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REBA news THE NEWSPAPER OF THE REAL ESTATE BAR ASSOCIATION
MARCH 2016 Vol. 13, No. 2
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Retired Appeals Court Judge Kantrowitz joins REBA Dispute Resolution

R. Marc Kantrowitz, who retired from the Appeals Court bench last year, has joined REBA Dispute Resolution's panel of neutral mediators.

"We welcome Marc to the panel," said REBA/DR President Mel Greenberg. "His broad range of experience, not just in real estate, but in many other concentrations, will broaden the program's client base."

"Judge Kantrowitz possesses a unique and engaging approach to conflict resolution," said Peter Wittenborg, REBA/DR treasurer. "I predict that he will become one of our most sought-after mediators"

Kantrowitz served as an associate justice in both the trial courts and Appeals Court handling scores of land use related cases. Three days after leaving the bench, he was in Athens, Ohio, serving as a visiting professor/scholar at his alma mater, Ohio University, both lecturing and teaching for the fall semester. The course he taught centered around his most recent book, "Old Whiskey and Young Women: American True Crime Tales of Murder, Sex and Scandal." He is well known here in the Bay State's legal community for "Law 'n History," a regular column in Lawyers Weekly.

In addition to his non-legal writing, which includes three other history-related books, Kantrowitz is the most highly published attorney in the commonwealth on state law. He has either authored or co-authored books on criminal law, motor vehicle tort law, juvenile law, evidence and mental health law. He has also written numerous law-related articles and chapters.

As a judge, he served on several SJC committees, most notably as a member of the Model Murder-Manslaughter Jury Instructions Committee, as a member and acting chair of the Bishop-Fuller Committee, which was established to develop protocol concerning the rights of criminal defendants to review the psychiatric records of complainants who sought psychiatric care. Perhaps most tellingly, he created and chaired the Advisory Committee on Massachusetts Evidence Law, established to assemble the current law into one easily usable document. The Massachusetts Guide to Evidence (Flaschner), also created under his guidance, is a mainstay in courts throughout the commonwealth, as is his Criminal Law Sourcebook (MCLE). Kantrowitz has also taught at various local institutions and currently teaches criminal trial advocacy at Northeastern University School of Law.

From 1972 to 1985, Kantrowitz served in the U.S. Army Reserves, leaving as a captain in the Quartermaster Corps. He earned a B.A., cum laude, from Ohio University, an M.A. in political science from Ohio University, and a J.D. from the University of Toledo College of Law.

Economist Barry Bluestone to speak at REBA's Spring Conference

Economist Barry Bluestone will deliver the luncheon keynote address at the REBA Spring Conference on Monday, May 2, at the Four Points by Sheraton in Norwood.

Bluestone, the Stearns Trustee Professor of political economy at Northeastern University, was the founding director of the Dukakis Center for Urban and Regional Policy and the founding dean of the School of Public Policy & Urban Affairs at Northeastern.

As a political economist, Bluestone has written widely in the areas of income distribution, business and industrial policy, labor-management relations, higher education finance, and urban and regional economic development. He contributes regularly to both academic and popular journals, and is the co-author of 11 books.

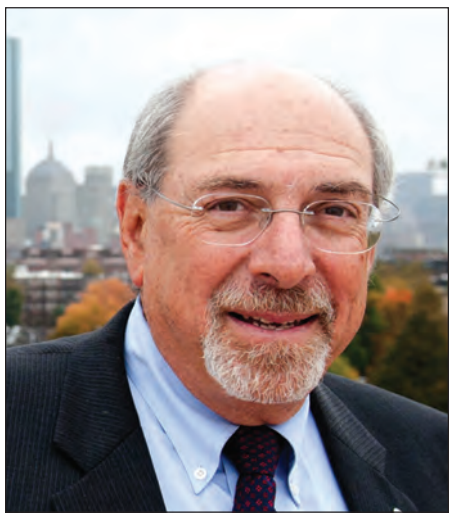
Bluestone's latest book, published in 2008 and co-authored with Mary Huff Stevenson and Russell Williams, is a major textbook entitled "The Urban Experience: Economics, Society, and Public Policy."

At the Dukakis Center, Bluestone has led research projects on housing, local economic development, state and local public finance, transportation, workforce development and vocational education, the manufacturing sector in Massachusetts, and assessment of the Massachusetts Life Sciences Center.

Under the Deval L. Patrick administration, he served as a member of the advisory council to the Executive Office of Housing and Economic Development as well as the Executive Office of Administration and Finance. He served on the Governor's Economic Development Strategy Council and is now an executive board member of the Governor's Advanced Manufacturing Collaborative.

From 2007-2010, Bluestone served as a member of the Community Affairs Research Advisory Board of the Federal Reserve Bank of Boston. In 2013, he served as a senior visiting scholar at the Boston Federal Reserve Bank in its Regional and Community Outreach Center. In 2015, he was appointed by the state Senate to both commissions on housing and on tax policy.

See pages 8 and 9 for more information about how to register and attend.



BARRY BLUESTONE

The latest on mortgage acknowledgements: Leave your screaming neon signs at home

BY MICHAEL J. GOLDBERG

MIKE GOLDBERG

The real estate bar is, by now, quite familiar with the ongoing litigation over defective mortgage acknowledgements taking place in Massachusetts bankruptcy courts. Those decisions have created a fair amount of confusion among conveyancers regarding the form of acknowledgement to use on a mortgage — and have left practitioners with significant concern that whatever form they utilize will be subject to attack by a Chapter 7 trustee in bankruptcy.

A recent decision issued in U.S. District Court, *HSBC Bank USA v. Lassman* (*In re DeMore*), 2016 WL 94249 (D. Mass., Jan. 7, 2016), is the latest decision involving defective acknowledgements. In upholding the validity of an acknowledgement of a power of attorney signature, the decision provides helpful insight into how a bankruptcy court may rule on such acknowledgements in the future.

The facts of *DeMore* are straightforward: In 2004, the debtors Andrew and Maureen DeMore (the "Debtors") gave a power of attorney to John G. Molloy, who thereafter executed a promissory note and mortgage on their behalf in favor of HSBC Mortgage Corporation, USA ("HSBC"). The mortgage contained the following acknowledgement, which the District Court noted was the form contained in Executive Order No. 455:

On this 27th day of April, 2004, before me, the undersigned notary public

See MORTGAGE, page 12

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

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

If you answered yes to any of these questions, please join REBA's Strategic Communications Committee. We won't take up much of your time – about one to two hours per month – and the time you spend will be invaluable to REBA.

INTERESTED?

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

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Mrs. Patmore weighs in on House No. 1111

BY ROBERT M. RUZZO

BOB RUZZO

Your correspondent has a record. Not a criminal record, perhaps, but a record nonetheless. One that is plainly in favor of an extensive re-examination of the commonwealth's Zoning Enabling Act (Chapter 40A), a statute that was last comprehensively revisited by the Great and General Court in 1975, and is now recognized in many quarters as one of the nation's weakest land use statutes.

In addition to its mind-numbing approach to prior nonconforming uses and structures (language described by the court in *Fitzsimonds v. Board of Appeals of Chatham*, 21 Mass. App. Ct. 53, 55 (1985) as "difficult and infelicitous"), Chapter 40A is perhaps most notorious for its total lack of any serious attempt to link land-use planning and substantive zoning provisions.

How's that working out for you?

It has been tried before and may yet take years, but a legislative "gut-rehab" of Chapter 40A is long overdue.

What is one to do then, when confronted with a piece of otherwise worthy legislation such as House No. 1111, "An Act Relative to Housing Production?"

Comprising some 17 unexpectedly brief and, for the most part, straightforward sections, the bill hardly constitutes a full-scale revision of Chapter 40A. Nonetheless, it contains a bevy of pro-housing production provisions and focuses on a number of emerging issues, from the opportunities presented by greyfields to the encouragement of regional (or at least inter-municipal) cooperation.

Has the time comes to abandon the principled high ground of comprehensive reform in favor of practical incrementalism?

In such times of crisis, your correspondent feels compelled to seek advice from only the straightest of straight-shooters: in this case, Mrs. Patmore, the pragmatic though somewhat overwrought cook and downstairs denizen of PBS' "Downton Abbey." As the show is in its final season and this year's formal legislative session is set to expire July 31, time is truly of the essence.

Recall, if you will, when Mrs. Patmore came into an unexpected inheritance and sought the counsel of the officious Mr. Carson, butler extraordinaire and supreme leader of the "in-service" crew. Mr. Carson, however, proved to be clueless when it came to investment advice, and his notions were swiftly but politely rejected by Mrs. Patmore. She then informed Mr. Carson that she had instead elected to purchase a small cottage to be rented out until her eventual retirement.

"This is very small beer," guffaws the dismissive Mr. Carson, utilizing that quaint but stinging British phrase designed to fall so harshly upon the ears of its addressee.

"Mr. Carson, it's my kind of beer and I know how to drink it," responds our heroine.

Not wanting to emulate the unfortunate Mr. Carson, it may be time to re-examine some of the provisions of House No.1111, which as things turn out, may not be such "small beer" after all.

While the legislation lacks a provision that would provide some much needed (though modest) restraint upon abutter appeals — by requiring a pre-complaint screening process modeled on a long-standing approach in the medical malpractice arena — House No.1111 nonetheless has many redeeming, if not fascinating, provisions.

Among its more notable sections are tandem provisions pushing back against single-family large lot zoning. Unfortunately, that is the norm here in Massachusetts. As noted by the Massachusetts Housing Partnership (and cited in testimony by CHAPA), in the past 10 years, more than a third of our municipalities have issued permits only for single-family homes. If one raises the bar only slightly to examine how many cities and towns have issued multifamily housing permits of five or more units, that percentage climbs to 50 percent. To counteract that, the legislation seeks to require local ordinances and bylaws to provide for multifamily housing and would require cluster development to be allowed as of right in zoning districts that allow single-family home construction.

In addition to pursuing innovations, the bill also seeks to improve existing procedures and perhaps even undo some poor prior land use choices.

One such process improvement is in the disposition of state-owned land. Section 14 would not allow any property owned by the commonwealth to be deemed surplus for purposes of disposition until it has been examined and determined to be of no use to DHCD for housing or mixed-use development, "subject to the commonwealth's Sustainable Development Principles."

Another area ripe for exploration is in the emergence of greyfields. Section 15 requires a multilateral one year review of the potential for redeveloping greyfields which are defined as "land with development that is outdated, underutilized, failing, or vacant." In the heavily developed eastern third of the state, as well as in many of our "gateway" cities, our development future is more accurately described as our re-development future. Redevelopment (which frankly should be welcomed as an opportunity to fix some of the ample number of our past mistakes) will play an ever increasing role in the years to come, particularly as battles over greenfields intensify.

The bill seems to get even feistier in its final two provisions. Section 16 would allow, with proper local authorization, the establishment of a regional planning board, zoning board of appeals, conservation commission or board of health. Any agreements establishing such regional boards would be subject to approval by either DHCD or DEP, as jurisdictionally appropriate.

Finally, Section 17 would (re)establish an Office of State Planning, whose work would be prioritized by a growth planning cabinet comprised of various Cabinet Secretaries or their designees. The expressed preference is to better utilize and to coordinate existing technical experts within the executive offices and the quasi-public agencies of the commonwealth.

Mrs. Patmore might well approve.

For while this beer may not really be that small, we do (or we should) know how to drink it.

You'll find no prognostications here about prospects for the bill's passage; however, a viable recipe of pro-housing initiatives such as this is a welcome addition to the commonwealth's development menu.

A "Downton devotee," Bob Ruzzo has been following the lives of the Yorkshire-based Crawley family, their friends and servants, for more than five years. A frequent contributor to REBA News, Bob is a senior counsel in Holland & Knight's Boston office. 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 by email at Robert.ruzzo@hklaw.com.

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for Massachusetts

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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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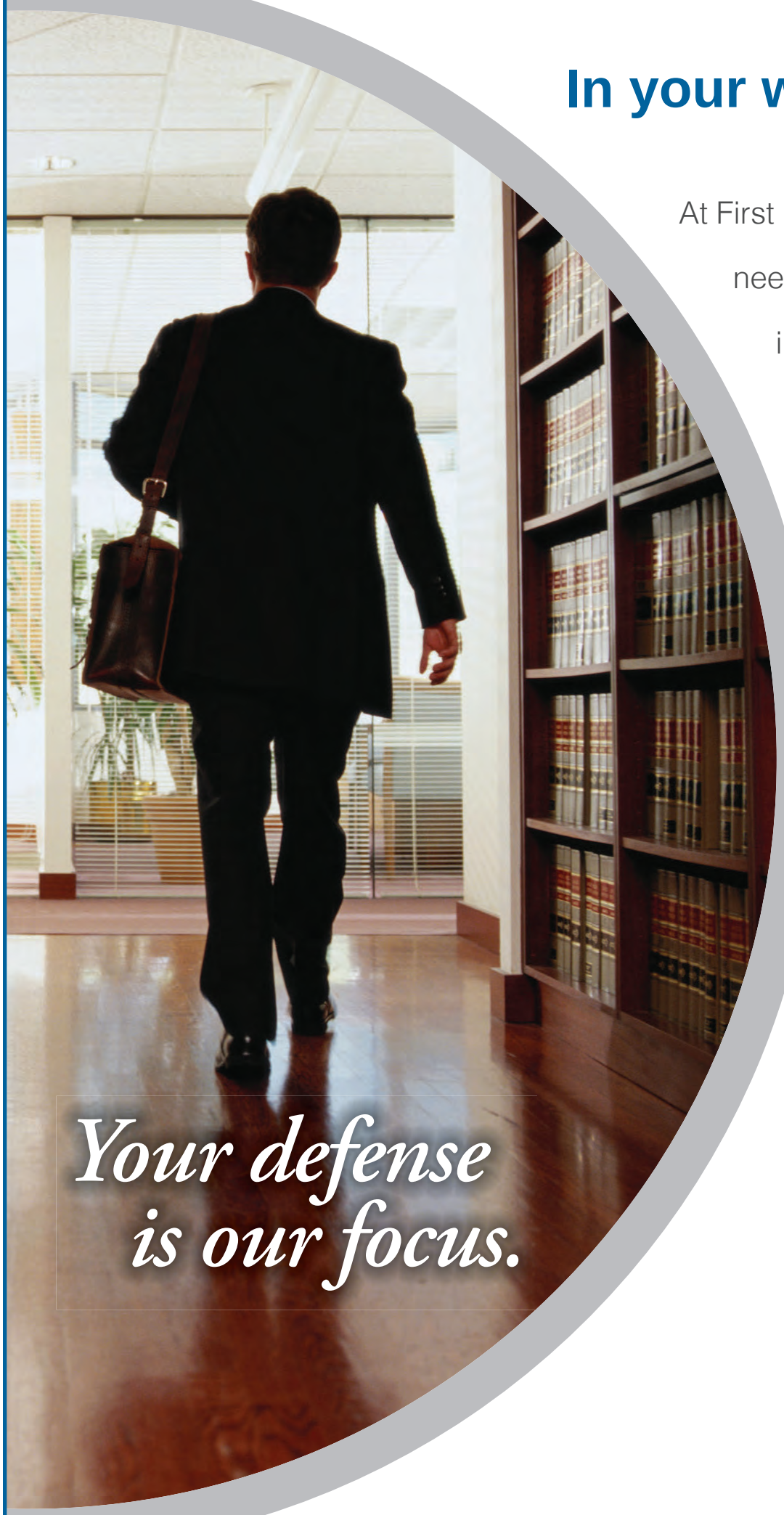

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See Video

'Infectious invalidity' — when zoning and title overlap to render lots unlawful

BY PAUL F. ALPHEN

PAUL ALPHEN

If you missed the 18th Annual MCLE Real Estate Law Conference, you owe it to yourself to purchase the materials or check to see if it available on line. Chairman Tom Moriarty did a great job bringing together some great topics and some knowledgeable speakers.

I could not help myself from bringing up a case that I had already discussed a few years ago at the 2014 conference. It illustrates some of the critical and overlapping issues involving title examination and zoning regulations.

It is the "infectious invalidity" decision of *Carabetta v. Bd. of Appeals of Truro*, 73 Mass. App. Ct. 266, 897 N.E. 2d 607 (2008). The case is haunting, and I cannot help myself from sharing it with you.

In 1967 the Truro Planning Board approved the "Lookout Bluff" subdivision that contained Lot 22. It became nonconforming when the town increased the minimum lot size in 1972, but under normal circumstances nobody would give a second thought to its non-conforming status. In 1979, the planning board approved the "Clearview Acres" subdivision that contained Lot 3, and which at all times complied with the minimum zoning requirements. Lot 3 on the "Clearview Acres" plan happens to abut Lot 22 on the "Lookout Bluff" plan.

Lot 22 (which was registered land) was sold in 1976 as a grandfathered lawful building lot (apparently because it was shown on a subdivision plan and protected by the fifth paragraph of Chapter 40A, Section 6) and a home was built on the lot. Lot 22 was sold in 1983 to Greenburg, who sold it in 2002 to O'Brien. However, Greenburg also owned Lot 3 (which was recorded land) from 1984 to 2002 (at which time they sold it to Carabetta). Therefore, Lots 22 and 3 were held in common ownership from 1984 to 2002 after the subdivision zoning freeze had expired for both subdivision plans.

You can see how both O'Brien and Carabetta could have innocently purchased their lots without regard to the merger issue. The Carabettas applied for a building permit for Lot 3 and the town denied them on the grounds that the lots had merged and they could not be later separated, because to separate them would render Lot 22 an unlawful lot containing a dwelling — even though Lot 3, owned by the Carabettas, complied with the dimensional requirements.

The Land Court saw the Carabettas as innocent victims of circumstances and employed some equity reasoning to conclude that the lots had not merged. "The judge noted that the lots derive from separate and distinct subdivisions, have never been conveyed in the same deed, are organized under different recording systems, and were always described as separate lots." *Carabetta v. Bd. of Appeals of Truro*, 73 Mass. App. Ct. 266, 270-73, 897 N.E. 2d 607, 611-12 (2008)

The town appealed, and was joined by the O'Briens and others. Apparently O'Brien was not concerned about the possibility that if the Carabettas' lot was unlawful, his lot would also be unlawful. Keep in mind that the Carabettas' Lot 3 met all zoning requirements.

The Appeals Court disagreed with the Land Court, finding that the lots had merged.

"We have said, however, that '[t]he 'usual construction of the word 'lot' in a zoning context ignores the manner in which the components of a total given area have been assembled and concentrates instead on the question of whether the sum of the components meets the requirements of the by-law.' … A person owning adjoining record lots may not artificially divide them so as to restore old record boundaries to obtain a grandfather nonconforming exemption; to preserve the exemption the lots must retain 'a separate identity.'" *Asack v. Board of Appeals of Westwood*, 47 Mass. App. Ct. 733, 736, 716 N.E.2d 135 (1999), quoting from *Lindsay v. Board of Appeals of Milton*, 362 Mass. 126, 132, 284 N.E.2d 595 (1972)." *Carabetta v. Bd. of Appeals of Truro*, at 270.

The Appeals Court also referred to a series of decisions within which they have stopped parties from conveying property so as to recreate old nonconforming lots. Unlike the decisions cited by the court, "… the Carabettas purchased a lot depicted on an approved subdivision plan that complied with all current zoning requirements and required no zoning relief, and the record reveals nothing that would have put them on notice that their rear property line abutted a nonconforming lot that was once held in common ownership with the lot they purchased." *Id.* at 611-612

Fortunately, however, the Carabettas were able to acquire additional land from an abutter and carve out a parcel that if added to Lot 22 would cure its nonconformity. Under those circumstances, the Appeals Court was not going to punish the Carabettas, and ruled that there was no impediment to the Carabettas obtaining a building permit, even though the O'Briens refused to take title to the parcel of land that would lessen their own nonconformity. The court further stated: "Moreover, having purchased an illegally nonconforming lot and refusing efforts to make it conforming, the O'Briens' position in opposing construction on lot 3A is 'so intrinsically inequitable that it should not prevail.'" *Hogan v. Hayes*, 19 Mass. App. Ct. 399, 404, 474 N.E. 2d 1158 (1985)" *Carabetta v. Bd. of Appeals of Truro*, 73 Mass. App. Ct. 266, 270-73, 897 N.E.2d 607, 611-12 (2008)

The *Carabetta* case is an example of "infectious invalidity" and is also a cautionary tale about the potential for a conforming lot to be tied up in years of litigation because of the non-conformity of an abutting parcel. The Carabettas originally applied for a determination from the building commissioner on Dec. 14, 2004. The Appeals Court decision was issued four years later, on Dec. 4, 2008. How often do purchasers of single family house lots examine the history of the abutting land to assure themselves that the lot they are about to purchase is conforming or lawfully preexisting nonconforming? Not often.

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.

American Land Title Association updates survey certification requirements

BY THOMAS L. GUIDI

TOM GUIDI

The American Land Title Association (ALTA) and the National Society of Professional Surveyors (NSPS), the successor organization to the American Congress on Surveying and Mapping (ACSM), have recently issued significant revisions to the Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys.

Highlights of the changes are as follows:

• Due to the substitution of NSPS in place of ACSM, the survey requirements will henceforth be known as the "Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys" and a survey plan will be labeled "ALTA/NSPS Land Title Survey."

• The revisions to Section 4 continue the trend of shifting from the surveyor to the title insurance underwriter or to the attorneys for the owner or lender the responsibility for obtaining and providing various information, including a current legal description of the property to be surveyed, record descriptions of abutting properties, recorded easements both burdening and benefitting the property, and unrecorded documents affecting the property to be surveyed, if the client wants them referenced on the survey plan. In practice, many surveyors find that they still have to independently obtain some of this information.

• Subsection 6Bii now requires that, except in the case of an original survey of the property, if a new description is prepared, a note shall be provided on the plan stating that the new description describes the same real estate as the record description, and if not, how the new description differs from the record description.

• Item 6 of Table A has been modified to require that any zoning information, including use districts and dimensional requirements, to be shown on the plan are to be provided by the client (not by the title insurer) in the form of a zoning report, which report will be referenced on the survey plan.

• Item 9 of Table A has been revised to clarify that the number and types of parking spaces in parking areas and structures are to be reported on the plan, but striping of parking spaces is limited to surface parking areas and excludes spaces within parking structures.

• Item 11 of Table A has been revised to eliminate old item 11(a) which related to surface and above-ground utilities which are now automatically included in the survey under Subsection 5Eiv of the Minimum Standards. Item 11 continues as what used to be 11(b), the optional requirement to locate underground utilities based on observed evidence, plans obtained from utility companies or the client, or markings provided by agencies such as Dig Safe.

• Item 18 (formerly item 19) of Table A has been revised to provide that the surveyor shall locate wetlands on the plan only if the wetlands have been flagged by a qualified specialist (hired by the client) prior to the surveyor conducting the fieldwork.

The changes were effective on Feb. 23, five years to the day after the last set of revisions went into effect. ALTA and NSPS have already begun work on the next set of revisions, to go into effect in February 2021.

Tom Guidi is a partner in the Boston law firm of Hemenway & Barnes, where he concentrates his practice in real estate and business law, with particular emphasis on commercial real estate and asset-based lending, leasing, financing, acquisitions, sales, and zoning. He co-chairs REBA's Commercial Real Estate Finance Committee and serves on the association's Executive Committee. Tom can be contacted at tguidi@hembar.com.

Appeals Court reaffirms Conservation Commission's dual authority

BY NATHANIEL STEVENS

NATHANIEL STEVENS

The Appeals Court in *Parkview Electronics Trust, LLC v. Conservation Commission of Winchester*, 88 Mass. App. Ct. 833 (2016), recently rejected a challenge to the well-established principle that a conservation commission can have regulatory authority under a local wetlands bylaw or ordinance from which it is independent, in addition to its authority under the state Wetlands Protection Act ("Act") — as long as a commission relies on a provision of its local wetlands law that is more stringent than the Act and complies with the time-frames set forth in the Act. Otherwise, a commission risks having its decisions under both state and local laws superseded by MassDEP in an appeal under the Act.

Since at least the early 1970s, Massachusetts courts have regarded the Act as setting forth only minimum statewide standards to protect wetlands and other inland and coastal resource areas, "leaving local communities free to adopt more stringent controls." *Golden v. Falmouth*, 358 Mass. 519 (1970). More than 190 of the 351 cities and towns in the commonwealth have home rule wetlands bylaws or ordinances (hereinafter "bylaw").

The interplay between wetlands bylaws and the state Act has been considered by the courts over the years, particularly when MassDEP entertains an appeal under the Act and reaches a different conclusion than a commission did under its bylaw. When a commission's decision relies on a bylaw that is more stringent than the Act (or the state Wetlands Regulations implementing the Act (310 CMR 10.00)), the commission's decision under the bylaw stands, even if its decision under the Act is reversed by DEP.

In 2007, the Supreme Judicial Court in its *Oyster Creek* decision added an important caveat: A commission must issue its decision within the time allowed under the Act (21 days after the close of hearing) or it will lose its authority under its bylaw if DEP issues a superseding order in an appeal under the Act.

On the other hand, if the bylaw is not more stringent, MassDEP's decision under the Act controls, essentially preempting the commission's decision under its bylaw. In determining whether a bylaw is more stringent, the bylaw is examined "as applied" rather than "on its face," with the court examining the particular provision(s) upon which a commission relies, rather than comparing the two laws in whole and in abstract. This analysis need not occur in practice if a commission fails to issue its decision within 21 days after the close of the public hearing. If an applicant has not voluntarily waived this statutory time requirement, a commission loses its authority under its bylaw.

The owner of an industrial park along the Aberjona River in Winchester, Parkview Electronics Trust, LLC ("Parkview"), argued unsuccessfully before the Appeals Court that a commission must base its decision exclusively on a bylaw, instead of both a bylaw and state law, for the commission to avoid being preempted by MassDEP. Relying on the Appeals Court's *Healer v. DEP* decision in 2009, Parkview argued that a conservation commission must choose to exercise authority under either the Act or its bylaw, but not both. Parkview seized on the Appeals Court's use of the word "exclusively" in Healer when it ruled:

> A local authority exercises permissible autonomous decision-making authority only when its decision is based exclusively on the specific terms of its by-law which are more stringent than the act … The simple fact, however, that a local

See APPEALS COURT, page 14

Women's Lunch Place welcomes REBA Women's Real Estate Networking Group

The Women's Networking Group held a fundraising reception on March 10 at the Women's Lunch Place in Boston's Back Bay. There was a raffle and silent auction, the proceeds from which were donated to the Women's Lunch Place.

Shellee Mendes, owner/stylist at Salon Monét on Boston's historical Newbury Street, executive board member on the Newbury Street League, and creator of the Newbury Street hair show held at Taj Boston, was the featured special guest at the meet-and-greet reception, which was open to all REBA members. Shellee's life journey has taken her from the projects to the shelter to business woman and entrepreneur, and she shared her inspiring story with the attendees.

The Women's Real Estate Networking Group permits women members to come together to network, collaborate and build professional and personal relationships with one another, as well as with non-lawyer professional women. The 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 learn more about the group, contact Nicole Cohen at cohen@reba.net. 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 the professional community and becoming a part of our growing network.

THANK YOU TO OUR EVENT SPONSORS

The Women's Lunch Place is a safe, welcoming daytime shelter for all women experiencing homelessness or poverty. Contributions are welcome and greatly appreciated. For more information, visit www.womenslunchplace.org

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ORLANS MORAN

In support of arbitration: issues of concern to the real estate bar

BY BRIAN R. JEROME
AND JEFFREY S. STERN

BRIAN JEROME

JEFFREY STERN

A recent three-part series in the New York Times ("Arbitration Everywhere, Stacking the Deck of Justice," Oct. 31, 2015) that spotlighted certain abuses and injustices in particular types of arbitration has gained wide attention in the ADR community and the broader legal community, as well as with the public.

While the series was unquestionably effective in pointing out problems where they exist, it also painted with such a broad brush as to tarnish (perhaps inadvertently) the arbitration system as a whole, and the many respected and ethical professionals who operate within it and who provide just and effective resolutions to conflicts of many forms.

While the authors are DR providers, not real estate practitioners, we believe that the issues raised below should be matters of interest and concern to the real estate bar, even if the mandatory arbitration clauses on which the series focused are more commonly seen in commercial and consumer contracts. In the penultimate paragraph, we discuss the possible use of mandatory clauses in condominium documents.

The primary emphasis of the series in The Times is the growing use of arbitration clauses being placed into commercial and consumer contracts among parties with unequal bargaining power, such as low-wage employees against their employers, credit card or bank customers against large financial organizations, and the like. Such arbitration clauses are being inserted in an ever-widening range of contracts, often buried in fine print and unbeknownst to the consumers or not understood by them, and in circumstances that bear no resemblance to freely negotiated agreements.

The articles were particularly critical of action taken by corporations, including arbitration clauses that have been interpreted to waive class actions by consumers — a practice that has been upheld by recent, highly controversial Supreme Court decisions. While reasonable people's opinions can differ about the merits of class actions (some critics believe that they benefit attorneys more than the class members), The Times articles demonstrate that without the leverage of class actions, it is simply impractical to pursue many claims against large corporations, by arbitration or otherwise.

The second installment of the series was particularly troubling to the DR community. It highlighted a small number of cases, the outcomes of which seemed particularly unjust, and strongly suggested that the process of arbitration — and arbitrators as a whole — were somehow biased and that the system itself was anti-consumers or anti-plaintiffs. Obviously, unjust outcomes are not unique to the arbitration process, as evidenced by the unpredictability of jury decisions. However, a few anecdotes of inequitable arbitration awards should not characterize the work of so many dedicated arbitrators who objectively follow the evidence and make unbiased and reasoned decisions.

The Times articles make a case for reform, either by court decisions or legislative response, as to the use of mandatory arbitration clauses in contracts that are neither prominently displayed nor understood by the parties, and particularly in circumstances where parties have significantly unequal bargaining power.

It is the professional obligation of the DR community, which we believe is undoubtedly shared by the populous of dedicated professionals providing arbitration services, to emphasize that the arbitration process has a long and honorable history, and should justifiably remain a viable and often preferred option to litigation and trial for many disputes. Unlike the situations described in The Times, arbitration is more frequently and freely decided upon by parties and their attorneys in ongoing cases without any mandatory arbitration clause. It is selected as the preferred dispute resolution process because one or more of its inherent features is appropriate for the case, such as:

- the time, expense and costs saved by choosing arbitration over extensive litigation, discovery and trial in the court system;
- the ability to mutually select the arbitrator or panel of arbitrators to hear the case, customarily neutrals with legal expertise in the area of the law involved and with track records of integrity and fairness;
- the convenience and efficiency of selecting the time and place of the hearing; and/or
- the privacy of a conference room over a court room, and the finality of an arbitration award, as may be deemed mutually beneficial to the parties.

As the real estate bar well knows, among the most difficult and contentious of all disputes arise within condominiums: between unit owners and the developer, between the condominium trust and individual owners, or between owners themselves. In our experience, disputes between unit owners of a two-unit condominium may be the bitterest of all, where there is no obvious "tie-breaker" to resolve disputes, where the degree of emotion runs highest and hottest, and where the disputants are literally locked up in conflict with no obvious exit.

To deal with this, we have come to learn that REBA is encouraging the use of a mandatory mediation clause in condominium documents, requiring arbitration if mediation fails. Given the financial impracticality of litigating many condominium disputes — and in particular those involving two or three units — the authors believe such a proposal is sensible, assuming, of course, that all parties understand it and buy in. It is beyond the scope of this article to weigh in on particular clauses and how they might be tailored for different sizes and scales of condominium disputes.

The Times articles focus on abuses pertaining to a narrow segment of the arbitration field, the regrettable hallmark of which is the use of arbitration clauses in contracts involving parties with unequal bargaining power, and where the agreement is neither fully understood nor freely bargained for. As such, its focus is not, and should not, be seen as representative of arbitration or arbitrators as a whole.

As attorneys and DR providers, we are bound by strict ethical rules and believe that authentic neutrality is at the very center of our mission and professional life. Indeed, those are the reasons why DR has become so progressively utilized and appropriate as a fair and effective resolution process, and why courtroom trials are now viewed by many as "the alternative."

Brian Jerome is the founder of Massachusetts Dispute Resolution Services (MDRS) and chair of the MBA's DR Committee. Jeffrey Stern is a neutral at The Mediation Group, on the panel of neutrals at MDRS, and a member of the MBA's DR Committee.

2016 Spring Conference

Monday, May 2, 2016 • 7:30 A.M. - 2:45 P.M.

Four Points by Sheraton, Norwood

General Information

- REBA's 2016 Spring Conference welcomes both members and non-members. All attendees must register; the registration fee includes the breakout sessions, the luncheon, and all written materials. REBA cannot offer discounts for registrants not attending the Conference luncheon.
- Credits are available for professional liability insurance and continuing legal education in other states. For more information, contact Bob Gaudette at 617.854.7555 or gaudette@reba.net.
- Please submit one registration per attendee. Additional registration applications are available at www.reba.net. REBA will confirm all registrations by email.
- In order to guarantee a reservation, conference registrations should be sent with the appropriate fee by email, mail or fax, or submitted online at www.reba.net, on or before April 25, 2016. Registrations received after April 25, 2016 will be subject to a late registration processing fee of $25. Registrations may be canceled in writing on or before April 25, 2016 and will be subject to a processing fee of $25. Registrations cannot be canceled after April 25, 2016; however, substitutions of registrants attending the program are welcome. Conference materials will be mailed to non-attendee registrants within four weeks following the event.
- We ask attendees to kindly refrain from cell phone use during the breakout sessions and luncheon.

Driving Directions

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

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

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

Registration

COMPLETE AND RETURN THIS REGISTRATION WITH THE APPROPRIATE FEE TO:

REBA Foundation, 295 Devonshire Street, Sixth Floor, Boston, MA 02110
TEL: 617.854.7555 | morales@reba.net | FAX: 617.854.7570

	By April 25	*After April 25*
☐ YES, please register me. I am a REBA member in good standing.	$225.00	$250.00
☐ YES, please register me as a guest. I am not a REBA member.	$265.00	$290.00
☐ NO, I am unable to attend, but I would like to purchase conference materials and a CD of the breakout sessions and luncheon address. (Please allow four weeks for delivery)	$200.00 $_____	$200.00 $_____

☐ Check Enclosed ☐ Credit Card ☐ VISA ☐ MasterCard ☐ American Express

Check No:_____ Card No:_____ Expiration:_____

Date:_____ Signature:_____ Date:_____

You May Also Register Online at REBA.net

Registrant Information

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

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

Firm/Company:_____

Address: _____

City/Town: _____ State: _____ Zip:_____

Tel:_____ Cell:_____ Fax: _____

Select Your Luncheon Choice Below

☐ Pan seared chicken breast with a mushroom trio topped with a crème fraiche sauce

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

☐ Roasted portabella with red pepper, zucchini and squash with quinoa and a balsamic glaze

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

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

Luncheon Keynote Address Presented by Barry Bluestone

Economist **Barry Bluestone** will deliver the luncheon keynote address at the Association's Spring Conference on Monday, May 2nd at the Four Points by Sheraton in Norwood. Bluestone, the Stearns Trustee Professor of Political Economy at Northeastern University, was the founding Director of the Dukakis Center for Urban and Regional Policy and the founding Dean of the School of Public Policy & Urban Affairs at Northeastern.

As a political economist, Bluestone has written widely in the areas of income distribution, business and industrial policy, labor-management relations, higher education finance, and urban and regional economic development. He contributes regularly to academic, as well as popular journals, and is the co-author of eleven books. Bluestone's latest book, published in 2008, and co-authored with Mary Huff Stevenson and Russell Williams, is a major textbook entitled The Urban Experience: Economics, Society, and Public Policy.

At the Dukakis Center, Bluestone has led research projects on housing, local economic development, state and local public finance, transportation, workforce development and vocational education, the manufacturing sector in Massachusetts, and assessment of the Massachusetts Life Sciences Center.

Under the Deval Patrick administration, he served as a member of the advisory council to the Massachusetts Executive Office of Housing and Economic Development, as well as the Massachusetts Executive Office of Administration and Finance. He also served on the Governor's Economic Development Strategy Council and is now an executive board member of the Governor's Advanced Manufacturing Collaborative. From 2007-2010, he served as a member of the Community Affairs Research Advisory Board of the Federal Reserve Bank of Boston. In 2013, he served as a Senior Visiting Scholar at the Boston Federal Reserve Bank in its Regional and Community Outreach Center. In 2015, he was appointed by the Massachusetts Senate to both commissions on Housing and on Tax Policy.

Schedule of Events

7:30 AM **Registration and Exhibitors' Hour**
8:30 AM - 1:15 PM **BREAKOUT SESSIONS (descriptions below)**

Ethics and E-Security Risks and Obligations
Matthew C. Kalin; Robert A. McCall; Maureen Mulligan
The business of real estate is rife with opportunities for fraudsters to launch an attack, out in the open or in clandestine fashion, and whether during a transaction or a firm's day-to-day operations. This session will discuss a variety of common schemes that pose a significant threat to firms, as well as the intersection between the firm's ethical responsibilities and the obligation to safely maintain sensitive and confidential information, data and funds. The session will also touch upon best practices aimed at prevention, as well as a discussion on the role of insurance following a cyber attack.
8:30 AM – 9:30 AM **CONFERENCE ROOM 103**
9:45 AM – 10:45 AM **CONFERENCE ROOM 103**

Joining the Social Media Revolution ... One Step at a Time
Julie P. Barry; Kimberly A. Bielan; Justin Tucker
Our panel of 'thought leaders' are here to help you dip your toe into the social media pool. We will address topics such as compliance, the various platforms, building an audience, compelling content, liability protection and disclaimers. These all point back to one very important end goal...improving your online reputation and visibility in order to increase your business. The panelists will help you understand where social media is at now and where we think it's heading, while showing you new ways to connect with your clients and prospects, and new ways to market your brand.
8:30 AM – 9:30 AM **CONFERENCE ROOM 102**
9:45 AM – 10:45 AM **CONFERENCE ROOM 102**

TRID: Dialogue on Current TRID Compliance Issues
Anthony E. DeSantis; Laura W. Dorfman; Marc Hall; Kosta Ligris
Taking a practical look at the new TRID regulations, our panelists will focus on those frequently asked questions, concerns and issues that have come about since the implementation of these new regulations on October 3rd.
8:30 AM – 9:30 AM **TIFFANY BALLROOM A**
9:45 AM – 10:45 AM **TIFFANY BALLROOM A**

Identifying and Recovering Tenant Overcharges: The Battle of Office Lease CAM and Operating Expenses
Rick Burke; Paul E. White
Too many commercial and office tenants casually manage their lease CAM and operating costs without a trained analyst to audit these landlord overcharges. With this lack of oversight, tenants may inadvertently pay charges that are not due. Our panel will examine how CAM and operating expenses should be calculated. The panelists will also explain how a careful audit can uncover significant financial errors, and offer legal arguments to challenge improper charges and ultimately to recover any overcharges. This program will be of particular interest to partners in smaller and medium-sized firms who may wish to take a more careful review of their office leases.
8:30 AM – 9:30 AM **CONFERENCE ROOM 104**
11:00 AM – 12:00 PM **CONFERENCE ROOM 102**

A Tale of Two Families: Introducing REBA's Model Trust for a Two-Unit Condominium
Eric A. Cataldo; Barbara J. Macy; Clive D. Martin
This will be a presentation of REBA's new two-family condo trust instrument. The discussion will include a general overview of the concepts this document addresses that are unique to a two-unit association, with a particular focus on the unique challenges of resolving disputes among unit owners.
9:45 AM – 10:45 AM **TIFFANY BALLROOM B**
11:00 AM – 12:00 PM **TIFFANY BALLROOM B**

Buyer's Attorney Beware: Risks of Purchasing Occupied Property
Jordana Roubicek Greenman; Emil Ward
Panelists will review the risks of purchasing occupied property starting at the "Offer to Purchase" stage and continuing through the P&S negotiation and finally, following through until the closing is complete. Many new buyers of multi-family property are finding themselves stuck with under-market tenants, non-paying tenants, illegal apartments, statutory violations, etc. Many of these issues can and should be handled at the offer stage. A diligent conveyancing attorney should become familiar with the rights and responsibilities of being a landlord or engage an eviction/landlord-tenant attorney at a very early stage.
11:00 AM – 12:00 PM **ESSEX/LENOX ROOM**

Notary Nightmares: It's Not Just Filling in the Blanks! ~ A Practical Skills Sessions
Tucker Dulong; Danielle Andrews Long; Francis J. Nolan
At 10 a.m. on Monday a lender client calls you regarding a transaction you closed in 2010. The borrowers are in bankruptcy and the trustee has filed a motion to "avoid and preserve" the mortgage due to a defect in the notary clause. What does that even mean? At this session, we will review recent case law regarding the use and misuse of acknowledgments and jurats and discuss how to avoid – and perhaps resolve – vexing notary problems. Lock your notary stamp in your desk drawer and come join us for the discussion!
8:30 AM – 9:30 AM **ESSEX/LENOX ROOM**
9:45 AM – 10:45 AM **ESSEX/LENOX ROOM**

Obscure Title Issues ~ A Practical Skills Sessions
Lisa J. Delaney; Sara Ann K. Supple
Join our panelists who will lead a discussion on several obscure title issues, including: the difference of a mortgage discharge and a discharge in bankruptcy; post-foreclosure lien revival/estoppel by deed; the possible lack of a perfected lien by execution for homestead land or titles held by the entirety; probate issues (unexercised power of sale and the requirement for a court approval of a testamentary trust); forest, agricultural or horticultural and recreational tax liens, including the possibility of estate tax recapture for former farm land; differentiating between deed restrictions and easements when noted in the same document and which expire; re-grant or re-dedication to a dry trust; and other obscure but important topics.
8:30 AM – 9:30 AM **TIFFANY BALLROOM B**
11:00 AM – 12:00 PM **CONFERENCE ROOM 103**

The Evolving World of Post-Foreclosure Title Claims ~ A Practical Skills Sessions
Erica P. Bigelow; Ward P. Graham; J. Patrick Walsh
This session will cover the latest developments in the post-Ibanez world, including the decision in Pinti v. Emigrant Mortgage Co., Inc., the new Massachusetts foreclosure title clearing statute, Chapter 141 of the Acts of 2015, and what you can do to clear title now (if you can't wait 'til 2017). Panelists will discuss some of the important details of the new statute, some of its limitations, and provide some practice guidance for conveyancers going forward.
9:45 AM – 10:45 AM **CONFERENCE ROOM 104**
11:00 AM – 12:00 PM **CONFERENCE ROOM 104**

Recent Developments in Massachusetts Case Law
Philip S. Lapatin
Now in his 38th year at these meetings, Phil continues to draw a huge crowd with this session. His presentation on Recent Developments in Massachusetts Case Law is a must-hear for any practicing real estate attorney. Phil is the 2008 recipient of the Association's highest honor, the Richard B. Johnson Award.
12:15 PM – 1:15 PM **CONFERENCE ROOM 103***
*Video simulcasts of this presentation will be held in Conference Rooms 102 & 104

1:20 PM
LUNCHEON PROGRAM

1:20 PM – 1:40 PM
Remarks from President Susan LaRose

1:40 PM – 2:10 PM
Business Meeting

2:10 PM – 2:30 PM
Luncheon Keynote Address by Economist Barry Bluestone

2:30 PM – 2:45 PM
Concluding Remarks

2:45 PM
Adjournment

'Taylor' showcases need to jettison doctrine of overloading

BY NICHOLAS P. SHAPIRO


NICK SHAPIRO

The Supreme Judicial Court will soon hear arguments in *Taylor v. Martha's Vineyard Land Bank Commissio*n, SJC-11963. The justices have been asked to decide and are soliciting amicus briefs concerning "[w]hether Massachusetts should revisit the rule stated in *Murphy v. Mart Realty of Brockton, Inc.*, 348 Mass. 675, 678-679 (1965), and henceforth permit the owner of a dominant estate to use an appurtenant easement also for the benefit of an after-acquired parcel that is contiguous to the dominant estate, where doing so would not increase the burden on the servient estate."

The rule in *Murphy*, the so-called doctrine of overloading, is that "[a] right of way appurtenant to the land conveyed cannot be used by the owner of the dominant tenement to pass to or from other land adjacent to or beyond that to which the easement is appurtenant."

If the court's recent decisions are any indication, eschewing formalism for a pragmatic/utilitarian approach, then the doctrine's days are numbered. In my opinion, the doctrine's abolition should be greeted with cheers, because it cannot be squared with practical reality and the balance of Massachusetts law

Taylor showcases one of the multiple practical problems with the doctrine's application. Martha's Vineyard Land Bank Commission obtained several parcels of registered land in the Town of Aquinnah as part of the Aquinnah Headlands Preserve, atop the Gay Head Cliffs. The preserve is divided into the South Head and the North Head. The North Head consists of the parcels at issue in *Taylor*. Access to North Head, unfortunately for the public that wish to enjoy its natural beauty, is over partially overlapping, but not entirely coextensive, easements. Though each of the parcels comprising the North Head has its own access, that access is over two different rights of way appurtenant to different lots.

In order to avoid an illegal overloading as held by the Land Court, people accessing different hiking trails at North Head must use different rights of way, and the commission must ensure that this arbitrary segregation of access is honored, despite many facts that make the doctrine's application absurd.

For instance, North Head is only open from September to June. The servient estate, the site of a seasonal inn, also lies dormant, except for 12 weeks during the period. Moreover, the number of hikers using the trails at North Head equates to one every 3.6 days. To consider such use an overburdening is the height of hyperbole; however, the doctrine does not concern itself with the use made of the servient estate, but the identity of the dominant estate alone.

In this way, *Taylor* elucidates the limits of overloading's rationality. With its focus divorced from the actual use of the servient estate, it is prone to practical perversion and is unrelated to other forms of overburdening claims, which concern types and intensity of use of the servient estate. It is a bitter irony that the rules governing these claims countenance substantially greater, more intense use of the servient estate than overloading prohibits.

For example, unless otherwise agreed upon, the law imposes no limit on the ways in which a dominant estate may be put to use. A dominant estate may be substantially subdivided, and the means of travelling over rights of way may evolve over time. In these ways, the typical overburdening rules allow uses of greater impact on the servient estate than were originally contemplated by the parties. Thus, it has always been difficult to reconcile overloading with the rest of overburdening law.

In the interest of full disclosure, my office has a case in Land Court that will be directly affected by the SJC's decision in *Taylor*, and in which we advocate for an exception to the doctrine's application. My opinion, however, is not merely that of a hired gun, but also a practitioner who cares deeply about the vitality and consistency of the common law, which are furthered by the doctrine's abolition.

Modernization should not be a dirty word in property law. Much of what keeps real estate practitioners' lives interesting is that we reside at the intersection of ancient legal doctrines, such as overloading, and modern administrative law, like zoning. But what keeps our work interesting also requires vigilance to ensure harmonization between disparate areas of law. One example of dissonance between title and zoning further exemplifies why overloading has become unworkable.

Earlier this year, the SJC reaffirmed the dual doctrines of merger and infectious invalidity under the Zoning Act. Merger treats adjoining properties held in common ownership as a single lot for zoning purposes in order to reduce or eliminate nonconformities. Infectious invalidity dictates that once properties have merged for zoning purposes, absent a variance (which generally should not be granted), those properties cannot lawfully be severed or separately conveyed.

Simultaneously, in Massachusetts, even three-acre lot minimums can be constitutional. Many cities and towns have adopted RGFA and lot coverage regulations. Practically all cities and towns impose minimum frontage, front, side and rear yard setback requirements. The total effect of this up-zoning is to require bigger and bigger lots. Thus, throughout the commonwealth, zoning encourages, if not mandates, the expansion of dominant estates that overloading considers unlawful. However, once grandfathered properties come into common ownership, they cannot lawfully come out of it. Therefore, based on these demonically complementary doctrines, property owners are punished for complying with zoning by effectively losing their access rights.

To illustrate, consider an undersized back lot, improved by a grandfathered residence, which is accessed solely through an appurtenant easement. Its owner wishes to purchase an adjoining undersized back lot in order to expand her yard and install a pool and pool house. This back lot is also improved by a grandfathered home and is served by a separate easement, over a different servient estate.

From a zoning perspective, this plan is great: It reduces the number of grandfathered structures and the lot area nonconformity of the two properties. However, under the doctrine of overloading, the owner would not be able to use either easement, because each would be overloaded by the addition of a non-dominant lot. This would apply regardless of the lack of any change in use of the easement or a greater practical burden imposed on either servient estate. Moreover, under infectious invalidity, she would not be able to sever the properties and revive her access rights.

That result is patently unfair. The direct abutter/servient estate owner benefits most from the open space that zoning requires. Open space, like conservation land, is a direct boon to servient estate owners, translating into more attractive neighborhoods and higher property values. Yet merely because the dominant estate is expanded, without any increase in use of the servient estate, overloading requires the effective end of its access rights. At the same time, incongruously, overburdening law otherwise allows changes in the mode of transportation over an easement and in the use of the dominant estate, and even its subdivision, as long as its identity remains unchanged. None of this makes any sense. It is time for the SJC to jettison the doctrine of overloading.

Co-chair of the REBA Young Lawyers Committee, Nick Shapiro practices at Phillips & Angley, where he concentrates in permitting, land use and real estate. Prior joining the firm, he served as a clerk in both the Appeals Court and the Land Court. Nick can be reached at nshapiro@phillips-angley.com.

Reflections of a land surveyor as mediator

BY ROBERT W. FOSTER

BOB FOSTER

In 1996, I was invited to join MCA Dispute Resolution as a mediator with the explanation that many cases submitted for mediation involved property boundary disputes. It was thought beneficial to have a land surveyor on the panel who might better understand the issues and could be better able to facilitate solutions to disputes.

At that time I had been involved as an expert in several tort cases of alleged surveyor negligence (for both plaintiffs and defendants), as well as an occasional land boundary dispute, so it seemed logical to try the mediation effort. I attended the Dispute Resolution Center of Framingham Court Mediation Services Inc. (FCMS), where I completed a 35-hour course in "basic mediation training in conflict resolution."

The FCMS course included lectures, reading assignments and role play. Several principles of mediation were introduced. First, the real interests of the parties must be defined. Next, besides the necessary neutrality of the mediator and the confidentiality of the process, we were taught that the mediator was not to be a problem solver, but a facilitator of agreement between disputing parties.

It was also suggested to us that the mediator need not be an expert in the subject of the dispute; in fact, it was often better for a mediator to have little or no knowledge of the subject so that he/she could concentrate on the parties and their interests rather than on the details of the dispute.

This last point came as a surprise to me. It seemed, at first, to be antithetical to the whole purpose of my being selected to mediate disputes involving property boundaries. And in our "role play" sessions I was rapped on the wrist several times for attempting to offer solutions to the imaginary participants. The FCMS instructors pointed out that engineers are, almost by definition, problem-solvers, but that a mediator must lead the parties to find and develop *their own* solutions.

In practice I have learned both not to solve the problem and that it is an advantage to be able to understand the technical details that are bound to be involved. I was selected to mediate a case in which measurable property damage was traced to a surveyor's determination of a property line. The plaintiff had hired a surveyor who came up with a boundary different from the defendant surveyor's location.

It was clear to me that both parties (and perhaps their lawyers) expected me to make a judgment as to the correct boundary location. I explained to them in the opening joint session that this was mediation, not arbitration, and that it was not my job to be a judge; furthermore, I would have to repeat much of the work of the two surveyors in order to make a judgment, and the two surveyors who were present for the mediation session, were both licensed with years of practice and well-deserved reputations.

I read for them a quote by Williams and Onsrud, two well-known experts of the surveying profession, in explaining one court's decision: "If a court upheld the surveyor's evaluation of the evidence in the example, it is because the surveyor arrived at a comprehensive and well-reasoned answer rather than because he arrived at the theoretically correct answer. … there are no "true answers" waiting to be discovered, only well-reasoned answers."*

I urged the parties to consider their *interests* rather than concentrating upon their *rights*. This was another principle suggested by the FCMS instructors: that if people insisted upon arguing their rights they may as well take their dispute to full court litigation. Mediation was intended for people to identify their interests first, find a win-win solution in which everybody's interests are served, and leave it to their counsel to see that their rights are not violated. In the end, the parties in this conflict arrived at a negotiated agreement in which both their interests were served, and with a settlement costing a fraction of the plaintiff's first claim for damages.

In another case involving property damages with conflicting surveyor participation, I advised one party in confidence that I believed their surveyor's opinion would be overruled in a court knowledgeable of certain surveying principles. I was careful not to report my opinion to the other party; instead, I was trying to convince an attorney that his case was weak in so far as it relied upon a surveyor's work that clearly contradicted one of the basic surveying doctrines.

That was one of the few cases in which I have offered a professional opinion; the attorney wanted to compromise at that point, but his client, the defendant, was determined to soldier on.

It was suggested by the FCMS instructors, not as a rule, but as a preference of some mediators, that the parties in mediation not bring their attorneys to the sessions. I have found, on the contrary, that the attorneys' presence in each of the sessions I have mediated was a great benefit to the process. Even as an advocate, an attorney is in a position to see past the emotions and biases of his client, and will often bring the client back to the subject and the important issues. Plus, his presence in the room seems to lend confidence to a lay person unfamiliar with the mediation process.

One of the worst frustrations for a mediator is the party that introduces a demand late in the process, long after the interests of both parties have (presumably) been identified. In the typical win-win solution, both parties are usually giving up something, and sometimes one party will decide late in the game that he is giving up too much or is not gaining enough. The result may be a new interest that must be satisfied — one that was unidentified until after the terms of the agreement had been informally established. That has happened twice to me, each time at the end of a long day of sessions with the parties, in which the issues were made clear and the terms clearly defined.

In each of those cases, one party came up with a new demand even as an agreement was about to be written for both to sign. And each time, the disrupting party's attorney, recognizing that his client was making a mistake, advised accordingly and agreed with me: that if I introduced the new demand the other party was likely to walk out. And that's exactly what happened. I assume that both these abortive disputes went back to the courthouse, though I never follow cases once we end the session. In both of those regrettable cases, I was glad that the attorneys were present.

Land surveyors occasionally find themselves caught between warring land owners, one of them being the surveyor's client. Issues of ethics, liability and self-confidence (not to mention fee collection), plus the fact that a surveyor has an equal responsibility to the neighbor as to her client, can make it difficult for her to facilitate acceptance and agreement. We are taught that good surveying should avoid conflict in the neighborhood but an owner's concept of where a property line *should be* combined with neighborly grudges and hard feelings can confound the best intentions of the surveyor-in-the-middle.

It is rewarding to be involved in a process with the potential to bring peace, save time and cost, and sometimes even see the warring parties shake hands at the end of the day.

Bob Foster is a registered professional surveyor and registered professional engineer with more than 40 years of experience in the planning and design of residential, commercial and industrial land uses. He is a widely published author of engineering articles and treatises, and is a sought-after expert witness in civil actions involving survey, title and boundary disputes. Bob can be contacted at robertwf97@gmail.com. To schedule a mediation with Bob, contact Andrea Morales at REBA Dispute Resolution at morales@reba.net.

No harm, no foul? 'Negligence in the abstract' reconsidered

BY JAMES S. BOLAN
AND SARA N. HOLDEN

JIM BOLAN

SARA HOLDEN

The difficult case of *Brissette v. Ryan*, *et al.* recently addressed the question of when an injury occurs in the context of a malpractice claim. Is this case, the Appeals Court concluded that the defense of "negligence in the abstract" (liability without consequential damage) does not succeed because harm had indeed accrued when a tortious act prevents an individual from obtaining a valuable interest, a life estate, that individual has suffered damage and a cognizable injury for which she is entitled to present redress.

Mother and Father sought legal advice to protect their home from Medicaid liens. Counsel advised them that they could transfer title in house No. 1 for consideration to their adult children with reserved life estates. They transferred title as recommended.

Years later, Mother and Father met with counsel about selling house No. 1 and buying house No. 2, putting title in the name of two of their children. Counsel said that if they reserved life estates and applied for Medicaid within five years, they could be rendered ineligible. He also advised that they did not need Medicaid protection, since their children would do right by them; thus, title was taken in the new house without life estates reserved.

One son took out a loan on his own house to finance the purchase of house No. 2. The deed was put in the son and daughter's names as joint tenants, and counsel released the deed to house No. 1, transferring title back to Mother and Father. They then sold house No. 1 and used the proceeds to allow their son to pay off the loan he took to finance the purchase of house No. 2. After Father passed away, Mother wanted to retake title in house No. 2 in her own name, but her children did not "do right" by her and declined to convey the house to their mother. Despite various offers from the children for Mother to stay in house No. 2, none of them created rights equivalent to a life estate. The malpractice claim was that, but for counsel's negligence, Mother would have had a life estate in exchange for the money paid to the son (which he used to repay his loan). Instead of a life estate, Mother ended up with "no legally cognizable interest," at risk of eviction. Unlike one with a life estate, Mother could not rent the house or get an equity loan.

The court concluded that the jury could have found, as counsel conceded at trial, that his advice was wrong both about ineligibility for Medicaid and about the possibility of a posthumous

Medicaid lien against the property had the clients reserved life estates in house No. 2. The Mother was deprived of a property right: the life estate. The value of a property right lies in, among other things, the rights it gives one to possession and to free alienation of the property. Deprivation of those rights is an "archetypal injury in fact"; moreover, one does not have to await more of an injury to have present compensable harm. Mother was damaged by the loss, even without proof that she had present plans to exercise her right to alienation.

The archetypical prima facie malpractice case requires the existence of a duty under an attorney-client relationship and the breach of that duty by conduct that falls below the standard of care, and proximately caused harm.

The case articulates further the definition of the nature of harm, and urges us to consider the consequences that might not seem apparent at first glance. It also reinforces what we would suggest is a valuable prophylactic practice that counsel should consider getting a "second opinion" (within or without one's office) before giving advice to a client on a substantive matter so that a second opinion giver can contemplate the intended and unintended consequences of the proposed action.

Jim Bolan and Sara Holden are regular columnists for REBA News, focusing their articles on practical legal and malpractice advice for transactional lawyers. Both are partners in the Newton firm of Brecher, Wyner, Simons, Fox & Bolan. Bolan can be reached by email at jbolan@legalpro.com; Holden can be reached at sholden@legalpro.com.

THE LATEST ON MORTGAGE ACKNOWLEDGEMENTS

MORTGAGE, CONTINUED FROM PAGE 1

> personally appeared Andrew DeMore and Maureen DeMore by their attorney-in-fact, John G. Malloy under power of attorney recorded herewith proved to me through satisfactory evidence of identification, which were drivers licenses to be the person whose name is signed on the proceeding attached document, and acknowledged to me that he/she signed it voluntarily for its stated purpose.

After the Debtors filed their Chapter 7 bankruptcy petition, the Trustee appointed in their case brought an adversary proceeding to avoid the mortgage under Bankruptcy Code Section 544(a)(3) — the so-called "strong arm" powers provision that allows trustees to avoid liens that do not provide constructive notice to a bona fide purchaser of the property. The Bankruptcy Court granted the Trustee's motion for summary judgment, avoiding the mortgage because the acknowledgement was ambiguous. The court found that "the language in the acknowledgement is unclear as it is capable of two different interpretations as to who personally appeared before the notary, either Molloy or the Debtors." 530 B.R. 519, 532 (Bankr. D. Mass. 2015).

Before addressing the District Court's decision, which reversed the Bankruptcy Court's ruling, it is important to understand the bankruptcy decisions previously addressing defective acknowledgements. Initially, those decisions addressed acknowledgements where the name of the mortgagor was omitted from the body of the acknowledgement, or where the wrong name was inserted in the acknowledgement. See *Agin v. MERS (In re Giroux)*, 2009 WL 1458173 (Bankr. D. Mass. May 21, 2009, missing name); *Agin v. MERS (In re Bower)*, 2010 WL 4023396 (Bankr. D. Mass. Oct. 13, 2010, missing name); *DeGiacomo v. Citimortgage, Inc. (In re Nistad)*, 2012 WL 272750 (Bankr. D. Mass. Jan. 30, 2012, wrong name).

In each of these cases, the Bankruptcy Court found that the acknowledgement had a material defect; was therefore not entitled to be recorded; could not provide constructive notice to a bona fide purchaser; and could therefore be avoided under Bankruptcy Code §544(a)(3).

In *Weiss v. Wells Fargo Bank (In re Kelley)*, these principles were applied to an acknowledgement involving execution under a power of attorney. 498 B.R. 392 (B.A.P. 1st Cir. 2013). In *Kelley*, the Executive Order form was used, but the notary (i) neglected to identify the means of identification, (ii) failed to indicate whether the signer was a "he/she/it", and (iii) failed to indicate whether the phrase "signed it voluntarily for its stated purpose" referred to the person signing or the person who granted the power.

Although the Bankruptcy Court concluded that the acknowledgement was not materially defective, the Bankruptcy Appellate Panel disagreed, holding that the Executive Order language, as utilized by the notary, "fail[ed] to unequivocally express that the execution of the Mortgage was the free act and deed of the principals, i.e., the Debtors …" *Kelley*, at 400. The BAP ruled that this ambiguity was a material defect, allowing the avoidance of the mortgage.

That brings us to *DeMore*. The District Court observed that, unlike in *Giroux*, *Bower* and *Nistad*, the correct names of the mortgagors were stated in the acknowledgement, and that it properly disclosed the means used to identify the signer. Expressing skepticism as to whether *Kelley* was correctly decided, the court stated that, in invalidating the mortgage, the Bankruptcy Court hadn't given sufficient weight to the legal force of a properly executed power of attorney. The District Court also opined that the Bankruptcy Court decision gave undue importance to the acknowledgement as evidence of the grantor's free act — and that instead, it was simply a "formulaic witnessing of the assumption of a debt by a party to a real estate transaction." Rejecting the Trustee's argument that the certificate of acknowledgement was imperfect, the court somewhat humorously observed that this argument was valid "insofar as the model template of the certificate mandates no screaming neon sign flashing 'FREE ACT AND DEED OF THE GRANTOR.'" The court rejected such a requirement, reversed the Bankruptcy Court and upheld the validity of the acknowledgement.

Where does the *DeMore* decision leave real estate practitioners preparing a mortgage to be executed by an attorney-in-fact? The opinion certainly confirms that the form of acknowledgement in Executive Order No. 455 may properly be used where documents are executed under a power of attorney. However, district court decisions issued in multi-judge districts are generally not binding on bankruptcy courts in the same district. Thus, *DeMore* cannot be relied on as having a binding impact on this issue.

In addition, it seems clear that the bankruptcy courts are uneasy with the Executive Order form of acknowledgement as applied to power of attorney executions, because of its lack of clarity regarding whose act is being characterized as voluntary, the grantor or the attorney-in-fact. While we await future bankruptcy decisions, one solution to the power of attorney acknowledgement problem might be to add the words "and as the voluntary act of the principal" to the Executive Order form. Thus, the power of attorney acknowledgement would read:

> On this __ day of ____, 20__, before me, the undersigned notary public, personally appeared _____, proved to me through satisfactory evidence of identification, which were _____, to be the person whose name is signed on the preceding or attached document, and acknowledged to me that he/she signed it voluntarily for its stated purpose as attorney in fact for _____, the principal, and as the voluntary act of the principal.

REBA's Legislation Committee has been developing revised legislation regarding the conduct of notaries, currently pending as Senate Bill No. 2064, which addresses the issues raised by *Kelley* and *DeMore* respecting power of attorney signatures. Part 2 of this article, to appear in the next issue of REBA News, will address those provisions in greater detail.

A member of the REBA Legislation Committee, Mike Goldberg is a partner at Casner & Edwards, where he specializes in the areas of business bankruptcy, financial restructuring and business transactions (in particular, real estate financing transactions). Mike was the principal draftsman of the REBA-sponsored 2011 overhaul of the Massachusetts Homestead Law, incorporating the concept of automatic homestead. He can be contacted at Goldberg@casneredwards.com.

Representing a condo developer or converter in the sale of individual units

BY SAUL J. FELDMAN


SAUL FELDMAN

I have previously written about how to represent an individual seller of a condominium unit. In this article, I am going to discuss how to represent a condominium converter or a developer in a unit sale.

My experience in representing a condominium converter or developer in unit sales began in the early 1970s with 330 Beacon St. in Boston and Weymouthport in Weymouth. My experience has continued over the decades to include Longyear at Fisher Hill at 120 Seaver St. in Brookline, the Farm at Chestnut Hill in Newton, Folio at 80 Broad St. in Boston, and Parkview in Westborough. The objective in handling multiple unit sales in a large building or buildings in a short period of time is to be well-organized and efficient.

Because the Supreme Judicial Court recently adopted a rule that requires Massachusetts attorneys to provide clients with an engagement letter concerning both the scope of the work and their fees, attorneys must provide such a letter to their developer and converter clients. In reality, this invariably has always been done, but now it is required by law.

Given the cyclical nature of real estate, the days of many unit closings in a short period of time are back. It is important to developer and converter clients that their closing attorneys be organized and efficient in order to close large numbers of closings relatvely quickly.

The seller's attorney must prepare the condominium documents, namely:

- The master deed
- The document that creates the organization of unit owners (usually a declaration of trust and by-laws in Massachusetts, but it could be articles of organization and by-laws if a corporation is used, and just by-laws if an unincorporated association is used)
- A form of unit reservation agreement (customarily used in lieu of an offer to purchase)
- A form of unit purchase and sale agreement
- A sample 6(d) certificate
- A sample unit deed (whereby buyers consent to any future phases/development is included)
- A sample tax letter agreement
- A limited warranty
- A preliminary budget
- A specimen title insurance policy

The foregoing together with a copy of the site and floor plans should be in a bound presentation given to purchasers by the sales staff. The presentation should contain an overview, whereby the developer retains the right to amend the condominium documents as long as the basic rights of the prospective unit owner are not materially affected. This shall apply to the number and configuration of units, the addition of phases to a condominium if applicable, and the ratio between residential units and commercial units in the case of a mixed-use condominium (as long as Fannie Mae/Freddie Mac/FHA provisions are not violated).

The purchase and sale agreement should be tailored to the particular project. I believe that a shorter P&S agreement is preferable; however, essential components need to be included. For instance, if the developer intends to develop additional phases, that needs to be explained in so that the buyer's consent to future development is obtained. Also, if a new project is to contain units above a floor, issues relative to the Interstate Land Sales Full Disclosure Act of 1968 (15 USC Chapter 42) need to be identified.

In addition to the presentation, the developer's or converter's attorney should prepare a closing package for the closing attorney (the attorney for the buyer and/or the buyer's lender), including:

- A completed unit deed
- A completed tax letter agreement
- An insurance certificate
- Recording information of the condominium documents
- A current municipal lien certificate
- In Boston, a current Water and Sewer Commission certificate
- Closing adjustments (condominium reserves, condominium fees and real estate taxes)

- A copy of the specimen title insurance policy
- A certificate of occupancy (temporary) in the event of a substantial rehabilitation or new construction;
- A list of recording charges

There must be careful tracking relative to conveyance of parking spaces, storage spaces and other appurtenant rights. In a project with 100 or more parking spaces, the developer and his attorney must be careful that a single space is not sold more than once by accident. You may be surprised to know that that does, in fact, happen!

A subordination agreement or consent to the condominium master deed by the lender(s) on a condominium development needs to be recorded with the registry of deeds. Lender(s) will have to provide a payoff statement relative to a partial release for each unit closing. The terms of obtaining partial releases for each unit closing should be established prior to the beginning of the sale of units. The more simple the formula (for instance, 80 percent of the purchase price) the better. If a lender is a private lender, original partial releases in recordable form will have to be delivered at the closing.

There is obviously much to be done in representing a developer or converter of a condominium. In a strong market for condo units, good organization is essential to a smooth and efficient process. In cases where my firm has represented developers of mid-sized and larger condominium projects, we have typically conducted three or more closings per day upon completion of construction. When a firm knows how to streamline the process, that's a realistic expectation.

Saul Feldman is a longtime REBA member and an active participant in the association's Condominium Law and Practice Committee. He has over 40 years of experience in real estate law. Saul can be contacted at info@feldmanlawoffice.com.

'Reynolds v. Stow' makes a positive impact on 40B development

BY DANIEL S. HILL

DAN HILL

In one of the most closely-watched Chapter 40B cases in years, the Supreme Judicial Court on Dec. 22, 2015, declined further appellate review from an Appeals Court decision that annulled a Chapter 40B comprehensive permit, where a local zoning board granted a critical waiver from an environmental regulation despite evidence that the project's septic system would pollute neighboring wells.

The case, *Reynolds v. Stow Zoning Bd. of Appeals*, 88 Mass. App. Ct. 339, FAR denied, 473 Mass. 1107 (2015), displayed the tension often seen in controversial Chapter 40B proposals, pitting environmental protection concerns against the rush to develop inexpensive housing in the commonwealth. In its affirmed ruling, the Appeals Court held that the expedited permitting scheme of Chapter 40B does not usurp reasonable, local environmental concerns. The Appeals Court's ruling does not create new law, but confirms the ability of zoning boards to impose environmental restrictions on Chapter 40B projects, something the Chapter 40B development community has forcefully resisted.

The case, *Reynolds v. Stow Zoning Bd. of Appeals*, displays the tension often seen in controversial Chapter 40B proposals, pitting environmental protection concerns against the rush to develop inexpensive housing in the commonwealth.

The project in question was a 37-unit apartment building on two acres in Stow. The project site and its abutters are not served by a municipal water system, and therefore are dependent on private drinking water wells. The project site is located within the town's water resource protection district, the bylaw for which imposes strict nitrogen loading limitations that are substantively equivalent to the state Title 5 nitrogen restrictions when septic systems are installed in "nitrogen sensitive areas" (440 gallons of wastewater per day, per acre). The project's septic system would have grossly exceeded the bylaw's nitrogen cap for the site; consequently the developer asked the Stow Zoning Board for a waiver from the bylaw's restriction, which was granted.

Under the comprehensive permitting scheme of Chapter 40B, a developer can obtain all of the local permits and approvals necessary for an affordable housing project through a single application filed with the zoning board of appeals. In towns that have less than 10 percent of housing stock restricted as affordable, zoning boards must generally grant whatever waivers are necessary to make a project "economic"; however, zoning boards must weigh the request for waivers against any "local concerns" such as threats to public health, safety or the environment.

The Appeals Court found that where the plaintiff presented evidence, accepted by the trial judge, that the project would contaminate abutting wells, it was "unreasonable" for the zoning board to waive the bylaw's nitrogen-loading restriction that would have protected those wells. The developer's application for further appellate review was supported by amici filings from a veritable "who's who" of the Chapter 40B development community: the state lending agencies that provide funding for Chapter 40B projects, the influential Citizens Housing and Planning Association, and the Department of Housing and Community Development (DHCD), which has regulatory authority under Chapter 40B. Their primary argument was that a project in compliance with federal or state regulatory standards cannot be denied or conditioned by a local zoning board based on more strict local standards governing the same area or issue.

The Appeals Court squarely rejected that theory, citing its previous ruling in *Zoning Bd. of Appeals of Holliston v. Housing Appeals Committee*, in which it held that a zoning board could deny a Chapter 40B permit by "identifying a health or other local concern that (i) supports the denial, (ii) is not adequacy addressed by compliance with state standards, and (iii) outweighs the regional housing need." The Appeals Court questioned the developer's assumption that Title 5's nitrogen loading restrictions were inapplicable, but held that regardless, evidence presented at trial demonstrated that compliance with state law, even if it applicable, was insufficient to protect public health.

In towns that have less than 10 percent of housing stock restricted as affordable, zoning boards must generally grant whatever waivers are necessary to make a project "economic" ...

The Appeals Court's rationale doesn't sound groundbreaking, and it isn't. But that hasn't stopped the Chapter 40B development community from invoking the "chicken little" defense. Mintz Levin, writing on behalf of the state's lending agencies (MassHousing, MassDevelopment, DHCD, etc.), wrote to the SJC that the Appeal Court ruling would "make it even more difficult for towns like Stow to meet that critical legislative goal [achieving 10% of its housing stock as affordable], substantially diminishing the authority of local boards to grant comprehensive permits…"

And in this newspaper this past December, my friend Bob Ruzzo, the former deputy director of MassHousing, stated that the ruling would "encourage the proliferation of scientifically questionable local environmental requirements." Vigilant readers of REBA News will recall that Ruzzo has previously railed against the scourge of judicial appeals from Chapter 40B decisions, accusing abutters of undermining the purpose of the statute.

The legislative history of Chapter 40B, which dates back to 1969, evinces an interest in balancing the need for more affordable housing with "local concerns" that may come from the abrogation of local planning controls, including environmental protection bylaws, through comprehensive permit waivers.

In communities like Stow, Carlisle, Sherborn and others that don't have municipal water distribution systems or municipal sewer systems, minimum lot size requirements and strict nitrogen loading limitations are not "barriers" to the development of affordable housing, but are necessary land use controls to protect private drinking water wells and fragile wetland ecosystems from unintentional contamination and degradation. This legitimate purpose has been consistently recognized by our appellate courts. Frivolous appeals and junk science can be vetted by the courts.

The developers in Stow could have followed the lead of more "friendly" 40B developers, and designed its project to avoid public health and environmental impacts, but instead elected to stand on principle that if their project complies with Title 5, they should be able to ignore adverse impacts and flout local protective bylaws (the Appeals Court observed here that the developer didn't even evaluate nitrogen impacts on off-site wells).

If anything, the Appeals Court ruling will have a positive impact on 40B development around the commonwealth, encouraging developers to heed local health, safety and environmental concerns, and strengthening the hand of municipalities to insist on responsibly-designed and appropriately-sited projects.

A member of REBA's Affordable Housing Committee, Dan Hill practices in Charlestown where he concentrates his practice in the real estate, land use and environmental law fields. Dan can be contacted by email at dhill@danhilllaw.com.

APPEALS COURT REAFFIRMS COMMISSION'S DUAL AUTHORITY

APPEALS COURT, CONTINUED FROM PAGE 5

by-law provides a more rigorous regulatory scheme does not preempt a redetermination of the local authority's decision by the DEP except to the extent that the local decision was based exclusively on those provisions of its by-law that are more stringent and, therefore, independent of the act.

Healer v. Department of Environmental Protection, 73 Mass. App. Ct. 714, 718-19 (2009).

Parkview challenged the Winchester commission's determination, in an Order of Resource Area Delineation and one or two later Enforcement Orders, that it had jurisdiction over its property under both its bylaw and the Act. The commission found the property to be within bordering land subject to flooding under the Act as well as within "land subject to flooding" under Winchester's wetlands protection bylaw. The bylaw has a more encompassing definition of land subject to flooding that does the Act.

MassDEP's regulations promulgated under the Act define "bordering land subject to flooding" as the area within the 100-year floodplain defined by the Federal Emergency Management Agency in its flood insurance rate maps and data. The Winchester Bylaw makes no reference to FEMA information, instead defining "flooding" as "temporary inundation of water or a rise in the surface of a body of water, such that it covers land not usually under water." This covers more geographic area than in the FEMA maps.

Parkview appealed the Winchester commission's decision under the Act to MassDEP and under the bylaw to Superior Court. MassDEP reversed the commission's decision, finding that the property was not within the area mapped at the time by FEMA as 100-year floodplain. When issuing its decision, MassDEP explicitly stated its decision was only under the Act.

Parkview lost its bylaw appeal in in Superior Court, then tried to convince the Appeals Court that MassDEP's decision also preempted the Commission's decision under the bylaw. Parkview argued the commission had violated Healer when it asserted jurisdiction under both state and local law, which, by the way, is a common approach by commissions with bylaws. Parkview maintained that the commission should have asserted jurisdiction only under the bylaw if it wanted to avoid being preempted by MassDEP.

The Appeals Court disagreed with Parkview and reaffirmed the long-established principle that even when a commission bases its decision on the Act and bylaw, MassDEP may review the decision and supersede any portion of the decision based on the Act. The Appeals Court stated that if were to adopt Parkview's position, it effectively would expand MassDEP's authority over bylaws, thus negating the principle that the Act (and thus MassDEP) sets minimum statewide standards.

The Appeals Court went on to advise that commissions "purporting to act under both State law and independently under local law should make it clear in their written decisions and orders that there is a dual basis for their determinations." This is something sophisticated commissions already do, some by issuing two entirely separate decisions using separate forms, findings, and conditions. Alternatively, many commissions utilize a single form modified to indicate the decision is under both the Act and bylaw, while attaching one set of findings and conditions for its decision under the Act and another for its decision under the Bylaw. These practices should satisfy the precepts of the *Parkview* decision.

A member of the REBA Environmental Law Committee, Nathaniel Stevens is an associate at McGregor & Legere, P.C. He handles a diverse range of land use and environmental matters including hazardous waste, underground storage tanks, wetlands, stormwater and air permits. He can be contacted at NStevens@mcgregorlaw.com.

Henry H. Thayer Scholarship Fund update

In collaboration with REBA, The Abstract Club and Rackemann, Sawyer & Brewster, MCLE has established the Henry H. Thayer Scholarship Fund to honor a remarkable leader of the real estate bar who, for 50 years, has influenced the field of real estate law and those who practice it. Widely respected as the dean of real estate titles in Massachusetts, Henry served as REBA's president in 1988 and was given the association's Richard B. Johnson award in 1995. His dedication to his clients, leadership in the bar and career-long commitment to the education, training and mentoring of others has always exemplified the best of our profession's rich legal heritage. Each year, scholarships from the fund will benefit lawyers who serve the public interest, including legal aid staff attorneys, private practitioners who accept pro bono cases, and other lawyers who, without financial assistance, would not be able to attend MCLE programs. **We thank the following donors for helping to create this fund in Henry's honor:**

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Women's Lunch Place empowers Boston women struggling with homelessness

BY ELIZABETH KEELEY

ELIZABETH KEELEY

How often is it said that the three things you need to know about real estate are location, location, location! In today's Boston housing market, this is most certainly true. New high rise condominiums and rentals are reaching for the stars throughout the downtown and seaport neighborhoods.

So what three things should you know about individuals experiencing homelessness? First, less than 4 percent of the homeless in Massachusetts live on the streets — one of the lowest rates in the country. Massachusetts is the only state in the country with a "right to shelter" law that entitles every family to a roof over their heads the day they qualify for emergency housing. As a result, the vast majority of the state's homeless population is in shelters or transitional housing.

Second, 25 percent of the homeless in this country are single unaccompanied women, as are 90 percent of the guests at Women's Lunch Place. Third, in January 2015, agencies in Massachusetts reported 21,237 people in shelters, in transitional housing or on the streets, an increase of more than 2,200 — or 12 percent — from the previous year.

At Women's Lunch Place, six days per week, we open our doors to hundreds of poor and homeless women. In the past two years, we have seen a 50-percent increase in women of all ages, from 16 to 90. They come because they are hungry, need to rest or shower, and want to be part of a safe, welcoming community. We offer programs and services that help restore their dignity and empower them to begin making positive changes. The biggest challenge is finding safe and accessible places for homeless women to live. For many women, the journey to a place of their own will take years.

Sharon's first visit to WLP came after she had after raised two children as a single mom, and needed help for her addiction disease and mental illness. She got sober, got married and moved into a home south of Boston. Tragically, after 10 years of stability, her partner relapsed, refused treatment and within months they were homeless. Sharon found her way to the shelter on Long Island, and a week before it closed, she found a bed in a sober house. Sharon also returned to WLP for help and to find a place to live.

After 18 months of filing forms and deadlines passing, Sharon is finally in her own apartment, sober and receiving treatment for her mental illness. She still visits WLP, for it is where her friends and support are, and she told me that "I owe so much to this community and the staff. I am taking care of myself, singing again, and no longer feel ashamed." Sharon admits she has to work hard every day to maintain her sobriety, mental health and positive attitude. When asked about the poor and needy she stated, "There is no reason, in this country of wealth, that anyone should go hungry or without a place to live."

Please do more than walk past the woman or man desperate and in need of help: Recognize their humanity. They deserve nothing less.

Elizabeth Keeley is executive director of the Women's Lunch Place. She can be reached at elizabeth@womenslunchplace.org.

A cautionary message regarding Choice Nationwide Notaries and other 'signing services'

The current robust residential real estate market, together with an increase in refinancing and home equity lines of credit, has brought an upsurge of complaints from REBA members about out-of-state witness closing signing services trolling for Massachusetts lawyers to handle what appear to be witness closings.

Our UPL Committee believes that one California-based company, Choice Nationwide Notaries, has been particularly aggressive in this arena. We encourage members to report any solicitations from witness closing agents. Identifying any title insurance underwriter associated with a witness or notary closing company is also helpful.

Closing lawyers must ensure that at the closing table they have the information necessary to "play a meaningful role in connection with the conveyancing transaction." *REBA v. NREIS*, 459 Mass. 512, 534 (2011). As the *NREIS* court found, the closing is a critical step in the transfer of title and a lawyer's sole function cannot be to hand documents around for signature and notarization. *Id.* at 533-534.

An invitation from the Title Standards Committee

The mandate of the REBA Title Standards Committee is to promulgate title standards, practice standards, ethical standards and REBA forms to promote uniformity and harmony in real estate and transactional practice. The work of the committee, which began in the 1970s, is compiled in the REBA Handbook of Standards and Forms, a key benefit of association membership. The committee's standards have often been cited in SJC and Appeals Court decisions.

The committee seeks member input on any area of title or transactional law where a common standard or useful form would be a helpful resource. In some instances, an existing standard or form may require revision or updating due to changes in decisional or statutory law.

If you have a suggestion or comment on the Handbook or the work of the committee, contact Co-chairs Richard Serkey or Chris Pitt at rserkey@wwsr.com or cpitt@rc.com.

REBA 2015 dues and lobbying activities

Many REBA members deduct the cost of their annual dues as a business or professional expense subject to restrictions imposed by law. Section 162 (e) of the Internal Revenue Code requires REBA to disclose to members the portion of their dues payments that are attributable to lobbying activities and therefore not deductible.

The non-deductible portion of your 2015 REBA membership dues that was used for lobbying was 8.7 percent.

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