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Silver lining in SJC's Article 97 ruling on Boston's Long Wharf

BY GREGOR I. MCGREGOR

GREG MCGREGOR

The Supreme Judicial Court last March ruled that the record facts failed to establish that Long Wharf in Boston qualified for Article 97 protection. Some read the SJC as bolstering urban renewal and the eminent domain tool.

Actually, the SJC has given us remarkable clarity and guidance on the fact-specific inquiry involved in assessing if a given property is protected as parkland or open space under Article 97. You appreciate how often real estate counsel is asked to make this call.

The case is *Mahajan et al v. DEP and BRA*, SJC Docket 11134, decided March 15, 2013. 464 Mass 604 (2013). This decision is the most important recent judicial gloss on Article 97, an area of law addressed infrequently by courts.

Most important, as a result of this case, the list of ways that land can come under the Article 97 ambit has grown. BRA land or water taken by eminent domain for urban renewal, or for that matter all public land no matter how or when acquired, could be or become Article 97-protected by a specific enough eminent domain taking, recorded deed restriction, condition on a gift, subsequent dedication, or even property uses over time demonstrating the original purpose was an Article 97 purpose.

Against the specific ruling on Long Wharf, the silver lining for conservationists, open space advocates, and land use planners is that the SJC saved Article 97 from a wholesale urban renewal exemption which had been urged by the BRA.

Specifically, the SJC in so many words rejected the BRA's argument that the original wording of an eminent domain taking order would be dispositive on whether Article 97 protects the land. Instead, the SJC made highly relevant the history of actual land uses as proving original intent. And the SJC explicated how Article 97 works in practice.

Recall that Article 97 was enacted by the voters in 1972 to establish explicit authority for state environmental legislation, commonly called a Right to a Clean

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Back to the future

Digitizing 25 years of records yields advice for Registries

BY DOUGLAS J. BRUNNER

DOUG BRUNNER

I have been spending a lot of time on the weekends at the office, reviewing closing files from 10 years ago. These are the files accumulated during that most hectic of times (2003), when anyone could buy their dream house, which kept us busy, stressed and working late. I'm not complaining!

Now, it's more nostalgia – or is that nausea? Stacked files fill our smaller conference room, plucked from their bulging cabinets for an arduous journey, like salmon swimming upstream, to the scanner and their new digital home. Each file is crammed with voluminous amounts of information and papers that are mostly useless and redundant, even at the time of closing. The piles remind me of those drawings in magazines demonstrating the size of a person in relationship to a dinosaur; in this case it's me, dwarfed by batches of closing files. Fading notes and faxes warn about dangers of including middle initials, rearranging lender's fees and pleadings with surveyors to finish the plot plan by tomorrow or the world as we know it could end.

Law students are assisting us, at least until they become glassy-eyed, sifting through the closing documents and following my list of what is important

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BEARING WITNESS

REBA v. NREIS and witness only closings

BY BRUCE T. EISENHUT

As we have just now passed the second anniversary of the Supreme Judicial Court decision in *Real Estate Bar Association v. National Real Estate Information Services, Inc. (REBA v. NREIS)*, 459 Mass. 512 (2011), it seems an appropriate time to review what that case did and did not hold.

The decision, among other concerns, deals with the question of whether so called "witness only" closings are the unauthorized practice of law in Massachusetts. In general, a witness only closing occurs when a nonlawyer settlement services provider is hired by a title company or lender to close the transaction. The settlement company retains a Massachusetts lawyer, but limits the scope of the lawyer's services to acting as a witness and notary to the signing of required documents. The other aspects of a closing, such as drafting the seller's deed in a purchase transaction, collecting and disbursing the line items on the HUD-1 settlement statement, certifying title to the buyer or to the title insurance company, and recording or registering documents, are performed by the settlement company. Typically, the "witness only" closing lawyer contracts with the settlement company, not the lender, and has no

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'Poison pill' or good clean drafting?

The legality of provisions limiting developer liability in condominium documents

BY DAVID C. UITTI AND HALEY M. BYRON

It's no secret that condominium developers often insert provisions into governing condominium documents to try to protect themselves and their developer-appointed condominium trustees from future litigation. But how far can a developer go before such provisions violate M.G.L. c. 183A and/or public policy? As far as the Massachusetts courts are concerned, this remains somewhat of an open question.

To illustrate the issue, let's start with a fun fact pattern: A single-purpose LLC developer entity creates a condominium by submitting land and 40 units to condominium status and recording a master deed. The developer also records bylaws and a declaration of trust in which Mr. Smith, the developer LLC's manager, is named as the sole trustee of the condominium trust for a number of years. The developer's only assets are the units, which it promptly begins to sell.

Within the declaration of trust is a provision which limits the liability of the trustee to acts of willful malfeasance. In addition, the bylaws allow the trustee to bring a lawsuit on behalf of the trust only after the trustee has obtained the written consent of 67 percent of the condominium unit owners (i.e., the developer, at least until it sells a majority of the units).

After three years the developer has sold all of the units and transferred control of the trust to elected unit owner trustees. The new trustees hire an engineer to inspect the condominium and she finds multiple costly construction defects. But the single-purpose developer LLC is now assetless, and while Mr. Smith's failure as a trustee of the condominium trust to sue the devel-

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REBA V. NREIS AND WITNESS ONLY CLOSINGS

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direct contact with the lender.

In *REBA v. NREIS*, the SJC was faced with two questions certified to it by the U.S. Court of Appeals concerning the unauthorized practice of law in Massachusetts, *REBA v. NREIS*, 608 F.3d 110 (1st Cir. 2010). REBA had sued NREIS for declaratory and injunctive relief, alleging that NREIS's business of providing lenders with settlement services to close residential real estate mortgage transactions in Massachusetts involved the unauthorized practice of law. In its decision, the SJC reviewed each step of a real estate transaction and concluded that many of the steps, such as performing a title examination, preparing a title abstract, preparing HUD-1 settlement statements and "mortgage-related forms," and issuing title insurance policies, did not involve the practice of law. On the other hand, the court identified steps that clearly involve the practice of law, such as drafting a deed or other instrument to convey a legal interest in real property and determining marketability of title.

The court then turned to a functional analysis of the traditional role of closing attorneys in Massachusetts real estate transactions, describing the closing as "a critical step in the transfer of title and the creation of significant legal and real property rights" and opining that "many of the activities that necessarily are included in conducting a closing constitute the practice of law and the person performing them must be an attorney." Specifically, the court noted that the lender's closing attorney must assure that the grantor has marketable title. The closing attorney also has "a duty to effectuate a valid transfer of the interests being conveyed at the closing," including both title to the real estate and the consideration for the transfer, including the mortgage proceeds. In certain types of mortgage transactions, an attorney is also required to certify title under G.L. c. 93, § 70. Finally, compliance with the good funds statute, G.L. c. 183, § 63(B), generally mandates the involvement of an attorney to hold the mortgage proceeds prior to closing.

Typically, the "witness only" closing lawyer contracts with the settlement company, not the lender, and has no direct contact with the lender.

A Massachusetts real estate closing thus requires the "substantive participation of an attorney." The court found that, because of the lawyer's obligations at the closing as described above, it is not an appropriate course for the lawyer's only function "to be present at the closing to hand legal documents that the attorney may never have seen to the parties for signature, and to witness the signatures." The court stated that "a closing attorney's professional and ethical responsibilities require actions not only at the closing but before and after it as well."

A "witness only" appearance by an attorney would necessarily be inadequate, professionally and ethically, except in the (perhaps unlikely) event that the attorney is first assured that steps constituting the practice of law are being or have been properly handled by other Massachusetts attorneys. To the extent that the other activities required to be done by lawyers are being conducted by nonlawyers, the "witness only" attorney might be assisting in the unauthorized practice of law, in violation of Mass. R. Prof C. 5.5(a). Other disciplinary rules may also be implicated; for example, the borrower may reasonably be misled as to the "witness only" attorney's role at the closing table.

The professional responsibility questions that arise in conjunction with closings, and particularly those relating to unauthorized practice, can be thorny and difficult. As a service to the Bar, the Office of the Bar Counsel operates an ethics helpline to discuss ethical questions that confront attorneys. An attorney who wishes to discuss an ethical question with an Assistant Bar Counsel can call (617) 728-8750 between the hours of 2:00 and 4:00 p.m. on Monday, Wednesday and Friday.

Bruce Eisenhut is assistant bar counsel. The opinions expressed herein reflect the opinions of the Office of Bar Counsel but not necessarily those of the Board of Bar Overseers or the Supreme Judicial Court. A longtime REBA member, Bruce has served as assistant bar counsel for the Board of Bar Overseers Office of Bar Counsel for more than 20 years. He is a frequent contributor to MCLE programs and publications including the Massachusetts Superior Court Practice Manual and Residential and Commercial Landlord-Tenant Practice in Massachusetts. In 2000 he received BBA's Denis Maguire Pro Bono Award for commitment to representation of the indigent. Bruce can be contacted at b.eisenhut@massbbo.org.

Unauthorized practice of law

Major UPL class actions filed in Georgia

Two Georgia homeowners have sued vendor management companies similar to NREIS, as well as the lawyers who conduct their "witness only" closings. The civil actions allege violations of RESPA Section 8(b), racketeering (RICO) and Georgia's good funds statute. The cases are *Patricia Clements vs. Lender Processing Services, Inc., et al.* andn-*Richard Busbee vs. Title Source, Inc., et al.*

The lenders in these two cases are Wells Fargo Bank NA and Nationstar Mortgage LLC.

The two complaints also include claims against attorneys who have participated in witness closings claiming that the attorneys have committed fee-splitting violations.

"The facts in these two cases two almost precisely echo the business model of out-of-state non-lawyer settlement service providers that continue to persist here in Massachusetts, despite the SJC's 2011 decision in our *REBA vs. NREIS* case," said Bob Moriarty, co-chair of REBA's Unauthorized Practice of Law Committee. "We are delighted that our fellow lawyers in Georgia are taking such strong initiatives to protect the public interest."

"A similar case here in Massachusetts could include an even broader scope, with settlement service providers, those lawyers still performing unlawful 'witness only' closings, as well as lenders themselves as defendants," said Doug Salvesen, counsel to the Unauthorized Law Committee. "With the foundation of the SJC's 2011 *NREIS* decision, such a class action here in Massachusetts would have strong prospects. Of course our case will include 93A counts and claims for triple damages."

"We are reaching out to every conveyancer in Massachusetts in an effort to secure a class action name plaintiff here," said Michelle Simons, REBA's president elect.

Copies of the two complaints are available on REBA's website, www.reba.net

REBA
THE REAL ESTATE BAR ASSOCIATION
for Massachusetts

50 Congress Street, Suite 600
Boston, Massachusetts 02109-4075
www.reba.net

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

MENTORING STATEMENT

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

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COMMENTARY

To comply with RESPA, the GFE estimates your HUD … huh, what?

BY PAUL F. ALPHEN

PAUL ALPHEN

When the veteran Celtics team finally won a playoff game against the slightly younger New York Knickerbockers, the headline in *The Boston Globe* sports section read: "Old Timers Day." Ok, if you are 37 years old and still playing professional basketball, you are considered an old-timer. Fortunately, the same cannot be said of those of us playing in the real estate game. We have survived the various stages of professional life from the young years, when we knew nothing, but mistakenly thought that we knew it all, to the old man years when nothing fazes us, even when sometimes things should scare us to death!

Perhaps once we have handled thousands of transactions, we become somewhat immune to the complexities that are contained within even a simple residential real estate transaction. This was brought to my attention during the past six months as my eldest son, the engineer, completed the process of buying his first home. He (rightly) asked me a million questions, and in the process it occurred to me that those of us who live in the world of real estate transactions speak a foreign language.

We toss around terms like HUD, GFE, APR, RESPA, MLC, escrow, covenant, lien, security instrument, odd days interest, settlement and statutory-power-of-sale like Frisbees, and we forget that novice buyers have no idea whatsoever what we are talking about. Even with the best mortgage lender, a new borrower is deluged with piles of paperwork to review and sign and return to the lender … most of which are "disclosures" that are suppose to educate consumers, but in reality the disclosures just add to the madness. Is there any way that a first time buyer can be adequately prepared to deal with the mumbo-jumbo and the associated circus? For most buyers it must be the equivalent of being knocked out cold and waking up in a foreign country, or worse, in a hospital (the medical profession remains the undisputed champion of confusing its clients/patients with mumbo-jumbo).

Think about it. There are very few first-time buyers who could afford to have counsel advise them of the ramifications of every sentence of every document executed during the process of a real estate transaction. We encourage our clients to follow links to Fannie Mae websites, title insurance company sites and similar resources to educate themselves on the process and documents; but just attempting to review and sort out the paperwork flying through the air is an impossible task. Fortunately for my son, he could seek my counsel seven days a week without charge – sort of. I asked him to help me with a variety of projects involving heavy lifting during the intervening period, and he happily gave up his precious weekends to help out the old man. But while we lugged the old washing machine out of the basement and took it to the Falmouth dump, he peppered me with questions about short sales, foreclosures, mortgages and the secondary mortgage market. It turns out he was paying attention, and when it came time for the closing he told me that he had already read the text of the Fannie Mae note and mortgage forms online. That was a first for me.

To add to the fun, in my son's case, the seller needed short sale approval, which created its own set of oddities and idiosyncrasies. This was not my first short sale deal, but I will forego sharing the details here. It's like trying to tell a stranger 'bout rock and roll.

When it was over, while ripping out the carpet and preparing for painting, we discussed all the people that were involved in the transaction over that six-month period, and the incredible amount of time and energy expended just to convey one condo. We decided that the party that was paid at the highest hourly rate during the transaction was probably the locksmith. Everyone else worked for peanuts.

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.

Begin mediation with preliminary, separate meetings

BY JOHN G. WOFFORD

JACK WOFFORD

Mediations can often benefit if each party meets separately with the mediator in advance of the usual joint session. Instead of beginning with parties, attorneys and mediator all in the same room, the mediation is likely to be more productive and more cost-effective if, several days before the mediation, each party meets separately with the mediator. I have used this procedure effectively for over 20 years, especially in complex cases.

Confidentiality, by written agreement, must be in place to protect what is said at such a meeting. The meeting should be held in the office of the party's attorney, with client present. And the meeting is most useful if the mediator has already read materials from both sides.

Separate meetings in advance have many benefits – all interconnected.

EDUCATION OF THE MEDIATOR

Each party has the opportunity, on its own turf, to educate the mediator. Each party can describe its perspective at its own pace, without feeling that the other side is hovering in the next room waiting for the mediator. Discussion with the mediator can be as thorough as the party wishes, including the human, financial, technical and historical context of the dispute, thereby encouraging exploration of the underlying causes of the impasse. When the joint session occurs, parties can focus on negotiating with each other, rather than trying to educate or persuade the mediator.

EXPLANATION OF THE PROCESS

The mediator can explain ground rules, including confidentiality, joint sessions, caucuses, schedule and arrangements. Often the client has never been in a mediation before. Discussion with the mediator in advance can clarify expectations and reduce apprehension.

ASSESSMENT OF CHEMISTRY

Personal chemistry can be assessed – of mediator, client and attorney. Since each mediator has a particular style, the advance session lets the mediator demonstrate his or her approach and develop confidence and credibility with client and attorney. The reverse is also true: the mediator is able to start sizing up how the personalities and styles of the participants may play out in the forthcoming negotiations.

START OF COACHING

The mediator can begin the "coaching" role that is an essential component of mediation – best summarized as "assisted negotiation." Mediation is direct negotiations between the parties, with the help of an impartial outsider with no power to impose an outcome. In addition to conducting a fair and focused process (facilitation) and "reality testing" offers and counter-offers (evaluation), the mediator also "coaches" each party – separately and confidentially – to think strategically about the upcoming negotiation, to recognize its own and the other side's strengths and weaknesses, to listen carefully and to communicate its message to the other party effectively. What kind of opening statement would be useful? What roles should client and lawyer play in the joint session? Is the client properly focused on "business judgment" and "risk analysis," rather than entitlement absolutes or litigation hopes? How might the other side negotiate? What ranges of settlement are targeted? What will be the total future transactional costs, including legal fees, if the matter is not settled? All such important issues are most effectively discussed in advance of the joint session

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BACK TO THE FUTURE

Digitizing 25 years of records yields advice for Registries

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enough to keep for posterity and enquiring clients. After a couple hours they silently plead to start calling lenders for old discharges, deliver closing packets in Maine, or get us coffee – anything for a break from the monotony of deciding "thumbs up" or "thumbs down" to closing documents packaged for my review prior to scanning. These law students may never complete law school after witnessing such a prolific waste of paper, legal analysis, billable hours and the frenetic pace of my staff in creating new files.

I have been told this task is a waste of time, but like any historian, I don't want to throw away certain pieces of history. Who knows what may be relevant in the future?

There is an urgency to our scanning these days. A lion is scratching at our door and roaring to take over the 102-year-old building where our office is located, in addition to a sizable piece of downtown Springfield. Two years ago, Springfield was visited by a devastating tornado; now it's MGM. Our building is the proposed site of MGM's hotel, which will rise 20 stories above their casino. To show historical sensitivity, they are keeping our building's facade as their grand entrance to the hotel.

Notwithstanding their colorful drawings, our facade reminds me of an antelope mounted on a hunter's wall. They haven't been chosen yet, but if I were a gambler, I would bet on MGM. Consequently, I don't want to be forced out of my building next year, hauling 20 heavy file cabinets that I don't need or want. Condensing all those files into a tape I can carry out the door is my goal, possibly followed by a cabinet tag sale.

IN THE BEGINNING

We started scanning our files into DocStar in December 2002, because I had concerns about running out of space. Filling my basement was no longer an option, as my son's recording studio and band practices had grabbed all the available real estate. Scanning was the only option.

The first files we scanned were title exams. We started with the present title exams and planned to reach the older files later. As a result, I have not purchased file cabinets in 11 years and have actually gotten rid of several.

> I had to let go of flipping through a physical file, which also has the benefit of decreasing paper cuts. It wasn't easy going digital, but it was also a relief to heave those first piles of files away.

Still, our office is awash with cabinets, because we have not scanned current closing files out of fear that lenders or clients would need copies of their documents. In a profession that is "paper intensive," it was not easy to let go of files. We were so accustomed to paging through our titles when someone called with a question that it took me months to throw out the first scanned titles. It wasn't until an attorney called with a title question and I couldn't locate his paper file, lost in an accumulated stack, that I realized it made no sense to keep him waiting when I could find the file in DocStar with a couple clicks of the mouse. After all, that was the purpose of getting the scanning system in the first place. I had to let go of flipping through a physical file, which also has the benefit of decreasing paper cuts. It wasn't easy going digital, but it was also a relief to heave those first piles of files away.

We digitize the complete title files, and there are no privacy issues because it is all public information. However, plans, from the days when we ordered them at the Registry, were challenging because of their large sizes. We had to stop writing on both sides of a page, as we often overlooked scanning the second page. One person in the office scans and inputs key file information so we can locate titles by address, file number, plan, client and title examiner. Recently, we started indexing certain probate files. At some point someone else double-checks the entries and makes any corrections. Then, after a brief ceremony commemorating the intrinsic value of the paper file, it is tossed!

Not so easy is digitizing the closing files. They are bigger and contain over 100 drama-filled pages with contributions from attorneys, paralegals, lenders, Realtors, sellers and borrowers. We save the P&S agreement, settlement statement, Truth in Lending, right to cancel, note and mortgage, among others. Documents like the UFFI, signature/name affidavit with odd name variations borrowers have never seen before, amortization schedules (in tiny print of six discouraging pages) and the lenders privacy policy, we don't keep. In the end, less than one-third of a file is retained and scanned.

We also divide the files into what is private and has to be shredded versus documents that can be thrown away. All titles, except for the summary that we keep in our closing files, are discarded, as they were previously scanned into DocStar. The shredding is a process in and of itself, but with my best shredder now in college and difficult to get a commitment from, though he sleeps under the same roof during the summer, I will use a shredding company to speed this process along.

NOTES FOR THE REGISTRIES

Our personal experience has relevance to the current situation faced by several of the Registries of Probate now running out of space for their files. It's not that I'm offering discounted file cabinets, because these Registries have already moved probate files offsite as a solution. This move has made it more challenging to attain the information necessary in completing title examinations. Several title examiners/attorneys have suspended closings for weeks because of their inability to review probate files needed to issue title certifications. This, of course, is a hardship to buyers, sellers and refinancing borrowers.

From a recent meeting with Harry Spence, court administrator of the Massachusetts Trial Courts, attended by Dick Golder, Tom Bhisitkul, Peter Wittenborg and me, on behalf of REBA, it was reiterated how important these probate records are to the Real Estate Bar. Spence strongly concurred with our opinion that digitizing the probate records was the solution. In a second meeting with several of the Registers of Probate, attended by Beth Barton, Dick Golder, Tom Bhisitkul and me, there was no disagreement over the importance of their records to us or the digitizing solution.

It is a question of long-range planning, funding and timing. In the interim, there is a necessity for delivering offsite probate files to title examiners/attorneys without delay. This has to be part of an ongoing discussion with Spence, Paula M. Carey, the newly appointed Probate and Family Court Department chief justice, and the Registers of Probate. Fortunately, they understand the situation and are willing to discuss changes to make the Probate files more available.

So here we are at a crossroads. I have a deadline to make our firm "file cabinetless" before the shovels hit the dirt in Springfield. The affected Registries of Probate have the challenge of making their offsite files accessible within a shorter timeframe, while considering how to reach a long-term solution of digitizing the public records.

Someday, one can only hope, we may all finally go paperless. Then what will I do with my free time? Maybe take up blackjack.

A co-chair of the REBA registries committee, Doug Brunner is sole proprietorr of the Law Offices of Douglas J. Brunner. He may be reached at djb.title@verizon.net or (413) 781-1202.

SILVER LINING IN SJC'S ARTICLE 97 RULING ON BOSTON'S LONG WHARF

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Environment, and to put in place procedural protection for public lands taken or acquired for natural resource purposes, notably a super-majority vote of the Legislature to transfer open space or parkland or use it for other purposes.

The SJC concluded that Article 97 does not apply to the Long Wharf project site, so a two-thirds vote of the Legislature is not required.

This ruling on Long Wharf is quite narrow. On the facts it does not qualify for Article 97 protection from BRA transfer and land use decisions. Yet the SJC enunciated that urban renewal eminent domain takings are not exempt from Article 97 and, of related importance, that when assessing whether a parcel is protected by Article 97, the wording of the original order of taking (the operative eminent domain document) is NOT dispositive. Rather, the uses to which the parcel is thereafter put could be the most important evidence of what the original purpose was.

The SJC discounted the well-known Quinn Opinion (rendered in 1972 in response to questions from the Legislature) "due to the generalized nature of the inquiry and the hypothetical nature of the response." The court's contemporary view of Article 97 is narrower that that expressed in the Quinn Opinion, and the court disagreed with it "to the extent it suggests that the vast majority of land taken for any public purpose may become subject to Article 97 if the taking or use even incidentally promotes the 'conservation, development and utilization of the … forest, water and air,' or that the land simply displays some attributes of art. 97 land generally."

The SJC also rejected the notion "that the relatively imprecise language of art. 97 warrants an interpretation as broad as the Quinn Opinion would afford it, particularly in light of the practical consequences that would result from such an expansive application, as well as the ability of a narrower interpretation to serve adequately the stated goals of art. 97."

The take-away point is what the SJC identified as the "critical question … whether the land was taken for [Article 97] purposes, or subsequent to the taking was designated for those purposes in a manner sufficient to invoke the protection of art. 97."

This seems to us to be the important lesson for lawyers and others dealing with what are or may qualify as open spaces and parklands. We already knew that Article 97 application to a piece of property is highly fact-specific. Now we will attend most closely to the original taking purposes or any subsequent designation for those purposes in a way sufficient to trigger Article 97 protection.

In its Long Wharf decision the Supreme Judicial Court has advanced black-letter law pertaining to parkland protection in Massachusetts, even while ruling that historic Long Wharf on Boston Harbor does not fall under the protection of Article 97.

Greg McGregor is a member of the REBA board of directors and chair of REBA's environmental committee. He and his associates Luke Legere and Michael O'Neill represented the plaintiffs/appellees Mahajan et al in the Supreme Judicial Court. Greg can be reached at gimcg@mcgregorlaw.com.

Preserving the deal

Building protections for investments in real estate development

BY THOMAS L. GUIDI

TOM GUIDI

While the recession put residential real estate development into a tailspin in 2008-2009, developers and investors are seeing a 2013 comeback focused on urban living. Demographics and confidence inspired by the slow but steady recovery are spurring activity in the sector, and small developers are turning to individual investors to participate in financing.

Following a developer's lead through negotiations can be tempting; however, investors must be certain they know what to ask for when structuring a deal to ensure a balanced transaction. As activity heats up, both parties should avoid rushing into an agreement; laying out the necessary protections will help keep the relationship – and the project – in good standing.

The discussion around careful dealmaking is timely, as a window of opportunity has cracked open to service a flourishing population of renters hesitant to embrace mortgages in the current environ-

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'POISON PILL' OR GOOD CLEAN DRAFTING?

The legality of provisions limiting developer liability in condominium documents

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oper before it sold off the units is likely negligence or a breach of fiduciary duty, it likely will not rise to an act of willful malfeasance. Under Massachusetts law, are these liability-limiting provisions legal?

AN 'ENABLING' STATUTE

Regarding the legality of the provision limiting the trustee's ability to sue, one could argue that such a provision violates M.G.L. c. 183A §10, which provides that a trustee can conduct litigation "as to any course of action involving the common areas and facilities or arising out of the enforcement of the by-laws, administrative rules or restrictions in the master deed." But while we encounter such provisions frequently, Massachusetts' appellate courts have not definitively addressed their legality in the face of M.G.L. c. 183A §10.

When faced with a challenge to a provision that limits a trustee's ability to file a lawsuit, developers typically argue that Massachusetts' courts have declared that M.G.L. c. 183A is simply an "enabling" statute and that a developer and unit owners are free to thereafter modify a condominium's governing documents as they see fit. In addition, developers usually argue that the unit owners, by purchasing their respective units with knowledge of the provisions in the governing documents, consented to these provisions and waived any right to later contest them.

In response to these arguments, a number of Massachusetts courts have rendered some interesting opinions, two of which we will take a look at here. In *Harris v. McIntyre* (Mass. Superior Ct. 2001), a construction defect action brought by the unit owner trustees against the developer and the original developer-appointed trustee, then-Superior Court Justice Louise Gants (now associate justice of the SJC) considered the legality of a provision in a condominium declaration of trust that limited the liability of a trustee to its "willful malfeasance." The case concerned the current trustees' claim of breach of fiduciary duty against the developer-appointed trustee for failing to bring suit against the developer for the construction defects.

Gants ruled that the provision violated public policy, and stated that "for all practical purposes, this provision would diminish the duty of loyalty owed by the developer-sponsored Trustee to the unit owners to little more than a duty not to steal." In reaching his holding, Gants underscored "the need for careful judicial scrutiny when a developer totally dominates the trust."

When faced with a challenge to a provision that limits a trustee's ability to file a lawsuit, developers typically argue that Massachusetts' courts have declared that M.G.L. c. 183A is simply an "enabling" statute and that a developer and unit owners are free to thereafter modify a condominium's governing documents as they see fit.

Having found that the provision violated public policy, Gants held that the duties of a trustee to unit owners is analogous to the duty owed by a corporate officer to a corporation's shareholders, and that as such, the trustee "must perform his duties in good faith and in a manner he reasonably believes to be in the best interests of the units owners, and with such care as an ordinarily prudent person in a like position would use under similar circumstances."

Sounds like the *Harris* decision comes close to ending the debate over the legality of at least some of these pro-developer provisions, right? Not so fast. The SJC in *Scully v. Tillery*, 456 Mass. 758 (2010) decided a dispute between two groups of unit owners at a single condominium concerning the legality of several master deed provisions, including one that limited one group of units owners' beneficial interest in the common areas to less than the fair market value of their units in violation of the requirement of M.G.L. c. 183A §5(a). (It is important to note that this master deed provision came about via a settlement agreement between the condominium trust by its trustees and the developer – in *Harris*, the trust never consented to the provision at issue).

The SJC, at least on the unique facts presented in the case, including the prior settlement agreement with the trust, held that unit owners could effectively waive their statutory rights by buying into the condominium. The SJC further held that the master deed provisions did not violate public policy because "it is apparent that it is private property rights, not public rights, that are protected by the proportionality provision of §5(a)". The SJC also noted that M.G.L. c. 183A is an "enabling statute" that provides developers and unit owners with a "framework" and "planning flexibility." The SJC also highlighted the fact that ruling against the unit owners that wanted to preserve the master deed provision would "subvert the well-established public policy of respecting and enforcing litigation settlement agreements."

So how do we read *Harris*, and *Scully*, together? Some important factual distinctions are that in *Harris*, the condominium trust, by its trustees, never consented to the pro-developer provision at issue, while in *Scully*, the provision in question was not pro-developer and was specifically consented to by the trust as part of a prior litigation settlement, which arguably tipped the scales in favor of public policy being protected.

So let's go back to our fact pattern. The unit owner trustees would have a colorable argument to have the offending pro-developer provisions struck down as violating public policy and/or M.G.L. c. 183A. The missing fact that would arguably leave *Scully*, closer to the sidelines is that the condominium trust never consented to these offending provisions, and that it is the trust, not the unit owners, who possesses the sole claim against the developer and a prior trustee for liability and damages concerning the condominium common areas. Nevertheless, these remain somewhat open questions that further decisions may clear up as parties continue to litigate these claims. Stay tuned.

Dave Uitti and Hayley Byron both practice with the Braintree firm of Marcus, Errico, Emmer & Brooks, P.C. A cum laude graduate of Boston University School of Law, Hayley can be contacted by email at hbyron@meeb.com. Dave practices in the firm's litigation department with an emphasis on condominium, construction, real estate and land use matters. He may be reached at duitti@meeb.com.

Permit Extension Law was a help, but was it enough?

A shot in the arm for local development

BY STEVE ADAMS

It was designed to throw a lifeline to moribund developments in the depths of the Great Recession, and renewed two years later amid continuing sluggishness in the real estate market.

The Massachusetts Permit Extension Act is being credited with serving as a Band-Aid and helping commercial developers retain financing commitments while waiting for a market recovery. But the full benefits, industry observers say, may have yet to have been felt.

"Our members said it was vital for us to have the tools and flexibility to keep a project going," said Gregory Vasil, CEO of the Greater Boston Real Estate Board. "You have the little things that would not put the knife through the heart, but delay it enough to be a problem. They saw it as being just enough to keep them afloat."

Many state and local development permits expire after two to five years, potentially imperiling projects that were conceived during the boom years of the previous decade.

Developers whose ambitious proposals entered holding patterns as financing dried up would have been required to return to local land-use boards to renew permits. And economic hardship does not necessarily justify an extension, said Peter Tamm, a real estate attorney for Goulston & Storrs.

"Usually you have to show you've been proceeding diligently with either predevelopment or actual construction," Tamm said.

Signed by Gov. Deval Patrick in 2010, the act established an automatic four-year extension to a broad array of local and state development permits issued between August 2008 and August 2010. It was renewed for an additional four years in 2012, covering permits issued between August 2010 and August 2012.

'CRITICAL' COMPONENT

John Rosenthal, president of Newton-based Meredith Management Corp., said the permit extension act has been "critical" to stabilizing the region's commercial real estate market.

"We came through the worst recession in 80 years and it's in everyone's best interest to keep projects alive if there are circumstances beyond your control," Rosenthal said.

In 2007, Rosenthal's company first proposed the $500-million Fenway Center, which would transform an array of parking lots into a mixed-use community of five buildings containing apartments, stores, restaurants and offices. The law did not directly benefit the complex project, which received final approval last week, but Rosenthal said it sent an important vote of confidence to developers and lenders.

"There's a real recognition that one of the things that makes Boston special is it's not overdeveloped and the barriers to entry are extreme," he said. "It's really hard to get a project approved."

Brian Grossman, a partner at Prince Lobel in Boston, said many of his firm's telecommunications clients have benefited from the extension while siting towers and equipment.

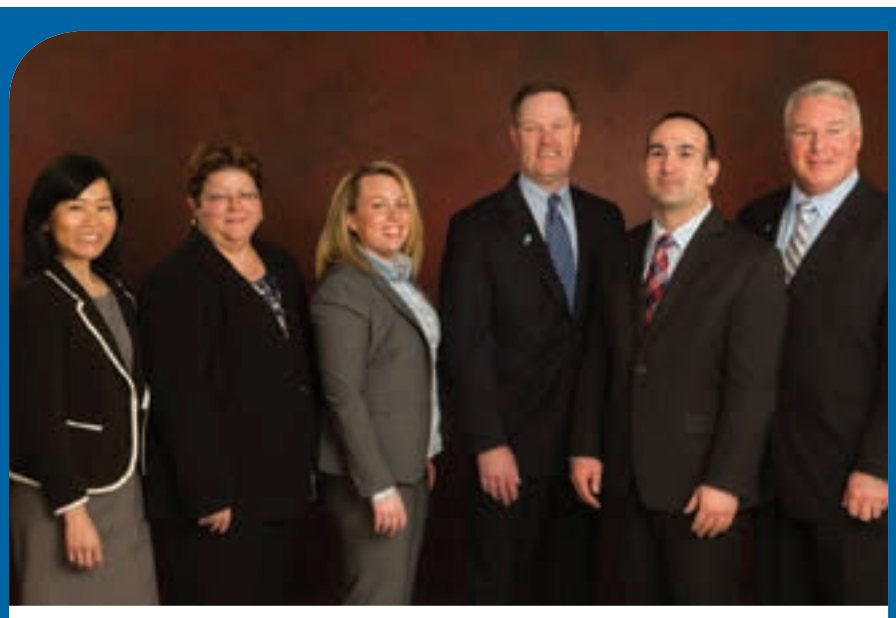
"It certainly has accomplished in part what it set out to do," Grossman said. "It alleviated some of the fears of developers, and in some cases lending institutions. It also kept them from having to spend the time, money and effort to file extensions for projects that boards might have looked favorably upon anyway."

Goulston & Storrs' Tamm said the savings on permitting costs is a significant incentive, particularly in Massachusetts' regulatory landscape.

"People had spent a considerable amount of time and effort and there are a lot of barriers to entry in Massachusetts," he said. "These entitlements took many years and were very costly for many projects."

As the economy and real estate markets recover, the full benefits of the act might be only beginning to be felt.

"Because any projects [permitted] between 2008 and 2012 now have an additional four years of life in them, our economy could realize the benefit of this for quite some time," said April Anderson Lamoureux, a land-use consultant and the state's former assistant secretary for economic development.



U.S. Supreme Court decision affirms constitutional limits on exactions from developers

BY CHARLES N. LE RAY

CHARLES LE RAY

On June 25, 2013, the U.S. Supreme Court held in *Koontz v. St. Johns River Water Management District*, 570 U.S., that the Fifth Amendment's Takings Clause limits on the exaction of property from a landowner as a condition of permit approval apply, whether the permit is granted or denied, and apply to demands for mitigation payments.

Koontz sought to develop 3.7 acres of his 14.9-acre parcel, much of which is wetlands. Florida's Water Resources and Wetlands Protection Acts required that he mitigate his project's environmental effects. Koontz offered to do so by deeding to the St. Johns River Water Management District a conservation easement over his remaining approximately 11 acres. The district wanted more. It gave Koontz two alternatives for obtaining the required management and storage of surface water permit. He could reduce his development footprint to one acre and give the district a conservation restriction on the remaining 13.9 acres, or he could build his project as proposed if he agreed to hire contractors to enhance district-owned wetlands located several miles away.

Believing the district's mitigation demands to be excessive, Koontz filed suit in state court. The Florida Circuit Court found, based on expert testimony, that the proposed development area already was "seriously degraded" by construction on surrounding parcels. It found that the district's demand for mitigation in the form of payment for offsite improvements to district property lacked both a nexus and rough proportionality to the project's environmental impacts. Consequently, it found the district's actions unlawful under the U.S. Supreme Court's decisions in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

The Florida District Court affirmed. The Florida Supreme Court reversed, finding a distinction between a *Nollan* or *Dolan* permit approval with unconstitutional demands and the district's denial of Koontz's application, because he refused to concede in advance to such demands. It also distinguished demanding an interest in real property *Nollan* or *Dolan* from demanding money in the form of payment to improve the district's property.

SUPREME COURT'S DECISION

In reversing the Florida Supreme Court, the U.S. Supreme Court held that a governmental demand for property from a land use permit applicant must satisfy the Fifth Amendment's right to just compensation even when the government denies the permit and or demands money. The *Nollan* and *Dolan* decisions reflect "two realities of the permitting process." First, land use permit applicants are "especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits," because the government often has the discretion to deny a permit worth much more than the property it would take in exchange. Second, many proposed land uses impose public costs that dedications of property can offset. *Nollan* and *Dolan* "accommodate both realities" by allowing governmental exactions of property if there is a nexus and rough proportionality between the property the government demands and the project's social costs.

The U.S. Supreme Court held that a governmental demand for property from a land use permit applicant must satisfy the Fifth Amendment's right to just compensation even when the government denies the permit and or demands money.

The Supreme Court found untenable the district's attempt to evade the limitations of *Nollan* and *Dolan* by making its demands as conditions precedent to permit approval. An application "approved if" the owner turns over property is constitutionally indistinguishable from an application "denied until" the owner does so. "Extortionate demands for property in the land use context run afoul of the Takings Clause," the court wrote, because they impermissibly burden the applicant's right not to have property taken without just compensation, even if the property has not yet been taken.

The Supreme Court went on to hold that monetary exactions also must satisfy the nexus and rough proportionality requirements. Because the district's second alternative – that Koontz spend money to improve the district's property – burdened Koontz's ability to develop his own land, it also violated the Takings Clause. The district (and the dissent) argued that if monetary exactions were subject to nexus and rough proportionality requirements, there would be no principled way to distinguish impermissible land use exactions from property taxes.

The majority pointed to a developed body of cases distinguishing taxes from

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BEGIN MEDIATION WITH PRELIMINARY, SEPARATE MEETINGS

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rather than in abbreviated form during a caucus.

SUGGESTING 'HOMEWORK'

The mediator may recommend that attorney and client do some "homework" before the joint session. Is there a survey that should be brought to the negotiations? Is there a key piece of correspondence? Are there utility or tax bills relevant to a lease matter? Are there additional cases, statutes or documents to clarify a title issue? Are there photographs that would assist the party demonstrate improvements (or damage) to the property? Is there sufficient attention to damages as well as liability? The mediator's responsibility is to ask – in a supportive way – direct, difficult, and sometimes awkward questions that may have been overlooked or avoided.

TIME TO THINK

After having had a private session with each party, the mediator can think more effectively about how best to structure next steps. Which party should begin the joint session? If there are separable main issues in the dispute, should the joint session deal with them issue-by-issue? Are emotions so high that the clients should not be in the same room? How do client and attorney relate to each other? Are the attorneys more focused on negotiating a settlement or getting ready for battle? There are many important issues that the mediator will address more effectively by having thought about them in advance.

On the day of the joint session, each party should go to a separate conference room – "home base," where the mediator can meet briefly with each side separately to see if anything new has transpired since the earlier, private meeting. Sometimes the "homework" has turned up something the party wants to discuss with the mediator in advance. Sometimes the party has had a change in thinking as they prepare. Letting each party know at the end of the advance session that the mediator will do a quick "base touching" will provide reassurance and reduce anxiety.

Does having private meetings in advance undercut or shorten the joint session? No; to the contrary, they make the joint session more effective, more focused, and more deliberative. There is generally less "waiting around" while the mediator is in caucus with the other party, thereby reducing time and supporting the "flow" of the mediation.

Is it worth additional cost to have private meetings in advance? Actually, it is not necessarily true that total costs will be higher. The joint session and the caucuses will be more efficient, with more time spent on actual negotiations. And even if costs turn out to be somewhat higher, they are part of the price to pay for a more effective process. In my experience, where advance meetings have taken place, the parties prepare more thoroughly, present to the other side more effectively, develop options more creatively, and use the mediator more appropriately. Meetings in advance optimize the whole process from start to finish.

Jack Wofford practices as a full-time ADR neutral, with an emphasis on mediation and arbitration. For over 17 years, he has served on the panel of neutrals at REBA Dispute Resolution, the leading ADR provider in Massachusetts for business and real estate-related disputes. For more information, email adr@reba.net or call (617) 854-7559.

A new initiative for Massachusetts' smaller cities

Boston Fed launches a contest

BY PRABAL CHAKRABARTI

Smaller cities in Massachusetts have faced an uphill battle. Most are former manufacturing centers grappling for decades with job loss and its spillover effects. They have higher unemployment and lower college attainment than the rest of the state. At the same time, the cities have assets. They are centers of their respective regions, with richly diverse populations, and are home to dozens of colleges, universities and hospitals.

THE ROAD TO GROWTH

Boston Fed research has shown that smaller cities' ability to spark economic growth and development depends on the ability of leaders to work together. Such collaboration is most successful when the public, private, and nonprofit sectors develop a shared vision and agenda, and when the collaboration includes grassroots participation. Building on these research findings and our belief in the ability of these cities to recover and become centers of regional growth, the Federal Reserve Bank of Boston is launching an initiative aimed at identifying and supporting collaborative leadership in small cities in Massachusetts and is laying the groundwork for a possible future rollout to other New England states.

The competition, or challenge, will provide grants to promising efforts that exemplify and advance cross-sector collaboration and have positive, long-lasting outcomes for low-income people and communities in those cities.

THE WORKING CITIES CHALLENGE

The Working Cities Challenge aims to (a) advance collaborative leadership in Massachusetts smaller cities and (b) support ambitious work that improves the lives of low-income people in those cities.

The challenge operates as a competition for grants to promising efforts that strengthen working relationships between public sector, private sector, and nonprofit leaders in these cities, working together on a shared goal that has a positive impact on low-income people and neighborhoods. Winners will be chosen by a jury of experts, excluding the Boston Fed, and will receive awards of up to $700,000 over three years.

Additional cities with promising projects will receive smaller seed grants.

The following cities are eligible to participate: Brockton, Chelsea, Chicopee, Everett, Fall River, Fitchburg, Haverhill, Holyoke, Lawrence, Lowell, Lynn, Malden, New Bedford, Pittsfield, Revere, Salem, Somerville, Springfield, Taunton and Worcester. They were selected based on population size (between 35,000 and 250,000) and being above the median poverty rate and below the median family income for their peers. The cities have a combined population of 1.25 million and an average poverty rate of 21 percent.

Prabal Chakrabarti is the vice president of the Federal Reserve Bank of Boston's Regional and Community Outreach Department. This article first appeared in the summer 2013 issue of the Federal Reserve Bank of Boston's *Communities & Banking* magazine.

U.S. SUPREME COURT DECISION AFFIRMS CONSTITUTIONAL LIMITS ON EXACTIONS FROM DEVELOPERS

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takings that will guide future courts deciding whether a land use permitting charge is so arbitrary as to be a confiscation of property. The *Koontz* dissent predicts that the decision will deprive local governments of the ability to charge reasonable permitting fees. The majority noted that this has not occurred in the two decades since the *Nollan* and *Dolan* decisions.

What are the limits on a permitting authority's ability to demand exactions from a land use permit applicant? The Supreme Court has upheld as reasonable land use policy regulations requiring a landowner to internalize a project's external costs. The *Koontz* majority noted that where a proposal "would substantially increase traffic congestion, for example, officials might condition permit approval on the owner's agreement to deed over the land needed to widen the public road."

Requiring Koontz to improve the district's wetlands several miles from his property lacked the required nexus and rough proportionality. The nexus between making a project proponent remove, or pay to remove, inflow and infiltration from the municipal sewer system in exchange for a connection permit may be clear. But is there rough proportionality in an I/I removal rate of four to one, or of 10 to one? Where are the nexus and rough proportionality in imposing job training impact fees on a project to transform a disused parcel into a multi-family or an office tower? Such a project would *create* construction jobs, not cause any loss of jobs. The *Koontz* dissent may be correct in predicting that future litigation will be determine the constitutionality of the specific exactions imposed on particular projects.

Charles Le Ray is a founding shareholder of Brennan, Dain, Le Ray, Wiest, Torpy & Garner, P.C., where his practice focuses on land use permitting and environmental matters. He is co-chair and a founding member of REBA's Land Use & Zoning Committee. He may be reached at cleray@bdlwtg.com or (617) 542-4880.

REBA members who graduated from Latin School meet with House Speaker (and Latin School grad) Robert DeLeo, attending the spring conference.

PRESERVING THE DEAL

Building protections for investments in real estate development

CONTINUED FROM PAGE 6

ment. Developers are rushing to launch or restart projects that cater to the resurgent demographics, especially urban multi-family complexes of up to 75 units with a project price tag of $10-$50 million.

Boston serves as a prime example. As noted in a recent Boston Globe article, "In just one year alone – 2010 – Boston's population grew by 7,500 people, and is now above 625,000, its highest level since the 1970s, according to city data. The population surge has thoroughly reversed the suburban migration that began in the 1950s."

The real estate market continues to trend in a promising direction, and developers will not be shy about lining up projects to supply inventory. The list of considerations for investors and developers can be lengthy; here are four guidelines that should be considered for every deal:

DON'T SKIMP ON DUE DILIGENCE

The first and most important question for investors and developers alike is clear: who are you dealing with? Both parties will want to work with partners who are reasonable and flexible when the situation demands it; the only way to find out in advance is to do the homework. A thorough due diligence process is not a guarantee of success, but it does lay the groundwork for a relationship that is built on trust.

Sophisticated investors may already have a system in place for due diligence and will be able to efficiently assess the project and participants. For those embarking on their first real estate development venture, deploying a team to gather information about the developer, partners, and the project itself should be key to the decision making process.

Investors should not be surprised if they become the subject of due diligence, as well. Developers should practice the same caution by checking investors' finance and project history.

OUTLINE LIQUIDITY GOALS

Parties should determine the timeframe for liquidity events at the outset in order to protect the investment and determine the life cycle of the deal. Investors may be focused on an exit, for example, while developers may prefer to maximize fees by keeping the project in play over a longer timeframe. Indeed, developers may plan their exit regardless of market conditions in order to fund a new opportunity, while an investor prefers to wait for a seller's market.

The real estate market continues to trend in a promising direction, and developers will not be shy about lining up projects to supply inventory.

These competing needs for cash should be addressed in a business plan drafted by the development team. Investors can seek to schedule a sale in advance or invoke the right to obtain additional funds via refinancing, and developers can negotiate for the right to trigger or delay a sale. The plan should lay out the complete sales strategy and expected cash flow fluctuations throughout the project.

THINK AHEAD TO COST OVERRUNS AND ADDITIONAL CAPITAL

Guarding against cost overruns has become a hotly contested issue. Sophisticated investors often ask for a guarantee that the projected budgets are fixed, including estimated development costs and a built-in contingency.

Investors should be certain to define terms upfront in order to avoid a situation that may lead to a heated battle. They should investigate a developer's history of cost overruns as part of the due diligence process, and know the difference between reasonable overruns and project management failures that are more indicative of default.

BALANCE THE NEED FOR CONTROL AND COMPROMISE

Control over decision making is another sensitive issue that should be sorted out before a deal is sealed. As with other elements, there is a direct correlation between due diligence and control: the more investors know, the more control they have. A full understanding of the developer and the project will guide investors to the right questions, goals, and legal protections.

When it comes to major decisions about construction, partners, financing, and exit planning, both investors and developers will vie for control. From start to finish, an 18-month project could see significant shifts in the market that necessitate changes to the deal structure. Once again, goals will not necessarily be aligned in these cases, as developers or investors may be inclined to stray from the plan.

As the list of considerations grows, investors that are new to real estate deal-making should keep a fundamental phrase in mind: know what to ask for and who to ask. Regardless of the project scope, knowing the parties and defining parameters will be essential to a successful relationship. Investors and developers alike should do their homework, protect themselves, and have confidence in the structure of the deal.

Tom Guidi chairs the real estate practice group at Hemenway & Barnes LLP and has served as co-chair of the MBA's property law section. He concentrates on commercial real estate, asset-based lending, leasing, acquisitions, sales and zoning. Tom can be reached by email at tguidi@hembar.com.

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