REBA news
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Retired Judge Sands joins REBA Dispute Resolution

Retired Land Court Associate Justice Alexander H. Sands III has joined REBA/DR's panel of neutrals where he will concentrate on mediation, arbitration and case evaluations.

"With 15 years on the Land Court bench, preceded by many years in a transactional law practice, Judge Sands brings an unparalleled depth of experience to our program," said REBA/DR President Joel Reck. "I'm confident that he will be among our most sought-after neutrals."

"We are delighted to welcome Judge Sands to our REBA/DR family," said Peter Wittenborg, REBA's executive director and treasurer of REBA/DR. "With his focus on land use, permitting and affordable housing, he will bring his unique strengths to our panel of mediators."

ALEXANDER H. SANDS III

Judge Sands served as an associate justice of the Land Court from 2002 to 2015, and as a recall justice from 2015 to 2017, where he authored many decisions of first impression. While on the bench, he researched and drafted revisions to the time standards of the Land Court, implemented in 2004.

During his time on the bench, Judge Sands was a proactive participant in the Land Court's robust court-connected alternative dispute resolution program, always stressing the mediation option at initial case conferences.

In 1977, he was a founding partner in the Boston law firm of Lynch, Brewer, Hoffman & Sands, now Lynch, Brewer, Hoffman & Fink, where he was head of the Real Estate Department, specializing in complex transactional projects in both the residential and commercial fields. He was a member of the Gloucester Planning Board from 1984 to 1991, where he focused on zoning, land use and subdivision law.

He has taught seminars for MCLE and the Massachusetts Bar Association in real estate law and has been a judge on moot court panels for Harvard Law School and for high school competitions with the Massachusetts federal courts.

He is a member of the Abstract Club and the Massachusetts Judges Conference, where he was recently nominated for an award in judicial excellence to be presented in November 2017. He was a primary speaker for the International Land Registration Conference held in Dubai, UAE, in 2016.

With 15 years on the Land Court

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REBA partners with Westcor

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

"We are thrilled to partner with REBA in their continuing efforts to support its lawyer members in these challenging times. We are committed to serve REBA and its members," said Chris Strynar, Westcor's New England regional manager. "The REBA partnership will become a strong asset for us as we continue to expand Westcor's market share both in Massachusetts and throughout New England."

"We look forward to working closely with our friends at Westcor as we build this new partnership together," said REBA President Fran Nolan.

Under the terms of this new, direct relationship, Westcor will make monthly donations to REBA to help support its efforts. This partnership will provide Westcor and its independent title agents with a strong defender and supporter in REBA and the important role lawyers provide in the closing process.

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

To learn more about the Westcor/REBA partnership or to become a Westcor agent, please contact Chris Strynar at cstrynar@wltic.com or Beth Young at byoung@wltic.com.

The New Lawyers Section held its summer networking reception in July at Tico Boston Restaurant in Boston's Back Bay. Pictured are New Lawyers Section Co-Chair Noel Di Carlo, First American Title's Cerise Bermudez, First American Title's Katherine Prifti, Virgilio Ong, Dominic Poncia, First Republic Bank's Maggie Horan and Arielle Mullaney. Virgilio, Dominic and Arielle are associates at Warshaw Di Carlo & Associates, P.C.

Reflections from the bench: Alexander Sands

BY ROBERT K. HOPKINS

I recently had the privilege to sit down and conduct an interview with the Hon. Alexander H. Sands III, who just retired from the Land Court after 15 years. Judge Sands was gracious enough to speak with me candidly about his career, both in private practice and behind the bench, share personal and professional insights, and discuss the next chapters in his notable life. The interview has been edited and condensed for clarity.

* * *

Q. *When did you decide to pursue a career in law?*

A. My grandfather was a lawyer, and my father was a lawyer and then became a judge. So I was brought up in that perspective, engrained in it growing up.

Q. *In private practice, on what areas of the law did you focus?*

A. My first week in private practice there was a closing coming up and they gave me some deeds and I had to do some research. I can remember saying, "Wow, I love this, this is really cool." I liked real estate from that very first week, right off the bat. The firm was general practice, but I always asked for anything real estate related. That is how it got started, and that is what I focused on. I did other things too, but when my former partners and I started our own firm, I was the one focused on real estate.

Q. *What was it about the Land Court that interested you to seek an appointment?*

A. Real estate was where I felt entirely confident, it is what I knew. I had spent a fair amount of time at the Land Court, I really liked the environment there, and the fact that it was a smaller court. I also loved, even more so when I joined the court, the opportunity to travel to the cities, towns and courthouses around the commonwealth to conduct trials. The Land Court was the only court where I could do that.

Q. *Right after taking the bench, what facet of the job surprised you the most?*

A. Maybe not surprising, but one of the biggest changes for me was taking a neutral position. I was so used to going to bat for a client, trying to undermine the opposing arguments, and building up my position. So for the first couple of months, after I would read the brief I would think, "If I were the attorney, which position would I take?" but then I would have to say to myself, "No, no, no. I really have to consider all sides here." Another surprise was realizing that you can have identical legal issues, in separate cases, but have to take a totally different approach in resolving the matter because the facts of each case can be so different. You can have these classic real estate issues, but there are so many different

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Inside this issue

Discovering a career

BY FRANCIS J. NOLAN

President's Message

Recently, I celebrated my 20th anniversary working at Harmon Law Offices in Newton. (I'd like to thank my colleagues for their thoughtful well-wishes and remind Richard Mulligan that he is not that far behind me.)

It's a little early for me to start looking back on my career — hopefully I'm a long way from any kind of lifetime retrospective — but it did strike me that, at this point, I can say with relative confidence that I have a career, however it might be defined.

That realization caused me to think about the newest of our colleagues, those attorneys who have just passed the bar, or maybe are waiting for confirmation they've passed the bar. So, at the risk of being labeled pretentious, I thought I'd take this opportunity to speak (mostly) to those of you who consider yourselves "new attorneys," or at least new enough not to think in terms of "my career."

For a new attorney, the word "career" works into conversation as a purely prospective thing, something that comes in the form of a question. For example, the new attorney might be asked, "What are your career goals?" Often, career goals for a recent law school graduate are summed up in three words: "get a job." And that's totally understandable.

For anyone, trying to envision where you'll be in five years, let alone 25, is an exercise in futility. Dreaming about where you'll be is a lot easier, which explains why I continue to harbor the hope that the Red Sox put out a general call for late 40-something left-handed relievers with no control and a fastball in the low 50s — but the potential for "good clubhouse presence."

I tell all my colleagues, some of whom are relatively new to the profession, to view themselves as Real Estate Attorneys, even if they don't believe they have sufficient experience to do so and even if they aren't sure it's what they want to do forever. It's what you do every day, and regardless of whether you're doing it mindfully, you're building a career.

How do you build a career? It's like getting to Carnegie Hall: practice, practice, practice. You go to the Registry of Deeds and put together a title report. You review a lease and negotiate changes that benefit your client. You conduct a closing and explain all those documents the first-time buyers are nervously signing. You attend a condominium association meeting and work with the board to address a contentious issue.

Or you do all of those, or one of a million other things. Any way you work at it, you develop your career incrementally, even if you don't realize you're doing so.

Get out and interact with your peers. Consider joining a bar association. (I have a particular one in mind if you're unaffiliated but open to suggestions.) REBA's New Lawyers Section is one of our most active and energetic groups, but it's not the only section that has a lot going on. Even if you're just there to say hello and listen to what the more-experienced attorneys around you have to say, you're investing in your career.

Maybe you discover that what you're doing every day isn't exactly what you want to do for the long term, and that's OK, too. Invest in yourself. Take the time to meet and speak with others who do what you want to do for the long term. That's how mentors present themselves, and it's how opportunities open up.

At any rate, communicating with other attorneys and professionals (real estate or otherwise) outside of a specific case makes for a lot more enjoyable experience. All of this is true regardless of whether you've been an attorney for five months, or five years, or five decades.

So, best of luck, and that's enough with the retrospection. There's still plenty of career-building to be done for you and me both. Hope to see you along the way.

The path to electronic acknowledgements

BY RICHARD P. HOWE JR.

As young people who have known nothing but digital commerce enter the home ownership market, the conveyancing community in Massachusetts will face increased pressure to leave paper behind in favor of purely electronic closings.

The statutory basis for this technological transition has been in place since 2004 with the adoption of G.L.c. 110G, the Massachusetts Uniform Electronic Transactions Act. Since then, all registries of deeds in the commonwealth have implemented electronic recording systems. Still, some uncertainly remains, especially regarding acknowledgements.

Earlier this year I wrote about electronic acknowledgement statutes in other jurisdictions in "Remote electronic acknowledgments," published in the March 2017 edition of REBA News. In the same article, I explained why registries of deeds in Massachusetts should record documents electronically acknowledged outside of Massachusetts, but not record those electronically acknowledged within Massachusetts. The primary basis for that opinion was that Massachusetts law requires a notary to affix a notary stamp to an acknowledgement, and that our law provides no electronic equivalent of that notary stamp.

> With the demand for electronic acknowledgements looming but not yet fully upon us, now is the time to amend our notary statute to accommodate new technological practices.

With the demand for electronic acknowledgements looming but not yet fully upon us, now is the time to amend our notary statute to accommodate new technological practices. The starting point for such an amendment should be a shared understanding of the purpose of an acknowledgement, particularly with regard to real estate documents.

In colonial Massachusetts, registries of deeds and the requirement that real estate documents be acknowledged arose simultaneously. The purpose of the registry was to provide a public record of who owned what land as a means of curtailing secret sales that muddled ownership and created uncertainty in real estate transactions.

The purpose of requiring deeds to be acknowledged before recording was meant to curtail fraud, either in the guise of a forged signature or of an actual signature that was later denied by its maker.

Conceived in the 17th century, the rationale for these rules, and the rules themselves, persist today. Registries of deeds perform the same core function of making public real estate ownership records, using new technology to do it.

So what is the core function of an acknowledgement? Primarily, it is to assure the public that the person who signed a document is who he or she purports to be. In Massachusetts, a notary does this by personally witnessing the signing of the document while positively identifying the person who signed it. The notary attests to this by signing the acknowledgement clause, printing his name and the expiration date of his notary commission underneath his signature,

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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.

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A short week in the life of a dirt lawyer

BY PAUL F. ALPHEN

My cousin Vinnie, the suburban real estate attorney, accepted my invitation to join some other captains of industry for a weekend of fishing. The term "fishing" is somewhat of an exaggeration as there is more eating than fishing involved.

He took me up on my offer to arrive on the Cape early on Friday so that he could watch me prep the boat and watch me pump diesel into the tanks. It gave us some time to catch up on family news, and it gave Vinnie an opportunity to vent about his suburban real estate practice before the other men arrived.

"Paulie," Vinnie started as we backed out of the slip on our way to the fuel dock, "What a week I had!" Sounding a little like the late Rodney Dangerfield, I fully expected him to tell me that he "gets no respect."

"Paulie, honest to goodness, this is a short list of some of the issues that entertained me in the last four days:

• A client wants to buy a lot that was conveyed into a trust with a Chapter 184, Section 35 trustee's certificate with no mention of successor trustees, and the trustee since died, and no one can find the trust;

• A buyer's attorney instructed me to prepare a grantee clause in violation of the four unities of joint tenancy;

• In reviewing a title, I found that our locus was one of a few lots conveyed years ago with the benefit of a common driveway easement declared by a party who did not own the servient estate;

• A portion of a unit, as described in the Master Deed, is physically separated from the living quarters of the unit, and stuffed with common mechanicals and pipes, and partially submerged by groundwater infiltration;

• A planning board approved a commercial use across the street from a client's home in a residential zoning district, in a town that does not allow use variances;

• I went to a closing for a seller and the buyer would not agree to close until she interviewed the landscaping contractor regarding the methodology used to seed the disturbed area over the new septic system;

• A town installed a new drinking water well, causing a number of homes to lie within a Zone 1, forcing them to install outrageously expensive septic systems;

• A condominium burned to the ground;

• A zoning board told me that my client's 40B was 'too dense', although it meets the board's own density guidelines;

• A landlord gave a commercial tenant notice that the tenant had to vacate early, and later sent a goon to the tenant's space to encourage them to 'start packin';

• A broker that got a commission based upon a 10-year lease from our landlord client, is now showing the tenant other space, which will no doubt cause the tenant to breach the lease; and

• I drove to Dedham for a closing and the buyer did not show, and days later nobody can find him."

I had to laugh and tell him that I understood all too well.

"Vinnie, when we tell people that we are real estate attorneys, they think we make a living sitting at a closing table passing loan documents to homebuyers; I am sure that's what my sisters think I do. In reality, it is impossible to describe what we do. Sure, our practices are real estate related, but we also take care of issues that touch, directly or indirectly, real estate — sometimes very, very indirectly. And all of them could be better defined as 'human issues,' as opposed to 'real estate issues.'"

Vinnie wandered over to the Yeti with the big BC logo on top and pulled out an IPA that had its roots in Nantucket, but is now brewed on the mainland somewhere. He felt better, having vented, and he paused to enjoy the passing scenery and the sunshine as I pushed down the throttles to leave terra firma behind.

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@alphen-santos.com.

ConCom inaction cured by previous Order of Conditions

BY OLYMPIA A. BOWKER

In July, the Appeals Court issued a decision, *Cave Corp. v. Conservation Commission of Attleboro*, 91 Mass. App. Ct. 767 (2017), reinforcing the durability of a conservation commission's Order of Conditions (OOC) issued under its municipal wetland ordinance.

The decision directly applied and tacked on an exception to the Supreme Judicial Court's rule from a leading Home Rule case, *Oyster Creek Preservation, Inc. v. Conservation Commission of Harwich*. The court also clarified what would happen legally on a crucial "what if" scenario.

That scenario, as evinced by the facts in *Cave*, is: "What if a conservation commission failed to act on a Notice of Intent (NOI) in a timely manner, but already had imposed valid conditions under its municipal bylaw or ordinance on a previous NOI, for the same property?"

Two layers of law protect wetlands in Massachusetts. One is the Wetlands Protection Act (WPA), G.L.c. 131, §40, which provides a statewide minimum of protection for all jurisdictional wetlands and other Resource Areas. The other is municipal wetland controls. These are typically in the form of bylaws or ordinances, should be more stringent than the state law, and only apply to specifically defined Resource Areas within the municipalities' jurisdiction.

If a proposed project will alter a Resources Area, a proponent must seek permission from the conservation commission of the municipality where the land lies. Then, the commission makes a determination under both laws — the WPA and the municipal wetland bylaw or ordinance — and issues an OOC, which is a set of conditions protecting the Resource Areas. Unless appealed, the project must comply with those conditions if it goes forward.

> The takeaway: An SOC issued by DEP does not divest a conservation commission of all authority to regulate activity on land subject to the SOC, if the same land is also the subject of a separate and earlier NOI on which the commission acted timely in issuing its OOC.

A proponent may appeal an OOC to the Department of Environmental Protection (DEP). The DEP then reviews the OCC and can issue a Superseding Order of Conditions (SOC), which can trump the commissions original OOC. However, the DEP's review is limited to conditions issued pursuant to the state law, or weaker than the state law. The DEP has no authority to review, second-guess or change the conditions that a commission imposes pursuant to a more stringent local municipal wetlands bylaw or ordinance.

In the *Cave* case, the Cave Corporation filed its first NOI with the Attleboro Conservation Commission (Commission) in December 2013. The Attleboro City Council had enacted a wetlands protection ordinance a decade earlier, affording wetlands protection beyond that of the WPA. As a result, when Cave filed its first NOI, to develop the parcel, the Commission applied both state and municipal law to consider the project and determine what, if any, conditions to impose.

In that first NOI, Cave sought to build general infrastructure for a subdivision. That proposed project had the potential to impact a variety of Resource Areas — among them, two vernal pools that are protected under the Attleboro ordinance (but not the WPA).

The Commission timely approved the work with an OOC. Notably, one condition, Condition 29, prohibited any work or disturbance within 125 feet of the two vernal pools on the subject property.

Cave appealed the OOC to the DEP, which eventually issued a SOC. However, as discussed in *FIC Homes of Blackstone, Inc. v. Conservation Commission of Blackstone*, the DEP cannot preempt a condition based on a more strict local wetlands provision. Therefore, Condition 29, as imposed in the local OOC, remained intact and effective.

In October 2014, Cave filed a second NOI with the Attleboro Conservation Commission, this time seeking permission to construct homes on lots within the proposed subdivision. Included in this second NOI was a plan to construct a driveway within 125 feet of one of the two vernal pools on the land.

The Commission failed to hold a timely hearing on the second NOI. Consequently, Cave appealed to DEP for a SOC. While this situation ini-

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A look at cracks in the Law of Sidewalks

The following article appeared in Banker & Tradesman.

BY EDWARD M. BLOOM

Under Massachusetts common law in effect since 1860, property owners have no duty to repair or warn of hazards on an abutting public sidewalk.

This long-established rule was recently addressed by the Appeals Court in *Halbach v. Normandy Real Estate Partners*.

The plaintiff, Halbach, suffered serious injuries as a result of his fall on uneven payment on the public sidewalk adjacent to the John Hancock Garage, a commercial parking garage on Clarendon Street in Boston.

Halbach sued the owners of the garage and its property manager, claiming that the defendants were negligent in their "ownership, control, maintenance and/or inspection" of the sidewalk and their "failure to keep … the walkway free from defects and conditions rendering it unsafe."

The defendants were granted summary judgment by the trial judge based on the long-standing Massachusetts rule, referred to above.

On appeal, the trial judge's ruling was upheld by the Appeals Court, even though there was evidence that the property manager corrected the uneven pavement after Halbach's fall. In a concurring opinion, Judge James Milkey suggested that the Supreme Judicial Court might want to alter the common law rule, and stated that his separate opinion was written "to note that the plaintiffs have a more forceful case for such change in the law than the majority opinion suggests."

Judge Milkey, while conceding that public sidewalks are treated as part of the public highways, and that town ways shall be kept in repair at the expense of the town where they are situated, cited the fact that municipalities regularly look to private property owners to keep sidewalks adjacent to their property free from snow and ice so that they are passable and safe.

In addition, he pointed out that most commercial property owners accept responsibility for adjoining public sidewalks, as evidenced by the property manager's repair of the sidewalk after Halbach's accident.

"In short, at least in the context of commercial property, the reality is that the world principally looks to private property owners to make sure that the sidewalks bordering their property are safe. It is far from self-evident why — under modern tort principles — the law should not follow suit."

Despite Judge Milkey's ardent recommendation that the SJC reconsider the common law rule regarding public sidewalks, the SJC denied further appellate review this past April.

So where does this leave individuals like Halbach who are injured on public sidewalks? Under G.L.c. 84, §15, the

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maximum recovery for a private party against a Massachusetts city or town for injuries due to a defect on public ways is $5,000. On the other hand, many cities and towns like Boston have enacted ordinances requiring owners to clear snow and ice from the abutting public sidewalks.

What if the individual is injured because an abutting owner failed to keep the sidewalk free from snow and ice in violation of a municipal ordinance requiring its removal?

While generally a violation of a statute or ordinance is evidence of negligence, it has been held that ordinances which require abutting owners to remove snow and ice from sidewalks are for the benefit of the community at large and not for persons who fall as a result of unremoved snow and ice. "Any obligation imposed by the ordinance runs to the municipality and not a member of the travelling public." *Gamere v. 236 Commonwealth Ave. Condominium Assn*, 19 Mass. App. Ct. 359, 361 (1985).

Unless the SJC has a change of heart and revises the existing common law, as suggested by Judge Milkey, it would seem that the best way to provide relief to individuals like Halbach would be for the Legislature to enact a statute imposing responsibility for the repair and maintenance of public sidewalks on abutting owners, or at least on commercial owners. Such legislation could be challenged because, according to the *Gamere* case, it is the responsibility of cities and towns to keep the public ways in reasonably safe condition for travelers and that duty may not be delegated to others.

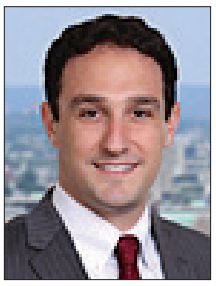
Alternatively, the Legislature could amend G.L.c. 84, §15 either to increase the maximum recovery permitted to injured individuals or to abolish altogether the $5,000 cap that currently exists.

Given the current shortfall of revenues for the commonwealth and its various cities and towns, the traveling public should best traverse carefully over those cracks and defects in public sidewalks.

Edward M. Bloom is a partner in Sherin and Lodgen's Real Estate Department. He is widely respected for his knowledge and experience in real estate law. Ed concentrates his practice on the development, sale, leasing and mortgaging of residential, office, shopping center, industrial and condominium properties. He can be contacted at embloom@sherin.com.

Even after 'Taylor,' difficult litigation will persist

BY MATTHEW S. FURMAN



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In *Taylor v. Martha's Vineyard Land Bank Commission*, 475 Mass. 682 (2016), the Supreme Judicial Court reaffirmed the commonwealth's nearly 180-year prohibition on the use of appurtenant easements to benefit after-acquired property absent the servient owner's consent.

The SJC preserved this so-called "overloading" doctrine on the basis that the benefits of keeping this longstanding bright-line rule outweighed any costs associated with its rigidity.

Even though *Taylor* presented extremely sympathetic facts for a deviation from the traditional per se ban on overloading, the SJC nonetheless opted not to change existing law.

While the case affirms what we already knew about flagrant violations, it still leaves unanswered questions for closer calls that will inevitably lead to litigation over the use of easements to benefit after-acquired property.

A brief recap of *Taylor* will help set the context for discussing unanswered questions left in the decision's wake. The Martha's Vineyard Land Bank Commission owned four parcels on the western edge of Martha's Vineyard atop the Gay Head Cliffs — commonly known as the Aquinnah Headlands Preserve. The Land Bank sought to connect two of its hiking trails to create a single loop for visitors.

The problem, however, was that the Land Bank's parcels did not have direct access onto the closest public way, but instead benefitted from two separate easements over an abutting property owned by the Taylor Realty Trust, which contained a small seven-room hotel and had direct access to a public way.

Neither of the Land Bank's easements, which were both created before the Land Bank took title, was appurtenant to all four of its parcels. One easement — referred to as the Disputed Way — benefitted three of the four parcels, and the other easement — referred to as the Twenty-Foot Way — benefitted only the fourth parcel. That fourth parcel was referred to as Diem Lot 5.

Appealing a permanent injunction issued against connecting the two trails, the Land Bank's opening brief to the SJC compellingly highlighted the rigidity of the outcome and the overloading doctrine:

"[A]lthough two people using the two permitted trails could embrace or shake hands across the line dividing Diem Lot 5 and [the other parcels], neither would be permitted to cross to the other lot, and the two trails, although they might come within a fraction of an inch of each other, may not connect over the invisible boundary line. ... Ironically, the effect of the Land Court judgment is that pedestrians can walk from the public street over the Taylors' Property and go in either direction — over the Disputed Way or the Twenty-Foot Way — to arrive at the same point, i.e., the southwesterly corner of Diem Lot 5, but cannot cross that invisible boundary but must instead turn around, retrace their steps to the Taylors' Property and go up the alternate route to reach the same destination and fully enjoy all trails on the North Head Preserve, creating more burden on the servient estate." Brief of Appellant Martha's Vineyard Land Bank Commission at 7-8.

Essentially, the Land Bank argued that a fact-focused, overburdening-type analysis should apply instead of the traditional per se rule against overloading.

Although many practical arguments for more flexibility could be made under these circumstances, especially for this type of defendant, the SJC decided that the traditional ban remained the better rule for a number of interesting reasons.

The court noted its general skepticism against altering longstanding rules of property (or contract) law, where default rules often influence individual action. They rationalized that the per se ban avoids the difficult, fact-intensive litigation of these issues as is common in overburdening disputes.

The SJC also expressed concern that a fact-focused analysis could lead to less predictable outcomes and "might not be affordable to owners of small servient parcels who are litigating against defendants with the financial means to acquire and develop multiple parcels of land." *Taylor*, 475 Mass. at 689.

Following *Taylor*, servient landowners will continue to have the potent weaponry of a permanent injunction for an obvious violation. For instance, consider the following example set in a sleepy, residential suburb:

The Smiths own a residential property known as Lot 1, which is burdened by a right-of-way for the benefit of a neighboring parcel known as Lot 2. If the Jones family then acquires Lot 2 and an abutting parcel (Lot 3) that does not benefit from the right-of-way, and seeks to build a new house straddling the boundary line between Lot 2 and Lot 3, *Taylor* certainly indicates that any use of the right-of-way should be enjoined. Use of that easement would inherently violate the overloading doctrine because it will always benefit the after-acquired Lot 3.

Yet, it is inevitable that fact-intensive issues will persist despite the overloading doctrine's continued rigidity. For example, if the Jones family builds their home solely on Lot 2 instead of straddling the boundary line between their two parcels, what, if any, uses can that family make of Lot 3? Is a permanent injunction still appropriate if Lot 3 is only a swimming pool for the kids to use during the summer? How about a workshop for dad's furniture-making hobby that he enjoys every few weekends? What about the 25 apple trees that mom planted on Lot 3 and prunes twice per year?

When the owners of dominant estates are savvy enough to limit their primary use of combined parcels to the portion that benefits from the easement only, real estate litigators will still be arguing over whether injunctive relief is appropriate in all of these circumstances. The focus is likely to be on the uniformity of the uses made of the dominant and after-acquired parcels and whether that level of uniformity is sufficient to make injunctive relief appropriate. These situations will involve fact-intensive overloading litigation even after the SJC's reassuring, and correct, decision in *Taylor*.

Matt Furman of Todd & Weld LLP in Boston concentrates his practice on complex commercial litigation, including real estate matters. His experience with real estate litigation includes handling disputes over easements and commercial leases, as well as defending and challenging variances and permits. He can be contacted at mfurman@toddweld.com.

Future of real estate closings: pen will no longer be mightier

BY KOSTA LIGRIS

The real estate title and settlement process has resisted change and deployment of technology for years. But are we experiencing the "beginning of the end" of the real estate closing as we've known it? If you ask our friends in North Carolina, which successfully conducted its first ever "eClosing" in May 2017 the answer is clearly yes!

Aside from the reduction in paperwork, electronic closings stand to provide tremendous convenience and value to consumers. The Consumer Financial Protection Bureau ("CFPB") ran a study that found electronic mortgage closings can benefit the consumer.

Electronic closings stand to provide tremendous convenience and value to consumers.

"While technology alone will not address all consumer concerns in the closing process, our study showed that eClosings do offer the potential to make the process less complex," said CFPB Director Richard Cordray. "We expect this pilot project and its findings to help inform further innovation that will be a win-win for consumers and industry alike."

Electronic closings will likely provide consumers with more time to review paperwork (such as lengthy loan documents), reduce the need to travel to a law firm, county registry or title company, and provide an audit trail for all the stakeholders including the consumers, lenders, insurers and regulators.

Even Fannie Mae is now accepting electronically executed promissory notes for mortgage transactions (subject to its terms and guidelines). The reality is that as electronic signature platforms continue to develop, the future of electronic closings as mainstream is imminent.

There will of course be critics, concerned with remote notarization, fraud and cyber-crimes. But the concept and argument that "we've always done it this way" will not be upheld.

As millennials start to enter the housing market, the future is clear that millennials hold massive buying power and are changing the housing market. They are used to conducting business online and via mobile apps (banking, transferring money, communicating, etc.). The housing and mortgage industry will need to adapt for them as well.

The time is now for the mortgage and title industry to prepare for the future in which the mouse and app will be mightier than the sword.

A member of the REBA Title Insurance and National Affairs Section, Kosta Ligris is the founder, CEO and managing partner of Ligris + Associates, P.C. His practice concentrates on residential and commercial real estate transactions; he represents buyers, sellers and developers in the acquisition, sale and development of residential and commercial real estate. Kosta also serves in a general counsel capacity for certain investors and developers by providing guidance on various legal matters and coordinating representation with other lawyers and law firms. Kosta can be contacted at kligris@ligris.com.

Short-term rental challenges for condo associations

BY CHRISTOPHER S. MALLOY

If you resemble the modern-day traveler, you will likely at least consider the idea of staying at an Airbnb-like rental on your next vacation or work trip.

If you own your home in or around a city or other another attractive destination, you may have given consideration to renting your house or condominium unit on a short-term basis, either while out of town yourself or during a peak travel season.

Often times, Airbnb offers a cost-effective alternative to a typical hotel and provides income to the homeowner to offset property costs. But for all the convenience Airbnb offers, both to the guest as well as the owner, many of us have heard at least one horror story where an Airbnb renter caused substantial damage to the property, held wild parties, or engaged in some form of criminal activity. While the incidences of such behavior are without question the exception rather than the rule, many Airbnb guests engage, often times unknowingly, in conduct that is either bothersome to neighbors or in violation of a condominium's rules and regulations.

When a guest rolls into town for one or two nights, it is safe to assume that he or she is not taking the time to review the association's bylaws and rules and regulations, even on the rare occasion when those materials are provided to the guest in the first instance. As a result, the guest is likely to be unaware that smoking is prohibited in the courtyard, what the proper trash policies are, and where he or she may legally park in the common area parking lot.

If this occurs only once or twice a year, it may be viewed by some as a minor inconvenience to the other unit owners; however, if there is frequent turnover and new guests are arriving on a daily or weekly basis, that inconvenience quickly evolves into a substantial interference with the ability of unit owners to peacefully enjoy their homes and common areas.

Associations are rightly concerned about a transient guest's lack of ties to the community, especially given that in most instances the guest is granted unfettered access to all the common areas of the condominium, which may include hallways, elevators, basements, roof decks and recreational facilities, without supervision from the actual owner from whom the guest is renting.

This presents a legitimate safety concern for other unit owners, especially when a unit is rented by many different people each week or month. The constant presence of unfamiliar faces just outside the door of your

DBVIRAGO

home is likely to unnerve most people. However, a condominium association is not, and cannot be, in the business of evaluating and monitoring each and every guest of a unit owner.

While state and local governments wrestle with regulatory, zoning, safety and taxation issues that short-term rentals present, condominium associations are struggling with their own set of issues related to the disruption and safety concerns transient guests present to unit owners.

While many condominium governing documents contain restrictions on a unit owner's ability to lease or otherwise rent his or her unit, the majority of these restrictions are boilerplate and do not contemplate the rapidly developing market for short-term transient rentals with the proliferation of Airbnb and similar type services.

Standard leasing restrictions in condominium documents may prohibit rentals for less than a prescribed period of time (six months to one year is common), prohibit rentals of anything less than the entire unit, and may require that a copy of the lease be provided to the board.

However, even when an association's governing documents adequately restrict transient rentals, there is still a concern as to whether the fine structure within an association's documents provides a sufficient deterrent to unit owners considering renting their unit in violation of the condominium documents.

See page 15

SCOTUS decision opens door for predatory lending claims

BY LAWRENCE P. HEFFERNAN, KENDRA L. BERARDI AND CHRISTOPHER M. BERGAN

On May 1, 2017, the U.S. Supreme Court issued a partial, but significant, victory to municipalities in the consolidated cases of *Bank of America Corp. v. City of Miami* and *Wells Fargo & Co., et al. v. City of Miami, Florida*, holding that the city of Miami has standing as an "aggrieved person" to assert claims under the Fair Housing Act ("FHA").

In 2013, the city of Miami filed suit against Bank of America and Wells Fargo, asserting that the lenders had violated the provisions of the FHA and engaged in predatory lending practices by granting loans to minority borrowers that, among other things, contained "excessively high interest rates, unjustified fees, teaser low-rate lows ... and ... unjustified refusals to refinance or modify the loans."

The city of Miami asserted that these practices resulted in higher default and foreclosure rates for these borrowers, which, in turn, led to a decrease in property values and a suppression of Miami's tax revenue. Furthermore, the city of Miami asserted that these practices increased the demand for municipal services in the affected neighborhoods, including an increased demand for police, fire, and building code enforcement services, which resulted in increased costs to the city of Miami.

Bank of America and Wells Fargo moved to dismiss the suits, contending that the city of Miami did not have standing to assert claims under the FHA. Specifically, the lenders argued that municipalities, like the city of Miami, did not fall into the "zone of interests" that Congress intended the provisions of the FHA to protect. In a 5-3 decision, the Supreme Court disagreed.

In determining that Miami had standing, the Court looked first to the FHA's definition of "aggrieved person." The FHA very broadly defines "aggrieved person" as "any person who ... claims to have been injured by a discriminatory housing practice" or believes that such an injury "is about to occur." In interpreting this definition, the Court noted that it had consistently ruled in the past that this definition indicated "a Congressional intention to define standing as broadly as is permitted by Article III of the Constitution."

Justice Breyer, writing for the majority, pointed to similar lawsuits that the Court had allowed to proceed it the past, including a village that was

BY LAIMERPRAMER FROM WIKIPEDIA

granted standing when it sought recovery under the FHA for "racial-steering practices" that resulted in lost tax revenue and undermined the racial balance of its community.

Although the FHA was amended after those cases, the Court noted that Congress made no significant changes to the definition of "aggrieved person." This lack of significant change showed an intent by Congress to "retain the relevant statutory text" and embrace the Court's expansive interpretation of standing under the FHA. As a result, the Court was compelled to find that the city of Miami had standing under the FHA.

Bank of America and Wells Fargo next argued that, even if the city of Miami had standing to sue, the city of Miami could not show that the damages claimed were sufficiently related to the claimed FHA violations such that they were proximately caused by the alleged violations of the FHA. In this regard, Bank of America and Wells Fargo found more success.

The 11th U.S. Circuit Court of Appeals had ruled that the city of Miami could make a showing of proximate causation because the result of the lenders' allegedly predatory or discriminatory lending practices were foreseeable.

In a victory for the lenders, the Supreme Court rejected the 11th Circuit's ruling that foreseeability alone is sufficient to establish proximate cause under the FHA. Noting that the housing market is interconnected with economic and social life and that a violation under the FHA might "be expected to cause ripples of harm to flow far beyond the defendant's misconduct," the Court observed that "[n]othing in the statute suggests that Congress intended to provide a remedy wherever those ripples travel."

The Court also noted that "entertaining suits to recover damages for any foreseeable result of an FHA violation would risk massive and complex damages litigation."

As a result, the Supreme Court noted that a claim for damages under the FHA was akin to a tort action and subject to the "traditional requirement" of proximate cause, which bars suits for harm that is "too remote" from the unlawful conduct.

Accordingly, the Supreme Court held that the city of Miami, and those following its blueprint, were required to show a direct connection between the alleged violation of the FHA and the claimed injury.

The Court, declined, however to establish the particular limits of proximate cause. Rather, the Supreme Court directed the lower courts to "define, in the first instance, the contours of proximate cause under the FHA" and further to determine how that standard would apply to the city of Miami's allegations of lost tax revenue and increased expenses.

Although the majority declined to offer an opinion as to whether such damages could meet the identified proximate cause test, Justice Thomas opined, in his dissent, that the majority's opinion left "little doubt that neither Miami nor any similarly situated plaintiff can satisfy the rigorous standard" where "the link between the alleged FHA violation and its asserted injuries is exceedingly attenuated."

Nevertheless, despite Justice Thomas' caution, the Court's decision allows the city of Miami, and other municipalities, to go forward, but how far?

This is a development that lenders in Massachusetts and across the nation will watch carefully.

Notably, about two weeks after the Court issued its decision, the city of Philadelphia filed suit against Wells Fargo, alleging violations of the FHA and seeking unspecified damages. Although it is unlikely that the city of Philadelphia will be the last municipality to assert these claims, it is still unclear whether these claims can be successful.

This is a development that lenders in Massachusetts and across the nation will watch carefully. Massachusetts is not far removed from its own mortgage and foreclosure battleground.

Although there has been no public progress in these cases in the lower court, other municipalities are bringing similar claims against lenders in other jurisdictions.

For example, the city of Providence filed suit against Santander Bank in the federal court in Rhode Island a years ago for violations of the FHA and the Equal Credit Opportunity Act, claiming the same type of injuries as the city of Miami. That action was quickly settled and dismissed. The issue of proximate cause will likely work its way back to the Supreme Court, which appears to have already set a high bar for damages.

Kendra Berardi, Chris Bergan and Larry Heffernan all practice in the Boston office of Robinson + Cole LLP. Kendra co-chairs REBA's Continuing Education Committee and serves on the association's Executive Committee. She can be contacted at kberadi@rc.com. Chris can be contacted at cbergean@rc.com, and Larry can be contacted at lheffernan@rc.com.

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A condo lawyer walks into a courtroom . . .

BY SAUL J. FELDMAN
AND ANGEL K. MOZINA

In this article we want to comment on a proposed bill in the Massachusetts House of Representatives (House No. 752), which is titled "An Act related to anti-litigation provisions in condominium documents" (the "Proposed Act").

The Proposed Act would prevent the developer of a condominium and/or its affiliates from having any power to impose upon the Condominium Board any precondition to the institution or maintenance of a lawsuit, an arbitration, a mediation or a similar proceeding unless the Condominium Board adopts such a provision after the date on which the unit owners, other than the Declarant and/or its affiliates, first elect a majority of the members of the Condominium Board.

Background

The Proposed Act seeks to amend Section 10 of Chapter 183A ("Chapter 183A"), the Massachusetts Condominium Statute, by adding the following clause:

"Any provision of a master deed, declaration of trust, or by-laws that imposes upon the organization of unit owners any precondition to the institution or maintenance of a lawsuit, an arbitration, a mediation, or a similar proceeding, including, without limitation, obtaining a vote of unit owners, obtaining the approval of the Declarant, establishing a budget for the litigation, providing a copy of the complaint to unit owners, or which otherwise limits the free exercise of the power conferred in subsection (b)(4) of this Section 10, shall be unenforceable unless the organization of unit owners adopts such a provision after the date on which the unit owners, other than the Declarant and/or its affiliates, first elect a majority of the members of the governing board for the organization of unit owners."

We will not say the Proposed Act goes too far and attempt to modify it. Instead, we want to attack the entire premise behind the Proposed Act.

Proponents argue that litigation limitation provisions in condominium documents, known otherwise as poison pills, directly conflict with Chapter 183A, Section 10(b)(4), because they take away from a condominium board the exclusive power of conducting litigation concerning the common areas of the condominium.

We will not say the Proposed Act goes too far and attempt to modify it. Instead, we want to attack the entire premise behind the Proposed Act.

The Proposed Act is a full-scale attempt to prohibit any clause in any of the initial condominium documents that would impose upon the Condominium Board any preconditions to the institution or maintenance of a lawsuit, an arbitration, a mediation or a similar proceeding.

The Proposed Act is grossly unfair to condominium developers. Given the enormous risks developers take, including, by way of illustration and not limitation, the lengthy and expensive permitting process as well as the vagaries of the condominium market, especially in multiple phase projects, there must be a limitation on the power of the Condominium Board to conduct freewheeling litigation.

For at least two decades, our firm has included the following limitation on the power of the Condominium Board to conduct litigation:

"The Condominium Board must deliver to all of the Unit Owners a copy of the proposed complaint and no less than eighty percent (80%) of all the Unit Owners shall consent in writing to the bringing of such litigation within sixty (60) days after the copy of the complaint is delivered to the Unit Owners and specify as a part of their written consent a specific monetary limitation to be paid as legal fees, costs and expenses to be incurred in connection therewith, which amount shall be separately assessed as a special assessment effective forthwith at the time of said affirmative consent. This provision must not be amended except by vote of at least eighty percent (80%) of the Unit Owners. The provisions of the foregoing shall not apply to litigation by the Condominium Board with respect to the recovery of overdue Common Expenses, Supplemental Monthly Condominium Fees or Special Assessments or to foreclose the lien provided by Section 6 of Chapter 183A or to enforce any of the provisions of the condominium documents against Unit Owners."

Conclusion

We believe it is a reasonable limitation. The consent of the majority is not a restriction but a prerequisite similar to the adoption of any amendment to the condominium documents.

Moreover, as recently as last November, the Appeals Court in *Bettencourt v. Trustees of the Sassaquin Village Condominium Trust*, 90 Mass. App. Ct. 1106 (2016) (Rule 1:28), agreed when it ruled that a provision requiring the consent of 80 percent of the unit owners prior to commencing litigation "does not offend public policy."

Therefore, the Proposed Act should be rejected!

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ConCom inaction cured by previous Order of Conditions

CONTINUED FROM PAGE 4

tially mirrored that in the *Oyster Creek* decision, the Appeals Court built on its analysis.

In *Oyster Creek*, the Harwich Conservation Commission failed to act on an NOI, under both state and local laws, within the statutory time frame of 21 days after the close of the public hearing.

The Supreme Judicial Court in *Oyster Creek* ruled that when a municipal conservation commission fails to act timely on an NOI for work affecting wetlands, the applicant may seek a SOC from DEP and "it is appropriate that [the commission] should lose the right to insist on the provisions of its local bylaw, and that any superseding order issued by the DEP should apply in its stead."

In *Cave*, when the Commission failed to timely act on the second NOI, Cave sought and received an SOC from DEP without the burden of any conditions based on local bylaws. Had the inquiry stopped there, Cave would be permitted to construct within 125 feet of one of the two vernal pools on the subject property. However, there was an earlier OOC based on an earlier NOI that prevented work within 125 feet of the vernal pools. Which controls: the OOC based on the first NOI, or the later SOC based on the Commission's failure to act timely on the NOI?

Cave sued in court, claiming the later SOC governed the work and the first OOC was no longer applicable. How would the court apply *Oyster Creek* to this situation?

The Appeals Court determined that even though the Commission failed to timely act on Cave's second NOI, the conditions of the first NOI applied to the same land. Therefore, the court found that Cave was still bound by Condition 29 of the first OOC because it was imposed earlier to protect the vernal pool habitat from human construction activities and remained in effect.

The court reasoned that because the Attleboro Commission included explicit reasoning for including Condition 29 in the first OOC, the property was the same land in both NOIs, and the preliminary work was for a subdivision — the conditions in the first NOI were still in effect for all other phases of work for the same land.

The takeaway: An SOC issued by DEP does not divest a conservation commission of all authority to regulate activity on land subject to the SOC, if the same land is also the subject of a separate and earlier NOI on which the commission acted timely in issuing its OOC.

Nonetheless, it is wise for conservation commissions to act on all NOIs within the prescribed statutory time periods, issue clear decisions with specific and articulated findings justifying the conditions they impose, keep accurate and complete records of past NOIs and OOCs, and track whether the OOCs have been properly recorded (and complied with). This advice is especially so for those commissions administering Home Rule wetlands bylaws or ordinances. Otherwise, a careless commission may find itself up Oyster Creek without a paddle.

Olympia Bowker is an associate at McGregor & Legere, P.C. in Boston. She helps clients with a broad range of environmental, land use and zoning matters. Olympia received both her J.D. and Masters of Environmental Law and Policy from Vermont Law School. She can be contacted at obowker@mcgregorlaw.com.

Big Papi at the bat

With apologies to Earnest Lawrence Thayer, and particularly to David Ortiz

The outlook wasn't brilliant for the Red Sox Nine that day;
the score stood four to two, with but one inning more to play.
And then when Pedroia died at first, and Betts did the same,
a sickly silence fell upon the patrons of the game.

A straggling few got up to go in deep despair. The rest
clung to that hope which springs eternal in the human breast;
they thought, if Big Papi could get but a whack at that —
they'd put up even money, now, with Big Papi at the bat.

But Ramirez preceded Papi, as did also Travis Shaw,
and the former was a washout and the latter was a flaw,
so upon that stricken Fenway multitude, grim melancholy sat,
for there seemed little chance Big Papi's getting to the bat.

Ramirez let drive a single, to the wonderment of all,
and Shaw, the much despised, tore the cover off the ball;
and when the dust had lifted, and the crowd saw what had occurred,
there was Travis safe at first and Ramirez a-hugging third.

Then from thirty thousand throats there rose a lusty yell;
it rumbled Kenmore Square, it rattled in the dell;
it knocked on the Green Monster and recoiled upon the flat,
Big Papi, mighty Papi, was advancing to the bat.

There was ease in Papi's manner as he stepped into his place;
there was pride in Papi's bearing and a smile on Papi's face.
And when, responding to the cheers, he lightly doffed his hat,
no stranger in the crowd could doubt 'twas Big Papi at the bat.

Sixty thousand eyes were on him as he rubbed his hands with dirt;
thirty thousand tongues applauded when he wiped them on his shirt.
Then while the writhing pitcher ground the ball into his hip,
defiance gleamed in Papi's eye, a sneer curled Papi's lip.

And now the leather-covered sphere came hurtling through the air,
Big Papi stood a-watching it in haughty grandeur there.
Close by the sturdy batsman the ball unheeded sped —
"That ain't my style," Big Papi said,
"Strike one," the umpire said.

From the bleachers, black with people, there went up a muffled roar,

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like the beating of the storm-waves on a stern and distant shore.
"Kill him! Kill the umpire!" shouted someone in the stands;
and it's likely they'd have killed him had not Big Papi raised his hand.

With a smile of Christian charity, Big Papi's visage shone;
he stilled the Fenway tumult; he bade the game go on;
he signaled to the pitcher, and once more the spheroid flew;
Big Papi still ignored it, and the umpire said: "Strike two."

"Fraud!" cried the maddened thousands, and echo answered fraud;
but one scornful look from Papi and the Fenway crowd was awed.
They saw his face grow stern and cold, they saw his muscles strain,
and they knew Big Papi wouldn't let that ball go by again.

The sneer is gone from Papi's lip, his teeth are clenched in hate;
he pounds with cruel violence his bat upon the plate.
And now the pitcher holds the ball, and now he lets it go,
and now the air is shattered by the force of Papi's blow.

Oh, somewhere in this favored land the sun is shining bright;
the band is playing somewhere, and somewhere hearts are light,
and somewhere men are laughing, and somewhere children shout;
and there is also joy at Fenway — Big Papi hit one out.

Editor's note: The doggerel verses printed above were forwarded to us by a longtime REBA member who shall remain nameless. He claims he found them in the waste receptacle near the recording desk at the Middlesex South District Registry of Deeds.

If you want something done right, do it yourself

BY ROBERT M. RUZZO

"We Have Met The Enemy, And He Is Us."
— cartoonist Walt Kelly, 1913-1973

THE HOUSING WATCH

The passing of summer into autumn always brings with it a certain melancholy for devotees of Chapter 40B (the "Affordable Housing Law" or the "Comprehensive Permit Law"). The anniversary of its enactment by a mere two-vote margin in the state Senate in August 1969 typically passes without fanfare. Moreover, that anniversary serves as a reminder that the struggle to build much-needed housing in our commonwealth is a longstanding one, with no obvious end in sight.

To a certain extent, of course, we are victims of our own success. For most of this calendar year to date, job creation numbers have been strong even as the unemployment rate ticks upward, reflecting the return of disaffected and disappointed workers to the workforce. Slow and steady growth continues and interest rates linger (persistently) near historical lows. Not surprisingly, housing costs continue to rise, streaking beyond the reach of those most in need of opportunity.

The real difficulty in assessing the damage to our economy from all this is that this impact is largely measured at present in unrealized opportunities, but if unaddressed over time an exodus will undoubtedly follow.

Can anything be done to change the direction of the housing price spiral?

The ever-worsening affordability picture does not result from a lack of trying. As noted previously in this space ("The Housing Crisis Approaches Middle-Age," November 2014), what makes Massachusetts' housing equation particularly pernicious is that it is not just an "affordable housing" crisis, but a crisis of "housing affordability" as well.

Massachusetts stands at Ground Zero of "affordable housing" expertise and innovation. As a 2015 study by the Urban Institute indicated, of the 10 counties nationwide that have seen the largest increase in meeting the needs of Extremely Low Income ("ELI") renters (those making 30 percent or less of the area median income), five of these counties are in Massachusetts, with Suffolk County leading the way.

The commonwealth has been at the forefront of the affordable housing finance world, developing its own programs, and enhancing and amplifying financing techniques that are now used in many states (the Affordable Housing Trust Fund, state historic tax credits, state affordable housing tax credits, etc.), with MassHousing having literally contributed hundreds of millions of dollars to the cause over the past few decades.

More resources are always welcome, but any realistic appraisal would conclude that we have highly developed the techniques at the delivery end of the pipeline. Our problem is at the other end.

Our innovations in "affordable housing" finance techniques, however creative they may be, will not be enough to offset our difficulty in increasing the flow into the housing pipeline at its source. We simply do not produce enough market rate housing in Massachusetts to meet our needs. This is the "housing affordability" side of the crisis, the ever-increasing prices that are paid in rent or sales prices in the "unregulated" housing market.

Whether it is our deep seated tradition of home rule and (unwieldy) participatory local government, the economics of housing and education under Proposition 2 1/2, the nation's least distinguished land use statute (Chapter 40A), or a combination of these and other factors, the numbers don't lie. Our housing costs are smothering our potential for further economic growth, and the drive (literally) to find reasonably priced housing is stressing our transportation infrastructure, as well as our workday commuters.

There is some reason for optimism on the housing production front, however, and it comes from both sides of the political spectrum. In July, the second annual YIMBY ("Yes In My Backyard") conference was convened in Oakland, California, an event that was billed as a three-day gathering for grassroots community organizers, local leaders, housing creators and everyday people. In fact, one pro-development group involved in this conference, the Bay Area Renters Federation, has advocated so forcefully for increased development that more traditional neighborhood groups have caricatured its position as being in favor of "more housing at all costs."

Closer to home, a perhaps more conventional organization has been taking some very unconventional steps in sounding the alarm about needing to look at the housing problem as a matter of economic viability and vitality. The South Shore Chamber of Commerce was recognized in May by the Massachusetts Housing Partnership as a "Housing Hero." The chamber is the first business organization to have been so recognized.

In crafting its comprehensive economic and community development plan "South Shore 2030: Choosing Our Future," the chamber not only focused on bringing jobs to the region, it also undertook to simultaneously analyze the housing needs that will be required to grow the economy in this fashion. Indeed, a major release regarding this housing element is due around the time of publication of this issue of REBA News in September.

Here's hoping that the South Shore Chamber of Commerce's involvement in the housing discussion is a trendsetter. Housers of all political stripes would welcome a new awakening within the business community of the need for its direct participation in the housing debate. Employers have ample "skin in the game," and increased employer participation, whether individually (through employee housing assistance programs) or collectively (through organizations advocating for increased development and redevelopment opportunities, as well as land-use reform), will add a valuable perspective that has been missing from public deliberations on housing production up until now.

If the problem solvers of the private sector can bring their creativity and drive to our housing problem, while the community organizers cultivate and nurture a YIMBY mindset, the future looks brighter for all in the housing market.

"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 at robert.ruzzo@hklaw.com.

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Robert M. Ruzzo
Holland & Knight LLP
Member since 1985

Neighbor's claim to shoreline of filled tidal pond rejected

BY NATHANIEL STEVENS

Following a two-day trial, Land Court Judge Robert Foster recently rejected an abutter's claim to the portion of a Falmouth family's lot where they plan to build an addition to their seasonal cottage.

The court found that the presumption of land ownership to low water, derived by the Colonial Ordinances, did not apply. The court invoked the doctrine of adverse possession by color of title to find for the Falmouth family on an alternative claim.

The case is *Nancy Evans, Trustee of the NWW-2 Realty Trust v. Michael J. Jackson, Jr. and Jane L. Jackson, Trustees of the Jackpot Trust*, 13 MISC 478683 (RBF), June 15, 2016. The decision implicates historic law in a modern context, waterfront legal principles, and invoked a rare form of adverse possession called adverse possession by color of title.

The area in dispute was once part of a tidal pond on Chapoquoit Island filled in the late 1920s as part of a dredging project in nearby West Falmouth Harbor. The abutter, plaintiff trustee Nancy Evans, asserted that she owned an approximately 5,300-square-foot portion of the family's Jackpot Trust land.

Evans claimed through the language in her deed and other deeds referenced by her deed. She tried to rely on the presumption of law derived from the Colonial Ordinance of 1641-1647 that when waterfront property is conveyed, the flats — the area between the low water and high water marks — are conveyed along with the uplands.

Evans' family had owned her lot (as well as two abutting properties) since 1930 but had never disputed the property boundary with the Trust. Evans commenced her Land Court claim in 2014 shortly after learning of the Trust's plans for an addition to its cottage.

The 1890 plan of lots for Chapoquoit Island in that area of Falmouth showed two ponds, an area called Chapoquoit Harbor, and Buzzards Bay. Roughly parallel to a majority of the shorelines of these waterbodies was a feature noted as "edge of bank," including along Evans' property.

Evans alleged that her residential lot was larger, including the disputed area, because deeds to her property described the boundary with the Jackpot Trust land and one formerly filled pond as being "by the edge of the bank" as per the 1890 plan.

The Trust denied Evans' allegations and filed two counterclaims: that its deed gave it ownership of the disputed area, and, even if it did not, it had gained title through the doctrine of adverse possession.

Following a view and trial with testimony from two title experts, two professional land surveyors, and five other witnesses, Judge Foster ruled in favor of the Jackpot Trust on both theories. Evans did not testify.

In the wording of Evans' deed, earlier deeds to her property, other deeds by the original developers of the area, and persuasive testimony of the defendant's title expert, Judge Foster found that there was no intention to include in the conveyance of Evans' property the area beyond edge of bank down to the low water mark of the filled tidal pond.

These facts were sufficient to successfully rebut the presumption derived from the Colonial Ordinance of 1641-1647 that the tidal flats are conveyed with the uplands of coastal property.

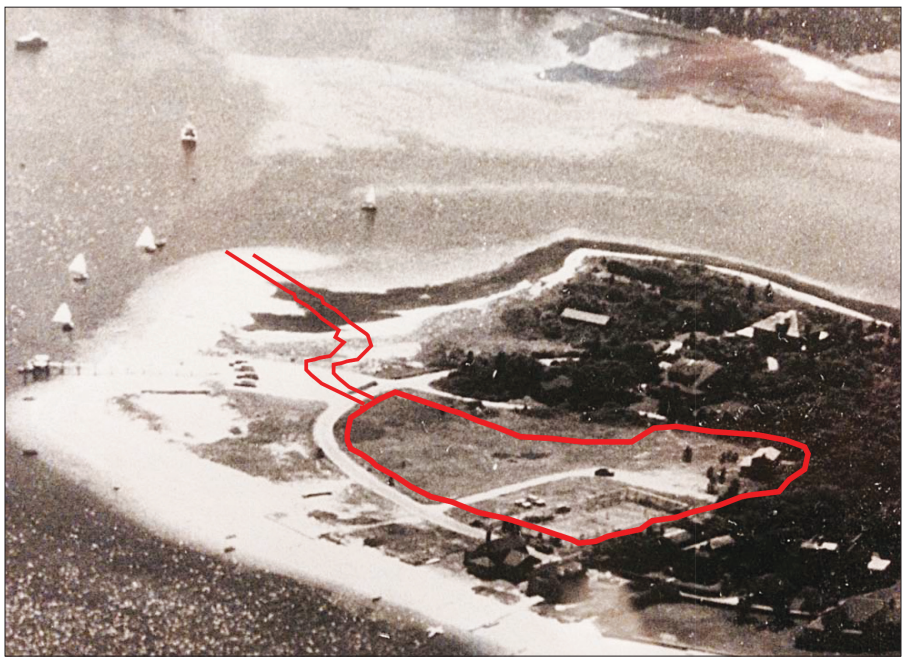
Although he did not need to (because he ruled the Trust owned the disputed area through record title), Judge Foster also considered the Trust's second counterclaim of title to the disputed area by adverse possession.

Based on the testimony of a trustee and beneficiary of the Trust, his brother, two neighbors, and a former regular summer renter of the property, Judge Foster ruled that the Trust and its predecessors in title exercised actual, open, notorious, exclusive and adverse possession of the disputed area for a period of well over 20 years, thus gaining title to it.

Interestingly, Judge Foster went on to rule that the Trust gained title to those portions of its property outside of the disputed area through the doctrine of adverse possession under "claim of title" or "color of title." This rarely invoked doctrine serves to overcome the issue in adverse possession law that one can gain title only to the area of land that is actually occupied.

Under this "color of title" doctrine, a possessor of land asserts ownership based on a deed or other land conveyance instrument that purports to convey title to the entirety of a parcel, even if it does not because of a defect in title. This doctrine grants the possessor constructive possession to the entire parcel described in the document, even if the possessor did not occupy all parts of the land.

Here, deeds to the Trust contained a metes and bounds description of the land as shown on a recorded 1958 Approval Not Required plan. Evans never challenged those land descriptions.



The red lines drawn over this aerial image of Chapoquoit Island in Falmouth from c. 1960 show the approximate location of the formerly filled tidal pond and its inlet.

Judge Foster found persuasive that the Trust and its predecessors had paid taxes on its land and that the town assessors' maps show boundaries that include the disputed area on the Trust land.

The unsuccessful plaintiff Evans did not appeal Judge Foster's Land Court decision.

A member of REBA's Environmental Law Section, Nate Stevens practices with the Boston firm of McGregor & Legere, P.C. He represents clients with environmental issues including permitting, development, contamination, transactions, conservation, real estate restrictions, underground tanks, water supply, water pollution, subdivision control, tidelands licensing, Boston and state zoning, coastal and inland wetlands, stormwater, air pollution and energy facility siting. Nate can be contacted at nstevens@mcgregorlaw.com.

Alexander Sands offers reflections from the bench

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ways to approach it. One little fact can turn the whole thing on its head.

Q. *What was the most challenging case you decided during your tenure?*
A. Beach rights are some of the hardest types of cases. There is so much law — conflicting law — and they are just very difficult. They usually have numerous competing parties, various claims of rights, and often historic timelines. I had a number of them while I was on the bench. I remember, around 2005, I had a big beach rights case on the South Shore. When I went out to the sight view, there were television trucks and cameras everywhere, and a huge crowd of people. When we got down to the beach — this woman had clearly planned this — a woman was walking her dog and took off every stitch of clothing and paraded nude up and down the beach with her dog in front of the cameras. My law clerk turned to me and asked, "Judge, should I put this in the notes?"

Q. *What changes have you observed within the Land Court since you took the bench?*
A. A lot. First of all, the number of judges has almost doubled. I was the fourth, now there are seven. That really helps ease the case load on each judge. Another big change was when the court went to single-judge assignment of cases. That was more than huge. My first year on the bench, I would have a status conference or something similar, but the next time the parties came in they would be in front of a different judge who would have to get up to speed on the whole case, then a different judge a month after that. It was crazy. Single-judge assignment made a world of difference. You stay married to the case from its filing, and it is a much more efficient process for the court and the parties. I was asked to research and draft the framework for the case management conference, which are the centerpiece of the single-judge assignments. I'm proud of that work.

Q. *What positive attributes did you like to see in an attorney before you in the courtroom?*
A. A lawyer who is prepared. I have seen some really good lawyers come in and fly by the seat of their pants, and it can be very frustrating. Now, I understand everyone has a lot going on. But being organized is on the top of my list. The second is being able to communicate. Reading from the brief you are holding in front of your face is not effective. Lawyers who can articulate their positions, and do it in a coherent manner, those are the ones who really impress me. Moreover, a big attribute for me is civility. When lawyers can't be civil, that is a big no-no for me. One time, I had a pair of lawyers attempt to show me a plan at sidebar, and they ended up ripping an old, original plan in half because they were arguing and jostling with one another. We had to call the court officer [and] take a recess. It was the epitome of how not to act.

Q. *What do you look forward to the most after leaving the bench?*
A. I am looking forward to conducting mediations with REBA. I think the mediations will allow me that intellectual challenge that I enjoyed so much on the court. I am also looking forward to teaching. This fall I am going to be teaching a course on affordable housing at UMass School of Law at Dartmouth. And, of course, I also look forward to being more involved in the theater, a love I have had my whole life, having a little more free time to do that. I'm also thinking about taking up a musical instrument. Maybe a ukulele. I just want to try a lot of new things.

Judge Sands, and the REBA New Lawyers Section, invites all REBA members and interested individuals to attend the Sept. 20, 2017, luncheon of the New Lawyers Section, from 12 to 1:30 p.m., during which Judge Sands will further reflect upon his career and answer questions from attendees.
A member of several REBA sections, including Zoning/Land Use and Commercial Real Estate Finance, Robbie Hopkins is an associate at Phillips & Angley, specializing in land use, zoning and real estate litigation. He can be contacted at rhopkins@phillips-angley.com.

The path to electronic acknowledgements

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and then affixing his notary stamp to the document.

Chapter 222, §8 requires a notary stamp to include "the notary public's name exactly as indicated on the commission; the words 'notary public' and 'Commonwealth of Massachusetts' or 'Massachusetts'; the expiration date of the commission in the following words: 'My commission expires _____'; and a facsimile seal of the commonwealth."

Not to minimize the importance of the facsimile seal of the commonwealth, but I am not sure how including that on an inked stamp that anyone, anywhere may purchase in any name from multiple vendors adds appreciably to the authenticity of a document or the signature upon it. To me, the basic reason for requiring a notary to include identifying information such as a printed name and a commission expiration date in the acknowledgement clause is to help identify and locate the notary if questions arise about the document.

While the notary stamp does require those two bits of information, so does the notary clause itself, which seems to make the notary stamp superfluous. Perhaps it would be more useful to assign each notary public a unique identifying number, much like an attorney's BBO number, and require that number to be included in the acknowledgement clause in lieu of a stamp. Such a unique number would expedite the identification of the notary and his whereabouts. It would also be easy and inexpensive to implement, both on paper and in electronic form.

In reviewing electronic acknowledgement statutes already adopted elsewhere, it seems that many states have created a dual commission regime, one for regular notaries, the other for electronic notaries. Other places require notaries to invest in sophisticated (and presumably expensive) technology that renders the electronic document being acknowledged tamper-proof.

Perhaps the tasks assigned notaries in other jurisdictions are more complex than those in Massachusetts, but both of these practices — a dual commission system and requiring sophisticated software of electronic notaries — greatly exceed anything now required or expected of notaries in this commonwealth.

In crafting rules for electronic acknowledgements in Massachusetts, we should strive to duplicate the functions now being performed by our notaries while allowing those functions to be performed on tablets and computer screens, not just on paper.

Complex and expensive systems are not needed to do this, and such additional requirements would needlessly delay our ability to keep pace with the evolving expectations of those we serve.

A regular and welcome contributor to REBA News, Dick Howe has served as register of deeds in the Middlesex North Registry since 1995. He is a frequent commentator on land records issues and real estate news. Dick can be contacted by email at richard.howe@sec.state.ma.us.

Retired Judge Sands joins REBA Dispute Resolution

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bench, his experience on municipal boards, and more than 30 years in a transactional real estate practice, Judge Sands is uniquely qualified to mediate any real estate dispute, particularly permitting and land use matters as well as affordable housing.

He has served on many civic, religious and charitable organizations, including chairman of the board and artistic director of the Annisquam Village Players, one of the oldest continually operating community theaters in the U.S., where he has directed an annual summer musical for the past 25 years, and on many committees of the Annisquam Village Church in Gloucester.

He received his B.A. from Williams College and his J.D. from the University of Virginia School of Law. He has also written two legal mystery novels, and he ran the Boston Marathon annually from 1991 to 2007. In 2016, he fulfilled a bucket list challenge by climbing Mount Kilimanjaro in Africa.

Earlier this month, in collaboration with the Land Court, REBA hosted a retirement party for Judge Sands. The reception also included an encore performance of "The Ballad of Alexander Sands," first performed at the spring meeting of the Abstract Club on May 8.

Lake management update for the real estate attorney

BY ELISABETH GOODMAN

Summer is a good time to focus on our lakes. The real estate lawyer practicing in Massachusetts should be aware of what activities in and near lakes require permits and how application of herbicides and control of invasive species are regulated in Massachusetts.

Monitoring and treatment of lakes is expensive. Lake districts are an effective mechanism for providing governance for lakes and helping to fund lake management by way of taxation.

Lakes and ponds are bodies of freshwater that contain standing water year round, with flora and fauna adapted to the permanent body of water. Important criteria that define these water bodies include underlying geology, surface area, volume of water, flushing rate and watershed area.

A Great Pond is defined as any pond or lake that contained more than 10 acres in its natural state. Ponds that once measured 10 or more acres in their natural state, but which are now smaller, are still considered Great Ponds. DEP has a list of Great Ponds, which can be found at http://www.mass.gov/eea/agencies/massdep/water/watersheds/massachusetts-great-ponds-list.html

Many large lakes are not Great Ponds because they are totally manmade (e.g., the Quabbin, and Wachusett).

There is no definition of a lake in the Wetlands Protection Act, G.L.c. 131, §40. A lake is defined in the regulations at 310 CMR 10.04 as "any open body of fresh water with surface area of 10 acres or more, and shall include great ponds."

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Inland ponds have a detailed definition in the wetlands regulations starting with requirement of surface area of at least 10,000 square feet. Several protected wetland resource areas must be examined when activities occur in and near lakes, including land under water, 310 CMR 10.56, and banks, defined at 310 CMR 10.54.

The definition of a bank includes the lower boundary that is defined as the mean annual low flow level. For lakes with historic drawdowns, the lower boundary of the bank extends to the low flow during the drawdown. It is useful to know this because the restrictions for work on banks are easier to deal with than the restrictions for working on land under water.

We used to file for work in lakes and ponds as a resource improvement project under 310 CMR 10.53(4). Now, these projects need to be submitted as an Ecological Restoration limited project. This includes publishing in the Environmental Monitor and getting pre-approved by NHESP.

Also, these Ecological Restoration projects require submission of an Appendix A. The DEP will advise the Conservation Commission that it needs to review 310 CMR 10.11, 310 CMR 10.12 and 310 CMR 10.53(4)(e)5 as well as the submitted Appendix A.

These projects still need to conform to the FGEIR and the Practical Guide to Lake Management in Massachusetts. See *In the Matter of Craig Campbell*, 2010 WL 2209452 (Mass. DEP)(2010), where DEP approved a multi-year program for the application of herbicides to reduce nuisance levels of aquatic vegetation in a shallow 1.5 acre pond. This decision includes extensive review of the criteria considered in interpreting guidance on aquatic land management.

A number of communities are experiencing similar problems regarding lake management. For many years the state has done no evaluations or management of many Great Ponds. Nutrient and other contamination from watersheds cross over town boundaries. The costs of water quality sampling and control of invasive species is high. Controlling invasive species when there is public boat access can be difficult. The cost of maintaining and repairing dams is extraordinary.

To address these problems, some lake residents are turning to the state Legislature seeking approval for the creation of a lake district. A lake district is a governmental body, like a municipality. To create a lake district, first the town adopts the provisions of the special act, then the special act is approved by the Legislature, which is then signed by the governor.

A district has to comply with the provisions of the special act, but usually they are run by a committee called a Prudential Committee. The property owners along the lake, called the Proprietors of the district, vote at an annual town meeting on the budget and other matters for the district.

The great advantage of creating a lake district is that the district can assess taxes and use them as a source of funds. The taxes are based on the annual budget adopted by the Proprietors of the district. Another advantage of a district is that it can qualify for grants as a governmental body.

Specializing in real estate, zoning and environmental law at Cain Hibbard & Myers, PC, Elisabeth Goodman has more than 30 years of experience representing businesses and individuals in Massachusetts. Her clients include developers with innovative building re-use projects, homeowners who have organized into special governmental districts, emerging and start-up corporations, nonprofit organizations and environmental engineering firms. She can be contacted at egoodman@cainhibbard.com.

Short-term rental challenges for condominium associations

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For instance, many condominium documents establish a graduated fine structure per offense (e.g., $25 fine for the first offense; $50 for the second; $100 for the third, etc.). Unit owners considering short-term rentals of their unit, especially in Greater Boston, can expect nightly rental prices in the hundreds of dollars, which, when weighed against a potential fine amounting to a fraction of their anticipated profit, do not provide much incentive to adhere to the requirements of the governing documents.

If a condominium association's governing documents are silent on leasing guidelines and restrictions, the association must take steps to amend its documents to specifically address this activity or it will likely be without authority to regulate or enforce short-term rentals.

Because such a provision operates to restrict what one may do with his her or her unit, an amendment to the master deed and/or bylaws will be required, which requires a minimum percentage of unit owners (typically at least two-thirds) to vote in favor of such a restriction. Depending on the location and demographics of the ownership, this may prove to be a difficult endeavor if multiple unit owners favor the ability to rent their units on a short-term basis.

Associations must also be cognizant of the implications unauthorized rentals have on Federal Housing Administration ("FHA") guidelines. In addition to explicitly restricting transient rentals, defined by FHA as initial terms of less than 30 days, FHA regulations require that at least 50 percent of the units be owner-occupied (in limited instances this percentage may be lowered to 35 percent, provided the project meets certain additional conditions established by FHA). If the total number of leased or rented units exceeds this threshold, FHA may suspend or revoke the project's eligibility, which could have a drastic impact on the ability of prospective new owners to obtain financing through FHA as well as unit owners seeking to refinance using an FHA product.

If an association does not have a handle on how many of its units are leased or rented at any one time, as they likely would not where multiple transient rentals are occurring without oversight or approval, the association may find it difficult to bring the project back into compliance with FHA guidelines.

If a unit owner's use of Airbnb violates state or local laws, codes or ordinances, such a violation could result in increased insurance premiums for the association as well as difficultly recovering on a claim under an existing policy.

Condominium unit owners who occasionally rent their units on a short-term basis may also be unknowingly violating their homeowner's insurance policies by effectively converting their occupied units into rental properties, which could result in a disclaimer of coverage by the insurance carrier if they become aware of the prohibited nature of the use. If a transient renter is injured on the common areas of the condominium, the association could face trouble on a claim with its master insurance policy if it is discovered that the unit was being used as a for-profit rental.

While the policymakers work to catch up to the ever-changing issues created by short-term rentals, one thing is clear: Airbnb-type services are for the most part here to stay.

Condominium associations have the tools to regulate such activity, often times to a greater degree than state or local law; however, associations should be proactive about addressing Airbnb-related concerns because retroactive efforts to address the short-term rental by unit owners may fall short if the existing condominium documents do not properly prohibit such rentals.

Condominium unit owners would also be wise to consult with their association prior to listing their unit on Airbnb or else they run the risk of significant fines and exposure to their association's legal fees incurred in connection with the enforcement of the association's bylaws and restrictions.

A founding partner of Braintree-based Moriarty Troyer & Malloy LLC, Chris Malloy brings nearly a decade of litigation and trial experience in the areas of complex construction, business and commercial litigation, as well as legal malpractice claims. Chris can be contacted at cmalloy@lawmtm.com.