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REBA news
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Globe Sports Columnist Dan Shaughnessy to Keynote Annual Meeting

Boston Globe sports columnist Dan Shaughnessy will deliver the luncheon keynote address at REBA's Annual Meeting and Conference on Monday, Nov. 4,at the Four Points by Sheraton in Norwood. Shaughnessy's column is perhaps the most widely followed of any in the *Boston Globe*. He has been named Massachusetts sportswriter of the year seven times and eight times has been voted one of America's top 10 sports columnists by the Associated Press Sports Editors.

In addition to his journalism work, Dan has written 10 books about the Boston Red Sox and the Boston Celtics. These include *The Legend of the Curse of the Bambino*, *Reversing the Curse* (written after the Red Sox won the 2004 World Series), *Fenway Expanded and Updated: A Biography in Words and Pictures*, *Ever Green: The Boston Celtics*, *Seeing Red: The Red Auerbach Story*, *At Fenway: Dispatches from Red Sox Nation*, and many others. Earlier this year, Shaughnessy and Cleveland Indians manager Terry Francona released *Francona: The Red Sox Years*, a biography focusing on Francona's years as manager of the Boston Red Sox. The book immediately became a best-seller.

Dan is a regular contributor to ESPN's "Sports Reporters," "Jim Rome is Burning" and "Pardon the Interruption," and makes regular appearances on WTKK (96.9 FM talk radio), WHDH Sports Xtra and network television's "Nightline" and "The Today Show."

A registration form for the Annual Meeting and Conference can be found elsewhere in the pages of this issue of *REBA News*. ♦

From left: REBA Chief Operating Officer Nicole Cunningham; REBA president Mike MacClary; CATIC vice president Anne Csuka; and CATIC president Rich Patterson.

CATIC recently donated $25,000 to REBA to support the association's ongoing efforts to eliminate the unauthorized practice of law. "REBA's mission and CATIC's mission include many congruencies," said REBA president Mike MacClary. "We are both concerned with maintaining the centrality of the lawyer at the closing table. CATIC has been a strong REBA supporter and we are grateful to have them as friends and allies."

Unwary landlords may lose right to damages when terminating defaulting tenant's lease

BY EDWARD M. BLOOM

ED BLOOM

The Supreme Judicial Court's decision in *275 Washington Street Corp. v. Hudson River International, LLC* essentially left the landlord of a defaulting tenant with no remedy because the landlord's lease form did not adequately provide contract damages for the landlord following its termination of the lease. The SJC stated that a "landlord left without an adequate remedy following breach of the lease by a tenant has only itself to blame for entering into a lease that fails to provide such a remedy."

In April 2006, the landlord leased premises on Washington Street in downtown Boston to a tenant for 12 years for use as a dental practice. Just a year into the lease, the tenant closed its doors, made some intermittent monthly payments during the next 12 months, but then notified the landlord that it was not going to make any further rent payments nor was it planning to return to the premises. As a result, in May 2008, two years into the lease, the landlord terminated the lease and brought a contract action against the tenant and the tenant's guarantor.

A Superior Court judge assessed over $1 million in damages against the defaulting tenant and the Spanish company that had guaranteed the tenant's obligations under the lease. Yet the Appeals Court and

See UNWARY LANDLORDS, page 5

REBA launches estate planning section

Sara Curley and Leo Cushing to co-chair

In response to strong member interest in estate planning, elder law and the Massachusetts Uniform Probate Code, REBA has launched a new committee: the Estate Planning, Trusts and Estate Administration Committee. Sara Goldman Curley, a partner at the Boston firm Nutter McClennen & Fish LLP, and Leo J. Cushing, a partner of the Waltham-based law firm of Cushing & Dolan PC, will co-chair the new group.

SARA CURLEY

LEO CUSHING

The committee will respond to unmet member needs for a broad and comprehensive resource in the estates and trusts field, including estate and tax planning, wealth preservation, probate and estate administration and elder law issues. In addition to open meetings with speakers of interest, committee will offer educational programs at the REBA's twice-yearly conferences and serve as a mentoring resource for members. The group will collaborate closely with the Title Standards Committee to develop and adopt forms and standards to support REBA members in these practice areas.

REBA members who wish to join the committee may contact Andrea Morales at morales@reba.net. ♦

Rebutting the proposed reformation of title insurance industry

BY JOEL A. STEIN

JOEL STEIN

A recently filed bill entitled, "An Act to Reform Title Insurance" HB 1241 demonstrates a real lack of understanding of the nature of title insurance. Filed by Rep. Antonio F.D. Cabral (13th Bristol), it contains two provisions which, if enacted, would set Massachusetts apart from the rest of the country. The first of these provisions, appearing as Section 10, reads as follows:

"No title insurer shall pay to any title insurance agent or permit such agent to retain any amount exceeding ten percent of the gross premium for any policy of the title insurer issued by such agent. The maximum commission to a title insurance agent shall not be increased directly or indirectly by an insurer providing anything of value, including services, to an agent for less than the actual cost or fair market value."

This attempt to limit the agent's percentage of the gross premium to 10 percent treats title insurance as if it were the typical risk insurance, i.e., homeowners insurance or auto insurance. The premium paid to a title insurance agent reflects the fact that virtually all of the work required to issue a title insurance policy is done by the agent prior to the issuance of the policy.

Perhaps even more controversial is Section 2 of the proposed bill, which provides as follows:

"(a) There shall be a commission to study the feasibility of establishing a title insurer owned by the commonwealth or by a public authority constituted by the commonwealth."

Section 2(b) addresses the constituency of the commission. Of the 20-plus members of the proposed committee, only one, the president of the Massachusetts Bar Association, or the president' s designee, is a practicing lawyer. No members of the title insurance industry and no members of REBA are included in the committee.

"(c) The commission shall examine the technical, legal and financial feasibility of establishing a commonwealth-owned title insurer. The commission shall evaluate the experience of Iowa with state-owned title insurance, identifying the advantages and disadvantages presented to purchasers of title insurance for residential property in Iowa as compared with such purchasers in Massachusetts. The commission shall also examine the existing structure and dynamics of the title insurance market as it currently operates in Massachusetts and shall include in its examination a review of how title risk is determined and title policies are priced. The commission shall also examine the proceeds generated by the sale of title insurance in Massachusetts and shall identify the parties that receive or make payments as a result of underwriting and issuing a typical title insurance policy. The commission shall make recommendations based on its examination as to the extent to which it believes the conduct of the business of title insurance in Massachusetts requires new legislation in order to protect consumers, reduce the price of title insurance or improve the regulation of the conveyance of real property."

COMMONWEALTH REFUTED

Although the probability of this bill being enacted is slight, just the filing of the bill creates press reaction.

One such article, entitled "Title Insurance – No Regulation. Few Claims. Huge Profits." was published in the summer 2013 issue of *CommonWealth* magazine. I was disappointed that, after spending an hour or so with the article's author, Jack Sullivan, to find that the article repeated the same criticisms directed against the title insurance industry as have previously appeared in multiple publications.

There is much criticism of the fact that title insurance agents are not regulated, though title insurance companies are; and while rates are not set, title insurance companies all issue rate guidelines which are to be followed. With the increase in class action cases relating to refinance rates arising throughout the country, woe to the agent who leaves himself and his company open to such litigation.

Massachusetts, despite having the fourth highest median home price, is not in the top 20 in closing costs. The title insurance premium charged in Massachusetts is substantially lower than the premium charged in Texas, California, New York, Florida and Illinois, among others. In addition, Massachusetts has no mortgage tax which is a substantial closing expense in many states.

The author's claim that title flaws used to be a big problem, but are now rare, is based on absolutely no evidence. First, transactions are far more complex, with new types of financing and higher demands from lenders. Defects in foreclosures, new foreclosure statutes and short sales have all created new work for the conveyancing attorney and the title examiner. The real estate boom of the '90s created hundreds of new subdivisions and condominiums throughout the state, and result in lengthy title examinations.

The claim that the ability to do title work online has resulted in a profit boom to attorneys is not credible. For most attorneys, the title examination is done by an outside examiner who will typically charge the attorney a set fee. As I explained to the author of the article in question, many of the registries do not allow you to examine the 50 years of time. I also told him that several of the registries are absolutely not reliable to do work online. And yes, you still need to do all the same work you would do if you were at the registry including checking marginal references.

The fact that a new title insurance premium is charged for each refinance always seems to be the "aha" moment for writers who address this topic. Do attorneys make a profit on the refinance title policy? Perhaps they do, but many attorneys are also stuck chasing discharges from prior transactions and in many cases "refinances" include taking a mortgage from a divorced party or an heir. The author of this article seems to want it both ways. He wants to argue that claims are low, and he wants to argue that attorneys have grabbed the work for themselves. But perhaps the two are connected. Perhaps claims are low because the majority of work in Massachusetts is done by attorneys. We have all seen the product of work done through witness closings. Bad descriptions, only one of two owners on a mortgage and the unending undischarged loans. This work is done by non-attorney companies throughout the country, and they have charged the same title premium as is charged by an attorney who does the work in Massachusetts.

If you are concerned about the passage of this bill, please contact your local state representative or senator. If you live in Bristol County, you should contact Rep.Cabral directly. ♦

Joel Stein serves as co-chair of REBA's title insurance and national affairs committees. He can be reached at jstein@steintitle.com.

CORRECTION

Due to an editorial error, in the July-August issue of *REBA News*, the Superior Court justice who decided the *Harris v. McIntyre* case was misidentified. He is Ralph Gants, now a justice of the Massachusetts Supreme Judicial Court. We regret the error.

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.

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PRESIDENT'S MESSAGE

In summary of a busy summer

BY MICHAEL D. MACCLARY

MIKE MACCLARY

As I write this message as we approach September with the expectation, post-Labor Day, of new deals pouring into our offices (!), I want to share with you some exciting new initiatives in the works here at REBA.

September means that the 2013 Annual Meeting and Conference is just around the corner. On Nov. 4, again hosted at the Four Points by Sheraton in Norwood, we will welcome award-winning *Boston Globe* sports columnist and best-selling author, Dan Shaughnessy, as our luncheon keynote speaker. Thanks to former presidents Ed Bloom and Paul Alphen for securing Dan as a speaker. We have full slate of 10 hour-long break-out sessions to inform and update our membership on the hottest topics in the real estate field, highlighted by a program covering the Consumer Financial Protection Bureau's new integrated rule for residential settlements presented by representatives of WFG National Title Insurance Company, the Massachusetts Bankers Association and our own Rich Hogan. We thank all of you who have already preregistered for the AMC13 and urge others to register. Elsewhere in this issue of *REBA News* you will find a complete listing of theAMC13's all-day program.

At the AMC13 luncheon we will also introduce a new REBA award to honor excellence in professionalism in the practice of real estate law. This award recognizes the honoree's integrity, passion and dedication to the highest standards in the practice of law. I am looking forward to honoring our first recipient on Nov. 4.

In additional to sending their in-house CFPB expert to present at AMC 2013, WFG has become a new underwriter partner with Tom Bussone and Massachusetts Attorney's Title Group. WFG will continue Tom's arrangement that with MassATG's agents to support REBA and our battle against the unauthorized practice of law in Massachusetts. I encourage all of you, whether you are an agent for MassATG or not, to speak with Tom about the support that MassATG has given to REBA through the years.

Also, I want to particularly thank our friends at CATIC for their long and continuing support of REBA and our work combating the unauthorized practice of law. Our mission and CATIC's include many natural congruencies; we are both dedicated to maintaining the centrality of the attorney at the real estate closing table. We are grateful to have them as our friends and ally.

This summer, REBA's board laid the groundwork for several new committees and groups. The Estate Planning, Trusts and Estate Administration Committee will kick off this month led by Leo Cushing and Sarah Curley. If any of you are interested in joining this committee as an inaugural member, please contact Andrea Morales at morales@reba.net. Also, our president-elect, Michelle Simons, is finalizing a Women of REBA group, focusing less on the nuts and bolts of our practices, but more on networking and informal member-to-member mentoring. We will have more to come on this in the next few months. We are also developing a new lawyers group to support and nurture newly admitted lawyers with additional mentoring, networking and practice development.

In our continued battle against witness closings, we have found a strong ally in the Office of Bar Counsel. Assistant Bar Counsel Bruce Eisenhut has authored a cautionary article on the risks of lawyer participating in witness only closings in Massachusetts. In addition to publication in the summer issue of *REBA News*, the article can be found on the BBO website and the REBA site. For those who have chosen to ignore our warnings until now, this may be the final straw!

We hope to see everybody at our annual meeting and conference in Norwood on Nov. 4. ♦

Mike MacClary is 2013 president of REBA and a partner at Burns & Levinson, LLP. He can be reached at mmacclary@burnslev.com.

2013 Spring Conference Reception

House Speaker Robert DeLeo was the keynote speaker at the 2013 REBA Spring Conference. Pictured, the reception for his address.

SJC preview: NEFF v. Board of Assessors

If a tree falls on conservation land, and no one is around to hear it, can it be taxed?

BY DOUGLAS W. SALVESEN AND ROBERT A. LEVITE

By state statute, land owned by a public charity is exempt from taxation if the charity occupies the land for its charitable purposes. In many cases, the determination whether the statutory requirements are satisfied is straightforward. Land on which hospitals, schools and museums are built clearly fall within the statutory purview. Undeveloped land owned by a charity, however, can present more difficult issues.

The Supreme Judicial Court has determined that undeveloped land owned by a charity is tax-exempt if the activity on the land is consistent with the charity's charitable purposes. For instance, undeveloped land adjacent to a private school which the school uses as a ball field for its students is exempt from taxation. Undeveloped land owned by a conservation land trust has been found to be tax-exempt by the Appellate Tax Board where the land trust seeks to preserve the natural character of the land for the public and the public has access to the land to enjoy it.

But what of a charity that owns undeveloped land as open space without public access? Does a land trust that seeks to protect the native flora and wildlife habitats by eliminating or minimizing activity on the land occupy it for charitable purposes? If the public is banished from these idyllic properties, how does it benefit from the charity's ownership of the land? How is that benefit, if any, different from when the undeveloped property is privately owned?

These are the questions that will be considered by the SJC this fall in *New England Forestry Foundation, Inc. v. Board of Assessors*, SJC No. 11432.

STETSON-PHELPS MEMORIAL FOREST

Muriel Shippee and Ed Phelps owned a house in Hawley, Mass., situated on 150 acres of forested land. To keep the property from being developed, they sold the house and surrounding property to the New England Forestry Foundation Inc. (NEFF). NEFF subdivided the house from the rest of the property and sold the subdivided parcel with the house to a third party. The remaining 130 acres of forestland became the Stetson-Phelps Memorial Forest and part of more than 7,000 acres of forestland NEFF owns in Massachusetts.

In 2009, NEFF applied to the Hawley board of assessors for a tax abatement and exemption under G. L. c. 59, § 5, Third. The board of assessors denied the request. It concluded that NEFF did not occupy the forest on an "active and ongoing basis," that the forest was insufficiently "accessible to the public," and that NEFF's conservation efforts were not sufficient to support a tax exemption under G. L. c. 59, § 5, Third. NEFF filed a petition with the ATB and presented its case in 2010.

Following the evidentiary hearing, the ATB found that though the Stetson-Phelps Memorial Forest was nominally open to the public for hiking, hunting and snowmobiling, it was about as accessible as Brigadoon. The entrance to the forest was difficult to locate. Individuals unfamiliar with the entrance might reasonably mistake it for the driveway to the house on the subdivided parcel (which it is – the forest is behind the house). There were no signs along the road into the property inviting public access to the forest. Information about the forest was not publicized by NEFF in any significant way. The ATB found that there was only one scheduled public activity at the forest since 1999, an "educational walk" to explain NEFF's logging activities in the forest. The ATB concluded that the forest did not appear to be accessible to the public.

Although NEFF disputed that finding, it conceded that it actively discouraged some public use of the forest. In fact, public use of the forest may be somewhat antithetical to NEFF's primary goals of protecting the natural beauty of the forest, maintaining and enhancing the wildlife habitats on the forest, producing income from periodic timber harvests, and managing the forest's timber resources. Nevertheless, NEFF contended that, whether or not there is public access

See NEFF V. BOARD, page 4

Admiration for professionals

BY PAUL F. ALPHEN

PAUL ALPHEN

While enjoying watching the Red Sox beat the Royals in Kansas City in August, my sons and I debated the topic of the most unfriendly sports fans (Pittsburg) and the friendliest fans (undecided). We discussed that while the players involved in the game can remain calm and friendly with their opponents (witness the friendly banter between a first baseman and a base runner), many well-fed fans, comfortably seated in the stands, are compelled to take the game personally and can erupt into unprovoked, hate-filled attacks upon visiting fans. Notwithstanding a few fastballs that may be aimed at the midsections of a few batters, professional athletes tend to be professionals and behave much better than many of the fans. What drove an adult fan in Cleveland to pour a beer on a 56-year-old quiet Celtics fan?

I admire those attorneys who always act in a professional manner. I wish I could be more like them, but I admit that a few times a year I run across an adversary that gets under my skin and I find it hard to hide my feelings – though I have never poured the equivalent of a beer on anyone.

It is always a pleasure to interact with the real estate practitioners from the nearby communities because of the mutual respect that has develop over the years, and because we know that what goes around comes around.

I am trying to behave more like those many brethren that I have come to admire. For example, MCLE has allowed me chair the Annual Real Estate Law Conference since 2009. Some of the best panels have been comprised of former adversaries in important real estate litigation matters, who have presented their opposing perspectives on the law and on the impacts of the decision at the conferences. Jeffrey B. Loeb and Glenn F. Russell, Jr (refereed by the unflappable Doug Salvesen) debated the merits of the *Ibanez* decision and opined on the elements of a proper foreclosure. A year later, Esme Caramello and Lawrence F. Scofield, who had adversarial positions in then *FNMA v. Hendricks* decision, continued the debate. Additionally, James R. Senor and Ira H. Zaleznick, adversaries in the *Denver Street LLC v. Salem* decision, discussed when a municipal charge becomes an illegal tax. When I first called each of them to ask if they would mind sharing a podium with their adversarial counsel, to a person each of them immediately replied that they would be delighted to. Each of them also expressed their great respect for the skills and abilities of their adversaries. When the day of the conference came, everyone in the room could tell that the mutual respect among the panelists was significant and genuine.

I continue to admire the many true professionals that I have the pleasure of meeting through the practice of real estate law, not just each of the many professionals that have graciously donated their valuable time, skill and expertise to the many MLCE and REBA programs, but also people like Jon Davis, who practice what they preach and are models of integrity in the practice of law.

Those of us who have had the pleasure to work with Jon on the REBA board of directors have relied upon his levelheaded perspective on maintaining the integrity of the practice of law. From time to time, when we have considered the taking the more expeditious path, Jon has brought us back to reality and reminded us that our collective duty is to protect the integrity of the recording process and to protect our clients. When Jon speaks, we cannot help but agree (at least most of the time). Jon is my touchstone for professionalism, but I have a ways to go. ♦

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.

Representing a condominium developer or converter in the sale of individual condominium units

BY SAUL J. FELDMAN

SAUL FELDMAN

I have previously written about how to represent an individual seller of a condominium unit. In this article, I am going to discuss how to represent a condominium converter or a developer in a unit sale.

My experience in representing a condominium converter or developer in unit sales began in the early 1970s with 330 Beacon St. in Boston and Weymouthport in Weymouth. My experience has continued over the decades to include the Farm at Chestnut Hill in Newton, Folio at 80 Broad St. in Boston, and Parkview in Westborough. The objective in handling multiple unit sales in a large building or buildings in a short period of time is to be well organized and efficient.

Because the Massachusetts Supreme Judicial Court has recently adopted a rule that requires attorneys in Massachusetts to provide clients with an engagement letter concerning the scope of the work they have been engaged to do for the client and their fees, the attorneys must provide such a letter to their developer and converter clients. In reality, this invariably has always been done, but now it is required by law.

Given the cyclical nature of real estate, the days of many unit closings in a short period of time are back. It is important to developer and converter clients that their closing attorneys be organized and efficient in order to close large numbers of unit closings within short periods of time.

Seller's attorney must prepare the condominium documents, namely:

- master deed.
- The document that creates the organization of unit owners (usually a declaration of trust and by-laws in Massachusetts, but it could be articles of organization and by-laws if a corporation is used, and just by-laws if an unincorporated association is used).
- A form of unit reservation agreement (customarily used in lieu of an offer to purchase).
- A form of unit purchase and sale agreement.
- A sample 6(d) certificate.
- A sample unit deed (whereby buyer's consent to any future phases/development is included).
- A sample tax letter agreement.
- Limited warranty.
- Preliminary budget.
- A specimen title insurance policy.

The foregoing together with a copy of the site and floor plans should be in a bound presentation given to purchasers by the sales staff. The presentation should contain an overview, whereby the developer retains the right to amend the condominium documents as long as the basic rights of the prospective unit owner are not materially affected. This shall apply to the number and configuration of units, the addition of phases to a condominium if applicable, the ratio between residential units and commercial units in the case of a mixed-use condominium (so long as Fannie Mae provisions are not violated).

The purchase and sale agreement should be tailored to the particular project. I believe that a shorter purchase and sale agreement is better than a longer purchase and sale agreement. However, essential components need to be included. For instance, if the developer intends to develop additional phases, this needs to be explained in a purchase and sale agreement so that buyer's consent to future development is obtained. Also, if a new project is

See CONDOMINIUM DEVELOPER, page 14

SJC PREVIEW: NEFF V. BOARD OF ASSESSORS

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to the forest, these activities satisfy the statutory requirements for the exemption set forth in G.L. c. 59, § 5, Third, and that the public benefits from NEFF's mere ownership of the forest.

IS OWNERSHIP OF OPEN SPACE A CHARITABLE ACTIVITY?

The ATB disagreed. The ATB relied on the SJC's definition of a charitable activity as one that is "for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government."

The ATB concluded that, while NEFF's aims were laudable, the preservation of open space did not fit within this traditional description. A land trust that seeks to maintain undeveloped land in its pristine state is like a museum that holds works of art but does not allow public viewing. There must be some activity on conservation land to warrant a tax exemption. The ATB noted that, traditionally, the activity has been tied up with encouraging public access, and the absence of public access generally has proven fatal to an exemption claim.

The ATB's decision is neither surprising nor unique. It has consistently held that passive ownership of undeveloped land is not a charitable activity.

In its brief to the SJC, NEFF argues that the conservation of land's natural beauty and character and the preservation of natural habitats is a gift for the benefit of the public should qualify as a charitable activity, whether or not the public is invited onto the property. It points out that the ATB's requirement that conservation charities allow public access onto their properties is without any basis in law, and in some situations could undermine NEFF's conservation goals. NEFF advocates that the SJC expand the definition of charitable activity beyond the eleemosynary notion of doling out relief to unfortunates in society to include a wider group of activities that are beneficial to society. In essence, NEFF wants the SJC to "go green."

Although the issue presented to the SJC is whether or not the conservation of open space is a charitable activity for G. L. c. 59, § 5, Third purposes, the SJC has already determined that the cultivation of forests is a charitable activity. In *Peakes v. Blakely*, 333 Mass. 281 (1955), the SJC considered the terms of a testamentary bequest by D. Blakely Hoar, a noted Brookline attorney. In his will, Hoar had directed the trustees of his estate to use part of his estate to purchase land along the Charles River and to cultivate a forest thereon. The SJC expressly stated that "the purpose to cultivate forests is in itself charitable."

The argument in *NEFF v. Board of Assessors* is scheduled for later this year. ♦

A partner in the Boston law firm of Yurko, Salvesen & Remz, P.C., Doug Salvesen has served as counsel to the association's practice of law by non-lawyers committee for more than 20 years and is a nationally acknowledged expert on the unauthorized practice of law. Doug can be contacted by email at dsalvesen@bizlit.com. Robert Levite has worked as general counsel to state agencies in both Vermont and Massachusetts and has been active as legal counsel and on the board of several nonprofit institutions, including the Massachusetts Watershed Coalition, the Ecological Landscaping Association and Kestrel Land Trust. He is active in the Massachusetts land trust community and chairs the Massachusetts Land Trust Coalition Attorney Panel.

UNWARY LANDLORDS MAY LOSE RIGHT TO DAMAGES WHEN TERMINATING DEFAULTING TENANT'S LEASE

CONTINUED FROM PAGE 1

the SJC, while agreeing that the tenant had clearly breached the lease and abandoned the premises, ruled that the landlord would have to wait 10 years in order to collect any damage award.

'THE LAW IS AN ASS'

Without knowing anything more about this case or the legal arguments put forth by the Appeals Court and the SJC to justify their decisions, your common sense tells you that this outcome is incorrect. In fact, one might even be tempted to sum up this case by citing Dickens' 1838 novel, *Oliver Twist*, and Mr. Bumbles' reply when the court informs him that the law supposes that "your wife acts under your direction." "If the law supposes that," replies Mr. Bumble, "then the law is an ass."

However, one cannot so simply dismiss this case, because there are important lessons to be learned. To begin with, under Massachusetts common law, once a lease is terminated for any reason, including a tenant's default, the tenant is no longer liable to pay rent thereafter accruing unless there is an enforceable lease provision specifying damages due the landlord as a result of the termination.

Accordingly, commercial lease lawyers in Massachusetts typically preserve a landlord's right to damages by employing several common provisions. One provision may require the tenant to continue to pay landlord each month, as damages, the monthly rent required by the lease, as if the lease had not been terminated. Other provisions require the tenant to pay, as liquidated damages, a lump sum which may involve a full acceleration of the remaining rent due under the lease discounted to present value; a partial acceleration equal to the amount by which the aggregate rent due for the remaining lease term exceeds the current fair market rent for the remainder of the term, discounted to present value; or a dollar amount equal to the monthly rent due for a period of anywhere from six months to two years.

The landlord in this case had nothing in its lease other than a provision that, upon lease termination as a result of the tenant's default, the tenant was to indemnify the landlord against all loss of rent and other payments which the landlord may incur by reason of such termination. But the SJC, upholding the Appeals Court ruling in this case, concluded that "[w]here the specific remedy is indemnification and no other time period is established as to when payment is due, … under our common law … the indemnified amount shall become due at the end of the original lease period."

The court reasoned that indemnification is a liability contingent upon events thereafter occurring, such as a fire or other casualty, relettings and defaults by replacement tenants, so that the full amount which the tenant must pay for the remainder of the term cannot be fully ascertained until the period ends.

In this case, such a holding means that the landlord would have to wait until 2018 to determine its damages, a result leaving the landlord, practically speaking, without a remedy. As the SJC said: "We recognize the possibility, as did the Appeals Court, that our common law rule, which requires the landlord to wait until 2018 to determine post-termination damages under the indemnification clause, 'may in effect make it impossible for the landlord to recover its true damages from this corporate tenant or guarantor, because of the protections afforded by legal processes, such as dissolution or bankruptcy.'"

LESSONS LEARNED

The lessons to be learned from this harsh decision are these: If an indemnification clause is to be used by a landlord as a remedy for a tenant's default, the provision must set forth a date or dates prior to the end of the lease term for the landlord to recover damages. For example, the clause can require the tenant to indemnify the landlord each and every month for the loss of rent that was due under the lease or provide for the determination of damages upon the reletting of the premises.

Secondly, and more importantly, a landlord must set forth in its lease detailed and specific contract damages for which the tenant will be liable when the lease is terminated by reason of the tenant's default. These provisions should reflect the liquidated damages clauses referred to above and should, at a minimum, grant to the landlord the benefit-of-its-bargain damages that are typical under the common law governing contracts in general.

The SJC missed a golden opportunity to change the common law regarding lease terminations, which creates a trap for the unwary landlord. The reason why a tenant is no longer liable to pay rent once a lease is terminated for any reason, including a tenant's default, flows out of the common law concept that a lease is a conveyance of an estate in land and once the estate terminates and the landlord regains its estate, the tenant no longer owes any rent because its estate has ended.

REBA and the Abstract Club had filed an amicus brief with the SJC urging it to view a lease as a contract rather than an estate in land and thus allow the common law of contracts to govern a tenant's damages when the contract is breached. The SJC definitively agreed that a commercial lease is a contract rather than a conveyance of property, but it decided that there was no reason to change the common law that has governed leases in Massachusetts for over 100 years.

Accordingly, it continues to apply the common law that flows out of the concept of a lease being an estate in land rather than applying the common law rule governing contracts (which would grant the landlord its benefit-of-the-bargain damages) even if the lease itself did not spell out these damages. So while Mr. Bumble's comments may be too harsh a view of this decision, the SJC's ruling that a commercial lease is a contract, but is not governed by the common law of contracts, defies all logic. ♦

Ed Bloom is partner in the real estate department at Sherin and Logden, and past president of REBA. He can be reached at ebloom@sherin.com.

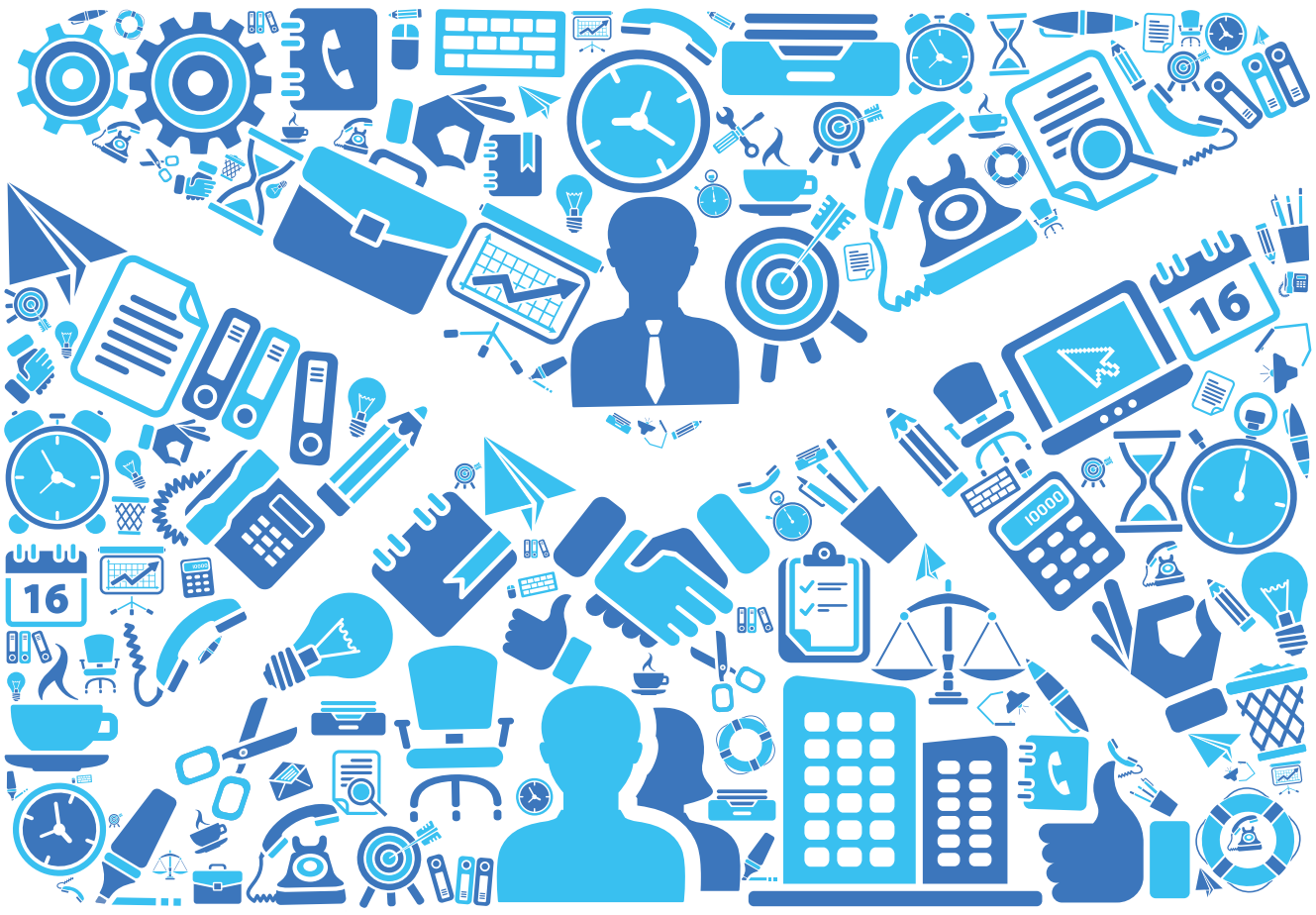
You mail, I mail, we all send email

BY JAMES S. BOLAN AND SARA N. HOLDEN

JIM BOLAN

SARA HOLDEN

Are disclaimers in emails a necessary evil, a prudent and reasonable course of action or a bloody waste of time? Does anyone read them? Do they provide needed notice, disclosure or protection from creeping legal and societal ills? Here are two examples for your consideration:



If a social media post no longer resides within a reasonable expectation of privacy, let alone your care, custody and control, can access to such sites be held to be outside of 4th Amendment protections from unreasonable search and seizures?

TOO MUCH, TOO LITTLE

Is there a conclusive movement away from the historic requirement of a formal, complete purchase and sale agreement when selling real estate? In *McCarthy v. Tobin*, 429 Mass. 84, 87 (1999), the Supreme Judicial Court held that the controlling fact is the "intention of the parties" and that, even if a final written agreement was not executed by the parties, that, "[i]f . . . the parties have agreed upon all material terms, it may be inferred that the purpose of a final document which the parties agree to execute is to serve as a *polished memorandum of an already binding contract*." (Emphasis added).

The evolutionary trend continued recently when, in a case of first impression, a Superior Court judge (Middlesex) applied *McCarthy* to find that an exchange of emails between buyer and seller of real estate inferred an intention to be bound to a contract. See *Feldberg v. Coxall*, 2012 WL 3854947 (Mass. Super.).

In *Feldberg*, the court allowed buyer's motion for endorsement of a *lis pendens* based upon an exchange of emails which included sufficiently material terms, including purchase price, property description and potential closing date. The seller argued that the emails were insufficient to satisfy the Statute of Frauds, G.L. c. 259, § 1, which requires a contract for the sale of land to be in writing and signed by the parties.

As the court noted, "the rules of the road" are not yet written to bridge the 17th century statute of frauds and 21st century email. So, seeking to construct a four-lane highway, the court found that the statute of frauds could be satisfied that there was a "writing" that was effectively "signed" by the parties. Said another way, if you live by electrons, you may die by electrons!

The *Feldberg* case sends the message that, if the parties communicate by email, then their intent can at least be inferred that those communications will serve as a binding agreement without signing a formal written agreement. NB: The Uniform Electronic Transactions Act, G.L. c. 110G recognizes transactions between parties who have both agreed to conduct the transaction electronically and that an "electronic signature" satisfies the law.

So, do *Feldberg* and the UETA mean that electronic signature blocks, among other things, are not necessary? In an age where business and negotiations are conducted electronically, how does one prevent the inference or conclusion being drawn that there is a binding agreement prior to an "intended" formal written agreement being signed by the parties? What do you do with the "binding" language of an offer to purchase form, which *McCarthy* upheld?

Should your emails now contain another disclaimer that says something along the following lines (with thanks to Susan Larose and Richard Vetstein):

Emails sent or received shall neither constitute acceptance of conducting transactions via electronic means nor shall create a binding contract in the absence of a written contract signed by all parties, unless otherwise specifically stated and agreed to by a return email.

Or, do you want to go the other way?

This email shall bind you and your client in the transaction referred to above and your receipt of this email is evidence of your acceptance of all terms and conditions and shall constitute a binding contract in the absence of a fully signed written contract, unless specifically stated otherwise.

Said another way, forgetabout getting out of this one!!

WHERE, OH WHERE, DID MY CONTRACT GO?

I have been raising questions for a number of years about the evolution of privacy in the U.S. and the world. As we use social and related media, the 20th century expectations of privacy are changing faster than protection of those expectations.

For example, does making a clear

See MAIL, page 11

EXCELLENCE IN PROFESSIONALISM

New Award Established

At the Annual Meeting and Conference this year, REBA will launch a new award: the Excellence in Professionalism Award. This award recognizes the honoree's passion and dedication to the highest standards in the practice of law. A recipient of this honor understands that the legal profession is a higher calling imbued with noble and aspirational goals of service – to clients, to the community and to the profession.

'This new honor will have parity of our two existing honors, the Richard B. Johnson Award and the Denis Maguire Community Service Award," said Nominating Committee Chair Chris Pitt. "However, it will focus on the honoree's commitment to the legal profession."

More information, as well as registration instructions, about the Annual Meeting and Conference can be found elsewhere in the pages of this issue of *REBA News*. ♦

David Wilson joins REBA Dispute Resolution

DAVE WILSON

David E. Wilson, a partner of the Boston law firm of Corwin & Corwin LLP, has joined REBA Dispute Resolution, REBA's alternative dispute resolution affiliate. David will focus on mediation and arbitration work on construction disputes.

"We are delighted that David has joined our panel of Neutrals," said REBA Executive Director Peter Wittenborg. "We anticipate that we will bring his special expertise in contrition law to our existing clients while expanding our program's area of expertise in to this important and often litigation-fraught area of the law."

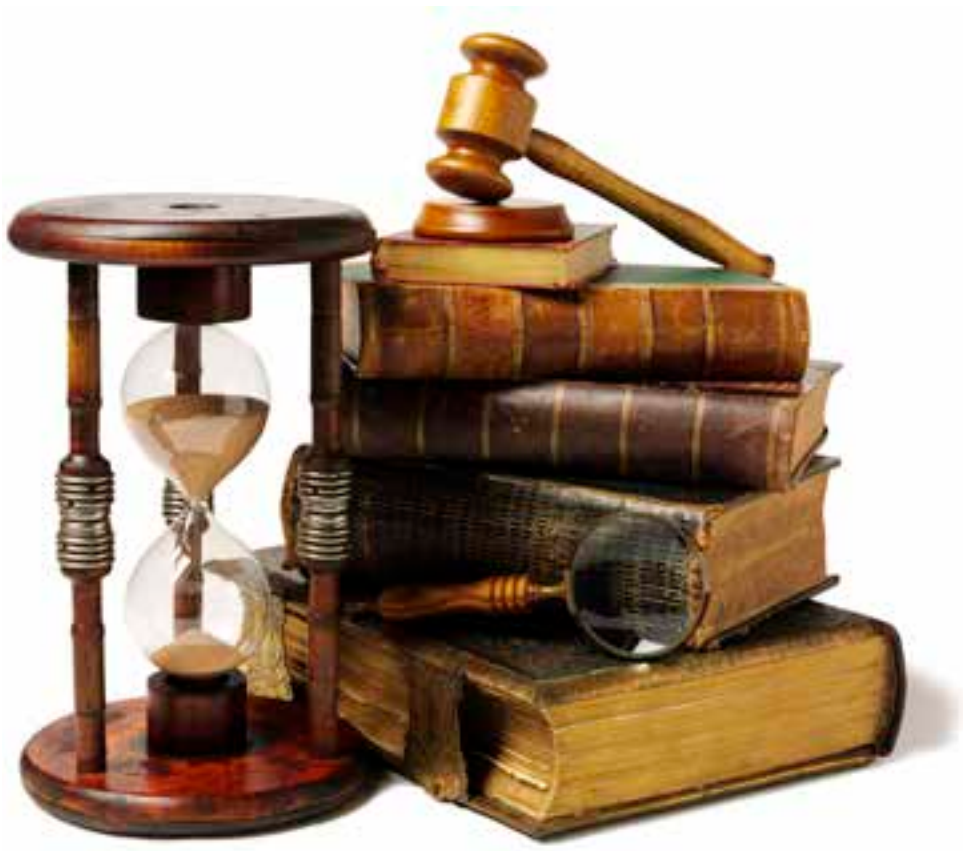
Wilson practices exclusively in the field of construction law, representing subcontractors and suppliers, general contractors and construction managers, sureties, designers and owners, in matters ranging from general advice to trials in district and state courts. He has lectured and participated in numerous classes and seminars on construction law with MCLE, Suffolk University Law School, MBA and BBA, as well as various trade groups. He has also drafted significant legislative bills pertinent to construction, a number of which have been enacted into law.

Wilson received a J.D. from Boston University School of Law, and an undergraduate degree from Brown University. ♦

Relation Back Doctrine preserves subcontractor's late claim against contractor and surety

BY CHRISTOPHER R. VACCARO

CHRIS VACCARO



In the world of litigation, timing is everything, especially because of the various statutes of limitations dispersed throughout the Massachusetts General Laws. To a litigation attorney, one of life's greatest joys is to successfully assert a statute of limitations defense, so the lawsuit against the client is dismissed without the expense of protracted discovery and trial preparation.

However, statutes of limitation are not always the silver bullets that defense counsel would like. For example, the "relation back doctrine," codified in the Rule 15(c) of the Massachusetts Rules of Civil Procedure, generously allows a plaintiff to add claims and defendants to an existing lawsuit after the limitations period expires, as long as the original suit was timely filed. Last July, the Massachusetts Supreme Judicial Court analyzed the interplay between the relation back doctrine and a 90-day limitations period in the mechanic's lien statute (M.G.L. c. 254), in allowing a subcontractor to prosecute a late claim against a contractor and a surety.

NES Rentals v. Maine Drilling & Blasting, Inc., 465 Mass. 856 (2013) involved an equipment rental firm that recorded a mechanic's lien to secure a debt owed by a contractor. After recording the lien, NES Rentals filed a timely enforcement action in Superior Court against the owner on May 21, 2010. Eleven months later, on April 29, 2011, the contractor and surety recorded a bond under Section 14 of the mechanic's lien statute, dissolving the real estate lien. NES Rentals received notice of the bond on June 13, 2011, served a motion to amend its complaint to add the contractor and surety as defendants on Aug. 23, 2011, and filed its motion to amend with the court on Oct. 3, 2011.

Section 14 of the mechanic's lien statute requires claimants to "commence" actions to enforce a surety bond within 90 days after notice, or risk dismissal. NES Rentals served its motion to amend, but did not file it with the court, within the 90-day period. The Superior Court allowed the amendment on Nov. 2, 2011. The contractor opportunistically seized on this delay, and moved to dismiss NES Rentals' claim as untimely. The Superior Court denied the contractor's motion to dismiss, ruling that NES Rentals' service of its motion operated to commence the action within the 90-day period. The contractor filed an interlocutory appeal.

The Supreme Judicial Court affirmed the lower court's decision, but disagreed with its analysis. The SJC explained that the mechanic's lien statute contains strict timing and notice requirements to protect property owners and others from tardy claims by contractors and suppliers. For example, the lien is dissolved unless the claimant files an enforcement suit within 90 days after recording a statement of the amount claimed, and records an attested copy of the complaint with the appropriate Registry of Deeds within 30 days after filing suit. The SJC noted that the statute enables title examiners to ascertain from registry records whether a mechanic's lien encumbers a parcel of land.

According to the SJC, the essential legal issue on appeal was to determine when NES Rentals "commenced" its enforcement action under Section 14 of the mechanic's lien statute. The options avail-

See DOCTRINE page 10

Proposed Zoning Reform Bill Summarized

BY GREGOR I. MCGREGOR

GREG MCGREOR

A zoning reform bill is pending with potential to fix much of what is regarded by many as being broken. The bill enjoys general support of many constituencies and stakeholders.

Massachusetts has been listed by the American Planning Association as one of the states with the weakest and most outdated state land-use laws. Since 1999 a concerted effort has been underway to reform and modernize the statutes that govern local planning, zoning, and subdivision control.

This legislative session, all of the previous supporters of zoning reform – municipal officials, planners, regional planning agencies, and environmental, smart growth, housing, and public health advocates – have collaborated to create a consensus bill.

The new bill is House Docket #3216, "An Act Promoting the Planning and Development of Sustainable Communities." (Find the bill at https://malegislature.gov/Bills/188/House/H1859.)

H.3216 blends aspects of previous zoning reform legislative proposals in the first major updating of the commonwealth's land use statutes in 37 years. It encourages communities to adopt or update their local master plans and provides tools to implement effective land use regulations. At the same time many of the existing statutory impediments to the achievement of what has been termed "smarter growth" in Massachusetts would be eliminated so that communities may better manage their growth and shape their futures. Landowners and developers would enjoy several new rights.

Reps. Stephen Kulik and Sen. Daniel Wolf are lead sponsors. The bill is supported by 56 other legislators. *The Boston Globe* endorsed it editorially as helping to ease housing woes. 42 organizations wrote to Speaker Robert DeLeo urging passage to replace antiquated planning and zoning laws to encourage new jobs and housing, community planning, and natural resource protection, including more certainty and predictability for developers and property owners.

REBA and its committees will host some discussions of the merits of H.3216. Our purpose here, for starters, is to summarize some of the provisions of H.3216 affecting real estate attorneys and their clients involved with projects and permits.

STATUTORY AUTHORITY AND BASIC DEFINITIONS

Due to contradictory court decisions, over the years since the Zoning Act in 1975, the bill would define and authorize explicitly the use of some existing planning tools. Current Zoning Act definitions of "cluster development" and "transfer of development rights" are examples. So are "inclusionary zoning," "natural resource protection zoning," and "form-based codes."

MAJORITY VOTE TO ADOPT OR AMEND ZONING

The current two-thirds majority vote to adopt or amend a zoning ordinance or by-law is unique in the U.S. The national norm is a simple majority to adopt/amend local zoning with no local ability to vary. Under the bill, communities may elect to lower the vote quantum from super-majority (default) anywhere down to a simple majority. Once reduced, the majority subsequently could be raised by whatever majority is then in place.

VESTED RIGHTS AND 'GRANDFATHER PROTECTIONS'

Even if their zoning laws change, most states offer protection to development projects in the pipeline where a substantial investment of time and money has been made. In Massachusetts these "vesting" protections are more liberal (to landowners) than common law or statute elsewhere in the U.S.

Our Zoning Act today provides three vesting loopholes which facilitate easy circumvention of local zoning law changes. These serve to perpetuate zoning long beyond grandfather protections for land on which any subdivision plans have been filed, even if hypothetical and never built; at the same time, the Act makes it harder for landowners to obtain vesting protection for their projects seeking just a building permit or special permit.

The bill eliminates two vesting loopholes and modifies a third. The vesting periods for building permits and special permits are extended.

The bill provides standardized zoning protections for development projects proposed in building permits, special permits, and subdivision plans. The proposed project itself would be protected for periods of two, three and eight years, respectively. The vesting point would be the date an applicant "duly applies for" a permit, which must be before the first published notice of the public hearing on a proposed zoning change, and the permit must ultimately be approved.

Preliminary plans no longer would be adequate as place-holders for vested rights. Instead there will be a "minor subdivision" process (at local option) which would afford 4 years of protection if approved. The ANR process (unique in the U.S.) would be eliminated.

These reforms are in line with the recommendations of the American Planning Association and are the national norm for states that have vested rights statutes.

SPECIAL PERMITS

The Zoning Act presently requires a super-majority vote to of the board for a special permit, a high hurdle that makes special permits harder to obtain. In addition, the duration of a special permit may not exceed two years, which can crimp development schedules.

Three significant changes are proposed. The required vote to approve a special permit becomes a simple majority, which may be increased by local option. The effective duration of a special permit is set at no shorter than three years (which matches the period of vested rights for a special permit proposed elsewhere in the bill). Finally, a simple process for the extension of a special permit is established.

SITE PLAN REVIEW

While not mentioned in the Zoning Act, many communities use site plan review (SPR) anyway. Ambiguities have plagued SPR such as uncertainty about review board discretion, ability to require mitigation, timelines for approval, conducting public hearings, voting and signing majorities, SPR duration after approval, and whether, when and on what standards is there a court appeal.

The bill would add a new section to the Zoning Act specifically on SPR. It sets standard procedures, clarifies that board discretion is limited (although approvals

See ZONE REFORM page 15

A few thoughts on why the zoning act is dysfunctional

BY ROBERT W. RITCHIE

BOB RITCHIE

In 1966 the citizens of Massachusetts approved a state constitutional amendment providing for constitutional home rule for our state's cities and towns. They reserved, however, the power to supersede that home rule authority through the enactment of state laws applicable to cities and towns generally. Before 1966, local zoning enactments could only be adopted if and as expressly authorized by general laws enacted by the Legislature. Thus in 1975 when the last omnibus revision of Chapter 40A was enacted, the old "Zoning Enabling Act" was appropriately re-named the "Zoning Act," in reality a "Zoning *Dis*abling Act" whose provisions are prescriptive or proscriptive, but otherwise leaving zoning to the locals. It should not be forgotten that municipal "home rule" was expressly meant to apply "in local matters," and what may well have been a local matter in 1966 could well have evolved into a matter of predominantly regional or state-wide concern in 2013.

The core legislative need for the Zoning Act, therefore, was for the commonwealth to exercise its reserved powers under Section 8 of the Home Rule Amendment to preempt or restrict the exercise of local zoning authority. Regrettably, in enacting the Zoning Act it failed to do so in a form that calibrated its text to the constitutional prerogatives of cities and towns to zone. This failure is evident in the retention of text in the "new" (1975) Chapter 40A that purports to "authorize" or "permit" precisely what the amendment had already equipped cities and towns to do without state legislation. This is the foundational dysfunctionalty of Chapter 40A.

As if unaware of this history – and even with the best of intentions – the Legislature at various times after 1975 amended Chapter 40A with text again expressed in terms of "permitting" or "authorizing," but which in the final analysis had quite the opposite effect of limiting or restricting municipal home rule powers. Where statewide uniformity in land use regulation is appropriate, the Legislature is constitutionally equipped to mandate uniform state-wide standards and procedures – illustratively, HB 1859 would do precisely this for site plan review, a zoning tool that did not exist in 1975 but which cities and towns have adopted in a wide variety of forms. Local legislative flexibility can well be exercised in conformity to state-wide substantive and procedural standards and criteria.

To remediate these errors of legislative judgment, HB 1859 would clarify the legitimacy of such contemporary zoning tools as site plan review, development impact fees, inclusionary zoning, and consolidated permitting, but would do by prescribing standards and procedures that would be uniform and consistent across municipal boundaries.

COHERENCY AND CONSISTENCY

Among the more glaring deficiencies of the existing statute is its failure to conform to accepted principles of good writing, instead offering up vast landscapes of often impenetrably dense text in sentences and paragraphs that run on for hundreds of words that often defy parsing by courts and common folks

Zoning reform ought to elevate the coherence of the statute by reassembly of currently loosely peppered provisions relating to a single topic into a single coherent re-statement of related provisions in one place.

The Zoning Act on variances establishes criteria so strict that valid variances are truly rare. The fallout from this is statewide inconsistency, with some towns strictly construing the statute and granting few or none, and others ignoring the clear language of the statute by granting them liberally in the expectation that if not appealed the variance will have successfully filed off the rough edges of an overly rigid law. It many cases, a town that liberally grants variances might wish to reflect on whether its by-law ought to have made the subject of the variance something allowed by special permit. Ultimately, disrespect and disregard for the law is a poor alternative to having our state statute and our local land use laws aptly drafted to legitimize well-reasoned adjustments to the strict application of local zoning, which the HB 1859 variance section seeks to do.

HB 1859 seeks to remedy the unreasonable and inconsistent vesting dates for building permits, special permits, and subdivision plans. Zoning freeze provisions of the Zoning Act kick in for building permits and special permits only upon issuance prior to first notice of a public hearing on a zoning change, which exposes development projects to possible zoning changes that might well be directly responsive to the project itself. On the flip side, preliminary plans filed anytime prior to adoption of a zoning change freeze zoning for all land shown on the somewhat meaningless plan, so long as a definitive plan with no required consistency with the preliminary plan is filed within seven months. This emasculates a community's power to implement its master plan since the deliberative phase of local lawmaking is exposed to frustration by the filing of a simple non-binding plan of land unaccompanied by any commitment to proceed as planned.

The remedy proposed in HB 1859 would be to assign the first publication date of the planning board's hearing on proposed zoning changes as the trigger date for application for the two permits and for definitive plans. The equitable adjustment of these dates in HB 1859 gives

See ZONING ACT page 14

Proposed bill a flawed plan

Act will result in more permits, less housing

BY MARK A. KABLACK

MARK KABLACK

Many have touted House Bill No. 1859, "An Act Promoting the Planning and Development of Sustainable Communities," as a panacea for Massachusetts zoning laws, arguing that the current laws are in dire need of reform. Still others, including *The Boston Globe*, have stated that the zoning reform bill is essential for providing incentives and tools to municipalities to produce more housing. Unfortunately, many aspects of the reform effort will make housing production more costly and more permit intensive, resulting in fewer housing starts and more problems for the housing industry.

To its credit, several provisions of the proposed legislation would be helpful to owners and developers, or at least content neutral. The codification of site plan review procedures, the establishment of new, more flexible standards for variance relief, the opportunity for expedited permitting for certain projects, and the articulation of greater vesting rights offered through the issuance of a building permit or special permit are all welcomed changes.

The benefits of the proposed legislation, however, are clearly outweighed by other provisions that eliminate certain permitting rights and procedures and add direct costs to development.

WHERE THINGS GO WRONG

The proposed legislation would amend sections of the Subdivision Control Law (M.G.L. c. 41) by redefining one of the core definitions of what it means to be a regulated "subdivision."

Currently c. 41 has as its main focus the regulation of *new* roadways and roadway infrastructure for the development of *new* lots. The current law exempts lots that are created along *existing* roadways through a plan approval process called "Approval Not Required" (ANR).

The proposed legislation would eliminate ANR plan endorsements in favor of a new "minor subdivision" process that could subject lots otherwise fronting on existing public ways, requiring no new roadway frontage or infrastructure, to the same rules and regulations required for major subdivisions. In essence it would remove one of the only by-right approval tools that property owners and developers have to create new housing units in a prompt and predictable manner.

An ANR plan must be endorsed under the current law within 21 days. Compare that to a minor subdivision review process that could take as many as 65 days, and could be subject to planning board regulations that vary from town to town, are unduly complicated, time-consuming and costly. Lastly, the minor subdivision plan review process is only applicable to six or fewer lots unless the local legislative body (e.g. Town Meeting) takes affirmative steps to increase the applicable yield.

With the elimination of the ANR plan, the proposed legislation also eliminates the three-year zoning or plan freeze protection afforded to owners and developers for property shown on an ANR plan.

Other important zoning or plan freeze protections afforded to full subdivision plans are also modified by the proposed legislation. The eight-year plan protection applicable to full subdivision plans, which currently freezes all zoning applicable to the property shown on the plan, would be curtailed to protect only those improvements shown on the plan itself. It is arguable that the new legislation would not apply to (and not protect) modifications or changes to the approved plan. More significantly, the eight-year period is reduced to five years for those municipalities that become "opt-in" communities.

One of the more onerous provisions in the new legislation is an inclusionary zoning requirement whereby a developer must subsidize the construction of one or more affordable units in any new development. This provision lacks any density bonus as provided in the current law, and contains no exemption for small projects or numerical standards as to how many affordable units must be constructed.

While we should all be advocates for affordable housing, the mechanism for accomplishing its construction must be rational and reasonable. It must follow a good economic model. Subsidies for affordable units, which by their nature are sold at reduced pricing levels, can easily surpass $100,000 per unit. If this subsidy is imposed on a relatively small development of 10 new homes, for example, the allocation of that subsidy per market rate unit would be $10,000. That subsidy is an additional cost that must be added to the price of home construction, when prospective home buyers in Massachusetts are already suffering from the highest housing prices in the nation.

FALLING SHORT

Those who advocate for this zoning reform bill state that the burdensome and costly components are offset by the benefits contained in other sections of the legislation, which encourage municipalities to update their master plans or designate districts for housing production and economic development (the so-called "opt-in" communities). These sections, however, fall short of meaningful production goals.

First, with respect to the creation of master plans, the current law already mandates such planning (see M.G.L.

See BILL FLAWED page 14

Legal issues of land zoning in Russia

BY ELENA BOLTANOVA

ELENA BOLTANOVA

Zoning of land can have different purposes and aims. Zoning activities (regardless of their forms) comprise a single subject: the classification of land sites by pre-established criteria, and features to solve a number of land use problems through the adoption of special legal norms.

Unlike in the United States of America, in Russia land zoning as a set of legal norms is relatively new and, in fact, is still in its formative stages. First of all, land zoning affects the rights of persons using parcels of land and other real estate objects as it requires determining limits and restrictions on the use of land. In this regard there can be mentioned two types of zoning: planning (territorial) zoning and restrictive zoning (identification of localized zones with special conditions of use).

"Planning zoning" is defined as municipal zoning to determine the overall territorial zones and planning regulations (Article 1 of the Town Planning Code of the Russian Federation).

Accordingly, this type of zoning is characterized, firstly, by the separation of the municipal territory into certain parts. The Russian federal legislation contains an open list of territorial zones, and it gives the right to the local governments to set their own types of territorial zones taking into consideration the specific usage of land sites and capital objects, and the plans for municipal development.

As a result of this planning zoning, there can be defined residential, social, business and industrial zones, zones of engineering and transport infrastructure, zones for agricultural usage, recreational zones, protected zones, special-purpose zones, zones for military facilities and other types of land zones. The limits of the territorial zones are to be established taking into account various factors, including the existing land use and the prevention of damage to the objects of capital construction located at adjacent territories.

Changing the territorial zone is possible, though it is a rather lengthy procedure as it requires amendment of the regulations for land use and development of the municipality. The procedure is complicated not only because it needs consultation with various offices, but also because it requires public hearings. It is therefore important at the stage of making regulations for the land use and construction to weigh the potential risks and danger, and harm threatening to the adjacent territories. The initiative to change the limits of territorial zones, or to change planning regulations can belong to persons and legal entities.

Secondly, the planning regulations for every territorial zone have legal effect for every such zone. The planning regulations constitute a part of the land use and construction rules, which need to be approved through normative acts of law issued by local municipal authorities, or, in the case of Moscow or Saint Petersburg, by their city authorities.

The planning regulations provide:

- The types of permitted use of land, as well as all that is above and below the surface of land sites and is used for construction and subsequent operations in buildings and structures (main types of permitted use, conditionally permitted types of use and supplementary types of permitted use).
- Limited (minimum and or maximum) size of land and parameters defining limits of permitted construction, reconstruction, construction in the height, and building density.
- Restrictions on the usage of land sites and buildings.

SPECIAL ZONING RESTRICTIONS

It is important to understand that the Regulations for Land Use and Construction, as well as any changes to that document, should correspond to the provisions of territorial planning documents (e.g., the general plans of towns and settlements). In Russia, there have already appeared court cases involving reversal of changes in regulations of land use and construction that did not comply to earlier adopted documents.

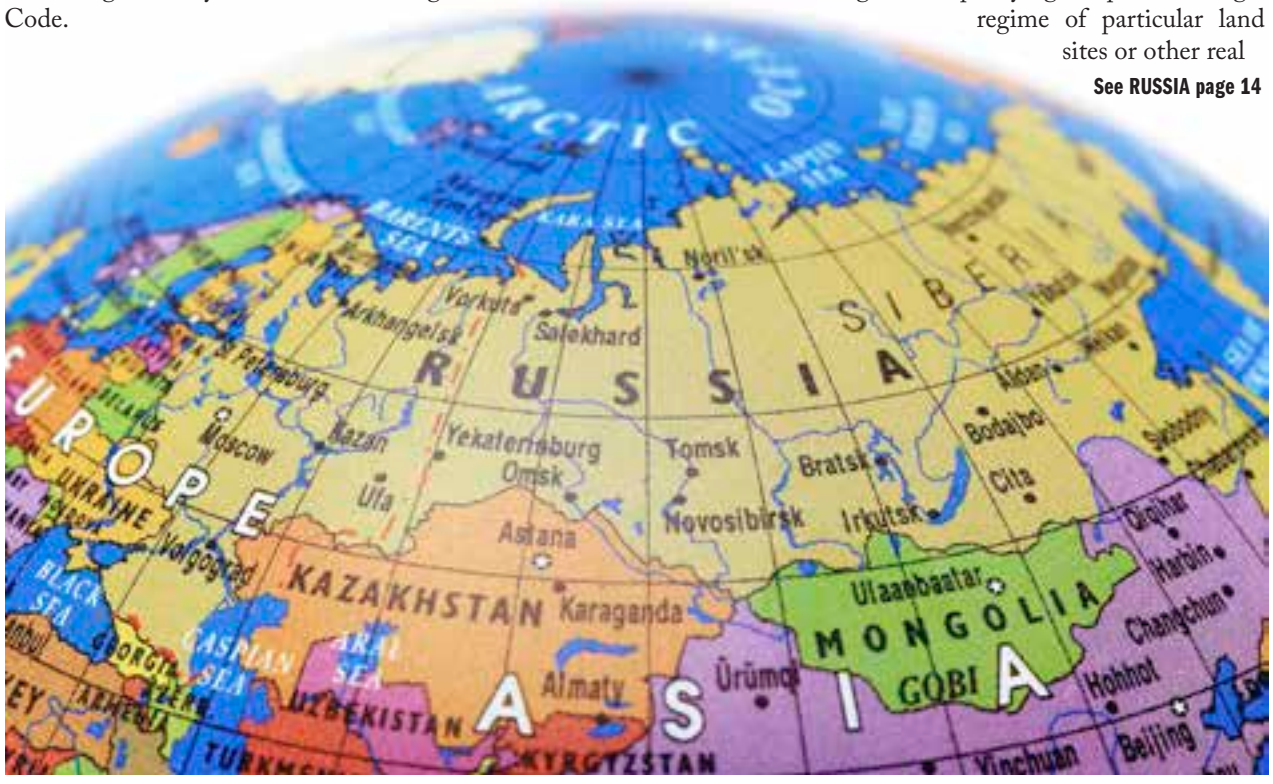
Thus, planning zoning allows one to plan the usage of land parcels and property in view of the possible activity at the site. This type of zoning affects both lands with buildings thereon and vacant lands liable to be built upon and is regulated by the Town Planning Code.

The restrictive zoning norms are contained in various federal laws and regulations (Land Code of Russia (2001), Water Code of Russia (2006), federal law On Environmental Protection (2002) and others). In order to ensure the preservation of natural resources and their protection, to establish special requirements for economic and other activities, additional restrictions can be applied in some areas by creation of special zones or zones with special conditions for land use (protective, sanitary zones, zones of cultural heritage of peoples of Russia (monuments of history and culture), water protection zones, and others). The special zones cover parcels of land where planning zones are disregarded, including those lands where planning zoning does not apply.

Russian legislation specifies many types of special zones that have different names. It is in common use for zones in which construction is largely restricted or limited. Construction of buildings has a very powerful impact on the environment in general, and on the land specifically. Such a restriction or limitation may include various matters ranging from the necessity to obtain permission from the authorized entities to build a structure (for example, the buffer zones of power lines and facilities) to a complete prohibition of construction of buildings and structures (for example, exclusion zones adjacent to a military warehouse, protected areas of gas supply facilities).

Thus, restrictive zoning often has a local, or, to some extent at least, an individual character (for example, the determination of the buffer zone of a particular object to ensure its safe and trouble-free operation). Should in some cases a planning zoning be in place, restrictive zoning allows specifying the particular legal regime of particular land sites or other real

See RUSSIA page 14



RELATION BACK DOCTRINE PRESERVES SUBCONTRACTOR'S LATE CLAIM AGAINST CONTRACTOR AND SURETY

CONTINUED FROM PAGE 7

able to the SJC were, in reverse chronological order: Nov. 2, 2011, the date when the lower court allowed the motion to amend; Oct. 3, 2011, the date when the motion to amend was filed with the lower court; Aug.23, 2011, the date when the contractor and the surety received notice of the motion to amend; or May 25, 2010, the date that NES Rental originally filed suit to enforce its mechanic's lien. This fourth option only makes sense if one applies the relation back doctrine to the issue.

Had the SJC chosen the first or second options as the date that NES Rentals commenced its suit, NES Rental's claim would be dismissed as untimely. Had the SJC chosen the third option, it would have adopted the lower court's position, and NES Rentals would prevail. The SJC rejected the third option, stating that merely serving an amended pleading, without filing it with the court, did not operate to "commence" the enforcement action. The SJC ultimately chose the fourth option, invoking the relation back doctrine to hold that NES Rentals' suit on the bond was "commenced" when it originally filed its mechanic's lien enforcement action, eleven months before the bond was recorded on April 29, 2011.

> The SJC explained that the mechanic's lien statute contains strict timing and notice requirements to protect property owners and others from tardy claims by contractors and suppliers.

The SJC's reasoning focused on Rule 15(c) of the Massachusetts Rules of Civil Procedure, which states that "whenever the claim or defense asserted in an amended pleading arose out of the conduct, transaction, or occurrence set forth …. in the original pleading, the amendment relates back to the original pleading." This rule also applies to an amended pleading that adds or changes parties. Accordingly, the SJC cited the relation back doctrine in Rule 15(c) to decide in favor of NES Rental.

The SJC's decision was not unanimous. Justice Barbara Lenk, dissenting, claimed the decision departed from the clear language of the statute and established precedent. She would have strictly construed the 90-day limitations period and dismissed the amended complaint. Lenk indicated that the bond enforcement action was not commenced until the motion to amend the complaint was filed with the court, which was outside of the 90-day period. She opined that the majority's decision rendered the 90-day limitations period "largely superfluous."

Notwithstanding this dissent, the SJC reaffirmed its willingness under the relation back doctrine to let plaintiffs add new claims and defendants to lawsuits after limitations periods have expired – a practice which the SJC conceded is "more liberal than other jurisdictions." ♦

A long-time REBA member, Chris Vaccaro practices in Stoneham, concentrating in the areas of commercial real estate and banking. His email address is cvaccaro@verizon.net.

YOU MAIL, I MAIL, WE ALL SEND EMAIL

CONTINUED FROM PAGE 6

choice in online privacy settings provide sufficient protection against disclosure or search? Is there a risk if an online or email account is hacked? These are the questions that we in the legal ethics community have been contemplating and a number of folks have been writing about, such as the article in 2010 in the *Marquette Law Review,* "The Fourth Amendment and the Brave New World of Online Social Networking." The article coalesces as follows: "Is there now an illusion of privacy? Has the definition (i.e., the subjective expectation of privacy) been inextricably altered?"

Mark Zuckerberg said several years ago that online activity means that people no longer have an expectation of privacy – it is*no longer the social norm*. Is the right to be left alone permanently obviated by the new social media contract? So, if a social media post no longer resides within a reasonable expectation of privacy, let alone your care, custody and control, can access to such sites be held to be outside of 4th Amendment protections from unreasonable search and seizures?

As we know, after 9/11, President George W. Bush issued an executive order that authorized the NSA to conduct surveillance of certain telephone calls without a FISA warrant. The issue has been raised anew recently. Do these realities create a new sense of exposure and liability for lawyers? Must we now take "reasonable" steps first to notify clients and others of the possibility of invasion of routine communications – hence the email disclosure? If we fail to do so, will we be charged with breach of confidentiality by a less than gruntled client? Or, has the expectation of privacy been so eroded for so long that there is no need to connect these dots when engaged in privileged or confidential acts?

In light of the renewed disclosures on NSA activity, we have been considering reviving the following disclaimers for our emails:

> *This email message, including any attachments that follow, was sent unencrypted. If you are concerned about confidentiality or privacy, such as the NSA PRISM program, please contact our office to discuss alternate delivery options for future communications.*

Answers may be few and far between, but the conversation needs to begin anew. ♦

Jim Bolan and Sara Holden are partners with the Newton law firm of Brecher, Wyner, Simons, Fox & Bolan, LLP, and represent and advise lawyers and law firms in ethics, bar discipline and malpractice matters. They can be reached at either jbolan@legalpro.com or sholden@legalpro.com.

Harry Spence to Address Litigation Committee

Trial Court Administrator Lewis H. "Harry" Spence will address a luncheon meeting of the REBA Litigation Committee on Tuesday, Nov. 12, 2013, at Todd & Weld LLP, 28 State St., 27th Floor, Boston. Spence will discuss his experiences in managing the seven departments of the trial court since his appointment in April 2012, as well as the challenge of court operations in a time of diminished funding appropriations.

Spence, who has a long history of managing complex organizations in both the public and private sectors, oversees 379 judges, more than 6,000 court staffers and an annual operating budget of more than $560 million. Prior to his court appointment Spence served as commissioner of the Massachusetts Department of Social Services, the commonwealth's child welfare program. From 1995 to 2000 Spence served as deputy chancellor for operations at the New York City Public Schools, the nation's largest school system, which has a budget of $10 billion and 120,000 employees serving 1.1 million students.

Prior to his work in New York City, Spence was appointed by then-Governor William F. Weld as receiver for the bankrupt city of Chelsea.

The Nov. 12 meeting is open to all REBA members in good standing. To register for the meeting, email Andrea Morales at morales@reba.net. ♦

2013 Annual Meeting & Conference

Monday, November 4th 2013 • 7:30 A.M. – 2:45 P.M.

Four Points by Sheraton |

1125 Boston-Providence Turnpike, Norwood, MA

Join us at our 2013 Annual Meeting & Conference, where you can take advantage of accredited continuing education, network with colleagues and enjoy an informational luncheon with old friends. The registration form can be found on the next page. We look forward to seeing you on November 4th!

Schedule of Events

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

Are the ALTA Best Practices in your Future?

Charles Cain; Richard A. Hogan; Jon K. Skarin

Initiatives from the Consumer Financial Protection Bureau specifically make lenders financially responsible for the activities of many third-party vendors including attorney settlement and title agents. In an effort to assist the lending community in its efforts to reduce its liability, the title insurance industry has implemented new quality control standards designed to improve service, reduce risk, and ensure the highest level of regulatory compliance. The best practices are voluntary standards professionals can adopt to protect consumers, promote quality service, provide for ongoing employee training, and meet legal and market requirements.

8:30 A.M. – 9:30 A.M. Tiffany Ballroom A
9:45 A.M. – 10:45 A.M. Tiffany Ballroom A

Homestead Reform: Three Years Later

Michael J. Goldberg; Ward P. Graham; Lynne F. Riley

The three years since the REBA-led overhaul of the Massachusetts homestead law have seen further changes in both the law and conveyancing practice. The panel will examine the impact of the new statute, including a discussion of state and federal court decisions interpreting its terms, and a review of technical and clarifying legislation pending on Beacon Hill. The faculty will discuss issues relating to the requirements for homestead declarations, and related title questions. In addition, the panel will explore exemption planning for bankruptcy debtors in the context of the new law.

8:30 A.M. – 9:30 A.M. Essex/Lenox Room
9:45 A.M. – 10:45 A.M. Essex/Lenox Room

Contracts to Purchase: The Cart before the Horse

Robert L. Bell Jr.; Michael McDonagh; Robert M. Ruzzo; George J. Warshaw

A residential contract to purchase, commonly, but mistakenly, called an 'offer', is a binding agreement (see McCarthy v. Tobin, etc.). So why do we need a purchase and sale agreement? Do our real estate broker friends – who are sometimes our clients – understand the binding nature of the standard form offer? Are brokers flirting with a 93A claim if they don't disclose this? If a seller reneges, the buyer can force the seller to perform based solely on a form offer. However, if a buyer reneges, a seller – with the home sale at stake – has no recourse. Can we rethink the use of this ubiquitous form without alienating our real estate broker colleagues?

8:30 A.M. – 9:30 A.M. Conference Room 102
9:45 A.M. – 10:45 A.M. Conference Room 102

A Lawyer's Primer on Short Sale Fundamentals

Hillery Dorner; Amanda Zuretti

The lawyer's responsibility in a short sale varies depending on the role played. This session will address the nuances of a P&S agreement when you represent the seller and the buyer, and the pitfalls the closing attorney needs to be aware of. It will also address customary practices of lien holders, short sale approval letters, title concerns, and the use of the discharge law in protecting the closing attorney and clearing title post-closing.

8:30 A.M. – 9:30 A.M. Conference Room 107/108

The New Medical Marijuana Law: Condominium Associations, Residential Landlords & Zoning By-laws

Adam D. Fine; Diane R. Rubin; Emil Ward

The Massachusetts medical marijuana law, and particularly the implementing regulations, present many issues for real estate practitioners including town counsel, zoning and land use lawyers, residential conveyancers, lawyers in the landlord/tenant arena and lawyers representing condominium owners' associations. The implementing regulations are intensely detailed in some areas and quite vague or silent in others. REBA members need to know this cutting edge law and the opportunities and challenges it will present to their clients.

9:45 A.M. – 10:45 A.M. Tiffany Ballroom B
11:00 A.M. – 12:00 P.M. Tiffany Ballroom B

Upcoming DEP Regulatory Reforms

Benjamin J. Ericson; Lealdon Langley; Ann Lowery; Sarah Weinstein

The upcoming DEP regulatory reforms are a comprehensive set of simplifying, streamlining and curative rule changes, in almost all operative DEP areas, put out for public comment and hearings in March. Panelists will cover the proposed regulatory reforms within each DEP program; opening and closing dates for public comment periods; locations and dates of public hearings in various parts of the Commonwealth; how to submit written comments for yourself and your clients; and what to tell them of some rules changes already promulgated. These changes will have surprising importance, wide application, welcome simplicity, and common sense wisdom. The changes will affect any attorneys and their clients involved even tangentially with real estate, transactions or permits, land management, or land use/environmental procedures.

9:46 A.M. – 10:45A.M. Conference Room 103
11:00 A.M. – 12:00 P.M. Conference Room 103

Ibanez & Eaton: Title Confusion and Possible Solutions

Allison West Dalton; Paul J. Mulligan; Rachelle D. Willard

The Ibanez and Eaton decisions have brought an element of uncertainty to legal titles and placed additional responsibilities on conveyancers certifying title. Practitioners and their staff will want to know what to look for on their titles so that the issues can be properly dealt with. The panel will provide a brief overview of the Ibanez and Eaton decisions as well as discuss how to spot these issues on title. The panel will then lead a discussion of methods and proposals to cure Ibanez issues in back title including: release deeds from prior owners and junior lienholders, Bevilacqua and foreclosure deeds as assignments of mortgage, re-foreclosure and the Eaton requirement to hold the note, making a new entry, statutes of limitation and registered land issues.

8:30 A.M. – 9:30 A.M. Tiffany Ballroom B
11:00 A.M. – 12:00 P.M. Conference Room 102

For information on conference registration and exhibitor/sponsorship opportunities visit www.reba.net. or call REBA at 617.854.7555

Commercial Closings & Title Policies for Residential Conveyancers

Melanie E. Kido; Christopher S. Pitt

The panel will discuss the requirements for commercial closings when the parties are foreign or domestic corporations, partners and limited liability companies. What authority documents will be needed? What due diligence should be done as to building jacket searches, zoning, etc.? Are there any leases? What is covered by the title policy and what endorsements are required? How does the ALTA/ACSM survey differ from a simple mortgage plot plan? Will the title company act as escrow agent? This informative session will help you be more at ease as you venture into commercial closings.

8:30 A.M. – 9:30 A.M. Conference Room 103
11:00 A.M. – 12:00 P.M. Essex/Lenox Room

Trusts from General Practitioner's Perspective: Title Issues, Probate & More

Sara Goldman Curley; Leo J. Cushing

The panelists will discuss and define the many types of trusts owning real property or holding the beneficial interest. An overview and definition of nominee trusts, estate planning trusts, revocable and irrevocable trusts, inter vivos trusts, testamentary trusts, and business trusts will discussed by the panel. Basic trust definitions will be reviewed, explaining the trustee, the beneficiary, the donor, the creator, and the settlor. The necessary components of various trust instruments and the C. 184 §35 Trustee Certificate will be discussed, as they relate to the proposed sale or refinance. There also will be a discussion of the Massachusetts Homestead exemption as it relates to trusts. The documentation to be required from various trustee sellers or borrowers, as the conveyancer and the paralegal prepare for closing, will be defined.

9:45 A.M. – 9:30 A.M. Conference Room 107/108
11:00 A.M. – 12:00 P.M. Conference Room 107/108

Recent Developments in Massachusetts Case Law

Philip S. Lapatin

Now in his 35th year at these meetings, Phil continues to draw a huge crowd with this session. His presentation on the Recent Developments in Massachusetts Case Law is a must hear for any practicing real estate attorney. Phil is the 2008 recipient of the Association's highest honor, the Richard B. Johnson Award.

12:10 P.M. – 1:15 P.M. Conference Room 103
***Video simulcasts of this presentation in Conference Rooms 102 & 107/108**

1:20 P.M.
LUNCHEON PROGRAM

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

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

2:00 P.M. – 2:20 P.M.
Award Presentation

Luncheon Keynote Address

PRESENTED BY
DAN SHAUGHNESSY
Boston Globe Sports Columnist

A sports columnist, Dan Shaughnessy's is perhaps the most widely followed of any column in the Boston Globe. He has been named Massachusetts Sportswriter of the Year seven times and eight times has been voted one of America's top-ten sports columnists by the Associated Press Sports Editors.

In addition to his journalism work, Dan has written ten books about the Boston Red Sox and the Boston Celtics. These include The Legend of the Curse of the Bambino, Reversing the Curse (written after the Red Sox won the 2004 World Series), Fenway Expanded and Updated: A Biography in Words and Pictures, Ever Green the Boston Celtics, Seeing Red: The Red Auerbach Story, At Fenway: Dispatches from Red Sox Nation, and many others. Earlier this year, Shaughnessy and Cleveland Indians manager Terry Francona released Francona: The Red Sox Years, a biography focusing on Francona's years as manager of the Red Sox. The book immediately became a best-seller.

Dan is a regular contributor to ESPN's "Sports Reporters," "Jim Rome is Burning" and "Pardon the Interruption" and makes regular appearances on WTKK (96.9 FM talk radio), WHDH Sports Xtra and network television's Nightline and The Today Show.

After graduating from the College of the Holy Cross, he worked for the Baltimore Evening Sun and the Washington Star, before joining the Globe in 1981.

General Information

- REBA's 2013 Annual Meeting & Conference is open to both members and non-members. All attendees mustregister; the registration fee includes the breakout sessions, the luncheon, and the written materials. REBA cannot offer discounts for registrants not attending the Conference luncheon.
- Credits are available for professional liability insurance and continuing legal education credits in other states. For more information, contact Bob Gaudette at 617.854.7555 or gaudette@reba.net.
- Please submit one registration per attendee. Additional registration applications are available at www.reba.net.REBA will confirm all registrations by email
- To guarantee a reservation, conference registrations should be sent with the appropriate fee by email, mail or fax, or submitted online at www.reba.net, before October 28, 2013. Registrations received after October 28, 2013 will be subject to a late registration processing fee of $25. Registrations may be cancelled in writing before October 28, 2013 and will be subject to a processing fee
- Attendees may not use cell phonesduring the breakout sessions or the luncheon

Driving Directions

FROM BOSTON:

Take I-93 South which turns into I-95 (Route 128) North. Take Exit 15B, Route 1 South, toward Norwood.Continue 4.5 miles down Route 1 South. The hotel will be on your right, after the Staples Plaza

FROM PROVIDENCE

Take I-95 North to Exit 11B, Neponset Street, Norwood. Drive 7/10 of a mile and tu
rn left onto Dean Street. At the traffic light, turn left onto Route 1 heading south.
The hotel will be on your right, after the Staples Plaza

FROM THE WEST:

Follow the Mass. Turnpike (I-90) East. Take Exit 14 onto I-95 (Route128) South (from the West it is Exit 14; from the East, it is Exit 15). Continue South to Exit 15B (Route 1, Norwood). Continue 4.5 miles down Route 1. The hotel will be on your right, after the Staples Plaza

Registration

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

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

	By October 28th	After October 28th
☐ YES, please register me. I am a REBA member in good standing.	$195.00	$220.00
☐ YES, please register me as a guest. I am not a REBA member.	$235.00	$260.00
☐ NO, I am unable to attend, but I would like to purchase conference materials and a CD of the breakout sessions and luncheon address. (Please order by 11/6/13 and allow four weeks for delivery)	$190.00	$190.00
	$_____	$_____

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

Check No:_____ Date:_____

Card No:_____ Expiration:_____

Signature:_____ Date:_____

You May Also Register Online at REBA.net

Registrant Information

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

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

Firm/Company:_____

Address: _____

City/Town: _____ State: _____ Zip:_____

Tel:_____ Cell:_____ Fax: _____

Selcet Your Luncheon Choice Below

- ☐ Buttcher shop cut choice petit filet mignon, grilled and served with a red winde demi-glace
- ☐ Pasta Primavera in a cream sauce
- ☐ Pan seared chicken breast stuffed with spinach, garlic & Fontina cheese in a while mushroom sauce
- ☐ None, as I am unable to stay for the Luncheon

REBA
THE REAL ESTATE BAR ASSOCIATION
for Massachusetts

A FEW THOUGHTS ON WHY THE ZONING ACT IS DYSFUNCTIONAL

CONTINUED FROM PAGE 8

the advantage to whomever first makes a declaration of specific intent, whether it be the applicant for a building permit, special permit, or definitive plan approval, or the community by publishing notice of a propose zoning change.

A SQUARE PEG

Where appropriate regulatory tools are not available, inappropriate ones are often brought to the task. Zoning tools widely available in other states are missing in our nearly 40-year old statute, often leaving cities and towns to fashion land local use regulations that widely differ one from the next.

All concerned with state and local regulation of land uses in Massachusetts need and deserve a modernized Zoning Act. The act should explicitly acknowledge proven contemporary tools and techniques for the sale, use, and development of private property throughout our state and for regulating that development in a balanced and equitable way. The act should assure expedited and predictable outcomes, not uncertainty and ambiguity in the allocation of the costs and benefits of growth.

It is a blemish that a state renowned for its contemporary approach to the demands of the 21st century in other areas is so behind the times in its zoning laws. It is a time for change.

HB 1859 was crafted to serve as a consensus bill in balanced response to the legitimate needs and expectations of many diverse constituencies. No bill will do everything any one constituency would like, and those who believe their interests are best served by the status quo would be well advised to reassess. ♦

Bob Ritchie is former General Counsel for the Massachusetts Department of Agricultural Resources. He can be reached at bobritchie@comcast.net.

PROPOSED BILL A FLAWED PLAN

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c.41, section 81D). The sad reality, however, is that municipalities reluctantly develop or update master plans and rarely zone in accordance with such plans. The new legislation does nothing to mandate master plan development or zoning conformance. If those who advocate for smart growth really want to accomplish meaningful planning and production reform, they would mandate planning and zoning benchmarks for all municipalities, coupled with regulatory oversight by state agencies, and advocate for appellate reform.

Second, the benefits derived from those portions of the legislation that encourage opt-in communities to designate districts for development are woefully inadequate. The requirement, for example, for an opt-in community to create new housing units equal to 5 percent of its total housing stock over a 10-year period, results in a small fraction of new housing starts in any one year. It is a pace that will never allow Massachusetts to overcome its housing shortage.

Moreover, the incentives that are provided to opt-in communities are likely to encourage anti-development bias. Opt-in communities, for example, can create natural resource zoning districts (with reduced housing unit densities equal to onr unit per 10 acres) and enact rate-of-development laws that restrict new housing starts.

Lastly, the tools that advocates say they need in order to plan for the future of Massachusetts such as transfer of development rights (TDR), open space or cluster development, or inclusionary zoning with a density bonus, are already available under the existing provisions of M.G.L. c. 40A.

The real estate industry should be wary of the threats presented in the proposed zoning legislation. While certain provisions of existing zoning law could use revision, a comprehensive re-write in the manner proposed would have severe negative impacts. Whether one supports zoning reform or advocates against it, one must be honest in recognizing that the current proposal does more to deter housing production and economic development than it does to promote them. ♦

Mark Kablack is principal of the firm M.A. Kablack & Associates, P.C. in Westborough. He can be reached at Mkablack@kablacklaw.com.

REPRESENTING A CONDOMINIUM DEVELOPER OR CONVERTER IN THE SALE OF INDIVIDUAL CONDOMINIUM UNITS

CONTINUED FROM PAGE 4

to contain 25 or more units, issues relative to the Interstate Land Sales Full Disclosure Act of 1968 (15 USC Chapter 42) need to be identified.

In addition to the presentation, the developer's or converter's attorney should prepare a closing package for the closing attorney (the attorney for the buyer and/or the buyer's lender):

- A completed unit deed.
- A completed tax letter agreement.
- An insurance certificate.
- Recording information of the condominium documents.
- A current municipal lien certificate.
- In Boston, a current Water and Sewer Commission certificate.
- Closing adjustments (condominium reserves, condominium fees and real estate taxes).
- A copy of the specimen title insurance policy.
- A certificate of occupancy (temporary) in the event of a substantial rehabilitation or new construction.
- A list of recording charges.

Careful track needs to be kept relative to conveyance of parking spaces, storage spaces or other appurtenant rights. In a project with 100 or so parking spaces, care needs to be taken so a single space is not sold more than once by accident. One might be surprised by how often this does in fact happen.

A subordination agreement or consent to the condominium master deed by the lender(s) on a condominium development needs to be recorded with the Registry of Deeds. Lender(s) will have to provide a payoff statement relative to a partial release for each unit closing. The terms of obtaining partial releases for each unit closing should be established prior to the beginning of the sale of units. The more simple the formula (for instance, 80 percent of the purchase price) the better. If a lender is a private lender, original partial releases in recordable form will have to be delivered to the closing.

There is obviously much to be done in representing a developer or converter of a condominium. In a strong market for condominium units, good organization is essential to a smooth and efficient process. In cases where my firm has represented developers of mid-sized and larger condominium projects, we have typically conducted from three to six closings per day, upon completion of construction. When a firm knows how to stream line this process, this is a realistic expectation. ♦

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

LEGAL ISSUES OF LAND ZONING IN RUSSIA

CONTINUED FROM PAGE 10

estate property located within the special zones.

A particular site being covered by a special zone means not only the necessity to follow the special rules and regulations during construction at the site but also the restriction on the alienation of the site, the impossibility to lease it for construction, and the prohibition to privatize it. Also, Russian legislation has other specifics that regulate legal relations within special zones.

When should the specific conditions and terms and the specific regime in the special zones be observed? This should occur from the moment when the land parcel is identified as falling within the specific special zone. Special zones have different names and different procedures required to be observed. In general, it can be stated that the boundaries of such zones shall be approved by the decisions of the state bodies of executive power, or by bodies of local municipalities. A special group of zones are those which shall be deemed to derive from a direct prescription of law: no special decision is required for their creation (such are, for example, protection zones for geodesic points, protected zones of objects of the gas supply system within the minimum distance to the objects of the gas supply system, and others). As such, the protective zone of the electric transmission systems is established only from the date when the information about it was registered in the state land cadastre.

Changing the territorial zone is possible, though it is a rather lengthy procedure as it requires amendment of the regulations for land use and development of the municipality.

The zoning can be vertical or horizontal in nature. Although the legislator mainly regulates horizontal zoning, at the same time planning zoning can set restrictions on the development of underground space. There are such cases of legal regulation of underground protection zones. In some regions of Russia it is stated that there should be designated boundaries of underground protection zones for individual monuments or artifacts – these zones should restrict intrusion in the underground space.

In general, zoning and special rules shall provide a reasonable balance of: a) the socio-economic and technological development of the country, associated rights of citizens and organizations, b) the interests of the preservation of historical and cultural heritage, environmental protection and related rights in the spiritual and cultural sphere. These goals are common for the legal regulation of land zoning not only in Russia but also in other countries. ♦

Elena Boltanova is an assistant professor on the law faculty at Tomsk State University, in the city of Tomsk, Siberia, Russia. She earned a doctorate in law and is a specialist in the field of legal regulation of real estate. She has many publications on problems of land and town planning law and is the co-author of the commentary to the Civil Code of Russia and the Land Code of Russia. She has published a textbook on land law.

PROPOSED ZONING REFORM BILL SUMMARIZED

CONTINUED FROM PAGE 8

may be subject to conditions and limited off-site mitigation is permitted), establishes that decisions must be made within 95 days and any public hearing (optional) is within the same 95 days, a simple majority vote is required for approval, SPR duration is at least two years, SPR is folded into any special permit review timeline, and SPR decisions may be appealed based on the board record, not new evidence.

No zoning freezes would be triggered by SPR application or approval.

INCLUSIONARY ZONING

Presently in Massachusetts there is a patch-quilt of municipal inclusionary housing requirements, which are inconsistently placed upon market-rate housing developments to increase diversity in local housing opportunities and add units to a community's subsidized housing inventory to help meet Chapter 40B. Yet these are widely used in other states, successfully and with support by developers.

A new section in the act would authorize and set parameters for zoning measures governing requirements to create affordable housing in development projects. Some off-site units, land dedications, or funds may be provided in lieu of on-site dwelling units, with dedicated accounts set up for this purpose. Any dwelling units created under this statute must be price-restricted for no less than 30 years. The upper limit of affordability is to households earning no more than 120 percent of the area median income (AMI). The municipality may require all or some of the units be eligible for inclusion on the community's subsidized housing inventory (affordable to household with income not exceeding 80 percent of AMI).

DISPUTE RESOLUTION

Although informal dispute resolution may occur now, in cities and towns that see a value in speeding approvals and reducing lawsuits, there is no set process in the Zoning Act, and no available confidentiality provisions to make negotiations attractive.

The bill offers an off-line avenue for applicants, municipal officials, and the public to work through the difficulties in a prospective development project using a neutral facilitator so that the formal approval process may later be successful for all. Confidentiality is provided.

VARIANCES

The Zoning Act as written about variance is remarkably restrictive for landowners and towns, tying the hands of building inspectors and zoning boards where variances are needed to relieve otherwise unfairly strict zoning. Some municipalities approve almost no variances, while others grant them liberally, but illegally. Most variances granted could be attacked in court successfully.

The bill establishes new procedures and criteria for variances while still maintaining a community's discretion to condition or deny a variance. There is explicit authority to deny variances sought because of "self-created" hardship. The effective life of a variance is extended from one to two years before it lapses if not used, and the permissible extension interval increases from six months to one year.

GROWTH ACT

Development patterns, according to the bill's sponsors, are not resulting in smart growth, a resilient economy, and enough new housing and jobs across the commonwealth, while protecting environmental resources and community character. The "town and country" landscape of Massachusetts is being lost to sprawling suburban development.

A new chapter would provide strong incentives for housing and job growth in appropriate locations, coupled with environmental and open space protections. In exchange for local adoption of zoning districts for new residential and commercial development, municipalities will get access to additional regulatory and fiscal resources and tools to realize their plans for sustainable development.

Oversight of "opt-in" eligibility, implementing regulations, and dispute resolution would be through the Secretary of the Executive Office of Housing and Economic Development. $2 million is budgeted for reimbursements to communities that prepare implementing regulations and regional planning agencies that review them.

MASTER PLANS

Required elements of a master plan in the present law are very general, master plans can be quite long and costly, and many are said to compile data of doubtful usefulness. Nine master plan elements are the same regardless of community size or characteristics. Plan adoption is solely by the planning board, without a public hearing.

The bill's supporters instead urge proactive planning, practical master plans, flexibility reflecting community nature, adoption by the community as a whole, and actual implementation. The bill rewrites the master plan provisions to invoke the state's sustainable development principles, including public health considerations; require five elements (goals and objectives, housing, natural resources and energy, land use and zoning, and implementation); allow seven other optional elements customized to local needs; discourage superfluous data collection unrelated to land use and the physical development; require assessment against similar information in a regional plan, if any; mandate a public hearing before plan adoption by the planning board; and specify the plan subsequently must be adopted by the local legislative body.

COURT APPEALS

Once a municipality has made a decision on a proposed project, opponents sometimes turn to the courts in the attempt to delay or stop the proposal even if there is no merit to the appeal. Resolving appeals is often an expensive and slow route, undermining the predictability and credibility of the local process in the eyes of local agencies, developers, and residents alike.

The bill streamlines the court appeal language for site plan review, special permits, and subdivisions; sets consistent deadlines; specifies the court will conduct a record-based review; and clarifies jurisdiction of the Land Court permit session to include residential, commercial, industrial and mixed-use projects. ♦

Greg McGregor is a member of the REBA board of directors and chair of REBA's environmental committee. He can be reached at gimcg@mcgregorlaw.com