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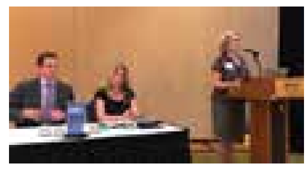

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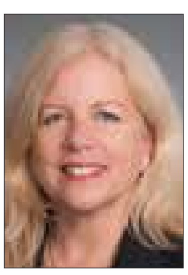
Senator Barrett's innovative carbon fee bill presented to REBA

BY JULIE PRUITT BARRY

Members of the Environmental Law Committee had the opportunity to meet with state Sen. Mike Barrett and economist Marc Breslow to discuss Barrett's proposed legislation for the imposition of a carbon fee in Massachusetts. Barrett is the author and chief sponsor of the pending legislation, which he describes as "a user fee on pollution." Breslow is policy director for Climate XChange, a proponent of the bill and respected resource on carbon fee policies, principles and protocols.



JULIE BARRY

There was lively discussion around the table about this groundbreaking bill, where attendees learned why the term "carbon tax" is incorrect. Under Sen. Barrett's proposed legislation, "An Act Combating Climate Change – SD285," a "carbon charge" would be added to the price of each coal, petroleum and natural gas fuel in proportion to the carbon thrown off as a byproduct. The concept is fairly simple: fees are leveled on fuels that emit carbon, the main driver of climate change; demand for these fuels goes down due to the higher price; proceeds of the fee are rebated equally to everyone; and less money goes out of state to pay for imported energy, resulting in more money in state to create local businesses and jobs. The bill sets fees at $10 per ton of carbon in the first year, increasing $5 per year until they reach $40 per ton. This $40 per ton charge translates into 36 cents per gallon of gas, but at $40 per ton each resident would receive a $225 annual rebate check.

The carbon charge is not a tax as it returns no money to the state, but instead but instead is "revenue neutral." This means each individual resident and every business in Massachusetts would receive an annual or quarterly check representing an equal share of the total carbon charges. Low and moderate income households would get back at least as much as they pay for higher costing fossil fuels – the bottom 60 percent of households come out ahead as a result of the carbon charge. They could then spend their rebate on whatever they wish, including if they choose, improving the energy efficiency of their homes or vehicles. Massachusetts businesses,

See CARBON FEE, page 3

Scenes from the Spring Conference

See more photos on page 9.

New precedents set in mortgage foreclosure law

BY JOEL A. STEIN

JOEL STEIN

Two new cases have joined the expanding canon of Foreclosure Law, clarifying the *Schumacher* decision and requiring conveyancers to take an even more careful look at transactions which include the foreclosure of a mortgage.

In *Schumacher Federal Home Loan Mortgage Corporation v. Annette LaPorta and Others*, Appellate Division of the District Court Department, Northern District No. 14-ADMS-10006, the facts were reasonably straightforward.

The defendants, owners of property at Winthrop Avenue in Revere, granted a mortgage to Mortgage Electronic Registration Systems, Inc., acting as nominee for American Brokers Conduit, dated June 1, 2007, recorded with Suffolk County Registry of Deeds, book 41932, page 250.

On Nov. 18, 2008, Wells Fargo Home Mortgage sent a notice of default to the mortgagors. The mortgage was subsequently assigned by Mortgage Electronic Registration Systems Inc. (MERS) to Wells Fargo Bank, N.A. by instrument, dated March 25, 2009, recorded with said deeds, book 44757, page 68.

The defendants claimed that Wells Fargo Home Mortgage was not the lender or current holder of the mortgage, or an authorized agent of either, when it delivered the notice of default, acceleration and rights to cure to the defendants. The case was heard on appeal of a summary judgment for the plaintiff's issued by the Chelsea District Court.

The defendants cited paragraph 22 of the defendants' mortgage which states:

"Acceleration; remedies. Lender shall give notice to borrower prior to acceleration following borrower's breach of any covenant or agreement in this security instrument. … The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this security instrument and sale of the property."

Paragraph 22 goes on to state, "If the default is not cured on or before the date specified in the notice, lender at its option …

See FORECLOSURE LAW, page 4

PRESIDENT'S MESSAGE

The rules of the road have changed

BY THOMAS BHISITKUL

I thought I was done writing about the CFPB and the new TRID rule (the Truth in Lending-Real Estate Settlement Practices Act Integrated Disclosure Rule, for the uninitiated). It has been the focus and source of consternation of the residential lending and conveyancing community for two years now, and most intensively during the last six months since I took over the helm of this fine organization. It has been written about, scorned, vilified and the subject of countless educational and practice preparation programs to help Massachusetts conveyancing attorneys prepare for the brave new world that was to come.

TOM BHISITKUL

But it was all supposed to be over by now. TRID rule implementation was scheduled to occur on Aug. 1, so by the time of this publication, the rule was supposed to virtually be in effect, and conveyancing attorneys were supposed to be (ready or not) in the trenches of the new rule, pulling their hair out grappling with its vagaries, and staving off seven-figure penalties if they happened to guess wrong. Of course, we had some cruel teasers in the final weeks leading up to Aug. 1, including movements by various U.S. legislators to persuade the CFPB to give residential lenders and lawyers an opportunity to test-drive the new TRID rule on some small side streets, to get a feel for the clutch, to adjust the mirrors and figure out where the controls were for the headlights and windshield wipers, all before launching the machine onto the Autobahn and braving its perils.

Surely, the CFPB would see the reasonableness of Sens. Donnelly's and Scott's bipartisan plea to the CFPB to institute a "grace period" for the industry players in the field to implement the rule in practice, without fear of enforcement action, while they explored the contours of the regulation and tried their hands with some of the more arcane operational features. Alas, the CFPB did see the wisdom on this trial period and politely demurred, noting that it has provided ample guidance and education on the new regulation over the past two years, and vaguely assuring the senators that the bureau would be "sensitive" in the implementation of the rule (at least to those whom the bureau deems to have employed good faith efforts to comply). So, as a further jolt of panic to those in the industry who were hoping for a little relief, the message from the CFPB was clear – the game was very much still "on" and they should continue their efforts to study the rule and get their houses in order in as the final weeks and days to Aug. 1 continued to tick away.

Then, out of the blue, in a strange twist of fate that some would call a miracle, or a lifeline, or some sort of Karmatic conversion, the CFPB announced that someone forgot to file the rule with the Government Accounting Office, as a consequence of which TRID rule implementation was required to be delayed for at least two weeks. But they didn't stop there – in an unexpected indulgence to the industry, the CFPB decided to extend the date of implementation even further to Oct. 1, 2015.

It has been akin to that brutal final examination in college for which you have been so far behind on studying, and on which you have been turning yourself inside out to catch up. All of a sudden, out of nowhere, the professor's car breaks down, or a snowstorm buries the campus or someone pulls the fire drill – in any event, and whatever the reason, the exam has been postponed. But the professor does not just postpone it to the next school day; she postpones it two extra months to give the students all the extra time they need to catch up, and eliminating any further excuse for not being ready when the examination finally commences.

So, the question becomes – how will Massachusetts lawyers and legal professionals utilize those extra two months that have been so graciously bestowed by the CFPB? Will they continue the TRID rule immersion and torrid pace of study that they had been maintaining prior to the CFPB's announcement, to be absolutely sure they are in TRID compliance come Oct. 1?

Or will they, perhaps, reward themselves with a respite from the TRID-immersion/panic/hell under which they have been toiling for the past several months, and turn their attention to that trashy novel they have been itching to read, or binge-watch the last several episodes of "House of Cards" that they had to miss in the final panic leading up to Aug. 1? It is summertime, after all, and those pesky TRID requirements will still be there to grapple with in the fall.

As just one suggestion of something in between those extremes, I would encourage REBA members (new and experienced lawyers, paralegals and professionals alike) to reward themselves with a fun and professionally fulfilling evening at Aragosta Bar and Bistro (in the Battery Wharf Hotel, located at 3 Battery Wharf, off Commercial Street, in Boston) on July 23, 2015 from 5:30 p.m. – 8:00 p.m. The occasion is a networking reception for real estate professionals jointly hosted by REBA's New Lawyers Committee and REBA's Paralegal Committee, where young lawyers and paralegals will get the opportunity to connect and network with more experienced professionals, and each other, and for the grizzled veterans to connect with each other as well.

Network in style on the posh terrace of the Aragosta Bar and Bistro overlooking the Boston Harbor, relax on some comfy couches and fraternize around a fire pit with your fellow brethren and sistren of the real estate bar, many of whom will undoubtedly be discussing the TRID rule. So you can enjoy the evening out, meet some new people, solidify professional contacts, and convince yourself that you are also doing your homework on TRID at the same time. Your conscience will be clear. ♦

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.

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MISSION STATEMENT

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

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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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Senate Bill 745

REBA FILES LANDOWNERS TITLE PROTECTION LEGISLATION

BY DOUGLAS A. TROYER

The ability of innocent owners to sell, or even refinance, their homes can be frustrated by the discovery of title defects that arose generations ago, but were not discoverable in the ordinary 50-year title search.


DOUG TROYER

The principle and rule of law that would be enshrined in REBA's Senate Bill 745 is that an unbroken chain of title for 50 years, with certain exceptions, would establish "a good and clear record and marketable title."

Also, this legislation would reduce the occurrence of title piracy, whereby third parties otherwise unrelated to the ownership of a particular parcel of land would scour old title records in search of technical defects, in order to find potential claims against current innocent landowners. In many of these situations, a person could claim on behalf of the descendants of a former owner that his/her interest in the land still exists because it was not technically released either at the registry of deeds, or at probate court in the settlement of a former decedent owner's estate. The public interest in settling title with finality should be greater than exposing innocent landowners to claims that reasonably could not have been known after a diligent search of title and probate records over 50 years, or more as the case may be.

The heirs of a former owner typically would not even have considered there to be a claim of title, but when approached with a potential for monetary gain, might be persuaded to sign their rights over to a stranger who would have deep enough pockets to legally challenge the present innocent landowner's title. Once notified, the present owner would have to bring a "quiet title" action or other proceeding, usually in the Land Court or Superior Court, in order to determine his/her rights against an active plaintiff.

The central thrust of the legislation is that any person having an interest in land, who has an unbroken chain of title to that interest for the "sufficiency period," shall be deemed to have a good and clear record and marketable title to that interest, subject only to the provisions of section 4 of the proposed legislation. An unbroken chain of title would exist when the records disclose: (i) the origin of title; and (ii) nothing in the records within or subsequent to the origin of title that would divest the person claiming the interest.

The "origin of title" is another way of saying a starting point at which a title examiner commences the review of the title, to determine if a "title transaction," as defined, was sufficient to create or transfer the interest in land that forms the basis for the title, and that was the most recent as of that date that is the beginning of the sufficiency period. The proposed sufficiency period would be 50 years, except that it would be 75 years if there appears to have been no title transaction within the preceding 50 years relating to the real estate, other than a devise or probate court decree.

Then, except as provided in section 4, all interests that depend upon any title transaction that occurred prior to the origin of title would be declared null and void.

The exceptions in section 4 include:

- Any interest or encumbrance that is created by a title transaction that is within the chain of title on or subsequent to the effective date of the origin of title only if the origin of title or subsequent recorded instrument specifically identifies either such prior interest or encumbrances or the instrument in the records wherein the interest or encumbrances was created, but general references (e.g. "for our title see") and general references (e.g. "subject to any rights, easements, restrictions and other other matters") shall not be deemed a "specific identification therein" so as to preserve such interest or encumbrance;
- any interest or encumbrance which is created by a title transaction prior to the effective date of the origin of title;
- any right or easement granted to owners abutting private ways;
- any right or easement granted, if there is evidence of the existence of such right or easement, whether or not observable on or above the ground;
- any right or easement, if there is evidence of the use of such right or easement upon any part of the land;
- any interest or easement of a public utility corporation or public service corporation;
- any reversionary interest of a lessor, or any interest of a successor of any lessor at the expiration of any lease;
- any interest of the United States, the commonwealth or any political subdivision, agency, authority or instrumentality of the commonwealth;
- the rights of any person arising from a 20-year period of adverse possession or prescriptive use, which period was in whole or in part subsequent to the date of origin of title;
- conservation, preservation, agricultural preservation and affordable housing restrictions;
- any interest or instrument of record which has been created pursuant to section 6 of chapter 21E;
- any liens created pursuant to section 13 of said chapter 21E;
- any restriction, easement, condition or license held by any governmental body, if the instrument is duly recorded, and describes the land by metes and bounds or by reference to a recorded plan showing its boundaries; and
- all interests preserved in chapter 185 (i.e. registered land).

This legislation is modeled on statutes passed in at least 20 other states, including Connecticut, Vermont and Rhode Island, the purpose of which is curative as to ancient clouds on title. The sufficiency period of 50 years – subject to being extended to 75 years in any case in which no transaction appears of record during the 50 years – would be among the longest among states that have adopted a "marketable title act." The intent of the proposed legislation is to make unnecessary the quiet title actions, and adverse possession claims that current owners have been required to file and litigate, in order to clear up clouds on title such as the ones described above.

For actual real-world examples of serious title problems where S. 745 would be helpful, contact Executive Director Peter Wittenborg at Wittenborg@reba.net. ♦

A partner in the Braintree-based law office of Marcus, Errico, Emmer & Brooks, P.C., Doug Troyer is a member of the firm's litigation group and has focused his trial practice in the areas of real estate, zoning, condominium, business and employment law. At REBA, he co-chairs the association's legislation committee. Doug can be contacted by email at dtroyer@meeb.com

CARBON FEES

CONTINUED FROM PAGE 1

including non profits and other entities, would receive a rebate in proportion to their share of total employment in Massachusetts, though additional rebates would be provided to businesses that are energy intensive and face significant competition outside of the state. The business recipients could likewise use their rebates as they see fit.

The goal of the bill is to encourage individuals and businesses to be more thoughtful about their use of fossil fuels, and thereby reduce the state's consumption of fossil fuels by 25 percent by 2020, and 80 percent by 2050. According to a report by the Massachusetts Department of Energy Resources, "net impacts are progressive … not by income group." This means progressives can support the bill because it does not put an undue burden on lower income families. And conservatives can support the bill because it is not a tax – the money goes to the state's residents and businesses, not to government.

The most important impact of Barrett's legislation is that it would cut carbon emissions more substantially than any other existing or proposed regulatory policy, saving billions of dollars spent on imported fossil fuels, and leaving more money for creating and expanding Massachusetts businesses and increasing employment. Carbon pricing has already been successfully implemented in British Columbia since 2008. The money from carbon pricing has gone back to the public, repeal efforts have failed, and the system is very popular. Barrett said they had learned from British Columbia in drafting the pending bill. He is optimistic that Massachusetts is ripe for implementing carbon pricing. As of the date of the committee lunch, 43 legislators had signed on to co-sponsor the bill. ♦

A partner in the litigation practice area at Prince Lobel Tye LLP, Julie Barry has had more than 20 years of experience in both the trial and appellate courts. She is co-chair of REBA's environmental law committee. She may be reached at jbarry@princelobel.com.

NEW PRECEDENTS IN FORECLOSURE LAW

CONTINUED FROM PAGE 1

may invoke the STATUTORY POWER OF SALE…"

The plaintiff argued the failure to comply with the provisions of paragraph 22 to be treated similarly to the failure to comply with the provisions of M.G.L. c. 244, § 35A as noted in *U.S. Bank National Association v. Schumacher*, 467 Mass. 421.

The court turned its attention to M.G.L. c. 183, § 21, which governs the statutory power of sale set forth in the mortgage. The statute provides that upon default of a condition in the mortgage, the mortgagee may sell the mortgaged premises "first complying with the terms of the mortgage and with the statutes relating to the foreclosure of mortgages by the exercise of a power of sale …"

In *Schumacher*, the court determined that M.G.L. c. 244, § 35A, was not a statute relating to the foreclosure of mortgages by the exercise of a power of sale.

Notwithstanding the plaintiff's argument that paragraph 22 of the mortgage should be interpreted similarly to the pre-foreclosure provision of M.G.L. c. 244 § 35A, the court determined that, since Wells Fargo held no interest in the mortgage and acted with no authorization from the mortgagee, the Nov. 18, 2008 notice was not sent by the lender as required by paragraph 22 of the mortgage.

As the pre-foreclosure notice required by paragraph 22 is not a matter of record, a conveyancing attorney will not know, without additional off-record research, that the notice was properly provided to the mortgagor.

As conveyancers regularly review green cards, it may be that good practice requires the review of the notice sent pursuant to paragraph 22 to determine that it was properly done, when taking title from a foreclosing mortgagee.

THE CASE OF THE COOKS

The case of *Wells Fargo Bank, N.A. v. Nancy B. Cook and Another*, Appeals Court Case No. 14-P-381 presents a far more complex fact pattern, but the result will again cause conveyancers to review foreclosures with greater care.

The defendant, Nancy Cook, had owned the property at Rosewood Street in Mattapan since 1971. In March 2006, she conveyed the property to herself and her daughter, Abena Cook, and subsequently refinanced with MERS as nominee for Fairfield Financial Mortgage Group Inc.

The mortgage is an FHA Massachusetts mortgage and includes the following language in paragraph 9(a):

"Default. Lender may, except as limited by regulations issued by the secretary in the case of payment defaults, require immediate payment in full of all sums secured by this security instrument if:

> (i) Borrow defaults by failing to pay in full any monthly payment required by this security instrument prior to or on the due date of the next monthly payment, or
> (ii) Borrower defaults by failing, for a period of 30 days, to perform any other obligations contained in this security instrument."

And the following language in 9(d):

"Regulations of HUD secretary. In many circumstances regulations issued by the secretary will limit lender's rights, in the case of payment defaults, to require immediate payment in full and foreclose if not paid. This security instrument does not authorize acceleration or foreclosure if not permitted by regulations of the Secretary."

The mortgage was assigned to Wells Fargo Bank, N.A., by instrument, dated March 25, 2009, recorded at book 44757, page 68.

The Cooks failed to make payments from June through August 2008. On Aug. 12, 2008, they attended a mass meeting at Gillette Stadium where mortgagors had the opportunity for face-to-face meetings with their lenders. Apparently, at that meeting, the Cooks met with a Wells Fargo representative and, shortly thereafter, received a forbearance agreement.

There are numerous factual disputes over what took place at the face-to-face meeting, but it is clear that the Cooks made the first three payments in accordance with the forbearance agreement. After that, the facts are again disputed, but Wells Fargo declared the loan to be in default and conducted a foreclosure sale.

At the summary process hearing, the Cooks challenged the validity of the foreclosure, and the issue of the preconditions under paragraph 9 were raised. The court held that the face-to-face meeting between the mortgagor and mortgagee did not comply with the HUD regulations, as it did not take place "before three full monthly installments due on the mortgage are unpaid."

The court also considered provisions in the HUD handbook which stated that the representatives conducting the face-to-face meeting must have the authority to propose and accept reasonable repayment plans. According to the Cooks, the representative at the hearing told them that they were not able to accept payments at the event. The court also took issue with the fact that the face-to-face meeting did not "involve personalized consideration of the mortgagors."

As in the *LaPorta* case discussed above, the court had to determine whether the failure to conduct a timely face-to-face meeting and comply with paragraph 9 of the mortgage, would render a foreclosure sale void pursuant to the provisions of M.G.L. c. 183, § 21. The court found that the HUD regulations were specifically incorporated into the mortgage and Wells Fargo was obligated to comply with the HUD regulations as terms of the mortgage before obtaining the authority to foreclose pursuant to the statutory power of sale.

The court, again, distinguished this case from *Schmacher*, deciding that the HUD regulations are "express terms of the mortgage" not a statute "relating to the foreclosure of mortgages."

As the court declared the foreclosure to be "void" rather than "voidable" meaning that a violation of the terms of the mortgage, even if not challenged by the mortgagor, will render the foreclosure void.

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

How to answer the question: 'Do I need my own attorney at my closing?'

BY PAUL F. ALPHEN

PAUL ALPHEN

For decades, the Massachusetts conveyancing bar has done an extraordinary job taking care of buyers, sellers, lenders and others, at residential closings. We have done the job so well that (a) the legal fees for closings have not changed significantly in over 30 years and (b) common folklore assumes that buyers and sellers do not need to retain counsel for their closings.

Common folklore should, however, be trumped by Massachusetts law. Mass. Gen. Laws ch. 184, § 17B, originally enacted in 1969, states:

"Every application for a mortgage loan on one to-four-family residential property and occupied or to be occupied in whole or in part by the obligor on the mortgage debt shall be made on a printed form which shall contain the following two statements in type of at least two points larger than the other type used on the application: (1) The responsibility of the attorney for the mortgagee is to protect the interest of the mortgagee. (2) Mortgagors may, at their own expense, engage an attorney of their selection to represent their interests in the transaction. A printed copy of the above statements shall be given to the mortgagor at the time of making the application."

Every borrower is provided with the above statement, in large bold type. Rarely does anyone ask us what the statement means. Well, it means what it says, and it has been affirmed by the courts on many occasions (See, for example, *Horvath v. Adelson, Golden & Loria, P.C.*, 55 Mass. App. Ct. 1113, 773 N.E.2d 478 (2002)).

To be honest, over the years, conveyancers have taken the time and energy to make sure that borrowers are well taken care of during closing transactions. However, ever-increasing demands on closing attorneys has made it difficult for us to always have the time to solve every dispute between buyers and sellers. It now takes hours to read most title exams (because of the added heft caused by the secondary mortgage market and by piles of permitting requirements), and with the ever-increasing changes in lending regulations (with more to come), time has become a precious commodity.

Closing attorneys are generally very good, but we are human – and a second set of eyes on the two-inch pile of closing documents can't hurt. My favorite story is the closing where I represented the buyer of a new home in a new subdivision and asked the closing attorney if I could take a look at the deed before she took it around the corner to the recording desk. The deed contained reference to the wrong lot – as did the mortgage.

I have also been involved in the aftermath of closings where the wrong plans were used for the property description, or only a portion of the premises were described in the deeds.

We have heard some buyers say that attorneys are too expensive. But, buyer representation usually costs less than a new stove, or about the cost of one car payment. So what do you get for your money?

1. Representation by counsel for the most important transaction in your life. As stated in chapter 184 § 17B, the lender's attorney represents the lender.

2. Someone to go over the two-inch pile of loan documents with you and summarize each form to you, to make sure you understand the terms of the transaction.

3. Someone to confirm that the terms of the loan transaction match your expectations, and work with the lenders attorney to correct errors. I have attended more than one closing where the terms of the note either did not match the terms of the loan commitment or it contained a balloon payment or crazy variable rate provisions.

4. In the event of a dispute with the seller (damage to the house, they don't move out on time, refuse is left behind, etc) your attorney can help you negotiate a resolution and prepare a written agreement.

Having your own attorney assures you that someone with the proper training and skills will review the loan documents with you. But as troubling as it sounds, even after the SJC ruled that a Massachusetts attorney must be a direct participant in all real estate closings, it appears that more closings are being performed by non-attorneys today than ever before. ♦

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.

Will we get the max for our statutory minima?

BY ROBERT M. RUZZO

To say that the commonwealth's Affordable Housing Law ("Chapter 40B" or the "Comprehensive Permit Law") "punches above its weight" in producing both affordable and market-rate rental housing is an understatement. Back at the height of the previous boom, the Citizens Housing and Planning Association documented that approximately 80 percent of all new rental housing produced outside of cities in Massachusetts was approved under Chapter 40B.

BOB RUZZO

With the rental lifestyle even more in vogue today, it's no surprise to learn that rental applications are literally flooding MassHousing – the only "subsidizing agency" under Chapter 40B that issues site eligibility letters for developments where it is not making a loan.

How much of a flood? In the first six months of 2015, MassHousing received as many rental site eligibility letter applications as it did in the previous two years combined. To use a technical term: "Wow."

Once again, given the absence of viable alternative vehicles, it looks from here as if the commonwealth has developed a troublesome over-dependency on Chapter 40B.

In what is likely not a wholly unrelated development, a number of Chapter 40B housing proposals have recently been confronted with yet another one of those existential challenges that have marked the recent history of the statute. This time, the question is: just exactly what does the General Land Area Minimum test, the second of the three so-called "statutory minima" under the Affordable Housing Law, really mean? And how does it/should it operate?

We have seen such challenges before. In the early 2000s, the ability of developments to utilize the Federal Home Loan Bank's New England Fund Program was challenged. Later in that same decade, disputes arose over what kind of conditions a municipality could lawfully attach to a Comprehensive Permit. Ultimately, it took rulings from the Supreme Judicial Court to resolve these questions.

This time around, while the number of impacted developments and municipalities will be smaller, the stakes are every bit as high. That's because at its core, the Affordable Housing Law requires that "local concerns" be balanced against the "regional need for low- and moderate-income housing." If a municipality satisfies certain criteria (any one of the statutory minima), that balance shifts entirely in its favor.

So let's look at these statutory minima.

First up is the so-called "10 percent test," known in regulatory parlance as the "housing unit minimum" (760 CMR 56.03 (3)(a). This is the most well-known of the three minima, and is the object of much attention (obsession) on the part of municipal officials and developers alike. It also presents a *relatively* straightforward exercise in counting (although what gets counted can get a little convoluted).

The 10 percent test essentially asks, "does low- or moderate-income housing make up 10 percent or more of the total year-round housing units in a municipality?" Even those of us who went to law school to avoid any further involvement with mathematics can understand the concept behind this exercise: you can easily log on to the DHCD Subsidized Housing Inventory (SHI) webpage and get a fairly current percentage of the number of affordable units in your hometown.

The remaining two statutory minima are known as the "general land area minimum" (760 CMR 56.03 (3) (b)) and the "annual land area minimum" (subsection (c)). They have dwelt in relative obscurity for much of the past 46 years since passage of the Comprehensive Permit Law. (Aug. 23, if you are the observant type.) The annual land area minimum is so obscure that even your correspondent cannot feign interest.

The "general land area minimum," however, while rarely invoked, is truly fascinating. (Full disclosure: I have advised private developers with respect to the general land area minimum.) It applies when "low- or moderate-income housing exists which is … on sites comprising 1.5 percent or more of the ***total land area zoned for residential, commercial or industrial use***." Land area owned by the United States, the Commonwealth or any political subdivision thereof, or any public authority is excluded from this total land area calculation.

Unlike the widely published SHI, information about the general land area minimum is harder to come by, approaching (sub)urban legend status. Housing Appeals Committee (HAC) decisions, innuendo and rumor have led people to believe that a small number of municipalities (including Watertown, Weymouth, Waltham and perhaps Somerville) had satisfied this statutory provision.

In recent months, a number of additional communities have asserted this position with both Norwood and Newton receiving a fair amount of press attention. Milton, Arlington, Provincetown, Southborough and others either already have or are about to knock on DHCD's door. That means Milton, a town with an SHI percentage of 4.9 percent, sought to essentially make further Chapter 40B proposals entirely discretionary under the general land area minimum test (a request with far-reaching consequences for DHCD for the reasons noted above).

As of this writing, the HAC has issued a proposed decision on a Stoneham challenge. Press accounts report that Norwood residents are seeking donations to raise money in the hopes of purchasing land to be restricted as open space, solely for the purpose of helping that town satisfy the general land area minimum test.

Developers are in a quandary about the potential for additional delay to a process that is supposed to be "expedited," but rarely seems to be. Municipalities have legitimate concerns about their inability to access valuable acreage data, most notably information on group homes. DHCD must concern itself with the next request from a municipality with a Milton-esque SHI tally.

The sky is falling. Nobody is particularly happy. What are we to do?

Given the constraints of space, it's best that we relax, catch up on our summer reading and put our collective thinking caps on.

Come September, we can share some thoughts about moving forward. ♦

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.

Retailers beware – are you paying more than your fair share?

SPOTTING AND LITIGATING AGAINST LANDLORD OVERCHARGES

BY PAUL E. WHITE

As shopping-mall retailers struggle to succeed in a demanding economic climate and against mounting challenges from online competitors, it is more critical than ever to look carefully at controlling operating costs. Among the main cost concerns for such retailers are the shared expenses they must pay as commercial tenants to the mall operator. As retailers begin to examine these charges more carefully, disputes can frequently arise under shopping-center leases as to whether the operator-landlord has correctly charged the retailer-tenant for its pro rata share of property taxes and other expenses incurred by the landlord.

PAUL WHITE

A shopping-center operator will typically seek to allocate to a retailer tenant a fair pro rata share of the total property tax expense incurred by the operator. This is commonly done on the basis of the relative physical size of the tenant's store within the mall. A governing lease provision usually recites a formula for determining the tenant's pro rata share of the taxes due for the mall property. The numerator of the fraction is nearly always the same: the square footage of the tenant's leased space. But the denominator can be different depending on the bargaining strengths of the parties and the skills of the negotiators. Most commonly, the denominator will be the area of leased or leasable space within the mall. While both of these denominators would exclude the interior common areas of the mall, they can produce markedly different results, especially during an economic downturn when vacant space is now a common feature at many shopping centers. For example, unless a mall is fully occupied, a denominator comprising *leased* area will always be smaller than one comprising *leasable* area and the tenant's share of expenses or taxes will be correspondingly larger. Tenants must be careful in their negotiations to ensure that they do not commit to a fraction that will oblige them to pay a disproportionate share of the taxes or maintenance expenses of the mall where their store is located. And a retail tenant must also be careful that, having obtained a desired formula in lease negotiations, it does not then proceed to lose the benefit of the bargain in the billing process.

Large retailers typically have specialized departments responsible for reviewing expense-allocation bills and authorizing payment.

Once the tax-sharing provision is negotiated, the operator will issue periodic bills (monthly, quarterly or semi-annually) using the applicable lease formula to calculate the tenant's *pro rata* share of the property taxes – and typically its share of other expenses paid by the operator. How detailed and clear the invoice calculations are will depend on the landlord's customary practices and on any lease term that governs the form of invoicing. On the tenant side, large retailers typically have specialized departments responsible for reviewing expense-allocation bills and authorizing payment. Even with the benefit of such review systems, however (and certainly in cases of smaller tenants without them), problems arise when a landlord seeks to recover more of a tax payment or other expense than is properly due under the lease, when the landlord seeks to charge for something that is not properly a "tax" expense within the meaning of the lease, or when the landlord's method of calculating the tenant's share, or the square footage numbers used, do not correspond to the lease language. Where the tenant fails to immediately notice an error, the problem may be replicated in subsequent invoices, sometimes remaining undetected for years.

Eventual efforts to recover such overcharges can be complicated by such a delay, as a landlord will frequently assert that any claim for recovery is precluded by the parties' own course of dealing reflecting a modification of the lease or is barred by the statute of limitations or that payments previously made are rendered unrecoverable by the "voluntary payment" doctrine. Tenants must be vigilant to ensure that they are being charged no more than their fair share and should take steps to have a regular review process in place to catch any improper charges.

In sum, a shopping center tenant must be careful to avoid the many traps for the unwary that can result in them paying more than their fair share of the taxes or other operating expenses paid by the mall owner or its ability to conduct a profitable retail operation can be severely impacted. ♦

Paul E. White is a senior partner at Sugarman, Rogers, Barshak and Cohen, P.C. in Boston where he concentrates his practice in the representation of retailers and manufacturers in complex contract, supply-chain or commercial lease disputes. Mr. White is an active member of the Massachusetts Real Estate Bar Association's Commercial Leasing. A more detailed version of this article is available upon request from the author at white@srbc.com.

Freddie Mac updates selling guide, including condominium eligibility requirements

BY HALEY M. BYRON

Freddie Mac recently updated the selling requirements in its Single-Family Seller/Servicer Guide as they relate to condominiums. The key changes were identified in an April 9, 2015, bulletin and modify or clarify sections 42.1, 42.3, 42.4, 42.5, 42.6 and 42.12 of the guide. The changes took effect immediately on April 9, 2015. Freddie Mac also issued a May 14, 2015, bulletin concerning certain additional changes, specifically modifications to comparable sales selections for condominium appraisals under section 42.8. The April 9, 2015, bulletin explains that Freddie Mac made revisions "in light of recent market trends and in response to customer inquiries."

HALEY BYRON

The changes to section 42.1 include the addition of general requirements concerning a lender's evaluation of the risks associated with a particular "condominium project," which is an all-encompassing term, defined as "a project that is legally established as a condominium project in compliance with the applicable state law in which the project is located." The update makes clear that in conducting a condominium project review, a lender must not only evaluate the borrower, but it must also seriously consider the viability of the project as a whole, specifically, the marketability and condition of the project, the marketability of the units, the financial stability of the project, project related litigation, restrictions on occupancy rights, ownership and use of the common areas and the adequacy of insurance coverage. By this update, Freddie Mac appears to be placing as much emphasis on the soundness of the assessment of the collateral value of the unit as on the individual unit borrower.

Most changes were made to section 42.3, which concerns mortgages that are ineligible for sale to Freddie Mac. First, Freddie Mac expanded the eligibility limit for non-residential or commercial use from 20 to 25 percent of the total square footage of the condominium. Second, Freddie Mac made changes to eligibility requirements for condominiums in litigation. Freddie Mac continues to reject projects in which the homeowners association or developer is named as a party in most types of litigation. The new changes clarify that the same applies when a project sponsor is named. Further, prior to April 9, 2015, if the litigation involved the safety, structural soundness or habitability of the project, the project was ineligible subject to exceptions. Freddie Mac has added litigation involving the "functional use" of the project to that list. Freddie Mac has also made eligibility exceptions for situations in which the lender determines that "the reason for the litigation involves minor matters that do not affect the safety, structural soundness, functional use or habitability of the project" and is limited to one of the listed dispute types (i.e., (a) the litigation is over a known amount, an insurance company is defending, and the litigation amount is covered by the insurance policy (b) the matter is a "non-monetary neighbor dispute" or involves rights of quiet enjoyment, or (c) the homeowners association is the plaintiff and the matter is minor with little impact to financial soundness of the project), which remains unchanged. The lender must also now retain documents to support its determination that the basis for the litigation is minor. Third, Freddie Mac expanded the number of units that a single entity or individual can own in a condominium with five to 20 units. For projects with less than 5 units, the limit remains one and for projects with 21 units or more, the limit remains 10 percent. Now, in condominiums with five to 20 units, a single entity or individual can own 2 units.

Freddie Mac also amended and clarified section 42.4, concerning streamlined project review. Section 42.4 no longer has a "spot" loan requirement. Previously, to be eligible for a streamlined project review, a mortgage had to be originated on an individual loan basis, and not part of a marketing push that resulted in multiple mortgage originations backed by units in the same project and sold to Freddie Mac by the same lender. This requirement is now eliminated. Language was also added to clarify that a condominium project containing a mix of attached and detached units is eligible for a streamlined review, so long as it meets other requirements.

With respect to sections 42.5 and 42.6, for both established and new condominiums, Freddie Mac adjusted eligibility requirements concerning the number of owners that can be delinquent in their common expense payments such that no more than 15 percent of the total number of units in the project can be delinquent for 60 or more days rather than 30 days.

Last, Freddie Mac amended section 42.12, and other data reporting requirements in the guide, to clarify how lenders provide necessary information to Freddie Mac at the time of sale, specifically with respect to condominiums with a mix of attached and detached units. Also pursuant to section 42.12, Freddie Mac now encourages, but does not require, lenders to obtain the association's taxpayer identification number.

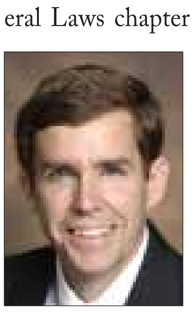
Ultimately, the revisions are modest but meaningful, particularly with regard to eligibility requirements. ♦

Haley Byron is an associate in the litigation department at Marcus, Errico, Emmer & Brooks, P.C.. Her practice focuses on condominium law and construction disputes. She can be contacted by email at hbyron@meeb.com

Bridging the electronic recording gap

BY RICHARD P. HOWE JR.

The legislature's 2004 enactment of the Uniform Electronic Transactions Act (General Laws chapter 110G) opened the door to electronic recording in Massachusetts. The following year, Middlesex North became the first registry in the Commonwealth to implement a comprehensive electronic recording system. By 2014, all 21 Massachusetts registries were recording electronically, with some receiving nearly 40 percent of all documents by that method.



DICK HOWE

The widespread use of electronic recording today in Massachusetts signals broad acceptance of that method of recording by the conveyancing community.

Still, there is always room for improvement.

Perhaps the biggest challenge that remains is bridging the "gap" in electronic recording. This gap is the passage of time between a customer pressing the "send" button to transmit a document to the registry for electronic recording and the registry actually recording that document. That time interval can vary from a few minutes to an hour or more, depending on the registry, the hour of the day and the day of the month. The concern is that during that space of time, a walk-in customer might record an attachment, an execution or some other document and gain priority.

Today, most users rely on a post-recording/pre-disbursement rundown to minimize exposure from the gap. By first doing the normal rundown and then doing a second rundown immediately after recording but before disbursing funds, a conveyancer would discover anything that snuck on record during the gap between the initial rundown and the moment of recording. While this would still leave documents on record, the funds could be withheld until the priority issue was resolved. This is a widely used, practical work-around that seems to be working well. However, a more direct solution to the gap problem is certainly desirable. To me, that solution may be found not in technology, but in history.

When I started practicing law in the 1980s, the rundown process at the registry of deeds was far different than it is today. There were no computers back then; instead, registry users perused a complex system of paper strips, daily sheets and boxes of just-recorded documents. The final step was to approach the people already standing in line to record and ask to look at their documents. Once you had ensured that none affected your locus, you got in line yourself, safe in the knowledge that nothing troublesome to your transaction would slip in front of you.

Finding a way to virtually duplicate the pre-computer rundown process could be a solution to the electronic recording gap. Making walk-in recording more like electronic recording would accomplish that. With electronic recording, the customer scans the document and then transmits the image of the document and data about it to the registry of deeds. At the registry, a clerk reviews the image and data and, if all is in order, clicks the "record" button. In the new system I envision, walk-in recording would also be a two-part process. At the first stop, the customer would hand the document to a registry clerk who would review it, enter data about it, and scan it. The clerk would then click the same "send to the registry" button used by electronic recording customers. That would insert the document image into an integrated electronic queue that contained not only other walk-in documents but also documents submitted through electronic recording. This integrated queue would preserve the submission chronology meaning that once something was in the queue, nothing new would get in front of it.

A critical new element of this integrated queue would be the ability for everyone, remote customers and those at the registry, to electronically look into this queue to see what had gotten in line ahead of them, just as we did in the pre-computer age. Back then, if you spotted something of concern, you just stepped out of line. This new system would permit you to do the same thing through the use of an abort button that would allow the person submitting the document to electronically yank it out of the queue at any point up until it was recorded. This integrated queuing system would end at a single recording terminal that would rapidly record each document in the queue in the same sequence in which it first entered the queue. Because all documents being recorded – electronic, walk-in and mail – would form up in the same electronic line, nothing could slip in front of you once you were in that queue.

Under this new system, registry personnel would still do a review of the submitted document for recordability, but this review of both walk-in and electronically recorded documents would occur before the documents entered the "ready to record" queue. That way, once a document was in the queue, it would steadily advance to the recording terminal where documents would be recorded without any further review.

Handling fee payments from walk-in customers would also be modified. For walk-in recordings and mail, perhaps the money could be collected "on account" pending the final recording of the document. While cash or checks for payment of fees would still be accepted – and hopefully credit cards, too – there might also be an opportunity to do an electronic transfer of funds from the customer's account to the registry's, which could reduce the disruption now caused by checks written in the wrong amount.

This new kind of walk-in recording system would bring other efficiencies. With walk-in documents scanned at the very beginning of the process, the originals would be handed back to the customer immediately, which would reduce the time spent by registry personnel handling paper. Customers who shared their email address or cell phone number could receive the recording receipt via email or text the moment a document was recorded, rather than waiting around for a paper version. The possibilities for increased efficiencies are almost endless.

If a system similar to what I describe already exists, I am unaware of it. It is also unlikely that any of the existing registry computer systems in Massachusetts could be easily reprogrammed to this configuration. While the computer system at the Middlesex North Registry in Lowell continues to operate satisfactorily, it was installed in 2002, making it ancient by technology standards. Therefore, it is appropriate to begin contemplating how its replacement should function. An important part of that analysis is to obtain feedback from those who do business at the registry of deeds.

In that regard, I would welcome comments on this proposal and on electronic recording in general via email at richard.howe@sec.state.ma.us.

Richard P. Howe Jr. is the Register of Deeds for the Middlesex North District, an office he has held since 1995. He has also served as the president of the Massachusetts Registers and Assistant Registers of Deeds Association. ♦

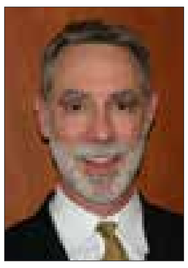
SCENES FROM THE SPRING CONFERENCE

CONTINUED FROM PAGE 1

THE LAWYERS' COUNSEL

The rules of the road have changed

BY JAMES S. BOLAN AND SARA N. HOLDEN



JIM BOLAN

SARA HOLDEN

This rule does not address the legal duties of a lawyer who receives a document or electronically stored information that the lawyer knows or reasonably should know may have been inappropriately obtained by the sending person.

New Rules of Professional Conduct become effective July 1, 2015 and the changes are both substantial and substantive. In part two of our coverage, here are highlights of some other important changes.

Rule 2.3 has changed so that a lawyer may provide an evaluation of a matter affecting a client for use by a third person if that evaluation is believed to be compatible with the client relationship and the client gives written informed consent or giving an evaluation is impliedly authorized. We would urge getting consent and not finessing the matter.

Rule 3.3 now requires that a lawyer is prohibited from knowingly making *any*, not just a material, false statement to a tribunal. One must take steps to remedy any criminal or fraudulent conduct relating to the proceeding known to the lawyer, even if committed by other non-clients. The obligation to remedy false testimony or statements now includes disclosure to the tribunal if necessary. See comment 13 as to the time in which to act. In the rare, but very difficult, situation where a client has lied to a court, Rule 3.3(b) now states that "[A] lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." A so-called "noisy withdrawal" may be necessary if the client does not remediate the fraud. As comment 10 notes, "[I]n some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like."

Lawyers may now contact jurors after their discharge *without* leave of court *if* the communication is not otherwise prohibited by law or court order, the juror has not made known a desire not to communicate with the lawyer and there is no misrepresentation, coercion, duress or harassment. Rule 3.5(c).

One change in Rule 4.2 notes that *ex parte* communication about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter is barred unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order. This rule applies even if a represented person initiates or consents to the communication. (See comment 3.)

Under Rule 4.4, if a lawyer receives any paper or electronic document inadvertently sent, the lawyer must promptly notify the sender. But, as noted in comment 3, what one does with those documents is left to the lawyer's judgment and that decision will be determined, ultimately, as a matter of applicable law. ("Some lawyers may choose to return a document or delete electronically stored information unread, for example, when the lawyer learns before receiving it that it was inadvertently sent. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.")

Comment 2 describes the conundrum further: "Paragraph (b) recognizes that lawyers sometimes receive a document or electronically stored information that was mistakenly sent or produced by opposing parties or their lawyers. A document or electronically stored information is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a document or electronically stored information was sent inadvertently, then this rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning or deleting the document or electronically stored information, is a matter of law beyond the scope of these rules, as is the question of whether the privileged status of a document or electronically stored information has been waived. Similarly, this rule does not address the legal duties of a lawyer who receives a document or electronically stored information that the lawyer knows or reasonably should know may have been inappropriately obtained by the sending person. For purposes of this rule, 'document or electronically stored information' includes paper documents, email and other forms of electronically stored information, including embedded data (commonly referred to as "metadata"), that is subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer."

Supervisory obligations, under Rule 5.1 – 5.3, however, were expanded to anyone in the firm with managerial responsibilities. However, the court declined to expand discipline to law firms leaving New York and New Jersey alone in that honor.

The requirement that advertisements, letters of solicitation and other written or electronic communications be retained for two years has been eliminated from the new Rule 7.2.

This two-part article is a brief summary of a generational change in governing rules. Beyond a thorough reading of them, if anyone has any questions, please feel free to contact us. ♦

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.

WFG National Title Insurance Company Vice President Beth Young greets attendees of REBA's program on the impending TRID (TILA-RESPA Integrated Disclosure) rule. Speakers at the two-hour program at the Newton Marriott included Lisa J. Aubrey and Rick Diamond, both of WFG National Title. Nearly 100 REBA members and guests attended the two-hour seminar.