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REBA news
THE NEWSPAPER OF THE REAL ESTATE BAR ASSOCIATION
JANUARY 2016
Vol. 13, No. 1
Supplement of Massachusetts Lawyers Weekly

The 'Ibanez' cure bill: a reason to be thankful

BY RICHARD M. SERKEY

On Nov. 25, 2015 — appropriately, just in time for Thanksgiving — Gov. Charlie Baker signed into law Chapter 141 of the Acts of 2015, the so-called *Ibanez* cure bill.

RICH SERKEY

The Land Court's 2009 decision in U.*S. Bank v. Ibanez*, affirmed by the Supreme Judicial Court in 2011, held that, absent proper documentation of a foreclosing entity's status as mortgagee prior to the initiation of the foreclosure process, a foreclosure was void. *Ibanez* had the effect of rendering unmarketable thousands of homes throughout the commonwealth whose titles devolved from pre-*Ibanez* foreclosures, since the practice of obtaining assignments after initiation of foreclosure was commonplace prior to the court's ruling.

The owners of these homes, referred to as "arm's length third party purchasers for value" in the bill, have been unable to sell or refinance their homes because of a title defect that they had no fault in causing, and of which they could not have had any knowledge when they bought their homes. Up until now, these owners have faced the daunting task of (a) trying to secure release deeds from foreclosed upon prior owners who are hard to find, and when found, can name their price for signing release deeds; and (b) trying to secure discharges of junior liens from lienholders who are hard to identify, and when identified, can also name their price for issuing discharges.

The *Ibanez* cure bill gives a period of three years to improperly foreclose upon parties within which to challenge their foreclosures, and more if they continue to occupy the mortgaged premises as their homes. It also preserves their right to bring a civil action against their mortgagee for any material misrepresentation contained in a foreclosure affidavit and makes any such material misrepresentation a violation of Chapter 93A.

Finally, it directed the attorney general to educate homeowners who were

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MCLE launches the Henry H. Thayer Scholarship Fund

Henry H. Thayer

MCLE has launched the Henry H. Thayer Scholarship Fund in collaboration with REBA, Henry's former colleagues at Rackemann, Sawyer & Brewster, as well as his friends, former clients and other colleagues.

The purpose of this initiative is to fund scholarships to benefit lawyers who serve the public interest, including legal aid lawyers, private practitioners who accept pro bono cases and other deserving lawyers who, without financial assistance, would not be able to attend MCLE programs.

Henry served as president of REBA's predecessor, the Massachusetts Conveyancers Association, in 1988 and received the group's highest honor, the Richard B. Johnson Award, in 1995. He is also a past president of The Abstract Club and served for many years as chair of the joint amicus committee of both groups.

He joined Rackemann, Sawyer & Brewster in 1964 and spent his entire legal career with the firm. For over 43 years, he advised clients with respect to real estate titles as extensive as a city block or a 3,600-acre tract, or as local as the disputed use of a driveway. Throughout his career, Henry participated in the Boston Bar Association's Volunteer Lawyers Project and received the BBA's Pro Bono Award in 1991.

An active MCLE volunteer throughout his career, Henry was the driving

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REBA recently received a generous donation from CATIC, New England's largest domestic and only Bar-Related® title insurance underwriter, and a strong supporter of the association. Pictured, from left: Chris Condie, CATIC senior vice president for operations; REBA President Susan LaRose; and CATIC Vice President and Massachusetts state manager Ed Forristall, co-chair of REBA's paralegal committee


MASSACHUSETTS LAWYERS WEEKLY
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IMPORTANT OPINIONS OF THE WEEK

Editor's Note

Massachusetts Lawyers Weekly, a division of Minnesota-based the Dolan Company, is now publisher of *REBA News* as an insert in *Lawyers Weekly.* We look forward to working with Associate Editor Matt Yas, Advertising Director Scott Ziegler and Publisher Susan Bocamazo as *REBA News* begins a new chapter.

We thank our former publisher, The Warren Group, particularly Editorial Director Cassidy Murphy, for their care and diligence publishing *REBA News.*

PRESIDENT'S MESSAGE

Expanding our reach in 2016

I am delighted to serve as REBA's president this year.

I have been actively involved with the association for many years. As REBA has been so valuable in supporting and growing my practice, I want my peers and colleagues — in fact, any Massachusetts real estate lawyer — to take full advantage of its resources.

As a leader of our Residential Conveyancing Committee, I have crisscrossed the state over the past several years, meeting with real estate practitioners — members and non-members alike — showing them how REBA can support and grow their law practices. I often say that we have committees literally from A to Z: Affordable Housing to Zoning, and everything in between! Our committees give our members valuable education and information, as well as forums to discuss current issues and developments in the always-evolving practice of law.

My one regret is that it can be difficult for some members, particularly those from outside of the Boston area, to effectively utilize REBA's professional development offerings. As my predecessor Tom Bhisitkul announced in his final president's message in REBA News, President-elect Fran Nolan and I, along with help from our staff, have launched a two-year technology initiative to help members.

SUSAN LAROSE

Our first step, already underway, will make committee meetings accessible via simulcast. Later on, we will develop an online library of current resources, including recorded sessions of meetings and presentations that can be accessed online at a member's convenience. With the breadth of knowledge of our members, we also will host what we refer to as "Real Estate Rock" segments (for those of you old enough to remember, this might sound a little reminiscent of "Schoolhouse Rock" — we hope it's as enlightening and entertaining). This program and meeting archive will cover on our title, ethical and practice standards, the practical use of our popular REBA forms, legislative updates, case law updates, and segments of interest for the many specialized fields within today's real estate practice.

What will 2016 bring?

Our members concentrating in residential conveyancing will master the CFPB regulations, including implementation of the TRID Rule, introduced last October. We know the transition, with REBA's support, will become easier over the course of 2016. We will also offer greater resources to the paralegal and title examiner communities, as they are an integral part of our practice.

We have seen many challenges to residential foreclosure practice, and we await judicial outcomes of several pending appellate cases in the foreclosure arena. This year, as in every prior year, REBA will sponsor bills that advance the interests of the real estate bar while closely watching other pending legislation affecting real estate practice. Of course, we will continue to offer amicus briefs in pertinent appellate cases.Finally, I must thank my predecessor, Tom Bhisitkul, who accomplished so much in leading the association last year, particularly through his tireless work spent searching for a new downtown venue for REBA, and then spending many, many hours negotiating the office lease. He has eased my path and I am very grateful.

I look forward to a challenging and productive year, and I urge you to take advantage of the many benefits the association offers.

My cousin Vinnie is adapting to the new world order

BY PAUL F. ALPHEN

PAUL ALPHEN

I recently ran into my cousin Vinnie, a suburban real estate attorney, at a family gathering. We started talking about the oddities of the National Football League.

He told me that at the moment he first heard that the pressure was allegedly low in some balls at halftime of last season's AFC Championship Game, he knew it was the result of the Ideal Gas Law.

"Paulie, it was the middle of January, but it was unusually warm the morning. I got into my pick-up at 10 a.m. to drive back from the Cape, and I took off my jacket and sweatshirt. I was driving with the windows down when I drove through Foxboro. But by the time the game started that evening, it was so cold that my walkway was covered with ice, and my buddy Skip, the DPW Director, slipped and landed on his can coming into my house; and he's an expert on snow and ice!" Case closed.

I asked him if he learned anything at the recent REBA Conference. "I wish I hadn't attended the session on the revised Rules of Professional Liability! There was a serious discussion of the things that can go wrong if you represent a buyer and the lender, or if you just prepare a deed for an unrepresented seller. Now, I know that the speakers had to be ultra conservative and provide us with worst case scenarios, but some of their expectations were unrealistic. There are still many brokers out there who tell buyers and sellers that nobody needs an attorney. Our cousin Richie bought a house during the summer, and he never called either one of us. He told me that the broker told him that the forms were all standard and regulated by the government. People continue to be naive of all the things that can go wrong, and the serious financial risks."

Actually, on one hand, I was relieved that Richie hadn't called me, because he would have expected me to work for free — but on the other hand, I wish he had.

I told Vinnie that it is partly our fault. Over the decades, as we represented lenders and discovered title problems, we quietly spent hours finding solutions and never told anyone or charged anyone. We worked with buyers and sellers to solve problems so that the closings occurred on time and never charged anyone for the additional hours. And we prepared deeds and a variety of other documents for free or for next to nothing.

"Vinnie," I explained, "I went online to see how much the big web based legal form company charges for a deed. First, they cannot prepare a deed for Massachusetts closing, but the cheapest deed they will sell you, for an interfamily conveyance, is $249!"

Vinnie had an epiphany, and bellowed, "You're right; we should not be preparing deeds for unrepresented parties. It reminds me of the time when I served as an expert witness in a malpractice case where the closing attorney prepared a deed for the seller, and had reviewed the deed with the seller, but months later the seller complained that there was another plan on record that carved off a parcel and he never intended to convey the second parcel! The seller knew about the other plan, because he had paid the surveyor to prepare it, but never mentioned it to the attorney … until it was too late."

Vinnie continued: "The other thing I learned at REBA is that TRID is definitely going to require that we spend more time on each transaction, and things are bound to go wrong. The closing attorney, and the paralegals, are going to have to concentrate more on the process and paperwork, and won't have time to cure title issues and address buyer-seller disagreements. Everybody should have their own attorney. When the closing gets delayed, the buyer is going to need an attorney to negotiate an extension with the seller's attorney. We will need to rely on having the sellers' attorney cure title issues … and if the seller does not have an attorney, the closing will get further delayed waiting for the seller to figure out he needs one and then find one."

I responded that it sounded as if Vinnie was going to bite the bullet and adapt to the new rules and continue to perform residential closings. I asked him if he was in compliance. "Yup," he replied, "to the best of my knowledge I'm in compliance. I had criminal history checks performed on my four employees: my wife, my paralegal of 30 years, my part time bookkeeper of 20 years, and my bother Nick, my part time IT guy. Not surprisingly, none of them had criminal histories."

I asked him what he did about document security. "Well, because theoretically my brother Nick could come into the office after hours to fix a computer problem, I had to lock everything down. I hired a locksmith to make keys for each of my ancient file cabinets, I bought a few more cabinets within which to sweep my desk off at the end of each day, and hung a locking key box in the office for the 40 keys to everything. It takes me an extra 10 minutes to lock and unlock the mess each day."

I asked him if he was sure that his data-shredding company really shred everything or if they boxed everything up and sent it to someone in an unfriendly foreign nation.

"Back off, Paulie! I'm certified! I sent in my money and I got certified!" I asked him who certified him. "I don't know, Julie from the Internet. I sent her my credit card information and all my bank account numbers and wire transfer information, and she sent me an email with an official looking certification form!"

I decided not to ask Vinnie who "certified" Julie-from-the-Internet and what she was doing with his bank account information. We just agreed that the world had gone crazy.

A former REBA president, Paul Alphen currently serves on the association's executive committee and co-chairs the long-term planning committee. He is a partner in the Westford firm of Alphen & Santos, P.C. and concentrates in residential and commercial real estate development, land use regulation, administrative law, real estate transactional practice, and title examination. As entertaining as he finds the practice of law, Paul enjoys numerous hobbies, including messing around with his power boats and fulfilling his bucket list of visiting every Major League ballpark. Paul can be reached by email at palphen@alphensantos.com.

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MISSION STATEMENT

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

MENTORING STATEMENT

To promote the improvement of the practice of real estate law, the mentoring of fellow practitioners is the continuing professional responsibility of all REBA members. The officers, directors and committee members are available to respond to membership inquires relative to the Association Title Standards, Practice Standards, Ethical Standards and Forms with the understanding that advice to Associations members is not, of course, a legal option.

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MASSACHUSETTS LAWYERS WEEKLY

(ISSN 01967509), 10 Milk St., 10th floor, Boston, MA 02108
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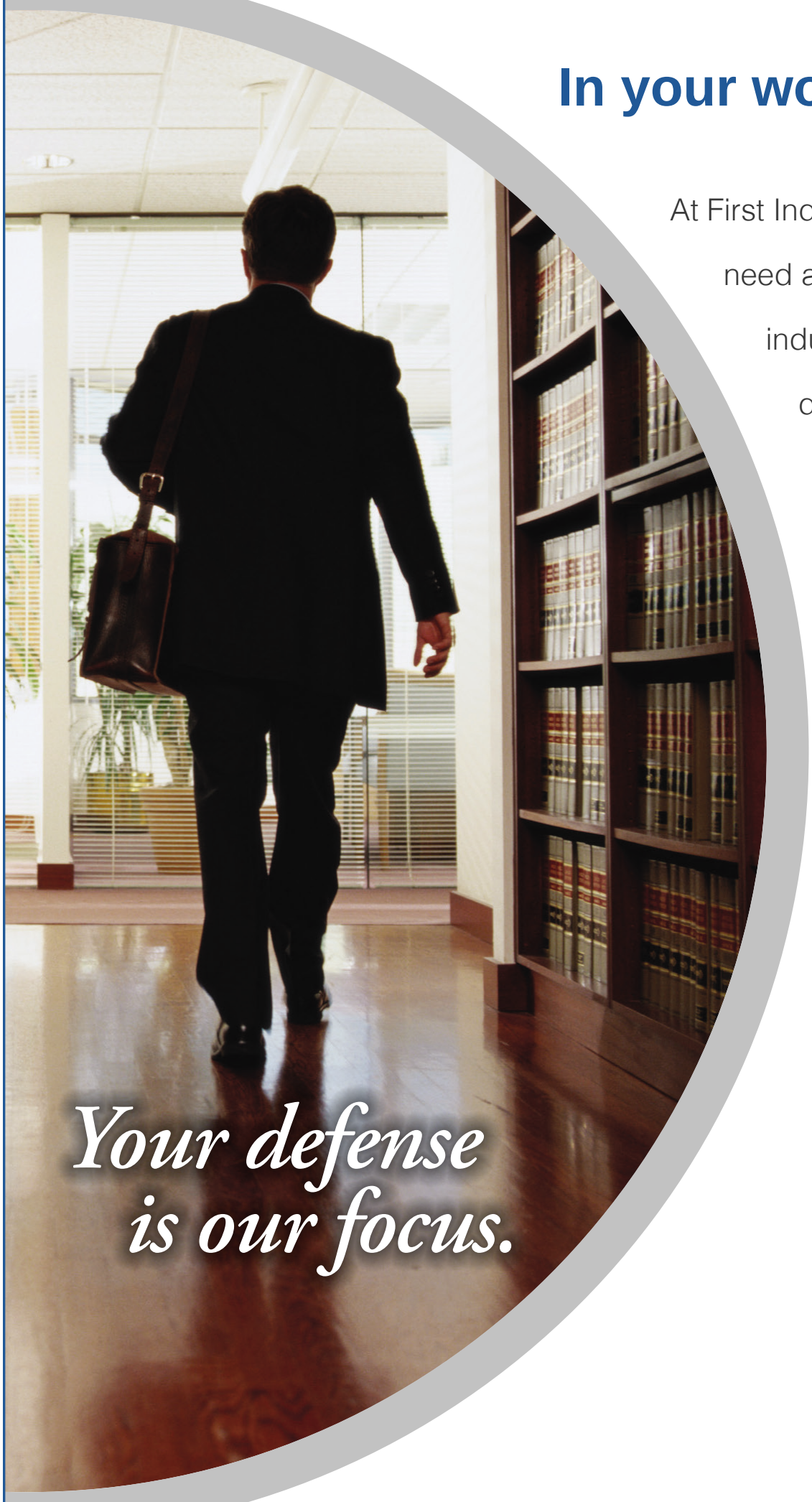

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See Video

Remembering Haskell Shapiro

BY DAVID D. MERRILL

In 1980, as a brand new attorney searching titles, a title issue cropped up that threatened an imminent closing. Although my firm was an agent only for Pioneer, I was instructed to call Lawyers Title. For that emergency, the only solution was Haskell Shapiro. It seemed like a long shot to me, but Haskell took the call and provided the answer.

A few years later, Haskell plucked me from the obscurity of the Salem registry, and I got a graduate course in conveyancing, literally at the right hand of the preeminent expert in the field. Haskell had not the slightest faith in knowledge I might have gleaned from Property 101 and a few years carting around dusty books. I had measure up to his standards, and that called for what amounted to a personal apprenticeship.

At that time — before computers, voice mail, email, dictation machines or fax machines — Haskell held court at a round table where a pair of secretaries relayed each other taking shorthand, interrupted by an endless series of telephone calls. Haskell's first lesson was that accessibility was paramount. Agents called when they needed help, and if they got it when they needed it, they called back.

For months sitting at that table, I listened to Haskell tackle problem after problem. It did not occur to me until much later that what Haskell was really teaching was not merely problem-solving, but the subtle art of risk assessment. Haskell was renowned for his encyclopedic knowledge of conveyancing, but he was much more than an "answer man." He had a particular genius for applying that vast store of knowledge to real-life situations, and making informed judgment calls.

Beyond his knowledge of the law, Haskell had a vast knowledge of his professional peers. A fact pattern might be important, but the identity of the players was a key element of the discussion. He knew whose work was trustworthy (whose work product got the benefit of the doubt) and he knew whose work was open to question. There were rules. Some were absolute, some bendable, and some broken outright; the trick was to know which were which. The key to the balancing act was to help agents close transactions without exposing the company to a claim.

Beyond book knowledge and an instinct for risk management, Haskell simply relished interacting with people. That round table was his stage, and all of us — agents, secretaries, employees, even hapless young lawyers like me — were the audience to a presentation of performance art that ran every day from 6 a.m. until Haskell laid down his pipe and headed for his car in the afternoon. The letters he dictated, from the salutation to the inscription of his signature (all using his venerable Parker fountain pen) were artifacts. The phone calls — often on speaker phone so everyone could hear — were scenes from a play. There were moments of high drama.

Haskell never lost the suspicion that my decisions might sink the company, and he let me know it. You could not work for Haskell and not be on your toes. At a moment's notice, Haskell might call a "risk meeting," and you would find yourself hashing out a particular underwriting situation, or facing up to a challenge of a decision he took issue with. Discussions might get intense, but if you could marshal your facts and defend your position, you could escape with most of your sanity and your self-respect.

For Haskell, agents and customers who called in were not supplicants seeking short answers cast in cement. They were professional colleagues expecting a reasoned discussion of the facts and circumstances of the particular title conundrum of the day. Haskell treated calls, however insignificant, with professionalism; but more than that, with personal warmth, because many callers were friends and acquaintances of long standing (even those he knew them only by telephone), and he knew that even first-time callers were future friends and acquaintances.

Haskell's life was a long journey, from selling Studebakers on his father's lot, to a law school career accelerated by the Korean War, to a stint in the Army in Germany, to journeys across Massachusetts searching titles for the expanding Massachusetts highway system, to corporate life among the title insurers. After a decade with Lawyers Title, he was the obvious choice to

See SHAPIRO, page 9

WHAT IS THERE TO SAY ABOUT HASKELL SHAPIRO? HERE ARE SOME RECOLLECTIONS:

· Bow ties — always hand-tied.

· Smoking his pipe, well after it was discouraged in the office — a special mix (maybe Ehrlich's).

· Maple syrup at years' end (though some customers preferred booze).

· That distinctive signature, inscribed with the Parker fountain pen he got at his bar mitzvah.

· His 6 a.m. arrival at the office. By the time I straggled in, he had been working for three hours. I was self-conscious about it, until it occurred to me that he liked that we had 12+ hour telephone coverage. Haskell prized accessibility. He had a coterie of callers at the crack of dawn, and I took the late calls. One CA attorney said if he wanted to talk to Haskell, he would have to call him before going to bed.

· His encyclopedic knowledge of conveyancing law and practice. Giving an answer was so often just the beginning of the conversation. The starting answer might be "no," but that was often the beginning of a conversation to get somehow to "yes."

· Master of the "mute" button. He was capable of listening with one ear, with the phone on mute, while he gave orders to his secretaries, or to me. He would give us background: who the callers were; where they came from; who their parents were; who was married to (or divorced from) whom; who they worked for; where they used to work; why they no longer worked there; what they did in their spare time ... He loved an audience. And he loved talking.

· A challenging boss. He had high standards and liked to be in control. You could argue with him, but heaven help you if you were not prepared. Debate could be a blood sport.

· His quirks. He never really accepted Title Standard 10, no matter what those venerable practitioners Sawyer & Gray had to say. He was convinced that Section 80C of chapter 60 was unconstitutional; how could sitting on the title for 20 years with no actual notice square with the 5th Amendment? He was suspicious that general estate claims could be limited to one year from date of death, not from the filing of the bond. We had a standing bet of 25 cents on underwriting questions, and that last question was the only quarter I ever won from him.

· His resistance of technology. Dictating to a tape machine was not as much fun as talking to Sophia, or Lorraine, or Lynda.

· His kindness and generosity. As irresistibly forceful as his personality was, the Haskell I experienced in daily contact was a thoroughly human and humane man. And I know that he gave generously to charity.

When I heard of his passing, the first memory that bubbled up was of a day in 1983, not long after he had inexplicably hired me. It was one of those indeterminate holidays, like Veterans Day or Columbus Day, and my parental schedule required me to drag my daughter to the office. I brought enough crayons and My Little Ponies and toy trucks to equip a small daycare center, and did my best to pound into a high-spirited 4-year-old that she had to amuse herself and not make noise. She was doing pretty well, until a head started to rise, like a moon, in the corridor outside my office. It was Haskell, tongue out and fingers in his ears, throwing discipline and decorum out the window. The next day, she wanted to come back and "play with Mr. Shapiro."

Thirty years later, that's something I wish for, too.

These are personal reminiscences and reflections on title insurance legend Haskell Shapiro offered by David Merrill at last November's meeting of the Abstract Club.

Ruling takes aim at zoning board waivers of local bylaws under 40B

BY THEODORE C. REGNANTE

TED REGNANTE

In the recent Appeals Court decision *Reynolds v. Zoning Board of Appeals of Stow* (88 Mass. App. Ct. 339, Sept. 15, 2015) the court in a 40B abutters appeal reversed the trial court and determined that where elevated levels of nitrogen would reach an abutter's private well from the developer's septic system, the zoning board's waiver of local regulations was unreasonable, notwithstanding the fact that the septic system was designed in conformity with state standards and nitrogen levels did not exceed such standards.

The Appeals Court concluded that the abutter had identified an important local health issue, i.e., maintaining clear groundwater servicing local private wells that is not adequately protected by compliance with applicable state standards. The court stated that in those circumstances, it is unreasonable to conclude that the local need for affordable housing outweighs the health concerns of abutters, and therefore, the board's waiver of its bylaws limiting the flow into the waste disposal system within a local water resource protection district was unreasonable. It should be noted that the area was not within a "Nitrogen-Sensitive Area" which would have been granted greater protection under state regulation.

The case highlights the difficulty of permitting affordable housing projects utilizing private septic systems where the project locus or abutting properties rely on private wells rather than a public water supply.

Does this decision contradict long-standing standards of review of comprehensive permits by taking away a local board's discretion to override local zoning bylaws?

If this case is not reversed or qualified on further appellate review, which is pending, local boards will have precedent to deny local waivers on comprehensive permit projects and abutters will have ammunition to attack the granting of local waivers. Compliance with state standards henceforth will only be the beginning of the board's and the court's inquiry. Without necessary waivers of local zoning and regulation, it will be virtually impossible to design most 40B projects.

The case highlights the difficulty of permitting affordable housing projects utilizing private septic systems where the project locus or abutting properties rely on private wells rather than a public water supply.

It should be noted that the Appeals Court remanded the case for an entry of judgment revoking the comprehensive permit. By doing so, has the Appeals Court improperly substituted its judgment for that of the board in granting the necessary waivers and has the established standard of review of a comprehensive permit been challenged?

In an equally confusing aspect of the case on standing, the court ruled that the plaintiff did not lack standing, despite the fact that the judge ultimately found that elevated nitrogen would not reach the plaintiff's well. The court indicated that such a finding goes to the success on the merits and not the abutter's ability to challenge the acts of the board.

The court stated that when a factual inquiry focuses on standing, a plaintiff is not required to prove by a preponderance of the evidence that his or her claim of particularized or specific injuries is true; rather, the plaintiff must put forth credible evidence to substantiate his/her allegation. Standing is essentially a question of fact for the trial judge. Should not the trial court's finding that the plaintiff's evidence on particularized harm was not credible mandate a conclusion that the plaintiff lacks standing?

Again, unless reversed or qualified on further appellate review, the case will make it more challenging to attack standing in the early stages of a case and has broad implications not only in 40B, but in 40A appeals as well.

Unless reversed or qualified on further appellate review, the case will make it more challenging to attack standing in the early stages of a case and has broad implications not only in 40B, but in 40A appeals as well.

In a footnote (No. 8) to the case, the Appeals Court noted that even though a project is outside of Conservation Commission jurisdiction, a local ZBA could require compliance with DEP regulations and standards governing stormwater management, particularly where a board is waiving local, more restrictive components of its bylaw. This is another area where practitioners have previously argued that compliance with state stormwater regulation is not required when the project is outside of conservation jurisdiction. This footnote, although not binding, will surely be cited by local boards and abutters in the future.

A request for further appellate review has been filed with the SJC (FAR 23812) by the developer and letters in support of such review have been submitted by DHCD, CHAPA, MassHousing and Mass Development. It remains to be seen whether the SJC will take this case for further review in this highly contentious and litigated area.

Ted Regnante is the founding partner and senior counsel of Regnante, Sterio & Osborne in Wakefield. Ted concentrates his practice in land use and permitting, with a particular emphasis in Chapter 40B permitting and litigation. He has represented developers in numerous cases before local ZBAs and the trial and appellate courts, and was lead developer's counsel in the SJC's Amesbury case, which defined the proper role of local boards vis-á-vis the subsidizing agencies and restricted the imposition of certain conditions as ultra vires to local boards. Ted is a c. 40B commentator for Land Law. He can be reached at tregnante@regnante.com.

Lease language and lease audits: working together to fight hidden rents

BY RICK BURKE

RICK BURKE

The lease was negotiated and signed a year ago, the billings from the landlord are coming in and you realize that what was budgeted for rent and additional rent is much lower than the actual billed amount. It begs the question: Why? Most likely, the answer is in the additional rent components, such as common area maintenance (CAM), real estate taxes and insurance. Over the years, these expenses have been described by many as the "hidden rent."

There are many factors contributing to the overbilling of additional rent, which range from an innocent mistake in the calculation of the tenant's statements to a more aggressive approach by the landlord of creating a profit center from a pass-through-cost. One common reason for increases in expenses from additional rent is a poorly worded or vague lease language that does not offer the tenant adequate protection against these overcharges.

A simple sentence in the additional rent clause such as "CAM or Operating Expenses billed to the tenant shall only include Actual Expenses Incurred for the Period without profit unless provided for in the lease" can significantly help the tenant in his position to disallow certain overcharges. In addition, most leases offer very little in the way of a penalty for a landlord aggressively overbilling a tenant.

Although the lease language dictates what a tenant is responsible for paying, it is the leverage that the tenant has in the negotiation that dictates the lease language. Nevertheless, no matter what shape the deal takes, lease language alone will not protect the tenant. Along with specific lease language outlining the tenant's additional rent responsibility, every tenant should incorporate a review process of its CAM or operating expense billings to insure that the lease language is being adhered to correctly.

The tenant's review of a landlord's billed expenses prior to payment is called the "desk top review," and can achieve a significant savings or cost avoidance for a tenant. The desk top review is designed to catch the overcharges before the tenant pays them. This is important, especially for tenants with smaller square footages, because it becomes much more difficult to collect the overcharges from the landlord once they have been paid.

Another form of reviewing the CAM or operating expense statements is the "lease audit," which is mostly performed after the tenant has paid the overcharges, and is generally much deeper in scope than the Desk Top Review. Lease audits are usually conducted by third parties that specialize in lease auditing. Again, like the desk top reviews, lease audits can provide significant dollar savings for the tenants.

It is important to include lease language that gives the tenant a right to request documentation and audit expenses billed by landlord. Basic lease language such as "Landlord shall submit an invoice for Operating Expenses no later than 120 days from the last day of the calendar year … along with invoices and source documentation to support such billed expenses," will help the tenant in his request for supporting documentation at the time of the desk top review.

Even if the lease is silent with regards to audit rights, the tenant is still considered to have those rights; however, every lease should have specific language to protect the rights to audit, such as, "Landlord shall keep as required by the Internal Revenue Service all completed and accurate books and records with respect to all Operating Cost and Tenant shall have the right at any time with 30 days' notice to Landlord to audit such record."

Many leases include a right to audit with constraints that are added by the landlord. These often include a time limit: "Landlord must be notified of tenant's desire to challenge expenses within 30 days of receipt of statement or expenses are Binding and Conclusive."

They may also include the type of entity that is permitted to perform the audit with language such as "must be reviewed by a CPA" or clauses like "No Contingency based audits." The object of these additional constraints is to make it more difficult, more costly for a tenant to review its billed additional rent expenses. The following a few typical areas where tenants may see overcharges:

TENANT'S PRO-RATA SHARE

The first item to review is the basic calculation of the tenant's pro rata share; that is, the percentage of expenses shared by the tenant for expenses incurred for the shopping center or office building. In most leases, the pro-rata share is calculated as a fraction of the tenant's square footage divided by the total leasable square footage of the shopping center or the building.

Be aware that your lease may state leased or occupied square footage vs. leasable square footage. If so, the reviewer must now verify all vacancies and tenant's move-in and out dates because only the leased tenants will share in the tenant's allocation of expenses. A tenant should never agree to Gross Leased Occupied Area (GLOA) or Gross Rented Area square footage as its denominator when negotiating a lease. It should always be based on Gross Leasable Area (GLA). Verifying the shopping center or office building's square footage (denominator) is always more difficult. A tenant roster or rent roll is needed to confirm total square footage. The tenant's demised square footage (numerator) is easy to verify and is usually stated in the lease.

NON-CAM EXPENSES

Many expenses are included or excluded based on the lease language. A clear concise list of what is excluded will certainly help both the tenant and landlord going forward. Some of the more common exclusions are related to the structure, roof, capital expenses, initial construction of the project or shopping center, specific or other tenant expenses, and landlord overhead cost. In addition, if the lease uses the wording, "expenses for operating, managing and repairing the common area" instead of "the shopping center," certain expenses related to areas other than the common area may be disallowed.

MANAGEMENT FEES

A common overcharge to the office tenants is the management fee. Most management fees, unlike administrative cost, are calculated based on 2 to 5 percent of gross revenue of the building, depending on where it is located. The first step a tenant should take when reviewing management fees is to refer to the lease to verify whether he is required to pay it. Not every lease requires the tenant to do so, and the language regarding management fees may be silent. In this case, the tenant is not responsible for such a fee; however, when crafting lease language, it is very important to be clear whether a management fee is included or not, the method of its calculation, and if it is derived from the entire project or just a single building. In addition, management fees can be calculated on a percentage of gross revenue or net revenue. Net revenue is gross revenue less the pass-through expenses.

In summary, there are many types of tenant overcharges that we haven't discussed, such as overcharges that range from a very simple math error to the more complex and creative expense allocations. It is important that those responsible for drafting the lease language be aware of those hidden costs after the lease is signed. Lease administrators and auditors traditionally are in reactive mode, attempting to stop the monetary bleeding after the lease is signed, but they need to be more proactive with more involvement with those drafting the leases. The bottom line is that well-crafted lease language, combined with a strong expense review and audit process, will protect the tenant from not falling victim to the hidden rent.

Rick Burke is founder and president of Lease Administration Solutions LLC, which specializes in all forms of lease auditing, lease administration, lease abstracting, and lease administrative software and training. Rick can be reached at RBurke@LeaseAdminSolutions.com.

REBA WOMEN'S REAL ESTATE NETWORKING GROUP TO MEET ON MARCH 10

The Women's Networking Group will hold a reception from 5:30 to 7:30 p.m. on Thursday, March 10, at the Women's Lunch Place, 67 Newbury St., in Boston's Back Bay.

Executive Director Elizabeth Keeley will be a special guest at the meet-and-greet reception, which is open to all REBA members. Feel free to also bring along other lawyers and real estate professionals (e.g. real estate brokers, property managers, bank and loan officers, mortgage brokers, appraisers, architects, engineers, landscape architects, designers, etc.) who may enjoy meeting other women in our professional community and becoming a part of our growing network. Light refreshments and beer/wine will be served.

The group permits women members to come together to network, collaborate and build professional and personal relationships with one another, as well as non-lawyer professional women. The Women's Real Estate Networking Group includes women at every level of professional experience and every practice concentration, sharing a single goal: to network and support each other's personal and professional growth.

To attend this reception or to learn more about the group, contact Nicole Cunningham at Cunningham@reba.net.

REBA's Women's Networking Group of Real Estate Professionals hosted several meetings in the last few months of 2015, including gatherings in Newton Center sponsored by Rockland Trust Company and in Boston's financial district sponsored by Wellesley Bank.

Established in 2013 by Michelle Simons, the group hosts informal gatherings at which members can came together to network, collaborate, and build professional and personal relationships with one another as well as non-lawyer professional women. Women Lawyers at REBA includes women at every level of professional experience and practice concentration, sharing a single goal: to network and support each other's personal and professional growth. To join the group, contact Nicole Cunningham at Cunningham@reba.net.

The Women's Networking Group recently held a reception at the Union Street Restaurant in Newton. From left: Guest speaker Alicia Adamson of United Way, REBA Past President and current Women's Group Co-chair Michelle T. Simons, and Luba Levin, vice president for event sponsor Rockland Trust

CFPB rulemakers change the game for non-traditional/private-party lending

BY RUTH A. DILLINGHAM

RUTH DILLINGHAM

In this article, I will address the impact of the Mortgage Loan Originator and Qualification Rule, which was released by the Consumer Financial Protection Bureau and became effective Jan. 1.

Prior to 2008, there were no regulations regarding the making of mortgage loans between individuals. Banks, and eventually non-bank mortgage lenders, were regulated at the state and federal level, but if Aunt Alice wanted to lend Cousin Cathy $100,000 to buy a house, there were no rules to follow; Alice could charge whatever interest rate or fees she wanted.

With the 2008 passage of the Secure and Fair Enforcement for Mortgage Licensing (SAFE) Act (at the federal level, PL 110-289 Title V), the landscape changed, and each state was required to pass a law regulating who could act as a loan originator (work with the borrower, negotiate the loan terms, etc.).

Essentially, the SAFE Act-compliant state statutes required everyone to become a licensed (mortgage company employee) or registered (bank employee) loan originator. And loan originators had to take tests, pass background checks, pay annual fees, not be criminals, etc.

Consequently, every state passed such a law (Massachusetts amended Chapter 255E and 255F to conform). Most states allowed for flexibility in establishing which individuals would be exempt from coverage: Most exempted loans between categories of family members, loans by sellers of their own home or of an investment property, or loans by nonprofits or schools. Every state was different.

In 2011, the Department of Housing and Urban Development issued a final rule, 76 CFR 38464, which clarified that their interpretation of the SAFE Act was not as strict as some state laws and regulations, and in effect explained that HUD didn't care about aunts lending to nieces; they wanted only to regulate loans made in a commercial context where the loan originator habitually takes mortgage loan applications. That was comforting to private lenders, but few states changed their laws to reflect HUD's guidance.

Then CFPB issued a final rule in January 2013 pursuant to the Dodd-Frank Act revisions to the Truth in Lending Act (78 CFR 11279), effective Jan. 1, 2014, which addressed loan originator compensation and qualifications. Pursuant to these new revisions to the Truth in Lending Act and Regulation Z, (12 CFR 1026.36(a)), all covered mortgage loans had to be originated by a licensed loan originator, with minor exceptions (including employment at a state excepted nonprofit). They contained two exceptions from the requirements:

• The lender is a natural person or organization who made three or fewer loans in 12 months. To have this exception apply, the property financed had to be owned by the financing entity (seller) and not have been constructed by the seller. In addition, the loan had to fully amortize, have a fixed rate or be a five-plus year adjustable rate mortgage, and the seller-financer had to determine that the borrower had ability to repay.

• The lender is a natural person, estate or trust who made only one loan in 12 months. For this exception to apply, the property financed had to be owned by the financing entity (seller) and not have been constructed by the seller. In addition, the loan could not have a negative amortization feature and have a fixed rate, or be a five-plus year ARM.

With that, all the state statute exceptions have been overruled by federal rulemaking. The business partners who substantially renovate and sell a triple-decker while taking back the financing, or the woman who lends to her granddaughter to buy a house the grandmother didn't own, risk violating the Truth in Lending Act.

A violation of G.L.c. 255E and 255F can result in enforcement by a state regulator, such as the issuance of cease and desist orders or civil penalties; however, the Final Rule from HUD states, "Neither the SAFE Act nor this Rule (MLO licensing) provides that a mortgage loan originator's failure to register as required affects the validity or enforceability of any mortgage loan contract…".

Under the Truth in Lending Act and Regulation Z, as well as the Dodd-Frank Act, there is a three-year statute of limitations, during which the borrower can sue for up to three years of finance charges and fees, as well as attorneys' fees. There statute of limitations is unlimited in the event that the borrower uses the violation as a defense to foreclosure. The civil penalties begin at $5,000 per day for failure to follow the rule, $25,000 per day for gross negligence, and up to $1 million per day for intentional violations.

Attorneys representing those types of lenders should sharpen their understanding of state and federal laws and regulations on this topic to avoid misleading clients into a false sense of security.

A former president of the association, Ruth Dillingham is vice president/special counsel for First American Title Insurance Company. She is also a past president of the Massachusetts Mortgage Bankers Association. This article is reprinted with the permission of First American. Ruth can be contacted by email at rdillingham@firstam.com.

The integrated mortgage disclosure rule – the first 100 days

BY STEVEN J. KELLEM

STEVE KELLEM

When you expect the worst of an event, it's hard to be disappointed when the moment finally arrives: the distant cousin's wedding 200 miles away that you can't believe you were invited to; the tropical storm moving up the coast during your Vineyard vacation week in August; the blind date arranged by your elderly aunt whom you can't disappoint because of the big gift last Christmas. You experience utter dread as these events approach, yet somehow, you dance the night away at the wedding, the storm veers west and misses the island, and your date turns out to be both attractive and fun.

And so came TRID.

The TILA-RESPA Integrated Disclosure Rule, affectionately called "TRID," arrived in the second homes many of us call our workplaces on Oct. 3, 2015. Adopted by the Consumer Finance Protection Bureau in response to what few of us considered to be an issue in the industry, TRID is now the new reality in conveyancing.

TRID has changed the playing field, perhaps like no change in the industry since the enactment of RESPA. Many attorneys who dabbled in conveyancing have abandoned this area of law rather than face the myriad of complexities and steep learning curve. Lenders, who bear the risk of massive penalties for missteps in compliance, have shortened their closing attorney lists to include only their most trusted lawyer partners. And for those among us who pay the rent and college tuitions by helping consumers into their homes, we have had to learn and adapt.

First came the countless online seminars; second, the need to feign mastery of the massive changes well enough to speak authoritatively to our most important referral sources: the real estate brokers and loan officers, many of whom would rather have a root canal than deal with this massive change in the way of doing business. Third on the learning curve was purchasing the latest and greatest conveyancing software, which must now integrate with the lender's, prepare disclosures that few of us fully understood, and remain user-friendly enough that our paralegals will not submit their notices of resignation.

For those reading this who are not conveyancers, here's a quick summary of how TRID rocked the traditional closing landscape: Under TRID, a mortgage loan-financed, residential real estate transaction closing cannot take place until three new things have happened in the process. These things are in addition to and after the usual chaos of the mortgage commitment, the approval of conditions and the "clear to close."

First, a document called the Closing Disclosure ("CD") must be provided to the borrower. The CD replaces the HUD-1 Settlement Statement, and contains among other things the terms of the loan transaction and a detailed itemization of funds needed to close. The major change in practice is the lender being responsible for preparation and provision of closing numbers rather than the closing attorney.

Second, the borrower must acknowledge receipt of the CD. This sounds simple, but there are varying methods for both delivery and acknowledgement of receipt of the CD that push the requirement toward the complex. Some lenders employ the use of the internet and email, so satisfaction of the requirement can happen quickly. Others, however, cognizant of the fact that the entire world is not online and perhaps fearful of the massive potentials for penalties TRID imposes for non-compliance, use the good old U.S. postal system. If the CD is mailed, a lender may conclusively presume receipt after three business days have elapsed from mailing.

Lastly, three business days must lapse between acknowledgement of receipt of the CD and the closing. One can only imagine the effect of the TRID rules on scheduling of movers, time-off from work or the seller's purchase of replacement housing. In an industry used to the sanctity of the closing date, much adjustment has been needed. Real estate professionals must now prepare and provide for waiting periods of two to three business days after the loan is fully approved. This is a long way from telling the parties waiting in the conference room with their cars in the parking lot and their movers ready to unload that the loan just cleared and you will have the closing package to sign within the hour.

So what have we learned, 100 days or so in? One, conveyancers work well together. When TRID was proposed, submitted for comment, amended, approved, scheduled for implementation, delayed and finally implemented as the new reality, we wondered how the inevitable resultant delays in closings would be handled between clients with competing interests and concerns.

From the standpoint of the seller, the conveyancing bar needed to foster adjustment of long-held expectations. A delay in closing must now be anticipated so it would not lead to obstinance and demands for the retention of the buyer's deposit. It is well-established in the commonwealth that an executed offer to purchase real estate can be enforced as a binding contract. It is equally well-established that years of industry custom often leave conveyancers on the sidelines during the offer process.

Thus, the first critical task was to alter that custom so that a TRID related closing delay did not result in automatic contractual default. What was the best way to accomplish that? Provide our industry partners with the education, knowledge and tools so that the delay issue is addressed in the offer rather than at the time of purchase and sale agreement, when many contractual parameters have already been set in stone.

Many of us have been on the road leading seminars at our realtor offices and for our loan officers emphasizing the absolute necessity of including TRID provisions in the offer. Many of us have added materials to our websites dedicated to TRID education for buyers and seller. And we have adopted and distributed specific forms for ready use of our real estate partners.

Acting proactively, the Real Estate Bar Association's Residential Conveyancing Committee circulated a "TRID Rider to Offer and Purchase and Sale Agreement," which has been widely distributed to the real estate community for inclusion at the time of offer. The Massachusetts Association of Realtors and the Greater Boston Real Estate Board have circulated similar forms to its members. And so, we have worked together to educate our buyer and seller clients to expect the bad blind date.

Few conflicts over closing delays have been reported. We have taught our clients that the closing date is no longer set in stone. The riders that we use in our purchase agreements and provisions we have adopted for use in the offer and purchase and sale agreement have set between a seven and 10-day delay in closing. That way, if TRID forces re-disclosure of closing numbers, or a buyer has not acknowledged receipt of the closing disclosure three business days prior to the contractually agreed closing date, we are not being asked to send default letters. If we expect the unexpected, litigation inducing stress is minimized.

In preparation for this article, I canvassed the conveyancing bar for reports of trouble and disaster. Happily, feedback has been limited to a tad of bumps and a wad of confusion. The bumps relate to consumers not understanding the CD sent to them without the guiding hand of the conveyancer. Few enough attorneys understand the way closing numbers were historically presented in the HUD-1 Settlement Statement. Arguably, the CD expands the muddle into a series of disconnected columns and backwards math. Effectively, TRID shifts the important task of explaining closing numbers from experienced counsel and his or her paralegal to the mortgage loan officer or lender's employee. Confusion abounds. Lenders differ significantly in how closing credits are shown, in whether the CD must await a "clear to close" before being sent and in use of technology to expedite the process. May we provide the real estate broker with copies of the CDs used in a closing when part of the justification for enactment of TRID was preservation of privacy?

So here we are, 100 days in. We have looked the dreaded wedding, the horrific hurricane and the bad blind date called TRID in the eye. Although we may not have won, we have survived. Perhaps fewer of us remain in the real estate conveyancing practice, but for those of us who do, and must — because like Richard Gere in "An Officer and a Gentleman," "we have no other place to go" — it is a marriage, for better and worse. 1,000 days in, perhaps it will be a different story …

Steve Kellem, a founding partner of Kellem & Kellem LLC, has practiced real estate law in Hull for 30 years, representing buyers, sellers and lenders in residential and commercial real estate transactions. He is a member of the association's residential conveyancing committee and chairs the group's Plymouth County regional affiliate. Steve can be reached at skellem@kellemandkellem.com.

Legislation would extend zoning 'freeze' protection for certain permits

MORE TIME NEEDED TO SECURE FINANCING FOR CONSTRUCTION

BY BENJAMIN FIERRO III

BEN FIERRO

One of the lingering effects of the credit crisis of 2008 is the excessive caution — at least in opinion of some in the real estate development community — being exercised by construction lenders. These lenders insist that a developer have all necessary permits in hand before committing financing to a new real estate project.

The problem is that this delays the start of construction, and therefore can substantially reduce the protection the project enjoys from subsequent changes in local zoning after the issuance of a building permit or special permit.

To address this issue, the Home Builders and Remodelers Association of Massachusetts has sponsored House Bill No. 1874, An Act Extending Certain Permits. H. 1874 would amend the Zoning Act to extend the period of time an applicant has to begin construction following the issuance of a building permit or special permit to be protected from subsequent changes in local zoning from six to 12 months.

The Zoning Act (G.L.c. 40A, §9) provides that municipal zoning ordinances and bylaws may allow certain types of uses and improvements to land only upon the issuance of a special permit. Special permits are typically provided for uses or developments that may be appropriate in a particular district, but might have adverse effects on neighbors and abutters that make municipal control and oversight desirable. Special permits may also be used to enable a municipality to grant "density bonuses" as an incentive to encourage favored types of development or features in developments. Special permits of all sorts are increasingly required for any real estate project. A board of selectmen, city council, board of appeal or planning board all may serve as a special permit granting authority in a city or town (G.L.c. 40A, §1A).

The Zoning Act (G.L.c. 40A, §6, ¶2) also provides that if the use or construction of a structure pursuant to a building permit or a special permit is begun within a period of not more than six months after the issuance of the permit, the use or structure is protected from any subsequent changes in local zoning. In cases involving construction, however, the work must be continued through to completion as continuously and expeditiously as is reasonable.

In *Alexander v. Building Inspector of Provincetown*, 350 Mass. 370 (1966), the Supreme Judicial Court held that preliminary work such as demolition and site preparation did not constitute "construction." Actual construction of the foundation for the structure for which the permit was issued appears to be what's required. See *Murphy v. Bd. of Selectmen of Manchester*, 1 Mass App. Ct. 407 (1973).

As any real estate development attorney knows, even a modest residential project may require not only a special permit, but also permits from other local bodies. After obtaining a special permit, a developer could spend months seeking final approvals from the conservation commission, the planning board, the board of health, the board of selectmen or city council and, in some communities, the design review board. The inability of a developer to begin construction within six months after the issuance of a special permit because he hasn't completed the obstacle course of municipal review can give opponents to the development the opportunity to propose an amendment to the zoning bylaw or an ordinance that would kill the project.

By extending the period of time to

See ZONING, page 11

Déjà vu all over again: The 2015 'Housing Report Card'

BY ROBERT M. RUZZO

BOB RUZZO

Readers may already be aware of the fondness this column previously has expressed for one Lawrence Peter Berra. Many also no doubt mourned along with your correspondent this past autumn at news of the passing of that noted purveyor of wisdom. Referred to in this space as the ancient Bronx philosopher, he was better known to his closest adherents as "Yogi." Perhaps "the Yogi" would be more fitting, given his splendid way of providing deep insights via simple utterances.

There is no way to know if the Yogi was a housing advocate; however, if the Yogi looked down from above (undoubtedly the only Yankee to enjoy such a vantage point) and tuned in to the release of the 2015 Housing Report Card presented by the Dukakis Center for Urban and Regional Policy at Northeastern University, he would have recognized it immediately for what it was: déjà vu all over again.

Even while the Report Card celebrates the good news — the number of new building permits for housing issued in the five-county Greater Boston Region is at its highest level since 2005 — reality intercedes.

And bites.

In this case, the harsh reality is that the estimated total of building permits issued for 2015 (approximately 12,800) represents just about half of the 25,000 or so permits that were issued in Greater Boston in 1986.

Looking back at its first bit of published research on housing, the Dukakis Center noted that the observations made back in 2000 "are just as valid today in 2015."

The Report Card then poses the perennial question:

Why has housing supply not kept up with housing demand?

The unsettling answer is that we have failed to meet housing production targets "because of the extreme barriers to new construction, especially in the form of severely restrictive zoning at the local level across much of Massachusetts."

While that much of the song remains the same, this year's Housing Report Card is notable for going further by asking: "What is to be done?" (Not too many people quote Lenin these days, except perhaps in academia). In addition, the Report Card unequivocally takes on the high cost of housing production and comes down foursquare in favor of advocating for larger housing developments to achieve economies of scale.

The Report Card proposes eight steps to be taken and raises one truly surprising suggestion. Since your correspondent believes that eight is more than enough, the focus here will be on only three of these steps, but first we need to discuss that truly surprising suggestion.

On page 62 (honest), the Housing Report Card suggests reforming the methodology behind calculating the number of units to be placed on the Subsidized Housing Inventory ("SHI"). The SHI measures the progress of communities towards attaining (and maintaining) the state's goal of having 10 percent of all housing units be affordable. Rightly or wrongly, many municipalities have made achieving the 10-percent standard a "Holy Grail" of sorts.

Rather than counting all (provided that 25 percent of the units are set aside as affordable) of the units in a (rental) project towards this goal, the Report Card suggests requiring an even greater percentage of affordability ("one might consider a minimum of 35 or even 50 percent") if a municipality wishes to count market rate units in a rental development toward meeting the Chapter 40B numerical standard.

Quite a bold proposal. It makes this column's recent suggestion to re-examine the General Land Area Minimum standard (hardly the Holy Grail for communities, given its relative obscurity) seem downright timid by comparison.

And, if you listen closely enough, you can actually hear the screaming from the Massachusetts Municipal Association, at the prospect of not being able to count all the rental units; the Greater Boston Real Estate Board, at the prospect of dealing with a municipality that plays this particular card; and the abutters to any such project, at the prospect of the greater density that would be required to achieve economic feasibility. What fun.

Having somewhat eviscerated that particular suggestion, let's note that the Housing Report Card is an important piece of work, one worthy of serious attention.

Three of the recommended steps are particularly worthy of applause. These are the recommendations to: (1) encourage larger housing projects to take advantage of economies of scale; (2) encourage multifamily zoning at higher density; and (3) push for local zoning reform more forcefully.

That's a lot of "pushing and encouraging" to attempt, and it seems from here that at least three elements of any such effort are worthy of focus.

First, an aggressive and sustained public education campaign aimed at changing attitudes and behaviors is essential. It can be done. Think of where public attitudes about smoking indoors and drunk driving were in the 1980s. Then take a moment to reflect upon where public perceptions of gay marriage and decriminalization of marijuana were at the beginning of this millennium. The focus here needs to be on those truly hurt by an unabated increase in housing costs: our children, and ultimately, our commonwealth. That means us.

Second: more financial support for planning for housing at the local level and more rewards for municipalities that do so (provided these plans incorporate economically feasible affordable and workforce housing), both financially and in a programmatic sense. Beyond financial support, this initiative could, for example, also encompass formally stated criteria for asserting a "municipal planning defense" under 40B.

Third, we need to attract new actors or at least amplify the intensity of involvement by certain current actors. Yes, large employers of the commonwealth: That means you. Remember, if you want something done right, you've got to do it yourself. Nothing threatens our economic competitiveness as profoundly as escalating housing costs, and no one has more at stake in that game.

Ultimately, if we don't take hasty action to substantially boost our Housing Report Card scores, we will all be ruminating on another piece of the Yogi's wisdom:

"The future ain't what it used to be."

A frequent and welcome commentator on housing issues in REBA News, Bob Ruzzo is senior counsel at Holland & Knight LLP. He possesses a wealth of public, quasi-public and private sector experience in affordable housing, transportation, real estate, transit-oriented development, public private partnerships, land use planning and environmental impact analysis. Bob can be contacted at robertruzzo@hklaw.com.

Land Court Judge Gordon H. Piper, a former president of REBA, was recently honored by the Massachusetts Judges Conference with their 2015 Judicial Excellence Award at the group's annual meeting in Framingham. Judge Piper was nominated and chosen by his peers for his demonstrated commitment to judicial excellence, for his leadership qualities on and off the bench, for his unselfish work for the benefit of the legal system, his colleagues and society, and for maintaining the highest professional and ethical standards of the profession.

SCHOLARSHIP FUND

SCHOLARSHIP, CONTINUED FROM PAGE 1

force behind updating and bringing back into use the seminal book on Massachusetts title and conveyancing practice, editing the eighth and ninth editions of "Crocker's Notes on Common Forms."

With special expertise on railroad titles, Henry also contributed to MCLE's Real Estate Title Practice in Massachusetts. He is widely recognized as the "Dean of Titles," having contributed immeasurably to the field of real estate law and to the training and professional development of the bar. He has been instrumental in leading and shaping the Massachusetts community of real estate lawyers. His dedication to his clients, leadership in the bar and career-long commitment to the education and training of others exemplify the best of our profession's rich legal heritage.

A graduate of Harvard College and Harvard Law School, Henry began his service in the U.S Army Reserve as a private in 1955 and retired as a colonel in 1988.

A committee of close friends and colleagues have joined together to help establish the Henry H. Thayer Scholarship Fund. For more information about the scholarship or to make a contribution, contact REBA Executive Director Peter Wittenborg at Wittenborg@reba.net or Sal Ricciardone at MCLE at sricciardone@mcle.org.

'IBANEZ' A FAIR RULING

IBANEZ, CONTINUED FROM PAGE 1

foreclosed upon of their rights under existing law until the *Ibanez* cure bill becomes fully effective on Jan. 1, 2017.

The *Ibanez* cure bill, effective Dec. 31, 2015, strikes a fair and careful balance among the rights of all stakeholders. A similar bill had been passed by the House and Senate in 2014, but was not approved by former Gov. Patrick. Fortunately, the Legislature took up the task again last year, resulting in a Happy Thanksgiving indeed.

Co-chair of the association's title standards committee, Rich Serkey testified on Beacon Hill on behalf of the Ibanez legislation. He has become a media resource on foreclosure issues. Rich has also represented homeowners whose titles have been clouded by the SJC's 2011 Ibanez decision. He practices at Winokur, Serkey & Rosenberg, P.C. in Plymouth, and can be contacted at rserkey@wwsr.com.

The Registry of Deeds: a blueprint for the future

BY RICHARD P. HOWE JR.

DICK HOWE

Early in November, Gov. Charlie Baker and Lt. Gov. Karyn Polito visited Lowell to deliver a multimillion dollar check for local infrastructure improvements for the planned Lowell Judicial Center.

With a target completion date of 2018, the facility will house Superior, District, Probate & Family, Juvenile, and Housing Courts, as well as the Middlesex North Registry of Deeds. Despite its 246,000 square foot size, space inside the new building will be at a premium, which has forced me to contemplate how the registry of deeds will function in smaller quarters. Technology will help, but some business practices of the registry and of those who use it will also have to change.

Besides employee work areas, the biggest consumers of space at the registry are bookshelves, public research rooms and areas for real estate closings. Here at Middlesex North, documents and indexes from 1629 to the present have all been scanned and are available digitally at the registry and on our website. We stopped making record books in 2001 and took all existing books out of service in 2007. Consequently, we have made some progress towards downsizing, but there is still much to be done.

The Middlesex North website was designed as a searchable index with links to document images. As resources allowed, we added older images and indexes, but they have taken different forms and do not fit cleanly into the site. That makes some information difficult to find, especially for a novice user, and is especially true for our pre-computer-age grantor and grantee indexes. All have been scanned as "electronic books," which are available at the registry and online. On public computers at the registry, these electronic indexes work better than their paper equivalents; however, because of their digital size, they do not work as well on our website. The next-generation registry website must better integrate these indexes and all other electronic records. Doing so will maximize the utility of offsite, online research.

Scanning older record books was a particular challenge, which we have largely overcome. Back in 1999, we used a commercial service to scan documents from microfilm. The result was useful, but because the microfilm was created when the documents were first recorded, it did not capture any marginal references (a book and page reference to another document, written in the margin of the related document), added later to the record books. The absence of marginal references diminished the value of these digital document images.

To remedy the problem, we cut apart our record books in the early 2000s and scanned the loose pages. The quality of the resulting images was far superior to our microfilm scans, plus the new images contained all marginal references. Because of the number of images involved — Middlesex North scanned nearly 10 million — a few "bad images" continue to be discovered. Quickly fixing them requires record books to remain onsite, but compact, non-public storage occupies much less space than do bookshelves open to the public.

With all record books and indexes digitized and made available on an improved website, the need for public book storage and research space will be greatly diminished. As for real estate closings, despite the widespread use of electronic recording, many attorneys continue to schedule closings at the registry. Because closings are bunched up on Fridays or on the last day of the month and not evenly distributed from day to day, dedicated closing rooms are inefficient and would be hard to justify in an expensive new building. Without public closing rooms in the future judicial center, attorneys may have to do closings in their own conference rooms or at other sites outside the registry.

So what will be left of the registry's physical space? Even with electronic recording available, many lawyers and most members of the public still record documents in person. Processing incoming documents quickly and accurately is essential to the operation of the registry, especially when real estate volume increases, as it inevitably will.

In addition to walk-in recordings, the registry now faces a steady stream of members of the public hoping to navigate the world of land ownership on their own. Anyone involved in the courts can attest to the rising number of pro se litigants. The same situation exists at the registry of deeds. While our customer service section provides general information to walk-in customers, we should perhaps formalize this service, much as the Trial Court has done with its self-help and court service centers.

By modifying business practices to take full advantage of available technology, the registry of deeds of the future will be able to provide speedy and efficient customer service both virtually and in person, while reducing the physical space needed to house the office.

A frequent and welcome contributor to REBA News, Dick Howe is register for the Middlesex North District Registry of Deeds. He can be contacted at Richard.howe@sec.state.ma.us.

A word of caution about a persisting wire fraud scam

BY JENNIFER L. MARKOWSKI

JEN MARKOWSKI

The next time you get an email requesting a wire transfer, be sure to confirm the legitimacy of the request, either through a personal contact or by separate written authorization. A relatively sophisticated scheme continues to deceive closing attorneys into wiring closing funds to the wrong person.

The scam goes like this: Someone's email account is compromised. It could be the seller, buyer, broker or attorney's account. The hacker obtains information about an anticipated transaction, including the identities of the parties involved, their email addresses and the particulars of the closing. The hacker then creates and sends an email to the closing attorney from an email account that appears to be that of the seller or the seller's agent. The email address might be off by one letter, but the change is fairly undetectable absent close scrutiny. The content of the email mimics what a closing attorney would expect to see for instructions; however, the bank account to which the funds are to be directed has been changed.

The scam is a reminder of how important it is to take steps to secure your network and to confirm that who you are communicating with via email is in fact who you think it is. To combat this particular method of fraud, never accept wire instructions via email alone. Implement a policy that requires a second or third step to verify the source of the instructions. If you receive a request via email to wire funds, require personal contact with the individual by telephone. Be sure the phone number used is one that was procured through a reliable source other than email communication.

Alternatively, or in addition to verbal verification, require that all wire instructions be in writing and sent either by regular mail, as a pdf attachment to an email with the recipient's signature, or delivered in person. When instructions arrive via email, confirm that they match the written instructions.

In many instances, one of these extra steps has resulted in detection of this particular scam. Because it is difficult to detect that the email itself is fraudulent, it is important to have a check in place. It's a relatively simple and efficient way to avoid a potentially costly error.

In addition to implementing a practice of verifying wire instructions, proceed with caution when you receive an instruction or communication that appears out of the ordinary for the person from whom it is purportedly sent. It is a small community where people get to know one another. Trust and use that knowledge. If the style, method or timing of the communication appears unusual in any way, it is worth taking the time to verify its authenticity.

Being aware of this scam and taking the extra steps to detect it should ensure that proceeds are not misdirected. If, however, you believe you have been a victim of this scheme, contact your financial institution immediately and request that they do something to stop the transfer. If caught early enough, a lender sometimes has the ability to stop the transaction. Also, notify your insurance agent about the situation. If the wire cannot be stopped, there is potential for significant loss for which you may have insurance coverage, and if that's the case, your insurer will provide you with counsel to resolve the situation.

A partner at Peabody & Arnold LLP, Jen Markowski co-chairs the REBA Ethics Committee and is a frequent commentator on ethical and professional liability concerns for transactional lawyers. Jen can be contacted by email at jmarkowski@peabodyarnoldcom.

YOU'RE INVITED...

To Join REBA's PR COMMITTEE

Would you like to help spread the word about the Real Estate Bar Association?

Do you have a particular expertise, knowledge or special interest that makes you a go-to source on particular issues?

Do you enjoy writing blogs or short articles for REBA News?

Are you savvy with social media like Twitter and Linked In, and do you have insights on you'd like to share with REBA members?

If you answered yes to any of these questions, please join the Public Relations Committee of REBA. We won't take up much of your time – about 1-2 hours per month – and the time you spend will be invaluable to REBA.

INTERESTED?

Please contact any of the following PR Committee members to learn more and participate in our monthly teleconference meetings.

- Kim Bielan kbielan@meeb.com
- Paul Alphen palphen@alphensantos.com
- Julie Barry jbarry@princelobel.com
- Chris Plunkett clp@clplunkett.com
- David Moynihan dmoynihan@mclane.com

EACH DAY A TOUR DE FORCE

SHAPIRO, CONTINUED FROM PAGE 4

provide immediate credibility and success for Commonwealth Land Title when it decided to open its Boston office, and he capped off his tour of the title companies with a stint at First American. Along the way, he defined the job of title attorney and became the role model for the generation who followed him.

Haskell resisted technology. Dictating to a tape machine was not as much fun as talking to real people. We were the last office in Boston to get fax machines. Computers penetrated slowly. Although I know he eventually came around, I personally never got a single email from him.

Of course, given the decibel level of his voice and the acoustics of 50 Federal Street, I didn't really need those emails. There were few secrets in that office, and if you kept your ears open, you always knew in advance what excitement was brewing. Haskell's door was always open, and his voice carried; this was the soundtrack of our days. For Haskell, going to work was to take his place among friends and peers — the friends, new and old, who called on the phone and the friends around him in the office — and each day was its own tour de force.

David Merrill is member of the REBA's title standards committee and is vice president and senior underwriting counsel at Commonwealth Land Title insurance Company. He recently offered remarks on his many years of working with Haskell at a meeting of the Abstract Club. David's email address is David.Merrill@fnf.com.

Five viewpoints: The changing legal landscape for Mass. title insurance underwriters

BY JOEL A. STEIN

JOEL STEIN

Conveyancers and title insurance underwriters reviewing residential real estate foreclosures have faced a series of daunting challenges over the past six years, beginning with the decisions in *Ibanez* (2011) and *Eaton* (2012), and continuing through the more recent decisions in *Pinti*, *Paiva* and *Turra*.

Some welcome relief comes with the passage of Chapter 141 of the Acts of 2015, which provides that an affidavit under G.L.c. 244, §15 is conclusive evidence in favor of a purchaser for value unless there is a challenge within three years of the date of its recording. The effective date of c. 141 was Dec. 31, 2015, and the deadline for challenging a foreclosure is "three years from the date of recording of the Affidavit or one year from the effective date of the Statute, whichever is later."

I have invited four eminent title insurance underwriters who are also members of the REBA Title Insurance and National Affairs Committee to comment on the current state of Foreclosure Law: Gene Gurvits, co-chair of the Committee and Vice president and special counsel for First American Title Insurance Company; Mike Powers, title counsel to CATIC; Mike Gagnon, vice president and Massachusetts state counsel at Old Republic National Title Insurance Company; Rich Urban, Massachusetts state counsel for commonwealth/Chicago; and Melanie Kido, vice president, senior underwriting counsel and regional underwriting counsel for the Northeast region of Stewart Title Guaranty Company. They each agreed to respond to four pertinent questions.

Q. *One of the issues raised in* Paiva *and* Turra *is the failure to provide the town or tax collector with notice pursuant to G.L.c. 244, §15A. How do you suggest conveyancers deal with this question?*

Gene Gurvits: At this point, and until there is a final decree from the Appeals Court, we are reviewing the 15A compliance for foreclosures that pre-date this decision on a case-by-case basis. For the foreclosures that took place after the date of the decision, the agent must be certain that the notice was given within 30 days from the date of the entry (as the statute refers to the date of possession as a triggering event).

Rich Urban: The *Turra* case and the issue of whether compliance with G.L.c. 244, §15A impacts the exercise of a power of sale in a foreclosure is presently before the Massachusetts Appeals Court; *Paiva* is also on appeal. Our office awaits each decision. In the interim, conveyancers may be best served by contacting the foreclosing lender and securing evidence of compliance with §15A and sharing the response with their underwriter.

Melanie Kido: Obtain and review appropriate evidence to confirm proper notice has been provided. In the event of a question regarding sufficiency of notice, please forward the matter to our underwriting department for further review.

Q. *The issue under* Paiva *was that the notice of default was sent by the servicer not the lender. How should an attorney handle this issue? If he or she can review the notice of default and determine it was sent by the lender, is that sufficient?*

Gurvits: The agent must review the notice of default to determine compliance with the *Paiva/Pinti* decisions.

Urban: Our Company issued an underwriting memorandum with detailed requirements that address compliance with *Pinti*. If a proper notice of default was sent by the lender, this may be enough to satisfy a portion of our underwriting criteria. However, the additional requirements of our memorandum must also be satisfied.

Kido: It is imperative when reviewing any titles where title comes out of a foreclosure sale to a bona fide purchaser to verify that pre-foreclosure default notices were sent prior to July 17, 2015. Where pre-foreclosure default notices were sent by the foreclosing mortgagee on or after July 17, 2015, it is imperative to obtain and carefully review all pre-foreclosure default notices sent to verify strict compliance with the requirements of the recorded mortgage, including but not limited to, that the proper party sent the notice.

Mike Powers: At CATIC, the most we can say at this point relative to *Paiva* is that the case is under appeal and we will look at each title on a case by case basis. We believe *Paiva* was improperly decided. There is a Memorandum of Decision and Order, *Blue Mountain Homes, LLC v. Maria Bruno, et al.* (CA NO, 13-679) from Hampden County Superior Court, dated Nov. 20, 2014, wherein Judge Ford stated, "I am inclined to agree…that a violation of 15A would not by itself void the foreclosure sale.…It is clear to me that that the purpose of the statute is to ensure that water and sewer invoices are sent to the proper parties after a foreclosure has taken place so that such bills are promptly paid … Section 15A ... sets forth a post foreclosure requirement that appropriate notices be sent. That is not a prerequisite to a valid foreclosure sale, and in my view failure to send such notices does not invalidate an otherwise valid sale." Judge Ford also noted that the statute was enacted in 1993 by an act entitled an "Act relative to the prompt collection of water and sewer bills."

Q. *The* Pinti *case dealt with an error in the language in the default letter. There are two issues here as the decision only affects foreclosures for which the notice of default was sent after July 17, 2015. How should attorneys deal with the issue of non-applicability? How should lawyer-agents determine that the notice was not defective?*

Gurvits: The agent must review the notice for the applicability of the *Pinti* decision, review the default notice provisions of the mortgage, and then analyze the sufficiency of the notice under the terms of the mortgage. If necessary, the agent may need to obtain an affidavit from a knowledgeable source to ascertain the compliance with the provisions of the notice of default under the terms of the mortgage.

Urban: Our company underwriting memorandum deals with these issues as well. If *Pinti* is not applicable, than an affidavit of non-applicability should be secured.

Kido: When reviewing any titles coming out of a foreclosure sale to a bona fide purchaser, an agent must determine that pre-foreclosure default notices were sent prior to July 17, 2015. Where pre-foreclosure default notices were sent by the foreclosing mortgagee on or after July 17, 2015, it is imperative to obtain and carefully review all pre-foreclosure default notices sent to verify strict compliance with the terms of the recorded mortgage.

Q. Pinti *holds that the failure to provide the correct notice of default voids the foreclosure. Given that draconian result, if a lawyer cannot obtain proper evidentiary proof, do you see any alternatives?*

Gurvits: The only option is to wait three years until the attorney can conclusively rely on the c. 244, §15 affidavit as evidence that the foreclosure sale was done properly in all respects, including, of course, compliance with *Pinti/Paiva*).

Urban: If an agent cannot fully comply with our company underwriting memorandum, policies of title insurance with an exception and, if appropriate, affirmative insurance might be issued for an owner; the manner in which a loan policy can be issued must be discussed with a company underwriter. In the alternative, the company may respectfully decline to insure the transaction.

Kido: Note that Section 2(d) of the recently-enacted Chapter 141 of the Acts of 2015 provides for an exception for the filing of a challenge to the validity of the foreclosure action asserted by a party who continues to occupy the mortgaged premises as that party's principal place of residence, regardless of whether that challenge was raised prior to the deadline. Accordingly, these situations will be reviewed on a case by case basis by the underwriting department.

Powers: We believe that the affidavit language suggested in the *Pinti* opinion, as to either applicability or non-applicability, could easily be added to the post foreclosure Eaton Affidavit, or it could be framed in a separate affidavit. CATIC will ask that the notice of default be provided for review although we do not anticipate requiring the attachment of the notice to the affidavit. At this point in time, if the lawyer-agent cannot secure proper proof, we see workable alternative. And the idea of judicial relief seems highly impractical. Again, we will examine these foreclosures on a case-by-case basis. We will not insure any foreclosure if any mortgagor, or family member or associate of the mortgagor are in possession. If there are other parties in possession we will review that on a case-by-case basis. Summary process against squatters or tenants or written leases executed by desirable tenants can be useful to insure that parties in possession will not challenge the foreclosure.

Mike Gagnon: Old Republic will review and address all and each of these issues on a case-by-case basis with our agents as we have since *Ibanez* was first decided. Because foreclosure jurisprudence continues to evolve, we believe the most effective way to underwrite these questions is by working closely with our agents as the issues present themselves. We've found that attempting to impose a rigid underwriting protocol on an area which is highly fluid is counterproductive. Specifically, we're concerned that if we impose an underwriting standard prematurely, we may fail to identify strategies which can be effectively utilized and which might not otherwise be recognized because of that preexisting protocol. As happened with *Ibanez*, we expect that over time, the underwriting will moderate and become standardized within our company and across the industry. However, at this early juncture we believe our agents are better served by simply reviewing each of these situations with them as they arise.

Co-chair of REBA's title insurance and national affairs committee, Joel Stein concentrates his practice in real estate law with an emphasis on title examination, title insurance and foreclosures, and is one of the commonwealth's leading authorities on real estate title law. A former president of the Association, he is also the recipient of REBA's highest honor, the Richard B. Johnson Award. He edited the association's Guide to Registries of Deeds in 1992, 1994 and 1996. Joel can be reached by email at jstein@steintitle.com.

LEGISLATURE SHOULD ENACT ZONING PROPOSAL

ZONING, CONTINUED FROM PAGE 8

begin construction from the issuance of a permit from six months to 12, H. 1874 would provide homebuilders and developers with a more realistic timeframe to close on financing and start actual construction. The Legislature first provided "freeze" protection for permits issued before notice of the hearing on a zoning amendment, provided construction was commenced within six months after the permit was issued, as an amendment to the Zoning Enabling Act in 1927. Notwithstanding revisions to the Zoning Enabling Act over the years and the enactment of the Zoning Act in 1975, this six-month period to begin construction has remained unchanged.

H. 1874 is simply an acknowledgment that obtaining approval and financing of real estate development projects in Massachusetts is far more complex and time-consuming today than in the distant past. Importantly, the bill does not infringe in any way upon the discretion of a local special permit granting authority to approve or deny the issuance of a special permit.

H. 1874 was filed by Rep. Joseph Wagner, D-Chicopee, and was the subject of a public hearing before the Joint Committee on Municipalities and Regional Government in 2015. With housing production in the commonwealth still woefully below that which is required to meet the needs of its citizens, the Legislature should enact this modest proposal in 2016.

A long-time REBA member, Benjamin Fierro III is a partner at Boston's Lynch & Fierro LLP and serves as counsel to the Home Builders and Remodelers Association of Massachusetts. He can be reached at bfierro@lynchfierro.com.

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