REBA news
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Law regulating notaries 'significant' for REBA

BY EDWARD J. SMITH

On Oct. 6, Gov. Charlie Baker signed Chapter 289 of the Acts of 2016, an act regulating notaries public to protect consumers and the validity and effectiveness of recorded instruments. Expected to take effect in 90 days, the statute is significant for REBA members and their legal staff who are notaries.

This legislation is, in part, a codification of Executive Order No. 455 (04-04), which provided for standards of conduct for notaries. However, its most serious consequence for misconduct was the revocation or non-renewal of a notary's commission. Chapter 289 establishes penalties and rights of action.

REBA has had a heightened interest in this subject matter on account of the organization's leadership in opposing the practice of law in Massachusetts by non-lawyers. REBA has resisted the aggressive efforts of settlement service providers and their national trade asso-

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Pair honored with Emerging Leader Award

The first recipients of REBA's newly-established Emerging Leader Award, Kim Bielan and Ben Adeyinka, were honored at the Association's Annual Meeting & Conference on Nov. 7.

Kendra Berardi and Nick Shapiro, co-chairs of REBA's new lawyers committee, presented the awards to the honorees. The Emerging Leader Award, first proposed by Berardi and Shapiro and subsequently approved by the association's board of directors, honors new leaders within REBA's membership, who demonstrate a level of association involvement, excellence, collegiality, ethics and integrity within the real estate bar that exceeds expectations for practitioners of their experience level. As the award's name suggests, honorees possess the characteristics that the association believes will serve them as future leaders.

Bielan joined several senior members of REBA to plan and launch the association's Strategic Communications Committee, which maintains and monitors several social media vehicles and platforms, as well as explores other innovative ways to share REBA's message. She has also been a leader in planning the programs and networking events of the New Lawyers Section. Bielan is a member of a number of REBA's sections, including Condominium Law, Litigation and Land Use and Zoning. She is an associate in the litigation department of Marcus, Errico, Emmer & Brooks, P.C. Her prior legal experience includes an internship for the Honorable Harry M. Grossman, former Associate Justice of the Massachusetts Land Court. In her hometown, Kim chairs the Falmouth Planning Board.

KIM BIELAN

BEN ADEYINKA

Adeyinka was among a small group of REBA members who planned and nurtured the Association's Residential Landlord/Tenant Section, which hosted its initial meeting just last month. He has also worked closely with the co-chairs of the New Lawyers Section in planning the group's programs and networking events. In 2013, he authored a Supreme Judicial Court amicus brief on behalf of REBA and the Abstract Club in *Bank of America, N.A., et al. v. Rosa, et al.* Adeyinka currently serves as administrative attorney for the Massachusetts Housing Court, where he works closely with Deputy Court Administrator Paul J. Burke and Chief Justice Timothy F. Sullivan.

REBA Dispute Resolution welcomes Markoff to neutrals panel

Eliane Markoff has joined REBA Dispute Resolution's panel of neutrals. She will be available to handle mediations, arbitrations, negotiations, case evaluations and other modes of dispute resolution. Markoff will mediate cases at REBA/DR's downtown Boston headquarters or at venues preferred by the parties.

"Eliane will bring her unique and broad experience from her work in a variety of community-based organizations into our program," said Joel Reck, a REBA/DR neutral. "We could not be more pleased with her participation."

ELIANE MARKOFF

"Eliane brings further strength to REBA/DR's panel with her experience resolving conflicts within family businesses and among family members," said Peter Wittenborg, REBA/DR's founder.

To schedule a mediation with Eliane Markoff, contact Andrea Morales at adr@reba.net.

About Eliane Markoff: Coming from the business world, she has worked for a Fortune 500 high-tech company managing work forces in the United States and Europe for twenty years. Markoff lent her considerable listening and mediation skills as an unofficial ombudsperson to build bridges among corporate divisions and individuals who needed to collaborate to be successful. With a high emotional IQ, she brings creative solutions to workplace conflicts. Markoff has mediated shareholder disputes within close corporations and conflicts among family mem-

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Association partners with WFG National Title

REBA has partnered with WFG National Title Insurance Company in its effort to support the role of the lawyer at the closing table and to combat the unauthorized practice of law.

"This new partnership is part of the evolution of Massachusetts Attorneys Title Group which I founded in 2007," said MassATG's Tom Bussone. "Of course, I will continue to work on behalf of REBA members to support and build this partnership."

"We are thrilled to partner with REBA in its continuing efforts to support its lawyer members in these challenging times. We are committed to serve REBA and its members," said Mike Supple, WFG's vice president and New England sales manager. "Tom Bussone will remain a strong asset for us as we continue to expand WFG's market share both in Massachusetts and throughout New England."

Under the terms of this new, direct relationship, WFG will make monthly donations to REBA to help support its efforts, the amount which will continue to increase as WFG grows in Massachusetts. This partnership will provide WFG and its independent title agents with a strong defender and supporter in REBA of the important role attorneys provide in the closing process.

"WFG agents in Massachusetts can take pride in knowing that their affiliation with WFG is directly supporting the fine efforts of REBA and its members and in benefiting the Massachusetts conveyancing community as a whole," said Supple.

To learn more about the WFG/REBA partnership, please contact Mike Supple at msupple@wfgnationaltitle.com or visit the WFG New England Website wfgagent.com/locations/Lynnfield, for more info regarding WFG's New England operations.

Inside this issue

'Privileged' to have played 'small role'

BY SUSAN B. LAROSE

President's Message

If you don't like something, change it. If you can't change it, change your attitude.

-Maya Angelou

This past year has seen many changes in our law practice areas and in our association. When change is out of our control, as with the changes mandated by the CFPB, we have to change our attitude. Instead of approaching the change with dread and resistance, we must maintain our professional focus.

As a bar association, when we see areas of the law that are detrimental to our members, we actively pursue change, through legislation or litigation. And this has been a very successful year for REBA. We have offered amicus briefs, legislative testimony and legislative initiatives that strengthen and protect our members' practices. Our recently enacted legislation regulating notaries public is but one example.

We also recognize that over time, the association must evolve to adapt to the needs of our members. Thanks to the efforts of the REBA board of directors and staff and particularly past presidents Thomas Bhisitkul and Edward Bloom, we relocated our headquarters to 295 Devonshire St. This move affords REBA the necessary space for committee and section meetings and with the updated technology, our offsite members can participate in these meetings via webcast.

REBA's new website will be live before the end of the year. The new capabilities of the site will further expand membership benefits of the association. In addition to providing our members with the plethora of resources available on the prior website, including title and practice standards as well as forms that are indispensable to our members, the new site will offer educational and professional resources to keep our members on the cutting edge of real estate law practice. President-elect Fran Nolan has been instrumental in pursuing this initiative and he has worked painstakingly with REBA's information technology guru, Bob Gaudette.

REBA continues to be at the forefront of the fight against the unauthorized practice of law, a cause that is imperative to the future of conveyancing in Massachusetts. We are grateful to Tom Bussone, working through MassATG, to help fund the fight.

A bar association is only as strong as those who believe in it and who devote their time and energy to its existence. REBA is extremely fortunate to have a devoted staff which continually demonstrates its devotion to the association. Peter Wittenborg, Nicole Cohen, Robert Gaudette and Andrea Morales are not simply employees, they are truly the foundation of the association. Over the years as a board member, I have observed their efforts, but until my term as president, I could not truly appreciate the extent of their work.

The executive committee, board of directors, chairs of committees and sections, as well as their members, must be recognized for their efforts. These individuals volunteer their time, energy and expertise to give the association the resources necessary to strengthen and protect the professional needs of our members.

With the continued support of our members, REBA will continue to evolve and adapt to the myriad challenges of our profession. I am privileged to have been able to play a small role this past year, and I look forward to watching the growth and development of the association in the future.

In defense of MERS

BY PAUL F. ALPHEN

In a recent Massachusetts Lawyers Weekly article on *Epps v. Bank of America*, it was suggested that MERS (Mortgage Electronic Registration Systems, Inc.) is "controversial." On the contrary, case law in Massachusetts continues to support the conclusion that MERS and the MERS® System database operate in compliance with Massachusetts law.

By way of background, MERS (a wholly-owned subsidiary of MERSCORP Holdings, Inc.) serves as mortgagee in the land records for mortgages registered on the MERS® System database on behalf of lenders and investors, who own mortgage loans that are traded in the secondary market.

MERS holds the secured interest in the property pledged as collateral for the repayment of the loan in the capacity as nominee – a limited form of agency – for the lender making the mortgage loan and for subsequent purchasers (beneficial owners) of the mortgage loan.

The MERS® System database is a national electronic database owned and operated by MERSCORP Holdings that tracks changes in mortgage servicing rights and beneficial ownership interests in mortgage loans secured by residential real estate.

Certainly, when MERS documents first appeared of record in our local Registries of Deeds about fifteen years ago, many old school conveyancers like me had questions and concerns; we are conservative by nature and slow to adopt new technologies in general. Nevertheless, with the passage of time and experience, we grew to understand and appreciate the system.

Notwithstanding MERS success in both federal and state courts and the fact that MERS assigns its mortgage lien interest prior to the commencement of foreclosures, legal challenges against MERS related to foreclosure actions continue to be raised here in Massachusetts.

Assertions that MERS was not the lawful mortgagee were raised and dismissed by the trial court and affirmed recently by the Appeals Court of Massachusetts in *Epps v. Bank of America* (2015-P-1095). This is the very same case where Olson questioned the validity of MERS.

In *Epps*, the Appeals Court ruled against the proposition that only the original lender can be the mortgagee, based on both the mortgage's contractual terms and as a matter of law in Massachusetts. This decision, rendered on Oct. 11, 2016, held that MERS was the legal mortgagee under the express terms of the homeowner's mortgage, until MERS assigned its interest in the mortgage to a subsequent party.

Further supporting the *Epps* holding are several other decisions by the Appeals Court that reject the theories underlying *Epps's* action and appeal, such as *Sullivan v. Kondaur*, 85 Mass. App. Ct. 202 (2014), *Shea v. Federal Nat'l Mort. Ass'n*, 87 Mass. App. Ct. 901 (2015) and others.

Prior to *Epps*, the Appeals Court made it clear in *Shea* that MERS may serve as mortgagee with authority to assign the mortgage, even though MERS never held the Note. 87 Mass. App. Ct. at 902-03. And, in *Sullivan*, the Appeals Court, in confirming the validity of a MERS assignment just like the assignment here at issue, determined that MERS was the original mortgagee with power to assign the mortgage and it needed no instruction from the owner of the debt in order to do so. See 85 Mass. App. Ct. at 208-09.

Just recently, the U.S. District Court held the mortgage's express language provided that MERS was the mortgagee and authorized MERS to assign the mortgage. The court also noted that, pursuant to 1st Circuit precedent, a note and mortgage need not be held by the same entity and that MERS can validly assign a mortgage. See *Hayden v. HSBC Bank USA, N.A Hayden v. HSBC Bank USA, N.A.*, No. 16-11492-DJC, 2016 U.S. Dist. LEXIS 135977 (D. Ma. Sept. 30, 2016).

Today, there are more than 5,000 lenders, servicers, sub-servicers, investors and government institutions using MERS and the MERS® System database, including MassHousing, the commonwealth's independent, quasi-public agency created to provide financing for affordable housing in Massachusetts. Far from controversial, the validity of MERS is settled law.

A former REBA president, Paul Alphen is an emeritus board member and serves on the association's strategic communications committee. Alphen can be reached by email at palphen@alphensantos.com.

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MISSION STATEMENT

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

MENTORING STATEMENT

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

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Summary of post-foreclosure case law

BY BENJAMIN O. ADEYINKA

Editor's Note: This is the first of a two-part article of a comprehensive summary of current post-foreclosure case law in Massachusetts. Part II will be published in the January/February 2017 issue of REBA News.

Foreclosure law is complex. Lawyers, judges, lending institutions and title companies have struggled with this particular area of law in the Massachusetts. Foreclosure law is a somewhat of a hybrid of various areas of law, such as contracts, property, torts, bankruptcy and consumer protection to name a few. Statutes were enacted by the legislature to deal with foreclosure law. Those statutes have been amended and interpreted through case law.

However, this area of the law is not an exact science with a one-size-fits-all solution. As a result, it is important for individuals who practice foreclosure law to familiarize themselves with the statutes and case law. The collection of cases infra is not an exhaustive list, but it provides relevant state court cases decided in 2016, which are important to foreclosure law.

Just Cause Evictions

Fannie Mae v. Quill, 2016 Mass. App. Unpub. LEXIS 891 (App. Ct. Sep. 19, 2016)

The plaintiff, Fannie Mae, appealed from a judgment of the Housing Court, following a bench trial, which awarded possession to the tenant, Quill, and $6,600 in damages in connection with Quill's counterclaims for breach of the warranty of habitability and interference with quiet enjoyment. The Appeals Court affirmed.

Fannie Mae became the owner of a property in Springfield through a foreclosure sale. At that time, Quill resided at the property pursuant to a rental agreement with the former mortgagor. Fannie brought an eviction action seeking possession based on failure to pay rent and denial of access by Quill. After a bench trial the court found:

1. Quill was a bona fide tenant pursuant to G. L.c. 186A, §1 and, as such, could only be evicted for "just cause";

2. Fannie Mae "failed to notify [Quill] in writing of the amount to be paid for rent or use and occupancy and to whom it was to be paid";

3. "[n]o evidence was presented to support the lack of access as a 'just cause'"; and

4. Fannie Mae failed to establish "just cause" for possession of the property and entered a judgment for possession of the property for Quill.

As for Quill's counterclaims, the Court awarded Quill $600 in damages for the breach of warranty of habitability and $6,000 for the interference with quiet enjoyment. This appeal followed.

Fannie Mae's summary process summons and complaint specifically stated that it was a "no cause" proceeding. Therefore, the notice was defective and the Appeals Court held that fact justified a ruling against Fannie Mae for possession.

> This area of the law is not an exact science with a one-size-fits-all solution.

Federal Natl. Mort. Assn. v. Nunez, 460 Mass. 511, 520 fn.11 (2011) "A foreclosing owner that has just cause to evict but has not alleged just cause in the notice to quit and the summary process action needs to recommence the summary process procedure and issue a new notice to quit asserting just cause and, if the tenant does not vacate, file a new summary process complaint."

Assignments

Wells Fargo Bank, N.A. v. Anderson, 89 Mass. App. Ct. 369 (2016)

The Appeals Court held that in this post foreclosure summary process action, the Housing Court properly granted possession to the plaintiff bank, where (although the judge mistakenly concluded that the bank could rely on assignments of the mortgage without any need to further substantiate their validity under G.L.c. 183, §54B) the assignments were not void and the defendant therefore lacked standing to challenge them or to seek further discovery of the validity of the documents effecting the assignments. *Id.* at 370-373. G.L.c. 183, §54B binds only the entity making and recording the assignment, if such action was made in compliance with the statute's provisions.

The statute does not bind any other party that has standing to contest the validity of the assignment. "The assignments may have been theoretically voidable by a party of interest and having standing but they were not void. Since the assignments were not void, Anderson had no standing to contest their validity and had no right to discovery beyond what was recorded pursuant to the statute." *Id.* at 373.

Pooling and Servicing Agreements (PSA)

U.S. Bank Nat'l Ass'n v. Bolling, 90 Mass. App. Ct. 154 (2016)

The Appeals Court held that the Housing Court erred in granting a borrower's motion for summary judgment in this summary process eviction action because, while the assignment of the mortgage was not made in accordance with the terms of the PSA, the borrower lacked standing to challenge the assignment because she was not a party to or an intended third-party beneficiary of the PSA. The Appeals Court remind us that "[u]nder Massachusetts law, although Bolling had standing to challenge deficiencies that render the assignment void, she d[id] not have standing to challenge those that make it merely voidable. *Id.* at 155-156 (internal citations omitted). Bolling's contention that the assignment was not made in accordance with the terms of the PSA was the type of latent defect that rendered the assignment merely voidable.

The Appeals Court also held the PSA's choice-of-law provision did not bear on what law governed the borrower's standing. "Although [the Appeals Court] conclude[d] that New York law does not apply, [it] note[s] that it would lead to the same result. '[A] mortgagor whose loan is owned by a trust … does not have standing to challenge the plaintiff's possession or status as assignee of the note and mortgage based on purported noncompliance with certain provisions of the PSA.'" *Id* at fn.6 quoting *Wells Fargo Bank, N.A. v. Erobobo*, 127 A.D.3d 1176, 1178, 9 N.Y.S.3d 312 (2015); see also *Rajamin v. Deutsche Bank Natl. Trust Co.*, 757 F.3d 79, 86-87 (2d Cir. 2014).

Note

Deutsche Bank Nat'l Trust Co. v. Lefebvre, 90 Mass. App. Ct. 1104 (2016)

On May 10, 2012, the Housing Court first entered judgment for Deutsche Bank on its summary process claim for possession. Subsequently thereafter, Lefebvre filed his first appeal to the Appeals Court. *Deutsche Bank Nat'l Trust Co. v. Lefebvre*, 86 Mass. App. Ct. 1101 (2014)

In June 2012, the Supreme Judicial Court rendered its decision in *Eaton*, ruling that to be statutorily entitled to foreclose, a mortgagee must not only hold the mortgage but also must either hold the note or act on behalf of the note holder. *Eaton v. Fannie Mae*, 462 Mass. 569, 570 (2012). However, the ruling in *Eaton* was prospective only.

In February 2014, the SJC issued its ruling in *Galiastro*, expanding the situations to which *Eaton* could apply retroactively to include cases in which the issue regarding the note was preserved and an appeal was pending as of June 22, 2012, the date of the *Eaton* decision. *Galiastro v. Mortgage Elec. Registration Sys.*, 467 Mass. 160 (2014)

As a result, Lefebvre's first appeal was resolved by remand for "further proceedings consistent with *Eaton* and *Galiastro*." *Deutsche Bank Nat'l Trust Co. v. Lefebvre*, 86 Mass. App. Ct. 1101 (2014)

After remand, the Housing Court issued a judgment in favor of Deutsche Bank on Feb. 10, 2015. Lefebvre filed his second appeal on Feb. 12, 2015. In Lefebvre's second appeal, he alleged that the foreclosure was invalid because his promissory note to IndyMac Bank was never indorsed in the name of Deutsche Bank, the foreclosing entity.

The Appeals Court affirmed the Housing Court's ruling explaining that, "[w]hen indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed." G.L.c. 106, §3-205(b)

As a result, after IndyMac indorsed the note in blank, it became enforceable by whoever received it from IndyMac – in this case, Deutsche Bank. "There was no need for any further indorsement by IndyMac or Deutsche Bank to make that transfer effective." *Deutsche Bank Nat'l Trust Co. v. Lefebvre*, 90 Mass. App. Ct. 1104 at 10

Prior pending action

Gold Star Homes, LLC v. Darbouze, 2016 Mass. App. LEXIS 50 (App. Ct. May 11, 2016)

The Appeals Court held that the Housing Court did not err in denying the defendant's motion to dismiss the plaintiff's summary process action, based on the pendency of an action for declaratory relief

in the Land Court. The relief sought by the plaintiff in the summary process (possession) was not available to it as a counterclaim in the Land Court action.

The Appeals Court also stated that the Housing Court did not abuse its discretion in hearing the summary process action notwithstanding the pendency of the Land Court action, where the parties had repeatedly agreed to continue the trial date in the Housing Court, where the Land Court action had been pending for almost one year, and where one defendant could have asked the Land Court judge for a stay of her eviction pending the outcome of the declaratory relief matter, but did not do so.

The Appeals Court also ruled the following:

No unfairness to the defendants arose from hearing the summary process action; and,

A post-foreclosure conveyance of the property by foreclosure deed did not render the summary process action invalid.

Res judicata

Santos v. U.S. Bank Nat'l Ass'n, 89 Mass. App. Ct. 687 (2016)

The Appeals Court affirmed the trial court's decision allowing the lender and loan servicers motion for summary judgment, which dismissed Santos' claims under G.L.c. 244, §35A for failure to provide notice of his 90-day right to cure, prior to foreclosure and for negligent processing of Santos' loan modification applications under HAMP.

The Appeals Court reinforced its view of res judicata stating, "[i]t is not acceptable for [Santos] to seek to force a foreclosing lender to litigate in multiple venues across separate proceedings by unilaterally holding certain claims back from summary process when those claims are within the summary process court's jurisdiction and assertedly essential to the determination of superior title." *Id.* at 695

"Res judicata will be employed by the courts to prevent the splitting of a cause of action where the party to be precluded (here [Santos]) had both the opportunity and the incentive to litigate all related matters fully in the original lawsuit." *Id.* at 695 (internal citations omitted)

The Appeals Court also addressed Santos' confusion, suggested in his summary process answer, where he doubted the District Court's jurisdiction.

The Appeals Court also addressed Santos' confusion, suggested in his summary process answer, where he doubted the District Court's jurisdiction. The Appeals Court noted that *Bank of America, N.A. v. Rosa*, 466 Mass. 613 (2013), may have clarified the expanded jurisdiction of the Housing Court, but U.S. Bank brought its summary process action in District Court. See *Santos* at 695. *Santos* did not suggest any basis to doubt the District Court's jurisdiction even prior to *Rosa*. G.L.c. 218, §19 ("Notwithstanding the limitation of $25,000, or other amount ordered by the [SJC], the District Courts may proceed with actions for money damages in any amount in summary process actions"); see also G. L.c. 231, §31 ("allows a summary process defendant to raise equitable defenses in the District Court that may 'absolutely and unconditionally' defeat the plaintiff's claim. Such defenses are not limited to failure to comply strictly with the power of sale of a mortgage. They may include, without limitation, the defense of payment of the mortgage note").

Paragraph 22

Valdez v. Fannie Mae, 89 Mass. App. Ct. 1129 (2016)

Valdez appealed from a dismissal of his complaint in the Superior Court in which he sought to invalidate the foreclosure sale of his property. On Sept. 16, 2011, Fannie Mae became the owner of the property via foreclosure deed. In May 2013, Valdez filed his complaint in Superior Court challenging the foreclosure sale.

FNMA, along with MERS and the servicer, jointly moved to dismiss the complaint. In June 2014, the motion to dismiss was allowed. In November 2014, Valdez filed this appeal in which he argued, for the first time, that his foreclosure was void for failure to comply with paragraph 22 of his mortgage.

In support of his assertions, he cited *Pinti v. Emigrant Mort. Co.,* 472 Mass. 226 (2015) and *Aurora Loan Servs., LLC v. Murphy*, 88 Mass. App. Ct. 726 (2015).

The Appeals Court declined to hear Valdez's paragraph 22 arguments, explaining that "[i]n these circumstances, where the issue concerning paragraph 22 was not raised by Valdez in the trial court before judgment entered, it was not properly preserved for appeal." *Id.* at *6 (internal citations omitted)

"Thus, although this case was pending on appeal when *Pinti* was issued, it does not qualify for the exception applied in *Aurora*." *Id.* at *6; see also *Aurora*, 88 Mass. App. Ct. 731-733 (applying exception to prospective application of *Pinti* requirement where case was pending on appeal on date of *Pinti* opinion and mortgagor had raised and preserved paragraph 22 claim in trial court).

Boston Prop. Holdings, LLC v. Callender, 89 Mass. App. Ct. 1104 (2016)

The defendant challenged the validity of a foreclosure sale of her property. The Housing Court rejected her arguments and ruled in favor of the plaintiff, which purchased the property at the sale. Appeals Court reversed stating, "In *Aurora Loan Servs., LLC v. Murphy*, 88 Mass. App. Ct. 726, 731-732 (2015), [the Appeals Court] held that the rule established by *Pinti* applies to all cases that were pending on appeal when *Pinti* was issued and in which the issue was preserved. Because this is just such a case, the borrower is entitled to judgment in her favor." *Id.*

McMahon v. Murphy, 89 Mass. App. Ct. 1108 (2016)

McMahon purchased a property at

See FORECLOSURE, page 14

Medical marijuana's impact on apartment leases

BY KENNETH A. KREMS

Issues regarding medical marijuana are beginning to confront landlords in Massachusetts. This is because in 2012, voters overwhelmingly approved a referendum allowing for the use of medical marijuana. Implementation of this has been very slow, but it is now picking up steam and a number of dispensaries have opened. Here in Massachusetts, recreational marijuana has also been legalized by voters this month.

Residents in both completely smoke-free buildings and buildings which are not smoke-free, often complain more about the odor of marijuana wafting into their apartments than they do about cigarette smoke coming into their units.

Smoke-free or not, leases should provide that the illegal possession or use of marijuana is prohibited. Since 2009, the possession of one ounce or less of marijuana has no longer been a criminal offense here. However, possession of marijuana is still a federal crime. In addition to the violation of federal law, marijuana smoke entering other units or being in the hallways interferes with the quiet enjoyment of other residents. If a resident continues to smoke marijuana in violation of the lease, he should be given several oral and written warnings and if the behavior continues, he can be evicted.

But what about medical marijuana? A resident who wants to use medical marijuana will need a medical marijuana card and to get that, she will need a doctor's authorization that she has a qualifying disability. Since the resident will have a disability, do we have to allow her to smoke medical marijuana as a reasonable accommodation?

Under Massachusetts and federal law, it is unlawful for a landlord to refuse to make a reasonable accommodation in rules, policies, practices or services when the accommodation is necessary to afford a disabled person an equal opportunity to use and enjoy the apartment.

The Massachusetts medical marijuana statute doesn't cover the use of medical marijuana in housing, but it does provide that "nothing in this law requires the violation of federal law or purports to give immunity under federal law."

A 2011 memorandum from the U.S. Department of Housing and Urban Development dealing with the use of medical marijuana in multifamily assisted properties provides that owners of federally assisted housing are required to deny admission to any household with a member who is using medical marijuana; that owners cannot have lease provisions that permit occupancy by a household member who is using medical marijuana; and that owners can terminate the tenancy of current households with a member who is using medical marijuana if the owner wishes to do so.

HUD concluded that owners "may not grant reasonable accommodations that would allow tenants to grow, use, otherwise possess, or distribute medical marijuana, even if in doing so such tenants are complying with state laws authorizing medical marijuana-related conduct."

There are no Massachusetts cases on the issue of the use of medical marijuana in apartments or condos. However, in December 2014, a federal court in Michigan in *Forest City Residential Management, Inc. v. Beasley*, 71 F.Supp.3d 715 (E.D. Mich. 2014) was faced with this question. In that case a tenant possessed a medical marijuana card and asked the landlord for a reasonable accommodation to allow him to smoke marijuana in his apartment.

The court stated that federal law making the use of marijuana a crime supersedes state medical marijuana laws allowing marijuana use, so to require a landlord to grant this accommodation would not be reasonable because it would require the landlord to violate federal law. The court stated, "Such a requirement would fundamentally alter the nature of [the landlord's] operation by thwarting Congress's mission to provide drug-free federally assisted housing." The court held that a landlord is not required to grant a reasonable accommodation to allow a tenant to use medical marijuana.

So as of now, a landlord does not have to allow a tenant to use medical marijuana inside the building. If a tenant wants to smoke marijuana for medical purposes, he can go outside to a location off the property where the smoke won't bother other residents. If the tenant is going to use medical marijuana inside the apartment, the tenant should have to ingest it in some other form, such as a pill or a brownie, or use a topical oil.

There is no question that in the next few years there will be cases in Massachusetts dealing with whether a landlord has to allow medical marijuana to be smoked in his or her building. We'll look forward to those decisions, but until a court rules otherwise landlords don't have to allow this.

Co-chair of REBA's residential landlord/tenant section, Ken Krems is a partner in the Boston office of Shaevel & Krems, LLP, where he focuses his practice on real estate management. Krems represents large residential management companies and is responsible for more than 11,000 units of housing in Massachusetts; he also represents landlords and tenants regarding commercial leasing issues, condominium associations and a buyers and sellers of real estate. Krems can be reached at kkrems@shaevelkrems.com.

'Meikle v. Nurse' did not change evictions forever

BY G. EMIL WARD

Lately this author has been hearing a lot of comments swirling around *Meikle v. Nurse*, 474 Mass. 207 (2016), a recent security deposit case. Some think the case means that $4.61 in unpaid interest on a security deposit claim can in and of itself act as a complete defense to an eviction. Others feel that this decision portends the doom of all evictions if the tenant files a security deposit counterclaim. This author has heard it said that this spells the end of the no-fault eviction and that the fate of landlords now lies in the hands of the legislature.

This author's response is simple: This is not so.

The case does not represent a sea change in landlord-tenant law. The case came out the way it should have under the present incarnation of G.L.c. 239, §8A, the statute that was not properly applied by the Boston Housing Court to produce the *Meikle* decision in the trial court. While one can argue that §8A should be changed, §8A is not producing any worse results for landlords after this decision than it did before it was handed down.

Here is why. For many years, security deposit claims have been an integral part of almost every tenant's defenses that this author has ever faced under Section 8A. In *Meikle*, the Supreme Judicial Court confirmed this. "The steady progression in the availability of tenant defenses, culminating in the elimination of conditions-based restrictions, confirms the legislature's intent to provide tenants with a broad set of defenses and counterclaims in the summary process action, including the defense asserted by the tenant in this case [alleging a violation of the security deposit statute, G.L.c. 186, §15B]." *Id.,* p. 213.

G.L.c. 239, §8A allows the tenant to raise any "counterclaim or defense" arising out of the tenancy, such as a security deposit claim. In a trial, an award under any such claim can be added to the tenant's damage award along with other damage awards, if any, and then matched against the unpaid rent found due to the landlord to determine if the tenant or landlord wins possession after setting one off against the other. This is what is usually known as the "pay over" provision.

For those of you unfamiliar with §8A's "pay over" provision, here is how it works. Under §8A, if after trial the landlord wins judgment for unpaid rent in the same amount of the tenant's damages or less than the tenant's damage award, (for, say, a leaky radiator ignored by the landlord for months in winter) the tenant keeps possession and the landlord must pay to the tenant the balance the court found that is due to the tenant. G.L.c. 239, §8A, fifth paragraph.

On the other hand, if the tenant wins an amount of money damages less than the landlord wins in unpaid rent, then the tenant has seven days in which to pay the difference between the rent found due and the damages won by the tenant into the court clerk's office.

If he pays that sum into court, the tenant retains possession. If not, the tenant loses possession. "Where a tenant prevails in a defense or counterclaim and is awarded damages in an amount less than the amount owed to the landlord, the statute provides that 'no judgment shall enter until after expiration of the time for such payment and the tenant has failed to make such payment.'" *Id.,* p. 213.

In *Meikle,* the trial judge found that the landlord won $3,900 (three months' unpaid rent). The tenant won the return of the security deposit and unpaid interest of $1,304.61 ($1,300 security deposit, plus $4.61 unpaid interest). The difference is, of course, the $2,595.39 that the tenant would have had to pay to the landlord through the court clerk's office to maintain possession. It is at this point that the trial court decision went off track.

For some reason not articulated in the decision, the judge failed to end the decision by offering the "pay over" opportunity, as has been the law for decades, to the tenant who would then have had the option to pay the difference in seven days' time and retain possession, or not as she chose. The trial judge then awarded $2,595.39 and possession to the landlord in violation of the statute.

That is the key part of the decision that was appealed by the tenant, namely, the judge's failure to state in the decision that now that the damages had been found for both sides and set off against one another, the tenant was to be offered the opportunity to pay the difference between unpaid rent of $3,900 and her judgment for damages of $1,304.61

See MEIKLE, page 7

My Cousin Vinnie explains the New Economy

BY PAUL F. ALPHEN

My cousin Vinnie, the suburban real estate attorney, joined my entourage in the Man Cave for a recent Patriots game. He was quite at home among the usual collection of captains of (very small) industry and leaders of (very small) governments. I had smoked a brisket and Vinnie appeared to enjoy slopping up the "burnt ends" in Carolina sauce and coleslaw…however he did so in my personal recliner and it was clear he was not relocating. After the game was over and we switched the big screen to the Red Zone, my buddy Bobby asked Vinnie how his business was doing.

Vinnie jumped out of my recliner and turned to face the attendees, partially blocking the screen. "I'm busier than any time since the start of the Great Recession, but it's a weird sort of busy. Everything I do, from big projects to residential deals, is rushed; it's affecting my blood pressure. Last week my favorite client called to tell me that he agreed to purchase a 'fully approved' commercial project on an online foreclosure auction, and do you know what they say about projects being sold as 'fully approved'?"

A chorus rang out from the back of the room from the well-versed engineers and Skip the DPW Superintendent: "It probably isn't!" Vinnie immediately responded with both arms up in the air: "You are correct! And the draconian 45-page P&S does not allow us to meet with any government boards in advance of the closing, which is only 20 days away. I have to sleuth around Town Hall and casually ask to see copies of department files without asking any hard questions or tell anyone what I'm up to.

"The agreement also says that we have to accept whatever quality of title the title insurance company is willing to provide; the words 'good and clear marketable record title' do not appear anywhere in the P&S. I've ordered a title exam knowing full well that I will spend months after the closing cleaning up the title, while begging for extensions and indulgences from the Planning Board."

Skip told Vinnie to move a little to the left and turn up the volume on screen 2 so that we can hear Coach B clear his nasal passages while saying nothing about the results of the game. Vinnie complied and then continued his rant. "Then tomorrow morning I have to prepare all the seller documents for the sale of an equipment leasing company with five locations in three states. The deal has been on again, off again since 2014 and I thought it was on hold; but I was told on Friday that the closing will be Monday afternoon. Meanwhile, I've got two new projects for which I have to perform damage control as the developers spent the last two months meeting with the nice folks at Town Hall without me, generating misinformation and bad will."

I'm busier than any time since the start of the Great Recession, but it's a weird sort of busy. Everything I do, from big projects to residential deals, is rushed; it's affecting my blood pressure.

"I know who you are talking about," laughed Skip, "Good luck." Vinnie finally moved from the front of the Man Cave to the rear to reload his plate with giant chocolate chip cookies, but he continued his rant.

"Even the simple residential deals are getting unnecessarily complicated, primarily because the nice buyers and sellers don't seem interested in putting much effort into their half a million dollar deals. For example, last Friday a buyer sent me 13 emails, called me with a bad cellphone from his summer house and demanded that I have to get the sellers to agree to include the moose head hanging in the family room and the Adirondack chairs as part of the deal. In the past two weeks the same guy expected my paralegal and me to be responsible for coordinating his brokers, his home inspector, his insurance agent, his contractor, his moving company, his money fund manager and his lovely wife. I'm worried that all these things are symptoms of the new economy, as everybody tries to do more with less. I'm just glad that I'm in my 60s and not in my 20s at the start of my career."

A former REBA president, Paul Alphen is an emeritus board member and serves on the association's strategic communications committee. Alphen can be reached by email at palphen@alphensantos.com.

'Meikle v. Nurse' did not change evictions forever

MEIKLE, CONTINUED FROM PAGE 6

or $2,595.39 and thus retain possession.

Of course, if the tenant had been given the "pay over" opportunity in the decision and failed to make the payment in seven days, judgment for possession would have issued for the landlord, Mr. Meikle. While Mr. Meikle was pro se in the appellate court, landlord groups filed an amicus brief as to the issue that concerned them most which is described below.

The interesting part, and the reason the author believes landlords were so upset with the decision is the following. In the appellate brief drafted by the Harvard Legal Aid Bureau, which represented the tenant, the brief tracks the SJC's arguments and the current law as the author understood the applicable law until its conclusion. In its "Conclusion" section, HLAB goes out of bounds and asks the SJC to ignore application of the "pay over" provision that might benefit the landlord and grant possession to the tenant.

"This Court should vacate the judgment for possession to the Landlord, award possession of the premises to the Tenant, and hold that G.L.c. 239, §8A provides a defense for possession when there are violations of the security deposit statute, c. 186, §15B." Brief of Appellant at 23, *Meikle v. Nurse*, 474 Mass. 207 (2016) (SJC-11859).

The SJC reversed the order for possession to the landlord and remanded for entry of an order "providing notice to the tenant of the right to retain possession in compliance with G.L.c. 239, §8A, fifth paragraph." *Id.*, p. 214.

However, to clear the air regarding the reach of the decision, the SJC stated that a security deposit counterclaim would not provide the tenant with a right to possession, "in perpetuity" if she made timely payment of the amount found due. *Id.*, p. 214. "The statute does not impose an obligatory tenancy on the landlord." *Id.*, p. 214.

Please note the "pay over" provision may only be used by tenants who are evicted for nonpayment or in no-fault evictions. On its face, the statute bars its use in defense of possession by tenants who are evicted for fault, i.e., breach of the tenancy terms. The statute does not consider nonpayment of rent to be a "fault" ground.

That's it. The Supreme Judicial Court simply rectified that error. It did not make new law. In this author's opinion, it is no big deal. Just another expensive and time-consuming security deposit case, but not a sea change in the law.

Emil Ward chairs the association's Landlord/Tenant Law Section. He discussed *Meikle v. Nurse* at one of the breakout sections at REBA's Annual Meeting and Conference. He can be contacted by email at gemilw@aol.com.

MMA: Changes on environment and land use

BY OLYMPIA BOWKER

On Aug. 9, Gov. Charlie Baker approved HB 4565, "An Act Modernizing Municipal Finance and Government," signing into law what is now Chapter 218 of the Acts of 2016. This newly enacted legislation tweaks, modifies and streamlines several existing statutes governing cities and towns.

The statutes amended are many and varied, and these are modifications that real estate attorneys and other professionals and their clients should know about. Here are select features of HB 4565, (MMA) with a focus on changes in municipal environmental and land use laws.

Local Agricultural Commissions are modified by three separate sections of the MMA. Section 23 of the MMA modified G.L.c. 40 by adding §8(L), which gives municipalities the explicit authority to establish a municipal agricultural commission and further outlines the authority of such a commission.

Section 215 of the MMA modified G.L. 111, §31 to accommodate the existence of any subsequently created municipal agricultural commissions. Finally, Section 243 of the MMA garners the same authority established in G.L.c. 40 for new municipal agricultural commissions, to ones that predated the legislation.

Municipal Procurements are affected by sections 2-4, and 6-12 of the MMA. These changes increase the dollar threshold for contracts requiring less than full competitive bidding. Sections 2-4 of the MMA alter G.L. 30, §39M by replacing subsection (a) with a new language that mandates all public construction valued at less than $10,000 be obtained through the sound business practices defined in G.L.c. 30B, §2. In addition, contracts for construction that are above $10,000 must be awarded to the lowest eligible responsible bidder. The new §39M (a) also includes specifics regarding notice requirements and blanket contracts.

Sections 6-12 of the MMA also alter the dollar threshold for contracts. G.L. 30, §4 is modified so that procurement for a supply or service for between $10,000 and $50,000 needs at least three written quotes from providers.

Prior to the MMA, under G.L.c. 30B, §5 (which governs competitive sealed bidding procedures) procurement contracts must have been valued at a minimum of $35,000 to fall under the listed procedures. The MMA altered this provision so the procurement contracts must be valued at least $50,000 to be required to conform to the competitive sealed bidding procedures set forth in G.L.c. 30B, §5.

> The statutes amended are many and varied, and these are modifications that real estate attorneys and other professionals and their clients should know about.

The MMA also altered G.L.c. 30B, §6, which now allows a chief procurement officer to enter into procurement contracts in the amount of $50,000 using competitive sealed proposals – a bump from the previous dollar threshold of $35,000.

A municipality's ability to deny local licenses and permits to delinquent taxpayers has been altered by sections 37 and 38 of the MMA. Prior law allowed municipalities to deny local licenses and permits to taxpayers that had neglected or refused to pay taxes for at least one year. This new change allows municipalities to a mirror a "good standing" requirement and removed the one year waiting period.

The MMA also alters G.L.c. 40 by adding a new §60B. This new section allows adoption and implementation of a workforce housing special tax assessment ("WH-STA") plan, to "encourage and facilitate incased development of middle income housing." The new provision goes on to outline the applicability and prescribed parameters of such a plan.

The MMA also amends G.L.c. 59 §5 by adding clause 58, which mandates that taxes on property included in a WH-STA plan only be assessed to the portion of property not exempt under G.L.c. 40, §60B.

The Municipal Affordable Housing Trust Fund Law, G.L.c. 44 §55C, is amended by the MMA so that G.L.c. 44B funds, from the Community Preservation Act (CPA), appropriated to local affordable housing trust funds are subject to the same restrictions as other CPA monies. In addition, at the end of each fiscal year the Municipal Affordable Housing Trust must ensure that all uses of 44B funds are reported to the community preservation committee so they are included in the CP-3 form to the department of revenue.

The newly enacted MMA also modifies Community Preservation Act surcharge exemptions in G.L.c. 44B, §3(e). In doing so, the MMA set a deadline for persons submitting applications for surcharge exemptions, which is the same deadline set under G.L.c. 59, §59.

G.L.c. 58, §8C, which governs Affordable Housing and Real Estate Abatements, is modified to allow a municipality to establish an agreement regarding an abatement of up to 75 percent of the outstanding real estate tax obligations and up to 100 percent of the outstanding interest and costs on the sites.

The MMA imposes some interesting changes to G.L.c. 61A. The MMA created G.L.c. 61A, §2A, which allows installation and operation of renewable energy on c. 61A land. However, there are several caveats for the location of the energy production, the amount of energy that can be produced and the application of the energy produced.

In addition, G.L.c. 61A, §13 was amended regarding the application of roll-back taxes, so they will now apply to agricultural land used or converted to renewable energy generation under the new §2A.

The MMA also amends Section 276 of Chapter 165 of the Acts of 2014, to extend a special exemption from the annual gross sales requirement for cranberry bogs from 2017 to 2020. Essentially, the cranberry bog owners don't have to meet minimum requirements for crop production and sales to maintain the tax benefits of Chapter 61A.

The amended statutory provisions listed above are just a sample of the many changes created by the MMA—the complete text can be found at: https://malegislature.gov/Bills/189/House/H4565.

Not all provisions of the MMA are effective simultaneously, so landowners, developers, lenders, investors and of course their attorneys should ascertain the timelines associated with the most noteworthy amendments.

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Landlord tips for co-tenancy requirements

BY JANE B. ERRICO

When it comes to opening and co-tenancy requirements, some leases require that a specific anchor tenant be open and operating before a smaller tenant is required to perform its lease obligations, such as opening or paying full rent.

Small shop tenants should address these issues in their term sheets or letters of intent, since their success is often dependent on foot traffic generated by particular anchor tenants. Landlords can protect themselves by considering the following issues in drafting co-tenancy provisions.

Define and broaden the nature, quality, and size of a replacement tenant

For a scenario in which an anchor tenant is to be replaced, co-tenancy requirements are typically satisfied by a "comparable" tenant. Since this can be left to a wide range of interpretations, the lease should clearly define the nature, quality and size of a "comparable" replacement anchor.

Must a replacement anchor be the same type of retailer as the initial anchor or just the same quality/class of retailer? Square footage requirements should also be considered since many retailers are shrinking the size of their prototypes. Must a replacement anchor be the same size as the initial anchor, or may it be smaller than the original anchor? May the requirement be satisfied by subdividing the anchor space into two or more smaller spaces and of what size? The answers to these questions should be clearly articulated.

Must a replacement anchor be the same type of retailer as the initial anchor or just the same quality/ class of retailer?

Since retail centers tend to evolve over time, landlords should broaden the definition of acceptable replacement anchors. In many existing centers, big box tenants have already replaced traditional department stores. Many centers are being redeveloped with an emphasis on entertainment uses to draw in customers.

Thus, a broader definition for replacement tenants should be acceptable to the tenant so long as the new use ensures that the center is active and vibrant. For example, replacements for a major department store could include a grocery store, a big box retail tenant, a destination restaurant, a multiplex cinema, medical offices, a day care center, or other non-traditional retail uses.

Specify payment of alternative rent terms

A typical remedy during a period when the specified anchor is closed, is payment of alternative rent. Alternative rent may be a reduction in fixed rent or payment of percentage of gross sales in lieu of fixed rent. If alternative rent is a remedy, the lease should also specify if additional rent (CAM, taxes and like charges) is payable during the rent abatement period. Landlords should negotiate that tenants must prove diminished sales in order to be entitled to pay reduced or alternative rent.

Include a "sunset" provision

Tenants often negotiate for the right to terminate if the co-tenancy violation is not cured within a certain time period. Landlords should include a "sunset provision" on the tenant's termination rights: For opening co-tenancy requirements, the tenant should be required to terminate or open and pay full rent after a certain period of time.

For on-going co-tenancy requirements, if the tenant fails to terminate within the specified time period, it should be required to resume full rent and the right to terminate with respect to the specific violation should lapse.

Limits on tenants' remedies

Tenant's remedies should be conditioned on the tenant not:

(a) being in default;

(b) having assigned or sublet during the closure of the anchor;

(c) having violated any radius restriction in its lease; and,

(d) exercising any option rights while the co-tenancy violation is ongoing

There should also be exceptions for closures due to casualty, condemnation, force majeure, assignments, remodeling and repairs. The lease should provide that tenant's sole and exclusive remedies for failure to satisfy co-tenancy provisions are limited to the specific remedies set forth in the lease.

Terms and conditions of anchor lease should be consistent with small shop leases

Finally, landlords should make sure that the terms and conditions of the anchor lease regarding opening and continuous operation are consistent with the co-tenancy provisions in its small shop leases.

A partner in Sherin & Lodgen's real estate practice group, Jane Errico is a member of REBA's commercial leasing section. She represents developers and tenants in the acquisition, disposition, development and leasing of retail centers and office parks. Errico's clients include property owners and managers, retail tenants operating on a regional and national level, financial institutions and start-up companies. She can be contacted by email at jerrico@sherin.com.

Suburban foreclosures of 'refi' mortgages on rise

BY RICHARD P. HOWE JR.

The number of foreclosure deeds recorded in the Middlesex North Registry of Deeds during the first nine months of 2016 increased 29 percent from the same period in 2015, rising from 133 to 172.

Projecting that number across the entire year would yield 229 foreclosures, far below the 639 that occurred in 2008 with the collapse of the economy, but far more than the 51 in 2005 when real estate was booming.

Urban foreclosures tend to get the most attention, but troublesome mortgages in the suburbs pose a significant problem as well. While many of the 2016 Middlesex North foreclosures were properties in the Gateway City of Lowell, 114 came from nine suburban towns (Billerica, Carlisle, Chelmsford, Dracut, Dunstable, Tewksbury, Tyngsborough, Westford and Wilmington) that make up the rest of the registry district.

The vast majority of these foreclosures – 81 of 114 – were of refinanced mortgages. That status was determined by comparing the date of the mortgage being foreclosed with the date of the deed by which the borrower became owner of the property. In cases where the person who lost the home had acquired title through inheritance or gift, the first full-consideration deed into the family, not any subsequent no-consideration deeds, was used in this analysis.

If the foreclosed mortgage was recorded on the same day as the deed, it was deemed to be a purchase mortgage. If the mortgage was recorded at some later time, it was deemed to be a refinanced mortgage.

Of the 81 refinanced mortgage foreclosures studied, 30 homeowners (or their family predecessors) had acquired title during the 2000s; 24 during the 1990s; 12 in the 1980s; three in the 1970s; five in the 1960s; three in the 1950s; and four in the 1940s. No matter when title was acquired, all of the refinanced mortgages that were foreclosed in 2016 originated during the 2000s.

If we measure the housing bubble from the start of 2003 through the end of 2007, 68 of the 81 refinanced mortgage foreclosures originated then. Only one came before, 11 came after.

Comparing the original purchase price of the property with the amount borrowed on the refinanced mortgage, and the length of time between that mortgage and acquisition of title, provides context for these foreclosures.

For the 30 people who purchased homes in the 2000s, quickly refinanced, and then lost their homes to foreclosure, the median amount borrowed on the refinanced mortgage was $249,000, while the median purchase price of the home was $247,450, a difference of just $1,550. This suggests that refinancing these newer mortgages may have been driven by lower interest rates or different terms rather than borrowing a larger sum.

For the 24 people who purchased their homes in the 1990s, eventually refinanced, and then lost their homes to foreclosure this year, the median amount borrowed on the refinanced mortgage was $244,000, while the median purchase price of the home was $125,000, a difference of $119,000. The median time between purchase and refinancing for this group was 10.5 years (I did not count how many times they refinanced).

For the 27 people who acquired title before 1990, the median amount borrowed on the refinanced mortgage was $267,200 and the mortgage was obtained 25 years after acquisition of title. Because many homeowners in this group acquired

title through inheritance or gift, it was difficult to ascertain the purchase price of these properties. Most likely, these homeowners paid little or nothing, suggesting that the amounts borrowed with these mortgages would most likely be all cash to the homeowner.

As for the 33 foreclosures that involved purchase mortgages, 28 of the homes were purchased during the 2003-2007 bubble, none were purchased before and five were purchased after. The median sales price of these homes was $276,000 and the median mortgage amount was $241,900. Eight homeowners financed 100 percent of the purchase price; six financed between 90 and 99 percent; ten financed between 80 and 89 percent, and nine financed less than 80 percent.

Registry records do not explain why these foreclosures occurred, nor do they disclose why they occurred now. Did longtime homeowners suddenly experience some catastrophic disruption of family cash flow that precipitated the loss of the house? Or did these loans have defective mortgages that required time for lenders to rectify title problems prior to foreclosure?

One thing that is clear from the record is that many longtime homeowners took advantage of rising values to extract equity from their homes. Most of these loans were obtained during the real estate bubble when values were at levels so high that current values still lag. Many homeowners with mortgages from this period, not just those who have experienced foreclosure, remain underwater, unable to realize enough from the sale of the property to pay off the existing mortgage. For that reason, the relatively high number of foreclosures seen this year will probably remain with us for several years to come, and other underwater home owners, those who remain current on their mortgages, will remain frozen out of the housing market, thereby contributing to the continuing lack of inventory that plagues the market today.

Dick Howe has served as register at the Middlesex North Registry of Deeds for more than 30 years. His periodic thoughtful commentaries on the Massachusetts real estate market and foreclosure trends, have been a regular and welcome feature in REBA News. He has also been a panelist at REBA's biannual conferences. Howe has also served as president of the Massachusetts Registers and Assistant Registers of Deeds Association. He can be reached by email at Richard.howe@sec.state.ma.us.

Recording mortgage discharges with registered land

BY D. BRUCE FITZSIMMONS JR.

One of the more vexing problems faced by conveyancing attorneys is successfully recording mortgage discharges where the title to the property consists of both recorded land and registered land parcels.

Many lenders, particularly those with mortgage servicing offices located outside the commonwealth, are unaware that Massachusetts has two recording systems and presume that sending the discharge to the relevant registry of deeds for recording will clear the title, not realizing that the mortgage will remain outstanding on the registered land side.

Explaining to such mortgage lenders that there are two recording systems and that recording the discharge on the recorded land side does not clear the title on the registered land side can be a time consuming (and not always successful) process.

In many cases, particularly if the loan has been repaid for some time or if the loan was serviced by an entity other than the record holder, obtaining the discharge needed for filing with the registry district can be nearly impossible.

Fortunately, there are some other possibilities of getting the recorded discharge filed on the registered land side. The best-case scenario is when the recorded discharge references the mortgage by both its recorded land book and page numbers as well as by its registered land document number.

If that is the case (and the discharge meets the other requirements for filing, such as correct names of mortgagor and mortgagee, date of the mortgage, proper execution and acknowledgment, etc.), you can simply obtain a certified copy of the recorded discharge and file it on registered land side.

The problem becomes a bit more challenging when the recorded discharge only describes the mortgage by its recorded land book and page numbers. Traditionally, registry districts will not accept a certified copy of a recorded discharge for filing if it lacks the mortgage's registered land document number.

Even in such cases, there is still the possibility that with proper supporting documentation, you may be able to obtain the Land Court's approval to file the recorded discharge with the registry district.

This article describes the process of "table review" by the Land Court's title examiners, including the documentation that you will need to present to the title examiner, any additional documentation that may be helpful, what questions you should expect from the title examiners, and guidance as to what arguments you may wish to include in your presentation.

The Land Court clerk's office opens at 10 a.m. each weekday, and you can request table review on a walk-in basis. When seeking approval of a recorded discharge for filing, you should bring the following documents with you:

(a) certified copy of the recorded discharge that you want approved for filing with the registry district;

(b) copy of the mortgage as filed with the registry district;

(c) copy of the mortgage as recorded with the registry of deeds;

(d) copy of the most recent Certificate of Title and Encumbrance Sheet(s); and,

(e) copies of plans of record that show both the recorded and registered land.

It is essential that you bring a certified copy of the recorded discharge since that is the document that you want stamped "Approved for Filing" and since it will be the document that you will file with the registry district. Based on experience, it is not essential that the documents noted (b) through (e) be certified copies, so long as they are copies of the recorded or filed documents and the recording information is plainly visible.

In addition, you may also want to bring copies of the mortgage loan pay-

See MORTGAGE, page 15

Assessment of agricultural and horticultural land

BY DAVID L. DELANEY

Chapter 61A, enacted in 1973, has been amended several times, most significantly in 2006 and most recently in 2014. Chapter 61A addresses the legislature's concern with the decrease of farmland in the commonwealth and thus the loss of a vital public resource.

According to relevant case law, it is both a remedial statute and thus is "to be liberally construed to effectuate [its] goals," and a tax statute and thus is to be strictly construed as "to resolve doubt in favor of taxpayer."

Chapter 61A accomplishes its purpose by providing a tax break (valuation of land for general property tax purposes at its value for agricultural and horticultural use) to landowners who devote no less than five acres of their property to agricultural or horticultural use, but exacts a price, in certain circumstances, in the form of conveyance or roll-back taxes and a town's right of first refusal or option to purchase.

Agricultural and horticultural use defined

Agricultural use – Chapter 61A, §1.

Land is in agricultural use when primarily and directly used for:

a) Raising animals . . . for the purpose of selling such animals or a product derived from such animals in the regular course of business; or,

b) In a related manner which is incidental thereto and represents a customary and necessary use in raising such animals and preparing them or the products derived from them for market.

Horticultural use – Chapter 61A §2.

Land is in horticultural use when primarily and directly used for:

a) Raising . . . foods for human consumption, feed for animals, tobacco, flower sod, trees, nursery or greenhouse products and ornamental plants and shrubs for the purpose of selling these products in the regular course of business; or,

b) Raising forest products under a certified forest management plan, approved by and subject to procedures established by the state forester, designed to improve the quantity and quality of a continuous crop for the purpose of selling these products in the regular course of business; or,

c) A related manner which is incidental to those uses and represents a customary and necessary use in raising these products and preparing them for market.

Minimum required acreage and sales/program payments

Not less than five acres actively devoted to agricultural or horticultural use when:

a) The gross sales therefrom and payments made under a governmental soil conservation or pollution abatement program therefor total not less than $500 per year; or,

b) The use thereof is clearly proven to satisfy such amounts with the normal product development process as determined by the farmland valuation marketing commission.

These minimum revenue requirements apply to land "actively devoted" and not to land "deemed contiguous" under §4.

In the event of a site larger than five acres, the sales and payment revenue requirements increase at a rate of $5 per acre, but in the case of woodland or wetland, at a rate of fifty cents per acre.

Minimum contiguous acreage requirement

§4 prescribes the minimum requirements for valuation of land at its value for agricultural or horticultural purposes (as opposed to its fair market value, to wit, at its highest and best use under Chapter 59). The minimum requirements are:

a) Not less than five acres;

b) Actively devoted [within the meanings of §1, 2 and 3] to agricultural, horticultural or agricultural and horticultural use; and,

c) So devoted for at least the two immediately preceding tax years.

The tax rate is applicable to commercial property under Chapter 59, or, if a town has accepted Chapter 61A §4A, the rate applicable to open space.

Land "so devoted" is deemed to include contiguous land under the same ownership not committed to residential, industrial or commercial use covered by the annual Chapter 61A application. Contiguous land includes land separated by a public or private way or waterway and land connected to other land by an easement for water supply (§4), as well as land in an adjoining town (§5). All land deemed contiguous shall not exceed in acreage 100 percent of actively devoted land.

Annual application for agricultural/horticultural valuation of qualifying land

An application must be submitted annually no later than Oct. 1 of the year preceding the fiscal year for which valuation is sought. Once submitted, an application may not be withdrawn. An exception to the Oct. 1 deadline is provided by §8 in a town undergoing a revaluation of all property, in which case the deadline is extended to no more than 30 days following mailing of the tax bill containing the new valuation.

The Commissioner of Revenue prescribes a form of application which is made available to applicants by the Board of Assessors. If the application covers leased land, the application must include the lessee's written statement of intended agricultural/horticultural use.

§7 provides for valuation of land at Chapter 59 standards if a change of use occurs after an application is submitted but on or before the start of the applicable fiscal year, and even thereafter as an additional assessment. Applicable conveyance or roll-back taxes are not affected by the additional assessment.

§9 provides that a Board of Assessors shall allow or disallow an application within three months of its filing. The failure to act within the three-month period is deemed an allowance of the application. The board must notify the applicant landowner within ten days of allowance or disallowance by written notice sent by certified mail. The notice includes a statement of a right to appeal pursuant to §19.

Board of Assessors recording requirements

Approved application

With regard to a first approved application, a board is required to forthwith record a statement of its action. The statement constitutes a lien on the land covered by the application for taxes levied under Chapter 61A and must name the owners of record and describe the land so affected in a manner that is adequate for identification. Failure to record the statement renders the lien ineffective with regard to a bona fide purchaser or other transferee without actual knowledge of the lien.

The statement, however, need not be recorded for every year during which the land is valued pursuant to Chapter 61A. The recording requirement applies as follows:

a) To a first approved application;

b) To any subsequent application following time during which the applicable land has not been so valued; and,

c) After a change of record ownership.

Recording when land no longer valued under Chapter 61A.

§9 also provides that a Board of Assessors must record a statement when land which has been valued under Chapter 61A ceases to be so valued. This statement must also name the record owner, give an adequate description and set forth the date on which the land ceased to be so valued.

Continuation of land valuation at its value for agricultural or horticultural use

The benefits of Chapter 61A apply to the use of the land meeting its requirements, and not to ownership. Thus, the benefits may be transferred to successor owners so long as they continue to comply with the statutory requirements. When the land no longer qualifies, liability for roll-back taxes attaches and is the obligation of the then owner of the land.

As an example, an owner of 12 contiguous acres of Chapter 61A land who no longer uses four of those acres for agricultural or horticultural purposes is liable for roll-back taxes applicable to the four acres. Likewise, if he sells four of those 12 acres to another who chooses to continue to use them for agricultural or horticultural purposes, but has no contiguous actively devoted land, the four acres will no longer qualify for agricultural or horticultural valuation because they no longer meet the five-acre minimum requirement. If the same owner then elects to sell an additional four acres to another third party with no contiguous Chapter 61A-qualified acreage, none of the original 12 acres qualify under Chapter 61A because none of the three parcels meets the five-acre minimum requirement.

Suspension of special or betterment assessment

Special assessments or betterment assessments apply to Chapter 61A land to the extent the service or facility financed improves the agricultural/horticultural capability of the land or personally benefits its owner.

They may, however, be suspended during the time the land is not used for agricultural or horticultural use, but nonetheless becomes due and payable on the date the use is changed. In the event only a portion of the use is changed, the suspension ends in proportion to the portion's percentage of the street frontage of the entire tract originally benefitted from the suspension. A provision is made for obtaining a release from the assessment from the tax collector for purposes of dissolving the lien.

David Delaney is one of the three founding partners of Delaney & Muncey, P.C. He was a panelist on Chapter 61A at REBA's annual meeting and conference. Delaney's areas of practice include representation of buyers, sellers and lenders in the acquisition of residential and commercial real estate, Land Court matters, title litigation and land use law, including zoning, subdivision, protected spaces and conservation. He can be reached by email at ddelaney@delaney-muncey.com.

Affordable housing restrictions in title matters

BY CARRIE B. RAINEN

In the realm of residential title examination, title insurance and conveyancing, "affordable housing restriction" is somewhat of an umbrella term for a variety of documents that may be found at the registry of deeds and employed in residential transactions.

The key point for conveyancers and lenders' counsel is that the property affected by such affordable housing restriction is subject to income-related restrictions on the ownership and re-sale price structure of real estate. There are several ways to establish these restrictions. In order to properly review title, close the transaction and issue title insurance, conveyancers must be aware of which documents to be on the lookout for, their effect and who the players are.

Creating affordable housing restrictions

The two most common forms of affordable housing restrictions are a "Master Covenant" or a "Deed Rider." The latter form is often employed with a single unit or home pursuant to a "Regulatory Agreement" with the Massachusetts Housing Finance Agency, the Massachusetts Department of Housing and Community Development (DHCD) or an agency of the local municipality, such as the Boston Redevelopment Authority.

A master covenant is entered into prior to the development or creation of the project by the developer and the monitoring agent(s). The master covenant affects an entire project even if only specific units or parcels are designated as affordable. Many projects in the City of Boston identify multiple parties to the covenant. These parties typically include the city's Department of Neighborhood Development, the Commonwealth of Massachusetts and MassHousing, as each has provided funding for the project. After the project is created, the deeds out of the developer for the specific affordable units will reference the master covenant.

A deed rider is a set of restrictions on the use and resale of property which is specific to a unit or parcel within a development project. Deed riders are contracts by and between the grantor and grantee in a given transaction, whether the grantor is the developer or a subsequent purchaser of the unit. Deed riders are typically used where there is a regulatory agreement between the developer and MassHousing, DHCD, or a municipality. They are also frequently found where the developer was granted a comprehensive permit under G.L.c. 40B, or where a project was subsidized by the federal or state government under a Local Initiative Program (LIP).

One of the more frustrating aspects of the deed rider for the title attorney or examiner is the lack of consistency of the formalities from project to project or registry to registry. A deed rider might be attached to the deed into a unit owner. Alternatively, it may be recorded immediately thereafter. A new deed rider may be executed with every transaction for a particular unit or parcel. Then again, it might only be recorded at the time of the first conveyance out of the developer and all subsequent deeds will merely incorporate it by reference.

Some covenants are specific to an individual's acquisition and subsequent ownership of property. The North Suburban Consortium is a group of eight communities north of Boston in which the Malden Redevelopment Authority administers affordable housing programs. Through the NSC, the MRA offers a First Time Homebuyer Down Payment/ Closing Cost Assistance Loan Program. Pursuant to this program, some borrowers will be required to execute an affordable housing covenant, which is recorded contemporaneously with the deed into the borrower and their primary mortgage, with a partner-institutional lender.

Similarly, it is not just public agencies and municipalities that create affordable housing restrictions on property. One such example is South Shore Habitat for Humanity, a faith-based 501(c)(3) non-profit organization which provides affordable homes to local families. This program is provided through the LIP and subject to DHCD's guidelines. Habitat for Humanity requires that the purchaser provide "sweat equity" towards the completion of the construction of the home. When the property is sold to the affordable buyer, South Shore Habitat for Humanity takes back a zero-interest first mortgage and provides a deed which contains affordability restrictions in perpetuity.

Another example is Citizens' Housing and Planning Association (CHAPA), a non-profit umbrella organization for affordable housing and community development activities in Massachusetts. In addition to advocacy, policy research and education, CHAPA serves as monitoring agent for several 40B projects.

Most affordability restrictions, regardless of whether they are created pursuant to a covenant or a deed rider, require a certificate of compliance to be recorded contemporaneously with any new deed, in order to confirm that the appropriate notices were provided to the monitoring agency, approvals received and that the purchaser is an approved buyer. Lack of a certificate of compliance where one is specifically required pursuant to the restriction can invalidate a transaction.

Closing on residential property with affordable housing restrictions

Every purchaser of affordable housing requires a mortgage loan. Programs such as NSC recommend which lenders to obtain primary financing through. With projects created by a comprehensive permit or pursuant to a master covenant, borrowers often can go to the lender of their choice. As with other applications for a mortgage, the loan officer seeks the best possible loan product for the consumer.

Some loans are financed/purchased by Fannie Mae, others by Freddie Mac. For approved lenders, the loans may be funded by MassHousing. Of course, the lender must know what happens if the mortgage were to be foreclosed. The lender may request an attorney opinion letter concerning the deed rider or covenant's continuation provisions, specifically whether the restriction terminates upon mortgage foreclosure.

A deed rider or covenant must be reviewed to determine what happens should the unit or home be foreclosed. These documents will provide specific notice instructions for the foreclosing lender. Often, the monitoring agent/ covenant holder will have the right to either cure the mortgage default or purchase the property.

One of the more frustrating aspects of the deed rider for the title attorney or examiner is the lack of consistency of the formalities from project to project or registry to registry.

Should the agent/holder take no action, the restrictions may terminate upon foreclosure or they may continue, though certain requirements, such as that the unit must be owner-occupied, may be temporarily waived. The deed rider or covenant will specify whether the restrictions will terminate. Often, this is dependent on the nature of the mortgagee that is foreclosing. However, if the property is restricted by use of a LIP Universal Deed Rider, the restrictions will always survive foreclosure.

In a bulletin issued on June 27, 2016, Freddie Mac stated that while it has traditionally only purchased mortgages with resale restrictions that terminate at foreclosure, it is moving toward purchasing certain mortgages with income-based property restrictions that survive foreclosure. These mortgages must be purchase money mortgages or "no cash-out" refinances, on a single unit primary residence that is not a manufactured home. These properties may be individual lots or part of a condominium development.

Fannie Mae's most recent Selling Guide, issued on June 30, 2016, states that lenders may deliver loans in Massachusetts subject to resale restrictions that do not terminate upon foreclosure or deed in lieu of foreclosure. The guide notes that the "Affordable Housing Restriction," which, presumably, is referencing the LIP Universal Rider, provides for a 120-day time period for notification to the municipality by the foreclosing lender and completion of the foreclosure/deed in lieu, while Fannie Mae's standard guidelines provides for 90 day notice only.

Despite this, the most recent guide states that the "use of this instrument for mortgage loans subject to a resale restriction secured by property in Massachusetts is acceptable without further approval from Fannie Mae. All other applicable requirements for resale restrictions continue to apply."

Some affordable housing restrictions require that the premises be encumbered by a mortgage held by a covenant holder. These mortgages often do not reflect an original principal dollar amount sometimes, because the mortgage merely secures the non-monetary obligations under the covenant. Alternatively, it is because the amount owed is not a fixed amount.

For example, the final amount may be the figure resulting from 120 percent of the positive difference between the maximum resale price plus costs and the actual resale price of the property. Ultimately, there may not actually be a payoff amount required. Regardless, like any other transaction, if the title examination reveals mortgages outstanding of record, discharges must be obtained and recorded.

After the closing, all documents pertaining to affordable housing restrictions should be included in the title insurance policy's exceptions to coverage, with as much specificity as possible. Even if the deed rider is not a separate instrument to the new deed identified in Schedule A of the policy, you must include it in the exceptions to coverage.

If a deed contains restrictions concerning maximum resale price, owner occupancy or household income requirements, reference to those restrictions should be included in the Schedule B Exceptions. I would also recommend including them in Exhibit A of the policy if it is part of the Exhibit A of the deed itself.

Should a monitoring agency or covenant holder require mortgages to be recorded subordinate to the primary mortgage, these often do not require separate policies of title insurance. Therefore, they should be noted on your Schedule B Part II with recording information.

Carrie Rainen is a REBA Board member and in 2017 will serve as the Board's liaison to the association's paralegal section. She is also a member of New England Land Title Association, Merrimack Valley Conveyancers' Association, Commercial Real Estate Women (CREW) Network and CREW Boston. Rainen can be contacted by email at crainen@rainenlaw.com.

Model declaration of trust for 2-unit condos

BY BARBARA J. MACY, CLIVE D. MARTIN AND ERIC A. CATALDO



The need for an up-to-date declaration of trust geared to the needs of two-unit condominiums is obvious to anyone who has faced the problems that arise when two unit owners live under governing documents designed for something other than a two-unit building.

Given the problems of the hybrid form of ownership that is a condominium, many of the problems of two-unit condominiums stem from the fact that the governing documents were frequently written for a set of documents intended for a multiple-unit building.

The unit owners in a two-unit condominium are more likely to find themselves at permanent loggerheads since there is no other owner to cast a tie-breaking vote; and rarely in the two-unit context are management and/or legal professionals consulted.

Courts as well as practitioners are well aware of the signal issues presented by two-unit condominiums. In 2014, the Massachusetts Appeals Court criticized a two-unit condominium declaration of trust because, "It appears intended for condominium trusts containing three or more trustees and not for the confined structure of a two-trustee entity." Operating in that "confined structure," where there are but two trustees and any majority vote of the trustees has necessarily to be a unanimous one, one unit owner can block the daily operation of the condominium.

In that case, "pure obstinacy would guarantee that the majority of trustees would never reach the required number of two." The net effect is that the condominium slides into a "state of dysfunctional paralysis."

In a concerted effort to reduce the "dysfunctional paralysis" that may easily affect two-unit condominiums, in November 2014, the co-chairs of REBA's Condominium Law and Practice Committee (now known as a section), Diane Rubin and Clive Martin, convened a Working Group from the spectrum of committee members who represent developers, lenders, associations and unit owners, with the intention of producing a Model Condominium Declaration of Trust specifically designed for the unique needs of a two-unit condominium.

The Working Group was comprised of Eric A. Cataldo of Gilmartin Magence LLP, Saul J. Feldman of Feldman Law Office, Neil D. Golden of Gilmartin Magence LLP, Michael E. Katin of Scheier, Katin & Epstein, P.C., Barbara J. Macy of Barbara J. Macy, Attorney at Law, Clive D. Martin of Robinson+Cole LLP, Diane R. Rubin of Prince, Lobel & Tye LLP, Ellen A. Shapiro of Goodman, Shapiro & Lombardi, LLC and Peter J. Silberstein of Silberstein & Associates.

In drafting the insurance provisions of the declaration of trust, the Working Group drew upon the expertise of Kevin Kehoe of W.T. Phelan & Co. Insurance, Joseph S. Sano, Esq. of Prince, Lobel & Tye LLP and Chuck Soucy of Albert Risk Management Consultants.

The Working Group put together a document that will allow condo practitioners and condo unit owners to create a functioning condo community. The text of the full Model Declaration of Trust can be accessed at the REBA website. Here we present a quick overview:

Dispute resolution. While many of the two-unit condominium declaration of trusts in current circulation make an attempt to provide for dispute resolution, the provisions are often unsuitable and often require the mediation of disputes by three mediators under American Arbitration Association rules.

Not only are AAA rules not geared for such small-scope disputes, but it is unlikely that two condo owners looking for a practical resolution of issues dividing them would have the desire to engage three outside parties. In the REBA document, the Working Group decided on a more streamlined approach.

First, the two disputing unit owners or trustees must meet, in person, soon after the dispute arises and make a good faith effort to resolve their differences. Warring owners often refuse to speak to each other, but our hope is that if the governing document of the condominium explicitly requires the owners to confer, they will. There is no substitute for face-to-face discussion.

Second, if direct negotiation does not resolve the dispute, the parties are to mediate the dispute under the auspices of REBA Dispute Resolution, Inc., with a mediator selected by the executive director of REBA, following consultation with both parties. The parties share the cost of mediation.

Third, if mediation is not successful, the dispute is to be arbitrated by REBA/DR. The arbitrator is selected by the executive director of REBA following consultation with both parties and if the parties agree, may be the same person as the mediator. Arbitration is to occur within thirty days of the selection of the mediator, to last no longer than five hours, and to take place at REBA's offices, unless the parties agree otherwise as to each of these provisions. The arbitrator has discretion to allow discovery. The cost of the arbitrator is to be shared by the parties; however an optional clause that developer's counsel may insert into the Declaration of Trust allows the arbitrator to award attorney's fees and costs to the prevailing party.

Except in the case of disputes over the collection of common area fees and disputes against the developer of the condominium, this provision is the sole dispute-resolution process contemplated in the Model Declaration of Trust. In other words, the owners of a unit in this two-unit condominium have no litigation rights. Members of the Working Group were divided on this. We did not lightly preclude a person's ability to seek recourse in court. Nevertheless, a majority of the group decided that if the Model Declaration of Trust is to be used in real life by real life unit owners, then for purposes of efficiency, litigation rights in a two-unit condo must be limited.

Automation appointment/resignation of trustees. The Working Group also focused on ensuring automatic appointment and acceptance of trustees. In a two-unit association, it is the exception rather than the norm for unit owners to file formal appointments and acceptances with the Registry of Deeds. This can lead to confusion during title searches, challenges to signatories of 6(d) certificates and difficulties in opening bank accounts. Automatic appointment tied into the recording of a Unit Deed and conversely automatic resignation by recording a subsequent Unit Deed transferring title is more user-friendly.

Powers of one. With respect to certain actions of the trustees, and in line with the Working Group's goal of preventing a stalemate, the model document empowers one unit owner to act on behalf of the board. The full list of the specific powers that one trustee can enforce are found in the By-Laws, Article V, §5.1.

Such powers include determining and collecting common funds, one of the most frequent topics of contention between unit owners. Of course, before so acting, prior notice must be provided to the other owner (notice requirements are set forth in §5.10) but the ability of one unit owner to act allows a condominium association to proceed toward resolution.

Standard of duty. One trustee's power to act is not unfettered. In order to ensure all persons are aware that even when acting as trustees of a two-unit condominium, they owe fiduciary duties, the model specifically provides a standard in Article I, Section 1.2. "Trustees shall have the highest duty of care toward the beneficiaries." However, this does not result in increased exposure for money damages, since our model retains the limitation on a condominium trustee's personal liability for money damages in §3.7.

Ultimately, the goal is to circulate the Model Declaration of Trust as a REBA Form. We hope it finds widespread use throughout the commonwealth.

Barbara Macy serves on the panel of mediators for the association's affiliate, REBA Dispute Resolution. She can be contacted at bjm@macwein.com.

Eric Cataldo concentrates on condominium conversions, representing developers in projects that range in size from three units to more than three hundred units. He has coordinated the preparation of loan subordination agreements, advised on compliance of architectural plans with Massachusetts condominium law and drafted formal tenant notifications of condominium conversion. He can be contacted at ecataldo@gmlawllp.com.

Clive Martin co-chairs the REBA condominium law and practice section and serves on the association's board of directors. He is experienced in the litigation of real estate disputes, such as title insurance matters, zoning and property management and the many litigation issues that arise out of the condominium form of property ownership. His email address is cmartin@rc.com.

Trending in DC: Barriers to housing development

BY ROBERT M. RUZZO

Long ago, before Washington's Senators were witty, inspirational figures like Harry Reid and Mitch McConnell, they were a rather dreadful baseball team.

How bad? In a riff on the homage to one of our nation's founding fathers and our ninth president, these senators were said to be: "First in war, first in peace, and last in the American league."

Today, Washington's Nationals are considered juggernauts in the National League and it would appear that on the land-use regulation front at least, our federal government can no longer be considered last, but merely late.

According to a September 2016 publication titled the "Housing Development Toolkit," our federal government has discovered that "[o]ver the past three decades, local barriers to housing development have intensified," a fact which "has reduced the ability of many housing markets to respond to growing demand."

Despite any such shortcomings, the publication of the toolkit is a welcome development, demonstrating that even in our federal capital, the traditionally "local" issue of our clogged housing production pipeline has garnered some overdue national attention.

Coming in the waning days of the Obama administration and styled as a checklist of potentially useful suggestions, the toolkit is by no means a call to broad federal legislative action. Given our experience in Massachusetts, its contents may even not hold out much hope as a blueprint for success. Nonetheless, the toolkit is another important voice in a growing chorus.

In Massachusetts, where we pride ourselves on being "ahead of the curve," the toolkit, with one exception, frankly does not add much to our range of alternatives. Indeed, the dusty shelves of your correspondent's office were sent askew when publication of the toolkit prompted a search for a copy of "Bringing Down the Barriers: Changing Housing Supply Dynamics in Massachusetts," an October 2000 bestseller. Recognizing that a problem exists is step one in its resolution, however, and putting a White House focus on the issue only enhances the range of the discussion.

In looking at the toolkit's menu of options, "Establishing By-Right Development" tops the list with "Streamlining or Shortening Permitting Processes and Timelines" crossing the line in third place.

Also included in the Top Ten were "Eliminate Off-street Parking Requirements," fueled by increasingly successful transit-oriented development experience and "Employing Inclusionary Zoning" (which prompted yet another search, this time for the January 2002 issue of NHC Affordable Housing Policy Review titled "Inclusionary Zoning: Lessons Learned in Massachusetts.")

The point of all this is not to lament that we have already tried most of this and it doesn't seem to have worked, but rather to catalogue the fact that Massachusetts has already employed many of these techniques and it still is not enough.

Because our problem is quite frankly worse than most.

This inevitably shines the spotlight on the cutting-edge tool in the toolkit (By-Right Zoning). Both a House-generated proposal to foster such By-Right Zoning and a Senate zoning reform proposal faltered at the close of the most recent legislative session.

In less than two months, a new legislature will convene and the race will be on (yet again) to persuade, cajole, convince, and ultimately, vote (or not vote) on rather obscure legal provisions that could dramatically impact the quality of life for our state's current and future residents. Whatever your political preference, be it the headiness of a true grassroots campaign or nostalgia for backroom wheeling and dealing, both of these approaches to legislative success seem at this time, a bit premature without flushing out at least a few more facts.

How well have we done our homework? The essential fact is that our zoning enabling act, Chapter 40A, is entirely incapable of producing sufficient housing, thereby failing to serve at least one of its fundamental purposes. As a result, the disproportionate housing cost burden borne by many, particularly our youngest workers, encourages them to consider relocating to less-costly regions, thereby undermining the state's long-term economic competitiveness.

Beyond that, what do the facts tell us? For example, what is the fiscal impact of implementing a (to be determined) level of by-right zoning upon the finances of a given municipality? Beyond the obvious "it depends" answer, it is hard to say, without some well-grounded analysis. Could it be time to update another dusty volume on the shelf, the 2003 UMass study titled, "The Fiscal Impact of New Housing Development in Massachusetts: A Critical Analysis"? Can an analytical tool be developed to provide an accessible, understandable, updated analysis to individual communities?

Similarly, if the basis for opposition to zoning reform of the type passed by the Senate's last session was that proposal's repeal/downsizing of existing mechanisms that provide swift or certain results (i.e. approval not required endorsements and subdivision plan freezes), would it not make sense to know exactly how much housing has been produced utilizing these techniques over the past five years?

In the absence of answers to these and many other questions, perhaps it is time for that last refuge of a scoundrel – a "blue ribbon" legislative commission – to first identify the most pressing of our collective homework assignments and then examine these housing-related issues in greater detail. One advantage we have this time around is a vastly improved array of options for garnering input and communicating results.

With some appropriate analysis, the possibility for dramatic change is not beyond our grasp.

How dramatic? Dramatic enough that Washington might want to check in on us again before another fifteen years has passed.

A monthly contributor to REBA News, Bob Ruzzo is senior counsel at Holland & Knight LLP'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. Ruzzo can be contacted by email at robert.ruzzo@hklaw.com.

Markoff joins REBA panel

MARKOFF, CONTINUED FROM PAGE 1

bers over will and estate contests. She has found during her mediation sessions that it is rarely just about the money.

Markoff spent four years as an adjunct professor at Bentley University teaching organizational behavior and conflict resolution to undergraduate and graduate students. Recently, Markoff moderated a mediation panel sponsored by the Small Business Association of New England (SBANE). She is one of the 125 women to appear in Boston Globe's Bill Brett's book, Inspirational Women of Boston.

Markoff received her mediation training from the Cambridge Dispute Resolution and the Boston Law Collaborative. She serves on the Board of Trustees for Wheelock College and is Founder of Art in Giving.

Markoff is fluent in French and Arabic and earned her MBA from Boston College and her undergraduate degree in Economics from the University of Massachusetts, Amherst.

Summary of recent post-foreclosure cases

FORECLOSURE, CONTINUED FROM PAGE 5

a foreclosure sale and acquired a deed. Murphy was one of the former mortgagors who resided at the property after the sale. McMahon brought a summary process eviction against Murphy. Murphy alleged that McMahon did not have superior right of possession and the Housing Court, after a summary judgment hearing granted possession to Murphy.

McMahon appealed. The parties' dispute implicated two decisions by the SJC (both decided after the entry of summary judgment): *U.S. Bank Natl. Assn. v. Schumacher*, 467 Mass. 421 (2014), and *Pinti v. Emigrant Mort. Co.*, 472 Mass. 226 (2015). Each of these cases dealt, like this case, with alleged defects in the mortgagee's foreclosure process. The Housing Court determined that the mortgagee's notice was defective for reasons later identified in *Schumacher* and *Pinti*.

The Appeals Court affirmed the Housing Court, stating that, "several defects of the notices sent to [Murphy were] outlined by the motion judge in his well-reasoned and, as it happened, prescient decision." *Id.* at 3. "Murphy's answer to the complaint asserted that the mortgagee's affidavit did not comply with G.L.c. 183, §21." *Id.* at 3. "The mortgage language concerning the right to cure includes the identical provision in paragraph 22 as the mortgage in *Pinti*, and the mortgagee's notice of right to cure… contains the same language that was found to be a fatal departure from the requirements of paragraph 22 in *Pinti*." *Id.* at 4. "McMahon's appeal was pending at the time *Pinti* was decided… it would be unjust to deprive Murphy of the precise benefit already received by the mortgagors in both *Pinti* and *Aurora Loan Servs., LLC*." *Id.* at 4.

Fannie Mae vs. Marroquin & others, DAR-24339 (Appeal Entered July 1, 2016)

The Housing Court granted possession to the former owner based on failure to comply with the power of sale. Fannie Mae appealed. The SJC took the case after an application was made for direct appellate review. The issue presented in this appeal is whether the SJC's ruling in *Pinti* applies to cases that were pending in the trial courts, at the time of the decision, and in which homeowners timely challenged the validity of title. This appeal also raises the issue of whether, as a matter of fairness, parties engaged in active trial court litigation on a foreclosing entity's compliance with paragraph 22 of a summary process defendant's mortgage should be subject to the *Pinti* ruling. We are awaiting a decision in this case.

Ben Adeyinka received the association's Emerging Leader Award at REBA's annual meeting and conference on Nov. 7. He is a member of a number of REBA sections including affordable housing and new lawyers. He also serves on the Amicus Committee and the Strategic Communications Committee. He is the administrative attorney for Housing Court, where he works closely with the Deputy Court Administrator, Paul J. Burke and the Chief Justice of the Housing Court, Timothy F. Sullivan. Adeyinka can be contacted by email at benjamin.adeyinka@jud.state.ma.us.

New regs for notaries public 'significant' for REBA

NOTARIES, CONTINUED FROM PAGE 1

ciations, through litigation and legislation, to control all aspects of mortgage closings in the commonwealth.

The practice of so-called "witness-only closings," or "notary closings," by non-lawyer notaries had spread from other states to Massachusetts. REBA's position has been that home mortgage closing represents the largest financial transaction for most consumers. Decisions made by home buyers and other mortgage borrowers are particularly susceptible of improper influence, and even predatory behavior, by individuals who are unqualified to give legal advice.

Chapter 289 codifies the promulgation in the Executive Order, as well as the holding in *REBA v. National Real Estate Information Services*, 459 Mass. 512 (2011), that a non-attorney notary may notarize documents but may not conduct a real estate closing. [G.L.c. 222, §17(e)]

Chapter 289 includes most of the Executive Order's provisions, some in a modified form. The legislation also added other new provisions in G.L.cc. 183 and 222.

Drawing from the Executive Order, the statute provides:

• Requirements for the notarial seal or stamp (expiration date affixed, exclusive property of the notary, etc.), except that a failure to comply shall not affect the validity of any instrument or the record thereof [G.L.c. 222, §8, as revised]

• Qualifications for a notary; the grounds for which the governor may decline an application for appointment or renewal of a notary commission, and the seven-year term of office, all as incorporated into the statute [G.L.c. 222, §§13, 14]

• Types of notarial acts that a notary may perform and prescribed forms for an acknowledgment, jurat, signature witnessing or copy certification [G.L.c. 222, §15]

• Obligations of the notary to determine the appropriateness of the circumstances under which the notary is asked to perform a notarial act (identity and demeanor of the principal, incomplete notarial certificates, no undue influence by the notary, the notary's relationship to the transaction or to the parties, etc.) [G.L.c. 222, §§16, 19, 20]

• Prohibition against notarizing signatures of family members shall not apply to notaries who are Massachusetts attorneys, as when the attorney takes the acknowledgement of an employee family member who witnesses a will, as provided in the executive order, but also if the family member employed by the attorney is the notary who takes the acknowledgement of the attorney. [G.L.c. 222, §16(a) (vii)]

• Failure of a document to contain the statutory forms shall not have any effect on the validity of the document or the recording thereof. [G.L.c. 222, §§16, 19, 20]

• Prohibition on a non-attorney notary engaging in the practice of law includes any representation in advertising that the notary has specialized legal knowledge, with particular reference to giving advice on matters related to immigration status. The prohibition shall not preclude a "notary who is duly qualified, trained, or experienced in a particular industry or professional field from selecting, drafting, completing, or advising on a document or certificate related to a matter within that industry or field," nor shall it preclude a notary employed by an attorney or lender from notarizing documents in conjunction with real estate loan closings properly conducted by the employer. [G.L.c. 222, §§16, 17, 21]

• Notaries shall maintain a chronological official journal of notarial acts, except that attorneys and their office staff shall continue to be exempt from this requirement. [G.L.c. 222, §§12, 22, 24]

• Notary public's commission may be revoked for official misconduct, or for other good cause. [G.L.c. 222, §§1, 26]

Chapter 289 has other provisions that did not originate with the Executive Order. In that regard the new statute also provides:

• Authorization to the attorney general or a district attorney to prosecute violations of G.L.c. 222, punishable by a fine and/or imprisonment; and new private right of action, to include punitive damages and relief under G.L.c. 93A. [G.L. c. 222, §18]

> REBA's position has been that home mortgage closing represents the largest financial transaction for most consumers. Decisions made by home buyers and other mortgage borrowers are particularly susceptible of improper influence, and even predatory behavior, by individuals who are unqualified to give legal advice.

• Acknowledgments shall pertain to the execution of the document, not the document itself, and can be made by an attorney or representative on behalf of a grantor [G.L.c. 183, §30, as revised]

• A revision to the standard acknowledgment clause, when the document is executed by the signatory in other than an individual capacity, to assist the notary in making clear that the document is the voluntary act of the principal, not merely the signatory [G.L.c. 222, §15(b)]

• Notaries may vary from the forms set forth in the statute if they are using a form that is authorized or required by statute, regulation or executive order, including one executed in a representative capacity by one who acknowledges his voluntary act but fails to acknowledge the deed or instrument as the voluntary act of the principal or grantor [G.L.c. 183, §42, as revised] [G.L.c. 222, §§15(h), 20]

• Failure to state that a document signed by an attorney in fact or in another representative capacity is in fact being signed as the voluntary act of the principal, not merely the signatory, shall not make the document invalid. [G.L. c. 222, §20(b)(iii)]

• A notary may use an alternative form from another state if the document is to be filed or recorded in or governed by the laws of the other state [G.L.c. 222, §15(i)]

• A notary need not use the statutory form of notarial certificate if a particular printed form contains an express prohibition against altering such form. [G.L.c. 222, §16(k)]

• The Land Court may issue registration guidelines in regard to required forms [G.L.c. 222, §§ 15(h), 20(c)]

• Restatement of the authority of certain commissioned officers in the armed forces to take acknowledgments from persons serving in the armed forces or their dependents [G.L.c. 222, § 11, as revised]

Edward Smith is REBA's legislative counsel. Chapter 289 was a high priority for the REBA Legislation Committee, which was co-chaired by Fran Nolan and Doug Troyer. The Committee succeeded in addressing within the legislation a number of improvident decisions of the Bankruptcy Court. Smith's email is ejs@ejsmithrelaw.com.

Getting recorded mortgage discharges filed with registered land

MORTGAGE, CONTINUED FROM PAGE 10

off correspondence if it is available to you to show that the loan secured by the mortgage has been paid in full. It may also be helpful to bring copies of plot plans and assessors' plans to show the property, although consisting of both registered land and recorded land, functions as a single parcel.

As you present the materials to the Land Court title examiner, you should anticipate that you will be asked to confirm that the mortgage has not been assigned or foreclosed on the registered land side. The Certificate of Title and Encumbrance sheet will help to show that neither such event has occurred, but since Certificates of Title are not always up to date or may not have been made up yet for the current owner, you should expect to be asked to confirm that based on your review of the record title, that status of the mortgage has not changed and that the discharge has been executed by mortgage holder of record.

You may also be asked what evidence exists to show that the recorded discharge is intended to be a full discharge of the mortgage as opposed to being only a discharge of the recorded land – in other words, that the discharge, despite its title, is only a partial release of the recorded land. Such evidence that the discharge was intended to be a full and complete discharge may include the following:

(a) the recorded and filed mortgages were stamped "both ways," "duplicate original for recording" or other words to similar effect by recording clerks at time of filing and recording, evidencing the intent that the mortgages pertain to the same "real world" parcel of land;

(b) the legal descriptions on the recorded and registered mortgages are the same, especially if they describe the combined registered and recorded land in a way that clearly includes the registered land as part of the larger combined parcel;

(c) with respect to residential property, if the recorded and filed mortgages have the same MERS mortgage identification number (MIN) noted on them, it should follow that the two mortgages pertain to a single parcel of land (or contiguous parcels that function as one), since mortgages encumbering multiple parcels of land are not eligible for sale on the secondary market and a MIN would be indicative that the mortgages were intended to secure a loan sold on the secondary market; and,

(d) the property is a condominium unit in a condominium that contains both registered and recorded land – admittedly a rare event since most such properties are removed from the registration system at the time that the master deed is filed. Since condominium master deeds generally prohibit one from conveying a portion of a condominium unit, it would follow that recorded and registered mortgages that encumber the same unit can only pertain to one property.

Of course, not all of these arguments will work in every case, but using the applicable ones together with the previously described supporting documentation should give you a good chance to get your discharge approved for filing on the registered land side.

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