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Photos from REBA's Fall Conference
PAGE 7

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REBA news
THE NEWSPAPER OF THE REAL ESTATE BAR ASSOCIATION
DECEMBER 2015
Vol. 12, No. 6
A publication of The Warren Group

Two for further review?

BY ROBERT M. RUZZO

BOB RUZZO

It's that time of year again – time for "further review."

By that I mean it's football season, and almost every week, millions of Americans watch in anticipation as black-and-white striped NFL arbiters retreat to the sidelines, go "under the hood," exchange secret communications with the league's offices in New York, and ultimately declare:"upon further review, the ruling on the field … ."

In a process that can be categorized as equally opaque, although not nearly as closely watched, the Supreme Judicial Court is being petitioned for further appellate review in two recent cases involving the production of much-needed housing in our commonwealth. Both of these decisions involve the well-established principle that courts owe "a highly deferential bow to local control over community planning." *Britton v. Zoning Board of Appeals of Gloucester*, 59 Mass. App.Ct. 73-74-(2003).

In one case, a dissenting justice has alleged that the local board's conclusions consisted "merely of a summary recitation" of a bylaw's criteria and were therefore "legally untenable." Conversely, a second appellate panel has departed from a long accepted norm with respect to the sufficiency of compliance with state environmental standards by affordable housing developments. The petitioners for further review in that case have cried foul, alleging that the panel essentially substituted its own judgment for that of the local board.

The first of these two cases involved a 23-unit senior housing (55 years of age and older) development that was proposed on 23 acres in Lenox pursuant to our beloved Zoning Enabling Act (Chapter 40A). The second proposal entails a comprehensive permit under MGL c. 40B (Chapter 40B or the Affordable Housing Law) to construct a three-story building in Stow consisting of 37 one-bedroom units of elderly housing.

A word of caution: care should be taken to cleanse one's cognitive palate thoroughly in between reading these two decisions before making any pronouncements about the degree of deference to be afforded to local permit granting authorities.

See FURTHER REVIEW, page 4

Editor's Note

This is the final issue of *REBA News* published by The Warren Group, which has been our publishing partner since 2010. Our next issue, to be published in January, will be published by *Massachusetts Lawyers Weekly*, a division of Minnesota-based Dolan Company. We thank our friends at The Warren Group: Tim Warren, Richard Ofsthun, Chris O'Neill, David Lovins and particularly Cassie Murphy. Cassie brought patient judgment and consummate professionalism to *REBA News*. We will miss her.

Peter Wittenborg,
Editor

TIME IS NOT ON YOUR SIDE

The time limits within Chapter 40A are strictly construed

BY PAUL F. ALPHEN

PAUL ALPHEN

There is yet another new decision that reminds us all that the statutory time limits within Chapter 40A (and, by association, the Subdivision Control Law sections of Chapter 41) are hard and fast. Take a look at *Niall v. Guaranteed Builders & Developers, Inc.*, No. 14 MISC 485381 AHS, 2015 WL 5257127, (Mass. Land Ct. Sept. 9, 2015). It's a complicated case, and there is a lot going on, but it provides us all with a warning about the constructive approval process.

The building commissioner issued a denial of a building permit. The applicant filed a timely Chapter 40A § 8 appeal of the denial to the zoning board of appeals on April 14, 2014. Note that MGL c. 40A § 15 requires that the ZBA must make a decision within 100 days of the filing of the appeal application. "Failure by the board to act within said [100] days or extended time, if applicable, shall be deemed to be the grant of the appeal, application or petition." MGL c. 40A, § 15 (West). Therefore, the ZBA had to act by July 23, 2014.

See TIME LIMITS, page 3

PRESIDENT'S MESSAGE

Big changes coming at REBA in 2016

BY THOMAS BHISITKUL

TOM BHISITKUL

Presidential messages in *REBA News* are not ordinarily the vehicle for reporting "breaking news," but this is a rare exception. I am delighted to report that REBA has just (as of the time of this writing) signed a new lease to relocate its headquarters to 295 Devonshire St. in Boston, which is situated at the corner of Devonshire and Summer streets and is a stone's throw from South Station. The new space is being built out as of this writing, and we expect to be operating in the new location by the end of this year.

The 10-year lease will not only provide a home for REBA for the next decade, but will also symbolically represent the progression of this storied 150-year-old organization into a new phase of technological advancement and increased level of service to our members. For starters, the new location will feature a large main conference room that will be a substantial upgrade over our current facility, and will comfortably accommodate larger receptions, seminars, committee meetings and presentations.

For those of you who have attended meetings in our current, irregularly shaped, narrow boardroom, and have perhaps become accustomed to the charms of climbing over the laps of three or four other attendees to access a seat at the table, it is with some sadness that I report that our new boardroom will not continue to foster that level of intimacy. Regrettably, the new boardroom will not only enable attendees to access seats without any physical contact with others, but will also afford them the rather extravagant creature comfort of having "extra" space to maneuver their chair positions to fit their tastes. (Puritans, feel free to groan at the pampered new generation of legal professionals we are enabling.)

REBA's new home, 295 Devonshire St. in Boston.

Our new boardroom will also be fit up with modern technological facilities that will enhance the on-site user experience and also address a logistical issue our organization has been grappling with for years – i.e., how to make REBA's programs and resources more accessible to members (and potential members) beyond the Boston suburbs (and beyond 128 and 495) who have obvious time, logistical and cost constraints in traveling to Boston to attend meetings and programs. Building on an initiative started earlier this year by the REBA staff, the new space will feature interactive videoconference technology that will enable committee meetings and presentations to be simulcast to our members via the Internet.

Our members will not only be able to view REBA meetings and presentations from their own homes or offices, but will be able to communicate and interact with the speakers and meeting participates as a true remote "attendee." These features are notably components of a larger master technology plan that has been spearheaded over the past year by REBA's current President-Elect Susan LaRose and REBA's Treasurer (and soon-to-be President-Elect) Fran Nolan to upgrade REBA's technological resources to enhance the online user experience for our members. Among other initiatives, Susan and Fran, together with REBA staff and vendors, are currently working on

See REBA MOVES, page 2

MOVING ACROSS TOWN AND INTO THE FUTURE

CONTINUED FROM PAGE 1

the design and development of a new website to make online resources accessible in an easier and more organized format, and to provide additional online content and services in response to evolving member needs. These and other initiatives will continue to be developed and unrolled over the course of the next few years and will continue to be a priority of successive administrations after mine comes to a close.

Which is an inartful transition to my next subject. My term as president of REBA is, in fact, coming to a close, and this is, in fact, my last presidential message to all of you, my friends and colleagues, fellow members of REBA and the Real Estate Bar at large. Reflecting back, it has certainly been an eventful year for the organization and the bar.

As I have mentioned in the past, I am not a conveyancing attorney, and part of my agenda coming into this year was to foster the growth of our commercial real estate committees and programs, such as our commercial leasing, zoning and land use, and commercial real estate finance committees. I then promptly spent the first six months of my term focusing on the Brave New World of TRID, the comprehensive overhaul of the residential mortgage lending and disclosure laws and bane of residential conveyancing attorneys throughout the commonwealth.

This was a subject that was (and continues to be) squarely within REBA's wheelhouse. I'm proud of the many ways REBA came to the forefront on this subject, shepherded its resources and experts to create programs and resources to help our residential conveying professionals prepare for the implementation of the new rule. Hopefully we convinced many panicked lawyers to come off of the proverbial ledge. (At times the line between proverbial and literal was blurry; several seasoned residential real estate attorneys told me that they were seriously considering dropping their residential practice – or simply retiring – rather than braving the perils of compliance with the byzantine new TRID rules and the severe penalties for noncompliance.)

By the way, my sources tell me that the CFPB is admonishing the residential real estate community to no longer refer to the law as "TRID;" the bureau has decided that "K-BYO" ("kay-bye-oh" – my crude stab at the phonetic) sounds more friendly than TRID and because, well, it just kind of rolls off the tongue. Never one to miss an opportunity to back their policies with teeth, rumor has it that the CFPB is considering imposition of a $2,000 fine per violation for any continued (at least not retroactive) references to the law as "TRID." I'm stopping here, as it is occurring to me that I have already racked up $10,000 in fines.

This year also saw the launch of the new REBA Construction Law Committee, which was natural extension of our organization into a practice area that operates at the intersection of, and blends into, many different real estate practice areas (such as commercial leasing, condominium law, commercial real estate finance, condominium law and practice, and title and conveyancing, to name just a few). The committee is headed up by two well-known and well respected co-chairs, Jonathan Hausner of Robinson & Cole, and my colleague, John Connolly of Hinckley Allen.

Legislatively, the entire legal community is thrilled with the success this year of the MLTA's so-called "Ibañez-fix" bill, which REBA has supported. The bill will finally address (in a sensible and fair manner) the vexing issue of back title defects resulting from prior defective foreclosures in the earlier chain of title. The legislation will finally bring relief to innocent "downstream" homeowners who purchased their homes without any practical knowledge of the back title defect, and now find themselves with unmarketable title, and in the unfair and untenable position of being unable to sell their homes and having no practical option to cure the defect. We at REBA applaud the efforts of Ed Smith and Fran Nolan (the co-chairs of REBA's Legislation Committee) who worked so skillfully and tirelessly inside the Statehouse to help MLTA push this bill forward and get versions of the same passed by both houses. It is our hope and expectation that, by the time of this publication, the bill will be signed into law.

Finally, I want to extend my congratulations and support to my soon-to-be successor, Susan LaRose, who will take the presidential gavel at our annual conference and start her administration on Jan. 1. Susan needs no introduction, as most of our members already know her to be an active leader in several roles inside the leadership at REBA, an expert on title insurance and national affairs, and a leading authority on TRID (oops … $12,000), the implementation of which will continue to be a major issue for our members in 2016.

It has been a pleasure serving this organization as president this past year, and I'm proud and humbled to have been trusted with the helm of this wonderful and storied organization. I want to extend a special thanks and recognition to the REBA executive staff, who are simply superb. Our Executive Director Peter Wittenborg and his staff and work daily miracles to keep this organization and all of its branches and facets humming. They deliver all of the innumerable programs, meetings and conferences in a first-class manner far beyond what they should reasonably be able to produce from the Spartan operating budget with which they have to work.

I hope you all have a terrific holidays, and I look forward to seeing and working with you all in 2016!! ♦

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.

'Tis the season … for percentage rent breakpoints

BY CHRISTOPHER R. VACCARO

CHRIS VACCARO

With Black Friday and the holiday shopping season approaching, retailers hope for sales revenues that will make them profitable in 2015. Landlords who receive percentage rent from retail tenants share their hope.

Percentage rent clauses in retail leases encourage a symbiosis between shopping center landlords and their tenants. Landlords have incentive to promote their properties and to cultivate tenant mixes that increase customer visits and tenants' sales. When tenants' gross sales reach a certain level known as a "breakpoint," tenants pay a percentage of sales revenue above the breakpoint to the landlord as rent. The breakpoint and the percentage are both negotiated based on the parties' relative bargaining power. Percentage rent raises several issues.

Natural breakpoint. Although breakpoints are negotiable, percentage rent leases often settle on the "natural breakpoint," which is the amount of sales equal to the tenant's annual base rent divided by the applicable percentage. For example, if a tenant pays $200,000 in annual base rent and its percentage rent figure is 5 percent, the natural breakpoint is $4 million ($200,000 divided by 0.05). In this example, a tenant generating $5 million in gross sales in a given year pays percentage rent of $50,000 ($5 million less $4 million, times 0.05), plus its $200,000 annual base rent.

Exclusions from gross sales. Not all tenant revenues are included in the percentage rent formula. Sales taxes are an obvious exclusion, as are revenues from returned goods and sales where tenants pay refunds to customers. Sales of tenant's fixtures and equipment (instead of inventory) and sales from tenant vending machines reserved for tenant employees are also properly excluded. Shipping and finance charges are often removed from the equation. Tenants offering employee discounts will want to exclude those sales as well, but landlords often limit this exclusion.

Continuous operations and radius clauses. Imagine a scenario where a tenant has made ample percentage rent payments for years, but suddenly its percentage rent payments cease. Upon investigation, the landlord finds that the tenant's once thriving store is now abandoned and gathering dust. Perhaps tumbleweeds languidly roll about the parking lot. Meanwhile, at a rival shopping center, the tenant has opened a new store where delivery trucks queue to unload inventory and hordes of customers merrily stuff their minivans with merchandise. To address this potential problem, landlords require tenants to open for business during certain hours daily (often penalizing them if they do not) and forbidding tenants from operating other stores within a certain radius of their shopping centers.

Audit rights. During nuclear weapons negotiations between the United States and the Soviet Union in the 1980s, President Ronald Reagan warned American negotiators to "trust, but verify." This proverb applies to percentage rent leases. Tenants are expected to furnish landlords with sales reports, and landlords reserve the right to audit tenants' records to verify that sales are not understated. If an audit reveals understated sales beyond a nego-

See BREAKPOINT, page 3

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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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TIME IS NOT ON YOUR SIDE

CONTINUED FROM PAGE 1

The ZBA opened the hearing on June 18, 2014, continued it to July 16, and then voted to continue it again to Aug. 27. No agreement to extend the time period for the board to act was filed with the town clerk. There are a variety of cases that state that for an extension to be valid, a written agreement must be filed with the town clerk. See *Czyoski v. Planning Bd. of Truro*, 77 Mass. App. Ct. 151, 156-57, 928 N.E.2d 987, 992 (2010) and *Craig v. Planning Bd. Of Haverhill*, 64 Mass. App. Ct. 677, 680, 835 N.E.2d 270, 273 (2005).

Knowing that the ZBA could not act within 100 days, on July 22, 2014, the applicant filed a notice with the town clerk that the application had been constructively approved. The town argued that the applicant filed its notice prematurely, as technically the ZBA had until the end of day on July 23 to file a decision. Notwithstanding that between July 22 and July 23 it would have been impossible for the ZBA to meet the posting requirements of the Open Meeting Law and render a decision, the Land Court did not agree with the applicant that the ZBA was not prejudiced by the early filing of the notice of constructive approval.

The Land Court found that the statutory time limits are firm and that the early constructive approval notice was fatally defective "… not only because it purported to take one day of consideration away from the ZBA, but also because it misinformed the 'parties in interest' to GBD's application and ZBA appeal of the correct [21] time period."

The decision made me think of *Purcell v. Sherrill, et al*, No. ESCV201002209B, 2012 WL 1325028, at (Mass. Super. Feb. 27, 2012) within which the Essex Superior Court made it painfully clear that the 30-day period described within MGL c. 40A, § 15 for filing an appeal of the issuance of a building permit is a hard and fast time limit. The court was not moved by the Plaintiff's attempt to first informally persuade the building commissioner that the building permit was issued in error. The plaintiff filed a MGL c. 40A, § 7 request for enforcement after learning of the grant of the building permit, believing that he had 30 days after receiving a response from the building commissioner within which to file an administrative appeal with the board of appeals.

The court referred to *Connors v. Annino*, 460 Mass. 790, 955 NE2d 905 (2011) within which the SJC considered the case of a party that had taken a similar route and filed his appeal after pursuing a Section 7 request for enforcement. The SJC stated: "… G.L. c. 40A, § 15 (§ 15), prescribes the time in which the administrative appeals described in § 8 must be taken. Specifically, § 15 provides that 'any appeal under [§ 8] to a permit granting authority shall be taken within [30] days from the date of the order or decision which is being appealed.' With respect to an appeal from an 'inability to obtain [a § 7] enforcement action' the date from which the [30]-day period for appeal is measured is the date of the written response of the municipal building official to the aggrieved person's request for enforcement. With respect to a building permit, the date of its issuance is considered 'the date of the order or decision.' *Id.* at § 15. For purposes of § 8, the issuance of a building permit qualifies as an order or decision of the inspector of buildings, or other administrative official,' see *Gallivan*, 71 Mass.App.Ct. at 854, 887 N.E.2d 1087, and therefore any appeal to the permit granting authority under § 8 must be brought within [30] days after the permit has issued. See *Elio v. Zoning Bd. of Appeals of Barnstable*, 55 Mass.App.Ct. 424, 427, 771 N.E.2d 199 (2002)." *Purcell v. Sherrill, et al*, No. ESCV201002209B, 2012 WL 1325028, at (Mass. Super. Feb. 27, 2012)

The Land Court found that the statutory limits are firm and that the early constructive approval notice was fatally defective.

The SJC left the door open for appeals beyond the 30-day window, but within 30 days after seeking a request for an enforcement action, if the appellant did not have adequate notice of the order being challenged, or when an abutter proceeds to construct something without a building permit.

Take a look at *Kitras v. Town Clerk of Aquinnah*, 61 Mass. App. Ct. 1121, 813 N.E.2d 584 (2004) for an example of an applicant who lost her ability to asset a constructive approval because the applicant did not move fast enough to file a mandamus complaint against a town clerk who refused to issue a certificate of constructive approval.

The bottom line: Follow the time limits closely. Keep a skilled litigator on speed-dial. File an appeal and then attempt to work things out with the town. ♦

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 since 2001 and as its president 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.

RENT BREAKPOINTS

tiated threshold, the tenant must pay the shortfall, audit costs, and financial penalties. Tenants should seek time limits on landlords' audit rights, to avoid the inconvenience of maintaining sales records over extended periods of time.

Online sales. sales throw a monkey wrench into the traditional approach to percentage rent. Difficulties can arise where customers visit brick and mortar stores, learn that desired goods are not in stock, and allow store clerks to order the goods online from other stores. A spectrum of different kinds of online sales are variations on this theme. Some general rules are helpful here.

First, if an online sale is fulfilled from inventory on hand at a given store, it counts toward the gross sales of that store. Second, if an online sale is ordered at a given store but is fulfilled from an offsite warehouse, the sale should be included in that store's gross sales. However, where a sale is made at one store, but fulfilled at another store, the sale should only be included in the gross sales for one of the stores. In other words, tenants should not have to pay percentage rent twice on the same transaction. Online sales present fertile areas for negotiations between landlords and tenants.

Percentage rent considerations loom large in the retail industry every holiday season. While visions of sugar plums dance through children's heads, shopping center landlords dream of tenants surpassing percentage rent breakpoints. But unlike children, who find out in December if their holiday expectations are met, landlords must wait for tenants' sales reports in late January to learn of their holiday rewards. ♦

This article first appeared in the Oct. 26, 2015 issue of CRE Insider, a special publication of Banker & Tradesman.

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Appraisers say new FHA policy goes too far

BY JIM MORRISON

JIM MORRISON

Appraisers say a new Federal Housing Administration policy requires them to work outside their expertise and assess structural and mechanical systems, causing more confusion among the general public and exposing them to increased liability.

The FHA's Single-Family Housing Policy Handbook, which applies to all FHA appraisals completed after Sept. 14, 2015, requires appraisers to report "if the roof has less than two years of remaining life" and "examine the heating system to determine if it is adequate for healthful and comfortable living conditions."

According to FHA's 2015 first-quarter market share report, the administration insured 16.5 percent of the purchase loans nationwide, and 5.7 percent of the refinancing market in 2014. That's more than 750,000 borrowers and $133 billion worth of mortgages.

John S. Brenan is the director of appraisal issues at The Appraisal Foundation in Washington, D.C. When the FHA solicited input for the new policy, his organization wrote that the language in the policy might lead a consumer to rely on an appraisal report in lieu of a home inspection.

Brenan said the new policy has only been in effect for a few weeks, so it's too soon to tell what impact it will have. He said he has heard from appraisers who say they'll stop doing FHA appraisals altogether.

"We don't want consumers to be confused about the differences between an appraisal and an inspection," Brenan said. "Most appraisers use pre-printed language stating the limits of their expertise. They feel that protects them. On the other hand, all it takes is a couple of lawsuits and you could have a very significant uprising of appraisers. Time will tell."

A spokesman for the FHA said the new policy is more of a consolidation of multiple documents and that the "appraisal requirements are largely unchanged." The agency said it has not seen a decrease in the number of approved appraisers and doesn't expect to, since the changes in the policy, as it relates to appraisals, were not dramatic.

APPRAISERS AREN'T INSPECTORS

Paul Morgan of JP Morgan and Co. in Wakefield has been appraising homes in Massachusetts for 22 years and said he thinks the requirements are unfair.

"Appraisers are not trained home inspectors," Morgan said. "Our profession is the science of valuation. We're not HVAC specialists or roofing specialists."

In fact, the Massachusetts standards of practice for home inspectors do not require them to estimate when a roof will fail or whether or not a heating system is adequate for healthful and comfortable living conditions. The American Society of Home Inspectors standards of practice don't require that either.

Morgan said asking appraisers to report on the distance between a well and a septic system, as the new regulations do, is unrealistic, given that both are buried deep underground. He said he disclaims expertise in structural and mechanical systems in every report.

"We would be creating a misleading appraisal report by representing we have certain knowledge regarding the electrical, heating, plumbing systems or structural integrity, when we don't," Morgan said. "We can't misrepresent any aspect of the report."

Morgan also said his firm raised their fees to reflect the additional work and liability brought on by the new language in the FHA policy.

LIABILITY COULD BE A PROBLEM

Brian L. Trotier is the executive vice president and COO of the Foundation for Real Estate Appraisers and the Associations Liability Insurance Agency Inc. He said he understands that the FHA just wants to make sure marginal borrowers aren't confronted with major, unanticipated repairs that could result in them defaulting on their loans.

"They want the right information for the right reasons, but they're going about it in the wrong way," Trotier said. "I fear appraisers will eventually be criticized or sued for something they say about the condition of a property by a lender or borrower."

Trotier said the new language in the FHA policy requires appraisers to make assessments of components of which they don't have the background – or insurance coverage.

"They are required to have errors and omissions insurance and now they're being ordered to do things that are outside the protection of that policy," Trotier said. "I don't think it improves the quality of the transaction."

Trotier said some appraisers are just going to stop doing FHA appraisals because the fees aren't commensurate with the additional risk.

"A claim could come in and I could see an insurance company not cover it if it has nothing to do with an appraisal," Trotier said. "And if claims happen, then rates will undoubtedly go up. These are not the kinds of events the underwriter contemplated when they wrote these policies. They insure against the value of the property, not the condition of the property."

Susan Kelly of Appraisal Solutions in Rhode Island has been doing appraisals in Massachusetts for 10 years. She said several appraisers she knows have stopped doing FHA appraisals as a result of the policy changes. She said she will continue to do them, but she will raise her fees accordingly.

"When I look at the requirements they're asking us to do and the time that's going to take, that has to be reflected in the fees," Kelly said. "I put it back on the lenders. The lenders control the market."

Kelly said appraisers fees haven't increased in 10 to 15 years and are largely controlled by lenders and appraisal management companies. She said she's also afraid the new policy will discourage the already small number of people entering the field because of the increased liabilities.

"I just don't see what homebuyers are going to gain by the FHA asking appraisers to do what home inspectors do," Kelly said. "It changes the scope of our work and it will impact the lenders' ability to process FHA loans. It's going to take longer and cost more money."

See APPRAISERS, page 9

TWO BAD CALLS UP FOR SJC REVIEW

CONTINUED FROM PAGE 1

BUCCANEER DEVELOPMENT, INC. V. ZONING BOARD OF APPEALS OF LENOX

The *Buccaneer Development* case (known as *Buccaneer II*, whose merits were decided by the Appeals Court in August, was also wrapped up in a disturbing (and lengthy) bit of procedural foreplay involving the Land Court Permit Session. Notwithstanding the good intentions of legislation known as "An Act Relative to Streamlining and Expediting the Permitting Process in the Commonwealth," the *Buccaneer* litigation became bogged down in a quagmire involving the subject matter jurisdiction of the Housing Court. In an exchange worthy of a Wimbledon match point volley, the case shuttled back and forth between the Housing Court, the Appeals Court, the same Housing Court justice sitting by designation in the Permit Session, and then ultimately back to the Appeals Court.

Procedural issues aside, *Buccaneer II* is notable for its stinging dissent from Associate Justice Janis Berry. Her words are potent: "I do not accept, and cannot give deference to, the fatally vague and cursory decision of the Lenox zoning board of appeals … , which, from all that appears, was tantamount to an unbridled and arbitrary conclusion that the board simply did not want this project to move forward." She decried the "vague and standardless nature of the bylaws at issue."

The bylaw required five findings, two arguably "more or less objective" and three of which even the majority conceded were "more subjective factors." Your correspondent's favorite factor requires the board find that the project "will not be detrimental to adjacent uses or to the established or future character of the neighborhood." One board member stated the proposed development "was unduly dense and would be detrimental to the established 'small-town' character of the neighborhood, and the 5-0 decision of the board echoed that sentiment."

Folks, we are talking about 1-acre zoning here; that hardly qualifies as an existential challenge to any community.

REYNOLDS V. ZONING BOARD OF APPEALS OF STOW

A little more than one month later, in *Reynolds*, the issue centered around *which standard* should be applied by the local permit granting authority. A different panel of the Appeals Court took an arguably different approach in its review of a local board's decision under the Affordable Housing Law.

Reynolds, like *Buccaneer II*, was about more than the merits.

In this case the recurring issue of determining standing in Chapter 40B appeals by abutters surfaced yet again. Here, the trial court specifically found the plaintiff's expert not credible when it came to showing injury to the plaintiff in the form of impact to his drinking well. Absent such a particularized harm, does such a plaintiff have standing to contest an impact that *may result to a neighbor's well?*

On its merits, the case centered on the impacts of a wastewater disposal system in an area of sandy, well draining soil. As part of its decision, the ZBA waived certain local wastewater disposal system limitations, but conditioned the issuance of a building permit upon demonstrating compliance with state Title V requirements. Such an approach has been followed for comprehensive permits since the days of the *Hanover* case dating back to 1973.

The *Reynolds* court declared that: "compliance with state standards, however, is not necessarily the end of the inquiry." The court stated that this "presumption" had been rebutted by evidence presented by the plaintiff with respect to the exceedance (at a neighbor's well) of criteria under a nitrogen loading analysis.

The trial court's opinion, however, stated that the project was not located in a "nitrogen sensitive area" and **was not "otherwise subject to** the MassDEP limit on sewage volumes within such areas." As the petitioners for further review plainly stated, the Appeals Court focused on the fact that nitrogen levels in the groundwater at a neighbor's well could exceed an inapplicable standard under a measurement that is not required by state regulation.

Without further review, this decision of an intermediate appellate panel could very well substantially change the rules of the game under the Affordable Housing Law, encourage the proliferation of scientifically questionable local environmental requirements, and further undermine the essential purpose of Chapter 40B. Such a path may very well be taken by the courts; however, if it is to be taken, it should only be taken by the Supreme Judicial Court upon further review.

By any measure, these cases represent two "bad calls" for housing production. Petitions for further review by the SJC are pending at the time of this writing. Will the "rulings on the field" be reversed? ♦

Bob Ruzzo is a senior counsel at Holland & Knight. He was the chief operating officer and deputy director of MassHousing from 2001 to 2012. A frequent and welcome contributor to *REBA News*, he is a member of the association's Affordable Housing Committee. He may be reached at robert.ruzzo@hklaw.com.

THE LAWYERS COUNSEL

Board of Bar Overseers and malpractice cases, together again

BY JAMES S. BOLAN AND SARA N. HOLDEN

JIM BOLAN

SARA HOLDEN

We represent lawyers and law firms in Board of Bar Overseers and malpractice matters. There is an ever-present risk that something said or done by counsel in a civil proceeding would cause a complaint to be filed with the Board of Bar Overseers and, more so, that a finding would cause collateral estoppel to be invoked where the lawyer was a party in the other matter.

Collateral estoppel occurs "when a plaintiff seeks to prevent a defendant from litigating issues which the defendant has previously litigated unsuccessfully in an action against another party." (Citations throughout omitted.) The Supreme Judicial Court has approved of the "offensive" use of collateral estoppel in disciplinary proceedings. Relitigating issues that were already finally addressed in another proceeding "would not comport with the judicial goals of finality, efficiency, consistency and fairness." For the doctrine to apply, first the lawyer must be a party. Next, there must be "an identity of issues, a finding adverse to the party against whom it is being asserted, and a judgment by a court or tribunal of competent jurisdiction." The lawyer/defendant must also have a "full and fair opportunity to litigate the issue in the first action." Finally, "the determination of the issues for which preclusion is sought must have been essential to the underlying judgment."

While the fact finder is "afforded wide discretion in deciding whether collateral estoppel should be applied in a particular case," bar counsel often presses for its adoption since it satisfies their burden of going forward and proof in a Board of Bar Overseers case and, equally importantly, bar counsel would not be permitted to join the civil action as a party itself.

The court also holds that the application of the doctrine must be "fair" in a particular case. In making that determination, "courts generally ask whether (1) the party in whose favor the estoppel would operate could have joined the original action, (2) the party against whom it would operate had an adequate incentive to defend the original action vigorously, (3) 'the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant,' and (4) 'the second action affords the defendant procedural opportunities unavailable in the first action that could readily cause a different result.'"

What all this means is that a lawyer who is a defendant in a civil action (let alone a criminal action) has "every incentive to defend that action vigorously, given the considerable professional and financial stakes involved."

In Massachusetts, where the evidentiary standard is a preponderance of the evidence in a civil action, that standard is the same in a Board of Bar Overseers case.

The Supreme Judicial Court has reiterated on several occasions that the use of collateral estoppel may be applied in bar discipline matters.

Issue preclusion was "not a bar to a proffer of mitigation evidence in a bar discipline proceeding," but only so far as such proffer would not "contradict any fact or issue of law determined in the underlying [civil] proceeding and essential to the [civil court's] judgment."

LAWYER AS LAWYER AND NOT AS DEFENDANT

The more frequent position is where a lawyer is simply acting as a lawyer, but still engages in conduct that raises the ire of opposing counsel or, heaven forbid, the court. Behaving badly can mean that you can end up in the "dock" just as easily as a party. While you will not be estopped from litigating the charges, there could be a finding by a court that could have the functional effect of a collateral order.

For example, I have successfully represented a lawyer in the middle of a civil trial where the court decided to hold an evidentiary hearing to determine whether the lawyer had engaged in improper conduct. If the court had made findings of fact and law against the lawyer, bar counsel may well have sought to estop relitigation in the Board of Bar Overseers matter.

I have successfully represented a lawyer in overturning a sanctions order based on conduct during discovery. We would argue that the initial finding, then withdrawn, could not serve a collateral estoppel since the final order withdrew any adverse finding.

And, to the chagrin of many, there is a surfeit of "public citizen" discipline imposed on lawyers and not just for criminal convictions even when not engaged in representing a client (See the disbarment of the former Speaker of the Massachusetts House of Representatives following a guilty plea in connection with misleading and false statements under oath while testifying in his capacity as speaker, and not as a lawyer, in a federal voting rights lawsuit).

Think of the "Butterfly Effect" on a limited scale, or, in some instances, Newton's Third Law. Except, for us, the urge is to flap our lips and not our wings. Every action can and often does have a direct and corresponding reaction. ♦

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Electronic recording and registered land

BY RICHARD P. HOWE JR.

DICK HOWE

With electronic recording now accounting for nearly 50 percent of all documents recorded at the Middlesex North Registry of Deeds, users inevitably ask about the availability of electronic recording for the filing of registered land documents. The answer to that question is complicated.

The Massachusetts Registers of Deeds Association and the justices and personnel of the Land Court are already exploring this possibility, but all concerned are committed to a deliberate, prudent process.

Technology-wise, existing electronic recording platforms and applications could be modified to accommodate registered land filings with little difficulty. The Essex South Registry of Deeds has already developed an electronic recording system for registered land, but the system can only be used for the pre-approval of documents since the physical documents must still be presented at the registry of deeds to complete the registration process.

Quite apart from anything to do with electronic recording, registers of deeds in offices lacking storage space are already questioning the requirement that the registry retain permanent possession of all registered land documents. The basis of this requirement is unclear. MGL c. 185 does not expressly require it, but even if it did, modern technology and other portions of the general laws lead us to a more basic question: "What is a 'document'?"

In 2015, nothing but prior practice and our own imagination limit the term "document" to a piece of paper with words upon it. The law is not so restrictive. MGL c. 110G, section 2, defines "document" as "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form." In other words, a collection of bits and bytes on a computer screen or smartphone can be a document, too.

When electronic recording first started in Massachusetts, one of the most common objections to it was the increased opportunity for fraud. But is an electronic document more susceptible to fraud than a paper document? Consider the process of filing a paper document. When an individual arrives at the registry of deeds and presents a document for registration, we do not require that individual to positively identify himself. We do not authenticate the signature on a document. We do not authenticate the signature or the status of the person who purportedly took the acknowledgement. With contemporary scanners and laser printers, it might be easier to create a forged paper document now than ever before. Yet paper is familiar to us and because of that we tend to minimize the possibility of fraud.

Electronic documents are new and because of that we tend to exaggerate the possibility of fraud. An electronically recorded document arrives at the registry not in the hands of an anonymous individual, but via a secure Internet connection from a submitter with a private log-in and password. Certainly someone could hack that connection and transmit a fraudulent document, but that risk is no greater than the risk of fraud with a paper document. With strong passwords and strict log-in protocols, the electronic recording system is even more secure than the paper recording or registration process.

The rapid adoption of electronic recording for recorded land documents was aided by the foundational registry practice of returning original documents to the land owner. Whether made with a quill pen or a high-speed scanner, official land records have always been copies of the original document. Accepting a scanned image sent by the customer was not a great leap from creating a scanned image from a document brought to the registry by the customer.

Registered land is different. Since the passage of the Land Registration Act in 1898, registries have retained possession of all original documents. The reason for that seems grounded in the law of evidence rather than the law of real property.

When the Land Registration Act was first enacted, the legislature established an assurance fund to reimburse anyone who was deprived of land or an interest in land due to an error, omission or mistake in a certificate of title or memorandum of encumbrance. The assurance fund would also reimburse anyone who suffered a loss due to fraud. The assurance fund continues in existence and is embodied in MGL c. 195.

Procedurally, a person making a claim against the fund must file an action of contract in Superior Court with the treasurer of the commonwealth as the named defendant. In any such action, the deed and related documents would be relevant evidence. With the best evidence rule creating a strong preference for original documents, the commonwealth's case in such litigation would be strengthened by the availability of the original documents and by a clear chain of custody of them. Furthermore, in a claim of forgery, a three dimensional original document would be of greater value to a hand writing examiner than a two dimensional photocopy or scanned image.

Experience has shown that claims against the assurance fund are rare. Does the evidentiary benefit of having possession of original documents outweigh the added expense that registries of deeds incur in retaining possession of all original registered land documents? Is that benefit also a sufficient reason to refrain from implementing electronic recording for registered land?

Those questions and others should be fully answered before electronic recording is made available for registered land. Electronic recording of recorded land documents has been a major efficiency at the Middlesex North Registry of Deeds. Electronic documents are processed in a fraction of the time spent on paper documents. While it seems desirable to bring those same efficiencies to registered land, it should not be done until the continued security and integrity of the registered land system can be assured. ♦

Dick Howe 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. Dick chaired a breakout session on e-recording and evolving technology at registries of deeds at REBA's annual meeting and conference. He may be reached at richard.howe@sec.state.ma.us.

Editor's Note: The Essex South Registry has asked us to share with our readers the following checklist for e-recordings.

E-recording rejection reasons, updated Oct. 5, 2015

- Name and signature at variance.
- Names are not typed or printed clearly under each signature.
- Incorrect of missing Book and Page number.
- Deed does not refer to property by street (MGL Ch 183 S6B).
- Grantee's address is missing on the deed (MGL Ch 183 S6).
- Mortgagee or assignee address is required (MGL Ch 183 S6C).
- Property address is required on discharge of mortgage (MGL Ch 183 S54).
- Document is not signed.
- Document is not dated.
- Document is not acknowledged.
- Please re-scan document; original scan unclear/illegible/poor quality.
- Notary's name is required below signature and the expiration date of commission is required (MGL Ch 36 S12A).
- Deed must have title reference for this registry.
- Consideration is not stated.
- Land is located in another registry district.
- Location of land by city or town is required.
- No Exhibit A is attached.
- Financing statement must include name of record owner's real estate and the address of the property affected.
- Re-recording an original document to correct an error or omissions is prohibited; see Massachusetts Deed Indexing Standards at www.salemdeeds.com/pdf/IndexStnds08.pdf.
- Documents or pages out of order or missing.
- Registered Land document; cannot be e-filed, must be either mailed in or e-submitted for review using the separate Simplifile module.
- Property address needs to be written on the front page of the document.
- Cannot accept document showing Social Security number; please redact.
- Cannot e-record multifunctional documents.
- Please change document type.
- Please check off or state evidence of identification in the notary clause.
- Notary seal illegible.
- Document has extra pages (repeated pages or other document attached).
- Number and written considerations at a variance. Please verify correct amount.

REBA Fall Conference Photos

Thank You To Our Conference Exhibitors

Why the vanilla box option is popular in retail leasing

BY MICHAEL D. MACCLARY

MIKE MACCLARY

Ok, so you've got a great business idea and you've found the perfect location, and the price and timing are right, but how are you going to get the space ready for your customers? What will the landlord deliver? What will it look like when it is finished? Who will design the space and who will build it out? Most importantly, what will this all cost? These are a few of the many questions confronting today's retail tenants.

When negotiating the letter of intent (LOI) with the help of a commercial broker, a retail tenant will negotiate and get a full understanding of what type of space the landlord will provide. There are many variations of the deals that can be struck between the parties.

On one end of the spectrum, a landlord may offer to build out the premises using its architects and builder with the cost of the build-out baked into the rent payment over the term of the lease. This plan eliminates the significant startup costs to the tenant, but it also typically results in space that may not be specifically designed for the tenant's unique use. A variation of this is when the landlord pays for the build-out, but it is done base on a per-square-foot allowance to the tenant. The tenant will then budget its work based on the allowance and use it to hire an architect and builder to perform the design and build-out.

The third and most popular option is one where the landlord delivers a so-called "vanilla box" to the tenant. In this scenario, the tenant is responsible for the entire cost of the design and build-out of the space, along with the responsibility of hiring, contracting with and overseeing the work of the architect and builder.

UNDERSTANDING THE RISKS

This vanilla box scenario, as common as it has become, seems to be the method most likely to trip up the tenant.

The lease will contain the terms of what the landlord will provide to the tenant. The tenant needs to understand if these provisions will be adequate for their purposes. For example, is the landlord delivering electrical service in its "as-is" condition or will it ensure that tenant will have the capacity necessary for their operation (200 vs. 400 amps of service)? Is the HVAC system adequate or will they represent that the tenant is getting what they require (two or three tons per 1,000 square feet)? Is the size and location of the water, sewer and gas lines adequate or can the tenant request that the landlord delivers requested specifications of 1½-inch water, four-inch sewer and two-inch gas line, for example?

The landlord and tenant will need to agree on the structure of the deal, but immediately thereafter the tenant must cede some authority to the professionals. The first to be involved is the commercial broker. He or she needs to understand the tenant's expectations at the onset of negotiations with the landlord in order to get the salient terms in the LOI. Next, a commercial leasing attorney will confirm that these agreed upon terms are translated from the LOI to the lease, typically in the form of a "work letter" drafted as an exhibit to the lease.

A savvy tenant will hire the services of a tenant's construction representative or project manager (typical cost is 3 percent to 4 percent of the total design and construction costs), whose role is to get to know the premises and the tenant's needs, then translate that information into contracts with the architect and builder. The architect and builder should be experienced in retail work (specifically in the neighborhood where the space is located) and comfortable with the permitting process (again, local experience here is crucial).

Tenants need to be mindful that the landlord has likely been down this road and will have professionals supporting their positions. Tenants must make sure to arm themselves with all the professional assistance that it can afford. Any help a tenant can give themselves will make the road to opening that much smoother! ♦

This article first appeared in the Oct. 26, 2015 issue of CRE Insider, a special publication of Banker & Tradesman.

A former president of the association, Michael MacClary is a partner at Boston-based Burns & Levinson LLP who concentrates in commercial real estate conveyances and leasing. He can be reached at mmacclary@burnslev.com.

Construction manager found not responsible for design

BY ELIZABETH K. WRIGHT AND DENNIS C. CAVANAUGH

ELIZABETH WRIGHT

DENNIS CAVANAUGH

In 2004, Massachusetts departed from the exclusive use of the traditional "design-bid-build" project delivery method for public projects and permitted public agencies to employ the less traditional design-build and construction manager-at-risk delivery methods on certain public projects. This change, along with an increasing trend in the use of non-traditional project delivery methods, raises a number of questions regarding the allocation of liability over the adequacy of a project's design.

On a traditional design-bid-build project, the owner holds two separate contracts, one with the design entity and another with the contractor. The contractor does not commence construction until the design is 100 percent complete. Because the contractor is not responsible for the design, the United States Supreme Court defined what has become known as the *Spearin* doctrine, which holds that the owner impliedly warrants that the plans and specifications are suitable for construction. Massachusetts adopted the *Spearin* doctrine into its common law in a 1970 decision, *Alpert v. Commonwealth*, 357 Mass. 306, 320 (1970), when public agencies continued to generally employ only the design-bid-build method.

Unlike a design-bid-build project, under the construction manager-at-risk project delivery method, the owner retains a construction manager, who in addition to acting as the general contractor during construction, may consult regarding the design prior to construction starting and, therefore, possibly affect the plans and specifications. Given this expanded role of a construction manager, it became unclear whether or not the *Spearin* doctrine would apply to construction manager-at-risk projects.

The Massachusetts Supreme Court recently resolved this issue and held that the *Spearin* doctrine does apply to a construction manager-at-risk (CMAR) who performs preconstruction services and some design review, provided the CMAR relied upon the design both reasonably and in good faith. In *Coghlin Electrical Contractors, Inc. v. Gilbane Building Company*, the Massachusetts Division of Capital Asset Management and Maintenance (DCAMM) as the owner and Gilbane Construction Company as the CMAR entered into an agreement for a public project involving the construction of a psychiatric facility at Worcester State Hospital. Following the completion of the project, Gilbane's electrical subcontractor Coghlin Electrical Contractors, Inc. filed suit against Gilbane to recover additional costs allegedly incurred as a result of certain design errors and omissions. Gilbane subsequently filed a third-party complaint against DCAMM alleging that "in the event that Coghlin proves its claim against Gilbane" DCAMM is liable for the additional costs incurred as a result of the design errors and omissions.

DCAMM sought to dismiss Gilbane's claim arguing in part that because the CMAR consulted on the design and offered preconstruction services it should not be afforded the same protection under the *Spearin* doctrine as a general contractor on a traditional design-bid-build project. The trial court agreed and dismissed the CMAR's complaint. Gilbane appealed. The Supreme Court reversed the lower court's decision and held that a CMAR on a public project is entitled to the protections set forth in the *Spearin* doctrine. The court concluded that despite the differences between a traditional design-bid-build project and a CMAR project, it "was not persuaded that the relationships are so different that no implied warranty of the designer's plans and specifications should apply in construction management at risk contracts … and that the CMAR should bear all of the additional costs caused by design defects" on public projects. However, the court also recognized that a CMAR does have more influence and access to the design than a general contractor in a traditional design-bid-build project. Therefore, the court limited the protection of the warranty by concluding that under a CMAR delivery method, in order to establish the owner's liability under the implied warranty, the CMAR bears the burden of proving that its reliance on the defective design was both reasonable and in good faith.

The *Coghlin* decision also reaffirmed Massachusetts' recognition and favorable treatment of subcontractor "pass-through claims." A pass-through claim is when a contractor asserts a subcontractor's claim against the owner, because a subcontractor, who does not have a contract with the owner, cannot assert its own claim. Instead of one lawsuit between a subcontractor and contractor and another between the contractor and the owner, pass-through claims allow the contractor to pursue its subcontractors' claims directly against the owner.

As set forth in the Texas Supreme Court decision *Interstate Contracting Corporation* v. City of Dallas, 135 S.W.3d 605, 610-614 (Tx. 2004), the vast majority of jurisdictions that have examined the enforceability of pass through claims, have held that such claims are permitted provided the contractor remains liable to the subcontrac-

See COUGHLIN, page 11

As Boston condo market explodes, vertical phasing rights become increasing important

BY SAUL J. FELDMAN

SAUL FELDMAN

We are all familiar with the concept of a phased condominium. The typical example is a suburban condominium development. My developer client wants the right to expand the condominium horizontally by the addition of a series of buildings over a period of time. An example of this is Olde Village Square Condominium in Medfield, Massachusetts, which I am working on currently. I draft phasing amendments bringing new buildings into the condominium from time to time. This is a multi-phased residential condominium, a typical example of horizontal phasing.

Vertical phasing, on the other hand, is ideal for a developer of a condominium who wants the right to expand the condominium vertically by adding additional floors to the building. These expansion rights are a good example of vertical phasing.

The tremendous current demand for condominiums in Boston makes the issue of vertical phasing rights important.

Vertical phasing can be simple or complex. Vertical phasing can be *above* an existing building, *within* the building or a *combination* of both.

SIMPLE VERTICAL PHASING

An example of simple vertical phasing would be a four-unit condominium building with a retail unit on the first floor, office units on the next couple of floors and a residential unit on the top floor. Appurtenant to the residential unit, there would be expansion rights, allowing the addition of one or two more floors with several new units to be built on these floors, by one or more phasing amendments. The roof would be limited common area for the exclusive use of the developer as the owner of the residential unit. Subject to obtaining the required zoning approvals (such as variances for height and density) and the consent of the construction lender, this type of vertical phasing can be accomplished by correctly drafting the master deed to allow vertical phasing above the existing building. Expansion rights are sometimes called "air rights" or "development rights."

Financing for the development and the exercise of expansion rights must be coordinated. Therefore, review by the construction lender is essential. The construction loan documents must reflect the expansion rights.

The exercise of expansion rights requires that the master deed be amended by one or more phasing amendments to include the expansion floors and expansion units into the condominium. The percentage interests of all of the units are adjusted downward in the amendment to reflect the addition of the expansion units.

The developer, in addition, must have the unilateral right to amend the master deed to include the expansion floors and expansion units in the condominium and to provide for the following:

- Temporary rights and easements through the common areas and existing units to allow construction of the expansion floors and expansion units, provided that any damage is promptly repaired, and further provided that the developer uses reasonable efforts to minimize interference with the use and enjoyment of the sold units by the owners and occupants of the sold units;
- Rights and easements in common with the unit owners to access the expansion floors by means of the existing stairways and elevators; and
- Rights and easements to extend elevators, utilities and stairs into the expansion area.

While the developer will reserve the unilateral right to develop the expansion area, the developer will have to calm any fears of existing unit owners that the structure of the building will not be impaired and that they will not be unreasonably disturbed during construction. The developer must have proper builders risk insurance.

The roof of the building often presents problems in vertical phasing. For example, in the event there is mechanical or air conditioning equipment on the roof of the building, the master deed must give the developer the unilateral right (without the consent of the unit owners or their mortgagees) to relocate this equipment in order to be able to exercise the vertical expansion rights reserved to the developer.

Another type of vertical phasing would be adaptive reuse, such as an abandoned church with a large open parking lot. The main building could be converted to a residential condominium and the air rights above the parking lot could be developed as additional residential condominiums. The parking lot itself can be preserved for the parking of automobiles for the residential owners in the main building and the residential units built in the air space above the parking lot. A well drafted master deed can provide for this without any problems, as long as the developer is able to obtain the zoning approvals (e.g., variances for height and density) required and the consent of the developer's construction lender. While zoning is often a problem, the consent of the lender is made easier because air rights are an interest in real estate and the lender will therefore be able to obtain title insurance for the air rights.

Another example of vertical phasing would be a large mill building. A particular mill building had been converted to a mixed use condominium with 49 residential units and one commercial unit, all in one building. I prepared the documentation adding additional residential units in the building and reducing the size of the commercial unit. This is vertical phasing within and above an existing mill building, an example of much more complicated vertical phasing.

There are mill buildings and other buildings throughout Massachusetts that can be converted to the condominium form of ownership with vertical phasing within the existing structures, above the existing structures, or both.

Neither horizontal nor vertical phasing are described in Chapter 183A, the Massachusetts Condominium Statute. In fact, the entire concept of phasing is mentioned only once in Chapter 183A (i.e., in Section 5(b)(i)). As Chapter 183A is merely an enabling statute, I have been able for over four decades successfully to push the envelope in drafting both horizontal and vertical phasing, in order to give my developer clients what they want.

In my opinion, it is good that our first generation condominium statute, Chapter 183A, does not go into detail about "expandable condominiums." Phasing, whether horizontal or vertical, is really all about expandable condominiums. Unlike Massachusetts, the condominium statutes in other states go into great detail about expandable condominiums. Unfortunately, in going into such detail, some states with second or third generation statutes eliminate the possibility of vertical phasing because the statutes describe horizontal phasing as the only permissible type of phasing. Therefore, our simple first generation statute in Massachusetts is clearly the better statute. What is not expressly prohibited is permitted. Unlike in some other states, in Massachusetts both vertical and horizontal phasing are legally permitted. ♦

A member of REBA's Condominium Law and Practice Committee, Saul can be reached at mail@feldmanrelaw.com.

APPRAISERS BUCK FHA

CONTINUED FROM PAGE 4

Jonathan Braverman, of Baker, Braverman and Barbadoro PC in Quincy, has been litigating real estate cases for 35 years. He said for most appraisers, complying with the new policy is "going to be extremely daunting."

"I think appraisers are going to have to look at this and consider whether they can disclaim competency and liability in any of these specific areas," Braverman said. "I believe appraisers are going to have to rethink what they're willing to sign off on, how much they charge and what liability arises out of it."

He said that while these appraisals are meant to be relied upon by lenders and the FHA, if the reports are given to consumers, it's possible they could rely on the appraisal report in lieu of a home inspection, and that would greatly increase the appraiser's liability.

Braverman said the new policy is meant to assure the FHA that properties they are insuring the loans on are up to a certain standard of fitness, but they are requiring appraisers to perform a lot of work that is outside their area of expertise.

"It's not a bad idea," he said, "but it's going to have to evolve." ♦

This article first appeared in the Oct. 10, 2015 issue of Banker & Tradesman.

Jim Morrison is a staff writer for The Warren Group, publisher of *REBA News*.

State struggles with affordable housing

LESSER-KNOWN 40R AND 40S CAN HELP BLUNT 40B'S BLOW

BY JIM MORRISON

JIM MORRISON

The need is clear: Massachusetts requires more affordable housing, but projects aren't being built fast enough – and the sometimes brutal approval process leaves many a bruised municipality in its wake.

A 2014 Massachusetts Housing Partnership (MHP) report says the need for affordable housing –defined as housing for families earning less than the area median income – is strong in the Bay State and only getting stronger.

In 1980, Massachusetts' home prices were near the national average, but since then, they've grown faster than any other state in the union, according to the report.

Worse, more than a million Baby Boomers are projected to leave the state's workforce by 2030 and there aren't enough current residents to fill those jobs. Nor is there enough housing available for new residents.

40B, 40R AND 40S

The state law known as Chapter 40B allows a developer to bypass local zoning and build higher-density developments if the housing stock in the community is not at least 10 percent affordable. In 2004, the state passed the lesser-known Chapters 40R and 40S. Chapter 40R encourages cities and towns to zone for compact residential and mixed-use development in "smart growth" locations by offering financial incentives and control over design. Chapter 40S deals with payments from the state to the municipalities incenting them to create 40R districts.

The town of Lynnfield created a 40R district called Market Street, a mixed-use residential, office space and retail development on the site of the former Colonial Golf Course. Richard Tisei, co-owner of Northrup Real Estate in Lynnfield, said it has become a selling point for the town.

"Market Street has been a win-win for Lynnfield," Tisei said. "Aside from expanding the communities tax base it also helped diversify the housing stock in the community."

Tisei said his office has worked with clients who chose to rent an apartment in the Market Street development while searching for their dream home in Lynnfield.

Gary Anderson, Easton's town planner, said just about every municipality would prefer a 40R development, where the town has control and receives state compensation, to a 40B, where the municipality has less control over the project and receives no payment from the state.

However, just 27 40R districts have been created in Massachusetts to date, largely because they require time, money and community support.

Easton approved a 40R zone in 2008. Queset Woods, a 280-unit development with 98 affordable units and 116,000 square feet of commercial space, is nearing completion near the campus of Stonehill College. The mixed-use development is to expected to generate over $2 million in new revenue for Easton in the first 10 years of operation.

"For the most part, it's been a positive for the town," Anderson said. "Because it isn't done, I'm hesitant to say it's been a grand slam, but at some point, it will be."

Anderson said that upfront payments and reimbursements also made 40R zones more attractive, adding that the town has a 290-unit project that is "significantly along the permitting process" that will bring Easton's affordable housing stock over 10 percent threshold, protecting the town from any unwanted 40B proposals.

"The development is a 'friendly' 40B, which goes along with the town's strategy of working with developers," he said.

A CAUTIONARY TALE

Paul Halkiotis, director of Planning and Economic Development in Norwood, said the town has experience with both 40Rs and 40Bs. In fact, it zoned one of the first 40R districts in the commonwealth in 2006. In 2014, Norwood approved its second 40R project. Initially proposed at 100 units, it was eventually pared it down to 40 units. Construction has already begun.

Across the street from that development is another old, run-down manufacturing facility called the Plimpton Press. A 300-unit 40R project was recently proposed for the site that would have put the town over the 10 percent threshold, protecting it from being forced to accept any future 40B developments.

"Some abutters objected to the project and campaigned hard against it," Halkiotis said.

The town's planning board and board of selectmen supported the project. A majority of Town Meeting members voted in favor – but not the two-thirds needed to change the zoning, and the project failed.

That may turn out to be a Pyrrhic victory for the abutters. The owners of the property currently have a purchase and sale agreement with a developer who Halkiotis expects will soon apply for a permit to build a 216-unit 40B affordable housing development.

In the meantime, a different developer has proposed another 300-unit 40B development in another part of town. That proposal was denied by the zoning board of appeals last week and will likely be appealed by the Department of Housing and Community Development (DHCD). Because Norwood didn't approve the 300-unit Plimpton Press 40R project, the town now faces the prospect of two 40B developments totaling 516 units.

Paul Keady, a Realtor and a Norwood native, said more than 50 percent of the housing in Norwood is already rentals and that it strains the real estate market.

"Norwood has cheap utilities and cheap taxes compared to other communities," Keady said. "Plus, you've got the train. That makes it a great place to build apartments."

Town services like schools, roads and police and fire departments are used by everyone, but paid for largely by real estate taxes. He said since renters outnumber owners, services get strained, which can result in larger school class sizes and lower test scores. He said homebuyers with school-aged kids notice that and many who can afford to will look elsewhere.

"People look at class size and scores and decide to look at other towns, like Westwood, for the schools," Keady said. "A lot of them move back to Norwood after their kids graduate."

A THIRD PATH

According to the DHCD, four municipalities in the commonwealth have considered creating a 40R zone, but ultimately decided not to. One of them is Melrose. At 7.6 percent, Melrose is three-quarters of the way to meeting the state's affordable housing requirement.

Denise Gaffey is Melrose's city planner. Gaffey said Melrose doesn't receive many 40B proposals, so the city didn't feel the need to create a 40R zone to defend itself against them. Instead, the Melrose board of aldermen approved their own 15.5-acre "smart growth" district within walking distance of buses and the Oak Grove MBTA station in 2008. It encourages mixed-use, preserving historic properties and requires that 10 percent of the units built there be affordable in perpetuity.

"We primarily hope to see residential and mixed-use developments there," Gaffey said. "We contemplated doing it as a 40R, but didn't because the aldermen didn't want to cede control of local zoning to DHCD and 40Rs require a higher percentage of affordable housing."

Two developments have already created 39 units of affordable housing in the zone so far. ♦

This article first appeared in the Oct. 12, 2015 issue of Banker & Tradesman.

Jim Morrison is a staff writer for The Warren Group, publisher of *REBA News*.

As UMass grows, Amherst struggles with housing availability

BY CHRISTOPHER R. VACCARO

CHRIS VACCARO

Conflicts between town and gown are business as usual in Amherst, home to UMass's flagship campus, as well as Amherst College and Hampshire College. With about 28,000 students in a town with fewer than 40,000 residents, problems arise when students and non-students compete for housing.

Amherst recently created a Town and Gown Steering Committee (TGSC) comprised of town and UMass representatives to commission a study of the town's housing and economic growth. Last December, TGSC issued a report framing Amherst's housing problem and recommending solutions. Amherst's residential growth is mostly attributable to UMass's expansion, causing higher rents for student housing. As a result, there are financial incentives for owners of off-campus housing, including single-family dwellings, to convert their properties to student housing. Non-student housing decreases and becomes less affordable. Also, high-spirited students (especially undergraduates) have schedules and social habits that can annoy working families. As student housing infiltrates traditional neighborhoods, the quality of life for non-students often erodes.

TGSC's report recommends that UMass expand its on-campus student housing to mitigate these problems. It suggests "public-private partnerships" between UMass and developers can achieve this goal, but acknowledges the legal and political challenges associated with private developments on state land. Given these challenges, years may pass before there is meaningful follow-through on TGSC's recommendations.

A PARTNERSHIP DERAILED

Meanwhile, a privately funded off-campus student housing project was under consideration for a 150-acre, residentially zoned woodland near UMass. The property owner, W.D. Cowls Inc. Land Co., contracted to sell the parcel to Landmark Properties, a national developer specializing in off-campus student housing. Landmark envisioned a cluster development of 175 dwelling units with 641 bedrooms. The development would preserve open space and vegetation, require less road construction and infrastructure, and minimize impacts on wetlands, while boosting Amherst's student housing inventory and attracting economic development off-campus.

Amherst's zoning bylaw allows cluster developments in residential zones, including zero lot line single-family dwellings, duplexes and attached dwellings on small lots. Cluster development lots generally must have street frontage of at least 100 feet, but the planning board may reduce frontage requirements for up to 50 percent of the development's lots. The lots must have enough area to contain a circle with a diameter equal to the "minimum standard street frontage required in the district."

Abutters filed suit in Land Court to stop the project in 2013. Entangled claims, cross-claims, amended pleadings and cross-motions for summary judgment followed among the abutters, the town, Landmark and Cowls. Landmark withdrew its zoning applications, but continued in the litigation.

The Land Court judge adeptly sorted out the parties' arguments, and narrowed the case to two issues. First, does the zoning bylaw require special permits for non-owner occupied duplexes in cluster developments? Second, does the bylaw allow the diameter of the frontage circle for a particular lot to equal the smaller frontage that the planning board requires, or must the diameter be 100 feet regardless of the reduced frontage? Cowls and Landmark argued that duplexes in cluster developments should not require special permits, and that the smaller frontage permitted by the planning board should reduce the frontage circle's diameter. The abutters and the town opposed their arguments. The Land Court rendered its decision last spring.

On the first issue, the court noted that the bylaw generally requires special permits for non-owner occupied duplexes in

See UMASS, next page

A legal guide to the use of drones in real estate

BY PAUL C. BAUER

PAUL BAUER

Drones, or unmanned aircraft systems (UAS), have escaped pure military purposes and exploded into the public consciousness as a commercial tool. For the real estate industry, there is great potential for UAS in many ways: providing stunning aerial photographs for marketing; using infrared cameras to locate building heat loss in energy audits; providing survey data and reference points; assisting in delineating wetlands through plant identification; and inspecting roofs.

Amazon has plans to employ UAS to streamline and expedite last mile deliveries. At the same time, however, there are regulatory hurdles and business risks to the use of UAS that property owners and real estate professionals must address.

Under current law, the use of UAS for commercial use is prohibited without a Section 333 waiver from the Federal Aviation Administration (FAA). The FAA is granting many of these waivers while it develops a regulation to address the new UAS industry. The proposed FAA regulation is out now and when finalized will govern UAS use. While a Section 333 waiver currently requires a pilot's license, the draft regulation provides for a new operator licensing process that does not require that operators be licensed pilots.

Some have challenged FAA authority to regulate UAS. This is a nonstarter for the real estate community as the risk of an unregulated industry flying chunks of metal across the sky would soon make use of UAS unviable. This is an instance where the industry needs clear rules to promote a stable new business tool.

States are also developing or enacting laws regulating UAS in many respects including prohibiting voyeurism, protecting wildlife, prohibiting use in hunting, fishing, or trapping as well as detailing use in commercial agriculture and defining no flight zones.

Recognizing the benefits of UAS for the real estate industry, there are a number of concerns as well. Property owners will want to protect the safety and security of persons and property against both accidental occurrences as well as malicious or terrorist actions. Similarly, owners will want to protect the privacy of occupants against UAS photography. This can encompass protection against industrial espionage as well as personal privacy expectations. Finally, owners will want to protect their tenants from any nuisance that a UAS on the property might cause.

While future federal and state laws may provide some help to property owners, there is no guaranty. However, there are steps owners and real estate professionals can take now to protect themselves against risks arising from UAS.

When looking to use a UAS for property purposes, real estate professionals must hire a company with a FAA Section 333 exemption, get a copy of the exemption from the provider, and have counsel prepare a contract with the provider that includes indemnity provisions that protect against losses that could be suffered due to improper UAS use or accidents arising from such use, and specifies the date and time at which the UAS will be employed. These contracts should not be a general authorization, but should cover each UAS use so that the location, date and time can be agreed upon.

On property that is likely to experience UAS use by hobbyists or professionals (such as parking lots, fields, etc.), owners should post signs prohibiting such use without express owner permission. Similarly, owners should prohibit use of UAS on the property by tenants either in new leases or in the building rules and regulations to cover existing tenants. Further, although Amazon's UAS delivery program is some time in the future, property owners should make sure that no delivery service delivers to tenants by UAS without an agreement in place with the landlord to define flight paths, time, and allocation of liability – if such delivery is permitted at all.

The brave new world of efficiencies and capabilities from UAS promises some very real benefits for the real estate industry. At the same time, to protect against the risks inherent in this new technology, property owners cannot wait for the regulatory environment to catch up with the issues raised by UAS access of private property. It is imperative that property owners get in front of issues creating potential risk exposure to protect their property. ♦

This article first appeared in the Sept. 28, 2015 issue of CRE Insider, a special publication of Banker & Tradesman.

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COUGHLIN DECISION

CONTINUED FROM PAGE 8

tor, but only to the extent the contractor receives payment from the owner. Notwithstanding this widely accepted view, Connecticut remains part of a very small minority that have adopted a contrary rule. Unlike the majority of jurisdictions that require only conditional liability, Connecticut requires that a contractor either admit unconditional liability to the subcontractor or pay the subcontractor prior to asserting the claim against the owner. As noted in *Coghlin*, Massachusetts follows the majority view that conditional liability to the subcontractor is sufficient to assert a pass through claim against an owner.

The *Coghlin* decision provides guidance to both construction managers and owners employing the construction manager-at-risk delivery method regarding who bears the responsibility for the design. Based upon this decision, owners must be aware that despite a construction manager's collaboration in the design, the ultimate responsibility for the accuracy and sufficiency of the design continues to rest with the owner and architect. ♦

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UMASS HOUSING

CONTINUED FROM PREVIOUS PAGE

residential districts. However, the bylaw allows cluster developments as-of-right in residential districts, without requiring special permits for duplex housing. Accordingly, the court agreed with Cowls and Landmark that special permits are unnecessary for duplexes in the project.

Regarding the second issue, the court acknowledged the bylaw's ambiguity, and that each side's interpretation was reasonable. However, the court ruled in the town's favor, citing the court's tradition of deferring to municipalities' interpretations of their ambiguous bylaws. This tradition seems questionable, because it allows municipalities to make ambiguous rules without consequence, but the court's approach is consistent with prior court decisions in Massachusetts.

As of now, Landmark seems to have abandoned the project, after spending about $1 million on permitting and consulting. Cowls will have to find another developer, unless Landmark returns to the table. It will be interesting to see which housing initiative, if any, finds success first in Amherst: on-campus housing built by TGSC's recommended public-private partnership, or off-campus housing on the Cowls property. In the meantime, housing pressures continue. ♦

This article first appeared in the Aug. 31, 2015 issue of CRE Insider, a special publication of Banker & Tradesman.

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