Spring Conference Wrap-Up
PAGE 6

The art of the title exam
PAGE 8

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Executive order requires benefits, substantive process

BY STACI M. RUBIN

On Nov. 25, 2014, Massachusetts became the eighth state in the country to promulgate an executive order on environmental justice (EJ EO). The environmental justice movement began in communities of color more than three decades ago in response to the concentration of hazards in low-income communities and communities of color. Environmental justice (EJ) populations reside in 137 of the commonwealth's 351 municipalities, including Boston, Chelsea, Lawrence, New Bedford, Springfield and Worcester. Residents of these communities, who are mostly low-income and/or people of color, live with substantially greater risk of exposure to environmental health hazards than the general population.

STACI RUBIN

The push for an EJ EO started five years ago when Alternatives for Community & Environment (ACE) and other community-based organizations saw the need to increase state resources to ensure that people can live, learn, work and play in environmentally safe communities. ACE convened the Massachusetts Environmental Justice Alliance, a network of grassroots member groups, organizers, health professionals, and academic researchers united in moving an EJ policy agenda. EJ in many states is focused on improving residents' and workers' ability to participate in decision-making without guaranteeing that such input will result in practical changes. The Massachusetts EJ EO is unique in that it requires substantive outcomes such as focused enforcement efforts and identification of funds for environmental benefits in EJ communities.

EXECUTIVE ORDER REQUIREMENTS

The EJ EO, Number 552, requires all executive branch agencies to develop strategies to promote EJ in ways that are tailored to the specific authority, mission and programs within the secretariat. Each strategy must identify all regulatory authority over development projects, brownfield remediation, industrial operations and commercial facilities, and describe how EJ populations are protected. Strategies must identify economic development

See ENVIRONMENTAL JUSTICE, page 6

SJC holds mortgages stating term of underlying notes subject to Obsolete Mortgage Statute

BY KIMBERLY A. BIELAN

The Obsolete Mortgage Statute (G.L. c. 260, § 33) was revised in 2006 to provide that a mortgage will automatically be discharged after a set number of years. A mortgage in which the term or maturity date is stated becomes unenforceable five years after the term expires. A mortgage in which there is no maturity date stated becomes unenforceable 35 years after the date it is recorded. *Deutsche Bank Nat'l Trust Co. v. Fitchburg Capital, LLC, et al.*, No. SJC-11756, slip op. at 2 (Mass. April 15, 2015) (citing G.L. c. 260, § 33, as amended by St. 2006, c. 63, § 6). The previous version of the statute, which was originally enacted in 1957, barred foreclosures of mortgages beyond a 50-year period.

KIM BIELAN

On April 15, 2015, the Supreme Judicial Court (SJC) issued its decision in *Deutsche Bank National Trust Company v. Fitchburg Capital, LLC, et al.*, No. SJC-11756, which analyzes the 2006 amendment to the Obsolete Mortgage Statute. In the decision, the SJC holds that a mortgage's reference to the term or maturity date of the underlying note is sufficient to establish the "term or maturity date of the mortgage" to make it subject to the five-year statute of limitation in § 33. Additionally, the 2006 amendment was constitutionally valid notwithstanding the retroactive application of the modified statute of limitation period.

In the matter, defendant Fitchburg Capital, LLC (Fitchburg) was the holder of two mortgages securing real property in Fitchburg. The first mortgage, which was dated April 12, 1999, and recorded on May 14, 1999, stated, in relevant part, that it was to secure a note that was "*payable in one year*– and with monthly payments of interest only, *as provided in the promissory note of even date* … ." The second mortgage, dated Dec. 16, 2002, and recorded on Dec.18, 2002, stated, in relevant part, that it was "to secure payment … *as provided in the Mortgagor's note of even date*… Mortgagor has promised to pay the debt *under this note in full not later than Dec. 31, 2003*." On April 30, 2012, pursuant to the statutory power of sale in G.L. c.

See MORTGAGE STATUTE, page 4

REBA launches Construction Law Committee

John P. Connelly

Jonathan R. Hausner

At the association's spring conference President Tom Bhisitkul announced the launch of a new section, a construction law committee. "Because construction touches upon so many areas of real estate law – affordable housing, permitting and land use, and commercial real estate finance, among others – this is a natural and logical addition to the roster of committees which serve our members," Bhisitkul said.

The Construction Law Committee will serve as a both a resource and a discussion forum for lawyers concentrating in the areas of construction law including the representation of public and private owners, developers, general contractors, subcontractors, material suppliers and construction sureties. The group will welcome practitioners concentrating in the area of construction law as well as lawyers whose practice occasionally touches upon construction law.

The new committee will be co-chaired by Jonathan R. Hausner of Robinson & Cole LLP and John P. Connelly of Hinckley Allen Snyder LLP.

Hausner primarily focuses his practice on the representation of public and private owners, general contractors, subcontractors, material suppliers, and construction sureties and handles all aspects of construction project consultation and construction litigation. He is also the legislative affairs liaison for the New England chapter of the construction management association of America.

Connelly's practice is focused in civil litigation (trial and appellate) with an emphasis on construction matters. He also represents clients in matters involving commercial, real estate, professional liability and insurance coverage disputes, as well as surety and fidelity bonds. He serves as a member of the ABA's forum on the construction industry; litigation section, construction litigation committee; tort and insurance practice section, fidelity and surety law committee. ♦

To join the Construction Law Committee, please contact REBA Executive Director Peter Wittenborg at Wittenborg@reba.net.

Environmental committee co-chair Julie Barry gave a presentation to the litigation committee about a Chapter 40B project in Belmont that has been in litigation with the town's conservation commission as well as a community group for more than 10 years.

For more information about Barry's appointment to the committee, see page 10.

The rising cost of malpractice insurance

BY JOHN L. TORVI

The consequences of the real estate crash include dramatic increases in professional liability, or malpractice, insurance claims against real estate professionals. Lawyers have not escaped this trend. A 2012 American Bar Association survey of the most common malpractice claims indicated that, beginning in 2008, the practice of real estate law became the most common reason attorneys were sued, overtaking perennial front-runner plaintiff law. The subsequent increase in insurance premiums and diminished underwriting capacity has created what is called a "hard market" in insurance terms, grabbing the attention of law firms purchasing insurance as they see prices going up and insurance companies leaving the market.

JOHN TORVI

COMMON CAUSES OF INSURANCE CLAIMS

Professional liability lawsuits in real estate often bring in all parties including the real estate agents, appraiser, lender, title agent and closing attorney. Allegations of error or omission that cast these broad nets are often related to disclosure or misrepresentation issues such as property defects, boundary disputes or valuation of a property. A professional can be forgiven for feeling that the claimant is just looking for deep pockets or to escape an unhappy purchase. However, real liability is assessed, and real money is paid out in court hearings and arbitration. The standard is set high for those working in real estate. The protection of the consumer and the importance of homeownership are clear factors in decisions resulting in the payout of malpractice claims.

Lawyers are not being sued because they just happened to participate in a transaction. There are clear trends related to actions of which the attorney is primarily responsible, including missed title defects, improper title searches and the rendering of title opinions. Land use and development, property acquisition and eminent domain are also common sources of claims.

Many lawyers took advantage of the massive increase of foreclosed and short-sale properties as a new source of revenue. The sheer volume of these transactions and their inherent complexities resulted in spikes of legal malpractice claims. Claim analysis indicates that many law firms took on a high volume of this work with insufficient quality control. Solo and small firms were particularly problematic as many firms lacked the experience, trained staff or infrastructure, resulting in practices with little oversight leading to errors in documentation and contracts, improper tax advice and other problem scenarios.

JOINING THE HARD MARKET

While increased claim activity started drawing the attention of insurance companies back to around 2008, Massachusetts' insureds have not seen the consequences of the hardening market until more recently. States with the highest foreclosure rates, poorer economies and/or with a housing market influenced by investment and second homes took the initial hits. Florida, Nevada, Arizona, Rhode Island and Michigan were among these. Large claims developed in Western states, including Texas, over title and development issues related to gas and oil rights. Insurers continued their cautionary approach with California, which consistently has the biggest monetary claims due to high valued properties, its' consumer protection orientation and an active housing market.

Massachusetts lawyers have enjoyed an environment of competitive malpractice premiums and underwriting availability for many years. While the liability market hardened nationally, Massachusetts real estate professionals benefitted from a stronger economy and housing market, keeping premiums lower. It is no surprise then that Massachusetts policyholders are getting sticker shock when they see renewal premiums or buy for the first time as the hardening market takes hold here.

When the market was more favorable, insurers were writing policies and competing for pricing on a level that some felt was unsustainable, even in Massachusetts. National trends have caught up locally, changing the market for the foreseeable future. Insurer actions affecting Massachusetts policyholders include non-renewal of policies if real estate areas of practice exceed a certain percentage of overall revenues or if there is any real estate practice at all, especially title work; restricting or eliminating policy issuance to solo practitioners or attorneys lacking a certain level of experience; or not writing policies at all in the state. As this happens, the laws of supply and demand take over. Diminished policy availability means that insurance companies are able to charge more premium to hedge future losses. While no area of practice is immune from the hardening market – especially estate and trust law and family/divorce law, real estate law and the resulting claims remain the primary culprit in premium increases.

WHAT TO EXPECT

Policyholders are experiencing premium increases of around 20 percent. They can also expect to have fewer options in choosing an insurance company. Solo and smaller firms will experience the biggest proportionate increases.

Some policyholders may neglect to consider other, more traditional factors that influence cost, including step increases that accompany all policies for the first several years of coverage. A step increase is imposed as the policyholder adds additional risk due to the lengthening of the Prior Acts coverage. Step increases, combined with rising prices, can be a bitter pill to swallow for a legal community used to purchasing the least expensive coverage available.

The focus on price has ironically contributed to the hardening Massachusetts market. One inescapable rule of insurance is that deflated pricing will lead to market volatility in the time of increased claim activity. Viewing malpractice insurance as a commodity to own based on the lowest price is as potentially dangerous as viewing any professional service in the same manner. Additional factors leading to increased premiums can include higher revenues or adding additional attorneys; changes in areas of practice, such as a higher percentage of revenues from commercial real estate, title work or collections; or a malpractice claim.

The hardening insurance market will continue for the foreseeable future, though the housing market's return to some normalcy and the improving economy are slowly mitigating increases in claims. Yet it will take some time for the environment to calm enough for the insurers to absorb previous losses and regain confidence in offering coverage. To help offset this less than rosy picture, attorneys should utilize the best possible risk management procedures at their disposal, including taking advantage of risk management tools offered by many insurance carriers to avoid claims and to document to their insurers for any premium considerations. Attorneys should also utilize insurance representatives with experience in the marketplace, access to sufficient carriers for price and coverage comparison, and then work to anticipate premium and coverage issues for the present and future renewals. Insureds who only shop for price will experience market volatility longer than those considering the bigger picture. Despite national and local insurance trends, attorneys can still positively impact their insurance program through sound risk management and an understanding of how their practice and their policy intersect for their immediate and long term concerns. ♦

John Torvi is the vice president of marketing and sales at the Herbert H. Landy Insurance Agency of Needham. The Landy Agency, founded in 1949, is one of the nation's leading providers of professional insurance services and is the affinity partner for professional liability insurance for members of REBA. Landy also supports meetings of REBA's regional affiliates across the commonwealth. John can be reached at johnt@landy.com.

A cautionary tale in hotel lending

BY JOSHUA M. BOWMAN

JOSHUA BOWMAN

When representing hotel lenders, the expression "forewarned is forearmed" seems especially appropriate. While there may be an abundance of lenders chasing hotel deals in Massachusetts these days, it is important for lawyers advising hotel lenders to keep in mind that hotel loans present risks not typically encountered with other asset classes of real estate.

Hotels are "hybrid assets" that consist of both real estate and one or more operating businesses. For that reason, a smart hotel lender needs to have the right team of professionals in place, including an experienced hotel lawyer. Since the Great Recession, I have seen many distressed hotel loans that were simply not documented properly at closing. In many of such situations, the lenders involved were represented by large, well-respected law firms that simply lacked hospitality lending expertise. If you don't typically deal with the issues described in this article, consider engaging "special hospitality counsel" or referring the project elsewhere. Your client may appreciate, and ultimately reward, your doing so.

One of the largest challenges for hotel lawyers is properly collateralizing all of the

See HOTEL LENDING, page 10

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for Massachusetts

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THE LAWYERS' COUNSEL

The rules of the road have changed

JAMES S. BOLAN AND
SARA N. HOLDEN

JIM BOLAN

SARA HOLDEN

New Rules of Professional Conduct become effective July 1, 2015 and the changes are both substantial and substantive. In this two-part series, we will highlight some of the important changes.

In Rule 1.0, which defines terms used, two important terms were added: "informed consent" and "confirmed in writing." "Informed consent" is "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." "Confirmed in writing." "when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent." The definition further requires that "if it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter."

It is no longer just good practice, but now requisite that lawyers communicate with their clients and often in writing so that there is transparency in the course of conduct being taken by the lawyer. Clear communications with the client, including disclosure of both positive and negative information, memorialized in writing is the best way to avoid a miscommunication with the client or a claim that the client did not understand and/or consent to a particular course of conduct.

Current Rule 1.2(c) allows attorneys to limit the "objectives" of a representation with the client's consent. New Rule 1.2(c) allows a lawyer to limit the "scope" of the representation "if the limitation is reasonable under the circumstances and the client gives informed consent." Even though the rule does not require such consent to be in writing, we would urge you to do so. Limiting the scope of the representation at the outset, in the fee agreement, is critical to memorialize the expectations of the lawyer and the client. For example, what if a lawyer decides only to represent the client in investigating a dispute with respect to a property boundary? Or a lawyer says that she will be glad to attend the closing, but she does not expect or intend to deal with licensing issues for the business taking over the premises? Be sure that a client will later claim that retention was much broader than it turned out to be. Without a written limitation of scope, disputes will arise or fester.

The rule on zealous representation has not changed, but having recently defended a lawyer and being able to get reversed a Rule 11 sanction order issued because of a substantial charge of lack of professionalism, Comment 1 to new Rule 1.3 is worth reading: "The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect."

Not surprisingly, Rule 1.4, which deals with communication with the client, has been expanded and has incorporated "informed consent". Again, there is a clear emphasis in the new rules on communication, disclosure and transparency between lawyers and clients.

Rule 1.6(b) has changed as well. Confidential information relating to the representation can be released only if the client gives informed consent, the lawyer is impliedly authorized or 1.6(b) permits it. Current Rule 1.6(b)(1) allows a lawyer to reveal confidential information "to prevent the commission of a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm." The new Rule 1.6(b)(1) allows a lawyer to reveal confidential information "to prevent reasonably certain death or substantial bodily harm." The new Rule 1.6(b) has also expanded the circumstances in which a lawyer may reveal confidential information, including in order to "secure legal advice about the lawyer's compliance" with the rules. This is an important exception to the general prohibition contained in Rule 1.6(a). Inevitably, ethical issues will arise in one's practice and when they do, the best course of action is to consult with either inside or outside ethics counsel to ensure compliance with the rules and minimize risk of either a malpractice action or disciplinary complaint. The new rule also authorizes release to detect and resolve conflicts when changing law firms.

New Rule 1.7(a) prohibits "concurrent conflicts of interest," which the new rule identifies as existing when "the representation of one client will be directly adverse to another client, or there is 'significant risk' that the representation of one or more client will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." New Rule 1.7(b) narrows the circumstances when an attorney can take on a representation despite a "concurrent conflict of interest," including the requirement that "the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal" and that each affected client must give "informed consent" to the conflict confirmed in writing.

Rule 1.10, the imputed disqualification rule, has been revised, including a change to the test for imputation of a newly-hired disqualified attorney. The test in the current Rule 1.10 is whether the personally disqualified lawyer had neither "substantial involvement nor substantial material information relating to the matter." The new test is whether the personally disqualified lawyer "had neither involvement nor information relating to the matter sufficient to provide a substantial benefit to the new firm's client."

Finally, Rule 1.18 is new and addresses an attorney's duty to a prospective client. The new Rule 1.18 outlines the circumstances in which an attorney receives "disqualifying information" from a prospective client and under what circumstances the attorney can still represent a client with interests "materially adverse" to the prospective client.

Up next: More changes to come in part two. ♦

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.

Peterson appointed to Senate Special Commission on Housing

REBA President Tom Bhisitkul has appointed former association president Greg Peterson to serve as REBA's representative on the Special Senate Commission on Housing, to be chaired by Sen. Linda Dorcena Forry. The commission, launched by Senate President Stanley Rosenberg, has a mission to develop a 21st century housing reform measure for the commonwealth that is both comprehensive and inclusive.

A 2002 association president, Peterson is a partner in the real estate and environmental group of Tarlow, Breed, Hart & Rogers, P.C. He provides strategic counseling to corporations, developers, investors, lenders, public utilities and private owners in connection with complex commercial real estate transactions, environmental and permitting and land use projects. ♦

TERM OF UNDERLYING NOTE SUBJECT TO STATUTE

CONTINUED FROM PAGE 1

244, § 14, Fitchburg held a foreclosure auction and subsequently recorded a foreclosure deed purporting to convey title to itself.

Plaintiff Deutsche Bank National Trust Company, as holder of a mortgage dated Sept. 10, 2004, and recorded on Oct. 1, 2004, subsequently instituted the Land Court action, seeking a declaration that Fitchburg's purported foreclosure of the mortgages was null and void because the mortgages had automatically been discharged under the Obsolete Mortgage Statute. The Land Court agreed, holding that "because more than five years have passed since the expiration of 'the term or maturity date stated in each mortgage,' the mortgages are deemed discharged and Fitchburg's foreclosure of the mortgages is void." *Deutsche Bank Nat'l Trust Co. v. Fitchburg Capital, LLC, et al.*, No. 12 MISC 467219(RBF), 2013 WL 5614291, at *1 (Mass. Land Ct. Oct. 11, 2013) (Foster, J.).

The SJC transferred Fitchburg's appeal on its own initiative and focused its inquiry on two issues. First, the court analyzed the language employed by the Legislature in amending the Obsolete Mortgage Statute in 2006 to assess whether a mortgage *setting forth the term or maturity date of the underlying note* is a "mortgage in which the term or maturity date of the mortgage is stated," and thus subject to the five-year statute of limitation in § 33. *Deutsche Bank National Trust Company*, No. SJC-11756, slip op. at 2. Answering in the affirmative, the SJC stated that "the common meaning of the 'maturity date of the mortgage' is the date on which the underlying debt is due because a mortgage derives its vitality from the debt that it secures." This conclusion echoes the argument advanced by REBA in its amicus brief. As the mortgage is tied to the underlying note, "considering the term or maturity date of the underlying obligation to be the term or maturity date of the mortgage comports with the common-law understanding of the words 'mortgage' and 'note.'"

Fitchburg's argument to the contrary – that the maturity date of the mortgage should be considered separate and apart from that of the underlying obligation – was thus rejected by the court. In analyzing the language used in the mortgages held by Fitchburg, the SJC determined that the explicit references to the term or maturity date of the underlying obligations were sufficient to subject both mortgages to the five-year statute of limitation in § 33. Accordingly, both mortgages had been discharged prior to the purported foreclosure sale pursuant to the self-executing mechanism of the statute.

Second, the SJC considered "whether the retroactive application of § 33 to mortgages recorded before the effective date of the amendment is constitutional." Upholding the constitutionality of the 2006 amendment and, specifically, the retroactive effect of the statute of limitation period contained therein, the court determined that the Legislature had provided sufficient time after enacting the statute (five and half months) for parties affected by the amendment to bring a foreclosure. Moreover, there was no "denial of justice" under the circumstances because "Fitchburg was entitled to record an extension or an affidavit of acknowledgement that the underlying obligation had not been satisfied in order to extend the time before its mortgages were deemed obsolete under G.L. c. 260, § 33."

The SJC's decision recognizes the Legislature's intent to expedite the discharge of obsolete mortgages. "By basing the discharge date on the term or maturity date including in the mortgage instrument, the Legislature has ensured that the enforcement period of a mortgage is clear from the record, allowing for more efficient discharge of obsolete mortgages." *Deutsche Bank Nat'l Trust Co.*, 2013 WL 5614291, at *6.

Editor's Note: The REBA amicus committee filed an amicus curiae brief in the SJC's Deutsche Bank *case. REBA's amicus brief is in harmony with the court's decision.* ♦

Kimberly Bielan is an associate in the litigation department at Marcus, Errico, Emmer & Brooks, P.C. She can be contacted by email at kbielan@meeb.com.

SECURING YOUR SYSTEMS

Is your firm at risk?

BY JAMES A. SIFFLARD

As a real estate conveyancing attorney, you pride yourself on attention to detail and customer service with regard to a real estate transaction. You and your staff focus on the deadlines and making sure the closing takes place pursuant to lender instructions. Unfortunately, with all this focus on the transaction, you can lose sight of your IT systems and proper business practices which can put your firm at risk. Paying attention to the following five items can go a long way to maintaining continuity and protecting your business.

JIM SIFFLARD

Properly maintaining your technology infrastructure is mission critical to your real estate law practice. In order to maintain your competitive edge and protect your business from downtime, you need to update your hardware every three to five years. If you operate too long on old technology (laptops, desktops and especially servers), you run the risk of hardware failure. You should also strongly consider a monthly maintenance plan that analyzes and supports your Internet connection, firewall, email, virus/malware protection and remote access policies.

If disaster does strike, are you prepared? What are your recovery time objectives and key steps to bringing your business back online quickly? Over the years I have dealt with title agents who have had their hard drives corrupted, office buildings burned to the ground, sensitive documents lost to flood and catastrophic server failure. These scenarios are real and you must have a strategy for dealing effectively with mitigating downtime. There are numerous disaster plan templates locating on the web. Google and download one today. It will give you piece of mind that you have a plan in place.

Also critical is a proper daily backup and rotation offsite to insure you can repopulate your data following a disaster or system failure. Cloud solutions are very convenient and cost-effective. Not sold on the web? Just make sure again your USB portable backup is rotated offsite and can be easily accessed.

Have you been contacted by a lender vetting company recently? Being verified and compliant is a necessity with the advent of the Gram-Leach Bliley Safe Guard Rule, FACTA Red Flag Rule and the state's Written Information Security Program (WISP) requirements, notification of breach and disposal laws. You need to understand and comply with these regulations in order to curb the onslaught of identity theft and maintain your lender relationships.

If you think you're lacking in the compliance area, you are not alone. Research indicates that a good percentage of attorneys are still unaware of their full obligations under the law. If you are getting inquiries from lenders to confirm compliance, there are measures you can take immediately. Start with developing a comprehensive WISP that details how you handle non-public personal information, encryption and metadata. You should also generate a business practices manual similar to what American Land Title recommends. In addition, a firm resume and letter of good standing from your title underwriters can finish off your comprehensive program.

This is another real area of concern with attorneys. You may be scanning, but perhaps don't have a good inventory and quick access to documents due to an ineffective document management solution. There are also questions on legal hold issues and what should and should not be destroyed.

The benefits of a records management plan and comprehensive document management solutions is worth the price due to the efficiency and risk mitigation it provides. Research popular solutions that take into consideration the size and workflow of your office and then leverage the right product and procedure. Also, be sure to choose a document destruction specialist which will insure compliance under the new federal and state data security and disposal laws.

A majority of title agents throughout Massachusetts have a web presence. It could be just an old static site you set up 10 years ago and haven't updated since. You may be more savvy and have a website, blog and a large social media presence including Facebook, Twitter, LinkedIn, Trulia and Active Rain. However you market online, be sure to not just "set it and forget it."

Make sure you have a strategy for engaging your customers that is both effective and compliant. Advertising and attorney/client relationship issues litter the Internet, so protect your business and know the rules. Review the American Bar Association website to make sure you are professionally responsible in the digital age.

I hope you find these suggestions beneficial. Over the next few issues of *REBA News*, I will use this space to take a deeper dive into these topics and will endeavor to share timely and practical information with you. ♦

Jim Sifflard is Old Republic National Title Insurance Company's agency account manager for Massachusetts and Rhode Island. Jim can be contacted by email at jsifflard@oldrepublictitle.com.

Berman joins REBA Dispute Resolution

Joe Berman

Joseph S. Berman has joined REBA Dispute Resolution's Panel of Neutrals. He will concentrate in professional liability and business disputes, as well as real estate issues. "Joe will broaden the scope of our mediation offerings with his 25 years in the practice of law and his strong background in professional liability law," said Peter Wittenborg, REBA/DR's treasurer.

Joe Berman is a full-time mediator and arbitrator, having spent 25 years as a trial and appellate lawyer. He has tried dozens of jury and non-jury cases, and has argued over 50 appeals in Massachusetts courts. As a neutral, Berman focuses his efforts on complex commercial cases, including real estate, professional liability and corporate matters.

Berman began his career as a law clerk to the Honorable Richard P. Matsch of the United States District Court for the District of Colorado. He then associated with a white collar criminal defense and commercial litigation boutique law firm in Denver. In 1993, Berman joined the Boston law firm of Posternak, Blankstein & Lund where his practice focused on the defense of lawyers and other professionals in malpractice and ethics cases. In 1998, he formed a new law firm, Berman & Dowell, where he continued his work in professional liability defense and expanded the practice to include real estate, employment and insurance litigation. In 2007, he joined Looney & Grossman as a partner, where he continued his practice until 2015, when he devoted his energies full time to alternative dispute resolution.

Berman has received many honors for his legal work. Since 2010, he has been named a Massachusetts "Super Lawyer" and was elected one of the 100 Best Lawyers in New England in 2013. He has received the President's Award from the Boston Bar Association for his *pro bono* litigation and was also honored by the New England Region of the Anti-Defamation League with the David A. Rose Civil Rights Award and the Krupp Young Leadership Award.

Berman is a frequent lecturer and writer in the areas of litigation and trial practice. He has taught classes at the Boston Bar Association and MCLE. Berman is a member of the national and regional boards of the Anti-Defamation League. He is also a director of the Associates of the Boston Public Library. He sits on the Conservation Commission in his home town of Weston. He is a member of the American, Massachusetts and Boston Bar Associations.

Berman graduated from Dartmouth College *cum laude* in 1986 and received his law degree, also *cum laude)*, from the University of Michigan in 1990. ♦

To schedule a mediation, arbitration or case evaluation with Joe Berman, contact Andrea Morales, REBA/DR's Mediation Coordinator, at morales@reba.net.

REBA Spring Conference Wrap-Up

The faculty of the break-out sessions on the implementation of the CFPB's impending TRID rule enjoy dinner at Legal Harborside prior to the spring conference. Pictured (left to right): Susan LaRose, REBA president-elect; Julie Palmaccio, Cushing & Dolan, P.C.; Michelle Korsmo, CEO, American Land Title Association and conference luncheon keynote speaker; and Ruth Dillingham, vice president/special counsel for First American Title Insurance Company.

People's United Bank exhibitor staff. Pictured (left to right) Patti Quint, senior vice president; Katie Morgan, treasury management sales officer; and Guy Ronan, vice president /market manager.

Michelle Korsmo addressing luncheon guests at the conference plenary session.

REBA President Tom Bhisitikul with Korsmo.

Pictured at a break-out session on municipal foreclosure ordinances after the SJC's Easthampton Savings Bank decision (left to right): Thomas D. Moore, associate city solicitor, city of Springfield; Tani E. Sapirstein, Sapirstein & Sapirstein, P.C.; and Benjamin O. Adeyinka, administrative attorney in the Administrative Office of the Housing Court. Moore represented the city of Springfield and Ms. Sapirstein represented the Easthampton Savings bank and co-plaintiffs in the SJC case.

EXECUTIVE ORDER FOR ENVIRONMENTAL JUSTICE

CONTINUED FROM PAGE 1

opportunities, environmental benefits and funding programs that consider EJ populations in the award process and create a public participation plan. The EJ EO requires all secretariats to designate an EJ coordinator responsible for ensuring implementation of each agency's EJ strategy and participate in the interagency workgroup on EJ. After secretariat strategies are published, clients will need to know how project reviews, procedures, grants and other subsidies affect their proposals and plan for increased public participation.

The EJ EO also requires Energy and Environmental Affairs (EEA) to update the Environmental Justice Policy, first adopted in 2002. The revised policy must ensure compliance and enforcement for facilities subject to environmental regulatory programs in areas with EJ populations. Practitioners ought to watch for new Massachusetts Environmental Policy Act thresholds that trigger enhanced substantive review for new and expanded projects affecting EJ populations and a new advisory council with community stakeholders tasked with overseeing EJ EO implementation. These requirements present an opportunity for the commonwealth to take the lead in ensuring healthy and safe communities for all its residents.

IMPLEMENTING THE EJ EO

There are numerous opportunities for successful implementation. The Department of Transportation could prioritize resources to improve bus routes by adding three rush hour trips on 15 key bus routes, which would improve many commutes for bus riders living in EJ populations throughout Greater Boston. Decades of focusing on moving people from outside the city to the downtown core have mostly failed to benefit residents of Roxbury, Dorchester and Chelsea, where black bus riders spend more hours waiting, riding and transferring on the T each year than white bus riders.

EEA can target inspection and enforcement for industrial facilities in EJ communities where there is dense clustering of industrial operations, many of which have not been inspected to determine compliance with environmental permits. Public Safety and Security can plan for and work with municipal first responders on communicating with limited-English language speakers.

Practice areas like real estate, environmental law and land use are affected. Practitioners ought to be alert to additional public participation and language translation requirements, which should be factored into the project timeline and costs.

One of the struggles that highlighted the need for the EJ EO involved a proposal to transport hazardous material by rail. ACE and the Chelsea Creek Action Group asked for assistance from multiple state and federal agencies to understand each agency's jurisdiction. The interagency EJ working group required by the EJ EO would be the appropriate venue for discussing such issues in the future and developing a consistent, efficient interagency response.

RECONCILING THE EJ EO AND EO 562

One of Gov. Deval Patrick's final actions before departing office was to sign the EJ EO to encourage sustained efforts now and in the future to ensure that EJ remains a priority for the executive branch. One of Gov. Charlie Baker's first actions upon assuming office was to sign Executive Order 562 to reduce unnecessary regulatory burden. Implementation of the EJ EO and EO 562 can be complementary. Strategies to meet the intent of both orders may overlap.

Executive Order 562 requires retaining regulations that are essential to the health, safety, environment or welfare of the commonwealth's residents. With the interagency EJ working group required by the EJ EO, executive agencies can maximize state resources and increase efficiency. The EJ working group can identify regulations essential to health, safety, and the environment to promote the right of commonwealth residents to be protected from environmental pollution and to live in and enjoy a clean and healthy environment regardless of race, income or English language proficiency.

ROLE OF THE PRIVATE BAR

Private sector lawyers should advise their clients about potential EJ issues that may arise. Lawyers may use the Massachusetts EJ Viewer to determine whether their clients' activities may affect a designated EJ population.

REBA members can encourage their clients to engage with community stakeholders early in the design and development phases of a project to understand potential concerns and improve designs and operation plans.

Lawyers can also advise their clients to invest in environmental benefits in all communities. ♦

Staci Rubin is a senior attorney at the Roxbury-based environmental justice advocacy group, ACE (Alternatives for Community and Environment. She was a recent guest at an open meeting of REBA's environmental committee where she lead a discussion of former governor Patrick's executive order on environmental justice. Staci can be contacted by email at staci@ace-ej.org.

Thank You To Our Conference Exhibitors

Convenyancers caveat: may not be trustworthy

BY JORDANA ROUBICEK GREENMAN

Many of us have been licensed attorneys and title agents in the commonwealth of Massachusetts for several years.

JORDANA GREENMAN

Personally, I write title policies for First American Title Insurance Company and WFG when handling closings. It seems easy: the seller/borrower signs an authorization, and we obtain payoff statements for residential loans. However, having experienced new hurdles, wrinkles and traps thrown in by at least one national bank, my trust in the process has been shaken. Wisdom may now dictate that conveyancers include an escrow agreement and hold back provisions for every transaction.

The purchase and sale agreement for this particular transaction hit my desk in early March. Title, plot plan and municipal lien certificate were ordered immediately and the seller, an elderly woman who was recently moved to a nursing home, notified the lender that the property was under agreement. Upon attempting to obtain a payoff statement, the seller was told to request the statement in writing because the mortgage was in default and that further information would come via mail within 10 days. An authorization to obtain information was then provided to me so that I could request the payoff from my office.

The frustration mounted as I had to fax a new request, try again when given a second number and yet a third time with a new number after being assured my request would be processed that day. It seemed like a typical "call center" approach with potential consequences much larger than a typical monthly service bill. Eventually, a payoff statement was faxed to me with a "good-through" date of March 31.

Over the next few days, I received no fewer than five additional faxes from the lender with identical payoff statements and good-through dates. I carefully reviewed each fax to make sure neither the amount nor the good-through date had changed. The last fax I received was on March 26, and contained identical information to that sent to me throughout that week. I closed on March 27, sent the payoff check on March 30 and received my delivery confirmation March 31.

On April 3, I received a call from the lender informing me that the property was winterized March 17, but the costs were not included in the payoff statement since they only hit the account on April 1. I demanded to know what authority the lender had to enter the property, but received no answer. Instead, the lender demanded I pay an additional fee for alleged services rendered in the amount of $210. Further investigation revealed these services rendered related to an illegal entry by the bank into the property for the alleged purpose of "winterizing."

This was outrageous – it was Friday afternoon before a Jewish holiday, and I needed it resolved before the end of the day. I eventually spoke to someone who told me I was not authorized to discuss the account, despite already having faxed my authorization to three different numbers. Then I spoke with someone who told me that "payoff figures can change at any time." While I do not dispute that charges may change, it seems reasonable and necessary that when they do, an updated payoff statement be sent to the closing attorney with an explanation for the change is included. This particular payoff was sent to me on the eve of my closing and, as the bank acknowledged, the fee itself did not hit the account until after I sent a check!

My check is clearly stamped received on March 31, yet they did not call me until April 3. In an effort to calm me down, the broker (Melanie Bissonnette of Riverside Realty) covered the illegal fee without knowing it should really be waived by the bank. I would like to get the money back for her, but she is more interested in making sure this never happens to any other homeowner who has informed a bank that the property is being sold and has not yet fully vacated! As an attorney closing loans for more than eight years, I have never experienced what I view as such extreme misconduct. It was not only illegal for the bank to enter and do work in that home, the attempt to charge me and/or the seller for it while refusing to negotiate my payoff check certainly constitutes a violation of M.G.L. c. 93A. As the closing attorney representing the buyer, I cannot legally pay the money they demanded, as the purchase funds had been fully disbursed.

This could potentially put my own license in jeopardy if I have to explain to my client the property may be subject to someone else's mortgage – and I am sure neither of the title companies for whom I write would be thrilled. The Post Closing Adjustment Agreement is only worth the paper it is written on in light of the fact the seller is unable to pay.

No foreclosure process had been commenced on this property, no demand letters had been sent and a payoff was requested by the owner long before the repairs were made. This is unacceptable, as it puts me as an attorney dangerously close to breaking the law. Though not typically a whistleblower, I reported this incident to the CFPB. I hope my story serves as a warning to others and grounds for new regulations ensuring it never happens again. ♦

COMMENTARY

My cousin Vinnie considers the art of the title exam

BY PAUL F. ALPHEN

PAUL ALPHEN

My cousin Vinnie, the suburban real estate attorney, and some other notable characters, took me out to dinner on the occasion of a landmark birthday; every year we use my holiday-season birthday as an excuse to congregate at a place where we can order massive amounts of oysters and sip 18-year-old scotch. We toasted our mutual acquaintances that had achieved great things this past year, and those who had screwed up royally. We were in mutual agreement that the economy improved considerably in 2014, and we agreed that running a business had become more complicated.

I was seated next to Vinnie, and at one point we began to reminisce about the evolution of our respective law practices over the past 30 years. I was telling stories of the early days when I brought home a bundle of title examinations every night and sat on the living room floor among the Little Tykes car and the Legos, piecing together the histories of parcels of land "running by the stone wall of land n/f of Boutwell to the oak tree and land of Fletcher …" We had to convert rods and links to feet and inches, and sometimes search the old plans in the archives of the public library to determine the location of "the road to Smith's farm house." Vinnie remarked: "It was funny, because once land was divided into house lots, it was all downhill; we only had to read a half-dozen deeds and a half-dozen mortgage discharges. Boy, have things changed!!"

The topic struck a nerve in Vinnie, and with arms flailing, he continued: "Somewhere in the late 1990s planning boards discovered word processors and every special permit or subdivision decision now contains 12 pages of conditions, half of which can result in automatic recession of the project unless some further act is completed. Residential titles became more complicated than commercial titles because they are crammed with refinance documents, ridiculous assignments and defective discharges. And although we can now access some Registries from our desktops, we have to imagine every possible misspelling of someone's name and street name in order to find everything; a classic example of 'garbage in, garbage out!'"

Every now and then I get a call from a fellow conveyancer with an esoteric question about a boundary line, or a condition of approval, that he or she discovered during the course of their review of a title exam. Inwardly, I congratulate them for being so thorough and for continuing to practice law the old fashion way. Outwardly, I say: "Ten lots have already sold in the subdivision and nobody else raised the issue!"

Notwithstanding that that registries are now partly digital, title examinations and reviewing examinations are much more time consuming and challenging than they were before the proliferation of the word processor and the invention of the secondary mortgage market and credit default swaps. I was reminded of that this week when I asked for an old back title file from our basement full of Steelcase cabinets. The file folder was as thin as a pancake, but it contained a full title exam.

Vinnie said: "They tell me that in the big city, the usual course of business is to have a title insurance company perform the examination and issue a policy for most commercial transactions. There have been certain deals where I have been happy to have that option, and my friends on Franklin Street took very good care of me. But out here along 495 and beyond, some of our clients are developing raw or underdeveloped land, and they count on us to know the details of every easement, right of way, boundary line discrepancy and defective document. And then we work with their engineers to determine if we can fit the project between the easements and around the encroachments – or reach out to the benefitted estates and try to work out a deal."

The art and science of title examination, and the review and interpretation of title examinations, are skills that are passed down by mentoring the younger generation. Vinnie asked: "Was it more difficult to read titles 30 years ago when we had to piece together oddly shaped parcels without the benefit of surveys and plans, than it is today when each title report is 2 inches thick, full of long-winded decisions, declarations of reservations and faulty mortgage assignments?"

"Vinnie," I said, "It doesn't matter. We do what we must do and march on." We then changed the subject to the subtle differences between a Washburn oyster and a Duxbury oyster. I prefer the Washburns. ♦

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 palphen@alphensantos.com.

The Real Estate Bar Association's residential conveyancing committee has completed its winter/spring seasonal round of regional affiliate meetings. Representatives of REBA meet with local real estate practitioners, often in collaboration with county bar associations, to brief them on recent developments in Massachusetts legislative and decisional law, pending issues on Beacon Hill relevant to real estate practice, and upcoming national regulatory changes, as well as unauthorized practice of law issues. Pictured here, REBA president Tom Bhisitkul addressing members of the real estate section of the Worcester County bar.

REBA'S 2015-2016 LEGISLATIVE AGENDA

Private road legislation filed on Beacon Hill

BY LISA J. DELANEY

Among REBA's legislative priorities for the current two-year session on Beacon Hill is a bill entitled "An Act Relative to the Maintenance of Private Roads, Beaches and Amentias in Municipalities," House Bill 2937. The legislation is focused on private roads and homeowner associations for which there is no statutory governing structure.

LISA DELANEY

Many roads and other private amenities, such as bridges or common beach and recreational areas, are privately owned. Therefore the state or city or town within which the roads, bridges or common amenities are located are not required to provide maintenance or upkeep of the roads, bridges and common amenities and they have fallen into disrepair or are in danger of doing so. This is especially problematic for those roads and amenities that serve many properties but are lacking an established owners' association or other method for raising the necessary sums for maintenance and upkeep.

This issue often occurs in suburban and rural settings, especially in connection with those areas originally subdivided and developed in prior centuries. There are also many commercial industrial and office parks with aging roadways and other infrastructure that don't have in place a clear and equitable process for assessing and collecting maintenance fees.

The existing provisions of M.G.L. c. 84, § 12, 13 and 14 provide a procedure to call a meeting of proprietors and rightful occupants of a private way or bridge, but those provisions, which are of ancient origin, include a cumbersome process for calling such a meeting, limit the parties entitled to call a meeting, and provide little guidance in terms of assessing and collecting maintenance costs and establishing an association of property owners to manage the ongoing maintenance and repair of common roads, bridges and other amenities. Those provisions are in serious need of both updating and expansion to meet the current needs of affected property owners.

The proposed bill, H. 2957, in lieu of requiring a warrant from a district court or town clerk or from a justice of the peace to call a meeting of property owners as in the current statute, instead allows such a meeting to be called by mailed notice together with publication in a local newspaper in accordance with other modern statutory notice provisions. The bill also expands the universe of property owners entitled to call a meeting to include not only those who own the common amenity, as in the existing statute, but also to include other property owners who have the benefit of using the common amenity without actually possessing a direct ownership interest in the amenity. This serves to include in the maintenance and repair process all affected property owners and not simply those who have an ownership interest in the common road, bridge or other amenity by virtue of owning property immediately adjacent thereto. In addition, the proposed bill expands the scope of common amenities covered by the statute to include not only private ways and bridges but also other common amenities requiring shared maintenance, such as private parks, buildings, recreational facilities, beaches and the like and privately owned utility lines.

The bill provides the necessary framework for the property owners to form an owners' association where none currently exists, including requirements with respect to establishing a board of directors and holding annual meetings, and also establishes requirements to be adhered to with respect to the raising of funds as reasonably related to the cost of maintenance and repairs of the common amenities. The association may also make assessments for maintenance and repair costs and record liens against the title of those who do not pay their assessed share.

REVISIONS AND CLARIFICATIONS

The current bill follows the framework established by H. 1880, filed in the previous legislative session, but has attempted to make various improvements to that bill. Among the substantive changes that have been made in the current bill from that filed previously are the following:

- The bill has been expanded to include private utility lines within the scope of the common amenities covered by these provisions.
- A clearly defined process for calling a meeting of property owners for the purpose of establishing an owners' association and/or a maintenance process has been added to the current bill.
- Provisions have been included to require certain basic information regarding an owners' association created pursuant to the statute to be recorded at the registry of deeds and to allow persons to rely in good faith on the information that appears at the registry of deeds.
- The ability of an owners' association to lien the property of owners that fail to pay their allocable share of maintenance and repair costs is provided for in the current bill similar to the ability of a condominium association to establish a lien for unpaid condominium charges.
- Provisions are included in the bill pursuant to which a statement from the owners' association can be obtained and recorded for the purpose of establishing that a property owner has paid its share of maintenance and repair costs as of the date of the statement, again drawing upon analogous statutory provisions applicable in the condominium context.

The current bill also includes proposed revisions to M.G.L. Chapter 254 for the purpose of establishing a framework for the enforcement of a lien for unpaid maintenance and repair costs. The framework for the enforcement of a lien established by those proposed amendments to Chapter 254 parallels the framework which applies in the context of unpaid condominium charges or time-share expenses which are already governed by the provisions of Chapter 254.

The bill seeks to be fair to property owners both individually and collectively, recognizes that those who use the roads and amenities are the logical parties to pay for their upkeep, and further recognizes that, with proper management and through the use of transparent owners' associations, dangerous and crumbling private infrastructure items can be repaired and future issues arising out of the failure to maintain such private infrastructure can be minimized. ♦

A long-time member of the legislation committee, Lisa Delaney was one of three principle drafters of the association's landmark 2011 reform of the Massachusetts homestead law. She practices in the firm of Carvin & Delaney, LLC in Braintree. Lisa can be contacted by email at ldelaney@carvindelaney.com.

The private roads legislation is one among a number of the association's current legislative priorities. For more information about House Bill 2957 or other REBA legislation, contact the co-chairs of the REBA legislation Committee – Fran Nolan at fnolan@harmonlaw.com, or Doug Troyer at dtroyer@meeb.com.

MITIGATING RISK IN HOTEL LENDING

CONTINUED FROM PAGE 2

assets of the hotel, including all necessary tangible and intangible personal property. Taking a mortgage on the hotel land and building only goes so far. The lender also needs the ability to take possession and/or control (directly or through a third-party management company) of the entire hotel and all associated businesses after an event of default. With regard to personal property, a well-drafted security agreement that expressly covers all of the personal property at the hotel (including without limitation furniture, fixtures, equipment, vehicles, inventory, accounts, contracts, trademarks and other intellectual property, capital leases, general intangibles and books and records) is critical, as is the proper perfection of the security interest created thereby. There are differing views about whether hotel room revenue constitutes "rent" that may be collateralized by an assignment of leases and rents. Uniform commercial code (UCC) insurance is available from national title companies, and many lenders obtain legal opinions from borrower's counsel on UCC perfection. However, there is simply no substitute for a lender's counsel with a deep understanding of the UCC.

A security agreement and the associated UCC filings are really just the beginning. Many hotels are subject to a franchise license agreement (FLA) that grants the borrower the right to operate the hotel under the franchisor's system or "flag." The continued availability of the flag during the term of the loan is often a critical component to the lender's underwriting. As a legal matter, most FLAs may not be collaterally assigned. However, it is critical that a hotel lender have certain rights under the FLA, including notice and cure rights, and the right to obtain an FLA for its own benefit (either directly or through a third party manager) in the event the lender takes title to the hotel. Such rights are usually conveyed pursuant to a "comfort letter," which is an agreement by and among the borrower, lender and franchisor.

Starting in the 1970s, there has been a nationwide trend for hotel owners to outsource hotel operations to third-party hotel management companies, pursuant to hotel management agreements (HMAs). Although some HMAs allow for termination on short notice without large termination fees, others may continue for decades and may not have express termination rights, even in the event of a foreclosure or sale of the hotel. Thus, it is important that a hotel lender receives a commercially reasonable subordination, non-disturbance, and attornment agreements (SNDAs) from the management company. Although deals rarely fall apart over the SNDA, they are complicated agreements that should be carefully negotiated. For example, the manager may push hard for an SNDA that grants the manager what it believes to be the benefit of its bargain, i.e., the ability to, absent a default by the manager, operate the hotel without interruption for the entire term of the HMA, notwithstanding any borrower default under the loan documents or transfer of title. The hotel lender, on the other hand, may want the right to change management or alter the terms of the HMA following any borrower default.

Dealing with the above described issues can be quite a balancing act for the hotel lender. For example, consider that many lenders use a deposit account control agreement or "lock box" agreement when making hotel loans, since the only way to perfect a security interest in a deposit account under UCC § 9-314 as original collateral is through control (as defined under UCC § 9-104(a)). However, the hotel manager may insist on having access to sufficient cash to ensure that the manager can make payroll, even following an event of default under the loan documents. Surely the manager's position seems reasonable given that the manager would have liability under the Massachusetts Wage and Hour Act if it misses payroll. But is the lender's security interest in the deposit account perfected if the manager has the unfettered right to make withdrawals?

The above constitute only a small number of the issues associated with hotel lending. For hotels with liquor licenses, pledges of liquor licenses in Massachusetts must be approved by the Alcoholic Beverage Control Commission before a security interest may be perfected by the lender. For hotels with equipment leases, the hotel lender should evaluate what would happen if they foreclosed on the hotel without taking ownership of leased personal property like beds, televisions or phones systems. Financial covenants may require hospitality specific terminology, some of which is defined in the Uniform System of Accounts (the hospitality industry's version of generally accept accounting principles). Certain types of hotels may be subject to the Worker Adjustment and Retraining Notification Act and/or collective bargaining agreements, either of which can materially affect the lender. If the hotel has significant government business, the lender may have rights under the Federal Assignment of Claims Act. Know when to call in reinforcements. In the words of one of my favorite hotel clients: "If you're not a barber, don't cut hair." ♦

Josh Bowman is a partner in Sherin and Lodgen's real estate department and corporate department and also chairs the firm's hospitality practice group. He recently led a discussion of hotel financing at an open meeting of the REBA's commercial real estate finance committee. Josh can be contacted by email at jbowman@sherin.com.

Barry to co-chair Environmental Law Committee

REBA President Tom Bhisitkul has appointed Julie Pruitt Barry co-chair of the association's Environmental Law Committee. A partner in the litigation practice area at Prince Lobel Tye LLP, Barry has had more than 20 years of experience in both the trial and appellate courts.

Julie Barry

She will serve alongside longtime committee chair Greg McGregor.

"I know Julie's involvement will raise even further the already high standard of environmental programs and meetings established by Greg McGregor in his years of leading this committee," Bhisitkul said.

ABOUT JULIE BARRY

Barry represents developers, commercial and residential property owners, businesses and individuals. She is also experienced in state and federal administrative proceedings before the Department of Environmental Protection, the state Building Code Board of Appeals, the U.S. Environmental Protection Agency, and the U.S. Army Corps of Engineers.

Her practice focuses on real estate and land use litigation and permitting, including real estate acquisition and title litigation, prescriptive easements and adverse possession claims, zoning and subdivision permitting and litigation, wetlands, tidelands, and Title 5 adjudicatory appeals and litigation, affordable housing permitting and development, historic districts, and state and federal environmental matters including MEPA, 21E, CERCLA, and RCRA permitting and litigation. She also represents clients in commercial real estate disputes, title and easement disputes, construction litigation, insurance coverage disputes, and product liability, and in mediation and arbitration.

ABOUT THE REBA ENVIRONMENTAL LAW COMMITTEE

One of REBA's most active committees, the group stays abreast of new developments at the intersection of real estate and environmental law, with a focus on new cases, recent statutes and practical tips for real estate attorneys handling transactions, permits and litigation, from residential to commercial to conservation. Land use law and environmental law are two sides of the same coin, important for our clients and us to know to be successful in all aspects of real estate.

The committee meets monthly for lunch, with a speaker or two on topical subjects, at the REBA office in Boston, emailing invitations to our members. All REBA members and non-members, including any real estate professionals and government agency staffers, are welcome to attend. We also propose or present environmental law-related workshops at the spring and fall REBA conferences.

The group's luncheon topics in recent years have included local climate change adaptation, trends in sustainable real estate, taxation of conservation lands, new FEMA flood hazard maps, DEP's regulatory reform rule changes, real estate implications of RLIUPA, constitutional limits on permit conditions, development impact fees in Massachusetts, pending zoning reform legislation, *Mahajan v. BRA and DEP* (Article 97 lands), use and abuse of municipal home rule, the Massachusetts Oceans Act and Ocean Plan, green siting-building-development, EOEEA energy law and policy reforms, recovery of cleanup costs and attorney fees, state economic development legislation, storm water-wetland science-hydrology for attorneys, DEP's permit and appeal streamlining, and annual surveys of developments in zoning, subdivision control, standing, Anti-SLAPP, 21E and 40B.

To join or learn more about the Environmental Law Committee, contact Greg at gimcg@mcgregorlaw.com or Julie at jbarry@princelobel.com.

Transit dis-oriented development?

BY ROBERT M. RUZZO

Talk about a crisis of confidence.

Over the last decade and a half, Massachusetts, particularly eastern Massachusetts, has begun to truly embrace the tenets of transit-oriented development (TOD). After some fits and starts, our state, once viewed as somewhat of a slacker in this regard, seemed to finally be getting the hang of things. Just take a look at the construction associated with Assembly Square, the planning for the extension of the Green Line, or the transformative impact that commuter rail is having in Brockton, Lowell or Haverhill. TOD has become *the* thing to do and everyone has been doing it.

BOB RUZZO

Then along came the winter of our discontent and its insistence upon making our public transportation system show us all of its vulnerabilities. As a result, the question has arisen in some quarters: Have we been orienting our development future around a fundamentally unreliable system?

Perhaps we should have known better.

Beginning at least as far back as the Public Control Act of 1918, our transit system has been in a state of almost constant crisis. Somehow, all but the worst flare-ups managed to remain hidden in plain sight. Neither the creation of the Metropolitan Transit Authority in 1947, its replacement with the Massachusetts Bay Transportation Authority in 1964, the reforms following the one-day shutdown in 1980, the enactment of forward funding in 2000, nor the recent reform attempts in the last decade have managed, for one reason or another, to produce an operationally sound, fiscally solvent system.

So why should we expect anything to be different this time around?

Well, for one thing, the recent crisis was epic. That fact, combined with the recent progress made on TOD, makes the stakes far higher this time around. Gertrude Stein famously once wrote, "A rose is a rose is a rose." As far as our transportation system is concerned, just the opposite is true. A public transportation crisis is a small business crisis, is an economic development crisis, is a housing crisis and an education crisis as well, to name just a few.

The harsh reality is that we must succeed this time around simply because we have run out of options.

From a housing affordability perspective, the fact that our roadways already creak from overutilization during peak commuting hours provides an everyday reminder that the "drive to qualify" theory of housing solutions offers us no real answers. Even the transit horrors of the snowiest winter in recorded history will not reverse that trend.

Look no further than our (relatively) new Republican governor, Charlie Baker. Republican governors used to be groomed in the Department of Public Works, the state's roadway building agency (see Volpe, John A. and Sargent, Francis W.). Today, perhaps for the same reason it took Nixon to go to China, it took a Republican governor to appoint a secretary of transportation from the Conservation Law Foundation.

So the smart money says that not only are we locked into a TOD bet for much of our future housing development, we are likely to double down on that wager as we sift through the possible solutions for standing up the MBTA.

As a result, the development community has a far greater stake than ever before in public transportation. So, where are the opportunities and what are the potential dangers to our own (undoubtedly enlightened) self-interest as we participate in the effort to reconstitute the T?

Well, one can start by scrolling down to page 12 of your handy April 8, 2015, copy of "Back on Track: An Action Plan to Transform the MBTA."

There you will find a call for the MBTA to "explore all avenues of new own source and value capture revenue." Translated into English, this means it is time to get off your assets and to start using them. This encompasses selling or leasing MBTA- and state-owned surplus land, including air rights for TOD purposes. Having had one personal near-death experience with leasing air rights, your correspondent can nevertheless attest that in the right location (high density, strong market, accessible adjacent land) the benefits are well worth the risks, costs and potential delay involved. For the wiser, perhaps more pragmatic among you, opportunities for development on surplus land are still numerous, and in the view of this column, within the body of every sizeable "park and ride" lot beats the heart of a "live and ride" community that is just waiting to break ground.

On the cautionary side of the equation is the call for putting "mitigation payments for MBTA improvements" on a more or less equal footing with mitigation payments for roadway improvements. Such payments are, as noted in the report, a routine and common practice in Massachusetts.

This is an idea that while attractive in theory, is likely to prove maddeningly complex in its implementation. First, the recommendation itself speaks interchangeably of supporting "MBTA service," "MBTA operations" and "MBTA improvements." Those can all be very different things, so just what does that language mean? Presumably, it means something beyond jitney service to the train station, providing Zip car spots on site or MBTA pass assistance. Presumably it also means different things depending upon the size and scope of the development proposal. Quickly developing some context here will be vital if the aim is to prevent this vision of a new future from succumbing to a lack of detail.

The second facet of this idea that will need immediate emphasis is how to keep this initiative from merely being another element in an already overburdened cost equation. This will prove to be a particularly difficult challenge if the notion of transit mitigation does not tie itself back into the local permit granting process in some fashion.

Well, no one said this would be easy, but remember two things: there is no feasible alternative and the next winter is just seven short months away. ♦

A frequent and welcome contributor to *REBA News*, Bob Ruzzo is senior counsel in the Boston office of Holland & Knight, LLP. He is also a member of the association's affordable housing committee. He was also deputy secretary of transportation for environmental policy from 1994 to 1996 and chief of real estate development for the Massachusetts Turnpike Authority from 1998 to 2000. Bob can be contacted at robertruzzo@hklaw.com.

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