The Lawyers' Counsel:
Legal malpractice
PAGE 5

The Women's
Lunch Place
PAGE6

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SJC considers municipal foreclosure ordinances

BY JOEL A. STEIN

JOEL STEIN

Four municipalities in Massachusetts – Lynn, Lawrence, Springfield and Worcester – have adopted city ordinances mandating lenders to engage in pre-foreclosure mediation with homeowners and to provide a cash bond to the city at the start of a foreclosure.

The Springfield ordinance became effective in September 2011 and added as amendments to Title 7 of the Code of the City of Springfield a revised Chapter 7.50, "Regulating the Maintenance of Vacant and/or Foreclosing Residential Properties and Foreclosures of Owner Occupied Residential Properties." It also added a new Chapter 7.60, "Facilitating Mediation of Mortgage Foreclosures of Owner Occupied Residential Properties."

The Springfield foreclosure mediation ordinance was the first of its kind in Massachusetts. As is the case in other Massachusetts municipalities, the mortgagee must be physically present unless a telephone conference is agreed to by the mortgagor. The Springfield mediation provisions require the conference to commence within 45 days of the mortgagor receiving the right to cure pursuant to M.G.L. c. 244, § 35A (g) and (h). The mortgagee faces a fine of $300 for every day of noncompliance up to $45,000. However, the city has not yet implemented its foreclosure mediation program.

Further, a $10,000 bond is required for vacant and/or foreclosing properties owned or controlled by the lender. The lender must give notice to the building

See ORDINANCES, page 8

Talking trash recycled (again)

GUIDELINES FOR RETENTION AND DESTRUCTION OF CLIENT FILES

BY CONSTANCE V. VECCHIONE

CONNIE VECCHIONE

Editor's Note: This article first appeared on the Massachusetts' state government's website.

In 2001, bar counsel posted an article on this website entitled "Talking Trash – Recycled," (www.mass.gov/obcbbo/trash2.htm), which itself was an update of a 1998 article called "Talking Trash." The 2001 article began as follows:

"'How long do I have to keep those closed client files stored in the attic of my garage?' A lawyer in fear of an imminent collapse of the garage rafters recently posed this question to bar counsel. Some of the boxes of closed files had been in that attic for years. The lawyer was planning to start to dump the oldest of the files in the town recycling bin each week to lighten the load for the garage. This plan might keep the garage standing, but it could create a new problem with the lawyer's former clients or bar counsel."

More than 12 years after that 2001 article, the problem is still a frequent source of inquiries to the Office of Bar Counsel, not only from active or retired lawyers seeking to dispose of old files, but, more problematically, from personal representatives of lawyers' estates and from landlords or storage companies saddled with files of deceased attorneys for whom there is no estate.

The advice given in the earlier article still stands. A lawyer who is entrusted with the property of a client has the following obligations with respect to its disposition: (1) valuable client property must be promptly

See FILE RETENTION, page 6

SJC decision permits solicitation of nominating signatures at supermarket entrances

BY JOSHUA M. ALPER AND SANDER A. RIKLEEN

Owners and operators of supermarkets and other commercial property in Massachusetts should be aware that on Oct. 10, the Supreme Judicial Court announced its decision in *Glovsky vs. Roche Bros. Supermarkets, Inc.*, SJC-11434, which allows a candidate for public office to solicit nominating signatures at a supermarket entrance, even a solo site supermarket which does not operate as part of a shopping center or mall. The decision expands on the court's 1983 decision in *Batchelder vs. Allied Stores, Inc.*, 388 Mass. 83, which allowed solicitation of nominating signatures in the common areas of a large shopping mall, subject to reasonable regulations imposed by the mall owner.Deciding the case upon review of a motion to dismiss, the court

A recent SJC decision declares supermarkets the new town square. Roche Bros. was at the center of the case. Above, the store in Natick.

articulated the following key points:

"Glovsky … has [adequately] alleged a right under article 9 [of the Massachusetts Declaration of Rights] to solicit nominating signatures on the private property outside the entrance to Roche Bros.' Westwood supermarket."

"Glovsky seeks only the right to engage in 'unobtrusive and reasonable solicitations' outside the store entrance. Nothing in the … record before us suggests that the proposed, presumably brief, interactions with shoppers as they enter or leave the supermarket would interfere with Roche Bros.' use of its property."

"Roche Bros. could post signs in the area disavowing any association with potential political candidates . … Additionally, Roche Bros. could prevent those soliciting signatures from harassing its patrons and impairing its commercial interests by prescribing reasonable restrictions on the location, time, and manner in which the nominating signatures may be sought."

"[N]othing in the record suggests that unobtrusive signature solicitation, subject to such reasonable restrictions as Roche Bros. may prescribe, would impair Roche Bros.' commercial interests. We conclude that Glovsky plausibly

See GLOVSKY, page 2

IN MEMORIAM

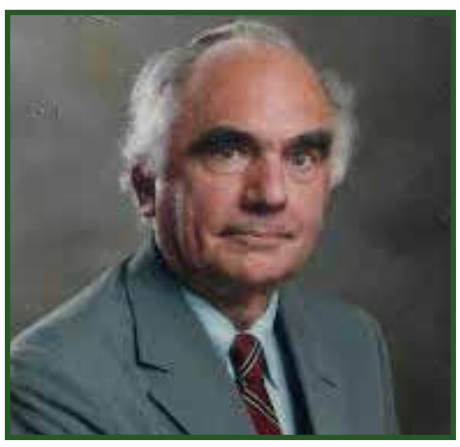
Remembering Lou Eno

BY PETER WITTENBORG

Former REBA President Arthur L. Eno Jr., known to all as Lou, died on August 6. He was born in Lowell on April 27, 1924, a stone's throw from where he grew up, overlooking the Merrimack River in the city he loved.

As the firstborn son of Arthur L. Eno Sr. and Claire (Lamoureux) Eno, his first language was French. He attended St. Joseph Grammar School and Keith Academy in Lowell, and his childhood buddy was Jack Kerouac, another of Lowell's Franco-American sons.

While Jack's destiny was to leave Lowell, Lou's destiny was to stay. Except for college and the war, he never lived more than 20 minutes from the city. Gifted with a strong



LOU ENO

intellect and an indomitable work ethic, he was accepted into Harvard at age 14. At the suggestion that he perhaps prepare a bit more socially for a college environment, he took an additional year of studies at Phillips Academy in Andover.

Never one for dawdling, he completed his undergraduate classics degree in three years; served in the Signal Section of the Army in Morocco, Italy, France and Germany for three years (he was in Paris at the end of the war); spent a year studying at the Sorbonne; and returned to enter Harvard Law School, which he completed in just over two years.

After admission to the Massachusetts Bar in 1948, he became an assistant professor of law at Northeastern University at age 24, just as he was opening his own private law practice in Lowell. Then, for the next 53 years, he commuted every day to the same

See LOU ENO, page 3

MESSAGE FROM THE PRESIDENT

An evolving bar association

BY MICHELLE T. SIMONS

MICHELLE SIMONS

This year I was delighted to serve at REBA's helm, navigating the currents and shoals swirling about today's real estate world, while having a hand in reshaping and growing of this nearly 150-year-old bar association.

During my time as president, REBA has launched several new initiatives and committees, in addition to focusing on our core goals – assisting real estate practitioners, patrolling the unauthorized practice of law and advancing important legislation, while building and strengthening our membership

We launched the Women's Networking Group of Real Estate Professionals in January. The association and its members welcomed this new women's group, REBA's first effort with inter-professional networking as its primary mission. The group drew women from throughout the real estate arena, including brokers, bankers, appraisers, engineers, surveyors, title insurance folks and many others. We hosted four successful receptions, two in Boston and one each in Needham and Lawrence. A range of 60 to 90 attendees participated in each reception – many women and some men, who are, of course, always welcome at these networking events. We plan to expand this group in 2015 and the years following.

Another wonderful initiative emerging this year was our New Lawyers Committee, co-chaired by Kendra Berardi of Robinson & Cole LLP and Dave Uitti of Marcus, Errico, Emmer & Brooks P.C. Their leadership and enthusiasm brought immediate success. They hosted both well-attended networking receptions as well as more focused educational programs. The goal of this rapidly growing committee is to provide new lawyers with the practice information and knowledge they needs while supporting and advising them as they develop and maintain new clients.

Our Long Term Planning Committee, co-chaired by Paul Alphen of Alphen & Santos P.C. and Chris Plunkett of Christopher Plunkett PC, has assumed an energized role this year. My successor, Tom Bhisitkul, will work closely with this committee in the coming year, developing new initiatives for expanded benefits and essential member growth.

This year has also brought the re-launch of our Paralegal Committee, with our capable chair, Jackie Waters Adams.

Our many other committees each focused on a specialty or concentration of real estate law and practice, hosted many open meetings this year. These segment-focused groups, open to all REBA members, are one of REBA's core member benefits, educating and informing our members of the ongoing changes and new developments within each particular practice area.

REBA understands the importance of keeping all of our members up-to-date with the latest developments within their specific practices, and we know that these open meetings are a great vehicle for meeting this challenge. Every day we strive to help lawyers and other real estate professionals across the commonwealth become the best informed practitioners in their fields.

Here at REBA, we strive to be the preeminent resource for our members to conveniently access the latest information and developments in their fields. Our always well-attended twice-yearly, all-day conferences attest to this commitment to excellence In the years ahead we will continue to secure top speakers and faculty to lead the breakout sessions at the conferences.

As a part of our community outreach mission, REBA has affiliated with the The Women's Lunch Place (WLP), a women's daytime shelter in Boston. The WLP provides a safe, comfortable sanctuary, serving lunch (and breakfast!) and offering many other services to poor, battered or homeless women. Their goal is to cultivate a community with resources devoted to meeting each woman's needs. Our members will collect seasonal sought-after items to donate to the shelter including winter gloves, hats and scarves. We have chosen WLP to be REBA's charity of choice for 2015 and will continue to assist WLP with their core mission. We hope that our members will generously volunteer their time to this charity, as they have generously given to others in the past.

This has been an exciting and productive year for me and for REBA. I am thrilled to have been a part of the many invigorating ideas and initiatives. Of course I have not navigated these waters alone. The phrase "it takes a village" best expresses my presidency at REBA. An amazing group of people have contributed to my presidency this year. I want to first thank the remarkable group of women who are part of the immediate past and current board of directors. These ladies have worked tirelessly to enable the inauguration and growth of the Women's Networking Group of Real Estate Professionals.

I thank the entire REBA staff – Peter Wittenborg, Nicole Cunningham, Bob Gaudette, Andrea Morales, Ed Smith and Mark Gagne – who comprise the incredible team keeping our association on track. I must also thank my partners at Brecher, Wyner, Simons, Fox & Bolan LLP. Their patience and understanding have enabled me to serve the association's president this year, and to continue to serve in the future.

As I conclude my year as president of REBA, I take with me many wonderful experiences, memories, new friends and colleagues, and for that I am eternally grateful. I wish all the best to 2015 President Tom Bhisitkul. I know he will be a strong and dynamic helmsman.

It has been an honor and a privilege to serve as your president. ♦

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.

SJC RULES ON *GLOVSKY*

CONTINUED FROM PAGE 1

JOSHUA ALPER

SANDER RIKLEEN

has alleged a right under article 9 to solicit nominating signatures on the private property outside Roche Bros.' Westwood supermarket."

The decision is based on the court's finding that in "many rural and suburban communities, the local supermarket may serve as one of the few places in which an individual soliciting signatures would be able to approach members of the public in large numbers." The court rejected the argument that "privately owned area immediately outside the entrance to such a supermarket differs … from the common areas of a shopping mall or shopping center." The decision is limited on its face to operating supermarkets, as opposed to retail stores generally, in recognition of the multiplicity of services and retail merchandise provided by modern supermarkets, which "in many communities would be dispersed among several shops along a public way."

Justice Robert J. Cordy dissented, taking the position advanced by Roche Bros. and the amicus brief filed by New England Legal Foundation, the Real Estate Bar Association and groups representing other commercial property owners, arguing that the majority decision " significantly expands the scope of the right afforded by article 9 of the Massachusetts Declaration of Rights at the expense of the rights of countless commercial property owners across the commonwealth. In so doing, its reasoning departs not only from the cautious analysis employed in *Batchelder v. Allied Stores Int'l, Inc.*, 388 Mass. 83 (1983), but also from the overwhelming national consensus on the proper balancing of rights where a limited right to solicit signatures on private property is recognized. By failing to recognize the enormous differences between large shopping complexes that duplicate traditional downtown functions and free-standing stores selling multiple products, the court completely undoes the intended balance between the rights of property owners and the rights of those whom they invite to use their property, and creates serious consequences for property owners who miscalculate their obligations despite their best intentions."

Beyond the obvious burdens this decision places on supermarket owners and operators to formulate appropriate rules and requirements, and to be alert to and monitor such activity, the decision creates uncertainty as to its intended scope. For example, grounded on its finding that in rural and suburban communities, the local supermarket serves as a kind of town square, one wonders whether this decision also applies to Wal-Mart, Costco and other so-called club stores which contain large grocery sections and a multiplicity of services and retail merchandise, or to supermarkets located in a densely developed urban area, which may not be served by an immediately adjacent parking lot, or a wide sidewalk – creating the real possibility of constricting or obstructing the supermarket entranceway. ♦

REBA member Joshua Alper is a partner in the real estate department at Sherin and Lodgen LLP and co-chair of the firm's environmental practice group. He may be reached at jmalper@sherin.com. Sander A. Rikleen is a litigation partner at Sherin and Lodgen LLP. He may be reached at SRikleen@sherin.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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COMMENTARY

I won't stay in a world without love

PAUL F. ALPHEN

PAUL ALPHEN

Like you, recently I have been faced with too many title examinations that contain cockamamie failed attempts at mortgage assignments and mortgage discharges. We have all seen the mortgage assignments that are executed by persons or entities that either never held the underlying mortgage or held the mortgage two assignments ago. Recently, I was faced with an assignment that, if taken literally, assigned the mortgage to two different entities.

With all due respect to the good people in the world of secondary mortgage market financing, I am grateful that those same people are not conducting real estate closings in Massachusetts (or Georgia, and other states). During the past decades of battling against the unauthorized practice of law, REBA (and the MCA before it) endured its own internal struggles regarding role that a bar association should take in policing the closing process. There were those who felt that it was plainly inappropriate for REBA to bring suit against agents of lender, and some others thought that we were biting that hand that feeds us. The majority view, however, was that it was our duty to protect consumers and the integrity of the conveyance process.

It is expensive, and exhausting, to engage in battle with national entities. And, the Great Recession happened to coincide with some of the more expensive and exhausting portions of our battles. And, of course, the Great Recession caused many people to cut back on expenses, including membership in bar associations.

There were moments a few years ago when some of us questioned the long-term viability of REBA and other bar associations. With apologies to Peter and Gordon, I won't stay in a world without REBA (or love). Think about the consequences. Without REBA, lawyers would not be conducting real estate closings. Closings would be conducted by the same people who were once "robo-signers," without the benefit of a review of a title exam (if a title exam was even performed), using deeds prepared in Las Vegas. Borrowers would be unable to obtain reliable advice at the closing table. The requirements of MGL Chapter 93 Section 70 would fall by the wayside, as would the requirements of the Good Funds Statute. And there is no doubt that most commercial closings would eventually be performed by non-lawyers.

To reinvigorate our membership, we have reached out to younger lawyers. We had heard rumors that young adults were not very interested in joining organizations like bar associations because they preferred to "network" electronically. Those rumors appear to be at least partly unfounded based upon the initial success of REBA's New Lawyers Committee, which followed the recent success of REBA's Women's Networking Group of Real Estate Professionals. Or, perhaps, the professional world is coming full circle and some people have concluded that "social networking" is neither social nor networking. We are re-energized by the enthusiasm of our newest members. For any organization to survive and thrive requires constant reinvigoration by new members.

Without REBA there would be no Mortgage Discharge Law. And numerous statutes, including the Homestead Law, would contain nonsensical provisions. Without REBA there would be no Title Standards, Practice Standards, Ethical Standards or Forms. If you came across an esoteric issue, like a deed from a trustee to himself free of trusts (or a ridiculous mortgage discharge), you would have to perform your own legal research and find the current statutes and case law and figure out the applicable standard on your own.

Without REBA there would be no REBA/DR or *REBA News*, or regular e-news blasts regarding developments in the law or legislative alerts. The list goes on. Without REBA there would be a lack of opportunities for practitioners to share developments in the law at one of the numerous committee meetings or one of the two annual meetings. There would be no place to obtain continuing legal education focused directly at your practice area.

The above list represents the tip of the iceberg. In other words, the practice of real estate law would be significantly different, all for the worse. Perhaps we would see more consumer clients with problems arising from their real estate closings; but such would not be a consolation. Our collective goal is to avoid problems and to augment smooth and lawful real estate transactions. REBA is an invaluable assistant to our practices. Encourage your friends and colleagues to come aboard and keep the good work going. ♦

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.

REMEMBERING LOU ENO

CONTINUED FROM PAGE 1

neighborhood, making many of the drives in his bright orange VW bug. In 1994, he created a firm, Eno Boulay and Martin (now Eno Martin Donahue) and retired in 2001.

In 1957, friends masterminded a fateful meeting with Ann Fitzpatrick of New Rochelle, New York. He called her at her New York City office to ask if she could arrange theater tickets for his girlfriend and him. This interesting tactic somehow worked and he successfully wooed Ann to Massachusetts. While the couple couldn't have been more different in temperament or outlook, they were married 56 years and raised three children, John, Madeleine and Will.

One of their proudest achievements was moving a 300-year-old house from Amesbury to Carlisle. Louis heard that a beautiful old home was up for auction due to the construction of Route 495. He carefully tucked two sealed bids, one low and one high, into his jacket pocket. When it came time to present bids, he forgot which was which, but still managed to win the house. He and Ann dismantled and moved it, board-by-board, brick-by-brick, and painstakingly recreated it on acreage in Carlisle.

Civic involvement was important to him, and he served on numerous professional organizations and political groups, including the Lowell School Committee (1951-1955), the Lowell Historic Board (1984-1993) and the Middlesex Canal Commission. He was a trustee of Central Savings Bank; a director of Jeanne d'Arc Credit Union (1972-1992); president of the Lowell Humane Society; president of the Middlesex Canal Association (1962-1972) and president of the Massachusetts Conveyancers Association (1982-1984). At that time, the MCA presidents served two-year terms.

While the law was his vocation, the history of Lowell was his passion. He edited "Cotton Was King," a compilation of essays about Industrial Revolution-era Lowell, published in 1976. He translated "Immigrant Odyssey" from French to English. Antiquarian books, bottles and artwork all with the common theme of Lowell, lined the bookshelves of the living room, and his office was a veritable museum to the city.

His numerous awards include Honorary Oblate of Mary Immaculate (1979), Lawyer of the Year (Greater Lowell Bar Association, 1991) and Franco-American of the Year (2000).

He served in a variety of positions at REBA's predecessor, The Massachusetts Conveyancers Association, including membership in the Practice Standards Committee and the Title Standards Committee. He was elected MCA president in 1983. In 1987, he received the association's highest honor, the Richard B. Johnson Award.

He was co-author of volume 28 and 28A, the real estate section of West Publishing Company's multi-volume "Massachusetts Practice Series," and editor of annual supplements of the publication for dozens of years. He edited the "Massachusetts Real Estate Sourcebook," published by MCLE.

Deeply religious, Lou rarely missed attending Mass, even while traveling. In his rare spare time, he took the family in the station wagon to explore the canals and locks of the eastern seaboard.

Until he lost his sight several years ago, reading was his ultimate pleasure. All he needed for a happy vacation at the family cabin in Vermont was his tall glass of ice tea and a tall stack of library books. He read quickly and remembered details. His 10-year-old daughter once asked him to read "Charlotte's Web" so she could discuss it with him. He sat on the porch and read it in a single sitting while she watched. A lifetime classics student, he gave his young children Peanuts books in Latin for Christmas.

He loved lobster, croissants, Paris, Quebec, speaking French, reading Greek philosophers, sci-fi movies, Bennie Hill, large dogs and his family. There was very little about the world, history or politics that he did not know. For the past several decades, he met his friends, Lenny and Jay, for lunch, jokes and political talk just about every Saturday.

His baby granddaughter was making her entrance into the world at the very moment he departed. ♦

Peter Wittenborg is REBA's executive director. He can be reached by email at wittenborg@reba.net.

The housing crisis approaches middle age

BY ROBERT M. RUZZO

BOB RUZZO

What do you get for the crisis that already has everything?

Here in Massachusetts, the housing crisis has been with us for decades.

In most circles, a crisis is typically thought of as an acute condition, one with a sudden onset or short duration. The Cuban Missile Crisis comes to mind. Not so with the housing crisis in Massachusetts. Here we have a crisis that is both multi-faceted and chronic; indeed, our housing crisis is approaching the onset of middle age (at least), and it showing no signs of abating.

Out of curiosity, your correspondent did an advanced Google search of the words "affordable" "housing" and "crisis" in the archives of John Henry's Journal (f/k/a *The Boston Globe*), and encountered a story dating from May 1977. Much of the focus in the article was on Ashland, described as "a country town west of Boston." In ominous tones, the article described how the consequences of "a suburbia increasingly hostile to growth" would impact "a housing crisis that has already reached unprecedented proportions."

Which might all seem quaintly amusing today if it didn't involve real people whose wellbeing and futures were at stake.

Part of the difficulty in understanding how a crisis becomes chronic stems from our lack of precision in specifying the exact crisis we are talking about. For example, earlier this year during one of the many candidate forums in the governor's race, a capable candidate (who ultimately did not make it to "the finals") was asked about the importance of addressing "housing affordability," not by focusing on "affordable housing," but rather by encouraging the production of more market-rate housing, particularly in the so-called Gateway Cities. The candidate expressed confusion about the question, saying politely: "I don't know what you mean."

That candidate is not alone. After all, shouldn't we be addressing "housing affordability" by producing more "affordable housing?"

Too often we use the terms "affordable housing" and "housing affordability" loosely, almost interchangeably. They are two very different things.

At the risk of oversimplifying things, references to producing "affordable housing" relate to housing derived from government intervention via a subsidy program of some kind. That intervention is typically characterized by twin trademarks: income related occupancy qualifications and some form of regulatory oversight to control future housing costs (maintaining affordability).

"Housing affordability," on the other hand, is a measurement of market realities that reflects how the cost of market rate housing relates to the ability of individuals to pay for it. As we in Massachusetts all know, despite the relatively high incomes earned by our citizens, market-rate housing continues to be extremely expensive, beyond the reach of too many working families.

Many years in housing have left your correspondent with a keen appreciation of two realities:

First, the free market cannot resolve this crisis because there really is no "free market" for market-rate housing. To be sure, if one only looks at the sale and resale of homes and condominiums or the leasing of rental apartments, there appears to be a functioning free market of willing consumers and providers. It is, however, the production of "widgets" for sale or lease that truly matters. And in that context, next to location, the most important determinant of price is regulation. So to those who view "affordable housing" production programs as some sort of unholy subversion of Adam Smith's eternal truths, it may be time to consider adjusting your medication.

The second reality is that "affordable housing" programs, as necessary as they are, cannot solve the housing affordability crisis alone. In Massachusetts, over the past few decades, "affordable housing" has become somewhat of an export industry, with many of our local leading actors assuming prominent positions on the national affordable housing stage. Yet despite this plethora of talent, and a substantial commitment to state funded housing programs, we continue to experience some of the highest housing prices in the nation. Why? Because our rate of housing production (in terms of new units) continues to bounce along the bottom of state production levels nationwide.

There is, of course, a non-virtuous interrelationship between "housing affordability" and "affordable housing." The worse the housing affordability equation becomes, the more affordable housing is in demand. Yet, as we are learning today, an escalating housing affordability issue that is addressed solely or primarily by providing affordable housing yields a gaping hole; the absence of housing for a middle class that can neither afford expensive market housing options, nor qualify for affordable housing offerings.

And as you might have already guessed, it's more complicated than that. In many of our established cities, particularly those somewhat more removed from metropolitan Boston, the problem is just the opposite. Affordable housing tax credits, frequently coupled with historic rehabilitation tax credits, have been responsible for revitalizing long dormant industrial buildings, providing excellent housing opportunities in the process (regrettably, though, only for a fortunate few).

Nonetheless, many of these cities lack the vitality of a solid "downtown vibe" that is generated by individuals with higher levels of disposable income. In these locales, the call is for more market housing, and affordable housing can actually be opposed because it may deter competing market-rate rehabilitation opportunities.

But wait, there's more! In between, there are many communities with ample market housing experiencing declining or stable populations. This can lead to deterioration of the existing stock, while new types of affordable demands emerge due to the aging of long time residents.

So as you can see, the housing crisis in this state really does have it all. One of the first steps in unraveling that complexity would be to appreciate the need for precision in describing exactly just which facet of the housing crisis we are attempting to address.

A small step, to be sure; an important one nonetheless. ♦

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.

A primer on the proposed elective share statute

BY SARA GOLDMAN CURLEY

SARA GOLDMAN CURLEY

Legislation is pending to change the Massachusetts spousal elective share statute, which is the law that protects a married person from being disinherited by his or her spouse. The bill, which closely tracks the Uniform Probate Code, is supported by the Massachusetts Bar Association, Boston Bar Association and Women's Bar Association. The Real Estate Bar Association has not taken a position at this time. The bill is dense and complicated, and requires careful reading to understand. However, it is addressing a complex problem that cannot be solved more simply. Below are some questions and answers for real estate attorneys seeking to understand the proposed legislation.

Does Massachusetts have an elective share statute? Yes. Under current law, if a person dies leaving a spouse and children, the surviving spouse may elect against the decedent's probate estate and receive one-third of the decedent's personal and real property. In *Sullivan v. Burkin*, 390 Mass. 864 (1984), the Supreme Judicial Court (SJC) interpreted the probate estate as including certain property transferred by the decedent into trust. Mechanically, the elective share works as follows: the first $25,000 is paid outright; the rest of the personal property is held in trust, with income only paid to the spouse; and the spouse receives a life estate in one-third of the decedent's real property. In situations where the decedent did not have descendants but left kindred, the life interests in real and personal property increase to one-half.

What's wrong with the current law? The problems with the current law include: the surviving spouse receives the same amount regardless of the length of marriage; it ignores the relative financial positions of the spouses; and the statute is easy to circumvent, thereby permitting a spouse to be disinherited, contrary to the commonwealth's public policy.

On two occasions the SJC has called on the legislature to update the elective share statute. The first time was in the 1984 *Sullivan* case. More recently, the SJC stated "there appears to be no dispute that our elective share statute is outdated and inadequate," and called the existing statute "woefully inadequate." *Bongaards v. Millen*, 440 Mass. 10 (2003).

How would the proposed elective share work? There are two distinct steps. First is to calculate the elective share amount. Second is to determine how the elective share amount is to be satisfied. It is in this second step where the bill is most often misunderstood.

Calculating the elective share: The amount of the elective share is 50 percent of the marital property portion of the augmented estate. At the risk of oversimplifying, there are three steps. First, determine the "augmented estate," which consists of the decedent's net probate estate, the decedent's non-probate transfers to others, the decedent's non-probate transfers to the surviving spouse, and the surviving spouse's property and non-probate transfers to others. Second, determine the "marital portion," which is the augmented estate multiplied by the percentage that applies to the number of years the couple was married. The percentages range from 3 percent for a marriage of less than one year to 100 percent for a marriage of 15 years or more. Third, divide the marital portion in half to determine the elective share amount.

It is crucial to understand that the amount of the elective share is not the same as what the surviving spouse "gets" from the deceased spouse's assets. To find out what (if anything) the survivor will receive from the decedent, we need to apply the rules for satisfying the elective share. In many cases, such as where the spouses have comparable assets or the "poor spouse" dies first, the surviving spouse will receive nothing.

Satisfying the elective share: The first category of assets used to satisfy the elective share is property the decedent transferred to the surviving spouse. Next is marital assets owned by the surviving spouse. It is only if these two categories are less than the elective share amount that other assets of the decedent will be used to satisfy the deficiency. The bill provides that the deficiency is apportioned among the recipients of the deceased spouse's net probate estate and recipients of non-probate transfers, based on the value of the assets received. Importantly, the liability belongs to the person who received the property – it does not attach to the property. Thus, there is no lien on real property, and no impediment to clear title.

How does the elective share impact real property the decedent owned at death?

It does not impact the property itself. The *value* of the property is taken into account in calculating the amount of the elective share. The liability for satisfying amounts owed to the surviving spouse is personal. With respect to probate property, the liability belongs to the recipient of the property. With respect to non-probate property, the original recipients of the decedent's non-probate transfers to others and the donees of such property (to the extent the donees have the property or its proceeds) are liable. The liability does not attach to property.

What about real property decedent transferred within two years prior to death?

Again, the *value* of certain property transferred within two years from the decedent's death is part of the elective share calculation. However, as described above, the liability for satisfying amounts owed to the surviving spouse is personal, and belongs to the recipient of the property.

Should the Real Estate Bar be concerned abou the proposal? No. Unlike prior versions of proposed legislation, this current proposal does not create a lien on real property. It is the public policy of this commonwealth that a person cannot disinherit his or her spouse. To have an effective remedy for an otherwise disinherited spouse, the survivor must receive property that the decedent left to others. This legislation is the product of careful and considered thought, and is the best solution to this difficult problem. ♦

A partner at Nutter, McClennen & Fish LLP, Sara Goldman Curley co-chairs REBA's estate planning trusts and estate administration committee. Sara's practice includes all aspects of estate planning for high net worth individuals. She can be contacted at scurley@nutter.com.

THE LAWYERS COUNSEL

Legal malpractice and real estate lawyers

PROXIMATE CAUSE: DEFENDING THE HYPOTHETICAL CASE

BY JAMES S. BOLAN AND SARA N. HOLDEN

JIM BOLAN

SARA HOLDEN

In legal malpractice actions, the focus is usually whether the lawyer breached the standard of care. However, even if the lawyer was negligent, the client must still prove "proximate cause" – "but for" the attorney's negligence, the client would have obtained a better result. This requires the client to prove that both a different and better result in the underlying action would have resulted but for the negligence of counsel, along with proof of the "case within a case."

A seminal case on "proximate cause" in legal malpractice actions is *Fishman v. Brooks*, 396 Mass. 643 (1986). Fishman, a part-time solo practitioner mainly handling real estate conveyances, agreed to represent Brooks in a personal injury case. Without doing any pre-trial discovery or investigating the amount of available insurance coverage, Fishman represented to Brooks that there was only $250,000 in insurance coverage when, in fact, there was $1 million available. Knowing that Fishman was not prepared for trial and having been told by Fishman that he would not win at trial, Brooks agreed to settle his personal injury claim for $160,000. When Fishman sued Brooks for his legal fee (a fatal misstep), Brooks then counter-sued Fishman in a seminal malpractice case claiming negligent settlement practice.

The malpractice action against Fishman required Brooks to prove the "case within the case" – that Fishman was negligent in the settling of Brooks' claim and that, had Brooks' claim not been settled for $160,000, he would probably have recovered more than he received in the settlement. Brooks was successful in proving to the jury that Fishman was negligent in his representation of Brooks, (in part by testimony of the insurance adjuster that the case was worth more than what the settlement achieved) and that, as a result of Fishman's negligence, Brooks had to settle his claim for less than "good value," and that the damages he would probably have recovered in the personal injury claim were substantially greater than the amount of the settlement.

Interestingly, the court's opinion in *Fishman* included a footnote that Brooks could have argued that his case was settled for too little money and that he was, therefore, entitled to the difference between the lowest amount at which his case would have probably settled with the advice of competent counsel and the amount of the actual settlement. See *Fishman* at 647, fn. 1. This potentially leaves attorneys exposed to malpractice claims by clients who decide after the fact that they are unhappy with a settlement. While such a claim may not be ultimately successful, it may set out enough facts under *Fishman* to get the case before a jury. This case is a classic poster child advertisement that counsel should handle matters for which they are appropriately experienced and competent. Said another way, a real estate lawyer may not be the best person to handle a substantial personal injury claim!

Proximate cause requires proof that the client would have achieved a better result. That "better result" includes not only a probable judgment in the client's favor in the underlying action, but proof that that probably judgment would be collectible. In *Jernigan v. Giard*, 398 Mass. 721 (1986), the court instructed the jury that it could only find the attorney negligent if, among other things, the jury found that the judgment in what would have been the underlying tort action would have been collectible. The jury found that a judgment would have been awarded but would not have been collectible and the court, on appeal, agreed.

The methodology described in the *Fishman* case and used in legal malpractice actions seems logical and straight-forward. However, what the client is actually attempting to prove and what the attorney will have to defend against is, in many ways, a hypothetical case or transaction as to what would have happened if the case or transaction was handled differently; that is, not negligently. What if the attorney negligently failed to file a claim within the statute of limitations? How does one defend against the underlying action when that action was never filed in the first place? What if, similarly to *Fishman*, no discovery had been conducted? How does one know whether or not an opposing party would have accepted a higher settlement offer? How does one show that, regardless of the attorney's negligence, a real estate transaction would have never been consummated? One of the ways to deal with this "in advance" – that is, in avoidance of a future potential claim – is to document in your file what was done, why it was done and when it was done, even if that means consulting with an outside expert to substantiate a difficult position or decision to be made in a client matter.

The inherently speculative nature of the "case within the case" methodology, in which the parties are dealing not with what really happened, but what should have happened creates myriad of problems on both sides of the table, for clients and attorneys. ♦

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.

REBA Fall Conference Wrap Up

REBA President Michelle Simons introduces Hank Phillippe Ryan, the luncheon keynote speaker, at the group's Annual Meeting and Conference. Ryan is an award-winning author of Boston-based thriller novels. Her most recent book, *Truth be Told*, has a real estate/mortgage foreclosure plot line.

Unauthorized Practice of Law Committee Co-Chair Tom Moriarty offers brief remarks at REBA's Annual Meeting and Conference on the group's continuing efforts to combat the unauthorized practice of law in the commonwealth.

Outgoing president Michelle Simons passes the presidential gavel to 2015 president Tom Bhisitkul.

REBA president Michelle Simons with REBA's luncheon keynote speaker Hank Phillippe Ryan with Ryan's latest thriller, *Truth be Told*.

REBA Executive Director Peter Wittenborg introduces Phil Lapatin at the association's Annual Meeting and Conference in November. Lapatin has presented an hour-long program on recent developments in Massachusetts case law twice yearly for the past 36 years. In 2008, Lapatin was awarded REBA's highest honor, the Richard B. Johnson Award.

REVISITING FILE RETENTION AND DESTRUCTION

CONTINUED FROM PAGE 1

delivered to the former client or safeguarded indefinitely; (2) complete records of the receipt, maintenance, and disposition of clients' or other trust funds and property must be kept from the time of receipt to the time of final distribution and preserved for a period of six years "after termination of the representation and after distribution of the property" as required by Mass. R. Prof. C. 1.15(f), and (3) other client property may, based on the client's direction, be delivered to the former client, stored, or destroyed. In addition, Mass. R. Prof. C. 1.5(c) requires that an executed copy of a contingent fee agreement be kept for seven years.

To reduce the problem of file storage on the back end, a lawyer should take steps up front. In addition, a lawyer's duty of competence and to preserve client confidentiality includes planning ahead to safeguard clients' interests in the event of unexpected illness, incapacity or death. What follows is a list of practical steps lawyers can and should take to alleviate the burden of preserving client files.

Institute a clear file retention policy for your firm that includes returning all trust property promptly to the client. Trust property includes funds and other property held in connection with the representation, including property held as a fiduciary, except for documents or other property received by the lawyer as investigatory material or potential evidence. Trust property includes wills, contracts, drawings, and the like that belong to the client. The file retention policy should spell out the firm's obligations under Mass. R. Prof. C. 1.15(f) and the firm's file disposal procedures.

Communicate your standard file retention policy to clients at the outset of the case as a standard paragraph in a written fee agreement or fee letter. Alternatively, provide the policy as a stand-alone document to all new clients at the time you are retained. A sample communication to the client might say something along the following lines:

[Lawyer] will maintain [Client's] file for [6] years after this matter is concluded.

[Client] may request the file at any time during, upon conclusion of, or after conclusion of, this matter. [Six] years after the conclusion of this matter, the file may be destroyed without further notice to [Client].

Massachusetts lawyers in most circumstances are already required by Mass. R. Prof. C. 1.5(b) to communicate the scope of the representation and the basis or rate of the fee and expenses to the client in writing. See "Write It Up, Write It Down: Amendments to Mass. R. Prof. C. 1.5 Require Fee Agreements To Be In Writing," (www.mass.gov/obcbbo/WriteItUp.pdf). It is therefore a relatively simple matter routinely to include an additional paragraph on file retention in the fee arrangement or to provide a separate policy statement at the same time. If there is any doubt about whether the client wants the lawyer to return a document, be sure to discuss the matter with the client and note that the client wants the document returned at the end of the representation.

Certain types of files will, of course, have special retention issues and need to be retained beyond the period specified in your file retention policy. Examples might include estate planning files where the client is still alive, files involving a divorce with minor children who have not reached majority or where alimony was awarded, or criminal cases in which the client is still incarcerated. Use your professional judgment as to whether there is any issue in a file that would require you to hold onto it beyond your standard file retention policy period or if you have reason to believe that the client might be unhappy with the outcome of the case and is considering a claim against you.

Advise (or remind) the client of your file retention policy in a closing or disengagement letter at the conclusion of the case. Even if you had already given notice of the policy when first retained, it is good practice to do so again when closing the file, if for no other reason than that it may well be years after the initial engagement when the matter is finished.

Make a practice of copying and immediately returning original documents (especially wills) to the clients, rather than holding them in the file or even in a "will box." If it is necessary to retain original items as evidence or otherwise, return them at the close of the case. Send any original deeds or other recorded real estate documents to the client when received back from the registry. Of course, you are required to return any tangible property belonging to the client or owner (securities, for example, or items such as jewelry, art, or photographs) at the close of the case. If you document that these steps have been taken, it will not be necessary for you, your personal representative, or any other authorized person to comb through your files looking for original items upon your retirement, death or disability.

Provide clients with copies of file documents on an ongoing basis while the file is open. Send the clients copies of pleadings or of correspondence between counsel. Technology makes this undertaking much easier than it would have been even a decade ago and doing so makes it much less likely that the clients will come looking for copies of items from your files years later.

Make sure your IOLTA and other trust accounts are maintained contemporaneously and are up to date. In particular, prior to closing a file, ensure that all liens and other obligations have been paid and, where applicable, that discharges are secured and recorded. It is good practice to have a second signatory on these bank accounts so that the accounts can be accessed, and funds disbursed, upon your death or disability. Finally, and most obviously, maintain trust account records that comply with the requirements of Mass. R. Prof. C. 1.15; upon your death or disability, the owners of funds on deposit can then be readily identified by a personal representative or other person charged with closing out the accounts.

Whenever feasible, every lawyer without a partner to carry on his or her law practice should also arrange, preferably in writing, for another lawyer to be the "back-up attorney" who, at a minimum, will contact clients with active matters, ensure the return or transfer of files, and see to or assist with the refund or transfer of trust funds.

Organize your files and carry out your file retention policy. In order for any file retention/destruction policy to work, the closed files have to be organized in a chronological order that will permit them

CONTINUED ON NEXT PAGE

Thank You To Our Conference Exhibitors

to be pulled for shredding at the appropriate time. One such method might be that, at the end of each year, the lawyer should separate any files that were closed in that year into a designated group, i.e., 2012 CLOSED FILES. Review the files as you group them and put an external label on any files that have special retention issues – for example, use a sticker such as "REVIEW BEFORE SHREDDING." Then shred files without retention issues that have been held for the time period provided in your fee agreement. Thus, if your fee agreements provide that you will hold files for six years after closing the case and distribution of funds, you could have shredded any 2006 closed files that didn't have special retention issues at the end of 2012. Files marked as having special retention issues should be segregated at that point and reviewed periodically to determine if there remains any need to continue to hold them.

Critical to this discussion, it is obvious that much of the age-old problem of file retention – mainly storage – can be addressed with new-fangled technology. Mass. R. Prof. C. 1.15 requires, among other matters, that attorneys maintain for all trust accounts a chronological check register, a ledger for each individual client matter, and reconciliation reports; these records can, and generally should, be kept electronically. A file that does not contain original documents can be scanned to an electronic file at the close of the case and the physical file discarded. Similarly, documents can be retained or scanned to an electronic case folder as the matter progresses, making it unnecessary to retain paper copies of all or most of the file once the case is concluded.

The electronic case information on your computer can be saved to a disc, backup drive, the cloud or other secure electronic storage medium at the end of the case and retained indefinitely without causing garage rafters to buckle. Off-the-shelf document and case management systems also make these tasks reasonably straightforward. Just be sure to update your electronic storage system so that the information remains accessible and that older information gets transferred to your current storage medium. A floppy disc is not of much use these days.

Assuming no problems with original documents, then whether or not there are special retention issues, you can shred the physical file when the case is over if you retain a complete electronic copy. And isn't that a lovely thought. ♦

Constance V. Vecchione is bar counsel at the Office of Bar Counsel of the Board of Bar Overseers since 2007. She is the author of numerous articles on ethics for Massachusetts bar journals and is a frequent lecturer at CLE programs. She is also an active member of the National Organization of Bar Counsel and a frequent panelist at its semi-annual meetings.

The Women's Lunch Place serves more than meals

BY ELIZABETH KEELEY

Have you ever asked yourself, where would I be without …. ? How many ways can you finish that sentence? Family, friends, love, health, career …

Sadly for too many women in Boston, those wouldn't be their answers. But for over 1,300 women the Women's Lunch Place is an answer. We are open to women struggling with homelessness and poverty, offering them solace from their lonely days and nights. We give hugs and open our hearts to journey with them towards a better life. Guests tell us the shelter is their home, a special community of friends that are family. We are a sanctuary for women lost and alone, where every day over 230 women finds comfort, hope and dignity to face another day.

Most mornings, I start my day in the shelter dining room greeting familiar faces and meeting new guests. We have come to know one another over the past year as we have shared our daily struggles and joys. After spending time with our guests, I leave inspired and with renewed energy to support the mission to help these amazing, deserving women.

Without the generosity of our donors, we would not be open six days a week, providing art and therapy classes, a resource center and serving over 79,000 meals a year! Without our committed volunteers, we would not be able to provide all of the services and programs that heal and empower women. Private individuals, corporations, foundations and volunteers faithfully support us so that our doors stay open for every woman who needs a bed to rest on, a hot shower, clean clothes or an advocate to assist her with finding housing or a better job.

Elizabeth Keeley

Please visit womenslunchplace.org to find out what we do – and why it matters. ♦

Elizabeth Keeley is the executive director of the Women's Lunch Place.

The digital age comes to the Essex North registry

BY PAUL IANNUCCILLO

PAUL IANNUCCILLO

Computers are the backbone of the modern registry of deeds. They have changed the course of land records management far beyond any other operational advancement in the history. In the first Modern Recording Act, the Massachusetts Bay Colony established the first Registry of Deeds in 1640. For the next 300 years, the approach to registry business changed little, until the late 1970s and the arrival of the practical computer. Yes, pens replaced quills, and typewriters replaced pens, but the rudimentary nature of these tools greatly limited the versatility of the institution.

From the birth of the Registry of Deeds in the days of the Pilgrims to the present, the main mission of the registries has not changed – but the computer has radically changed the way these goals are now accomplished. Computer technology has given forward-thinking registers the opportunity to expanded services provided to the public while more efficiently accomplishing the registry's core mission.

We live in a mobile society. The information gathered and housed in the registry of deeds is no longer confined within its four walls. Gone are the days when you have to "go to the registry" to do business – today, smartphones and tablets allow us to take the registry of deeds with us wherever we go, 24 hours a day. A cutting-edge registry needs to sharpen its edge with technology.

One of my main objectives as Northern Essex Register of Deeds is to fully utilize technology to fine-tune fundamental services and reposition this registry to the forefront of innovative land records management. Let me give an example: 18 months ago, as the newly elected register of deeds, I frequently solicited feedback from registry users. Quickly, I discovered that the main complaint was the unreliability and slowness of the Northern Essex website, lawrencedeeds.com. I used this opportunity to have a communication engineer analyze our Internet data line. Two problems emerged from this analysis. A bad connection was discovered in the actual wire that ran from outside of the building to the registry. This could easily be fixed, but the engineer's analysis also revealed another, more significant issue. The distance the Internet line ran from the point of entry to the registry's server was too long for our limited DSL service to provide optimum service. I quickly switched our Internet service provider from a DSL line to a fiber cable, and the results have been amazing – the speed of our connection increased an astounding 15-fold, and the reliability problem has been eliminated.

With the generous assistance of Secretary of State William F. Galvin and his staff, numerous technological advancements have been made at the Northern Essex Registry of Deeds that facilitate public access and document recording.

The Northern Essex Registry of Deeds also established a Customer Service Center that, among its many duties,

See DIGITAL AGE, page 11

MUNICIPAL FORECLOSURE ORDINANCES UNDER REVIEW

CONTINUED FROM PAGE 1

commissioner and the fire commissioner on the status of the vacant property at the time of delivering the mortgagee's intention to foreclose pursuant to M.G.L. c. 244, § 17B. This notice requires an estimate of the time the property will remain vacant. The Springfield ordinance has imposed additional burdens upon lenders and their servicers as well as fines in the amount of $300 per day for noncompliance with any provisions of the ordinances.

The city did not enforce the bond requirement until October 2013.

Following Springfield's enactment of its mediation and property registration ordinances, six Massachusetts banks brought suit in the United States District Court *Easthampton Savings Bank, et al vs City of Springfield*, Case No. 3:11-cv-30280-MAP) seeking to have the Springfield ordinances invalidated as inconsistent with and preempted by state laws and regulations. In 2012, the U.S. District Court entered judgment for the city. On appeal, the U.S. Court of Appeals for the First Circuit ordered its clerk to forward to the Massachusetts Supreme Judicial Court a copy of certified questions and their opinion in this case. The certified questions are:

1. Are Springfield's municipal ordinances Chapter 285, Article II, Vacant or Foreclosing Residential Property" (the foreclosure ordinance) or Chapter 182, Article I, "Mediation of Foreclosures of Owner-Occupied Residential Properties" (the mediation ordinance) preempted, in part or in whole, by those state laws and regulations identified by the plaintiffs?
2. Does the foreclosure ordinance impose an unlawful tax in violation of the Constitution of the commonwealth of Massachusetts?

The Real Estate Bar Association has filed an amici brief in this case raising two points not addressed elsewhere: first, the Springfield foreclosure ordinance is inconsistent with and preempted by the State Sanitary Code, G.L. c. 111, § 127I which addresses matters identical to the ones covered by the foreclosure ordinance; and second, that the foreclosure ordinance's cash bond is an illegal tax.

The Supreme Judicial Court heard oral arguments on the certified questions in September. The First Circuit has enjoined Springfield from enforcing its ordinances pending further rulings from both the SJC and the First Circuit.

MEANWHILE, IN LYNN

The city of Lynn ordinance, subtitled "Bill of Rights for Homeowners," originally enacted in June 2013, was amended by the City Council last April to require a pre-foreclosure mediation conference and registration of the property along with a $10,000 cash bond at the start of each foreclosure. In addition, the amended ordinance also requires that the bank – if the purchaser of the property at the foreclosure sale – allow the former owners to become rent-paying tenants at a reasonable market rate until a new owner purchases the property!

The mandatory mediation program applies to the foreclosures of mortgages on owner-occupied residential property with no more than four units. The scope of the mediation must include issues including the possible reinstatement of the mortgage, the modification of the loan and restructuring of the mortgage debt, and reduction and forgiveness of mortgage debt.

The Lynn ordinance provides under Section 7.00 that the mortgagee or its servicer shall send a copy of all notices given to the mortgagor pursuant to M.G.L. c. 244, § 35A (g) and (h) to the city of Lynn within 10 days of sending it to the mortgagor. The mortgagor may request mediation within 15 days of receipt of this notice. The mediation conference is to be scheduled no later than 30 days following the mortgagor's receipt of their rights to cure under M.G.L. c. 244, § 35A(g) and (h).

The Lynn ordinance further provides for the loan/mortgage mediation conference to be held at a location mutually convenient to the parties. Both the homeowner/mortgagor and lender/mortgagee must be physically present unless telephone participation is mutually agreed upon. The homeowners must be aware of their right to an in-person mediation conference. The homeowner/mortgagor is entitled to have a lawyer, an interpreter and up to three additional persons of his or her choosing present at the mediation conference

Although the Lynn ordinance does not require him to do so, the Essex County (Southern District) Register of Deeds has rejected foreclosure deeds that don't have a "certificate of mediation compliance."

A CHALLENGE FROM LENDERS

The Worcester ordinance also mandates a $5,000 bond when foreclosure proceedings are instituted and requires that lenders negotiate alternatives to foreclosure with homeowners through a formal mediation process. The lender must then obtain a certificate from the mediator before commencing foreclosure. The Worcester ordinance further requires lenders to maintain, post-foreclosure, any foreclosed and abandoned properties.

Lynn and Worcester's ordinances were challenged by a consortium of local lenders in U.S. District Court in July of this year (*Hometown Bank et al. v. City of Worcester and City of Lynn*, Case No. 4:14-cv-40088-DHH). In a complaint similar to the one challenging Springfield's ordinance, the lenders allege that the ordinances are unconstitutional and are preempted by several existing state laws and regulations. The lenders have sought injunctive relief pending the First Circuit's ruling in the Springfield case, but Lynn in particular has opposed an injunction on the grounds that its mediation program is active and would be damaged significantly if the city were forced to discontinue the program even temporarily. A hearing on the request for injunctive relief has been scheduled for Nov. 7.

The city of Lawrence program, set forth as Chapter 8.30 of the Revised Ordinances of the City of Lawrence, also requires that both the homeowner/mortgagor and lender/mortgagee be physically present for the mediation conference unless telephone participation is mutually agreed upon. The Lawrence ordinance provides that the mortgagor shall not be responsible for more than 15 percent of the total cost of the mediation. It further provides that a mortgagee's failure to comply with any section of the article shall result in a fine of $300. Currently, Lawrence has neither enforced the ordinance nor developed procedures for compliance. ♦

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.

Is 'transportation, transportation, transportation' the new mantra for real estate?

BY ERICA MATTISON

ERICA MATTISON

You've heard "location, location, location," but what about "transportation, transportation, transportation"?

From Dorchester's Peabody Square to Somerville's Assembly Row, Greater Boston's development is increasingly taking place in close proximity to transit, much of which has recently been updated, or even newly created.

Thousands of spaces are coming online in the form of mixed-use, transit-oriented developments. The investments in public transportation and the accompanying transit-oriented development (TOD) have the potential to improve public health and quality of life, while reducing traffic and greenhouse gas emissions. They also represent an opportunity to retain young people who were drawn to the area for college and wish to continue their urban lifestyle here.

There are concerns, however, that if communities, the commonwealth and developers do not make a concerted effort to incorporate affordability into new developments, equity and access will be sacrificed. Of the 10,000 housing units built in downtown Boston since 2010, 76 percent are high-end. Building affordable and moderate income housing needs to be prioritized in the coming years to ensure it's not only the wealthy who can afford to live in Boston.

The mid-20th century approach of designing drivable suburbs is being replaced with creating walkable urban places, both in city centers and the suburbs. A study this year from the George Washington University School of Business ranked the Boston metro area #3 in the country for walkable urbanism, signifying that the area has a high number of neighborhoods where destinations are concentrated and within walking distance. In Boston, more and more people are choosing to both live and work in the city (in recent years the percentage has grown from 34 to 39 percent).

MEETING OUR HOUSING NEEDS

"The 2012 Greater Boston Housing Report Card," published by The Kitty and Michael Dukakis Center for Urban and Regional Policy at Northeastern University, reported that production of single-family and multifamily housing in the region has to increase by at least 12,000 per year through 2020 to meet housing needs. The study noted that meeting housing development needs will rely upon communities' adoption of cluster development, inclusionary zoning provisions and Chapter 40R.

In October, Boston Mayor Martin Walsh released "Housing a Changing City: Boston 2030," the administration's housing plan. By the year 2030, it is projected that Boston will reach more than 700,000 residents, the city's highest population since the 1950s. The city has set a goal of helping to create 53,000 new units of housing at a variety of income levels by 2030, which would amount to a 20 percent increase in housing stock.

Here are several examples of areas where parallel real estate development and public transportation projects are creating exciting new opportunities for neighborhoods.

RED LINE

In 2008, directly adjacent to the Ashmont MBTA station, Trinity Financial opened the $52.6 million Carruth Building, a six-story mixed-use TOD development, including 74 affordable rental units, 42 market-rate condominiums, and 10,000 square feet of retail space. Given that the building is a few steps from public transportation, the developer provided 80 underground parking spaces for residents – substantially less than one parking space per unit, and less than zoning regularly requires.

The Carruth was followed in 2011 by an $84 million reconstruction of Ashmont MBTA station, part of Red Line Rehabilitation Project. Convenient access to downtown without a car is one of the Carruth's selling points.

Currently, the same developers of the Carruth are seeking Boston Redevelopment Authority approval to build another mixed-use development across the street. This project (Ashmont TOD2) would also include retail, affordable housing, market-rate condos, and minimal underground parking.

ORANGE LINE

Head just north of Boston and you'll see Orange Line improvements that are happening concurrently with private real estate development. Assembly, constructed in 2014 and located in Somerville between the Wellington and Sullivan Square stations, is the first subway station the MBTA has opened in more than 25 years.

Across from the station is the new Assembly Row development, a neighborhood that provides a mix of retail, restaurants, entertainment, residences and office space. Assembly Row, located along the Mystic River, has over 500,000 square feet of retail, 2,100 residential units and 1.75 million square feet of office space. This development and the new T station have made this area a new hot spot. As Somerville Mayor Joseph Curtatone has said, "All of the development in Assembly Square never would have materialized without the new T station."

COMMUTER RAIL

The 9.2 mile Fairmount Corridor Commuter Rail Line, which goes from Hyde Park through Dorchester, Roxbury and Mattapan, used to include five stops: Readville, Fairmount, Morton Street, Uphams Corner and Boston South Station. Over the past couple of years, new stations have been created along the route to improve access and increase ridership, including Newmarket, Four Corners/Geneva and Talbot Avenue. A Blue Hill Avenue stop is also in the works. In addition, weekend service will start this fall

See TRANSIT, page 11

Foreclosure of mortgages held by Freddie Mac may not meet *Eaton* requirements

BY LEONARD M. SINGER

LEONARD SINGER

Freddie Mac's 2,799-page *Single-Family Seller/Servicer Guide* presumably provides banks that service Freddie Mac mortgage loans everything that they might need. A recent Superior Court decision holds, however, that the guide does not give a mortgage servicer authorization to foreclose a mortgage loan which is in default. (*Guru Jiwan Singh Khalsa et al. v. Sovereign Bank*, Suffolk Superior Court C. A. 13-0083.)

Eaton v. Federal National Mortgage Association established that a mortgage holder seeking to exercise the statutory power of sale must either hold the mortgage note or be authorized to foreclose by the note holder. In *Guru Jiwan*, the Superior Court ruled that Sovereign Bank had neither and, accordingly, entered judgment voiding a foreclosure sale that Sovereign had conducted.

The underlying facts were that shortly after the origination of the Guru Jiwan mortgage loan Sovereign Bank sold it to Freddie Mac. In connection with that sale, an assignment of mortgage had been prepared, but it had never been executed by Sovereign. Under the circumstances, Sovereign was the mortgage holder, both in fact and of record.

In connection with the sale to Freddie Mac, however, the mortgage note had been endorsed in blank. That is, the notation "PAY TO THE ORDER OF" with no name filled in was endorsed on the note. The notation was signed by an officer of the bank and Freddie Mac took physical possession of the note.

Under the Massachusetts UCC, the person or entity in physical possession of a negotiable instrument which has been endorsed in blank is the "holder." Under the circumstances, Freddie Mac was the holder of the Guru Jiwan note.

Even though it was the mortgage holder, because it was not the holder of the note, Sovereign's foreclosure would be valid only if it had Freddie Mac's authorization to foreclose at the time of the foreclosure. In response to interrogatories, Sovereign said that the guide had furnished the requisite authorization. But in response to questions at a deposition pursuant to Rule 30(b)(6) Sovereign's witness could point to only two provisions in the guide as providing that authority.

The first provision relied on by Sovereign dealt with assignments of mortgages, specifying that an assignment of mortgage does not have to be prepared and, if prepared, should not be recorded unless directed to do so by Freddie Mac. The second provision dealt with whether a foreclosure should be done in Freddie Mac's name or in the servicer's name, mandating that the foreclosure should occur in the servicer's name unless that is not possible under applicable law.

The Superior Court judge summarily rejected Sovereign's argument that either of these provisions conferred the requisite authority to foreclose. The bulk of the Superior Court's memorandum of decision dealt with Sovereign's argument that authorization to foreclose was implicit in the guide. In particular Sovereign relied upon an affidavit which asserted that "when a borrower defaults, Freddie Mac authorizes a servicer to initiate foreclosure proceedings in accordance with the guide. … As a result of the plaintiffs' default on their mortgage, Sovereign, as a Freddie Mac servicer, was authorized to conduct foreclosure proceedings against the plaintiffs."

The Superior Court found this statement insufficient as evidence that Sovereign had received authorization from Freddie Mac. The court observed that the statement was "lacking in foundational knowledge and factual specificity." Furthermore, the affidavit contained no "facts" based on first-hand knowledge; it merely purported to summarize the content and legal effect of the guide without citing to the pertinent provisions thereof. Under the circumstances, it was a conclusory contention which would be inadmissible at trial and could not be considered as raising a genuine issue of material fact within the meaning of Rule 56.

At oral argument, counsel for Sovereign suggested that a ruling for the plaintiff could call into question a very substantial number of foreclosures. That may be true. The guide does contemplate that the mortgage itself will continue to be held by the servicer and that was true of the *Guru Jiwan* mortgage. Prior to *Eaton* (and perhaps in many of the other jurisdictions to which the guide applies), holding the mortgage would be sufficient to allow the servicer to foreclose, notwithstanding that it did not hold the mortgage note. *Eaton* made it explicit that being the mortgage holder would no longer be sufficient. The guide may need to be updated to reflect that new reality. ♦

Len Singer is an independent practitioner concentrating in federal and state court litigation cases involving real estate and real estate development, fraud, breach of fiduciary duty, breach of contract, break-up of closely held businesses, commercial leasing, billboards and transportation. Len can be reached by email at leonardmsinger@gmail.com.

NE LAND

REGISTRY JOINS DIGITAL AGE

CONTINUED FROM PAGE 8

answers public email questions, and we will soon provide live support for online registry customers with research and recording questions.

The popularity of e-recording is dramatically on the rise. Recent statistics show that 25 percent of all recordings at the Northern Essex Registry of Deeds are e-recordings. The registry offers a fully functional e-recording system that allows registered individuals the ability to record documents from the convenience of their office. We recently added a second gateway submitter and are anticipating a third before years' end, creating a competitive situation that ensures the consumer will receive the best vendor fees.

Approximately 90 percent of the registry's documents have been digitized. This mean the public can now search and view Northern Essex land records back to the registry's establishment in 1869. These documents are accessible on both our in-house database and our website.

Technology has given us the opportunity to better stay in touch with constituents, and the Northern Essex Registry of Deeds is taking full advantage of this. Our Facebook and Twitter pages keep social media users up to date on what is happening at the registry. Also, registry users can sign up to receive email alerts announcing breaking news, such as unexpected power outages and inclement weather closings.

This article would not be complete without mentioning the new lawrencedeeds.com. Our new website is easier to use and has many new consumer-friendly features: The site is translatable into over 50 languages; it has an interactive support function so a person seeking help can simply click and begin a live chat with a member of our Customer Service Department; the website's text can be enlarged for sight-impaired users; the site contains a live online bulletin board that displays all documents recorded in the previous 30 minutes to assist with e-recording; and most importantly, the Search Records interface has been streamlined and significantly improved.

Finally, most everyone uses either a tablet or smartphone or both. It is essential that online access to registry records is compatible with these devices. To achieve this, the new website was designed using a new technology called "progressive design." This technology automatically reformats a webpage so it displays completely and correctly on any mobile device.

All of these improvements, whether hardware or organizational, maximize the efficiency of the Northern Essex Registry of Deeds which ultimately makes a better experience for the public. The days of the Registry of Deeds being an old, outdated, stuffy governmental agency are over. ♦

A former state representative for the 16th Essex District, Paul was elected register of the Essex North Registry of Deeds in 2012. He is a graduate of Merrimack College and Suffolk University School of Law. Paul can be reached by email at paul.iannuccillo@sec.state.ma.us.

Railroad rights haunt development sites

TITLE SEARCHES COMPLICATE FUTURE OF PARCELS

BY JAY FITZGERALD

The commercial real estate industry and the state of Massachusetts are trying to sort out the legal confusion surrounding long-abandoned railroad properties strewn across the state and hampering some developments.

No one is questioning the state's authority to maintain the right to one day reclaim abandoned track corridors, where mostly private rail cars once chugged along, hauling both people and cargoes across the region. The state may one day want to resurrect some rail corridors for future commuter-line use or bicycle paths, industry officials say.

But dotted across the landscape are also an unknown number of old and abandoned industrial rail spurs, depot lots and even entire rail yards, some dating back to the spectacular collapse of the once mighty Penn Central train company in the early 1970s, and even to the 19th century. There are abandoned "wood lots" where railroad companies once piled chopped logs that were used to fuel train steam engines in the 1800s.

Officials say those are the properties – and not necessarily each and every rail corridor where actual tracks used to lie, or still lie, in some cases – that are hindering development.

Under a state law passed in 1973 after Penn Central declared bankruptcy, the state reserves the right to review and approve any development of former railroad properties, not just former Penn Central track corridors. The process currently entails extensive title searches and hearings to review development plans.

"It's a really arduous and time-consuming process and problem," said Edward Smith, an attorney and lobbyist for the Real Estate Bar Association.

The process can take months, if not longer, to legally settle land-use issues. Commercial lenders and title insurance companies are often hesitant to get involved in development deals that may be complicated by disputes over former railroad properties.

Paula M. Devereaux, an attorney at Rubin & Rudman LLP, said she once had an industrial property owner as a client who wanted to expand a facility over what used to be a private rail spur that came onto the company's property. The private spur was once used to redirect individual cargo train cars from regular tracks to make deliveries to the site.

But it wasn't clear whether the spur was covered by the state's railroad-land law, complicating the client's development project, said Devereaux.

Sometimes track spurs are only a couple of hundred feet long, but other times they can be hundreds of yards or even a few miles long, officials say.

Other development plans – mostly commercial developments, though sometimes residential projects as well – have been caught up in the land-use confusion.

The problem, legal experts agree, is the original wording of Chapter 40, Section 54A. The statute acts to protect "right of way" corridors, but the law also refers to "appurtenant" railroad land. Over the years, different gubernatorial administrations have had different interpretations of what "appurtenant" means – whether it means just the track right of ways, or adjacent land, or all railroad-related properties, from spurs to abandoned railroad depots.

"It ended up becoming a moving target because you didn't know from case to case how the state would rule," said Smith of land-used disputes.

This past legislative session, NAIOP Massachusetts jumped into the fray and helped craft a compromise bill eventually sponsored by Rep. Joseph Wagner, D-Chicopee. Wagner could not be reached for comment.

Tamara Small, senior vice president of government affairs at NAIOP, said all parties involved in the issue, including the Massachusetts Department of Transportation, were determined to clarify the law, but there wasn't enough time to get the compromise bill passed this past legislative session. Supporters expect to re-file the bill next year.

Basically, HB 3168 would have eliminated the use of the confusing "appurtenant" reference and spelled out what properties could be potentially developed, including former spur tracks.

Among other things, the bill also would allow the Department of Transportation secretary to personally review and approve any development deal on railroad properties abandoned before January 1960, rather than requiring a full-scale department review and public hearings.

But railroad properties abandoned since January 1960 – including the critical railroad corridors that were formerly owned by Penn Central, which also owned the former New York-New Haven-Hartford Rail Road Co. – would still be subject to full state reviews and public hearings, according to the draft compromise bill.

In a statement, MassDOT said this past spring's legislative negotiations were "positive" and the agency indicated it hoped the compromise bill can be re-filed as soon as possible. ♦

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REAL ESTATE'S FUTURE: TRANSIT-ORIENTED DEVELOPMENT

CONTINUED FROM PAGE 9

to further improve access. The additional stations and expanded service in these neighborhoods represent a step forward for economic and environmental justice because they make it easier for residents to get downtown without needing a car and for people from various places to access the neighborhoods (and perhaps support some local businesses).

This fall, city and state officials announced that Allston will get a commuter rail station on the Framingham/Worcester commuter rail line as part of the Mass Department of Transportation (MassDOT) $260 million I-90 Interchange Improvement Project. This project is part of a larger redevelopment opportunity which could bring about improvements that encourage biking and walking, while creating additional open space, and enhancing access to the Charles River.

WHAT BOSTON NEEDS TO DO TO MEET FUTURE NEEDS

With substantial housing needs and an expected growing demand for walkable urban development, the city's capturing of opportunities will come down to many factors, including Boston's ability to:

- Work successfully with colleges and universities to minimize the number of students living off-campus (at present, they number 36,000).
- Support the creation of more mixed-income developments and neighborhoods.
- Identify funding sources to support more affordable housing (an additional $20 million annually will need to be identified to enable the city to meet its affordable housing goals).
- Lead a residential zoning reform process with more as-of-right support for housing production citywide and re-zone for residential density around transit stations.
- Work with state agencies such as MassDOT to secure and redevelop sites.

STATE POLICY OPPORTUNITIES

In addition, policies on the state level could provide communities with valuable guidance and resources for how to grow responsibly. State laws that govern development and zoning have not been updated in four decades.

House Bill 1859, "An Act Promoting the Planning and Development of Sustainable Communities," filed by Sen. Dan Wolf (Harwich) and Rep. Stephen Kulik (Worthington), would provide communities across the state with a common set of practices that make it easier to update zoning. This legislation would help to discourage sprawl, encourage transit-oriented development, preserve open space, and allow for more density. Zoning reform is an important step forward for Massachusetts because it will help the state remain competitive and improve its ability to meet the needs of those who call it home – and those who want to. ♦

Erica Mattison is legislative director of the Environmental League of Massachusetts. Prior to joining ELM in 2013, she launched and led Suffolk University's sustainability program and served as the Executive Director of the Caucus of Women Legislators. She holds a bachelor's degree from Commonwealth Honors College at the University of Massachusetts Amherst and master's degree in public administration and a law degree from Suffolk University. Erica can be contacted by email at emattison@environmentalleague.org.

The renovated Ashmont T station includes a plaza which is home to a weekly farmers market, a neighborhood event that builds community and provides residents with access to locally grown foods.

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