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REBA news
THE NEWSPAPER OF THE REAL ESTATE BAR ASSOCIATION
JULY 2014
Vol. 11, No. 3
A publication of The Warren Group

Save the Date …

ABA/REBA MID-SUMMER REFRESHER ON UPCOMING CFPB REQUIREMENTS

Defending Liberty Pursuing Justice

The American Bar Association's Committee on Conveyancing, Title and Bar-Related Title Insurance Companies will co-sponsor with REBA a morning half-day refresher and update program covering the Consumer Finance Protection Bureau's TILA/RESPA Integrated Disclosure Rule, as well as ALTA's developing cyber security and encryption "best practices" requirements for lawyers handling residential loan closings.

This program, part of the ABA's 2014 week-long Annual Meeting in Boston, will run from 9 a.m. to 12 noon on Monday, Aug. 11, at the Four Points by Sheraton Hotel in Norwood. REBA and the ABA will host a buffet breakfast from 8 to 9 a.m.

Registration is complimentary to all REBA members, their guests and non-members of the association.

For more details about registration and speakers, see the next issue of *REBA News*.♦

REBA

GET READY!

No summer break for REBA

BY MICHELLE T. SIMMONS

MICHELLE SIMONS

REBA never takes a summer vacation; the board of directors, committee chairs, committees and networking groups continue to bring you informative educational seminars and events all summer long.

We have many great events planned as the summer solstice is upon us. We hope you will take some time out of your summer activities to join us at one or all of these events.

In mid-June the Women's Networking Group of Real Estate Professionals hosted its third networking reception at the Atrium at Heritage Place in Lawrence. Lauren Stiller Rikleen discussed her latest book, "You Raised Us-Now Work with Us: Millennials, Career Success and Building Strong Workplace Teams." The reception was well-attended and enjoyed by all. I am thrilled that this group has been so well received. We are currently planning a meeting on Cape Cod in August and we will post information about this meeting soon.

The REBA New Lawyers Committee has been off to a great start with a kick-off meeting last April with a program about "Top Ten Rules of the Road," presented by Sara Holden, my partner at Brecher, Wyner, Simons, Fox & Bolan, LLP. The group will host a networking reception from 5:30 – 7:30 p.m. on July 24 at Papa Razzi Trattoria, 16 Washington St. in Wellesley. All REBA members and all new lawyers are welcome, including newly-admitted lawyers who are not members. Rodney S. Dowell, executive director of the Massachusetts Law Office Assistance Program (LOMAP), will on hand to offer brief remarks.

Another important event this summer is the ABA/REBA Mid-Summer Re-

See *PRESIDENT'S MESSAGE*, page 2

REBA Women's Networking Group meets in Essex County

For more images of the Networking Group's meeting, see page 7.

Barbara Macy and David Singer join REBA Dispute Resolution's Mediation Panel

Barbara J. Macy and David J. Singer have joined REBA Dispute Resolution's panel of neutrals.

"We are delighted to welcome Barbara and David into the REBA/DR family," said REBA Executive Director Peter Wittenborg. "Barbara has almost singlehandedly led REBA's *pro bono* residential foreclosure mediation program in the United States Bankruptcy Court with an exceptional record of settlements. David's deep mediation and law practice experience will expand strengthen the program's reach in Hampshire, Hamden, Franklin and Berkshire counties."

Macy has been practicing law in Boston for nearly 30 years. In addition

BARBARA MACY

DAVID SINGER

to her private, general practice and her work with REBA's residential foreclosure mediation program in the Bankruptcy Court, she volunteers in the Boston Bar Association's Lawyer for the Day program at the Suffolk Probate and Family Court and acted as a conciliator for civil cases in the Boston Municipal Court. She has served as a member of the Massachusetts Bar Foundation's Society of Fellows since 1994, reviewing IOLTA funding requests. Macy received mediation training at the Community Dispute Settlement Center and is admitted to practice law in Massachusetts, the U.S. District Court for the District of Massachusetts and the United States Supreme Court.

Singer has practiced law in Franklin County since 1979 with a concentration in transactional matters, as well

See MEDIATION PANEL, page 7

PRESIDENT'S MESSAGE

CONTINUED FROM PAGE 1

fresher on the Upcoming CFBP Requirements on Aug. 11. This program, part of the American Bar Association's week-long annual meeting in Boston, will run from 9 a.m. to 12 noon at the Four Points by Sheraton on Route 1 in Norwood. There will be a breakfast buffet hosted by REBA and the ABA from 8–9:00 a.m. Registration is complimentary to all REBA members and their guests.

Many of REBA's committees will continue to meet throughout the summer months to bring you exciting and informative events.

The summer months bring warm weather, sunshine and some wonderful programs and events that are open to all REBA members; we hope you will be able to attend one or all of these events.

Our 2014 all-day Annual Meeting and Conference will be held on Monday, Nov. 3, at the Four Points by Sheraton. Please hold the date – and in the meantime, stay active, and stay involved. ♦

Michelle Simons, REBA's 2014 president, is a partner in the Newton firm of Brecher, Wyner, Simons, Fox & Bolan LLP. She can be reached at msimons@legalpro.com.

Chapter 40R in theory and in practice

BY ROBERT M. RUZZO

BOB RUZZO

The ancient Bronx philosopher Lawrence Peter Berra (known to his closest adherents as "Yogi") once observed: "In theory, there is no difference between theory and practice. In practice, there is."

Ten years after Gov. Mitt Romney signed Chapter 40R into law, the theory behind the commonwealth's smart growth legislation rings truer than ever. In practice, however, utilization of the statute continues to lag. According to information recently circulated by the Department of Housing and Community Development (DHCD) at a 10th anniversary roundtable, Chapter 40R has yielded some 12,350 future potential units with "as of right" zoning in 33 "Smartgrowth Overlay Districts" located in 31 municipalities across the state.

That sounds impressive; however, to date, only some 2,186 units have been built or had building permits issued for construction. That's a record of success roughly equivalent to the 2014 Red Sox team's batting average with runners in scoring position over the first three months of this baseball season.

Not exactly what the fans (including your humble correspondent) had hoped for.

Without sounding like an apologist, there are still many reasons to believe that brighter days are ahead for Chapter 40R.

First of all, things couldn't get much worse. After the law was enacted and the implementing regulations promulgated, the housing market began its slide into the structural financial crisis now known as the Great Recession. Massachusetts was on the front end of this wave, although our trough was not nearly as deep as in other states. Nonetheless, few developers were, in those days, willing to undertake the costly campaign-style effort that a developer driven Chapter 40R overlay district vote entails. Although conditions have improved since then, attaining an economic recovery sound enough to stand on its own with growth symbiotically producing a robust housing construction sector has proven to be maddeningly elusive.

Second, Chapter 40R still has a lot to offer.

It links planning and zoning in a way that represents a break (for the better) with long-established approaches to development in Massachusetts.

While overlay districts need to overcome the same hurdles as all other types of zoning amendments (a two-thirds vote by the local legislature), if a district is adopted, it comes cloaked with two very special attributes: (a) as of right permitting status (subject only to plan review and design standards); and (b) the requirement that project opponents post a potentially significant bond as part of any legal challenge.

Municipalities receive tangible financial incentives to participate, both when a district is adopted and when building permits are issued. Companion legislation, known as Chapter 40S, also offers a school cost "insurance policy." The lack of resort to the Chapter 40S insurance policy – only Lakeville and Chelsea have participated thus far – may mean that either education costs are not as great a burden as generally assumed in the development equation, or Chapter 40S "underinsures" municipalities, as at least one observer has posited, thereby decreasing the odds for a district to be adopted. Only more time and a greater sample size will provide enough evidence to make a judgment on this issue.

Even in its nascent days, Chapter 40R has provided municipalities bold enough to adopt overlay districts with some insulation against controversial Chapter 40B developments. Developers, on the other hand, will appreciate Chapter 40R's lack of the often cumbersome cost certification requirements and limitation on profits associated with Chapter 40B.

Districts have been adopted across all the regions of the commonwealth and units have actually been built or had building permits issued for construction in 19 of the 31 municipalities that have embraced the statute. That's a winning

See CHAPTER 40R, page 9

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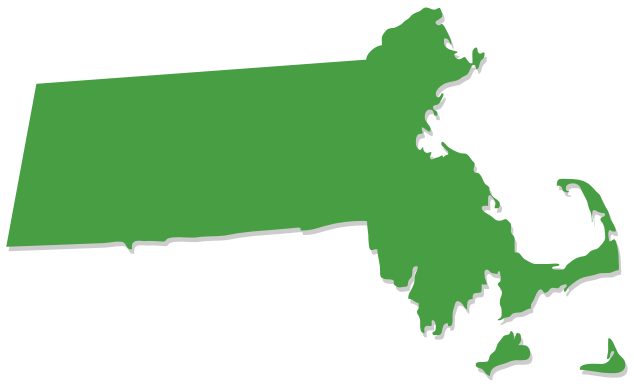

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MISSION STATEMENT

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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Standard bulk postage paid at Boston MA, 02205. Postmaster: Send address changes to REBA, 50 Congress St., Boston MA, 02109

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COMMENTARY

My cousin Vinnie considers value pricing

BY PAUL F. ALPHEN

PAUL ALPHEN

On a nice evening in May, I invited my cousin Vinnie, the real estate lawyer, to a Sox game (my sons were otherwise occupied). I purchased the tickets in December a few seconds after they went on sale and, because the opponent was Toronto, with the new value pricing scheme used by the Sox, the tickets were only $40 each for lower box outfield. Vinnie had a beer in one hand, one hot dog in his other hand, and another one in his mouth.

He asked: "Mmmmmrprtrrrrfrmmmm?" Which, when interpreted, meant: "How did you get these tickets for only $40?" I explained the value pricing system that is used by many (perhaps most) MLB teams, whereby the prices for each game can vary based upon the quality of the opponent and demand for tickets. The same seats for a Seattle game cost $58. Or, as the guy in the ticket window in San Diego explained the ticket prices to me for a game against LA: "What are you willing to pay?"

"Wish I could do that!" exclaimed Vinnie, as the topic shifted to the wonders of running a small-town law firm. Vinnie explained that he had read a lot about the need for lawyers to provide more value pricing for their clients, or to try options like flat fees. "I tried a few flat fee deals last summer," he said, while sipping on an overpriced beer.

"Big mistake. As soon as I told the buyer that I would represent him in P&S negotiations and though the closing for a low flat fee, everyone went on vacation! Literally! The seller, the buyer and both brokers took off for exotic places while I stayed in Podunk and read the title to the small condo and found that nearly everything that condo had done (or had failed to do) over the past 10 years was defective. Everything from instruments signed by persons without authority, to missing documents, to documents that should have been registered having been recorded. I finally found the broker on a beach and she told me I should take care of everything. Fortunately, I knew how to respond. I told her that the seller needs a real estate lawyer. Turns out the seller got her ancient uncle Fred, the semi-retired criminal defense attorney; and I ended up rewriting every document he sent me, including the 6D. It would have been easier to do it myself, for free. As it was I was working for nothing as of halfway through the deal."

I told Vinnie I knew what he was talking about. Vinnie pulled a ham sandwich out of his jacket pocket. "Paulie, did you know you can bring your own food into this park?" I told him that I was aware of that little oddity, but he was not allowed to bring in a pizza box next time I took him to a game. We were interrupted when a visitor to America's Most Beloved Ballpark asked Vin when the beer vendor would find his way to our section. "1978. Call Doc Brown and set the flux capacitor to 1978." The visitor thought Vin was kidding and continued to spin his head around in search for a warm Bud.

"What's worse," continued Vinnie, "are the fees that the Gotham City bank attorneys get for having their secretaries change the loan amount and the date on a package of standard loan documents! Really! How hard is it to refinance a little commercial building in Mendon, Natick or Maynard? I used to do dozens in a week without breaking a sweat. But when the lender's idea of local counsel is Thurston Howell IV from The Avenue of the Americas, they act as if they are refinancing the Empire State Building. And I do all the work, from arranging for and editing the ALTA survey, to examination of title and preparing the legal description and exceptions, obtaining tenant SNDAs, reviewing the pile of documents for the borrower, acting as settlement agent, conducting the closing and then personally speeding to the Registry of Deeds to record because it's always a last-minute emergency! Thurston never leaves his office and just sends out 7 p.m. emails from behind the curtain like some modern version of the Wizard of Oz. When I finally get Thurston's invoice to add to the settlement sheet, it's usually equal to what I paid for my last car!"

Vin thought he had come up with an idea for value pricing: "In advance of a recent deal, my client asked me what my legal fee may be for the refinance. I told him I would charge one-third of whatever the Wizard of Oz charges. The client didn't think I was funny. He asked me to try to keep the fee under $800, and he was dead serious." ♦

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.

SJC rules open space protected by nonprofit conservation organizations exempt from property tax

BY LUKE H. LEGERE

LUKE LEGERE

Cash-strapped cities and towns eyeing protected open space as a potential source of tax revenue should look elsewhere following the Supreme Judicial Court's (SJC) ruling in *New England Forestry Foundation v. Town of Hawley*, 468 Mass 138 (2014). In that May 15 decision, the SJC unanimously ruled that conservation of forests and open space is a charitable activity that benefits the public, and nonprofit organizations created to preserve land in its natural state are entitled to a property tax exemption for their protected parcels.

Specifically, the SJC ruled that the New England Forestry Foundation's (NEFF) 120-acre Stetson-Phelps Pine Ridge Farm site in Hawley qualifies for a property tax exemption under G.L. c. 59, §5, Third, which provides that real estate owned by a "charitable organization and occupied by it or its officers for the purposes for which it is organized" is exempt from taxation.

The dispute stemmed from the town of Hawley's modest $173 tax bill for NEFF's Stetson-Phelps Pine Ridge Farm, issued following the town's denial of NEFF's application for a property tax exemption under G.L. c. 59, §5, Third. NEFF appealed that denial, which was based upon a lack of information, and the state Appellate Tax Board (ATB) ruled in favor of the Hawley assessors.

In so doing, ATB threatened to undermine the longstanding tax-exempt status of many nonprofit conservation organizations across the commonwealth. Many land trusts and other conservation organizations, along with the municipalities where they own land, had been operating under the principle that they "occupy" land by preserving it as open space and are therefore exempt from property taxation.

Of particular concern to the state's conservationists was ATB's introduction of a rigorous "public access" requirement for conservation lands to qualify for a tax exemption. Despite the fact that NEFF allows public access to the Stetson-Phelps Pine Ridge Farm for recreational and educational purposes (indeed, its website lists the property as open to the public and even provides driving directions), ATB determined that NEFF fell short at this site due to the lack of a paved driveway and presence of a gate prohibiting vehicular access. NEFF appealed.

The SJC took direct appellate review and unequivocally reversed the ATB's decision in an opinion authored by Justice Francis Spina, which reflects the environmental concerns, scientific evidence, and practical considerations voiced by NEFF and the many leading environmental organizations which participated as amici.

In concluding that NEFF's purposes are traditionally charitable under G. L. c. 59, §5, Third, the SJC ruled that "NEFF's programs and activities, both in Hawley and throughout New England, are of the sort that their benefit inures to an indefinite number of people" and that these "benefits may extend beyond the parcel of land itself."

Specifically, "by holding land in its natural pristine condition and thereby protecting wildlife habitats, filtering the air and water supply, and absorbing carbon emissions, combined with engaging in sustainable harvests to ensure the longevity of the forest, NEFF engages in charitable activities of a type that may benefit the general public."

Furthermore, NEFF and other nonprofit environmental organizations "serve a traditionally charitable purpose by lessening the burdens of government." In Massachusetts, "conservation and environmental protection are express obligations of the government" under Article 97, as well as "a number of statutory schemes [that] make nonprofit land-conservation organizations the partners of municipalities in conservation and land use programs." Organizations like NEFF "have been identified as essential partners in statewide conservation efforts."

In rejecting ATB's public access requirement to establish that a conservation organization "occupies" land "for the purposes for which it is organized," the SJC clarified that the relevant question is not whether an organization promotes access, but whether it "takes affirmative steps to exclude the public from the land." Although the historic measure of the benefits provided by open space was public access, the court noted that "as the science of conservation has advanced, it has become more apparent that properly preserved and managed conservation land can provide a tangible benefit to a community even if few people enter the land."

The SJC even suggested that, if necessary to achieve its charitable purposes, an organization could exclude or limit public access to conservation land without losing the tax exemption ("where the ecosystem is so fragile that any human presence could undermine the organization's conservation efforts," for example). The organization will, however, face "a heightened burden to show that such exclusion of the public is necessary to enable it to achieve its charitable purposes," which will require "compelling facts demonstrating that the exclusion of the public is necessary to achieve a public benefit." In this case, "where NEFF does not exclude the public from its land and offered evidence demonstrating how NEFF uses the land as a site on which it carries out sustainable forestry practices, the board erred in concluding that NEFF did not meet its burden to show that it occupied the Hawley forest within the meaning of" the law.

This case holds several lessons for attorneys representing land trusts or other conservation organizations hoping that their protected open space properties will qualify for a tax exemption under the law.

First, vet your client. Make sure that

See OPEN SPACE, page 7

THE LAWYERS COUNSEL

Legal malpractice and real estate lawyers

BY JAMES S. BOLAN AND SARA N. HOLDEN

JIM BOLAN

SARA HOLDEN

There are two seismic events in lawyers' lives – a Board of Bar Overseers complaint and a malpractice claim. While legal ethics courses are routinely presented in American law schools, it is estimated that a course in legal malpractice is taught on only about 25 percent of campuses. And, there are barely a handful of legal malpractice treatises extant. With that background, we wanted to present a brief primer, in several parts, focused on real estate law and the issues that arise.

DEFINITIONS AND STANDARDS

To establish a claim, a client must show that:

- There was an attorney-client relationship – (a) a person seeks advice or assistance from an attorney, (b) the advice or assistance sought pertains to matters within the attorney's professional competence, and (c) the attorney expressly or impliedly agrees to give or actually gives the desired advice or assistance;
- The attorney owed a legal duty – the standard of care – to the client;
- The attorney breached that duty by conduct that was below the applicable standard of care (that is, the attorney failed to exercise the reasonable skill and care of the average qualified practitioner);
- The client suffered harm;
- The standard of care breach was the proximate cause of the harm; and
- The attorney's substandard conduct actually caused that harm.

Finally, there is the added burden in that the client must establish that he/she would have recovered a judgment/settlement or recovered a better judgment/settlement but for the attorney's substandard conduct and that such judgment/settlement would have been, at least, in part, collectible. See, e.g. *Jernigan v. Giard*, 398 Mass. 721 (1986).

THE ATTORNEY-CLIENT RELATIONSHIP

First, the general rule is that an attorney's liability for malpractice is limited to a duty owed to a client. In general, where there is no attorney-client relationship, there cannot be a breach of duty and, therefore, no liability. See, *DeVaux v. Amer. Home Assurance Co.*, 387 Mass. 814 (1983) (whether an attorney-client relationship had been created by the attorney's secretary was a jury question). Massachusetts' courts have taken a limiting view of the attorney-client relationship. There is a small range of matters in which a non-client might prevail on a narrow theory of, for example, detrimental reliance, but claims by non-clients rarely survive. See the now-seminal case is*Spinner v. Nutt*, 417 Mass. 549 (1994), in which the court held that "a trustee's attorney owes a duty not only to the trustee but also to trust beneficiaries, conflicting loyalties could impermissibly interfere with the attorney's task of advising the trustee. … [I]t is the potential for conflict [not actual conflict] that prevents the imposition of a duty on the [trustee's attorney] to the trust beneficiaries."

Proof of an implied relationship via detrimental reliance – that the person seeking legal services reasonably relies on the attorney to provide them and the attorney, aware of such reliance, does nothing to negate it – has rarely been found to exist.

By way of example, in *Dolan v. Hickey*, 385 Mass. 234 (1982), an attorney represented a bank, but later testified that he was also the real party in interest in the sale and that the seller and others were straw parties. After the Hickeys executed notes and mortgages, counsel offered to draft a real estate trust for them. The Hickeys accepted and counsel performed the work for a fee. In a proceeding to collect a deficiency after foreclosure of the second mortgage, the Hickeys sought to avoid liability on grounds of fraud, misrepresentation and illegality by counsel. The Hickeys argued that counsel (whose actions they attribute to the plaintiff mortgagee) made affirmative misrepresentations concerning the ownership of the property and his position in the transaction. The judge, however, found "specifically that no misrepresentations were made by [counsel] to [the Hickeys] to induce them into signing." And the court held that since no attorney client relationship existed until after the closing, there was no privity as to the mortgage documents drafted or the foreclosure. Since there was no attorney-client relationship, there was no duty or breach of the standard of care.

THE STANDARD OF CARE

The most common claims in real estate malpractice cases are negligent title searches, certifications or handling of transactions.

In a recent case, we represented an attorney in a claim related to a condo. The condo owner had failed to pay common area fees, resulting in a "super lien" placed on the unit. The condo association sued to foreclose the lien. Lawyer 1 tried to defend the lien case, but the association obtained a judgment and execution. Following a sheriff's sale, the condo unit was sold to a third-party buyer. Well after the foreclosure, the now former owner was referred to Lawyer 2 (whom we ended up representing). Lawyer 2 searched title and told the former condo owner that he had lost title via foreclosure.

At some point, the former owner was sent a confirmatory deed drafted by the attorney for the buyer at foreclosure (who, interestingly, had represented the condo association in the lien action and the foreclosure). He prepared the confirmatory deed because he erroneously thought that the former owner had a right of redemption and that he needed to "clear title." The former owner signed the confirmatory deed allegedly on the advice of Lawyer 2. Later, the former condo owner engaged new counsel who sued everyone, including Lawyer 2 claiming malpractice for having lost a "right of redemption" when the former owner signed the "confirmatory deed." We engaged an expert who confirmed that there was no right of redemption in this instance, by statute, so that tendering a confirmatory deed to correct an alleged title defect was a nullity and a meaningless act. We sought summary judgment and the former owner tendered an expert opinion who conceded that we were right, as a matter of law.

Now the interesting part. In the opposition to summary judgment, but *not* in any pleading, the former owner argued that counsel for the condo association "intended" to "preserve" a right of redemption even after foreclosure and that Lawyer 2 had a "duty" to "zealously represent" the former owner by trying to "extract an agreement" from counsel to get title back or money in consideration of the confirmatory deed. Therefore, so the argument asserted, allowing the former owner to sign the confirmatory deed was an act of malpractice.

We argued that it would be against public policy and Mass. Rule of Prof'l. Conduct 1.3 to conclude that a lawyer be held to a standard of care to ignore the law in order to "zealously" represent one's client. Rule 1.3 says a lawyer should represent a client zealously, but only "within the bounds of the law." The court completely agreed that the standard of care cannot encompass a duty to "change the legal effect of the foreclosure" (i.e., ignore the bounds of the law) and, thus, anything relating to the post foreclosure confirmatory deed was, as we argued, a nullity and meaningless.

So, at the end of the day, a lawyer does not have a duty to ignore the law, take advantage of the other side's offer to ignore the law and "zealously" extract money from the other side to "clear" title (that didn't need clearing) just because it might get something for the now former owner. ♦

Jim Bolan is a partner with the Newton law firm of Brecher, Wyner, Simons, Fox & Bolan, LLP, and represents and advises lawyers and law firms in ethics, bar discipline and malpractice matters. He can be reached at jbolan@legalpro.com. A partner in the Newton law firm of Brecher, Wyner, Simons, Fox & Bolan, LLP, Sara Holden represents lawyer, physicians and other professional in discipline and malpractice matters. Sara can be reached by email at sholden@legalpro.com.

This article is the first in a three-part series. Watch for the next installment, "Standard of care: redux" in a forthcoming issue of *REBA News*.

THE NEW LAWYERS COMMITTEE INVITES YOU TO A NETWORKING RECEPTION FOR REAL ESTATE PROFESSIONALS

Join us at an reception with special guest speaker Rodney S. Dowell, executive director of the Massachusetts Law Office Assistance Program. He will offer advice and insights derived from his experience helping professionals identify and navigate the opportunities and challenges of their careers.

This event is open to all REBA members. Please feel free to invite other lawyers, as well as any other real estate professionals – real estate brokers, property managers, bank officers, loan officers, mortgage brokers, appraisers, architects, engineers, landscape architects, designers, etc. – who may enjoy meeting other professionals in our community and becoming a part of REBA's network.

When: Thursday, July 24, 5:30 – 7:30 p.m.
Where: Papa Razzi Trattoria, 16 Washington St., Wellesley
Light refreshments and beer/wine will be served. To attend, please RSVP to Nicole Cunningham at cunningham@reba.net.

Defamation and condominiums: Advice from First Amendment lawyers

BY JEFFREY J. PYLE AND ASYA CALIXTO

JEFFREY PYLE

ASYA CALIXTO

Condominium associations can be breeding grounds for personal conflict. When unit owners have no choice but to interact with people they dislike – when they feel their intimate living space is impacted by strangers from whom they can't escape – the intensity of ordinary neighborly disputes can be heightened.

It's no surprise, then, that claims of defamation and other speech-based torts often arise in the context of condominiums. At the same time, social media and other online communication platforms may widen the audience and thus the potential for reputational harm in such cases. As First Amendment and media lawyers, we offer the following observations which may help condominium practitioners and lawyers representing property managers avoid some pitfalls of publishing torts.

THE CONDOMINIUM ASSOCIATION MAY BE LIABLE

If a trustee of a condominium association says something defamatory about a unit owner or property manager, the condominium association may also be on the hook. Defamation liability extends to every person or entity involved in the defamatory publication, and condominium associations have been successfully sued for defamation for statements by their trustees. That's even true where a trustee is repeating a defamatory statement he heard somewhere else, or a rumor picked up online. The law of libel adheres to the dictum that "tale bearers are as bad as tale makers;" a "republisher" is just as liable as a publisher, absent a legal privilege.

SOCIAL MEDIA FORUMS PRESENT SPECIAL PROTECTIONS – AND RISKS

Some condominium associations – and dissident unit owners – are availing themselves of social media platforms to discuss issues of common concern. Forums such as Building Link and Basecamp are useful tools for sharing information, and are said to promote a sense of community and diffuse tension resulting from a condominium board's decision or a resident complaint. But if a unit owner posts something defamatory, can the condominium association be sued for running the forum, or failing to remove the offending post?

Condominium associations, like other providers of online services that allow multiple users to share content, are protected from such defamation claims by Section 230 of the Communications Decency Act (CDA). Under Section 230, service providers are not responsible for defamatory comments posted by others, so long as they do not entangle themselves in the creation of those comments by encouraging unlawful speech or heavily editing posts.

Ironically, the CDA's limitation of an online service provider's liability is actually meant to encourage them to police third party content. The law allows service providers to remove *some* offensive posts, without taking on an obligation to remove *all* such posts. Condominium associations have the flexibility to restrict whatever posts they think may be disruptive to the community, without the threat of legal action for allowing other posts to be shared. To avoid protests by frustrated unit owners, however, we recommend establishing clear guidelines for using online communication platforms. In addition to limiting liability and helping to preserve certain privileges, well-defined guidelines empower management to monitor posts and set expectations in the condominium community.

The same CDA protections apply to Yelp, Ripoffreport.com, Angie's List and other companies that operate websites that allow users to share comments in a public forum. If a unit owner uses Yelp to falsely accuse a management company of fraud or to vent about board's misconduct, the management company or board may have a claim against that unit owner for defamation, and may seek to unmask a person who comments anonymously. But defamation claims against Yelp for providing the forum in which that content is published (or for refusing to take it down when asked) will be barred by Section 230.

DON'T BRING A SLAPP SUIT

Property management companies can feel threatened by false and defamatory speech about their services, whether online or not. A company is only as successful as its reputation, and in the world where the first Google result can be an unfavorable review on Yelp or Ripoffreport.com, it can seem as if a company has no choice but to bring a lawsuit to try to "make it stop." But these suits aren't a piece of cake. In addition to the Section 230 issue described above, a defamation lawsuit may be subject to a state's law addressing Strategic Lawsuits Against Public Participation, called the "Anti-SLAPP" law for short.

The Anti-SLAPP law protects citizens' efforts to "petition" the government for redress of grievances. It makes lawsuits based on the exercise of the right of petition – broadly defined –subject to a special motion to dismiss that shifts the burden to the plaintiff. If allowed, a special motion to dismiss imposes an attorneys' fee award. As many libel plaintiffs have learned to their sorrow, the Anti-SLAPP law sweeps much more broadly than just to statements to authorities like the board of selectmen or the governor; among other things, it applies to claims based on statements made "in connection" with issues under governmental review, and any statement "reasonably likely to enlist public participation in an effort to effect" the consideration of issues by the government. Thus, if a unit owner complains on Facebook about the services of a property manager, and simultaneously files a complaint with the Consumer Protection Division of the Attorney General's Office, even a suit based solely on the Facebook post could be subject to an Anti-SLAPP motion. Jeff Pyle, in fact, represented the defendant in a case that resulted in the first-ever application of the Massachusetts Anti-SLAPP law to Facebook.

We urge condominium associations and management companies to be sensitive to potential liability for speech-based claims. Taking advantage of protections afforded by the CDA, establishing guidelines that govern online discussion platforms, and proceeding cautiously when responding to defamatory can help mitigate the risk associated with useful, but sometimes thorny, online discussions. ♦

Asya Calixto and Jeff Pyle practice at Prince Lobel Tye LLP. Asya concentrates her practice in media and intellectual property litigation and prepublication review. She can be contacted at acalixto@PrinceLobel.com. Jeff is a trial lawyer specializing in First Amendment, libel and media law issues. Jeff's email address is jpyle@Princelobel.com.

Flood insurance changes protect Cape property values

FEDERAL LEGISLATION DELAYS PREMIUM HIKES

BY CHRISTOPHER R. VACCARO

CHRISTOPHER VACCARO

The singer Patti Page sweetly assured that we would fall in love with old Cape Cod in 1957. Her prediction came true for homeowners and real estate investors. However, recent changes to the National Flood Insurance Program (NFIP) threatened this love affair, until Congress took action.

Cape Cod is blessed with sandy beaches, salt marshes and protective harbors. But the Cape is cursed with sudden storms that rearrange the shore and damage coastal property. The NFIP took effect in 1968, after private insurers excluded flood hazard coverage from their standard policies. The NFIP authorizes the Federal Emergency Management Agency (FEMA) to identify special flood hazard areas on flood insurance rate maps. The program discourages development in those areas, and flood insurance is not available through the NFIP. Unfortunately, flood insurance premiums often do not reflect actual risks of flood losses, with about 20 percent of policyholders' premiums being subsidized.

The NFIP pays out more in claims than it receives in premiums, and the federal government's general revenues are tapped to cover the difference. Taxpayers living outside flood zones effectively subsidize flood insurance premiums on many coastal homes, which often belong to wealthy individuals.

For decades the NFIP's losses were manageable, but its deficit ballooned to $24 billion after Hurricane Katrina and Superstorm Sandy. The program was taxed by flood damage to older structures built before the NFIP was adopted. Repetitive loss payments on high-risk properties ag-

See FLOOD INSURANCE, page 11

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Registered land is human, too

BY JOEL A. STEIN

JOEL STEIN

Two recent cases should cause conveyancers to view registered land in a slightly different light. In the first case, *Sullivan v. Kondaur*, a clearly defective assignment, accepted for registration, was challenged by the mortgagors and found to be deficient resulting in the subsequent foreclosure being void.

In the second case, *Martin v. Simmons Properties, LLC*, an easement shown on a Land Court plan between two registered owners was found to be subject to the restatement, which entitles the owner to the servient estate to make reasonable changes in the location or dimensions of an easement.

Massachusetts Appeals Court Case No. 13-P-706, a 2006 mortgage from the Sullivans to Mortgage Electronic Registration Systems Inc., was foreclosed in 2009.

The mortgage covered registered land and was assigned twice; the first assignment from Mortgage Electronic Registrations Systems Inc., as nominee for WMC Mortgage Corp. to Saxon Mortgage Services Inc. was dated May 21, 2008, and filed with said Registry District as Document No. 1092434. The Sullivans challenged this assignment, claiming that MERS' interest in the mortgage was "inherently invalid because it separated from the ownership of the underlying debt." The court acknowledged that though a foreclosing mortgagee must demonstrate an unbroken chain of assignments in order to foreclose a mortgage *Ibanez*, it must also demonstrate that it holds the note or acts as authorized agent for the noteholder at the time it commences foreclosure. However, nothing in Massachusetts law requires a foreclosing mortgagee to demonstrate that prior owners of the record legal interest in the mortgage also held the note each time it assigned its interest in the mortgage to the next holder in the chain.

The second assignment was from Saxon Mortgage Services Inc. to Kondaur Capital Corp. It was dated Feb. 12, 2009, and filed with said Registry District as Document No. 1107431. This assignment was executed for Saxon Mortgage Services Inc. by Natalie Flowers. There was no designation of her office or other capacity next to her signature. In addition, the paragraph preceding the execution read, "In witness whereof, Mortgage Electronic Registration Systems Inc., as nominee for WMC Mortgage Corp., has caused these presents to be signed by its duly authorized officer and its corporate seal to be hereunto affixed, this 12 day of December 2009." This clause was copied from the prior assignment.

In addition, the acknowledgment is by Natalie Flowers, individually. The acknowledgment and execution are clearly defective.

The court notes that the only reference to the status of the individual signatory in the second assignment, Natalie Flowers, as an officer of any kind of any entity is in the paragraph immediately preceding the signature block which recites that MERS has caused these presents to be signed by its duly authorized officer.

Concerning the acknowledgment, the court notes "nor can the notarial acknowledgment supply the missing evidence; it merely recited that Flowers acknowledged that she executed the assignment 'in (her) duly authorized capacity' without describing what that capacity might be, or with whom."

Kondaur further asserted that the Sullivans could not challenge the validity of its title by virtue of the issuance of a transfer certificate of title in its name prior to the commencement of the action.

The court notes that although the underlying purchase of title registration is to protect the transferee of a registered title, M.G.L. c. 185, §114 authorizes any registered owner or other person in interest to bring a motion to correct the certificate of title upon various grounds including "that any error or omission was made in entering a certificate or any memorandum thereof" provided that "nothing shall be done or ordered by the court which shall impair the title or other interest of a purchaser holding a certificate for value and in good faith."

The court concluded that in this case, they are not dealing with an innocent third party, as the foreclosing mortgagee, Kondaur, was required to establish its title to the mortgage by reference to instruments of assignment transferring the mortgage to it, following the Sullivans' conveyance of the mortgage to MERS in the first instance.

In the case of *Clifford J. Martin v. Simmons Properties, LLC*, 461 Mass. 1, the Supreme Judicial Court confirmed a Land Court decision that certain encroachments into an easement, defined by reference to a Land Court plan, did not interfere with the easement holder's rights to passage over the easement, in that the encroachments did not lessen the easement's utility for passage by vehicles much larger than any in existence at the creation of the easement, did not increase the burden on the plaintiff in his use of it, and did not frustrate the purpose of travel to the plaintiff's lot.

The plaintiff, Clifford J. Martin, was the owner of property designated at Lot 3A on Land Court Plan 6199J. According to the certificate of title, Lot 3A is "subject to and has the benefit of" various easements, including an easement for travel over Lots 4A, 10 and 12, as shown on the plan as "Way A."

The owner of Lots 4A, 10 and 12, Simmons Properties, LLC, made a number of alterations to the parcels which to some extent protrude into Way A.

In M.P.M. Builders, the Supreme Judicial Court adopted Section 4.8 (3) of the Restatement (Third) of Property Servitudes, which provides, "Unless expressly denied by the terms of an easement, as defined in §1.2, the owner of the servient estate is entitled to make reasonable changes in the location or dimensions of an easement, at the servient owner's expense, to permit normal use or development of the servient estate, but only if the changes do not (a) significantly lessen the utility of the easement, (b) increase the burdens on the owner of the easement in its use and enjoyment, or (c) frustrate the purpose for which the easement was created."

The decision includes an extensive discussion of the expansion of M.P.M. Builders to registered land. The court notes that there is nothing in the Land Registration Act to support a different understanding of the Law of Easements concerning registered land, as opposed to recorded land, and emphasizes the importance of public policy favoring productive use of land and in the resolution of conflicts among the parties to servitudes. ♦

A former association president and co-chair of the title insurance and national affairs committee, Joel Stein can be contacted at jstein@steintitle.com. He is available to respond to questions about mortgage foreclosure practice and procedure.

Point-counterpoint in condominium law and practice

BY SAUL J. FELDMAN

SAUL FELDMAN

At the recent Sixteenth Annual Conference on Real Estate Law (2014), sponsored by MCLE, Clive Martin and I delivered a presentation on representing condominium developers versus representing condominium associations.

In this article, I am going to summarize some of my thoughts on representing condominium developers.[1] I am deliberately being provocative and aggressively pro-developer in this article. In the next edition of *REBA News*, Clive will respond from the point of view of the condominium association.

DEVELOPER CONDUCT

The Massachusetts Condominium Statute, Chapter 183A, is merely an enabling act. Matters not prohibited by Chapter 183A can be left to the developer and his consumers – i.e., the unit purchasers. If a potential buyer does not like the condominium documents, he need not buy. As long as the developer owns any unit in the development, the developer needs broad discretion in order to build and market units. "Absent overreaching or fraud by a developer, we find no strong public policy against interpreting Chapter 183A, Section 10(a), to permit the developer and unit owners to agree on the details of administration and management of the condominium unit." *Barclay v. DeVeau*, 384 Mass. 676, 682 (1981).

METHOD OF ORGANIZATION OF ASSOCIATION OF UNIT OWNERS

Because of its wide use in Massachusetts, a trust is usually used. I advise my developer clients to use a limited liability company (an LLC) as the initial trustee of the condominium trust. A separate LLC should be created for each development. If used properly, the LLC will protect the developer from any personal liability. It is not easy to pierce the corporate veil. As trustees are fiduciaries, other forms of association may have a lower level of responsibility. For example, a developer may prefer an unincorporated association with a developer controlled LLC as the sole initial manager until the turnover date.

PHASING

Developers like phasing because it allows developers flexibility in building and marketing the units over time. I believe that the developer can vote the percentage ownership interests of the units which are not yet built and phased in as long as the master deed clearly provides for this. The developer should be able to retain control of the association until all of the units are built and conveyed.

DEVELOPER'S RESERVED RIGHTS

Developers want broad reserved rights because parking and laundry are lucrative and because rooftop rights allow for the development of additional floors. If the condominium documents are drafted properly, a condominium association can and should be entirely cut out of this lucrative area.

CERTIFICATES OF OCCUPANCY

I sometimes suggest that my clients consider adding the following to the condominium declaration of trust:

"No unit owner, including the declarant as a unit owner, shall be liable for the payment of common expenses or special assessments with regard to any unit so owned until such time as a certificate of occupancy for the unit is issued."

However, in a Trial Court decision *Diggs v. Trustees of Whispering Pines Condominium*, 31 Mass. L. Rep. 618 (Superior Court 2014), the court held that the developer is liable for condominium fees on each unit from the date of recording of the master deed to the date of sale of the unit. As this is only a Superior Court decision, I would still recommend the above quoted clause until and unless the decision is affirmed on appeal.

The quoted clause may or may not be enforceable. However, provisions of Chapter 183A may be waived incident to a legitimate dispute and a legitimate settlement agreement. *Scully v. Tillery*, 456 Mass. 758 (2010). Therefore, if this provision should become the subject of a settlement agreement, it might well be enforceable under *Scully*.

ANTI-LITIGATION PROVISION

The condominium documents can provide that the lawsuit must be approved by a super-majority (e.g., at least 75 percent of the unit owners. Also the association must get the approval of a litigation budget by a super-majority of the unit owners. In my opinion, these provisions are enforceable even though they may protect the developer from suits for construction defects. There is no case law in Massachusetts that allows an association to begin a lawsuit and spend unlimited

See CONDO LAW, page 9

SJC: OPEN SPACE EXEMPT FROM PROPERTY TAX

CONTINUED FROM PAGE 1

it is a duly organized charitable corporation, that the organization's stated purpose or mission is conservation or environmental protection, that it has in fact operated as a public charity, and encourage obtaining formal federal IRS tax-exempt status if not already.

Second, be sure that the subject land is "occupied" in a manner consistent with your client's charitable purpose.

Third, urge your client to provide responsible recreational and educational opportunities on its land wherever and whenever practicable, in view of your client's charitable purpose or mission and consistent with the land's environmental sensitivity.

Fourth, be aware of the SJC's "heightened burden" if your client excludes the public from its land.

Finally, counsel your client to foster cooperative relationships with local government (including but not limited to conservation commissions, board of selectmen or manager, town meeting or city council, assessors, finance committee and open space committees) to identify mutual conservation goals and find opportunities to collaborate in public-private partnerships to save land that needs protection. ♦

Luke Legere is a member of REBA. He and Gregor McGregor of McGregor & Associates in Boston were counsel in *NEFF v. Hawley* for amici Massachusetts Association of Conservation Commissions and the Compact of Cape Cod Conservation Trusts. Legere may be reached at llegere@mcgregorlaw.com.

MEDIATION PANEL

CONTINUED FROM PAGE 1

as mediation in business and real estate disputes of all kinds. He specializes in real estate law, both residential and commercial. He possesses experience in land trust, conservation and ground lease transactions, and has represented multiple clients in closing extensive tax credit projects.

Singer was trained as a mediator in 1995 at the Mediation Training at Harvard law School Program of Instruction for Lawyers, in 1997 at the Franklin Mediation and Training Collaborative and in 2013 at the MCLE Mediation Training in Boston.

Singer's mediation skills have been effective in settling school contracts; creating a new charter, changing Greenfield's governance from a board of selectmen to a mayoral form of government; zoning changes; and ongoing issues involving city government. He served on the Franklin County Mental Health Board for four years, two as president; Greenfield School Committee in Greenfield for six years, two as chair; the Zoning Board of Appeals in Greenfield for three years; the Charter Commission for one year; the Executive Committee of the Franklin County Bar Association, two years as president; and the Greenfield City Council for six years, two as president. ♦

REBA WOMEN'S NETWORKING GROUP MEETS IN ESSEX COUNTY

CONTINUED FROM PAGE 1

The REBA Women's Real Estate Networking Group hosted its June reception in Essex County. Lauren Stiller Rikleen was the group's guest speaker. A former president of the Boston Bar Association, Rikleen discussed her recent publication, "You Raise Us – Now Work with Us: Millennials, Career Success and Building Strong Workplace Teams," an insightful volume of managing generational differences in the workplace with a particular focus on the generation known as Millennials. Former REBA board member Mary Ryan introduced Rikleen. The networking group is a signature initiative of REBA President Michelle Simons, who hosted the reception. The group hopes to hold a late summer reception on Cape Cod. ♦

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Navigating the new compliance world

LAND COURT RULES AGAINST TOWN

BY RICK DIAMOND AND KELLEY SHELLHAAS

RICK DIAMOND

KELLEY SHELLHAAS

Traveling the country, talking about the Consumer Financial Protection Bureau's (CFPB's) rules and regulations, we've been hearing a lot from title insurance agents about their efforts to cope with a new, more complex and infinitely more challenging regulatory environment.

Some of the immediate challenges stem from the CFPB's directives making lenders responsible for the actions and compliance lapses of title agents and other third-party vendors. Title agents (many of whom are attorneys) know lenders are requiring them to meet rigorous compliance standards, and many are overwhelmed by that task – uncertain about exactly what lenders will be demanding from them and worried about their ability to meet those demands. The questions they ask most frequently:

"How do I create the kind of compliance program lenders want to see?" "How do I implement a compliance program, once I've created it?" "Where can I find the help I need to accomplish these tasks?"

WFG has responded to those questions by creating an online compliance management system (CMS) for its agents. It's a soup-to-nuts program that takes agents step-by-step through the process of creating a compliance program, implementing it and keeping it up-to-date. We think the model we've created will work well for all agents trying to navigate their way through the compliance maze.

CREATING A COMPLIANCE PACKAGE

Our system is built around a library of compliance policy templates and related material agents can use to create their own compliance package. Once created and implemented, this compliance program can become an effective marketing tool agents can use to distinguish themselves from their competitors.

Whether they use WFGs CMS, tools provided by other underwriters, or programs they design themselves, agents have to develop a compliance management program. It is a business necessity today.

IMPLEMENTATION

Creating a compliance package alone won't make agents compliant, however. Lenders will have "boots on the ground" – literally. They will be visiting title agencies, examining their operations and asking them to demonstrate the compliance policies and proficiencies they claim. Lenders will ask agents to "prove what you say you do" (a

See COMPLIANCE, page 10

Swampscott case illustrates perils of spot zoning

LAND COURT RULES AGAINST TOWN

BY CHRISTOPHER R. VACCARO

CHRISTOPHER VACCARO

From time to time, cities and towns must dispose of obsolete municipal buildings, usually by sale or redevelopment. A recent Land Court case out of Swampscott is instructive as to how municipalities should not go about this task.

In *McLeod v. Town of Swampscott*, the Land Court scrutinized the rezoning of a vacant school property from a single-family residential district to a "planned development district." The two-acre property sits atop a hill overlooking the Atlantic Ocean, among single-family homes. The original schoolhouse was built in 1893 and has historical significance.

After considerable study, the town decided to sell the property to a private developer in a manner that would maximize the sales price and future tax revenues. The town singled out the property for rezoning, allowing the developer to build by right 41 residential units up to 60 feet high, without special permits or historical, age or affordability restrictions. The developer planned to demolish the entire building, including the historic schoolhouse, to make room for a multifamily project.

The abutters took umbrage, concerned about traffic impacts on their thickly-settled neighborhood with steep and narrow hillside roads. They filed suit in Land Court, arguing that the town's rezoning was impermissible "spot" zoning in violation of the Massachusetts Zoning Act. The Zoning Act requires that zoning districts be "uniform within the district for each class or kind of structures or uses permitted."

COURT RULES IMPERMISSIBLE SPOT ZONING

The Land Court agreed with the abutters. The court cited the seminal 1943 case *Whittemore v. Building Inspector of Falmouth*, where the Supreme Judicial Court ruled that "a singling out of one lot for different treatment from that accorded to similar surrounding land," solely for the economic benefit of a single property owner, is impermissible spot zoning. The Land Court noted, however, that lots can be singled out for less restrictive treatment to promote the public welfare.

The town of Swampscott insisted that its rezoning advanced the public welfare, because the rezoning would diversify local housing options, creating smaller dwelling units for Swampscott's "empty-nesters" seeking to downsize. The court was unimpressed, noting that the rezoning lacked an elder housing component. Swampscott had in fact rejected such a component, in favor of augmenting the property's sale price and tax revenues. Alternatively, the town argued that increasing the town's revenues, by itself, advanced the public welfare and legitimized the zoning change. The court disagreed.

The court acknowledged that zoning bylaws are presumed to be valid, but cautioned that judicial deference and restraint are not an abdication. According to the court, if the rezoning had required the developer to preserve the historic schoolhouse or to set aside dwellings for lower-income or elderly buyers, the rezoning may have passed muster. However, zoning changes designed solely to maximize the town's economic return, without land use objectives tied to the public welfare, are invalid. For these reasons, the court ruled for the abutters, and ordered that the zoning change be stricken from the Swampscott zoning bylaw.

Although it decided against the town, the court offered guidance on avoiding future spot zoning challenges. Swampscott can return to the drawing board and draft a zoning change with historical preservation requirements and set-asides for elderly or low-income housing. It can also add a special permit requirement with easily satisfied conditions. Such changes should make the rezoning more palatable to the courts, but the resulting multifamily development, no matter how much it promotes the public welfare, will probably remain objectionable to the neighbors. ♦

Christopher R. Vaccaro is a partner at Looney & Grossman LLP in Boston. His email address is cvaccaro@lgllp.com.

Congratulations to former REBA President and (REBA Dispute Resolution mediator) Mike Healy, who graduated on May 17 from Andover Newton Theological Seminary, where he received a master of divinity degree. Mike, pictured here on graduation day, is surrounded by his 11 grandchildren, ages ranging from two to seven.

CONDO LAW

CONTINUED FROM PAGE 6

sums in litigation without the approval of a super-majority of the unit owners both before and after the transition from developer control. It is understandable, of course, that litigators representing associations do not like anti-litigation provisions!

CONDOMINIUM CONVERSIONS

In a conversion, my developer clients want the purchase and sale agreement to state:

- That the sale is "as-is";
- That there is an inspection period during which time the deposit is refundable;
- That after the expiration of the inspection period, if the buyer has not cancelled the deal, the deposit is non-refundable and the buyer must close, absent default by the seller;
- In the event the buyer fails to close, the seller may elect specific performance or monetary damages; and
- The seller is not limited to liquidated damages.

CONCLUSION

I submit that a condominium regime is a mini government. However, I also submit that the response of "you don't have to buy a unit here" will prevail in court, as long as the judge has a good understanding of Chapter 183A and of the extensive body of common law which has been created since 1963 when Chapter 183A became the law in Massachusetts.

In representing a developer, the objectives in drafting condominium documents are to maximize marketability and to minimize liability. The documents should be flexible and balanced as long as the developer is protected. The documents must fit the particular project and comply with Chapter 183A.

Good documents should be easy to understand and balance the interests of the developer and the unit owners. At such time as the developer has sold all of the units, the association may amend and restate the documents. Until then, the developer has to be protected so that he can build and market the units free from interference from the unit owners.

Sometimes, a developer client wants the documents to be aggressively pro-developer. This is true in the current market which clearly favors sellers.

I suspect that Clive Martin may not agree with much of what I have said. However, Clive is quite able to state his views. To learn Clive's views, you will have to wait until the next edition of *REBA News*. ♦

1. As Sasha said to Yvonne in *Casablanca*: "Yvonne, I love you dearly, but he" (i.e., Rick) "pays me!"

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.

CHAPTER 40R

CONTINUED FROM PAGE 2

percentage higher than the one achieved by the 2013 World Champion Red Sox.

Third, the stable of experienced practitioners is slowly growing. The 10th anniversary roundtable included real-life stories from both for-profit and nonprofit developers who had successfully utilized both developer driven and municipally driven Chapter 40R districts. Nothing succeeds like success.

Finally, Chapter 40R links housing development to existing infrastructure in a way that should assure it of continued support across the political spectrum. It seeks to maximize the return on existing infrastructure investments, which in turn helps to relieve development pressure on open space areas that may be deserving of protection.

Without sounding like an apologist, there are still many reasons to believe that brighter days are ahead for Chapter 40R.

AN INNOVATIVE LAND-USE FRAMEWORK

For Chapter 40R then, the future still seems bright. Absent some form of "grand bargain" on zoning reform, it will remain the most innovative land-use framework available within the commonwealth. The hope is that the number of municipally driven Chapter 40R districts will increase, as stories about what is happening in places like Haverhill spread.

Haverhill has seen the addition of 362 housing units, while the city has received almost $3.4 million in state funding when Chapter 40R incentive payments, density bonus payments and state financial support for an intermodal parking facility are combined. Chapter 40R's 10-year anniversary provides an excellent opportunity for an incoming administration to both look back at what has worked and to look ahead to identify the techniques that will help foster these larger, municipally-driven districts that can be truly transformative.

Massachusetts continues to rank woefully low when compared to other states in terms of new housing starts (especially outside of the metropolitan core area). If we are to remain competitive, we are simply going to have to get better at utilizing the opportunities afforded by Chapter 40R. We need to keep practicing. ♦

Bob Ruzzo is a senior counsel at Holland & Knight. He was the chief operating officer and deputy director of MassHousing from 2001 to 2012. He may be reached at robert.ruzzo@hklaw.com.

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NAVIGATING THE NEW COMPLIANCE LANDSCAPE

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quote taken directly from a recent lender review of a title operation). If agents say they have a clean-desk policy, they must be prepared to deliver a written description of it and demonstrate that employees are adhering to it. That dictate applies across the board: Agents must document and demonstrate (where appropriate) every policy and procedure they claim.

No one can be 100 percent certain what every lender will require; no compliance program, however robust and well-designed, can guarantee an A+ on every lender audit. But creating a compliance package will position agents well for these audits by documenting their compliance policies and their commitment to compliance overall. To have a workable compliance program, agents will also have to:

- Educate themselves about compliance issues and requirements.
- Communicate their policies consistently and clearly to their employees and provide compliance training to them.
- Integrate their compliance policies into the company's daily operating procedures and its culture – "walk the walk," not just "talk the talk."
- Enforce their policies through a monitoring system.
- Review their compliance program regularly and correct any weaknesses or deficiencies they find.

- Update their compliance program as needed to reflect changes in regulatory requirements and lenders' standards.

Any compliance system agents create must have the capacity to achieve all those goals.

ASSISTANCE TOOLS

We designed the WFG CMS platform to provide the resources agents need not just to create a compliance program, but also to implement it. The implementation piece will require an array of technologies and services addressing specific compliance requirements in critical areas, such as data storage and destruction, email encryption, office security and disaster recovery, to name just a few.

There are many vendors offering myriad products and services today and choosing among them is part of the compliance challenge. Agents have to ensure that they are dealing with reputable, reliable vendors who understand the title industry and its compliance requirements. Underwriters should be able to help their agents identify the compliance solutions they need and to help vet the vendors providing them.

A JOURNEY, NOT A DESTINATION

When we talk to agents about compliance, we emphasize that it is a continuing journey, not a final destination. You don't get to a given compliance position and stop. Compliance rules and regulations will change, and keeping up with those changes – in compliance requirements and technologies – is a key component of the compliance effort.

But all journeys, even continuing ones, begin with a first step. And having a CMS in place gives title insurance agents a tremendous start on the compliance road along with the peace of mind that comes from knowing they are moving in the right direction. A well-designed CMS will also give agents a huge edge on competitors who are still wondering how and where to begin. ♦

Rick Diamond is senior vice president for IT and agency operations at WFG National Title Insurance Company. Kelley Shellhaas is assistant midwest underwriting counsel for the company. Diamon may be reached at rdiamond@wfgnationaltitle.com

INSURANCE UPDATES PROTECT CAPE PROPERTIES

CONTINUED FROM PAGE 5

gravated the problem.

In response to this flood tide of red ink, Congress passed the Biggert-Waters Flood Insurance Reform Act of 2012. This legislation required steep annual increases to flood insurance premiums on many subsidized properties, and would have ended insurance subsidies on properties when sold to new owners. The legislation pushed FEMA to update flood insurance rate maps, placing properties thought to be safe from flooding into special flood hazard areas. The changes to FEMA's flood maps would have especially impacted the town of Dennis, with about 4,000 homes added to flood zones.

Higher premiums and expanded flood zones presented a double whammy that threatened Cape property values. After unanimously backing the Biggert-Waters Act, Massachusetts' congressional delegation reconsidered, and sought to mitigate the law's effects. Rep. Bill Keating, representing the South Shore and Cape, challenged FEMA's remapping methodology.

To forestall negative impacts of the Biggert-Waters Act, Congress passed the Homeowner Flood Insurance Affordability Act of 2014, which the president signed into law in March. This legislation delays major premium increases and implementation of FEMA's new maps, while FEMA develops a plan to make premiums more affordable. Some policyholders can recover premium refunds for policies purchased since 2012. The law also compensates homeowners who successfully appeal FEMA's new maps that place their properties in flood zones. Sellers of subsidized homes may pass along their lower premium rates to buyers, thus protecting property values which might have dropped if buyers had to pay full-risk premiums. The legislation also imposes annual $25 insurance surcharges on primary residences, and $250 surcharges on other properties, to add fiscal stability to the program.

The Homeowner Flood Insurance Affordability Act is a rare instance of bipartisan cooperation in Washington. The legislation recognizes the NFIP's snowballing deficits, then offers a long-term solution without immediately foisting draconian premium increases on coastal property owners. This approach should sustain Cape property values, while allowing premiums to gradually rise over time, eventually eliminating subsidized flood insurance.

With the Homeowner Flood Insurance Affordability Act now in the books, our love for the Cape continues, as does the Cape's robust real estate market. ♦

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Cambridge And Somerville Illustrate Housing Market Deficiencies

LACK OF INVENTORY CAUSING PRICES TO SKYROCKET, EVEN AS SALES DROP OFF

BY COLLEEN M. SULLIVAN

The incredibly tight inventory in some Boston metro markets is squeezing buyers like a cheapskate with a nearly empty tube of toothpaste, and as prices rise in some of the most desirable towns, it appears more sales are being rolled up into neighboring communities.

A comparison of Somerville and Cambridge perhaps best illustrates the tale. Both cities attract similar buyer demographics, and have already surpassed their 2005 price peaks (the Bay State housing market as a whole reached its highest prices in September 2005).

"Both markets are hot. They were hot last year, they're hot this year. There's no change there – in fact, if there's any change, they're both hotter," said Charles Cherney, an agent with Hammond Real Estate in Cambridge.

But though buyer demand is high in both places, inventory has been slightly more abundant in Somerville, and that's all it takes to hugely up drive sales, even as Cambridge sales have nosedived compared to last year.

In Cambridge, through the first five months of the year, the median single-family home price in Cambridge rose 14.1 percent, from $854,000 to $975,000, while the median condo price rose 15.8 percent, from $475,000 to $550,100. Meanwhile, sales of single-family homes decline 36.5 percent, from 52 to 33, while condo sales dropped 30.6 percent, from 3017 to 213.

In contrast, in Somerville, the media single-family home price was nearly flat, going from $520,500 through the first five months of 2013 to $520,000, a dip of 0.1 percent, for the same period in 2014. Median condo prices rose sharply, however, going from $399,000 in the first five months of 2013 to $491,500 through the first five months of 2014. But unlike in Cambridge, Somerville sales have largely kept pace. While single-family sales were about on par with last year – 26 so far in 2014, compared to 30 at the same time in 2013 – condo sales have skyrocketed, going from 126 through the first five months of 2013 to 182 through the same period this year, an increase of 44.4 percent.

"I've been doing this for 30-odd years, and I've never seen it like this. It's just such a severe inventory shortage," said Donald Norton, broker/owner of The Norton Group in Somerville. "We had a house on Albion St. here in Somerville that had been in a family for 60 years. You could live in it, but [it needed work]. It was on the market for $500,000, and sold for $540,000. We had 70 people at the open house, on a Saturday, and six offers by Monday night."

CAN'T BUY, WON'T SELL

The logjam that has long plagued the market has intensified, with many existing owners who would otherwise be inclined to sell reluctant to list their current homes for fear of either losing their current low-interest rate mortgages or not being able to find a suitable new place in today's tight market.

"The only people who really are selling are estate sales," said Norton. "If you're living in your house and looking for a new one, you're going to be out there in the market," often competing against cash buyers prepared to go well over asking price.

It's not just Somerville and Cambridge where the inventory crunch is getting desperate. There are indications that as people are being priced out of more desirable locations, cheaper alternatives are getting a boost. While Charlestown has seen condo sales dip 22.7 percent through the first five months of the year, from 110 to 85, condo sales are up 257 percent in East Boston, more than doubling from 14 to 50.

"Most of the buyers that I've talked to are being priced out of Somerville, and looking to Medford and Malden," said Norton. "Everywhere you go – Malden is now on fire, Woburn, even Chelsea. We had a house in Lawrence which was only on the market for two weeks, an extraordinarily short period of time." ♦

Colleen Sullivan is a staff writer for The Warren Group, publisher of REBA News. She may be reached at csullivan@thewarrengroup.com.

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