denying special permits. We will also cover the more stringent legal standards for variances under G.L. c. 40A, s. 10, and the decidedly limited discretion that ZBAs possess in granting variances. It will also cover procedural steps seeking these forms of zoning relief, and practical strategies in presenting an application before the local SPGA or ZBA.

9:45 A.M. – 10:45 A.M. **Salon E**
11:00 A.M. – 12:00 P.M. **Salon E**

CFPB Proposes an Integrated Truth in Lending and RESPA Form: What Will This Mean to Your Real Estate Practice?

Marissa Aquila Blundell; Steve Gottheim; Richard A. Hogan; Joel A. Stein

The CFPB recently released its long-awaited proposal to consolidate the application and closing disclosures required by the Truth in Lending Act and RESPA. The proposal is almost 1,100 pages long and creates a new three-page loan estimate form and a new five-page closing disclosure form. In addition to the new forms, the proposed rule significantly amends the requirements governing mortgage practices. This program will provide a summary of the proposed rule and its likely impact on real estate attorneys in the commonwealth.

8:30 A.M. – 9:30 A.M. **Seminar Room**
9:45 A.M. – 10:45 A.M. **Seminar Room**

Professional Liability Insurance: Claim & Underwriting Considerations

Jennifer L. Markowski; Matthew F. Probolus

The panelists will offer guidance in responding to questionnaires and completing applications and offer real-life examples of instances requiring notice to a carrier.

12:15 P.M. – 1:15 P.M. **Salon E**

Recent Developments in Massachusetts Case Law

Philip S. Lapatin

Now in his 34th year at these meetings, Phil continues to draw a huge crowd with this session. His presentation on the Recent Developments in Massachusetts Case Law is a must hear for any practicing real estate attorney. Phil is the recipient of the Association's highest honor, The Richard B. Johnson Award. There will also be a simulcast of this session in the Seminar Room.

1:20 P.M. - 3:00 P.M.
LUNCHEON PROGRAM

1:20 P.M. – 1:40 P.M.
President's Welcome & Remarks

Christopher S. Pitt

1:40 P.M. – 2:00 P.M.
Report of the REBA Title Standards Committee

Presented by Co-chairs, Richard M. Serkey and Nancy Weissman

2:00 P.M. – 2:20 P.M.
Presentation of the Richard B. Johnson Award

Introduced and Presented by the Honorable Rudolph Kass (ret.)

2:20 P.M. – 2:40 P.M.
Luncheon Keynote Address by ALTA's Steve Gottheim

2:40 P.M. – 3:00 P.M.
Passing of the Presidential Gavel

Christopher S. Pitt and Michael D. MacClary, 2012 President-Elect

3:00 P.M.
Adjournment

For information on conference registration and exhibitor/sponsorship opportunities visit www.reba.net.

General Information

- Registrants are welcome to attend any breakout session at any time and are not required to preregister for sessions.
- Premium credit for professional liability insurance and continuing legal education credit in other states may be given for attending properly documented CLE programs. Call (617) 854-7555 or email gaudette@reba.net for details.
- Registration to REBA's 2012 Annual Meeting & Conference is open to members in good standing, their guests and non-members (for an additional fee). Everyone attending the 2012 Annual Meeting & Conference must register. The registration fee includes the cost of the breakout sessions, the conference written materials, and the luncheon. We cannot offer discounts for persons not attending the luncheon portion of the program.
- Please submit one registration per person. Additional registration forms are available at www.reba.net, by request to Andrea Morales at morales@reba.net, or by calling (617) 854-7555. Confirmation of registration will be sent to registrants by email. Name badges and a list of attendees will be available at the registration desk, located in the hotel foyer.
- Registration forms and the appropriate fee should be sent by email, mail or fax, or submitted online at www.reba.net, and should arrive prior to October 22, 2012, in order to guarantee a reservation at the Annual Meeting & Conference. Registrations received after October 22, 2012, will be subject to a late registration processing fee of $25. Registrations cancelled in writing before October 22, 2012, will be honored and charged a processing fee of $25. No other refunds will be permitted. Registrations cancelled on or after October 22, 2012, will not be honored; however, substitutions of registrants attending the program are welcome. Conference written materials will be mailed to those who registered but could not attend within four weeks after the program.
- The use of cell phones is prohibited in the meeting rooms during the breakout sessions and luncheon meeting. Please be sure to visit the lounge areas, located in the Princess Room, the Duchess Room, and the hotel's courtyard foyer. Refreshments will be served.

Driving Directions

FROM WORCESTER:
Route 290 East to Exit 26A (I-495),
I-495 South to Exit 24B (US-20 West),
Turn right onto Royal Plaza Drive,
Keep straight past the Trade Center,
Hotel is at end of Royal Plaza Drive.

FROM STURBRIDGE:
Mass Turnpike (I-90)
East to Exit 11A (I-495 N),
I-495 North to Exit 24B (US-20 West),
Turn right onto Royal Plaza Drive,
Keep straight past the Trade Center,
Hotel is at end of Royal Plaza Drive.

FROM I-495 NORTH/SOUTH:
Take I-495 to Exit 24B (US-20 West),
Turn right onto Royal Plaza Drive,
Keep straight past the Trade Center,
Hotel is at end of Royal Plaza Drive.

FROM CONNECTICUT:
Route 84 North to Mass Turnpike (I-90)
East I-90 East to Exit 11A (I-495 North),
I-495 North to Exit 24B (US-20 West),
Turn right onto Royal Plaza Drive,
Keep straight past the Trade Center,
Hotel is at end of Royal Plaza Drive.

Registration

COMPLETE AND RETURN THIS REGISTRATION FORM WITH THE APPROPRIATE FEE TO:

REBA Foundation, 50 Congress Street, Suite 600, Boston, MA 02109-4075
TEL: (617) 854-7555 | morales@reba.net | FAX: (617) 854-7570

	By October 22nd	After October 22nd
☐ YES, please register me. I am a REBA member in good standing.	$195.00	$220.00
☐ YES, please register me as a guest. I am not a REBA member.	$235.00	$260.00
☐ NO, I am unable to attend, but I would like to purchase conference materials and a CD of the breakout sessions and luncheon address. (Please order by 10/31/12 and allow four weeks for delivery)	$190.00	$190.00
	$_____	$_____

☐ Check Enclosed ☐ Credit Card ☐ VISA ☐ MasterCard ☐ American Express

Check No:_____ Card No:_____ Expiration:_____

Date:_____ Signature:_____ Date:_____

You May Also Register Online at REBA.net

Registrant Information

Name of Registrant:_____ Esq. (y/n):_____

Call Name *(for badge)*:_____ Email:_____

Firm/Company:_____

Address:_____

City/Town:_____ State:_____ Zip:_____

Tel:_____ Cell:_____ Fax:_____

Selcet Your Luncheon Choice Below

☐ Roasted 8 oz. Prime Rib Served with Au Jus

☐ Chicken Breast with Apple and Cranberry Stuffing

☐ Grilled Salmon Served with a Papaya Salsa

☐ Butternut Ravioli in a Shallot Brandy Cream Sauce

☐ None, as I am unable to stay for the Luncheon

REBA
THE REAL ESTATE BAR ASSOCIATION
for Massachusetts

Economic Development Act of 2012

CONTINUED FROM PAGE 1

THE 40R SMART GROWTH TRUST FUND

$4 million in one-time settlement payments have been redirected from the Stabilization Fund to the Smart Growth Trust Fund, encouraging municipalities, landowners and developers to use 40R smart growth zoning.

NEW LOCAL INFRASTRUCTURE DEVELOPMENT PROGRAM

The act authorizes and establishes the procedures for creating local development zones (which may be in a single municipality or in abutting areas of adjoining municipalities).

Within the new local development zones MassDevelopment may issue bonds to finance infrastructure investments. The debt obligation will be repaid through betterment assessments on benefited properties in the zone, so no existing local or state funds are encumbered.

The program is a strictly local option (by vote of the board of selectmen. in towns) upon petition of all of the landowners in a proposed zone.

THE I-CUBED PROGRAM

The act increases the number of I-cubed projects in any community from two to three, and increases the available funding from $250 million to $325 million.

It also adds parking garages to the definition of public infrastructure improvements, and adds taxes generated by construction jobs and purchases to the calculation of new state tax revenues includable to fund I-cubed financing.

STATE REGULATORY OMBUDSMAN

The secretary of EOHED will appoint a regulatory ombudsman, working in partnership with the existing permitting ombudsman, to provide assistance to businesses in regulatory compliance.

ABUTTER NOTIFICATION REQUIREMENTS UNDER THE WETLANDS ACT

Abutters who must receive notice for projects involving land under water bodies or waterways or on a tract of land greater than 50 acres now include only those within 100 feet of the proposed project site, not within 100 feet of the property bounds of the property within which the work is to be done.

But in the case of linear-shaped project sites more than 1,000 feet in length, notification must be given to all abutters within 1,000 feet of the proposed project site. Linear project work within easements now also requires notice to the fee owner.

Section 50 of the act also authorizes the DEP to adopt Wetlands Act regulations and issue authorizations for emergency response actions related to geographically wide-spread storm damage.

Greg Peterson is co-chair of the REBA land use and zoning committee. He can be reached at gpeterson@tbhr-law.com.

Ibanez, *Eaton*, and An Act to Prevent Unnecessary Foreclosures

A title perspective

BY EUGENE GURVITS

Gene Gurtvits

In the course of the last several years, our understanding of foreclosure laws has evolved with a speed usually not seen in the legal field. *In Re Schwartz*, *Ibanez*, *Bevilacqua*, *Eaton*, and other judicial and legislative developments upended long-held understandings and forced even experienced real estate attorneys to question each aspect of the foreclosure process with greater scrutiny. The recently passed Chapter 194 of the Acts of 2012, An Act Preventing Unlawful and Unnecessary Foreclosures, continues the evolution and represents yet another significant change in the way conveyancers will have to review titles based on foreclosure sales. Effective on Nov. 1, 2012, lenders who wish to foreclose on their mortgages will have to comply with several new requirements and procedures. The act also codifies (and modifies) the steps necessary to effectuate compliance with the Supreme Judicial Court (SJC) decisions in the *Ibanez* and *Eaton* cases.

The *Ibanez* decision made it clear that, while the foreclosing party must hold the mortgage at the time of the foreclosure, the mortgage assignment need not be in recordable form. The act contains an amendment to Section 14 of M.G.L.c. 244 that further regulates the steps that the mortgage assignee must take prior to the foreclosure. As of Nov. 1, the notice under Section 14 will have to include the recording information of the chain of assignments that resulted in the mortgage being held by the foreclosing entity. The amendment goes on to say that the notice (and the resulting sale) is void unless the assignments are recorded prior to the notice and the recording information is referenced in the notice of sale. Since the overwhelming majority of mortgages are assigned prior to them being foreclosed, a conveyancer will have to scrutinize the record title to make sure that it matches the assignment information contained in the notice of sale.

A new section of Chapter 244, Section 35B, was created under the act to enable some borrowers of "certain mortgage loans" to negotiate pre-foreclosure workouts. "Certain mortgage loans" are defined statutorily as loans on owner occupied one- to four-family residential properties that fall within one of seven categories. Essentially, these are loans that contain one or more of the following features:

- A low "teaser rate"
- Payment of interest only for a period of time
- No income verification requirement
- Severe prepayment penalties
- Above 90 percent loan to value ratio.

For these loans, the lenders will be required to take reasonable steps and good faith effort to avoid foreclosure. The creditor will have to analyze the value of the property, the borrower's current ability to repay the modified mortgage, and the availability of loan modification programs to assist the borrower in that regard.

The act requires the creditor to give the borrower a notice of the borrower's rights to pursue a modified mortgage loan. The notice will have to be sent concurrently with the notice of default as required by M.G.L.c. 244, §35A. Prior to the commencement of the foreclosure for these loans, the creditor will need to execute and record an affidavit of compliance with the provisions of this section. Under the statute, this affidavit will constitute conclusive evidence in favor of third party purchasers that the creditor has complied with the provisions of Section 35B. The statute is clear that "the arm's-length third party purchaser for value relying on such affidavit shall not be liable for any failure of the foreclosing party to comply and title to the real property thereby acquired shall not be set aside on account of such failure." As the record title will never be clear on the issue of which mortgage secures a certain mortgage loan, titles to all mortgages where the first notice of sale was published on or after Nov. 1 should contain the affidavit of compliance with this section. The affidavit should be recorded prior to the date

See *EATON*, page 11

Protecting your life online

Small changes reap big rewards in the wide world of the web

BY SARAH A. DOWNEY

Sarah Downey

Surfing the web has become a part of everyday life, so these days almost everyone has a digital footprint. As you browse the web, you are constantly leaving behind a trail of personal information whether you know it or not. If you've got only a few minutes, you can drastically improve your privacy with these seven tips.

Be careful on social networks. Almost everything you say and do on social networks is public by default. Facebook has dozens of privacy settings that allow you to be more private. To get started, turn OFF tag suggestions and turn ON tag and profile review. By doing these two things you'll be able to control what others post about you.

Stop secret web tracking. Hundreds of different companies, including social networks and ad companies, follow all your activity across the web, building up a detailed profile about what you read, like, click and buy to sell to advertisers. Free browser tools like DoNotTrackPlus (DNT+) stop this tracking and make invisible trackers visible with a click of a button. Download for free at abine.com.

Use secure browsing (HTTPS) whenever possible. HTTPS prevents others from snooping on your wireless connection. It's particularly useful when you're using insecure wireless connections, like those in cafes or airports. You'll know that a site is secure and using HTTPS when you see a lock icon next to the URL of the site you're visiting.

The Electronic Frontier Foundation (EFF) offers a helpful and free tool for Chrome and Firefox call ed "HTTPS Everywhere." You can also use a paid virtual private network (VPN) service to securely encrypt all your web traffic. PrivateWiFi and AirVPN are particularly good choices.

Delete your info from data collection sites. The phone book used to be just that – your name and phone number. But today literally hundreds of phonebook-like data websites collect much more, including your net worth, value of your home, family members names, social media content, employment history, your home address, email, and more. This information is largely available to anyone with a computer, including criminals such as ID thieves.

Learn how to remove yourself from these websites at abine.com/optouts.php. Or use your special discount for REBA members on premium privacy service, DeleteMe, which removes you and your family's information from 50+ of the largest websites that collect, share, and sell it. Check it out here: abine.com/reba.

Use multiple email addresses. Have a different email for each of the following areas of your life: people you trust, signups for online accounts, signups for offline accounts, legal, work, and acquaintances (or any other category you'd like to create). That way, one email getting hacked or compromised won't affect the others.

Notable free email services with good privacy protections include Hushmail, Lavabit or Vmail.

Use different profile photos for different areas of your life. You can be found through existing photos of yourself with reverse image searches such as TinEye or Google. Reverse image search works by looking for photo fingerprints, exact matches of existing photos. If you're worried about reverse image search, use different images for different contexts. Don't use the same photo on your employer's profile page that you have as your Facebook profile picture. That way, someone doing a reverse search with a particular image will only find a limited set of results: the ones you've chosen to associate with that image.

Stop broadcasting your geolocation. Facebook Places, Foursquare checkins, and Twitter may be giving out your location, and some third-party apps can access your public social network checkins and literally put you on the radar.

To turn off geotagging on Twitter, go to Settings, then make sure to uncheck the box next to "add a location to my tweets." Many smartphones record the GPS location where you snapped a photo and appending it to that photo's metadata. Disabling this feature depends on your specific device, but one general safety tip is to turn off your phone's GPS connection when you don't need it.

Sarah Downey is an attorney, privacy advocate, and writer. She joined Abine in 2010 after receiving her J.D. from the University of Connecticut School of Law, where she received a certification in intellectual property and was a Pudlin First Amendment scholar, and holds a B.A. in Psychology from Hamilton College. A vocal proponent of privacy rights, she writes Abine's privacy blog and much of the website content and manages media relations.

New Economic Development Act fixes SJC leasing decision

BY EDWARD M. BLOOM

Ed Bloom

In Section 54 of Chapter 238 of the Acts of 2012 (the 2012 Economic Development Act), a minor correction to G.L.c. 186, §19 resolves a serious problem for commercial landlords that was created by the SJC in its 2011 decision of *Bishop v. TES Realty Trust*.

It is a basic principal of property law that when a third party is injured on rented real estate, the liability usually belongs to the party who is in control of the area where the incident occurred. Typically if within the demised premises, liability falls on the tenant; if occurring in the common areas, it falls on the landlord.

In the 1980 case of *Young v. Garwacki*, the SJC changed that rule with respect to residential premises and decided that "even in the absence of an express agreement to keep rented premises in repair, a lessor of residential premises has a duty to exercise reasonable care to assure that persons legitimately on the premises were not subject to unreasonable risk of harm. The reasons behind the court's change in the law were based on the recognition that the residential tenant is typically in a weaker bargaining position than his landlord, his tenancy is often brief and he generally lacks the skills, financial resources and incentive to improve the leased premises. The court thus concluded that the residential landlord is in a better position to make repairs and prevent injuries.

Over the following 26 years, the courts in 1985, 1988, 1989, 1991 and 2006 refused to extend the *Garwacki* rule to commercial tenancies.

In March 2011, however, the SJC muddied the waters in its *Bishop* decision. The court essentially took this case to determine whether the statutory duty of a landlord under G.L.c. 186, §19 to exercise reasonable care to correct an unsafe condition described in a written notice from a tenant applies to commercial leases. This particular statute was enacted in 1972, but had never been interpreted by the courts in the almost 40 years it was on the books.

The statute provides that a landlord of any real estate (except an owner-occupied two- or three-family dwelling) within a reasonable time after receipt of a written notice from a tenant of an unsafe condition, *not caused by the tenant, his invitee or anyone occupying under the tenant*, shall exercise reasonable care to correct the unsafe condition. If landlord fails to correct the unsafe condition within a reasonable time, the landlord could be liable in tort for any injury to the tenant or any person on the tenant's premises.

Most commercial lawyers took it as a given that the statute applied to commercial leases, but assumed that if the commercial tenant was responsible for maintenance and repair of its demised premises, the statute would not apply because any unsafe condition would have been caused by the tenant as a result of its failure to properly maintain its premises.

But the SJC held that if lease provisions making the tenant responsible for all repairs to the demised premises mean that the tenant cannot send a notice to the landlord of an unsafe condition, then the lease provisions would effectively constitute a waiver of Section 19, which is not permitted by the terms of the statute. By assuming that the tenant was responsible for the repair and maintenance of the demised premises but that §19 still required the landlord to respond to the letter from the tenant of an unsafe condition in the premises and correct the same, the SJC created the very problem that it avoided when it refused to extend the *Garwacki* rule for residential tenancies to commercial leases.

The *Garwacki* rule is workable for residential tenancies because all residential leases are used for habitation, so a landlord can determine if there is an unsafe condition on the leased premises.

When you shift to commercial leas-

See LEASING DECISION page 11

Understanding the Massachusetts condominium conversion law

BY SAUL J. FELDMAN

Saul Feldman

The burgeoning number of rental apartment buildings now under construction in Massachusetts may be followed by a wave of condominium conversions after the condominium market revives.

Developers of these apartment buildings should be aware of the Massachusetts Condominium Conversion Law (Chapter 527 of the Acts of 1983).

This article covers three topics: first, the Massachusetts condominium conversion statute, Chapter 527 of the Acts of 1983; second, the by-laws or ordinances regulating condominium conversions by local Massachusetts cities or towns; and third, the regulation of condominium conversions by a city or town that does not have a special condominium ordinance or by-law, but has been granted special enabling authority in a narrow context as to conversions.

THE STATUTE

The Massachusetts Condominium Conversion Law applies to every municipality in Massachusetts unless a municipality has adopted its own ordinance or by-law covering condominium conversions.

A moratorium against evictions: The converter must notify tenants by delivery, certified or registered mail, of the filing of a master deed and of the owner's intent to terminate their tenancy and their rights under Chapter 527. Most tenants have one year before they must leave. Three categories of tenants have longer: Handicapped tenants; elderly tenants (over 62); and low or moderate income tenants.

These protected classes have two years or longer (up to two more years) if they cannot find comparable rental housing in the same municipality.

A tenant is protected if there is merely an intent to convert. For example: a master deed is prepared, Purchase and Sale Agreements are prepared, there are inspections, measurements, surveys, showings, advertising, etc.

Buildings of less than four residential units are exempt. In determining whether the four units minimum is met, units in two adjacent buildings with common ownership will be added together.

A limit on rent increases: consumer price index or 10 percent, whichever is greater.

Tenant's right to purchase: a tenant has a 90-day period to purchase on the same terms as or more favorable terms as those which will be extended to the general public. I have had tenants execute a waiver of the tenant's right to purchase a rental unit. The tenant, in the waiver, acknowledges that he received a purchase and sale agreement executed by the owner of the apartment building and that he was notified that the terms and conditions of the agreement were substantially the same as or more favorable than the terms and conditions which will be offered to the general public during the 90-day purchase period.

Relocation payments: $750 for the tenant, unless tenant is a "protected tenant," in which case it is 1,000. This is a mandatory payment.

Penalties: Fine of not less than $1,000 or imprisonment of not less than 60 days.

Chapter 527 prohibits evictions for the purpose of converting a building to condominiums. However, a tenant may be evicted for any violation of the lease, including non-payment of rent, provided that this is not merely a pretext for a condominium conversion eviction.

LOCAL ORDINANCES OR BY-LAWS

In addition to Boston, the following municipalities have adopted by-laws or ordinances: Abington, Acton, Amherst, Brookline, Haverhill, Lexington, Malden, Marlborough, New Bedford, Newburyport and Somerville. Just to complicate things, a few of these municipalities have statements in the ordinances or by-laws that specifically state that Chapter 527 *and* the local ordinance or by-law both apply to condominium conversions. A municipality may adopt a more-stringent or less-stringent law than Chapter 527.

For example, the Boston ordinance gives elderly, handicapped and low income tenants five years, but says that the notice period may be extended by future legislation, possibly leading to indefinite protection. While its intentions are laudable, the Boston ordinance may lead owners to try not to rent to such people if the owner intends at some point in the future to convert the building.

Municipalities may regulate conversions even without a condominium conversion ordinance or by-Law

A municipality might not have a separate ordinance or by-law covering condominium conversions. However, a municipality, under enabling legislation, may provide that if a special permit has to be obtained from the special permit granting authority to build more than a certain minimum number of units, conversion to condominiums may not occur without obtaining an additional special permit from the special permit granting authority. Therefore, conversions in such a municipality clearly are governed by Chapter 527 and would also be governed by the requirement of an additional special permit!

THE FUTURE

Today's weak condominium market has caused some developers to deliberately reserve a part of a building to rentals while selling the balance of the building as condominiums. Chapter 527 will apply to this type of building when the market turns around and the developer wants to sell off the rental part of the building. Developers anticipating that they may want to start selling units again may want to allow more vacancies in order to be able to sell units free of tenant interference.

Saul Feldman is co-principal of the Law Offices of Feldman & Feldman, P.C., which specializes in real estate and condominium law. Contact him at 617 523-1825 or by email at saul@feldmanrelaw.com.

Recent decisions rapidly changing foreclosure field

CONTINUED FROM PAGE 9

of the first publication of the notice of sale.

COMPLICATIONS OF *EATON*

The *Eaton* case was decided by the SJC almost simultaneously with the passage of the act. While the court in the *Eaton* case defined mortgagee as the party who holds the mortgage and either holds the note or acts on behalf of the holder, it did not clarify how the record title should reflect the identity of the holder of the unrecorded note.

Another new section of the foreclosure statute added by the act puts much-needed clarity into the situation. Section 35C of Chapter 244 requires the creditor to certify that the creditor is the holder of the note (or its authorized agent). Prior to the publishing of the notice of foreclosure sale, the creditor will have to record an affidavit of compliance with this section based on its review of its business records. This affidavit is also conclusive in favor of third party purchasers that the creditor has complied with the provisions of Section 35C. Like Section 35B, Section 35C also goes on to specifically state that "the arm's-length third party purchaser for value relying on such affidavit shall not be liable for any failure of the foreclosing party to comply and title to the real property thereby acquired shall not be set aside on account of such failure." As the effective date of the act is Nov. 1, the affidavit will be conclusive proof of the note ownership only as to the foreclosures commenced on or after that date. As to the foreclosures commenced between June 22, 2012 (the date of the *Eaton* decision), and Nov. 1, 2012, confusion continues to reign.

In the coming months and years, as foreclosures continue to occur with alarming regularity, challenges to the existing procedures will undoubtedly result in more court decisions that will surprise the conveyancing bar and challenge our understanding of the law. It becomes more critical for us to maintain a dialogue with the legislature to ensure that our concerns for the integrity of real estate titles do not get lost in the tug of war between the lenders and the mortgagors. The act, while not addressing all of such concerns (titles affected by the *Ibanez* decision, for example, continue to languish without a comprehensive solution), nevertheless manifests the importance of REBA to continue its position of leadership in this ongoing process.

Currently vice president and special counsel, Gene Gurvits has served First American Title Insurance Company in various underwriting positions for 25 years. REBA President Chris Pitt recently appointed Gene to a three-person working group to coordinate and articulate the association's position on foreclosure legislation in the recently-concluded two-year session of the legislature. Gene can be contacted by email at ggurvits@firstam.com.

EDA addresses commercial landlord injury issues

CONTINUED FROM PAGE 10

es, the range of tenant uses can be infinite. How is a landlord to know what is an unsafe condition for retail use versus storage use versus office use versus manufacturing use versus research and development use? It is up to a tenant to provide a safe working environment for its employees, and the tenant is in a much better position than the landlord to decide what repair and safety requirements are necessary for its own business operations. A landlord, who is really an outsider to the way a tenant operates its business, cannot be reasonably expected to insure that any OSHA requirements applicable to a tenant's workplace are being satisfied, so how does a landlord comply with a §19 letter in these situations?

The upshot of the *Bishop* case was to completely muddy up the simple test that whomever controls the area where an injury occurs is the party with liability. If it occurred in the demised premises of a commercial tenant, the liability was almost always the tenant's. After *Bishop*, it could be the landlord's as well as the tenant's.

The new Economic Development Act simply amended one sentence in Section 19 by adding three words so as to read: "Any waiver of this provision in any lease or other rental agreement *for residential use* shall be void and unenforceable." This simple amendment will now allow commercial landlords and tenants (but not residential landlords and tenants) the freedom to negotiate whether or not c.186, §19 will apply to the repair, maintenance and liability provisions of the lease being negotiated. This amendment restores the basic principles of freedom of contract and the commercial certainty that are necessary to a robust business climate in the commonwealth, which the SJC *Bishop* case had impaired.

Ed Bloom is partner in the real estate department at Sherin and Lodgen, and the immediate past president of Real Estate Bar Association of Massachusetts. He can be reachde at embloom@sherin.com.