Free Advice For Rookie Lawyers
PAGE 8

'Aggrieved' Residents Blocked By Court
PAGES 11

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REBA news
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Title Appraisal Vendor Management Association closes its doors

The Pittsburgh-based Title Appraisal Vendor Management Association (TAVMA) has announced that it is ceasing operations. TAVMA was a significant REBA adversary in the unauthorized practice of law (UPL) struggle for many years. TAVMA engaged lobbyists and filed legislation in the General Court to permit out-of-state corporations to practice law in Massachusetts.

"Through the perseverance of its members and leadership, through these difficult economic times, REBA has outlasted – if not vanquished – one of its principal legislative adversaries on the issue of the unauthorized practice of law," said Tom Moriarty, co-chair of the REBA Unauthorized Practice of Law Committee. "Determination, buoyed by the justness of our cause, has allowed the Association to prevail over powerful external forces bent on undermining if not eliminating the lawyer's role in real estate practice in the commonwealth. What a glorious day for REBA!"

"This welcome news is a fitting coda to the collapse of NREIS, our courtroom adversary in our UPL litigation," added REBA President Mike MacClary. ♦

COMMERCIAL INTERESTS

The bias against building for families

Why Mass. is lagging in the multifamily arena

BY SCOTT VAN VOORHIS

SCOTT VAN VOORHIS

Incredibly, you can add the humble three-bedroom apartment to the list of undesirable development towns and suburbs across Massachusetts want to ban.

Just 6 percent of all apartments built in the last decade under the Bay State's affordable housing law were three bedrooms. By contrast, roughly a quarter of the rental market across the Northeast is made up of rentals that are at least three-bedrooms or larger.

It's hardly due to lack of demand. A shortage of apartments of all sizes has made Massachusetts one of the most expensive places on the planet to rent in.

Rather, small town and suburban politicians are pressuring developers to ditch plans for three-bedroom units and instead stick with smaller, one- and two-bedroom units.

After all, they just might be appealing to families with children, which, based on the actions of local officials, appear to be just as unwelcome in many Bay State communities as toxic waste and methadone clinics.

"The bias against multifamily housing and school children from rental properties is enormously strong," said John Connery, a longtime Melrose-based housing consultant who works with communities and developers.

The pushback against three-bedrooms can be seen in communities across the state.

In fact, it has gotten so bad that the state is preparing to mandate that three-bedrooms make up at least 10 percent of all new apartments built under Chapter 40B, the state's long-standing affordable housing.

The most recent battles have taken place in the suburbs of Boston.

In Walpole, Bayberry Homes dropped

See BUILDING FOR FAMILIES, page 8

For more photos from REBA's Annual Meeting and Conference, see page 10.

Would you like a doggy bag, or should I have that digested and transmitted to your home?

BY CHARLES N. LE RAY

CHARLES LE RAY

The Massachusetts Department of Environmental Protection recently concluded public hearings on amendments to the commonwealth's solid waste management regulations, to prohibit the disposal of "commercial organic material" at landfills. In this instance, "organic" means carbon-based food materials, without regard to whether it was grown with pesticides or fertilizers, how it was pastured, etc. The regulatory changes will affect food manufacturers and wholesalers/distributors, hospitals, nursing homes, resort/conference centers, schools, colleges and universities, corporate cafeterias, supermarkets, and larger restaurants. The Patrick administration's July 10 press release that announced the planned ban makes clear that a primary goal of disposal ban is to provide feedstock for anaerobic digesters, a key element in the commonwealth's renewable energy program.

The disposal ban will apply to any entity that generates more than one ton per week of "food material and vegetative matter" for solid waste disposal. Single- and multi-family residences, group homes, and apartment complexes will be exempted, but centralized dining facilities (such as university dining halls) will be subject to the ban. Any food wastes that an entity is unable to donate or repurpose will have to be sent for anaerobic digestion, composting or use as animal feed.

Identification, Characterization, and Mapping of Food Waste and Food Waste Generators in Massachusetts, a 2002 report prepared for MassDEP, analyzed 5,799 food waste generators. The report provides formulas for estimating annual

waste volumes. Some of the formulas are complex, involving the number of beds, seats, or inmates, estimates of food waste per meal, and other factors. Others are simple: supermarkets and restaurants are estimated to generate 3,000 pounds per employee per year. By this estimate, a supermarket or restaurant with 35 or more employees will be subject to the ban. The

See DOGGY BAG, page 2

WOULD YOU LIKE A DOGGY BAG, OR SHOULD I HAVE THAT DIGESTED AND TRANSMITTED TO YOUR HOME?

CONTINUED FROM PAGE 1

average restaurant studied in the 2002 report generated 51 tons per year, barely below the threshold.

An anaerobic digester works by enclosing food waste or other organic material in a sealed chamber, along with microbes that digest the materials to produce biogas. The biogas then is burned to produce heat and electricity. In recent years, Massachusetts has seen increased interest in digesters at dairy farms, municipal landfills, and wastewater treatment plants. Some proposals, however, have received opposition from neighbors concerned about potential odors from the digesters or from the truckloads of waste that would be hauled to them each day.

In conjunction with the commercial food waste disposal ban, the Patrick administration has made available $3 million in low interest loans for private companies building anaerobic digesters. Another $1 million in grants will be available to public entities for anaerobic digesters. The first $100,000 was awarded to the MWRA for a pilot project to introduce food waste into one of the Deer Island wastewater treatment sludge digesters, to determine the effects of co-digestion on operations and biogas production.

The regulations are due to take effect on July 1, 2014. The average annual food waste volumes identified in the 2002 report make it unlikely that certain types of entities will be able to avoid being subject to the regulations. For example, the report lists food waste volumes for food manufacturers, colleges and universities, and correctional institutions of 656, 242, and 104 tons per year, respectively. Many of these entities already have implemented food waste reduction programs such as order management, improved storage practices, repurposing of unserved leftovers, portion control, and employee education. Other types of entities generate average annual volumes close to the one ton per week threshold. For example, the reported average food waste volumes for nursing homes, independent preparatory schools, and restaurants were 54, 50, and 51 tons per year, respectively. For these entities, more modest changes in food ordering and handling practices may be enough to avoid applicability of the new regulations. ♦

Charles Le Ray is a founding member and co-chair of REBA's land use and zoning committee. He is a shareholder in Dain, Torpy, Le Ray, Wiest & Garner, P.C., where his practice focuses on land use and environmental law and his firm's restaurant practice. Charles can be reached by email at cleray@daintorpey.com.

AMERICAN LAND TITLE ASSOCIATION

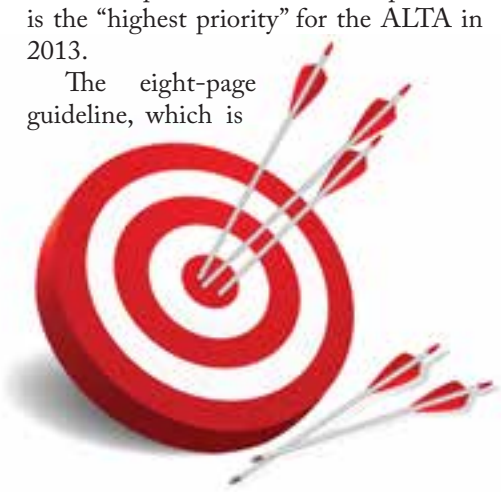
ALTA promulgates 'best practices' for real estate closings

BY JOEL A. STEIN

JOEL STEIN

Responding to the financial meltdown of 2008, attempts to make mortgage lenders more financially responsible for their third-party vendors resulted in Consumer Financial Protection Bureau (CFPB) Bulletin 2012-03, dated April 13, 2012, the American Land Title Association issued a "Best Practices Framework" in January 2013 and updated July 2013. The purpose of the "best practices" is to assist lenders in satisfying their responsibility to manage third-party vendors and "to guide its membership on best practices to protect consumers, promote quality service, provide for ongoing employee training, and meet legal and market requirements."

The implementation of these practices is the "highest priority" for the ALTA in 2013.



The eight-page guideline, which is available at www.alta.org, includes seven sections:

Establish and maintain current license(s) as required to conduct the business of title insurance and settlement services. Although Massachusetts does not require licensing of its title insurance agents, attorneys should be certain to keep their BBO registration and malpractice insurance to date.

Adopt and maintain appropriate written procedures and controls for Escrow Trust Accounts allowing for electronic verification of reconciliation. The purpose of this provision is to "help title and settlement companies meet client and legal requirements for the safeguarding of client funds." Procedures include requiring that escrow funds and operating accounts are separately maintained, escrow accounts are prepared with trial balances and on at least a monthly basis, Escrow Trust Accounts are prepared with trial balances (three-way reconciliation), listing all open escrow balances.

Adopt and maintain a written privacy and information security program to protect non-public personal information as required by local, state and federal law. Federal and state laws (including the Gramm-Leach-Bliley Act) require title companies to develop a written information security program that describes the procedures they employ to protect non-public personal information. Depending on the size of your office, and the sensitivity of the customer information, these procedures may vary. As in the case of the maintenance of escrow trust accounts, I suggest a complete review of the guide.

Adopt standard real estate settlement procedures and policies that help ensure compliance with federal and state consumer financial laws as applicable to the settlement process. This includes procedures to record in a timely fashion, to track shipment of documents for recording and to maintain written procedures to ensure that customers are charged the correct title insurance premium and other rates for services provided by the Company.

Adopt and maintain written procedures related to title policy productions, delivery, reporting and premium remittance. Procedures to be incorporated to meet this guideline include the timely delivery of title insurance policies and timely premium reporting and remittance.

Maintain appropriate professional liability insurance and fidelity coverage.

Adopt and maintain written procedures for resolving consumer complaints. The guideline suggests standard procedures for logging and resolving consumer complaints and the development of a standard consumer complaint form.

I would expect that these best practices will be adopted by each of the title insurance agents and will become a part of the agent audit. Hopefully, lenders will understand their importance, and will no longer be guided towards the need for vetting by independent third-party companies. ♦

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

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

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

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COMMENTARY

Some free advice for rookie lawyers

BY PAUL F. ALPHEN

PAUL ALPHEN

As this is being written, all four Boston sports teams are playing. We are closely watching the performance of the rookies on the various fields of play. When the Pats win, we are forgiving of the errors of the rookie wide receivers. When an error by Rays rookie Wil Myers saved the day for the Sox, the Sox fans (lovingly) rode him like a rented mule.

We all like rookies, including rookie counselors of law. REBA is forming a new committee for newly minted lawyers. The focus may be on creating networking opportunities for young lawyers, and an opportunity to share information and counsel, but we have not forgotten that all new lawyers are not necessarily young. Many new attorneys have attended our spring and fall conferences over the years, or have taken advantage of our mentoring program. Now, REBA is specifically reaching out to all new lawyers to assure them that REBA welcomes, and needs, new faces and new ideas. Encourage your young colleagues to get involved.

Young attorneys do not have it easy, especially if they do not have sufficient apprenticeship opportunities. With the decline in the economy, many new lawyers went into practice by themselves who otherwise would have worked for a firm. Hopefully the new REBA committee will provide some support to some of those who are running solo.

I got a lot of advice in my early years as a lawyer, most of which I forgot or ignored. But, here are some gems that I remembered and sometimes practiced:

1. All you have is your reputation. Guard it with your life.

2. You should be honored when a client puts his/her trust in you to help them with their most important life and business issues.

3. Frequently, the correct answer to a question is: "I will have to review the [agreement] [statute] [case law] [title standard] and get back to you." The law is a complicated and moving target. It's perfectly honorable to admit that you don't know the answer to every question off the top of your head.

4. When preparing instruments to be recorded in the Registry of Deeds, think about the title examiners that will review the documents 10 or 20 years from now. Make sure every document contains a reference to the source instrument, and if you are performing a land swap or modifying multiple documents, provide a roadmap for future examiners to follow.

5. A client who expects you help them bend a rule or law will likely not hesitate to make you a defendant if the wheels fall off the bus.

6. Keep in mind that our system of laws, and their subsystems like the Registries of Deeds, depend upon the integrity of the bar. We have a duty to respect and operate within the rules.

7. Numerous malpractice cases are brought by people who did not pay for the advice. This is especially true when a friend of a friend asks for advice on a Saturday afternoon. Similarly, follow the rule of my plumber, who, when I called him at his home one sunny Saturday afternoon regarding a plumbing emergency, said: "Paul, when I've started drinkin', I don't do no plumbin'."

Rays' rookie Wil Myers at an Aug. 26 game versus the Kansas City Royals.

8. Some people don't plan on paying for services rendered. There is a whole group of people out there who think that life is a giant game, and if they trick you into working for free, then it's your own fault for trusting them. It's like what Blutarsky said to Dorfman after the Delta House totaled Dorfman's brother's Lincoln.

9. There are other people who think that you are their business partner and if their grand schemes do not pan out and they fail to generate a glorious profit, then there is no reason to pay the lawyer (or the engineer).

10. Be respectful of your elders, not just because they have wisdom acquired by years of experience, but because each of them keeps a note pad in their top drawer upon which they jot the names of young insulting cads who crossed their paths. What goes around comes around. ♦

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.

Condominium within a condominium

In mixed-use developments, two-tier system should be employed more often

SAUL FELDMAN

BY SAUL J. FELDMAN

A resurgence of condominium activity in the current real estate market, together with issues regarding mixed-use condominiums, requires all of us to be knowledgeable about the structure of a mixed-use condominium.

For various reasons, the single tier has been used far more for mixed-use development in Massachusetts than in other parts of the United States, but two tiers – usually called "a condominium within a condominium" – should be used more often than it has been.

SINGLE V. TWO TIER

One of the first questions to be addressed in a mixed-use condominium is whether to have one condominium or more than one condominium. Most developers and their counsel in Boston believe that the two-tier approach should be used sparingly; however, there are often good reasons for its use.

For example, the two-tier approach is useful when the bottom half of the building is a hotel and the top half is residential condominiums. The hotel wants to be totally independent of the residential condominiums. In this scenario, there will be a two-unit primary condominium, consisting of the hotel unit and the residential unit. There will be a secondary condominium, consisting of all of the residential units. The hotel will want broad power. The primary condominium will be run by three directors. The hotel will want to select two of the three, with only one selected by the residences, but the residential director will have a veto over "major decisions." The concept of a condominium within a condominium works in this situation.

AN HISTORICAL OVERVIEW

The two-tier concept was not used more often in the past because of an ambiguity in the Massachusetts Condominium Statute, Chapter 183A. Section 1 of Chapter 183A defines a "condominium" as land and buildings submitted to the provisions of this chapter, which means that the condominium has to include land.

The issue, then, is what land the secondary condominium claims – and the answer is that a secondary condominium unit has an interest in the common areas and facilities of the primary condominium. Therefore, the

secondary condominium has an interest in the land. Because we have overcome this hurdle, we can and should start using the concept of a condominium within a condominium more frequently.

ZONING

Whether a one- or two-tier structure is used, zoning issues must be addressed.

The use clause in the condominium documents must be sensitive to the use provisions allowed in the zoning ordinance or zoning by-law. In many cases, permits from the local zoning board must be obtained before the development can go forward.

RESIDENTIAL VS. COMMERCIAL OWNERS

The major issue in mixed-use condominiums is the tension between residential owners and commercial owners in many matters: use, control, insurance, maintenance, and contribution to expenses, for example. The condominium documents must address this tension.

A two-tier structure that keeps the residential owners in a separate condominium, some of these tensions can be alleviated.

RESTAURANTS

A building often consists of the restaurant on the first and second floors of a building, and residential units in the remainder of the building. Using a two-tier approach is a good way of keeping the restaurant separate from the residential units. The two-unit primary condominium would consist of the restaurant unit and the residential unit. The secondary condominium would be the residential units within the residential unit. The restaurant would function separately. The idea would be to have the restaurant unit and the residence unit include as much of the building as possible, thereby decreasing the issues that the two units would fight about.

THE PARKING GARAGE

The best way to handle a parking garage is to make it a separate unit in the primary condominium. Parking spaces could be sold as easements to residents and other occupants of the building, and to others who have no connection with the building.

SEPARATE CONDOMINIUM BOARDS

The primary condominium will have a board responsible for the maintenance of the building common areas, general use restriction enforcement, exterior signage, and architectural and landscape control. The residential and commercial owners share certain facilities that they use and work together on common issues, but the residential owners can control their space and the commercial owners can control their space with relative autonomy from each other. Separate boards are created to govern their respective portions of the building. The two-tier approach separates the residential units from the commercial units more than a single-tier approach.

THE FUTURE

In the future, we will see urban mixed-use condominiums consisting of commercial uses on the first and second floors and luxury, mini-residential units in the remainder of the building. We will also see urban luxury residential use in the upper part of a building, with office use in the lower part of the building. These buildings will be built near public transit and may have no onsite parking. In any event, they will be condominiums, and they will be developed best under a two-tier structure. ♦

A member of REBA's condominium law and practice committee, Saul practices with his daughter at Feldman & Feldman, PC. He can be reached at mail@feldmanrelaw.com.

THE ALIMONY REFORM ACT

An overview of alimony under the new rules

BY LEO J. CUSHING AND JOBLIN C. YOUNGER

LEO CUSHING

JOBLIN YOUNGER

The two basic premises of alimony has been the need of the recipient and ability of the payor to pay. The new act creates four new categories of alimony, as follows:

General term alimony is defined as the periodic payment of support to a recipient spouse who is economically dependent. General term alimony terminates upon the remarriage of the recipient or the death of either spouse; provided, however, that the court may require the payor spouse to provide life insurance or another form of reasonable security for payment of sums due to the recipient in the event of the payor's death during the alimony term.

Rehabilitative alimony is defined as the periodic payment of support to a recipient spouse who is expected to become economically self-sufficient by a predicted time, such as reemployment, completion of job training, or receipt of a sum due from the payor spouse under a judgment.

Reimbursement alimony is defined as a periodic or one-time payment of support to a recipient spouse after a marriage of not more than five years to compensate the recipient spouse for contributions to the financial resources of the payor spouse, such as enabling the payor spouse to complete an education or obtain job training.

Transitional alimony is defined as a periodic or one-time payment of support to a recipient spouse after a marriage of not more than five years to transition the recipient spouse to adjust in lifestyle or location as a result of the divorce.

General term alimony shall be suspended, reduced, or terminated upon the cohabitation of the recipient spouse when the payor shows that the recipient spouse has maintained a common household as defined in this subsection with another person for a continuous period of at least three months. Cohabitation does not necessarily mean with a lover; it could mean a friend or family member. Some judges interpret this section to apply only if cohabitation began after the enactment of the statute, even though the statute says "alimony shall be suspended …" without regard to when the cohabitation began. Alimony suspension resulting from cohabitation may be reinstated but not beyond the termination date of the original order.

Once issued, term alimony orders shall terminate upon the payor obtaining the full retirement age. The payor's normal retirement age to be eligible to receive full benefits under the United States Old Age Survivors and Disability Insurance Program, but shall not mean early retirement age as defined in 42 U.S.C. 416. The payor's ability to work beyond full retirement age shall not be reason to extend alimony. The court may set a different alimony termination date for good cause; provided, however, that in granting deviation, the court shall enter written findings for the reasons for deviation.

Except upon written findings by the court that deviation beyond the time limits of the governing section are required in the interests of justice, if the length of the marriage is 20 years or less, general term alimony shall terminate no later than a date certain under the certain durational limits:

(1) If the length of the marriage is five years or less, general term alimony may not exceed one-half the number of months of the marriage.

(2) If the length of the marriage is 10 years or less, but more than five years, general term alimony may not exceed 60 percent of the number of months of the marriage.

(3) If the length of the marriage is 15 years or less, but more than 10 years, general term alimony may not

See ALIMONY REFORM, page 7

Condominium restrictions on the right of an owner to rent

BY GEORGE J. WARSHAW

GEORGE WARSHAW

More and more condominiums are placing significant restrictions on the ability of a unit owner to rent his or her condo. I surveyed a number of condominium recordings to assess the range of restrictions often used.

Since many of these restrictions are newly imposed by amendment, a brief recap of the law may be helpful.

Because rules and regulations may be changed by a simple vote of the board of trustees, directors or managers rather than unit owners, many condominium associations favor a rules change to enact restrictions on an owner's use of a unit. This has proven a vulnerable approach.

Rules and regulations govern solely the use of common areas and changes are the province of the board of managers, directors and trustees. By-laws and master deeds govern both the use of common areas *and* units and thus amendments affecting use of a unit are reserved to the unit owners.

In *Johnson v. Keith*, 368 Mass. 316, 319 (1975), "[B]y statute administrative rules and regulations may govern the details of the use and operation of common areas and facilities. G. L. c. 183A, § 11 (d). … [The condo rule in question] undertakes to regulate conduct in individual units without statutory authorization," and *Granby Heights Ass'n v. Dean*, 38 Mass. App. Ct. 266, 268 (1995); under G. L. c. 183A, § 11 (e) an association may "unreasonably interfere with the enjoyment by the various unit owners of their units, but only if the restriction is contained in the by-laws or master deed."

In response to these cases, some drafters have tried to give the board authority over unit matters in several ways, most commonly by designating the board as attorney-in-fact for all unit owners; whether this approach usurps the rights of unit owners remains to be determined.

Restrictions on rentals and tenancies fall into three areas: the right to rent, leasing requirements and problem tenancies.

RESTRICTING THE RIGHT TO RENT

The reason to restrict rentals in a condominium are apparent: many tenants are less concerned and respectful of the right of others to the quiet use and enjoyment of their homes; while investors are often more indifferent to meeting their financial obligations, supporting needed repairs or improvements or taking action against tenant misconduct.

Drafters have taken three different approaches to limiting the number of rentals in condominiums: some ban rentals altogether while others limit the number and/or duration of rentals or require prior owner-occupancy.

Nothing in Massachusetts law prohibits a condominium from banning rentals. Some associations limit the actual number of units that can be rented at any one time. Others prefer to delineate a percentage of permissible rentals, such as no more than 25 percent of the units may be rented at any one time. A few permit rentals only after the unit has been owner-occupied for a minimum period of time.

Associations that have banned rentals altogether often permit limited carveouts at the discretion of the board for good cause such as when owner becomes unemployed, suffers injury or illness or is transferred by an employer to another state.

LEASING REQUIREMENTS

Where rentals are permitted, many documents impose registration requirements, approval requirements and/or leasehold requirements.

Many associations require that the landlord register the names of each tenant and occupant with the board prior to occupancy or lease signing. Some go further and require approval of the tenant and/or approval of the form of the lease as a condition precedent of the rental.

Master documents commonly require the tenant acknowledge receipt of the rules/regs, by-laws and master condo documents. Some also require specific condominium provisions be included in the lease. The most sensible approach, in my view, is to require an association specific condominium addendum be attached to each lease.

TROUBLED TENANCIES

What may an association do when a tenant disturbs the quiet enjoyment of others or violates the master condominium documents?

Fines and penalties assessed against a unit owner often do not stop tenant

See CONDOMINIUM RESTRICTIONS, page 10

Two recent cases on appurtenant easements may create traps for unwary

BY RICHARD M. SERKEY

RICH SERKEY

As we know, REBA Title Standard No. 1 provides as follows: "It is sufficient if the title examination covers a period of 50 years and the starting point is a warranty, quitclaim, or duly authorized or empowered fiduciary's deed which on its face does not suggest any defects.

In the case of registered land, it is sufficient to start the examination with the present owner's certificate of title, except for running certificate holders for bankruptcies and Federal and Massachusetts tax liens."

The first comment to Title Standard No. 1 is as follows: "If there is a reference in the starting deed to a mortgage, an easement, an agreement, a restriction or another encumbrance which might still be in existence and applicable, a further examination should be made to ascertain the extent and the applicability of such burden and, in the case of a mortgage, whether or not such mortgage has been foreclosed."

Suppose, however, that there is a reference in the starting deed (or, in the case of registered land, in the certificate of title) to an *appurtenant* easement? In that case, the title to the servient estate should be examined to establish that the easement was validly created, and, if so, to establish that the easement has not been subsequently extinguished. In the case of registered land, if the certificate of title contains an appurtenant easement over recorded land, then an examination of the recorded land should be undertaken from the date of the decree of registration of the registered land to determine if the easement may have been extinguished by merger. (See: *Williams Bros. of Marshfield, Inc. v. Peck*, 81 Mass. App. Ct. 682 (2012))

This can present a trap for the unwary. If the current deed (or certificate of title) of Blackacre sets forth an appurtenant easement over Whiteacre, then if the deed or certificate description is copied verbatim to create Schedule A in a title insurance policy, the title policy insures that Blackacre does indeed have the benefit of this appurtenant easement. Unless the title to the servient estate has been examined, however, the conveyancer will not know whether the appurtenant easement was in fact validly created or, even if so, whether it was subsequently extinguished by merger, release, or otherwise.

In this situation, the professional responsibility of the conveyancer can often run counter to the economic realities of the transaction, especially in residential transfers and refinances, where fees are tightly limited by lenders. An additional examination of the servient estate often delays a closing and always results in an unexpected cost that the lender's good faith estimate of closing costs will not have included, and which the lender and the buyer/borrower will therefore often

See APPURTENANT EASEMENT, page 9

Weiss v. Wells Fargo

Use caution when acknowledging power of attorney documents

BY ERICA P. BIGELOW AND MICHAEL J. GOLDBERG

By now, most real estate practitioners have heard about the recent decision of the United States Bankruptcy Appellate Panel for the First Circuit (BAP), issued in *Steven Weiss, Chapter 7 Trustee, v. Wells Fargo Bank, N.A.* In this appeal from a Bankruptcy Court ruling, the Chapter 7 Trustee successfully avoided a mortgage on the basis that it was not properly acknowledged.

Reactions to the decision have been varied. Some take it to mean that the acknowledgement forms in Executive Order No. 455 (04-04), setting forth Standards of Conduct for Notaries Public (the executive order), are no longer valid. Others worry that acknowledgements involving powers of attorney cannot be comfortably taken. In reality, although the BAP's decision reads the statutory acknowledgement requirements restrictively, devising a "fix" to its implications is relatively straightforward, and will not significantly change real estate practice in the commonwealth.

ERICA BIGELOW

First, the facts of the case: the debtors refinanced their mortgage with Wachovia Mortgage (now Wells Fargo Bank). They did not execute the mortgage themselves; instead, they executed a limited power of attorney designating Shannon Obringer as their attorney in fact, and Obringer executed the mortgage on their behalf.

The required acknowledgement, affixed to the mortgage immediately following and on the same page as the signature of Obringer, provided, in pertinent part: " … personally appeared Shawn G. Kelley and Annemarie Kelley by Shannon Obringer as attorney in fact proved to me through satisfactory evidence of identification which was/were [left blank] to be person(s) whose name(s) is/are signed on the preceding document, and acknowledged to me that he/she/they signed it voluntarily for its stated purpose."

MIKE GOLDBERG

What did the BAP find was wrong with the acknowledgement? The trustee first argued that, by stating that "Shawn G. Kelley and Annemarie Kelley by Shannon Obringer" appeared before the notary, it was unclear who actually appeared before the notary. The court dismissed this argument, stating that the use of the word "by" made it clear that Obringer personally appeared.

The BAP also rejected the trustee's second argument, that the failure to state the means of identification rendered the acknowledgement ineffective. In this regard, the court found that this requirement was contained only in the executive order, not in Chapter 183, Section 2, and therefore could not be a basis for invalidating a mortgage.

But the trustee's third argument prevailed. The trustee argued that the statute requires the acknowledgement to verify that the signature is being provided vol-

See *WEISS V. WELLS FARGO*, page 9

LAWYERS CONCERNED FOR LAWYERS

Intervening with the 'abrasive' attorney

Q: As managing partner of a fairly large law firm, I have on more than one occasion had to arrange to intervene with a firm employee (or partner) whose drinking was getting out of hand and affecting performance, client impressions or both. In some cases (including with LCL's input), the upshot has been referral to a rehab followed by gradual reintegration into the life of the firm.

The source of my current concern, however, is a partner-track lawyer who, as far as I can tell, has no drug or alcohol problem, and does not seem to be suffering from depression or anxiety, but who has nevertheless managed to alienate both clients and peers through an interpersonal style that can be quite abrasive and can come across as disrespectful. I'm not sure that he has any idea how others react to him (or, if he does, that he cares about it). Yet he is extremely sharp in his legal work, and has created very profitable outcomes that were greatly appreciated by clients, so we certainly would hate to lose his skills. Is there any kind of intervention that might be applicable in a situation of this sort?

A: You're right that in some ways clearly identifiable problems like addictions are easier (though far from easy) to address. Rehab is a kind of treatment that can be required as a kind of package, and monitoring progress is simpler when measured by means of urine tests, "sick" days, slurred speech, etc. Even depression and anxiety tend to be manifested in some observable ways, not to mention that individual sufferers may report on their level of distress.

The picture becomes murkier when addressing longstanding characteristics that might be regarded as "personality disorders" or, in some cases, "wired-in" impairments in connection and attunement to others (such as Asperger's Syndrome or so-called Nonverbal Learning Disorder). Either of these types of issues (and some people have a bit of both) can include significant limitations in the ability to empathize with others or to be sensitive to one's interpersonal impact. Such gaps in social functioning are not correlated (either positively or negatively) with intelligence or competence, so some of the same people who make poor impressions on others may do excellent work.

To the extent that one can intervene in such cases, an initial step might be to get a detailed clinical evaluation. While a clinical interview by a skilled diagnostician is invaluable, other kinds of useful information (that may not be accessible via interview) can be gleaned from various kinds of psychological testing (normally performed by doctoral-level psychologists who have specialized in assessment). The results of evaluation may suggest (a) certain types of treatment, (b) executive or workplace-oriented coaching and/or (c) reconfiguring the lawyer's job description in such a way as to maximize benefits from his areas of strength while reducing social interaction in his professional role.

Our suggestions would be different in the case of a more *acute* behavioral picture, as opposed to the longstanding traits that you seem to be describing. For that reason, although we've given you an overview of some possibilities, it's always a good idea to confer with an LCL clinician or other trusted behavioral health resource (in some detail, and in person, if feasible) before launching into a course of action. LCL's services are both confidential and free to Massachusetts lawyers. ♦

Questions quoted are either actual letters/emails or paraphrased and disguised concerns expressed by individuals seeking assistance from Lawyers Concerned for Lawyers. Questions for LCL may be mailed to LCL, 31 Milk St., Suite 810, Boston, MA 02109; emailed to email@lclma.org or called in to (617) 482- 9600. LCL's licensed clinicians will respond in confidence. Visit LCL online at www.lclma.org.

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AN OVERVIEW OF ALIMONY UNDER THE NEW RULES

CONTINUED FROM PAGE 4

exceed 70 percent of the number of months of the marriage.

(4) If the length of the marriage is 20 years or less, but more than 15 years, general term alimony may not exceed 80 percent of the number of months of the marriage.

The court may order alimony for an indefinite length of time for marriages longer than 20 years, but generally not past age 66. G.L. c.208, §49(c). In order to have a durational time limit running, there must be a judicial order.

When issuing an order for alimony, the court shall exclude from its income calculation capital gains income and dividend and interest income, which derive from assets equitably divided between the parties under Section 34; and gross income, which the court has already considered for setting a child support order.

In determining the appropriate form of alimony and in setting the amount and duration of support, a court shall consider the following factors: the length of the marriage; age of the parties; health of the parties; income, employment, and employability of both parties, including employability through reasonable diligence and additional training if necessary; economic and noneconomic contributions of both parties to the marriage; marital lifestyle; ability of each party to maintain their marital lifestyle; lost economic opportunities as a result of the marriage; and such other factors as the court considers relevant and material.

Except for reimbursement alimony or circumstances warranting deviation for other forms of alimony, the amount of alimony should generally not exceed the recipient's need, or 30 percent to 35 percent of the difference between the parties gross incomes established at the time of the order being issued. In any event, the term "income" is defined as in the Massachusetts Child Support Guidelines.

In the event of payor's remarriage, income and assets of the payor's spouse shall not be considered in a redetermination of alimony and a modification action, and income from a second job or overtime work shall be presumed immaterial to alimony modification if (a) a party works more than a single full-time equivalent position; and (b) the second job or overtime began after the entry of the initial order.

The durational limits and basis for establishing alimony entered into before March 1, 2012, may terminate only under such judgments, modifications or as otherwise provided in the act.

The act's enactment is deemed a material change of circumstances that warrants modification. All existing alimony awards are deemed general term alimony. Therefore, existing alimony awards exceeding durational limits of general term alimony may be modified upon filing a complaint for modification. As far as taxation is concerned, the general rule is that alimony is taxable to the recipient and deductible to the payor. Child support, however, is neither.

All in all, the legal community has embraced the act. In a recent article published by *The Boston Globe*, then chief judge of the Probate Court Paula Carey acknowledged that there have been some growing pains, but overall implantation of the alimony statute was a welcome change for judges and citizens. ♦

Leo Cushing co-chairs REBA's estate planning, trusts and estate administration committee. He is the founder of Cushing & Dolan, PC and a frequent speaker on estate planning, asset protection, elder law, trust planning, charitable giving and resolution of tax controversies. Leo can be reached by email at lcushing@cushing-dolan.com. Joblin Younger manages the trusts and estate administration practice at Cushing & Dolan and focuses his practice on trusts and estates administration, taxation, special needs trusts, guardianships/conservatorships and complex tax planning. Joblin's email address is jyounder@cusingdolan.com.

Editor's Note: REBA's Estate Planning, Trusts and Estate Administration Committee is open to all REBA members. The committee is led by Leo Cushing and Sara Goldman Curley. To join contact Andrea Morales at morales@reba.net.

THE BIAS AGAINST BUILDING FOR FAMILIES

CONTINUED FROM PAGE 1

plans to include three-bedroom apartments in its proposed, 174-unit housing complex after getting some very strong hints from town officials.

By contrast, in Norton, the chairman of the local board of selectmen backed off on a push to ban three-bedrooms from a proposed new apartment complex after hearing about the pending move by the state.

Local officials talk a good talk about trying to protect constituents from rising school costs.

One local nabob was incredulous after it became clear I wasn't ready to jump on the anti-rental housing bandwagon with him.

"Of course," he replied, as if to a slow learner, when asked if his opposition to three-bedrooms was related to concerns that families with children might be moving in.

"It just makes commonsense if you have more bedrooms, you are going to have more children," he said.

A LOT OF HOT AIR

But that argument is getting weaker by the year, with studies by UMass-Boston and Tufts having exposed these arguments as so much hot air.

UMass-Boston's Donahue report found that school costs in communities across the state rose and fell independent of enrollment trends, going up at times even in cases where student enrollment dropped.

What's really happening is just small-town politics and demagoguery at its worst, driven by fear of change and outright ugly attitudes about renters and, worse still, their children.

Clearly, in the minds of some small-town pols, every new apartment complex is a potential urban-style housing project filled with Section 8 tenants, even if families are having to fork over $1,500 or more a month in rent.

But laughable or not, such attitudes are helping distort our state's already highly distorted housing market, helping drive up rents for everyone, including families with children.

There is already a dire shortage of apartments across the state, let alone without town and local officials trying to stop anything larger than two-bedroom from getting built.

New apartment and condo construction is struggling to emerge out of a decades-long slump. While 5,191 units were given approval by towns and cities across the state in 2012, it was just half of the 10,000 multi-family units Gov. Deval Patrick has declared are needed to keep up with current and future demand.

Not surprisingly, Massachusetts is the seventh most expensive state in the country for renters, with the average two-bedroom costing $1,271 a month, the National Low Income Housing Coalition finds.

Once you strip away the BS and get to what's really going on here, there's lots of room for outrage here.

In fact, this is an issue that should unite both liberal affordable housing activists and conservatives who put their faith in the free market, a category developers are more likely to fall into.

First, there is a moral issue, with local officials effectively discriminating against families with children. No, it's not exactly like a landlord who says, "Thanks, but no thanks, but I just don't want kids in my building" – and there are still plenty of those jerks out there.

But it's damn close. You have local officials basically stopping construction of apartments for the sole reason that families with children would be more likely to rent them out. If the units aren't there because of boneheaded local housing policies, it's all not that much different than some mother and her young children being turned away by some bigoted landlord.

However, free market advocates should also be lobbying hard to open up our state's incredibly overregulated housing market as well.

A good part of our state's chronic woes could be solved not by creating some new government initiative or program, but by simply demolishing the irrational maze of local zoning rules and regulations and letting the market do its thing.

There's a huge market demand for housing of all types here in the Bay State, including three bedrooms.

But developers are effectively being prevented from serving this market and rightly profiting from the honorable work of building places for people to live,

Any way you look at it, trying to stop apartments from being built to keep children out is about is as low as you can go. And that we tolerate this nonsense, especially in this age of supposed hypersensitivity to discrimination of any kind, is just flat-out amazing.

This article originally appeared in the Nov. 4 issue of Banker & Tradesman ♦

Scott Van Voorhis can be reached at sbvanvoorhis@hotmail.com.

WEISS V. WELLS FARGO

CONTINUED FROM PAGE 6

untarily. Where a power of attorney is involved, the acknowledgement must make clear that the act was voluntary on the part of both the signer – the attorney – and the principal – the grantor. The BAP found that: "the preprinted form utilized by the notary combined with her failure to attend to the blank space and the inapplicable verbiage creates ambiguity whether the execution of the mortgage was the voluntary act of the debtors. … [W]e are left to speculate whether the voluntariness relates to the principals (the debtors) or to the attorney-in-fact (Obringer)."

AVOIDING FUTURE PROBLEMS

For the BAP, the form's several failings combined to create a defective acknowledgement. Referring to the signer as "Shawn G. Kelley and Annemarie Kelley by Shannon Obringer" created uncertainty regarding whom the phrase "signed it voluntarily for its stated purpose" referenced. That failure was compounded by the failure to complete the blank portion of the acknowledgement, the somewhat inartful use of the form's language, and the failure to designate one of "he/she/they" as having signed the document. So, what should we make of the decision, and how can practitioners avoid future problems?

First, acknowledgements should not be taken lightly. As noted by the BAP, Massachusetts law is clear that a defective acknowledgement fails to give record notice of a deed or mortgage to third parties. Defective acknowledgements – failure to identify the signatory (leaving the space blank) or reference to a person other than the grantor – have already been found to render a mortgage unenforceable against a bankruptcy trustee.

Second, the issue in the *Weiss* case relates solely to acknowledgements of signatures by powers of attorney. The confusion found by the BAP – whose free act and deed was being acknowledged – would not exist in the absence of a power of attorney arrangement.

Third, the common use of the acknowledgement (and other) forms in the executive order can continue without concern. In its decision, the BAP cited *McOuatt v. McOuatt*, 320 Mass. 410 (1946), as the seminal Massachusetts case concerning the validity of acknowledgements. The decision was cited for the principle that '[n]o particular words are necessary so long as they amount to an admission that [the grantor] has voluntarily and freely executed the instrument." Although the court also stated that failure to use of the statutory form (with the phrase "free act and deed") requires an *inquiry* into the sufficiency of the form used, it was careful not to reject use of the executive order acknowledgement.

Fourth, where a power of attorney is involved, care should be taken to adapt the acknowledgement to fit the facts of the execution, and *to identify the person whose signature is being acknowledged*. The acknowledgement form contained in the executive order is perfectly fine. It reads:

On this ____ day of _____, 20__, before me, the undersigned notary public, personally appeared _____ (name of document signer), proved to me through satisfactory evidence of identification, which were _____, to be the person whose name is signed on the preceding or attached document, and acknowledged to me that (he) (she) signed it voluntarily for its stated purpose.

(as partner for _____, a partnership)
(as _____ for _____, a corporation)
(as attorney in fact for _____, the principal)
(as _____ for _____, (a) (the) _____)

The applicable parenthetical phrase should be added after "for its stated purpose," in all cases where the person appearing is acting on behalf of another – whether as an officer of an entity (corporation, general or limited partnership, etc.)e – or as attorney in fact. Thus, when Sarah Jones executes under a power of attorney for James Jefferson, the principal, the acknowledgement clause should read:

On this 28th day of October, 2013, before me, the undersigned notary public, personally appeared Sarah Jones, proved to me through satisfactory evidence of identification, which **was a MA driver's license**, to be the person whose name is signed on the preceding or attached document, and acknowledged to me that signed it voluntarily for its stated purpose, **as attorney in fact for James Jefferson, the principal.** [changes to standard form in bold]

While it seems unlikely that an acknowledgement in the form above would be invalidated because of the failure to cross out extraneous words, e.g. "he/she/they," the better practice is to remove all ambiguity by crossing out the inapplicable words.

It should also be acceptable to use the following after the words "signed it": it **as her free act and deed, and the free act and deed of James Jefferson, her principal**. This parallels other states' forms, where the voluntariness of the act of both the signer and the entity is stated.

In sum: Panic over the *Weiss* decision is unnecessary. Simply taking care with acknowledgements, particularly when the signer is acting in a representative capacity, will permit practitioners to continue using the executive order forms. ♦

Erica Bigelow and Mike Goldberg were architects of REBA's signature 2011 reform of the Massachusetts Homestead Law. Counsel at Rich May PC, Erica has written and lectures on zoning, affordable housing (Chapter 40B) and smart growth. She can be contacted at ebigelow@richmaylaw.com. Mike is a partner at Casner & Edwards LLP, where he specializes in the areas of business bankruptcy, financial restructuring and business transactions. Mike's email address is goldberg@casneredwards.com.

TWO RECENT CASES ON APPURTENANT EASEMENTS MAY CREATE TRAPS FOR UNWARY

CONTINUED FROM PAGE 6

balk at paying.

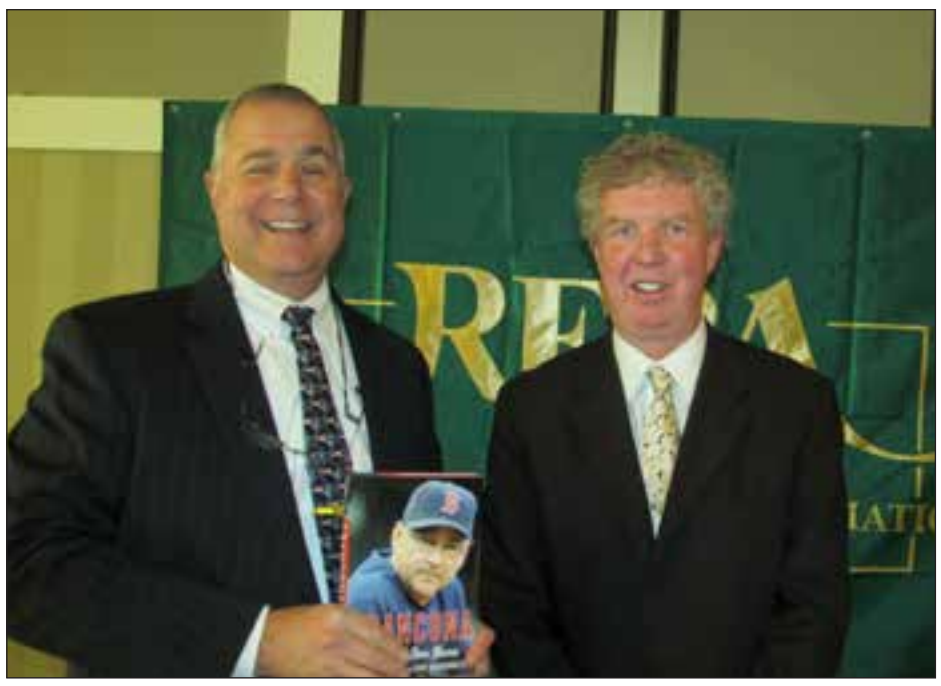
The careful conveyancer will alert the lender and/or the borrower, as the case may be, of the need for an additional examination of the servient estate, so that the each can decide whether or not to waive this additional examination, in which case the conveyancer should note in the title insurance policy and (if required) his title certification that the title to the servient estate has not been examined and that therefore the current validity of the appurtenant easement is not insured or certified to.

The decision whether or not to waive this additional examination often will turn on the nature of the appurtenant easement and its importance to the owner's use and enjoyment of the dominant estate. At one end of the spectrum is an appurtenant easement for access: If Blackacre is landlocked, and then obviously the title to the servient estate must be examined, since the absence of access is a risk covered on the jacket of every title insurance policy and is an obvious bar to any use and enjoyment of Blackacre. Suppose, however, that the appurtenant easement is for secondary access, or is for a view shed, or for beach rights, or (as in *Williams Bros. of Marshfield, Inc. v. Peck*) for sand rights? The possibilities are numerous, and in each case the conveyancer must be certain that the party/parties to whom he has a duty has/have been fully informed of the scope and cost of the additional work required, so that each can then decide whether to authorize it or to waive it, so that the conveyancer can then either undertake it or insert limiting language in the title insurance policy/certification, as the case may be. (See also: *Nichols v. Cole*, 10-P-1268 (Appeals Court Rule 1:28 Decision). ♦

A partner in the Plymouth law firm of Winokur, Serkey & Rosenberg, PC, Rich Serkey co-chairs REBA's title standards committee. Serkey was counsel to one of the parties in the *Williams Bros. of Marshfield* case and also counsel to one of the parties in the 2011 *Nichols* case. Rich can be contacted by email at rserkey@wwsr.com.

REBA's Annual Meeting and Conference

At REBA's Annual Meeting and Conference on Nov. 4, long-time board member and former association president Jon S. Davis was the first recipient of the newly established REBA Excellence in Professionalism Award. Joel Stein presented the award. The award recognizes the honoree's integrity, passion and dedication to the highest standards in the practice of law. The award's recipients recognize 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.



Boston Globe sportswriter and author Dan Shaughnessy delivered the luncheon keynote address at REBA's Annual Meeting and Conference. Paul Alphen, chair of the association's long-term planning committee, introduced Shaughnessy.

CONDOMINIUM RESTRICTIONS ON THE RIGHT OF AN OWNER TO RENT

CONTINUED FROM PAGE 5

misbehavior or suspected drug or illegal activity. A number of documents provide the association with a right of action to evict the tenant in summary process.

Some master documents grant the association the right to bring summary process directly against the tenants while others permit the association to bring an action in the name of the landlord-unit owner or as attorney-in-fact for the unit owner.

There are significant legal and practical problems with any of these approaches. As a rule, actions must be brought by the real party in interest; i.e. the landlord/unit owner. An agent, including an attorney-in-fact, is not the real party in interest particularly where there is a disclosed agency, such as an attorney-in-fact relationship. It is questionable that adding a "power coupled with an interest" refrain transcends the general rule.

Furthermore, the landlord is usually a necessary party to the action and must be joined, if he, she or it can be found or served. How does the association effectively contest summary process defenses that targets the landlord-owner's breaches or failures where the association has no information, knowledge of the facts, or documents in its possession? How does an attorney-in-fact respond to discovery demands where the owner is not available or cooperative?

What if the association doesn't succeed in its action? Has it prejudiced the unit owner from bringing a more successful action? Is the association liable to the unit owner if it fails summary process? Does it then forego all its prior fines and attorneys' fee assessments? There are endless questions with no simple answer.

In my view, a direct civil action in the name of the association seeking an injunction may well be faster, with less risks and impediments, and achieve the goal of eviction in the end. ♦

George Warshaw is a member of REBA's condominium committee. He may be reached at george.warshaw@warshawlaw.com.

'Aggrieved' residents gain legal advantage

Citizen groups' standing differs in Massachusetts courts

BY CHRISTOPHER R. VACCARO

CHRIS VACCARO

Are you a "person aggrieved"? If so, Massachusetts courthouse doors swing wide open so you can challenge government permits issued to real estate developers. But if not, you have little, if any, right to contest such permits in court.

Developers must seek and obtain approvals from an array of state and local agencies, before putting a shovel in the ground. For controversial projects, hastily organized citizen groups pack hearing rooms to voice opposition. Even a minor change to an unpopular project can attract the ire of dozens of citizen groups. Such groups can slow the permitting process, forcing developers to expend time and money. Administrative agencies often welcome citizen group participation at hearings. However, the commonwealth's courts are becoming less accommodating to such groups, unless the groups' members are actually "aggrieved" by an agency's decision.

The Massachusetts Appeals Court's unpublished September decision in *Coalition to Preserve the Belmont Uplands and Winn Brook Neighborhood v. Department of Environmental Protection*, exemplifies this trend. The developer in that case proposed a 299-unit affordable housing project in Belmont. The local conservation commission denied a wetlands permit for the project, but the Department of Environmental Protection (DEP) approved the project on appeal. The local commission challenged the DEP's decision, forcing the DEP to hold an adjudicatory hearing. The hearing officer allowed a coalition of 12 Belmont residents and two conservation groups to intervene in the hearing and contest the wetlands permit. Nevertheless, DEP's commissioner upheld the approval. Undeterred, the coalition filed a complaint in Superior Court, but the court affirmed the DEP's decision. The coalition appealed.

The developer asked the Appeals Court to dismiss the coalition's appeal, arguing that the coalition lacked "standing" to challenge the development in court. This argument has become a powerful defense for developers facing opposition from private parties. Massachusetts law generally requires that persons show that they are "aggrieved" in order to appeal a license or permit in court. If they cannot show aggrieved status, they lack standing to maintain their appeal, and the courts will dismiss the appeal, regardless of its merits. Thus, the opening battle in permitting lawsuits often requires complainants to prove their aggrieved status. To satisfy this burden, complainants must show a substantial likelihood of economic loss or nuisance, causing measurable harm to them. General dislike for the project does not, by itself, suffice.

Belmont Uplands

In *Coalition to Preserve Belmont*, the Appeals Court acknowledged that Massachusetts law generally allows citizen groups to intervene in administrative hearings without difficulty. However, this does not automatically confer aggrieved status on the group when it appeals an adverse decision in court. A developer can ask the court to dismiss the appeal, by claiming that the citizen group is not truly aggrieved. After reviewing the administrative record in *Coalition to Preserve Belmont*, the Appeals Court found no evidence that the coalition was actually aggrieved, and ordered that the coalition's complaint be dismissed.

One can draw two lessons here. First, citizen groups do not have automatic access to Massachusetts courts when seeking to block developments. Developers should vigorously contest their opponents' standing in such cases. Second, unless citizen groups carefully assemble a record during the administrative process, showing how the development will harm their members, the courts will reject their appeals.

To hinder a development in Massachusetts courts, it is better to be aggrieved than not. ♦

This article originally appeared in the Oct. 28 issue of Banker & Tradesman.

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CONSTRUCTION LAW EXPERTISE

Nancy Holtz joins REBA dispute resolution

JUDGE HOLTZ

Hon. Nancy Staffier Holtz (ret.) has joined REBA's alternative dispute resolution affiliate. "We are delighted that Nancy has joined our panel of neutrals," said REBA Executive Director Peter Wittenborg. " We know she will bring her considerable expertise in construction law and general business disputes to our existing clients while expanding area of expertise."

With more than 15 years of experience on the Superior Court bench, Holts presided over many civil cases including significant multimillion dollar business litigation, construction litigation and a broad range of civil matters.

Prior to serving on the Superior Court, Gov. William F. Weld appointed her as associate commissioner of the alcoholic beverages control commission, and then as general counsel and secretary of the office of consumer affairs and business regulation. She is a member of the American Bar Association's construction forum and its section of alternative dispute resolution.

She received her undergraduate degree from Boston University, summa cum laude, Phi Beta Kappa and her law degree from Suffolk University School of Law, cum laude.

To schedule a mediation or arbitration with Holtz, contact Andrea Morales at morales@reba.net. ♦

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