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REBA news
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PRESIDENT'S MESSAGE

In with the new, out with the old

BY CHRIS PITT

This year's final issue of *REBA News* is my opportunity to review and reflect on our Association's accomplishments this year while looking ahead to the challenges of 2013.

We are inspired by those hearty members who braved the elements to attend the fall Annual Meeting and Conference, held as scheduled at the height of Hurricane Sandy. Over half of those registered attended in person.

The morning break-out sessions continued to offer necessary, timely and high-value educational programs with industry and market intelligence for real estate practitioners of all stripes. Our CLE Committee featured the 1,200-page proposed combined disclosure rules put forth by the Consumer Financial Protection Bureau (CFPB) to compliance with the Real Estate Settlement Procedures Act (RESPA) in residential transactions. Steve Gottheim, legislative and regulatory counsel for the American Land Title Association (ALTA) and our luncheon keynote speaker, offered insight into the proposed rule's development, as well as some sobering projections on how it may be implemented.

Given that this is the first complete regulatory overhaul of nationwide residential real estate practice since the adoption of RESPA in the mid-1970s, I can safely predict that REBA will be offering CLE

See NEW, page 4

Land Court limited assistance representation order adopted

BY THE HON. ROBERT B. FOSTER

Limited assistance representation (LAR) permits an attorney, either for payment or not (*pro bono*), to assist a self-represented litigant on a limited basis without undertaking a full representation of the client on all issues related to the legal matter for which the attorney is engaged.

On April 10, 2009, the Supreme Judicial Court issued an order (effective May 1, 2009) providing that limited assistance representation may be implemented in any department of the Trial Court in such divisions and in connection with such matters as each department chief justice, in his or her discretion and with the approval of the chief justice of the Trial Court, may prescribe.

ORDER

The Land Court Department, with the approval of the Chief Justice of the Trial Court, hereby adopts Land Court Standing Order No. 1-12, to implement limited assistance representation

Notwithstanding any provisions to the contrary in any Rule of Court or Standing Order, it is hereby ordered that the following procedures shall apply in the Land Court Department with respect to Limited Assistance Representation. In addition, the judge in an individual case may enter further orders with respect to Limited Assistance Representation to the extent necessary to further the goals of this Order and access to and the administration of justice.

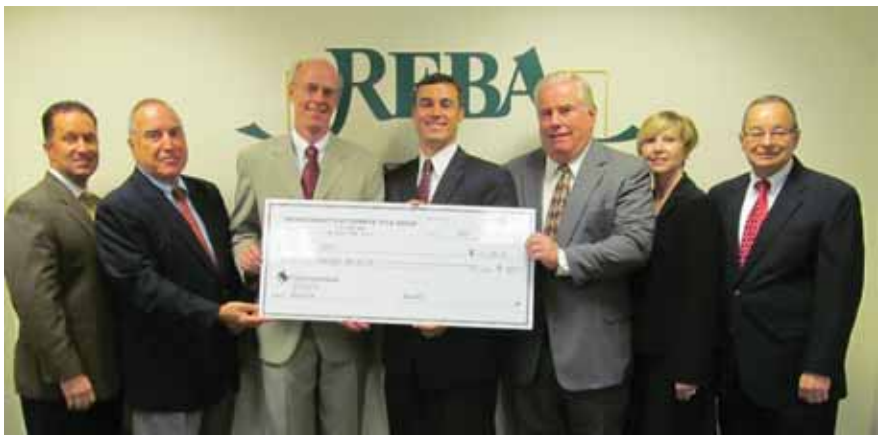
1. Matters for Which an Attorney May Enter a Limited Appearance

A qualified attorney shall be permitted to enter a limited appearance on behalf of a self-represented litigant for the purpose of representing such a litigant in connection with any matter pending or filed in the

See LAND COURT page 2

MassATG donates $25k to REBA

Massachusetts Attorneys Title Group, through the support of CATIC, has donated another $25,000 to the Real Estate Bar Association to fight the unlawful practice of law, bringing aggregate donations to $175,000. These essential donations permit REBA to continue its fight against the unauthorized practice of law, particularly in the landmark case of *REBA vs. NREIS* (National Real Estate Information Services), now back in the federal district court.



Pictured (left to right): MassATG agent development director Kevin Atwood; MassATG founder Tom Bussone; REBA president Chris Pitt; REBA president-elect Mike MacClary; CATIC president Rich Patterson; CATIC chief operating officer Anne Csuka; and CATIC general counsel Ed Browne.

REBA comments on CFPB's proposed integrated disclosure rule

The federal Consumer Financial Protection Bureau (CFPB) has proposed an integrated disclosure rule for the Real Estate Settlement Procedures Act (RESPA) and the Truth-In-Lending Act (TILA) that will affect residential real estate practice nationwide. The rule, if finalized, is the most significant change in the residential real estate arena since the introduction of REBA in the mid-1970s.

REBA has a number of concerns about the new rule which are included in the association's comment letter to the CFPB, which appears here in its entirety.

To access the proposed rule, go to http://files.consumerfinance.gov/f/201207_cfpb_proposed-rule_integrated-mortgage-disclosures.pdf.

Dear Sir or Madam:

The Real Estate Bar Association (hereinafter "REBA") is a 2,500-member, 125-year-old Bar Association located in Massachusetts. Our members are primarily attorneys, but also include other real estate professionals including paralegals, title examiners and members of the title insurance industry. We have followed changes in the RESPA Rule closely for the past 20 years and have taken part in roundtable discussions in Washington. Massachusetts is an "attorney" state, meaning that closings done by settlement agents across much of the country are done by attorneys in Massachusetts. The independence of the attorney at the closing table is taken very seriously in Massachusetts, and we have drafted legislation that has been enacted to protect the consumer; legislation including a title certification statute and a good funds statute. We strongly agree with the concept that consumers should "know before they owe" but have several concerns, particularly with the combining of the TILA/RESPA disclosure and the requirement that any change in said disclosure statement invokes a new three day review period prior to closing.

The closing disclosure proposed Rule §1026.38 integrates the existing HUD-1 closing statement and the Truth in Lending disclosure. This disclosure form must be provided to borrowers at least three business days prior to closing. But for an exception for bona fide personal financial emergency, this period cannot

See REBA'S COMMENTS, page 8

Land Court limited assistance representation order adopted

CONTINUED FROM PAGE 1

Land Court Department on or after the effective date of this Standing Order.

2. Limited Assistance Representation

A qualified attorney may limit the scope of his or her representation of a client if the limitation is reasonable under the circumstances and the client gives informed consent. An attorney shall not be deemed a "qualified attorney" unless he or she completes one of the following information sessions on Limited Assistance Representation approved by the Chief Justice of the Land Court Department: (1) the written and audio LAR materials developed by the LAR Advisory Group of the Supreme Judicial Court Steering Committee on Self-Represented Litigants, which are currently available through Senior Partners for Justice at www.spfj.org; (2) the "Building Your Practice with Limited Assistance Representation" seminar periodically offered by Massachusetts Continuing Legal Education; (3) any LAR training and/or training materials developed and made available by the LAR Task Force of the Access to Justice Initiative. If an attorney previously completed an LAR information session approved by the Boston Municipal Court, District Court, Housing Court, or Probate and Family Court prior to the issuance of this Standing Order, then such attorney need not complete another information session. By filing the Notice of Limited Appearance attached to this Standing Order, an attorney is certifying that he or she is qualified to appear as an LAR attorney in the Land Court Department.

3. Limited Appearance

An attorney making a limited appearance on behalf of an otherwise unrepresented party shall file a Notice of Limited Appearance in the form attached to this Standing Order. The Notice shall state precisely the court event to which the limited appearance pertains. An attorney may not enter a limited appearance for the sole purpose of making evidentiary objections. A limited appearance shall not allow both an attorney and a litigant to argue on the same legal issue during the period of the limited appearance. An attorney may file a Notice of Limited Appearance for more than one court event in a case. At any time, including during an event, an attorney may file a new Notice of Limited Appearance with the agreement of the client.

A pleading, motion or other document filed by an attorney making a limited appearance shall comply with Rule 11(a), Massachusetts Rules of Civil Procedure, and/or cognate Land Court Rules, and shall state in bold type on the signature page of the document: "Attorney of [party] for the limited purpose of [court event]." An attorney filing a pleading, motion or other document outside the scope of the limited appearance shall be deemed to have entered a general appearance, unless the attorney files a new Notice of Limited Appearance with the pleading, motion or other document.

Upon the completion of the representation within the scope of a limited appearance, an attorney shall promptly withdraw by filing a Notice of Withdrawal of Limited Appearance in the form attached to this Standing Order, which notice shall include the client's name, address, telephone number, and email address, unless otherwise provided by law. The attorney must file a Notice of Withdrawal of Limited Appearance for each court event for which the attorney has filed a Notice of Limited Appearance. Unless and until a Notice of Withdrawal of Limited Appearance is filed, the attorney shall be treated as appearing for the party, notwithstanding whether the court event for which the attorney filed the Notice of Limited Appearance has been concluded. An attorney who fails to file a Notice of Withdrawal of Limited Appearance promptly upon completion of the court event for which the attorney filed the Notice of Limited Appearance will be deemed to have entered a general appearance. In addition, the court may impose sanctions for failure to file such notice.

4. Service

Whenever service is required or permitted to be made upon a party represented by an attorney making a limited appearance, for all matters within the scope of the limited appearance, the service shall be made upon both the attorney and the party. Service upon a party shall be at the address listed for the party in the Notice of Limited Appearance. If the party's address has been impounded by court order or rule, service of process on the party shall be made in accordance with the court order or rule. Service upon an attorney making a limited appearance shall not be required for matters outside the scope of the limited appearance.

5. Assistance in the Preparation of Documents

An attorney may assist a client in preparing a pleading, motion, brief or other document to be signed and filed in court by the client, a practice sometimes referred to as "ghostwriting." In such cases, the attorney shall insert the notation "prepared with assistance of counsel" on any pleading, motion, brief or other document prepared by the attorney. The attorney is not required to sign the pleading, motion, brief or document, and the filing of such pleading, motion, brief or document shall not constitute an appearance by the attorney. The client remains responsible to the court and other parties for all statements in any pleading, motion, brief or other document prepared but not signed by an attorney.

6. Notice of Availability of LAR

The plaintiff in any action shall serve a copy of the "Limited Assistance Representation (LAR) Information Sheet" upon all defendants at the same time as service of the summons, complaint, and civil cover sheet is made. The "Limited Assistance Representation (LAR) Information Sheet" is available at the Land Court website or from the clerk's office. Plaintiff or plaintiff's counsel shall certify to the Court that the "Limited Assistance Representation (LAR) Information Sheet" has been served.

Karyn F. Scheier
Chief Justice
Land Court Department

Dated: October 9, 2012
Effective Date: January 2, 2012
Commonwealth of Massachusetts
The Trial Court
Land Court Department

The Hon. Robert B. Foster was appointed to the Land Court bench as an associate justice in 2011, succeeding Hon. Charles W. Trombly. Prior to his appointment to the bench, Foster was a shareholder in the Boston firm of Rackemann Sawyer & Brewster PC.

Mills joins REBA Dispute Resolution

DAVID MILLS

Recently retired Appeals Court Associate Justice David A. Mills has joined the panel of REBA Dispute Resolution. He will focus on land use and zoning matters. He is available for mediations of all kinds including domestic relations, civil unions and marital break-ups.

Mills was a justice of the Massachusetts Appeals Court from 2001 to 2012. During his service on the Appeals Court bench Judge Mills authored 120 published opinions and 15 rescript opinions.

Prior to joining the Appeals Court, Mills' law practice focused on advocacy in zoning and land use matters before municipal, state and federal land use and regulatory agencies in more than 2,000 cases. During his years in private practice, Mills also served as a long-time faculty member on MCLE's zoning and land use programs, as well as constitutional law programs.

A graduate of Boston College and Boston College Law School, Mills first served in the appellate section of the Middlesex County District Attorney's Office before going into private practice. He is a member of the Massachusetts and Boston bar associations, as well as the Massachusetts LBGTQ Bar Association. A life-long resident of the town of Danvers, he was a town meeting member for 30 years, serving as town moderator in the late 1990s.

REBA
THE REAL ESTATE BAR ASSOCIATION
for Massachusetts

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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 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

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COMMENTARY

Practicing law by telegraph and walkie-talkie

BY PAUL F. ALPHEN

PAUL ALPHEN

My cousin Vinnie called to harass me after another embarrassing loss by the BC football team. It's getting to be a regular thing. I responded with all kinds of optimism that the new athletic director will turn the program around and he will also find a way for the fans that attend the games to have fun. Perhaps BC will have to purchase all of the land within a mile radius of the campus so that the onerous anti-tailgating, anti-fun rules can be lifted.

To change the subject I made the mistake of asking Vinnie how his suburban real estate practice was fairing now that the economy was improving. Vinnie went into a 20-minute rant regarding his hatred for emails. He said: "Years ago when emails first started to appear, they were usually brief messages and were of little consequence, so it was hard to justify a charge. At some point emails supplanted phone calls, but the emails contained productive information that assisted all parties in reaching terms and consummating a deal. Emails were simple and usually required one word answers, like: 'Can we meet on Monday at 10 a.m.?' or 'Can we change the date for the closing to Jan. 4?' Then the wheels fell off the bus."

"At some point after the 2008 market crash, emails became more complicated. Now emails usually sound like this: 'I signed an agreement to purchase a lot with four seasonal buildings that were probably constructed prior to zoning. The lot is undersized and is bisected by a right of way. Can I reconstruct all four for full-time occupancy, and if I construct an addition to one building, do I have to maintain a front yard setback from the right of way?'"

"The correct answer should be: 'I need to see a survey plan of the property and the buildings, examine the records of the buildings at Town Hall and the zoning by-law and perform a title examination of the property to determine if the buildings are lawfully pre-existing non-conforming buildings, and determine who has rights in the right of way. Please forward a retainer of mucho dinero and I will provide you with an opinion letter in three to four weeks.'"

"Unfortunately, societal expectations have prevented us from responding via email in such a fashion. People expect to see instant and brief responses to emails. It has become the norm. We hate to disappoint, so we respond to emails in the manner that senders expect to see them, and we feed the monster. This is what it must have been like sending and receiving telegraphs before the invention of the telephone."

Vinnie's rant continued: "Look at my email inbox. It's a nightmare. Yesterday, I received over 150 emails, including 10 about one simple single family P&S. A few years ago, the types of issues now raised in the emails were addressed in one phone call; usually after counsel and client spent a little time discussing all the relevant issues. But because buyers, sellers, brokers and sometimes counsel send out emails each time a new thought pops into their heads, a simple transaction can result in dozens of emails. Counsel has to sort through them all, read them and take notes to compile the collective thoughts contained in all the messages. The compilation process wastes time."

Vinnie went on, noting that

See TELEGRAPH, page 6

24 'top ten' rules of the road

BY JAMES S. BOLAN

Jim Bolan

In our representation of lawyers and law firms, a repetitive theme is, as they say, "remember what you learned in kindergarten." In that spirit, there are overarching "rules of the road" that need to be attended to – from alarm bells on whether to undertake a matter, who your client is (an enormous problem in real life), what the scope of your engagement is (how broad or limited), is there a clear fee arrangement – to how you extricate yourself at the other end. For your reading pleasure, culled from our experience and years of reading "to-do lists" from many sources, please see the following sample "top 10" rules of the road:

PROSPECTIVE CLIENTS

Avoid prospective clients whose expectations, demands, or "all-knowingness" give you pause.

Avoid matters that arrive at your door too late for you to be contemplative. Said another way, if you have to rush to rescue a claim, you may step over the cliff before you realize it.

If something doesn't seem right, run it by a friend, colleague or other trusted person before you undertake a representation. Do NOT ignore red flags, bright lights, or bells going off.

CONFLICTS

Conflicts checks!!!! The failure to do them will come back to bite you someday.

NON-ENGAGEMENT/ LIMITED ENGAGEMENT

If you do not undertake to represent someone, confirm the non-representation in writing, whether by email or letter.

If you are undertaking a limited scope of engagement (just prepare the loan documents and do the closing), is it really limited or is the client expecting you to run title, etc.? Have you taken the time to memorialize the limited scope? If you don't, call me when the Board of Bar Overseers or malpractice claim is filed!

FEES AND BILLS

Think long and hard about undertaking a matter in which the amount in issue is less than the realistic costs of conducting the litigation. If a $25,000 claim is going to cost $20,000 to litigate, you are going to lose money, the client is going to be furious and someone will complain.

Talk about fees. Do not avoid the subject. If someone is reluctant or unable to pay up front, why is it going to get better down the road? (We are not talking about contingent or startup situations, of course.)

If you agree to be retained, put it in writing. As Rule 1.5 states, "the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client."

Make sure that the scope of the engagement is clear and defined from the beginning. (Did I mention this before??)

Bill monthly. Make the bills clear and use lots of "action" verbs.

If you are not being paid, do not walk away, fail to show up or withhold services. See "Getting Out," page 10.

GETTING IN: REPRESENTATIONS, PLANNING AND DOING

If you make a promise, can you keep it? Since you probably cannot, don't make it.

If you guarantee a result, can you achieve it? Since you probably cannot, don't do it.

Avoid placating clients with claims that they will achieve a "good result."

Lying for any reason will come back to haunt you! ("Of course, we filed the extension.")

Spend time determining whether the facts and the law provide a good faith basis *before* filing suit. Therefore, don't promise to file suit when you are not sure if you will have a good faith basis to do so.

Consider having an expert witness on board as early in the case as possible (if one is going to be needed) to substantiate the basis for claims to be made.

Keep an accurate calendar, with ticklers for upcoming dates, and make sure that a second person double checks it.

If you don't want or cannot handle a matter, tell that client (or prospective client) that you want to refer it out. Make sure that the person referred to is competent. If you intend to seek a referral fee, it must be in writing signed by both counsel and the client before the referral is made.

ACCOUNTING

The bane of all lawyers' existence is keeping bank and accounting records straight. But take the time to set up IOLTA records correctly, make sure they are reconciled no less than every 60 days and make sure that you enter data so you can track income and outgo for each client, and each matter, in "subaccounts". And do not forget to maintain a small separate "subaccount" for the office within the IOLTA account to cover bank or related fees in case there is a charge to the account for a bounced or returned check.

See TOP TEN page 10

2012: A recap from President Pitt

CONTINUED FROM PAGE 1

training programs and break-out sessions on the subject for several years to come.

One highlight of our annual meeting and conference was the presentation of REBA's highest honor, the Richard B. Johnson Award, a lifetime achievement award for real estate lawyers. Joel Reck, this year's award recipient, exemplifies a legal career echoing REBA's mission of service and professionalism. Of course, Rudy Kass's encomium of Joel was original and delightful.

On the legislative front this year, REBA served well the interests of Massachusetts real estate lawyers, successfully engineering the addition of precise reliance language text into major foreclosure legislation that will help to resolve major conveyancing and title headaches associated with the Supreme Court's 2011 *Ibanez* and 2012 *Eaton* decisions. With Ed Smith's counsel and astute guidance, REBA also singlehandedly influenced the insertion of reliance language into the Massachusetts Uniform Probate Code (MUPC) technical corrections bill, to resolve a vexing ambiguity for conveyancers in the 2011 MUPC.

Our two REBA-sponsored legislative priorities, notary public reform legislation and an easing of the requirements for voluntary withdrawal from the registered land system, as well as marketable title legislation, remain on our docket as unfinished business. If not enacted this year, our Legislation Committee, ably co-chaired for 2013 by Fran Nolan and Rich Hogan, will re-file the bills for the 2013-20 session. Look to the January/February issue of *REBA News* for a full report on REBA's full legislative agenda for the upcoming two-year session.

At REBA, we have always considered the Land Court to be "our court." We make a special effort to advocate in the court's interest on court funding and other issues of concern to the court's leaders. For some time now, funding constraints have limited the court to a single clerk for all seven judges. I am pleased to note that legislative appropriations now permit the court to engage two additional law clerks, bringing the total number of paid full-time law clerks for all seven judges from one clerk to three. We have a long way to go to reach the level of one clerk for each judge. REBA will continue to advocate for additional Land Court funding on Beacon Hill.

As I write, the Land Court is on the verge of launching a limited assistance representation (LAR) program pursuant to Standing Order 1-12, to take effect in January. Our staff will collaborate with Associate Justice Robert Foster to develop lists of our members approved for participation in this exciting program. We welcome the opportunity to serve the court and its litigants.

In our mission of eliminating the practice of real estate law by non-lawyers, REBA won a great victory in the SJC in April 2011 in our long-running *REBA vs. NREIS* litigation, launched in 2006. This triumph was not only for our members, but also for every current and future lawyer in the commonwealth, regardless of their field of concentration … and most of all for the home-buying public! The SJC gave the definitive answer that conveyancing in Massachusetts is the practice of law. Our case is now back in the federal district court on the docket of Judge Stearns for additional discovery. Both our long-time counsel, Doug Salvesen, and our leadership are increasingly optimistic about a favorable and final result. In addition to *NREIS*, REBA prevailed in the settlement of another unauthorized practice of law case in the Superior Court, *REBA vs. National Loan Closers, Inc.*

I must pause to recognize the sustained support REBA has enjoyed in its unauthorized practice of law (UPL) efforts from special allies. Our thoughtful and wise counsel, Doug Salvesen, has become a national authority on the unauthorized practice of law. With each meeting, consultation and conference call, my admiration for Doug grows. As most of you are aware, Massachusetts Attorneys Title Group (MassATG) is REBA's pre-eminent affinity partner is supporting our unauthorized practice of law mission. Since its inception, MassATG has contributed nearly $180,000 to REBA's UPL fight. Of course, MassATG could not function without institutional and underwriting back-up from our friends at CATIC. Tom Bussone and Kevin Atwood at MassATG and Anne Csuka, Rich Patterson and Ed Browne at CATIC are stalwart allies in this shared mission.

Now in its 17th year, our affiliate, REBA Dispute Resolution, continues to thrive. We are grateful to our neutrals, particularly Rudy Kass, Joel Reck, Mel Greenberg and Leon Lombardi. for their commitment to our alternative resolution program. Nicole Cunningham and Andrea Morales manage this affiliate's day-to-day work with remarkable finesse.

We are now in the fourth year of a global economic meltdown that continues to have profound consequences for all of us, not sparing REBA members. But as we approach the year's end, we see encouraging signs in both the residential and commercial real estate arenas. The fall selling season for homes and condominiums was strong, refinances are picking up and commercial transactions and new construction are showing strength. I am proud that REBA is weathering the storm when so many other organizations have faltered. We are grateful to our loyal members who have maintained and renewed their membership in these stressful times.

I leave our leadership in capable hands. Mike MacClary will take over as REBA President for 2013 and President-elect Michelle Simmons in 2014. In October, we elected a strong and diverse slate of board members who will carry our mission into 2013 and the years that follow. I am particularly grateful to our leadership team: Mary Ryan, Michelle Simons, Tom Moriarty, Paul Alphen, Mike MacClary, Chris Plunkett and my immediate predecessor Ed Bloom.

Thank you for the honor and privilege of serving you and leading this venerable organization.

Christoper Pitt

Chris Pitt, REBA's outgoing president, concentrates his practice in commercial and residential real estate matters, practicing with the Boston office of Robinson & Cole LLP. He has been a frequent media commentator on the SJC's *Eaton* decision and predecessor cases. Chris can be contacted by email at cpitt@rc.com.

The condominium turnover
Transitioning to unit owner control

BY JENNIFER L. BARNETT


Jen Barnett

In Massachusetts, a condominium is established by recording a master deed, which submits the condominium to the provisions of G.L. c. 183A. The governing body of the organization of unit owners may take several forms, but it is generally established by the recording of a declaration of trust and is regularly referred to as the board of trustees.

The individual or entity who establishes the condominium is often referred to as the condominium's developer and/or declarant, and usually, the condominium by-laws and/or the declaration of trust allows the developer and/or declarant to appoint trustees of the condominium trust during the development of the condominium project.

The condominium's by-laws and declaration of trust often include a provision about the turnover event (either triggered by a percentage of units sold, or by the expiration of a specified period of time). G.L. c. 183A does not provide for any specific turnover event to facilitate the transition of the condominium from developer

See CONDO, page 7

Three important changes to the Wetlands Protection Act

BY NATHANIEL STEVENS

During the last week of the full Legislature session, lawmakers on Beacon Hill passed, and Gov. Deval Patrick later approved (in large part), the 2012 Economic Development Act, which affects the permitting program under the Wetlands Protection Act. These changes became effective on Aug. 7, 2012.

ABUTTER NOTIFICATION CLARIFIED

The 2012 Economic Development Act amended the Wetlands Protection Act to change or clarify abutter notification procedures for some project types, mostly projects where actual work occurs in a portion of a larger area. Essentially, instead of looking at the property line of the parcel where work is to occur to determine the abutters within 100 feet, one now measures from the area where the actual dredging, filling, or altering will occur.

When work is inland under water bodies and waterways, or on a tract of land greater than 50 acres, written notification must be given only to abutters with 100 feet of the "project site." "Project site" is newly defined as the land where "the following activities are proposed to take place: dredging, excavating, filling, grading, the erection, reconstruction or expansion of a building or structure, the driving of pilings, the construction or improvement of roads or other ways and the installation of drainage, sewerage and water systems."

Interestingly, the law also defines "land under water bodies and waterways" for purposes of abutter notification as "the bottom of, or land under, the surface of the ocean or an estuary, creek, river, stream, pond or lake". This essentially combines lists in the DEP Wetlands Regulations' definitions of Land Under Ocean and (freshwater) Land Under Water Body. 310 CMR 10.25 and 10.56.

When the project site is a linear shape greater than 1,000 feet in length, notification must now be given to "all abutters within 1,000 feet of the proposed project site." Indeed, the signed legislation does state "1,000 feet" rather than 100 feet, potentially providing a significantly greater number of abutters who would be notified. If the linear project site is wholly within an easement through another person's land, notice also shall be given to the owner of the land over which the easement runs.

WAIVER OF FILING REQUIREMENTS FOR CLEAN-UP AFTER A DESTRUCTIVE STORM

Following Hurricane/Tropical Storm Irene and the Halloween snowstorm later last year, DEP Commissioner Kenneth Kimmell issued emergency regulations that relaxed procedures for clean-up and restoration work. These regulations meant that even the emergency provisions of DEP's Wetlands Regulations (310 CMR 10.06) were not required for some work. Apparently there was some question whether such regulations were legal or effective. To facilitate similar action in the future, the 2012 Economic Development Act amends the Wetlands Protection Act to explicitly give the DEP Commissioner such authority as well as provide parameters.

After "a destructive weather event requiring widespread recovery efforts, debris cleanup or roadway or utility repair," the DEP commissioner may declare a "severe weather emergency" so as to allow for emergency work to protect public health or safety. The commissioner's severe weather declaration must specify: the work that can be done without filing a notice of intent or an emergency certification; general mitigation measures that may be required for such work, notification or reporting requirements, and the geographic area covered by the declaration.

The declaration must specify the length of time in which it will be in effect, though not more than three months unless extended by the commissioner.

The declaration must be sent electronically to all conservation commissions in the geographic area of the severe weather emergency. Also, it must be made widely available to the general public "through appropriate channels for emergency communications."

UTILITIES EXEMPTION EXPANDED

Certain public utility work has long been exempt from the Wetlands Protection Act through an explicit provision in the statute. Work that maintains, repairs, or replaces existing structures or facilities used by listed types of public utilities does not have to comply with the procedural requirements of the act. Such work cannot substantially change or enlarge the structure or facility of the public utility. The public utilities list is public electric, gas, water, telephone, telegraph and other telecommunication services.

The 2012 Economic Development Act adds "sewer" to this list of public utilities. Work to maintain, repair, or replace any structure or facility used by a public utility to provide sewer service is now exempt from the Wetlands Protection Act. Communities replacing their aging sewer collection systems now do not have to file notices of intent before beginning such projects. Remember, however, that DEP's Wetlands Regulations place the burden on the project proponent, not the conservation commission, to establish that such utility work is exempt.

CONCLUSION

As part of its economic development law last summer, the state included three Wetland Protection Act amendments changing, in subtle but significant ways, abutter notifications on large lot or linear projects, jurisdiction and standards for storm damage cleanup projects, and a sewer work qualified exemption.

Nathanial Stevens practices with McGregor Associates. He can be reached at nstevens@mcgregorlaw.com.

Practicing law by telegraph and walkie-talkie

CONTINUED FROM PAGE 3

today the abundance of emails in some commercial deals can be overwhelming: "Your client and his business associates try to keep you in the loop as they send you copies of innumerable emails of the dialogue between them. You have two choices: You can sit behind your computer screen all day and read every email that comes into your inbox, and then, when something meaningful is decided, copy the pertinent data from each email and insert it a working redline copy of a contract based upon the email traffic; or, you can ignore the emails at your peril and wait for your client to call and complain that you have not yet provided a finished product based on their various emails."

"The problem with the first option is that out in the suburbs nobody is going to pay you to sit and watch your inbox and separate the wheat from the chaff, and even if you tried to keep up with the emails, you will be unable to do anything productive all day monitoring email traffic. The net result is that you can broke monitoring emails all day. Perhaps in the big city paralegals go through all the emails and bill the clients accordingly."

I have asked some of my friends who own their own businesses if they have a similar love-hate relationship with emails. The feeling was universal. As my friend the insurance agent said: "I love all my clients, but I especially love those who still use the phone when needed. Emails are handy for one-sentence updates and for circulating documents. But they are often counterproductive when you send out multiple questions to a recipient and he responds to only one of the questions or completely misunderstand a question. The beauty of a phone call or an in-person meeting is the opportunity to confirm that you and the other party fully understand one another, with the instant opportunity to ask follow up questions or seek clarification."

I realize that my cousin Vinnie and I sound like curmudgeons, complaining about technology. But, I have to believe that even young practitioners in small or suburban firms realize that they would be more productive if they could spend more time speaking with their clients rather than exchanging telegraphs. Unless, of course, one party is speaking on a bad cell phone where you can only understand every other word; which is like trying to provide legal advice by walkie-talkie.

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.

Transitioning condos to unit owner control

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to unit owner control. At the turnover event, control over the condominium and all of its affairs are turned over from the developer and/or declarant to a board of trustees elected by the unit owners.

The initial developer-appointed trustee and the developer and/or declarant should initiate the process. However, if the turnover event is about to happen or has already taken place, unit owners should be proactive and contact the developer and/or declarant and/or developer appointed trustee to begin the process. Upon the election and/or appointment of the unit-owner controlled board of trustees, appropriate documentation will have to be recorded with the registry of deeds to confirm the trustees' acceptance and/or appointment.

Prior to the transition event, the unit owners should be aware of any attempts by the developer and/or declarant to extend the period of developer control beyond that called for in the condominium's constituent documents. Additionally, the unit owners should be aware of any attempts by the developer and/or declarant to sell off its last remaining assets, especially if any construction defects and/or deficiencies have been detected before the turnover event.

Following the turnover event, the board of trustees should consider hiring a management company or do an internal review of the condominium's books and records to review the budget and to determine whether the current monthly condominium fees are adequate.

In some instances, the monthly condominium fees may have been kept artificially low in order to attract buyers. Further, the board should consider hiring an independent accountant to perform a financial review to ensure that the association has adequate reserves, to identify any unexplained expenditures during developer control, and to ensure that the books are otherwise in order. To that end, it is also important to confirm that the developer and/or declarant paid monthly condominium fees for the units that it owned from the time that they were first added to the condominium until they were sold to independent third parties, and that the developer and/or declarant did not pay developer related expenses out of the condominium's accounts.

The board should also carefully review the condominium's governing documents. Often, there are provisions requiring that all disputes be submitted to arbitration and/or that the board obtain the consent of all unit owners before commencing litigation and/or that litigation fees be assessed up front. These provisions are often referred to as "poison pills" and the board should carefully consider amending these provisions out of their governing documents in accordance with the provisions therein.

Upon the turnover event, the unit owner controlled board should also consider engaging a professional engineer to perform a conditions survey to identify any and all construction defects and deficiencies. As there is a limited window in which to act to seek redress from the developer and/or declarant for any construction defects and/or deficiencies, the board should not wait to have the survey performed. If nothing else, the survey report will help the board budget for ongoing maintenance and repair issues. The survey report should not be shared with any unit owners or any party outside of the board and the property manager and/or attorney. This is particularly important if the board elects to pursue litigation, because the initial survey report is often preliminary in nature and if the report is shared, it loses its privilege and may be used against the board of trustees in litigation.

In the event that the survey report identifies construction defects or deficiencies, the board of trustees has a number of options. It could either ask the developer and/or declarant to address the same, it could have the items repaired and addressed out of association funds, it could move forward with litigation to address the defects/deficiencies with respect to the condominium's common areas and/or facilities (as opposed to the individual units which are unit owner responsibility) or some combination of the above. Of course, the board could do nothing, which approach has its own inherent and obvious risks.

Importantly, in deciding whether or not to pursue litigation against the developer and/or declarant, it is important to take a business approach. Litigation can be costly and protracted. Further, the attorneys' fees and costs incurred in connection with litigation brought against the developer and/or declarant are generally not recoverable. Accordingly, in deciding whether or not to pursue litigation it is important to weigh the costs and benefits. Additionally, it is important to identify prior to the start of litigation whether the developer and/or declarant still owns any assets. Often the developer and/or declarant is a single purpose entity, and upon the sale of the last condominium unit, it is rendered asset less or, in other words judgment proof. If an association can attach the assets standing in the name of the developer and guarantee a source of recovery in the event of a favorable judgment, the association will be in a much better position.

In the event that the board intends to hold the developer and/or declarant accountable for any of the construction defects and/or deficiencies through litigation or otherwise, it should not make any repairs or alterations to the affected common elements, unless and until it affords the developer and/or declarant an opportunity to inspect and monitor the progress of any and all repairs and/or alterations of the affected elements.

In summary, it is important to be aware of the timing of the turnover event in the condominium's governing documents and to be aware of the rights and responsibilities of the newly elected/appointed board of trustees. Possessed of that information, the board will be in a position to protect and preserve the rights of the entire association of unit owners.

Jennifer Barnett practices with Marcus, Errico Emmer & Brooks, PC, concentrating her practice in the areas of civil and appellate litigation, condominium law and real estate law. Before joining the firm in 2005, she served as law clerk for Land Court Chief Justice Karyn F. Scheier. She can be reached at jbarnett@meeb.com.

REBA comments on CFPB's proposal

CONTINUED FROM PAGE 1

be waived and if changes occur between the time the disclosure is given and the time of closing, a new disclosure must be given and the consumer will have an additional three business days to review the disclosure before the closing may occur.

This requirement will cause unnecessary delays in closing for consumers and will result in settlement agents incurring unnecessary costs.

It is commonplace for closing numbers to change, sometimes right at the closing table. Inspection issues, matters disclosed by title examination, last minute changes for real estate taxes and water and sewer charges, settlement charges and payoffs for borrower's other debts are only some of the issues that might result in a change in the disclosure statement.

Limiting the amount to the acceptable increase to $100.00 is too low a ceiling. A decision to purchase owners title insurance or a day before closing fill up of a residential oil tank could each lead to an increase of closer to $1,000.00. In addition, a seller could be the party creating the situation which might result in a three day business delay, and the seller could, in fact, use such a forced delay for leverage in a negotiation.

These types of changes rarely involve the terms of the loan itself, and borrowers typically do not need three days to consider these types of changes. The additional three day waiting period could result in the borrower losing a rate lock and possibly waiting for days in a motel room with their belongings in storage or, worse, potentially jeopardizing a buyer's deposit and ability to perform in accordance with the terms of a purchase and sale agreement.

As many of the reasons for requesting a waiver are those that would benefit a consumer, it would seem unreasonable to request a waiver be for a "bona fide personal emergency". The consumer should have the option to waive the additional three day disclosure.

For settlement agents, the three day disclosure will increase costs, requiring the agent to review the settlement disclosure form to the consumer at the time of disclosure and then again, at the closing. This duplication of effort will impact small business profitability, with no apparent benefit to the consumer.

According to the ALTA, the proposals and forms under consideration by the CFPB will be costly for consumers and the industry. The industry went through changes to RESPA in 2010, and vendors reported that the comparatively smaller changes at that time cost each software company up to $1,000,000.00 to implement. The anticipated costs for this round of changes are expected to close to $2,000,000.00.

It is expected that because of high costs associated with this round of changes, software firms will pass on these costs to their clients, most of which are small businesses. According to the ALTA, these costs will include $800.00 per employee in upfront implementation and training costs and a 20% increase in yearly software maintenance fees. It will be difficult for small businesses to absorb these fees.

The proposed Rule considers increasing liability on lenders for "tolerance" violations. REBA is concerned that this increased liability will result in lenders limiting the number of settlement agents they will work with. The number of choices made available to consumers was already impacted by the 2010 Rule change and a further inability to compete will result in less choice and eventually higher costs to the borrower.

The Real Estate Bar Association has dedicated a great deal of time and resources to be certain that consumers receive the best possible representation at the closing table, both in terms of quality and assurance that the representation is independent of influence exerted by lenders and mortgage brokers. Our commitment to independent representation is threatened by provisions concerning the combined TILA/RESPA settlement disclosure.

As drafted, the proposed Rule provides two options: The first provides that the lender would be responsible for delivering the Closing Disclosure Form to the consumer. The second option allows for the lender to rely on the settlement agent to provide the form, but the lender will remain responsible for the accuracy of the Closing Disclosure Form.

The first option could result in the lender opting to prepare that portion of the Closing Disclosure Form relating to settlement service charges. This would be a major change in the way business is conducted. Typically, the consumer deals with the settlement agent, who will be responsible for gathering all the necessary information to prepare the HUD-1 Statement. The settlement agent will review the title examination and obtain all necessary payoffs. The agent will also obtain tax information and will be in communication with the seller's attorney. The lender is not in a position to prepare the HUD-1 independently.

Not only is the lender not in the position to prepare the HUD-1 Settlement Statement, the CFPB should strongly oppose this possibility. This would be the first step towards the lender conducting the closing, a contingency that would result in no independent third party review of the transaction.

The second option, although preferable, still leaves open the possibility that the lender may prepare the HUD-1 portion of the Closing Disclosure Form.

The CFPB should require that an independent settlement agent prepare the settlement cost portion of the Closing Disclosure Statement.

REBA agrees with ALTA that lenders should be responsible and liable for preparing the part of the Closing Disclosure form related to loan costs, while settlement agents should continue to be responsible and liable for preparing that part of the Closing Disclosure form related to settlement costs. ALTA CEO Michelle Korsmo stated, "We should remember title insurance and settlement companies didn't cause the housing crisis and didn't take advantage of investors and consumers. Consumers deserve an independent, third party at the settlement table, and this Rule should ensure this role remains in the real estate transaction."

Thank you for the opportunity to comment on these proposed changes to the TILA/RESPA forms and underlying Regulations. If you have any questions or wish to discuss these issues further, please feel free to contact me at the Real Estate Bar Association, 50 Congress Street, Suite 600, Boston, Massachusetts 02109-4075.

Very truly yours,

Christopher S. Pitt, President
Real Estate Bar Association

Resurgence of homeowner associations evidence of market rebound

BY SAUL J. FELDMAN


Saul Feldman

I can tell that the housing market is improving when clients start to ask about homeowner associations.

While more common in other parts of the country, homeowner associations do exist in New England. In my experience, owners of single-family homes may be members of a homeowner association that owns certain common amenities – the roads, or the clubhouse, for example.

The homeowner association could be a trust with the homeowners being beneficiaries of the trust. The homeowners pay fees to the trust that maintains the roads and any other common amenities.

Sometimes there are multiple two-unit condominiums with a homeowner association. Multiple two-unit condominiums are two or more condominiums each containing two-condominium units. Sometimes there are single family homes as well as duplex condominiums with a homeowner association.

Homeowners associations are common interest communities not formed under the Massachusetts Condominium Statute, Chapter 183A of the Massachusetts General Laws. Often, for a subdivision of homes, there is a need for a homeowners association in order to enforce a common scheme of restrictions and to provide for the maintenance of roads and other common property.

This is accomplished by the creation and recording of an umbrella organization, usually a trust, with each homeowner being a beneficiary of the trust. The developer is the sole trustee until all of the homes are sold. When all of the homes are sold, usually three or more of the homeowners become the trustees. The trust enforces a declaration of covenants, conditions and restrictions (the DCC and R). The DCC and R is recorded before the first house is conveyed. All of the homeowners are bound by the DCC and R.

The trust is not governed by Chapter 183A. This can create problems if, for example, there is a need to incorporate the lien enforcement and lien priority provisions of Chapter 183A into the documents. It is, in my opinion, possible to incorporate the priority provisions without statutory authority. As long as this is done, the trust and DCC and R will work to impose a common scheme on the homes in the subdivision. As there is no statute governing a homeowners association, there is broad free-

See HOMEOWNER ASSOCIATIONS page 11

24 'top ten' rules of the road

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GETTING OUT

If you are not being paid, do not walk away, fail to show up or withhold services. See Rule 1.16. If you are involved in a matter before a tribunal (court or administrative agency, for example) you would need to file a motion to withdraw. If you are involved in a transactional matter, send a notice in writing that you are withdrawing and please invite the client to note deadlines of which you are aware. Termination letters are an "art form" and should be carefully drafted.

If you do file a motion to withdraw, limit the text of the motion to a disclosure that there are "irreconcilable differences between you and the client." Refrain from telling tales about the client since anything you disclose of substance is a breach of confidentiality and the client will see it as a betrayal.

Do not go into business with a client. (A rare exception is taking stock in a start-up company, but even that occurrence has substantial risk and conditions attached.)

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.

Open meeting on Prompt Pay Law and Mechanics Lien Law


James Singer

With the stirring of new construction across the commonwealth, both residential and commercial, the Commercial Real Estate Finance Committee will host a "boots-on-the-ground" practical skills refresher on the Prompt Pay Law and the Mechanics Lien Law.

The meeting, open to all REBA members, will be at noon on Tuesday, Jan. 15, 2013, at Nutter McClennen & Fish LLP, 155 Seaport Boulevard in Boston. Featured speakers will be Kathy MacNeil, partner at Millennium Partners – Boston, Jim Singer, partner at Rudolph Freidman LLP, and David Wilson, partner at Corwin & Corwin LLP.


Kathleen MacNeil

MacNeil's work, primarily as a real estate development manager, has included several downtown Boston projects, including Millennium Place, a new residential project under construction, The Ritz-Carlton Hotel and Towers, restoration of the former Ritz-Carlton (now the Taj), the 10 St. James office tower, One Charles Condominium and the rehabilitation of 179 Lincoln St. The 179 Lincoln project is a preservation award-winning and a LEED Silver-certified office renovation in Boston's South Station area.

MacNeil, a LEED accredited professional, holds a Massachusetts construction supervisor's license. She received a master's degree in real estate development from the MIT Center for Real Estate in 1988. She serves on the board of directors of Historic Boston, Inc.


David Wilson

Singer has assisted numerous clients with construction litigation, commercial collections, landlord/tenant issues and general business disputes. Prior to joining Rudolph Freidman, Singer had a legal services background, and was supervising attorney at the Volunteer Lawyers Project of the Boston Bar Association. When not practicing law, he enjoys playing basketball and jogging.

A partner in the Boston construction law firm of Corwin & Corwin LLP, Wilson has written and lectured extensively on construction law. He was the principal draftsman of the Massachusetts Prompt Pay Law. He is active in the Boston Bar Association, where he has serve as co-chair of the real estate section and chair of the construction law committee. He currently serves on the BBA's education committee. He has also been a guest lecturer on construction law for Suffolk University Law School for more than 15 years.

A graduate of Brown University and Boston University School of Law, Wilson's active pro bono involvement includes preparing contracts for post-earthquake construction of the largest hospital in Haiti, including building and site, utilities and sewage treatment plant.

Wilson has been a rider in the Pan-Massachusetts Challenge for 13 years.

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

Zoning amendments for particular projects should survive 'spot zoning' challenges

BY MICHAEL K. MURRAY


Mike Murray

There are circumstances in which a zoning amendment is necessary to facilitate a particular development project on particular land. While such amendments often draw the charge of illegal "spot zoning," the law clearly reveals that, so long as the projects the amendments are intended to promote may reasonably be expected to further the public welfare, they should withstand any such challenge. Three recent cases – *Farrington v. City of Cambridge*, *Galvin v. Boston Zoning Commission*, and *HRPT Medical Buildings Realty Trust v. Boston Zoning Commission* – are the most recent in a long line of cases that have upheld such amendments.

The concept of illegal spot zoning has its roots in the uniformity provision of G.L. c. 40A, § 4 and the equal protection clause of the state constitution and, where it occurs, the zoning amendment must be annulled both because it violates state law and because it is arbitrary, capricious, and in excess of the zoning authority's power. The traditional definition of spot zoning is the "singling out of one lot for different treatment from that accorded to similar surrounding land indistinguishable from it in character, all for the economic benefit of the owner of that lot." (emphasis added), *Lamarre v. Commissioner of Pub. Works of Fall River.*

The "spot zoning" inquiry is a fact specific one in which courts may look at a variety of factors, including, but not limited, to the following:

The size of the rezoned area: however, there is no magic size below which a finding of spot zoning is mandated (see *Marblehead v. Rosenthal*).

Whether parties with an interest in the re-zoned land will benefit from the amendment, However, there are a plethora of cases that have affirmed zoning amendments intended to promote particular projects that, in addition to benefitting the public, benefit particular landowners (see *Woodland Estates, Inc. v. Building Inspector of Methuen*, *Barrett v. Building Inspector of Peabody*, *Lanner v. Board of Appeals of Tewksbury*, *Lacroix v. Zoning Board of Appeals of Methuen*, *Rando v. Town of North Attleborough*, and *Kennedy v. Building Inspector of Randolph*).

The nature of the area re-zoned and the surrounding area. However, in urban areas that are characterized by a mixture of uses, the concept of "uniformity" may have a different meaning than it does in rural areas. (See *Kimberk v. Boston Zoning Comm'n*)

How much planning went behind the amendment. While the only statutory requirement relating to planning is that the municipality's planning board consider the amendment and that both the planning board and the legislative body hold hearings on it, Section 3 of the Boston Zoning Enabling Act, c. 665 of the Acts of 1956 (within Boston, in which BRA is the planning authority), facts demonstrating that the amendment was the subject of careful consideration may help show that the vote to adopt it was neither arbitrary nor capricious (see *Sullivan v. Town of Acton* and *National Amusements, Inc. v. City of Boston*)

None of these factors, however, is dispositive. A zoning amendment is a legislative act, and enjoys a presumption of validity. While the courts may consider a variety of factors in resolving a spot zoning challenge, the ultimate inquiry, as with any legislative challenge that does not involve a protected class or protected conduct, is whether the evidence supports a finding that the legislative action "bears a rational relation to any permissible public object which the legislative body may plausibly be said to have been pursuing." (*W.R. Grace & Co.-Conn. v. Cambridge City Council.*) The permissible public objects of zoning include the promotion of the "public welfare," an extremely broad and elastic concept that includes, among many other things, economic development.

Where there is a reasonable basis to support the vote of the local legislative body, the vote must be sustained, even if there are contrary arguments that make the "reasonableness of a zoning regulation … fairly debatable." (*National Amusements, Inc. v. City of Boston.*)

To summarize the appropriate standard, where the evidence offered to the court permits the conclusion that the legislative body could reasonably have believed that the zoning amendment would further the public welfare, a spot zoning challenge should be rejected, regardless of the size of the rezoned land, whether and how greatly the landowner(s) will benefit from the rezoning, or any other factor. *Farrington*, *Galvin*, and *HRPT*, which all involve forms of overlay districts, are consistent with this well-established law.

Farrington involved a challenge to a zoning amendment that created the "Lesley Porter Overlay District," which applied only to certain properties that Lesley University (Lesley) owned in the Porter Square section of Cambridge. The express purposes of the amendment were to, among other things, encourage the development of an arts institute, the creation of additional ground floor retail uses and the elimination of vacant parking lots.

The other two cases involve unique forms of overlay districts recognized under the Boston Zoning Code. *Galvin* involved a challenge to the adoption by the Boston Zoning Commission (BZC) of a 10-year institutional master plan of the trustees of Boston College, which permits the university to, among other things, expand and improve its facilities and increase the amount of on-campus housing units for its students. *HRPT* involved a challenge to the BZC's adoption of a planned development area (PDA) that authorized a large, mixed use development on land and over air rights above the Massachusetts Turnpike in the Fenway/Kenmore/Audubon section of the city.

Neither plaintiff used the term "spot zoning" in their complaints, but they alleged that, among other things, the amendments were arbitrary capricious, and in excess of the BZC's authority because they benefitted particular land and particular landowners to the detriment of the public.

All three cases were resolved at the summary judgment stage, and each of the decisions notes that the overlay districts had undergone extensive, multi-year public review processes and that the municipal zoning authority could reasonably have believed that that the projects that the zoning amendments encouraged would further the public welfare in a variety of respects.

CONCLUSION

As a practical matter, securing a zoning amendment is no easy feat. Careful planning that includes ample community participation is often necessary to build political support, minimize opposition, and convince the local legislative body of the wisdom of the amendment. However, *Farrington*, *Galvin* and *HRPT* provide a reminder that, for projects that can reasonably be expected to further the public welfare, a zoning amendment is a perfectly viable planning tool, and one that may withstand a "spot zoning" challenge.

Michael Murray is senior counsel with Goodwin Procter, LLP. He represents the non-municipal defendants in *Farrington*, *Galvin* and *HRPT*, and can be reached at mmurray@goodwinprocter.com.

Residential Conveyancing Committee schedules regional meetings

REBA's Residential Conveyancing Committee (RCC) has begun to schedule regional meetings around the commonwealth in collaboration with county bar associations. While these meetings are open to all lawyers, not just REBA or local bar members, the RCC will particularly focus on newly admitted lawyers.

The regional meetings will include updates on real estate related legislation and decisional law, an overview of the Consumer Financial Protection Bureau's proposed 1,099-page combined loan estimate disclosure and mortgage disclosure rule and a report on REBA's unauthorized practice of law litigation, *REBA vs. NREIS*.

Essex County: The regional meeting will be co-hosted with the Essex County Bar Association at 6 p.m. on Tuesday, Jan. 15, 2013, at Angela's Restaurant in Middleton.

Worcester County: The regional affiliate meeting will be co-hosted by the real estate section of the Worcester County Bar Association at 4:30 p.m. on Monday, Jan. 28, 2013, at the Worcester District Registry of Deeds

Hampden County: The regional meeting will be co-hosted by the Hampden County Real Estate Bar Association (the real estate section of the Hampden County Bar Association) at 12 p.m. (noon) on Tuesday, Feb. 12, 2013, at the Red Rose Pizzeria in Springfield.

The committee's co-chairs will post dates and times of additional regional meetings as they become available.

Resurgence of homeowner associations evidence of market rebound

CONTINUED FROM PAGE 9

dom in the provisions of the trust and the DCC and R. It can place restrictions on the size and appearance of the homes and other restrictions which can benefit the homeowners.

Finally, I want to address the issue of multiple condominiums which share "community" property. A homeowner association is the proper way to own and manage the community property. The community property is most often the road or roads into the development. It also includes amenities such as the club house, swimming pool, and tennis courts.

There is a right way and a wrong way to create multiple condominiums with a homeowner association. The right way is to create the homeowner association first and then build the multiple condominiums. The wrong way is to develop the condominiums first and then join them by the homeowner association.

I have seen the disastrous effect to a developer of the latter approach. The developer retained ownership of the entrance roads during the course of building and selling units in four separate condominium communities. He then wanted to set up the homeowner association. He had to deal with the four separate associations of unit owners, their lenders, unit owners and numerous lawyers.

The developer somehow thought there was an advantage to keeping control until the end of the development. In fact, it was the worst way to plan a development.

It is beyond the scope of this article to address the fact that some decisions of condominium trustees and unit owners can not be delegated to a homeowner association.

I should note also that the community amenities could be located in one of the condominiums with cross-easements to the other condominiums. This is a problem unless the amenities are all located on the first condominium. Unit owners will wonder whether the swimming pool, club house, and other amenities will in fact ever be constructed. Therefore, I prefer the scenario of multiple condominiums linked by a homeowner association which is created at the very beginning of the development and owns the amenities.

A member of REBA's Condominium Law and Practice Committee, Saul practices with his daughter at Feldman & Feldman, PC. Saul can be contacted at mail@feldmanrelaw.com

Former REBA presidents receive MCLE's Scholar-Mentor Award

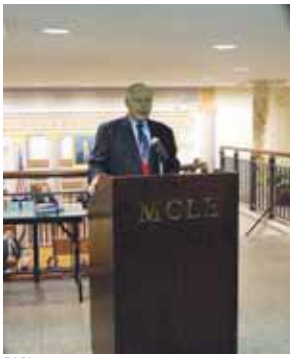
Former REBA presidents Ruth Dillingham and Ed Bloom, together with two others, were honored by Massachusetts Continuing Legal Education with a Scholar-Mentor Award in October.

MCLE created the Scholar-Mentor Awards to honor four MCLE volunteers each year who have "raised the bar" through their outstanding contribution to legal education and to acknowledge their exceptional service to the legal profession.

Special counsel at First American Title Insurance Company, Dillingham served as the association's president in 1996 and is currently a member of the Amicus and Condominium Law & Practice Committees. She has also been president of the Massachusetts Mortgage Bankers Association where she currently co-chairs the group's compliance committee.

Bloom, a partner in the Boston-based law firm of Sherin and Lodgen LLP, was REBA's president last year. He currently serves as co-chair of the group's Amicus Committee and Chair of its Nominating Committee.

Ruth Dillingham



Ed Bloom