REBA news
WWW.REBA.NET
THE NEWSPAPER OF THE REAL ESTATE BAR ASSOCIATION
JUNE 2017 • Vol. 14, No. 3
Supplement of Massachusetts Lawyers Weekly

Remembering 'a giant of the real estate bar'

BY DANIEL J. OSSOFF

Henry H. Thayer, a giant of the Massachusetts real estate bar and a former president of REBA (then the Massachusetts Conveyancers Association), died March 26, 2017, 20 days shy of his 80th birthday.

Henry was a 1958 graduate of Harvard College and a 1963 graduate of Harvard Law School. Between college and law school, Henry served in Korea from 1959 to 1960. That represented a portion of a long military career — of which Henry was understandably very proud — that saw Henry serve in the U.S. Army Reserve for 33 years, enlisting as a private in 1955, receiving his commission as a second lieutenant in 1958 and retiring with the rank of colonel in 1988.

A member of the Field Artillery branch, Henry also participated in Army Intelligence and the Foreign Liaison Service and was awarded the Meritorious Service Medal in 1988.

Upon receiving his J.D. from Harvard Law School, Henry joined Rackemann, Sawyer & Brewster, where he spent his entire legal career. Henry was a part of the last generation of title experts and conveyancers who grew up largely in the pre-title insurance age. Younger than many of them — if not in age than certainly in appearance and spirit — Henry learned from — and quickly joined the ranks of — that group of notable members of the real estate bar as Abe Wolfe, Orrin Rosenberg, Wiley Vaughan, Norman "Shorty" Byrnes and others.

Henry was the driving force behind updating and bringing back into use Crocker's Notes on Common Forms, editing the eighth and ninth editions for MCLE. In addition to serving as president of the Massachusetts Conveyancers Association in 1988, he received the MCA's highest honor, the Richard B. Johnson Award, in 1995. He was also a president of the Abstract Club and a longtime and enthusiastic participant on the club's executive committee.

In addition, Henry served for many years as chair of the Joint Amicus Committee of both the MCA — later REBA — and the Abstract Club. As noted by Chief Justice Margaret Marshall when she poked her head into the 125th Anniversary Dinner of the Abstract Club in 2008, Henry was absolutely unique in honoring the principal that briefs — most notably those submitted by Henry on behalf of the Joint Amicus Committee — should be brief. Henry was also a fellow in the American College of Real Estate Lawyers, elected to that group in 1984.

Among his many philanthropic and

See page 8

SJC defines scope of religious exemption

BY THOMAS L. GUIDI

In a decision anxiously anticipated by religious organizations across the commonwealth, the Supreme Judicial Court recently held that property owned by a religious organization is exempt from local real estate taxation under G.L.c. 59, §5, Clause Eleventh, where the "dominant purpose of the questioned portion of the property is religious worship or instruction, or purposes connected with it."

The case, *Shrine of Our Lady of LaSalette Inc. v. Board of Assessors of Attleboro*, 420 Mass. 290 (2017), was on appeal from a decision of the Appellate Tax Board decided in favor of the Attleboro assessors.

In its unanimous decision, the court recognized that a house of worship is more than a chapel used for religious services and classrooms used for religious instruction. It held that the accessory portions of the property (including parking lots, anterooms for greeting and hanging coats, the parish halls, offices for clergy and staff, and storage areas), whether located in a single building or in multiple buildings, are also exempt even if no worship occurs within such spaces, so long as they are used for purposes connected to or in support of religious worship.

DEPOSITPHOTOS/RPARYS

The LaSalette Shrine is a Catholic religious organization established in 1953 to honor and commemorate the apparition of the Virgin Mary to two children in the village of LaSalette, France, in 1846. Hundreds of thousands of people visit the shrine each year to participate in a broad range of activities on the shrine's property, including daily mass and confessions, special prayer services, retreats and a holiday festival of lights. The shrine also hosts a variety of

See page 11

Boston College Club partners with REBA

The Boston College Club, located atop 100 Federal St. in Boston's Financial District, is offering a unique opportunity to our members.

By simply making a one-time $100 contribution to the REBA Foundation, members are invited join the Boston College Club with a special REBA-members-only initiation fee of $100, reduced from $800. Located in the heart of Boston for over 20 years, the Boston College Club is where the city's leaders come to connect, work, host and play.

"The BC Club offers amazing 360-degree panoramic views of Boston, with superb cuisine and service," said REBA Executive Director Peter Wittenborg, a frequent visitor to the club. "The Club will be an excellent professional and social resource for our members, particularly lawyers outside of the city needing a Boston-based venue to meet and host clients and friends."

On June 13, the Boston College Club hosted a cocktail reception for the association's officers, directors, committee co-chairs and all REBA members. An enjoyable evening was had by all.

NEW LAWYERS SECTION PROGRAM

The REBA New Lawyers Section recently presented a program at Suffolk University Law School in collaboration with the school's Real Estate Trusts and Estates Association (SLRETE) on managing the challenges and obstacles confronting a first-year associate. From left: New Lawyers Section Co-Chairs Nick Shapiro and Noel Di Carlo, section member Dom Poncia, SLRETE Vice President Maegan O'Rourke, SLRETE President AJ Rivera and section member Ben Adeyinka

Inside this issue

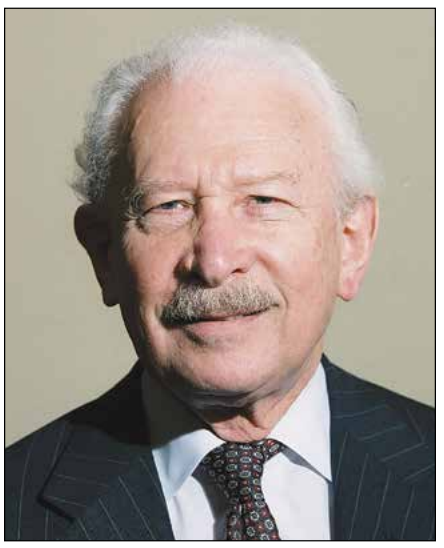
Bidding farewell to Robert Hoffman

BY PETER WITTENBORG

Born and raised in Newton, Bob Hoffman was a graduate of Harvard College and Harvard Law School. Upon his admission to the bar in 1954, he joined the law firm of Hoffman and Hoffman, founded by his uncle together with his father, Harry Hoffman, back in 1920. From 1955 to 1958, he served as an assistant U.S. attorney for the District of Massachusetts. Thereafter, he returned to private practice and remained with the family firm, concentrating on real estate law for 50 years until his retirement in 2007. He practiced in the same firm at the same address (Nathan Miller's building a few doors down from the Parker House and a short walk from his home on Marlborough Street) for his entire life.

Bob served on the Massachusetts Conveyancers Association's board of directors for 20 years, was president in 1986, and chaired the ethics committee. As president, he took a bold step, hiring the association's first employee, a part-time administrator who worked in an office the size of a walk-in closet. In 2000, he received the Richard B. Johnson Award, the association's highest honor. He also served on the REBA Dispute Resolution panel of neutrals in its early years.

He was a member of the executive committee of the Massachusetts Association of Bank Counsel and a recipient of their leadership award. He was also a



ROBERT J. HOFFMAN

member of the Boston Bar Association, the Massachusetts Bar Foundation and, of course, the Abstract Club.

Bob was part of that remarkable generation of real estate lawyers who attended law school immediately following World War II, including Norman "Shorty" Byrnes, Denis Maguire, Wiley Vaughan and many others.

In addition to his professional career, Bob was active for over 50 years in the Movement for Reform Judaism. He was an honorary trustee of Temple Israel of Boston, the commonwealth's premiere reform congregation, after serving as president from 1991 to 1993, and previously as a vice president and chair of the congregation's social action committee.

When I began practicing law in the early 1980s, I was in a firm where I was the only real estate guy — and I knew precious little about real estate law! But I joined the Massachusetts Conveyancers Association and met Norman Byrnes (of course, I was too much in awe of him to call him "Shorty"), Bill Hovey and Bob Hoffman. They became generous, informal mentors, always willing to take my calls and offer counsel. I was invited to join the MCA board in '86, Bob's year as president, and he became a role model and a lifetime friend. When I joined the REBA staff, I bought a condo near Boston Common so I could walk to work. Bob represented me and I never saw a bill for legal fees.

His second wife, Phyllis, was very musically inclined. Bob sold his beloved Martha's Vineyard weekend home and bought a place in the Berkshires so she could be near Tanglewood.

And he had patrician taste. When I asked Phyllis about a gift, she told me his favorite beverage was Louis Roederer Crystal champagne!

If I were to sum Bob up in a word, it would be: engagement. Never one to sit on the sidelines or let the world pass by, Bob brought a passion, engagement to every aspect of his life.

He will be missed.

Peter Wittenborg delivered these remembrance remarks to members of the Abstract Club at the group's spring meeting on May 8, 2017.

The 'GLAM' test: the most potentially potent footnote in affordable housing

BY ROBERT M. RUZZO

By all accounts, the so-called "GLAM test" under G.L.c. 40B ("Chapter 40B," "Affordable Housing Law" or "Comprehensive Permit Law"), one of the hottest topics in affordable housing over the past few years, is going to continue to attract attention in the coming months.

As affordable housing aficionados know, the General Land Area Minimum (GLAM) test is one of three safe harbors provided for under the Affordable Housing Law. Under Chapter 40B, this safe harbor exists when "low or moderate income housing exists … on sites comprising 1.5% or more of the total land area zoned for residential, commercial or industrial use."

For years, this safe harbor was relatively unknown, particularly when compared to the widely recognized "10 percent test" under the statute. Two years ago, even the Housing Appeals Committee (HAC) had to concede in *Newton Zoning Board of Appeals v. Dinosaur Row LLC* that "the General Land Area Minimum is a complex measure, which has not been addressed extensively during the 45 year history of the Comprehensive Permit Law." The third Chapter 40B safe harbor, the Annual Land Area Minimum, remains a veritable affordable housing Sasquatch, whose existence is alleged, but as yet remains unverified.

After an extensive internal review, the Department of Housing and Community Development (DHCD) published "Draft Guidelines for Calculating General Land Area Minimum" (the GLAM Guidelines) on its website on May 5, 2017. The GLAM Guidelines are intended to provide straightforward assistance to municipalities.

THE HOUSING WATCH

In addition to the eight pages of guidance, which includes a new definition of "Group Home," two appendices accompanied the GLAM Guidelines. Appendix A consists of 12 pages of technical instructions, while Appendix B walks through an "Example Calculation" complete with illustrations. DHCD will be accepting written comments on the GLAM Guidelines (including the appendices) through July 5, 2017.

The publication of these eagerly anticipated guidance provides an appropriate opportunity to step back and reflect upon some of the larger issues surrounding the Affordable Housing Law and the statutory safe harbors in particular.

As noted recently in a cogent presentation by the Massachusetts Housing Partnership (MHP) at a meeting of the CHAPA Housing Production Committee, Chapter 40B has been the vehicle for the production of more than 70,000 housing units since 1969. The future, however, is not as bright in MHP's view, because the potential for "new 40B development is diminishing relative to projected housing need."

Why? According to MHP, the gap between projected housing need and the remaining Chapter 40B housing development potential "is greatest in Metro Boston where 26 communities have permitted enough subsidizing housing" to cross the 10 percent safe harbor threshold. According to MHP, the remaining development potential under Chapter 40B in the Metropolitan Area Planning Commission region is approximately 21,000 units.

Of course, under the 2007 *Boothroyd v. Zoning Board of Appeals of Amherst* decision, a municipality may nonetheless elect to grant a Comprehensive Permit even if it has satisfied the 10 percent test. But that is a pretty thin reed to grasp in our current housing affordability wind tunnel.

To make your affordable housing day even brighter, a number of the 10 communities identified by MHP as having the "most remaining Chapter 40B Development Potential" in the Metro

See page 8

REBA
THE REAL ESTATE BAR ASSOCIATION
for Massachusetts

295 Devonshire Street, Sixth Floor,
Boston, MA 02110-1266
www.reba.net

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 opinion.

Postmaster: Send address changes to REBA, 295 Devonshire Street, 6th Floor, Boston MA, 02110

MASSACHUSETTS LAWYERS WEEKLY

(ISSN 01967509), 10 Milk St., 10th floor, Boston, MA 02108
(617) 451-7300 • masslawyersweekly.com

A condo lawyer walks into a Boston bar and . . .

BY SAUL J. FELDMAN

I read the *First Main Street Corporation v. Board of Assessors of Acton* case when it was decided in 2000 (49 Mass. App. Ct. 25 (2000)).

Recently, I reread the *First Main* case. The reason I did so in February of 2017 is that the city of Boston has adopted a policy to tax parking spaces in condominium buildings.

I had thought that *First Main* put this issue to rest 17 years ago. In *First Main*, the town of Acton sought to tax development rights that were retained by the developer to build subsequent phases of a condominium. The assessors treated the development rights as present interests in real estate that are taxable under G.L.c. 59, §11.

The court strongly disagreed. Rather, the court affirmed the decision of the Appellate Tax Board holding that "the limited scope of that taxing statute and the unambiguous prescription and proscription of G.L.c. 183A, §14, regarding the taxation of common areas of a condominium do not authorize the tax the assessors have sought to impose."

The decision of the Appeals Court was authored by Judge Rudolph Kass, who noted that "the right to tax must be plainly conferred by statute. It is not to be implied. Doubts are resolved in favor of the taxpayer." For this proposition, the court cited *Cabot v. Commissioner of Corp. and Taxation*, 267 Mass. 338, 346 (1929). There often is value in the common areas, the court wrote in *First Main*, but "[e]verything of value, however, is not necessarily subject to taxation, *unless the Legislature makes it so*."

The court stated that the land is common area of the condominium and as such, is taxed pro-rata to current unit owners in the condominium.

> I had thought that *First Main* put this issue to rest 17 years ago.

Common areas may not under Section 14 be taxed other than proportionately to the unit owners. The court went on to quote the statute:

"Each unit and its interest in the common areas and facilities shall be considered an individual parcel of real estate for the assessment and collection of real estate taxes, but the common areas and facilities, the building and the condominium shall not be deemed to be a taxable parcel."

The court concluded that the only way there could be a real estate tax on a part of the common areas would be if our Legislature enacted a statute to that effect.

To sum up, in the event a condo lawyer walks into a Boston bar, you should ask him about the *First Main* case. In the event he says he is not familiar with that case or the attempt by the city of Boston to tax parking spaces, you should suggest that he "better call Saul" at 617-523-1825.

Saul Feldman practices with the Feldman Law Office in Boston The firm's primary specialties are commercial real estate transactions and condominium law and development, in addition to residential conveyancing. Saul can be contacted at saul@feldmanrelaw.com.

The co-chairs of the commercial leasing section, Ed Bloom and Rick Heller, hosted a webcast meeting open to all REBA members, with a discussion and review of the REBA Short Form of Office Lease and the proper way to use it from both the landlord and tenant sides. The review was also a tutorial on lease issues that landlord and tenant attorneys should be aware of when negotiating various matters addressed by the form lease.

My cousin Vinnie explains effective communication

BY PAUL F. ALPHEN

My very patient and understanding wife gets flummoxed by my insatiable appetite for attending sporting events and she has attempted to impose injunctions on arbitrary and capricious ticket purchases. Nevertheless, when a certain Saturday morning in December rolls around each year I can be found behind the keyboard waiting to find reasonably priced tickets for games in America's Most Expensive Ballpark.

Consequently, my Cousin Vinnie, the suburban real estate attorney, and I were able to enjoy a nice spring evening in the ballpark watching the fourth highest payroll in the MLB.

Vinnie was intrigued by the lobster offerings now available inside the park. Me, not so much. I had tried the fried clams twice, but I have since reverted to standard issue hotdogs. Vinnie was stuffing lobster poutine (whatever that is) in his mouth while monitoring the beer inventory accumulating under his seat.

"Paulie," Vinnie announced, "I finally figured out what makes our profession unnecessarily difficult." I couldn't wait to hear the revelation. "People don't communicate. It became apparent to me today when I had a nice conversation with Town Counsel for Podunk. Her client had asked her to look into the historical conditions of approval related to my client's property, and she called me questioning if my client could proceed with his planned development.

I agreed with Vinnie that the ever-increasing practice of dropping email bombs on opposing counsel had weakened the overall camaraderie of the bar.

"I discussed the issues with her, and she listened. She asked questions, and she listened. I described the case of *Patelle v. Planning Bd. of Woburn* (20 Mass. App. Ct. 279, 480 N.E.2d 35 (1985)) and a landowner's ability to reconfigure lots within a subdivision. She contemplated the situation, and said, 'I don't think there is a problem here.' After we finished the phone conversation it occurred to me that what had just happened had become a rarity. I was able to discuss the relevant law and legal principles with counsel on the other side (as I never think of the town of Podunk as an 'adversary'), and counsel listened, and we were able to agree and move forward."

I agreed with Vinnie that the ever-increasing practice of dropping email bombs on opposing counsel had weakened the overall camaraderie of the bar. We don't get to see each other, or even speak with each other, as often as we should. I told Vinnie that I don't think it is just a coincidence that when working on deals with attorneys that I see at REBA meetings, or at meetings of the estimable Merrimack Valley Conveyancer's Association, that the conversations are always civil, and the solutions forthcoming.

We watched Mookie Betts hit a single, and Vinnie retrieved another beverage from his inventory. "I am not perfect," said Captain Obvious. "I still lose my temper once a year when some jack-of-all-trades calls to tell me how to practice law, but I am much more likely to take the time to consider the views of opposing counsel when counsel is willing to engage in intellectual discourse, as opposed to those who attempt to berate and bully me."

Again, amazingly, I found myself in agreement with Vinnie.

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

New state housing program for 'starter homes'

BY BENJAMIN FIERRO III

Although Massachusetts has seen an increase in housing production in the past several years, most of that increase has consisted of multi-family housing. Single-family housing stats continue to lag far behind what is needed to meet demand, especially for more modestly priced new homes. In an effort to encourage the production of affordable single-family homes, the state is launching a new program that specifically promotes "starter homes."

The Starter Home Program was included in Gov. Charlie Baker's omnibus economic development bill that was enacted last summer. Sections 37 through 54 of Chapter 219 of the Acts of 2016 amend G.L.c. 40R (the Smart Growth Zoning and Housing Production Act) to encourage municipalities to adopt local zoning ordinances and bylaws that permit the construction of smaller single-family homes (not exceeding 1,850 square feet of heated living area) on smaller lots (not exceeding a quarter acre).

Chapter 40R and purpose of Starter Home Program

The Legislature enacted Chapter 40R in 2004 to provide financial incentives for cities and towns to create "smart growth zoning districts" for development of mixed-use and higher density housing as a matter of right. While the law has had some success, it has failed to spur single-family housing production.

The amendments to Chapter 40R allow communities to take advantage of the law's financial incentives to facilitate the production of starter homes. It is targeted at suburban and rural communities with large lot zoning that makes it uneconomic to produce affordable single-family homes for young families.

State approval and local zoning adoption

Before adopting a Starter Home Zoning District, communities must apply to the Department of Housing and Community Development (DHCD) for approval of the location of the proposed district, the proposed zoning regulations and any design standards.

Like all zoning, Starter Home Zoning Districts are adopted either through Town Meeting or City Council approval. The ordinance or bylaw must include provisions to allow starter homes to be developed either as-of-right or through a limited plan review process akin to site plan review.

Financial incentives

Upon DHCD review and local adoption of a Starter Home Zoning District, communities become eligible for payments from the Smart Growth Housing Trust Fund, as well as other financial incentives. Three types of incentives are offered.

1. Production bonus payments: After DHCD approves the district, the municipality receives a production bonus payment based on the potential number of new housing units (the maximum number of units possible under the 40R overlay zone minus the total number of units permissible under the previous zoning) that can be constructed in the district. Payments range from $10,000 for up to 20 units to as much as $600,000 for 501 or more units.

2. Bonus payments: The community will also receive a bonus payment of $3,000 for each new housing unit constructed in the district once a building permit has been issued.

3. Funding preference: DHCD, as well as the Executive Office of Energy and Environmental Affairs, the Executive Office of Transportation and the Executive Office of Administration and Finance, must give preference to municipalities with an approved Starter Home Zoning District when awarding discretionary grants.

Program requirements

A Starter Home Zoning District must meet the following minimum requirements:

1. It must be located in an eligible location, i.e., an area with the infrastructure, transportation access, existing underutilized facilities, smart growth characteristics and/or location that make it highly suitable for a Smart Growth Zoning District or Starter Home Zoning District. A "highly suitable location" may include without limitation areas near public transit stations; areas of concentrated development, including town and city centers and other existing commercial or rural village districts; or other areas considered "highly suitable" for starter homes to be further defined in DHCD's amended regulations.

2. Housing density shall satisfy the following criteria:

(a) at least four units per acre of developable land area;

(b) smart growth principles of development must be emphasized, such as cluster development and other forms that provide for common open space usable for recreational activities and/or the use of low-impact development techniques; and

(c) at least 50 percent of the starter homes, excluding accessory dwelling units, must contain three or more bedrooms.

3. At least 20 percent of the starter homes shall be affordable to and occupied by individuals and families whose annual income is less than 100 percent of the area median income, and shall be deed restricted for at least 30 years.

4. It shall be exempt from any moratorium or limitation on the issuance of building permits for residential uses.

5. It shall be exempt from any municipal environmental or health ordinances, bylaws or regulations that exceed applicable state requirements, unless the Department of Environmental Protection (MassDEP) has determined that specific local conditions warrant imposition of more restrictive local standards, or the imposition of such standards would not render infeasible the development contemplated under the comprehensive housing plan, housing production plan or housing production summary submitted as part of the application for such district.

6. It must comply with federal, state and local fair housing laws.

7. A single district may not exceed 15 percent of the total land area in the city or town. Upon request, DHCD may approve a larger land area if such approval serves the goals and objectives of the law.

8. The combined land area of all approved districts may not exceed 25 percent of the total land area in the city or town. DHCD may approve a larger combined land area if such approval serves the goals and objectives of the law.

A Starter Home Zoning District ordinance or bylaw may include provisions to modify or eliminate the dimensional standards contained in the underlying zoning in order to support desired densities, mix of uses and physical character. Modified requirements may be applied as of right throughout all or a portion of the district, or on a project specific basis through the plan review process as provided in the ordinance or bylaw.

A Starter Home Zoning District ordinance or bylaw may also designate certain areas as dedicated perpetual open space through the use of a conservation restriction and the amount of such open space will not be included as developable land within such district. For developable land of under 50 acres, up to 10 percent may be designated as open space; up to 20 percent is permitted for larger tracts of developable land.

Implementation

The Starter Home Program provisions of Chapter 40R became effective Jan. 1, 2017, but will not be implemented until DHCD promulgates amendments to the current 40R regulations. See 760 CMR 59.00. Those draft regulations are anticipated to be released in the early spring for public comment.

Ben Fierro is a partner in the Boston law firm of Lynch & Fierro LLP and served on the Department of Housing and Community Development's Starter Home Advisory Committee. He can be contacted by email at bfierro@lynchfierro.com.

Kevin G. Honan and Joseph A. Boncore, co-chairs of the Legislature's Joint Committee on Housing, recently spoke at an open webcast meeting of the REBA Affordable Housing Section. The legislators discussed the commonwealth's legislative housing agenda for 2017-2018 as well as some of the issues and challenges in housing policy that may be considered by the Joint Committee in the current term of the General Court.

Standing for environmental appeals: One size does not fit all

BY LUKE H. LEGERE

Real estate lawyers pay close attention to establishing standing in agency hearings and court. Standing is the first hurdle and failing is fatal. This is especially so in environmental cases.

It is tempting to think there must be one universal rule, convenient to memorize, on who has standing to appeal environmental decisions within state agencies and then to court. In fact, there are similarities but subtle differences in the rules among Massachusetts agencies, even within the Department of Environmental Protection (MassDEP) for its various kinds of permits and enforcement.

Consider the general statutory framework for administrative appeals of state agency decisions and then judicial review of final agency actions. The Administrative Procedures Act, G.L.c. 30A, §10, governs adjudicatory appeals generally and also allows persons substantially and specifically affected by appeals to intervene in them. Section 10A, the "Ten Person Right to Intervene," allows a group of 10 residents to intervene in adjudicatory proceedings where damage to the environment is or may be an issue. Section 14 authorizes a person aggrieved by a final agency decision to appeal to court.

Often confused with the Ten Person Right to Intervene, G.L.c. 214, §7A is the so-called "Ten Citizen Suit Statute." It gives any 10 people domiciled in the commonwealth legal standing to pursue a civil action in Superior Court to prevent environmental damage that is occurring or imminent. Note the different wording in these two laws, and the legal import (e.g., residents versus domiciliaries). This amounts to statutory standing to enforce state and local environmental laws and regulations on the books, not a generalized right to a clean environment.

Now we examine the state Wetlands Protections Act (WPA), Clean Waters Act (CWA), and G.L.c. 91 Waterways and Tidelands laws. All three are administered by MassDEP to protect wetlands, water resources and related rights. MassDEP regulations governing appeals under these programs differ in important ways with respect to standing.

A quick reading of these rules gives a false sense of uniformity. The universe of persons who may obtain an adjudicatory hearing for a WPA Order of Conditions or action, CWA Water Quality Certification (WQC) or Chapter 91 license generally includes some or all of the following people: applicants, property owners, persons aggrieved, 10 resident groups and certain governmental or private organizations. The regulations diverge in their specifics.

For example: who may request an adjudicatory hearing as of right. The WPA rules give applicants, property owners and local conservation commissions the right to this trial-type hearing. The CWA rules, in contrast, list applicants and property owners as having this right. In greater contrast, the Chapter 91 rules say only an applicant can appeal either one which has a demonstrated property right in the affected lands or which is a public agency.

All three regulatory schemes grant standing to "aggrieved persons." They must demonstrate that, due to an act or failure to act by MassDEP, they may suffer an injury in fact, which is different in type or magnitude from that suffered by the general public and which is within the scope of the interests identified in the governing statute and regulations. This is classic standing.

The WPA rules add an extra layer, whereby an aggrieved person must have participated in writing in the permit proceedings. The CWA rules, with another twist, confer standing on aggrieved persons who have submitted written comments during the public comment period (unless the appeal is based upon new substantive issues arising from changes in the scope or impact of a project which were not apparent from the public notice). The Chapter 91 rules give standing to aggrieved persons so long as they participated in writing during the public comment period and can demonstrate that, as a result of issuance of a license, they may suffer an injury in fact which is within the scope of the interests protected by Chapter 91 and G.L.c. 21A.

There are some liberal standing rights for citizen groups, but they read differently. Under the WPA, 10 residents of the municipality where the project is proposed may request an adjudicatory hearing, so long as at least one member of the group has participated in writing during the prior proceedings. The CWA provides standing for "ten persons of the Commonwealth pursuant to G.L. c. 30A" so long as at least one member of the group has submitted written comments during the public comment period. Chapter 91 confers standing upon "ten residents of the Commonwealth, pursuant to G.L. c. 30A, § 10A" provided five members reside in the municipality where the licensed activity is located, all members of the group have submitted comments during the public comment period and each member of the group files an affidavit stating her intent to be part of the group and represented by its authorized representative.

Standing also is available to government officials, agencies or environmental organizations. Under the CWA, governmental or private environmental organizations that have submitted written comments during the public comment period have standing (again, the prior written participation requirement is waived for appeals based upon new substantive issues arising from changes in the scope or impact of a project that

See page 11

'GLAM' test: potent footnote in affordable housing

CONTINUED FROM PAGE 2

Boston area are among the very communities that have recently asserted the GLAM safe harbor (Arlington, Newton and Waltham). For these municipalities and others similarly situated, however, an underappreciated danger lurks behind the assertion of the GLAM safe harbor based upon current Subsidized Housing Inventory (SHI) counting methodology. Such arguments may run headlong into the most potentially potent footnote in all of affordable housing.

First, some full disclosure. Your correspondent has previously suggested that the treatment of rental developments under the GLAM test may no longer make sense in an era of smart growth and concentrated development. Remember that under current SHI practice, rental housing and ownership units are treated very differently. Assuming all other requirements to gain listing on the SHI have been met, all units in a rental housing development are counted on the SHI, while homeownership developments are counted only on a proportionate basis. The HAC politely questioned this approach as early as 2003, in footnote 6 of *Arbor Hill Holdings Limited Partnership v. Weymouth Board of Appeals*, stating "it would seem anomalous to count all of a very large [rental] lot containing only a very small number of affordable units."

But footnote 6 in *Arbor Hill* pales in comparison to the suggestion of the Supreme Judicial Court in footnote 12 of *Zoning Board of Appeals of Sunderland v. Sugarbush Meadow, LLC*, 464 Mass. 166, 178 (2013). There, the SJC expressly left open the issue of how counting should be performed for SHI purposes, declaring: "we need not address *whether the inclusion of non-subsidized housing units in the SHI is permissible under the act* … (emphasis added)." Thus, the issue of SHI counting methodology under the 10 percent test remains an open question, as far as the SJC is concerned.

Certainly any counting methodology employed by DHCD over many years would be entitled to a great deal of deference. Nonetheless, a judicial rebuke to such a long-standing regulatory practice would not be without recent precedent. As development lawyers learned back in 2007 in the Chapter 91 context, the SJC is not hesitant to let it be known that "the principle of according weight to an agency's discretion" is "one of deference, not abdication," stating further that "this court will not hesitate to overrule agency interpretations of statutes or rules when those interpretations are arbitrary or unreasonable." *Moot v. Department of Environmental Protection*, 448 Mass. 340, 346 (2007).

By aggressively asserting the GLAM safe harbor, a municipality may raise the entire issue of SHI counting methodology before the state's highest court for the first time. So as we enter upon the "Summer of GLAM," remember it may be time to re-examine the most important footnote in affordable housing as well.

"The Housing Watch" is a regular column from Bob Ruzzo, senior counsel in the Boston office of Holland & Knight LLP. He possesses a wealth of public, quasi-public and private sector experience in affordable housing, transportation, real estate, transit-oriented development, public private partnerships, land use planning and environmental impact analysis. Bob is also a former general counsel of both the Massachusetts Turnpike Authority and the Massachusetts Housing Finance Agency; he also served as chief real estate officer for the turnpike and as deputy director of MassHousing. Bob can be contacted by email at robert.ruzzo@hklaw.com.

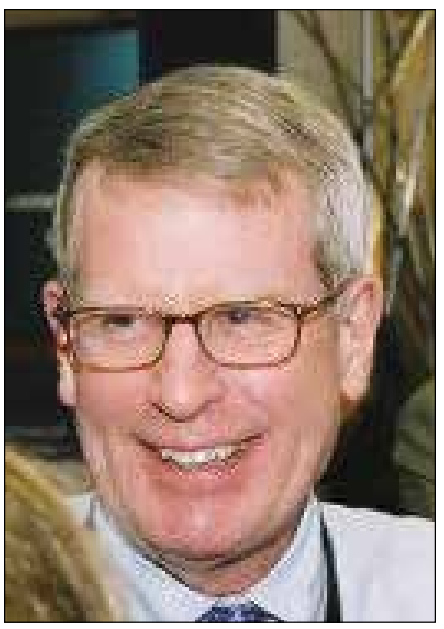
Remembering 'a giant of the real estate bar'

CONTINUED FROM PAGE 1

charitable endeavors, Henry perhaps valued most his work with the Cathedral Church of St. Paul in Boston, where he served as chancellor from September 2005 through January 2013 and was a member of the cathedral's Leadership Development Institute. In addition, Henry offered his much needed love and support to St. Paul's Church in Brockton.

Those are the facts, but those are only a small part of what his many friends and colleagues will remember about Henry. His fellow workers at Rackemann will remember the constant knocking on Henry's always open door, with the knock inevitably greeted with a "What you got?" Or, if he was feeling particularly perky that day, a "Come forth and you shall be heard. God save the Commonwealth of Massachusetts."

Greetings which could be intimidating to young attorneys at Rackemann as they approached the "great man." But which one and all quickly grew to understand simply meant that Henry was ready to drop everything



HENRY H. THAYER

that he was doing so that he could assist you with your question or problem, which, as soon as your knock was heard, became the most important thing on his desk at that moment.

And it was not just those within his own firm to whom Henry extended his generosity. His phone would ring constantly with questions from fellow members of the real estate bar. Henry invariably dropped everything and took the call on the spot, and shared freely of his knowledge and experience. The one word which inevitably comes up in discussions reflecting on Henry's accomplishments and his contributions to our legal community is "generosity." Henry gave freely of his time to all — almost to a fault, if that is possible.

Henry's generosity was by no means limited to other members of the bar. He shared equally of his time with anyone who sought his guidance or advice. Henry was absolutely oblivious to status. At Rackemann, he was noted for treating everyone equally and as his equal: the folks in the mailroom, the secretaries and receptionists, his fellow attorneys from the newbies right out of law school to the most senior partners, and, of course, his cherished team of title examiners.

The service that was held for Henry at St. Andrews Episcopal Church in Wellesley on April 12 was notable in part for the impressive gathering of the best of the real estate legal community that was represented there. But it was every bit as notable for the many members of the support staff at Rackemann who made the effort to attend the service for Henry out of a show of respect for a man who always showed them the utmost respect and kindness.

His generosity also extended in very real and tangible ways to those less fortunate in our community. Just as he couldn't resist dropping everything for every knock on his door or call that came in from a fellow member of the real estate bar, he also found it extremely difficult to turn down the various pro bono cases that came his way.

For many years Henry participated in the BBA's Volunteer Lawyers Project. He also contributed many hours of work over several years providing pro bono service to the Dudley Street Neighborhood Initiative, serving as eminent domain counsel in connection with the rejuvenation of the Dudley Triangle neighborhood in Roxbury and Dorchester. In recognition of time that he donated to so many causes, Henry received the Boston Bar Association's Pro Bono Award in 1991 and the Massachusetts Bar Association's Pro Bono Award in 1998.

We will also remember fondly Henry's love of railroad history and his love of rail travel. If there was a way to get where he wanted to go by train, Henry was on that train and not in his car or in an airplane. Of course, his love of all things railroad evolved into his expertise in the law of railroad titles, a subject on which he wrote and lectured extensively and on which so many members of the bar looked to Henry for guidance.

There hung in Henry's office for years a framed map entitled "G. Woolworth Colton's Series of Railroad Maps No. 2, Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut and Lower Canada" published in 1861. For those who knew him well, there is no doubt in their minds that Henry had committed that map to memory, as he was able to recite, without reference to notes, to files or to his famous box of index cards, the history of rail lines throughout our part of the country — and many from far afield as well.

But there was, of course, still more to Henry for those who practiced with him, enjoyed REBA and Abstract Club activities with him, or who counted him as a friend. There was the way he wrote a letter. His letters were beyond conversational — each sentence being a separate paragraph with bits of wisdom sprinkled throughout but with no excess formality and — most of all — no excess verbiage.

It didn't matter if the letter was one of his many friendly missives to his fellow members of REBA or the Abstract Club, or was a letter to the chief justice of the SJC or the governor of the commonwealth. The style was the same and unquestionably Henry's.

And, of course, there was his quirky and at times unconventional wit. He loved to share a joke and have a good laugh, occasionally at his own expense but not at the expense of others. His love of humor — the sillier the better — and his tendency toward mischief was truly infectious and made it a joy to be in his company.

Above all, Henry remained throughout his life, during good times and tougher times, the most humane of men, always kind and thoughtful, concerned more about the welfare of others than about himself. For those who had the honor and privilege of knowing him well, we can't imagine that there will ever be another Henry. He will be profoundly missed.

Rackemann, Sawyer & Brewster partner and former REBA president Dan Ossoff delivered these remarks at a meeting of the Abstract Club on May 8, 2017.

EXPERIENCE
clubLIFE

EXPAND YOUR NETWORK AT THE BOSTON COLLEGE CLUB

Introducing an exclusive offer for members of the Real Estate Bar Association of Massachusetts! For a limited time, make a $100 donation to the REBA Foundation, Inc. and **receive an exclusive reduced Initiation Fee of only $100 to join Boston College Club!***

As a Member at the Club, you'll enjoy:

- 50% off* a la carte Club dining for Members and their families
- Upscale dining where you can host, entertain and celebrate in style
- Private event hosting privileges for meetings and company parties
- Private work spaces where you can be productive on the go
- Anytime Lounge with locally-sourced menus and signature drinks
- Hospitality benefits with different snacks each day
- Member events for virtually every interest

Boston College Club is committed to our community and is proud to honor REBA members' contributions to the REBA Foundation, Inc. as satisfaction of a

Contact the Club to learn more today.
617.946.2828 | bostoncollegeclub.com

*Offer expires December 31, 2017 and may not be combined with any other promotions or discounts. Loyalty agreement may be required and early resignation fees may apply. The O.N.E. program and corresponding benefits are subject to certain restrictions and exclusions. Other restrictions may apply. See Club for details. © ClubCorp USA, Inc. All rights reserved. 34158 0317 SS

BOSTON COLLEGE CLUB
A Member of the ClubCorp Family

Nobody Delivers **Digital Marketing** Like We Do.

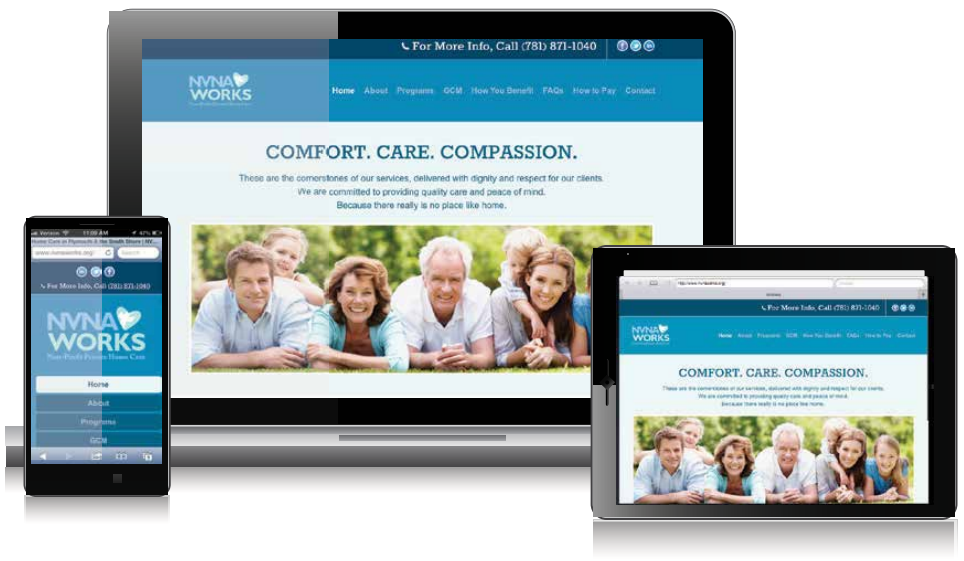
Propel connects business with the people who matter most- **their customers.**

Propel Marketing is a one-stop shop for all your online marketing services. We help our customers improve their bottom line by providing cutting-edge digital solutions and industry best practices.

With a full array of online marketing solutions, we can create the perfect mix suited to boost your business.

Some of our services include:

- *Responsive Website Design*
- *Social Media Management*
- *Centralized Dashboard*
- *Call Tracking*
- *Reputation Monitoring*
- *OnTarget - Display Advertising*
- *Search Engine Marketing*



CALL TODAY! 617-218-8211
Scott Ziegler

WEBSITES. MOBILE. SOCIAL. LISTINGS. SEARCH. SEO. REPUTATION.

LAWYERS WEEKLY | *Partnered with* PROPEL MARKETING

www.propelmarketing.com

SJC defines scope of religious exemption

CONTINUED FROM PAGE 1

other functions and activities, including fundraising events.

In addition to its main church, the shrine's facilities consist of several indoor and outdoor chapels, gardens containing religions statues and artifacts, a retreat center, a welcome center, a maintenance building, a former convent leased to a nonprofit organization as a safe house for battered women, parking lots and surrounding lands.

For the tax year in question, the shrine's property included approximately 199 acres of land, of which approximately 110 acres served as a wildlife sanctuary subject to a conservation easement and under the control of the Massachusetts Audubon Society.

After approximately 60 years of operations without its tax exemption being questioned, in fiscal year 2013 the city's assessors determined that the shrine owed property taxes of $92,292.98. The assessors' determination was that while the church, chapels, religious gardens, monastery, retreat center and surrounding land and parking areas were exempt, the welcome center was only partially exempt and the maintenance building, safe house and wildlife sanctuary were fully taxable.

The welcome center contains a cafeteria, which in addition to serving visitors to the shrine functions as a soup kitchen on a weekly basis. A bistro and gift shop are also located in the welcome center. The welcome center is where most visits and pilgrimages to the shrine begin. Masses are held in the welcome center. The shrine also uses the welcome center and surrounding land for various fundraising activities, including yard sales, a carnival, clambake and Christmas bazaar. The shrine also allows a few private, but mostly public, religious and nonprofit groups to use the welcome center for various public and private functions.

The assessors determined and the Appellate Tax Board concurred that the welcome center was used in part for purposes other than religious worship or instruction and found that the assessors were correct in taxing the welcome center on an apportioned basis, according to the percentage of the time each portion of the welcome center was used for purposes other than religious activities. The result was a tax based on 40 percent of the assessed value of the welcome center and the surrounding land.

The religious exemption as defined in Clause Eleventh applies to "houses of religious worship" owned or held in trust for religious organizations and "the pews and furniture and each parsonage so owned" … "for the exclusive benefit of the religious organizations" but does not extend to "any portion of any such house of religious worship appropriated for purposes other than religious ownership or instruction."

Thus, the question for the court was whether the activities taking place on the shrine property that were not strictly religious worship or instruction constituted an "appropriation" of the portions of the property where such activities took place.

The court found that the assessors and the Appellate Tax Board had defined the scope of the religious exemption too narrowly and rejected the board's approval of taxing the welcome center on an apportioned basis based on the assessors' estimate of the nonreligious use of portions of the welcome center. By choosing the word "appropriated," the Legislature expressed its intent that a portion of a house of worship will either be exempt or not exempt based on its dominant purpose, the court explained.

The Appellate Tax Board committed an error of law in failing to apply the dominant purpose test to the welcome center, the court held, and it should have been entirely exempt under Clause Eleventh.

Because the maintenance building was used to store display items for the shrine's festival of lights, inventory for the gift shop and various vehicles used on the shrine's property, the court determined that its dominant purpose is connected with the religious worship and instruction offered at the shrine and therefore it is exempt from taxation as well.

The court also found that the dominant purpose of the safe house was charitable rather than religious worship or instruction. While the court recognized that religion embraces charitable deeds, because the lease of the safe house gave exclusive use to another organization, it did not fall within the religious exemption. The court noted that the shrine could have obtained an exemption for the charitable use of the safe house by filing the appropriate application (Form 3ABC) with the city, but had failed to do so.

The REBA Women's Real Estate Networking Group hosted its annual fundraising reception in late April for the Women's Lunch Place (WLP), a Boston-based day shelter for vulnerable and homeless women. The reception raised more than $12,000 for the WLP. Boston City Councilor-at-Large Ayanna Pressley was the guest speaker. From left: REBA Women's Real Estate Networking Group Co-Chair Nancy Blueweiss, Co-Chair and founder Michelle Simons, Pressley, WLP Executive Director Elizabeth Keeley, and WLP outreach and events coordinator Liz Harrington

Similarly, the court held that the dominant purpose of the wildlife sanctuary, which was under the exclusive control and management of the Massachusetts Audubon Society, was also charitable in nature and thus the wildlife sanctuary was not exempt under Clause Eleventh.

The court's decision makes it clear that religious organizations need not fear that the use of their facilities for bake sales, rummage sales, carnivals, bazaars and other fundraising activities or for wedding receptions and other community activities will subject their property to real estate taxation. However, this decision also clarifies that in situations where a portion of church property is leased to and under the exclusive control of another tax-exempt charitable organization, the religious exemption is not applicable.

For example, many churches lease a portion of their space to a nursery school or day care center. If the church operates and staffs the school as part of its mission, then it is exempt under Clause Eleventh. If, however, it is operated by another charitable organization, a Form 3ABC must be filed by March 1 of each year in order to secure the charitable exemption from local property taxes.

The outcome of this case was extremely favorable to the shrine. Because the welcome center and the maintenance building account for a substantial share of the assessed value of the shrine's property, the shrine expects an abatement in the aggregate amount of approximately $350,000 for taxes paid for the tax year 2013 and the four subsequent tax years that have occurred while the case was pending. Of equal importance, assuming the appropriate Form 3ABC is filed for the portions of the property leased or controlled by other charitable organizations, the shrine should have no property tax liability going forward.

A co-chair of the association's commercial real estate finance section and a member of the board's executive committee, Tom Guidi concentrates his practice in real estate and business law, with particular emphasis on commercial real estate and asset based lending, leasing, financing, acquisitions, sales and zoning. He chairs the Real Estate Practice Group of the Boston firm of Hemenway & Barnes LLP. His practice also includes a significant amount of general representation of nonprofit organizations. Tom can be contacted by email at tguidi@hembar.com.

Standing for environmental appeals: One size does not fit all

CONTINUED FROM PAGE 7

were not apparent from the public notice). Chapter 91 licenses may be challenged by a municipal official in the affected city or town who has previously submitted written comments during the public comment period and, in certain instances, the state Office of Coastal Zone Management and Department of Conservation and Recreation.

These details matter. MassDEP's presiding officers routinely undertake a close analysis of standing. One recent MassDEP Final Decision concluded that a 10-person group must allege environmental harm to enjoy standing to appeal a Chapter 91 license, although many interests protected by Chapter 91 are not per se "environmental" (such as navigation, water access and livelihood interests). *In the Matter of Webster Ventures, LLC*, Docket No. 2015-014, Final Decision (June 15, 2016).

In another recent Final Decision, MassDEP found that a petitioner lacked standing to challenge a WQC as a "person aggrieved," due to his failure to submit written comments, yet granted him standing as being a property owner. *In the Matter of Tennessee Gas Pipeline Co., LLC*, Docket No. 2016-20, Final Decision (March 27, 2017).

Ultimately, appealing a final agency action to court requires plaintiffs to meet the traditional standing test of injury-in-fact to an interest cognizable by law or rule. This means proving claims of particularized harm or prejudice to substantial individual rights.

Do not assume that a party before an agency under state environmental laws has automatic standing to challenge the resulting agency decision in court. This was driven home by the Supreme Judicial Court in *Board of Health of Sturbridge v. Board of Health of Southbridge*, 461 Mass. 548, 559 (2012). Plaintiffs with standing as a 10-person group for an adjudicatory hearing at MassDEP, therefore, had better be ready to individually establish "old-fashioned" standing in court.

Careful practitioners never take standing for granted. Read the statute and agency regulations for the pleading and proof requirements, consult the court cases and agency decisions, and leave time to satisfy yourself that the petitioner(s) have (or lack) the requisite standing. And remember that, while alleging personalized harm may be unnecessary to establish statutory or rule-based standing before the agency below, it is always necessary to get your day in court.

Luke Legere is a partner with McGregor & Legere, P.C. He helps clients with a broad range of environmental, land use and real estate issues including coastal and inland wetlands and waterways, zoning, subdivision, development agreements, conservation restrictions, state and local enforcement actions, stormwater, solid waste, hazardous waste, air pollution, site remediation, regulatory takings, affordable housing and energy facility siting. A regular contributor to REBA News, Luke can be contacted by email at llegere@mcgregorlaw.com.