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REBA news
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A message from the Unauthorized Practice of Law Committee

In 2011, REBA won a watershed victory in our more than 20-year battle to eliminate the unauthorized practice of law in real estate transactions: the Supreme Judicial Court's decision in *REBA vs. NREIS*. We began this battle back in 1991, on behalf of our lawyer members and Massachusetts home buyers.

While NREIS is out of business today, our battle to eliminate the unauthorized practice of law (UPL) goes on. We know that the scourge of witness-only closings continues here in the commonwealth. Ignoring the *NREIS* decision, out-of-state, non-lawyer settlement service providers, enabled by national title insurance underwriters, continue to conduct real estate transactions.

That's why we need your help. We must pay off substantial outstanding legal fees from the NREIS case, while taking strong stands – with further legal action, if possible – against witness-only closings.

Massachusetts Attorneys Title Group, better known as MassATG, has been a primary resource in this struggle, contributing more than $250,000 to our UPL initiative, funds that go directly to legal fees. By joining MassATG as an affiliate agent, you ac-

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SJC rules §35a is not part of mortgage foreclosure process

BY BENJAMIN O. ADEYINKA

BEN ADEYINKA

On March 12, 2014, the Massachusetts Supreme Judicial Court (SJC) rendered a landmark decision in *U.S. Bank National Association, Trustee v. John Schumacher & another*, resolving the question of whether a mortgagee's failure to strictly comply with the right-to-cure statute, G.L. c. 244 §35A (§35A), renders a foreclosure sale void. The SJC determined that the statutory right to cure required under §35A is "not part of the mortgage foreclosure process," and therefore failure to strictly comply with §35A does not, in and of itself, render a foreclosure sale void in a summary process action.

Justice Ralph Gants explained in the concurrence that a defendant would have to prove more than a mere violation of §35A to defeat a summary process action. The defendant would have to prove "that the violation of §35A rendered the foreclosure so fundamentally unfair that she is entitled to affirmative equitable relief [of] setting aside of the foreclosure sale."

PROCEDURAL HISTORY

In October 2009, U.S. Bank N.A., trustee, became the owner of the subject property by foreclosure sale. On April 12, 2010, U.S. Bank filed a summary process

See *SCHUMACHER*, page 4

Author/historian Steve Puleo discussed his book *The Caning* at REBA's recent Spring Conference. The book describes one of the seminal events of the Civil War, an 1856 act of violence in the U.S. Senate that turned moderates into hard-liners and made war almost inevitable. Pictured: Steve Puleo with REBA President Michelle Simons.

We are from the government, and we are here to help

BY PAUL F. ALPHEN

PAUL ALPHEN

Volunteers from REBA's Residential Conveyancing Committee (RCC) have been traveling around the commonwealth, meeting with regional bar associations and groups of local attorneys. For years they have spread the gospel according to REBA and provided fair warning of some of the future requirements of the Consumer Financial Protection Bureau (CFPB). When the RCC came to my area, they urged those in attendance to submit comments on the proposed CFPB regulations to the Federal Register. They didn't have to ask me twice, and when I visited the CFPB website, I found instructions that encouraged me to describe the many things that go wrong at closings and list the types of additional information and documentation that borrowers should be provided at the closing table. The instructions seemed to assume that closings were performed by non-attorneys (as is the case in many states) and the instructions assumed that consumers were often misled or uninformed. Here is some of what I wrote:

Consumers have relied upon the closing attorneys in Massachusetts to coordinate the brokers, buyers, sellers and the lenders, and to obtain plot plans, certificates of no municipal liens, pay off and discharge the prior mortgages and provide a certification of title. Additionally they have come to expect that the closing attorneys will safeguard the funds in the transaction and otherwise police the entire transaction to protect the integrity of the process (and minimize surprises). In Massachusetts, consumers have come to expect the added comfort of knowing that a licensed attorney will handle the funds and complete the transaction. The closing attorney is available at the closing table to answer questions and help minimize disputes between the parties.

Consumers, however, find the mountain of paperwork required by a closing to be overwhelming. Each transaction requires an inch-high pile of paper; some required by the lender, some by federal requirements and some by state requirements. Consumers are confused by much of the extraneous paperwork presented at the closing. There are now so many disclo-

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SJC upholds MESA regulations for delineating and regulating priority habitat

BY LUKE H. LEGERE

LUKE LEGERE

In an important victory for the state's vulnerable wildlife species, the Massachusetts Supreme Judicial Court (SJC) recently upheld the Massachusetts Endangered Species Act (MESA) regulations in all respects. The case, known as Pepin v. Division of Fisheries and Wildlife, challenged the procedural and substantive jurisdiction implemented by the state Division of Fisheries and Wildlife (DFW) under MESA.

The SJC, considering MESA for the first time, endorsed the DFW's priority habitat regulations as being consistent with MESA and within the authority granted to the DFW by the Legislature.

For those unfamiliar with MESA, the statute was enacted in 1990 to protect rare plant and animal species (categorized as endangered, threatened or of special concern) and their habitats. The statute proscribes a number of activities in order to prevent human interference with protected species, including the broadly defined term "take" (essentially, harming a species or disturbing its habitat).

MESA authorizes the DFW to delineate "significant habitats" for endangered and threatened species, in which development is essentially prohibited, and incorporates protections for affected property owners. These rights include 30-day notice, a public hearing, a habitat map recorded at the Registry of Deeds, the right to petition the DFW for habitat purchase, and the right to appeal a decision to court to determine whether a compensable taking has occurred.

DFW's regulations also establish a "priority habitat" designation, which applies to all listed species. The statute, however, does not provide for priority habitat designations. Projects in priority habitats are reviewed by the DFW on a case-by-case basis, and the property owner must establish that the project will not result in a take. If the landowner cannot prove that no take will occur, DFW may find a "conditional no take" (meaning that there will be no take so long as the project complies with conditions), or issue a conservation and management permit, so long as "there is a long-term net benefit to the conservation of the impacted species."

In the Pepin case, plaintiffs William and Marlene Pepin own property in Hampden County, which the DFW designated a priority habitat for Eastern box turtles. The Pepins requested reconsideration, but the agency confirmed the designation.

The Pepins then appealed to an adjudicatory hearing, and lost. The Superior Court affirmed the DFW's final decision verifying the priority habitat delineation on the Pepins' property, and concluded that the priority habitat regulations do not exceed the DFW's statutory authority and are consistent with MESA. The Pepins appealed once more, and the SJC took the case on its own initiative.

The Pepins argued that DFW's priority habitat regulations are facially invalid because they limit development of private property, but fail to offer the types of protections afforded by MESA to property owners affected by significant habitat designations. Therefore, the Pepins reasoned, DFW's priority habitat regulations are inconsistent with MESA and exceed the authority granted to DFW under the statute.

The SJC's detailed analysis of MESA's legislative history, and the resulting statutory and regulatory scheme, is a must-read for anyone hoping to understand the framework for protecting rare species in the commonwealth.

In rejecting the Pepins' claim, the SJC ruled that the priority habitat regulations prohibit takes of listed species and "preempt

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UPLC

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cess the underwriting expertise and the A-prime rated strength of its affiliate underwriter, WFG National Title Insurance Company, while contributing to REBA's UPL mission with every policy you issue. Without a continuing non-dues source of funds from MassATG, we cannot finish the job of stamping out witness-only closings.

To learn more about MassATG, go to www.massatg.com or contact Tom Bussone at tbussone@massatg.com.

Since the *NREIS* decision, we have embarked on several paths to eliminate witness-only closings to protect the consumer and to assure our members that a Massachusetts lawyer will always sit at the head of the closing table. These include a favorable article from the BBO and several legislative initiatives. But without more members of MassATG, we may not be in a position to hold the ground we have secured to date and we fear that any further offensive will be beyond our ability to sustain. ♦

Robert J. Moriarty Jr.
UPL Committee Co-chair

Thomas O. Moriarty
UPL Committee Co-chair

Bob Moriarty and Tom Moriarty, who are not related, co-chair REBA's committee on the unauthorized practice of law. Both are former presidents of the Association. Bob Moriarty commenced the association's legal action against National Real Estate Information Services (NREIS) in 2006. He can be reached by email at rmoriarty@mmoglaw.com. Tom Moriarty, who also co-chairs the association's residential conveyancing committee, can be emailed at tmoriarty@meeb.com.

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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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ALPHEN: WE'RE HERE TO HELP

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sure forms that they have become ineffective and create confusion rather than education.

There should be a way to consolidate the numerous disclosure forms or eliminate them. The absurdity of the unnecessary forms derogates the importance of the important forms.

Consumers want to know that that the terms of the promissory note match their loan commitment. They want to know their monthly payment, if taxes and insurance are included in the payment, when the first payment is due and where they should send the money. They want assurance that they are getting good title to the home and that the seller has safely vacated the house. They want to know when they can move in. By the time the closing rolls around they have already negotiated and lived with the purchase and sale agreement for months, they have been through the mortgage application process, seen the good faith estimate (which creates more confusion with the recalculation of the interest rate, than education), and they know the loan terms.

Most real estate attorneys in Massachusetts go through each of the 100 documents with the buyer. We go though the settlement sheet line by line until everyone in the room is happy with the figures. We go through the promissory note, paraphrasing in simple English, each paragraph of the promissory note. We paraphrase the entire mortgage, and we summarize each document before asking the borrowers to sign and provide them with an opportunity to ask questions. It would be nice if the lenders had a sample package of their forms available online for people to review in advance of the transaction, but I bet few would take advantage of the opportunity. Buyers and sellers should be urged to retain their own counsel so that their own counsel can explain the documents to them and answer questions; but not every buyer or seller wants to spend the extra $500 or so to have counsel at the closing, which is baffling considering the hundreds of thousands of dollars involved in the transaction.

Consumers also do not want to spend hours at the closing table. A purchase and sale transaction usually takes about an hour, and people get noticeably fidgety if the closing lasts longer. The parties are usually dealing with moving vans waiting in driveways, babysitters or work obligations. Many borrowers sell their home in the morning and close on their new home the same day. Their principal goal is to have a roof over their heads and a place to sleep for the night.

Hopefully the CFPB will take into consideration my comments, and the comments from thousands of other attorneys, when forming future regulations. ♦

Paul Alphen has been practicing law primarily in areas related to real estate development within a small firm in his hometown of Westford, Mass., for 29 years, after having enjoyed a decade of public service in state and local government. He is actively involved in the improvement of the profession including serving as a member of the board of directors of the Real Estate Bar Association for Massachusetts since 2001 and as its president in 2008, and as chairman of the Annual MCLE Real Estate Law Conference since 2009. More importantly, his youngest son is on schedule to join the profession this year. Paul can be reached at paul@lawbas.com.

REBA Remembers

Margaret Cronin

Margaret M. "Peggy" Cronin, a longtime conveyancer, passed away March 26 after a long battle with cancer. The following are some words of remembrance written by her sister, Mary Ellen Cronin, with whom she practiced.

Peggy graduated from Suffolk Law school and passed the bar in 1974. From an early age, she wanted to follow in her mother's footsteps and become a lawyer. She spent summers and semesters while at Northeastern University in the Registries of Deeds doing titles with her mother, and forged many friendships there. She, like her mother (Margaret D. Cronin, former chief title examiner of the Land Court), excelled in a field which at the time was predominantly male. She loved the practice of law and had great success for close to 40 wonderful years. She was a consummate professional and an exemplary real estate conveyancer. She was respected by her colleagues and valued by her clients. Everyone she came in contact with is richer for having known her.

Above all, family was the most important thing to Peggy. She was a devoted daughter, sister and aunt. When Peggy could take time to escape the practice of law, she escaped to her home on Nantucket. Her love of the island began during a trip there to work at the Registry of Deeds more than 30 years ago. She loved spending as much time there as possible, gardening, exploring the island walking trails, and relaxing at the beach with family and friends. Some of her happiest times were spent on island.

Everyone who knew Peggy loved her. She touched so many in countless ways, too numerous to mention. Through her nearly decade-long battle with cancer, her strength, bravery and faith were unparalleled. The real estate bar lost one of their best when they lost Peggy Cronin. She will be greatly missed. ♦

THE OUTCOME OF THE *SCHUMACHER* DECISION

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complaint against former owners, John and Edna Schumacher in Worcester Housing Court. Schumacher filed an answer and counterclaims denying that U.S. Bank owned the subject property. The answer filed "made no mention of any problems concerning the [35A notice]."

The summary process action proceeded to bench trial and Schumacher raised §35A arguments for the first time. Schumacher alleged that the §35A notice was invalid because it misidentified U.S. Bank as the mortgagee, while MERS was mortgagee of record at the time the letter was sent. Schumacher argued that failing to name MERS in the §35A notice voided the foreclosure. The Housing Court granted judgment to U.S. Bank, and Schumacher appealed to the Massachusetts Appeals Court. The SJC took up the matter.

LEGISLATIVE INTENT OF §35A

As discussed by the SJC, §35A was created by 2007 Mass Acts c. 206 § 11, effective May 1, 2008. The law was designed to provide borrowers at least 90 days notice before a residential mortgage is foreclosed, and a list of resources, including the name and number of the party who can assist the borrower with information on how to cure default "…before the foreclosure process is commenced." The clear intent of the statute was to prevent foreclosures, prior to acceleration of the debt and exercise of the statutory power of sale. In 2010, §35A was to provided a 150-day right to cure and additional protections to help a mortgagor in default.

§35A CASE LAW

The consumer and legal services bar consistently raised the theory that because §35A is within G.L.c. 244, it was a foreclosure statute, and *U.S. Bank Nat. Ass'n v. Ibañez* requires strict compliance with foreclosure statutes. (Although §35A was not included as part of the exercise of the power of sale in *Ibañez*.) The first case noted where a borrower successfully challenged a foreclosure by alleging a §35A defect was *Bravo-Buenrostro v. OneWest Bank*, where the §35A notice identified IndyMac as mortgagee, although MERS was the recorded holder of the mortgage at the time. The Superior Court held that the alleged defect in the §35A voided the foreclosure: "one of the terms of the power of sale that must be strictly adhered to is articulated in §35A." Citing *Ibañez*, the *Bravo-Buenrostro* court "conclude[d] that §35A's 'mortgagee, or anyone holding thereunder' language refers exclusively to the current holder of the mortgage" and must be included in the notice of right to cure.

Following *Bravo-Buenrostro*, judges across the commonwealth chose sides regarding §35A: strict compliance versus substantial compliance. This split raised doubt in title examiners and real estate practitioners, because a copy of the notice of right to cure is not part of the record title. In the summary process courts, Land Court, Superior Court, Appellate Court and Federal District Court, decisions can be found on both sides of this issue.

Given the uncertainty of how a court would rule on a post-sale challenge to §35A, title insurers refused to insure any post-foreclosure property that the borrower continued to occupy. The issue could not be resolved until the SJC ruled on whether §35A is part of the foreclosure process itself and, if so, whether a mortgagee's failure to strictly comply with its provisions renders a foreclosure sale void.

REBA'S INVOLVEMENT

On Aug. 2, 2013, the SJC solicited amicus briefs for the *Schumacher* case. Given the effect of the controversy on title insurability, the Real Estate Bar Association's amicus committee voiced its concerns in a brief submitted to the SJC. The brief stressed that the §35A must be complied with prior to the exercise of the power of sale, not as part of it. It also discussed the risk to the perceived trustworthiness of record title if the SJC found that the §35A required strict compliance, noting that §35A notice is not recorded at the registry of deeds, so interested parties cannot determine compliance with § 35A by way of a title examination.

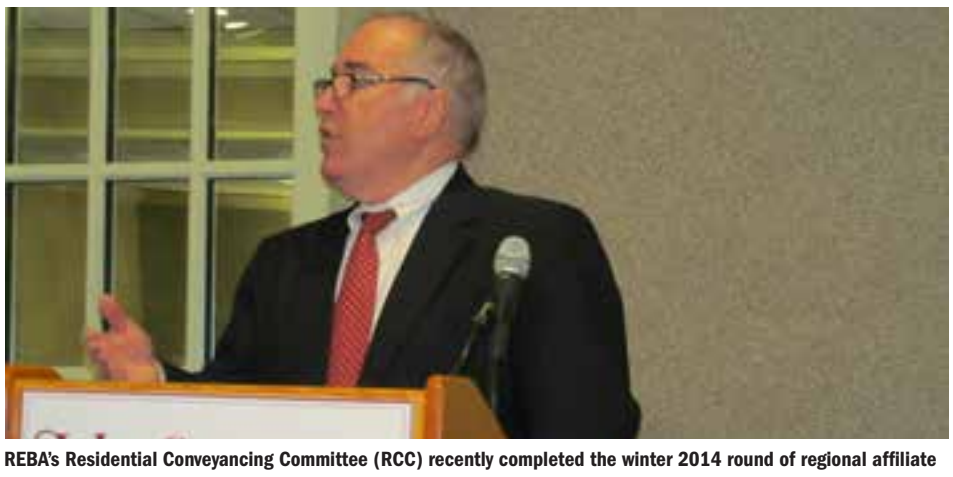
APPLICATION OF *SCHUMACHER*

Post-*Schumacher*, courts have applied the "fundamentally unfair" standard in analyzing borrowers post-sale §35A challenges. On March 31, 2014, the Boston Housing Court ruled that a defendant's §35A challenge did not render the foreclosure, so "fundamentally unfair" that it would void a foreclosure sale that took place in July 2012. The United States District Court also applied the *Schumacher* analysis in *Coelho v. Asset Acquisition*, stating that "[i]n order to succeed on a Section 35A claim the plaintiffs "must prove that the violation of §35A rendered the foreclosure so fundamentally unfair that [they are] entitled to affirmative equitable relief, specifically the setting aside of the foreclosure sale. Having acknowledged the absence of actual prejudice from any of the claimed defects in the notice, the plaintiffs have not made the necessary showing."

REBA members and real estate practitioners across the commonwealth should be pleased that the SJC's decision in *Schumacher* balances the fairness of providing proper notice to borrowers of their rights prior to foreclosure with certainty of title after a sale is complete and recorded at the registry of deeds. This decision is a positive step forward in the recovery of the housing market and the preservation of the recording system in Massachusetts, by providing for the insurability of titles post-foreclosure. ♦

Ben Adeyinka practices with the Waltham office of Orlans Moran PLLC. Before attending law school, he worked with the Federal Home Loan Bank of New York providing first-time homebuyer grants to low-to-moderate income individuals. His practices focuses on litigation, bankruptcy and landlord/tenant law. Ben can be contacted by email at badeyinka@orlansmoral.com.

REBA's Residential Conveyancing Committee's Winter Regional Affiliate Meetings



REBA's Residential Conveyancing Committee (RCC) recently completed the winter 2014 round of regional affiliate meetings. Massachusetts Attorneys Title Group (MassATG) founder Tom Bussone updates Plymouth County lawyers on recent developments with the association's efforts to eliminate the unauthorized practice of law.

REBA President Michelle Simons welcomes residential conveyancing attorneys in the northern Middlesex County area to the residential conveyancing committee's regional affiliate meeting in Chelmsford.

WFG National Title Insurance Company's senior underwriting counsel Ward Graham briefs REBA members on pending legislation at the RCC regional affiliate meeting in Chelmsford.

GET READY!

Lenders will be asking about your data security policies: Will you have the right answers?

BY RICK DIAMOND

RICK DIAMOND

If it's true that your ears burn when someone is talking about – or watching you – then the ears of title insurance agents should be on fire right now, because mortgage lenders will be focusing intently on the policies and procedures you have in place to protect the consumer data you collect.

That scrutiny comes from provisions in the Dodd-Frank financial reform legislation authorizing the Consumer Financial Protection Bureau (CFPB) to enforce most consumer protection requirements applicable to financial institutions, including those related to the confidentiality and security of consumer information.

Although the CFPB does not regulate title insurance companies, the agency has "recommended" that the financial institutions it does regulate ensure that their service providers comply with federal consumer privacy and data security requirements – specifically those outlined in the Gramm-Leach-Bliley Act and in the privacy and safeguards rules implementing it.

In a recent compliance bulletin, the agency outlined several specific steps financial institutions should take, among them:

- Conduct due diligence to ensure that the service provider understands and will comply with the relevant laws.
- Request and review the service provider's policies and procedures to ensure that the service provider's employees are properly trained and supervised.
- Incorporate contractual provisions detailing the compliance responsibilities of service providers and the consequences of noncompliance.
- Monitor their compliance with the laws and "act promptly" to correct any deficiencies.

In the regulatory world, there is little distinction between "recommendations" and "requirements." So CFPB-regulated entities, including non-banks and depository institutions, will ask their service providers about the policies and procedures to protect the non-public information (NPI) collected from consumers. Mortgage lenders and mortgage brokers will insist that their title insurance agents comply and document their compliance with the CFPB's data security regulations.

COMPLIANCE BEST PRACTICES

The CFPB has not yet drafted its data protection regulations, but it is not difficult to anticipate in a general sense what they will include. I have identified 20 key areas that data protection policies should address. These are, for the most part, commonsense best practices that all title agents should adopt, even absent statutes, regulations or pressure from clients.

1. Create and implement a written privacy and information security program to protect NPI data. The program should be monitored closely and updated continually as processes, procedures and rules evolve.
2. Know where sensitive customer information is stored and store it securely. Make sure only authorized employees have access.
3. Establish procedures to protect paper files. Dispose of documents containing NPI safely and appropriately by shredding them. Make sure "to-be-shredded" documents are secure. Many companies leave these documents in unsecured boxes – a common compliance failure. If you use a shredding service, make sure that company has appropriate data security policies in place and documents the chain-of-custody to establish accountability.
4. Establish strict guidelines to protect documents sent outside the office for off-premises closings or any other purpose. Make sure the couriers you use to transport documents have written data security procedures.
5. Make sure all entry points to your office and to work areas are secured, with access controlled by personal codes or keys. You must know who is walking through your office at all times.
6. Establish a "clean desk policy" requiring employees to put closing files out of sight when they are away from their desks.
7. Make sure all files are locked every night and stored in a secure location, protected against destruction or damage from physical hazards, such as fire or floods. A scanning solution (with levels of security limiting access) can be a great alternative to file storage, permitting ready access to files, reducing storage space and storage costs, and creating the ability to comply with likely CFPB requirements "lock-down" electronic files.
8. Maintain up-to-date firewalls and use anti-virus and anti-spyware software that updates automatically.
9. Store archived hard copy data off-line in a physically secure area.
10. Encrypt email and attachments when storing or transmitting sensitive data electronically. These are probably the areas in which companies are the most vulnerable to data breaches.
11. Restrict access to personal email accounts from work computers.
12. Conduct background checks on employees who have or might have access to NPI data. You must know who is working for you and trust absolutely their access to consumer information.
13. Establish an employee training program to explain the data security and privacy requirements. All employees must understand your policies and procedures for protecting NPI and their responsibility for following those procedures.
14. Inspect what you expect. Establish audit procedures to ensure that all employees (not just new ones) are complying with and implementing your documented data security procedures. Impose clear and meaningful penalties for violations.
15. Develop special policies for employees who telecommute specifying (among other things) whether they are allowed to transport NPI to their homes and if so, the security procedures they must follow.
16. Immediately deactivate the passwords and usernames of terminated employees and take other necessary measures to block their access to customer information.
17. Develop clear, written guidelines and controls ensuring the appropriate use of company technology. Among other measures:
    - Limit access to authorized employees and make sure all devices are password-protected and locked down outside work hours. Passwords should be strong and changed every 90 days.
    - Locate servers in properly ventilated areas and locked at all times with access limited to authorized personnel.
    - Use appropriate, secure means to destroy or erase data when disposing of hard drives, laptops, desktops disks, CDs, magnetic tapes, PDAs, cell phones, or any other electronic media or hardware containing customer information. Don't forget about copiers, which also contain hard drives. Obtain a letter of compliance documenting that you have followed recommended security procedures for disposing of NPI material.
    - Make sure all mobile devices are password-protected, in case of loss or theft, and can be wiped clean remotely. (Existing software allows you to do this.)
    - Strictly control the use of removable storage devices, such as flash drives or CDs. These devises should be used only by authorized personnel and solely for business purposes.
18. Make sure your service providers are taking steps to protect and secure NPI data. Insist on written documentation of their data security policies and procedures. Include provisions in their contracts requiring them to maintain data security safeguards. You should impose on your service providers the same compliance requirements that your clients will be imposing on you.
19. Establish and document disaster management and business continuity plans. Many lenders are insisting that their service providers do the same kind of disaster planning that the CFPB is requiring of them.
20. Establish procedures for responding to a data breach. Take immediate steps to assess the cause and extent of the breach, notify the consumers whose personal information has been or may have been compromised and mitigate the security gap so it will not occur again.

You can view compliance in one of two ways: As an unwelcome and annoying burden, draining resources and distracting you from "more important" business goals; or as an integral component of your business, essential for avoiding regulatory sanctions and liability risks and, equally important, a way to better serve your clients and to distinguish you from your competitors. We think the second option is best. ♦

Rick Diamond is senior vice president for information, technology and agency operations at WFG National Title Insurance Company. If you have questions about this article or about compliance generally, you can reach Rick at rdiamond@wfgnationaltitle.com or 617-721-9703.

SJC UPHOLDS MESA REGULATIONS

CONTINUED FROM PAGE 2

otherwise irreparable harm to habitats," thus achieving the two central purposes of MESA. Without the priority habitat regulations, DFW "would be dependent on bringing suit only after harm had already occurred in order to enforce the take prohibition."

Furthermore, the priority habitat regulations allow the DFW to avoid "rely[ing] exclusively on the significant habitat provision of MESA, whose flat bar against development could prove unduly restrictive in some circumstances, as a way to protect habitat."

Applying the principle that "statutory authority to act in one particular respect does not bar consistent action under general statutory authority," the SJC found that MESA's explicit protection of endangered and threatened species through the designation and regulation of significant habitats does not preclude the DFW from protecting all listed species by delineation and regulation of priority habitats.

The SJC distinguished the impact to properties designated significant habitats from those designated priority habitats, and concluded that the severe statutory limitations on issuance of a permit to alter significant habitats warranted the protections afforded by MESA. The same protections need not be extended to owners of property designated priority habitats, like the Pepins, because the priority habitat regulations "neither constitute a comparable bar against development, nor require comparable procedural mechanisms."

Specifically, the priority habitat regulations "are designed to facilitate property development, albeit in an environmentally sensitive manner." The review process for projects proposed in priority habitat "can result either in a determination that development will not result in a take, in which case it may proceed unhindered; a determination that a project has the potential to result in a take, in which case mitigating conditions will be imposed on development; or a determination that a project will result in a take, in which case a more rigorous permitting process will be required before development can proceed."

The court's decision illustrates the substantial deference given to state agencies by courts reviewing the validity of their regulations, as well as the heavy burden on a party challenging an agency's regulations.

Practitioners should warn clients that for projects proposing work in priority habitats, conservation commissions may not issue an order of conditions until the DFW has confirmed exemption from MESA, announced either a "no take" or "conditional no take" determination, or issued a conservation and management permit. ♦

Luke Legere is a member of REBA's environmental committee and practices with McGregor & Associates, P.C. in Boston. Luke can be contacted at llegere@mcgregorlaw.com.

Title insurance issues for post-foreclosure residential real estate

BY JOEL A. STEIN

JOEL STEIN

Issues surrounding the insurability of titles coming out of foreclosure have been a hot topic for the REBA's National Affairs and Title Insurance Committee. Starting with the allegations of robo-signing and continuing through the amendments to M.G.L. c.244, underwriters for each of the title insurance companies doing business in Massachusetts have considered the issues and prepared guidelines to be followed to insure a title following foreclosure.

The *Eaton* decision, decided by the Supreme Judicial Court in 2012, required foreclosing lender to be either (1) the holder of the note; or (2) be acting on behalf of the holder of the note.

The title insurance industry is presently divided on at least two issues arising from the *Eaton* decision.

SECTIONS 35B AND 35C

The first area concerns whether an additional affidavit, referred to as an "affidavit of continuing noteholder status" must be dated and recorded on or after the date of the foreclosure sale. This affidavit must state that the foreclosing lender held the note or was acting on behalf of the note holder as of the date notices of sale were initially sent pursuant to M.G.L. c.244, §14, through and including the date of the foreclosure auction.

Generally, at least one title insurance underwriter requires a copy of the note with the allonge, if applicable, be attached and recorded with the affidavit. All underwriters require that a copy of the note with the allonge be obtained and reviewed for compliance with *Eaton*.

M.G.L. c.244, §35A requires the sending of a right to cure notice prior to the commencement of foreclosure proceedings for certain principal residential properties. The Land Court has issued a form entitled "mortgagee's affidavit," which is filed with the Land Court prior to the commencement of the foreclosure action. This form is not recorded with the registry of deeds or filed with the registry district. The Supreme Judicial Court, in the recent decision of *U.S. Bank National Association v. Schumacher*, held that Section 35A is not part of the mortgage foreclosure process. (For more about the *Schumacher* decision, see the article on the cover of this issue of *REBA News*.)

M.G.L. c. 244 was further amended by the enactment of Sections 35B and 35C, which took effect in November of 2012.

M.G.L. c.244, §35C codified the ruling of the Supreme Judicial Court in the *Eaton*-case, requiring the creditor to certify that it is the holder of the note or the authorized agent for the holder of the note. The creditor has to record an affidavit of compliance with this section based upon the review of its business records. While this affidavit must be dated prior to the first publication, it can be recorded at any time.

M.G.L. c.244, §35B sets forth criteria by which a creditor must offer the mortgagor a means to avoid foreclosure with respect to "certain mortgage loans."

An affidavit of compliance pursuant to Sections 35B and 35C must:

- Be provided by the "creditor" as defined therein (usually the foreclosing mortgagee) or its duly authorized agent.
- Certify compliance with the applicable sections.
- Be based upon a review of the creditor's business records.
- Be **dated and acknowledged prior** to the publication of the first foreclosure notice and recorded; however, it may be **recorded after** the foreclosure sale, with the other foreclosure documents.

If M.G.L. c.244, §§35B and 35C are not applicable, an affidavit of non-applica-

See TITLE INSURANCE ISSUES, page 11

The revised MCP – gardening at urban residences

BY SAMUEL W. BUTCHER

SAM BUTCHER

The Massachusetts Department of Environmental Protection (MassDEP) recently revised the regulations that dictate how contaminated properties are assessed, how the risk associated with the contamination is evaluated, and how contamination is remediated. The changes to the Massachusetts Contingency Plan (310 CMR 40.0000, or MCP), have significant implications for those who buy and sell contaminated or potentially contaminated properties. One group that will be afforded additional protection and who will benefit from the changes are those managing low concentrations of contamination at residential properties, especially those who may be considering gardens at these properties.

THE PROBLEM – URBAN FILL

Most of Massachusetts cities and urban areas were initially developed centuries ago. During development the land was re-graded by importing and removing fill material to raise or level properties for development. With the cost of transporting and excavating clean gravel from surrounding towns at a premium those needing fill often turned to alternative sources for structurally sound material that could be used beneath and surrounding foundations and to level yard spaces. MassDEP recognized long ago that this historic fill material, or "anthropogenic fill" as it is called in the revised regulations, contained construction and demolition debris, dredge spoils, coal ash and wood ash as well as other non-hazardous solid waste material. These materials contain elevated concentrations of metals and semi-volatile organic compounds. Although these metals and compounds may be present at concentrations that represented a health risk in some situations like gardening the ubiquitous presence of this fill in urban environments makes remediation of this fill unrealistic and impractical.

URBAN FILL UNDER THE OLD MCP

The "old" MCP recognized the infeasibility of attempting to address contaminated sites where contaminants were associated with urban fill. Under the regulations, one did not have to report "releases of oil and/or hazardous material related to coal, coal ash or wood ash, excluding wood ash resulting from the combustion of lumber or wood products that have been treated with chemical preservatives." Coal and coal ash are sources of polycyclic aromatic compounds and are frequently detected in urban fill. Further, contaminants associated with asphalt binder and, in some cases, the lead in lead-based paint, did not require reporting, regardless of the concentrations of these potential contaminants.

This reporting exemption, while well intended, presented a dilemma for those working at properties where residential or community gardens might be planned. While the presence of metals and other compounds in soil was not reportable and therefore not subject to assessment or remediation under the regulations, these potential contaminants were often present at concentrations that could represent a risk to public health, especially for high-intensity exposure, such as gardening.

URBAN FILL UNDER THE REVISED MCP

The "new" MCP provides clarification and new definitions for, among other things, "historical fill." By including such definitions, MassDEP is assuring that potential contaminants associated with this fill are wrapped into the evaluation of site conditions.

But by including historical fill in the definition of "anthropogenic background," MassDEP is also assuring that those completing response actions under the MCP will not be incurring significant costs to excavate fill material, which may have been present for many decades and which may be ubiquitous in the area.

The inclusion of a new definition may seem like a fine point, but it leads to another change in the MCP, which is the change from the old response action outcome (RAO) nomenclature to a new "permanent solution" nomenclature and, with specific reference to the challenges of urban/historical fill, permanent solutions with conditions. When the regulations are promulgated, responsible parties will be able to close out sites where contaminants associated with historical fill are present as a permanent solution with conditions, but in a manner that does not require an activity and use limitation (AUL).

This provision will allow the closure of such sites with no need for an AUL, so long as there is a recommendation for best management practices in the event that non-commercial gardening in a residential setting. In sum, the site closure will not require a deed restriction, but anyone considering gardening will be appropriately notified of the need to think before growing a lot of vegetables.

DILEMMA SOLVED?

Under the old MCP, those completing response actions were put in the awkward position of being able to close disposal sites in accordance with the regulations while recognizing that in some cases and under some use scenarios, such as gardening in a residential setting an unacceptable risk may exist. The revised regulations will require consideration of the potential risk imposed by metals and compounds associated with urban/historical fill, and will contain provisions for notification to future users of the property of such condition, while at the same time allowing for the timely closure of sites where urban fill and its associated contaminants are present. ♦

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A web of intrigue

To chat or not to chat! That is the conundrum

BY JAMES S. BOLAN AND SARA N. HOLDEN

JIM BOLAN

SARA HOLDEN

The Internet, with blogs, social media sites, Twitter and email, has become the 21st century communications conduit of choice. But, even in cyberspace, real world lawyer rules apply. Rules 7.1 through 7.5 of the Massachusetts Rules of Professional Conduct address advertising and solicitation rules for lawyers. While those rules may not directly or entirely address the modes of communication that are now commonplace, let alone those that are evolving, they are applicable however written and interpreted.

Rule 7.1 prohibits a lawyer from making any "false or misleading communication." But what is a misleading communication? Lawyers are permitted to "puff" in negotiations. ("This undeveloped parcel is a gem.") But can we do so in an ad? ("We closed more deals than anyone last year!") Is each representation true? What would be your proof if called upon to demonstrate its "truthiness" to Bar Counsel? Carefully review, line-by-line, all online advertising, including emails, posts or tweets to ensure that each and every representation being made is accurate and not in any way misleading. Better yet, have someone else review it.

Rule 7.2 permits lawyers to advertise for their legal services, but not to "solicit" business. So, how do we distinguish between impermissible solicitation and permissible advertising? And, is the difference valid anymore in light of the speed and facility of the web, the existence of blogs versus the "instantness" of chat rooms?

The demarcation line is Rule 7.3, the "solicitation" rule, which prohibits the targeting of specific individuals or groups for the purpose of obtaining business. A solicitation has been defined as a targeted communication by the lawyer that is in-person or directed to a specific person and offers to provide legal services. In contrast, a lawyer's advertising typically does not constitute a solicitation if to the general public, such as via billboard, Internet banner advertisement, website or television commercial; it is responding to a request for information or is automatically generated in response to Internet searches.

Other than exceptions for close family members, former clients, another lawyer or a businesses, does that mean that, if I target and contact Mr. Smith privately (but not in person) about his plot of land that might be ripe for subdivision, I am soliciting him? What about a general letter to all large parcel landowners north of Boston, among which is Mr. Smith? Or if I put out a public advertisement ("We have handled thousands of subdivision matters") and put it in the local newspaper or an online trade blog? Where is the line now that electronic communications have overtaken quill ink?

We can solicit professional employment for a fee from a prospective client known to be in need of legal services even by written communication, including an audiotape, videotape or other electronic communication such as email, if we keep copy for two years. So, where is the line?

YOUR STATUS IN THE LEGAL WORLD

Next is what you can say about your "status" in the legal world. What happens if you want to denote your area of expertise or specialty? Rule 7.4 now allows lawyers to hold ourselves out publicly as specialists, experts, or concentrating in a particular service, field, or area of law, so long as the claim is not false or misleading. If you do, you really must be able to demonstrate such specialty, expertise or concentration. But how do you prove such claims? What if you have been out of law school for two years and only handled closings? Is that a concentration? Do you have expertise despite youth or inexperience?

And beware that if you hold yourself out as a specialist you will be held to the standard of performance of specialists in

See WEB, page 10

Quo vadis, municipal planning defense?

BY ROBERT M. RUZZO

BOB RUZZO

A municipality's ability to deny an application for a comprehensive permit because the proposed development is inconsistent with a well-conceived municipal master plan has been part of the Chapter 40B landscape for decades. Since this concept initially took hold in *Harbor Glenn Associates v. Hingham*; however, the instances in which the Housing Appeals Committee (HAC) has actually upheld a local denial have been few, and have tended to involve circumstances unlikely to be replicated broadly.

The outcome in *Harbor Glenn*, for example, was set in motion by federal action in turning over 750 acres of the former Hingham Naval Ammunition Depot to the town. A second notable decision in this vein, *Stuborn Limited Partnership v. Barnstable*, implicated waterfront property in Barnstable, a circumstance less unusual than *Harbor Glen*, but still somewhat removed from mainstream land use planning issues in non-coastal communities.

In a host of other cases, the HAC has articulated the elements of the municipal planning defense in the context of determining its inapplicability to the facts before it. For example, in *KSM Trust v. Pembroke*, the HAC outlined the three threshold questions facing a municipal master plan: Is the plan bona fide? Is the plan on its face restrictive of low and moderate income housing? And has the plan been implemented in the area of the site?

That's where things basically stood prior to *28 Clay Street v. Middleborough*. In *28 Clay Street*, the HAC upheld a denial of a proposal to construct affordable housing within a development overlay district (DOD) in the vicinity of a major highway interchange, a set of land use circumstances that could hardly be classified as remarkable. Thus the question arose: Did the*28 Clay Street* decision, following relatively closely upon *Stuborn II*, represent a developing trend towards greater deference to municipal planning by the HAC?

Proponents of such a theory can find no comfort in two recent decisions by the HAC, both released in final form on Feb. 10, 2014. In both *Hanover Woods, LLC v. Hanover* and *Hanover R. S. Limited Partnership v. Andover* , the HAC reversed the denial of a comprehensive permit by a local zoning board of appeals that asserted a municipal planning defense.

The *Andover* decision in particular portends that *28 Clay Street* was an anomaly rather than a harbinger. In *Andover*, a developer sought to construct 248 units of affordable housing on the last remaining vacant lot in an otherwise built-out industrial park. A credible case could be made that Andover's municipal planning efforts were more firmly established than similar efforts in Middleborough, more formal, more successful and more coherent. For example, Andover prohibited residential uses in its industrial district, while Middlebor-

See MUNICIPAL, page 11

Women's Networking Group

REBA's 2014 president, Michelle Simons, spoke at event for The Women's Networking Group at the Needham Historical Society on April 3.

Tax abatements for problematic properties in the new year

BY SAUL J. FELDMAN

SAUL FELDMAN

In my experience in representing taxpayers, the valuation that boards of assessors place on certain categories of real estate is often too high. In this article, I will set out the strict time requirements for tax abatements. Then, I will cover some of the situations I have encountered in my tax abatement practice.

Municipalities are having budgetary problems. The assessors and the appraisal firms hired by the assessors do not necessarily have the expertise or the will to determine the actual fair cash value of property. It is up to owners, therefore, to file for abatements in order to pay no more real estate taxes than the law requires.

TIME REQUIREMENTS FOR FILING

We are in fiscal year 2014, which began on July 1, 2013, and ends on June 30, 2014. Now is the time to review the assessments on commercial and industrial real estate. In the event the assessment exceeds the fair cash value as of the "relevant date," which was Jan. 1, 2013, owners should consider filing an application for abatement with the local board of assessors. We spend a significant amount of our time each January and February filing applications for abatement.

Most municipalities in Massachusetts send out quarterly tax bills. The first two are merely preliminary bills. The third bill, which is usually sent after the tax rate has been set, is an actual bill.

The application for abatement must be filed with the board of assessors not later than the date for paying the actual bill. Assuming that the bills were mailed by Dec. 31, 2013, the due date both for payment of the tax and for filing the application for abatement was Feb. 3, 2014. The next step in the process is an appeal to the Appellate Tax Board, in the event the board of assessors fails to grant a satisfactory abatement.

The remainder of this article covers some of the situations I have encountered in my tax abatement practice.

SPECIAL PURPOSE BUILDINGS

Assessors have trouble with special purpose buildings, like amusement centers, health clubs, nursing homes and medical office buildings. There are often not enough sales of comparable special purpose properties. The sale of a medical office building does not occur every day in a town such as Norwell, for example. Therefore, it becomes impossible to use the sales-comparison approach. The sales that have occurred may not be truly comparable. A medical office building in Norwell does not have the value of a medical office building in Wellesley.

In lieu of the sales-comparison approach, appraisers use income capitalization or cost reproduction for special purpose properties. This can lead to inaccurate appraisals. For example, an appraiser is not qualified to testify on cost reproduction. This should be done by an engineer, but often the only expert involved in the case is an appraiser. The result can be less than satisfactory.

Special purpose properties tend to be high-risk properties. If the facility is vacant or nearly vacant, it is difficult to use the income capitalization approach. Cost reproduction also does not work, as it is unlikely that a buyer would pay cost reproduction for an empty building which has only one use. For example, a buyer would not pay replacement cost for a health club which includes an indoor swimming pool and other amenities, if the buyer did not want to use the building as a health club. The cost to retrofit a special purpose building clearly is a negative in putting a value on the building.

EMINENT DOMAIN

When a special purpose parcel is partially taken by eminent domain, the assessors try to value the remaining parcel by the percent of land remaining after the taking. This often does not make any economic sense. For example, if the property was used before the taking as a truck terminal and after the taking can no longer be used as a truck terminal, the remaining value is minimal. This assessor should accept this and value the property accordingly. Also, at a minimum, the assessors should be willing to subtract the dollar amount received as a result of the taking from the value of the property. However, assessors will not do this unless they are forced to do so by an appeal to the Appellate Tax Board.

CONTAMINATED PROPERTY

Neither capitalization of income nor sales-comparison methods lead to accurate valuation for properties contaminated by hazardous materials. The stigma of a contaminated property is difficult to quantify. It is certainly more than just the cost to remediate or the cost to monitor. The difficulty of obtaining financing, the need to indemnify purchasers, and the liability to third parties must be considered. Because it is difficult to quantify the affect of contamination on a given property, assessors often ignore the negative impact of contamination. This obviously leads to an inaccurate assessment. The affect of contamination on smaller commercial properties, such as a building with four stores, can be very difficult to determine. A buyer of such a property is normally not sophisticated and will be reluctant to buy a property with a history of contamination.

AFFORDABLE HOUSING

The case law is clear that in calculating the estimated gross annual income of a housing project financed by and operating under a governmental program to promote housing for low and moderate income people, the restrictions placed by federal regulations on the actual income of the project must be considered. Therefore, the assessors may not base their valuation on the higher "fair market" rental rates. ♦

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Chapter 21E and the Massachusetts Contingency Plan Version 5.0

BY GREG D. PETERSON

GREG PETERSON

In March, MassDEP published long-awaited amendments to the Massachusetts Contingency Plan, 310 CMR 40.0000 et seq., the regulations governing the cleanup of oil and hazardous materials under M.G.L. c.21E. The amendments are the product of eight to 10 years of discussions, multiple drafts, comments and feedback among MassDEP, owners and developers of real property (represented particularly by NAIOP), the 21E bar, and licensed site professionals (LSPs), who supervise cleanups and prepare and file the paperwork. In many ways the regulatory amendments are the most significant change to the 21E program since 1998, when the Brownfields Amendments were adopted.

From the perspective of the regulated community, the amendments are likely to prove a mixed bag, giving clarity and new paths to permanent closure for some sites, yet also eliminating long-standing bright-line tests and substituting much more labor- and time-intensive data collection and analysis for many other sites. In some cases, especially so-called vapor intrusion (VI) sites involving chlorinated solvents or gasoline, where non-aqueous phase liquid (NAPL) may be present, the amendments will have both impacts simultaneously. Certain regulatory and paperwork requirements are streamlined. New paperwork requirements are added, especially for VI sites. Acronyms and terminology used for over 20 years have been eliminated (no more RAOs, for example), while a range of new acronyms and terms have been created (permanent solution with no condition; permanent solution with conditions; non-stable NAPL, micro-scale mobility NAPL, exposure point mitigation measures (EPMMs); and active exposure point mitigation measures (AEPMMs) being among the more notable.

There is emerging consensus among LSPs and lawyers practicing in the area that it likely will be more difficult to achieve unconditional permanent solutions, with more sites closed using activity and use limitations (AULs). Lawyers and title examiners providing title services for AULs should expect additional work as a result. But the consequence for brownfield redevelopers is not so rosy. Because the state brownfields tax credit level (50 percent vs. 25 percent credit) is driven by whether the permanent solution required an AUL (only a 25 percent tax credit for AUL closures), the regulations will have the effect of reducing financial incentives to acquire and remediate many brownfields sites. This result was almost certainly inadvertent on the part of MassDEP. A statutory change to the brownfields tax credit would appear to be required to remedy the situation.

The AUL form mandated by MassDEP has been revised to eliminate the LSP opinion exhibit, previously a source of accidental contradiction or ambiguity between pieces of the document. But a new trap for unwary real estate lawyers and buyers and sellers of property subject to an AUL has been added. Going forward, a copy of the deed transferring title to a property subject in whole or in part to an AUL must be delivered to MassDEP within 30 days of closing. Failure to do so will subject both seller and buyer to liability, with the predictable impact on attorney liability. Make an addition to your closing checklists now, ladies and gentlemen.

In broad outline, the amendments include:

Process improvements, especially a simplified tier classification system (reduced to Tier I, ID and II only), no tier permits, and a path for using AULs at Superfund sites.

A path to achieve permanent solution closure of VI sites using simple radon-type venting systems, supplemented by mechanisms to assure that the systems are maintained and replaced from time to time, that telemetry connecting the systems to MassDEP to make the department immediately aware of system stoppages, that notices are given to occupants for vent system failures lasting 30 days or more, and annual re-certifications by property owners.

Allowing sites with more than half-inch of NAPL (free-phase product) to be closed, provided that data, gathered and analyzed over several seasons, if not years, proves that the NAPL is not mobile vertically or horizontally at a macro level, nor seasonally mobile at a micro level, using the "principles of multi-phase flow in porous media." This will be of special help with former manufactured gas plant (MGP) sites with thick residual tars. The approach will be more problematic, time-consuming and expensive, however, for gasoline and fuel oil spills (especially as most gasoline sites will be treated as hav-

See CONTINGENCY, page 11

Why I'm a member

REBA MEMBERSHIP IS ITS OWN REWARD

Meet Donald Rousseau

"I recommend reading every issue of *REBA News* from cover to cover."

As part of his ongoing series exploring the rewards of membership in the Real Estate Bar Association, former president Mike McClary speaks with member Donald H. Rousseau about why REBA News is a must-read, and how the migration to the Internet doesn't need to murder civility.

Q. Where do you work and what type of work do you typically handle?

A. I have been in solo practice in Marblehead since 1991. I mainly practice residential real estate; representing buyers, sellers, and lenders. I also do some estate planning, wills and trusts, collections, zoning, that type of law. It's typical small town general practice.

Q. How long have you been a REBA member and how long have you been on the board of directors?

A. I knew I wanted to concentrate on real estate before I even entered in law school, so I think I first became a REBA member while I was still a law student. This is my fourth year serving on the board.

Q. What do you feel are the biggest benefits of being a REBA member?

A. Definitely having full access to the REBA website. Barely a week goes by without me consulting the title and/or practice standards either to confirm my original thinking or to back up my position on a title issue with opposing counsel. It's amazing how many times I have had to cite the standards to other attorneys to explain why I was insisting on either this or that for a closing. Having immediate access to the "rules" of Massachusetts conveyancing practice is a great day to day practical benefit of REBA membership.

Q. How has membership with REBA benefitted your practice?

A. Membership in REBA has made me a much better lawyer by keeping me up to date and on top on all of the important changes and decisions affecting Massachusetts real estate law. I have learned so much through REBA, and I continue to learn daily. REBA membership has been invaluable to the success of my practice.

Q. What advice would you give to a REBA member who is new to the practice of law?

A. Definitely get involved with their regional REBA affiliate and attend as many open meetings of the REBA committees as they can. It will give them an opportunity to meet and connect face-to-face with other real estate practitioners. We tend to rely too much on electronic communication these days. I like to put a face with a name; I think it helps to develop a sense of camaraderie. I find that the tone of some emails can become very impersonal when the sender does not know the lawyer's face on the other side of the computer. I would also recommend reading every issue of *REBA News* from cover to cover. Not only does *REBA News* highlight all of the recent and important developments in Massachusetts real estate law, I have also garnered some very sage advice from some very wise practitioners within its pages.

Q. How do you think the real estate practice will evolve over the next five years?

A. Well, if I had a crystal ball, I wouldn't be sitting here right now; I'd be on my yacht at some undisclosed tropical location. But I don't, so unfortunately, I'm still sitting here grinding away. I think technology will have the biggest immediate impact on the future of conveyancing. Everything is moving to the Internet, from electronic title searches, to electronic signatures, e-filings, and even e-closings. But my biggest fear is that over-regulation of the mortgage industry at the federal level will eventually destroy the ability of a small practice to make a profit. It's always the law of unintended consequences. But I am confident that we as lawyers will always find a way to adapt and survive.

Q. Give me a war story of two of closings gone bad or strange things that have happened to you at a closing.

A. Once I was representing the lender on a $650k-plus sale of a home in Peabody. The closing was in late September and the home had an in-ground pool. The seller had just added $50 worth of pool chemicals to the pool to keep it clean for a few more weeks and he was asking for a $50 adjustment at the closing table. The buyer flatly refused, saying he was going to shut the pool down for the season anyway. A heated argument ensued over the $50 of pool chemicals, and it must have lasted at least 45 minutes. I can't remember who got to keep the $50, but the saddest part of the tale

See WHY I'M A MEMBER, page 10

Charitable organizations, housing and tax exempt status

BY SAUL J. FELDMAN

SAUL FELDMAN

Feldman & Feldman recently represented a charitable organization in a property tax abatement case regarding a senior living facility in Massachusetts.

This was an appeal of a denial by the board of assessors of a Massachusetts municipality of an application for a tax abatement regarding a living facility containing low-income elderly housing. The facility had Housing of Urban Development (HUD) Section 202 financing.

The municipality denied the application for an abatement, claiming that our client was not entitled to tax exempt status under Massachusetts General Laws, Chapter 59, Section 5, Clause Third. The municipality argued that, because the property was leased to individual tenants, the charitable organization did not occupy the premises.

Clause Third states that "real estate owned by or held in trust for a charitable organization and occupied by it or its officers for the purposes for which it is organized" is exempt from taxation.

The test for qualification of tax exempt status under Clause Third is twofold. First, an organization must prove that it is a charitable organization, and demonstrate that its operations are for the benefit of the community at large, i.e., it must pass the "community benefit test." Second, an organization must prove that it occupies the property, i.e., it must pass the "occupancy test."

Our client was exempt from federal income taxation under Section 501(c)(3) of the Internal Revenue Code. In addition to being exempt from federal income taxation as a charitable organization, our client needed to demonstrate the organization provide a public benefit to a broad, rather than a limited, segment of the population.

As the Supreme Judicial Court has stated, "an organization 'operated primarily for the benefit of a limited class of persons,' such that 'the public at large benefit[s] only incidentally from [its] activities, is not charitable.'"

In *Western Mass. Lifecare Corp. v. Assessors of Springfield*, the court acknowledged that there was no "precise number" of persons who must be served to meet this test. The court went on to state that, however large or small the group of persons might be, membership in the class must be "fluid" and must be "drawn from a large segment of society or all walks of life."

The standards enunciated by the Supreme Judicial Court in *Western Mass.* have come to be known as the "community benefit test," which essentially requires a determination of the breadth of the population which receives services from the institution or facility in question. In the case of our client, residents at the facility were drawn from numerous communities in the greater metropolitan area. The public demand for the facility by a wide range of low income senior citizens met the longstanding measure of "community benefit."

Having succeeded in proving that our client was a charitable organization, the remaining challenge before us was proving that our client occupied the property.

In *Mary Ann Morse Healthcare Corp. v. Board of Assessors of Framingham*, the court reversed a denial of a petition for an abatement by the Appellate Tax Board (ATB). In the case, the owner provided extensive services to the residents of an assisted living facility who suffered from Alzheimer's disease and dementia. Common areas of the building were continually used by the owner's staff. However, the ATB looked to the statutory rights of the residents and determined that they had rights under Massachusetts law entitling them to rights as tenants, precluding the owner from claiming occupancy as well.

As was the situation in *Morse*, residents of our client's facility did not have exclusive occupancy. The residents entered into leases which required our client to commence judicial proceedings to evict a resident, much the same as for the Chapter 19D protections for residents in *Morse*. However, our client's representatives were allowed to enter the residents' apartments under various circumstances, such as for repairs to the apartment and to monitor the health of a resident. The staff of the facility was continually present and the occupancy by the residents was not exclusive.

Since the Morse decision, the ATB has granted a full exemption to other HUD low-income elderly housing projects. In October 2011, the ATB granted a full exemption in *The Congregation of Sisters of St. Joseph of Springfield, Inc. v. Board of Assessors of the City of Holyoke*. The circumstances in *Holyoke* constitute a fact pattern quite similar to our client's circumstances. The essence of the *Holyoke* case is that occupancy by a charitable organization does not have to be exclusive of tenancies of residents.

Our firm took the position that the fact that residents had rights as tenants was not decisive in determining occupancy, and that the property could be occupied by both a nonprofit entity and residents. Our client settled the case with the municipality prior to a trial with the ATB. ♦

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A WEB OF INTRIGUE

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their field, with potential civil as well as disciplinary consequences. So, for example, should an attorney who holds oneself out as specializing or concentrating in commercial real estate transactions be familiar with the intricacies of the hazardous waste law or zoning?

Now what happens if a social media network, such as LinkedIn, does not allow certain headings such as "specialist" or "expert" to be modified? Do you leave that section blank and provide information about practice areas under other, more general headings? Do you denote that you are a general practitioner *including* real estate and conveyancing? A comment to the rule states that "lawyers may *limit responsibility*with respect to a particular service, field, or area of law to the standard of an ordinary lawyer by holding themselves out in a fashion that does not imply expertise, such as by advertising that they "handle" or "welcome" cases, "*but are not specialists in a specific service, field, or area of law.*" Do you really want to make such a dismissive statement? ("I don't specialize in this field. But come on down and I'll help you anyway!)

What about content added by others? Online communication and advertising raises the possibility of real-time conversations and contributions to your online content by others outside of your control. Will you be held responsible for content that others have added to your website or blog? What if someone, who is not in any way acting as your agent, posts content on your website that is not in compliance with the rules? What if, for example, someone claims on your website that you are an expert or specialize in certain field? Will you be held to a higher standard or held to account for an alleged misrepresentation? And what about endorsements by clients?

For these reasons, it is important to monitor your online content. If someone posts something that violates your ethical obligations, consideration should be given as to whether that post should be removed, whether you should ask the person to remove it or whether you should make a curative post.

Finally, Rule 7.5 deals with the use of names and firm letterheads, which also cannot be false or misleading. (Sensing a theme?) Can we set up a blog called "Rules-Busters"? Or Jim "The Hammer" Bolan and Sara "The Enforcer" Holden on the firm's letterhead? (There are a number of such ads around the country. Intellectual property issues aside, the effectiveness, let alone the propriety, is a very open question. But, they are pretty funny.)

Rules always run behind the times, but there are clearly analogs to existing modern day technologies. Regardless of the state of the rules, we will be held responsible for the content of websites, blogs, profiles, tweets, etc. So, when you extend the public invitation to the world to look and see, take the time to ensure compliance as best you can. ♦

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WHY I'M A MEMBER

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was that both parties were represented by counsel at closing.

Another time, I was acting as lender's counsel for the purchase of a multifamily in Quincy. We were closing at the Registry of Deeds in Dedham. The seller was a youngish Chinese man and his elderly mother. The mother could not speak a word of English and she was refusing to sign the deed, because, as far as I could tell, she thought her son was trying to rip her off. Again, much screaming ensued, this time in Chinese, so much so that one of the court officers had to keep coming over to quiet the mother down. It got so bad at one point that the court officer had to threatened to throw her out of the building. She eventually calmed down and signed the deed. When I was in the recording line, a title examiner came over and told me that it was the worst closing she had witnessed in her 30-plus years of examining there.

On a lighter note, I was conducting a closing for a young couple that was buying a small starter home from a very elderly gentleman in Salem a few years ago. He was in his 90s and had lived in the home for over 60 years. As I was explaining the loan details and the monthly payments to the buyers, the elderly gentleman could sense that the young wife was getting nervous. So he reached his shaky old hand across the table and gently took hers, and said: "Don't you worry, sweetie, you know what my monthly payment was when I first bought this house? It was $37 a month, and I didn't think I was going make it!" ♦

TITLE INSURANCE ISSUES, POST-FORECLOSE

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bility should be recorded. The requirements of *Eaton*must still be satisfied.

As noted above, the majority of title insurers in Massachusetts still require compliance with the *Eaton* decision despite the enactment of these amendments to M.G.L. c.244. The basis for this decision is that since the affidavit pursuant to Sections 35B and 35C must be dated prior to the publication, it does not satisfy the requirement in *Eaton* that the foreclosing mortgagee must hold the note or is acting on behalf of the noteholder from the date of the commencement of the power of sale up to and including the date of the foreclosure sale.

The *Eaton* decision applies to both residential and commercial properties, while 35B **and** 35C apply only to residential properties, making this inconsistency a potential pitfall.

REBA has issued Form No. 57A and Form No.57B. If these forms are used, they must be revised to comply with the *Eaton* requirement.

There are additional requirements for foreclosures by third-party loan servicers. See the regulation issued by the Division of Banks and Loan Agencies at 209 CMR 18.00 et. seq. entitled, "Conduct of the Business of Debt Collectors and Loan Servicers."

If the foreclosure is performed by a third-party loan servicer, the REBA form must be expanded to include a detailed description of the basis of the affiant's claimed personal knowledge of information, including sources of all information recited, and a statement as to why the sources are accurate and reliable; and a statement that the third-party loan servicer has complied with all provisions of 209 CMR 18.21A(2).

Here are four final considerations:

- Any affidavit must be signed and sworn to with a *jurat* as opposed to an acknowledgement.
- No title insurer will authorize the issuance of a policy unless the property is vacated by the mortgagor after Nov. 1, 2012. Some insurers may insist upon complete vacancy and/or vacancy of related parties of the mortgagor.
- Any assignment of the foreclosed mortgage must be dated prior to the date of the first publication.
- The Sections 35B and 35C affidavit must be signed by the "holder" or a party acting on behalf of the holder. At least one lender has insisted on using the word "owner." This appears to be acceptable with the majority of underwriters.

For additional guidance, see the memorandum by Edmund A. Williams, chief title examiner of the Land Court, dated Nov. 1, 2012, and memoranda issued by the various title insurance underwriters which have been used in this article. ♦

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MASS. CONTINGENCY PLAN VERSION 5.0

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ing volatile organic compounds (VOCs); and especially problematic for chlorinated solvent sites (former dry cleaners, former plating facilities, former machine shops, former silicon chip plants) where the NAPL is denser than water and sinks over time, especially where the underlying geology involves bedrock fractures.

Increased focus on "source control" as a requirement to achieve a permanent solution, requiring not merely the removal of leaking tanks but also eliminating, or controlling and eliminating to the extent feasible, pockets of contamination which act as ongoing sources of contamination via dissolution or volatilization processes,

Increased level of proof that contamination is not migrating (that plumes in groundwater and vapors in soil above the water table are stable or contracting).

Eliminating response action outcomes (RAOs) and instead styling closure documents as permanent solution with no conditions; permanent solution with conditions, but no AUL; permanent solution with conditions requiring AUL; or temporary solutions. Former Class A and Class B RAOs are mapped to permanent solutions. Former Class C RAOs are mapped to temporary solutions.

Four categories of sites will be able to achieve permanent solutions with conditions but without the need for AULs: residential settings with existing or potential non-commercial gardening; sites with anthropogenic background, especially historic fill (although the types of qualifying fills have been narrowed somewhat); where remaining contamination is under public ways or railroad rights of way; and vacant land where the levels of contaminants in groundwater would pose a problem if a building were to be built there in the future.

Due to the increased requirements for data collection and analysis over time, and the development and ongoing refinement of conceptual site models incorporating such additional data, the time periods within which Phase I, II, III and IV reports must be filed with MassDEP have each been extended by an additional year, but the overall requirement to file a permanent or temporary solution within five years of tier classification (within six years from initial reporting) have been retained.

The 2014 amendments are immediately effective for classifying the severity of a contaminated site and determining the level of MassDEP supervision, and for quantities or levels of contamination that trigger reporting, and otherwise take effect on June 20, 2014. ♦

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MUNICIPAL PLANNING DEFENSE

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ough expressed a "strong preference" for commercial uses in its DOD.

In the end, the HAC concluded that Andover's master plan was of moderate quality, that it had been generally implemented, but that its housing planning had yielded only moderate results. "Balanced against this, the town's failure to meet its statutory minimum 10 percent housing obligation 'provides compelling evidence that the regional need for housing does in fact outweigh the objections to the proposal.'"

The *Andover* decision also set forth for the first time a four-point analysis by which a local board "may establish the weight of its local planning concern." While the HAC indicated that it was prudently seizing "an opportunity to clarify the standard we apply," its articulation may well be criticized by others as "moving the goalposts." In addition, footnote 4 cites "[some of] the more important of over a half dozen cases in this area" since *Stuborn II*, with only*28 Clay Street* tilting in favor of a municipality. Chapter 40B trivia buffs will recall that-*Stuborn II* itself presented an extremely rare circumstance – two dissenting votes.

Thus, the municipal planning defense seems at best directionless, if not downright endangered, going forward.

Nonetheless, these municipal planning defense cases reemphasize the need for painstaking analysis of each individual development proposal to be submitted under Chapter 40B.

Some (potentially) useful advice includes:

For developers: *Andover* may calm fears that grew out of *28 Clay Street*, but the world is unquestionably more complicated than it was prior to that decision. Given the "safe harbor" and "recent progress" provisions in the regulations, things were never as simple as merely looking up a community's status on the subsidized housing inventory prior to filing an application for a project eligibility letter; however, applicants now must also review local planning efforts, particularly actions that might qualify as "municipal actions previously taken" under 760 CMR 56.04(4)(b).

An applicant should assume going in that some form of a municipal planning defense will be raised in any HAC proceeding. The best way to be prepared is to know your host community well.

For municipalities: Andover undertook a professional approach to master planning over an extended period of time. The community could not be characterized as overtly hostile to affordable housing. Indeed, at one point it exceeded the 10 percent statutory minimum under Chapter 40B before falling back below that threshold, at least in part due to the expiration of certain affordability restrictions, combined with the addition of new housing units to its denominator. The glaring shortcoming in Andover's case, however, was the fact that "multifamily housing is not permitted as of right anywhere in town."

Draw your own conclusions, but one should be that the case for adopting a Chapter 40R overlay district has never been stated more eloquently.

Consider also, that denying a comprehensive permit application outright is a very high risk strategy. Losing a denial case may mean that many conditions that could have ameliorated the impacts of a development will not be included in a reversal handed down by the HAC. ♦

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