Q&A with Ruth Dillingham

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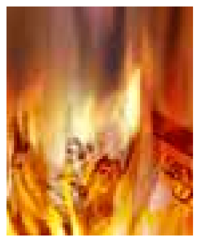

Arson tests co-insureds

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REBA news
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REBA's limited liability company legislation enacted

On Nov. 10, 2014, Gov. Deval Patrick signed into law House Bill 4380 as Chapter 371 of the Acts of 2014. Filed by Rep. Edward Coppinger on behalf of REBA, the legislation amending M.G.L. c. 156C, § 45 provides that any Massachusetts limited liability company that has been cancelled shall continue in existence for limited purposes to convey forgotten or overlooked real estate or other assets.

"This legislation corrects a troublesome issue in the Massachusetts LLC statute for those who were affected. It will no longer be necessary to obtain a court order in connection with the transfer of a property standing in the name of a cancelled LLC," said Pat Walsh, regional counsel for Fidelity National Title Group and a long-time member of the REBA Legislation Committee.

Under prior law, once a certificate of cancellation for the subject limited liability company was filed, there was no ability, in the absence of a court order, even to grant a discharge of a mortgage held by the LLC. The amendment to § 45 is modeled after similar provisions for dissolved corporations. It shall apply to LLC cancellations filed before, on or after the effective date, which is Feb. 8, 2015. REBA acknowledges the contributions of the office of State Secretary William F. Galvin to the language of the final bill.

It should be noted that the new law would not be available to a foreign limited liability company that has cancelled in its home state. MGL c. 156C, § 47 provides that "A foreign limited liability company's organization and internal affairs and the liability of its members and managers shall be governed by the laws of the jurisdiction under which it is organized." Thus, Massachusetts could not provide for its continued existence, even for the limited purposes set forth in revised §45, if the foreign LLC was cancelled in its home state. However, a different result might obtain in the case where the foreign LLC only filed a cancellation in Massachusetts. In that case the new statute would likely apply. ♦

Massachusetts construction law game-changer

A BREAKDOWN OF THE NEW RETAINAGE ACT

BY JONATHAN R. HAUSNER

JONATHAN HAUSNER

A new law is now in effect for construction contracts executed after Nov. 6, 2014, that not only affects the amount of retainage that a construction stakeholder may withhold, but also mandates processes for project completion. In short, the new law is a game-changer. The summary below describes how the game has very recently changed in Massachusetts private construction.

Does the new law govern your project?

The new law applies to projects where the contract for construction is one for which a "lien may be established under sections 2 or 4 of chapter 254 on a project for which the person whose contract with the project owner has an original contract price of $3,000,000 or more …" However, the statute does not apply to projects containing or designed to contain at least one but not more than four dwelling units.

What exactly does the new law require?

The statute imposes a limit on the amount of retainage that may be withheld; creates a detailed mandatory process for establishing the date of substantial completion; establishes a mandatory process for submitting punch lists and completing punch list items; and mandates a process for the application for payment and payment of retainage.

You can review the act online at malegislature.gov/Laws/SessionLaws/Acts/2014/Chapter276.

See RETAINAGE, page 10

REBA's Annual Meeting and Conference

The AMC took place on Nov. 3, 2014, at the Four Points by Sheraton. The annual meeting featured a ceremonial passing of the presidency gavel, informative breakout sessions, and a keynote address from author Hank Phillippi Ryan. See more photos on page 7.

Estate Planning, Trusts & Estate Administration Committee hosts open meeting on Mass. Homestead Law

REBA's Estate Planning, Trusts & Estate Administration Committee will host an open luncheon meeting at 12:00 noon on Wednesday, Feb. 25, 2015, at the John W. McCormack Court House, 5 Post Office Square, 12th Floor, in Boston.

The meeting topic will be a general discussion of the Massachusetts Homestead Law. Guest speakers include the Hon. Joan N. Feeney and the Hon. William C. Hillman, both of the United States Bankruptcy Court, and Don Lassman, a Chapter 7 Trustee and debtor's attorney.

The Estate Planning, Trusts & Estate Administration Committee is co-chaired by Leo Cushing and Sara Goldman Curley.

RSVP to Andrea Morales at morales@reba.net. Lunch will be available at a cost of $10, payable at the meeting, and will consist of a variety of sandwiches, salad, beverages, and dessert. Please indicate whether or not you would like to order lunch in your RSVP. You are also welcome to bring your own. This meeting is open to all REBA members. ♦

MESSAGE FROM THE PRESIDENT

REBA evolves, while remaining true to core values

BY THOMAS BHISITKUL

TOM BHISITKUL

As I embark upon my tenure as the new president of the Real Estate Bar Association for Massachusetts, I am both delighted by the privilege of leading this fine organization, and daunted by the responsibility of continuing the excellent stewardship of so many of my predecessors who have had a role in shaping the association into what it is today. As some of you may know, REBA is the second oldest bar association in this state, and its success over such a long period of time is attributable to its ability to adapt to the changing legal landscape from time to time, and to adjust its products and services in accordance with the evolving needs of its members. Part of our mission in 2015 will be to continue to learn and ascertain what our members need from their bar association and discover new ways in which the organization can serve our members, aid their practices, and provide advocacy on the issues that are important to them and to the integrity of the real estate legal practice in general.

The REBA leadership has recognized this evolving landscape, and has devoted significant time and focus in implementing new initiatives and expanding the range of services and resources that REBA can offer to our members. In this regard, we owe tribute to our outgoing president, Michelle Simons, who recognized early in her tenure that our membership yearned for opportunities to socialize and network with their brothers and sisters in the real estate bar. Through Michelle's vision, leadership and tenacious energy, REBA launched two very significant initiatives in her short year as president. The Women's Networking Group of Real Estate Professionals, Michelle's brainchild and perhaps her signature accomplishment as president, was an immediate and resounding success and revealed the apparently voracious appetite our members have for new networking opportunities. The Women's Networking Group events brought our members together with brokers, bankers, engineers and a host of other real estate professionals under the REBA banner, and served as a blueprint for future member networking initiatives.

The second major initiative pioneered during Michelle's tenure was the launch of REBA's New Lawyer's Committee, which was formed to provide a resource to new real estate lawyers as they launch their own careers and begin building their own practices (whether on their own, or as a young associate in established law firms). The New Lawyer's Committee will, in keeping with REBA's core educational mission, provide educational programs for new lawyers to build their foundational knowledge of real estate law and real estate customs and practice. This new committee will also continue to create networking and career development opportunities for new lawyers to meet and share ideas with other new and young lawyers, and also make contacts with (and network with) more experienced colleagues in the real estate bar and gain valuable insights from their wisdom.

As we look forward into 2015, we plan to build upon the successes of these and other terrific initiatives, while we continue to look for other new and innovative ways to serve the evolving needs of our members.

Of course, some of the core elements and values of our organization have been hallmarks of our mission for 150 years and will not change. Legal education continues to be a fundamental focus of our organization, and a core resource that we will continue to deliver to our members. As is REBA's tradition, we are so fortunate to have as our committee chairs and board members so many talented, energetic people who are leaders in their own areas of practice, and are at the forefront of issues that affect our member's practices. Many of our members are bracing for the implementation in 2015 of the Consumer Financial Protection Bureau's new rules governing residential lending, which involve new closing forms and disclosures and dramatically change residential real estate settlement practices in Massachusetts. REBA will provide education and training resources to assist our members in navigating the new rules and conforming their closing practices to comply with the new CFPB requirements. REBA is also engaging Michelle Korsmo, the CEO of the American Land Title Association, to serve as the keynote speaker at one of the REBA conferences in 2015, and who can provide insights into the new CFPB rules and ALTA's corresponding changes in settlement practices.

As REBA continues its long tradition of serving the needs of conveyancing attorneys in Massachusetts, I feel constantly compelled to proselytize REBA's broader mission to serve real estate practitioners in all practice areas and disciplines and to encourage our members to take advantage of the considerable resources the organization already has in place for practitioners in these other disciplines. REBA has committees dedicated to, and chaired and populated by leaders in such areas as, commercial real estate finance, zoning and land use, commercial leasing, condominium practice, environmental, affordable housing, litigation and a host of other practice areas. These committees provide educational events throughout the year on topics ranging from cutting-edge issues affecting those practice areas, to fundamentals and primers that are of interest to practitioners who are younger or new to the particular practice area. In addition, our biannual conferences continue to offer educational programs and sessions spanning the broad range of these various practice areas. Our goals in 2015 will include promoting these resources within and without the organization, and to also promote the availability of these resources to members who practice outside of the Route 128 corridor.

As another core element of our mission, REBA will continue to represent our members' interests and serve as their voice, both inside the State House and inside the court houses, on legal and legislative issues that impact the practice of real estate law in our state. Through the skilled (and tireless) efforts of Ed Smith, REBA's legislative counsel, and Fran Nolan of Harmon Law Offices and Rich Hogan of CATIC (co-chairs of REBA's Legislation Committee), REBA has sponsored or supported a long list of successful legislative measures, including most recently the passage of REBA-sponsored legislation to expand the right to voluntarily withdraw land from Land Court registration.

REBA is also fortunate to have its Amicus Committee chaired by some of the most talented legal advocates in the real estate bar, such as Ed Bloom of Sherin and Lodgen, Diane Tillotson of Hemenway & Barnes, and Dan Ossoff of Rackeman Sawyer & Brewster, who will ensure that REBA's voice is presented cogently and effectively in cases of significant impact to the practice of real estate law in our state.

As I start my tenure as president of REBA in 2015, I am so proud to have been selected to lead an organization that serves our members and advances the practice of real estate law in so many different ways, with so many talented people, and with resources that are so strategically directed. I look forward to working with you all to continue the improvement and enhancement of the programs and services REBA offers to its members, and to face and find solutions to the issues and challenges that face our organization and the practices of our members. ♦

The 2015 president of REBA, Tom Bhisitkul, is a partner in the Boston office of Hinckley, Allen & Snyder LLP with a practice focused on commercial real estate with a concentration on retail acquisitions and development, commercial leasing, land use and real estate litigation. He can be contacted via email at tbhisitkul@haslaw.com.

"I'd like you to review my proposed New Year's resolutions to make sure that none of them will be legally binding."

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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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Cousin Vinnie hires an associate

PAUL F. ALPHEN

PAUL ALPHEN

We love the holiday season because it provides numerous opportunities to gather with family members that otherwise we would see only at funerals. That is not to say that we spend the better part of the year avoiding them; we really love seeing them all and we relish their numerous personality traits and their idiosyncrasies. Of course, it is always a real joy to spend time with my cousin Vinnie, the suburban real estate attorney, as I annually follow him around the buffet table, over and over again.

"Big Paul!" he bellowed, "I finally broke down and hired an associate!" My heart instantly went out to the poor soul that had to follow Vinnie around his dingy, carton-laden offices. Vinnie had laid off his last associate at the start of the Great Recession and had been afraid of hiring a new one. I can't blame him; the evening he laid off his associate Skippy, Skippy's mother came bursting into Vinnie's office, gave him a tongue lashing and almost beat him with her handbag. True story. There are witnesses.

"You know, Alph, I am not getting any younger." Vinnie uses all my nicknames. "It occurred to me that I was going to end up working every night and weekend if I didn't bring on an associate. It was easy to find an eager associate; the world is full of under-employed lawyers. After having him work with me for only a week, I already felt some of the weight coming off my shoulders. I was quickly reminded of the good times before the Recession when I could delegate tasks, and engage in a certain amount of capitalism."

"Think about it, Paulie, there are only so many hours in the week that I can work. With an associate I can get more done, improve the quality and quantity of my work product, and pay the associate a few bucks less than the income he generates." Vinnie walked around the buffet table again, making a meatball, sliced ham and potato salad sandwich. "Before I hired the kid, I felt like I was running a radio talk show giving legal advice. I had so little time to get things done that I felt compelled to instantly respond to each phone call or email with a final answer or document, which does not always result in the best answer or finest work product. But now things are better. For example, last week a client called with a multi-million dollar deal and needed a complicated P&S and loan documents for multiple properties. And the client needed the documents immediately, as if the idea for the deal occurred to him in the shower that morning. I miss the good old days when developers engaged in long-term planning. Well, anyway, I worked on the 52 page P&S while the kid dug up the deeds and drafted the loan documents. The end product was a thing of beauty and I never felt like I was going to have a panic attack!"

"I have also encouraged the kid to pursue a career in real estate law. I told him that most of the great lawyers practicing real estate are older than I am. Sooner or later their wives or their doctors are going to tell them to stop going to the office every day, or they will just wise up and realize that there are better ways to spend their 'salad days' than sitting behind a computer screen for nine hours a day. I predict that in the next five years, hundreds of very successful lawyers will call it a day; and then, kid, the world will be your oyster."

Our successful cousin Nick joined us in the buffet table waltz, and sampled each of the 12 deserts. "So, Paul, you still workin' for that town off 495?" He asks me that every year. I am not sure if he is so shallow that my first cousin and college classmate really doesn't know what I do for a living, or if he just likes to get under my skin.

"No, Nick, I've been practicing law for the past 30 years." Nick had a new retort: "Sounds like it's time to retire. You too, Vin, you're even older than Paulie." Vinnie had a response. "Nick, you make a good point. I'm working on it. I finally have a smart young kid working for me and perhaps someday I will sell him my empire of manila folders and Steelcase and spend more time on the Cape." Nick muttered something about the Cape being middle class and regaled us with a long story about his latest trip to Mexico and some interaction with the Federales. Vinnie listened with one ear as he toured the buffet table searching for some hidden gem that perhaps he had overlooked. He was clearly a more relaxed person since hiring the kid. ♦

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.

The chairs of the residential conveyancing committee hosted a luncheon last month with some leading real estate conveyancers in Barnstable County.

Photo by Peter Wittenborg

REBA Continuing Legal Education Committee seeks new members

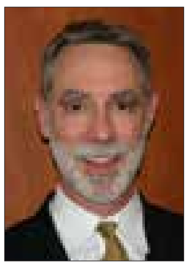
CLE Committee 2015 co-chairs Beth Barton and Dave Uitti seek new members to join the CLE Committee, which plays a pivotal role in the success of REBA's semi-annual conferences. Committee members are actively involved in conceiving and planning educational programming, and also introduce the conference breakout sessions.

Interested REBA members who wish to become involved and join this committee may email Nicole Cunningham at cunningham@reba.net.

THE LAWYERS COUNSEL

Law firm discipline – coming soon to a rule near you?

BY JAMES S. BOLAN AND SARA N. HOLDEN



JIM BOLAN

SARA HOLDEN

In 2015, the Supreme Judicial Court is going to enact a major set of revisions to the Rules of Professional Conduct. One rule, if adopted, is going to change the landscape for lawyers and law firms and some of the consequences of that change may be unintended. Until now, only individual lawyers who engaged in culpable conduct could be disciplined. Next year, it is possible that law firms may find themselves as "respondents" in bar discipline investigations.

THE RULE – PROS AND CONS

To date, only New York and New Jersey can discipline law firms. The present form of the proposed Massachusetts Rule 1.5(d) states that "A law firm shall make reasonable efforts to ensure that: (1) all lawyers in the firm conform to the Rules of Professional Conduct; and (2) the lawyers in the firm are subject to adequate supervision that is reasonable under the circumstances."

Advocates on the *pro* side are those who want to impose a greater duty of responsibility (often in larger firms because of sheer size) to oversee the lawyers within their "governance." Given larger corporate firm structures, there is a need to extend the reach of responsibility to all floors of the tall towers.

Advocates on the *con* side are those who worry not that firm-wide responsibility is not appropriate, but that the potential notoriety, let alone sanctions, in all size firms, could be disastrous to the non-managerial, innocent members and employees.

THE GRAND CANYON OF RELATIONSHIPS

Management and employees in law firms, like all entities, are often in adverse positions. With the evolution of in-firm counsel, and the intention that such counsel represent the interests of the firm, that dichotomy has increased. Since the firm's interests are now able to be protected by one of its own whose role is to advise the firm and not individual lawyers, that hierarchical divide puts individual lawyers outside of a protected circle.

If law firm discipline is imposed, that divide could become a chasm. Would the potential exposure of a law firm and the inherent conflict with the lawyer entice management to push the employee off of the curb to create defensible distance? The interest in protecting the firm name, reputation and goodwill could result in a "lowly" lawyer looking at the bus from underneath. Or will it provide a prophylactic shove the other way into a better-run enterprise.

Should a lawyer on the 23rd floor (or the Springfield office) be swept along if the firm is sanctioned along with one of its lawyers on the 15th floor (or the Pittsfield office)? Indeed, a Delaware multi-office firm was dissolved by the court after repeated conflicts violations!

THE DISCIPLINARY BROAD BRUSH AND ELEVATED CIVIL RISK

Upon a complaint, both the firm and the individual lawyer ought to have separate counsel. If the firm is a possible target, individual lawyers within a firm will no longer seek out in-firm counsel or a risk management partner to advise them, thus escalating the risk of a breach of fiduciary duty to and within the firm and to clients. Greater, not less, risk of isolation will result.

Part of that risk is the effect on civil liability by the potential rule violation not just by *respondeat superior*, but directly upon the firm. Presently, the scope of the rules notes that "[a] violation of … a disciplinary rule [by an individual lawyer] … is not itself an actionable breach of duty to a client. … As with statutes and regulations, however, if a plaintiff can demonstrate that a disciplinary rule was intended to protect one in his position, a violation of that rule may be some evidence of the attorney's negligence." *Fishman v. Brooks*, 396 Mass. 643, 649 (1986).

Appreciation of this risk urges consistency both in application of an entity rule and its potential legal effect so that law firm discipline would not create, or elevate, a violation of Rule 5.1 into a standard different from that of an individual lawyer, such as negligence per se.

WHAT ARE THE CONSEQUENCES?

There is no "lawyers' oath" for law firms, only individual lawyers. Should corporate "guilt by association" be the measure of responsibility? While there may be contract and fiduciary obligations within a firm for ill-conceived conduct, punishment of the firm itself and, by clear implication, all of the non-offending lawyers, sweeps too far unless common sense rules exist and are applied in a common sense manner. In a time of diminishing loyalties, will such a rule have the unintended consequence of dividing loyalties even further?

What will be the potential sanctions for the law firm? There have been very few cases of discipline in the 20 years or so of the rule's existence in New York and New Jersey. But, in one case, the lawyer and then the firm were censured for failing to control the behavior of one of the named partners. The court found that multiple instances of rude and uncivil conduct admitted to by the partner warranted public discipline and that this was "one of the 'rare instances'" where a law firm should be disciplined "since the pattern of mis-

See DISCIPLINE, page 6

Unlimited thoughts about the 'limited dividend' requirement

BY ROBERT RUZZO

BOB RUZZO

If confession is good for the soul, then this month's topic should be *really* good.

Ever since the Supreme Judicial Court's 2002 decision in *Board of Appeals of Wellesley vs. Ardemore*, the "limited dividend" requirement of the Comprehensive Permit Law (also known as Chapter 40B or the Affordable Housing Law) has been on your correspondent's mind. Not every day, mind you, but many a day to be sure.

WHAT GOOD CAN COME OUT OF A FORECLOSURE?

In *Ardemore*, the court wrestled with a comprehensive permit that was silent on the issue of how long a development's affordable units had to remain affordable. The owner argued that since the original financing documents and their embedded affordability requirements were no longer in effect, the obligation to provide affordable units had similarly expired.

The SJC undertook a thorough examination of the intent of the legislation as well as the independent financing arrangements that had been made in connection with construction of the development. Without reliving all of the gory details (what could be gorier than a foreclosure in Wellesley?), the court ultimately concluded that the obligation to maintain affordability existed independent of the financing documents, stating: "unless otherwise expressly agreed to by a town, so long as the project is not in compliance with local zoning ordinances, it must continue to serve the public interest for which it was authorized." Thus, the issue of the duration of affordability was put to rest.

But what about the provisions contained in Chapter 40B stating that "low or moderate income housing" must be "built or operated" by "[a] public agency or [a] nonprofit or limited dividend organization?" While the term "limited dividend organization" is certainly mentioned in the Affordable Housing Law, it is not meaningfully defined. This is hardly remarkable for a statute which was once described by one of its co-authors as "vague, even obscure." Nonetheless, the "limited dividend" element of the statute is by no means trivial; indeed, it formed a core part of the original internal bargain contained within Chapter 40B: "The government will provide you with subsidy and an ability to override local zoning if you as developer agree to make units affordable and limit your profit." The terms of that bargain have evolved over time.

HOW DID WE GET HERE?

A little historical digression is in order at this point. When the Affordable Housing Law was passed by the Legislature in 1969, it came directly upon the heels of litigation in the Supreme Judicial Court determining the constitutionality of the MassHousing enabling act. In order to defeat arguments that the Agency's financing might impermissibly (and unconstitutionally) benefit private parties, a "limited dividend" requirement (among other changes) was baked into the enabling statute. That notion carried over into the Affordable Housing Law.

A lot has happened since that time. Deep financial subsidies at the federal and state level have dwindled, the financing of affordable housing by nongovernmental actors has become commonplace, and development entities have become more national (and international) and sophisticated. As these changes continue and the breadth of the real estate marketplace continues to expand, the "limited dividend" requirement of Chapter 40B seems increasingly vestigial and parochial. The real question remains: is it constitutionally required, and if so to what extent?

WHAT DIFFERENCE DOES IT MAKE?

Given the manner in which the Affordable Housing Law has been interpreted by the Department of Housing and Community Development and the various subsidizing agencies, the economic issues associated with the limited dividend requirement *in the rental context* are more theoretical than real. Developers are allowed to "look back" and apply unused dividends from prior years and the Developer's Equity in a project can be revalued once during any five year period. Despite such developer-favorable interpretations, reasonably priced rental housing remains in short supply.

Unfortunately, even an often theoretical issue such as the limited dividend requirement can have real-world implications as more and more Chapter 40B developments are traded across an ever broader spectrum of development actors. Since Chapter 40B developments constitute such a significant portion of the overall rental housing stock in the Commonwealth (affordable and market rate), legacy issues such as the "limited dividend" requirement may very well chill investor interest in certain Chapter 40B rental properties within our borders.

Back in the immediate aftermath of *Ardemore*, one might have concluded that, like the affordability requirement, the limited dividend requirement had an ongoing vitality independent of a specific development's financing documents.

So much has changed since 2002. In 2007, the Supreme Judicial Court sanctioned the "New England Fund Program" as a permissible subsidy source under Chapter 40B, thereby accelerating an already developing trend: affordable housing development that is built without the sort of state subsidy that gave rise to constitutional concerns in the first place.

Three years later in 2010, the SJC's decision in *Amesbury v. Housing Appeals Committee* acknowledged the primacy of state Chapter 40B programmatic requirements (such as how to calculate the limited dividend) over conflicting local interpretations.

How far does such primacy extend? Certainly, regulations or guidance cannot "erase" the limited dividend requirement from the statute, but could they not limit that requirement in time, just as a municipality could, if it so chose, limit

See LIMITED DIVIDEND, page 10

Arson case tests insurance coverages

APPEALS COURT DENIES RECOVERY TO INNOCENT CO-INSUREDS

BY CHRISTOPHER R. VACCARO

CHRISTOPHER VACCARO

As the holiday season approaches, it is worth remembering that while we cannot choose our parents and siblings, we can choose our business partners. Anyone familiar with the court system knows that nasty disputes are common among family members in business together. This is especially true if one family member happens to be an arsonist with an ax to grind.

Last summer the Massachusetts Appeals Court decided *USF Insurance Company v. Langlois*, rejecting three brothers' insurance claim after a fourth brother burned down their tavern in Haverhill. The four Langlois brothers – Richard, Robert, David and Bruce – owned the tavern's real estate in the Langlois Family Realty Trust. Robert and David were trustees, and Richard was first successor trustee. Bruce, the second successor trustee, could become a trustee only upon the death of all original trustees. The four brothers were beneficiaries of the family trust, owning their interests jointly with rights of survivorship.

The family trust leased its real estate to Smith's Tavern Inc. of Haverhill, an affiliated corporation that operated the tavern. The four brothers were directors of the corporation, with David as president, treasurer and secretary. David and Robert managed the tavern. Bruce tended bar. USF Insurance Co. issued a casualty insurance policy naming both the family trust and the corporation as insureds. The policy excluded from coverage damages caused by dishonest or criminal acts of the insureds or their "partners, members, officers, managers, employees … directors, trustees … or anyone [entrusted with] the property for any purpose."

Apparently dissatisfied with his position in the Langlois family hierarchy, Bruce set the tavern on fire in 2010. He later pleaded guilty to arson, confessing his hostility toward his brothers. When the brothers reported the loss to USF Insurance Co., it filed suit in Superior Court claiming that losses resulting from Bruce's arson were excluded from coverage. The Superior Court entered judgment in favor of the insurance company.

INTERESTS WERE INTERTWINED

The Langlois brothers presented two arguments on appeal: first, the insurance policy was ambiguous; and second, the family trust was an innocent coinsured that should not lose insurance coverage because of Bruce's crime. Addressing the ambiguity argument, the Appeals Court noted that interpretations of insurance policies are not questions of fact for juries, and such ambiguities are resolved against insurance companies and in favor of insureds. However, when policy language is unambiguous, courts interpret policy terms according to their plain meaning. The Appeals Court found no ambiguity in the policy's language and rejected the brothers' argument.

The court then turned to the brothers' argument that the family trust was an innocent coinsured that should not be barred from collecting insurance proceeds from the fire. Under this argument, the brothers conceded that the corporation should not recover because Bruce was a director; however, the family trust should keep its insurance claim because Bruce was not a trustee. The court disagreed, observing that the trust's and corporation's interests were "inextricably intertwined," since the four brothers (including Bruce) were directors of the corporation and beneficiaries of the trust, and the trust had entrusted the corporation with the care of the building. The court upheld the lower court's ruling, concluding that despite the family trust's innocence, Bruce's intentional arson released the insurance company from any obligation to pay for the loss.

Soon family members across America will gather to celebrate holidays and share their love for one another. However, it would not be surprising if during this year's holiday season, one brother is missing from the Langlois family's gatherings. ♦

This article first appeared in the Nov. 24, 2014 issue of Banker & Tradesman.

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

Q & A

The CFPB's TILA-RESPA Integrated Disclosure Rule

RUTH DILLINGHAM

JOEL STEIN

SUSAN LAROSE

Editor's Note: The Consumer Financial Protection Bureau's TILA-RESPA Integrated Disclosure Rule, taking effect on Aug. 1, brings a sea change in residential closing practice throughout the United States. The new rule is the most significant change in federal regulation of residential transactions since the advent of RESPA in the 1970s.

Recently, Joel Stein and Susan LaRose sat down with Ruth Dillingham, special counsel at First American Title Insurance Company and an acknowledged national authority on the development and implementation of the new rule, for a question and answer session.

Q: In a recent newsletter, Wells Fargo has stated that it intends to generate and deliver the borrower's closing disclosure. Do you believe most lenders will follow this trend, and should conveyancers be concerned that the lender will be preparing the portion of the closing disclosure that was previously the HUD-1? Will the attorney still be preparing the seller's side? If there are last-minute changes, how will those be handled?

A: At this time no one knows exactly how lenders will respond to the changes in their liability under the Truth in Lending Act for preparation of the final closing disclosure. Clearly Wells Fargo had determined that the risks outweigh the benefit of having a settlement agent prepare the document, but other lenders may feel that they have a sufficiently strong relationship with their closing attorney that they can allow the attorney to prepare the form for them (as is permitted under the rule).

The role of the conveyancer in many ways will not change. While they may be delivering the information to the lender for inclusion in a lender generated document, only they have the resources to obtain certain information necessary to complete the closing disclosure. Furthermore, under the rule, the lender must use good faith in obtaining the amounts included in the closing disclosure, which amounts the lender will want to know are, in some way, "verified." Examples include the amount of real estate taxes, which the closing attorney has verified by means of obtaining a municipal lien certificate, or a final water reading from the town.

As for the seller's side of the transaction, the settlement agent remains the one who prepares that document, not the lender.

As for last-minute changes, there is the possibility that lenders will adopt a hybrid approach, where the lender prepares the initial closing disclosure and ensures delivery to the borrower in compliance with the rule, but allows some minor changes to be made by the closing attorney at the table utilizing the closing attorney's software and re-keying the lender data.

As individual conversations and attendance at recent mortgage industry programs has evidenced, most lenders are still assessing their risks and are in the process of making these decisions; there are many issues still to be resolved.

Q: There is increased concern by lenders regarding compliance by vendors. How do the ALTA "Best Practices" fit in?

A: As lenders continue to confront their new liabilities to consumers and regulators under this rule, they are naturally looking to ensure that all of their business partners are of the highest quality. This extends well beyond conveyancing attorneys and applies to appraisers and credit bureaus and all other participants in the mortgage transaction as well. For the closing attorney looking to exhibit adherence to an impartial set of standards, the ALTA Best Practices are the best tool currently in place. While some lenders have required demonstrated compliance with all of the seven best practices, others have requested responses to surveys and questionnaires to show the extent to which a firm has appropriate policies and procedures on specific issues. However, the ALTA Best Practices remain the standard that all of the information requests are measured by.

Q: Can you talk about the timing of the initial disclosure and revised disclosures? What does this do to "time is of the essence?"

A: The loan estimate, which combines the information now in the good faith estimate and initial Truth in Lending Disclosure, continues to have the same timing triggers – it must be delivered or mailed within three days of application. The rule does change the definition of application, and makes a separate rule for re-disclosure once a rate is selected, but the basic timing remains the same.

For the closing disclosure, which combines the information now in the HUD-1 and the final Truth in Lending Disclosure, the timing has changed. Under the new rule, for a closing of a loan whose application was taken on or after Aug. 1, 2015, the closing disclosure must be received by the borrower/applicant three business days before "consummation" (which in Massachusetts is generally considered the closing date, since loan documents and title transfer documents are executed at the same time and place). As a general rule, if a lender or settlement agent mails the form to the consumer, this means placing the closing disclosure in the mail a week in advance of the closing date to allow for the three-day presumption of receipt of a mailed document. The rule does provide an exception for the time for presumptive delivery to be overridden if actual and verified delivery is at an earlier date, but that delivery date only begins the three-day period before the closing can occur. The three-day period for review prior to closing cannot be waived by any party with the exception of a borrower who has a bona fide personal financial emergency (using the same standard as is currently used in the context of a waiver of rescission).

If, after receipt of the closing disclosure and during the three business days prior to closing, there is a change of the borrower's loan program, the addition of a prepayment penalty or the APR changes beyond the tolerances permitted under the Mortgage Disclosure Improvement Act, then the lender must re-disclose and the transaction cannot close until an additional three business days have elapsed.

However, for more typical changes, such as an increase in the buyer's costs due to an oil delivery, or the decision to purchase personal property, there is no need to wait an additional three days; the change can be made at the time of the closing.

The major question posed by this change in timing is, "How will this affect closing dates selected by buyers and sellers in purchase and sale agreements, frequently months in advance of the actual anticipated closing?"

Some subsidiary issues to be considered are:

- The seller is not a party to the loan transaction and therefore is not bound by the lender's time lines. Since the contract states that "time is of the essence" it appears that a buyer who cannot perform on the contract date due to the lender's inability to close (due to the timing issues) is in danger of losing a deposit.
- Even if this transaction is set to closing on schedule, what about those transactions that are dependent on it for their completion (a buyer who can't sell or a seller who can't buy due to a lender issue)?
- Will the conveyancing bar amend purchase contracts to allow for an automatic extension of time to accommodate these issues?
- What about a transaction where the lender insists on approving or re-creating an amended closing disclosure? Will they have staff available during non-conventional business hours?

In summary, as we all learned with the changes to the mortgage loan transaction rules in 2010, conversations will have to be had, both between lenders and their regulators and between lenders and their closing attorneys. The best recommendation now available? Keep informed and keep the lines of communication open with your lender clients as they finalize these important business decisions. ♦

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LAW FIRM DISCIPLINE COMING SOON?

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conduct indicated a firm-wide problem and the highly visible misconduct of a name partner must have been apparent to all members of the … firm."

If New York is a measure of things to come, do we all become burdened by a standard of "apparent knowledge" of miscreant conduct? Will smaller law firms bear a greater burden and, thus, more discipline will be imposed on smaller, not larger, firms? If so, will smaller firms have to spend more of their time and energy managing behavior simply because it is more likely that misconduct will be "apparent" in that format? Does that kind of "standard" create a more strict enforcement and civil consequence on smaller firms than amidst the diaspora of a tall tower or multi-state firm?

SOME SUGGESTIONS

One way of addressing the issue (and a way of leveling both the size and knowledge differential) is that, in lieu of sanction, the offending law firm would participate in a law office management audit, a non-disciplinary and non-public disposition. A second would be a private diversion program. A third and fourth could be probation and/or fines.

Otherwise, if the New York "standard" that one person's conduct "must have been apparent" to everyone else is adopted here and public discipline results, guilt by association will pit partner versus partner and employee versus management in more and more adversarial ways. While I have for years advocated that no substantive communication be sent out of the office without a second lawyer first reviewing it, the reality is very few abide. Will individual lawyers constantly be pressing management to impose more oversight "prophylactically" in the hope that there will be adequate proof of reasonable efforts to insulate all but the offender when the inevitable misconduct arises? And, if management is working to protect their own interests and that of the firm, so as not to risk sanction, of what effect are those efforts on assisting their clients, let alone the lawyer now under the bus?

In my view, there is a good reason why only two states have chosen this route thus far and with limited effect. A better recourse would be law firm self- or engaged-audits for a "best practices" result. ♦

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The role of municipalities in adapting to climate change

BY ALADDINE JOROFF

ALADDINE JOROFF

Climate change is a global phenomenon, but municipalities play an important role in developing and implementing measures to adapt to its impacts. Local jurisdictions will frequently take the lead in responding to the effects of more frequent and severe storms, flooding, and high temperature days on their residents, building stock and infrastructure. The challenge of adapting communities and ecosystems to changes in the environment is not new, but municipalities will face growing pressure to be more comprehensive and proactive in pursuing what the U.S. Environmental Protection Agency describes as both "protective" and "opportunistic" adjustments to adapt to climate change.

Multi-faceted tools are required to build resiliency to the impacts of climate change and resulting vulnerabilities, including flooded buildings, over-burdened public infrastructure, health stresses and strained energy infrastructure. Adapting to the challenge is not the province of a single area of law that operates in a silo; it requires an integrated approach that involves a range of permitting, development and funding decisions. The experience and governance structures that regulators have built in the context of climate change mitigation informs adaptation efforts, but resiliency planning raises distinct challenges, including the need to regulate around evolving information and predictions climate change impacts.

DEFINING CLIMATE CHANGE ADAPTATION

Adaptation measures, whether described as building adaptive capacity, resiliency planning, sustainability planning or disaster planning, involve proactive decision-making and requirements. As defined by the Intergovernmental Panel on Climate Change (IPCC), climate change adaptation entails "adjustment in natural or human systems in response to actual or expected climatic stimuli or their effects, which moderates harm or exploits beneficial opportunities" including adaptation that is both anticipatory (or proactive) – taking place before impacts of climate change are observed – and planned – resulting from a deliberate policy decision, based on an awareness that conditions have changed or are about to change and that action is required to return to, maintain or achieve a desired state.

Importantly, climate change adaptation does not take the place of mitigation, which focuses on reducing emissions of greenhouse gases (GHGs). As reported by the IPCC, no matter how much the emission of GHGs is reduced going forward, existing levels of GHGs will result in some level of change to the environment, and these risks will grow if emissions are not reduced. Mitigation and adaptation are complementary strategies that may, but need not, overlap. For example, deploying distributed renewable energy generation may both reduce GHG emissions (mitigation) and provide an "islandable" energy source if the grid went offline during a storm (adaptation); and efforts to develop urban tree canopies both absorb carbon from the atmosphere (mitigation) and provide cooling during higher-temperature days (adaptation).

ADDRESSING CHALLENGES

Municipalities face not only the question of what they can and should do to adapt to climate change, but also when they should take action and where to obtain required resources and financing. Answering these questions may involve different analyses and challenges than encountered when developing mitigation plans. For instance, a mitigation analysis looks at a project's impact on the environment – will new energy use or transportation contribute to GHG emissions? – while an adaptation analysis also considers how a changing environment could affect a project – will projected increases in precipitation make a development more prone to flooding?

Adaptation planning must also consider the complexity associated with projecting the impacts of climate change and environmental responses. Although the growing scientific consensus is that there will be irreversible impacts from climate change, which could lead to a level of natural hazard risks beyond those for which emergency managers currently plan, the exact level of impact is not known. For example, projections of sea level rise and higher temperatures vary based on the underlying GHG emissions scenarios. Moreover, the modeling needed for local-level data can be costly and labor intensive. Such uncertainty forces municipalities to consider the level of information needed to insulate increased restrictions on development, such as limiting flood-sensitive uses in floodplains, against legal challenges such as takings claims.

Because information about climate change impacts will evolve over time, there are benefits to avoiding front-loaded decision making that locks in consequences or patterns of behavior for many years. Adaptive management, a tool used in other contexts marked by uncertainty, may be a useful framework for navigating adaptation policy-making. This cyclical process begins by assessing a problem, designing a tool to address the problem, implementing the tool, monitoring results, evaluating success, adjusting the tool and then beginning again. Mechanisms that could incorporate adaptive management include phased requirements and reopeners in permits and regulations that might be triggered by threshold events (e.g., a certain amount of sea level rise, multiple significant flooding events at a property or the replacement of a roof) or temporal events (e.g., every five years or upon issuance of new floodplain maps). The issues revisited during a reopener could range from whether a project is meeting its intended design goals, e.g., whether stormwater management features are performing as anticipated, to whether a substantive requirement needs to be revised, e.g., increasing the stormwater storage capacity required for new projects.

WHY MUNICIPALITIES ARE ACTING NOW

The difficulties associated with planning around complex and potentially evolving data are not preventing municipalities from adopting adaptation measures. Ongoing adaptation activities are motivated by many factors, including:

- Existing conditions, such as eroding coastlines or weather events that already overwhelm or strain public infrastructures, e.g., "extreme" events like Hurricane Sandy or "regular" problems like the high tides that routinely swamp low-lying streets in Miami.
- Cost-benefit analyses, such as the projection in the Climate Change Vulnerability Assessment and Adaptation Planning Study for Water Quality Infrastructure in New Bedford, Fairhaven and Acushnet that a Category 3 hurricane with four feet of sea level rise would result in $3.5 billion of economic damages.
- Pressures from residents or outside forces, such as state and federal governments, which may tie funding, for tasks like emergency preparedness or coastal protection programs, to climate change adaptation, or pressures from the insurance industry, which seeks to limit the damages it will have to pay due to climate change impacts, including by pushing municipalities to adopt adaptation measures like stronger building codes.

The potential role of insurance companies as drivers of municipal action was highlighted in a recent lawsuit brought by Farmers Insurance Company against nearly 200 municipalities in the Chicago area for allegedly failing to adequately prepare for the impacts of climate change. The complaint was withdrawn before this theory of liability was fleshed out, but it may be a precursor of the type of risk local regulatory and permitting bodies could face if they choose not to address existing information about the impacts of climate change in their decision making.

In Massachusetts, communities may use authority derived from the home rule system, police powers and other sources to promote resiliency efforts through laws, regulations, policies and guidance relating to a range of issues, including wetlands and stormwater management, zoning, infrastructure standards, procurement policies, design review programs and emergency management plans. Such steps, which may be informed by regional or local climate change vulnerability assessments, can impact existing development and operations as well as new projects in the private and public sectors. Examples of measures communities can take to address impacts of climate change are available in the paper "Legal Options for Municipal Climate Adaptation in South Boston," prepared by Harvard Law School's Emmett Environmental Law and Policy Clinic. ♦

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RETAINAGE ACT

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How much can a construction stakeholder back as retainage?

The statute imposes a limit of 5 percent on the amount of retainage a construction stakeholder may assert on an applicable project.

THE NEW 'SUBSTANTIAL COMPLETION' PROCESS

The statute defines "substantial completion" as "the stage in the progress of the project when the work required by the contract for construction with the project owner is sufficiently complete in accordance with the contract for construction so that the project owner may occupy or utilize the work for its intended use." Substantial completion may apply to all or a part of a project. This definition should be familiar to construction stakeholders because it does not differ vastly from that contained in other General Laws and industry standard form contracts.

The statute outlines the substantial completion process as follows:

- The contractor must submit a notice of substantial completion (in accordance with the statutory form provided in subsection c) within 14 days of reaching the stage of the project that the contractor believes meets the definition above.
- The owner must then accept or reject the contractor's notice within 14 days after its receipt. If the owner fails to act on the notice, it will be deemed accepted after the 14-day time period lapses. Upon acceptance, the project's substantial completion date is established and binding for all purposes outlined in the project's construction contract (for example, liquidated damages cut off, commencement of warranties, and insurance coverages).
- If the owner rejects the contractor's notice, the rejection notice must state the factual and contractual basis for rejection and be certified as being made in good faith. The contractor may avail itself of the construction contract's dispute resolution procedures on an expedited basis. If the contractor does not submit to the dispute resolution process, it may resubmit the notice to the owner and seek acceptance again.

THE PUNCH LIST PROCESS

The Massachusetts legislature has also established a statutory punch list submittal and completion protocol:

- The owner must provide the contractor with a written punch list (again, certified as being made in good faith) within 14 days after acceptance of the substantial completion notice. The punch list must include a description of all incomplete/defective work and a list of all required "deliverables." The statute defines a deliverable as "a project close-out document required to be submitted by the person seeking payment of retainage under the person's contract for construction; provided, however, that a lien waiver or release, which is a deliverable, shall comply with chapter 254; and provided further, that 'deliverable' shall not include any document affirming, certifying or confirming completion or correction of labor, materials or other items furnished or incomplete or defective work." The contractor may dispute items on the punch list.
- The contractor must then pass the list on to its subcontractors within an additional seven days (21 days after acceptance of notice of substantial completion). The contractor is free to add items to the list it passes down to its subcontractors. Like the owner's list, the contractor's list must be certified as being made in good faith. Subcontractors may also dispute items on the punch list the contractor provides.
- After the process above has been completed, the owner and the contractor must fulfill their punch list obligations "in good faith and in a timely manner."

WHEN AND HOW RETAINAGE IS PAID

Stakeholders against whom retainage is being held may seek release of retainage no sooner than 60 days following substantial completion or a final and binding resolution of a dispute about the substantial completion date. Note, however, that the owner and contractor may allow for an earlier submission of an application for payment of retainage in the construction contract. The application for payment of retainage must be certified as being made in good faith and must include the punch list previously received, indicating whether each item on that list has been completed or repaired, and a list of each deliverable delivered.

The stakeholder receiving the retainage application must then release retainage amounts for such items within 30 days. That stakeholder, however, may continue to withhold amounts for outstanding work and/or incomplete or defective work, missing deliverables and pending claims.

The amount an owner may withhold at this stage is limited to the following:

- The reasonable value of outstanding deliverables agreed upon by the parties and, absent an agreement, not more than 2.5 percent of the total adjusted contract price.
- 150 percent of the cost to correct incomplete or defective items.
- The reasonable value of claims and any costs, expenses, and attorneys' fees incurred as a result of the claims if permitted in the contract.

Owners have a special restriction when it comes to continued retainage withholding. Specifically, unless an owner has declared the prime contractor in default, the owner cannot hold retainage for subcontractor work that is not the subject of the owner's claim(s) against the prime contractor.

This new legislation, like the Prompt Payment Act, will have a broad and lasting impact on the construction industry in Massachusetts. Regardless of what a construction contract says, the act will control for projects with a contract value over $3 million (with the notable exception for smaller residential projects). The most glaring trap for the unwary is the automatic or deemed approval of a notice of substantial completion because "approval" of the notice establishes the substantial completion date for various critical issues (for example, liquidated damages and warranties). Further, as projects close out, owners and contractors may begin to feel a cash flow squeeze when lower-tier contractors begin to avail themselves of the retainage payout process. It will be some time before construction stakeholders know the full impact of the new law, but parties may wish to build the new deadlines and strictures into both contracts and contract administration protocols. ♦

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Issues continue to surround registered land

BY JOEL A. STEIN

JOEL STEIN

In the case of *In Re: Safina N. Mbazira*, the United States Bankruptcy Court for the District of Massachusetts ruled that a mortgage encumbering registered land whose certificate of acknowledgment omitted the mortgagor's name, but which mortgage was accepted by the Land Court for registration and is noted on the certificate of title, does not provide constructive knowledge to third parties.

In a previous article in *REBA News*, I discussed the case of *In Re: Giroux* and *In Re: Bower*, which dealt with a similar issue for a mortgage on the recorded side. The registered mortgage which ran to Mortgage Electronic Registration Systems Inc., was filed with the Middlesex County (Southern District) Registry District of the Land Court on July 26, 2005. The acknowledgment omitted the name of the acknowledging party as well as the name of the county and the year of the acknowledgment. As is frequently the case, the notary failed to cross out any of the "he/she/they" alternatives.

The court held that a mortgage with a defective acknowledgment should not have been accepted for recordation under M.G.L. c. 183, § 29 and, as it should have not been accepted for filing, it does not provide notice to third parties under M.G.L. c. 185, § 58.

The court also held that the fact the mortgage appears on the memorandum of encumbrances does not change the result and determined that the language in the first paragraph of M.G.L. c. 185, § 46 must be read together with the language in M.G.L. c. 185, § 58.

This case provides a further chink in the armor of registered land. As in the case of *In Re: Giroux*, where improperly executed assignments were determined to be invalid, here an improperly acknowledged mortgage, in the original amount of $528,000, was found to be ineffective against third parties.

The dual lessons are clear: First, that you must be very careful reviewing acknowledgments of all instruments prior to recording or filing and, secondly, that you should be reviewing documents that have been accepted for filing on the registered side with the understanding that if they are improperly executed or acknowledged, they may be found to be invalid despite the fact that they have been accepted for filing and appear on the memorandum of encumbrances attached to the certificate of title.

TITLE ACCURACY IN QUESTION

In another matter relating to registered land, I have been alerted to an s-petition case that was filed and allowed in 2012. The s-petition sought to add a mortgage onto a current certificate of title which mortgage was not brought forward onto the current certificate "through mistake or inadvertence."

The current owner has held title since 1987. The mortgage in question was executed on July 29, 1985, and was due and payable on Aug. 1, 2015. The transfer from the mortgagors to the current owner was for good consideration. There is no note on the deed that the property was being conveyed subject to the mortgage.

The current owner did not finance the property when it was purchased. The only mortgage she has filed since taking title is a future advance mortgage in 2008. Presumably, they did not find the mortgage in question at the time of closing.

I am not certain of the effect of this matter upon practice by conveyancers and title examiners. If, as a matter of course, you cannot rely on the accuracy of a certificate of title, we need to seriously consider title examination practices. ♦

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.

40B'S LIMITED DIVIDEND

CONTINUED FROM PAGE 1

the duration of affordability under *Ardemore*?

WHAT DOES IT ALL MEAN?

As an increasing number of publicly financed projects avail themselves of alternative sources of financing and refinancing, the time is ripe for definitive interpretive guidance on this matter to be promulgated by the public and quasi public sector. With such guidance from the state, a high degree of certainty could be provided to the development community and any unhappy parties could always petition the courts.

Only time, and perhaps ultimately the Supreme Judicial Court, will resolve this issue. But it is time to move in that direction.

In the interim, my sincere apologies for not pushing this issue harder, earlier. ♦

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