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The tyranny of the abutter

BY ROBERT M. RUZZO

BOB RUZZO

The time spent deconstructing the writings of Alexis de Tocqueville has to rank among the least gratifying memories of every former political science major. De Tocqueville's most notable work, *Democracy in America*, expounded upon the potential dangers of majority rule run rampant. De Tocqueville was not the first to identify this concern; indeed, any kernel of originality attributed to his work in this area is suspect at best. Fear of oppressive rule by the majority has roots at least as far back as ancient Greece. At various times, John Adams, John Stuart Mill and Lord Acton all voiced similar thoughts, more eloquently.

The Founding Fathers, for their part, believed that a balance of powers was essential; thus, the judicial branch was established as the protector of individual rights and liberties and as the classic countervailing check for non-majoritarian interests against de Tocqueville's oft-dreaded tyranny.

For many, and in particular for those who live, work and play in the land use entitlement sector, it would seem that De Tocqueville need not have worried quite so much. For in this realm, the pendulum appears to have swung rather decisively to the opposite extreme.

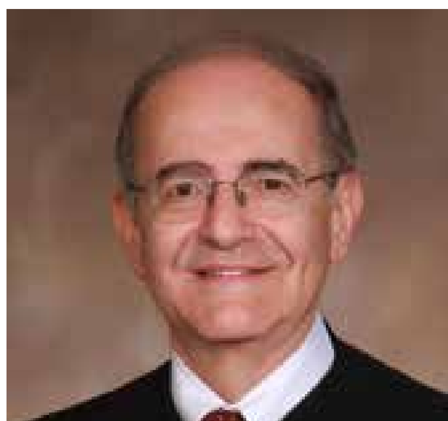
For land use entitlement proposals of all kinds, but particularly for housing proposals, lawsuits brought by disgruntled abutters challenging the decisions of a local permit granting authority are common fare. Anecdotes abound about well-heeled abutters seeking to delay projects with the aim of entangling proponents in the flotsam and jetsam of the next economic downturn. As Judge Rudolph Kass (now retired) noted many years ago in *Milton Commons Associates vs. Board of Appeals*, 14 Mass.App.Ct. 111, n.2 (1982): "Delay is often as effective as denial."

Any one anecdote may be apocryphal, but the burgeoning growth of this cottage industry adds to an already overburdened development cost equation. And, in a region of housing scarcity and increasingly high prices, at some point we need to ask ourselves – with apologies to Dr. Spock and Captain Kirk – under what circumstances do the needs of the many outweigh the needs of the few (or the one)?

That's what makes the attempted resuscitation of a review panel for abut-

See BILL FILED, page 6

REBA Dispute Resolution welcomes Retired Land Court Judge Harry Grossman



Judge Grossman

Former Land Court Associate Justice Harry M. Grossman has joined the panel of neutrals of REBA Dispute Resolution. Nominated to the Land Court bench in 2006 by former Gov. Mitt Romney, Grossman retired at the end of last year.

Prior to joining the court, Grossman's career included a stint at Brown Rudnick followed by many years of public service at the Massachusetts Department of Revenue and at the Executive Office of Administration and Finance, where he served as general counsel.

"We could not be more pleased that Harry has joined the REBA/DR family," said Mel Greenberg, president of REBA Dispute Resolution. "We are confident that his many years of service in the public sector, combined with his nearly 10 years on the Land Court bench, will bring an added dimension of knowledge and expertise to our mediation clients."

For more information about Grossman or to schedule a mediation or arbitration, contact Andrea Morales at morales@reba.net. ♦

MESSAGE FROM THE PRESIDENT

Preparing for the approaching storm

BY THOMAS BHISITKUL

When I was in college, I took a class in American art history. Now, 27 years later, I remember almost nothing about that class, except two things. First, I remember the term "chiaroscuro;" I couldn't actually tell you what it means, but I know it's embedded somewhere in my subconscious because whenever I order a "chacarero" sandwich from the famous restaurant in Boston I invariably ask for a "chiaroscuro."

The only other thing I still remember from my art class is an 1859 landscape painting by Martin Johnson Heade entitled "Approaching Thunderstorm," which depicts the dark calm of an inlet in Point Judith, Rhode Island, shrouded by darkening clouds and portent of an impending storm. The painting symbolizes the political instability and cultural tension of the time, as the country was moving inexorably toward the Civil War.

TOM BHISITKUL

Over the past few weeks as I have been travelling across the state with the REBA Residential Conveyancing Committee (RCC) on their famous "roadshow" presentations, I have thought a lot about that painting. One of the main components of the RCC program is an excellent presentation by Susan LaRose, REBA's president-elect and co-chair of the Title Insurance and National Affairs Committee, on the new Consumer Financial Protection Bureau rule that will, inexorably, go into effect on Aug. 1.

As I assume every residential lending and conveyancing attorney knows by now, the new CFPB rule (officially dubbed the "TILA-RESPA Integrated Disclosure Rule") is a comprehensive overhaul of real estate settlement practices under RESPA and lending disclo-

See PRESIDENT'S MESSAGE, page 3

IN MEMORIAM

Remembering Judge Peter Kilborn

BY THE HON. MARK V. GREEN

The Massachusetts real estate bar lost a giant late last year, when former Land Court Chief Justice Peter W. Kilborn passed away following a stroke.

Of the many positive attributes Peter held in abundance, three in particular stand out: kindness, patience and intellect. His intellect served him – and the bar – well, in the clarity and precision that were the hallmarks of his written explanations of the often complex and intricate matters he decided. But it was his kindness and patience that set him apart as an exceptional jurist for the litigants who appeared before him, and as a leader to the colleagues and staff he led for many years as chief justice of the Land Court.

To a person, his law clerks comment on his treatment of self-represented litigants who appeared before him. He consistently treated them with dignity and respect, and gave them the time they needed to present their case. He was just as patient and kind to court staff and his judicial colleagues. He ran a remarkably democratic court; our weekly judges' meetings, over lunch, typically consisted of a brief informational session followed by a free-ranging discussion that he led, but never dominated.

Peter presided over two milestones in the life of the Land Court. In 1998 he was joined by Supreme Judicial Court Chief Justice Herbert Wilkins, retired

See IN MEMORIAM, page 4

Getting down to specifics for Boston's growth zones

BY MATTHEW J. LAWLOR

MATT LAWLOR

With the avalanche of snow that buried Boston throughout February and remains piled around us even in March, this past December seems like a vague memory and spring seems far off. But as the snow melts (finally) and 2015 comes more clearly into focus, everyone interested in the competitiveness of our region's central city, especially as it relates to housing supply and cost, needs to remember the potentially groundbreaking speech on that Boston Mayor Martin Walsh delivered to the Boston Chamber of Commerce in mid-December.

That speech picked up where the Walsh Administration's major housing blueprint – "Housing a Changing City/Boston 2030" – left off. Very briefly summarized, "Housing a Changing City" predicted a continuation of strong population growth in the next 15 years that will put Boston above 700,000 residents for the first time since the late 1950s. According to the report, this new, and welcome, population trend results in the need for a total of almost 53,000 new housing units of all kinds (senior, student, workforce and affordable) to be built in the same time period. The report cautions that failure to produce at least this many units would worsen what is already one of the most expensive housing markets in the country, push out middle-class and lower-income households, and widen the city's income gap.

For several decades, housing at all levels, especially middle- and lower-income affordable housing (and with the possible exception of luxury units), has not been produced at anywhere near the levels required to achieve the 2030 goal, and the report recommends a wide range of actions the city can take in seeking to reach the levels it needs across all categories, including, for example, new direct local funding for affordable housing and new approaches for the student housing segment, including privately-financed dormitories.

For workforce housing, major recommendations of the report include that the city identify areas where higher density housing can be allowed as-of-right in certain transit-served outlying neighborhoods, where land and construction costs, while still high, are at least lower than downtown, and that permitting be further streamlined after last year's successful clearing of the Board of Appeals' zoning relief docket.

The mayor's speech took the report's recommendations a step further, and laid out a specific rationale for these "growth zones" in language that is worth quoting directly: "We start [shaping new growth] by moving forward one of the key strategies in our housing plan: growth zones for transit-oriented workforce housing. Boston needs more housing. But there is no one-size-fits-all solution. Every neighborhood has its own character. In some places, density is not only appropriate – it is badly needed. It is needed to bring prices back within reach. It is needed to spur retail investment. It is needed to breathe new life into under-developed streets."

The mayor identified two locations where growth zones would be implemented first: in South Boston, along Dorchester Avenue between Broadway and Andrew stations on the Red Line (South Boston), and, second, in Jamaica Plain along Washington Street/Columbus Avenue between Forest Hills and Jackson Square stations on the Orange Line.

What the mayor couldn't do in such a speech was define the details of what, exactly, growth zones would include in terms of regulatory changes from current zoning. And now, over two months on, a city (or at least its housing advocates, developers and zoning attorneys) eagerly awaits those details. The time has come to flesh them out and debate them openly and honestly. It would be a huge lost opportunity if growth zones were to somehow end up merely a policy or, worse yet, tried to temporize or put off resolving key questions to another day or leave them to be fought over on each project that tries to come through the pipeline.

Accordingly, the following is a list of four critical regulatory questions that will need to be wrestled with and solved for growth zones to have the impact that is desired:

As of right residential density – This seems like the "easy" one because it's the one that "Housing a Changing City" was most definitive about, but make no mistake that even in the initial transitional areas slated for growth zones, this will be lively debate. The increase in pre-entitled residential density must be substantial and it cannot be bargained away in the process. To do otherwise is to invite a continuation of the slow walk that has characterized new residential development in Boston's neighborhoods for decades.

Inclusionary affordable housing requirements – At present, the city only requires inclusionary affordable units for projects of a minimum size requiring zoning relief. For growth zones, with minimum residential densities allowed as-of-right, this model will not work. It may be that the inclusionary policy will morph into a density bonus for projects in growth zones that is tied to additional affordable units in order to avoid putting pressure on pricing for the market rate units. This will be a key part of the debate for affordable housing advocates.

Off-street parking requirements – Debate over off-street parking requirements is a perpetual fixture of development discussions in Boston. The rail transit-orientation of growth zones will argue strongly for substantially reducing and potentially even eliminating off-street parking requirements and promoting shared use parking use arrangements. Bottom line: new development in growth zones cannot be burdened with excessive off-street parking requirements that would result in reduced residential densities and higher per-units costs.

Large project review – Finally, it seems appropriate to consider what role Article 80 large project review should play in growth zones. In a nutshell, large project review is the process by which the Boston Redevelopment Authority, acting in its planning and project review capacity, evaluates significant development projects for their impacts on their immediate surroundings and the city at large in order to arrive at an agreed-upon package for mitigating those impacts. Large project review takes as its starting premise that any new development must inherently have negative impacts that must be mitigated before it can be allowed to go forward.

But what happens if the city has determined that growth (and accelerated growth even) in particular locations is essential to its competitiveness? What role should large project review play then? We may be about to find out. The city might raise the current 50,000-square-foot gross floor area threshold or even eliminate large project review in growth zones, though consideration would have to be given to the impact on linkage requirements, perhaps including codifying other typical mitigation elements.

These four issues seem at this juncture to be the most significant, but the list could certainly be longer and could include different approaches depending on one's perspective. Time will tell as the planning and regulatory processes for the growth zones unfold. "Housing a Changing City" sets ambitious goals for Boston as the city enters a sustained upswing in population that will inevitably lead to more residential development. While many factors will be at play, it seems the success or failure of the plan will depend in large part on the success or failure of the growth zones. ♦

The opinions expressed in this article are the author's own, and are not to be attributed to Robinson & Cole LLP or any other person or entity.

Matt Lawyer is a partner with Robinson + Cole. He may be reached at MLawlor@rc.com.

The Women's Networking Group hosts a night at the Women's Lunch Place

Join special guest Elizabeth Keeley, executive director of the Women's Lunch Place, for this meet-and-greet reception. Light refreshments and beer/wine will be served. This reception, open to all REBA members, is from 5:30 p.m. to 7:30 p.m. on Wednesday, April 1, at the Women's Lunch Place, 67 Newbury St., Boston. Parking is available at the Back Bay Garage, located at 87 St. James Ave. (between Berkeley and Clarendon streets) at a cost of $10. Street meter parking is also available.

Please RSVP by March 25 to Nicole Cunningham at cunningham@reba.net.

Feel free to bring along other lawyers and real estate professionals, including real estate brokers, property managers, bank officers, loan officers, mortgage brokers, appraisers, architects, engineers, landscape architects, designers, etc., who may enjoy meeting other women in our professional community and becoming a part of our growing network.

The Women's Lunch Place is a safe, welcoming daytime shelter for all women who are experiencing homelessness or poverty. Contributions are welcome and greatly appreciated. Mother's Day cards will be available for purchase at this event. Contributions support the Women's Lunch Place. For more information about the Women's Lunch Place, go to www. womenslunchplace.org. ♦

REBA
THE REAL ESTATE BAR ASSOCIATION
for Massachusetts

50 Congress Street, Suite 600
Boston, Massachusetts 02109-4075
www.reba.net

President:
Thomas Bhisitkul
tbhisitkul@hinckleyallen.com

President Elect:
Susan B. LaRose
susan@dandllaw.com

Immediate Past President:
Michelle T. Simons
msimons@legalpro.com

Treasurer:
Francis J. Nolan
fnolan@harmonlaw.com

Clerk:
Diane R. Rubin
drubin@princelobel.com

Executive Director, Editor:
Peter Wittenborg
wittenborg@reba.net

Legislative Counsel:
Edward J. Smith
ejs@ejsmithrelaw.com

Unauthorized Practice of Law Counsel:
Douglas W. Salvesen
dsalvesen@bizlit.com

Managing Editor:
Nicole Cunningham
cunningham@reba.net

Assistant Editor:
Andrea M. Morales
morales@reba.net

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

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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Real Estate & Financial Information Since 1872

280 Summer Street, 8th Floor
Boston, MA 02210-1131
(800) 356-8805
www.thewarrengroup.com

PRESIDENT'S MESSAGE

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sure rules under TILA, and will fundamentally alter the conduct of residential lending and conveyancing practices in the commonwealth of Massachusetts and across the nation. During Susan's presentations, I could see in the eyes of the attendees an uneasy mixture of academic interest and psychological apprehension, and could feel the growing sense of tension and foreboding fill the room. These final few months truly have the look and feel of the figurative "calm before the storm" in the residential lending and conveyancing community.

I am not a residential conveyancing attorney, but in learning about the new CFPB rule and some of its more notable (pernicious?) tentacles, I can understand this communal anxiety. The new rule establishes new and more complex forms of closing disclosure and settlement statement (a term that will shortly disappear from our collective legal vernacular and be supplanted by the more consumer-friendly but professionally menacing "closing disclosure").

The new rule will impose new procedural requirements that will create a tectonic shift in the way residential closings are conducted in Massachusetts For example, "time is of the essence" language is a concept that someday soon be as unfamiliar to new lawyers entering the practice as fax machines and typewriters are to new lawyers entering the practice today. The new rule will impose draconian financial penalties on residential lenders who fail to comply with the requirements. The responsibilities and consequences of these requirements, as with other things that flow downhill, will be ultimately be saddled upon their vendors – i.e., the closing attorneys.

> The TILA-RESPA Integrated Disclosure Rule will fundamentally alter the conduct of residential lending and conveyancing practices in the commonwealth of Massachusetts and across the nation.

All of these and other regulations are all set forth in a nice, tidy rule document that consists of in excess of 1,800 pages of typically Byzantine federal regulations, which our fine brothers and sisters of the real estate conveyancing bar will be responsible for learning, knowing, living and implementing into their practices by August. A daunting task to be sure. There is already a fair amount of confusion over these provisions, and when the rule goes into effect we can all expect to see all manner of chaos, plague, pestilence, drought, wringing of hands and gnashing of teeth.

While these are truly foreboding times, it has created a unique opportunity for REBA to rise to the forefront and take a leadership role in an area that is squarely within its wheelhouse. As president, I am proud of the various ways that our organization, particularly our RCC, has responded, and want to be sure our members are aware of some of the various educational support and resources that REBA has made (and is continuing to make) available to our members to help them prepare for the apocalypse.

As mentioned above, the RCC roadshows include a terrific presentation on the new CFPB rule by Susan LaRose, who provides a general overview, discusses some of the more problematic requirements in further detail, and outlines some very helpful practice strategies for addressing them. In addition, our members should be aware, if they are not already, that our Spring Conference on May 4 will include a program dedicated exclusively to the new CFPB rule that will be chaired by the incomparable Ruth Dillingham of First American Title. She has been on the front lines of the development of the new rule through her associations with the American Land Title Association.

On that subject, we are absolutely thrilled to have as our conference keynote speaker none other than the CEO of ALTA, Michelle Korsmo, one of the key players in the development of the CFPB rule and the top national advocate on behalf of the title and conveyancing community. In addition to delivering the keynote speech, Michelle has also graciously agreed to join the panel of the breakout session on the CFPB rule, which is expected to make this program one of the most popular and densely attended sessions we will have in recent memory.

The conference will also have yet another separate breakout session on the specific topic of date encryption and security requirements that the CFPB rule will impose, and which all conveyancing attorneys will need to know and implement into their practices by Aug. 1.

As this year unfolds, and we continue the inexorable march toward Aug. 1, REBA will continue to develop other educational resources and practice assistance to help our members prepare, and also to help them navigate whatever complications and issues arise once the new CFPB rule is implemented. I hope our members will take advantage of these programs and resources as we all figuratively sit on that beach in Point Judith and wait for the approaching thunderstorm. ♦

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@hinkleyallen.com.

Foreclosure glut due to past bad loans

THREE-QUARTERS OF CURRENT FORECLOSURES DATE BACK TO MID-2000S

BY COLLEEN M. SULLIVAN

Much like the snow clouds over Boston, the lingering gloom of the foreclosure crisis never quite seems to let up – and a causal reading of the headlines might lead one to suppose it's actually getting worse. Compared to the same time the prior year, foreclosure petitions nearly doubled in December, while foreclosure actions were up 15 percent and foreclosure deeds – the final stage in the proceedings – were up 38 percent, according to the latest data provided by The Warren Group, publisher of REBA News.

But a look behind the surface statistics reveals that the while the Bay State may still be being battered by foreclosures, in reality, it's continuing to weather the same old storm: Loans from the mid-2000s, when lending standards were loosened and home sales boomed, make up the vast majority of distressed properties today. Of the more than 13,000 properties which were in some stage of the foreclosure process in 2014, more than 75 percent had mortgages originated between 2003 and 2008. (The Bay State housing market peaked in the fall of 2005, while the financial crisis of September 2008 marked the beginning of the nationwide housing crash.)

Post-crash loans, the bulk of which were issued under much tougher underwriting standards, made up only 13.8 percent of the loans in some stage of foreclosure proceedings in 2014. (The remainder of the distressed properties, or 9.5 percent, had loans originated prior to 2003.)

"Once they tightened up [underwriting standards] in 2008 or so, the newer loans just haven't had as many problems," said an attorney with a firm that handles many foreclosures. Even the newer cases that are being opened often involve loans that were originated several years ago, often with homeowners who may have attempted to have their loan modified and found they still couldn't keep up with the payments.

While the backlog of old troubled loans is still being cleared, fresher cases of distress are sparse on the ground. "Short sales are way down. In terms of new foreclosures, new distressed sales, it's way down," said Rich Vetstein, a Framingham real estate attorney and author of the Massachusetts Real Estate Law Blog. In his own practice, "the last short sale I did was probably in the early fall – I haven't seen any since."

See FORCLOSURES, page 10

NE Land Survey, Inc. ??

IN MEMORIAM

CONTINUED FROM PAGE 1

Land Court Chief Justice Marilyn Sullivan, current and former Land Court staff and others in celebrating the court's centennial. Perhaps less celebratory but decidedly more momentous, he also led the court's relatively smooth migration from the old Suffolk County Courthouse, where it had resided for nearly a century, to the newly-constructed Brooke Courthouse. The move was as symbolic as it was geographic – with the move, Peter led the Land Court into the 21st century in ways too numerous to recount, but starkly recognizable to those who remember the "old days."

Very shortly following my appointment to the Land Court, while I was still shadowing my colleagues for training, I found myself sitting beside Peter at a hearing he scheduled on a motion seeking reconsideration of his earlier ruling on a motion for summary judgment. The plaintiffs sought a determination that their application for a special permit had been constructively approved, because the board of aldermen of Newton did not include in their written decision the reasons for denial of the plaintiffs' application. A majority of its members, in fact, voted to grant the special permit, but the vote fell short of the supermajority needed for approval. The board's written decision advised that the permit was denied based on the vote, but included a statement of reasons (apparently authored by the majority favoring approval) more consistent with approval. Peter initially had ruled that the decision satisfied the statutory requirement for a timely decision on the application. Now, however, the plaintiffs appeared with an Appeals Court rescript decision, squarely on point, suggesting that the board's decision was inadequate. Peter reversed his earlier ruling, and the Appeals Court affirmed. Thereafter, in *Board of Aldermen of Newton v. Maniace*, 429 Mass. 726 (1999), the Supreme Judicial Court declared that the board's decision was adequate to meet the requirement for a timely decision on the application, thereby adopting Peter's initial ruling. From my earliest encounter, I was witness to the soundness of Peter's legal acumen, as well as his humility and respect for his role in the process.

Appeals Court Chief Justice Chris Armstrong (right) and Peter Kilborn.

A STORIED LEGACY

His doctrinal legacy includes many other seminal cases.

In *Beale v. Planning Bd. of Rockland*, 423 Mass. 690 (1996), the Supreme Judicial Court affirmed Peter's ruling that a shopping center developer could not extend a road from the adjacent town of Rockland to provide access across residentially-zoned land to a proposed shopping center in Hingham. In *Heritage Park Dev. Corp. v. Southbridge*, 424 Mass. 71 (1997), the SJC agreed with Peter's conclusion that a planning board's rescission of its approval of a subdivision plan did not abrogate the zoning freeze the developer had secured, under G. L. c. 40A, § 6, upon the board's approval of the definitive plan. In *Planning Bd. of Hingham v. Hingham Campus,* 438 Mass. 364 (2003), the SJC affirmed his dismissal, on grounds of standing, of a planning board's appeal of a comprehensive permit granted by the town's zoning board of appeals, adopting his rejection of the planning board's attempt to import into c. 40B the automatic standing conferred on local boards under c. 40A. And in its review of Peter's judgment in *Durand v. IDC Bellingham, LLC,* 440 Mass. 45 (2003), the SJC clarified that a developer's payment of cash to a town for improvements unrelated to the impacts of a proposed project does not derogate from the validity of a town meeting vote approving a rezoning to authorize the project, in the process eschewing any inquiry into whether such a payment might constitute "extraneous consideration," impeaching the integrity of the vote. Space limits prevent me from citing other examples; suffice to say that his work and his wisdom live on.

Peter's own integrity was beyond reproach. He oversaw the last revisions to the Code of Judicial Conduct in 2003. Thereafter, following his retirement, he was asked by the SJC to act as hearing officer in a highly sensitive and widely publicized disciplinary matter involving a judge who sent threatening letters to a newspaper publisher after obtaining a favorable libel judgment against the paper. Peter's recommendations for discipline were adopted by the Supreme Judicial Court, over an alternative disposition advocated by the Commission on Judicial Conduct.

Before the Land Court's move to the Brooke, my office was next to his. At the end of most days as the first of us would leave I often said, reflexively, "See you tomorrow." His response, invariably, was "I sure hope so." It was at once a gentle reminder of the imprecision inherent in customary greetings, and a commentary on the fragility of life. In his own life, he took nothing for granted, and left everyone he touched better for the encounter. He was a terrific chief justice, a wonderful mentor, and a good friend. I speak for everyone who knew him when I say that I miss him very much. ♦

An associate justice of the Massachusetts Appeals Court, Mark Green served on the Land Court bench with Judge Kilborn.

MassDEP creating interim policy for soil reclamation project

BY SAMUEL W. BUTCHER

SAM BUTCHER

You could be forgiven for missing Section 277 of Chapter 165 of the Acts of 2014, passed by the Massachusetts State Legislature as part of the 2015 budget. This section states in part (from the MassDEP Soil Reclamation website):

"Not later than June 30, 2015, the department of environmental protection shall establish regulations, guidelines, standards or procedures for determining the suitability of soil used as fill material for the reclamation of quarries, sand pits and gravel pits. The regulations, standards or procedures shall ensure the reuse of soil poses no significant risk of harm to health, safety, public welfare or the environment considering the transport, filling operations and the foreseeable future use of the filled land. The department may adopt, amend or repeal regulations establishing: (i) classes or categories of fill or reclamation activities requiring prior issuance of a permit issued by the department; (ii) classes or categories of fill or reclamation activities that may be carried out without prior issuance of a permit issued by the department; and (iii) classes or categories of fill that shall require local approval based on the size, scope and location of a project; provided, however, that local approval shall not be required for projects involving less than 100,000 cubic yards of soil."

For the past several months, the Massachusetts Department of Environmental Protection MassDEP) has been holding public meetings as part of the Reclamation Soil Project. The goal of the meetings has been to develop some sensible and workable policies, guidance and regulations around this legislative mandate.

The genesis of the legislation appears to be the perceived lack of local control over large landfilling projects, such as quarry reclamation projects, which involve moving large volumes of soil and placing this soil into large holes in the ground. Though these projects are land filling activities, they are significantly distinct from solid or hazardous waste landfills that are already regulated under state and federal solid and hazardous waste regulations. But these projects do involve the noise and nuisance associated with truck traffic and health concerns about bringing large volumes of soil of unknown quality into and through sometimes residential areas.

Though the scope of the regulations is still being discussed, they will likely cover projects involving the placement of soil with low concentrations of oil or hazardous materials. Concentrations above those that could be considered "clean fill" yet below the reportable concentrations promulgated in the Massachusetts Contingency Plan (310 CMR 40) (MCP).

MassDEP hopes to have an interim policy in place soon with an eye toward developing regulations by June 2015. The policy and regulations will contain language around sampling requirements, permitting requirements, MassDEP oversight and, perhaps most important, local approvals.

MassDEP is hearing plenty of input from stakeholders. Among the concerned are developers who need to export material associated with their projects, developers who want to import material to reclaim these quarries and sand pits, and licensed site professionals (LSPs) who will likely have a role in any sampling and permitting process. Among the questions being raised:

- How significant will the permitting burden be? It will likely depend on what type of soil is being used and where the land filling operation is taking place. Expect a tiered permitting process.
- What will the MassDEP's role be in approving permits vis-á-vis the local permit approval process? To be determined.
- What sort of sampling requirements will be required to document the quality of the soil proposed for placement at the land filling project? MassDEP is currently leaning toward a sampling program that will require collecting and compositing a significant number of samples in order to develop an accurate understanding of the average concentration of chemical constituents.

Stay tuned as MassDEP develops the interim policy and eventually the regulations. ♦

Samuel Butcher is a licensed site professional and vice president at Loureiro Engineering Associates in Rockland. He may be reached at swbutcher@loureiro.com.

Practicing real estate law is not as easy as it looks

BY PAUL F. ALPHEN

PAUL ALPHEN

The next book in my Kindle queue is another John Grisham novel; the author I love to hate, or hate to love. Sure, reading his books is something of a busman's holiday, but it's a diversion from my usual nonfictional fare. That is, until I get to the part in almost every novel where he makes disparaging comments regarding dirt lawyers. He regards real estate law as the lowest form of the profession. Even below insurance defense counsel!

We know better, and we are reminded every day. But we still have to deal with the perception.

We all have clients who have engaged a $1,200-per-hour Manhattan firm to work on either their estate plans or their business organizations, but when it comes to their real estate deals they insist that you perform their closings for a flat fee of $600. Or, we have all attempted to close a transaction and the attorney on the other side is an estate planning attorney who attempts to befuddle us with layer upon layer of trusts and beneficiaries, but dare we raise any real estate question they respond with indignation that we are creating unnecessary complications.

I recently tried to explain merger of title to an experienced attorney and suggested that the abutting lots be conveyed to separate entities. Usually when I raise this issue, the response is one of appreciation for identifying the issue. Not this time. It would mess up the estate plan!

When I think of merger of title, I think of infectious invalidity and of *Carabetta v. Bd. of Appeals of Truro*, 73 Mass. App. Ct. 266, 897 N.E.2d 607 (2008). In that case, an innocent buyer purchased a conforming lot (Lot 3), which at one moment in time was held in common ownership with an abutting lot (Lot 22), shown on a completely different subdivision plan registered with the Land Court side of the registry of deeds. The conveyance rendered Lot 22 non-conforming, which, because of infectious invalidity, rendered Lot 3 non-buildable. Tell me who reviews a title exam to determine if there was ever a merger of title with an abutting lot, shown on another subdivision plan, recorded with another department of the registry?

Even the world's smartest corporate attorney could not have anticipated the series of events culminating in the Superior Court decision of *Vaillancourt v Grey Wolf Realty, LLC*, 2012 WL 1370997. In 1985, the Tyngsborough planning board approved a special permit for a PUD with a condition that no future development would be allowed on the site that would increase density or the number of occupants. In 1987, the land was rezoned to R-1 and the PUD zoning by-law was rescinded. From 1993 to 2006, numerous permits were granted for additional buildings without challenge. In 2006, Town Meeting voted to change the zoning for the property and voted to issue preliminary approval of a new multifamily development plan. The land owner applied for a special permit for the multifamily development including a request that the no-further-development condition be removed. The special permit was constructively approved "as a result of a lack of clerical help."

A resident of one of the condominium units constructed within the original PUD filed a timely appeal of the constructive approval. The court referred to Mark Bobrowski's book and *Barlow v. Planning Bd or Wayland*, 64 Mass App Ct 314 (2005) to support the proposition that planning boards can amend a previously granted special permit. The court looked at the history of the property, including the Town Meeting votes to change the zoning and to support the preliminary plan, as evidence of significantly changed circumstances that would justify the planning board to approve a modification to the special permit, and affirmed the constructive approval.

A few years ago in reviewing a title exam, we came across a title where an improved lot in a Massachusetts city changed hands a half dozen times, although the property was subject to a mortgage. The various deeds contained errors that would suggest that they were not prepared by attorneys, nor were title examinations performed. The outstanding mortgage was granted by a prior owner to a strangely described mortgagee. The names have been changed to protect the innocent, but it reads: "… grants to Joe Smith, trustee of Happy Credit Counseling Inc (By its actual President Billy McGee) of 100 Main Street, Big City, [wrong county], Massachusetts."

There is no record of the corporation. There is no such party at that address. There are no other documents at the registry of deeds to or from similar names. Google tells us that Billy McGee is an alias for Joe Smith, but short of hiring a private investigator, we have found neither of them. The date of execution of the mortgage is four months prior to the date of the acknowledgement, and the mortgage was recorded 10 months after that. Ok, smart guy; now what do you do?

Recently I was reviewing the title to property in Norfolk County, and something about the title exam and the loan commitment letter caused me to search the property owner's name in Westlaw. I found that there were a series of pending Land Court cases involving the owner pertaining to a different address. I got curious and called the building inspector; turns out there was a change in the name of the street, and the cases pertained to the use of our subject locus.

Sometimes the issues are simple, like a condition of approval that requires town counsel and the town planner to review condominium documents before the sale of the first unit. Your client should never have agreed to such a condition, as the "review" will take a month and will hold up the first closing.

Ok. I feel better. Now I can read Grisham without risk of throwing the book across the room. ♦

Paul Alphen has been practicing law primarily in areas related to real estate development within a small firm in his hometown of Westford for 29 years, after having enjoyed a decade of public service in state and local government. He may be reached at palphen@alphensantos.com.

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BILL FILED TO ADDRESS HOUSING SHORTAGE

CONTINUED FROM PAGE 1

ter appeals so interesting. The proposal is one of eight ideas that the Massachusetts Housing Partnership (MHP) floated as ways to address the need for more housing in Massachusetts. The good folks at MHP indicate that the concept for this review panel was originally discussed within the Romney administration, but was not formally floated legislatively. As of this writing, it was not incorporated into a omnibus housing package (that included six of the MHP proposals) recently filed by Rep. Kevin Honan, a longtime housing stalwart.

The original legislative proposal would have established a three-person permit appeal review council, consisting of designated members of the governor's administration hailing from housing, environmental and finance backgrounds. MHP's version substitutes a representative of the regional planning agencies for a Department of Revenue (Division of Local Services) representative. Parties would have an opportunity to submit briefs to the council regarding the merit or lack of merit of a particular appeal. A determination that an appeal appears to lack substantial merit (to be issued in writing) would specify an amount of anticipated reasonable attorneys fees, plus carrying costs and other costs. That total would then be the amount of a bond to be posted by the party bringing the appeal. If a bond has not been posted within 60 days, an appeal would be dismissed. In the event the appealing party does not prevail in court, the costs represented by the bond would be assessed against the appealing party and paid from the bond.

The proposal, while intriguing, is not entirely radical. First, no one actually loses their right to a day in court. The costs of bringing a less than meritorious appeal are simply increased. According to MHP, the concept of screening out "frivolous" medical malpractice lawsuits by using a tribunal has been in play since 1976. The requirement to post a bond in order to bring an appeal is also a part of our existing smart growth law (Chapter 40R). Moreover, Massachusetts has for a number of years countenanced the notion that certain litigation may be against public policy.

The discussion of a review panel to pre-screen abutter appeals should continue. A few observations: (a) the composition of the panel should continue to be examined; (b) an exemption for neighboring municipalities is warranted; and (c) the proposal should have a built in reporting mechanism which would track the ultimate disposition (or non-pursuit) of the appeals that come before it. It will be essential to know and closely monitor the panel's track record. If appeals subjected to a bonding requirement are ultimately successful on the merits in great numbers, the legislation would need to be revisited.

Call this an irrational burst of spring optimism brought on by a long, hard winter, but such a proposal could actually provide some common ground for developers and municipalities. Many municipalities, having gone through an arduous local permitting process, are less than enthusiastic about paying further costs that may be associated with non-meritorious appeals, even if they are minimal because the developer is leading the way.

Like this past winter's MBTA crisis, the commonwealth ongoing housing affordability woes stem from a long term failure to maintain our (land-use regulation) infrastructure. Unlike the transit system's failures, the impacts are not felt equally by everyone, but rather are more acutely felt by those now seeking to enter the housing market, whether they plan to buy or to rent a place to live.

It's time to start asking ourselves the hard questions about the best way to move forward. The MHP is one potential answer to such questions. Without some original thinking of this sort, the situation will only continue to get worse. ♦

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.

EXCHANGE AUTHORITY

Ethics Committee seeks new members

The REBA Ethics Committee, chaired by Jen Markowski of Peabody & Arnold LLP, seeks new members. The group is responsible for drafting and promulgating ethical standards which become part of the *REBA Handbook of Standards and Forms*. The committee also hosts an ethics hotline allowing members with questions about conflicts of interest, waivers and general ethical questions to seek advice. The committee meets from time to time, hosting guest speakers including representatives of the Board of Bar Overseers. These meetings are open to all REBA members.

To join the committee or for more information about the group's mission, contact Jennifer Markowski at jmarkowski@peabodyarnold.com. ♦

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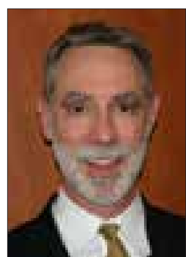
REBA

THE LAWYERS' COUNSEL

Legal malpractice and real estate lawyers: Dialing for damages

BY JAMES S. BOLAN AND SARA N. HOLDEN


JIM BOLAN

SARA HOLDEN

In the event that a plaintiff in a legal malpractice action is able to overcome the hurdles of proving the existence of an attorney-client relationship, breach of the standard of care and proximate cause, proof of causally connected damages remains.

Legal malpractice actions are contract-tort hybrids: a breach of contract case applying a negligence standard. *Clark v. Rowe*, 428 Mass. 339, 341 (1998). Successful plaintiffs can be compensated for the "reasonably foreseeable loss" sustained to put them back in the position in which they would have been, had the lawyer not committed malpractice. This requires plaintiffs to prove a "case within a case" and demonstrate the position in which they would have been, absent the malpractice. *Fishman v. Brooks*, 396 Mass. 643, 647 (1986).

There are no hard and fast rules as to what is "reasonably foreseeable" and each case will depend on its particular facts. Due to the inherently hypothetical nature of the "case within a case" method, a precise and exact determination of damages is difficult. However, damages that are too speculative and lack a sufficient foundation will likely be rejected. Further, an expert may not be permitted "to give an opinion that is based on conjecture or speculation from an insufficient evidentiary foundation." *Van Brode Group, Inc. v. Bowditch & Dewey*, 36 Mass.App.Ct. 509, 520 (1994).

So what types of damages are recoverable and how are they calculated? General damage principles apply, but due to the "reasonably foreseeable" standard, the calculation of damages in each case is also very fact specific. Examples of the types of circumstances in which general damages principles were applied are as follows:

Negligent legal advice: In *Williams v. Ely*, 423 Mass 467 (1996), the attorney gave a client "reasonable" tax advice, but negligently failed to advise the client that that particular area of law was unsettled and, therefore, deprived the client of the ability to assess risk and elect an alternative course of action. The client could recover reasonably foreseeable monetary losses – in the amount of gift tax liabilities – that "they might not have incurred but for the defendants' negligence."

Negligent handling of the prosecution of a claim: In *Don v. Soo Hoo*, 75 Mass.App.Ct. 80 (2009), the attorney failed to timely file bankruptcy petition. By the time the mistake was realized and a petition was filed, the client had a change of economic circumstances that caused the bankruptcy petition to be dismissed. But for the attorney's negligence in not filing the petition, the client's debts would have been discharged. The client was awarded damages in the amount of the fee to the lawyer, the amount of a particularly large creditor's claim that was not discharged and an amount representing the difference between the debt owed by the client when the lawyer was retained and when the petition for bankruptcy was filed.

Negligent handling of the defense of a claim: In *Glidden v. Terranova*, 12 Mass. App.Ct. 597 (1981), the attorney failed to file answer or remove proceeding to Superior Court, which resulted in default judgments and the client's subsequent arrest and imprisonment for failing to pay the judgment. When a lawyer mishandles the defense of a claim, the lawyer is liable for the losses that result therefrom, in this case, the amount of the default judgments.

Negligent handling of a settlement: In *Fishman v. Brooks*, 396 Mass. 643 (1986), the attorney failed to properly prepare for trial in personal injury case and misrepresented the amount of insurance available, causing client to settle the claim below what a properly represented client would have accepted. Damages for the mishandling of a settlement are the difference between the amount of the actual settlement and the "fair settlement value" of the underlying claim.

Negligent handling of a transaction: In *Republic Oil Corp. v. Danziger*, 9 Mass. App.Ct. 858 (1980), the attorney hired to represent clients in purchase of property and perform title examination failed to advise client or secure discharge of a lien on the property. The plaintiff's damages were measured by the cost in removing the lien from the property as well as the "reasonably foreseeable loss" that resulted from the error – in this particular case, foreclosure costs.

ADDITIONAL RECOVERY

Damages may not be limited solely to the amount of the client's actual losses and may also include interest (see M.G.L. c. 231, §6B, *Shinnick v. Rodibaugh*, 2007 WL 1849102 (2007)), legal fees and expenses incurred as a result of or to remedy the injurious conduct of the lawyer *Salin v. Shalgian*, 18 Mass.App.Ct. 467 (1984)), and, potentially, in the most egregious of cases, emotional distress damages *Wagenmann v. Adams*, 829 F.2d 196 (1st Cir. 1987)). It is also possible, for example, under M.G.L. c. 93A, that a client could recover double or treble damage if the lawyer's conduct is determined to be a willful or knowingly unfair or deceptive act or practice against consumers. Finally, even if the client is unable to prove his or her losses with certainty, there is support for the client to be awarded nominal damages nonetheless. *Fall River Savings Bank v. Callahan*, 18 Mass.App.Ct. 76 (1984)).

CONCLUSION

Legal malpractice cases require proof that the lawyer had an attorney-client relationship with a client, the allegations of error were within the scope of the engagement, the standard of care was breached, proximate cause of the harm can be shown and damages resulted from the breach of that duty. This gauntlet is, and should be, a hard one to navigate. If a problem arises, notify your carrier immediately and seek counsel to review and, if appropriate mitigate or litigate. The worst thing that can be done is to emulate an ostrich! Not only do you blind yourself from reality, but sand is harder to swallow than real life. ♦

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.

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2015 Spring Conference

Monday, May 4, 2015 • 7:30 A.M. – 2 :45 P.M.

Four Points by Sheraton, Norwood

General Information

- REBA's 2015 Spring Conference welcomes both members and non-members. All attendees must register; the registration fee includes the breakout sessions, the luncheon and all written materials. REBA cannot offer discounts for registrants not attending the conference luncheon.
- Credits are available for professional liability insurance and continuing legal education in other states. For more information, contact Bob Gaudette at (617) 854-7555 or gaudette@reba.net.
- Please submit one registration per attendee. Additional registration applications are available at www.reba.net. REBA will confirm all registrations by email.
- To guarantee a reservation, conference registrations should be sent with the appropriate fee by email, mail or fax, or submitted online at www.reba.net, on or before April 27, 2015. Registrations received after April 27, 2015, will be subject to a late registration processing fee of $25. Registrations may be cancelled in writing on or before April 27, 2015, and will be subject to a processing fee of $25. Registrations cannot be cancelled after April 27, 2015; however, substitutions of registrants attending the program are welcome. Conference materials will be mailed to non-attendee registrants within four weeks following the event.
- We ask attendees to kindly refrain from cell phone use during the breakout sessions and luncheon.

Driving Directions

FROM BOSTON:

Take I-93 South, which turns into I-95 (Route 128) North.
Take Exit 15B, Route 1 South, toward Norwood.
Continue 4.5 miles down Route 1 South.
The hotel will be on your right, after the Staples Plaza.

FROM PROVIDENCE:

Take I-95 North to Exit 11B, Neponset Street, Norwood.
Drive 7/10 of a mile and turn left onto Dean Street.
At the traffic light, turn left onto Route 1 heading south.
The hotel will be on your right, after the Staples Plaza.

FROM THE WEST:

Follow the Mass. Turnpike (I-90) East.
Take Exit 14 onto I-95 (Route 128) South (from the West it is Exit 14; from the East, it is Exit 15).
Continue South to Exit 15B (Route 1, Norwood).
Continue 4.5 miles down Route 1.
The hotel will be on your right, after the Staples Plaza.

Registration

COMPLETE AND RETURN THIS REGISTRATION FORM WITH THE APPROPRIATE FEE TO:

REBA Foundation, 50 Congress Street, Suite 600, Boston, MA 02109-4075
TEL: (617) 854-7555 | morales@reba.net | FAX: (617) 854-7570

	By April 27	After April 27
☐ YES, please register me. I am a REBA member in good standing.	$205.00	$230.00
☐ YES, please register me as a guest. I am not a REBA member.	$245.00	$270.00
☐ NO, I am unable to attend, but I would like to purchase conference materials and a CD of the breakout sessions and luncheon address. (Please allow four weeks for delivery)	$190.00	$190.00
	$______	$______

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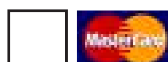
☐ 

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Tel:______________________ Cell:______________________ Fax: ______________________

Selcet Your Luncheon Choice Below

☐ Baked statler breast of chicken with a mushroom jus

☐ Stuffed acorn squash with stir fry vegetables and jasmin rice

☐ Butcher shop cut choice petit filet mignon, grilled and served with a red wine demi-glace

☐ None, as I will not be eating at the luncheon

☐ None, as I am unable to stay for the luncheon

Luncheon Keynote Address Presented by Michelle L. Korsmo

Michelle Korsmo, CEO of the American Land Title Association (ALTA), will deliver the luncheon keynote address at REBA's 2015 Spring Conference. Prior to the luncheon, Ms. Korsmo will also lead an hour-long breakout session on the Consumer Financial Protection Bureau's (CFPB) new TILA-RESPA Integrated Disclosure Rule, effective August 2015.

This new rule, dubbed Know Before You Owe, was first announced by CFPB Director Richard Cordray in Boston in November 2013. It is a stem-to-stern overhaul of residential closing practice nationwide, the most significant change since the introduction of the Real Estate Settlement Procedures Act almost 40 years ago. Ms. Korsmo and the ALTA regulatory staff had a seat at the table during the conception and drafting of the Rule leading up to its Boston roll-out.

Additionally, in response to lender oversight of vendors, ALTA has produced a framework to provide a standard assessment of lawyers, title insurance, and settlement companies for use in the marketplace. This framework, entitled Title Insurance and Settlement Company Best Practices is an industry-led risk management solution to lenders' requirement to actively oversee third-party service providers. These best practices have been well received by industry and regulators alike.

Recognized for her strategic vision, management skills, and problem-solving abilities, Michelle joined ALTA in April 2008. Since then, she has been instrumental in rejuvenating the trade association to compete in a changing market place. In the years she has been with ALTA, the association has achieved record membership levels, greatly increased contributions to the Title Industry Political Action Committee and revamped the membership and communications benefits for the association's membership.

Schedule of Events

7:30 A.M. – 8:30 A.M. **Registration and Exhibitors' Hour**
8:30 A.M. – 1:15 P.M. **BREAKOUT SESSIONS**

CFPB: Encryption and Data Security Requirements

Rick Diamond; Christopher J. Gulotta; Richard M. Reass

The CFPB, the OCC, the FDIC and the Federal Reserve require lenders to be compliant with federal consumer protection and privacy laws. Lenders will look to conveyancing attorneys to validate their compliance with these regulations. Our panel will address how law firms can start the compliance process; implement data security controls; develop written policies; and conduct onsite security assessments. These experts will describe how to take action now to protect conveyancing practices under the new guidelines from the sophisticated scams.

8:30 A.M. – 9:30 A.M. **Tiffany Ballroom A**
9:45 A.M. – 10:45 A.M. **Tiffany Ballroom A**

Ibanez and its Aftermath: Title Issues to be Aware of Post-Foreclosure

Kendra L. Berardi; Melissa B. Morrow

Join us for a discussion of the common title issues to consider and address following a real estate foreclosure. Panelists will examine the challenges that can arise after Ibanez and its progeny from both a transactional and a litigation perspective and examine the various legislative solutions being proposed to more permanently address the post-Ibanez title landscape.

8:30 A.M. – 9:30 A.M. **Tiffany Ballroom B**
11:00 A.M. – 12:00 P.M. **Conference Room 102**

The Impending TILA/RESPA Integrated Disclosure Rule: The Practical effects of the CFPB's Authority over our Lender Clients

Ruth A. Dillingham; Michelle L. Korsmo; Julie M. Palmaccio

The new Integrated Mortgage Disclosure rule takes effect on Aug. 1, 2015. You must be prepared for new procedures, new documents and changes to some common business practices. The panelists will discuss issues as diverse as anticipated purchase and sale agreement revisions, the increased liability for lenders if the rule is not followed and how to set your firm apart by adoption of ALTA Best Practices.

9:45 A.M. – 10:45 A.M. **Tiffany Ballroom B**
11:00 A.M. – 12:00 P.M. **Tiffany Ballroom B**

Taming Your Files: Best Practices for Your Firm (A Practical Skills Session)

Heidi S. Alexander; Michelle T. Simons

As a real estate practitioner, you know how much of your practice relies on documents. Where and how you store those documents can determine the overall efficiency of your practice. The better document management system (DMS) you implement, the more clients you can serve and in turn the more profitable your practice will become. This session will teach you best practices in document management, including how to set up a paperless office, as well as the practicalities in setting up and using a DMS in practice. You'll walk away from this session with a number of practical and simple tips to incorporate into your real estate practice.

8:30 A.M. – 9:30 A.M. **CONFERENCE ROOM 101**
9:45 A.M. – 10:45 P.M. **CONFERENCE ROOM 101**

Land Court and Registered Land Practice and Procedure (A Practical Skills Session)

Mary L. Cataudella; Robert J. Moriarty Jr.; Edmund A. Williams Jr.

Knowledge of the often-overlooked details of the registered land system and a working familiarity with the Land Court Guidelines are essential to the day-to-day practice of any Massachusetts real estate lawyer. The faculty will discuss the 2014 REBA-sponsored law relaxing withdrawal requirements for registered land as well as the Court's memoranda setting procedures for withdrawal. The faculty has expertise in registered land decisions, title examination, and litigation and will offer practical guidance for any real estate practitioner to comfortably handle registered land issues and know when to withdraw land from registration under the new legislation.

8:30 A.M. – 9:30 A.M. **Essex/Lenox Room**
9:45 A.M. – 10:45 A.M. **Essex/Lenox Room**

Avoiding and Fixing Environmental Issues in your Title (and Title Insurance): Chapter 91 Licenses, Wetlands Orders of Conditions, and Certificates of Compliance

(A Practical Skills Sessions)

Margaret B. Briggs; Scott W. Horsley; Carrie B. Rainen

The speakers, a title and title insurance lawyer, and two well-known environmental consultants, will describe the array of environmental and land use permits and restrictions found recorded on real estate titles. What, if anything, the title attorney must do about them, and why some environmental matters may not be included in your examination. Case studies on avoiding or solving problems will include "perpetual" Orders of Conditions, "partial" Certificates of Compliance, expired Chapter 91 licenses, Superfund restrictions due to contaminated soils, Conservation, Historic or Agricultural Restrictions, old Wetland Restriction Orders, MEPA Certificates, and limitations due to endangered species habitat under MESA.

8:30 A.M. – 9:30 A.M. **Conference Room 103**
11:00 A.M. – 12:00 P.M. **Conference Room 101**

Foreclosure Ordinances after the SJC's Easthampton Savings Bank Decision: Addressing Municipal Concerns

Benjamin O. Adeyinka; Thomas D. Moore; Tani E. Sapirstein

Late last year the SJC decided the Easthampton Savings Bank case, which severely limited the ability of municipalities, hard-hit by the foreclosure crisis, to respond to the many vexing problems created by foreclosed-upon dwellings neglected by far-away lenders and mortgage servicers. The panel includes counsel for the bank and opposing counsel for the city of Springfield in this important case. A third panelist, on the staff of the administrative office of the Housing Court, will offer impartial comments from his experience in the private sector, provide insight on the foreclosure crisis and discuss the emerging public policy focused on keeping mortgagors in their homes.

8:30 A.M. – 9:30 A.M. **Conference Room 102**
9:45 A.M. – 10:45 A.M. **Conference Room 102**

Economics of Construction: Understanding the New Retainage Law and Revisiting the Economic Loss Rule

Jonathan R. Hausner; Thomas O. Moriarty

The new Massachusetts Retainage Law, which applies to certain private construction contracts executed after November 2014, impacts not just the amount of retainage withheld by a construction stakeholder, but also mandates very specific processes related to project completion. Jonathan Hausner, who co-chairs REBA's newly-launched Construction Law Committee, will brief attendees on this important new statute. Also, Tom Moriarty will discuss the economic loss rule, long an impediment to the prosecution by Massachusetts condominiums of construction-related tort claims. Condominium associations had no contractual remedies or adequate tort remedies. The SJC's decision in Wyman has eliminated the economic loss rule and has changed the way these cases are litigated and the risk assessment process related to same all to the benefit of condominium unit owners' organizations.

9:45 A.M. – 10:45 A.M. **Conference Room 103**
11:00 A.M. – 12:00 P.M. **Conference Room 103**

Wireless Telecommunications and Real Estate

Carol J. Holahan; Ricardo M. Sousa

This session will provide an overview of the zoning and permitting of wireless facilities including towers, rooftop and stealth installations. The panel will also address wireless leasing (rooftops and raw land leases), including a discussion of important often-negotiated lease provisions, lease buyouts and revenue stream sale transactions, and the evolution of small cells. In addition, panel members will discuss important issues relating to recent federal statutory and regulatory provisions and the interplay between federal law and local zoning ordinances. Attorneys who attend this session should come away with an understanding of important lease provisions required by carriers; the limits of local zoning by-laws; and an understanding of the issues in balancing the interests of carriers, landlords and municipalities.

11:00 A.M. – 12:00 P.M. **Essex/Lenox Room**

Recent Developments in Massachusetts Case Law

Philip S. Lapatin

Now in his 36th year at these meetings, Phil continues to draw a huge crowd with this session. His presentation on Recent Developments in Massachusetts Case Law is a must hear for any practicing real estate attorney. Phil is the 2008 recipient of the association's highest honor, the Richard B. Johnson Award.

12:15 P.M. – 1:15 P.M. **Conference Room 102***

**Video simulcasts of this presentation will be held in Conference Rooms 101 & 103*

1:20 P.M.
LUNCHEON PROGRAM

1:20 P.M. – 1:45 P.M.
Welcome & Remarks from President Thomas Bhisitkul

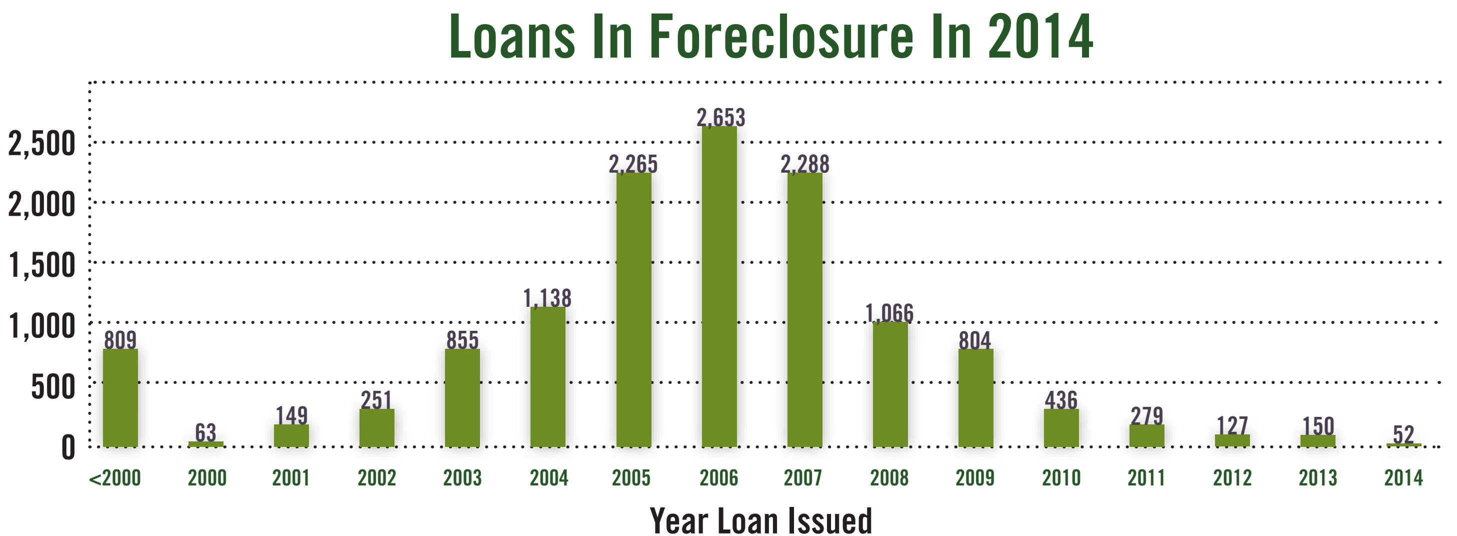
1:45 P.M. – 2:10 P.M.
Report of the Title Standards Committee

2:10 P.M. – 2:45 P.M.
Luncheon Keynote Address by Michelle L. Korsmo

SLOWDOWN IN FORECLOSURES DUE TO MANY FACTORS

CONTINUED FROM PAGE 2

Loans In Foreclosure In 2014



A LONG ROAD TO FORECLOSURE

There are several reasons why so many of today's foreclosures involve loans almost a decade old. Post housing crash, both state and federal lawmakers passed waves of regulatory changes which have upended servicers and attorney's former foreclosure practices, extending the amount of time homeowners have to make good on a default, and requiring services to evaluate loans for potential modification and offer such mods to homeowners.

In the Bay State, a 2012 law extended a homeowner's right to cure a default to 150 days in most cases, in addition to requiring banks to evaluate homeowners for modification and provide proof the loan was unsuitable for a mod before proceeding with foreclosure if they did not offer one. The state's Division of Banks did not issue final rules on how to fulfill the new requirements for several months after the law's passage, and banks were reluctant begin foreclosure proceedings without being sure of their ground. Given extended foreclosure timelines, a foreclosure begun in 2012 may well not have been completed until 2014 – or beyond.

In addition, federal regulators, including the Consumer Financial Protection Bureau, have also been revising their foreclosure regulations, and servicers of distressed loans have come under increasingly strict scrutiny in recent months by both federal and state regulators anxious to ensure they fulfilling their legal obligations. Earlier this year, the California state attorney general attempted to suspend Ocwen Financial's operations in that state, alleging abuses. Ocwen is one of the largest servicers of distressed loans in the country. That regulatory pressure has slowed down national servicers' foreclosure processes, attorneys say.

Despite the fact that many of today's distressed properties first went into default many months ago, experts suspect it may be years before the level of foreclosures returns to pre-crisis norms. Nationally, despite a 33 percent drop in the foreclosure inventory over the past year, foreclosure rates remain more than double their pre-crisis norms, according to data from real estate analytics firm CoreLogic.

The picture in Massachusetts is much the same. One experienced attorney who specializes in foreclosures said that prior to the crash, Bay State foreclosures were completed in an average of 150 days; his own firm was often able to complete them in half that time. With all the regulatory changes and reforms brought about in response to the crisis, it currently takes them more than 400 days – more than a year – to complete a foreclosure. That figure is an average; if a homeowner hires and attorney to contest the foreclosure or if the lenders offers them a loan modification, the time between a loan defaulting and a foreclosure being completed can stretch out for years. ♦

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

FOR YOUR PRACTICE

LAWYERS CONCERNED FOR LAWYERS

Anger in the courtroom

Q: I've been a contracted Commission for Public Counsel Services (CPCS) lawyer for many years, and in many ways I think I have a great handle on the job. But it seems that I've also lost patience when others — often an overly entitled client, but sometimes an assistant district attorney or even a judge — have an axe to grind that gets in the way of a reasonable resolution to the case. I'm confident of the correctness of my instincts from a legal standpoint, but I now find myself coming to the attention of those in authority positions as well as the Board of Bar Overseers, so I guess I need help with "anger management."

A: Remember that scene from *And Justice for All*, where Al Pacino's character completely loses his temper in court? His points are valid, and his outrage well-founded, but there is no benefit in his mode of expression (other than to entertain us in the movie audience and vent our shared anger at, as you say, the obstacles to reasonable justice). Thankfully, you show self-awareness of what's happening with your frustration and how it is working against you.

There are various approaches to "anger management," some of them more appropriate for those with a much lower level of awareness and who justify even abusive behavior. Approaches for people who do have insight often involve developing a behavioral analysis of triggers to anger and finding alternate ways to think and behave in reaction to them. Indeed, strong, reflexive reactivity without awareness or conscious decision-making is often a recipe for regrettable behavior.

A related, but different, approach involves applying so-called "mindfulness" to the situation arousing the reaction (in your case, the behavior of clients/lawyers/judges that you find self-serving and irritating). Mindfulness is in some ways the current incarnation of the "meditation" and "relaxation response" and "be here now" approaches (those terminologies more prominent in previous decades). More broadly, there is an emphasis on, in a sense, zooming out to a broader perspective from which one *observes* and *accepts*, rather than judging or reacting.

Imagine that you are driving on an interstate when suddenly you're hit by a blinding snowstorm. It might be natural to react with fear, anger at nature, at the foolish drivers barreling past you on the slippery road, etc., but what would be the most helpful stance? Probably to become more grounded, highly alert, observing conditions and positions of other vehicles, accepting the immediate reality since it is the one before you, and using your awareness and experience to make fluid choices about navigation – responding more than reacting. There might also be the sense of slowing down the action and viewing the entire situation from a greater distance. It may well be that this road should be better lit, that the weather forecast should have been more accurate, etc., but focusing on those factors over which you have no control is worse than useless, because it uses mental resources that could be focused on using the available information to find the best solution.

The analogy to your situation is obvious enough that we need not spell it out. Taking a more mindful approach does not mean that you deny your anger – you can observe it within yourself, including its physical manifestations. But taking a few self-observing breaths coupled with increased perspective, you may be able to let it go, identify more productive ways and times to express it and prevent stirring up additional conflict or calling negative attention to yourself.

At Lawyers Concerned for Lawyers (LCL), we can do a careful review with you of the situations that have elicited these difficulties, and get you started on a path toward better management of your anger when it emerges. As we often mention, our services are confidential and free to any Massachusetts lawyer (or law student or judge), and if you need more sustained clinical input, we refer to quality outside providers. ♦

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

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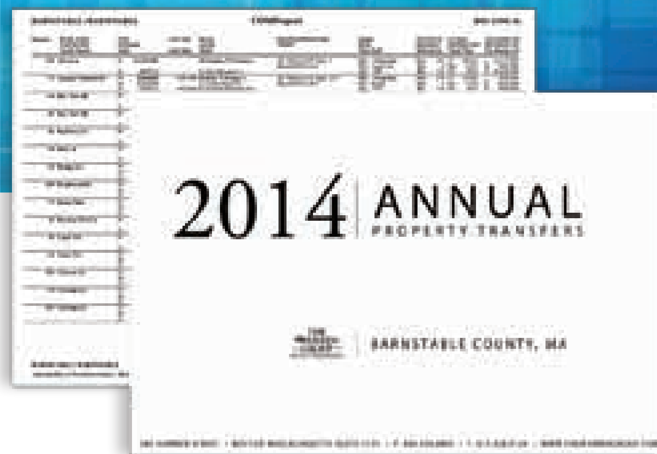

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