Drones and condo associations
PAGE 2

2015 Annual Meeting and Conference
PAGE 8

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SJC mandates strict contractual compliance prior to foreclosure

BY ANNE E. SHANNON

ANNE SHANNON

On July 17, 2015 the Massachusetts Supreme Judicial Court ruled in *Pinti v. Emigrant Mortgage Company* that strict compliance with the notice of default provision in a mortgage is required as a condition of a valid foreclosure sale. The *Pinti* decision will have significant implications for foreclosure practitioners and on titles that are affected by future foreclosures.

In *Pinti*, Emigrant Mortgage Company foreclosed on the plaintiffs' mortgage through the power of sale provision contained in the mortgage. After the sale, Pinti filed an action to have the foreclosure declared void on the basis that Emigrant did not comply strictly with the default provision contained in paragraph 22 of the mortgage. Paragraph 22 of the mortgage required Emigrant to advise the mortgagors of their "right to bring a court action to assert the nonexistence of a default or any other defense to acceleration and sale." Emigrant's notice instead informed the mortgagors that they "ha[d] the right to assert in any lawsuit for foreclosure and sale the non existence of a default or any other defense [they] may have [had] to acceleration and foreclosure and sale."

Emigrant argued that its notice substantially complied with the terms of the mortgage, and that strict literal compliance with the terms of the mortgage is unnecessary. In support of its position, Emigrant cited last year's Supreme Judicial Court decision in *U.S. Bank v. Schumacher*, in which the SJC ruled that substantial compliance with the statutory requirements for pre-foreclosure notices of default was sufficient to effectuate a valid foreclosure.

The court rejected Emigrant's argument that the holding in *Schumacher* should control and distinguished *Schumacher* from the present case. The court noted that the statute at issue in Schumacher was created not to enhance existing foreclosure procedures, but to give homeowners a period of time within which to cure the default before commencement of a foreclosure action. Therefore, the long line of case law requiring strict compliance with "the statutes relating to the fore-

See *PINTI*, page 4

Will we get the max for our statutory minima?

PART II OF II

BY ROBERT M. RUZZO

BOB RUZZO

Undoubtedly, many Real Estate Bar Association members spent a considerable amount of the summer (as did your correspondent) contemplating just exactly what does the General Land Area Minimum (GLAM) test under the Comprehensive Permit Law (Chapter 40B) really mean, and how should it function?

Since our summer hiatus began, in addition to witnessing personnel changes at the Housing Appeals Committee (HAC), we have seen the issuance of three HAC decisions with respect to this subject – two involved the city of Newton and the third in the town of Stoneham. One thing is clear: the GLAM test is not an issue that is going to go away anytime soon.

THERE'S GOLD IN THEM THAR' FOOTNOTES

Each of the three decisions referenced above tilted in favor of the project proponent and against a municipality seeking the "safe harbor" that flows from satisfying the GLAM test. While the language of these decisions reflects the significant burden placed upon municipalities asserting such a safe harbor, the flurry of activity surrounding this issue also signals to the Department of Housing and Community Development

See GLAM, page 5

AMC keynote address presented by NPR's Bill Littlefield

Bill Littlefield

Bill Littlefield, host of National Public Radio and WBUR's "Only A Game" program, covering mainstream and offbeat national and international sports, will deliver the luncheon keynote address at REBA's 2015 Annual Meeting & Conference.

Bill has been the host of "Only A Game" since the program began in 1993 and has been a commentator for WBUR and NPR since 1984. For several years, he hit second (Tuesday) in a "Morning Edition" lineup that included Frank Deford on Monday and Red Barber on Friday.

His books include *Take Me Out*, a collection of sport-and-games-related doggerel; *The Best of W.C. Heinz*, for which Bill edited and wrote the introduction; *Only A Game* and *Keepers*, both collections of his radio and magazine work; *Prospect* and *The Circus in the Woods*, both novels; and *Baseball Days and Champions: Stories of Ten Remarkable Athletes*.

In addition to penning his own books, Littlefield served as the guest editor of the 1998 edition of *The Best American Sports Writing*, and his essay, *The Gym At Third and Ross*, was featured in the 2013 edition. He also writes a column about sports-related books for the *Boston Globe*.

Though his daughters, Amy and Alison, have grown too old for Bill to coach them, he still has nightmares about youth league basketball games in which he was allegedly an official. ♦

For more information about the Annual Meeting & Conference, see page 8.

The dog days of summer saw a flurry of Massachusetts climate change activity

BY JULIE PRUITT BARRY

JULIE BARRY

Momentum is building in Massachusetts for raising the net metering cap on solar power and addressing climate change impacts. Two bills were filed, one passed by the Massachusetts Senate, concerning climate issues, in addition to the Clean Power Plan proposed by the Obama administration. The proposed increase of the net metering cap is expected to bring costs savings for ratepayers and spur development of solar power. This could mean more development opportunities for Massachusetts land owners interested in developing large solar farms or community solar facilities.

In late July, the Massachusetts Senate passed a bill by Sen. Marc Pacheco (D-Taunton), chair of the Senate Committee on Global Warming and Climate Change. Titled "An Act to Establish a Comprehensive Climate Management Plan in Response to Climate Change," or CAMP, the bill (S. 1973) would require the state to provide a "comprehensive plan for establishing goals, priorities and principles to ensure the resiliency, preservation, protection, restoration, and enhancement" of the state's built and natural environments from the risks of climate change, most notably rising sea levels. Among other things, the bill requires the state to develop a climate change adaptation management action plan.

In August, the Baker administration filed legislation in the House titled "An Act Relative to a Long-Term Sustainable Solar Industry," which would reduce electric costs to ratepayers while facilitating the development of solar energy. The bill would help achieve the state's goal of developing 1,600 megawatts of solar power by 2020. According to the Baker administration, after reaching 1,600 megawatts, the legislation would give a higher credit value for solar developed by government entities, municipalities, low income ratepayers, and community net metering projects. Commissioner Judith Judson of the Department of Energy Resources said the bill would "support the continued growth of the Massachusetts solar industry to our goal of 1,600 megawatts and beyond."

See CLIMATE CHANGE, page 6

Drones are in the air, in the news and on the agendas of condominium boards

BY MARK S. EINHORN

I am somewhat of a technophobe when it comes to technology. I was a Blackberry holdout and I still read newspapers (the paper version). So, not surprisingly, I hadn't thought much about drones – until I looked up recently and saw one buzzing over my deck with what looked like a high resolution camera. My first thought – "What is it?" – was followed quickly by, "Is it going to fall on my house, my car or my head?"

MARK EINHORN

I am by no means the only one asking these questions. The real-world applications for drones are seemingly limitless. But like many new technologies, drones have developed more rapidly than the regulatory structures for them.

The Federal Aviation Administration estimates that there will be 30,000 commercial drones flying within the next four years. On the personal use side, the Consumer Electronics Association estimates that hobbyists will purchase 700,000 drones this year, compared with just 128,000 two years ago.

CAUSE FOR CONCERN

While the companies using drones (or planning to) and the hobbyists playing with them see their potential, others see cause for concern in five areas:

Civil liberties. Do law enforcement agencies tracking suspected criminal activity need search warrants for those surveillance efforts?

Crime. Prisoners reportedly used a drone recently to smuggle drugs into an Ohio prison. The *Washington Post* reports that the Department of Homeland Security has recorded 500 instances of "rogue" drones hovering over "sensitive sites and critical installations."

Physical injury and property damage. A few months ago, a low-flying drone struck a spectator watching a Memorial Day parade in Marblehead. Another errant drone smashed into the side of a high-rise in Cincinnati.

Privacy. "Naturists," sunbathing on a popular nude beach in England, became incensed when they were buzzed by a drone they suspected was photographing them. A homeowner in Kentucky shot down a drone he thought was spying on his daughters.

Air safety. The FAA says it receives 25 reports every month about drones flying too close to airports and aircraft, including reports of nearly two dozen near-collisions this year. Firefighters in California and elsewhere have complained bitterly about private drones interfering with their efforts to combat wildfires.

These incidents and others have led to demands for regulations and legislation to address public safety, privacy and other concerns.

THE REGULATORY LANDSCAPE

FAA regulations currently bar commercial uses of drones, but the agency is drafting new rules that would open many of those doors, if not all of them. The proposed rules won't be finalized before next year, at the earliest, and they don't address recreational drones (weighing less than 55 pounds), which currently fly through a loophole exempting them from the FAA's existing ban. But Congress and some state lawmakers are beginning to target this sector, as well.

The Consumer Drone Safety Act, sponsored by Sen. Dianne Feinstein (D-CA), would mandate an array of safety features for recreational drones and direct the FAA to adopt rules establishing height limits for flights and specifying the distance drones must maintain from airports, flight paths and public events.

The National Conference of State Legislatures reports that 17 states have adopted drone-related measures; 45 states (Massachusetts among them) considered proposed legislation in the past year.

Most of the measures that have been enacted or proposed target the use of drones for law enforcement purposes. In Massachusetts, a measure sponsored by Sen. Bob Hedland would require law enforcement officials to obtain a warrant before using drones for surveillance, and limit the information they could collect. The Massachusetts House is considering a similar measure.

ISSUES FOR CONDO ASSOCIATIONS

Lawmakers and regulators are clearly struggling to catch up, and condominium associations are (and should be) paying attention, too. Some condo owners will almost certainly acquire recreational drones, while other owners will almost certainly complain about the drones that are flying over and landing in their communities. Anticipating

these conflicts and others, community associations are wrestling with a number of complicated questions, among them:

- Should associations impose restrictions on drones, and if so, what should they entail?
- Should boards themselves use drones to patrol common areas and spot rule violations? If they do, how will they manage the information and images they collect?
- How will boards balance the privacy concerns of some owners ("I don't want my neighbor's drone taking pictures of me!"), and the desire of others to operate drones and/or have them deliver pizzas and packages to their homes?
- If a drone operated by an owner or a business falls on another owner's car, will the association be liable for the damage?

These are just some of the questions boards are looking to address. While it is too soon to offer definitive answers, a few preliminary observations may help managing boards and multifamily communities frame the issues:

- Boards have the authority to adopt rules banning drones in common areas and should begin thinking now about whether they want to do so.
- Instead of banning drones entirely, which will upset some owners, boards could consider regulations limiting their size or specifying where and when they can land in common areas.
- The liability concerns surrounding drones will be large and complicated. Boards should check with their insurance agents to determine what their existing policies cover and what additional coverages they may need.
- Even if boards aren't yet ready to act, they should start discussing policies, procedures and regulations governing drones before they begin fielding the inevitable questions, complaints and law suits related to them.

Two years ago, we would have said that drones are coming. Today, we have to say they're here. The challenge for community associations is finding ways to live with them. ♦

A partner in Marcus, Errico, Emmer & Brooks P.C., Mark Einhorn specializes in condominium law. He advises condominium associations and association managers on the full range of matters affecting condominium communities. He can be contacted at meinhorn@meeb.com.

REBA
THE REAL ESTATE BAR ASSOCIATION
for Massachusetts

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

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The rich are different from you and me

BY PAUL F. ALPHEN

PAUL ALPHEN

My cousin Vinnie, the suburban real estate attorney, was on the Cape golfing last weekend and stopped by my place to watch me replace a gasket between the turbocharger and an exhaust elbow. I told him that if he promised not to say a word about the Red Sox, I would put down my socket wrench and grab a few cold beverages. He agreed.

"Paulie," he started, "You know when you can't get a tune out of your head? Usually for me it's 'In A Gadda Da Vida,' but these days it's something else that I can't get out of my head. I keep thinking about the time you took me to the Merrimack Valley Conveyancers Association meeting and Gregor McGreggor spoke on the 115 necessary steps to due diligence prior to purchasing commercial real estate. At the end you asked Gregor what to say to the client who is spending their last dime on the purchase of the property and they can't afford to go through 115 steps of due diligence. Do you remember the answer?" I did remember; it was: "Tell the client that his venture is severely undercapitalized, and he should not go forward." Vinnie responded "Exactly! Except, these days I want to say to some of my new clients: Your venture severely lacks intellectual capitalization, and you should not go forward!"

I reached into the mini fridge sitting outside on the deck that my wonderful and very patient wife keeps telling me to remove from the deck, and pulled out a few more cold beverages; I couldn't wait to hear what Vinnie had to say next.

"I love my new clients, they are extremely bright, intelligent and resourceful; they have earned tons of money in a variety of fields like writing computer code or selling medical devices. But, they don't know anything about commercial real estate development. It seems as if they think that development would be a fast and easy place to make a few million extra dollars. Kinda like a new hobby, but with the promise of oodles of profit. I've had some call me late on a Friday afternoon and tell me that they have to close on a commercial property before the end of the day; a property that they had never once mentioned to me. They pretend not to understand when I say words like 'title exam,' 'zoning,' '21E,' 'ALTA plan' and 'wetlands.' I get the impression that they think I am either an idiot or that I am just raising problems to generate fees!"

"I've had nice clients who wish to use Section 3 exemptions for nonprofit educational uses. They just want to know if they can build and operate their business; yes or no. They don't want to hear that there have been hundreds of Appeals Court cases interpreting Section 3, and we still have to deal with wetlands, site plan review and determinations of what may or may not be 'reasonable regulations.' I regularly get emails requesting an immediate 'yes' or 'no' answer to a question that has not yet been addressed by the Appeals Court or the SJC, and they have no patience for an answer that begins with 'There are some narrow Land Court cases that appear to allow what you have in mind, but …'"

Vinnie used the brass bottle opener, bolted to the deck rail, that my wonderful and very patient wife has asked me to remove once a month for the past 20 years. I told him the story of the nice person from South America who fancied himself as a developer who purchased land in our client's subdivision. We should have been concerned when 10 days prior to the closing he called my office and asked me what an Order of Conditions was. We told him to get his own lawyer. Long story short, there is an injunction against any further construction and the local police and the so-called "developer" have become very familiar with one another.

Vinnie, as usual, had a better story.

"I've been contacted by investors from Asia who wish to invest some of their billions in the strong Greater Boston real estate market. Well, technically, I have been contacted by interpreters who tell me that they are working on behalf of investors from Asia. I put everything in writing, but I wonder if my thoughts are getting through."

"Paulie …" Vinnie started to wax philosophical. "We learned this game from men like your dear departed client Bob who was in constant search for good land, spent months, sometimes years, meeting with farmers in their kitchens trying to make a deal. Those guys would walk the land, put a shovel in the ground and sketch out the subdivision plan – and then tell the engineers how to finish the plans. They designed each house, board by board, and put their own sweat into every square inch of the project. Those guys are a dying breed. Meanwhile, the land use regulations have quadrupled in the past 30 years, the decisions of the courts have become more inconsistent and too fact specific, and the available land is, at best, challenging. Nevertheless, it seems that they only people who can afford to develop land are those who learned real estate development from playing Sim City."

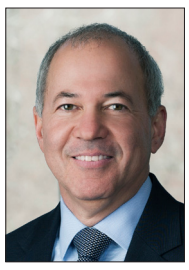
There was nothing I could say. I got Vinnie another frozen pint glass, and lit the grill. ♦

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 over 30 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 present in 2008, and as chairman of the Annual MCLE Real Estate Conference from 2009 through 2014. More importantly, his youngest son joined the profession in 2014. Paul can be reached at palphen@alphensantos.com.

Flushing out the safe harbor

'GENERAL LAND AREA MINIMUM' OFFERS NEWTON NO 40B SHELTER

BY BRIAN C. LEVEY



BRIAN LEVEY

Municipalities long unable to achieve 10 percent affordable housing are increasingly turning to a different safe harbor to block development of low and moderate income housing – compliance with the "general land area minimum" of Chapter 40B's affordable housing regulations.

In its first ruling on the topic, the Housing Appeals Committee (HAC) expanded the municipality's total land area and shrank the total land area occupied by eligible affordable sites, leaving Newton outside of this 40B safe harbor and facing a comprehensive permit application for a 135-unit affordable housing project. As demonstrated in *In the Matter of Newton Zoning Board of Appeals and Dinosaur Rowe LLC*, HAC No. 15-01, with the burden to prove compliance with the general land area minimum squarely on municipalities, cities and towns face significant challenges qualifying for this safe harbor.

In the Matter of Newton Zoning Board of Appeals and Dinosaur Rowe, LLC concerns an affordable mixed-income rental project on a 2.5-acre lot proposed by Dinosaur Rowe LLC. After the developer filed its application on Nov. 5, 2014, the board notified Dinosaur Rowe that the city achieved the safe harbor, having met the general land area minimum, claiming that eligible low or moderate income housing existed on sites "comprising more than 1.5 percent of the total land area zoned for residential, commercial or industrial use … ." The developer appealed to the Department of Housing and Community Development (DHCD), which issued a decision on Jan. 23, 2015, finding in favor of the developer. In February, the board appealed to HAC, which issued its "Interlocutory Decision Regarding Safe Harbor."

THE EXPANDING DENOMINATOR

In municipalities where the 1.5 percent has been met, any decision made by the local board of appeals is "consistent with local needs and thus unassailable as a matter of law." The 1.5 percent is calculated by dividing the area of affordable housing sites that are eligible to be inventoried on the Subsidized Housing Inventory (SHI) of the DHCD by the total land area in the city that is zoned for residential, commercial or industrial use.

The comprehensive permit regulations specify types of land to be included and excluded from the denominator. The parties agreed upon the total area calculated by Newton, 7,901.3 acres. From this number, government-owned land (55 acres), wetlands on which development has been prohibited by restrictive order of MassDEP (83.5 acres), water bodies (238.1 acres) and land in a "flood plain [zone], conservation zone or open space zone, if said zone completely prohibits residential, commercial [and] industrial use" (352.4 acres) were excluded without objection by Dinosaur Rowe, while 2.6 acres were added by agreement due to duplications.

The parties were divided, however, over the board's attempt to exclude 539.8 acres of land on three private golf clubs. Although zoned single-family residential, the board justified the exclusion of the land on the grounds that it had "been classified by the Board of Assessors … as open space and recreation land" under Massachusetts General Laws Chapter 61B. HAC rejected the attempt to exclude lands, concluding that even though "this land will be used for quite some time for golf … the owners … could develop it for housing at any time." The denominator was increased from 6,609.2 to 7,149 acres.

THE SHRINKING NUMERATOR

The numerator consists of inventoried and un-inventoried sites. The former are sites on DHCD's SHI, while the latter are made up of sites "established according to [the comprehensive permit regulations] as occupied, available for occupancy, or under permit as of the date of the applicant's initial submission to the board." The board offered proof that slightly over 100 acres should be counted in the numerator, but the developer challenged a number of the sites and was successful twice. The board provided a spreadsheet of DHCD-inventoried sites of nearly 100 housing developments resulting in 93.4 total countable acres. Where 28 single-room-occupancy apartments represented less than 11 percent of the gross building area on a roughly 6-acre site, HAC reduced the inventoried area by 5.4 acres. HAC also shrank the land area for an affordable rental housing site that included facilities for MBTA commuters; because the developer was leasing long-term approximately 3.9 acres of the 6.9, the remaining 3 acres were eliminated. Together, this reduced the countable inventory sites from the board's 93.4 acres to 85 acres.

The board sought to include un-inventoried sites totaling 11.5 acres. The parties agreed to include 0.3 acres for a nine-unit project. However, HAC agreed with the developer to discount a 3.9-acre project, because at the time Dinosaur Rowe's comprehensive permit application was filed, that project was not eligible towards the SHI, since the 40B regulations look to the date of application to determine inventory-eligible projects.

The board also argued that un-inventoried sites should include 7.3 acres representing 39 group homes for people with disabilities and deed-restricted units. Dinosaur Rowe argued against two sites totaling 0.6 acres, since they lacked evidence of an affordable housing deed rider or fair housing marketing plan. The board's response – the group home serves individuals with special needs, is a nonprofit, tax exempt organization– was deemed insufficient by HAC, which subtracted the acres. Then HAC eliminated another 1.4 acres for a project allowed by special permit from the board, despite the permit conditioning the "dedication of at least 10 units … for low income persons as defined by HUD income standards and at least ten units with services for moderate income persons," as HAC found the city failed to meet its burden of proof when no state or federal subsidy program was identified and there was no proof the city qualified the units as local initiative units. However, HAC allowed 0.2 acres to remain included, where the board offered a deed rider for one challenged project. HAC reduced Newton's un-inventoried sites from 11.05 to 5.6 acres.

Faced with the burden of proof, the board failed to convince HAC on several scores. In total, HAC shrank Newton's proposed numerator by roughly 13 percent and increased Newton's proposed denominator by approximately 8 percent. Rather than exceeding the general land area minimum of 1.5 percent, Newton's calculation of 1.58 percent was reduced to 1.26 percent, leaving the board to consider the 135-unit 40B project on the merits or further appeal through the courts. Although the "general land area minimum" safe harbor is at the disposal of cities and towns, their burden of proof to demonstrate compliance with each and every component of the numerator and denominator to meet the 1.5 percent threshold ensures it will not be easily met. ♦

Brian Levey is a shareholder at the law firm of Beveridge & Diamond, P.C. in its Wellesley office, where he concentrates in land use and environmental permitting and litigation including representation of multifamily housing developers. He can be emailed at blevey@bdlaw.com.

PINTI RAMIFICATIONS

CONTINUED FROM PAGE 1

closure of mortgages by the exercise of a power of sale" was inapplicable in that case.

In *Pinti*, the court held that strict compliance with the terms of the mortgage contract is required for a valid foreclosure, reasoning that the contractual term in question constituted a prerequisite to the exercise of the power of sale clause. The court further noted that in Massachusetts, foreclosure can be accomplished by the exercise of the statutory power of sale clause without court adjudication. Emigrant's failure to adhere strictly to the language in the mortgage contract could lead the plaintiffs to believe they did not need to initiate a pre-foreclosure action, but rather could wait and assert their rights as a defense once a foreclosure lawsuit was filed by Emigrant. In theory, the borrower's passivity – waiting for a lawsuit that would never be filed – would result in the title to the property passing to a bona fide purchaser through the non-judicial foreclosure process.

The SJC's ruling in *Pinti* indicates its decision is to be applied prospectively. However, conveyancers representing mortgage lenders and downstream purchasers must be cognizant of this decision when reviewing foreclosures on title. It is likely that *Pinti* will prompt borrowers' counsel to pursue challenges based on similar perceived differences between default notices and contractual language. To date, Massachusetts title insurance companies have not yet determined what documentation they will require in light of *Pinti* in order to insure owner's title. Conveyancers should watch carefully for the ramifications of the *Pinti* decision as the case law develops. ♦

An associate attorney at Harmon Law Offices, P.C. in Newton, Anne's practice focuses on creditor representation in foreclosures and post-foreclosure evictions. She can be reached at ashannon@harmonlaw.com.

RECENT GLAM CASES AND GUIDANCE

CONTINUED FROM PAGE 1

(DHCD) that some additional focus on this area is both warranted and worthwhile.

Below are a few observations in that regard. (Full disclosure: I have advised private developers with respect to the General Land Area Minimum.)

First, it is time for the GLAM test to come out of the shadows and into the sunlight. This point is echoed by the HAC's words and actions. Most notably, the three HAC decisions referenced above were all interlocutory decisions; therefore, consultation with the full HAC was not required. Nonetheless, the full committee was brought in and, as the HAC declared in footnote 2 of "In the matter of *Newton Zoning Board of Appeals v. Dinosaur Rowe LLC*: The General Land Area Minimum is a complex measure, which has not been addressed extensively during the 45-year history of the Comprehensive Permit Law." The HAC's recognition of these high stakes opens the door to further action by DHCD.

What type of action? Definitive, clarifying regulatory guidance is in order. Procedurally this guidance should recognize that the safe harbor is a fluid one, literally. Due to its relationship with the Subsidized Housing Inventory (SHI) and the potential for property dispositions to occur, the safe harbor for any municipality may not only be attained as a result of changes in ownership (i.e. acquisition of land by a governmental body), but it may also disappear via changes in the status of units under the SHI (i.e. loss of units through expiring use or conversion of rental units to condominiums). Nonetheless, some public statement of exactly which municipalities are entitled to a safe harbor as of a date certain would be helpful.

Perhaps first among the substantive issues that can and should be addressed is whether the current treatment of rental developments under the GLAM test continues to make sense in an era of smart growth and concentrated development. This issue was raised in footnote 6 of *Arbor Hill Holdings Limited Partnership v. Weymouth Board of Appeals*, 1 MHACR 721 (2003), where the HAC noted "it would seem anomalous to count all of a very large lot containing only a very small number of affordable units." That, however, is exactly the approach that would result from current counting practices with respect to rental developments.

Imagine 40 rental units on a very large cluster development site. If eight affordable units are made available to individuals making 50 percent or less of the area median income, the entire area would count in the numerator of the GLAM calculation – not only the area occupied by the buildings, but also the non-developed acreage of the site. This seems difficult to support, other than by the fact that this "count 100 percent" approach is utilized when computing the Housing Unit Minimum under Chapter 40B. That methodology was adopted when homeownership units were first introduced into the Chapter 40B arena. Homeownership developments are analyzed on a proportionate basis under 760 CMR 56.03(3)(b).

Footnote 6 in *Arbor Hill Holdings* is helpful in this regard, since it recognizes that different methodologies may be utilized in calculating different tests under the Comprehensive Permit Law. In *Arbor Hill Holdings*, the HAC expressed confidence if a situation such as the one described above arose, "if and when it arises, we are confident that we or DHCD can craft an appropriate exception to the general rule."

The better approach would be to re-examine "the general rule." Simply put, the approach used for calculating the Housing Unit Minimum test need not be duplicated when calculating the result under the GLAM test.

JUSTICE (AND PRIVACY) FOR ALL

Other topics that would benefit from being addressed by published guidance include: (1) group homes, (2) counting methodology (how and by whom?) and (3) good faith.

Municipalities such as Newton have a legitimate complaint in asserting that they cannot get acreage information with respect to group homes which may be critical to the calculation of their numerator. Surely an accommodation can be reached on this issue, whether it is by the appointment of a confidential "mini-master," or some other means.

With respect to counting methodology, there is a fair amount of policing up of this area that would be helpful. For example, the "simple" calculation of roadway area can in practice be daunting. Additionally, in the past, DHCD had issued a statement entitled "DHCD Guidance for Interpreting 760 CMR 31.04 (2)" – the predecessor version of the General Land Area Minimum counting regulation, or the "Guidance"). Indeed, the HAC acknowledged the Guidance in footnote 5 of "Dinosaur Rowe," while simultaneously noting its determination to read the (former) regulation more narrowly than did the Guidance. It would be helpful to square this issue away.

As a general proposition, new DHCD guidance in this area could benefit from the approach taken in the cost certification process: (1) establish guidelines, (2) approve certain entities to perform the work, (3) require that these entities be utilized and that they certify that they have followed the guidelines and (4) audit the outcomes as necessary.

Finally, the recent activities of the town of Norwood warrant a revisiting of the issue of good faith. According to recent press accounts, Norwood officials believe they are at 1.51 percent for purposes of the GLAM test. Town officials also publicly stated that they were under a tight timeframe of eight months to identify land, sign a purchase and sale agreement, set a town meeting date, obtain a town meeting vote and close two recent transactions.

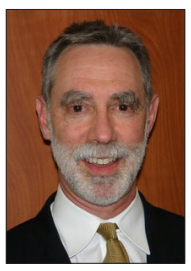
Why such a rush? The only reason for the deadline was the expiration of a temporary two-year safe harbor the town had obtained under a different section of the regulations. Such municipal machinations harken back to *Pheasant Ridge Associates Limited Partnership v. Town of Burlington*, 399 Mass. 771 (1987), wherein the court concluded that a municipal taking for open space had been undertaken in bad faith for the purpose of blocking a development under the Comprehensive Permit Law. A regulatory/guidance admonition against such efforts is warranted where the aim is to achieve the same result by means other than eminent domain. ♦

Bob Ruzzo is a senior counsel at Holland & Knight. He was the chief operating officer and deputy director of MassHousing from 2001 to 2012. He may be reached at robert.ruzzo@hklaw.com.

THE LAWYERS' COUNSEL

Brick and mortar re-imagined: A changing view of the law office

BY JAMES S. BOLAN AND SARA N. HOLDEN



JIM BOLAN

SARA HOLDEN

Do you need to occupy a physical, "bona fide" law office to practice law? Or can you park your briefs at Starbucks or your home office instead? What about telecommuting? Lawyers have created "virtual law offices" (VLOs) instead of being present every day at a central locale. Obviously, everyone is somewhere – whether at Starbucks or at home – since "beaming" or travel by "tardis" are not yet available. The idea of never leaving home is more than tempting when the snow piles up and, so long as we register an office address with the Board of Bar Overseers, operating a VLO as a Massachusetts-admitted lawyer within Massachusetts should not be an issue.

But what if your VLO is located in New Hampshire? If you practice Massachusetts law exclusively, at some point, would New Hampshire Bar Counsel raise their UPL eyebrow about your presence in their fair state? Does Rule 5.5 get raised, which notes generally that a lawyer not admitted to practice in a jurisdiction violates the rule if one establishes an office or other systematic and continuous presence in the jurisdiction, even if not physically present there? Or if you live in Massachusetts, but start to draft deeds or wills for New Hampshire residents without being admitted or located there? Where is the line drawn?

A VLO requires compliance with all applicable rules of professional conduct, no matter which states are involved. Maintaining and preserving confidences and supervising employees is critical.

Do you have a duty to inform clients of your office structure? What will you list as your office address, as reported to the BBO? And if you temporarily practice in another jurisdiction, must you revise your web presence accordingly?

A VLO requires compliance with all applicable rules of professional conduct, no matter which states are involved. Maintaining and preserving confidences and supervising employees is critical. (How secure even is the wifi at Starbucks these days?) The MBA opined in 2012 that a lawyer "generally may store and synchronize electronic work files containing confidential client information across different platforms and devices using an Internet-based storage solution, such as 'Google docs,' so long as the lawyer undertakes reasonable efforts to ensure that the provider's terms of use and data privacy policies, practices and procedures are compatible with the lawyer's professional obligations, including the obligation to protect confidential client information reflected in Rule 1.6(a). A lawyer remains bound, however, to follow an express instruction from his or her client that the client's confidential information not be stored or transmitted by means of the Internet, and all lawyers should refrain from storing or transmitting particularly sensitive client information by means of the Internet without first obtaining the client's express consent to do so." (Have you ever read the terms and conditions on cloud storage agreements?)

Under our new rules to maintain requisite knowledge and skill, "a lawyer should keep abreast of … the benefits and risks associated with relevant technology."

A number of states have weighed in on the requirement of a bona-fide, brick-and-mortar presence. Sixteen other states have chimed in on technology and law practice, including VLOs, and as one would expect, the opinions vary.

For example – New York and Pennsylvania permit VLOs. In *Schoenefeld*, the 2nd Circuit is poised to hold unconstitutional New York rules that prohibit a VLO in New York. In Pennsylvania, the bar association also permitted VLOs with the caveat that one must take appropriate precautions to confirm the identities of clients.

But, Delaware, for example, suspended a lawyer for working from his Pennsylvania home office while practicing Delaware law for violating Delaware's bona fide office rule.

So, do you stay or do you go? Stay tuned. ♦

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 lawyers, physicians and other professionals in discipline and malpractice matters. Sara can be reached by email at sholden@legalpro.com.

ADDRESSING CLIMATE CHANGE

CONTINUED FROM PAGE 1

Both bills provide for the increase of the net metering cap, which limits the growth of solar power in the state. Net energy metering is a credit applied to bills of residential and business customers for unused energy generated by their solar power systems. The surplus power is added to the grid for use by other customers. Net metering caps have led to reduced interest in developing large private, commercial and municipal solar projects.

Carter Wall, founder of independent power consulting company Franklin Beach Energy, said of the Baker administration's bill: "I'm happy to see that the governor is engaged on renewable energy, and that he understands the urgency to move forward on this issue as quickly as possible. I'm concerned about what happens after the first 1,600 megawatts, but it's a solid first step. These policies aren't just good for the environment; they're good for small business owners, because they help lower our operating costs. My company provides solar asset management services to real estate companies and property owners, and this legislation would be a big help to their development and investment opportunities."

Neither bill was taken up by the House before the summer break.

Net metering is not the only focus of the CAMP bill, which also addresses the state's need to develop a comprehensive plan for dealing with the effects of climate change. This is also the subject of the Clean Power Plan introduced by the Obama administration in early August. The plan, which proposes to reduce carbon dioxide emissions by 32 percent by 2030, sets standards for limiting carbon dioxide emissions from power plants for the first time. It is expected to save the average family approximately $85 annually on electric bills, promote development of solar and wind power, create jobs and lead to investment in clean energy technology.

According to the EPA, state goals under the Clean Power Plan range between 771 pounds of carbon dioxide per megawatt hour for states with only natural gas plants to 1,305 pounds for states with only coal/oil plants. The goal for Massachusetts is 824 pounds per megawatt hour, an 18 percent decrease from the 1,003 emitted in 2012. Massachusetts is expected to reach this goal before the 2030 deadline, and may be further assisted in this effort by passage of Sen. Michael Barrett's proposed carbon fee legislation ("An Act Combating Climate Change" – SD285), which was the subject of an Environmental Committee lunch in June. Barrett's bill would cut carbon dioxide emissions more substantially than any other existing or proposed regulatory policy, saving billions of dollars spent on imported fossil fuels, leaving more money for creating and expanding Massachusetts' businesses and increasing employment. ♦

Co-chair of the association's environmental law committee, Julie Barry is a partner at Prince Lobel Tye LLP. Her practice focuses on real estate and land use litigation and permitting. She may be contacted at JBarry@PrinceLobel.com.

Unified municipal e-recording system would benefit all parties

BY RICHARD P. HOWE JR.

DICK HOWE

The number of documents recorded electronically at the Middlesex North Registry of Deeds continues to grow, with e-filing accounting for nearly half of all recordings in July. Documents created by municipalities and other governmental entities have largely missed this electronic recording wave. With tax takings, notices, board decisions and votes constituting at least 15 percent of all recordings at this registry, shifting city and town documents to electronic recording would increase the efficiency of both the registry and the submitting municipality.

The existing method of electronic recording does pose several obstacles to municipalities. Currently, all electronic recordings must go through third-party intermediaries like Simplifile and CSC. These entities provide important services: They give customers a common interface no matter which registry is to receive the documents, they collect payment for filing fees and taxes from the submitters and forward them in a daily lump sum to the appropriate registry and they provide technical support to the submitters.

These intermediaries charge for this service in various ways. For lawyers, these added costs are outweighed by the ability to do the entire closing without ever leaving the office. Similarly, the added staff time spent scanning original documents and typing information about them easily blends with the other tasks of the closing.

All of these obstacles could be overcome by creating a new, municipal-only electronic recording system

The calculus is not the same for a municipality. A town only records at one registry of deeds, so the ability to record at multiple registries is of no value. Tight municipal budgets also have difficulty absorbing the additional fees of electronic recording, and thinly-staffed town offices probably prefer that registry employees continue to do scanning and data entry.

All of these obstacles could be overcome by creating a new, municipal-only electronic recording system that operated alongside the existing commercial systems widely embraced by non-governmental submitters. This new, municipal-only system could use a platform named Commonwealth Electronic Recording System (CERS), which was developed by the secretary of state's office several years ago and currently operates alongside commercial offerings at several registries. Because the state already owns the CERS software, it could be affordably repurposed as a state-operated, one-town-to-one-registry electronic recording platform which could then eliminate for cities and towns the ancillary fees charged by commercial providers.

While this point-to-point connection would yield some savings, the real payoff would come by breaking entirely new ground. Two decades ago, it was common to refer to three levels of electronic recording: Level one involved sending just the image of a paper document to the registry for recording either by fax or as a scanned image. Level two involved sending the scanned image of a paper document along with the indexing data about the document (the method used exclusively today). Level three contemplated a purely electronic transaction that sent data from the submitter's computer to the registry's, with no paper involved. Although Level three electronic recording has yet to be used in Massachusetts, it is already specifically authorized by the MGL c. 110G, the Massachusetts Uniform Electronic Transaction Act.

Municipal recordings are prime candidates for level three electronic recording. This would allow the tax collector to queue up a batch of tax takings on the municipality's own database and transmit that data electronically to the registry of deeds, inserting document templates, electronic signatures and electronic acknowledgements on the fly. At the registry, each of these tax takings would be rapidly recorded just like any other electronically submitted document. The data flowing into the registry's index would be the same that resided in the municipality's database. The need to scan paper documents and re-enter names and addresses would be eliminated. Standard recording fees could be debited to a registry-maintained charge account for each municipality, allowing bills to be paid monthly rather than with each recording. The efficiencies at both ends would be considerable.

Some components of this level three municipal electronic recording system are already in place but much remains to be done. Synchronizing municipal software with registry electronic recording systems will require a considerable amount of computer programming by vendors and IT staff. Current regulations and executive orders governing notaries do not yet expressly allow the type of electronic acknowledgement required by this system. Still, municipal leaders in the Middlesex North District have enthusiastically embraced this vision and are working cooperatively with this registry and the secretary of state's office on its implementation. Once realized, this new system will be an excellent example of entities at different levels of government working together to perform tasks more accurately and efficiently. ♦

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. He can be reached by email at richard.howe@sec.state.ma.us.

Despite next steps, mediation agreement is binding

BY JOEL M. RECK

JOEL RECK

At the conclusion of every successful mediation, when the parties, their counsel and certainly the mediator are tired, cranky, late for dinner, emotionally exhausted and just wanting to get out of the conference rooms, it is time to start drafting the settlement agreement. In my role as mediator, I typically draft a very simple agreement – and that is an understatement!

Since such an agreement is typically only a page or two in length, I would normally provide that the parties intend to execute a more detailed settlement agreement. Assuming, of course, that the parties want the agreement to be enforceable, it is important to provide explicitly that the parties intend that the mediation settlement agreement is to be enforceable notwithstanding that a more complete written agreement is contemplated.

There is substantial case law in Massachusetts dealing with the enforceability of preliminary agreements which contemplate the execution of more complete agreements. Not surprisingly, the courts have looked to the intention of the parties as to whether they intended to be bound by the earlier agreement and as to whether the earlier agreement contained all of the essential terms for an enforceable contract. Mere agreements to agree will clearly not be enforced, nor will contracts that specifically provide that they are not intended to be enforceable unless and until a more detailed agreement has been executed by all of the parties.

There has not yet been a lot of case law in Massachusetts dealing with the enforceability of settlement agreements executed at the conclusion of mediation. Arguably, the same standards should pertain as for other agreements, although the circumstances involved in the drafting of these agreements are usually very different from those in other kinds of negotiated agreements. The time pressure of getting a mediation settlement agreement drafted and executed before one or more of the parties leaves to pick up a child or to go to a ballgame means that, as a practical matter, these agreements are not only hastily drafted, but are often first drafts and somewhat sketchy.

In my experience, the most challenging problems in drafting an enforceable settlement agreement involve dealing with issues that require further steps to be taken or issues to be resolved. For example, in real estate disputes, further engineering or survey work is often necessary to establish precise lines or to locate easements. Although it is often possible to sketch an approximate location of an easement, subject to a final survey that is to be reasonably acceptable to the parties, what happens when one party claims to be reasonable in objecting to the proposed final location? Or, in a development context, how should financial and

See NEXT STEPS, page 11

2015 Annual Meeting & Conference

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

Four Points by Sheraton, Norwood

General Information

- REBA's 2015 Annual Meeting & Conference welcomes both members and non-members. All attendees must register; the registration fee includes the breakout sessions, the luncheon and all written materials. REBA cannot offer discounts for registrants not attending the luncheon.
- Credits are available for professional liability insurance and continuing legal education in other states. For more information, contact Bob Gaudette at 617-854-7555 or gaudette@reba.net.
- Please submit one registration per attendee. Additional registration applications are available at www.reba.net. REBA will confirm all registrations by email.
- To guarantee a reservation, conference registrations should be sent with the appropriate fee by email, mail or fax, or submitted online at www.reba.net, on or before Oct. 26, 2015. Registrations received after Oct. 26 will be subject to a late registration processing fee of $25. Registrations may be cancelled in writing on or before Oct. 26 and will be subject to a processing fee of $25. Registrations cannot be cancelled after Oct. 26; however, substitutions of registrants attending the program are welcome. Conference materials will be mailed to non-attendee registrants within four weeks following the event.
- We ask attendees to kindly refrain from cell phone use during the breakout sessions and luncheon.

Driving Directions

FROM BOSTON:

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

FROM PROVIDENCE:

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

FROM THE WEST:

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

Registration

COMPLETE AND RETURN THIS REGISTRATION WITH THE APPROPRIATE FEE TO:

REBA Foundation, 50 Congress Street, Suite 600, Boston, MA 02109-4075
TEL: 617.854.7555 | morales@reba.net | FAX: 617.854.7570

	By Oct. 26	After Oct 26
☐ YES, please register me. I am a REBA member in good standing.	$225.00	$250.00
☐ YES, please register me as a guest. I am not a REBA member.	$265.00	$290.00
☐ NO, I am unable to attend, but I would like to purchase conference materials and a CD of the breakout sessions and luncheon address. (Please allow four weeks for delivery)	$200.00 $_____	$200.00 $_____

☐ Check Enclosed
Check No:_____
Date:_____

☐ Credit Card ☐ VISA ☐ MasterCard ☐ AMERICAN EXPRESS
Card No:_____ Expiration:_____
Signature:_____ Date:_____

You May Also Register Online at REBA.net

Registrant Information

Name of Registrant:_____ Esq. (y/n):_____

Call Name *(for badge)*:_____ Email:_____

Firm/Company:_____

Address: _____

City/Town: _____ State: _____ Zip:_____

Tel:_____ Cell:_____ Fax: _____

Selcet Your Luncheon Choice Below

☐ Eggplant roulade with grilled vegetable & jasmine rice over tomato coulis, topped with fried leeks

☐ Roasted statler chicken with roasted vegetables and creamer potatoes, topped with rosemary jus

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

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

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

Luncheon Keynote Address Presented by Bill Littlefield

Bill Littlefield, host of National Public Radio and WBUR's "Only A Game" program, covering mainstream and offbeat national and international sports, will deliver the luncheon keynote address at REBA's 2015 Annual Meeting & Conference.

Bill has been the host of "Only A Game" since the program began in 1993, and has been a commentator for WBUR and NPR since 1984. For several years, he hit second (Tuesday) in a "Morning Edition" lineup that included Frank Deford on Monday and Red Barber on Friday.

His books include *Take Me Out*, a collection of sport-and-games-related doggerel; *The Best of W.C. Heinz*, for which Bill edited and wrote the introduction; *Only A Game* and *Keepers*, both collections of his radio and magazine work; *Prospect* and *The Circus in the Woods*, both novels; and *Baseball Days* and *Champions: Stories of Ten Remarkable Athletes*.

In addition to penning his own books, Littlefield served as the guest editor of the 1998 edition of *The Best American Sports Writing*, and his essay, "The Gym At Third and Ross," was featured in the 2013 edition. He also writes a column about sports-related books for the *Boston Globe*.

Though his daughters, Amy and Alison, have grown too old for Bill to coach them, he still has nightmares about youth league basketball games in which he was allegedly an official.

Schedule of Events

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

e-Recording is Here to Stay: Evolving Technology at the Registries of Deeds

Richard P. Howe Jr.; Paul C. McCarthy; John F. Meade; Mary Olberding

Join Dick Howe (Middlesex North), Mary Olberding (Hampshire) and Jack Meade (Barnstable) for an illuminating round-table discussion of evolving registry technology and future trends in today's land records system. Paul McCarthy, head of Secretary Galvin's Registry of Deeds Division, will join our panel of registers. McCarthy will provide comments and insights from the perspective of the Secretary's office. The panel will offer ample opportunity for questions from attendees.

8:30 AM – 9:30 AM **TIFFANY BALLROOM A**
9:45 AM – 10:45 AM **TIFFANY BALLROOM A**

CFPB Update November 2015: Predicting Challenges after One Month of TRID

Joseph A. Grabas; Kosta Ligris; Julie Taylor Moran

One month after TRID implementation, the collateral affects, changes, and unintended consequences will be upon us. Dealing and managing with TRID as it relates and affects: dual closing statements; changes to offer(s) and/or purchase and sale agreements (including the Massachusetts "time is of the essence" standard); managing and representing small lenders vs. larger lenders and national banks;; scheduling challenges and more. What do we know now one month after implementation of the most comprehensive reregulation of real estate financing since RESPA of 1974? Join Julie, Joe and Kosta as they examine the aftermath and look towards the future of residential real estate transactions in Massachusetts.

9:45 am – 10:45 am **TIFFANY BALLROOM B**
11:00 am – 12:00 pm **TIFFANY BALLROOM B**

Advising Clients in a Changing Landscape: New Challenges of Residential Mortgage Underwriting

Shant Banosian; Brian L. Lynch; Christine J. Miele

The CFPB has utterly changed residential real estate transactions, not only with the TRID Rule for closing attorneys, but with the Ability to Repay Rule and the Qualified Mortgage ("QM") Guidelines rules for our lender clients. Join our panel of mortgage broker underwriters for a roadmap to these new federally mandated protocols which have been in effect now since January. Any lawyer who represents buyers – or sellers – in residential transactions should attend this program.

8:30 am – 9:30 am **TIFFANY BALLROOM B**
11:00 am – 12:00 pm **CONFERENCE ROOM 103**

Understanding the Revised Rules of Professional Conduct

James S. Bolan; Katherine L. Kenney; Kathleen M. O'Donnell

Last July, the Supreme Judicial Court approved a significant overhaul to the Rules of Professional Conduct, which include some new tarps and pitfalls. These changes affect all lawyers, regardless of their practice area and regardless of whether they practice solo or in large firms. One of the most significant changes to the Rules imposes on all lawyers affirmative obligations with respect to information technology and data security. Lawyers who fail to take appropriate steps to secure their clients' confidential information could find themselves in violation of the Rules.

8:30 am – 9:30 am **CONFERENCE ROOM 102**
9:45 am – 10:45 am **CONFERENCE ROOM 102**

How Real Estate Legislation May Affect Your Practice

Francis J. Nolan; Edward J. Smith; Douglas A. Troyer

This legislative update features both recently-enacted and pending real property-related legislation proposed by REBA's Legislation Committee and others, including Ibanez title cures, regulation of notaries, homestead law clarifications, liens vs. assessments in private subdivisions, and other timely issues.

8:30 am – 9:30 am **CONFERENCE ROOM 103**
9:45 am – 10:45 am **CONFERENCE ROOM 103**

Tips & Insights for Construction Contract Drafting for Owner/Developers

John P. Connelly; Jonathan R. Hausner

Owners and/or developers of property in Massachusetts typically must procure design and construction services via a set of standard forms drafted by an industry trade group. Whether the AIA, ConsensusDocs, EJCDC or others, each set of standardized construction contracts is drafted for a particular constituency. The owner/developer is often the voice least heard in the development of these standard forms. The panelists will discuss how standard clauses can be customized to swing the risk pendulum towards the interests of the owner/developer. The panelists will also discuss certain standard clarifications to various common terms and conditions to benefit owner/developers or construction lenders.

8:30 am – 9:30 am **CONFERENCE ROOM 104**
11:00 am – 12:00 pm **CONFERENCE ROOM 102**

How to Handle Various Types of Restrictions on Title

(A Practical Skills Sessions)

Kevin T. Creedon; Joel A. Stein

The panelists will discuss the creation and enforceability of restrictions both before and after the passage of M.G.L. c. 184. We will review what restrictions remain in effect for more than 30 years, the requirements for extending common scheme restrictions and recent cases dealing with the enforcement and interpretation of restrictions. Joel and Kevin will also address insuring over restrictions and crafting various affirmative title insurance coverages.

8:30 am – 9:30 am **ESSEX/LENOX ROOM**
9:45 am – 10:45 am **ESSEX/LENOX ROOM**

Trustee Certificates Pursuant to M.G.L. c. 184 § 35

(A Practical Skills Sessions)

Lisa J. Delaney; Nancy Weissman

When properly drafted and executed, these certificates provide record evidence of a trust without recording the entire instrument. Our panelists, Lisa Delaney and Nancy Weissman, will review and discuss both the statute and REBA's Forms 20G and 35 and provide valuable guidance on the uses and functions of trustee certificates. Nancy and Lisa will also guide us through the review and drafting of all types of trustee certificates, including the role that they play in title, and how to be sure that each type of certificate is used correctly.

11:00 am – 12:00 pm **ESSEX/LENOX ROOM**

Proposed Amendments to the MUPC & Possible Legislative Changes

(A Practical Skills Sessions)

Leo J. Cushing; Ward P. Graham; Mark A. Leahy

The MUPC celebrated its third birthday on March 31, 2015! Knowledge of the law and its application in the conveyancing world is a vital part of title review and drafting title documents involving estates and trusts. Our speakers, with years of experience in probate and real estate law, are key players in proposed legislation to amend the MUPC. This panel will share their knowledge of the MUPC and conveyancing, and discuss the proposed revisions to the statute.

9:45 am – 10:45 am **CONFERENCE ROOM 104**
11:00 am – 12:00 pm **CONFERENCE ROOM 104**

Recent Developments in Massachusetts Case Law

Philip S. Lapatin

Now in his 37th year at these meetings, Phil continues to draw a huge crowd with this session. His presentation on Recent Developments in Massachusetts Case Law is a must-hear for any practicing real estate attorney. Phil is the 2008 recipient of the Association's highest honor, the Richard B. Johnson Award.

12:15 pm – 1:15 pm **CONFERENCE ROOM 103***

**Video simulcasts of this presentation will be held in Conference Rooms 102 & 104*

1:20 P.M.
LUNCHEON PROGRAM

1:20 P.M. – 1:30 P.M.
Remarks from president Thomas Bhisitkul

1:30 pm – 1:40 pm
Report of the Title Standards Committee

1:40 pm – 1:50 pm
Report of the Nominating Committee

1:50 pm – 2:10 pm
Presentation of the Richard B. Johnson Award

2:10 pm – 2:30 pm
Luncheon Keynote Address by Bill Littlefield

2:30 pm – 2:45 pm
Concluding Remarks & Passing of the Gavel

Zoning reform bill highlights permitting reforms

BY ROBERT W. RITCHIE

BOB RITCHIE

On Sept. 15, the Joint Committee on Community Development and Small Business will hold a hearing on this session's comprehensive zoning reform bill (S.122). The bill's key sponsors are Sen. Dan Wolf and Rep. Steve Kulik, who are joined in supporting the bill by 57 other members of the House and Senate. A broad coalition of planners, municipal officials, conservationists, housing advocates and public health professionals from all parts of the state provide grass roots support for zoning reform legislation.

Other zoning measures will be taken up by the committee on Sept. 15, but S.122 represents the most broadly supported and equitably balanced zoning measure making its way through the legislative process this session. A bill with substantially the same provisions was favorably reported out last session by the Joint Committee on Municipalities and Regional Government, but the session came to a close before the bill could be acted upon.

S.122 reflects the evolution of the zoning reform efforts of prior years, but is more finely tuned to re-balance vested rights with vested interests and to eliminate the inequities of current law for landowners, developers, local government regulators and the general public. Among the provisions that expand the realistic expectations of landowners and municipalities are the following:

- Provides for more reasonably obtainable and longer-lasting vesting provisions for building permits and special permits; resets the default vote required to a simple majority for special permits; and extends the duration of a special permit or building permit to a minimum of three years or two years, respectively.
- Provides cities and towns with the authority to reduce the quantum of vote for zoning changes to between a simple majority and the current two-thirds requirement.
- Redefines "variance" to allow a zoning board to grant them subject to strict, but less Draconian, standards and criteria; extends effective duration of variance from one to two years before lapse if not used; and increases permissible extension interval from six months to one year.
- Equitably resets the vesting date for special permits and building permits to the date on which they are applied for rather than the date on which they are issued, and similarly pegs the vesting date for subdivisions at the date the definitive plan is filed rather than the filing of a preliminary plan. Like the vesting for building and special permits, the protection for subdivisions would be for the plan, not the land shown on the plan, altering the scope of vesting under the *Massachusetts Broken Stone* decision.
- Eliminates the three-year use-only protection accorded to ANR plans, but provides an optional alternative for streamlined review of "minor subdivisions" of up to six lots that would provide the same range of vested rights accorded to full subdivisions.
- Achieves prompt and predictable outcomes by placing clear boundaries around well-defined development impact fees and by providing for consolidated permitting by multiple local boards.
- Elevates "site plan review" to statutory status to achieve state-wide consistency in its use. Sets limits on board review time and payment for off-site mitigation. Requires time-saving consolidation of SPR and special permit process before a single board when both are required.

If reported out favorably by Community Development and Small Business, the bill will likely make its way to Senate Ways and Means before reaching the senate floor for a vote. If approved by the full Senate, the legislation will be considered by the House and may be further vetted by House Ways and Means before the full House acts. Once approved by the House, both branches must then enact the measure and, assuming no conference committee is necessary, the enacted bill will arrive on the governor's desk for signature.

S.122 was designed to make planning and development more predictable. Its provisions have been reviewed and endorsed by a wide range of constituencies who advocate for the elimination of broken, unworkable provisions of the current law and the introduction of land use laws that are clear, flexible and fair. If enacted, it would be the first comprehensive statutory change since 1975 to bring Massachusetts land use law into sync with contemporary national standards.

Bob Ritchie served as municipal law unit director for Attorneys General Harshbarger, Reilly and Coakley, and before that served for 15 years as town counsel for the town of Amherst, and as special counsel to several other towns. He has served on the board of directors and as president of Massachusetts Municipal Lawyers Association and had been a member of the board of directors of the International Municipal Lawyers Association. Since 1997, he has served on the Zoning Reform Working Group. He lives in Amherst, having recently retired as general counsel for the Massachusetts Department of Agricultural Resources. Bob can be emailed at bobritchie@comcast.net.

Busy end of Supreme Court term produces important land use cases

BY GREGOR I. MCGREGOR

GREG MCGREGOR

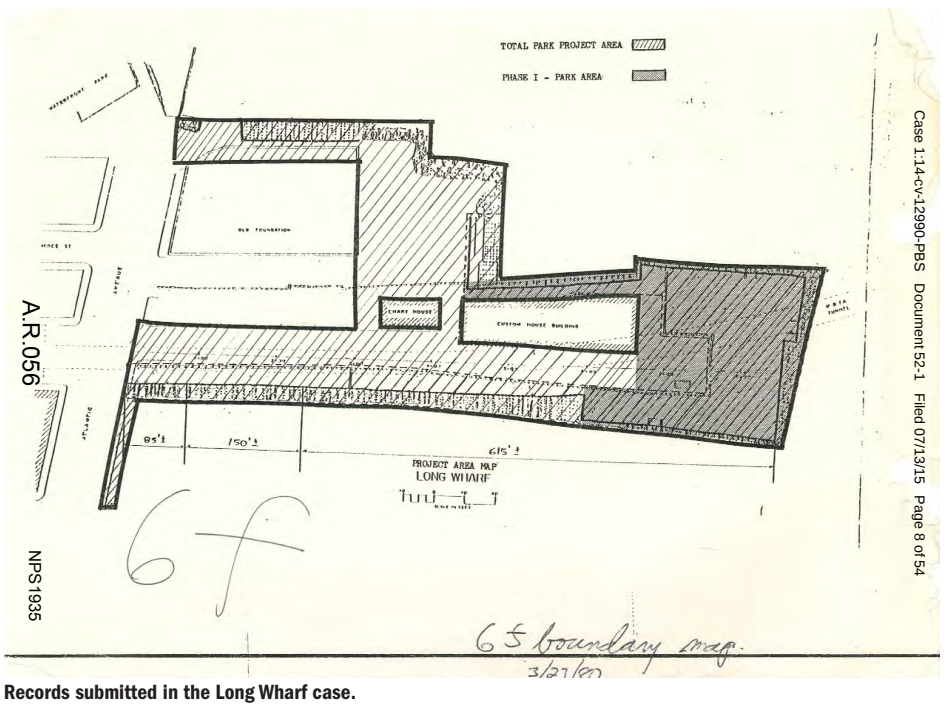
On three days in June, the U.S. Supreme Court decided cases making new law on signs and free speech, fair housing litigation, and air pollution regulation. We look at them in turn, in brief.

The sign case with wide free speech implications is *Reed v. Town of Gilbert, Arizona*, No. 13-502 (Sup.Ct. June 18, 2015), 576 U.S.____(2015). (www.supremecourt.gov/opinions/14pdf/13-502_9olb.pdf)

A municipal sign code imposed more stringent restrictions on signs directing the public to the meeting of a nonprofit group (a church) than on signs conveying other messages (such as political ads). The Supreme Court ruled that this is content-based regulation of speech that cannot survive the test of strict scrutiny.

This case was decided 9-0. The opinion by Justice Thomas expands the meaning of "content-based" to reach many more types and varieties of signs that are subject to local sign regulation, even if they were of a nature formerly thought to be content neutral. Now, they are presumptively unconstitutional. Concurring opinions warn of this overreach.

On remand from the Supreme Court, the Court of Appeals struck down the town of Gilbert ordinance. Other federal courts since *Reed* have invalidated laws barring panhandling, automated phone calls and, most recently in New Hampshire, "ballot selfies."



Records submitted in the Long Wharf case.

This case is regarded by many commentators as vastly expanding free speech rights. The wording of Thomas' decision seems to reach all kinds of rules distinguishing between types of speech.

This writer feels that a case presenting simple facts (requiring quicker removal of church signs than political signs) gave rise to a ruling making lots of state, county and municipal laws subject to the most searching form of First Amendment review. This puts the burden on the government to prove the challenged law is "narrowly tailored to serve compelling state interests."

This test is very hard for a sign or speech rule to survive. As the *New York Times* observed on the *Reed* decision: "You can stare at those words as long as you like, but here is what you need to know: Strict scrutiny, like a Civil War stomach wound, is generally fatal." (NYT 8.18.15, p.A18)

The fair housing case is *Texas Department of Health and Community Affairs v. Inclusive Communities Project*, No.13-1371 (Sup.Ct. June 25, 2015), 576 U.S.___(2015) (www.supremecourt.gov/opinions/14pdf/13-1371_m64o.pdf)

The federal Fair Housing Act prevents discrimination in sale and rental of housing. Disparate-impact claims are cognizable under the FHA.

This case was decided 5-4. The opinion by Justice Kennedy held that the FHA focuses on the consequences of the actions rather than actor's intent, similar to Title VII of the Civil Rights Act of 1964 and Age Discrimination in Employment Act, enacted about the same time with disparate-impact liability.

Consequently, the Supreme Court ruled, disparate-impact liability is consistent with FHA's purpose to prevent discriminatory housing practices, as it allows plaintiffs to counteract unconscious prejudices and disguised discrimination that may be harder to uncover than disparate treatment.

The ICP had claimed that the TDHCA granted tax credits disproportionately to developments within minority and Caucasian neighborhoods, leading to concentration of low-income housing in minority neighborhoods, perpetuating segregation in violation of the FHA.

At trial, ICP had showed discrimination by disparate impact using statistical allocation of tax credits, which the Federal District Court ruled was sufficient to prove a prima facie case. Unable to show no less discriminatory alternatives existed, the TDHCA lost.

The U.S. Court of Appeals had upheld this result as consistent with regulations of HUD, the agency tasked with implementing the FHA.

The Supreme Court agreed. While this case is a block-buster in the fair housing field, allowing suits based on disparate impact, it remains a requirement under the law that a prima facie case for disparate-impact liability must meet a robust causality requirement. Evidence of racial disparity on its own is not sufficient.

The air pollution case is *Michigan v. Environmental Protection Agency*, No. 14-46 (Sup. Ct. June 29, 2015), 576 U.S.___(2015) (www.supremecourt.gov/opinions/14pdf/14-46_bqmc.pdf)

Here the U.S. EPA had interpreted 42 U.S.C. §7412(n)(1)(A) of the Clean Air

See LAND USE, next page

REVIEW OF RECENT LAND USE CASES

CONTINUED FROM PREVIOUS PAGE

Act, which requires the agency to regulate power plants when "appropriate and necessary," to allow it to consider costs (to industry) after it had made that initial decision to regulate. The Supreme Court ruled this was an unreasonable interpretation of the CAA section at issue.

This case was decided 5-4. The opinion by Justice Scalia ruled that when Congress orders an agency to begin regulating an industry, but says it should do so only if "appropriate and necessary," the agency must take costs into account before it issues any orders.

The EPA's approach to regulating mercury and other toxics (the MATS rule) had been challenged by two dozen states and trade groups representing the electric generating and coal mining industries.

The EPA was ruled to be wrong in refusing to make its cost-benefit analysis upfront, before starting any regulatory program, preferring to review cost-benefit when imposing plant-specific controls in regulations promulgated later.

This decision has the effect of temporarily blocking the EPA from regulating power plants for mercury (potentially applicable to many other pollutants). It is important to recognize, however, that the ruling does not affect the EPA's legal authority to regulate in this area of air pollution.

On that score, the majority opinion by Justice Scalia says that the EPA does not have to follow any particular method of gauging costs, but it has to fashion some way to calculate that prior to doing any regulating.

Fortunate for the EPA, not every act it administers reads the same way as this section of the CAA for air toxics.

Greg McGregor is a member of the REBA board of directors and chair of REBA's environmental committee. He can be reached at gimcg@mcgregorlaw.com. ♦

'NEXT STEPS' NOTWITHSTANDING, MOA VALID AND BINDING

CONTINUED FROM PAGE 7

non-financial issues resulting from changes to the development plan be dealt with? How much uncertainty can be tolerated before the settlement agreement becomes unenforceable?

The Land Court recently dealt expeditiously with such a case in which I had served as the mediator for REBA Dispute Resolution Inc. See *Dandreo v. Kornitsky et al*, 13 MISC 479144 (AHS). In this decision by Judge Alexander Sands dated June 30, 2015, the court found that the memorandum of agreement (MOA), which was executed by the parties at the conclusion of the mediation, was "a valid and binding agreement," notwithstanding a variety of "next steps" that needed to be taken by the parties. Judgment was dated Aug. 12, 2015. As of the writing of this article, the appeal period had not run.

This case involved the construction of 15 townhouse-style condominium residences for persons aged 55 and above in Swampscott. The dispute was over the location of construction access, the location and extent of the water and sewer hookup and the amount of reimbursement to the plaintiff for plaintiff's expenses, not including attorney's fees, in constructing a previously installed water and sewer line in the street.

The MOA described certain post-mediation obligations of the parties, which, when satisfied, would result in termination of the existing litigation and the exchange of mutual releases.

The "next steps" were, in pertinent part, as follows:

1. A hydrant flow test was to be done;
2. The parties were to meet by a certain date to negotiate (a) the location of construction access, (b) reasonable compensation to the plaintiff to reimburse him for his construction costs in constructing a previously installed water and sewer line in the street and (c) utility construction for a water loop, sewer and other utilities in accordance with the approved plan.
3. A request for modification of the Swampscott Zoning Board of Appeals's decision was to be filed seeking construction access over two streets instead of just one street as provided for in the original decision of the ZBA.

Post mediation, significant disputes arose regarding each of these "next steps."

With respect to the flow test described in paragraph 1 above, the plaintiff objected to the report's conclusion that a loop system would need to be constructed. The court, however, noted that the only obligation under the MOA was to conduct the flow test and, therefore, found that this obligation was satisfied.

With respect to the negotiations to be conducted pursuant to paragraph 2 above, the enforceability questions were more complicated. After a careful analysis of each of these items, the court wove several of the key provisions of the MOA together with the post mediation conduct of the parties to find that these "next steps" had been satisfied. The negotiation of reasonable compensation described in paragraph 2(b) above was a particularly challenging issue. The court ordered payment of the amount that the defendant had offered "in good faith" to the plaintiff because the plaintiff made no counterproposal and "breached his obligations … with respect to negotiating an agreed-upon compensation to be paid to him."

With respect to the paragraph 3 request for modification of the ZBA decision, which was denied by the ZBA, the court noted that that the MOA only required that the modification request be filed and that the MOA further explicitly provided that denial of the modification by the ZBA would not invalidate or render the MOA null and void or unenforceable, in whole or in part.

In divining the intention of the parties as to the enforceability of the MOA, the court relied heavily on a provision in the MOA that "this memorandum of agreement is intended to be enforceable notwithstanding that a more complete written agreement is contemplated." Such a provision has been enforced in an established line of Massachusetts cases dealing with the enforceability of agreements that are intended to be superseded by more detailed agreements that memorialize the prior agreement.

In short, the court found that the MOA "is a valid and binding agreement, and that all that remains to be done in order to trigger the obligation to enter into a final stipulation dismissing this case and issuing mutual releases is the payout to be made to plaintiff." ♦

A neutral mediator for REBA's affiliate REBA Dispute Resolution, Joel Reck is a retired partner from Brown Rudnick LLP and is the former chair of its real estate department. His practice consisted of structuring, managing and closing sophisticated commercial real estate transactions throughout the United States and has included several of the largest development projects and leases in the Greater Boston area. To schedule a mediation or arbitration with Reck, please contact Andrea Morales at morales@reba.net.

Nutter McClennen & Fish senior partner in real estate Robert A. Fishman was named The Best Lawyers in America© 2016 "Lawyer of the Year" in his respective practice area in the Boston metropolitan region.

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