REBA

THE REAL ESTATE BAR ASSOCIATION
for Massachusetts

1872 *Sesquicentennial* 2022

REBA FOUNDATION

ANNUAL MEETING & CONFERENCE

Monday, November 14, 2022

Four Points by Sheraton
1125 Boston-Providence Turnpike
Norwood

REBA

DISPUTE RESOLUTION, INC.

The Leading Dispute Resolution Provider in Massachusetts for Business & Real Estate Disputes

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Peter Wittenborg
wittenborg@reba.net
(617) 854-7555, ext. 103

Audrey Stewart
stewart@reba.net
(617) 854-7555, ext. 101

For more information, including a complete list of our DR Neutrals and their bios, visit www.disputesolution.net

REBA DISPUTE RESOLUTION, INC.
295 Devonshire Street, Sixth Floor
Boston, MA 02110

2022 REBA Annual Meeting & Conference

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Thank you for attending the 2022 REBA Annual Meeting & Conference! We look forward to seeing you again at our Spring Conference on Monday, May 1, 2023 at the Four Points in Norwood.

2022 REBA Annual Meeting & Conference

Program Evaluation

Thank you for taking the time to complete this evaluation. We value your suggestions and comments. All information is used to ensure the continued quality and relevancy of REBA programs. Please return this form to the registration desk or send it via mail to: REBA, 295 Devonshire Street, Sixth Floor, Boston, MA 02110.

1. How long have you been a REBA member?

   ☐ One year ☐ 2-10 years ☐ 11-20 years ☐ 21+ years ☐ Non-member

2. Are you an attorney? ☐ NO, I am a: _____ ☐ YES, my practice concentration is:

   ○ Real Estate ○ Affordable Housing ○ Commercial Leasing ○ Commercial Real Estate Finance

   ○ Condominium ○ Construction ○ Environmental Law and Renewable Energy ○ Foreclosure

   ○ Government ○ Land Use/Zoning ○ Landlord/Tenant ○ Litigation ○ Personal Injury ○ Probate

   ○ Residential Conveyancing ○ Residential Leasing ○ Title Insurance ○ Other: _____

3. How many REBA conferences have you attended in the past?

   ☐ None ☐ 1-5 ☐ 6-10 ☐ 11-20 ☐ I go every year, no matter what the topic.

4. In general, the conference was: ☐ Excellent ☐ Good ☐ Fair ☐ Poor

5. What were the strengths of today's conference? ☐ Breakout Sessions ☐ Speakers ☐ Materials

   ☐ Networking ☐ Luncheon ☐ Keynote Speaker ☐ Location ☐ Other: _____

6. Comments regarding the conference in general, including the breakout session topics, speakers, refreshments, luncheon, keynote speaker, venue, parking, accommodations, etc.: _____

   _____

   _____

   _____

7. List topics you would like to have presented at future conferences, as well as suggestions for future keynote speakers:

   _____

   _____

   _____

   _____

8. Please rate the breakout session presentations for content and delivery:

Continued on back…

Mortgage Foreclosure Reboot: What's New/Not in Post-COVID Era

	EXCELLENT	GOOD	FAIR	POOR	N/A	COMMENTS
Matthew J. Carbone	☐	☐	☐	☐	☐	
Julie T. Moran	☐	☐	☐	☐	☐	

Ethical Issues and the BBO: Helping Conveyancers Avoid Both

	EXCELLENT	GOOD	FAIR	POOR	N/A	COMMENTS
Henry J. Dane	☐	☐	☐	☐	☐	
Robert M. Daniszewski	☐	☐	☐	☐	☐	

The Leading Land Use Cases of 2021 and 2022

	EXCELLENT	GOOD	FAIR	POOR	N/A	COMMENTS
Kate Moran Carter	☐	☐	☐	☐	☐	
Gregor I. McGregor	☐	☐	☐	☐	☐	

When Estate Planners & RE Lawyers Don't Speak The Same Language

	EXCELLENT	GOOD	FAIR	POOR	N/A	COMMENTS
Theresa M. Santoro	☐	☐	☐	☐	☐	
Lisa Vesperman Still	☐	☐	☐	☐	☐	

Witness Closings & Other Proscribed Practices Eleven Years After NREIS

	EXCELLENT	GOOD	FAIR	POOR	N/A	COMMENTS
Conrad J. Bletzer Jr.	☐	☐	☐	☐	☐	
Timothy J. van der Veen	☐	☐	☐	☐	☐	

ALTA's 2021 Policy Forms Adapt to Changing Title Insurance Needs

	EXCELLENT	GOOD	FAIR	POOR	N/A	COMMENTS
Jonathan S. R. Anderson	☐	☐	☐	☐	☐	
Tracie M. Kester	☐	☐	☐	☐	☐	

Title Issues Cured by Applying REBA Title Standards Statutes

	EXCELLENT	GOOD	FAIR	POOR	N/A	COMMENTS
Jutta R. Deeney	☐	☐	☐	☐	☐	
Carrie B. Rainen	☐	☐	☐	☐	☐	

Marketable vs. Insurable Title & Attorney Certification Statute

	EXCELLENT	GOOD	FAIR	POOR	N/A	COMMENTS
Lisa J. Delaney	☐	☐	☐	☐	☐	
Ward P. Graham	☐	☐	☐	☐	☐	

Ghost Haunting Land Use Law: Site Plan Review & Local Zoning Regs

	EXCELLENT	GOOD	FAIR	POOR	N/A	COMMENTS
Shawn M. McCormack	☐	☐	☐	☐	☐	
Michel L. Wigney	☐	☐	☐	☐	☐	

Recent Developments in Massachusetts Case Law

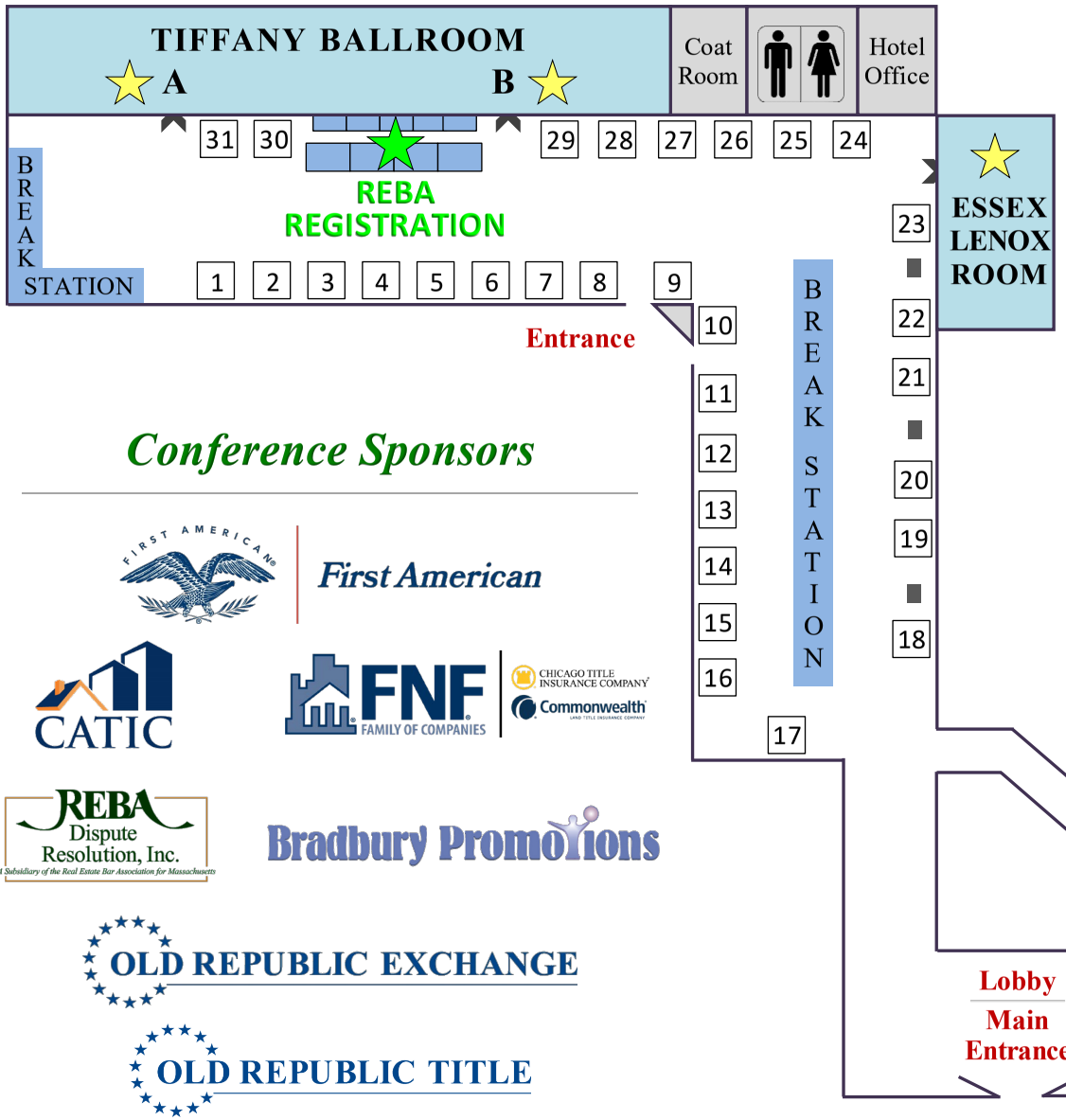
	EXCELLENT	GOOD	FAIR	POOR	N/A	COMMENTS
Philip S. Lapatin	☐	☐	☐	☐	☐	

2022 Annual Meeting & Conference

SCHEDULE OF EVENTS

	Tiffany A	Tiffany B	Essex/Lenox	Room 101	Room 103	Room 104
8:30 am - 9:30 am:	SESSION #1 *The Leading Land Use Cases of 2021 and 2022* Carter & McGregor	SESSION #1 *Mortgage Foreclosure Reboot: What's New & What's Not Post-COVID* Carbone & Moran	SESSION #1 *When Estate Planners & RE Lawyers Don't Speak The Same Language* Santoro & Still	SESSION #1 *Ethical Issues & BBO: Helping Conveyancers Avoid Both* Dane & Daniszewski	SESSION #1 *2021 ALTA Policy Forms Adapt to Changing Title Insurance Needs* Anderson & Kester	SESSION #1 *Marketable v. Insurable Title and Attorney Certification Statute* Delaney & Graham
9:45 am - 10:45 am:	SESSION #2 *The Leading Land Use Cases of 2021 and 2022* Carter & McGregor	SESSION #1 *Witness Closings/Other Proscribed Practices 11 Years After NREIS* Bletzer & van der Veen	SESSION #2 *When Estate Planners & RE Lawyers Don't Speak The Same Language* Santoro & Still	SESSION #1 *Title Issues Cured by Applying REBA Title Standards and Statutes* Deeney & Rainen	SESSION #2 *2021 ALTA Policy Forms Adapt to Changing Title Insurance Needs* Anderson & Kester	SESSION #2 *Marketable v. Insurable Title and Attorney Certification Statute* Delaney & Graham
11:00 am - 12:00 pm:		SESSION #2 *Witness Closings/Other Proscribed Practices 11 Years After NREIS* Bletzer & van der Veen	SINGLE SESSION *Ghost Haunting: Site Plan Review and Local Zoning Regs* McCormack & Wigney	SESSION #2 *Title Issues Cured by Applying REBA Title Standards and Statutes* Deeney & Rainen	SESSION #2 *Mortgage Foreclosure Reboot: What's New & What's Not Post-COVID* Carbone & Moran	SESSION #2 *Ethical Issues & BBO: Helping Conveyancers Avoid Both* Dane & Daniszewski
12:15 pm - 1:15 pm:				VIDEO SIMULCAST *Recent Developments in Massachusetts Case Law* Lapatin	LIVE PRESENTATION	VIDEO SIMULCAST
1:20 pm - 2:45 pm:	CONFERENCE LUNCHEON *Keynote Address by SJC Chief Justice Kimberly S. Budd*					

2022 REBA Annual Meeting & Conference



Conference Sponsors

First American

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FNF Family of Companies

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Commonwealth Land Title Insurance Company

REBA Dispute Resolution, Inc.
A Subsidiary of the Real Estate Bar Association for Massachusetts

Bradbury Promotions

OLD REPUBLIC EXCHANGE

OLD REPUBLIC TITLE

Conference Exhibitors

1. REBA Dispute Resolution
2. Women's Lunch Place
3. E-Closing
4. First American Title Insurance Company
5. First American Title Insurance Company
6. Direct iT
7. Chicago Title Insurance & Commonwealth Land Title Insurance Company
8. Chicago Title Insurance & Commonwealth Land Title Insurance Company
9. New England Land Title Association
10. Westcor Land Title Insurance Company
11. Hingham Institution for Savings
12. Old Republic Exchange
13. Old Republic Title Insurance
14. REBA Dispute Resolution
15. SoftPro
16. REBA Dispute Resolution
17. Massachusetts Independent Title Examiners Association, Inc.
18. Brophy Professional Genealogy and Heir Searching
19. Massachusetts Lawyers Weekly
20. Next Level Promotions
21. Stewart Title Guaranty Company
22. Northern 1031 Exchange
23. New England Land Survey
24. WFG National Title Insurance Company
25. Lawyers Concerned for Lawyers
26. CATICTrac
27. CATIC
28. LEAP Legal Software
29. LEAP Legal Software
30. REBA Dispute Resolution
31. Fidelity National Title Insurance Company

2022 REBA Annual Meeting & Conference

Breakout Sessions

8:30 AM - **9:30** AM | TIFFANY BALLROOM B
11:00 AM - **12:00** PM | CONFERENCE ROOM 103


MATTHEW J. CARBONE


JULIE T. MORAN

Mortgage Foreclosure Reboot: What's New and What's Not in the Post-COVID Era

After more than two years of COVID moratoria and emergency orders, mortgage foreclosure volume is on the rise. This breakout will provide an overview of new underwriting requirements, forms and guidelines for the post-COVID era. It will also cover affidavits, certifications and best title insurance practices, as well as a refresher course in key mortgage foreclosures processes and standards for the real estate practitioner.

8:30 AM - **9:30** AM | CONFERENCE ROOM 101
11:00 AM - **12:00** PM | CONFERENCE ROOM 104


HENRY J. DANE


ROBERT M. DANISZEWSKI

Ethical Issues and the BBO: Helping Conveyancers Avoid Both

Conveyancers are frequently faced with challenging situations where the road ahead may be unclear. Our panelists will discuss a range of ethical topics of particular interest to conveyancers. These include conflicts of interest and who is your client; the latest on IOLTA accounts and the *Olchowski* rules relating to unclaimed and unidentified funds; Rule 1.5 fee disclosure and engagement letters; escrow and holdback agreements; and more.

8:30 AM - **9:30** AM | TIFFANY BALLROOM A
9:45 AM - **10:45** AM | TIFFANY BALLROOM A


KATE MORAN CARTER

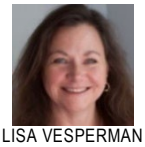

GREGOR I. McGREGOR

The Leading Land Use Cases of 2021 and 2022

During 2021 and 2022, the SJC and Appeals Court issued several decisions that shape and clarify the rights of owners, developers, and users of real estate in the Commonwealth, including cases about waterfront development, commercial solar development, and projects subject to both the Wetlands Protection Act and local home rule wetlands protection bylaws. These are seminal cases. Understanding these decisions is a must for all real estate lawyers who handle any transactions, permitting or titles.

8:30 AM - **9:30** AM | ESSEX / LENOX ROOM
9:45 AM - **10:45** AM | ESSEX / LENOX ROOM


THERESA M. SANTORO


LISA VESPERMAN STILL

When Estate Planners and Real Estate Lawyers Don't Speak the Same Language

This program will review a number of topics common to both estate planning and real estate lawyers, but don't necessarily mean the same to each. Topics include certifications by trustees vs. trustee certificates under M.G.L. c. 184, §35 vs. trustee certificates under M.G.L. c. 203E, §1013; the effect of informal probate on the intestate estate; deeds of distribution; reporting the sale and disbursement of sale proceeds when the property is owned by a nominee trust; sale of the property by a life tenant and remaindermen and how to allocate sales proceeds between them; transfer of real estate to a trust and the effect on the property tax, city tax, or residential tax exclusions; estate taxes and when a conveyancer can rely upon an affidavit of no estate tax under M.G.L. c. 65C; and more.

9:45 AM - **10:45** AM | TIFFANY BALLROOM B
11:00 AM - **12:00** PM | TIFFANY BALLROOM B


CONRAD J. BLETZER


TIMOTHY J. VAN DER VEEN

Unfulfilled Promise? Witness Closings and Other Proscribed Practices Eleven Years After NREIS

In the landmark ruling *REBA v. NREIS*, the SJC declared witness closings to be the unauthorized practice of law. *NREIS* confirmed the importance and necessity of the attorney's central role in residential conveyancing and identified the practice of law elements and ethical considerations in residential transactions. Tim van der Veen, Chair of REBA's UPL Committee, will review the *NREIS* holding and identify problematic practices that persist today. He will also discuss how REBA members and conveyancing attorneys can help achieve the promise of *NREIS* by advocating enactment of REBA's remote online notarization legislation.

2022 REBA Annual Meeting & Conference

Breakout Sessions

8:30 AM **- 9:30** AM | CONFERENCE ROOM 103
9:45 AM **- 10:45** AM | CONFERENCE ROOM 103


JONATHAN S.R. ANDERSON


TRACIE M. KESTER

▸ Practical Skills Session

ALTA's 2021 Forms Adapt to Evolving Title Insurance Needs

New forms for commitments, owner's and lender's policies went into effect on July 30, 2021, but have not been adopted by all state regulators and title insurance underwriters. Meticulous attention by the ALTA Forms Committee to every word in title insurance policies means many changes with which conveyancers must be familiar. Fannie Mae will require the use of these forms in 2024, but use of the Revised Forms rollout has already begun. Items that were formerly exceptions to title are now exclusions in policy jackets. The definition of "Insured" has changed, remote online notarization (RON) is now part of Covered Risk 2(a), and Covered Risk 11 on mechanics liens expands coverage to services and equipment, in addition to labor and materials. Attend this breakout to learn more!

9:45 AM **- 10:45** AM | CONFERENCE ROOM 101
11:00 AM **- 12:00** PM | CONFERENCE ROOM 101


JUTTA R. DEENEY

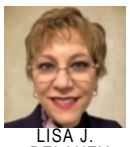

CARRIE B. RAINEN

▸ Practical Skills Session

Title Issues Cured by Applying REBA Title Standards and Statutes Regulations

This session will focus on establishing heirs and death of a joint owner, and missing probates. REBA Standards & Forms Committee Co-chairs, Jutta Deeney and Carrie Rainen, will discuss recent updates to REBA Title Standard No. 41, List of Heirs; REBA Title Standard No. 71, Evidence of Death of Deceased Joint Owners and Life Tenants; and, REBA Title Standard No. 14, Missing Probates. They will also cover what happens when an owner in the chain has died, providing an overview of REBA Title Standards to help conveyancers along the way.

8:30 AM **- 9:30** AM | CONFERENCE ROOM 104
9:45 AM **- 10:45** AM | CONFERENCE ROOM 104


LISA J. DELANEY


WARD P. GRAHAM

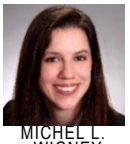
▸ Practical Skills Session

Marketable vs. Insurable Title and the Attorney Certification Statute, MGL c. 93, § 70

Marketable and insurable title are not always the same as marketable title is primarily based upon clear record title, while "insurable title" often involves insuring over known title issues, either without taking exception for them or by taking exception and providing affirmative coverage for them. Our panel will review several common title situations with different marketable or insurable outcomes. The speakers will also discuss certifications of title under M.G.L. c. 93, § 70, and certain land use issues that are specifically excluded from title insurance policies and not covered by the statutory certification, but which may have a significant financial impact on your clients or expose the practitioner to liability aside from the title certification.

11:00 AM **- 12:00** PM | ESSEX / LENOX ROOM


SHAWN M. MCCORMACK


MICHEL L. WIGNEY

▸ Practical Skills Session

The Ghost Haunting Land Use Law: Site Plan Review & Local Zoning Regulations

This panel will discuss administrative site plan review – what it is, what it is not, and why it is a perennial source of confusion for practitioners. Site plan review is not codified in the Zoning Act, arising instead from municipal home rule authority, which has resulted in site plan review requirements as unique as the towns in which they are implemented. Regulating as-of-right uses, the process allows the local authority to condition projects, while not granting discretionary authority to approve or deny projects. What constitutes reasonable conditions and how approvals are appealed are hotly contested questions that have yet to receive definitive answers. Exorcising land-use law of the ghost which haunts it is unlikely, unless a renewed campaign for codification is successful. However, acknowledging and categorizing the idiosyncrasies of site plan review will provide lawyers and developers with a more solid understanding of the process.

12:15 PM **- 1:15** PM | CONFERENCE ROOM 103
Video Simulcasts | CONFERENCE ROOMS 101 & 104


PHILIP S. LAPATIN

Recent Developments in Massachusetts Case Law

Now in his forty-fourth year as case commentator at REBA's twice-yearly conferences, Phil Lapatin continues to draw a full house with this session. Attending his twice-yearly presentations are a must for any practicing real estate lawyer. Phil is the 2008 recipient of the Association's highest honor, the Richard B. Johnson Award.

Residential Mortgage Foreclosure Reboot: What's New/What's Not in the Post Covid Era

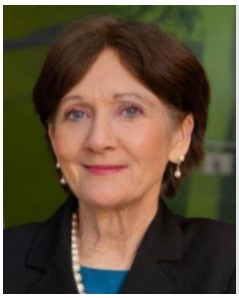
Matthew J. Carbone, Esq.

First American Title Insurance Co.
800 Boylston Street, Suite 2820
Boston, MA 02199
(617) 772-9214
mcarbone@firstam.com

Matthew Carbone is Underwriting Counsel at First American Title Insurance Company. His responsibilities include underwriting all types of transactions from commercial to residential. Prior to joining First American, Matt was an associate at Flynn Law Group, and a litigation and closing attorney at Harmon Law Offices, P.C.

Matt has handled countless post-foreclosure transactions and represented clients in a variety of litigation actions throughout the Commonwealth and in New Hampshire. He has presented education seminars for REBA and at First American on a variety of real estate topics.

Matt received his J.D. from New England School of Law – Boston and his B.A. in Criminal Justice from the University of Delaware.



Julie T. Moran, Esq.

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Waltham, MA 02451
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jmoran@orlans.com

Julie Moran is Senior Executive Counsel at Orlans PC, a 100% women-owned, WBENC-certified law firm where for more than 25 years she has provided legal services to the banking and financial services industry in commercial and residential real estate and mortgage default.

Julie is an author of numerous industry articles, as well as a frequent speaker on regulatory compliance and mortgage foreclosure at both local and national conferences. She is chair of both the Legal Issues Committee of the United States Foreclosure Network (USFN) and the Financial Litigation Services PAC of the National Association of Minority and Women Owned Law Firms (NAMWOLF), is a member of the Board of Directors of both REBA and the Massachusetts Housing Homeownership Advisory Committee. She is a co-founder of Women Executives in Banking and a founding member of the recently instituted Massachusetts Creditors Law Association. She is past chair of the Board of Directors of The Charles River Community Health Center, which provides family-based, affordable health care. She also serves on the Town of Wareham Finance Committee.

Julie received her J.D. from Union University Albany Law School and is a *magna cum laude* graduate of the University of Rochester.

Residential Mortgage Foreclosure Reboot: What's New/What's Not in the Post Covid Era

A title arising out of a non-judicial mortgage foreclosure in typical times presents a unique set of circumstances when it comes to reviewing that process. The COVID-19 pandemic added additional hurdles for all the parties involved to navigate. Below is a small sample of the additional challenges added to the 1-4 family residential non-judicial foreclosure process in the Commonwealth, what the foreclosing mortgagees needed to work through, along with a brief review of what those on the buyer's side should be cognizant of when reviewing title.

I. The COVID Long Tail Underwriting Impacts of Moratoria, Legislation and Emergency Orders

A. Federal Action

1. Coronavirus Aid, Relief & Economic Security Act (the "CARES Act")
    a. Foreclosure (FC) moratorium applicable to 1- 4 family Federally Backed Mortgages ("FBM"). Holders are:
        i. Federal National Mortgage Association (Fannie Mae)
        ii. Federal Home Loan Mortgage Corporation (Freddie Mac)
        iii. Department of Veteran's Affairs (VA)
        iv. U.S. Department of Agriculture (USDA)
        v. U.S. Department of Housing & Urban Development (HUD)
    b. Not applicable to privately held mortgages
    c. Effective March 18, 2020 (USDA-March 17, 2020) – May 17, 2020;
        i. FBM holders extended to July 31, 2021
    d. Activities subject to moratorium
        i. Initiating/advancing/completing FC
        ii. Proceeding with a FC related eviction, auction sale or REO sale
        iii. Loss Mitigation – Servicer must offer forbearance to all borrowers experiencing a COVID 19 hardship upon request
    e. Exemption: vacant or abandoned property (note- no Massachusetts statutory definition)

2. Moratoria implemented by holders of FBM's
    a. Effective March 17, 2020 (USDA), otherwise March 18, 2020 – July 31, 2021
    b. Issued additional mortgage servicing guidelines and requirements to assist Borrowers impacted by COVID.
    c. Exemption for vacant or abandoned property

3. Bureau of Consumer Financial Protection (CFPB)

    a. Issued "Protections for Borrowers Affected by Covid-19 Emergency Under the Real Estate Settlement Procedures Act" (Final Rule) Reg X, 86 FR 34849 https://www.consumerfinance.gov/rules-policy/final-rules/protections-for-borrowers-affected-by-covid-19-under-respa/

    b. Applicability:

        i. FBM's

        ii. Owner occupied property

        iii. Forward mortgages

    c. No relief for:

        i. loans at least 120 days delinquent as of March 1, 2020

        ii. Statute of Limitations expired before January 1, 2022

    d. Effective August 31, 2021 – December 31, 2021

        i. Fannie Mae/Freddie Mac implemented this rule July 31, 2021 to avoid moratoria gap.

    e. Temporary procedural safeguards

        i. Servicers must engage in loss mitigation review for borrowers experiencing a COVID financial hardship upon their request before initiation of FC

        ii. Provided relief from select provisions of the CFPB Mortgage Serving Rules, as amended (certain notices, etc.)

    f. Servicers can proceed with FC only if:

        i. Property is deemed abandoned under state or local law

        ii. Servicer sent proper notices/made good faith effort to establish live contact and borrower been unresponsive

        iii. Borrower submitted a complete loss mitigation application which was fully evaluated

        iv. Loss mitigation application rejected, appropriate notice has been sent and Borrower appeal denied or not filed; *or*

        v. Borrower rejected loss mitigation options offered by Servicer; *or*

        vi. Borrower has failed to perform under loss mitigation agreement

B. Coordinated State and Federal Action

1. Homeowner Assistance Fund (HAF)

    a. §3206 of American Rescue Plan; $9.9 billion allocated by U.S. Treasury with minimum grant of $50 million per state (allocation formula based on unemployment rate and percentage of loans in default)

    b. States process grant application, collects documents from Servicer and makes award. As of September 1, 2022, Massachusetts set award cap of $50,000 per borrower. Award is grant; no repayment obligation and is not a taxable event. Massachusetts prohibits dual tracking while application is pending

c. Eligibility: Borrowers of low/moderate income, who experienced a COVID financial hardship with forward mortgages within conforming loan limits. Must be at least 90 days behind in mortgage payments; applicable to expenses incurred after January 21, 2020.

d. Funds can be used to cure mortgagee default/avoid FC, pay taxes, insurance, HOA fees, utilities, certain types of home repairs

e. Treasury reminder: HAF is not a "stand alone" solution to delinquency/financial hardship of a borrower. Servicer must coordinate with investor/agency offerings for loss mitigation.

f. Massachusetts "Strongly" recommends servicer contact borrower in default and notify of program with outreach letter. Borrowers denied loss mitigation by servicer should be made aware of HAF.

g. No dual tracking (proceeding with FC) upon notification of receipt by state of HAF application

C. Commonwealth of Massachusetts Action

1. Chapter 65 of the Acts of 2020 – Emergency legislation

a. Effective April 20, 2020 – October 17, 2020

b. Imposed foreclosure moratorium on initiation of FC on residential property as defined under M.G.L. c. 244, §35B (1-4 family; owner occupied as principal residence)

i. Initiation is defined as any action that "cause notice of a foreclosure sale to be published pursuant to said section 14 of said chapter 244; (ii) exercise a power of sale; (iii) exercise a right of entry; (iv) initiate a judicial or non-judicial foreclosure process; or (v) file a complaint to determine the military status of a mortgagor under the federal Servicemembers Civil Relief Act, 50 USC sections 3901 to 4043, inclusive."

ii. Exemption for vacant or abandoned property (undefined)

2. Emergency Orders re gathering limits/masking impacted FC sales at property. https://www.mass.gov/info-details/covid-19-state-of-emergency

a. Level of concern as to chilling/increased scrutiny of sale and terms of emergency order in place at the time of sale

3. Supreme Judicial Court Third Updated Order Regarding Court Operations Under the Exigent Circumstances Created by the COVID-19 (Coronavirus) Pandemic, No. OE-144 (June 24, 2020).

a. Tolled all civil statutes of limitations (SOL) from March 17, 2020- June 30, 2020

i. Affects SOL of note and expiration date of mortgage

ii. Recent Land court case makes clear tolling applies to all civil SOL's. *Shaw's Supermarkets, Inc. v. Melendez*, 173 N.E.3d 356, 488 Mass. 338 (Mass. 2021). SJC held that the plain language of its order, the phrase "all civil statutes of limitations," was clear and unambiguous. The use of the word "all," encompassed each and every civil statute of limitations, not just those where the statutory period of limitations expired between March 17, 2020, and June 30, 2020. (106-day tolling period)

iii. Expiration date of SOL is calculated by determining how many days remained as of March 17, 2020, until the statute of limitation would have expired, and that same number of days will remain as of July 1, 2020 in civil cases. For example, if fourteen (14) days remained as of March 17 before the statute of limitation would have expired in a civil case, then fourteen (14) days will continue to remain as of July 1, before the statute of limitation expires (i.e., July 15).

b. Impact on mortgage foreclosure

i. Tolling extended judgments and executions; must consider when identifying junior lien holders for purposes of notice under M.G.L. Ch 244, §14

ii. Tolling extended three-year ripening period for Certificate of Entry

iii. Tolling extended foreclosure affidavit protections under M.G.L. Ch 244, §15.

II. Documenting Foreclosures Conducted during COVID

A. FC Moratoria

1. Post FC Moratoria affidavits – 50 states/50 forms;100 title agents/100 forms

a. Documenting vacancy/abandonment exemption

i. Who has requisite knowledge to sign - FC firm, Servicer and/or attorney in fact for mortgagee

1. Will require one or more unexpired Limited Power of Attorney in recordable form if sign as AIF

ii. Unsubstantiated affirmations will be deemed insufficient; must provide evidentiary proof

iii. Examples of evidentiary proof

1. Copies of series of detailed property preservation reports covering a period of time prior to and during the FC process

2. Utilities shut off date

3. Borrower statement that vacating and no request to regain access

iv. Detailed recitations in affidavit as to role/acquisition of personal knowledge of business records of mortgagee/servicer by signatory

v. Affidavit should be in recordable form

b. Documenting private/portfolio mortgage exemption

i. More limited number of these FC were completed during moratoria

ii. Investor recitations are important

iii. Types of documentary proof of mortgage origin varies

c. Best practice is for the foreclosing entity to provide and the buyer to request a moratoria affidavit beyond those loans that went to sale where a vacant or abandoned exemption applied. This helps record title especially where the majority of buyers are what the industry has dubbed “flippers.”

B. "Initiation" of FC During the Moratoria

1. What does "initiate…a non-judicial foreclosure" mean in the sense of the moratoria?

   a. Does *US Bank v. Schumacher,* 467 Mass. 421 control?

   b. Or if one proceeded in a conservative manner as to what "initiate" may mean, would that lead to better results in the Commonwealth for all parties?

C. Social Gathering Affidavits

1. Typically requested where FC sale is otherwise valid but held during pendency of a COVID Emergency Order

2. Affidavit requirements

   a. Signed by licensed auctioneer who conducted sale/FC attorney who attended with personal knowledge of sale circumstances

   b. Identification of applicable Emergency Order at time of sale

   c. Identify where on property sale was held- unenclosed space

   d. What were the gathering limitations at the time/how many attended?

   e. How was adherence to social distancing guidelines effectuated?

   f. Were applicable masking rules adhered to?

   g. Should affidavit be recorded with deed package?

D. Land Court Affidavit

1. Court promulgated form- "Affidavit Showing FC deed maybe registered notwithstanding FC Moratoria"

   a. Form reciting circumstances allowing FC.

   b. Must be completed/executed and filed with FC deed package submitted for registration

III. Insurability Concerns Relative to Foreclosure Titles

Reviewing a recent (less than three years on record without a proper challenge) non-judicial foreclosure in the Commonwealth is an extensive task for buyer's counsel and their title company. The need for the extensive review on a new or recent foreclosure stems from the statute, or the protections (lack thereof initially) afforded therein, specifically, M.G.L. Ch 244, §1-2, and 15. There are no statutory protections for the parties on the buyer's side coming out of foreclosure (by Entry or under M.G.L. Ch. 244, §14) until the documents have been on record for three years without a proper challenge. As such, one needs to go behind the foreclosure to review the off-record documents such as the notices of sale, the note, the default/contractual demand letters and determine the occupancy of the property to put their client in the best position possible to get to three years without a challenge that could void their superior claim to title.

A. Massachusetts Form of Acknowledgment

1. Massachusetts Land Court Memorandum dated February 4, 2021, "Forms of Acknowledgment and Powers of Attorney" https://www.mass.gov/memorandum/form-of-acknowledgments-and-powers-of-attorney

2. Requires acknowledgment of deeds, mortgages, powers of attorney/limited powers of attorney used in connection with a conveyance and mortgages regardless of where notarized. Must use Massachusetts form of acknowledgment conforming substantially with statutory form of language (M.G.L. Ch. 222, §15(b)).

3. Critical language – free act and deed; signed voluntarily for its stated purpose.

4. Acknowledgment in compliance with M.G.L. Ch. 222, §15(b) required for registered and recorded land

    a. Some states do not allow notarization using of out of state form of acknowledgement. Some (Ex.CA) have through recent legislation allowed use of out of state forms of acknowledgment

    b. Securitized loan pools may have a cascade of LPOA's with non-compliant acknowledgments. Re-execution with conforming acknowledgment has been the norm.

B. Occupancy Status at Time of FC

1. Properties which are vacant or abandoned or occupied by a party other than the owner at the time of the FC sale

    a. Occupied properties present complex issues for the buyers and those seeking title insurance, especially due to the litigation risks. Vacant properties don't necessarily come with the same litigation risks, a summary process action for possession, as such they may be easier for a buyer to get title insurance after a proper review of the FC.

    b. Duly executed affidavit of sale is conclusive that the power of sale under the mortgage was duly executed and sale was legally compliant with MA law, three years after recordation without a proper challenge. M.G.L. Ch. 244, §15(c) effective January 2, 2016.

    c. Same protection not afforded foreclosing mortgagee who takes property at FC sale until they sell to a BFP.

2. Properties which are occupied at time of FC through the closing with a third party for consideration (a BFP)

    a. Due to the lack of statutory protections for the buyers of a foreclosed property, an occupied property presents additional complications for the buyer and a Title Company being asked to insure. See M.G.L. Ch. 244, §15 et seq,

    b. Validity of the FC can be challenged at any time by owner occupant if records copy of pleading within 60 days of filing.

C. Strict Compliance with Power of Sale

1. Lack of statutory protections until three years after recordation of affidavit of sale under M.G L. Ch. 244, §15(c) without a challenge requires review of off record FC notices and documents as part of title underwriting

a. The foreclosing mortgagee needs to be the holder (owner) of the note or the authorized agent of the holder (owner) of the note. *Henrietta Eaton vs. Federal National Mortgage Association & another.* 462 Mass 569

i. Lost note affidavits are not effective in Massachusetts

ii. The party who lost the note needs to bring the lost note enforcement action, *Zullo v. HMC Assets, LLC, et.al.* MISC 16-000413 – See also, M.G.L. Ch. 106, §3-309

b. §35A/B right to cure/loan modification notices must substantially comply with 209 CMR 56

i. Review form and content of notices for compliance

ii. fatal irregularities (incorrect loan balances; missing language; additional enclosures)

iii. Party sending notice must be the holder of the mortgage or a servicer entitled to collect the debt on their behalf

iv. Addressed and mailed to each mortgagor with proof of timely mailing by certified mail

a. deceased borrower

v. Validity of right to cure notice - sent once every three years

c. Acceleration notices

i. Must strictly comply with disclosures under Paragraph 22 of the mortgage or relevant notice provision of that mortgage. *Pinti v Emigrant Mortgage Company*, 472 Mass. 226

ii. Evidence of timely mailing

d. Eaton Affidavits, 209 Certification

2. Mortgage Assignments

a. Assignment recitations must be accurate; assignment chain must be complete and unbroken. Gap assignments have no effect in Massachusetts.

b. Assignments executed by attorney in fact must be supported by one or more as applicable recorded, valid and unexpired LPOA's

c. Executed and recorded 209 Certification

d. Mortgages held by out of state unrecorded trusts (i.e., DE trust)

i. Generally arise when agent signed POA on behalf of the trust

ii. Title companies generally will insure; Perceive trust as akin to a corporation rather than indefinite reference

D. Massachusetts Land Court

1. SCRA Action – a separate action to the non-judicial foreclosure, but if not done properly, will cloud title

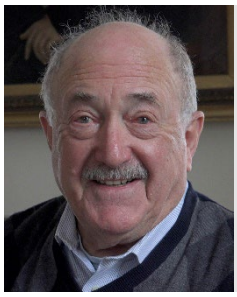
a. Plaintiff must be current holder of note and mortgage
b. Defendant(s) must be current owners of record of the property
c. Deceased borrowers – exercise due diligence to locate heirs
d. Not subject to Civil Rules of Procedure
e. Standing of Plaintiff and Defendant limited *HSBC Bank USA, N.A. Trustee v. Matt,* 464 Mass193
f. Plaintiff may not proceed with FC sale until judgment issues
g. Sale must be held within three years of the date of the judgment

2. Actions to Quiet Title – Mortgage Reformation, etc.
    a. Expect substantial (2-3 years) Land Court delays in docketing, judgment

E. <u>FC Deed Package</u>

1. Complete FC deed package: Judgment, executed Deed, POA (unless foreclosing mortgagee employee makes the entry), Certificate of Entry, Affidavit of Sale, Publication Tear Sheet, Eaton Affidavit, other applicable Affidavits and if required, LPOA's and Assignment of Bid
    a. M.G.L. Ch. 183, §54B – helpful statute for execution of mortgage related documents like, discharges, assignments, foreclosure documents and LPOA's related to mortgage servicing.
2. Additional information to look for in the Affidavit of Sale: general circulation, recitation to postponements, beyond three postponements and depending on the length of the postponements the sale may not be insurable. Also, the affidavit should recite what happened at the auction when dealing with failed bids made in good faith, i.e., include the name and amount of said bid in addition to that bidder's failure to perform.
    a. Publication in a newspaper, is it the best practice for our current times, digital age?
3. Include reference to recorded POA/LPOA or include recordable form
4. Fallout from COVID rolling forbearance/loss mitigation: Impact of restarts/delays
    a. Contractual notices and documents expiring/ becoming stale
    b. Expired/noncompliant POA's and LPOA's cause cascade of delays
    c. Expiration of mortgages under M.G.L. Ch. 260 §33
    d. Expiration of SOL of notes
5. Registration of FC deed Package
    a. Must submit complete FC package for approval before filing
    b. No checklists used by examiners to review package
    c. Inconsistent treatment of authority documents
    d. Some revisiting of prior examiner approvals
    e. An overworked court staff may lead to delays, be prepared with extensions on the closing with the buyer

Ethical Issues and the BBO: Helping Conveyancers Avoid Both



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Ethical Issues and the BBO: Helping Conveyancers Avoid Both

About the Office of Bar Counsel

- The Office of Bar counsel (OBC) investigates and prosecutes complaints of professional misconduct by Massachusetts lawyers. See SJC Rule 4:01 for an explanation of the disciplinary process.
- If, after investigation, a complaint is found to merit discipline, bar counsel will file and prosecute a petition for discipline with the Board of Bar Overseers, which will assign the case to a hearing committee.
    - Lesser misconduct may warrant a (private) admonition or a diversion.
    - As an alternative to a hearing, bar counsel and the lawyer may reach a stipulation on the discipline to be imposed.
- The Attorney and Consumer Assistance Program (ACAP) is the intake unit of the Office of Bar Counsel. ACAP resolves routine concerns or minor disciplinary issues without opening a disciplinary file and promptly refers matters that raise issues of more serious misconduct for investigation.

Disciplinary Complaints Involving Conveyancers

- OBC opens far and away more files against real estate lawyers than any other category of practitioners.
    - Other leading areas of practice in terms of bar counsel files are civil litigators, divorce lawyers, immigration lawyers; but real estate lawyers far outpace any of those groups.
- This is perhaps mostly attributable to maladministration of IOLTA accounts, of which real estate conveyancers typically have more than one, and with respect to which conveyancers tend to rely heavily on paralegals, bookkeepers, and other non-lawyer staff.
- Files are frequently opened as a result of insufficient funds notifications sent directly to OBC by banks.
    - Investigation often reveals inadequate recordkeeping and other IOLTA administrative practices. Key takeaway: Get your IOLTA houses in order!

Lack of Diligence, Competence, and/or Communication

- Mass. R. Prof. C. 1.1 (Competence); 1.3 (Diligence); 1.4 (Communication). Key factors in this type of case are whether the misconduct was isolated (vs. part of a pattern) and the extent of client harm.
- Matter of Pham, 30 Mass Att'y Disc. R. 537 (2013). Public reprimand where attorney failed to advise buyer-clients that under terms of proposed purchase and sale agreement, they risked losing deposit. Clients lost $13,000.
- Matter of Slipp, 38 Mass Att'y Disc. R. ___ (2022). Indefinite suspension for lawyer whose misconduct included a lack of competence and diligence in failing to pay off a mortgage following a real estate closing. The lawyer sent funds to the mortgagee in the amount shown on a payoff statement, but the payoff statement had expired, and the figures had changed. The lawyer collected additional funds from the buyers and attempted a second payoff, but again the figures had increased. Ultimately, the buyers had to retain new counsel and expend an additional $6,600 in interest and other charges to get the mortgage paid off some ten months after the closing.

Lack of Diligence, Competence, and/or Communication *(cont'd)*

- Matter of Kiely, 36 Mass. Att'y Disc. R. 287 (2020). Public reprimand for lawyer who, acting as settlement agent, failed to make timely distribution to mortgagors of the proceeds from real estate sale, resulting in additional per diem charges to the mortgagee.

- Matter of Kelley, 24 Mass. Att'y Disc. R. 392 (2008). Attorney failed to review title examination, negligently certified clear title, failed to pay title insurance premium, erroneously had deeds signed by unauthorized person, and failed to remit funds that had been withheld at closing to pay water and sewer.

Bounced IOLTA Checks

- **Funds Must Clear Before They are Disbursed**

  - A lawyer must verify that funds have **cleared** before disbursing funds. Available and cleared are different. The lawyer must verify the funds have CLEARED before authorizing any disbursement.

  - Contact a senior officer at your bank and determine the bank's rules and policies on deposited items, holds, etc.

  - DO NOT give out post-dated checks.

- **Common problems that cause bounced checks:**

  - "I grabbed the wrong checkbook."

  - "My client begged me for a post-dated check."

  - "I deposited a settlement check and disbursed against it before it cleared."

  - "My banking app showed the funds as 'available.'"

  - "I / my secretary / the bank teller deposited the funds to the wrong account."

  - "I made a mistake and wrote a check for $1550 instead of $1500."

  - "I ordered checks, but I hadn't deposited personal funds into the account to pay for them."

  - "The bank made a mistake!" This might be true, but do you have the required records that would ensure that you caught the error?

IOLTA Account Shortfalls: Disciplinary Cases

- Absent a bank error, a confirmed shortfall in a client trust account signifies that client funds have been misused, either negligently or intentionally. This is a serious situation and it's the reason for requiring banks to notify bar counsel of a bounced check from an IOLTA.

- Regardless of the reason, when a shortfall is discovered, it is important not to continue disbursing funds from the account!

  - Matter of Dodd, 21 Mass. Att'y Disc. R. 196 (2005). Suspension for a year and a day where attorney intentionally issued checks from his IOLTA account to cover obligations at closings when he knew the account had a deficit.

  - Matter of Franchitto, 23 Mass. Att'y Disc. R. 163 (2007). Public reprimand of conveyancing attorney who suffered shortage in IOLTA account as a result of client fraud, but conducted two closings after he became aware of deficit without informing participants that he had insufficient funds to pay disbursements.

IOLTA Recordkeeping

- You must keep CONTEMPORANEOUS records in THREE locations:
  1. IOLTA Account Check register
  2. Individual Client Ledgers for each client matter, AND
  3. Bank Ledger for any personal / firm funds to cover bank fees (and to track interest)
- Requirement One: The Overall Check Register
  - The primary check register: All transactions must be recorded contemporaneously in chronological order.
  - Date, amount and client identifier for every deposit
  - Date, check #, payee, amount and client identifier for every withdrawal
  - Date and amount of every interest debit and credit
  - Includes all types of transactions (check, wire, EFT)
  - Specific, consistent client identifier for each transaction
  - Running balance *after each transaction*
- Requirement Two: Individual Client Ledgers (The bundles that make up the whole)
  - Each individual client ledger must:
    - Name the client matter.
    - Start with a deposit for that client (No individual client ledger should ever have a negative balance!).
    - Document all the funds received or disbursed within the IOLTA account for that client matter (date, source, payee).
    - Reflect the balance held following every transaction for the client matter.
      - This allows you to (1) look at any client ledger and instantly know the client's balance and (2) avoid making a disbursement on a client matter for which the account does not contain sufficient funds.
- Requirement Three: Ledger for Bank Fees (Firm Funds)
  - The funds deposited to pay for "reasonably expected" bank fees and charges are the only personal funds a lawyer is permitted to hold in an IOLTA account.
  - Do not hold more than $200 unless circumstances warrant doing so (e.g., multiple wiring fees each month).
  - The Bank Fees ledger is also a convenient place to record interest earned and disbursed to IOLTA, especially if your bank does not credit and debit the monthly interest on the same day.

IOLTA Recordkeeping *(cont'd)*

- ▶ <u>You must conduct a three-way reconciliation at least every 60 days</u>
  - The total of all client subaccounts, plus the subaccount for bank fees, must match the overall IOLTA account balance.
  - And this total must also align with the balance shown on the most recent bank statement, adjusting for any uncashed checks or other transactions not yet shown on the bank statement.
- ▶ An attorney must REVIEW the reconciliation report. Any discrepancies between what the bank records show and what the lawyer's records show must be corrected immediately. Be sure to document where and how you made any corrections.

❍ Software Programs

- ▶ There are many different programs.
  - Convenience of one-time input of information.
  - BUT they generally do not produce the required records "out of the box."
- ▶ You must ensure that the records generated contain the specific requirements enumerated in Rule 1.15(f)(1)(B),(C),(D) and (E). Your program's "Reconciliation" may not be compliant.
- ▶ You may need to contact the software provider to determine how to produce the records you are required to maintain.

Undisbursed IOLTA Funds

- ▶ Watch out for and RESOLVE uncashed checks and positive balances.
- ▶ Rules implicated:
  - Mass. R. Prof. C. 1.15(c): "Prompt Notice and Delivery of Trust Property to Client or Third Person"
  - Mass. R. Prof. C. 1.3: "Diligence"
  - Mass. R. Prof. C. 1.4 "Communication"
- ▶ Uncashed checks: High volume real estate practices: recording fees, discharge fees, liens, real estate taxes.

Recordkeeping/Undisbursed Funds: Disciplinary Cases

- The typical sanction for recordkeeping violations under Rule 1.15 is a public reprimand. *See, e.g.*, Matter of Matuzek, 34 Mass. Att'y Disc. R. 303 (2018) (13-year failure to maintain adequate records, remit unearned fees to clients, and promptly withdraw earned fees from IOLTA); Matter of Weiner, 34 Mass. Att'y Disc. R. 562 (2018) (12-year failure to perform three-way reconciliations and keep required IOLTA records; lawyer also deposited and retained personal funds in the account); Matter of Coyne, 28 Mass. Att'y Disc. R. 162 (2012) (lawyer failed to keep required IOLTA records, notify client of receipt of funds, and promptly remit funds due client).

- However, recordkeeping violations, coupled with long-term accruals of undisbursed funds, have been met with stayed, three-month suspensions, with conditions. *See* Matter of Murray, 36 Mass. Att'y Disc. R. 341 (2020); Matter of Barrett, 36 Mass. Att'y Disc. R.63 (2020) and Matter of Mahoney, 35 Mass. Att'y Disc. R.423 (2019).

Matter of Olchowski, 485 Mass. 807 (2020)

- IOLTA funds are not within the Abandoned Property statute.

- IOLTA funds cannot escheat to the Treasurer.

- If you have such funds, they will be transferred to the IOLTA Committee upon bar counsel's motion to the SJC.

- See the OBC article at massbbo.org: "*Olchowski Decision and the Disposition of Unidentified and Unclaimed IOLTA Funds"*

Engagement Letters

- Rule 1.5 - Engagement letters are required for any matter where the lawyer reasonably expects the fee to exceed $500.

- Purpose –

    - State fees to be charged, and more importantly, how and when they will be collected.

    - Accurately describe the limits of your representation.

    - If fixed fee, describe any exceptions or potential additions to this fixed fee.

    - Are you representing the lender as well? Clearly outline the relationship and how you will handle a conflict of interest.

Conflicts of Interest

- Pitfalls of Representing the Buyer and the Bank
  - Most common – the so-called "repair rider" attached to the P&S and not sent to the lender.
  - Funds provided to buyer through an undisclosed loan from a family member.
  - Changes in buyer's circumstances that have not been disclosed to the lender.
  - Issue in the title or shown on the survey or plot plan – lender gets title insurance coverage but buyer does not.
- What do you do? Pick one client? Leave both?
- Remember who your client is!
  - Representing siblings – make sure that you have consent from all, in writing, before following any course of conduct.
  - Beware unintended expansion of representation – in the course of handling sale of a trust property, one beneficiary starts asking questions about a second piece that she owns individually.
- Unrepresented sellers when you are representing buyer and lender
  - How far do you go to "help out"?

Conflicts of Interest: Disciplinary Cases

- Matter of Strojny, 28 Mass. Att'y Disc. R. 827 (2012). Nine-month suspension for violation of rules including 1.7(b) and 8.4(c) and (h). Attorney represented a lender in a real estate transaction at the same time as he was seller's real estate broker and entitled to a 5% cut and had a 50% interest in the mortgage broker firm to whom he referred the buyer, all without informed consent.
- Matter of Pike, 408 Mass. 740 (1990). Six-month suspension where attorney represented landlord and tenant in real estate transaction in which he also acted as broker for landlord, thus earning broker's fee.
- Matter of Brady, 7 Mass. Att'y Disc. R. 18, 22 (1991). Public reprimand and one-year probation where attorney had represented both buyer and seller in real estate transaction, and did not zealously represent the seller, resulting in her loss of a substantial asset.

Supervision

- Rule 5.3(b) – "[A] lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer[.]"
  - Rule 5.3(a) imposes the same responsibility on partners toward associates.
- Compliance with Rule 1.15 is a Non-Delegable Duty
  - Hiring a bookkeeper or office manager to maintain billing and/or financial records does not absolve the lawyer of the responsibility to comply with Mass. R. Prof. C. 1.15.
  - Many title insurance companies audit their agents' accounts for compliance with their requirements. This does not mean the records are compliant with Mass. R. Prof. C. 1.15.

Supervision: Disciplinary Cases

- Admonition No. 03-06, (2003). Attorney failed to supervise real estate paralegal. Paralegal, unknown to respondent, recorded lender's mortgage when funds were not good and delayed four additional days before fully dispersing those funds.

- Matter of Goldberg, 23 Mass. Att'y Disc. R. 191 (2007). One year and a day suspension of attorney who engaged in negligent misuse when he delegated all responsibility for checkbooks and closing-related mail to inexperienced office manager, gave her authority to sign checks, and failed to have any controls in place.

- Matter of Heartquist, 28 Mass. Att'y Disc. R. 446 (2012). Suspension of six months and a day for attorney who negligently misused client funds due to theft by office manager, who failed to deliver checks to title insurance companies and others to whom funds were due. Attorney questioned employee who provided various explanations for IOLTA checks made out to herself and lawyer accepted explanations. Attorney also violated record-keeping rules.

Escrow Disputes

- Try to avoid holding a deposit – better practice is to have the funds held by the broker.

- No broker – funds are usually held by the seller's attorney with escrow protection provisions for the seller's attorney included in the P&S.

- In the event of a dispute over a deposit – don't pick a side! – place funds in escrow with a third party or file interpleader action in court, just as a broker would do.

- Obtain signed instructions and releases from everyone before making any disbursements.

Escrow Disputes: Disciplinary Cases

- Matter of Lacet, 24 Mass. Att'y Disc. R. 409 (2008). Public reprimand for buyers' counsel in home sale for unilaterally deciding to withhold in escrow $10,000 in sale proceeds in order to see if the sellers damaged the home during move-out. After learning of damage, the lawyer then released the $10,000 to the buyers even though the monies belonged to the seller under the deal.

- Admonition No. 15-25, 31 Mass. Att'y Disc. R. 791 (2015). Violations of 1.3, 1.15(c), and 1.15(e)(6). Respondent was the settlement agent in a real estate transaction. Under the terms of the escrow agreement, he withheld a portion of the sale proceeds pending the removal of a neighbor's shed encroaching on the subject property. Respondent did not subsequently release the funds as dictated by the escrow agreement but rather held the funds in his IOLTA account for three years until the buyer lodged a complaint with bar counsel. Respondent was found to have failed to act with reasonable diligence, failed to promptly deliver the funds, and wrongly holding trust funds in a non-interest-bearing client trust account for three years.

Notarization Practice

Moving target at this time – REBA legislation House No. 4716 on remote online notarization, allowed in 40 states.

"Old way" – in person, with identification confirmed, with active assent of party executing documents.

Bar counsel has prosecuted many lawyers for false notarizations, usually under Rule 8.4(c) (prohibiting conduct involving "dishonesty, fraud, deceit, or misrepresentation").

- Matter of Driscoll, 447 Mass. 678 (2006). A lawyer represented his employee and her bank at a loan closing. The employee forged her spouse's signature on a loan document and lied to the lawyer about it. The lawyer notarized the spouse's signature. The lawyer was found guilty of one count of making a false statement to a bank in violation of 18 U.S.C. § 1014 and sentenced to probation. The bank suffered no harm, but the SJC found that the lawyer had a conflict in representing the employee that resulted in his placing too much confidence in her to the detriment of the bank/client, thus warranting a one-year suspension.

Avoiding Scammers

▶ Rules implicated (a non-exclusive list):

- Rule 1.15(b) and (c) – Lawyer's duty to safeguard funds in trust pending disbursement to the client or rightful owner
- Rule 1.1 – ("Competence"): As reflected in Comment [8] to the rule, competence requires a lawyer to "keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology"
- Rule 5.3(b) – "[A] lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer[.]" (Rule 5.3(a) imposes the same responsibility on partners toward associates.)

▶ Ways to Avoid:

- Make Sure You Have Good Funds
- Wire instructions
- Positive Pay
- Limiting Access to Your Accounts

Resources

- If you have ethical questions, you can call the Office of Bar Counsel at 617-728-8750, on Monday, Wednesday, and Friday, from 2:00 p.m. to 4:00 p.m., and speak to an assistant bar counsel.
- Check out our website at **www.mass.gov/obcbbo** (includes links to the rules; answers to frequently asked questions; articles on ethics prepared by assistant bar counsel; disciplinary decisions dating back to 1999; information on upcoming programs and new developments; and other resources).
- Trust account training programs – monthly free programs (check our website); also training/information is available through LOMAP, the Mass IOLTA Committee, and periodic MCLE and bar association courses.
- Ethics Helpline – The REBA Ethics Section offers individual, one-on-one advice to members who encounter conflicts concerns or ethical issues in their day-to-day practice. This program is intended to offer confidential, practical and pragmatic advice to members with immediate, fact-based concerns. For more information, email ethics@reba.net.

RULES OF PROFESSIONAL CONDUCT RULE 1.5 (FEES)

(b) (1) Except as provided in paragraph (b)(2), the scope of representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client in writing before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate.

REBA ETHICS SECTION
RULE 1.5 FEE DISCLOSURE

THE RULE: 1.5 FEES

SCOPE OF REPRESENTATION

BASIS OF *FEES*

SHALL BE *COMMUNICATED*

TO THE *CLIENT*

IN *WRITING*

NO MORE REQUIRED:

NO LETTER

NO CLIENT SIGNATURE

MAY BE FROM 3RD PARTY, NOT THE ATTORNEY (E.G. BANK)

WITHOUT COMPLIANCE

POSSIBLE DISCIPLINE

NO STANDING IN EVENT OF FEE DISPUTE

POSSIBLE SOURCE OF MALPRACTICE REGARDING SCOOPE

KEEP CLEAR WHO IS THE CLIENT?

SELLER

BUYER/BORROWER

LENDER

CLIENTS:

IF SELLER: CANNOT REPRESENT LENDER OR PROVIDE TITLE SERVICES TO BUYER

IF LENDER: RULE SATISFIED BY COMMITMENT LETTER OR TRANSCRIPT

NO REASON WRITTEN COMMUNICATION CANNOT BE FROM THE CLIENT

RELATIONSHIP WITH BUYER:

FREE P&S
DEED FREE OR OTHERWISE

RELATIONSHIP WITH SELLER:

DISCHARGE TRACKING AND TITLE CLEARING

IF LENDER WHERE FEES PAID BY BORROWER AND FEES NOT STATED
(R. 4.1 Truthfulness in Statements to Others)

UNREPRESENTED BUYER: RELIANCE ON LENDER COUNSEL FOR TITLE

IMPORTANCE OF NOTICE OF NON-REPRESENTATION TO APPROPRATE PARTIES

WHY GO BEYOND THE RULE?

INFORM CLIENT

AVOID LIABILITY (WHAT IS EXCLUDED FROM SCOPE?)

AVOID OR RESOLVE FEE DISPUTE

ESSENTIAL FOR FIXED FEE ENGAGEMENTS (WHAT DOES THE FEE COVER?)

ADDITIONAL PROVISIONS

RETAINER, TIME OF PAYMENT AND INTEREST

OWNERSHIP AND DISPOSITION OF FILES

WIRE TRANSFER WARNING

ESCROW MANAGEMENT AND DISPUTE RESOLUTION

BBO ACTION:

Virtually no BBO cases involving real estate transactions, and in the non-real estate cases, it rarely stood alone as the only offense (See: Public Reprimand No 2021-3 Stefan J. Rozembersky)

Written Fee Arrangement:
Representation of Seller in a Residential Purchase Transaction

Addressee Name

Re: Sale of (property address)

Dear _____:

Thank you for the opportunity to represent you in matters relating to the sale of the above referenced premises. I/We write to you in accordance with Massachusetts Rules of Professional Conduct 1.5(b) which requires me/us to communicate to you in writing the scope of my/our representation and the basis or rate of my/our fees and expenses charged.

Scope of Representation

The scope of my/our representation will include some or all of the following services:

- Reviewing offers to purchase and any other related documentation;
- Drafting, reviewing, and/or negotiating the purchase and sale agreement;
- Calculating adjustments;
- Attending the closing and supervising the sale;
- Consulting with you as to the terms and particulars of the transaction;
- Communicating with brokers, attorneys and/or the buyer;
- Drafting the deed and power of attorney;
- Obtaining a copy of the current deed from the appropriate Registry of Deeds or Land Court District.

Unless otherwise expressly agreed in writing, the scope of my/our engagement shall be limited to the foregoing and shall not include issues of valuation; advice on structural, mechanical, building code, septic, engineering or survey issues; or matters relating to zoning, wetlands or hazardous substances.

Fees and Costs

In contemplation of the above-described services, you have agreed to pay a flat fee of _____ plus costs for my/our services in this matter which will be payable at [time of closing, date certain, etc.]. Costs are likely to include the following:

_____.

Although I/we have endeavored to identify all likely costs, you will be responsible for paying all costs that are incurred in the course of the representation, whether or not the costs are identified herein.

OR

In contemplation of the above-described services, you have agreed to pay my/our hourly rate of _____ for each hour worked on this matter, plus costs. Costs are likely to include the following:

_____.

Although I/we have endeavored to identify all likely costs, you will be responsible for paying all costs that are incurred in the course of the representation, whether or not the costs are identified herein.

My/Our fees and costs will be payable at [time of closing, date certain, etc.].

OR

I/we will bill you for my/our services on a monthly basis and payment will be due within _____ days of [the date of the bill, receipt of the bill].

I/We appreciate the opportunity to be of service to you in this transaction. Please do not hesitate to call me/us with any questions you may have about any aspect of my/our representation.

I/We would also appreciate your signature below acknowledging your receipt and understanding of the terms of this letter and my/our prospective representation.

Sincerely,

_____

Agreed to and acknowledged:

_____
Seller

Comments

Revisions to Mass. R. P. C. 1.5 went into effect on January 1, 2013. With limited exceptions, the amended rule requires that for all representation commenced on or after January 1, 2013, a lawyer must, "within a reasonable time" after commencement of the representation, provide the client with a writing which sets forth "the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible." The "writing" does not have to be in letter form so long as it contains the two required pieces of information.

A writing is not required under the following four (4) circumstances:

- *Where the lawyer regularly represents a client, originally fulfilled the writing requirement and there has been no change in the basis or rate of the fee.*
- *Where the representation will consist of a "single-session legal consultation."*
- *Where the lawyer reasonably expects the total fee to the client will be under $500.*
- *Where an indigent fee is imposed by a court.*

In the absence of one of the four enumerated exceptions, a lawyer who represents either a buyer or a seller in a real estate transaction is required to provide the client with a written fee arrangement as described in Rule 1.5(b).

In transactions where the lawyer represents the lender, the lender is often – although not always – a regularly represented client and thus a writing is not required for each new transaction. However, if the lawyer does not regularly represent the lender, a written fee arrangement is necessary.

Adopted May 6, 2013

REBA Form No.59A

Written Fee Arrangement:
Representation of Buyer in a Residential Purchase Transaction

Addressee Name

Re: Purchase of (property address)

Dear _____:

Thank you for the opportunity to represent you in matters relating to the purchase of the above referenced premises. I/We write to you in accordance with Massachusetts Rules of Professional Conduct 1.5(b) which requires me/us to communicate to you in writing the scope of my/our representation and the basis or rate of my/our fees and expenses charged.

Scope of Representation

The scope of my/our representation will require some or all of the following services:

- Drafting offers to purchase and any other related documentation;
- Drafting, reviewing, and/or negotiating the purchase and sale agreement;
- Calculating adjustments;
- Attending the closing and supervising the purchase;
- Consulting with you as to the terms and particulars of the transaction;
- Communicating with brokers, attorneys and/or the seller;
- Drafting and negotiating any extension(s) for financing and closing dates, if necessary;

Unless otherwise expressly agreed in writing, the scope of my/our engagement shall be limited to the foregoing and shall not include issues of valuation; advice on structural, mechanical, building code, septic, engineering or survey issues; or matters relating to zoning, wetlands or hazardous substances.

Fees and Costs

In contemplation of the above-described services, you have agreed to pay a flat fee of _____ plus costs for my/our services in this matter which will be payable at [time of closing, date certain, etc.]. Costs are likely to include the following:

_____

Although I/we have endeavored to identify all likely costs, you will be responsible for paying all costs that are incurred in the course of the representation, whether or not the costs are identified herein.

OR

In contemplation of the above-described services, you have agreed to pay my/our hourly rate of _____ for each hour worked on this matter, plus costs. Costs are likely to include the following:

_____

Although I/we have endeavored to identify all likely costs, you will be responsible for paying all costs that are incurred in the course of the representation, whether or not the costs are identified herein.

My/Our fees and costs will be payable at [time of closing, date certain, etc.].

OR

I/we will bill you for my/our services on a monthly basis and payment will be due within _____ days of [the date of the bill, receipt of the bill].

I/We appreciate the opportunity to be of service to you in this transaction. Please do not hesitate to call me/us with any questions you may have about any aspect of my/our representation.

I/We would also appreciate your signature below acknowledging your receipt and understanding of the terms of this letter and our prospective representation.

Sincerely,

_____

Agreed to and acknowledged:

_____
Seller

Comments

Revisions to Mass. R. P. C. 1.5 went into effect on January 1, 2013. With limited exceptions, the amended rule requires that for all representation commenced on or after January 1, 2013, a lawyer must, "within a reasonable time" after commencement of the representation, provide the client with a writing which sets forth "the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible." The "writing" does not have to be in letter form so long as it contains the two required pieces of information.

A writing is not required under the following four (4) circumstances:

- *Where the lawyer regularly represents a client, originally fulfilled the writing requirement and there has been no change in the basis or rate of the fee.*
- *Where the representation will consist of a "single-session legal consultation."*
- *Where the lawyer reasonably expects the total fee to the client will be under $500.*
- *Where an indigent fee is imposed by a court.*

In the absence of one of the four enumerated exceptions, a lawyer who represents either a buyer or a seller in a real estate transaction is required to provide the client with a written fee arrangement as described in Rule 1.5(b).

In transactions where the lawyer represents the lender, the lender is often – although not always – a regularly represented client and thus a writing is not required for each new transaction. However, if the lawyer does not regularly represent the lender, a written fee arrangement is necessary.

Adopted May 6, 2013

REBA Form No.59B

APPLICATION OF INTEREST

Statements, when rendered, are payable upon receipt. We reserve the right to apply interest at the rate of 1.5% percent per month on balances outstanding more than 30 days.

DISPOSITION OF FILES

The contents of our files (other than internal notes and memoranda), belong to you, the client, and, at the conclusion of our engagement, if you would like to have the file delivered to you or another designated person, you are requested to provide us with delivery instructions and pay all copy and delivery charges within one year of the conclusion of our engagement. After that time, we reserve the right to send the original file to storage, to electronically scan and retain it in digital format or to destroy it at our option.

WIRE TRANSFER WARNING

Please be advised that we will never provide, accept or honor wire instruction sent by email, and you are advised to do the same.

REPRESENTATION OF LENDER (FOR BUYER ONLY)

If, in addition to the foregoing, you ask us to close your mortgage loan for the lender, you should be aware that, while you may benefit from such an arrangement, our primary obligation in the mortgage transaction is to the lender.

REBA Ethical Standard No. 5

Wire Transfer Funds

Any attorney who has been asked to wire transfer funds in connection with a closing may, in the case of reasonable doubt as to the authenticity or correctness of the wire instructions, refuse to execute the wire transfer.

Adopted November 6, 2017

REBA Practice Standard No. 25

Electronic Funds Transfers

It is better practice for the conveyancing attorney to require receipt of significant funds and, upon a request that is reasonable under the circumstances, to make disbursement of significant funds by way of an electronic funds transfer (an "EFT" or "wire transfer") rather than by bank check or cashiers check, both of which are subject to various holding periods as set forth in Regulation J at 12 CFR 210 and Regulation CC at 12 CFR 229.

Comment

Money received via EFT enables immediate use of those funds to provide seller proceeds, as well as mortgage payoffs and eliminates delay as well as the inadvertent "kiting" of funds in the closing attorney's IOLTA account while awaiting checks to be credited.

See R.E.B.A. v NREIS, 459 Mass. 512, 687 (2011) which expresses the duties and related ethical obligations of the closing attorney concerning loan proceeds:

> *"In addition to marketability of title, a closing attorney has a duty to effectuate a valid transfer of the interests being conveyed at the closing. This includes not only the actual transfer of title on behalf of the attorney's client, but also the transfer of the consideration for the conveyance—typically mortgage loan proceeds in the case of the mortgage transactions at issue here. With respect to such loan proceeds, the duty derives in part from rules of professional conduct. See Matter of Franchitto, 448 Mass. 1007, 1008, 860 N.E.2d 656 (2007), citing Mass. R. Prof. C. 1.15(a), 426 Mass. 1363 (1998), and G.L. c. 183, § 63B.[FN48]*
>
> > *FN48. See Part 4(a)(iii), supra, where we discuss the good funds statute. The statute, among other things, stipulates that mortgage proceeds owed to a borrower may be disbursed to "the mortgagor, the mortgagor's attorney or the mortgagee's attorney."*
> >
> > *G.L. c. 183, § 63B. If the funds are disbursed to one of the attorneys, that attorney is obligated under the statute as well as professional conduct rules to see to it that such disbursements are properly and timely transferred to the appropriate recipient or recipients. See Matter of Franchitto, 448 Mass. 1007, 1008, 1010, 860 N.E.2d 656 (2007) (upholding public reprimand of attorney whose lender client fraudulently failed to fund loans it had engaged attorney to close; attorney violated both disciplinary rules and good funds statute)."*

Adopted May 7, 2012

HENRY J. DANE

PROPOSED ETHICS/PRACTICE STANDARD
RE: DELIVERY OF PROCEEDS

DRAFT JUNE 5, 2017

"The sole obligation of a conveyancing attorney with regard to the delivery of the seller's proceeds in a residential transaction is to deliver a check after the deed has been recorded on the attorney's Massachusetts IOLTA account (or, upon request and the payment of an additional fee, a bank cashier's or treasurer's check) drawn to the exact names of seller(s) as set forth in the deed, or in accordance with written instructions delivered at the closing, signed by all sellers shown on the deed. Any other means of delivery shall be in the discretion of the conveyancing attorney who may impose an appropriate charge for such service."

WE WILL NEVER SEND YOU WIRE INSTRUCTION BY EMAIL

Henry J. Dane, J.D., Ph.D.
Dane Brady & Haydon, LLP, Attorneys-at-Law
PO Box 540 Concord, Massachusetts 01742
Email: hdane@danelaw.com
Phone: 978-369-8333 Ext. 18
Fax: 978-369-3106

DB&H

PRIVILEGED AND CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION

PLEASE CALL DANE BRADY & HAYDON, LLP AT 978-369-8333 FOR INSTRUCTIONS BEFORE YOU SEND ANY FUNDS TO OUR OFFICE.
BECAUSE OF THE POTENTIAL FOR FRAUD, PLEASE DO NOT HONOR ANY WIRE INSTRUCTIONS SENT TO YOU BY E-MAIL INCLUDING THOSE THAT APPEAR TO COME FROM OUR OFFICE. IF YOU REQUEST THAT ANY FUNDS BE SENT
BY WIRE, WE CAN ONLY ACCEPT YOUR INSTRUCTIONS lF GIVEN ON OUR OWN FORM.
NEITHER ORIGINAL INSTRUCTIONS NOR ANY CHANGES WILL BE ACCEPTED WHETHER BEFORE OR AFTER THE CLOSING IF DELIVERED BY E-MAIL (EITHER OPEN OR SECURE).

7. PURCHASE PRICE:

The agreed purchase price for said premises is Two Million Nine-Hundred and Seventy Thousand ($2,970,000.00) Dollars and 00/100, of which

$	10,000.00	has been paid with the Offer to Purchase
$	138,500.00	have been paid as a deposit this day and
$	2,821,500.00	are to paid at the time of delivery of the deed by wire transfer,
$	2,970,000.00	**in accordance with signed hard copy instructions given by the Seller or the Seller's Attorney at or prior to such time. Neither the Seller nor the Seller's attorney will ever provide wire instruction by means of email, and the Buyer is advised not to accept wire instructions transmitted by email regardless of the source**

Outline for Safe and Compliant Distribution of Closing Funds

I. IS THE MONEY THERE?

Good funds law 183 sec. 16B - re: mortgage proceeds (binding on lenders only?)

Certified check, bank treasurer's check, cashiers check, transfer between accounts in same bank, or wire [FR or automated clearing house]

Good Funds standards apply to non-mortgage funds?

Safe to take IOLTA Checks?

worry about other attorney being rendered insolvent by scam

Will you bank wire out uncollected funds - subject to reversal

Can you close on uncollected funds

Funds wired in - what if your instructions to buyer or lender are hacked

Confirmation of funding with your bank: telephone, online, email

II. IS THE MONEY SAFE

FDIC protection of IOLTA Accounts - limits?

Safer than individual, insured accounts for amounts in excess of $250,000

Protection of accounts from unauthorized access

Separate from recording and Simplifile accounts

No ACH

On-line access – “view only”

Outline for Safe and Compliant Distribution of Closing Funds
(cont'd)

III. DISTRIBUTION

Who gets it: name on deed or mortgage note

Or by written direction of the above

Or "Attorney For" (?) with or without a power of attorney

What if seller won't accept IOLTA check as provided in P&S

Wire instructions

Signed

Complete

As early as possible

Limitations on alteration

Mailed, or delivered in person at closing

No email or fax:

Indemnification

OUTGOING WIRE TRANSFER PROCEDURE

1. NO WIRE INSTRUCTIONS OR CHANGE TO THEM ARE TO BE GIVEN OR ACCEPTED IF TRANSMITTED VIA EMAIL. NO EXCEPTIONS.

2. Instructions for outgoing wire transfers must be given on our own "Wire Transfer Authorization" form (Exhibit A) which must be signed by the verified recipient. If signed under a Power of Attorney, the POA must be reviewed for due authority and attached to the Authorization Form.

3. Wire instructions for Outgoing Mortgage Discharge payments may be accepted if received via fax (but not email), but ABA and account number must be verified by independent phone or by reference to our list of approved wire information for that lender. Funding must be verified by reference to settlement statement/funds reconciliation ledger.

4. All Outgoing Wire Transfers will be from our IOL TA XYZ account with ABC Bank only in writing on the Bank's Faxed Wire Transfer Order Form (Exhibit B) signed by an authorized signatory and delivered to the bank via fax or by hand to the bank branch.

5. After funds are verified, and Registry Recording (if necessary to the funding of the transaction) is confirmed, the Bank's Faxed Wire Transfer Order Form will be sent to the Wire Room via fax at the number on the Form.

6. After the form is faxed to the Bank, the Wire Room is called at the phone number on the form to verify and confirm the faxed instructions. The person making the call will be required to give their own individual PIN number.

7. Before initiating the Wire Transfer, the Wire Room will call back to confirm the originating phone call from our office. Again, the PIN number of the confirming party will be required by the Bank.

8. The transaction will be confirmed by an email sent to us from ewire@abcbank.com.

Black & Blue, LLP
Phone (617) 555-1212; Fax (617) 555-1213
WIRE TRANSFER AUTHORIZATION

PROPERTY ADDRESS: _____

NAME OF REQUESTOR: _____

PHONE NO. & EMAIL OF REQUESTOR: _____

NAME OF RECEIVING BANK: _____

ADDRESS OF RECEIVING BANK: _____

ACCOUNT NUMBER: _____

ABA/ROUTING NUMBER OF RECEIVING BANK: _____

TITLE OF DESTINATION ACCOUNT: _____

ADDRESS OF ACCOUNT HOLDER: _____

IN THE EVENT THE RECEIVING ACCOUNT REQUIRES FURTHER CREDIT INFORMATION:

FOR FURTHER CREDIT TO ACCOUNT NUMBER: _____

FOR FURTHER CREDIT TO ACCOUNT NAME: _____

OTHER SPECIAL INSTRUCTIONS: _____

We hereby request that a wire transfer of our funds be initiated in accordance with these instructions. We have confirmed and assume full responsibility for the legibility, accuracy and completeness of this information. We agree to promptly reimburse Black & Blue, LLP for any costs or expenses incurred in carrying out these instructions, and will defend, indemnify and hold said law firm, its members and employees harmless on account of any loss, damage or delay from whatever source in completing the requested transfer.

NOTE: ORIGINAL AUTHORIZATIONS OR CHANGES SENT BY EMAIL ***WILL NOT BE ACCEPTED***. A NEW AUTHORIZATION FORM WILL BE REQUIRED FOR ***ANY*** CHANGES TO PREVIOUSLY GIVEN INSTRUCTIONS.

_____* _____*
Signature Signature

_____ _____
Printed Name Printed Name

Date: _____

*If Executed under a **Power of Attorney**, please attach a copy to this form.

FOR OFFICE USE ONLY:

ABA # VERIFIED ONLINE _____ (http://www.checkcomposer.com/fnnbanksearch.aspx)

TELEPHONE VERIFICATION OF BANK INFORMATION _____
Initials

$$ AMOUNT VERIFIED AGAINST RECONCILIATION _____
Initials

Rev. 9/21/17

The Leading Land Use Cases of 2021 and 2022

Kate Moran Carter, Esq.

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(857) 453-4354
kcarter@daintorpy.com

Kate Moran Carter is a shareholder and director at Dain, Torpy, Le Ray, Wiest & Garner, P.C. Her practice focuses on real estate land use, and title litigation, and helping her clients manage risk and resolve disputes to avoid litigation. Prior to joining the firm, Kate spent six years as an associate at Robinson + Cole, LLP in the firm's Title Insurance-Real Estate Litigation practice group.

Kate provides litigation services to owners, developers, and operators of real estate concerning a wide range of matters including zoning litigation, landlord/tenant leasing disputes, buyer/seller real estate transaction disputes, owner/contractor construction disputes, broker/client commission disputes, title disputes, easement interpretation, boundary line disputes, adverse possession and beach rights.

Additionally, a portion of Kate's practice is devoted to advising condominium associations in connection with a full range of issues including interpretation of condominium documents, the initial transition from developer control, governance questions, construction litigation, and disputes with unit owners. She has tried cases in Massachusetts district and superior courts and the United States District Court for the District of Massachusetts. She has argued before the Massachusetts Appeals Court and the Rhode Island Supreme Court.

Kate is also committed to providing *pro bono* representation to immigrants applying for political asylum through her participation in the Political Asylum Immigration Representation Project (PAIR). She has won asylum or otherwise secured protection for clients from Togo, Uganda, and Syria.

Kate received her J.D. from Georgetown University Law Center and her A.B., *magna cum laude*, *Phi Beta Kappa*, from Georgetown University.

Gregor I. McGregor, Esq.

McGregor Legere & Stevens PC
15 Court Square, Suite 660
Boston, MA 02108
(617) 338-6464 x123
gimcg@mcgregorlaw.com

Greg McGregor is the founder of the Boston-based environmental law firm, McGregor, Legere & Stevens PC, which handles environmental, land use, and real estate matters, plus related litigation. He is also a founding member of the Environmental Law Network, an alliance of specialty law firms in the United States and abroad, sharing expertise and experience for the benefit of their clients.

Greg's cases in court have broken new ground in environmental impact statements, wetland and floodplain protection, hazardous waste liability and cleanups, land preservation and taxation, home rule powers of cities and towns, enforcement and remedies, eminent domain and other takings, and constitutional law.

Greg has been in private practice since 1975. Until then, he was a Massachusetts assistant attorney general and first chief of the Division of Environmental Protection. Greg is editor of the *Massachusetts Environmental Law* treatise published by MCLE. He is Co-chair of MCLE's Annual Environmental and Land Use Law Conference, Co-chair of MCLE's Real Estate and Environmental Law Curriculum Advisory Committee and Co-chair of the National Conference on Real Estate Law. He also serves on the REBA Board of Directors and is Co-chair of the Association's Environmental Law Section.

Greg graduated from Dartmouth College and Harvard Law School.

SJC Rules that Each New Property Owner Opens a New Window for Local and State Enforcement Against Old Wetlands Protection Act Violations

By Gregor I. McGregor

Town of Norton Conservation Commission v. Robert Pesa, 488 Mass. 325 (2021) is a seminal case of the Supreme Judicial Court supporting a commission, under the state Wetlands Protection Act, in a long-running attempt to get compliance from recalcitrant landowners. The decision is of singular importance to Commissions and the Massachusetts Department of Environmental Protection (MassDEP) which also enforces the Act

The original property owner in 1979 filed a Notice of Intent (NOI) with the Norton Conservation Commission to construct a store and parking lot. The Commission approved the project with a permit in the form of an Order of Conditions. Construction took place, but a Certificate of Compliance was never requested by the permit holder.

The owner died and the property transferred to his wife. In 1984, 1987 and 1988 the Commission sent letters about excess fill beyond the approved project plans.

In 2014 the Commission inspected the site and reviewed aerial photographs of the property and informed prospective purchasers of 11,000 square feet of unauthorized fill on the property and vegetation removal.

The prospective purchasers acknowledged the issue, asked for time to resolve it. but became new owners in December 2014 and said they would not remove the fill. In 2015 the Commission issued an Enforcement Order directing removal and restoration to the original condition. The new owners did not appeal that Enforcement Order to court or comply with it.

In 2016, the Commission sued the new owners in Superior Court. In 2020 a Superior Court judge ruled that the Commission's enforcement order as to original work was barred by the two-year statute of limitations and that a three-year statute of repose in the Act against a new owner required the Commission to have brought an enforcement action within three years of the first transfer of ownership in the property (the wife).

The Town of Norton appealed. The SJC ruled favorably for the Town that the three-year time limit for actions against new owners did not apply to just the first new owner. Rather, the Court interpreted the Act to allow a court action to be initiated against any subsequent owner within three years of that particular individual obtaining title to the property.

This important decision gives Conservation Commissions a useful tool to cure historic fill violations and some other types of noncompliance. In effect, each transfer of title renews the opportunity for the Commission to enforce against each subsequent owner who allows unauthorized fill to remain in place.

Be sure to consult the actual wording of the Act’s statute of repose. It also facilitates actions against violators of Enforcement Orders even where the violation is not unauthorized fill or other permanent change to the land.

Take note that a Commission issuing an Enforcement Order, which is an administrative action, is not sufficient to toll the statute, a common misperception. Rather, the enforcement action to be timely must be a court action. This would mean a civil suit or criminal prosecution.

21-Day Deadlines for Convening Hearings and Issuing Permits Under Wetlands Act Are Mandatory and Pre-Empt Local Home Rule Bylaws

By Gregor I. McGregor

Local wetlands bylaw (or ordinance) jurisdiction over projects in and near resource areas depends on Conservation Commission compliance with the 21-day deadlines for commencing public hearings and issuing decisions on Notices of Intent (NOI). Indeed, you may safely regard those timing provisions in the state Wetlands Protection Act (the Act) as binding on the Commission, with failure to meet them potentially fatal to any decision the Commission may render. This could apply to Determinations of Applicability, as well.

Recall that a Commission loses its "Home Rule" wetland bylaw control (with the result that the applicant has no need for the local permit) if it fails to issue its denial, permit or other decision on an NOI by the deadline of 21 days from the close of the public hearing and the applicant appeals this inaction to the Massachusetts Department of Environmental Protection (MassDEP) under the Act. This is by virtue of the Supreme Judicial Court's 2007 decision in *Oyster Creek Preservation, Inc. v. Conservation Comm'n of Harwich*, 449 Mass. 859, 866 (2007). Now, by virtue of the Massachusetts Appeals Court's decision in *Boston Clear Water Company, LLC v. Town of Lynnfield,* No. 21-P-166, 100 Mass. App. Ct. 657 (Mar. 23, 2022), the Commission loses its control, and the applicant does not need to obtain the local wetlands permit, if the Commission fails to convene the public hearing by the deadline of 21 days from the NOI being filed and the applicant appeals to MassDEP under the state Act.

The upshot of either untimely default by the Conservation Commission is that the project is no longer subject to the municipal bylaw and, in most situations where this comes up under both the state Act and local bylaw, the only wetlands permit needed for an applicant's project is the Superseding Order of Conditions from the MassDEP under the Act.

The Appeals Court applied the doctrine of preemption of municipal regulatory authority by the superseding authority of the Commonwealth, based on the intent of the 21-day time frames in the state Act. Home rule authority of cities and towns, while regarded as very broad and deep in Massachusetts, is nonetheless subject to state preemption in certain circumstances. One such circumstance is when the Legislature has made specific provision for a procedure with which a city or town may not conflict. The 21-day periods specified in the state Act for convening the hearing and issuing the decision, as interpreted in these two court decisions, are such specific provisions and thus critical timelines to meet for the municipality to be able to exercise its home rule wetlands power.

At issue in the *Boston Clear Water* case was whether the Lynnfield Commission's failure to conduct a hearing within 21 days of receiving the Notice of Intent, pursuant to G. L. c. 131, § 40, and its town wetlands protection bylaw, caused it to lose its authority over the proposed project and as a result forfeit the right to apply and enforce its bylaw. While under Home Rule principles enunciated in earlier decisions about the state Act and local bylaws, the general rule is that if provisions of a local wetland bylaw are more stringent than the Act, those provisions will apply, that freedom does not apply to the statutory time frames for opening hearings and issuing decisions.

In other words, the Lynnfield Commission's failure to commence its public hearing within 21 days was not discretionary, it could not unilaterally reschedule the date for later, and so the Commission lost its jurisdiction to MassDEP when the applicant appealed to the state.

Consequently, MassDEP's Superseding Order of Conditions controls.

The Appeals Court saw the Supreme Judicial Court's ruling in *Oyster Creek* as binding precedent as to the beginning of the public hearing, concluding: "As a result, we are constrained under *Oyster Creek* to conclude that, by failing to conduct a hearing within the act's twenty-one-day mandatory time period, the commission lost the authority to regulate BCWC's project under the town bylaw. The DEP's superseding order of conditions approving the project thus controls."

It bears emphasizing what the Appeals Court found most significant in the *Oyster Creek* decision where that SJC observed that the Act's "timing provisions" --in the plural--are "obligatory."

The Commission was unable to convene a quorum within 21 days, did not obtain from the applicant a waiver of the deadline, and commenced the hearing late. Even though the applicant did not participate and made clear its position that it did not need Commission approval, the Commission held several hearing sessions without the applicant and denied the OOC for lack of participation or lack of information. The applicant already had appealed to MassDEP the Commission's failure to open the hearing in timely fashion, as per the Act and MassDEP Regulations, and MassDEP had issued a Superseding OOC approving the project. The court case arose because the applicant sued the Commission seeking a ruling to confirm the invalidity of its late hearing and decision. The Commission won in the Superior Court, but the Appeals Court overturned that short-lived victory, for the essential reason that the "timing provisions" in the Act are "obligatory," under the Act an applicant may appeal noncompliance to the MassDEP, and the resulting Superseding OOC will govern.

These *Oyster Creek* and *Boston Clear Water* holdings, both of which dealt with Commission disapprovals of proposed projects (either after the time for commencing the public hearing or after the time for issuing a decision), warrant renewed attention to the Commission's timing of all its hearings, meetings, and decisions. Commissions, their staff, the applicants, their consultants, and any legal counsel involved should attend to these 21-day time periods, even though at times that can be challenging, inconvenient, difficult, and even impossible.

Fortunately, there is available the common practice where the applicant and Commission arrange to time the NOI filing to fit the Commission hearing schedule, agree to leave the hearing open (continuing it to dates certain) until all the relevant information is received for the administrative record, plan carefully the Commission meeting(s) for deliberations after the hearing has closed so as to not run out of time, manage efficiently the drafting and circulation of the OOC or other decision for vote, signature and issuance, leave time for the necessary hand delivery or US Postal Service mailing, or, if time is about to expire, secure the applicant's written waiver of the legal deadline.

Oyster Creek and *Boston Clear Water* might govern another Commission action that is subject to the same 21-day deadline in the Act. The Commission must act on a Request for Determination of Applicability within 21 days of it being filed. This does not involve convening and conducting a public hearing under the Act. Here is the phrasing in the Act which we think comprises the "timing provisions" the courts are referring to in making these preemption rulings: "If a conservation commission has failed to hold a hearing within the twenty-one day period as required, or if a commission, after holding such a hearing has failed within twenty-one days therefrom to issue an order, or if a commission, upon a written request by any person to determine whether this section is applicable to any work, fails within twenty-one days to make said determination…."

Outdoor Advertising, the First Amendment, and Free Speech: The Supreme Court Refines the Case of *Reed v. Gilbert* by its Decision in *Austin v. Reagan*

By Gregor I. McGregor

The City of Austin, Texas regulates signs that advertise things not located on the same premises as the sign, and signs directing readers to offsite locations, all known as "off-premises signs." The City's sign code prohibited construction of new off-premises signs, but gave existing signs vested rights and treated on-premises signs liberally. An outdoor advertising company filed suit alleging the prohibition against digitizing off-premises signs, but not on-premises signs, violated the First Amendment's Free Speech Clause. The federal courts reviewed the City's ordinance to see if it was content neutral under the seminal sign case of *Reed* v. *Town of Gilbert*, 576 U. S. 155 (2015).

The District Court ruled for the City, but the Court of Appeals found the on-/off-premises distinction to be facially content based because, as the Court said, a government official had to read a sign's message to determine whether the sign was off-premises. On this logic, applying the strict scrutiny test to sign rules that are not content neutral, the City lost in the Court of Appeals. The U.S Supreme Court reversed, holding the City's on-/off-premises distinction is facially content neutral, so it does not violate the Free Speech Clause.

The Supreme Court applied and explained *Reed* in a way that ameliorates (some say undercuts) the strictness of that sweeping and controversial decision. *Reed* had caused much consternation as apparently applying to all regulation of speech, not just signs for advertising, political, informational, directional and other purposes, and virtually banning whatever remotely controls speech or expression. You could say that the *Austin* decision brings some order to the chaos left in the wake of the *Reed* decision concerning regulation of signs, and even speech, nationwide.

The case is *City of Austin, Texas v. Reagan National Advertising of Austin, LLC,* 596 US ___ (April 21, 2022). Justice Sotomayer authored the decision. Not surprisingly, Justice Thomas, who authored the *Reed* decision, filed a dissent. *Austin* does not so much rebuke *Reed,* though, as a refine what it meant, discuss how to apply it, and dampen the doubts thrown at every form of sign regulations. The Supreme Court disapproved the misconceived "reading the sign" logic: "The Court of Appeals' interpretation of *Reed*—to mean that a regulation cannot be content neutral if its application requires reading the sign at issue—is too extreme an interpretation of this Court's precedent."

Specifically, *Reed* had ruled that a regulation of speech is content based if it targets speech based on its communicative content, meaning that it "applies to particular speech because of the topic discussed or the idea or message expressed." 576 U. S., at 163. *Reed* moreover had lumped into content-based sign rule regulating speech directly for its particular subject matter, as well as more subtly by its function or purpose. 576 U. S., at 163. Commentators and lower courts since *Reed* had seen this as making content-based any regulation of speech and expression by subject matter, function or purpose.

The Supreme Court in *Austin* sweeps away that concern, stating with clarity that the "subject-function-purpose" test "does not mean that any classification that considers function or purpose is *always* content based."

Recall that in *Reed*, a comprehensive and detailed sign code of Gilbert, Arizona applied distinct size, placement, and time restrictions to 23 different categories of signs, giving more favorable treatment to some categories (such as ideological signs or political signs) and less favorable treatment to others (such as temporary directional signs relating to religious events, educational events, or other similar events).

In *Austin,* in contrast, the Supreme Court found "the City's sign ordinances here do not single out any topic or subject matter for differential treatment. A sign's message matters only to the extent that it informs the sign's relative location. Thus, the City's on/off-premises distinction is more like ordinary time, place, or manner restrictions, which do not require the application of strict scrutiny."

The Court pointed out that precedents and doctrines in this field have consistently recognized that restrictions on speech may require some evaluation of the speech and nonetheless remain content neutral. Examples are valid regulation of solicitation, where speech must be read or heard to determine whether it entails solicitation, and regulation of off-premise signs, where they must be read to know if they are on-premises or off-premises.

Thus, even while citing (and not overturning) *Reed,* the Supreme Court in *Austin* told us: "Underlying these cases and others is a rejection of the view that *any* examination of speech or expression inherently triggers heightened First Amendment concern. Rather, content-based regulations are those that discriminate based on 'the topic discussed or the idea or message expressed.' *Reed*, 576 U.S., at 171. Pp. 8-10."

The Court remanded the case to the lower courts for what it termed the rest of the inquiry whether the sign ordinance violates the First Amendment. Much is specifically left to do on remand. The Court indicated that its determination that the City's on-/off-premises distinction is facially content neutral does not end the First Amendment inquiry. Evidence that an impermissible purpose or justification underpins a facially content-neutral restriction may mean that the restriction is nevertheless content based. Moreover, to survive intermediate scrutiny, a restriction on speech or expression must be "narrowly tailored to serve a significant governmental interest."

The lessons of *Reed* as moderated by *Austin* seem to be these:

- ordinary time, place and manner restrictions on signs, and on Free Speech more broadly, do not trigger strict scrutiny, just intermediate scrutiny;

- more sign rules will be found to be facially content-neutral; typical on-/off- premises signs distinctions likely will be upheld;

- the classic prohibitions of off-premise advertising signs will remain valid, as will the typical limits on digitized, moving and changing signs;

- federal, state, county and municipal rules about most informational and directional signs, permanent or temporary (like event signs) remain safe;

- an underlying impermissible purpose or justification, however, will change the nature of the restriction, level of scrutiny, and likely result in court;

- therefore, beware inappropriate motives and unstated reasons for targeting specific advertisers, products, messages, property owners, land uses, political positions, or religious faiths; and,

- regardless, be sure that any restrictions that are imposed on signs, or on any speech or expression, are narrowly directing to accomplish a significant government interest.

First Circuit Rules Federal Clean Water Act Citizen Plaintiffs Are Not Completely Trumped by Past or Pending EPA or State Agency Administrative Enforcement Against the Violator

By Gregor I. McGregor

Can citizen plaintiffs in federal court sue the same violator for the same water pollution violation against which the U.S Environmental Protection Agency (EPA) or state agency is taking or has taken administrative enforcement? The answer to the question is yes, as long as the federal citizen suit does not seek civil penalties. This according to the First Circuit Court of Appeals decision, issued April 28, 2022, in the case of *Blackstone Headwaters Coalition, Inc. v. Gallo Builders*, No. 19-2095, 32 F. 4th 99 (1st Cir. 2022).

Civil penalties are court-ordered money sanctions. Previously, the conventional wisdom was that EPA or state enforcement of any kind against the same violator for the same violation could entirely preclude a federal water pollution suit filed by citizens, seeking any type of relief. Indeed, a common tactic of choice of companies targeted by citizen suits has been to quickly arrange some form of EPA or state administrative enforcement, and then agree to comply. Sometimes this agency enforcement might be tough and strong, other times token and weak.

Until recently, then, EPA or state enforcement usually has been regarded as a complete defense to a citizen suit. Courts have declined to order permanent injunctive relief, for example, where the defendant had made a persuasive showing that it was complying with orders issued as a result of a federal or state administrative enforcement action and that the defendant's compliance yielded improvement in the environmental conditions of concern.

Against this background, the First Circuit, sitting *en banc* in the *Blackstone* case, ruled that under the CWA, administrative enforcement action by the government results in preclusion only a citizen's "civil penalty action." The Court of Appeals interpreted this term in the CWA to mean only a court suit seeking civil monetary penalties. A federal citizen suit seeking other (non-monetary) forms of relief, *such as* equitable relief like a prospective injunction or declaratory judgment, therefore, may proceed notwithstanding the government's action.

The *Blackstone* case arose as a result of stormwater discharges from defendants' development project in Worcester. The Massachusetts Department of Environmental Protection (MassDEP) had entered into an administrative settlement with the main defendant in the form of an Administrative Consent Order with Penalty (ACOP). The MassDEP ACOP required the defendant to pay an $8,000 civil penalty, to undertake certain remedial measures at the site, and to pay additional stipulated penalties if there were further discharges of turbid stormwater from the site.

About three years later, the *Blackstone* plaintiff organization filed a citizen suit under the CWA against several defendants involved in the construction site. This suit sought civil penalties, as well as declaratory and injunctive relief against alleged continued stormwater discharges. The *Blackstone* defendants argued that the citizen suit was precluded by Section 1319(g)(6)(A) of the CWA because the violations were subject to an ongoing "diligent prosecution" by MassDEP under its ACOP. Their defense relied on the First Circuit's earlier decision in the case of *North & South Rivers Watershed Ass'n v. Town of Scituate*, 949 F.2d 552 (1st Cir. 1991). There, a First Circuit panel had ruled that the limitation on citizen suits established by Section 1319(g)(6)(A) precludes a citizen suit which seeks to obtain declaratory or prospective injunctive relief for a violation of the CWA. The panel had reasoned that duplicative enforcement actions, one by the government and one by citizens, would be inconsistent with the CWA's statutory scheme entrusting the government with primary enforcement authority.

That preclusion of suit defense by "diligent prosecution" refers to language in the CWA. In the language of the CWA, the *Blackstone* defendants defended on the ground that the MassDEP's administrative "enforcement action" constituted a "diligent prosecution" under a state law "comparable" to the CWA for the "same violations" alleged in the citizen suit.

As context, we briefly note that a federal citizen suit is totally precluded by EPA or state litigation—that is actually a civil suit or criminal prosecution. The court cases call that the "broadest preclusion." A "narrower preclusion" exists, they say, when the federal or state agency does something less than judicial enforcement, such as here in *Blackstone*.

In the first appeal phase of the *Blackstone* case, indeed, a panel of the First Circuit agreed with the defendants and relied on *Scituate* to affirm the federal District Court's grant of summary judgment against the citizen organization. In an interesting twist, the full First Circuit Court of Appeals, upon request, then revisited and reconsidered its decision in *Scituate,* decided it was wrongly decided back then, and vacated its own panel opinion in the pending case. The Court of Appeals ruled that the limitation set forth in Section 1319(g)(6)(A) bars only a citizen suit that seeks to impose a civil penalty for an ongoing violation of the CWA and does not bar a citizen suit for declaratory and prospective injunction relief to redress an ongoing violation of the CWA.

The practical implications are important. The CWA and several other federal environmental statutes contain citizen suit provisions. These simplify standing for private persons by eliminating the "injury in fact" part of the test of standing. These citizen suit provisions effectively make private plaintiffs "little attorneys general" seeking the same, similar or different remedies (or often more extensive or stricter remedies) as the federal and state air, water, wetlands, sewage, drinking water, solid waste, and hazardous waste agencies.

Citizen suits are usually filed in the absence of *any* government enforcement. Overall, the courts have recognized the benefits of citizens being empowered to sue environmental violators. Citizen suits are regarded as an important supplement to government enforcement of the CWA, given that the government has only limited resources to bring its own enforcement actions. Here in the First Circuit, EPA and MassDEP cannot be everywhere and know everything. Now citizen plaintiffs can seek civil money penalties if the EPA and MassDEP have not.

Supreme Court Strikes Down the City of Boston's Flag-Flying Practice at City Hall Plaza as Going Over a Bright Line Between Rightful Control of Government Speech and Relaxed Regulation of Private Speech

By Gregor I. McGregor

In *Shurtleff v. City of Boston,* 596 US ___ (May 2, 2022), the U.S. Supreme Court held that the City of Boston's flag-raising program did not constitute government speech. Consequently, the City's refusal to allow the petitioners to fly their flag because of its religious viewpoint violated the Free Speech Clause of the First Amendment to the US Constitution. The result hung on whether and when a governmental entity engages in government speech (which can be highly regulated) and when it does not engage in government speech.

Justice Breyer delivered the opinion, in which all members of the Court joined or concurred. The decision is important, even if out of proportion to the stakes for one flag at Boston City Hall. It affects governmental flag-flying policies and practices, as well as management of free speech and expression generally, as to controls of all kinds of signs, posters, flyers, forums, programs, exhibitions, announcements, and (nowadays) government sponsored social media posts.

Outside Boston City Hall, Boston flies the American flag, the flag of the Commonwealth of Massachusetts, and usually the City's own flag. Boston for years allowed groups to hold ceremonies on City Hall Plaza, during which participants may hoist a flag of their choosing in place of the City's flag. Boston regulated the content of the flags not at all. Between 2005 and 2017, Boston approved raising about 50 unique flags for 284 such ceremonies. Most of these flags were other nations' and some were associated with groups or causes, such as the Pride Flag. The Plaintiff asked to hold an event on the plaza to celebrate the civic and social contributions of the Christian community. He wished to raise what he described as the "Christian flag." Worried that flying a religious flag at City Hall could violate the First Amendment's Establishment Clause, and never having flown such flag, the City of Boston told the Plaintiff no. The Plaintiff sued, claiming Boston's refusal to let him raise his flag violated the Free Speech Clause.

The Federal District Court held that flying private groups' flags from City Hall's third flagpole amounted to government speech, so Boston legally could refuse petitioners' request without running afoul of the First Amendment. The First Circuit Court of Appeals affirmed and the City was pleased. The Supreme Court then granted certiorari to decide whether the flags Boston allows others to fly express government speech, and whether Boston could, consistent with the Free Speech Clause, deny the Plaintiff's flag-raising request. The decision was long-awaited among government officials, civil rights advocates, and of course the property managers, agency staffers, and event sponsors who actually process applications for events and messages.

The Supreme Court acknowledged that the Free Speech Clause does not prevent the government from declining to express a view, citing the leading case of *Pleasant Grove City* v. *Summum*, 555 U. S. 460 (2009). It is firmly established that government must be able to decide what to say and what not to say when it states an opinion, speaks for the community, formulates policies, or implements programs. The Court then cautioned, though, that the boundary between government speech and private expression can blur when, as here, the government invites the people to participate in a program.

In those situations, the Court said it conducts a holistic inquiry to determine whether the government intends to speak for itself or, rather, to regulate private expression. This begs the question, what are the facts and factors for such an "holistic inquiry." The Court's cases over the years have looked to

several types of evidence to guide the analysis, including: the history of the expression at issue; the public's likely perception as to who (the government or a private person) is speaking; and the extent to which the government has actively shaped or controlled the expression. Considering these indicia, the Court has dealt with permanent monuments in a public park (government speech, even for monuments privately funded and donated); license plate designs proposed by private groups (government speech since, among other reasons, the state maintained direct control over the messages conveyed); and trademarking words or symbols for private registrants (NOT government speech as the Patent and Trademark Office did not exercise sufficient control over the nature and content).

Applying these factors to Boston's flag-flying, the Court was ambivalent, stating that the history of flag flying, particularly at the seat of government, supports Boston. However, on the 20 or so times a year when Boston allowed private groups to raise their own flags, did those flags express the City's message? On the one hand, the Court stated that flags evolved as a way to symbolize communities and governments. Not just the content of a flag, but also its presence and position have long conveyed important messages about government. Flying a flag other than a government's own can convey a governmental message. On the other hand, the Court stated that the circumstantial evidence of the public's perception did not resolve the issue.

The Court concluded that the key issue is whether Boston shaped or controlled the flags' content and meaning, as such evidence would tend to show that Boston intended to convey the flags' messages as its own. And on that critical issue, the Court found, Boston's record was thin with respect to the way in which the flag policy has been administered. Specifically, the Court pointed out that Boston told the public that it sought "to accommodate all applicants" who wished to hold events at Boston's "public forums," including on City Hall Plaza; the City's application form asked only for contact information and a brief description of the event, with proposed dates and times; the City did not request to see flags before the events; the City's practice was to approve flag raisings without exception—until the Plaintiff's request; and the City had no written policies or clear internal guidance about what flags groups could fly and what those flags would communicate.

As a result, on balance the Court ruled that Boston's control is not comparable to the degree of government involvement in the selection of park monuments or license plate designs. "Boston's come-one-come-all practice—except, that is, for petitioners' flag—is much closer to the Patent and Trademark Office's policy of registering all manner of trademarks…. All told, Boston's lack of meaningful involvement in the selection of flags or the crafting of their messages leads the Court to classify the third-party flag raisings as private, not government speech." That being so, the Supreme Court reversed the lower courts and ruled against the City of Boston. When the government does not speak for itself, it may not exclude private speech based on "religious viewpoint"; doing so "constitutes impermissible viewpoint discrimination."

In light of the Court's government-speech holding, Boston's refusal to allow the Plaintiff to raise his flag because of its religious viewpoint violated the Free Speech Clause. While the decision about one flag is interesting to federal, state, county, and municipal property managers, event sponsors, parade managers, and government attorneys, and those who track evolving Supreme Court law and attitudes about Free Speech and Expression under the First Amendment, the unanimity of the ruling adds to the impact.

The fallout is yet to be felt, as the case is recent, but initial indications are that many governments are reviewing their flag, sign, message, and comment-posting policies (if indeed they have any). Some are getting out of the business of allowing too much private expression by signage on public properties, while others are allowing more free-flowing expression with a hands-off attitude. Yet all are becoming mindful of the rightful controls that are attendant to what is properly classified as government speech.

SJC Rules Regulatory Taking Claim in Casino Dispute May Proceed to Discovery and Trial

By Gregor I. McGregor

The case of *FBT Everett Realty, LLC v. Massachusetts Gaming Commission*, 489 Mass. 702 (May 23, 2022) arose from financial disputes about the former Wynn casino, now operating as Encore Boston Harbor in Everett. The SJC handed a win to the former owners of the casino site, ruling that the Superior Court erroneously had dismissed a lawsuit the former landowners filed against the Massachusetts Gaming Commission in a bid to collect an additional $40 million for the Everett land. We commend the decision for its comprehensive discussion and citations of the leading cases on regulatory taking, both federal and Massachusetts.

Plaintiff brought this suit against the Commission alleging various claims including tortious interference with contract and a regulatory taking after the Commission refused to allow Plaintiff to receive a "casino-use premium" on the sale of a parcel of land in Everett. The result is an SJC decision illuminating the so-called three-factor balancing test enunciated in the seminal case of *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

The *FBT* decision was noted in the popular press for its impact on the economics of the original casino developers, and for leaving the path open to litigate the regulatory taking claim on the merits. In truth, the decision amounts to a fine law review article on how the SJC sees the regulatory taking doctrine, how the taking test under *Penn Central* is applied, and what is the relevant evidence for the three *Penn Central* factors, with particular attention to federal and Massachusetts jurisprudence.

Specifically, the SJC affirmed the Superior Court judgment dismissing FBT's claim against the Massachusetts Gaming Commission alleging intentional interference with a contract and reversed the grant of summary judgment on the regulatory takings claim, holding that there were material-disputed facts at issue precluding summary judgment.

The SJC found that the Gaming Commission took "highly unusual" action in 2013 after discovering that a businessman with a criminal record and organized crime ties was suspected of having a hidden interest in FBT Everett Realty LLC, which had negotiated a deal to sell the Everett property to Wynn for $75 million. Wynn's casino license was approved after it slashed the purchase price for the 35 acres on the Mystic River to $35 million, the estimated value of the land if the buyer were not building a casino.

Central to the ruling is language familiar to all of us following the evolution of regulatory takings jurisprudence at the U.S. Supreme Court and, for an even longer time, the Massachusetts Supreme Judicial Court:

"The regulatory takings inquiry is a fact-intensive evaluation that should consider multiple factors, including not only reasonable investment-backed expectations but also the economic impact and character of the challenged regulatory action."

"The motion judge here limited his analysis to the investment-backed expectations factor. This was error, as he also should have considered the significant $40 million economic impact and the highly unusual character of the government action here --conditioning the award of a casino license to Wynn on FBT not receiving a casino-use premium on the sale of the Everett parcel, thus effectively compelling the transfer of this economic benefit to Wynn."

Left open for discovery and maybe trial on remand, according to the SJC, are disputed facts about "exactly what the commission expected or required Wynn to do, and what Wynn did on its own initiative."

"Whether the commission directed such a compelled transfer of property, or merely accepted it as a cure to its concerns about undisclosed criminal ownership interests at FBT, cannot be decided without further discovery," the Court stated, allowing the suit to go forward on the regulatory claim.

Noteworthy is the SJC's compilation of the U.S. Supreme Court's long line of decisions on proper formulation of the three-factor *Penn Central* balancing test:

"We note that the Court has expressly cautioned that interference with investment-backed expectations is only "one of a number of factors that a court must examine" … "*Penn Central* inquiry does not turn "exclusively" on regulation's economic impact and degree of interference with legitimate property interests"… "Investment-backed expectations … are not talismanic under *Penn Central*"…"all three *Penn Central* factors are important, or at least may be important in determining whether a regulatory taking occurred, and should be considered in the regulatory takings inquiry."

Amplifying its understanding of the "investment backed expectations" factor, the Court states:

"We have recognized that an important determinant of the reasonableness of an owner's investment-backed expectations is the regulatory environment at the time that the owner purchased or otherwise took title to the property at issue" … (citations omitted) … "a property owner's investment-backed expectations must be reasonable and predicated on existing conditions."

While allowing the suit to proceed on the regulatory taking claim, the SJC affirmed the Superior Court's decision to dismiss a second claim by FBT alleging that the Gaming Commission intentionally interfered with its contract to sell the land. As a public employer, the Court ruled, the Gaming Commission is immune from suit for intentional torts under the Massachusetts Tort Claims Act, G.L. c. 258.

Some take-aways seem to be that:

- the regulatory takings doctrine is alive and well in Massachusetts;
- proper pleading of it and documentation in agreed facts and summary judgment record can survive attack;
- the *Penn Central* three-factor test must be applied in a fact-intensive analysis;
- reliance on the absence of reasonable investment-backed expectations alone will not win the day;
- reliance on the economic impact on governmental restriction alone likewise will fail;
- reliance on attacking the nature of the governmental interest is a hard hill to climb;
- rather, all three *Penn Central* factors are important with none weighted more than the others;
- there are many federal and Massachusetts decisions explicating how they properly apply; and
- this *FBT* decision is a nice synopsis of this constitutional doctrine which limits governmental power.

Real estate, land use, and environmental lawyers take heed.

SJC Gives Shot in The Arm for Commercial Solar Developments

By Madison Gaffney

Tracer Lane II Realty, LLC v. City of Waltham, decided by the Massachusetts Supreme Judicial Court on June 2, 2022, was eagerly awaited by municipalities and solar project sponsors alike. The citation is *Tracer Lane II Realty, LLC v. City of Waltham*, No. SJC-13195 (Mass. Jun. 2, 2022). Real estate, environmental and energy attorneys and their clients take note.

The State's Zoning Act, M.G.L. c. 40A, § 3, protects solar energy systems from local regulation that is not "necessary to protect the public health, safety or welfare." The SJC was faced with the issue of whether an ancillary structure was a part of the zoning code's legally protected solar use.

In the Town of Lexington and City of Waltham, solar developer Tracer Lane owned two properties. The Lexington land is located in a commercial and manufacturing use zoning district. The Waltham land is located in a residential use zoning district.

Tracer Lane proposed to build a "one-megawatt solar energy system centered on the Lexington property that will cover an area of approximately 413,600 square feet and contribute solar energy to the electrical grid."

In addition, to this solar energy system, Tracer Lane intended to construct an access road through its Waltham property. Tracer Lane anticipated that construction vehicles and maintenance trucks would utilize the access road during the solar energy system's assembly and lifetime.

Waltham officials informed Tracer Lane that it could not construct the access road as a road for commercial use was "not permitted in a residential zone." Tracer Lane then brought a complaint in Land Court against Waltham pursuant to M.G.L. c.240, §14A (portions of which are called the Dover Amendment). Tracer Lane sought a declaration that Waltham could not prohibit Tracer Lane from constructing the access road.

Both parties cross-moved for summary judgment and the Land Court granted Tracer Lane's motion. The Land Court cited the statute's language that "no zoning ordinance or bylaw shall prohibit or unreasonably regulate the installation of solar energy systems or the building of structures that facilitate the collection of solar energy, except where necessary to protect the public health, safety, or welfare."

Waltham appealed the Land Court decision and the case was transferred from the Massachusetts Appeals Court to the SJC.

Both parties argued whether Waltham's zoning code permitted or prohibited solar energy systems. Tracer Lane insisted that it does not because the zoning code does not mention solar energy systems, so, therefore, solar energy systems are prohibited. Waltham, however, argued that the zoning code "expressly permits solar energy systems in industrial zones, which encompass approximately one or two percent of Waltham's total area."

Waltham pointed out that the zoning code's definition of industrial zones could include "establishments for the generation of power for public or private consumption purposes that are further regulated by Mass. General Laws." Further, Waltham asserted that "accessory solar energy systems" are permitted in residential and commercial zones.

The Supreme Judicial Court looked to governing case law to interpret the statute's intention as to whether the access road must be governed by M.G.L. c. 40A, §3, ninth paragraph. From those cases, ancillary structures are a protected use. Here, the Court reasoned that the access road is imperative to the proposed solar energy system's construction and therefore is "part of the solar energy system." Therefore, the statute protects the access road.

The SJC then asked whether the statute barred Waltham's action. Again, the SJC turned to the case law which addresses other protected uses. The Court conducted a balancing test between the interest that the bylaw advances and the impact on the protected use and concluded that the zoning code's interest does not outweigh the benefits of the proposed energy system.

The Court added that "these standalone, large-scale systems, not ancillary to any residential or commercial use, are key to promoting solar energy in the Commonwealth" and limiting solar energy development directly conflicts with the statute's purpose. The SJC then affirmed the Land Court's judgment.

The *Tracer Lane* case confirms that large-scale solar generation systems are protected under M.G.L. c. 40A, §3. The unanimous SJC decision clarifies that a municipality cannot justify "zoning out" such solar developments just because of the uses or features ancillary to the solar facility.

This decision is welcomed by solar developers like Tracer Lane confronted with a myriad zoning bylaws and ordinances (not to mention non-zoning codes and regulations) across Massachusetts. Effectively, solar energy developers cannot be stopped from using residential zones for all or some of their project facilities except on a "very site-specific basis, use-by-use, parcel-by-parcel, neighborhood-by-neighborhood."

Other environmental law and land use attorneys have stated that "[t]he outcome of Tracer Lane should encourage municipalities that now ban large scale solar facilities from most or all of their territory, to adopt reasonable regulations that permit these kinds of o facilities with site plan or special permit review." Further, the Court's directive from the statute will yield solar facility evaluations on a "site-by-site" basis. Which will require more participation and effort from local municipalities and courts but will likely result in meeting the statute's purpose of "protecting the public health, safety, [and] welfare" while also promoting climate activism.

Madison Gaffney is a rising 3L at Vermont Law School where she is pursuing her J.D. and Master's in Environmental Law and Policy.

SJC Nixes Boston Waterfront Harbor Plan and with it the Harbor Tower Garage and the Municipal Harbor Plan Approval Process: Stay Tuned for Revamped MassDEP MHP Regulations

By Gregor I. McGregor

The Massachusetts Supreme Judicial Court (SJC) decided July 12, 2022, the case of *Katherine Armstrong et al v. Secretary of Energy and Environmental Affairs et al*, 490 Mass. 243 (2022), and a consolidated case brought by the Conservation Law Foundation of New England, Inc. (CLF) and others. From a land use dispute over proposed development of a high rise building on the Harbor Garage parcel near the New England Aquarium and Harbor Towers condominium, this matter grew into a full-blown litigation on the Public Trust Doctrine, the Waterways Act (M.G.L. c. 91), and the legality of Massachusetts Department of Environmental Protection (MassDEP) regulations creating and approving Municipal Harbor Plans (MHPs).

The decision is of intense interest to landowners, developers, managers, lenders, investors, real estate attorneys, and their clients in the Boston Downtown Waterfront MHP, which includes 42.1 acres and 26 parcels along the waterfront from Long Wharf to Seaport Boulevard. This area includes the Aquarium, Long Wharf, and Rowe's Wharf.

The case did not challenge the legality of the Boston MHP itself (only the process), the legality of any Chapter 91 license (not applied for yet), or the legality of the other 16 MHPs approved over the decades. Specifically, the SJC ruled that MassDEP exceeded its authority by promulgating provisions in its Chapter 91 Regulations, 310 CMR Section 9.00 *et seq*, that require MassDEP, when licensing certain projects subject to a MHP approved by the Secretary, to apply standards specific to that particular harbor area that have been approved by the Secretary. This delegation was ruled *ultra vires* Chapter 91. MassDEP plans curative amendments to its Waterways Regulations regarding the fundamental MHP scheme.

The Waterways Act is implemented through the Waterways Regulations, which set forth the basic requirements and performance standards for uses and structures licensed on public and private tidelands. These range from engineering and dimensional specification to use and open space limitations. According to the SJC, an MHP in effect for a harbor typically allows a substitution of some but not all of the generic specifications with local-specific specifications "that deviated (sometimes substantially)" from those in the MassDEP regulations, assertedly tailored to that particular harbor area but differing nonetheless.

The Boston Downtown Waterfront MHP was approved in April 2018 after a five-year planning process. The crux of the case was its particular application (and not the generic standards) to two parcels, namely the Harbor Garage site and the Hook Wharf site. These are on filled tidelands within 100 feet of the Boston Harbor high water mark. The MHP for the Boston waterfront contemplated construction of at least a 600-foot-tall tower at the Harbor Garage site and a 305-foot-tall building at the Hook Wharf site plus 30 more feet to accommodate building mechanicals. The SJC compared this with the MassDEP regulations which generally impose a 55-foot height restriction at the water's edge with graduated increases inland.

CLF and 13 private citizens filed suit in July 2018. At the same time residents of the Harbor Towers condominium filed suit. The Superior Court consolidated the cases and ruled on cross motions for summary judgment. That court reasoned that under our Public Trust doctrine, the Legislature expressly delegated to MassDEP the obligation to preserve the public trust and to protect the public's interest.

The Superior Court ruled, then, that the agency may not delegate or relinquish to the Secretary any of the oversight responsibilities that the Waterways Act entrusted to it. As the Act lacks an express authorization for MassDEP's MHP approach, it is irreconcilable with its enabling act and the Waterways Act.

Relying on its decision in *Moot v. Department of Environmental Protection*, 448 Mass. 340 (2007), striking down a MassDEP regulation exempting landlocked tidelands as improperly relinquishing licensing jurisdiction, the SJC saw an unlawful delegation of Chapter 91 licensing determinations to the Secretary through the Municipal Harbor Plan approval process. The MHP Boston Harbor provisions, it ruled, are *ultra vires* and invalid.

The decision amounts to a legal treatise on the Public Trust Doctrine. The SJC decision begins with a condensation of the legal principles, legislative delegation, the MHP approval process, the "substitute specifications" of the Secretary, what MassDEP judgment they override, and the resulting invalidation of the Boston Waterfront MHP. Essentially the SJC saw the MassDEP "bound to determine that the project meets the requirements…" of the MHP. Citing *Moot*, 448 Mass. at 353, the Court saw the MHP rules and process as relinquishing "all public rights that the Legislature has mandated be preserved through the licensing requirements…."

The SJC discussed the nature and scope of review ("reconciling regulations with the Legislature's intent"), the weight accorded an agency's discretion ("deference, not abdication"), the Legislature's history of delegation to MassDEP (rather narrow and strict), the constraints on licensing "nonwater dependent uses of tidelands", the Secretary's substitute specifications (which MassDEP "shall presume" comply with the Waterways Act's "proper public purpose" test which mandates "greater benefit than detriment to the rights of the public in such lands"), and the small opportunity for rebuttal of that presumption (only on " narrow grounds").

The SJC helpfully observes, "To be sure, the department is free to consider – but should not be bound to adopt -- the Secretary's input when it makes licensing decisions…." The bottom line, to this author, is that "the department may not cede to the Secretary the decision whether nonwater-dependent uses of tidelands serve, *inter alia*, a proper public purpose…."

The SJC's decision was unanimous and so stands as another strong rebuke of the MassDEP administration of the Chapter 91 program in recent years. Fortunately, in a footnote, the SJC allowed all prior MHPs to stand as-is, noting the window of time in which they could be legally challenged has expired. We feel this means those MHPs and all the Chapter 91 licenses that were issued pursuant to them are beyond legal attack by virtue of the statutes of limitations.

The MassDEP meanwhile has set about revising its Waterways Regulations and may take steps to re-approve the MHPs in a legally-prescribed way. Last February, for instance, the agency published proposed amendments and took written comments. As a result, in September the agency published further revised rules which would apply to 16 MHPs (but not yet the Boston Harbor MHP). We await all that MassDEP wishes to do to conform its MHP regime to the SJC decision.

Supreme Judicial Court Instructs Conservation Commissions on Home Rule Wetland Protection Power: Use It or Lose It

By Gregor I. McGregor

A local conservation commission can have regulatory authority under a local wetland protection town bylaw or city ordinance that is independent from, and in addition to, its authority under the state Wetlands Protection Act ("Act"). The effective use of this municipal authority was made contingent on the commission relying on bylaw provisions which are more stringent than those in the Act. This test of reliance is important. Otherwise, the commission decision is said to be null and void as preempted by the state.

This rule of preemption in the field of municipal wetlands protection is sometimes (half-seriously) referred to as the DeGrace Doctrine, named after the case of *DeGrace v. Conservation Comm'n of Harwich*, 31 Mass. App. Ct. 132, 135-136 (1991). As the SJC enunciated in seminal cases since then, where a conservation commission "rests its determination on provisions of a local bylaw that are more protective than the act[,] . . . a superseding order of conditions issued by the DEP cannot preempt the conservation commission's bylaw-based determination." *Oyster Creek Preservation, Inc. v. Conservation Comm'n of Harwich*, 449 Mass. 859, 865 (2007). "This rule is [premised] on the recognition that the act establishes Statewide minimum wetlands protection standards, and local communities are free to impose more stringent requirements." *Oyster Creek* at 866.

The issue came before the SJC in *City of Boston v. Conservation Commission of the City of Quincy*, SJC No. 13244, July 25, 2022 (LW 10-092-22). Boston had filed an NOI with the Quincy Conservation Commission (Commission) to rebuild a bridge to Long Island in Boston, as the bridge work (specifically the piers and roadway) would alter wetlands in Quincy. The Commission denied Boston's application pursuant to the Act and Quincy's local wetlands ordinance. Boston appealed the denial to MassDEP for a Superseding Order of Conditions, which MassDEP granted as the project met the requirements of the Act and MassDEP Regulations. Boston also appealed to Superior Court, for review in the nature of certiorari (for any legal errors on the certified record), insofar as the denial was under the ordinance. The Superior Court overturned the Quincy denial and Quincy took appeal to the Massachusetts Appeals Court.

In the Boston-Quincy dispute, the issue for the SJC as usual was whether MassDEP's order supersedes the Commission's local ordinance denial decision. The Commission argued that it relied on its ordinance's reference to "cumulatively adverse effect[s] upon wetland values," and that this language is more stringent than the language in the Act. This stricter-than-the-Act language had been approved by the Appeals Court in an earlier case, as a basis for upholding a denial. *Cave Corp. v. Conservation Comm'n of Attleboro*, 91 Mass. App. Ct. 767, 771-772 (2017). Several cities and towns have this "cumulative effects" language in their Home Rule wetland protection bylaws and ordinances and sometimes take heart that the *Cave Corp.* case validates that wording and lets commissions consider and rely on it in evaluating and acting on projects. The lesson from the Boston-Quincy case, as we will shortly see, is that it matters whether they merely invoke it or actually utilize it.

The SJC in this Boston-Quincy case distinguished the *Cave Corp. case*, saying that the Attleboro commission concluded that any disturbance to the 125-foot area on the subject parcels of land will result in cumulative adverse impacts upon the resource area values. This conclusion was appropriate despite a MassDEP superseding order of conditions "[i]n light of the commission's mandate to consider the cumulative effects of the proposed subdivision with regard to the purpose and the objectives of the ordinance, and the evidence before it." *Cave Corp.* at 771-772, 774. Specifically, in *Cave Corp*. the

Attleboro ordinance itself, in so many words, specified the cumulative effects that the commission should consider. It directed the commission to "take into account the cumulative adverse effects of loss, degradation, isolation, and replication of protected resource areas throughout the community and the watershed, resulting from past activities, permitted and exempt, and foreseeable future activities." *Cave Corp.* at 773.

The crux of the case before the SJC was whether the Quincy Commission actually relied on – and explained in its decision how it relied on – the provisions of its ordinance and any regulations to support its project denial. It did not. Therefore, the SJC here concluded that the MassDEP order supersedes the Commission's denial. Earlier, the SJC, as well as the Appeals Court, had cautioned in this line of cases that "[t]he simple fact[] . . . that a local by-law provides a more rigorous regulatory scheme does not [prohibit] a redetermination of the local authority's decision by the DEP except to the extent that the local decision was based exclusively on those provisions of its by-law that are more stringent and, therefore, independent of the act." *Healer v. Department of Envtl. Protection*, 73 Mass. App. Ct. 714, 718-719 (2009).

A local conservation commission, then, that wishes to rely on a more stringent local bylaw or ordinance to deny a project must explain how the bylaw or ordinance applies to the facts presented. "[I]f a town conservation commission simply refers to a by-law without providing any indication that its protective provisions, and a commission's general reference to the by-law in its decision, without elaboration, would allow it to insulate the decision from scrutiny". *Oyster Creek Preservation, Inc. v. Conservation Commission of Harwich,* 449 Mass. 859 (2007), at 866 footnote 12.

As applied to Quincy, the SJC ruled: "(T)he commission claims it relied on the local ordinance's reference to 'cumulatively adverse effect[s] upon wetland values,' and that this language is more stringent than the language in the act. According to the commission, it did not have enough information to determine the cumulative effects of the work that would occur on the piers and the access road. The commission does not explain in its brief, and did not explain in its decisions denying Boston's application, how its own analysis differs from the analysis that the DEP was authorized to perform. Accordingly, and as discussed further infra, we conclude that the DEP's superseding order of conditions preempts the commission's determination."

It was relevant to the SJC that "the local ordinance is concerned almost entirely with the procedure for permit applications. Its substantive provisions are limited to broad '[p]urpose' and '[s]cope' sections, which merely prohibit several activities in protected areas without the commission's approval. These sections do not give the commission additional authority over fisheries, wildlife habitats, pollution, land under the ocean, or land containing shellfish that the DEP does not also have." On this score the SJC held that "the commission did not rely on cumulative effects when analyzing the piers. The commission relied on distinct factors that the DEP also could consider pursuant to the act and the regulations. Additionally, the ordinance at issue in *Cave Corp*., unlike the local ordinance here, specified the cumulative impacts that the commission should consider."

In summary, since the Quincy Conservation Commission did not couch its stated concerns on wetland interests different than the Act, did not base its findings on any Regulations other than those of MassDEP, did not raise issues other than those within the purview of MassDEP, and did not have an ordinance stricter than the Act except in its general purpose and scope language, the Quincy denial was preempted. Legally, the Commission's ordinance denial was null and void and thus of no legal effect, and hence the MassDEP permit governs the wetland aspects of the Long Island Bridge reconstruction.

Housing Choice Act Of 2020 Promotes Multi-Family in Massachusetts Zoning Act and 40R

By Michael J. O'Neill

Governor Baker signed the Housing Choice Act of 2020, Chapter 358 of the Acts of 2020 (the "Housing Choice Act") on January 14, 2021, as an emergency law, which made it effective immediately.

It made significant procedural and substantive changes to the Massachusetts Zoning Act (Chapter 40A) and Smart Growth Districts (Chapter 40R), largely to facilitate multi-family housing near transportation facilities.

Mandatory Zoning Allowing Multi-Family Housing in MBTA Communities

The Housing Choice Act added a new requirement for "MBTA Communities," which are broadly defined to include essentially all communities served by the MBTA. MBTA Communities now are required under the Zoning Act to have at least one zoning district of reasonable size in which multi-family housing is allowed as a matter of right.

Such MBTA Community districts must be unrestricted as to age, must be suitable for children, and must have a minimum gross density of at least 15 units per acre. If applicable, they must be located not more than a half-mile from a commuter rail station, subway station, ferry terminal, or bus station.

This provision has sharp teeth. If a MBTA Community does not adopt the requisite zoning, it cannot qualify for the Local Capital Projects Fund, MassWorks Infrastructure Program, and Housing Choice Initiative Program.

The Housing Choice Act says that the department (presumably, the Department of Housing and Economic Development) shall promulgate guidelines to determine if an MBTA Community is in compliance with this new section of law. Guidelines have yet to be issued.

What is not specified is whether a MBTA Community may elect not to enact the requisite zoning and accept ineligibility for the specified state programs. The law is mandatory and does not seem to provide that option. It requires an MBTA Community to enact this specific zoning despite the fact that zoning traditionally is a strictly local decision.

Court May Require a Bond in Some Appeals Under G.L.c. 40A, sec. 17

The Housing Choice Act added another provision to the Zoning Act giving a court discretion to require a plaintiff appealing certain land use permissions to post a surety or cash bond of not more than $50,000 to secure the payment of costs if the court finds that the harm to the defendant or to the public interest resulting from delays caused by the appeal outweighs the financial burden of the surety or cash bond on the plaintiffs. The court is directed to consider the relative merits of the appeal and the relative financial means of the plaintiff and the defendant.

This new provision is limited to appeals of a special permit, variance, or site plan approval, regardless of whether the project involves housing or multi-family housing near transportation facilities. Note that the surety or bond is not mandatory or automatic; rather, it is up to the discretion of the court.

This provision significantly changes existing practice. A plaintiff's finances are now open to discovery and scrutiny by the defendant, as well as the court, at the very beginning of a case. Such information is not presently open to such disclosure at the very beginning of a case. This may have a chilling effect discouraging appeals.

Voting Requirements to Approve Certain Zoning Amendments Reduced

The Housing Choice Act makes it easier to enact zoning amendments to provide for multi-family housing and certain other uses allowed as a matter of right. Zoning amendments allowing the following uses as of right require a simple majority rather than a two-thirds vote:

- multi-family or mixed-use development in an eligible location;
- accessory dwelling units;
- open space residential development;
- Transfer development right zoning or natural resource protection where it will not result in a reduction of the number of housing units that could be developed;
- the adoption of a smart growth zoning district or starter home zoning district in accordance with Chapter 40R.

Voting Requirements to Approve Certain Special Permits Reduced

The Housing Choice Act also makes it easier to obtain a special permit for multi-family housing near a transportation facility. It amends the voting requirements by the Special Permit Granting Authority for approval of a special permit from 2/3 to a simple majority for a special permit for certain uses, namely, multi-family housing within a half-mile of a commuter rail station, subway station, ferry terminal, or bus terminal, provided that not less than 10% of the housing is affordable housing.

Definitions of Basic Terms Added

The Housing Choice Act adds definitions to the Zoning Act of a number of basic zoning terms, including: "Accessory dwelling unit," "As of right," "Eligible locations," "Gross density," "Lot," "MBTA community," "Mixed-use development," "Multi-family housing," "Natural resource protection zoning," and "Open space residential zoning." The definition for "Transfer of development rights" was revised. These definitions will help judges, as well as attorneys and other land use professionals, in their work.

Conclusion

While the word on the street is that the Housing Choice Act affects only MBTA Communities and multi-family housing developers, in actuality it changes the Town Meeting and City Council votes for several kinds of housing the Commonwealth wants to promote, alters the vote needed for a Special Permit for multi-family projects near transportation nodes (if there is some affordable housing included), poses the prospect of appellants having to post bonds in Section 17 appeals to Superior Court and Land Court, and gives us several good definitions of many land use terms that have been common parlance amount community planners, boards, applicants, engineers, and lawyers for many years.

PFAS Update: What EPA Designation of PFAS as a Superfund Substance Under CERCLA Means

By Caroline E. Smith

The United States Environmental Protection Agency ("EPA") has proposed to designate Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). This is the federal Superfund law. Collectively these chemicals are known as "PFAS."

The EPA Administrator may designate a substance as hazardous if, when released into the environment, it may present substantial danger to the public health or welfare or the environment. PFAS are water soluble and over time have seeped into surface soils, leached into groundwater and surface water, and contaminated drinking water. PFAS are now found in rivers, lakes, fish, and wildlife. That scientific reality is why the EPA is moving in this direction.

This proposed Superfund coverage of this new class of chemicals is significant. CERLCA imposes liability on the following "potentially responsible parties" (PRPs) for the actual or threatened release of any hazardous substances and the cleanup costs of any release. Release is broadly defined as "spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment." 42 U.S.C. § 9601(22). The class of PRPs includes a long list: current owners and operators of a facility, past owners and operators of a facility at the time hazardous wastes were disposed, generators, parties that arranged for the disposal or transport of the hazardous substances, and transporters of hazardous waste that selected the site where the hazardous substances were brought. 42 U.S.C. § 9607(a).

If PFOA and PFOS are designated under CERLCA, as appears likely to happen, any person in charge of a facility would be required to report releases of one pound or greater of PFOA and PFOS within a 24-hour period to the National Reporting Center in accordance with 40 C.F.R. 302. For example, Section 304 of the Emergency Planning and Community Right-to-Know Act also requires facility owners or operators to immediately notify their community emergency coordinator or local emergency planning committee of a release. Upon notification, the Federal government will evaluate the need for a response in accordance with the National Oil Hazardous Substance Contingency Plan.

Because current owners and operators of facilities can be found liable under CERCLA, that means even passive receivers of PFAS can be found liable. It is expected that this new designation by EPA would affect PFAS manufacturers and processors, manufacturers of products containing PFAS, downstream product manufacturers, users of PFAS products, and waste management and wastewater treatment facilities. A small sample of potentially affected businesses includes car washes, carpet manufacturers, airports, landfills, firefighting foam manufacturers, municipal fire departments, paper and textiles mills, wastewater treatments plants, waste management services, water utilities, and many more.

An increasing number of states have their own PFAS policies or regulations with which the listed manufacturers and users need to comply. Designation of PFAS under CERLCA may introduce a uniform and more predicable nationwide application of PFAS regulations and enforcement, or at least a set of minimum standards and specifications on which states may improve. We shall see.

Designation of PFOA and PFOS under CERCLA certainly will affect real estate transactions. Environmental due diligence, at some level, should always be a part of any real estate transaction,

certainly for industrial, commercial, agricultural and larger residential developments. Any buyer, lender, investor, or tenant always is well advised to determine the current and past uses and owners of a property to establish whether a release of a hazardous substance could have occurred. This should include CERCLA, TSCA, RCRA and counterpart state regulatory laws.

Large commercial developers routinely use the American Society of Testing and Materials International Standard E1527-13 Phase I Environmental Site Assessment ("Phase 1") process in order to identity any history of any potential contaminants on the site. This has been called the "paperwork review." By using this standard, purchasers of properties can satisfy one of the requirements to qualify as an innocent landowner or bona fide prospective purchaser under CERCLA and limit their liability under CERCLA. As of now (and until PFAS are listed as hazardous substances under CERCLA), Phase 1 does not include PFAS in its due diligence standards and developers would not be protected from liability for PFAS even if they complied with all the standards set out in Phase 1. Until the rule is finalized, developers may be wary of redevelopment projects.

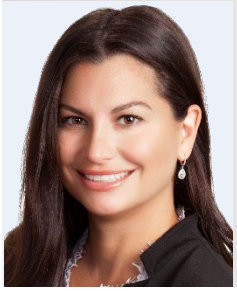
The addition of PFOA and PFOS under CERCLA will bring new parties to existing Superfund sites since the EPA is authorized to bring in new liable parties. Existing parties also are able to make contribution claims against those new liable or potentially liable parties. This addition will also expand the geographic scope of current remediation projects and reopen old Superfund sites since they likely will contain PFAS. Many parties that have resolved their CERCLA liability via settlement agreement have reopener clauses in their contracts that may subject them to additional liability.

The new designation will enable the EPA and states to identify more Superfund sites that are not currently designated as such. These practical implications will increase the time, cost, complexity, and uncertainty of the remediation process.

One way state and municipalities have been reckoning with PFAS is through litigation. Multidistrict litigation consisting of hundreds of lawsuits brought by state attorneys general, municipalities, and private and public water districts is ongoing. State and local officials are using litigation as a tool to punish wrongdoers and obtain large sums of money to spearhead testing and cleanup efforts.

Caroline Smith is a Law Clerk at McGregor Legere & Stevens PC.

When Estate Planners and Real Estate Lawyers Don't Speak the Same Language



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Theresa Santoro is Of Counsel in the Real Estate Department at Sherin and Lodgen, LLP. Prior to that, she was an attorney at Cushing & Dolan, PC's Real Estate Department. Theresa is analytical and detail-oriented, with broad and deep experience in complex business and real estate matters, including entity formation, real estate and business acquisitions, dispositions, and financing, as well as transactional commercial and residential real estate, condominium developments and conversions, due diligence, permitting, complex contract and lease negotiations, and risk assessment involving a variety of multifaceted legal and title problems.

Theresa drafts and negotiates a significant workload of matters, including leases, contracts, business acquisitions, institutional and private equity and trust financing, and purchase and sale agreements for residential properties and commercial projects, including businesses, hotels, restaurants, retail spaces, multifamily buildings, office and industrial buildings, warehouses, business parks, and raw land for development projects. She also coordinates IRS 1031 tax deferred like-kind exchanges, advises on zoning and land use matters, and files petitions throughout Land Court and various Probate Courts.

A recipient of the CALI Excellence for the Future Award, Theresa is the Co-chair of REBA's Estate Planning Section. She is also a member of the MBA, Federal Bar Association and Rhode Island Bar Association, and served as Secretary of the Bristol County Bar Association and President of the Warren Barrington Rotary Club.

Theresa earned a J.D. from Roger Williams University School of Law. She was the third successful graduate in the advanced collaborative program with Roger Williams University undergraduate study, resulting in her achievement of a dual major Bachelor of Science, *summa cum laude*, and a Juris Doctor in six years.

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Lisa Vesperman Still is the New England Regional Counsel and Massachusetts State Counsel for WFG National Title Insurance Company. Lisa has over 25 years of experience in real estate and title, both as a transactional attorney in private practice for more than 17 years, concentrating in all-things-real estate, and as underwriting counsel. As underwriting counsel, Lisa unravels complex title puzzles and oversees the underwriting in all New England states. Lisa heads up WFG's Basically Title series, and leads the New England Back to School sessions and CE classes for WFG's Real Estate School.

In addition to being a member of the REBA Standards & Forms Committee, Lisa serves on the Education, Membership and Best Practices Committees of the American Land Title Association, is president of the New England Land Title Association, and a member of the Barnstable Bar Association. She is also involved in her local Cape Cod community, serving in volunteer roles and leadership capacities on the Lower Cape. Lisa served as grievance officer for the Orleans and Brewster Housing Authorities and was a board member of the Community Development Partnership, and currently serves as secretary of the Brewster Sportsman's and Civic Club and as president of the Nauset Warriors Booster Club.

Lisa received her J.D. from Loyola University New Orleans College of Law and her B.A. in Political Science from The College of New Rochelle. She lives in Brewster with her partner Steve and daughter Savannah, while keeping tabs on her son Ethan, who serves in the Army. When she's not tackling title puzzles, Lisa loves walking and hiking the little-known paths, trails and dunes of Cape Cod.

When Estate Planners and Real Estate Lawyers Don't Speak the Same Language

Powers of Attorney

Massachusetts General Laws, Chapter 190B, §§5-501 to 5-507

REBA Title Standard No. 34
Powers of Attorney

An instrument executed by an attorney in fact under a recorded power of attorney, durable or otherwise, is not on that account defective provided:

(1) the power of attorney had not, at the time of such execution, terminated pursuant to its own terms;

(2) the power of attorney contains sufficient powers for the execution of the instrument, the transaction for which the instrument is being used, or both;

(3) at the time of the recording of such instrument:

(a) no revocation of the power of attorney had been recorded with the registry of deeds for the county or district in which the real estate affected lies; and
(b) no evidence of the death of the principal had been recorded with either the registry of deeds or registry of probate for the county or district in which the real estate affected lies; and
(c) in the case of a non-durable power of attorney, no evidence of incapacity or legal disability of the principal had been recorded with either the registry of deeds or registry of probate for the county or district in which the real estate affected lies; and

(4) only if required by the express terms of the power of attorney, there has been recorded an affidavit signed by the attorney in fact under the penalties of perjury stating that the attorney in fact did not have at the time of such execution pursuant to the power of attorney, actual knowledge of the revocation or of the termination of the power of attorney by death, or, in the case of a non-durable power of attorney, by mental illness or other disability or incapacity.

Comments

See M.G.L. c. 190B, §§5-501 to 5-507.
Under M.G.L. c. 190B, § 5-504 (as amended effective July 8, 2012), an affidavit of the type described in clause (4) of this Title Standard is no longer required as to either durable or nondurable powers of attorney to establish good faith reliance by third parties unless the power of attorney itself expressly requires the recording of such affidavit. However, this legislative change does not affect the advisability of obtaining such an affidavit from the attorney in fact as a matter of practice in new transactions in order to gain the benefit of the statutory conclusive reliance provision of M.G.L. c. 190B, § 5-505.

Adopted November 6, 1978
Amended May 21, 1984 (Added first paragraph)
Amended May 7, 2012 (to conform Standard to passage of M.G.L. c.190B, effective March 31, 2012)
Amended May 6, 2013 (to conform Standard to passage of M.G.L. c. 190B, §5-504(c) effective July 8, 2012)

REBA Form No. 1
Affidavit Regarding Power of Attorney

I, _____

of _____, _____ County, Massachusetts, do under oath depose and say that I am the attorney in fact or agent named in a Power of Attorney dated _____ executed by my principal of _____ County, Massachusetts, and filed or recorded with _____ Registry _____.

_____ as Document _____ and noted on Certificate of Title _____
_____ in Book _____, Page _____.
_____ herewith

and that at the time of the execution, pursuant to said Power of Attorney, of an instrument dated _____ and filed or recorded with said Registry.

_____ as Document _____ and noted on Certificate of Title _____
_____ in Book _____, Page _____.
_____ herewith

I did not have actual knowledge of any revocation or of any termination of said Power of Attorney by death, mental illness or other disability.

Executed under the penalties of perjury this _____ day of _____, 20_____.

_____

See REBA Title Standard No. 34

[Attach appropriate acknowledgement certificate here]

Adopted May 21, 1984

Commonwealth of Massachusetts Land Court
Guidelines on Registered Land dated February 27, 2009

15. Deeds: Execution and Acknowledgment of Deed under Power of Attorney

(May 1, 2000)

Although, as indicated below, there is some leeway in the way a deed in such an instance can be signed, there is little flexibility as to how the granting clause should be drafted.

When a sealed instrument is executed by an agent or attorney, for the principal, the strict technical rule of the Common Law, which has never been relaxed in England or in this Commonwealth, requires that it be executed in the name of the principal in order to make it his deed" *Abbey v. Chase,* 6 Cush. 54. As stated in Crocker's Notes on Common Forms, Little Brown & Company (Seventh Edition, 1955), § 351, where A.B. is the principal, a deed beginning “I, C.D.,” or “I, C.D. as attorney for A.B.” is an improper form as to the granting clause, and will be ineffective as the deed of the principal. The deed should be drafted by reciting in the granting clause the principal's name only, as though there was no power of attorney.

As far as the execution of the instrument, the signature should be as noted below. We'll assume that Mary Doe is the principal and that John Doe is her attorney in fact under a power of attorney:

/s/ Mary Doe
by John Doe her Attorney in Fact
under Power of Attorney, recorded with (Registry of Deeds) Book---, Page---

In this instance John will actually sign Mary's name. Although the above form is the preferred one, the signature "John Doe for Mary Doe" would seem to be satisfactory. See *Mussey v. Scott*, 7 Cush. 215.

The acknowledgment, like the deed, should be that of the principal (albeit through the act of the agent), as follows:

> Then personally appeared the aforementioned John Doe and acknowledged the foregoing instrument to be the free act and deed of Mary Doe.

Registered land memos from the Chief Title Examiner

Memorandum: Form of Acknowledgements and powers of attorney dated 02/04/2021 - https://www.mass.gov/memorandum/form-of-acknowledgments-and-powers-of-attorney

Life Estates

Massachusetts General Laws, Chapter 184

Section 5: Conveyance vesting life estate and remainder to heirs

Section 5. If land is granted or devised to a person and after his death to his heirs in fee, however the grant or devise is expressed, an estate for life only shall vest in such first taker, and a remainder in fee simple in his heirs.

Source: https://malegislature.gov/Laws/GeneralLaws/PartII/TitleI/Chapter184/Section5 (9/30/2022)

26 United States Code Annotated/Title 26. Internal Revenue Code

§ 2036. Transfers with retained life estate

(a) General rule.--The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death--

(1) the possession or enjoyment of, or the right to the income from, the property, or

(2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom.

§ 7520. Valuation tables

(a) General rule.--For purposes of this title, the value of any annuity, any interest for life or a term of years, or any remainder or reversionary interest shall be determined--

(1) under tables prescribed by the Secretary, and

(2) by using an interest rate (rounded to the nearest 2/10 ths of 1 percent) equal to 120 percent of the Federal midterm rate in effect under section 1274(d)(1) for the month in which the valuation date falls.
If an income, estate, or gift tax charitable contribution is allowable for any part of the property transferred, the taxpayer may elect to use such Federal midterm rate for either of the 2 months preceding the month in which the valuation date falls for purposes of paragraph (2). In the case of transfers of more than 1 interest in the same property with respect to which the taxpayer may use the same rate under paragraph (2), the taxpayer shall use the same rate with respect to each such interest.

(b) Section not to apply for certain purposes. -- This section shall not apply for purposes of part I of subchapter D of chapter 1 or any other provision specified in regulations.

(c) Tables. --

(1) In general. -- The tables prescribed by the Secretary for purposes of subsection (a) shall contain valuation factors for a series of interest rate categories.

(2) Revision for recent mortality charges. -- The Secretary shall revise the initial tables prescribed for purposes of subsection (a) to take into account the most recent mortality experience available as of the time of such revision. Such tables shall be revised not less frequently than once each 10 years to take into account the most recent mortality experience available as of the time of the revision.

[(3) Redesignated (2)]

(d) Valuation date. -- For purposes of this section, the term “valuation date” means the date as of which the valuation is made.

(e) Tables to include formulas. -- For purposes of this section, the term “tables” includes formulas.

Internal Revenue Service Actuarial Tables
https://www.irs.gov/retirement-plans/actuarial-tables

Massachusetts General Laws, Chapter 65C

Section 5: Valuation; gross estate

Section 5. (b) The value of an annuity, a life estate or an interest in property less than an absolute interest shall be determined in accordance with the actuarial tables in effect as of the decedent's death under section two thousand and thirty-one of the [Internal Revenue Code of the United States] in effect on January first, nineteen hundred and eighty-five at such time and regulations issued thereunder.

Source: https://malegislature.gov/Laws/GeneralLaws/PartI/TitleIX/Chapter65C/Section5 (9/30/2022)

Commonwealth of Massachusetts Land Court
Guidelines on Registered Land dated February 27, 2009
28. Life Estate Deeds
(May 1, 2000)

An example of a life estate deed is where one or more grantors convey real estate to one or more grantees (the "remaindermen") reserving (a) the right to use and occupy the real estate and (b) sometimes other rights such as the right to sell or mortgage, during the lives of the grantors (the "life tenants").

The certificate of title should issue in the names of the grantees/remaindermen in whatever relationship is stated in the life estate deed, e.g., joint tenants or tenants-in-common, immediately followed by a recitation of the rights reserved by the grantors/life tenants exactly as it appears in the life estate deed, e.g., subject to the rights of _____ and _____ to use and occupy the premises for and during their lives as reserved in Document No. _____.

If the grantors/life tenants reserve additional powers with or without notice to the grantees/remaindermen, these should be recited in the certificate of title, e.g., “Subject to the rights, powers and interests reserved to and in Document No. _____, any of which may be exercised without notice to, or assent from, the above-named owners or their assigns.”

If the grantors/life tenants holding the retained rights exercise them, no notice to or assent from the grantees/remaindermen or their assigns need be given or obtained unless, of course, called for by the deed reserving such rights.

A typical “no notice” provision in a deed would be “No notice to, or assent by, the grantees herein or their assigns shall be necessary in connection with any exercise of the rights retained by the grantors herein.”

Trusts

Real Estate Bar Association (REBA) Title Standards

- TS 9 - Massachusetts Business Trusts and the Rule Against Perpetuities
- TS 23 - Self Dealing by Trustees
- TS 33 - Transfers by Trustees
- TS 38 - Attachments of Trust Property
- TS 45 - Transfers to Trusts
- TS 53 - Indefinite References - Trusts
- TS 68 -Trustee's Certificates Under MGL c. 184, § 35

Real Estate Bar Association (REBA) Forms

- Form 20: Declaration of Trust: Establishing Nominee Trust
- Form 20A: Schedule of Beneficiaries Nominee Trust
- Form 20B: Receipt of Schedule of Beneficiaries
- Form 20C: Nominee Trust Resignation
- Form 20D: Nominee Trust Appointment of Successor Trustee
- Form 20E: Certificate of Acceptance by Trustee
- Form 20F: Nominee Trustee Certificate of Appointment of Successor Trustee and Acceptance
- Form 20G: Trustee Certificate
- Form 20H: Certificate and Direction of Beneficiary

Commonwealth of Massachusetts Land Court Guidelines on Registered Land dated February 27, 2009

- LC Guideline 51 - Trusts: Conveyances to Trustees
- LC Guideline 52 - Trusts: Conveyances by Trustees
- LC Guideline 53 - Trusts: Trustee's Deeds for Nominal Consideration
- LC Guideline 55 - [Instruments requiring] Approval by Chief Title Examiner (Section 6 Successor Trustees/Removal of Trustees
- LC Guideline 59 – Indefinite References
- LC Guideline 62 – Trusts: Expired

Trustee's Certificates

Massachusetts General Laws Chapter 184

Section 35: Trustee's certificate; requirements; effect

Section 35. Notwithstanding section 25 to the contrary, a certificate sworn to or stated to be executed under the penalties of perjury, and in either case signed by a person who from the records of the registry of deeds or of the registry district of the land court, for the county or district in which real estate owned by a nontestamentary trust lies, appears to be a trustee thereunder and which certifies as to: (a) the identity of the trustees or the beneficiaries thereunder; (b) the authority of the trustees to act with respect to real estate owned by the trust; or (c) the existence or nonexistence of a fact which constitutes a condition precedent to acts by the trustees or which are in any other manner germane to affairs of the trust, shall be binding on all trustees and the trust estate in favor of a purchaser or other person relying in good faith on the certificate. The certificate most recently recorded in the registry of deeds for the county or district in which the real estate lies shall control.

Source: https://malegislature.gov/Laws/GeneralLaws/PartII/TitleI/Chapter184/Section35 (9/30/2022)

REBA Form No. 35
Trustee's Certificate Pursuant to M.G.L. c. 184, § 35

Name of Trust: _____
Dated: _____

I, _____ [Name of Trustee], Trustee of _____ [name of trust] under _____ [indenture] _____ [agreement declaration] of Trust dated _____ [date], [as amended] (the "Trust") between _____ [name of settler/donor] as _____ [settler/donor] and _____ [name of original trustees] as the original [and current] trustees, certify as follows:

(a). _____ Name of Trustee(s) is/are the current trustee(s) of the Trust. If either one of us shall fail or cease to serve, _____ Successor Trustee shall serve as successor Trustee;

(b). The trustees of the Trust have authority to act with respect to real estate owned by the Trust, and have full and absolute power under said Trust to convey any interest in real estate and improvements thereon held in said Trust and no purchaser or third party shall be bound to inquire whether the trustee has said power or is properly exercising said power or to see to the application of any trust asset paid to the trustee for a conveyance thereof; and,

(c). There are no facts which constitute conditions precedent to acts by the trustees or which are in any other manner germane to affairs of the Trust.

Executed as a sealed instrument under the pains and penalties of perjury on _____, 20___.

_____
NAME OF TRUSTEE
Trustee

See REBA Title Standard No. 68

Note

The Trustees Certificate may need to be amended in certain circumstances, for example, where there are conditions precedent to the acts by the trustees.

[Attach appropriate acknowledgement or jurat certificate form]

Comment

As to registered land, see also Land Court Guideline 52.

Adopted November 3, 2003
Amended November 14, 2011 (Amended to make reference to jurat certificate form in the Note and to add the Comment)

Massachusetts General Laws, Chapter 203E [Massachusetts Uniform Trust Code]

Section 1013: Certification of trust

(a) Instead of furnishing a copy of the trust instrument to a person other than a beneficiary, the trustee may furnish to the person a certification of trust containing the following information:

(1) that the trust exists and the date the trust instrument was executed;

(2) the identity of the settlor;

(3) the identity and address of the currently acting trustee;

(4) the powers of the trustee;

(5) the revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust;

(6) the authority of co-trustees to sign or otherwise authenticate and whether all or less than all are required in order to exercise powers of the trustee;

(7) the trust's taxpayer identification number; and

(8) the manner of taking title to trust property.

(b) A certification of trust may be signed or otherwise authenticated by any trustee.

(c) A certification of trust shall state that the trust has not been revoked, modified or amended in any manner that would cause the representations contained in the certification of trust to be incorrect.

(d) A certification of trust need not contain the dispositive terms of a trust.

(e) A recipient of a certification of trust may require the trustee to furnish copies of those excerpts from the original trust instrument and later amendments which designate the trustee and confer upon the trustee the power to act in the pending transaction.

(f) A person who acts in reliance upon a certification of trust without knowledge that the representations contained in the certification are incorrect shall not be liable to any person for so acting and may assume without inquiry the existence of the facts contained in the certification. Knowledge of the terms of the trust may not be inferred solely from the fact that a copy of all or part of the trust instrument is held by the person relying upon the certification.

(g) A person who in good faith enters into a transaction in reliance upon a certification of trust may enforce the transaction against the trust property as if the representations contained in the certification were correct.

(h) A person making a demand for the trust instrument, in addition to a certification of trust or excerpts, shall be liable for damages if the court determines that the person did not act in good faith in demanding the trust instrument.

(i) This section shall not limit the right of a person to obtain a copy of the trust instrument in a judicial proceeding concerning the trust.

Source: https://malegislature.gov/Laws/GeneralLaws/PartII/TitleII/Chapter203E/Section1013 (9/30/2022)

Commonwealth of Massachusetts Land Court
Guidelines on Registered Land dated February 27, 2009

52. Trusts: Conveyances by Trustees

(May 1, 2000, Revised February 27, 2009)

A. Nominee Trust Conveyances - Trust in Same Registry District

Conveyances by Trustees of a nominee trust are acceptable if

(1) the instrument of conveyance is authorized by the terms of the registered or recorded (previously or simultaneously) trust instrument or certificate given pursuant to G.L. c. 184 §35, and (a) a Trustee's Certificate in substantially the form appended hereto as Exhibit A or Exhibit B is submitted, or (b) the instrument of conveyance itself contains all such matters required to be set forth in a Trustee's Certificate;

or

(2) Land Court approval has been obtained.

B. Nominee Trust Conveyances - Trust in Different Registry District or recorded in Registry of Deeds

Conveyances by Trustees of a nominees trust are acceptable if

(1) the instrument of conveyance is authorized by the terms of the registered or recorded (previously or simultaneously) trust instrument and (a) attested copies of the trust declaration, or of a certificate pursuant to G.L. c. 184 §35, and all amendments thereto and all trustee resignations and appointments are submitted (as established by a certificate by an attorney, or given under oath by the trustee, certifying that the instrument or certificate of which the attested copy is provided is current, in force, and not the subject of any recorded amendment), and (b)(i) a Trustee's Certificate in substantially the form attached hereto as Exhibit A or Exhibit B is submitted, or (ii) the instrument of conveyance itself contains all such matters required to be set forth in a Trustee's Certificate, and with respect to a Trust for which only a Certificate pursuant to G.L. c. 184 §35 has been recorded, it is subscribed and sworn to under the pains and penalties of perjury

or

(2) Land Court approval has been obtained (this requires the fully executed instrument and a Land Court Examiners Report on the contents and status of the trust).

CAVEAT: Certificates pursuant to G.L. c 184 § 35, once recorded or registered in connection with, and establishing authority for, a particular transaction, may not be used for subsequent transactions at a later date unless: (a) the earlier certificate establishes that the termination of the trust has not occurred as of the date of the later transaction, or (b) the earlier certificate provides that any party interested in title to the locus may rely on the continuing existence of the trust until the recording of a certificate or document establishing the termination of the trust.

CAVEAT: A trustee certificate as contained in attached Exhibit A cannot be used also to demonstrate authority of a trustee to convey, in cases where the trust instrument is not of record and a certificate pursuant to G.L. c. 184, § 35 instead has been recorded or registered, unless the recorded or registered G.L. c. 184, § 35 certificate authorizes any party interested in title to the locus to rely on such a trustee certificate.

C. Trust Conveyances Other Than Nominee Trusts- Trust in Same Registry District

Trust conveyances are acceptable if the instrument is authorized by the terms of the trust. In these cases, no separate Trustee's Certificate is required.

D. Trust Conveyances Other Than Nominee Trusts- Trust in Different Registry District or recorded in Registry of Deeds

Trust conveyances are acceptable if

(1) the instrument of conveyance is authorized by the terms of the trust and (a) attested copies of the trust declaration (or, instead, provided the trust is not a testamentary one, of a recorded or registered certificate pursuant to G.L. c. 184, §35) and all amendments thereto and all trustee resignations and appointments are submitted (as established by a certificate by an attorney, or given under oath by the trustee, certifying that the instrument or certificate of which the attested copy is provided is current, in force, and not the subject of any recorded amendment) and (b)(i) a Trustee's Certificate in substantially the form attached hereto as Exhibit C is submitted, or (ii) the instrument itself contains all such matters required to be set forth in a Trustee's Certificate

or

(2) Land Court approval has been obtained (this requires the fully executed instrument and a Land Court Examiners Report on the contents and status of the trust).

Commonwealth of Massachusetts Land Court Guidelines on Registered Land dated February 27, 2009
53. Trusts: Trustee's Deed for Nominal Consideration
(May 1, 2000, Revised February 27, 2009)

A trustee's deed containing a recitation of nominal consideration may be accepted for registration without prior Land Court approval when accompanied by a trustee's certificate, if authorized by the trust, or a certificate pursuant to G.L. c. 184 §35, signed by at least one of the trustees, certifying that all the beneficiaries who are natural persons are of full age and are competent and that all of the beneficiaries have assented to the conveyance for nominal consideration (See the attached sample certificate.)

The requirements of this guideline address only the issue of a deed reciting nominal consideration; the requirements of other guidelines relating generally to instruments executed by trustees also must be satisfied.

I, _____ Trustee
of_____ under a Declaration of
Trust dated_____ and registered as_____ hereby certify that:

1. Said Trust is in full force and effect.
2. All the beneficiaries of said trust who are natural persons, if any, are of full age.
3. All the beneficiaries of said trust who are natural persons, if any, are competent.
4. All the beneficiaries of said trust have consented to the transfer of the property to_____ for nominal consideration.

Signed under the penalties of perjury.
Signed: _____
Dated: _____

[Add Oath]

Self-Dealing

Massachusetts General Laws, Chapter 203E

Section 802. Duty of loyalty

(a) A trustee shall administer the trust solely in the interests of the beneficiaries.

(b) Subject to the rights of persons dealing with or assisting the trustee, as provided in section 1012, a sale, encumbrance or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account or which is otherwise affected by a conflict between the trustee's fiduciary and personal interests shall be voidable by a beneficiary affected by the transaction unless:

(1) the transaction was authorized by the terms of the trust;

(2) the transaction was approved by the court;

(3) the beneficiary did not commence a judicial proceeding within the time allowed by section 1005;

(4) the beneficiary consented to the trustee's conduct, ratified the transaction or released the trustee in compliance with section 1009; or

(5) the transaction involves a contract entered into or claim acquired by the trustee before the person became a trustee.

(c) A sale, encumbrance or other transaction involving the investment or management of trust property shall be presumed to be affected by a conflict between personal and fiduciary interests if it is entered into by the trustee with:

(1) the trustee's spouse;

(2) the trustee's descendants, siblings, parents or their spouses;

(3) an agent or attorney of the trustee; or

(4) a corporation or other person or enterprise in which the trustee, or a person that owns a significant interest in the trustee, has an interest that might affect the trustee's best judgment.

(d) A transaction not concerning trust property, in which the trustee engages in the trustee's individual capacity, shall be a conflict between personal and fiduciary interests if the transaction concerns an opportunity properly belonging to the trust.

(e) An investment by a trustee in securities of an investment company or investment trust to which the trustee, or its affiliate, provides services in a capacity other than as trustee shall not be presumed to be affected by a conflict between personal and fiduciary interests if the investment otherwise complies with the prudent investor rule of chapter 203C. In addition to compensation for acting as trustee, the trustee may be compensated by the investment company or investment trust for providing those services out of fees charged to the trust. If the trustee receives compensation from the investment company or investment trust for providing investment advisory or investment management services, the trustee shall at least annually notify the persons entitled under section 813 to receive a copy of the trustee's annual report of the rate and method by which that compensation was determined.

(f) In voting shares of stock or in exercising powers of control over similar interests in other forms of enterprise, the trustee shall act in the best interests of the beneficiaries.

(g) This section shall not preclude the following transactions, if fair to the beneficiaries:

(1) an agreement between a trustee and a beneficiary relating to the appointment or compensation of the trustee;

(2) payment of reasonable compensation to the trustee;

(3) a transaction between a trust and another trust, decedent's estate or conservatorship of which the trustee is a fiduciary or in which a beneficiary has an interest;

(4) a deposit of trust money in a regulated financial service institution operated by the trustee; or

(5) an advance or loan by the trustee of money to the trust for a proper trust purpose.

Source: https://malegislature.gov/Laws/GeneralLaws/PartII/TitleII/Chapter203E/Article8/Section802 (9/30/2022)

Massachusetts General Laws, Chapter 203E

Section 1005. Limitation of action against trustee

(a) Unless previously barred by adjudication, consent or limitation, any claim against a trustee for breach of trust shall be barred as to any beneficiary who has received a final account or other statement fully disclosing the matter and showing termination of the trust relationship between the trustee and the beneficiary, unless a proceeding to assert the claim is commenced within 6 months after receipt of the final account or statement. Any claim against a trustee for breach of trust shall be barred in any event and notwithstanding lack of full disclosure, against a trustee who has issued a final account or statement received by the beneficiary and has informed the beneficiary of the location and availability of records for examination by the beneficiary after 3 years. A beneficiary is deemed to have received a final account or statement if, being an adult, it is received by the beneficiary personally or if, being a minor or disabled person, it is received by the beneficiary's representative as described in article 3.

(b) Where a claim is not barred by subsection (a), a beneficiary may not commence a proceeding against a trustee for breach of trust more than 3 years after the date the beneficiary or a representative of the beneficiary knew or reasonably should have known of the existence of a potential claim for breach of trust.

(c) If subsections (a) and (b) do not apply, a judicial proceeding against a trustee for breach of trust must be commenced within 5 years after the first to occur of:

(1) the removal, resignation or death of the trustee;

(2) the termination of the beneficiary's interest in the trust; or

(3) the termination of the trust.

Source: https://malegislature.gov/Laws/GeneralLaws/PartII/TitleII/Chapter203E/Article10/Section1005 (9/30/2022)

REBA Title Standard No. 23
Self-Dealing by Trustee

A title based upon a deed from a trustee of record to themselves, or a party identified in M.G.L. c. 203E, §802(c) (See Comment 5), free of the trust, is not on that account defective if:

(1) The recorded trust, as it may be amended, or a Trustee's Certificate pursuant to M.G.L. c. 184, §35 evidencing the provisions of the trust, expressly authorizes self-dealing on the part of the trustee;

or

(2) A court of competent jurisdiction has rendered a judgment authorizing or ratifying the deed;

or

(3) A period of at least three (3) years has elapsed since the recording of the deed and the record does not disclose any adverse claim arising under M.G.L. c. 203E, §802(b) in connection with the transfer;

or

(4) The trust does not contain spendthrift provisions, and all beneficiaries, in a recorded instrument, consent to or ratify the conveyance by the trustee;

or

(5) Barring an express prohibition against self-dealing, the recorded trust, as it may be amended, or Trustee's Certificate pursuant to M.G.L. c. 184, §35, recites that third parties may conclusively rely upon instruments or documents executed by such trustees as mandated by the trust as being duly authorized.

Comments

(1) Regardless of the fairness of the price paid, if the trustee is the purchaser of the property the beneficiaries may insist upon a reconveyance of the property from the trustee, or from any person who purchased from the trustee with notice or knowledge that the trustee had purchased the property through self-dealing, upon the payment of the purchase price where there has been no actual fraud; or, the beneficiaries may hold the trustee liable for the actual value of the property at the time of sale; or, if the trustee has sold the property for an amount in excess of the price paid by such trustee, the beneficiaries may recover such excess. See Vinal v. Gove, 275 Mass. 235, 175 N.E. 464.

(2) Self-dealing is considered a breach of the trustee's duty of loyalty. It is characterized as "a sale, encumbrance or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account or which is otherwise affected by a conflict between the trustee's fiduciary and personal interests" and is voidable by an affected beneficiary. M.G.L. c. 203E, §802(b).

(3) If a beneficiary has not received a final account fully disclosing the self-dealing and terminating the trust relationship between the beneficiary and the trustee, a beneficiary is barred from commencing any proceeding against a trustee for self-dealing "more than 3 years after the date the beneficiary or a representative of the beneficiary knew or reasonably should have known of the existence of a potential claim for breach of trust." M.G.L. c. 203E, §1005(b). For purposes of this Standard, a beneficiary is presumed to have known or reasonably should have known about the breach of trust when the deed is recorded at the Registry of Deeds in the County in which the property is located.

(4) Frequently, the identity of a trust's beneficiaries is disclosed only in an unrecorded schedule of beneficial interests. As such, third parties may be unable to readily ascertain from the registry records the identity of those persons who may consent to, or ratify, a trustee's conveyance which might otherwise violate this standard, or release the trustee from liability therefor. In such circumstances, the identity of a trust's beneficiaries may be conclusively established, in favor of persons relying thereon in good faith, in a trustee's certificate made by a trustee of record that conforms to Title Standard 68. Under certain fact determinative circumstances, it may also be acceptable to establish the identity of off-record trust beneficiaries by recording either the original unrecorded schedule of beneficial interests along with an affidavit pursuant to M.G.L c. 183, §5B by an attorney with actual knowledge of the affairs of the trust, or a copy of the unrecorded schedule of beneficial interests attached to such affidavit.

(5) M.G.L. c. 203E, sec 802(c) states that a transaction entered into by a Trustee with any of the following parties gives rise to a rebuttable presumption of self-dealing:

a. the trustee's spouse;

b. the trustee's descendants, siblings, parents or their spouses;

c. an agent or attorney of the trustee; or

d. a corporation or other person or enterprise in which the trustee, or a person that owns a significant interest in the trustee, has an interest that might affect the trustee's best judgment.

Adopted May 3, 1977

Amended May 11, 1998 (Changes 'fiduciary' to 'trustee' throughout the Standard)

Amended November 1, 2021 (Updated to include reference to Massachusetts Uniform Trust Code section discussing self-dealing and change limitation period in paragraph 3. Additionally, changes include reliance on Certificates under MGL. c. 184 s. 35. Comments 2-5 added.)

Intestate Estates and Informal Probate

Real Estate Bar Association (REBA) Title Standards

- TS 14 – Missing Probates
- TS 41 – List of Heirs

Memorandum Re: Land Court Guideline 14. Death: The Effect of Death upon Registered Land Titles (revised 10-2019) - https://www.mass.gov/doc/land-court-chief-title-examiner-memorandum-re-land-court-guideline-14-death-the-effect-of-death/download

Deeds of Distribution

Massachusetts General Laws, Chapter 3-906

Section 3-906: Distribution in kind; valuation; method

(a) Except as restricted or otherwise provided for by will or order of the court, a personal representative may distribute assets of the estate in kind or partly in cash and partly in kind and pro rata or not pro rata at then current values as between distributees.

(b) After the probable charges against the estate are known, the personal representative may mail or deliver a proposal for distribution to all persons who have a right to object to the proposed distribution. The right of any distributee to object to the proposed distribution on the basis of the kind or value of asset he is to receive, if not waived earlier in writing, terminates if he fails to object in writing received by the personal representative within 30 days after mailing or delivery of the proposal.

Section 3–907: Distribution in Kind; Evidence

If distribution in kind is made, the personal representative shall execute an instrument or deed of distribution assigning, transferring or releasing the assets to the distributee as evidence of the distributee's title to the property.

Section 3-908: Distribution; right or title of distributee

Proof that a distributee has received an instrument or deed of distribution of assets in kind, or payment in distribution, from a personal representative, is conclusive evidence that the distributee has succeeded to the interest of the estate in the distributed assets, as against all persons interested in the estate, except that the personal representative may recover the assets or their value if the distribution was improper.

Source: https://malegislature.gov/Laws/GeneralLaws/PartII/TitleII/Chapter190B/ArticleIII (9/30/2022)

REBA Form No. 58
Deed of Distribution, M.G.L. c. 190B, §3-907

WHEREAS, _____, of _____, Massachusetts ("the Decedent") died on _____ having an interest in real estate at ____, Massachusetts; and

WHEREAS, the undersigned _____, of _____, Massachusetts is the duly appointed and qualified Personal Representative of the Estate of the Decedent in the _____ Probate and Family Court, Docket No. _____;

WHEREAS, the Distributee[s] herein is/are:

(a) [ ] the Devisee[s] under the Last Will and Testament of the Decedent;

(b) [ ] the Heir[s] of the Decedent;

NOW, THEREFORE, the undersigned, in distribution of the estate, for no consideration, hereby distributes to:
_____, of _____, Massachusetts,
[Distributee 1]
_____, of _____, Massachusetts,
[Distributee 2]
_____, of _____, Massachusetts,
[Distributee 3]

as _____
[specify tenancy]

such interest in the land in

Being the same premises described in a deed of _____ to the Decedent dated _____ and
[ ] recorded with _____ County Registry of Deeds in Book _____, Page _____.
[ ] filed in _____ Registry District of the Land Court as Document No. _____ and noted on Certificate of Title No. _____.

Address of Premises: _____.

WITNESS my hand and seal on the _____ day of _____, _____.

_____
Personal Representative

COMMONWEALTH OF MASSACHUSETTS

_____, ss

On this _____ day of _____, _____, before me, the undersigned notary public, personally appeared the above _____, proved to me through satisfactory identification, being (check whichever applies): ☐ driver's license or other state or federal governmental document bearing a photographic image, ☐ oath or affirmation of a credible witness known to me who knows the above signatory, or ☐ my own personal knowledge of the identity of the signatory , to be the person whose name is signed on the preceding or attached document, and acknowledged to me that s/he signed it voluntarily for its stated purpose as Personal Representative.

_____
Notary Public
My Commission Expires:

Notes and Comments

See M.G.L. c. 190B, §§ 3-906, 3-907, 3-908, 3-909, and 3-1006 for limited purpose, requirements, and effect of deeds of distribution.

REBA Form No. 58

Estate Taxes

Massachusetts General Laws, Chapter 65C

Section 14: Lien for unpaid tax liability for delinquent tax, release or discharge of lien
Section 14. (a) Unless the tax imposed by this chapter is sooner paid in full, it shall be a lien for ten years from the date of death upon the Massachusetts gross estate of the decedent, except that such part of the Massachusetts gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by the probate court having jurisdiction thereof, shall be divested of such lien. For dates of death on or after January 1, 1997, an affidavit of the executor, subscribed to under the pains and penalties of perjury, recorded in the appropriate registry of deeds and stating that the gross estate of the decedent does not necessitate a federal estate tax filing, shall release the gross estate of the lien imposed by this section.

Source: https://malegislature.gov/Laws/GeneralLaws/PartI/TitleIX/Chapter65C/Section14 (9/30/2022)

REBA Form No. 32
Affidavit
M.G.L. c. 65C, § 14(a)

RE: _____ ("Decedent") (Name of Decedent) late of _____, _____, MA (Street address) (City/ Town)

Date of Death: _____

I, _____, after first being duly sworn, do depose and say that:

1. I am: (Check One:)

   _____ (a) the duly appointed and qualified Executor under the Will/Administrator of the Estate of the Decedent filed with the _____ County Probate Court Docket No. _____

   or (if there is no executor or administrator of the estate of the Decedent appointed, qualified and acting within the Commonwealth of Massachusetts)

   _____ (b) a person in actual or constructive possession of property of the Decedent.

2. At the time of his/her death, the Decedent owned an interest in real estate situated at _____, _____, _____ County, Massachusetts, as more particularly described in a certain deed from _____ to _____ dated _____ and recorded in the _____ County Registry of Deeds at Book _____, Page _____, or described by _____ County Registry of Deeds Land Court Records Certificate of Title No. _____.

3. (Check all that apply:)

   _____ (a) The gross estate of the decedent does not necessitate a Federal estate tax filing.

   _____ (b) The gross estate of the decedent does not necessitate a Massachusetts estate tax filing.

4. This affidavit is given pursuant to and in accordance with the provisions of Massachusetts General Laws Chapter 65C, Section 14(a).

Executed under the pains and penalties of perjury this _____ day of _____ 20____.

_____

Notes and Comments

1. *This form replaces REBA Forms 2 and 3*

2. *See IRC Sections 2011 and 2031 and REBA Title Standard No. 3 for Federal estate tax exemption amounts by year of death.*

3. *See M.G.L. c. 65C § 2A and REBA Title Standard No. 24 for Massachusetts estate tax exemption amounts by year of death.*

4. *See M.G.L. c. 65C, § 6(a) for a definition of who may sign this affidavit.*

5. *In the event the Decedent's estate has not been probated and no death certificate has been previously recorded, a death certificate should be recorded with this certificate.*

5. *While not required by the language of the statute, if a person other than an Executor or Administrator signs this affidavit, the affidavit should identify the signatory's relationship to the decedent and how they became in actual or constructive possession of the decedent's property; i.e., spouse, child, caretaker, etc. This may be a The Land Court requirement regarding Registered Land.*

Adopted June 1, 2004

REBA Form No. 32A
Affidavit Regarding Federal Estate Taxes

Property Address: _____
_____
_____

Book: _____

Page: _____

RE: _____ ("Decedent") late
(Name of Decedent)
of _____, _____, MA.
(Street Address) (City/Town)

Date of Death: _____

I, _____, having personal knowledge of the facts herein stated, under oath depose and say as follows:

1. At the time of his/her death, the Decedent owned an interest in real estate situated at _____, _____, _____ County, Massachusetts, as more particularly described in a certain deed from _____ to _____ dated _____ and recorded in the _____ County Registry of Deeds at Book _____, Page _____, or described by _____ County Registry of Deeds Land Court Records Certificate of Title No. _____.

2. Please select one. (NOTE: If Paragraph 2(b) is selected, you must proceed to Paragraph 3.)

_____ (a) The gross estate of the decedent does not necessitate a Federal estate tax filing.

_____ (b) The gross estate of the decedent does necessitate a Federal estate tax filing.

3. (NOTE: Please ignore if Paragraph 2(a) was selected. Please select one if Paragraph 2(b) was selected.)

Attached hereto is a copy of (check all that apply), together with supporting proof of payment of the amount shown as due, if any:

_____ (a) Federal Estate Tax Closing Letter

_____ (b) Account transcript issued by the IRS showing transaction code 421 and the explanation "Closed examination of tax return."

Signed under the penalties of perjury this _____ day of _____, 20__.

_____

COMMONWEALTH OF MASSACHUSETTS

_____, ss. _____ __, 20__

Then personally appeared the above named _____, proved to me through satisfactory evidence of identification which was _____, to be the person whose name is signed on this document, and acknowledged to me that the contents of the document are truthful and accurate to the best of his/her knowledge and belief, before me.

_____
Notary Public:
Print Name:
My Commission Expires:

Certificate

I, _____, hereby certify that I am an attorney at law with offices at _____, _____, Massachusetts, and that the facts stated in the foregoing affidavit are relevant to the title to the premises therein described and will be of benefit and assistance in clarifying the chain of title thereto.

_____
Attorney

Notes and Comments

1. If Paragraph 3 is applicable, this Affidavit is not complete unless a copy of the Federal Estate Tax Closing Letter or the IRS Transcript, as applicable, is attached, together with proof of payment of any amounts shown as due.

2. The Affidavit may be executed by any person with actual knowledge of the facts stated therein, including, without limitation, the personal representative of the decedent's estate, accountant, or attorney.

3. An Attorney may execute the Affidavit as written, or may insert a numbered paragraph stating "the affidavit is relevant to the title to the premises therein described and will be of assistance in clarifying the chain of title thereto" and delete the concluding Certificate. See M.G.L. c. 183, § 5B.

Adopted November 5, 2018

REBA Form No. 32A

Unfulfilled Promise? Witness Closings and Other Proscribed Practices 11 Years After NREIS

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Conrad Bletzer is the senior real estate litigation partner at Bletzer & Bletzer, PC. Before joining the firm, Conrad had a successful career as an assistant district attorney for Suffolk County from 1980 to 1983. From 1982 to 1983, he was the supervisor of the District Attorney's office in the Roxbury District Court. He also served as a member of the Homicide Response Team.

An active trial attorney with extensive courtroom experience, Conrad has tried well in excess of 1,000 criminal or civil cases and has argued countless motions in his over thirty years of experience in criminal and civil courtrooms. In the area of criminal law, he has acted as both a prosecutor and a defense attorney, giving him a unique perspective. As a defense attorney, he has successfully tried criminal cases ranging from disorderly person to aggravated rape, and is also active in civil litigation. Conrad's experience has been on both sides of disputes, as he has successfully represented plaintiffs and defendants in civil litigation. He is also corporate counsel for several companies, and provides litigation and litigation assessment services to several others. His background in litigation, finance and real estate allows him to give a broad perspective in providing corporate services. Conrad has extensive experience in forming corporations, LLC's, LLP's, partnerships and trusts, and advises them with respect to their needs. He has significant experience in negotiating contracts, handling employment matters, representing companies before the Massachusetts Commission Against Discrimination, and assessing litigation for companies. Conrad has represented lenders, sellers and buyers in thousands of real estate transactions, and has substantial experience in both residential and commercial real estate closings.

Born and raised in Brighton, Conrad received his J.D. from Boston College Law School and graduated from Boston Latin School. He is a member of REBA's Board of Directors.

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Tim van der Veen is the founder/owner of the Law Office of Timothy J. van der Veen, PC. Since 2003, he has handled thousands of real estate transactions throughout Massachusetts ranging from one-bedroom condo sales to commercial transactions in the tens of millions.

After law school, Tim practiced as a litigator for two separate Boston firms with a focus on complex commercial disputes and insurance defense work. In 2003, Tim left the litigation world and formed his own firm dedicated exclusively to real estate. Complimenting his law practice, Tim has become a real estate instructor, hosting or participating in dozens of homebuyer and home seller seminars. As a licensed real estate instructor, Tim also teaches realtor certification and continuing education classes through his chartered school, The Real Estate Academy.

Tim graduated from University of Massachusetts-Amherst with a B.S. in Mechanical Engineering. After working as an engineer for several years with a gas utility company, Tim transitioned to a law career by enrolling in Suffolk University Law School. He received his J.D., *magna cum laude*, from Suffolk Law. While at Suffolk, Tim was a member of the school's *Law Review* journal, publishing two articles on union labor issues.

Unfulfilled Promise? Witness Closings and Other Proscribed Practices 11 Years After NREIS

REBA v. NREIS **Codified?**
How House Bill 4716 Could End Witness Closings for Good

I. Pre-NREIS (before 2011)

Is Conveyancing the Practice of Law?

- Black's Law Dictionary: "act and business" of transferring title in real estate
- Massachusetts: traditionally, residential connotation

MCA v. Closings, Ltd. **(Super. Ct. 1993)**

- Default judgment against national foreign corporation
- Hire MA attys to conduct conveyancing
- Violation M.G.L. c. 221 § 46 (prohibits corporations from practicing law)
- Practice of law includes residential real estate conveyancing
- Prep. of instruments affecting title to real estate
- Advising others regarding legal rights in conveyancing

MCA v. Colonial Title **(Super. Ct. 2001)**

- Court issued declaratory judgment/permanent injunction against Colonial
- Colonial Massachusetts and Rhode Island corp. owned by two non-lawyers
- Conducted all conveyancing duties / title agent
- Court: dual roles as title insurance agent and closing agent = UPL
- Issuing policies based on Colonial's title evaluation enjoined

Bottom Line

- No appellate decisions → green light for witness closings

II. ***REBA v. NREIS*** **459 Mass. 512 (2011)**

Procedural History

- 2006: REBA files UPL suit in Superior Court (DJ & Injunction relief)
- *NREIS* removes to U.S. District Court (Massachusetts)
  **NREIS* obtains summary judgment; activities not UPL; $900k legal fees
- REBA appeals; First Circuit vacates; certifies two questions to SJC

Question #1: Whether *NREIS's* activities, either in whole or in part, based on the record in this case and as described in the parties' filings, constitute the unauthorized practice of law in violation of M.G.L. ch. 221, §§ 46 et seq.

- "Conveyancing" = series of interconnected but discrete activities
- Title exams/preparation of abstracts – not UPL
- Preparation of HUD / closing documents – not UPL (except deeds, other title xfer docs)
- Post-closing delivery of documents to lender and Registry – not UPL
- Issuance of title insurance policies – not UPL
- Possible violations regarding deed preparation, Good Funds Statute, title opinions
- Record insufficient

Question #2: Whether *NREIS's* activities, in contracting with Massachusetts attorneys to attend [real estate] closings, violate Mass. Gen. Laws ch. 221, §§ 46 et seq.

- Record insufficient for definitive answer, BUT…
- First Circuit also requests advice to "aid in the proper resolution of the issues"
- … and what great advice it was for Massachusetts consumers and practitioners

***REBA v. NREIS* (cont'd)**

"[A] lawyer is a necessary participant at the closing to direct the proper transfer of title and consideration and to document the transaction, thereby protecting the private legal interests at stake as well as the public interest in the continued integrity and reliability of the real property recording and registration systems."
…
"[M]any of the activities that necessarily are included in conducting a closing constitute the practice of law and the person performing them must be an attorney."
…
"Implicit in what we have just stated is our belief that the closing attorney must play a meaningful role in connection with the conveyancing transaction that the closing is intended to finalize."
…
"[This] case is closer to one where a party places itself as an intermediary between an attorney and a client. When a third party interposes itself between an attorney and a client, the key question is who exercises and retains control over the attorney … there must be a genuine attorney-client relationship, and direction and control over the attorney's actions cannot rest with that third party."

III. Post-*NREIS* (2011 – Present)

Fake Compliance - Model #1

- Title and settlement arm of national title insurers
- Assembly line model
- 1 funding attorney; disburses proceeds and records mortgage/conveyance documents
- Title and settlement company contracts attorney to conduct closing

Fake Compliance - Model #1 (cont'd)

- Title company is primary or sole contact with lender-client
- REBA position: violation of *NREIS*, no atty-client relationship established
- State offices of national carriers support REBA position to no avail
- Three cheers for CATIC: exception to the rule

Fake Compliance - Model #2

- Out of state law firm or independent title/escrow company
- Same as model #1 but in-house attorney gets licensed in Massachusetts
- Typically, has never practiced in Massachusetts; not involved in transactions
- Transactions managed by out of state non-attorneys

Recent Complaints Received by UPL Committee

1. Refinance closing conducted by non-attorney
   - Borrower was a REBA board member!
   - REBA members have reported cold call advertising from non-atty notaries
2. Rhode Island law firm
   - One attorney; one non-attorney who handles transactions; hire Massachusetts attorneys to close
   - Rhode Island / Bristol County border fertile ground for UPL
3. Massachusetts title/escrow LLC (Bristol County)
   - owned, managed by non-attorney (even named after him)
   - tacitly holding himself out as an attorney
   - Employs two Massachusetts attorneys
   - Violation of M.G.L. c. 221 §§ 46, 46A
   - Violation of MRPC Rule 5.4 (fee sharing w/non-lawyer)

IV. House Bill No. 4716 – Remote Online Notarization

Amends M.G.L. Chapter 222 (governing notaries public)

- Proposed adoption of Remote Online Notarization
- Would pre-empt pending Federal RON bill (with no witness closing safeguards)
- AG rule-making authority, communication technology and ID verification

Amends M.G.L. Chapter 221

- Adds § 46E *Practice of law in real estate closings involving the use of communication technology*.

[N]o person shall direct or manage a real property closing unless that person has been admitted as an attorney in the Commonwealth of Massachusetts.

No person shall take the following actions in preparation for, or furtherance of closing unless that person has been admitted as an attorney in the Commonwealth of Massachusetts:

(1) giving or furnishing legal advice as to the legal status of title;

(2) ensuring that the seller, or the borrower-mortgagor in a mortgage refinancing transaction, is in a position to convey marketable title to the residential property at issue;

(3) issuing a certification of title pursuant to section 70 of chapter 93;

(4) drafting a deed to real property on behalf of another;

(5) ensuring that the documents necessary for the transfer of title are executed in accordance with the laws of the Commonwealth of Massachusetts;

(6) disbursing, or managing the disbursement, of consideration for the conveyance.

The attorney general may initiate an action, including a petition for injunctive relief against any person or creditor whose violation of this section is part of a pattern, or consistent with a practice, of noncompliance. The supreme judicial court and the superior court shall have concurrent jurisdiction in equity. A person having an interest or right that is or may be adversely affected by a violation of this section may initiate an action against the person or creditor for private monetary remedies.

V. What Can Do You?

- Join REBA's UPL Committee (Committee Co-Chair Vacancy)
- Report UPL to REBA promptly
- Contact your local state representative and say: Pass House Bill No. 4716 *now* (please)!

ALTA's 2021 Forms Adapt to Evolving Title Insurance Needs

~ Practical Skills Session ~

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Tracie Kester is Massachusetts underwriting counsel with Stewart Title Guaranty Company. Prior to joining Stewart, she was Underwriting Counsel with First American Title Insurance Company. Before that, she was a partner with Annino, Draper & Moore, PC in Springfield, where she represented lenders, buyers and sellers in residential and commercial real estate transactions. Tracie was also an instructor for the Realtor® Association of Pioneer Valley in Springfield and taught pre-license sales person classes from 2008 through 2016.

Tracie is a member of REBA and the Hampden County Bar Association. She received her J.D., *magna cum laude*, from Western New England University School of Law and her B.A., *summa cum laude*, from Elms College.

ALTA's 2021 Policy Forms: Adapting to Changing Needs

Why revise the forms now?

Changes to the legal and regulatory environment: new and updated laws and regulations, and court decisions as well. Examples:

- Consumer Financial Protection Bureau
- Remote Online Notarization has become available in many jurisdictions
- *McGirt v. Oklahoma*, 140 S. Ct. 2452 (U.S. Sup. Ct., July 9, 2020)
    - In the McGirt case, the Court held that the state of Oklahoma could not prosecute a Native American who allegedly committed a serious crime covered by a federal statute, finding that the statute gave only the federal government and the tribe concurrent jurisdiction within the boundaries of the tribal reservation
    - The 2021 Policies include language clarifying the operative law to apply when interpreting policy provisions and determining rights and liabilities
- Legislative-Regulatory-Judicial Focus on Discriminatory Covenants
    - (e.g., Indiana HB 1314; 2020 Florida Legislation; 2020 Orange County, CA – ALTA TitleNews Online, February 9, 2021; Washington HB 1335; *May v. Spokane*, (WA Ct. App.-Div. Three, Feb. 23, 2021)

Other changes influenced by comments and requests by Government Sponsored Entities (GSEs), professional organizations, lenders, attorneys and title agents.

What's Revised? – Every Section of the Standard Policy Forms

Covered Risks (the "Jacket")

Exclusions From Coverage

Schedule A & B

Conditions

- New & Revised Definitions

NEW POLICY JACKETS

Introductory Language

Both the new Owner Policy ("OP") and new Loan Policy ("LP") begin by effectively incorporating coverage provided by the Policy Authentication Endorsement (ALTA 39)

- As long as the Insurer issues the policy with a Policy Number and Date of Policy, the policy is valid even if issued electronically or without any signatures

Covered Risk 2 (Owner and Loan)

The Owner and Loan Policies update Covered Risk 2 by adding these new examples of title defects that can cause a covered loss:

- a document affecting the Title not being properly authorized, created, executed, witnessed, sealed, acknowledged, notarized, *(including by remote online notarization),* or delivered; and
- the repudiation of an electronic signature by a person who signed the document because the electronic signature was not valid under applicable electronic transactions law.

The survey coverage provided by Covered Risk 2(c.) is also enhanced to add a boundary line overlap as one of the matters covered if it would have shown up on a survey.

Covered Risk 9 (Loan Policy)

The 2021 Loan Policy updates Covered Risk 9 by adding these new examples of matters that can impair the Insured Mortgage and cause a covered loss:

- the Insured Mortgage not being properly authorized, created, executed, witnessed, sealed, acknowledged, notarized (including by remote online notarization), or delivered; as well as
- the invalidity or unenforceability of Insured Mortgage resulting from the repudiation of an electronic signature by a person who signed the mortgage because the signature was not valid under applicable electronic transactions law.

Covered Risks 5, 6 and 7

Both the Owner and Loan Policies also revise Covered Risks 5, 6 and 7 for loss resulting from a violation or enforcement of governmental regulations, enforcement of other governmental powers, or the exercise of the power of eminent domain.

- The updated language covers loss to the extent of the violation, enforcement or exercise described in an Enforcement Notice
- Enforcement Notice is a new defined term, and together with a refinement of the definition for Public Records, represents a significant clarification regarding the type of notice that triggers coverage and where that notice needs to be recorded.

New Covered Risk 8

Both Policies add a new Covered Risk 8 that insures against an enforcement of a PACA-PSA Trust to the extent of the enforcement described in an Enforcement Notice

- PACA-PSA Trust is also a new defined term
- The Perishable Agricultural Commodities Act (7 U.S.C. §§ 499a, et seq.) imposes a trust in favor of unpaid suppliers and sellers of fresh fruits and fresh vegetables against assets of buyers or dealers. The Packers and Stockyards Act (7 U.S.C. §§ 181, et seq.) establishes a similar trust to protect livestock producers. Both trusts can exist in unrecorded form

Covered Risk 10 (Loan)

Covered Risk 10 now explicitly insures the priority of the Insured Mortgage as to specific components of the Indebtedness, including:

- The amount of the principal disbursed as of the Date of Policy;
- the interest on the obligation secured by the Insured Mortgage;
- the reasonable expenses of foreclosure;
- amounts advanced for insurance premiums by the Insured before the acquisition of the estate or interest in the Title; and
- the following amounts advanced by the Insured before the acquisition of the Title to protect the priority of the lien of the Insured Mortgage:
    - i. real estate taxes and assessments imposed by a governmental taxing authority; and
    - ii. regular, periodic assessments by a property owners' association

Covered Risk 9 (Owner) and Covered Risk 13 (Loan)

There is new creditors' rights coverage in Covered Risk 9 of the Owner Policy, and similar coverage in Covered Risk 13 of the Loan Policy

- The protection against loss resulting from a court order providing an alternative remedy now applies to both subsections of the Covered Risk. Section 550(a) of the Bankruptcy Code authorizes an alternative remedy in allowing the bankruptcy trustee to "…recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property"
- In addition, the provision also updates coverage by insuring against loss resulting from the prior transfer being voidable under the Uniform Voidable Transactions Act. The National Conference of Commissioners changed the Uniform Fraudulent Transfer Act to the Uniform Voidable Transactions Act in 2014

EXCLUSIONS

Both the Owner and Loan Policies have two new Exclusions. The remaining changes to the Exclusions consist of updating and making them consistent with the revised language in the corresponding Covered Risks and the Conditions

- For example, in addition to excluding loss resulting from municipal regulations, **Exclusion 1** revises subsection b. to exclude loss or damage resulting from "any governmental forfeiture, police, regulatory, or national security power"
- **Exclusion 3** updates language to exclude loss or damage that would not have been sustained had the insured paid consideration sufficient to qualify as a bona fide purchaser or encumbrancer under applicable recording laws, but clarifies coverage by not excluding loss based on the insured's failure to pay fair market value

Exclusion 4 (Owner) and Exclusion 6 (Loan)

The creditors' rights exclusion in each new policy contains a clarification that loss resulting from a voidable preference is excluded if not given as a contemporaneous exchange for new value

- Also contains an express exclusion for loss resulting from the transaction vesting the Title or creating the Insured Mortgage being a voidable transfer under the Uniform Voidable Transactions Act
- This reference to the Uniform Voidable Transactions Act is intended to modernize the 2021 Policy forms

Exclusion 5 (Owner) and Exclusion 7 (Loan)

Both policies include a new exclusion for loss arising from any claim of a PACA-PSA Trust, while stating that the exclusion does not modify or limit the coverage provided by the new Covered Risk 8.

- Covered Risk 8 in both policy forms insures against loss resulting from the enforcement of a PACA-PSA Trust, but only to the extent of the enforcement described in an Enforcement Notice.

Exclusion 7 (Owner) and Exclusion 9 (Loan)

- Another new Exclusion in both policies excludes loss caused by "any discrepancy in the quantity of the area, square footage, or acreage of the Land or of any improvement to the Land."

SCHEDULES

Schedule A

An optional Transaction Identification Data header has been added to Schedule A to provide clarity and make post-closing smoother and general inquiries easier to initiate

- This information is intentionally set apart from the insured information in Schedule A so it's not an insured matter but serves as reference information to improve communication

Another optional provision enables the Schedule A to incorporate specific ALTA endorsements by reference. Reference can also be made to other available endorsements (for example: those that are state specific or proprietary)

Schedule B

Schedule B begins with the following sentences:

- *Some historical land records contain Discriminatory Covenants that are illegal and unenforceable by law. This policy treats any Discriminatory Covenant in a document referenced in Schedule B as if each Discriminatory Covenant is redacted, repudiated, removed, and not republished or recirculated. Only the remaining provisions of the document are excepted from coverage.*

This language makes it clear that when a policy includes an exception for restrictions, it does not republish any unenforceable discriminatory provisions contained within those restrictions nor does it except any Discriminatory Covenant from coverage.

Exception Language

The new Policies also revise the lead-in sentences immediately preceding the list of the exceptions in Schedule B:

- *"The policy does not insure against loss or damage, and the Company will not pay costs, attorneys' fees, or expenses resulting from the terms and conditions of any lease or easement identified in Schedule A, and the following matters:"*

This addition obviates the need to include a specific exception in Schedule B for the terms and conditions of any leases or easements that comprise all or a part of the insured property.

CONDITIONS

New Definitions in Condition 1

The terms *Affiliate*, *Discriminatory Covenant*, *Enforcement Notice*, *PACA-PSA Trust* and *State* are new in both policy forms

Affiliate

In both policies an "*Affiliate*" is an Entity:

- that is wholly owned by the Insured;
- that wholly-owns the Insured; or
- if that Entity and the Insured are both wholly owned by the same person or entity.

An Affiliate will be considered an Insured when the named Insured conveys the Title to the Affiliate by deed or other instrument of transfer

State

The policies include State as a new defined term.

- The term means the state or commonwealth of the United States where the Land is located, and where applicable also includes the District of Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, and Guam

The Loan Policy features a newly defined term for *Consumer Protection Law*, that replaces the terms *consumer credit protection laws* and *truth in lending laws* used in Exclusion 5 of the 2006 ALTA Loan Policy. The Loan Policy also includes newly defined terms for *Government Mortgage Agency or Instrumentality* and *Obligor.*

Revised Definitions

Insured (Owner)

In the new Owner Policy, a deed from the named Insured to one of the following can also result in the grantee being an Insured under the policy:

- an Affiliate;
- a trustee or beneficiary of a trust created by a written instrument established for estate planning purposes by an Insured;
- a spouse who receives the Title because of a dissolution of marriage;
- a transferee by a transfer effective on the death of an Insured as authorized by law; or
- another Insured named in Item 1 of Schedule A.

These last two categories are new, and this provision also differs from the corresponding language in the 2006 policy because there is no requirement that the deed or conveyance be for no consideration.

Insured (Loan)

The new Loan Policy also makes changes to the definition of *Insured*. This additional language in the Loan Policy does not alter coverage but does clarify that the Insured is a person that holds the Title after acquiring the Indebtedness, regardless of the means of acquisition.

In the Loan Policy, a transfer from the named Insured to one of the following can also result in the grantee being an Insured under the policy:

- the grantee of an Insured under a deed or other instrument transferring the Title, if the grantee is an Affiliate (Note that this is no longer conditioned on the transfer being for no consideration);
- an Affiliate that acquires the Title through foreclosure or deed-in-lieu of foreclosure of the Insured Mortgage (regardless of whether the Affiliate owned or held the Indebtedness); or
- any Government Mortgage Agency or Instrumentality.

Public Records

The 2021 ALTA policies modify the definition of *Public Records*

- The clarification distinguishes between those records that are Public Records for purposes of the terminology used in a title policy and other governmental records that are not intended to be, and are generally not construed as, within the scope of Public Records for purposes of triggering coverage in the policies
- "Public Records" means the recording or filing system established under State statutes in effect at the Date of Policy under which a document must be recorded or filed to impart constructive notice of matters relating to the Title to a purchaser for value without Knowledge. *The term "Public Records" does not include any other recording or filing system, including any pertaining to environmental remediation or protection, planning, permitting, zoning, licensing, building, health, public safety, or national security matters*.

Condition 8: Contract of Indemnity; Determination and Extent of Liability

This Condition has been revised in both policies and clarifies the fact that the policy is a contract of indemnity, with an initial statement that the policies are not abstracts of title, reports of the condition of title, legal opinions, opinions of title, or other representations of title

- Among the improvements in coverage are the provisions establishing a procedure for the Insured to select the date for determining value for purposes of calculating loss. The ability to choose an alternate date for the determination of loss is no longer conditioned on the Insurer's unsuccessful attempt to cure the defect

Owner Policy

In the Owner Policy, while terms regarding the extent of liability remain essentially the same, a revised subsection addressing valuation states that the fair market value of the Title is calculated using the date the Insured discovers the defect or other matter insured against by this policy; however if, at the Date of Policy, the Title to all of the Land is void by reason of a matter covered by the policy, then the Insured Claimant may, by written notice given to the Insurer, elect to use the Date of Policy as the date for calculating the fair market value of the Title.

- If the Insurer does pursue its rights to cure the Title and is unsuccessful:
- the Amount of Insurance will be increased by 15% (an improvement from 10% in the 2006 policy); and
- the Insured Claimant may elect to use either the date the settlement, action, or proceeding is concluded or the date the notice of claim is received by the Insurer as the date for calculating the fair market value of the Title

Loan Policy

The new Loan Policy also provides options to the Insured for determining loss regardless of any actions taken on the part of the Insurer. Fair market value of the Title is calculated using either:

- the date the Insured acquires the Title as a result of a foreclosure or deed in lieu of foreclosure of the Insured Mortgage; or
- the date the lien of the Insured Mortgage or any assignment set forth in Item 4 of Schedule A is extinguished or rendered unenforceable by reason of a matter insured against by the policy.

In addition, a new subsection provides additional alternatives to the Insured Claimant if the Insurer attempts to establish the Title but is unsuccessful:

- the Amount of Insurance will be increased by 15%; and
- the Insured Claimant may elect to use either the date the settlement, action, or proceeding is concluded or the date the notice of claim is received by the Insurer as the date for calculating the fair market value of the Title.

Condition 10: Reduction or Termination of Insurance (Loan)

Condition 10 in the Loan Policy, now entitled *Reduction or Termination of Insurance*, improves the coverage in the Loan Policy by adding a new subsection b. that states:

- *"b. When the Title is acquired by the Insured as a result of foreclosure or deed in lieu of foreclosure, the amount credited against the Indebtedness does not reduce the Amount of Insurance."*

Condition 16 (Owner) and Condition 15 (Loan): Revised Choice of Law Provisions in Subsection a.

These revised Conditions clearly provide that the State law of the State where the Land is located, or to the extent it controls, federal law, will determine the validity of claims against the Title or enforcement of the policy.

- While the provision is needed because of increased multi-state and cross-border transactions, the new reference to federal law addresses the jurisdictional issue raised in the *McGirt* decision.

Other Forms Revised in 2021

- **COMMITMENT FOR TITLE INSURANCE**, and the Short Form Commitment
- **SHORT FORM RESIDENTIAL LOAN POLICY**
- **HOMEOWNER'S POLICY**
- **EXPANDED COVERAGE RESIDENTIAL LOAN POLICY—CURRENT ASSESSMENTS**, and the Short Form Expanded Coverage Residential Loan Policies

- **ALTA 3** Zoning
- **ALTA 3.1** Zoning—Completed Structures
- **ALTA 3.2** Zoning—Land Under Development
- **ALTA 3.3** Zoning—Completed Improvement—Non-Conforming Use
- **ALTA 3.4** Zoning—No Zoning Classification
- **ALTA 4** Condominium—Assessments Priority
- **ALTA 4.1** Condominium—Current Assessments
- **ALTA 6** Variable Rate Mortgage
- **ALTA 6.2** Variable Rate Mortgage—Negative Amortization
- **ALTA 7.1** Manufactured Housing—Conversion—Loan Policy
- **ALTA 7.2** Manufactured Housing—Conversion—Owner's Policy
- **ALTA 8.1** Environmental Protection Lien
- **ALTA 10** Assignment
- **ALTA 10.1** Assignment and Date Down
- **ALTA 11** Mortgage Modification
- **ALTA 11.1** Mortgage Modification with Subordination
- **ALTA 11.2** Mortgage Modification with Additional Amount of Insurance
- **ALTA 12** Aggregation—Loan Policy
- **ALTA 12.1** Aggregation—State Limits—Loan Policy
- **ALTA 14** Future Advance—Priority
- **ALTA 14.1** Future Advance—Knowledge
- **ALTA 14.2** Future Advance—Letter of Credit
- **ALTA 14.3** Future Advance—Reverse Mortgage
- **ALTA 26** Subdivision
- **ALTA 27** Usury
- **ALTA 30** Shared Appreciation Mortgage
- **ALTA 30.1** Commercial Participation Interest
- **ALTA 32** Construction Loan
- **ALTA 32.1** Construction Loan—Direct Payment
- **ALTA 32.2** Construction Loan—Insured's Direct Payment
- **New: ALTA 34.1** Identified Exception & Identified Risk Coverage

To see redlined comparisons of the old and new policy forms, and to download the ALTA Endorsement chart, go to: http://www.alta.org/policy-forms

Title Issues Cured by Applying REBA Title Standards and Statutes

~ Practical Skills Session ~

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Jutta Deeney is Senior Underwriter and New England Regional Underwriting Counsel for Stewart Title Guaranty Company, where she is responsible for overseeing the underwriting services throughout New England.

Prior to joining Stewart Title, Jutta worked for another major title insurer, where she served in various roles, including underwriting, loss prevention and claim services. Prior to her career in the title insurance industry, Jutta worked in both the private sector at a Boston law firm and in the public sector as an associate corporation counsel for the City of Boston.

C-chair of the REBA Standards and Forms Committee, Jutta is a graduate of Suffolk University Law School and the University of Massachusetts.

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Carrie Rainen serves as Treasurer on the REBA Board of Directors. She is also Co-chair of the Association's Standards and Forms Committee, as well as a member of its Women's Networking Group and Strategic Communications Committee.

In addition, Carrie is a member of the Abstract Club, New England Land Title Association (NELTA), and the Merrimack Valley Conveyancers' Association. She also serves on MCLE's Real Estate and Environmental Law Curriculum Advisory Committee, and is active in CREW Boston, a commercial real estate networking group for women.

As a member of the planning committee for the TomorrowNite gala event, Carrie has fundraised for the benefit of St. Jude Children's Research Hospital for over 25 years. Additionally, she serves on the board of directors for Acting Out! Theater Company in Lawrence.

A Land Court Title Examiner, Carrie participated in the drafting of an Amicus brief on behalf of the Massachusetts Association of Bank Counsel, Inc. in the mortgage foreclosure case of *Bevilacqua v. Rodriguez*. She is licensed to practice in both Massachusetts and New Hampshire.

Carrie received her J.D. from New England School of Law, where she served as Current Developments Editor of the *New England Journal of International and Comparative Law*, and her B.A. from American University.

Updated Title Standards on Death and Title Issues

I. REBA Title Standard No. 41 – List of Heirs

What changed and why?

- Pre-MUPC – Listing of spouse and heirs at law deemed reliable
- MUPC adopted in March of 2012 (10 years ago)
- Question presented: Can listings in an informal probate as to identity of heirs at law and spouse provide reliable evidence?
- Amended in **November 2019**

Pre-Amendment

REBA Title Standard No. 41
List of Heirs

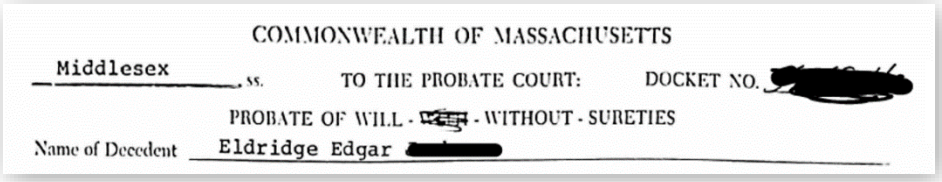
The listing of heirs on a petition filed prior to March 31, 2012 in a probate court in connection with the probate of a will or the administration of an estate may be relied upon as complete and accurate in the absence of evidence to the contrary recorded or filed in the appropriate registry of deeds or probate.

EXAMPLE
LIST OF HEIRS PRE-MUPC

Initial filing with court-seeking to Probate Estate of Decedent.

Form included a place to LIST spouse and heirs.

note bottom of form contained a space for Judge's signature indicating allowance (reliance only upon allowance)

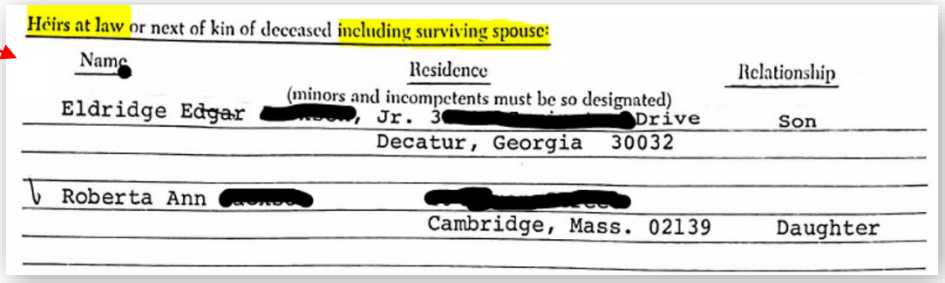


COMMONWEALTH OF MASSACHUSETTS

Middlesex ss. TO THE PROBATE COURT: DOCKET NO. [redacted]

PROBATE OF WILL - [redacted] - WITHOUT - SURETIES

Name of Decedent Eldridge Edgar [redacted]



Heirs at law or next of kin of deceased including surviving spouse:

Name	Residence (minors and incompetents must be so designated)	Relationship
Eldridge Edgar [redacted], Jr.	3[redacted]Drive Decatur, Georgia 30032	Son
Roberta Ann [redacted]	[redacted] Cambridge, Mass. 02139	Daughter

MPC Form 162
Surviving Spouse, Children Heirs at Law – filed as part of the Informal Filing and allowance

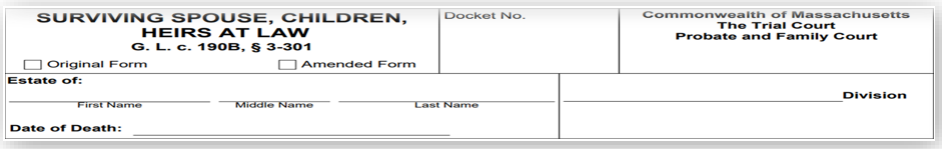
(note completed in both Informal and Formal Probates)

- ✓ Must be completed with each filing
- ✓ Provides detailed instructions to aid preparing in arriving at heirs-at-law are

NOTE Justice or Magistrate must approve filing of probate using form MPC 750 (called "Order of Informal Probate of Will and/or Appointment of Personal Representative")

Formal Probate v. Informal Probate

- In a Formal Probate proceeding, due to nature of proceedings, heirs-at-law are determined upon allowance. (Form 755 or 757)



SURVIVING SPOUSE, CHILDREN, HEIRS AT LAW
G. L. c. 190B, § 3-301

☐ Original Form ☐ Amended Form

Docket No.

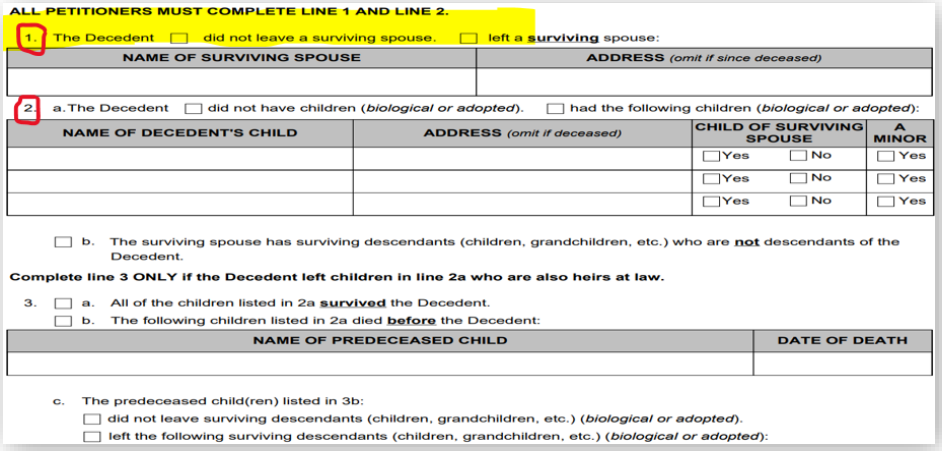
Commonwealth of Massachusetts
The Trial Court
Probate and Family Court

Estate of:

First Name Middle Name Last Name

Date of Death:

Division



ALL PETITIONERS MUST COMPLETE LINE 1 AND LINE 2.

1. The Decedent ☐ did not leave a surviving spouse. ☐ left a **surviving** spouse:

NAME OF SURVIVING SPOUSE	ADDRESS *(omit if since deceased)*

2. a. The Decedent ☐ did not have children (*biological or adopted*). ☐ had the following children (*biological or adopted*):

NAME OF DECEDENT'S CHILD	ADDRESS *(omit if deceased)*	CHILD OF SURVIVING SPOUSE	A MINOR
		☐Yes ☐No	☐Yes
		☐Yes ☐No	☐Yes
		☐Yes ☐No	☐Yes

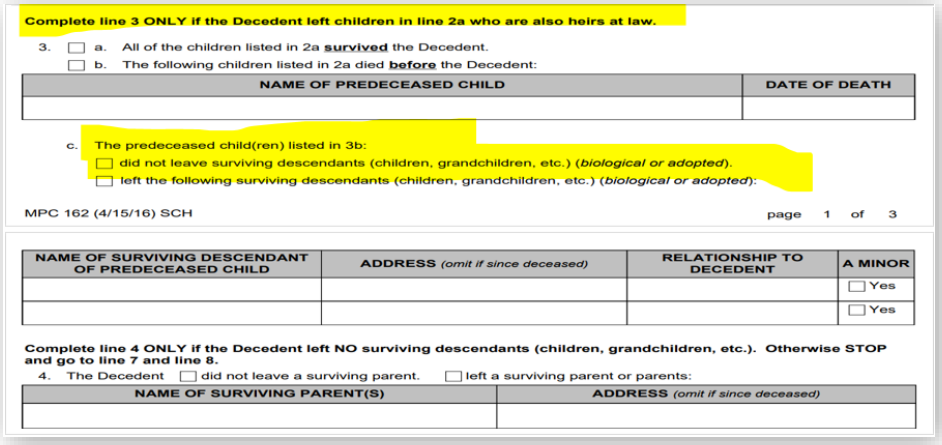
☐ b. The surviving spouse has surviving descendants (children, grandchildren, etc.) who are **not** descendants of the Decedent.

Complete line 3 ONLY if the Decedent left children in line 2a who are also heirs at law.

3. ☐ a. All of the children listed in 2a **survived** the Decedent.
☐ b. The following children listed in 2a died **before** the Decedent:

NAME OF PREDECEASED CHILD	DATE OF DEATH

c. The predeceased child(ren) listed in 3b:
☐ did not leave surviving descendants (children, grandchildren, etc.) (*biological or adopted*).
☐ left the following surviving descendants (children, grandchildren, etc.) (*biological or adopted*):



Complete line 3 ONLY if the Decedent left children in line 2a who are also heirs at law.

3. ☐ a. All of the children listed in 2a **survived** the Decedent.
☐ b. The following children listed in 2a died **before** the Decedent:

NAME OF PREDECEASED CHILD	DATE OF DEATH

c. The predeceased child(ren) listed in 3b:
☐ did not leave surviving descendants (children, grandchildren, etc.) (*biological or adopted*).
☐ left the following surviving descendants (children, grandchildren, etc.) (*biological or adopted*):

MPC 162 (4/15/16) SCH page 1 of 3

NAME OF SURVIVING DESCENDANT OF PREDECEASED CHILD	ADDRESS *(omit if since deceased)*	RELATIONSHIP TO DECEDENT	A MINOR
			☐Yes
			☐Yes

Complete line 4 ONLY if the Decedent left NO surviving descendants (children, grandchildren, etc.). Otherwise STOP and go to line 7 and line 8.

4. The Decedent ☐ did not leave a surviving parent. ☐ left a surviving parent or parents:

NAME OF SURVIVING PARENT(S)	ADDRESS *(omit if since deceased)*

REBA Title Standard No. 41 – as Amended

The listing of a surviving spouse (if any) and heirs in proceedings filed in a Massachusetts probate court may be relied upon as complete and accurate in the absence of evidence to the contrary recorded or filed in the appropriate registry of deeds or probate:

A. on an allowed petition for the probate of a will or administration of an estate filed prior to March 31, 2012;

Part A: is the OLD standard

B. in a Decree and Order of the court that makes a determination of heirs in either a formal or informal probate; or

Part B: NEW – *reliance upon* ***Court Order***

C. In an original or duly amended list of Surviving Spouse, Children, Heirs at Law (Form MPC 162), filed with or after a Petition for Informal Appointment of Personal Representative pursuant to G.L. c. 190B, § 3-301 (Form MPC 150) that has been allowed by an Order of Informal Appointment of Personal Representative (a) after 12 months from the approval of the informal petition, or (b) three years from the date of death, whichever is later provided, however, that at least one of the following also applies:

Part C: NEW – *reliance on listing, but…*

1. a Decree and Order of Complete Settlement has been issued but it fails to formally determine the surviving spouse and heirs or fails to confirm the listing of the surviving spouse and heirs on the Form MPC 162;

2. a Closing Statement (Form MPC 850) has been duly filed pursuant to G.L. c. 190B, § 3-1003 and no challenge to the Closing Statement or other proceedings involving the personal representative were pending at the end of one year after the Closing Statement was filed;

3. six years have passed since the allowance of the Bond of the Personal Representative.

APPLICATION IN THE REAL WORLD

- Until November 2019 – No reliance in an **Informal** Probate unless
  - ✓ Allowance for an **Order of Complete Settlement with a Determination of Heirs.** (*note:* Petition for Order of Complete Settlement, which doesn't request Determination of Heirs, leaves heirs undetermined).

- **ORDER of Complete Settlement –** requires:
  - ✓ Wait at least 1 year from date of death
  - ✓ Wait at least 1 year from the appointment of the PR in the proceeding
  - ✓ Filing fees, publication fees, final account fees
  - ✓ Filing of multiple forms, including Petition for Order of Complete Settlement, Inventory, First and Final Account, Military Affidavit
  - ✓ Provide notice to all interested parties
  - ✓ Wait for court to rule on petition

Decedent Died Intestate - Can I Rely on This?
There's No Formal Adjudication of Spouse, Children, Heirs-at-Law

Docket Information

Docket Date	Docket Text
11/14/2013	Certificate of Death
11/14/2013	Bond without Sureties
11/14/2013	An Interested Person,Billy Don Smith , Filed MPC 455 toAssent and Waiver of Notice
11/14/2013	An Interested Person,Rodney Smith , Filed MPC 455 toAssent and Waiver of Notice
11/14/2013	An Interested Person,Melinda Johnson , Filed MPC 455 toAssent and Waiver of Notice
11/14/2013	Petition for Informal Probate
11/14/2013	Order for Informal Probate of Will and/or Appointment of Personal Representative
11/14/2013	Affidavit as to Military Service
11/14/2013	Bond Without Sureties Approved Tara DeCristofaro

Note: the probate court has had some form revisions and in the early years of the MUPC, the Spouse, Children, & Heirs-at-Law form was included as part of the petition. NOW, a separate form is used.

Date of Death: August 6, 2012

- ✓ proceeding under MUPC - YES

Do we fall under the New Standard?

- ✓ List of Spouse, children and heirs at law are included in the Petition for Informal – YES
- ✓ Was the PR appointed and Bond approved – YES
- ✓ Have more than six (6) years passed – YES

II. REBA Title Standard No. 71 – Evidence of Death of Deceased Joint Owners and Life Tenants

What changed and why?

- In 2019, a question was presented to the Standards and Forms Committee whether additional evidence was reliable of death of a joint owner or life tenant, in addition to those listed in TS 71
- A revised version of TS 71 was adopted in **May of 2019** to reflect these additional sources of information deemed reliable (related to DOR forms)
- In 2020, prompted by increasing difficulties for non-family members to obtain death certificates, further additional sources of evidence of death were added
- TS 71 was further amended in **November 2020** to reflect the alternate sources deemed reliable

Pre-Amendment

REBA Title Standard No. 71
Evidence of Death of Deceased Joint Owners and Life Tenants

A title derived from surviving joint owner(s), or from remainderpersons after the death of life tenant(s) or from a personal representative or an executor, administrator, guardian, conservator, heir(s) or devisee(s) of such survivor(s) or remainderperson(s) (collectively, "Survivors"), is not defective by reason of any uncertainty as to the death of the deceased joint owner or life tenant if evidence of the death is established by:

a) a death certificate recorded at the Registry of Deeds in the district where the property is located or a death certificate filed with or noted in the docket of a probate or other proceeding in the Probate Court in the county where the real property is located; or

b) the recording at the Registry of Deeds in the district where the property is located of

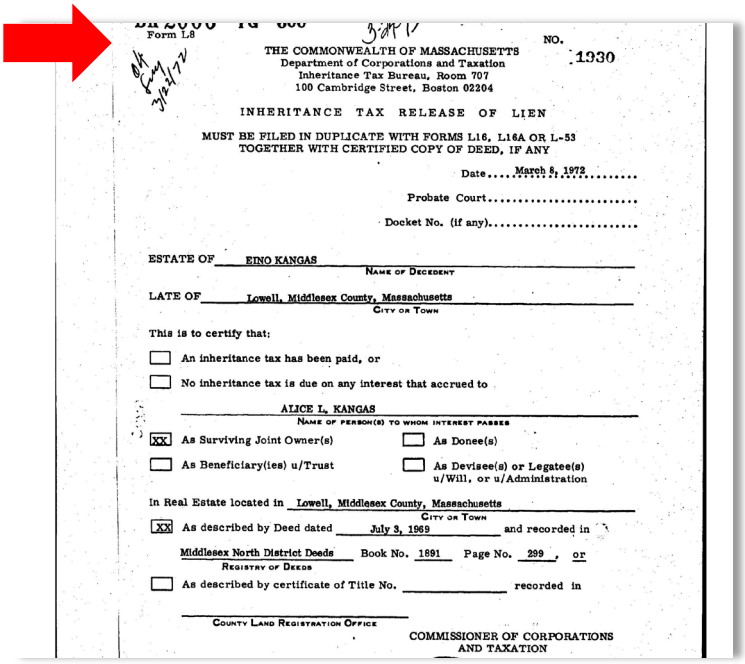
1) a certified copy of an approved or allowed petition for a domestic or foreign probate or administration of the decedent's estate, or a certificate of appointment in such matter, which in either case recites the decedent's date of death, provided that recording of such petition in the Registry of Deeds shall not be necessary if such petition is filed in the same county where the property is located; or

2) a Massachusetts Inheritance Tax Lien Release ("L-8") relative to the decedent's interest in the property; or

3) a Massachusetts Certificate of Release of Estate Tax Lien ("M-792") relative to the decedent's interest in the property; or

4) a deed for the real property from such Survivors that contains a recital that the decedent has died, even if no date or place of death is recited, provided, however, that such deed has been recorded for more than 20 years.

EXAMPLES: L-8, M-792



Form L8

NO. 1930

THE COMMONWEALTH OF MASSACHUSETTS
Department of Corporations and Taxation
Inheritance Tax Bureau, Room 707
100 Cambridge Street, Boston 02204

INHERITANCE TAX RELEASE OF LIEN

MUST BE FILED IN DUPLICATE WITH FORMS L16, L16A OR L-53 TOGETHER WITH CERTIFIED COPY OF DEED, IF ANY

Date.... March 8, 1972

Probate Court.....

Docket No. (if any).....

ESTATE OF EINO KANGAS
NAME OF DECEDENT

LATE OF Lowell, Middlesex County, Massachusetts
CITY OR TOWN

This is to certify that:

☐ An inheritance tax has been paid, or

☐ No inheritance tax is due on any interest that accrued to

ALICE L. KANGAS
NAME OF PERSON(S) TO WHOM INTEREST PASSES

☒ As Surviving Joint Owner(s) ☐ As Donee(s)

☐ As Beneficiary(ies) u/Trust ☐ As Devisee(s) or Legatee(s) u/Will, or u/Administration

In Real Estate located in Lowell, Middlesex County, Massachusetts
CITY OR TOWN

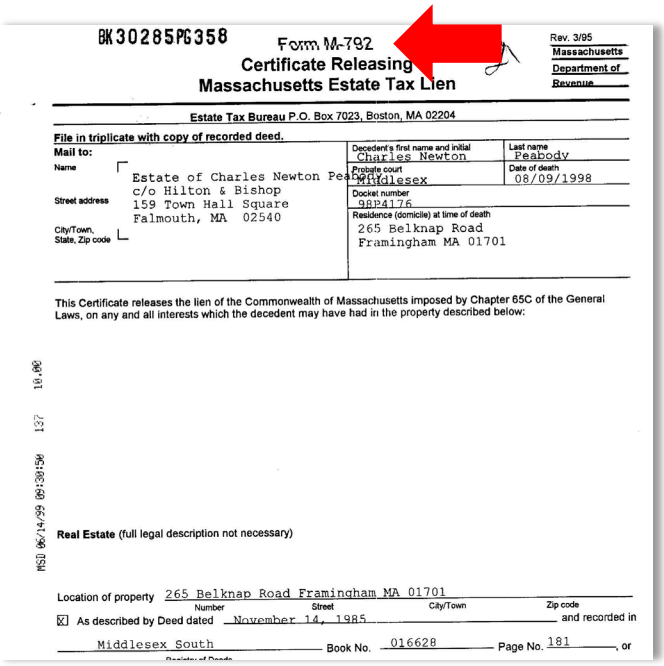
☒ As described by Deed dated July 3, 1969 and recorded in

Middlesex North District Deeds Book No. 1891 Page No. 299, or
REGISTRY OF DEEDS

☐ As described by certificate of Title No. _____ recorded in

_____
COUNTY LAND REGISTRATION OFFICE

COMMISSIONER OF CORPORATIONS AND TAXATION



BK30285PG358

Form M-792
Certificate Releasing
Massachusetts Estate Tax Lien

Rev. 3/95
Massachusetts Department of Revenue

Estate Tax Bureau P.O. Box 7023, Boston, MA 02204

File in triplicate with copy of recorded deed.

Mail to:
Name: Estate of Charles Newton Peabody
c/o Hilton & Bishop
Street address: 159 Town Hall Square
City/Town, State, Zip code: Falmouth, MA 02540

Decedent's first name and initial: Charles Newton
Last name: Peabody
Probate court: Middlesex
Date of death: 08/09/1998
Docket number: 98P4176
Residence (domicile) at time of death: 265 Belknap Road Framingham MA 01701

This Certificate releases the lien of the Commonwealth of Massachusetts imposed by Chapter 65C of the General Laws, on any and all interests which the decedent may have had in the property described below:

MSU 06/14/99 09:38:59 137 10.00

Real Estate (full legal description not necessary)

Location of property 265 Belknap Road Framingham MA 01701
Number Street City/Town Zip code

☒ As described by Deed dated November 14, 1985 and recorded in

Middlesex South Book No. 016628 Page No. 181, or
Registry of Deeds

REBA Title Standard No. 71

2019 Amendments

A title derived from surviving joint owner(s), or from remainderpersons after the death of life tenant(s) or from a personal representative or an executor, administrator, guardian, conservator, heir(s) or devisee(s) of such survivor(s) or remainderperson(s) (collectively, "Survivors"), is not defective by reason of any uncertainty as to the death of the deceased joint owner or life tenant if evidence of the death is established by:

a) a death certificate recorded at the Registry of Deeds in the district where the property is located or a death certificate filed with or noted in the docket of a probate or other proceeding in the Probate Court in the county where the real property is located; or

b) the recording at the Registry of Deeds in the district where the property is located of

1) a certified copy of an approved or allowed petition for a domestic or foreign probate or administration of the decedent's estate, or a certificate of appointment in such matter, which in either case recites the decedent's date of death, provided that recording of such petition in the Registry of Deeds shall not be necessary if such petition is filed in the same county where the property is located; or

NEW → 2) a Massachusetts Inheritance Tax Lien Release ("L-8 **or L-53**") relative to the decedent's interest in the property; or

3) a Massachusetts Certificate of Release of Estate Tax Lien ("M-792") relative to the decedent's interest in the property; or

4) a deed for the real property from such Survivors that contains a recital that the decedent has died, even if no date or place of death is recited, provided, however, that such deed has been recorded for more than 20 years.

REBA Title Standard No. 71

2020 Amendments

A title derived from surviving joint owner(s), or from remainderpersons after the death of life tenant(s) or from a personal representative or an executor, administrator, guardian, conservator, heir(s) or devisee(s) of such survivor(s) or remainderperson(s) (collectively, "Survivors"), is not defective by reason of any uncertainty as to the death of the deceased joint owner or life tenant if evidence of the death is established by:

a) a death certificate recorded at the Registry of Deeds in the district where the property is located or a death certificate filed with or noted in the docket of a probate or other proceeding in the Probate Court in ~~the~~ any county ~~where the real property is located~~ of Massachusetts; or

b) the recording at the Registry of Deeds in the district where the property is located of:

(1) a certified copy of an approved or allowed petition for a domestic or foreign probate or administration of the decedent's estate, or a certificate of appointment in such matter, which in either case recites the decedent's date of death, provided that recording of such petition in the Registry of Deeds shall not be necessary if such petition is filed in ~~the same county where the property is located~~ any county; or

(2) a Massachusetts Inheritance Tax Lien Release ("L-8 or L-53") relative to the decedent's interest in the property; or

(3) a Massachusetts Certificate of Release of Estate Tax Lien formerly known as an "M-792" relative to the decedent's interest in the property; or

(4) a deed for the real property from such Survivors that contains a recital that the decedent has died, even if no date or place of death is recited, provided, however, that such deed has been recorded for more than 20 years; or

(5) a subsequently recorded death certificate of the Survivor that lists the Survivor's marital status as widowed and that identifies the predeceased joint owner as the spouse of the decedent; or

(6) in a case in which a previously recorded deed for the real property from such Survivor(s) to an arm's length purchaser for value exists, an affidavit given by an attorney in good standing pursuant to G.L. c. 183 §§ 5A or 5B:

(i) that states that a death certificate cannot be obtained because such records are confidential or unavailable in the jurisdiction where the decedent died and includes a supporting narrative, and

(ii) that appends a true copy of a published obituary that provides the date of death.

APPLICATION IN THE REAL WORLD

- Prior to Amendment – record title required one of the following:
  - ✓ Death Certificate
  - ✓ Massachusetts Tax Releases
  - ✓ Federal Tax Releases
  - ✓ 20 years since recitation indeed from remainder or joint owner
- Practical issues for down-stream owners
  - ✓ Not possible to obtain death certificate (certain states limit who can obtain)
  - ✓ Death occurred outside of the country
  - ✓ Delay in acquiring documents, when death is certain

Example:

Property owned by Margaret J. Connolly and Michael Connolly

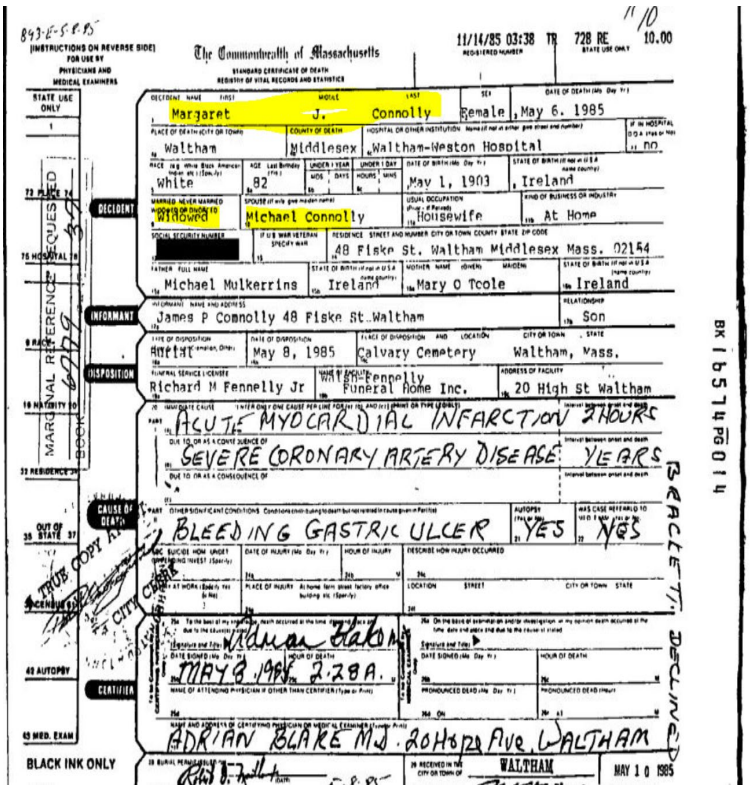
- Margaret and Michael deed to James Connolly and reserve a life estate
- Margaret and Michael have both died and James sells the property in 1990 to Bonnie Buyer, but the title exam completed for Bonnie Buyer misses that there is NO death certificate recorded for Michael.
- Bonnie is selling in 2022 to Nellie Newhouse. Nellie's attorney identifies the life estate of record held by Michael

Issues:

- Bonnie is not related to the Connolly family so she has no idea if Michael has died
- Searching Vital records for a Michael Connolly is time consuming and may be cost prohibitive
- Google searches for obituaries aren't helpful in locating date or place of death (probably due to age)
- Bonnie doesn't have title insurance!

Cure:

- Margaret's death certificate was recorded at the time of sale and can provide proof of Michael's death



REBA Title Standard No. 71

2020 Amendment to Comments and Notes

Notes and Comments

(1) As to the recording of a death certificate as a matter of practice, see REBA Practice Standard No. 10.

(2) For purposes of this Title Standard, the term "joint owners" shall include joint tenants and tenants by the entirety.

(3) When a death certificate or probate is outside of the county where the land is located, it is the recommended practice to note in the title reference of the deed being recorded, the county where the death certificate is recorded or the probate is filed.

(4) The spouse of a widowed Survivor may be identified by his/her birth name on the death certificate issued by the municipality.

(5) An affidavit recorded pursuant to (b)(6) of this Title Standard must be based on personal knowledge, contain sufficient information setting forth the steps taken to obtain the death certificate, cite the statutory or regulatory bar existing which prohibits obtaining the death certificate by the record title owner, contain a recitation of the facts discovered or known to the affiant, and the source of information which establishes that the person identified in the obituary was the owner for whom proof of death is necessary to establish the record title.

(6) For purposes of this Title Standard a published obituary shall include digital publication of the obituary through the funeral home or digital obituary publication service.

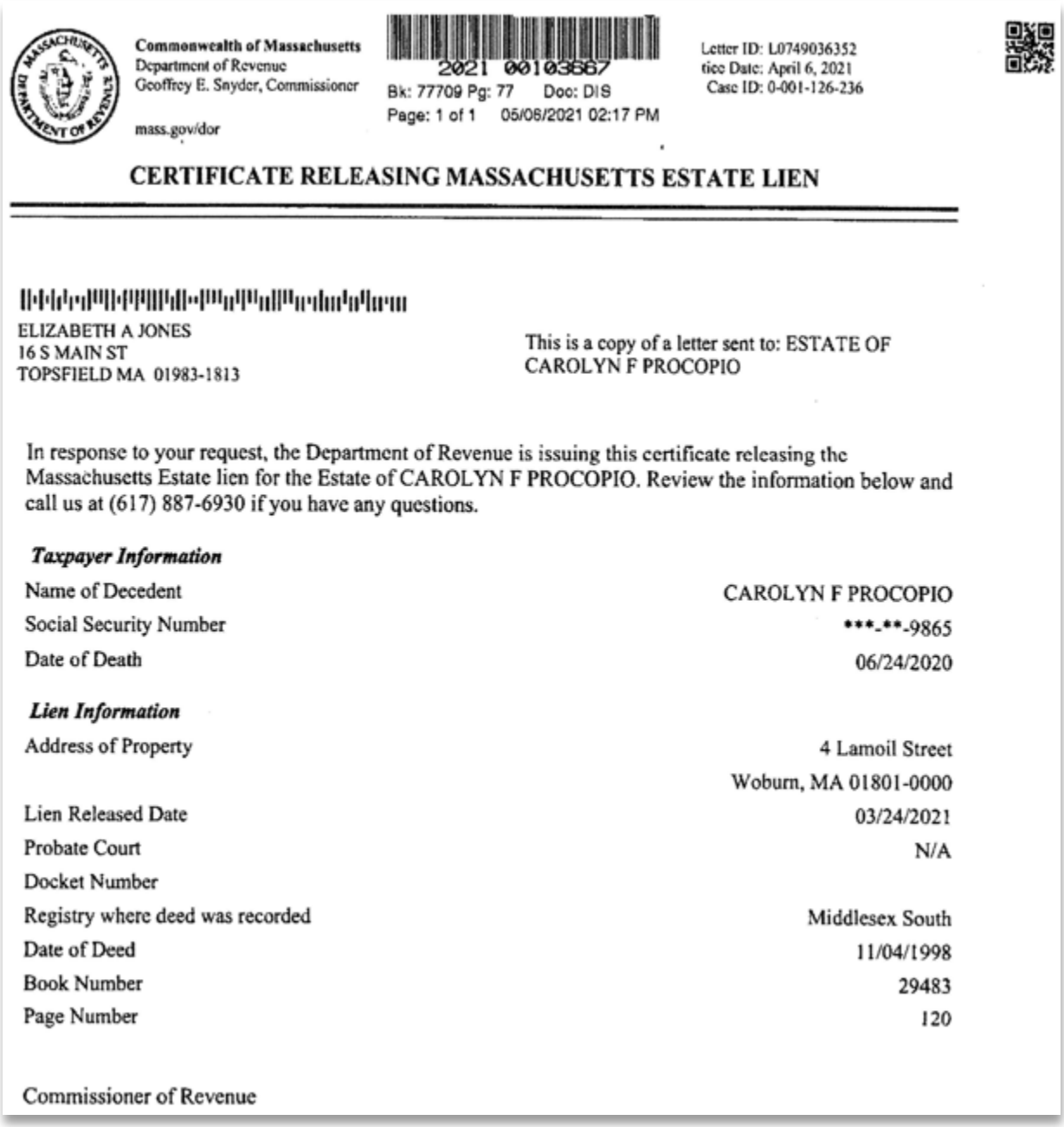
Caveat

(1) As to registered land, see Land Court Guideline No. 14 (May 1, 2000, Revised February 27, 2009).

(2) While M-792s, L-8s or L-53s are considered sufficiently reliable evidence of death under the circumstances discussed in this title standard, an Estate Tax Affidavit pursuant to G.L. c. 65C, §14(a) is not.

EXAMPLE

MA ESTATE TAX RELEASE



Commonwealth of Massachusetts
Department of Revenue
Geoffrey E. Snyder, Commissioner

mass.gov/dor

2021 00103587
Bk: 77709 Pg: 77 Doc: DIS
Page: 1 of 1 05/06/2021 02:17 PM

Letter ID: L0749036352
tice Date: April 6, 2021
Case ID: 0-001-126-236

CERTIFICATE RELEASING MASSACHUSETTS ESTATE LIEN

ELIZABETH A JONES
16 S MAIN ST
TOPSFIELD MA 01983-1813

This is a copy of a letter sent to: ESTATE OF CAROLYN F PROCOPIO

In response to your request, the Department of Revenue is issuing this certificate releasing the Massachusetts Estate lien for the Estate of CAROLYN F PROCOPIO. Review the information below and call us at (617) 887-6930 if you have any questions.

Taxpayer Information

Name of Decedent	CAROLYN F PROCOPIO
Social Security Number	***-**-9865
Date of Death	06/24/2020

Lien Information

Address of Property	4 Lamoil Street Woburn, MA 01801-0000
Lien Released Date	03/24/2021
Probate Court	N/A
Docket Number	
Registry where deed was recorded	Middlesex South
Date of Deed	11/04/1998
Book Number	29483
Page Number	120

Commissioner of Revenue

III. REBA Title Standard No. 14 – Missing Probates

What changed and why?

- In 2019, the SFC desired to remove any ambiguity as to a filing of Voluntary Administration for a decedent
- Comment 3 was added in 2019, which stated that a Voluntary Administration was not a probate proceeding
- A Voluntary Administration cannot be employed to convey real property or determine heirs at law, as its sole use is for distribution of personal property of no greater value than a particular statutory dollar amount.
- Thus, if your title examination shows a voluntary administration, it must be treated like a missing probate

Pre-Amendment

REBA Title Standard No. 14
Missing Probates

A title dependent on a deed from heirs of a person for whom there are no Massachusetts probate proceedings is not defective if:

(1) the decedent died more than 25 years ago, and

(a) a recorded affidavit or death certificate shows the date of death and place of residence at death, and

(b) an affidavit recorded pursuant to G.L. c. 183, §§ 5A or 5B names the decedent's heirs, states that the decedent died intestate, and declares that no probate proceedings have been filed in any jurisdiction,

or

(2) *the decedent died more than 50 years ago and instruments recorded in the chain of title of land of the decedent identify the heirs.*

Comments

1. *(a) G.L. c. 193, § 4 limited the effect of administration proceedings begun after 20 years. G.L. c. 191, §§ 12 and 13 required wills to be presented promptly. G.L. 197, § 19 precluded a sale of real estate to pay legacies after six years. (All repealed, effective March 31, 2012)*

   (b) G.L. c. 190B provides with limited exceptions that a probate may be opened only within 3 years from date of death (G.L. c. 190B, §3-108) and that a proceeding to determine heirs may be opened thereafter (G.L. c. 190B, §3- 402).

2. *When the owner has been dead 25 years without probate or administration, the risk is deemed negligible that others than the grantee from the heirs have a valid interest in the land.*

Amendment

REBA Title Standard No. 14
Missing Probates

A title dependent on a deed from heirs of a person for whom there are no Massachusetts probate proceedings is not defective if:

(1) the decedent died more than 25 years ago, and

(a) a recorded affidavit or death certificate shows the date of death and place of residence at death, and

(b) an affidavit recorded pursuant to G.L. c. 183, §§ 5A or 5B names the decedent's heirs, states that the decedent died intestate, and declares that no probate proceedings have been filed in any jurisdiction

or

(2) the decedent died more than 50 years ago and instruments recorded in the chain of title of land of the decedent identify the heirs.

Comments

1. *(a) G.L. c. 193, § 4 limited the effect of administration proceedings begun after 20 years. M.G.L. c. 191, §§ 12 and 13 required wills to be presented promptly. G.L. 197, § 19 precluded a sale of real estate to pay legacies after six years. (All repealed, effective March 31, 2012)*

   (b) G.L. c. 190B provides with limited exceptions that a probate may be opened only within three years from date of death (G.L. c. 190B, §3-108) and that a proceeding to determine heirs may be opened thereafter (G.L. c. 190B, §3- 402).

2. *When the owner has been dead 25 years without probate or administration, the risk is deemed negligible that others than the grantee from the heirs have a valid interest in the land.*

3. *For purposes of Title Standard 14, the filing of a Voluntary Administration under G.L. c. 190, §3-1201 or G.L. c. 195, § 16 shall not be deemed a probate proceeding.*

Example

Voluntary Administration

VOLUNTARY ADMINISTRATION STATEMENT PURSUANT TO G.L. c. 190B, § 3-1201	Docket No. 16P1374	Commonwealth of Massachusetts The Trial Court Probate and Family Court

3. At least 30 days have elapsed since the death of Decedent:

4. A death certificate issued by a public officer is in the possession of the Court or accompanies this statement.

5. ☒ The Petitioner is unaware of any unrevoked Will relating to property in Massachusetts.

   OR

   ☐ The original Will and codicil(s) are in the possession of the Court or accompanies this statement. The Petitioner is unaware of any instrument revoking the Will and believes that the Will is the decedent's last Will.

6. ☒ Copies of this statement and the death certificate have been sent by certified mail to the Division of Medical Assistance Estate Recovery Unit, P.O. Box 15205, Worcester, MA 01615-0205.

7. The probate estate consists entirely of personal property and the total value of all personal property owned by the Decedent and subject to disposition by Will or intestate succession at the time of the Decedent's death does not exceed $25,000.00, exclusive of one motor vehicle.

REBA Title Standard No. 41
List of Heirs

The listing of a surviving spouse (if any) and heirs in proceedings filed in a Massachusetts probate court may be relied upon as complete and accurate in the absence of evidence to the contrary recorded or filed in the appropriate registry of deeds or probate:

A. on an allowed petition for the probate of a will or administration of an estate filed prior to March 31, 2012;

B. in a Decree and Order of the court that makes a determination of heirs in either a formal or informal probate; or

C. in an original or duly amended list of Surviving Spouse, Children, Heirs at Law (Form MPC 162), filed with or after a Petition for Informal Appointment of Personal Representative pursuant to G.L. c. 190B, § 3-301 (Form MPC 150) that has been allowed by an Order of Informal Appointment of Personal Representative (a) after 12 months from the approval of the informal petition, or (b) three years from the date of death, whichever is later provided, however, that at least one of the following also applies:

   1. a Decree and Order of Complete Settlement has been issued but it fails to formally determine the surviving spouse and heirs or fails to confirm the listing of the surviving spouse and heirs on the Form MPC 162;

   2. a Closing Statement (Form MPC 850) has been duly filed pursuant to G.L. c. 190B, § 3-1003 and no challenge to the Closing Statement or other proceedings involving the personal representative were pending at the end of one year after the Closing Statement was filed;

   3. six years have passed since the allowance of the Bond of the Personal Representative.

Comment

As to paragraph A, although most conveyancers rely on such listings, pre-MUPC case law indicates that the list of heirs set forth in a petition is not conclusive. See Cassidy v. Truscott 287 Mass. 515, 192 NE. 164 (1934); and Hopkins v. Treasurer and Receiver General 276 Mass. 502, 177 N.E. 654 (1931).

The period of six years provided for in paragraph C. 3. is based on M.G.L. c. 202 §20A, which limits the Personal Representative from seeking a license to sell to pay costs of administration after that time period.

Caveat

Paragraph A of this Standard does not apply to a listing of heirs on a petition converted to a probate proceeding under M.G.L. c. 190B pursuant to Probate and Family Court Amended Standing Order 5-11 (Application of M.G.L. c. 190B, Articles I-IV, VI and VII, to Estate Cases Pending on January 2, 2012 or with a Decree Issued Prior Thereto).

Adopted November 26, 1979
Amended May 7, 2012 (to confirm Standard to passage of M.G.L. c. 190B, effective March 31, 2012)
Amended November 4, 2019

REBA Title Standard No. 71
Evidence of Death of Deceased Joint Owners and Life Tenants

A title derived from surviving joint owner(s), or from remainderperson(s) after the death of life tenant(s) or from a personal representative or an executor, administrator, guardian, conservator, heir(s) or devisee(s) of such survivor(s) or remainderperson(s) (collectively, "Survivors"), is not defective by reason of any uncertainty as to the death of the deceased joint owner or life tenant if evidence of the death is established by:

(a) a death certificate recorded at the Registry of Deeds in the district where the property is located or a death certificate filed with or noted in the docket of a probate or other proceeding in a Probate Court in any county of Massachusetts; or

(b) the recording at the Registry of Deeds in the district where the property is located of:

(1) a certified copy of an approved or allowed petition for a domestic or foreign probate or administration of the decedent's estate, or a certificate of appointment in such matter, which in either case recites the decedent's date of death, provided that recording of such petition in the Registry of Deeds shall not be necessary if such petition is filed in any county; or

(2) a Massachusetts Inheritance Tax Lien Release ("L-8 or L-53") relative to the decedent's interest in the property; or

(3) a Massachusetts Certificate of Release of Estate Tax Lien formerly known as an"M-792" relative to the decedent's interest in the property; or

(4) a deed for the real property from such Survivors that contains a recital that the decedent has died, even if no date or place of death is recited, provided, however, that such deed has been recorded for more than 20 years; or

(5) a subsequently recorded death certificate of the Survivor that lists the Survivor's marital status as widowed and that identifies the predeceased joint owner as the spouse of the decedent; or

(6) in a case in which a previously recorded deed for the real property from such Survivor(s) to an arm's length purchaser for value exists, an affidavit given by an attorney in good standing pursuant to G.L. c. 183 §§ 5A or 5B:

(i) that states that a death certificate cannot be obtained because such records are confidential or unavailable in the jurisdiction where the decedent died and includes a supporting narrative, and

(ii) that appends a true copy of a published obituary that provides the date of death.

Notes and Comments

(1) As to the recording of a death certificate as a matter of practice, see REBA Practice Standard No. 10.

(2) For purposes of this Title Standard, the term "joint owners" shall include joint tenants and tenants by the entirety.

(3) When a death certificate or probate is outside of the county where the land is located, it is the recommended practice to note in the title reference of the deed being recorded, the county where the death certificate is recorded or the probate is filed.

(4) The spouse of a widowed Survivor may be identified by his/her birth name on the death certificate issued by the municipality.

(5) An affidavit recorded pursuant to (b)(6) of this Title Standard must be based on personal knowledge, contain sufficient information setting forth the steps taken to obtain the death certificate, cite the statutory or regulatory bar existing which prohibits obtaining the death certificate by the record title owner, contain a recitation of the facts discovered or known to the affiant, and the source of information which establishes that the person identified in the obituary was the owner for whom proof of death is necessary to establish the record title.

(6) For purposes of this Title Standard a published obituary shall include digital publication of the obituary through the funeral home or digital obituary publication service.

Caveat

(1) As to registered land, see Land Court Guideline No. 14 (May 1, 2000, Revised February 27, 2009).

(2) While M-792s, L-8s or L-53s are considered sufficiently reliable evidence of death under the circumstances discussed in this title standard, an Estate Tax Affidavit pursuant to G.L. c. 65C, §14(a) is not.

Adopted November 14, 2005
Amended November 5, 2008 (to delete a requirement in subsection (b)(3) that, to establish evidence of death, an M-792 must have been recorded for at least 20 years)
Amended May 7, 2012 (to confirm Standard to passage of M.G.L. c. 190B, effective March 31, 2012)
Amended May 6, 2019
Amended November 2, 2020 (to expand sources of evidence which may be relied on for proof of death for joint owners and remainderpersons)

REBA Title Standard No. 14
Missing Probates

A title dependent on a deed from heirs of a person for whom there are no Massachusetts probate proceedings is not defective if:

1. the decedent died more than 25 years ago, and

   (a) a recorded affidavit or death certificate shows the date of death and place of residence at death, and

   (b) an affidavit recorded pursuant to G.L. c. 183, §§ 5A or 5B names the decedent's heirs, states that the decedent died intestate, and declares that no probate proceedings have been filed in any jurisdiction,

   or

2. the decedent died more than 50 years ago and instruments recorded in the chain of title of land of the decedent identify the heirs.

Comments

1. (a) G.L. c. 193, § 4 limited the effect of administration proceedings begun after 20 years. G.L. c. 191, §§ 12 and 13 required wills to be presented promptly. G.L. 197, § 19 precluded a sale of real estate to pay legacies after six years. (All repealed, effective March 31, 2012).

   (b) G.L. c. 190B provides with limited exceptions that a probate may be opened only within 3 years from date of death (G.L. c. 190B, §3-108) and that a proceeding to determine heirs may be opened thereafter (G.L. c. 190B, §3- 402).

2. When the owner has been dead 25 years without probate or administration, the risk is deemed negligible that others than the grantee from the heirs have a valid interest in the land.

3. For purposes of Title Standard 14, the filing of a Voluntary Administration under G.L. c. 190, § 3-1201 or G.L. c. 195, § 16 shall not be deemed a probate proceeding.

Adopted November 26, 1973

Amended May 22, 1989 (The phrase "and declare that no probate proceedings have been filed in any jurisdiction" was added.)

Amended May 7, 2012 (to conform Standard to passage of G.L. c. 190B, effective March 31, 2012.)

Amended May 6, 2013 (to restore use of statutory affidavits to identify the heirs of a decedent who died more than 25 years ago.)

Amended May 6, 2019 (to clarify that a Voluntary Administration is not deemed a probate proceeding for purposes of this Standard)

Marketable vs. Insurable Title and Attorney Certification Statute, MGL c. 93, §70

~ Practical Skills Session ~

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Lisa Delaney, the owner of the Braintree firm Carvin & Delaney, LLC, concentrates her practice on large commercial transactions, where she handles complex title research, providing detailed analysis of clear and concise facts. She negotiates and drafts commercial contracts with a focus on leasing and purchase agreements. In addition to her own clients, Lisa's practice includes title counsel for other lawyers and provides title and closing services, litigation consultation, and appearances as Land Court Examiner or expert witness in title litigation matters. She also offers a full-service residential practice to homeowners, buyers and sellers.

A member of the REBA Board of Directors, Lisa led a working group of the Association's Standards and Forms Committee in the development and drafting of proposed REBA Form No. 66, a comprehensive 20-page rider of provisions for residential purchase and sale agreements. She is also a principal drafter of the Massachusetts Homestead Statute and several of REBA's title standards and forms.

Lisa is a frequent seminar panelist for REBA and has spoken on homestead, agricultural/horticultural law, mortgage discharge curative statutes and obscure title issues. In addition to REBA, Lisa is an annual seminar panelist for MCLE on the process and ethics throughout a residential transaction.

Lisa received her J.D. from Suffolk University Law School.

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Ward Graham has been an underwriting and claims counsel in the title insurance industry for over 35 years, most recently joining Old Republic Title as Vice President and Senior Underwriting Counsel in 2016. After a tour of duty as a U.S. Naval Judge Advocate, Ward spent several years in private practice concentrating in the areas of real estate conveyancing and probate before entering the title insurance industry. Throughout his career in the title insurance industry, Ward's focus has always been on legal education and creative solutions to title problems in order to facilitate real estate transactions.

Ward is a member of the REBA Standards & Forms Committee and Legislation Section. He is also a member of the Abstract Club, a past president of NELTA, and a contributing author to the MCLE publication, *Real Estate Title Practice in Massachusetts* (2nd ed. 2010) (specifically, Chapter 4 on Title Insurance, §4.2(c), reference to which was made by the SJC in footnote 42 of *REBA v. NREIS*, 459 Mass. 512, 534-535 (2011), for reference with respect to "Massachusetts case law relating to different types of marketable title promised in purchase and sale agreements"). He has participated in numerous seminars on topics of real estate law and title insurance and was a guest lecturer for several years for the Real Estate Litigation Course at Suffolk University Law School.

Ward received his J.D. from Suffolk University Law School and his B.A. from Tufts University.

Marketable vs. Insurable Title and Attorney Certification Statute, MGL c. 93, §70

SECTION 1: CERTIFICATION STATUTE AND SAMPLE CERTIFICATION FORM

M.G.L. c. 93, §70. Certification of title to mortgaged premises; liability of attorney; unfair practice

In connection with the granting of any loan or credit to be secured by a purchase money first mortgage on real estate improved with a dwelling designed to be occupied by not more than four families and occupied or to be occupied in whole or in part by the mortgagor, an attorney acting for or on behalf of the mortgagee shall render a certification of title to the mortgaged premises to the mortgagor and to the mortgagee.

For the purposes of this section, said certification shall include a title examination which covers a period of at least fifty years with the earliest instrument being a warranty or quitclaim deed which on its face does not suggest a defect in said title; provided, however, that in the case of registered land, it shall be sufficient to start the said examination with the present owner's certificate of title issued by the land court, except that bankruptcy indices and federal and state liens shall be examined. The term record title, as used herein, shall mean the records of the registry of deeds or registry district in which the mortgaged premises lie and relevant records of registries of probate.

The certification shall include a statement that at the time of recording the said mortgage, the mortgagor holds good and sufficient record title to the mortgaged premises free from all encumbrances, and shall enumerate exceptions thereto. The certification shall further include a statement that the mortgagee holds a good and sufficient record first mortgage to the property, subject only to the matters excepted by said certification.

The liability of any attorney rendering such certification shall be limited to the amount of the consideration shown on the deed with respect to the mortgagor, and shall be limited to the original principal amount secured by the mortgage with respect to the mortgagee. Said certification shall be effective for the benefit of the mortgagor so long as said mortgagor has title to the mortgaged premises, and shall be effective for the benefit of the mortgagee so long as the original debt secured by the mortgage remains unpaid.

Willful failure by an attorney to render a certification to the mortgagor as required by the provisions of this section shall constitute an unfair or deceptive act or practice under the provisions of chapter ninety-three A.

SAMPLE ATTORNEY'S CERTIFICATE OF TITLE

SELLER:
BUYER/BORROWER:
LENDER:
PREMISES:
DATE:
SETTLEMENT ATTORNEY:

Pursuant to Massachusetts General Laws Chapter 93, Section 70, we hereby certify to Buyer and Lender that upon the recording of the mortgage described below, Lender is the holder of and mortgagee named in a good sufficient record first mortgage to the premises subject to the matters excepted by this certification, given to it by Buyer, mortgagors, dated _____ covering the premises located at _____ and securing the payment of a note in the sum of $_____, based on a contract sales price of $_____, and to certify also to said mortgagors that upon the recording the same mortgage, the mortgagors hold good and sufficient record title to the mortgaged premises free from all encumbrances except said mortgage and further subject to the following matters which are specifically excluded from this certification of title:

1. those encumbrances referred to in General Laws, Chapter 185, Section 46, (which encumbrances include liens not required to appear of record, taxes within two years after being committed to the collector, public and private ways laid out on registered land under Section 21 of Chapter 92 without boundary determination statements, leases under seven years, liens for betterment, assessments, and Federal liens for unpaid taxes) if notice of such encumbrance is not recorded with the Registry;

2. any real estate taxes not presently due and payable;

3. any encroachments, boundary line disputes or other state of physical facts which may be revealed by a personal inspection or accurate survey of the Property;

4. rights or claims of parties in possession not shown by the Records;

5. easements, or claims of easements, not shown by the Records;

6. any lien, or right to a lien, for services, labor, or material heretofore or hereafter furnished, imposed by law and not shown by the Records;

7. any law, ordinance, bylaw, or other governmental regulation affecting, restricting, prohibiting, or otherwise regulating the occupancy, use or enjoyment of the Property, the character, dimensions, or location of any present or future improvement now existing or hereafter planned for the Property, or a separation in ownership or change in the dimensions or area of the Property (including, without limiting the generality of the foregoing, Zoning Laws, State Building Code, Wetlands Protection Act, Subdivision Control Law, Lead Paint Law, health laws, sewage disposal laws, historic districts, and pollution control laws);

8. matters not of record known, suffered or created by the Mortgagor and/or the Mortgagee;

9. any lien or claim, any other tax liability, or any matter of bankruptcy or insolvency that may not appear in the indices of Registry of Deeds in which the said premises are located;

10. forgeries;

11. errors and omissions in the records and indices of the Registry of Deeds and relevant Registries of Probate;

12. lack of sufficient capacity or competency of grantors;

13. such matters, if any, shown on the Exhibit "A" attached hereto and made a part hereof;

14. the mortgages which were paid as part of the transaction and listed on the closing settlement statement.

Our examination of title covers a period of at least fifty years and was confined to the records of the Registry District or the Registry of Deeds in which the mortgaged premises lie and to relevant records of Registries of Probate. If the premises herein is registered land, then a portion of the 50-year title exam may consist of our reliance on the integrity of a Certificate of Title dated within the past 50 years as the earliest instrument in our title.

Our liability to the Mortgagor shall be limited to the amount of consideration shown on the deed to the Mortgagee filed immediately prior to the filing of the Mortgage. Our liability to the Mortgagee shall be limited to the original principal amount secured by the Mortgage. Further, our liability shall otherwise be limited as provided in Massachusetts General Laws, Chapter 93, Section 70, as amended by Chapter 448 of the Acts of 1980, which Section sets forth the requirements for title certifications.

Settlement Attorney

By _____

Receipt of copy of Certification of Title
Acknowledged on _____

Buyer _____

SECTION 2: REBA TITLE AND PRACTICE STANDARDS AND SELECTIONS FROM REBA FORMS NO. 21 (PURCHASE AND SALE AGREEMENT FOR MASSACHUSETTS REAL ESTATE) and FORM NO. 66 (SAMPLE RIDER PROVISIONS TO RESIDENTIAL PURCHASE AND SALE AGREEMENT) (comments and caveats removed)

GENERAL MARKETABILITY, TITLE INSURANCE AND TITLE STANDARDS

REBA Form No. 21 – selected paragraphs relating to quality of title and options for title issues:

2.4. The Premises shall be conveyed on the Date and Time of Closing at the Place of Closing by a good and sufficient deed (accompanied by a Certificate of Title if this is registered) running to Buyer (or Buyer's Nominee) conveying a good and clear record and marketable title thereto free from all encumbrances except those listed in Paragraph 1.11 and the following:

a. Real Estate Taxes assessed or to be assessed on the Premises to the extent that such taxes then are not yet due and payable.

b. Betterment assessments, if any, which are not a recorded lien on the Premises as of the Date of this Agreement.

c. Federal, state and local laws, ordinances, by-laws and rules regulating the use of land, particularly environmental, building, zoning, health, rent control and condominium conversion laws, if any, applicable as of the Date of this Agreement, provided that at the Date and Time of closing the Premises may be used as of right for single family residential use;

d. Existing rights, if any, in party or partition walls; and

e. Utility easements in the adjoining ways

2.11. Seller may, if Seller so desires, at the Closing, use all or part of the Purchase Price to clear the title of any encumbrances or interests provided at all instruments necessary for this purpose are recorded by and at the expense of Seller simultaneously with the deed or at such later time as shall be reasonably acceptable to Buyer, and provided further, with respect to discharges of mortgages from insurance companies, banks and credit unions, such discharges may be recorded within a reasonable time after the recording of the deed.

2.12. If Seller is unable to convey title or deliver possession of the Premises as required hereunder or the Premises do not comply with the requirements of Paragraph 2.10, upon notice by either party, prior to the Date of Closing, this Agreement shall be automatically extended for 30 days (or if Buyer's mortgage commitment sooner expires, to a date one business day before the expiration of such commitment). Seller shall remove all mortgages, attachments and other encumbrances incurred or assumed by Seller which secure the payment of money, provided the total amount thereof does not exceed the Purchase Price, and Seller shall use reasonable efforts to remove other defects in title, or to deliver possession as provided herein, or to make the Premises conform to the provisions hereof.

At the end of the extended period, if all such defects have not been removed, or the Seller is unable to deliver possession, or the Premises do not conform with the requirements of this Agreement, Buyer may elect to terminate this Agreement and to receive back all deposits, upon receipt of which all obligations of the parties hereto shall cease.

At the original or extended time for performance, Buyer may elect to proceed with the Closing upon payment of the full Purchase Price reduced by an amount sufficient to remove all mortgages, attachments and other encumbrances which secure the payment of money which have not been removed by Seller but otherwise without deduction. In the event that the reason the Premises do not conform is damage to the Premises caused by fire or other casualty insured against, and Seller has not restored the Premises to their former condition and Buyer elects to proceed, Seller shall assign all insurance proceeds to Buyer and the Purchase Price shall be reduced by:

a. the net amount of any insurance proceeds which a mortgagee has applied to the mortgage debt,

b. less any amounts reasonably expended by Seller for partial renovation.

c. the amount of any insurance proceeds received by Seller; and

d. any deductible amount under Seller's insurance policy.

2.21 Any matter or practice arising under or relating to this Agreement which is the subject of a Title Standard or a Practice Standard of the Real Estate Bar Association for Massachusetts shall be governed by said Standard to the extent applicable.

REBA Form No. 66, Par. 5.12. REBA forms, title standards and practice standards

Any title or practice matter which is the subject of a Title or Practice Standard or a Form of the Real Estate Bar Association for Massachusetts (REBA) shall be governed by said Title or Practice Standard or Form to the extent applicable, unless the Title or Practice Standard or the Form has been mooted by case law or statute in effect prior to the effective date of the Purchase and Sale Agreement.

REBA Form No. 66, Par. 5.14. Title insurance provision

In addition to the condition that title to the property is marketable, BUYER's performance hereunder is conditioned upon title to the premises being insurable on an ALTA form owner's insurance policy issued by a recognized title insurance company licensed to do business in the Commonwealth of Massachusetts, at normal premium rates. In the event of a title matter for which a title insurance company is willing to issue so-called "affirmative coverage" over a known defect or problem, BUYER may elect to accept same but shall not be required to do so, and shall have the right, at their option, to deem title to the premises unacceptable or unmarketable and terminate the Purchase and Sale Agreement.

REBA Form No. 66, Par. 5.2 title and land use conformity and compliance

It is understood and agreed by SELLER and BUYER that the subject premises shall not be in conformity with the Purchase and Sale Agreement unless:

(a) all buildings, structures and improvements, and all means of access to the [ ] premises or [ ] Condominium of which the Unit is a part are located completely within the boundary lines of said [ ] premises or [ ] Condominium, and do not encroach on, over or under easements of which the subject [ ] premises is or [ ] Condominium is the servient estate;

(b) no building, structure or improvement of any kind belonging to a person other than [ ] SELLER or [ ] Condominium of which the Unit is a part encroaches on or under said premises;

(c) the [ ] premises or [ ] Condominium abut or have valid private access to a public way or a way laid out and approved by a municipal planning board pursuant to the Subdivision Control Law or ordinance, zoning bylaw, etc. for those cities and towns that have not adopted the Subdivision Control Law;

(d) the premises are not in violation of applicable zoning codes and ordinances, including the use of the premises for residential purposes;

(e) the premises are equipped with all necessary utilities, including without limitation electricity, municipal or private water supply, septic or sewer, as applicable, and all utilities and appurtenant easements serving the premises are unencumbered and have title that is both record and marketable;

(f) the premises are in compliance with all recorded land use documents. All required land use completion documents are recorded at or prior to the Closing and contain either no continuing conditions or only those conditions requiring reasonable property maintenance.

(g) the premises are not in a special flood hazard area for which an institutional lender would require BUYER to purchase flood insurance.

MORTGAGE PAYOFFS AND DISCHARGES

REBA Practice Standard No. 17. Mortgage Discharges.

It is the duty of the seller (through seller's attorney if seller has one) to provide promptly to the buyer's attorney and the attorney for buyer's mortgagee, upon request, the name, address (including branch) and customer service telephone number of seller's mortgagee and the account number of the mortgage, as well as the seller(s) social security number. Such information shall be provided in writing and shall include authorization to obtain payoff information for the mortgage. If this information is not provided promptly and the attorney for the buyer or mortgagee is required to obtain this information, the attorney may make a reasonable charge to the seller for such services, as well as for obtaining a mortgage payoff letter.

To facilitate the closing adjustments, attorneys are encouraged to suggest to their clients selling property that they refrain from making mortgage payments within seven days of the closing, provided such conduct will not result in a default under the mortgage or in an additional charge. The attorney shall be entitled to rely upon the last available written payoff statement from the lender.

It shall be the duty of a mortgagee to provide promptly written information relating to its mortgage loans, including the outstanding balance, accrued interest, late charges, escrow deposits and per diem rates, to an attorney representing himself or herself as a buyer's, seller's or mortgagee's counsel.

It shall be reasonable for an attorney representing a buyer's mortgagee to charge the seller (in the case of a sale) a reasonable fee for pursuing the current mortgagee of record for a discharge and attending to other matters to clear the record title. It is also reasonable for an attorney representing a buyer's (in case of a sale) or borrower's (in case of a refinance) mortgagee to charge a reasonable fee for obtaining discharges of prior outstanding mortgages of record and attending to other matters to clear the record title. If the discharge to be obtained is of a mortgage granted by the seller or borrower, then a moderate fixed charge is reasonable. The attorney making the charge or arranging for the payoff shall obtain and record a proper discharge, or verify that a proper discharge has been recorded.

REBA Form 66, Par. 1.6. Recording of mortgage discharges.

Mortgage discharge documents by banks or other institutional lenders may be delivered after the recording of the deed and delivery of closing proceeds to SELLER providing same are paid for in full as a closing disbursement pursuant to lender’s or lender’s servicer’s mortgage pay-off letter complying with the provisions of M.G.L. Ch. 183, s. 54. All other release documents and all releases for liens held by personal or non-institutional lenders must be delivered to BUYER at the time of the delivery of SELLER’s deed.

REBA Practice Standard No. 29. Discharge or Partial Release of Private Mortgages.

At the closing of a transaction involving real property encumbered by a private mortgage that is to be discharged or partially released as part of the transaction, the owner shall:

1. Provide to the closing attorney not more than 7 days before the scheduled closing date a payoff statement or partial release payment statement from the private mortgagee that complies with M.G.L. c. 183, s. 54D, together with contact information including, without limitation, the telephone number, email address, and disbursement instructions of the private mortgagee or the private mortgagee's attorney; and

2. Arrange for the delivery to the closing attorney prior to or at the closing of the fully executed and notarized discharge or partial release, which shall be unconditionally released for recording no later than upon disbursement by the closing attorney to the private mortgagee of good funds in the amount specified in the payoff or partial release statement.

REBA Form No. 66, Par. 1.5. Equity or revolving credit mortgage.

SELLER agrees to freeze any equity or revolving credit mortgage lines prior to the issuance of the lender's payoff statement by following such written instructions as are required by each of SELLER's credit or revolving equity lenders, and each payoff statement shall contain or include written confirmation that the equity or revolving credit line has been closed.

REBA Practice Standard No. 19. Home Equity Loan Discharges.

It is considered standard practice for an attorney representing a lender or buyer in a residential loan to require the seller to notify his or her home equity lender to terminate his or her right of withdrawal from the line of credit at least 14 days before the sale and to cause such termination to be noted on the lender's payoff letter to the attorney representing the buyer or lender. It is considered standard practice for the buyer's and lender's attorneys to decline to close the purchase or the acquisition loan if the seller fails to terminate his or her equity loan in a timely manner to assure the proper satisfaction and discharge of the equity loan.

TAXES AND MUNICIPAL ASSESSMENTS:

REBA Title Standard No. 19. Municipal Lien Certificates.

A municipal lien certificate, if recorded within 150 days after its date, operates to discharge the land described therein from liens for all taxes, assessments, or portions thereof, rates and charges, not shown by the certificate to constitute liens except taxes, assessments, or portions thereof, rates and charges

(1) with respect to which evidence of a taking or sale by a municipality has been recorded, or,

(2) concerning which a statement or order creating or continuing such lien has been so filed under any provision of law, if said lien can be discharged by the recording or registration of an instrument other than a municipal lien certificate.

REBA Title Standard No. 19. Municipal Lien Certificates.

A municipal lien certificate, if recorded within 150 days after its date, operates to discharge the land described therein from liens for all taxes, assessments, or portions thereof, rates and charges, not shown by the certificate to constitute liens except taxes, assessments, or portions thereof, rates and charges

(1) with respect to which evidence of a taking or sale by a municipality has been recorded, or,

(2) concerning which a statement or order creating or continuing such lien has been so filed under any provision of law, if said lien can be discharged by the recording or registration of an instrument other than a municipal lien certificate.

LAND USE ITEMS

1. Former Railroad Land:

Somerset Savings Bank v. Chicago Title Insurance Company, 649 N.E.2d 1123 (Mass. 1995)

M.G. L. c. 40, §54A

M.G.L. c. 161C, §7

2. Orders of Conditions

Lyon v. Duffy, 77 Mass.App.Ct. 860 (2010)

REBA Form No. 66, Par. 5.2(f) (repeat from above)

the premises are in compliance with all recorded land use documents. All required land use completion documents are recorded at or prior to the Closing and contain either no continuing conditions or only those conditions requiring reasonable property maintenance.

REBA Practice Standard No. 14. Orders of Condition.

Absent any agreement to the contrary, at the sale of property which, according to the record title, may be or is in fact encumbered by an Orders of Condition, the seller shall provide:

(1) A certificate of Compliance from the appropriate authority; or

(2) A partial release of the property from the Orders of Condition; or

(3) Evidence indicating that the property is released from or is in fact not covered by the Orders of Condition, such evidence to be in recordable form and be acceptable to the buyer's and the mortgagee's counsel, if any.

ASSOCIATTION FEES

REBA Practice Standard No. 26. Land Subject to a Non-Statutory Obligation to Pay Assessments.

A conveyancing attorney certifying title to property which is subject to a declaration of restrictive covenants or other instrument which imposes a non-statutory obligation on the land owner to pay assessments in connection with the use of the common property or shared amenities should obtain written documentation that all outstanding assessments have been paid through the date of conveyance. Evidence of payment should be in written form from a person purporting to be an authorized signatory of the homeowner’s association or from another entity identified of record as the one responsible for the collection of assessments.

The form of such acknowledgement of payment should be, whenever possible, in recordable form.

MISSING PROBATES

REBA Title Standard No. 14. Missing Probates.

A title dependent on a deed from heirs of a person for whom there are no Massachusetts probate proceedings is not defective if:

1. the decedent died more than 25 years ago, and

   (a) a recorded affidavit or death certificate shows the date of death and place of residence at death, and

   (b) an affidavit recorded pursuant to G.L. c. 183, §§ 5A or 5B names the decedent's heirs, states that the decedent died intestate, and declares that no probate proceedings have been filed in any jurisdiction, or

2. the decedent died more than 50 years ago and instruments recorded in the chain of title of land of the decedent identify the heirs.

WHAT IS MARKETABLE TITLE AND WHOSE RESPONSIBILITY IS IT TO MAKE THAT DETERMINATION?

For the most part, the case law discussing marketable title is based on controversies stemming from a party to a purchase and sale agreement seeking to either get out of the purchase or to specifically enforce the agreement but it certainly can come up in cases involving post-closing claims of malpractice. See, for example, *Lyon v. Duffy*, 77 Mass.App.Ct. 860 (2010)(attorney's title examiner missed an Order of Conditions and, therefore, it was not excepted from the attorney's 93/70 certification of title) and *Fall River Savings Bank v. Callahan*, 18 Mass.App.Ct. 76 (1984)(closing attorney neglected to deal with potential estate tax lien issue in title coming out of a probate estate).

In a case we are all quite familiar with, The Real Estate Bar Association for Massachusetts, Inc. v. National Real Estate Information Services, 459 Mass. 512 (2011), the Supreme Judicial Court provided the following guidance with respect to both marketable title and an attorney's role in determining whether a title is marketable.

> The lender's closing attorney has a responsibility to his or her client to ensure that the seller (in a purchase and sale transaction) or borrower-mortgagor (in a mortgage financing transaction) is in a position to convey "marketable title" to the real property at issue.[41] **At its core, marketable title means title that is "free from encumbrances beyond reasonable doubt."**[42] [Citations omitted.] Determining marketable title is a multiple step process that demands both investigation of the record at the registry of deeds and analysis of all title-related information relating to the property, with **the goal of making sure that the seller—or, more at issue here, the mortgagor—actually owns the property to be mortgaged and that there are no other legal claims on the property that might otherwise frustrate or jeopardize the conveyance**.

> As we have previously indicated, the first step of this process, investigation of the record at the registry of deeds and preparation of a title report or abstract, generally does not constitute the practice of law,[43] and these activities are commonly performed by nonlawyers for real estate attorneys. The second step in this process—analyzing title abstracts and other records to render a legal opinion as to marketability of title—does constitute the practice of law in Massachusetts.[44] [Citations omitted.] See also *Fall River Sav. Bank v. Callahan,* 18 Mass.App.Ct. at 77–84, 463 N.E.2d 555 (discussing obligations of lawyer in certifying marketability of title). A determination of marketable title therefore typically must be performed by an attorney prior to the execution of the mortgage documents at the closing, and also prior to recording them.[45] **We emphasize that the closing attorney possesses an ethical and professional obligation to ensure marketability of title regardless whether the closing attorney personally performs this analysis.**[46,47]

Id., at 534-536. [Emphasis added.] As you can see, there are a number of footnotes but with regard to the subject matter of title certifications under M.G.L. c. 93, § 70 and marketable title, the following footnotes are instructive:

> 42. There is no precise definition of marketable title in Massachusetts, and what constitutes marketable title may differ depending on the wording of documents that are relevant to the transaction, including a purchase and sale agreement when one is involved. See, e.g., *O'Meara v. Gleason,* 246 Mass. 136, 138, 140 N.E. 426 (1923) (discussing difference between "good and clear record" title and "good marketable title"). See also W.P. Graham, Title Insurance, Real Estate Title Practice in Massachusetts § 4.2(c), at 4–40—4–44 (Mass. Continuing Legal Educ.2d ed. 2010) (examining Massachusetts case law relating to different types of marketable title promised in purchase and sale agreements).
>
> A standard purchase and sale agreement states that the seller will deliver a deed providing "good and clear record and marketable title" to the buyer. See, e.g., 1 R.A. Dillingham, Buying and Selling a Home, Massachusetts Basic Practice Manual Exhibit 5C, at 5–23 (Mass. Continuing Legal Educ.3d ed. 2009). "Good and clear record" title is title "free from obvious defects, and substantial doubts" in the record, and one for which the record "show[s] an indefeasible unencumbered estate." *O'Meara v. Gleason,* 246 Mass. at 138, 140 N.E. 426. **Accordingly, a buyer's attorney (who stands in the same place as a lender-mortgagee's attorney in a mortgage loan transaction) owes an obligation to his or her client to determine that the seller's title meets this standard.** [Emphasis added.]
>
> 46. The scope of obligation for determining marketable title has been partially defined by the Legislature. The title certification statute, **G.L. c. 93, § 70, requires an attorney** for the lender in a purchase money first mortgage **to certify that the mortgagor and mortgagee hold "good and sufficient record title" and that such certification must include a title examination dating back at least fifty years from the date of the conveyance.** The purpose of G.L. c. 93, § 70, is to ensure that "the granting of a mortgage [has] vest[ed] title in the mortgagee to the land placed as security for the underlying debt." *Lyon v. Duffy,* 77 Mass.App.Ct. 860, 865, 934 N.E.2d 831 (2010), quoting *Maglione v. BancBoston Mtge. Corp.,* 29 Mass.App.Ct. at 90, 557 N.E.2d 756. The Legislature,

> however, did not impose the statute's certification requirements on mortgage refinancing transactions, and we do not do so today as a matter of an attorney's professional responsibility. Nevertheless, as indicated in the text, closing attorneys representing lender-mortgagees have an obligation to their clients to ensure that all mortgages properly vest title in mortgagees. [Emphasis added.]
>
> 47. Analyzing the title to determine marketability also may reveal either title defects or title encumbrances that need to be resolved before the transfer of title can be completed. Resolution of some title problems, such as those that require an appearance before a court, will likely involve the practice of law, while others, such as paying outstanding taxes, mortgages, and liens, may not.

In the *Fall River Savings Bank v. Callahan* case cited above by the SJC in *REBA v. NREIS*, the court was dealing with a malpractice claim against a closing attorney who failed to obtain releases of potential federal and state estate tax liens in a title coming out of a probate estate. (The case preceded the adoption of MGL c. 65C, s. 14(b) regarding reliance on no-estate-tax-return-required affidavits.) Regarding the issue of the marketability of the title, the court observed:

> The question was not whether taxes were in fact owed but whether it appeared that the title might be subject to an adverse claim which could reasonably be expected to expose the purchasers to controversy and expense to maintain their title. *Smith v. Allmon,* 17 Mass.App. 712, 716, 461 N.E.2d 1237 (1984).

Id., at 81. Regarding the standards applied to the determination of the attorney's responsibility to have properly evaluated the title and recognized the need to obtain estate tax releases, the court observed:

> Of the many areas of law practice, conveyancing is one which lends itself particularly to formulation through decisional law and commentary as to what are appropriate procedures. There may be no definitive rules which prescribe a right or wrong way to conduct a deposition but certain rules have evolved for passing on a title. Thus, reported cases have laid down that it is the duty of conveyancers to notify purchasers that their titles may be subject to contest, even if it appears that resolution of the contest will favor the purchaser-client. [Citations omitted.] "[C]aution is an indispensible attribute in examining title." Mallen & Levit, Legal Malpractice § 606 at 765. That a potential tax lien raises the prospect of controversy is apparent from cases such as *Sawl v. Kwiatkowski,* 349 Mass. 712, 212 N.E.2d 228 (1965), and *Sachs v. Hirshom,* 16 Mass.App. 704, 704–705, 454 N.E.2d 928 (1983). In the narrow range of cases where decisions and commentaries based on decisions establish a standard of lawyers' practice, a court may employ those commentaries in deciding the case. The question has become one which is more of law than fact. See Prosser, Law of Torts 206 (4th ed. 1971).

Id., at 83.

HOW DO REBA TITLE STANDARDS RELATE TO MARKETABLE TITLE?

The PREAMBLE to the REBA Title Standards provides an excellent explanation as to the relationship of the title standards to marketable title:

> The objective of the conveyancer is to determine whether or not the title in question is satisfactory of record. Objections to the title should be made only when the defect or defects could reasonably be expected to expose the prospective owner, tenant or lienor to the risk of adverse claims or litigation. The following title standards express the practice considered reasonable by members of the Real Estate Bar Association for Massachusetts. This standard of reasonableness is intended to assist the conveyancer in determining if title is marketable. This is not necessarily the same standard that the Land Court will apply consistent with its statutory obligation under M.G.L. Chapter 185. While every effort has been made to maintain consistent standards for both recorded and registered land, there are instances in which the two sets of standards diverge. When dealing with registered land the conveyancer should always review the applicable Land Court Guidelines.
>
> When a conveyancer encounters a situation that he or she believes to constitute a defect in title, it is recommended that the conveyancer contact the prior conveyancing attorney to determine if there are facts or circumstances not apparent from the record that would make title marketable under these standards or otherwise.
>
> To achieve uniformity and harmony in the practice of conveyancing, every purchase and sale agreement should contain the following provision: "Any matter which is the subject of a title, practice or ethical standard of the Real Estate Bar Association for Massachusetts at the time for delivery of the deed shall be governed by said standard to the extent applicable".

WHAT IS INSURABLE TITLE?

Title Insurance Policy Forms.

The customary forms of title insurance policies, both owner's and lender's, issued in Massachusetts are based upon the American Land Title Association forms adopted by most, if not all the title insurance companies operating in Massachusetts. Since the introduction of title insurance more broadly into the Massachusetts real estate conveyancing marketplace starting the 1980s, the forms of ALTA policies have changed over the years but, starting in the late 1990s, they have bifurcated into two basic forms: a standard lender's and owner's policies (used predominantly for non-residential properties and transactions) and extended coverage lender's and homeowner's policies (used for 1-4 family residential properties and transactions). The standard policies provide fewer coverages regarding matters that are not matters of title traditionally covered by title insurance while the expanded coverage policies provide additional coverages that do go beyond matters of title traditionally covered by title insurance prior to the late 1990s. For purposes of this seminar, we will refer to the latest version of the ALTA policies now entering the marketplace as the basic coverages relating to marketable title have not changed all that much over the years.

Who and What Are Being Insured?

2021 ALTA Owner's Policy

COVERED RISKS

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B, AND THE CONDITIONS, Old Republic National Title Insurance Company, a Florida corporation (the "Company"), insures as of the Date of Policy and, to the extent stated in Covered Risks 9 and 10, after the Date of Policy, against loss or damage, not exceeding the Amount of Insurance, sustained or incurred by the Insured by reason of:

1. The Title being vested other than as stated in Schedule A.

2. Any defect in or lien or encumbrance on the Title. Covered Risk 2 includes [certain enumerated examples of defects, liens or encumbrances which have been omitted from these materials to save space except for paragraph c, which is a new form of survey coverage]:

. . .

c. the effect on the Title of an encumbrance, violation, variation, adverse circumstance, boundary line overlap, or encroachment (including an encroachment of an improvement across the boundary lines of the Land), but only if the encumbrance, violation, variation, adverse circumstance, boundary line overlap, or encroachment would have been disclosed by an accurate and complete land title survey of the Land.

3. Unmarketable Title.

. . .

9. The Title being vested other than as stated in Schedule A, the Title being defective, or the effect of a court order providing an alternative remedy [resulting from certain described bankruptcy or insolvency proceedings regarding fraudulent conveyances and voidable preferences which have been omitted to save space].

The **definition of "Unmarketable Title"** is provided in the Definitions section of the Conditions of the standard policy and that definition is "The Title affected by an alleged or apparent matter that would permit a prospective purchaser or lessee of the Title or a lender on the Title to be released from the obligation to purchase, lease, or lend if there is a contractual condition requiring the delivery of marketable title." As you'll see below, the definition of "unmarketable" title in the Homeowner's Policy is not as detailed and states only "which allows someone else to refuse to perform a contract to purchase, lease, or make a mortgage loan on the Land." The distinction can be important when dealing with the standard purchase and sale agreements in Mass, which routinely require "good clear record and marketable title" as opposed to just "marketable title."

2021 ALTA Homeowner's Policy

COVERAGE STATEMENT

SUBJECT TO THE PROVISIONS SET FORTH BELOW, We insure You against loss or damage resulting from one or more of the Covered Risks if the matter creating the risk exists on the Date of Policy or, to the extent expressly stated in any Covered Risk, after the Date of Policy. We will also pay the costs, attorneys' fees, and expenses provided for under this policy.

Your insurance is effective on the Date of Policy.

This policy covers You only if the Land is improved with an existing one-to-four family residence and each party named in Item 1 of Schedule A is a Natural Person or Estate Planning Entity.

Your insurance is further limited by all of the following:

- Amount of Insurance
- For Covered Risks 16, 18, 19, and 21, Your Deductible Amount and Our Maximum Dollar Limit of Liability shown in Schedule A
- Exceptions from Coverage in Schedule B
- Our Duty to Defend against Legal Actions
- Exclusions from Coverage
- Conditions

COVERED RISKS

1. Someone else owns an interest in Your Title.

. . .

7. Your Title is defective. Some examples of title defects are:
    a. someone else's failure to have authorized a transfer or conveyance of Your Title
    b. a defective judicial or administrative proceeding.
    c. a document, including an electronic document, on which Your Title is based:
        i. was signed using a falsified, expired, or otherwise invalid power of attorney;
        ii. was not properly authorized, executed, created, signed, witnessed, sealed, acknowledged, notarized (including by remote online notarization), or delivered; or
        iii. was not properly filed, recorded, or indexed in the Public Records.
    d. the repudiation of an electronic signature by a person that executed a document because the electronic signature on the document was not valid under applicable electronic transactions law.
8. Someone else has a lien on Your Title.
9. Someone else has an encumbrance on Your Title.

. . .

29. Your Title is unmarketable, which allows someone else to refuse to perform a contract to purchase, lease, or make a mortgage loan on the Land.

Schedule A of the policy.

The policy information for each particular policy is generally contained in a **Schedule A**. This information includes the policy number, the date of the policy (usually the recording date of the deed and/or mortgage), the amount of insurance, the named insured(s) and (in the Loan policy) the parties in whom the title to the property is vested, the estate or interest being insured (usually fee simple as to the owner's estate and the mortgage interest as to the lender), and basic property information, such as the address of the property and, in the case of a condominium, the unit number and condominium name.

While the full description of the property may be placed on **Schedule A** if it is short enough, customarily, the property description is contained in a **Schedule A Description** sheet or an **Exhibit** sheet. It is important to note that the **Description** of the property to be insured should generally be limited to the **actual description of the land** (together with the buildings thereon) by metes and bounds or by references to lots on recorded plans.

Acreage or area should not be included. Appurtenant rights, such as access easements, may be included but generally only if the validity and current enforceability of those rights has been specifically searched and verified. If matters to which the property is subject (such as easements, restrictions, covenants, condo docs, etc.) appear in the deed and are copied into the policy description, such matters MUST also be included as specific exceptions on Schedule B of the policy. Title references should not be included in the policy description either unless the agent has verified the accuracy of the title reference (title references are often wrong).

Schedule B of the Policy.

Matters listed on **Schedule B** are excepted from coverage by virtue of the following clause printed at the top of the **Schedule B**:

This policy does not insure against loss or damage arising by reason of the following:

The list of matters placed in **Schedule B** complete the sentence and, thus, constitute those matters for which the policy does not provide coverage. Because the listing of any matters in **Schedule B** is the completion of that clasuse, it is not necessary to start a **Schedule B exception** with the words "subject to" but that is fairly common to see in agent-issued policies and is usually not an issue. Just the listing of the matter itself (such as an easement) together with identifying information (such as the parties to it and, perhaps, its subject matter, such as "utility easement" or "drainage easement")[1] and recording information (book and page and the date of the instrument or, preferably, the date of recording[2]) is sufficient to except it from coverage.

[1] Although one must, of course, be careful if characterizing the nature of an encumbrance to do so accurately.

[2] Generally, the date of recording is more significant than the date of the instrument as the Massachusetts recording priority system is based on who gets to the Registry of Deeds first, not who signed the document first.

Originally, the ALTA form of **Schedule B** did not contain any pre-printed exceptions. The top of the **Schedule B** merely began with the disclaimer statement referred to above: After that disclaimer statement, specific exceptions as to title matters not to be insured would be listed. Over time, some pre-printed exceptions began to appear and were shown on the **Schedule B** as **"General Exceptions"** or **"Standard Exceptions"**. Like the **Exclusions From Coverage** appearing in the policy jacket, these **"General" or "Standard" Exceptions** dealt primarily with matters which a customary title search would not normally cover or discover. Although the precise wording may be somewhat different from company to company, the more common pre-printed **Standard Exceptions** in the current **Schedule B** forms are as follows:

1. Rights or claims of present tenants, lessees or parties in possession not shown by the public record.

2. Discrepancies, conflicts in boundary lines, shortage in area, encroachments, or any other facts which a correct survey and inspection of the premises would disclose, and which are not shown by public records.

3. Any lien, or rights to a lien, for services, labor or material heretofore or hereafter furnished, imposed by law and not shown by the public records.

4. Liens for municipal taxes and assessments which become due and payable after the date of this policy.

After these **Standard Exceptions**, any **"Special Exceptions"** revealed by the title search or a plot plan or survey will be listed in the **Schedule B.** In both commercial and residential transactions, most of the affirmative coverages and endorsements (most of which provide standardized forms of affirmative coverage) a title insurance company will be asked to provide to an insured will relate to either **Standard or Special Exceptions** appearing in **Schedule B** rather than to **Exclusions From Coverage** contained in the jacket of the policy.

Note that the **Schedule B** does not state that anything contained in it is a defect, lien or encumbrance on the insured's title. It is simply a schedule by which the title insurance company identifies certain matters against which it will not insure. To be sure, many times **Schedule B** matters do affect the title in some way and they may, indeed, be deemed to be defects, liens or encumbrances. However, based on the character of a title insurance policy as a **contract of indemnity** for loss, the title insurance company may want to take exception for matters which may or may not necessarily affect the title, or the use or possession of the property as an incident of that title, but the company sees some risk of claim, litigation, loss or controversy and seeks to eliminate its exposure to paying for the consequences of same. In other cases, the company may be seeking by a particular **Schedule B** exception to clarify, define or limit a particular insuring provision. In still other cases, the company may be placing a particular exception in **Schedule B** in order to provide some affirmative coverage for that matter upon the request of the insured. Thus, the **Schedule B** form is not only a form that contains **Exceptions From Coverage**, but it may also be used to recite **affirmative coverages** over certain matters that might otherwise be excluded or excepted from coverage.

In both residential and commercial transactions, it is quite common that the lender will request that the **Standard Exceptions** (other than the tax lien exception) be deleted from a Loan policy.

Insurable Title.

In its basic nomenclature, insurable title is a title to real property which a title insurance company issues or authorizes the issuance of a title insurance policy. However, as discussed above, title insurance policies routinely contain certain exclusions from coverage, conditions and Schedule B exceptions (both standard and specific) that limit the coverages provided under the "Covered Risks".

With every title issue presented, a title insurance underwriter must be mindful of all of the Covered Risks, but, in most cases, especially Covered Risks relating to whether the title issues raise a question about:

(1) title to the estate or interest being properly vested in the Seller or Mortgagor and, as a result of the transaction to be insured, will be properly vested as will be described in Schedule A of the policy to be issued;

(2) the issue constituting a defect in or lien or encumbrance on the title; and

(3) the issue marketability of the title.

To a large degree, these determinations are also going to be governed by the law regarding marketability of title as discussed above, the law relating to any given title issue and REBA Title Standards because the definition of unmarketability of title in the forms of title insurance policies in use over the last 20+ years, which is defined in relation to matters that would allow "a prospective purchaser or lessee of the Title or a lender on the Title to be released from the obligation to purchase, lease, or lend if there is a contractual condition requiring the delivery of marketable title." See the title policy provisions discussed above.

Certainly, if title is determined under applicable law and REBA Title Standards[i] to be "good clear record and marketable title," the title will be insurable as well.

Although we often hear that a buyer or lender is looking for a "clean policy," i.e., a policy with absolutely no exceptions in Schedule B, it is increasingly rare that real property in Massachusetts has no exceptions to title. Indeed, purchase and sale agreement forms routinely allow for certain exceptions to be acceptable to the buyer (such as utility easements and other encumbrances that do not affect use and enjoyment of the property) and those matters, if appearing in the record title or revealed by a survey and inspection of the property will be taken as Special Exceptions in the title insurance policy but that is routinely acceptable to buyers and lenders and constitutes "insurable title."

However, "**Insurable Title**" also refers to the issuance of a policy with coverage over a known title matter that may call into question whether the title is "good clear record and marketable title." In such cases, the affirmative coverage can take the form of not taking an exception for the matter, taking an exception and providing specific affirmative coverage or taking exception for the matter and providing affirmative coverage by means of standard ALTA Endorsement relating to the matter at issue.

[i] Also, always be mindful of the Land Court Guidelines for Registered Land promulgated by the Land Court in 2009 as supplemented by various Memoranda by the Chief Title Examiner in the years since. In addition to providing guidance for registered land, they can also be helpful on issues that may not be covered by REBA Title Standards. At the same time, as to some matters, the Land Court Guidelines vary somewhat from the respective REBA Title Standard.

Indemnity and Undertaking Letters.

In the last 25 years or so, as more and more owners of property have been smart enough to listen to their closing attorneys and purchase owner's title insurance policies, when questions or controversies arise with respect to title issues, it has become more and more common for the current transaction title insurance company to insure without exception[ii] for the matter and allow the transaction to proceed based upon an indemnity or indemnity and undertaking letter from the current owner's title insurance company.

Whether the letter will be just an indemnity or will need to be an indemnity and undertaking letter depends on the nature of the title issue and a discussion between underwriting counsels at the respective companies.

More often than not, if the matter is one that, under the circumstances, cannot reasonably be expected to result in an affirmative claim against the title and the matter will expire within a reasonably short period of time, a letter with just an indemnity may be all that is required for the current transaction title insurance company to issue a policy without exception. The classic example, nowadays, would be an undischarged or improperly discharged prior owner mortgage with a maturity date that has already passed but has not quite reached the five years from maturity date (or is within, say, two or three years from the expiration of 35-years from the recording of a mortgage with no stated maturity date).

On the other hand, if the matter presents a genuine risk of a claim against the title or presents a marketability of title issue because the record title is not clear and not resolved by applicable law, title standards or, when applicable, Land Court Guidelines and the issue will not otherwise expire as title matter within a reasonable time, then an indemnity letter with undertaking will usually be required.

Indemnity and undertaking letters vary a bit from Company to Company but a sample of the content of an Old Republic National Title Insurance Company letter appears on the next page.

[ii] Although on occasion, the current transaction policy may issue with an exception for the matter and affirmative coverage against loss or damage incurred as a result of the matter.

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY

35 New England Business Center, Andover, MA 01810 | T: 800.370.6466

[date]

VIA EMAIL (email address)
[Underwriting Counsel]
********** Title Insurance Company
[Address of Title Insurance Company

Policy No.: ***SV-409****, dated March 26, 2004 in the amount of $340,000.00***
Property: ***284 *********, Street, Beverly, MA***
Insured: ***John R******

Dear **********:

Old Republic National Title Insurance Company hereby agrees to indemnify and hold harmless ********** Title Insurance Company ("**********" or "your Company") for all actual loss suffered by it as a result of claims due to the issuance of ********** policies on the above-referenced premises by your agent, **********, and arising from the following:

Mortgage from **** and ****** to MERS as nominee for North American Mortgage Company in the original principal amount of $160,000.00 dated April 3, 2001 and recorded on April 12, 2001 at the Essex South Registry of Deeds in Book ******, Page ***, as affected by a discharge from North American Mortgage Company recorded at said Registry of Deeds in Book *****, Page **.***

This letter of indemnity extends to loss resulting from unmarketability of title relating to said encumbrances or defects and to any subsequent policies of title insurance issued by your Company on the above property. Furthermore, Old Republic National Title Insurance Company agrees that it will undertake reasonable efforts to correct said defects in a timely manner, following which the Company's obligations hereunder shall terminate. This agreement is made with the provision that you notify Old Republic National Title Insurance Company in writing of any notice of claim in the matter which your Company receives within a reasonable time following your receipt of said notice.

This indemnity is provided only so long as there is no hold back of any of our insured's proceeds in regard to the matter listed above. If any such hold back is made or required, then this indemnity letter is null and void. If the Seller in the current transaction is not our Insured then this letter of indemnity shall be null and void.

Best Regards,
[signature]
[name and position]

cc: [Agents and attorneys involved]

Ghost Haunting Land Use Law: Site Plan Review and Local Zoning Regulations

~ Practical Skills Session ~

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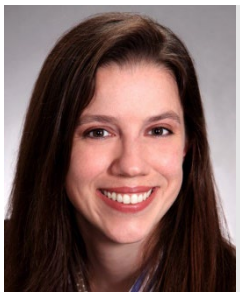
Shawn McCormack is a land lawyer with Davis Malm & D'Agostine, P.C. Most of his practice involves litigating zoning appeals. In addition, he litigates disputes involving easements, boundary lines, adverse possession and registered land. Shawn also represents clients before local permitting authorities, in real estate transactions, and in the cannabis industry. Prior to joining Davis Malm, Shawn served as a law clerk to the Hon. Gordon H. Piper, Chief Justice of the Land Court.

A REBA member since law school, Shawn serves on the Association's Land Use & Zoning and Litigation sections. He is also a member of the Zoning Board of Appeals in the town of Boxborough.

Shawn received his J.D. from Suffolk University Law School and his B.A. from Skidmore College.



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Michel Wigney is an associate in Moriarty Troyer & Malloy LLC's real estate, zoning and land use, and litigation departments. Her practice focuses primarily on real estate development and associated work such as permitting, environmental document review, and zoning compliance. She has worked in land use and real estate law for more than four years, starting practice in Oregon before moving to Massachusetts. She has represented a variety of clients, including individuals, small businesses, large-scale corporations, and federally recognized Indian tribes.

Michel is a member of REBA's Land Use and Zoning, Condominium Law & Practice, and New Lawyers sections, as well as a member of the Women's Bar Association and the Community Associations Institute.

Michel is admitted to practice in Massachusetts, California, and Oregon. She received her J.D. from the University of California, Davis School of Law, and her B.A. from Ohio Wesleyan University.

Ghost Haunting Land Use Law: Site Plan Review and Local Zoning Regulations

~ Practical Skills Session ~

What is a Site Plan?

- A site plan or a plot plan is a comprehensive blueprint used by architects, landscape architects, urban planners, and engineers which shows existing and proposed conditions for a given area, typically a parcel of land which is to be modified.
- The site plan will often show features such as:
    - property lines.
    - outline of existing and proposed buildings and structures.
    - distance between buildings and property lines (setbacks).
    - parking lots, indicating parking spaces.
    - driveways.
    - surrounding streets.
    - landscaped areas.

The Function and Purpose of Site Plan Review

- Site plan review is "an informational tool which discloses the specifics of the project, including the proposed location of buildings, parking areas, and other installations on the land, and their relation to existing conditions such as roads, neighboring land uses, public features, and ingress and egress roads." *Prudential*, *supra* at 281 n. 6.
- Site Plan Review is meant to establish design standards for a development project.
- Site plan review also is a means of collecting the comments of various municipal authorities, such as highway, fire, police, and health departments.

Who conducts the Review?

- The review generally is conducted by a zoning board of appeals or a planning board.
- Site plan provisions may also require an assessment of off-site impacts on "traffic, municipal and public services and utilities, environmental quality, community economics, and community values."

Important considerations

- Although not specifically authorized by G.L. c. 40A, site plan review is a common practice used by municipalities to review and condition certain uses or activities where the underlying use is permitted by right or allowed subject to a special permit.
- First recognized by the Supreme Judicial Court in *Y.D. Dugout, Inc. v. Bd. of Appeals of Canton,* 357 Mass. 25 (1970).
- Absent the lack of standardization under the Zoning Act municipalities have adopted a range of procedures from "administrative site plan review" to those treated as special permits.
- For uses allowed as-of-right, administrative site plan review amounts to something akin to as-of-right plus permitting.
- Through administrative site plan review, "if the specific area and use criteria stated in the by-law [are] satisfied, the board [does] not have discretionary power to deny . . . [approval], but instead [is] limited to imposing reasonable terms and conditions on the proposed use." *Prudential Ins. Co. of America v. Board of Appeals of Westwood* ("*Prudential*"), 23 Mass. App. Ct. 278, 281 (1986). This is because "the concepts of a use as of right and a use dependent on discretion are mutually exclusive." *Prudential*, *supra*.
- Accordingly, a reviewing court is "to examine the proposal to see if the . . . problem [upon which site plan review was denied i]s so intractable that it could admit of no reasonable solution. Short of independently finding that, [the judge i]s not obliged to give deference to the board's decision." *Prudential*, *supra* at 283. *See Castle Hill Apartments L. P. v. Planning Bd. of Holyoke*, 65 Mass. App. Ct. 840, 845-846 (2006), quoting *Quincy v. Planning Bd. of Tewksbury*, 39 Mass. App. Ct. 17, 21 (1995) ("[w]here the site plan involves a permitted use, 'the judge's proper role ... [is] to inquire whether the public interest [may] be protected to a degree consistent with the reasonable use of the locus' for [that permitted use]").
- Over the years, the Courts have grappled with a number of site plan-related issues, summarized nicely by Judge Speicher in *Corner et al., v. Forest Delahunt Development, LLC et al.,* 18 MISC 000316.
    - If a site plan is treated by a municipality as a special permit, does it require a supermajority vote? (per G.L. c. 40A, § 9)
    - How detailed must the findings be in an approval? *See Bowen v. Bd. of Appeals of Franklin*, 36 Mass. App. Ct. 954, 955 (1994) (because "site plan review has to do with regulation of permitted uses, not their prohibition, as would be the case with a special permit or a variance … the local board need not be held to as demanding a standard of reporting of the factual and legal underpinnings of their approval of a site plan.").
        - Is there a different standard for a denial?
    - Can a site plan approval be denied for an as-of-right use?
    - Can a planning board impose stricter dimensional regulations as a condition of site plan approval? Yes, *see Muldoon v. Planning Bd. of Marblehead*, 72 Mass. App. Ct. 372 (2008).
    - Ripeness of appeal of a site plan approval (the very issue grappled with in *Corner*).

Important considerations (cont'd)

- What is significant when a municipality designates site plan review as a "special permit"? *See Epstein v. Plan. Bd. of Marblehead*, 100 Mass. App. Ct. 1128 (2022) (Rule 23.0) ("Notwithstanding the fact that the bylaw incorporates the procedures under § 9 by reference, and thus may appear to apply to all special permit applications, § 9 does not, as a matter of law, apply to a special permit application for a use as of right."). Is this correct?
- What standard does a court apply when reviewing a site plan denial?
  - What standard when reviewing an approval with conditions in an appeal brought by the applicant?
  - What standard when reviewing an abutter appeal of an approval?
    - One framework for review:
      - (1) Is the underlying use is permitted as of right (this is not always undisputed),
      - (2) Did the local board apply the proper criteria in approving the site plan (how do you prove this if the board renders only a cursory written decision? How does this play out on de novo review?),
      - (3) Was the board's approval legally tenable and not arbitrary or capricious (for an as-right use, how does an abutter show the board was arbitrary and capricious? Must an abutter propose specific conditions the board failed to impose? Can an abutter hope for a better result than a remand?)?
- In an abutter appeal, are the requirements to demonstrate status as a "person aggrieved" the same as a discretionary special permit or variance?

Considerations when Applying for Site Plan Approval on behalf of Project Proponent

- The Zoning Bylaw/Ordinance – the by-the-book bible (make sure you have the most up-to-date version – ask the Town Clerk for a certified copy). Absent codification under the Zoning Act, there is a lack of uniformity in procedures between Towns or municipalities. The submission requirements, Board authority, hearing procedures, notice requirements, timing expectations/limitations, and (hopefully) appeal process are laid out in the bylaw or ordinance and form the starting point for submitting your project for review and approval.
- Know the Planning/Zoning staff. Know your Board.
  - Whichever board or group is your authority for Site Plan Review, know who the staff person is and what the expectations are. Some Town Halls only operate on half days on Friday. Some require that the Staff member stamp your Site Plan submission as "received" in order to start your review period. Some staff members will want additional information from you before you application is deemed complete.
  - Some Towns allow you to meet with the staff member or department staff prior to submitting your Site Plan, this can be a good way to understand what is being reviewed more critically in your submission and what the expectations are. Even if there is no process for this, it is a good idea to meet informally with the staff member if you can.

Considerations when Applying for Site Plan Approval on behalf of Project Proponent (cont'd)

- The Board members are next: Who are they? Do they have any subject matter expertise? When were they elected? Were they elected on a particular platform?
  - Want to be extra thorough? Watch a previous Board meeting (or two) online. While there are many aspects of SPR that *are* consistent across the State, many jurisdictions have idiosyncratic rules that have developed through years of Town meetings, specific precedents (Projects that have been previously loved or hated and worked their way into the process – either officially or unofficially).
  - Local politics plays a big role in many development projects – whether you have NIMBY/YIMBY/Other Board is important to know going in.

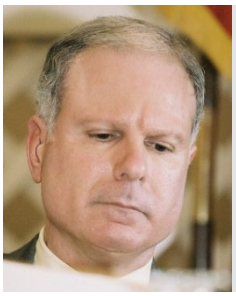
What to Submit?

- Whatever the Bylaw lists. Generally, this will include:
  - Application
  - Application Fee
  - X number of Plan Sets (often a combination of full-sized 24x36 inch plan sets and reduced 11x17 inch plan sets)
    - Bylaw usually stating what items must be displayed on the Plans
  - Parking/Traffic Analysis
  - Stormwater/Drainage Compliance or Analysis
  - Information on what (if any) other permits or approvals are required (e.g. Conservation Commission proceedings, special permit, septic system approval, etc.)
  - Site walk
- Whatever the Planning/Zoning Staff tell you (even if it isn't listed in the ordinance or bylaw)
- Gold star? Memorandum in Support
  - Good practice to walk your Board through why your project is compliant with all of the Site Plan approval criteria and appropriate for the character of your neighborhood. Also provides a good frame of reference for the Board.

Important Permitting-Specific Considerations

- Neighbors – Some bylaws require notice to abutters and some do not, but the court of public opinion can affect how long/how many hearings you have and what conditions may be included in your approval.
- Who else is reviewing your Site Plan?
  - Many Towns require that their Board solicit comments from relevant departments (Police, Fire, Engineering, Health/Sanitation, Conservation Commission, etc.); comments from these departments are typically incorporated into conditions of approval.

Recent Developments in Massachusetts Case Law



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Phil Lapatin, a partner in the Boston office of the international law firm of Holland & Knight, LLP, has been REBA's case law commentator since 1978.

Phil's practice focuses primarily on commercial leasing, as well as the purchase and sale of investment property. He has been involved in various cases of importance to the real estate industry, including suits in which rent control ordinances were invalidated and condominium documents were exempted from the statutory provisions governing restrictions on the use of land. He also led a lawsuit preventing the City of Boston from imposing a special tax on the owners of downtown office buildings in order to fund fire department costs.

Phil is the author of *The Standard Forms Guide*, *The Real Estate Legal Desk Book* and *The Massachusetts Landlord Survival Guide,* all published by the Greater Boston Real Estate Board.

A native of Rhode Island, Phil attended Cornell University and Boston University School of Law, where he served as Editor of the *Boston University Law Review*. In 2008, REBA awarded Phil its highest honor, the Richard B. Johnson Award, for lifetime achievement.

RECENT DEVELOPMENTS IN MASSACHUSETTS CASE LAW

March -- September, 2022

Philip S. Lapatin
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Note: "LC" citations refer to Land Court opinions which can be obtained from Massachusetts Lawyers Weekly ("MLW") by using the designated identification number. Please do not request these cases from the Land Court clerks. Where "SD" is included as part of a Land Court citation, only a Summary Decision was issued pursuant to Rule 14 without any detailed legal analysis. MLW reference codes have been included as well in the case of federal decisions which have not yet appeared in the permanent digest. "UP" citations refer to unpublished Appeals Court opinions also available through MLW; these cases are not binding precedent and can be cited only for whatever persuasive value they may have.

ADVERSE POSSESSION

Driggers v. Rizkallah, Mass. App. Ct. UP: Neither adverse possession nor prescriptive easement established where use of portion of neighbor's property was neither continuous nor notorious

Geiger v. Needham Miller, LLC, Mass. App. Ct. UP: Summary judgment inappropriate where lawn maintenance may be sufficient to support adverse possession claim unless owner also cared for disputed area

Jonak v. Brady, LC 46: Expansion of driveway sufficient to establish adverse possession while prescriptive easement has been acquired to maintain flagpole and birdfeeder, but blowing of leaves and other yard waste onto larger wooded area does not support adverse possession claim

King v. Claire Adams, LLC, Mass. App. Ct. UP: Occasional use of parking area by customers of ice cream shop insufficient to prescriptively extinguish exclusive nature of easement in favor of grocer

Lord v. Orange, LC 37: Although county road discontinued by implication following establishment of superior, parallel road, claimant subsequently acquired prescriptive easement to travel across and install utility poles along portion of discontinued road

Morose v. Fitch, LC 67: Adverse possession established with respect to area which was enclosed by fence and used as extension of claimant's back yard but not with respect to additional areas where claimant planted roses and bushes not clearly demarcated from adjoining wild growth and trimmed trees and brush with permission of owner; additionally, claimant has prescriptive easement to share use of lawn area adjoining garage but not to travel over pathway whose location cannot be verified

Ramos v. Meade, LC 51: Registry properly rejected document asserting adverse possession of registered land

Reposa v. Ferreira, LC 44: Use of disputed area as part of yard, including cultivation, lawn maintenance and construction of carport and other improvements, sufficient to establish adverse possession; claimant's alleged promise to remove encroachments unenforceable absent proof of fraudulent intent or reliance by record owner

Silverio v. North Andover, LC 24: Summary judgment inappropriate where court must determine whether adverse possession was established prior to enactment of statutory amendment barring claims with respect to property held by town or school committee for public purpose

Thornton v. Driscoll, LC 71: While mortgage does not include portion of residential property already lost through adverse possession, remainder of parcel was validly encumbered by mortgage subject to right of neighbor to subsequently adversely acquire additional portion of land subject to mortgage

Vasquez v. Cambridge Housing Authority, LC 62: Where land comprising portion of site leased by Authority to private developer for affordable housing project is held for public purpose and thus exempt from adverse possession pursuant to G.L. c. 260, §31, encroaching shed, planter bed and fence must be removed

BROKERAGE

Huang v. RE/MAX Leading Edge, 101 Mass. App. Ct. 150: Broker may proceed with damage claim resulting from client's breach of oral agreement granting broker exclusive right for one year to find home in exchange for broker's reasonable efforts but client was entitled to terminate oral agreement granting broker exclusive right to sell current home where agreement had no specified duration and imposed no obligations on broker

CONDOMINIUMS

Catule v. Barreau, LC 73: Pursuant to provisions of master deed, unit owners have exclusive right to use certain outdoor areas but must share driveway

Connolly v. Moore, Mass. App. Ct. UP: Where ordinary function of preliminary injunction is to maintain status quo until trial, judge erred by requiring condominium association to obtain municipal approval of exterior gate installed by unit owner

Liu v. Mystery, LLC, LC 31: Subject to Statute of Limitations, condominium unit owner entitled to pursue unjust enrichment claim based on payment of real estate taxes allocable to area which was physically added to adjoining unit by improperly placed demising wall

Stahl v. 12-14 Marcella Street Condominium Trust, LC 50: Condominium trustees obligated to ensure that location of unit owners' parking space conforms to recorded site plan

EASEMENTS

Alexander v. Kluever, LC 45: De minimis 4.8-inch encroachment of fence outside prescribed building area does not constitute actionable violation of easement designed to preserve view of pond

Cardoso v. AY Enterprises, LLC, LC 23: Easement generally allowing travel across lot may be utilized without regard to ultimate destination of easement holder

Genova v. Cornell, Mass. App. Ct. UP: Blocking path of easement with trailer, boat and canoe constitutes trespass

Keaveney v. Ayers, LC 30: Preliminary injunction appropriate to bar interference with easement allowing subdivision lot owners to make use of dock and pathway

Lindenbaum v. Perez, Mass. App. Ct. UP: Easement allows only pedestrian travel and may not be overloaded so as to service additional property acquired by holder

Moriarty v. Resor, LC 35: In accordance with intent of parties, conveyance of lot included implied easement to use roadway so as to facilitate future construction of house

Spatz v. Preece, LC 60: Defendants may be held in contempt for clear and undoubted disobedience of preliminary injunction prohibiting interference with right of way

LAND USE

Armstrong v. Secretary of Energy and Environmental Affairs, 490 Mass. 243: Department of Environmental Protection improperly delegated to Secretary its authority under G.L. c. 91 to approve construction on filled tidelands

Strayton v. Martha's Vineyard Commission, Mass. App. Ct. UP: Absent evidence of alleged harm potentially resulting from emissions or obstruction of view, plaintiffs lack standing to challenge Commission's approval of telecommunications tower

LEASES

APT Management Inc. v. Newcomb, Mass. App. Ct. UP: Notice to quit based on tenant's failure to keep apartment in good, sanitary condition was not vitiated by subsequent notice seeking removal of tenant for illegal activity pursuant to G.L. c. 139, §19

Cimini v. Nicola, Mass. App. Ct. UP: Landlord violated covenant of quiet enjoyment and impinged on tenant's right to privacy by posting oversized copy of termination notice on front door of rented house

EMG Realty, LLC v. Read, Mass. App. Ct. UP: Provisions of G.L. c. 239, §8A regulating counterclaims in eviction action do not apply after case transferred to civil docket

James v. Familia, Mass. App. Ct. UP: Where landlord seeks eviction based on nonpayment of rent, tenant entitled under G.L. c. 239, §8A to pursue counterclaims resulting in award of damages for breach of warranty of habitability, improper utility charges and violation of security deposit statute

Kahyaoglu v. Sillari, Mass. App. Ct. UP: Tenant lacks standing to challenge conveyance of apartment building by landlord who had allegedly promised to bequeath property to tenant in his will

Lawrence v. Lei, Mass. App. Ct. UP: Sale of dilapidated property by receiver was not unconstitutional taking

Linardon v. WoodSpring Suites Boston MA Saugus, LLC, 490 Mass. 1006: Judge properly lifted stay of execution following denial of tenant's appeal

LSE Corona Borealis LLC v. Fairgrounds Realty LLC, Mass. App. Ct. UP: Pursuant to provisions of lease, tenant not responsible for real estate tax increase unless allocable to construction and operation of its solar-powered electric generating facility

McNeff v. Cerretani, 489 Mass. 1024: Where deadline not prescribed by statute, judge may extend his own time limit for posting of eviction appeal bond

Rangel v. Mohamed, Mass. App. Ct. UP: Residential eviction not presumed retaliatory under G.L. c. 239, §2A where tenant's complaint to police alleging criminal assault by landlord's employee occurred more than six months prior to initiation of eviction

S&B Property Management v. Miranda, Mass. App. Ct. UP: Eviction barred under G.L. c. 239, §2A where landlord has failed to rebut presumption that tenancy was terminated on account of tenant's complaint regarding infestation but rent was improperly withheld under G.L. c. 239, §8A where landlord was not aware of problem before tenant failed to make payment

Shattuck v. Donovan, Mass. App. Ct. UP: Following early termination of agreement, housemate entitled to return of advance rental payment

Slater v. Traynor Management, Inc.,101 Mass. App. Ct.705: Landlord's failure to return security deposit within 30-day period prescribed by G.L. c. 186, §15B not excused by offer to let tenant retrieve check at management office, particularly where landlord knew that tenant had left state

Slavin v. Lewis, Mass. App. Ct. UP: Judge did not abuse discretion in refusing to grant injunction compelling surrender of house by owner's former girlfriend in lieu of summary process eviction proceeding

Stikeleather v. Lowe, Mass. App. Ct. UP: Tenant breached provisions of commercial lease by removing ceiling beams in order to facilitate use of forklifts

MORTGAGES

21st Mortgage Corporation v. DeMustchine, 100 Mass. App. Ct. 792: Notwithstanding bank's failure to include girlfriend as co-defendant in summary process action, borrower who failed to pay required use and occupancy charges may not pursue appeal of post-foreclosure eviction order

Catarius v. Carton, Mass. App. Ct. UP: Absent knowledge that son was executor of deceased borrower's estate, mortgage servicer not liable for entering into loan modification agreement with daughter

Glaser v. MTGLQ Investors, L.P., Mass. App. Ct. UP: Borrower may proceed with claim that mortgage of property which he owned jointly with wife was invalid where signed only by wife as his attorney in fact

HSBC Bank USA, N.A. v. Morris, 490 Mass. 322: Mortgage assignee seeking eviction following foreclosure is subject to counterclaim whereby borrower attempts to reduce or extinguish liability for repayment based on alleged violation of Predatory Home Loan Practices Act (G.L. c. 183C, §15(b)(2))

Shea v. Bank of New York Mellon, Mass. App. Ct. UP: Loan not subject to provisions of G.L. c. 244, §35B requiring lender to take reasonable steps and make good faith efforts to avoid foreclosure of certain residential mortgages

TJR Services, LLC v. Hutchinson, LC 19: Summary judgment inappropriate where court must determine whether party conducting foreclosure sale was successor trustee of mortgage holder

U.S. Bank National Association v. Arsenault, Mass. App. Ct. UP: Housing Court may simultaneously consider challenge to validity of foreclosure and complaint seeking eviction of borrower

U.S. Bank National Association v. Menard, Mass. App. Ct. UP: Mortgage may not be reformed to add holder of life estate who was unaware of loan and received no benefit from proceeds

U.S. Bank National Association v. Mistovich, Mass. App. Ct. UP: Bank entitled to recover appeal bond following borrower's unsuccessful challenge of post-foreclosure eviction order

PURCHASE CONTRACTS

El Nar v. Salis, Mass. App. Ct. UP: Complaint improperly dismissed where court must determine whether accepted offer constituted binding contract for purchase and sale of condominium unit

Fariello v. Zhao, 101 Mass. App. Ct. 566: Lis pendens properly dissolved where buyer, following acceptance of offer, failed to submit a form of purchase contract he was prepared to sign and did not object to certain provisions of seller's draft until after deadline for execution

Menayrji v. Aniello, LC 78: Where recorded trust requires all trustees to approve any action but also provides that documents executed by single trustee are conclusive evidence of trustee's authority, buyers may enforce purchase contract only if they lacked actual knowledge that one trustee objected to sale

New England Preservation and Development, LLC v. Fairhaven, Mass. App. Ct. UP: Judge improperly dissolved lis pendens where buyer's allegation that seller improperly terminated purchase contract is not frivolous

O'Brien v. DC Properties, LLC, LC 25: Seller bound to proceed with sale of commercial property pursuant to provisions of accepted offer, including giving buyer an opportunity to complete its due diligence investigation and terminate contract if tenant fails to vacate rear portion of building

RCS Learning Center, Inc. v. Pratt, LC 33: Purchase contract deemed to have been abandoned where neither party tendered performance or alleged a breach after buyer was unable to fund acquisition of property

Ritter v. Johnson, _ F.Supp. 3d _ (MLW 02-205-22): Seller must comply with provisions of accepted offer purporting to be binding contract where all material terms related to proposed house purchase were agreed upon

Stonegate Group Management, LLC v. Tucard, LLC, Mass. App. Ct. UP: Although lis pendens erroneously allowed where commercial tenants not named as defendants, plaintiff may proceed with claim that seller wrongfully refused to sign purchase contract and convey property after completion of negotiations

SUBDIVISIONS

Colchester Properties, LLC v. Methuen Community Development Board, LC 77: Board improperly withheld approval of proposed subdivision and refused to waive subdivision rules based on incorrect determination that project would violate provisions of local zoning code

Jackson Woods Investments, LLC v. Holden Planning Board, Mass. App. Ct. UP: Having failed to challenge condition of subdivision approval requiring funding of third party inspector to oversee installation of infrastructure, developer may not subsequently seek to modify plan by reducing inspection costs

Tessier v. Frattaroli, LC 40: G.L. c. 40A, §16 bars issuance of building permit within two years after prior permit was annulled absent finding of specific and material changes in conditions; subdivision exemption requires finding that lots have frontage on private way adequate to accommodate traffic

TAXES AND TAX TAKINGS

Bourne v. Coffey, 101 Mass. App. Ct. 496: Petition to vacate tax taking foreclosure properly denied where, despite alleged illness and financial difficulties, taxpayer could have participated in proceedings but chose not to do so

Oxford v. Smith, Mass. App. Ct. UP: Owner who had actual notice of town's petition to foreclose right of redemption following tax taking was properly defaulted after failing to appear at hearing

TITLE

Amaral v. Gloucester, Mass. App. Ct. UP: Pursuant to Article 97 of Amendments to state constitution protecting land taken or acquired for conservation purposes, legislature properly authorized use of existing softball field for construction of new school

Balicki v. Ziegler, LC 53: Boundary line between adjoining lots determined by reference to existing stone monument

Battle v. Howard, 489 Mass. 480: Neither interim court order authorizing partition nor acceptance of purchase offer terminated joint tenancy so as to vitiate right of survivorship following death of co-owner

Commonwealth v. Comley, LC 59: Having failed to establish superior title, defendants enjoined from trespassing upon wildlife management area and blocking passage along roadway

DeVico v. Sullivan, Mass. App. Ct. UP: Brothers may proceed with claim that sister who had promised to hold parents' property in trust for benefit of children improperly named herself as sole beneficiary

DiCienzo v. Pizziferri, LC 20: Property invalidly conveyed by trustee who was subject to guardianship

Emami-Tabrizi v. Emami, LC 72: Where grantor acquired condominium unit in his own name as residence for his brother, subsequent, unrecorded deeds conveying title to brother and his wife were ineffective to transfer title where parties intended only to show condominium association that brother and wife were lawfully residing in unit

Gobbi v. Dedham, LC 26: Claims against town related to drainage system barred where notice not properly given under Tort Claims Act (G.L. c. 258)

Great River Hydro, LLC v. Mayhew Steel Products, Inc., LC 29: Owner of hydroelectric-generation facility validly agreed to provide free electricity forever in exchange for water rights

Gulino v. Michaud, LC 70: Partition action may be pursued by holder of undivided share in property distributed after termination of trust

Hanlon v. Flores Brothers Realty, LLC, LC 55: Deed may not be reformed to eliminate portion of lot which seller did not intend to convey where buyer has granted mortgage to lender unaware of discrepancy

Johnson v. Christ Apostle Church, Mt. Bethel, LC 49: Construction of fence on defendants property but in close proximity to property line and plaintiff's home does not constitute nuisance where height does not exceed six-foot threshold established by G.L. c. 49, §21 and plaintiff remains entitled to access defendant's property pursuant to G.L. c. 266, §120B in order to facilitate repair and maintenance of plaintiff's home

Long v. Commonwealth, LC 43: 1870 deed was intended by parties to exclude strip subsequently acquired by railroad

In re Luu, 71 Bankr. Ct. Dec. 722: Homestead declaration invalid where not signed or acknowledged under penalty of perjury

Morth v. Morth, Mass. App. Ct. UP: Interim order appointing commissioner to investigate proposed partition is not appealable

OverCreek LLC v. LeClaire, Mass. App. Ct. UP: Based on contemporaneous discussions between the parties, deed construed to prevent all structures on encumbered lot

Slesar v. Goldman, Mass. App. Ct. UP: Replacement cost damages properly assessed for wrongful cutting of trees

Smith v. Silva, Mass. App. Ct. UP: Owner not prohibited from cutting tree limbs and roots within portion of his land where neighbor has access easement to facilitate maintenance and upkeep of her own trees

Sor v. Lim, LC 22: Deed requiring grantee to pay purchase price within 24 months did not create fee simple determinable so as to entitle grantor to recover property if payments not made

Sousa v. Brownell, LC 74: Pursuant to provisions of 1843 deed, boundary between adjoining properties is Swansea-Somerset town line

ZONING

Exemptions

Hume Lake Christian Camps, Inc. v. Monterey Planning Board, LC 28: Religious exemption under G.L. c. 40A, §3 protects use of area for parking of recreational motor vehicles by persons attending religious camp but not for housing volunteer workers or seasonal staff

Macdonald v. Mashpee Zoning Board of Appeals, LC 54: Provisions of G.L. c. 40A, §6 allowing construction of house on undersized lot does not apply where owner also hold title to adjoining trailer park

Tracer Lane II Realty, LLC v. Waltham, 489 Mass. 775: Where unreasonable regulation of solar energy facilities is prohibited by G.L. c. 40A, §3, city may not bar access road servicing such a facility from residential zoning districts

Williams v. Norwell Board of Appeals, 490 Mass.684: Where, prior to adoption of local code amendment rendering lot unbuildable, lot had more than 50 feet of frontage, defined by code to include frontage on private way, house may be constructed on lot pursuant to G.L. c. 40A, §6

Nonconforming Uses

Berger v. Briarstone Partners, L.L.P., LC 65: Where concerns regarding view not recognized by local zoning code and alleged harms related to groundwater contamination and increased density are unfounded, abutter lacks standing to challenge appeals board decision allowing enlargement of nonconforming house after fire damage

Bignami v. Brookline Zoning Board of Appeals, LC 18: Provisions of G.L. c. 40A, §7 conferring lawful nonconforming use status on illegal alterations in place and unchallenged for ten years applies to alteration of lot line rendering existing house unlawful on account of insufficient frontage

Doyle v. Charlton Zoning Board of Appeals, Mass. App. Ct. UP: Blasting activities constitute permissible extension of lawful nonconforming use of property for mining

Granby Bow & Gun Club, Inc. v. Granby, LC 32: Clearing of land to facilitate additional long-range target shooting did not impermissibly expand nonconforming use of archery, pistol and rifle club

Kende v. Edgartown Zoning Board of Appeals, LC 57: Where concerns regarding noise, traffic, congestion, privacy and view unsubstantiated or not recognized by local zoning code, abutters lack standing to challenge permit allowing addition of apartment and swimming pool to nonconforming house on undersized lot so as to allow occupancy by owner's daughter and her family

Maldonado v. Lynn Zoning Board of Appeals, LC 34: When nonconforming lot size and frontage not modified and both current and proposed uses are allowed under local zoning code, single-family house may be converted to two-family house

Mandell v. Wellfleet Zoning Board of Appeals, LC 39: Local zoning code construed to allow granting of special permit for reconstruction and enlargement of nonconforming cottage following destruction by fire

Noll v. Abington Zoning Board of Appeals, LC 76: Board may not allow use of nonconforming two-family dwelling to be changed pursuant to G.L. c. 40A, §6 by adding another unit where only single-family dwellings are allowed in district

Special Permits and Variances

Agami v. Boston, LC 21: Summary judgment inappropriate where court must decide whether abutters unreasonably delayed in challenging project because they were not notified of hearings which resulted in granting of variance under Boston zoning code

Bask, Inc. v. Taunton Municipal Council, 490 Mass. 312: Although judge had no jurisdiction to enjoin consideration of competing applications, he properly ruled that special permit for retail marijuana dispensary was improperly denied where concerns regarding traffic were unsupported, unreasonable and pretextural

Benevolent Botanicals LLC v. Malden, LC 68: Proposed lessee has standing to contest denial of variance to operate retail marijuana store within prohibited residential buffer area but location of property within such area does not constitute topographical hardship; lessee may proceed with claim that provisions of local zoning code are unreasonably impractical in violation of state statute (G.L. c. 94G) regulating marijuana sales

BoylstonD3 LLC v. Brookline Zoning Board of Appeals, LC 69: Pursuant to G.L. c. 231, §6F, party who, with representation of counsel, falsely claimed ownership interest in abutting parcel in order to challenge special permit for construction of townhouse community required to reimburse legal fees and other costs incurred by developer

Buckingham v. Wareham Planning Board, LC 17: Prescriptive easement insufficient to confer standing on plaintiff seeking to challenge special permit allowing construction of solar energy facility and pursue speculative claim that project will violate local earth removal by-law

Decklebaum v. Provincetown Zoning Board of Appeals, LC 75: Variance properly granted for reconstruction of nonconforming deck destroyed by plaintiff-abutter's contractor where disabled patrons would otherwise be unable to access restaurant

Empire Acquisition Group, LLC v. Seekonk Zoning Board of Appeals, LC 42: Board lacks authority to grant variance allowing construction of driveway on unbuilt, heavily-wooded private way

Epstein v. Falmouth Zoning Board of Appeals, Mass. App. Ct. UP: Speculative concerns regarding density and view insufficient to confer standing on abutter seeking to challenge special permit authorizing construction of condominium

Epstein v. Marblehead Planning Board, Mass. App. Ct. UP: Special permit allowing proposed redevelopment of oceanfront property properly granted under provisions of local zoning code

Galbi v. Cellco Partnership, 101 Mass. App. Ct. 260: Judge properly refused to allow additional abutter to intervene in action challenging issuance of variance long after expiration of appeal period

Grissom Park Co., LLP v. Pembroke Planning Board, LC 47: Special permit and site plan approval properly granted pursuant to local zoning code for storage of dumpsters on commercial property

Guinee v. Lawrence Zoning Board of Appeals, LC 38: Congestion concern confers standing on abutter seeking to challenge variance, which was unlawfully granted absent showing of hardship which would result from not being allowed to subdivide parcel and construct additional residences

Johenning v. Milton Planning Board, LC 61: Res judicata bars challenge to renewal of special permit which was previously subject of unsuccessful appeal by plaintiffs

Markham v. Pittsfield Cellular Telephone Company, 101 Mass. App. Ct. 82: Abutter who allegedly failed to receive notice of special permit hearing may not appeal decision following expiration of 90-day period prescribed by G.L. c.40A, §17 for asserting procedural defects

Nova Farms, LLC v. Attleboro Zoning Board of Appeals, LC 27: Special permit for retail sale of marijuana properly denied under local zoning code on account of concerns regarding undue traffic congestion

Rodrigues v. Brockton Zoning Board, LC 48: Summary judgment inappropriate where grantee of variance allowing operation of seafood distribution business in residential neighborhood must rebut presumption (which need not be verified by expert testimony in the first instance) that traffic concerns sufficient to confer standing on abutter-to-abutter wishing to challenge decision

Scott v. Lakeville Planning Board, LC 56: Concerns regarding noise confer standing on abutters seeking to challenge special permit and site plan approval, which were improperly granted pursuant to local zoning code amendment which authorized warehouse within Development Opportunities Overlay District not demarcated on official map

Spencer Solar Farm, LLC v. Spencer Zoning Board of Appeals, LC 36: Special permit allowing use of property as solar energy facility did not lapse pursuant to local zoning code where, within two years of issuance, developer took action to fulfill condition imposed by decision, namely application for site plan approval, which did lapse when developer took no action to fulfill conditions of decision within two years thereafter; Land Court lacks jurisdiction to entertain claim related to municipal by-law requiring stormwater permit

Strayton v. Martha's Vineyard Commission, Mass. App. Ct. UP: Unsubstantiated concerns regarding health and visual impact insufficient to confer standing on plaintiffs seeking to challenge special permit authorizing proposed telecommunications tower

Wang v. Lexington Planning Board, Mass. App. Ct. UP: Summary judgment inappropriate where special permit allowing construction of residential development may have violated Board's regulations by not providing for easement allowing access from new roadway to abutting property

Miscellaneous

Andrews v. Halifax Zoning Board of Appeals, LC 66: Multifamily development complex improperly approved where each building not located on individual legal lot as required by local zoning code

Bartlett v. Nantucket, LC 63: Local zoning code provision allowing hot tubs impliedly imposes limit of 1,000 gallons of water where larger capacity would meet definition of prohibited swimming pool

Bellingham Massachusetts Self Storage, LLC v. Bellingham, Mass. App. Ct. UP: Zoning code amendment invalid where not initiated by town officials or other persons enumerated in G.L. c. 40A, §5

Cogliano v. Norton Planning Board, Mass. App. Ct. UP: Local zoning code amendment facilitating solar energy installation on cranberry bogs properly adopted where (1) error in notice identifying hearing date but describing hearing as occurring on a Wednesday rather than a Tuesday was not misleading for purposes of G.L. c. 40A, §5 and (2) pursuant to local bylaws, notice was properly published in newspaper without being mailed to specific property owners given that amendment applied to any parcel within town where bog already existed or might be created in the future

Dery v. Boxford Zoning Board of Appeals, LC 52: Construction of model locomotives in separate building on house lot as hobby constitutes permitted accessory use under local zoning code

Gabriel v. West Boylston Zoning Board of Appeals, LC 41: Large garage for storage of commercial vehicles does not constitute permissible accessory residential use under local zoning code

Gallagher v. Nahant Zoning Board of Appeals, Mass. App. Ct. UP: Abutter who did not timely appeal building inspector's decision generally determining that landscaping component of new house conformed to local zoning code may nevertheless challenge substantial additional work not shown on site plan accompanying original building permit application

Immanuel Corp. v. Uxbridge Zoning Board of Appeals, Mass. App. Ct. UP: Local zoning code bars importation of soil by gravel quarry operator

Milton Zoning Board of Appeals v. HD/MW Randolph Avenue, LLC, 490 Mass. 257: Committee properly modified comprehensive permit by eliminating conditions imposed by local appeals board which rendered affordable housing project significantly more uneconomic than originally proposed

Northborough v. Anza, Mass. App. Ct. UP: Farmer properly held in contempt for disobedience of court order enforcing local zoning code by barring storage of food waste products in excess of amount needed to feed livestock

Pepperell Board of Selectmen v. Pepperell Zoning Board of Appeals, LC 58: Filling of pit with unwanted soils reclaimed from other sites constitutes commercial dumping ground barred by local zoning code provision enforcement of which is not barred by state law regulating soil reclamation projects

Pinecroft Development, Inc. v. West Boylston Zoning Board of Appeals, 101 Mass. App. Ct. 122: Board unreasonably construed local zoning code to prohibit construction of apartment building on lot straddling two districts where portion of lot located in more restricted district would be used only to satisfy open space requirements

Sweeney v. Pace, LC 64: Approval of proposed hotel pursuant to Article 80 of Boston zoning code may not be challenged by abutter, who must await issuance of building permit or decision by board of appeal

Winchester House Condominium Trust v. Brookline Zoning Board of Appeals, Mass. App. Ct. UP: Concerns regarding shadows, noise and tree removal insufficient to confer standing on abutters seeking to invalidate comprehensive permit

THE REAL ESTATE BAR ASSOCIATION
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Annual Meeting & Conference

Report of the REBA Standards & Forms Committee

PRESENTED BY:

Jutta R. Deeney & Carrie B. Rainen

Co-chairs, Standards & Forms Committee

PROPOSED AMENDMENTS

REBA Title Standard No. 40
Transfers by Devisees Under a Will Containing a Power of Sale

REBA Title Standard No. 76
Internet-Based Title Information Sources

PROPOSED NEW

REBA Practice Standard No. 31
Internet-Based Title Information Sources

ORIGINAL

REBA Title Standard No. 40

Transfers by Devisees

A title dependent on a deed from a devisee under a will giving the executor a power of sale is not rendered defective by the failure of the executor to join in such deed if:

(1) a final account has been allowed showing payment of all debts, legacies, expenses of administration and Massachusetts death taxes;

or

(2) claims for debts, legacies, expenses of administration, and Massachusetts death taxes are barred by lapse of time or otherwise.

Comment

The above standard has no application to the situation in which an executor is required to exercise a power of sale pursuant to special provisions in the will.

Adopted November 26, 1979

REBA Title Standard No. 40

Transfers by Devisees Under a Will Containing a Power of Sale

Title dependent on a deed from the devisees under a duly allowed or admitted will giving the personal representative a discretionary, as opposed to a mandatory, power of sale is not ~~rendered~~ defective by reason of the failure of the personal representative to join in said deed if:

(1) The testator died on or before March 30, 2012, and:

(a) the probate case includes an allowed final account showing payment of all debts, legacies and expenses of administration;

or

(b) a period of six years has passed from the date of approval of the bond and no outstanding claims appear in the estate;

or

(2) The testator died on or after March 31, 2012, and:

(a) the probate case includes a Decree and Order of Complete Settlement;

or

(b) the estate was opened formally and more than one year has passed since the filing of a Closing Statement (MPC 850) by the personal representative showing payment of all debts, legacies and expenses of administration;

or

(c) the estate was opened informally, more than one year has passed since the filing of a Closing Statement (MPC 850) by the personal representative showing payment of all debts, legacies and expenses of administration, and three years has passed since the date of death without the filing and allowance of a superseding formal probate;

or

(d) a period of six years has passed from the date of approval of the bond and no outstanding claims appear in the estate.

or

(3) The decedent's will is admitted to probate in a late and limited proceeding, pursuant to M.G.L. c. 190B § 3-108(4).

Comments

1. The MPC form titles and numbers recited are current as of the date of adoption of the first amendment to this title standard and should be construed as referring to such forms as they may be amended or replaced in the future.

2. With respect to the limited powers of a personal representative in a late and limited proceeding, pursuant to M.G.L. c. 190B, § 3-108, "…the personal representative shall have no right to possess estate assets as provided in section 3–709 beyond that necessary to confirm title thereto in the successors to the estate and claims other than expenses of administration shall not be presented against the estate…." See In Re Estate of Kendall, 486 Mass. 522 (2020).

3. When taking title from the heirs of an intestate estate, refer to Title Standard 41 for lists of heirs which may be relied on as accurate and complete.

Caveat

4. Probate estates may be subject to Massachusetts and federal estate tax liens. See Title Standards 3, 24 and 61.

Adopted November 26, 1979

Amended , to update the standard to account for the passage of M.G.L. c. 190B.

PROPOSED REVISED

REBA Title Standard No. 40

Transfers by Devisees Under a Will Containing a Power of Sale

Title dependent on a deed from the devisees under a duly allowed or admitted will giving the personal representative a discretionary, as opposed to a mandatory power of sale, is not defective by reason of the failure of the personal representative to join in said deed if:

(1) The testator died on or before March 30, 2012, and:

(a) the probate case includes an allowed final account showing payment of all debts, legacies and expenses of administration;

or

(b) a period of six years has passed from the date of approval of the bond and no outstanding claims appear in the estate;

or

(2) The testator died on or after March 31, 2012, and:

(a) the probate case includes a Decree and Order of Complete Settlement;

or

(b) the estate was opened formally and more than one year has passed since the filing of a Closing Statement (MPC 850) by the personal representative showing payment of all debts, legacies and expenses of administration;

or

(c) the estate was opened informally, more than one year has passed since the filing of a Closing Statement (MPC 850) by the personal representative showing payment of all debts, legacies and expenses of administration, and three years has passed since the date of death without the filing and allowance of a superseding formal probate;

or

(d) a period of six years has passed from the date of approval of the bond and no outstanding claims appear in the estate.

or

(3) The decedent's will is admitted to probate in a late and limited proceeding, pursuant to M.G.L. c. 190B § 3-108(4).

Comments

1. The MPC form titles and numbers recited are current as of the date of adoption of the first amendment to this title standard and should be construed as referring to such forms as they may be amended or replaced in the future.

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3. When taking title from the heirs of an intestate estate, refer to Title Standard 41 for lists of heirs which may be relied on as accurate and complete.

Caveat

4. Probate estates may be subject to Massachusetts and federal estate tax liens. See Title Standards 3, 24 and 61.

Adopted November 26, 1979

Amended _____, to update the standard to account for the passage of M.G.L. c. 190B.

ORIGINAL

REBA Title Standard No. 76

Internet-Based Title Information Sources

A title is not defective by reason of change of name, merger or other succession of an entity, where proof of such succession is in the form of information provided by an electronic data source operated by one of the following agencies:

1. The Federal Reserve;
2. The Federal Deposit Insurance Corporation;
3. The National Credit Union Administration;
4. The Office of the Comptroller of the Currency;
5. The Office of Thrift Supervision;
6. The Secretary of the Commonwealth of Massachusetts; or
7. The Secretary of State of any other state,

and the proof of such succession is recorded as a certification by a member in good standing of the bar of Massachusetts in the form of an affidavit to which is attached unedited printouts of the pertinent pages of the website of such agency, containing the link address of each web page, and which certifies that the printed web pages are the actual printouts and that they show the chain of pages necessary to establish such succession. The affidavit shall be certified in the form required by G.L. c. 183, §5(B).

A recorded certification in the form required shall be sufficient evidence of the succession of the entity for all purposes and shall not be limited in effect to a specific property referenced in the certification, unless the party relying thereon shall have actual knowledge to the contrary.

Comments

1. This standard recognizes that while a website address for the governmental organizational and supervisory body can change, it is the underlying source of the information that is critical to that information's reliability. The current websites for the above-mentioned agency data sources are, respectively:

a. http://www.ffiec.gov/nicpubweb/nicweb/SearchForm.aspx
b. http://www3.fdic.gov/idasp/main.asp
c. http://www.ncua.gov/indexdata.html
d. http://www.occ.treas.gov
e. http://www.ots.treas.gov/?p=InstitutionSearch
f. http://corp.sec.state.ma.us/corp/corpsearch/corpsearchinput.asp
g. official website for the Secretary of State for non-MA state of organization of the Entity

2. Also see provisions of the mortgage discharge statute as set forth in G.L. c.183, §55(i), particularly with regard to recitals in discharges, assignments, etc. as being sufficient evidence of entity succession.

3. As to registered land, see Land Court Guideline 56 which, as of the date of adoption of this standard, requires approval of the Chief Title Examiner prior to filing.

Adopted November 9, 2009

REBA Title Standard No. 76

Internet-Based Title Information Sources

A title is not defective by reason of change of name, merger, conversion or other succession of an entity, where proof of such succession is in the form of information provided by an electronic data source operated by one of the following agencies:

1. The Federal Reserve;
2. The Federal Deposit Insurance Corporation;
3. The National Credit Union Administration;
4. The Office of the Comptroller of the Currency;
5. The Secretary of the Commonwealth of Massachusetts; or
6. The Secretary of State of any other state.

Comments

1. This standard recognizes that while a website address for the governmental organizational and supervisory body can change, it is the underlying source of the information that is critical to that information's reliability. As of the date of this revision, the websites for the above-mentioned agency data sources are, respectively:

a. http://www.ffiec.gov/nicpubweb/nicweb/SearchForm.aspx
b. https://banks.data.fdic.gov/bankfind-suite/bankfind
c. http://www.ncua.gov/indexdata.html
d. http://www.occ.treas.gov
e. https://corp.sec.state.ma.us/corpweb/corpsearch/CorpSearch.aspx
f. official website for any other Secretary of State for an entity organized in another state.

2. Also see provisions of the mortgage discharge statute as set forth in G.L. c.183, §55(i), particularly with regard to recitals in discharges, assignments, etc. as being sufficient evidence of entity succession.

3. As to registered land, see Land Court Guideline 56 which requires an affidavit under G.L. c. 183, §5B by a member of good standing of the Massachusetts bar, supported by applicable current internet-based source print outs, and approval of the Chief Title Examiner prior to filing.

4. See also REBA Practice Standard No. 31 for documenting internet-based sources with the Registry of Deeds via affidavit.

Adopted November 9, 2009

Revised to reflect merger of the Office of Thrift Supervision with The Office of the Comptroller of the Currency, updated to reflect acceptability of reliance on government internet-based sources, revised Comment 3, and added Comment 4.

PROPOSED REVISED

REBA Title Standard No. 76

Internet-Based Title Information Sources

A title is not defective by reason of change of name, merger, conversion or other succession of an entity, where proof of such succession is in the form of information provided by an electronic data source operated by one of the following agencies:

1. The Federal Reserve;
2. The Federal Deposit Insurance Corporation;
3. The National Credit Union Administration;
4. The Office of the Comptroller of the Currency;
5. The Secretary of the Commonwealth of Massachusetts; or
6. The Secretary of State of any other state.

Comments

1. This standard recognizes that while a website address for the governmental organizational and supervisory body can change, it is the underlying source of the information that is critical to that information's reliability. As of the date of this revision, the websites for the above-mentioned agency data sources are, respectively:

a. http://www.ffiec.gov/nicpubweb/nicweb/SearchForm.aspx
b. https://banks.data.fdic.gov/bankfind-suite/bankfind
c. http://www.ncua.gov/indexdata.html
d. http://www.occ.treas.gov
e. https://corp.sec.state.ma.us/corpweb/corpsearch/CorpSearch.aspx
f. official website for any other Secretary of State for an entity organized in another state.

2. Also see provisions of the mortgage discharge statute as set forth in G.L. c.183, §55(i), particularly with regard to recitals in discharges, assignments, etc. as being sufficient evidence of entity succession.

3. As to registered land, see Land Court Guideline 56 which requires an affidavit under G.L. c. 183, §5B by a member of good standing of the Massachusetts bar, supported by applicable current internet-based source print outs, and approval of the Chief Title Examiner prior to filing.

4. See also REBA Practice Standard No. 31 for documenting internet-based sources with the Registry of Deeds via affidavit.

Adopted November 9, 2009

Revised _____ to reflect merger of the Office of Thrift Supervision with The Office of the Comptroller of the Currency, updated to reflect acceptability of reliance on government internet-based sources, revised Comment 3, and added Comment 4.

PROPOSED NEW

REBA Practice Standard No. 31

Internet-Based Title Information Sources

When relying on an internet-based information source to ascertain a merger, conversion, name change, or other succession of an entity, it is advisable to record the evidence of such succession with an affidavit certified in the form required by G.L. c. 183, §5B by a member in good standing of the Massachusetts bar to which is attached unedited printouts of the pertinent pages of the website of such agency, containing the link address of each web page, and stating that the printed web pages are the actual printouts and that they show the chain of pages necessary to establish such succession.

Comments

1. *See also Title Standard 76 for reliance on various internet-based government sources.*

2. *As to registered land, see Land Court Guideline 56 which requires an affidavit under G.L. c. 183, § 5B by a member in good standing of the Massachusetts bar, supported by applicable current internet-based source print outs, and requires approval of the Chief Title Examiner prior to filing.*

Adopted _____

THE REAL ESTATE BAR ASSOCIATION
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Report of the REBA Nominating Committee

PRESENTED BY:

Neil D. Golden
Chair, Nominating Committee

Proposed Slate of
2023 REBA Board of Directors

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2023 REBA Board of Directors Slate

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Construction Law	**Christopher C. Miller** Kenneth A. Sherman
Continuing Education	**Kimberly A. Bielan** Elizabeth J. Young

NOTE: Officers, At-large Directors and Board Co-chairs are in bold

2023 REBA Board of Directors Slate

(Continued)

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Estate Planning, Trusts & Estate Administration	**David S. Raymon** Theresa M. Santoro
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Land Use and Zoning	**Nicholas P. Shapiro** Kate Moran Carter Kathleen M. Heyer
Legislation	**Matthew W. Gaines** Douglas A. Troyer
Litigation	**Daniel P. Dain** Johanna W. Schneider
New Lawyers	**Robert K. Hopkins** Alexandria K. Castaldo Ryan D. Grondahl
Paralegal	Jacqueline A. Waters Adams Amanda J. Pinard
Registries	**Shannon N. Hyle** Tracie M. Kester
Residential Conveyancing	**Noel M. Di Carlo** Dominic H. Poncia III Katherine Prifti
Residential Landlord/Tenant	**Ted S. Papadopoulos** Michael J. Louis
Title Insurance & National Affairs	**Lisa J. Delaney** Tucker Dulong
Women's Networking Group	**Michelle T. Simons** Julie T. Moran
Directors At-large	**Conrad J. Bletzer Jr.** **Kate Moran Carter** **Paula D. Devereaux** **Neil D. Golden** **Kathleen M. Heyer** **Jennifer L. Markowski** **Thomas O. Moriarty** **Francis J. Nolan**

NOTE: Officers, At-large Directors and Board Co-chairs are in bold

2022 REBA Annual Meeting & Conference

Richard B. Johnson Award Honoree

Peter Wittenborg

Peter Wittenborg has served as Executive Director of the Real Estate Bar Association since 2003 and is the founder of its successful dispute resolution affiliate, REBA Dispute Resolution. Prior to joining the REBA staff, Peter was Eastern Massachusetts branch manager for CATIC. Currently, he serves as vice-chair on the Oversight Committee of Lawyers Concerned for Lawyers (LCL). Peter is also a member of MCLE's Real Estate Environmental Law Curriculum Advisory Committee, and in 2015, he was honored with MCLE's Scholar/Mentor Award.

During his years in the practice of law, Peter was a partner in the Boston law firm of Kaye, Fialkow, Richmond & Rothstein, and later a partner in the Boston office of Stroock & Stroock & Lavan LLP, headquartered in New York City. Prior to private practice, he was law clerk to The Hon. William I. Randall, Chief Justice of the Land Court.

In the non-legal world, Peter has been a member of the Union Club of Boston for over 30 years, serving as the Club's president for a two-year term in 2001-2002. For ten years, he served on the Board of the Millennium Place North High-Rise Residential Association (Ritz-Carlton), five of which as the group's treasurer, followed by five years as president. Concurrently, he was on the Board of the Millennium Place Primary Association. Peter is a longtime parishioner of Trinity Church in Copley Square, where he has just completed a three-year term as a member of the parish's annual giving committee.

In the 1990's, Peter was active in the lay leadership of the Episcopal Diocese of Massachusetts, as chair of the Diocesan Clergy Compensation Committee, and as a member of the group's Stewardship Commission. He is also author of a history of the Framingham District Court.

A graduate of St. Mark's School in Southborough, Peter has a J.D. from Vanderbilt University School of Law and a B.A. from Lawrence University.

About the REBA Richard B. Johnson Award

The REBA Richard B. Johnson Award is the Association's highest honor. An award for lifetime achievement, it recognizes the recipient's outstanding and selfless contributions to advancing the practice of real estate law. The award was created to honor Richard B. Johnson, who became a highly-regarded, even revered, figure in the legal community following distinguished and heroic service in World War II. Award recipients have included members of the judiciary, former officers of the Association, members of the Land Court's legal staff and eminent real estate lawyers.

2022 REBA ANNUAL MEETING & CONFERENCE

Luncheon Keynote Address

presented by

HON. KIMBERLY S. BUDD

Chief Justice of the Supreme Judicial Court

On December 1, 2020, the Hon. Kimberly S. Budd was appointed the 38th Chief Justice of the Supreme Judicial Court by Governor Charles D. Baker.

Beginning a long and distinguished record of public service, Judge Budd began her legal career as a law clerk to Appeals Court Chief Justice Joseph P. Warner in 1991. She was a litigation associate at Mintz Levin, before serving as an Assistant United States Attorney in the United States Attorney's Office for the District of Massachusetts. She then worked in the General Counsel's Office of Harvard University, and later was Director of the Community Values program at Harvard Business School.

In July 2009, Budd was nominated as an associate justice of the Superior Court by Governor Deval Patrick, where she served until her 2020 appointment as Chief Justice of the SJC.

Judge Budd teaches in MCLE and Bar Association programs. She is a former adjunct instructor at New England Law and has taught trial advocacy at Harvard Law School. She earned a J.D. from Harvard Law School in 1991, and a bachelor's degree in English from Georgetown University, graduating *magna cum laude* in 1988. She is married with two sons.

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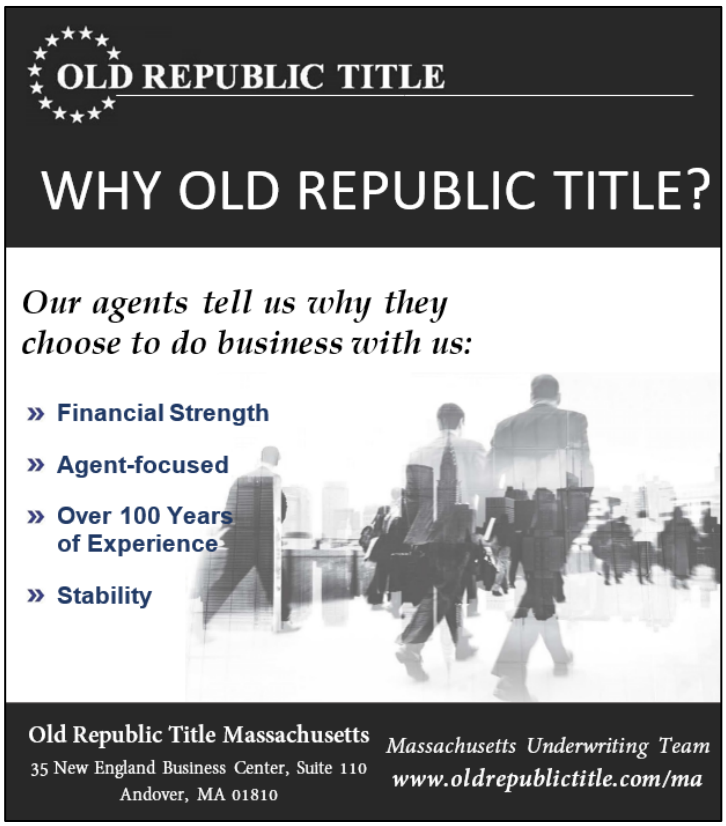

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An Abridged History of REBA and the Massachusetts Conveyancers Association

BEGINNINGS

When Neil Golden and Kendra Berardi asked me to pen a few paragraphs on the history of the Association, I immediately recognized a daunting task, as REBA has few records pre-dating the early 1970's. However, our more legacy-minded sibling association, the Abstract Club, published a pocket-sized written history prepared in 1908 by Charles S. Rackemann, updated in 1972 by William L. Payson and further updated in 1986 by Mark Titlebaum, with some collateral material about what was then simply known as the Conveyancers Association.

Most of the lawyers who founded the Abstract Club in 1886 were already members of the Association, which had been established 14 years earlier. The Club's mantra was "Deeds, Not Words." The first president was Alfred Hemingway (1887-1901). Other familiar names are Charles S. Rackemann (1909-1933) (evidently, there were no term limits!), Richard B. Johnson (1973-1977), Herbert W. Vaughn (1977-1980), Frederick S. Lane (1981-1984), and Norman Byrnes (1984-), all of whom led the MCA.

The Abstract Club's history certainly suggests that it was a drinking, eating – and singing – organization, as well as a group of learned professionals. Every meeting of the Club involved a meal – usually five courses with wine – at some of Boston's best-known hostelries. Young's Hotel was a favorite venue. The Club's history includes several references to "trenchermen" (referring to folks who are hearty eaters).

In the summer months, there were outings to Plymouth, Nahant, Dedham and the Brewster Islands. Occasionally, members of the group would advocate legislation on Beacon Hill. In those instances, recognizing that the club's name could perplex legislators, they adopted an alias, the "Real Estate Law Society."

Following more collateral research (thank you, Fran Nolan), we learned that in March of 1900, the Massachusetts Historical Society published the text of a presentation given by John T. Hassam at the Society's May 1898 meeting. Mr. Hassam's topic was the various recorders and registers of deeds for Suffolk County. In the course of his discussion, Mr. Hassam discussed the development of the Classified Descriptive Index by the "Conveyancers' Association," which he identifies as having been formed in 1872 and "includ[ing] nearly all the leading conveyancers of Boston." This pegs REBA's founding to 1872.

The history of the Abstract Club also references this Conveyancers Descriptive Index, which permitted the interchanging of abstracts of title among members. Each member would keep his own books and abstracts in his own office, but the library would have a common index, presumably by address, and files of reference. The Index was an early example of comity and collaboration among transactional lawyers, which, I believe, distinguishes REBA members today.

The only records in the Association's possession are handwritten income/expense ledgers from the 1920's through the 1970's. These books show that during this time, annual dinners were held at the Parker House. They were boozy evenings, with cocktails before, and brandy and cigars after, consisting almost entirely of men, with perhaps a handful of women on hand. The cost of the 1937 annual dinner at the Parker House for all members was $303.95, with tips for the waiters aggregating to no more than $15. In 1947, the cost of the Parker House annual dinner had increased to $646.88; and by 1956, it was $1376.48, including tax and tip. There is no written evidence of registration fees for the annual dinners, so we infer that dues revenue covered this cost. The Association also hosted a number of smaller dinners at the Boston City Club on Ashburton Place, although we cannot determine their nature or purpose.

During the first half of the 20th century, printing and postage were a major MCA expense, as all communications – fee invoicing, annual dinner invitations, etc. – were done by mail and required printing. "Multigraph" printing was a recurring expense in the 1930's. For any deceased member, the Association sent flowers, usually a "spray of chrysanthemums" for $10. Annual dues, which remained at $5 for decades, were increased to $10 in the early 1960's.

Another curiosity that endured into the 1970's was the publication and distribution to all members of a "Minimum Fee Schedule" for residential mortgage transactions based on a percentage of the loan. In 1938, the Association paid $27.25 for printing 1500 copies of the fee schedule. A few years later, the group ordered 2500 copies. Evidently, MCA members had fewer antitrust worries in those halcyon days.

THE MODERN ERA

The 1970's

The modern era of the Association begins in the 1970's with the 1973 formation of the Title Standards Committee and the establishment of the Richard B. Johnson Award. As an unincorporated association, there were no boards of directors or board meetings. However, there was an executive committee that met irregularly for luncheon meetings, most often at Locke-Ober's on Winter Place.

These two seminal 1970's events began a long evolution of the Massachusetts Conveyancers Association from a primarily social organization to a full-service, broad-based 21st century bar association, with a significant advocacy and educational mission. This evolution can be benchmarked by the format changes of the group's twice-yearly conferences. From the 1920's through the 1970's, the MCA met for dinner in the Rooftop Ballroom of the Parker House, by happy coincidence, the venue for today's gala Sesquicentennial Dinner. Meetings were later hosted at the Newton Marriott, with a brief, late afternoon educational programs.

The 1980's

In the 1980's and into the '90's, Thomas J. Donovan, of the Beacon Hill firm of Spencer & Stone, was the Association's longtime secretary/treasurer. His records system consisted of five-by-seven index cards, which he kept in several shoeboxes. On the front of the card was the member's name and address, handwritten; on the reverse side, also handwritten, was a record of annual dues payments. The Association's mail house used metal plates, similar to a GI's dog tags, to print address envelopes for the mailing of annual dues invoices. The MCA's handwritten expense ledger, going back to the 1920's and now lodged in the REBA archives, illustrates a wealth of often trivial information.

During the late 70's, Carolyn Partan, later to become the Association's first woman president in 1989, launched the Association's fledgling newspaper, *The Conveyancer*, which later became *REBA News*. That began a collegial relationship with several generations of the Sutherland family printing business, Blanchard Press, now known as Sutherland Printing, that continues to this day – an engagement of nearly 50 years.

In 1986, (the Bob Hoffman era), the Association hired its first administrator, part-time, and rented a small one-room office at 44 School Street. With just a desk, a phone and a filing cabinet, Susan Goldstein assumed the tasks of the secretary/treasurer. In succeeding years, the Association had quarters in the Old South Building at 294 Washington Street, 111 Devonshire Street, 50 Congress Street, and finally, 295 Devonshire Street.

Susan Goldstein was succeeded by Sharin Paaso, the Association's first full-time administrator. Sharin's passion for event planning brought the twice-yearly conferences to a new level of professionalism. Her Halloween costumes at the annual meetings were legendary. She also schooled the MCA leadership on the value of the Handbook of Standards and Forms. Rather than strewn willy-nilly across the Commonwealth with no thought of ownership, these assets were to be nurtured, protected and copyrighted, as they held significant monetary value.

Member communication was slow and primitive in this pre-internet time. Most member communications were by mail. For important time-sensitive messaging, particularly during the fray of UPL litigation, the Association employed a "broadcast fax," a costly and time-consuming effort.

Also in the Bob Hoffman era, recognizing the need for stronger advocacy on Beacon Hill, the MCA engaged Edward J. Smith as legislative counsel. For more than 36 years, Ed has quietly and ably represented the interests of the real estate and conveyancing bar in the legislature. His deep, intuitive and abiding understanding of the culture of Beacon Hill brought 57 Association-sponsored bills to fruition. Nine of these 57 bills were lengthy omnibus acts in the drafting of which REBA had substantial involvement: homestead technical changes (2022); conduct of notaries and title curative provisions (2016); homestead reform (2010); mortgage discharge practice (2006), lis pendens reform (2002); expansion of the Land Court's jurisdiction (2002); Article 9 amendments (2001); amendments to condominium statute (1998) and mechanics lien reform (1996). These are the often-overlooked accomplishments of the Association.

Another innovation of the Bob Hoffman era was amending the by-laws by reducing a president's term from two years to one, affording more members the opportunity to lead the Association.

During the 1980's and into the '90's, the MCA had a unique leadership succession arrangement. There was no nominating "committee." Instead, all nominating decisions were delegated to the Land Court's legendary Chief Title Examiner Orrin Rosenberg, who held forth at an annual multi-course luncheon at The Bay Club atop 60 State Street. By the time Orrin had finished his second martini, officers were nominating for the coming year… and all was well.

The 1990's

In the 1990's (the Joel Stein era), the Association evolved further with a major change in the format of REBA conferences, when the dinner, preceded by a cocktail hour, was replaced by an alcohol-free luncheon, followed by a handful of educational programs. A few years later (the Ruth Dillingham era), educational sessions began in the morning, with a luncheon concluding the conference. Over the succeeding years, the Association has hosted conferences in Framingham, Westborough, Danvers and the DCU Center, formerly known as the Worcester Centrum, before settling on the Four Points Sheraton in Norwood.

In 1995, as part of an initiative to become legally better positioned as a plaintiff in addressing unauthorized practice of law issues, the MCA, hitherto an unincorporated association, became a Massachusetts Chapter 180 corporation.

Also, in the mid-1990's (the Ruth Dillingham era), following its first strategic planning initiative, the MCA explored the establishment of a proprietary title insurance company linked to Connecticut Attorneys Title Insurance Company, now known as CATIC. MCA leaders made several treks to Rocky Hill, just south of Hartford, to make plans. Ultimately, the project was abandoned, as the leadership believed it to be too fraught with risk and capital-intensive for a small specialty bar association.

As a fallback, the leadership launched an alternative dispute resolution subsidiary, MCA Dispute Resolution, Inc., incorporated under M.G.L c. 156B in 1996. In 2004 (the Chris Kehoe era), the corporation became REBA Dispute Resolution, Inc. The Corporation's stock is held by the Association.

Today, REBA/DR, led by Joel Reck with a board of directors, including three retired Land Court judges, is a crucial underlying resource for REBA's success.

In 2007, REBA again considered a partnership with CATIC. The vision of Treasurer Tom Bussone to create a new subsidiary, to be known as REBATitle, triggered considerable discussion and some dissent within the Board and among the members, as well as angry opposition from the title insurance industry. Many were genuinely concerned that the creation of a competing title company would alienate many of REBA's long-standing allies within the title insurance industry. The ultimate Board decision was to demur.

Undaunted, Tom Bussone, carried by the momentum of the proposal, created Massachusetts Attorneys Title Group (MATG), which provided years of support to the Association. Payments aggregating more than $300,000, helped support REBA's UPL mission.

The Unauthorized Practice of Law

The Massachusetts Conveyancers Association, et al vs. Closings, Ltd.

In 1989 (the Carolyn Partan era), the now-defunct Massachusetts Association of Bank Counsel, led by Waltham lawyer Alan Brams, became concerned about a non-lawyer, high-volume residential conveyancing corporation doing business in the Commonwealth with connections to a Peabody law firm. The Delaware corporation, Closings Ltd., was backed financially by Bain & Company, together with Bain Venture Capital Corp., with legal representation from Hale & Dorr, now known as WilmerHale.

Following intense debate, the Board voted to engage Tom Maffei, then a partner at Choate Hall & Stewart, to bring an action for injunctive relief in Suffolk Superior Court. Second chair was a young associate, Doug Salvesen, who would go on to play a pivotal role as counsel in two subsequent UPL cases in the years ahead. As the Association was not yet incorporated, the plaintiffs in the 1993 complaint were Peter Wittenborg, Michael P. Healy and James B. McElroy, officers of the MCA. The MCA persuaded the Massachusetts Bar Association to file an amicus brief.

In August of 1993 (the Mike Healy era), Superior Court Judge Charles T. Spurlock issued a default judgement enjoining Closing, Ltd. from conducting real estate closings in the Commonwealth. While REBA prevailed, Closings, Ltd. essentially bled to death by two factors: first, of course, by legal fees, but more importantly, by the highly cyclical and unpredictable nature of the residential real estate market, which caused Closings Ltd.'s capital-intense closing business to shrink dramatically, ultimately bringing insolvency. These same two factors again arose in the Association's two subsequent UPL actions.

The Massachusetts Conveyancers Association, Inc. vs. Colonial Title & Escrow

In 1996, the MCA faced an entirely different UPL challenge with Colonial Title & Escrow, Inc. Unlike Closings, Colonial was a lean and mean operation, conducting business out of a warehouse in Foxborough, with a sole practitioner from Weymouth as counsel. Again, the Association, together with seven other bar associations, filed for a declaratory judgment and injunctive relieve in the Suffolk Superior Court. In 2001, Judge S. Jane Haggerty determined that Colonial's actions constituted the unauthorized practice of law. Much of the text of the Haggerty decision had been prepared by the MCA's UPL counsel, Doug Salvesen. Colonial went out of business not long thereafter.

The Real Estate Bar Association for Massachusetts, Inc. vs. National Real Estate Informational Services et al.

The most challenging of all of the Association's UPL initiatives came with National Real Estate Informational Services (NREIS), a Pittsburg-based, non-lawyer settlement services company with a broad, multi-state reach, represented by K&L Gates, a major national law firm. This David vs. Goliath confrontation, launched in Suffolk Superior Court, was immediately transferred to federal district court by NREIS.

It would be impossible to overstate the time, energy, expertise and consternation expended during this battle. Members volunteered countless hours of expertise assisting in strategy sessions and discovery. Board meetings regularly ran late into the evenings, with sometimes heated exchanges debating the appropriateness of the Association's nuanced legal positions. There was concern on the part of some board members of potential personal liability if the case went the wrong way.

In 2009 (the Steve Edwards era), at the hands of U.S. District Court Judge Joseph L. Tauro, REBA suffered a devastating defeat, which featured a damage award to NREIS of nearly one million dollars. Those were dark days for REBA and its existence was in peril. Preparing for the worst, the Association immediately engaged bankruptcy counsel in anticipation of a Chapter 11 filing. The dark clouds cleared in June of 2010, in a strongly-worded decision of Chief Justice Sandra L. Lynch, in which the First Circuit vacated Judge Tauro's decision and certified questions on state law to the SJC.

The narrative of the history of REBA's UPL initiatives cannot be complete without a tribute to the courage, determination and unwavering leadership of Jon Davis, who served as president in 1995. With Jon's strength, coupled with the vision and counsel of longtime Association UPL counsel Doug Salvesen, REBA pressed on with an appeal to the First Circuit. In 2013, shortly before Jon's untimely death, a grateful Association established the Jon Davis Excellence in Professionalism Award, which recognizes the honoree's integrity, passion and dedication to the highest standards in the practice of law. The award's recipients understand that the legal profession is a higher calling imbued with noble and aspirational goals of service—to clients, to the community and to the profession.

Finally, in April of 2011 (the Ed Bloom era), SJC Associate Justice Margot Botsford's decision upheld the Association's position that conveyancing in Massachusetts is indeed the practice of law. Allies supporting REBA with amicus briefs were Attorney General Martha Coakley, the American Immigration Lawyers Association, the Massachusetts Bar Association (authored by legendary litigator Robert J. Muldoon), and various legal assistance organizations, as well as CATIC and other bar-related title insurers. Ultimately, NREIS closed its doors, another victim of the fierce economics of the cyclical and unpredictable residential real estate market.

During the pendency of the *NREIS* litigation, REBA fought another battle, this time in the legislative arena. The Pittsburg-based Title/Appraisal Vendor Management Association (TAVMA), filed legislation in the General Court that would eviscerate the Commonwealth's UPL law.

Notwithstanding TAVMA's lobbying and testimony before the Joint Committee of the judiciary in 2008, the TAVMA legislation was sent to study. TAVMA went out of business in 2013.

Despite successes in three UPL actions, which seriously strained the resources of the Association, the unauthorized practice of law is a continuing issue in Massachusetts with the advent of witness closings or so-called notary closings. REBA must remain vigilant.

The 21st Century

In 2005 (the Greg Peterson and Kathleen O'Donnell eras), the leadership launched a major strategic planning initiative to transform and rebrand the MCA, while broadening the scope of its mission. Greg Peterson's vision was the genesis of the Real Estate Bar Association. A new position, executive director, was established with a mandate to effectuate that strategic plan. Beginning in 2003, the leadership invited a cautious and reluctant Peter Wittenborg to become the Association's first executive director, and in 2004, Nicole Cohen and Bob Gaudette joined the staff. This triumvirate, with exemplary and almost symbiotic teamwork, has staffed REBA headquarters and built a narrowly-focused association, into today's full-service, broad-based organization reaching every real estate related practice concentration area.

Early on, the trio established the member messaging vehicle, REBA e-News, as well as *REBA News,* published five times a year by *Lawyers Weekly*. Bob Gaudette introduced REBA to social media platforms and established the REBA Blog.

During these first decades, REBA launched a number of practice concentration sections in an effort to broaden membership.

2003 Commercial Leasing Section, chaired by Ed Bloom

2003 Ethics Section

2004 Commercial Real Estate Finance Section, chaired by Beth Mitchell

2004 Affordable Housing Section, chaired by Kurt James

2005 Environmental Law Section, led by Mary Ryan and Greg McGregor

2006 Paralegal Section, launched by Jackie Waters Adams, Colby Welch and Karen DePalma

2013 Estate Planning, Trusts and Estate Administration Section, led by Leo Cushing and Sara Goldman Curley

2012 Women's Networking Group, launched and chaired by Michelle Simons

2014 New Lawyers Section, launched by Kendra Berardi and David Uitti

2016 Construction Law Section, led by Jonathan Hausner and John Connelly

2016 Residential Landlord/Tenant Section, launched by Emil Ward and Ken Krems

REBA is fortunate to have the Women's Networking Group among its sections. The Group's annual benefit reception for its designated charity, the Women's Lunch Place, has become a time-honored tradition.

In 2006, the Association established the Denis Maguire Community Service Award. Denis Maguire, a long-standing Association member, served as president of the Massachusetts Conveyancers Association for a two-year term in 1979 and 1980. The award honors members contributing to their communities outside the bounds of the legal profession through their volunteer endeavors, exemplify a sense of caring, initiative and ingenuity.

During these years, REBA established a Long-term Planning Committee, led by Paul Alphen and Dan Ossoff, as well as a Strategic Communications Committee. These new groups were established in addition to the longstanding but now renamed Standards and Forms Committee, as well as the Amicus Committee, one of the Association's better-known resources. Since 1979 the Committee has filed more than 70 amicus briefs with the SJC or with the Appeals Court.

Despite these advances, there were also turbulent times. The huge legal expenses relating to the successful *NREIS* litigation were a burden on the Association's coffers, almost a decade following the successful outcome of the case. Furthermore, the economic crash of 2008 decimated membership rolls. REBA has not yet regained the pre-crash membership numbers.

Increasing membership, particularly among younger and newer lawyers, continues to be a major ongoing challenge for the leadership, the Long-Term Planning Committee and the New Lawyers Section. To that end, in 2016, REBA established the Emerging Leader Award honoring young or new leaders who demonstrate a level of involvement, excellence, collegiality, ethics and integrity within the Massachusetts real estate bar that exceeds expectations for practitioners of their experience level.

Today

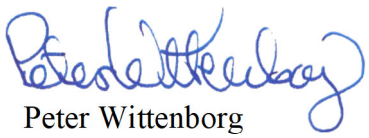
Today, we joyfully celebrate REBA's existence and survival at the 150-year milestone, not knowing what lies ahead.

However, we do know that REBA offers its members the benefits of a broad-based, full-service bar association, comparable to the BBA and MBA, with a dedicated but often over-stretched staff, and a meagre budget. As the COVID pandemic has demonstrated, REBA can respond nimbly to extraordinary challenges, perhaps more responsively than its two larger siblings.

REBA's greatest strength is the direct personal service offered to individual members. A member can make an ethics or conflicts inquiry, and in less than 24 hours, receive a mini-treatise, complete with citations to the Rules of Professional Conduct, from Ethics Section Co-chair Henry Dane, backgrounded by his decades of experience and practice. A member seeking a referral, advice on the application of a standard or the use of a form, will receive a prompt response from the appropriate committee/section co-chair or from the Association's staff.

Looking ahead, REBA is blessed with a wealth of leadership. There was a time, not too long ago, when a frustrated nominating committee, due to a dearth of potential leaders, considered recycling former president Henry Thayer to a second term.

Today, we have strong line-up of future leaders of the Association, including Julie Barry, Carrie Rainen, Noel Di Carlo and Nick Shapiro, with more waiting in the wings. I am confident that with these leaders, REBA will meet the unknown challenges that lie ahead.



Peter Wittenborg
October 13, 2022

REBA Membership

Benefits, Resources

&

Affinity Partner Programs

Member Benefits, Resources & Affinity Partner Programs

MEMBER BENEFITS

REBA Handbook of Standards and Forms:
All of the individual title standards, practice standards, ethical standards and forms are available to members, at no additional cost, at www.reba.net.

Practice Area Sections:
Members are invited to join up to three practice area sections, which are co-chaired by experts in the related subject and work to further the practice of real estate law in that particular field.

Webinars & Luncheons:
Members are invited to attend section-sponsored webinars and luncheons featuring guest speakers discussing topics of interest and concern. These presentations are recorded and posted to the video section of REBA's web site.

Attorney Referral Program:
REBA's web site features a referral database, where potential clients can search for a participating lawyer by name, location or practice area.

REBA Peer-to-Peer Mentoring Program:
REBA's experienced mentors provide guidance to members who are new to the practice of law. Members are invited to participate as a mentor or a mentee.

Employment Section Online:
Members are invited to post résumés and job ads on the Employment Opportunities' section of REBA's web site.

MEMBER RESOURCES

Legislative Support:
The Association has long advocated the passage of legislation at the State House to advance the practice of conveyancing and real estate law. REBA has also succeeded in the defeat of many legislative proposals that would have been detrimental to the integrity of real estate titles and the practice of real estate law.

Unauthorized Practice of Law (UPL) Initiatives:
REBA is the only bar association in the Commonwealth making concerted efforts to end the unauthorized practice of law in Massachusetts.

Ethics Hotline:
REBA's Ethics Section offers individual, one-on-one advice to members who encounter conflicts concerns or ethical issues in their day-to-day practice. This program is intended to offer confidential, practical and pragmatic advice to members with immediate, fact-based concerns. For more information, email ethics@reba.net.

eNews Announcements:
REBA's electronic newsletter keeps members up-to-date on breaking legislative news and national affairs relating to the practice of real estate law and other adjacent fields, as well as recent and upcoming events, conferences and section-sponsored programs and receptions.

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- Westfield Bank

To learn more about all of REBA's member benefits, resources and affinity partner programs, call (617) 854-7555, email membership@reba.net or visit us online at www.reba.net.

REBA Practice Area Sections

~ Open to Membership ~

AFFORDABLE HOUSING SECTION

Co-chaired by Robert M. Ruzzo, bobruzzo@comcast.net, Kimberly L. Martin-Epstein, kle@bostonbusinesslaw.com, and Kurt A. James, kjames@kjppartners.com

This Section educates those in the legal community on emerging initiatives and opportunities in developing and financing multifamily housing and community development projects. The group hosts monthly luncheon forums and invites speakers from the public and private sectors to discuss new or proposed legislation, recent court and regulatory decisions, new financing programs, and innovative development structures. One of Section's primary goals is to provide an opportunity for REBA's members, via regular meetings and programs, to communicate directly with and learn from leaders and decision-makers in the field as well as other attorneys, bankers, developers, consultants and regulators who are interested in sharing their experiences with the group. The Section also participates, in collaboration with other sections, in the Beacon Hill dialogue on all housing-related legislation, particularly M.G.L. c.40B reform, Public Housing reform, and M.G.L. c.40R, "smart growth." The Section serves as a legal resource in the housing and development field for lawyers and other practitioners across the state.

COMMERCIAL LEASING SECTION

Co-chaired by Thomas Bhisitkul, tbhisitkul@hinckleyallen.com, and Michael J. Riley, mriley@daintorpy.com

The Section meets monthly to discuss emerging issues involving commercial and residential leasing. The topics, which include analyses of recent court decisions, continuous review of statutory provisions affecting commercial leasing, and monitoring of trends and current practices affecting leasing, such as the impact of recent legislation expanding the scope of the ADA, changes in insurance industry practices and coverage, and local ordinances, are viewed through a lens to help REBA members in recognizing potential problems and providing solutions, whether in drafting provisions or in developing best practices. Section members actively participate in creating leasing forms for REBA members, preparing articles for *REBA News*, developing and participating in breakout sessions at REBA's semi-annual conferences, and sponsoring topical panel discussions at open webinar meetings. Section members also assist in preparing and filing amicus briefs with appellate courts with respect to leasing issues.

COMMERCIAL REAL ESTATE FINANCE SECTION

Chaired by Peter Gelzinis, pgelzinis@pierceatwood.com, and Vicki S. Donahue, vdonahue@cainhibbard.com

The Commercial Real Estate Finance Section is the pre-eminent resource for REBA members and others on emerging trends and industry practice in all aspects of commercial real estate lending. The group's webcast educational programs address issues of concern to counsel for commercial real estate owners and lenders and seek to extend the knowledge and expertise of seasoned commercial real estate attorneys to younger attorneys. The Section also provide input on legislative initiatives related to the commercial lending practice and co-sponsor meetings with other sections, including Commercial Leasing and Affordable Housing. Meetings are typically held every other month and include topics such as the negotiation of loan documents, typical title insurance endorsements in commercial loan transactions, interest rate swap transactions, and ground lease financing.

CONDOMINIUM LAW & PRACTICE SECTION

Co-chaired by Christopher S. Malloy, cmalloy@lawmtm.com, and Timothy N. Schofield, tim@schofieldlg.com

If you are an attorney whose practice touches any area of condominium law and practice, this Section has much to offer. Whether you're a novice or veteran; you primarily represent associations, trustees, unit owners, developers, managers or lenders; or your interest is in a two-unit condex, a phased suburban development, or a mixed-use, two-tier, luxury downtown condo, this Section – with all levels of experience and areas of expertise – offers a first-class resource and encourages social and professional ties among colleagues. If you are facing a practical problem or want to stay on top of recent condominium cases, trends in decisional law and legislative updates on Ch. 183A, our meetings will enlighten you. Our principal goal is to learn from one another and establish a high-quality of practice for condo practitioners. The group offers webinars, roundtable discussions and other lively presentations on a range of issues, including acoustics, insurance, and attorneys' fees, leasing, using and controlling social media in condos, smoking, medical marijuana, service/support animals, elections and mandatory mediation.

CONSTRUCTION LAW SECTION

Co-chaired by Jeffrey L. Alitz, jalitz@fmglaw.com, and Rhian M. J. Cull, rcull@goulstonstorrs.com

REBA's Construction Law Section serves as a both a resource and a discussion forum for lawyers concentrating in the areas of construction law including the representation of public and private owners, developers, general contractors, subcontractors, material suppliers and construction sureties. The group welcomes practitioners concentrating in the area of construction law as well as lawyers whose practice occasionally touches upon construction law.

REBA Practice Area Sections

Continuing Education Section

Co-chaired by Kimberly A. Bielan, kbielan@lawmtm.com, Elizabeth J. Young, byoung@wltic.com

REBA's Continuing Education Section is the source of the educational programs for the Association's all-day Spring Conference in May and Annual Meeting & Conference in November. The programs are attended by upwards of 600 lawyers and other professionals involved in real estate law, probate law, family law, conveyancing and all aspects of a transactional practice. Educating both new and seasoned attorneys and real estate professionals, each hour-long, CLE-accredited breakout is developed by the Section based on suggestions from REBA members, as well as topics from outside sources. Every conference includes an hour-long update of recent Massachusetts case law. All Section meetings are hosted by conference call or videoconference and, often include discussions about future topics to benefit REBA members. The group encourages all members to participate, and welcome suggestions for future programs.

Environmental & Renewable Energy Law Section

Co-chaired by Gregor I. McGregor, gimcg@mcgregorlaw.com, and Julie P. Barry, jbarry@princelobel.com

One of REBA's most active Sections, the group stays abreast of new developments at the intersection of real estate and environmental law, with a focus on new cases, recent statutes, and practical tips for real estate lawyers handling transactions, permits and litigation, from residential to commercial to conservation. Land use law and environmental law are two sides of the same coin, important for our clients and us to know to be successful in all aspects of real estate. The group hosts monthly webinars, with a speaker or two on topical subjects, including local climate change adaptation, trends in sustainable real estate, taxation of conservation lands, new FEMA flood hazard maps, DEP's regulatory reform rule changes, real estate implications of RLIUPA, constitutional limits on permit conditions, development impact fees, zoning reform and economic development legislation, *Mahajan v. BRA and DEP* (Article 97 lands), use and abuse of municipal home rule, the Massachusetts Oceans Act and Ocean Plan, EOEEA energy law and policy reforms, recovery of cleanup costs and attorney fees, DEP's permit and appeal streamlining, annual surveys of developments in zoning, subdivision control, standing, Anti-SLAPP, 21E and 40B, and more. The Section also proposes or presents environmental law-related breakouts at REBA's semi-annual conferences.

Estate Planning, Trusts & Estate Administration Section

Co-chaired by David S. Raymon, draymon@burnslev.com, and Theresa M. Santoro, tmsantoro@sherin.com

Massachusetts has enacted various statutes involving estates, trusts and probate which affect the practice of real estate, including the Massachusetts Homestead Statute, the Massachusetts Durable Power of Attorney Statute, the Massachusetts Uniform Principal and Income Act, the Massachusetts Uniform Trust Code, the Massachusetts Uniform Probate Code, without any significant input from the real estate bar. Apart from legislation, there are numerous issues that real estate practitioners face within the Massachusetts Probate Court system when titles involve probate, such as lost files and delayed service. The mission of this Section is to provide a mechanism to provide meaningful input into legislation and proposed legislation that affect the practice of real estate even though legislation primarily is focused on probate, trusts and estate taxes. Additionally, the Section will provide input to the Probate Courts to facilitate the real estate practice as it relates to probate, titles and related matters. In order to accomplish this, the group will draw upon the expertise of Section members and the membership at large. The Section believes that through education and sharing of knowledge by real estate practitioners and trust and estate planning practitioners, the citizens of the Commonwealth, who are the ultimate consumers of the services we provide, will be better served.

Ethics Section

Co-chaired by Kathleen M. O'Donnell, kmodonnellesq@gmail.com, and Henry J. Dane, hdane@danelaw.com

The Section serves REBA members by promptly responding to ethics questions posed through REBA's email ethics helpline, ethics@reba.net. Section members also address ethical issues through written submissions to *REBA News,* participating in breakout sessions at REBA's semi-annual conferences and, from time-to-time, presenting brief seminars on ethical matters. On occasion, the Section also drafts standards, forms and opinions on ethical issues arising in the area of real estate law. The goal of the Section is to provide a forum for raising and addressing ethical issues, and to support real estate practitioners in maintaining the highest level of professional integrity.

Land Use & Zoning Section

Co-chaired by Nicholas P. Shapiro, nshapiro@phillips-angley.com, and Kate Moran Carter, kcarter@daintorpy.com

This Section serves members by hosting luncheons and programs on topics of interest to land use and zoning lawyers, and it aims to be a valuable resource to all members, whether local lawyers or large law firm members, for matters relating to land use, planning and zoning. The group's members collaborate with the Amicus Committee to discuss and comment on amicus requests for pending appellate zoning and land use cases, and with the Legislation Section on filed and proposed legislation relating to zoning and land use issues. The Section strives to host webinars monthly or to join with other groups in presenting topics of interest, including recent cases and developments in zoning and land use practice, or a focus on matters unique to these practice areas. The group often joins with the Environmental Law Section in presenting programs and discussions on environmental and regulatory matters affecting land use and zoning. The group welcomes suggestions as to luncheon topics and programs.

REBA Practice Area Sections

LEGISLATION SECTION

Co-chaired by Matthew W. Gaines, mgaines@meeb.com, and Douglas A. Troyer, dtroyer@lawmtm.com

The Section meets on a monthly basis to discuss and develop legislative initiatives of interest or concern to REBA members. Working with REBA's legislative counsel, they identify pending legislation; where appropriate, give testimony at public hearings on Beacon Hill; report recommendations to the Board as to bills the Section believes REBA should support or oppose; and provide technical input to legislative sponsors and others in order to improve pending legislation. Section members have also drafted and submitted legislation recommended by REBA members, and welcome input from REBA members regarding proposals for future statutory revisions, as well as feedback about pending bills of interest. Among the Section's recent successes have been the omnibus mortgage discharge law, the modernized homestead statute, authorization for the "permit session" of the Land Court, technical amendments to the MUPC, and provisions to ensure that the notice of sale in a mortgage foreclosure include record evidence of the current holder and that the compliance affidavit be conclusive for title purposes. They are also responsible for legislation affording owners of registered land the ability to withdraw from the Torrens System.

LITIGATION SECTION

Co-chaired by Daniel P. Dain, ddain@daintorpy.com, and Johanna W. Schneider, jschneider@hembar.com

The Section is open to all members, particularly civil litigators who represent clients in disputes involving real estate in state and federal courts, as well as in arbitration proceedings and other forums. The group hosts regular webcast meetings for speakers to present matters of interest to members, including recent trial or appellate decisions and ways in which to maintain and improve the members' professionalism, ethics, civility and advocacy skills. The group is also an active forum for the exchange of ideas leading to the improvement of individual trial skills as well as an advocate for updating legislation for the jurisdiction and streamlining the operation of the Land Court. Section members are often called upon by judges of the Land Court to help improve the operation of the Land Court, such as the Limited Assistance Representation program. Involvement in the Section is a great way to keep your practice up-to-date and to meet other real estate litigators and judges outside of court.

NEW LAWYERS SECTION

Co-chaired by Robert K. Hopkins, rhopkins@phillips-angley.com, Kathleen M. Heyer, kheyer@pierceatwood.com, and Alexandria K. Castaldo, acastaldo@phillips-angley.com

The Section's mission is to reach out to lawyers who are new to real estate practice or new to the profession and to introduce them to the many benefits of REBA membership, including the peer-to-peer mentoring program. The group hosts regular one-hour webcast lunch meetings, at which a speaker will present and provide written materials on a topic that is useful to the new lawyer, *e.g.*, how to take or defend a deposition, how to conduct a real estate closing, and how to avoid conflicts of interest in your practice. In advance of these lunch meetings, the Section co-chairs solicit input from Section members and others about which topics are important to them. The Section is also committed to connecting new lawyers with other professionals, REBA members and members of the judiciary through hosted networking receptions. The co-chairs also maintain a member email distribution list that encourages questions about REBA, real estate practice, and networking. All new lawyers are welcome to join and actively participate in this Section.

PARALEGAL SECTION

Co-chaired by Jacqueline A. Waters Adams, jwatersadams@gbllaw.com, Amanda J. Pinard, amanda@rocheandwrenn.com, and Shannon L. Hogan, shogan@swiftcurrentenergy.com

The Section provides educational opportunities for its members, offering input and suggestions to REBA's CLE Section, for programs at REBA's semi-annual conferences. The group also offers members open webcast meetings on topics of general interest, as well as round-table discussions. A further objective is the delivery of news and intelligence about changes and updates affecting all areas of real estate practice, as well as practical tools. The Section boasts diversity among its members in both their areas of concentration and demographics. Members of the group work in residential and commercial real estate and possess expertise in such areas as multi-state and national commercial closings, residential closings, residential short sales and foreclosures, title insurance claims, title insurance underwriting, and management and training. The Section offers the opportunity to build relationships among dedicated paralegals within the profession while providing support, networking and camaraderie to its members. They host well-attended webinars approximately six times per year and maintain email contact on a regular basis.

REBA Practice Area Sections

REGISTRIES SECTION

Co-chaired by Douglas J. Brunner, djb@titlebound.com, and Tracie M. Kester, tracie.kester@stewart.com

The Section addresses registries' issues that arise through membership concerns, especially indexing and computerization, as well as maintenance and access to the public records to ensure availability. They meet often with representatives from the Secretary of State's Office, and with the registers and assistant registers of deeds. They keep abreast of developing registry matters, like electronic recordings (E-sign). The Section's purpose is to work with the registers and staff of the 21 registries of deeds throughout the Commonwealth, and offer them feedback and support in providing accurate, accessible and reliable real estate records to attorneys, title examiners and the general public. The group seeks to master the peculiarities and nuances of the different registries, as well as attend meetings offering opportunities to build relationships with the various registers. When an issue arises that requires the attention of the REBA membership, whether immediate or as a matter that requires deliberation or study, the group makes every effort to address the issue. Section leaders attend the meetings of the Registry of Deeds Technology Advisory Committee and provide insight, on behalf of REBA, to the Secretary of the Commonwealth. The group has also expanded its concerns to the registries of probate due to the essential role of probate records in title examinations. The Section has sought to work with the court system and the probate registers to make their records promptly accessible, especially when stored offsite. The co-chairs make a special effort to ensure that its membership is geographically diverse, with an attempt to represent every registry district.

RESIDENTIAL CONVEYANCING SECTION

Co-chaired by Noel M. Di Carlo, ndicarlo@warshawlaw.com, Dominic H. Poncia III, dponcia@warshawlaw.com, and Katherine Prifti, kprifti@firstam.com

For any lawyer whose practice includes residential conveyancing, participation in the Residential Conveyancing Section is essential. Whether discussing recent case law, statute, or regulation, or emerging trends or office practice and procedure, the RCS is a crucial resource for the conveyancing practitioner. The RCS hosts regular webinars, including round-table discussions and guest speaker presentations. The Section also supports statewide regional affiliates comprised of local conveyancers. These RCS affiliates are led by a REBA member practicing in the affiliate's geographic region. The Section's co-chairs, collaborating with the regional affiliate leaders, organize educational meetings focused on recent developments in conveyancing law and practice. For a lawyer facing a practical problem or wishing to interact with fellow practitioners to discuss practice developments and standards, the RCS-sponsored events offer a forum to voice concerns and opinions, as well as to offer solutions. Ultimately, the Residential Conveyancing Section is a welcoming community of transactional lawyers committed to elevating and educating its members.

RESIDENTIAL LANDLORD/TENANT SECTION

Co-chaired by Ted S. Papadopoulos, ted@ampslaw.com, and Michael J. Louis, mlouis@downingvandyke.com

The Residential Landlord/Tenant Section is a resource and forum to its members to discuss and share current information about landlord/tenant practice matters. Many of its members practice within the housing and district courts handling summary process evictions. Working with the Legislation Section, the group counsels REBA members about legislative and case law developments while providing expertise and input regarding proposed legislation affecting the residential landlord/tenant areas of Massachusetts law. The Section also aids the Association's Continuing Legal Education Section in hosting relevant programs at REBA's twice-yearly conferences.

TITLE INSURANCE & NATIONAL AFFAIRS SECTION

Co-chaired by Mark B. Elefante, markelefante@hembar.com, and Eugene Gurvits, ggurvits@firstam.com

The Section, which includes members of the conveyancing community and title insurance industry, has dual goals; first, to keep abreast of national issues, such as changes to RESPA and national trends, including practice of law issues, and second, to communicate among conveyancers and title insurance underwriters on local issues relevant to the group's mission, including legislation, underwriting procedures and guidelines, and the impact of court decisions. The group meets periodically by remote videoconference or at in person at REBA, and members, who are encouraged to bring their own concerns and questions to meetings, are provided with an agenda and materials to review in advance. The group's goal is to raise the awareness of REBA members to national and local issues. This is typically done through articles, which regularly appear in *REBA News*, and the occasional opportunity to present at REBA conferences.

WOMEN'S NETWORKING GROUP

Co-chaired by Michelle T. Simons, msimons@legalpro.com, and Julie Taylor Moran, jmoran@orlans.com

The Section, established in 2013 by former President Michelle Simons, is an informal group where members and non-lawyer professionals come together to network, collaborate, and build professional and personal relationships. The group includes real estate and mortgage brokers, appraisers, engineers, landscape architects, designers…virtually any profession that touches the real estate world. The group hosts four events per year, which include ample networking time and lite bites, as well as guest speakers who are prominent leaders in business, the professions, academia and government. Each spring, the group hosts a fundraising and networking reception for its selected charitable organization, the Women's Lunch Place, a non-profit that provides a safe, comfortable day shelter, nutritious meals and support for women experiencing homelessness and poverty.

REBA Operational Committees

~ Invitational ~

AMICUS COMMITTEE

Co-chaired by Daniel J. Ossoff, dossoff@verrill-law.com, and Edward M. Bloom, edwardbloom41@gmail.com

The Amicus Committee operates as a joint committee of REBA and the Abstract Club to write and present *amicus curiae* briefs relating to real estate law matters to the Massachusetts Appeals Court and the Supreme Judicial Court, as well as, on occasion, to the Federal District Court of Massachusetts and the First Circuit Court of Appeals. Often, briefs are submitted at the invitation of the court or, on other occasions, at the request of counsel to one of the litigants. In deciding whether to submit a brief, the Committee evaluates which party it believes should prevail in the case, whether the case involves issues with wide application in real estate law, and whether the case will have significant precedential value or, alternatively, whether the case is so fact-intensive that it will not provide a useful precedent in addressing similar issues in the future.

Because of the group's over 50-year history, and in light of the respect afforded to REBA by the courts in the field of real estate law, the Amicus Committee is uniquely situated to play a role in assisting Massachusetts appellate courts in shaping and resolving long-standing complex issues in the real estate law arena, whether involving long-standing ambiguities in the common law applicable to title and conveyancing matters or complications of a more recent origin arising out of ongoing statutory or regulatory enactments in the ever-expanding areas of leasing, environmental and land use law.

Through its involvement in each carefully selected case in which the Committee elects to submit a brief, the Committee has a very tangible and long-term impact upon the evolution of real estate law. Membership on the Amicus Committee, which is by invitation, is largely comprised of current and former REBA Committee chairs and select members of the Abstract Club, although briefs are often solicited from, and contributed by, the broader community of REBA members.

LONG-TERM PLANNING COMMITTEE (LTP)

Co-chaired by Paul F. Alphen, palphen@alphensantos.com, and Thomas Bhisitkul, tbhisitkul@hinckleyallen.com

The task of the Long-term Planning Committee is to determine that the work and mission of the Association fulfills the long and short-term needs of REBA members. The Committee also guides the Association's growth, bringing oversight to new member recruitment and retention programs, development of member benefits including affinity programs with third-party service providers.

Often the group reviews the Board and section/committee structures to ensure that they most effectively serve the members in an ever-changing practice environment.

STANDARDS & FORMS COMMITTEE

Co-chaired by Carrie B. Rainen, crainen@rainenlaw.com, and Jutta R. Deeney, jutta.deeney@stewart.com

The Committee, which dates back to the early 1970's, is responsible for the *REBA Handbook of Standards & Forms*, the crown jewel of Association membership. The group proposes amendments to existing title standards, practice standards and forms and the adoption of new title standards, practice standards and forms, based on changes in case law, legislation and professional practice. The Committee's proposals are submitted to REBA's Board of Directors. If the Board approves the proposals, they are then put before the general membership at the next Conference for adoption. The Standards and Forms Committee meets monthly and welcomes input from REBA members. Membership on the Committee is by application or invitation.

REBA Operational Committees

~ Invitational ~

STRATEGIC COMMUNICATIONS COMMITTEE (SCC)

Co-chaired by Julie P. Barry, jbarry@princelobel.com, and Olympia A. Bowker, obowker@andersonkreiger.com

The REBA Strategic Communications Committee (SCC) was created by the Association's leaders in response to several emerging member needs. As social media has become a greater part of our personal and professional lives, particularly with younger and new lawyers, the Committee offers oversight to the REBA staff in maintaining several social media vehicles and platforms, including a popular blog, and LinkedIn and Facebook pages.

The Committee evaluates new and emerging social media platforms, and coordinates requests for comment or response from traditional media outlets on issues relating to the mission of REBA and its various sections. The SCC also explores other innovative ways to share REBA's message of excellence and professionalism with other members of the bar, non-lawyer real estate professionals and the general public.

UNAUTHORIZED PRACTICE OF LAW COMMITTEE (UPL)

Chaired by Timothy J. van der Veen, tim@timvanderveenlaw.com

The UPL Committee fulfills one of the Association's primary missions, combatting the unauthorized practice of law. The group has successfully led the Association through three UPL lawsuits: *MCA, et al vs. Closings, Ltd, et al* (1993), *MCA, et al vs. Colonial Title & Escrow Company, et al* (2001) and *REBA vs. NREIS* (2010). The Committee remains vigilant in its efforts to protect the public from the unauthorized practice of law in real estate closings. Membership is limited, for the most part, to past officers of the Association. Although much of their work goes unreported to REBA members, the Committee is very active.

The Committee also investigates complaints brought to its attention by REBA members. This work is vital and all REBA members are strongly urged to continue to forward to the Association closing documents, including HUD settlement statements, which might indicate a violation of UPL laws.

REBA PRACTICE AREA SECTIONS

Join Today!

REBA's Practice Area Sections determine the direction of the Association. Most section meetings are held via remote videoconference, or in person at REBA headquarters conveniently located in downtown Boston. Each section is co-chaired by an expert in the related subject and works to further the practice of real estate law in that particular field. Many section meetings with guest speakers are simulcast for the convenience of members who cannot attend in person. Please see the descriptions below.

This special benefit is available ONLY to REBA members!

To join one or more practice area sections and have your contact information posted on the REBA web site, complete the form below and return it to: REBA, 295 Devonshire Street, Sixth Floor, Boston, MA 02110-1266. Completed forms may also be sent via email to membership@reba.net.

Contact Information:

Name: _____ Firm: _____

Address: _____ City/State/Zip: _____

Phone: _____ Email: _____

Select up to <u>three</u> Practice Area Sections you would like to join:

- ❑ Affordable Housing
- ❑ Commercial Leasing
- ❑ Commercial Real Estate Finance
- ❑ Condominium Law & Practice
- ❑ Construction Law
- ❑ Continuing Education
- ❑ Environmental Law
- ❑ Estate Planning, Trusts & Estate Administration
- ❑ Ethics
- ❑ Land Use and Zoning
- ❑ Legislation
- ❑ Litigation
- ❑ New Lawyers
- ❑ Paralegal
- ❑ Registries
- ❑ Residential Conveyancing
- ❑ Residential Landlord/Tenant
- ❑ Title Insurance & National Affairs
- ❑ Women's Networking Group

Signature: _____ Date: _____

REBA MEMBER APPLICATION

Please complete the application below and return it, along with the appropriate fee, via mail to: REBA, 295 Devonshire Street, 6th Floor, Boston, MA 02110; or via email to membership@reba.net. You may also join or renew online at www.reba.net or by phone at (617) 854-7555.

CONTACT INFORMATION

Please indicate the type of mailing address: ❑ Business ❑ Home

NAME: _____ FIRM/COMPANY: _____

ADDRESS: _____ CITY, STATE ZIP: _____

EMAIL: _____ PHONE: _____ ❍ Mobile ❍ Work

Lawyers Only:

LAW SCHOOL: _____ DATE ADMITTED: _____ BBO#: _____

MEMBER CATEGORY

Please select the appropriate category below:

❑ GROUP 1: Lawyer Admitted to the Massachusetts Bar ..... $ 405

❑ GROUP 2: Lawyer Admitted to the Bar less than three or 45+ years ago ..... $ 235

❑ GROUP 3: Government, Legal Services, Non-Profit or Retired Lawyer ..... $ 235

❑ GROUP 4: Other Real Estate Professional *(please select below)* ..... $ 235

❍ Paralegal ❍ Title Examiner ❍ Land Surveyor

❍ Bank/lending institution/credit union ❍ Mortgage broker/loan officer

❑ GROUP 5: Law Student ..... $ 75

PAYMENT

❑ CHECK *(payable to REBA)*

Check No: _____

Date: _____

❑ CREDIT CARD

Card No: _____ Exp.: _____

Signature: _____ Date: _____

SOCIAL MEDIA

Follow REBA on Facebook, Twitter and LinkedIn for updates and breaking news, information about upcoming events and programs, and more!

To learn more about REBA, go to www.reba.net.

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AMD: 03/2022