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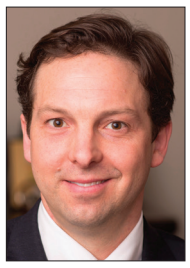
Article 97 jurisprudence advanced by SJC in Westfield playground ruling

BY LUKE H. LEGERE



Cities and towns contemplating a change in use or disposition of a playground or other land in public outdoor recreational use must look beyond the chain of title to determine whether Article 97 legislative approval is necessary.

That is the upshot of the Massachusetts Supreme Judicial Court's October 2017 ruling in *Smith v. City of Westfield*, which announces that Article 97 protection may be triggered for municipal land without the formal recording at the Registry of Deeds a deed, conservation restriction or other instrument.

The SJC's precedent-setting decision ruled that the city's Cross Street Playground is subject to Article 97 protection. Enacted by the voters in 1972, Article 97 codifies the public interest in conserving natural areas and open space and is an important element of the state's Public Trust Doctrine. Article 97 requires a supermajority vote of the Legislature to transfer, or change the use of, land taken, acquired or designated for its purposes.

The key facts of the case are as follows. Westfield took title of the property to satisfy a tax debt in 1939. In 1946, the Planning Board and City Council recommended that the land be converted to a playground. Two years later, "full charge and control" of the property was transferred to the city's Playground Commission. In 1957, the City Council passed an ordinance recognizing the property as a playground and naming it the John A. Sullivan Memorial Playground, which the mayor subsequently approved.

In 1979, the city applied for and accepted federal Land and Water Conservation Fund (LWCF) grant money to improve the playground. As part of the application for that grant money, the city designated the playground as permanently protected open space and "Article 97 land," consistent with the Massachusetts Statewide Comprehensive Outdoor Recreation Plan (SCORP).

In August 2011, against this background, the City Council voted to transfer the property to the School Department for construction of an elementary school.

Plaintiffs, approximately 25 Westfield residents, sued to stop construction and sought a court order directing the city to comply with Article 97 before building or operating a new school on the site. Both the trial court and state Appeals Court ruled in favor of the city, pointing to prior SJC rul-

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Decision issued on taxing of partially constructed 'units'

BY DAVID ROGERS

The Supreme Judicial Court recently denied a developer's application for further appellate review of a decision concerning the taxation of development rights, wherein the Appeals Court had ruled that a town may tax partially constructed structures — existing on land that has been submitted to condominium status — that have not yet become lawful condominium units; *R.I. Seekonk Holdings, LLC v. Board of Assessors of Seekonk*, 91 Mass. App. Ct. 1104 (2017) (Rule 1:28) *review denied* 476 Mass. 1115 (2017).

At first blush, the Appeals Court's decision appears to run counter to the Massachusetts Condominium Act as well as its own previous decisions. Indeed, for the last 17 years, it had generally been well accepted that land submitted to condominium status — which was subject to development rights — constituted common area of the condominium, which was exempt under G.L.c. 183A, §14 from assessment. *Spinnaker Island & Yacht Club Holding Trust v. Bd. of Assessors of Hull,* 49 Mass.App.Ct. 20 (2000). See also *First Main St. Corp. v. Bd. of Assessors of Acton,* 49 Mass.App.Ct. 25 (2000).

The Appeals Court, however, was able

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Discovery due diligence yields favorable Land Court outcome

BY KIMBERLY A. BIELAN

Cases in which the court must determine whether use of a property is consistent with an alleged preexisting, nonconforming use are "often heavily fact-dependent." Nevertheless, when the undisputed facts clearly indicate a failure to satisfy at least one of the prongs of the so-called *Powers* test, the court may determine the question as a matter of law.

In a recent case that our office litigated in the Land Court, *HAYR, LLC v. Nigosian*, No. 15 MISC 000103 (HPS), No. 15 MISC 000242 (HPS), 2017 WL 3426681 (Mass. Land Ct. Aug. 9, 2017) (Speicher, J.), this was the precise issue before the court. In its detailed analysis, the Land Court ultimately held that the defendants, Dominic Murgo and PJM Family Enterprises LLC (collectively "PJM"), had "failed to indicate that any evidence will be forthcoming at trial tending to show that their present nonconforming use is not a change or substantial extension of the use protected under G.L.c. 40A, §6."

The plaintiff, HAYR, LLC ("HAYR"), is undertaking a development of a large residential subdivision in the town of Millbury, which is located directly to the south of Worcester. HAYR's property is not located far from Route 20 in Worcester, and the property immediately adjacent to its northwesterly property boundary, which is owned by PJM, has frontage on Route 20.

PJM's property is nearly 6 acres in size, but only the front portion of it is located in Worcester; the rear

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REBA's Residential Conveyancing Section recently held a Norfolk County regional affiliate meeting, aka 'roadshow,' at the Norfolk County Registry of Deeds, hosted by Register Bill O'Donnell. Pictured from left are Chris Malloy, a partner in the Braintree firm of Moriarty, Troyer & Malloy, the program's featured speaker; REBA President Fran Nolan; and Susan LaRose, New England underwriting counsel for WFG National Title Insurance Company. Malloy's topic was 'Condominium Life in a Post Marijuana Legal World.'

Another year, another doorway

BY FRANCIS J. NOLAN

President's Message

The Roman god Janus is sometimes referenced as the god of beginnings, but in ancient mythology he is more accurately considered the animating spirit behind doorways and archways. (The Romans were big on archways.)

Though there is still time left in 2017, we here at REBA are already walking through the metaphorical doorway toward another new year. There's a lot to which we can look forward, but there's also a lot that's been done this year that warrants a glance backward before we cross the threshold.

REBA finds itself at the doorway, with a future full of promise and a recent past full of accomplishments.

REBA has had a tremendous year of progress in its efforts to leverage technology to improve the value of membership and make the sharing of knowledge more accessible to members for whom a visit to REBA headquarters in downtown Boston to attend a section program in person is not feasible.

Our section chairs have embraced the idea of opening their meetings to an ever-wider audience; this September, REBA hosted more open section meetings than it ever had before. IT manager Bob Gaudette has worked tirelessly to improve the audio and video quality of our webcasts, and efforts are underway to build out our website to support CLE accreditation for the excellent programming REBA's sections are providing to our members every month.

At the time of this writing, there are plenty of reasons to be optimistic. Membership has increased since this time last year. REBA's new website, launched under Susan LaRose's leadership at the end of last year, has had over 30,000 visits. The roster of attorneys volunteering to serve as section chairs and board members is, once again, reflective of the very best and most knowledgeable attorneys to make up the Massachusetts real estate bar.

Best of all, REBA crosses the threshold into a new year in great hands, as we welcome incoming President Diane Rubin. Diane has long contributed to REBA in many ways — along with Clive Martin, she's been one half of the dynamic duo that makes our Condominium Law section so successful; she's actively participated in our Women's Networking Group; she serves as a neutral for REBA Dispute Resolution; and not least, she's been a steady leader and helpful sounding board for yours truly. REBA is extremely fortunate to have Diane at the helm in 2018.

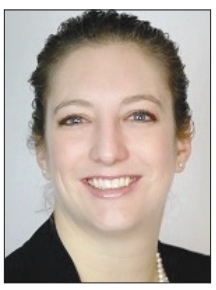
Back to Janus for a second. He is traditionally pictured as having two faces: one looks forward, the other faces the opposite direction. At REBA, looking backward still points us forward; many of our former presidents continue to help the association thrive and progress. Particular thanks are due to Susan LaRose and Michelle Simons for their invaluable guidance, support and leadership throughout the past year.

Finally, there are the people who truly carry REBA across the threshold every year. Our executive director, Peter Wittenborg, and our COO, Nicole Cohen, are invaluable to the success of the organization, not just this year but every year. Thank you, Peter and Nicole, thank you for everything.

And so, once again, REBA finds itself at the doorway, with a future full of promise and a recent past full of accomplishments. It has been a privilege to be a part of this year's success. Thank you for the opportunity to serve the association as president. The door's open: let's keep moving forward.

'Unit owner, tear down that addition'

BY KATHLEEN M. HEYER



Condominium unit owners: your exclusive common area, though for your use alone, may not be the grounds (literally) for an addition to your unit.

The Appeals Court recently held in *Calvao v. Raspallo*, 92 Mass. App. Ct. 350 (2017), that "a unit owner may not annex exclusive use common area to her unit without the unanimous consent of the other unit owners holding a legal interest in that common area." The unit owner, Kathleen Raspallo, had appealed from a Superior Court judgment ordering her to physically remove the addition she had constructed, despite the fact that the addition was completely within the common area dedicated to her unit's exclusive use.

Raspallo owned Unit 2 in a two-unit condominium. Prior to pulling permits for her addition, Raspallo had the developer appoint her as sole trustee, which the Superior Court found violated the master deed, and constructed the addition over the objections of the owners of Unit 1, the Calvaos. The Calvaos then filed suit.

Despite the statutory requirement that unanimous consent of all condominium owners is necessary for expansion of a condominium unit into a common area, Raspallo argued that this requirement was not applicable where the common area in question was dedicated to one unit's exclusive use and the trustees (but not necessarily all unit owners) consented to the expansion.

The Appeals Court concluded that "Raspallo's view would allow condominium trustees unilaterally to eliminate an owner's undivided interest in portions of the common areas, thus negating the essence of condominium ownership," and "that a unit owner has legal ownership of the common areas, whether or not they are for the exclusive use of another unit, and cannot be deprived of that ownership without her consent."

Therefore, although practically the exclusive common area was only available for Raspallo's use, she could not acquire a fee interest in it solely with the permission of the trustee (in this case, herself).

This conclusion both seems contradictory and makes perfect sense. It seems contradictory because the exclusive common area is just that — exclusive use for the benefit of solely the corresponding unit owner. However, "use" is only one of the sticks in the bundle that makes up property rights.

Here, by statute the other unit owner has an undivided ownership interest in the common area, even that common area exclusively set aside for the benefit of Raspallo. Therefore, this decision makes perfect sense, as it preserves the ownership rights of the other unit owner, despite those rights having limited practical purpose.

Compounding the legal loss, the court affirmed that Raspallo must remove the addition at her own expense, which was estimated to run into the tens of thousands of dollars. And the court restricted Raspallo's use of her own unit pursuant to a section of the master deed that stated "except for Unit 1 [the Calvaos' unit], which may be occupied on a year round basis, no Unit may be occupied between November 30th of one year and March 15th of the succeeding year, except that Owners may occupy Units during said period during weekends, holidays and for customary second home recreational use."

Based on this, the court enjoined Raspallo from living in her condominium unit year-round. This case should also serve as a reminder that, while the condominium documents are very important and determine much of how the condominium functions, in instances where the condominium documents conflict with the provisions of G.L.c. 183A, the statute controls.

An active Association member, participating in several REBA sections, Kathleen practices with the Andover firm of Johnson & Borenstein LLC. Prior to joining the firm she spent a year as a legal fellow for Land Court Associate Justice Harry M. Grossman. She can be contacted at kathleen.heyer@jbllclaw.com.

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MISSION STATEMENT

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

MENTORING STATEMENT

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

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As the transit oriented development world turns. . . .

BY BOB RUZZO

"The pessimist complains about the wind; the optimist expects it to change; the realist adjusts the sails." — William Arthur Ward

Sometimes, reality can get a little daunting if one is not sufficiently careful. Witness two recent presentations touching upon the present state of rail transportation, particularly commuter rail, and transit oriented development ("TOD") opportunities associated with our commuter rail system.

THE HOUSING WATCH

The first, as reported in Commonwealth magazine, was a gathering of eight experts from around the country and the world that had been convened by U.S. Rep. Seth Moulton and assembled by the Urban Land Institute to spend an intensive week "gathering information on the North South Rail Link and the region's transportation infrastructure." Kudos to the Massachusetts Competitive Partnership for funding this study.

While it is the belief here that within the soulless cracked asphalt of every "park-and-ride" lot, there beats the heart of a "live-and-ride" community yearning to breathe free, that is not going to happen overnight.

Part of the discussion focused on the state of TOD at commuter rail locations. As reported by Commonwealth, Robert Ravelli, a director at Contemporary Solutions in London, was quoted as saying the panel members saw the "commuter rail system as an untapped resource… a lost opportunity." He urged close examination of TOD possibilities at all commuter rail stations, many of which, in the words of the Commonwealth article, "are just rudimentary stations with big parking lots next to them."

On the other hand, one week later at a Regional Real Estate Development Leadership Council meeting of the Greater Boston Chamber of Commerce, a MassDOT/MBTA presentation noted past successes, current projects and future potential for just the kind of development called for by the ULI Study group.

In a candid assessment examining both successes and failures, development projects on publicly owned land were addressed in some detail. A number of these developments included the transformation of either commuter rail or end-of-the-line park-and-ride facilities, including Arbor Point at Woodland station in Newton, the Carruth at Ashmont Station, Forest Hills, Mattapan High Speed Rail, Beverly Depot and Greenbush station. Those developments run the gamut from completed to proceeding apace to struggling, but still chugging along.

How can both the (relatively) optimistic picture offered by MassDOT and the critique of the ULI study both ring true?

Three factors are worth remembering.

First, the universe is a pretty big place. The MBTA alone has more than 300 rapid transit, commuter rail and bus rapid transit stations. Within a half-mile radius of these stations, you will find 25 percent of the region's housing and 37 percent of the region's jobs, all on about 5 percent of the region's total land area.

Regional transit authorities add further to the number of potential TOD locations. There is plenty of room within that universe for MassDOT to report its hard-won successes and for others to clamor for more to be done.

While it is the belief here that within the soulless cracked asphalt of every "park-and-ride" lot, there beats the heart of a "live-and-ride" community yearning to breathe free, that is not going to happen overnight. But it does have to happen.

BY PI.1415926535 VIA WIKIMEDIA COMMONS

Second, every opportunity a developer envisions at a commuter rail stop brings an operational challenge with it. Operational issues, much like an offensive line in football, really only get the attention they truly deserve during periods of failure (real or perceived).

Construction, however, is by nature a disruptive event, and commuting habits are just that, habits. A disruption to the anticipated availability of parking due to construction brings with it the potential to raise the ire (and change the habits) of an (unquestionably) impacted ridership.

And unlike, for example, escalator maintenance, construction period impacts have an extremely long duration. It is therefore not surprising that many of the TOD successes to date have occurred at locations were there was in fact a surplus of parking.

Third, the MBTA is in fact frequently in competition with its neighbors. Typically, though not always, park-and-ride facilities are in a premier locations with respect to the transit location; however, adjacent parcels in private hands nonetheless represent advantageous development opportunities, ones that come: (1) without the public procurement obligations and (2) blissfully removed from operational concerns.

And, for good measure, you can add in the customary challenges any development encounters in the entitlement process in Massachusetts. For example, the "friendly Chapter 40B" process that resulted in Arbor Point at Woodland Station came at the end of a 10-year development effort.

What would help?

Greater planning resources for both the MBTA and host communities alike would be useful in site prioritization and co-ordination of the interests of competing properties, particularly in exploring potential temporary or "swing space" parking solutions.

While the attributes of our Comprehensive Permit Law (including its robust potential as a redevelopment tool) are routinely applauded in this space, TOD locations would benefit most from a thoughtful planning process and planning-based zoning amendments thereafter, including but not limited to Chapter 40R Overlay Districts.

Despite all of its challenges, interest in TOD continues unabated. In many respects, TOD is riding a third great transit wave. The first wave arrived upon the electrification of previously horse-drawn streetcars and the resulting proliferation of streetcar suburbs; the second sizzled during the war years of the 1940s (representing the transportation equivalent of "the last days of disco" before the onset of suburban supremacy); and now the third wave continues to build as the combined result of animus against further development of green fields and exasperation with the congested state of the nation's highways.

TOD's future? As a commonwealth, we are in it for the long haul. Let's adjust the sails and continue forward.

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

Why I'm a REBA member

When it comes to considering joining a bar association, REBA is the gold standard for real estate practitioners. Not only is there literally "something for everyone" who practices in the field of real estate law, but the resources that are provided are of the highest quality. Whether you are seeking precise technical guidance on an intricate title matter, reaching out to an experienced fellow practitioner for advice, or desperately seeking a well-grounded neutral to resolve a nettlesome dispute, REBA has everything that you are looking for… and more. That's why I am a REBA member, and that's why you should be one too.

Robert M. Ruzzo
Holland & Knight, LLP, Boston
Member since 1985

New deed indexing standards coming soon

BY RICHARD P. HOWE, JR.

In January, the Massachusetts Registers and Assistant Registers of Deeds Association will release a new version of the Deed Indexing Standards for the Commonwealth of Massachusetts. This update will reflect statutory, judicial and technological changes that have occurred over the past decade while retaining much from prior versions of the standards.

Back in the early 1990s, registries of deeds across the country increasingly used computers to perform core functions such as index creation and document reproduction. Because registries back then operated more or less independently, there was considerable variety in the computer systems.

At the same time, many in the conveyancing bar shifted from local to regional practices, which required research and recordings at multiple registries. Finding it difficult enough to master one computer system, registry users began demanding standardization across registries.

Realizing that standardization required common rules of data creation as well as common platforms, the Registers Association formed a standardization committee in 1997. After many meetings and considerable input from users, the standardization committee issued the first version of the Massachusetts Deeds Indexing Standards on Jan. 1, 2000.

That initial version of the standards dealt almost exclusively with how names and addresses were entered in the index. Subsequent versions, issued at the start of 2006 and 2008, grew to include other topics that frequently arose in the recording process. The 2018 version continues that trend.

Here are some highlights: As before, names and addresses will be entered in the index just as they appear in the document presented for recording. However, mandatory abbreviations such as RD for "road" or INC for "incorporated" are still required. One notable change is in the treatment of punctuation marks in names. Formerly, only hyphens were entered in the index. Now, all punctuation marks except for apostrophes will be included. For example, Amazon.com will be indexed as AMAZON.COM.

The permissive approach toward acknowledgements taken outside Massachusetts continues. When a document is acknowledged in another state or country, the registry will assume compliance with the law of that other jurisdiction and will record the document without further inquiry.

Attorney affidavits under G.L.c. 183, §5B, were the subject of debate among registers. Some cited "183/5B" affidavits that encumbered property rather than clarified title, and questioned whether such a document should be recorded. However, because the statute grants authority for making that determination to the lawyer certifying the document, these affidavits will be recorded as long as they are in the proper form.

A long-standing registry rule is that only original documents (or certified copies) may be recorded, but technology is making it increasingly difficult to determine what is an original document. A number of governmental entities now produce documents that are only electronic, leaving it to customers to print the electronic document and present that tangible object to the registry for recording. Under the new standards, such a document would be recordable.

From the *Recording Desk...*

Another long-standing rule modified in 2018 involves certified copies. The person recording the document will now be permitted to annotate its bottom margin with the book and page number of another document to which a marginal reference is to be made.

The new standards seek to clarify the applicability of the deeds excise tax to deeds recorded pursuant to a divorce decree. When such a deed constitutes a division of marital property rather than a sale of an interest in the property, the transfer is not a taxable event even though consideration in excess of $100 may be stated. To assist the registry in making this determination, the deed should specifically state that the consideration indicated is a division of marital assets and list the docket number of the divorce case.

Electronic recording has its own section in the new standards, incorporating many of the requirements contained in the submitter agreements already used by some registries. Other sections reflect recent statutory changes such as foreclosures, multifunction documents, homesteads and time of recording.

Finally, the new standards include a separate section on liens to emphasize that absent some statutory authority to the contrary, as in the case of mechanic's liens or condominium fees, judicial authorization is required before a document creating an encumbrance may be recorded.

The new standards are scheduled to take effect on Jan. 1, 2018. Between now and then, the Registers Association welcomes feedback on the standards, which are available on the REBA website at www.reba.net/about-us/sections-committees/sections/registries-section/2018draftindex/

Please send your comments to me at richard.howe@sec.state.ma.us.

Dick Howe's column, "From the Recording Desk...," is a regular feature of REBA News. Dick has served as register of deeds in the Middlesex North Registry since 1995. He is a frequent commentator on land records issues and real estate news. Dick can be contacted by email at richard.howe@sec.state.ma.us.

Restaurant leasing in mixed-use developments

BY DANIEL E. ROTTENBERG AND RICHARD HELLER

For many mixed-use developments, restaurants have become the new mini-anchors. With brick-and-mortar retail tenants facing significant challenges from e-commerce, landlords have increasingly turned to restaurants to attract businesses and consumers to their mixed-use projects.

These mixed-use projects often include residential units, offices, hotels, and even medical facilities and health clubs, all in an effort to create a vibrant, self-contained living experience. In this dynamic setting, the restaurant tenant's leasing attorney must not only deal with the typical restaurant leasing issues, but also with the interaction between the restaurant tenant's unique construction and operational needs and these other uses.

This article will address some of the key issues that the restaurant tenant's leasing attorney will need to consider during the lease negotiation process, including construction, operations, parking, permitted use and exclusive provisions and signage.

In addressing these issues, the tenant's leasing attorney should bear in mind the significant investment being made by the restauranteur and the client's need for concept flexibility. In addition, the lease should address an exit strategy in case the restaurant does not succeed, since consumers are notorious for being fickle.

Construction

The most critical task for the restaurant tenant's leasing attorney is to work closely with the tenant at the outset in assisting with the due diligence necessary to ensure a successful restaurant operation. The construction of a restaurant is expensive and time-consuming. Working with the tenant and its design and construction team, the tenant's attorney can help identify construction- related issues at the outset of a new project.

- **Utilities**

For example, determining the available capacity and location of the utilities is critical at an early stage. Restaurants need electrical capacity (including a conduit suitable to accommodate a single feeder for electrical service capable of providing up to 600 amps at 277/480V, or if primary service 120/280V, 1200 amps), a sanitary and sewer line (usually a minimum of 4"), a domestic water line (usually a minimum of 2"), a gas line and a grease trap.

With respect to the grease trap, several factors should be considered. Will it be point-of-use or will the municipality require a separate external grease trap? If a separate external grease trap is required, will it be shared with other tenants? If so, where will it be located; who will maintain it, and how will the costs be allocated?

These are critical questions for a tenant's leasing attorney to identify during the due diligence stage of a lease negotiation. Similar attention may be given to the restaurant tenant's utility lines. It is imperative, for example, to determine which party is responsible for bringing the various utility lines to an appropriate point in the restaurant.

In a mixed-use development, there are many different types of users, making the process of bringing the conduits to the restaurant expensive. In addition, the maintenance and repair requirements and obligations in the lease should be well-defined.

For instance, if the tenant is responsible for repair and maintenance of the line, and must access the utility line either through the hotel or residential units, how will that be accomplished? Will the tenant have an easement to access the lines? Similarly, the lease will need to address how repairs to the utility lines will be accomplished in cases of emergency.

- **HVAC system**

The HVAC system and the appropriate fire suppression/sprinkler system are also critical for a successful restaurant operation. In a mixed-use development, the size of the HVAC system (required to supply the appropriate tonnage) and the placement of the system will undoubtedly affect other tenants. If the system is placed on the roof, the location of the venting is critical in order to avoid odors being sucked into the other premises, e.g., residential units, hotels, or medical facilities.

In a mixed-use development, there are many different types of users, making the process of bringing the conduits to the restaurant expensive.

If the tenant's HVAC is part of a central building system, then important issues arise with respect to how usage will be measured and allocated between the applicable parties. With respect to the fire suppression/sprinkler system, it should be determined at the outset if it is independent or tied to the building system.

In developments where such a system is tied to a central fire suppression/sprinkler building system, the system may be triggered by actions of another user tied into the system. This could be highly problematic for a restaurant, where the activation of an alarm could cause the loss of business and product.

- **Odors**

Restaurants must also deal with odor control, which can be a particularly sensitive issue in a mixed-use development that has office, hotel or residential space in close proximity. The first consideration is whether the landlord will require an odor control system. If so, what type of system will be required; where will it be located, and what are the associated costs?

If the system is too big to be in the restaurant and must be placed outside, the attorney should ensure that there are no underlying restrictions preventing such placement. Also, how will the odors be measured, since a smell may be odious to one individual but not problematic to another? It will be important for the lease to include some objective criteria on this point, such as providing that so long as the odor control system is operating within the stated requirements, then the obligation to remediate an offensive odor would rest with the landlord.

- **Hot water**

During the construction due diligence phase, the restaurant tenant's leasing attorney should also review the proposed hot water system for the premises to ensure its adequacy. If the restaurant is located on the ground level with residences or hotel rooms directly above, a gas-fired hot water system will require access to the flue to ensure that it is properly cleaned and maintained to avoid a dangerous condition.

The lease will need to address how the flue will be accessed and by whom. In many cases, it may be more appropriate to install an electric hot water heater.

- **Timing**

Once the utility requirements have been determined, the timing of construction is particularly critical in a mixed-use development. The lease will need to address when construction should begin.

For example, will construction commencement be triggered by the completion and occupancy of the project's residential units or hotel? Will the restaurant be required to commence construction only after a certain number of other restaurants have done so? What amenities in the common area will be required to complete construction?

These timing issues are particularly important in a restaurant lease, since the cost of delay and interruption in restaurant construction is far too great.

Operations

- **Hours**

More so than with a standard retail lease, a restaurant lease requires the tenant's leasing attorney to take time during the due diligence phase to understand the restaurant's ongoing operational needs, particularly in a mixed-use environment.

For example, the hours of operation should be assessed at the outset of due diligence because this will have a significant bearing on both the restaurant's interior operation and exterior patio. If the restaurant expects to operate a patio, the lease will need to address what hours it can operate and whether music, live or otherwise, and televisions will be permitted. Inquiry should also be made to the municipality to identify any additional restrictions.

The leasing attorney must also consider how the hours of operation and use of the patio will affect any adjacent uses. Unruly guests leaving the restaurant may be bothersome to residential neighbors and the impact of lighting the patio should also be considered. In addition, the leasing attorney should be aware of any underlying documents (such as a reciprocal easement agreement or condominium documents) that could further restrict the operations of a patio area.

- **Deliveries**

Another key operational issue in a mixed-use project is the mechanics for product delivery. Hours of delivery must be assessed at the outset of any lease negotiation. Restaurants require frequent deliveries of fresh product and beer and wine (assuming there is a liquor license); any restrictions on such timing, so as to not disturb any neighboring residences, could be problematic.

The leasing attorney should also understand whether there will be a central loading dock to be shared with other users, such as a hotel or the residential units. In a central loading dock situation, conflicts may arise as to the use of the loading dock and who has priority. Any restrictions on the use of the central loading dock, such as a limitation on the size of the delivery trucks, could be troublesome to the restaurant and its suppliers. The leasing attorney should also look into whether any permits are required to make deliveries.

- **Trash**

The storage and removal of trash is extremely important in a mixed-use setting. Restaurants generate a great deal of trash, both wet and dry, so the location of trash storage and the frequency and timing of trash removal are critical.

Again, the leasing attorney should ask several questions. Must trash be stored within the restaurant until re-

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Vinnie appreciates the finer point of title exams

BY PAUL F. ALPHEN

My cousin Vinnie, the suburban real estate attorney, joined the gang in the Man Cave for a recent Patriots' game. He brought some terrible beer, suitable for his own personal consumption, which was fine because nobody else wanted to drink it.

I am sure the smoked brisket made the beer taste better, because smoked meat makes everything better. After the victory, Vinnie hung around with the die-hard football fans to watch "Red Zone" and eat cookies. Only then did he start regaling us with stories from his small-town practice.

"Paulie, I don't know if you have noticed, but it seems to me that our brothers and sisters of the bar have upped their standards when it comes to reviewing title exams. I have been very pleased to see more requests that sellers need to obtain confirmatory discharges, or need to record missing trusts and cure deed descriptions. Until a few years ago, it was as if we were expected to accept anything, including discharges from the first cousin of a mortgage holder, but now that things have settled down, it seems that there is more attention to detail and a greater expectation of precision."

I told Vinnie that I had noticed the same trend, and I told him about a deed that came across my desk last week from the assignee of an assignee of a foreclosing entity, with one of those crazy long names with a "certificate series number" signed via POA. The POA *may* have provided authority to execute and deliver deeds, but for some reason the drafter of the POA did not know how to type the words "and execute and deliver deeds."

Contemplations, Ruminations and Musings of a Country Lawyer

Vinnie declined an offer for a taste of some Eagle Rare bourbon and held on to his crappy beer. "It's a conundrum," Vinnie continued. "If three owners ago a trustee's certificate was not perfect, and all the trustees died, but the title was buttressed with attorney's affidavits, certificates of appointments and acceptance, a new certificate plus the passage of 10 years, I suppose you can complain that the title is not perfect, but somewhere you have to apply a reasonableness standard. On the other hand, if the parties are alive and available to sign corrective documents, I will usually insist that we obtain and record corrective documents; and I usually end up drafting all the corrective documents and confirmatory deeds."

Vinnie continued: "And, the other thing that is happening is that subdivisions that sat dormant since the Great Recession are coming back to life. But unfortunately the land owners are attempting to sell expensive lots only to discover that the septic regulations have changed, or the wetlands have migrated, or orders of conditions have lapsed. On more than one occasion I have seen land owners attempt to sell pricy lots, but in the course of my title exam I found conditions of approval that were long forgotten by the seller/developer, including lapsed special permits, and missing easements or restrictions that still require review by learned town counsel. Talk about delays to the closing!"

My buddy Chip told us to stop talking shop, and pay attention to the games. He had a point. There would be plenty of time to contemplate the fine details of a 2-inch-thick title exam on Monday morning.

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

Why I'm a REBA member

On the first day of my first job as an attorney, in 1985, I became a member of the Massachusetts Conveyancers Association. Having the Standards and Forms to refer to has been invaluable to my small practice; having them to rely upon is like being able to run something by an infallible seasoned expert. The spring and fall meetings provide us with the opportunity to break bread with our brothers and sisters, and they are an essential source of CLE. The case law updates by Phil Lapatin are alone worth the price of admission. I have no idea how anyone practices real estate related law without the resources and CLE provided by REBA.

Paul F. Alphen
Alphen & Santos, PC, Westford
Member since 1985

Restaurant leasing in mixed-use developments

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moval? If so, how will that affect the layout and utilization of the restaurant space? If trash can be stored outside, where will the receptacles be located, and is there a limitation on the size of the containers?

Safeguards against noise and odor in the trash storage and removal process should also be considered. While controls on noise and pests are important to a landlord in any restaurant lease, the need for such controls can become heightened in a mixed-use setting. If there are residences above the restaurant, a noise-baffling system may be required. More frequent extermination may also be required, given the potential impact on the other users.

All of these additional requirements affect the cost of a restaurant's operation and should be given careful attention.

Parking

Parking issues can also be more complicated in a mixed-use environment because of the need to integrate different types of parking users.

Residents are more likely to use their cars during the day, creating more vacant spaces during daytime hours, but less availability in the evening. On the other hand, users of a medical facility or health club are more likely to use the spaces during the day, rather than at night. It is imperative to include a parking plan as an exhibit to the lease at the outset of a negotiation.

Another important factor is whether the restaurant will be entitled to exclusive use of any parking spaces. If such exclusivity is prohibited, it may be possible for the restaurant to require the landlord to post signs indicating that certain spaces can be used by the restaurant patrons.

The availability of "take-out" parking spaces to be used by restaurant patrons for short-term parking should also be considered, as well as whether there is an opportunity for valet parking. If valet service is available, it will be important to determine where the cars can be parked and how long it will take the valet service to retrieve the cars.

The lease will also need to address what happens if the number of parking spaces ever gets reduced, either permanently or for a period of time, such as in connection with construction of an additional project phase. The location of parking for the restaurant's employees will also be an important consideration.

Permitted use and exclusives

Use and exclusive protections, tenant mix, and exit strategies can be particularly thorny issues in a mixed-use community, where the landlord has taken great pains to integrate the many users.

Since restaurants can serve — and are often treated — as mini-anchors, the quid pro quo for the restaurant tenant's economic benefits is often a requirement that the tenant operate continuously and under a specific use. From the landlord's perspective, the restaurant is an important asset to the mixed-use community and serves as an inducement to attract residents. On the other hand, the restaurateur requires concept flexibility and an exit strategy in case expectations do not match reality.

One potentially viable solution that addresses both concerns is to require the tenant to operate under its intended use for a fixed period, usually five years, and, thereafter, permit the tenant to have an expanded-use clause for any restaurant use. This will allow the tenant flexibility to change its use if the consumer demands, and, at the same time, allow for a potential exit strategy under the assignment of lease provision.

If the landlord requests this use requirement, the tenant may request an exclusive-use provision. The protections and pitfalls of an exclusive are, for the most part, similar to those in restaurant leases generally. In mixed-use communities, however, the tenant needs to ensure that it is protected from future violations if the construction of the community is phased, making sure that the exclusivity applies to all phases.

In addition, if a hotel is contemplated, the exclusive should prevent the hotel operator from operating a comparable restaurant. In urban mixed-use projects, there may be limited space for the operation of multiple restaurants — for instance, if the restaurant is located in the ground level of a mixed-use residence.

The restaurant tenant may also require that seating in any other restaurants be limited, particularly if the restaurant intends to have a strong bar business. The restaurant operator may also want to limit the number of bar seats in any adjacent restaurant.

Signage

Signage is critical to the restaurateur, as the signage directly reflects the restaurant's concept and image. In mixed-use communities, signage is also especially important to the landlord.

Placement, size, type of lighting, location and number of signs will have an impact on the look and feel of the community. If the restaurant tenant is, in fact, a mini-anchor, the landlord will likely be more amenable to working in concert with the tenant to create a look and feel — through signage as well as other branding elements — that will attract multiple users to the community. For example, the landlord may be open to the creation of a tasteful decorative structure or mural, depending upon the concept.

If the restaurant tenant is, in fact, a mini-anchor, the landlord will likely be more amenable to working in concert with the tenant to create a look and feel that will attract multiple users to the community.

Conclusion

Restaurants are a hot commodity now and a key component to a successful mixed-use project, adding much desired foot traffic and vitality. It is important for landlords and tenants to work together to accommodate each other's particular needs in the hope of creating a vibrant, integrated community that benefits all parties.

Keeping these core issues in mind during the negotiation process will help a restaurant tenant's leasing attorney create a lease that can become the backbone to a successful restaurant project.

This article originally appeared in Shopping Center Law and Strategy, published by the International Council of Shopping Centers, Inc., 1221 Avenue of the Americas, New York, N.Y. 10020; www.icsc.org.

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Co-chair of REBA's Commercial Leasing Section, Richard Heller is senior vice president and general counsel of Legal Sea Foods. Rick is responsible for business planning and commercial real estate. He is also a member of, and has presented numerous Restaurant Leasing Programs at, the International Council of Shopping Centers ("ICSC") Law Conferences. He can be reached at rheller@legalseafoods.com.

An encomium for Jackie Waters Adams

Conveyancing is in Jackie's DNA!

Her grandfather, James A. Waters, began practicing real estate law in Newton Center in 1908. Many of our members remember Jackie's dad, James P. D. Waters, known as Jimmy, who joined his father's practice, which became known as Waters & Waters in 1958, after two years of Navy service in the Korean War and graduating from Boston College Law School.

Jackie worked in the family firm as a paralegal in 1976, after receiving her B.A, *cum laude,* from Boston College. During her time at Waters & Waters, Jackie also earned paralegal certifications from Bentley College in four disciplines. She continued at the family firm until 2004, when Jim Waters retired. Following her dad's retirement, Jackie spent the next two years coordinating the winding down and dissolution of the family firm.

Not long thereafter, she joined REBA's predecessor, the Massachusetts Conveyancers Association. When REBA launched its Paralegal Committee, today known as the Paralegal Section, in 2013, Jackie was the obvious choice to lead the new group.

JACKIE WATERS ADAMS

Jackie's son James, who is here with us today, follows the family's real estate legacy. After graduating from Boston College law school last June as *salutatorian*, he joined the Boston-headquartered international law firm Goodwin (still known to many of us as Goodwin Procter!) earlier this year.

In the intervening years, Jackie led the Paralegal Section while also serving in the leadership of the Massachusetts Paralegal Association. Today, both groups enjoy a close collaborative relationship and co-host continuing education programs. She has also been a real estate law instructor at the Boston University Metropolitan College Paralegal Studies Program for about a year now, teaching the course on a semi-annual basis.

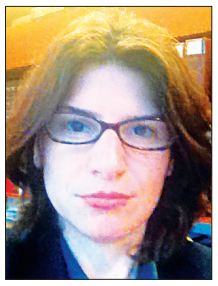
Jackie has been an extremely active member of REBA's Continuing Education Section, participating in various breakout sessions at the association's all-day conferences. I should add that she is a fanatical advocate for REBA membership and we can attribute many new members to her enthusiastic efforts.

In profound appreciation of Jackie's passionate support of the Real Estate Bar Association, I am proud to offer her this recognition of her service.

Editor's Note: This message was part of the luncheon program at the Association's annual meeting and conference on November 6.

Condominium issues in the 21st century

BY SAUL J. FELDMAN
AND ANGEL K. MOZINA

In this article, we are going to discuss current condominium issues:

Marijuana

Although legal in Massachusetts, marijuana remains illegal under federal law. Some condominium associations have asked for us to draft language making marijuana illegal except for medical purposes. Other associations have asked us to draft language making marijuana legal for recreational and medical uses.

This issue of marijuana can be covered as part of a "no smoking" prohibition. For example, a prohibition against smoking except in an outdoor gazebo may encompass marijuana. These regulations can apply to both common areas and individual units.

Online home-sharing sites

The huge increase in use of Airbnb, HomeAway and other online home-sharing sites has led associations and developers to wonder about whether to modify documents regarding short-term rentals of condominium units.

The short-term rental may be for an entire condominium unit or just for a single room within the condominium unit. This practice may violate a town's zoning bylaws, because a property may not be used for a commercial enterprise in a single-family zoning district.

Notwithstanding such a zoning prohibition, in our opinion, the condominium documents should also address this issue as it affects insurance coverage, and taxation of these properties, similar to the taxation of hotels and motels.

Mixed-use condominiums

The common belief is that tensions between unit owners in a mixed-use condominium often lead to total dysfunction in the condominium. We want to demonstrate that it is often possible to resolve the differences between the various owners. We will do this by exploring a common fact pattern.

The tensions are between:

(1) the condominium association in a mixed-use building with residential units in most of the building, and

(2) the owner of the restaurant unit.

In this example, there is a restaurant operating on the first floor of the building with the next several floors occupied by residential units.

The restaurant wants to obtain a liquor license and convert the restaurant into a sports bar, which will, of course, generate even more noise. Under the condominium documents, a restaurant is allowed, but a sports bar is not allowed. The zoning allows for both a restaurant and a sports bar.

On the surface, this may seem like an unresolvable disagreement between the owner of the restaurant unit and the condominium trustees. The trustees could hold firm and not allow the sports bar. If the restaurant goes ahead and converts the use to a sports bar, the parties will end up in years of litigation.

Eventually, the trustees may win and the restaurant may lose. However, in reality neither party will win. The costs of litigation in this case could be in excess of $200,000. This just happens to be the cost of proper sound-proofing. The solution is for the two parties to come to an agreement on proper sound-proofing of the ceiling of the restaurant unit. The cost should, of course, be borne solely by the restaurant.

The agreement will also be signed by as many of the unit owners as possible. The condominium trust must indemnify the owner of the restaurant unit against claims by any of the unit owners who fail to sign the settlement agreement.

This fact pattern is quite common in Boston and other urban areas throughout the United States. Our point is that most tensions in a mixed-use condominium can be settled and need not lead to dysfunction and litigation.

Small condominiums

A small condominium (two to four units) is really a joint venture — a general partnership limited to one project. The "project" is the operation of the condominium.

The condominium documents should be made as simple as possible.

There should also be a mechanism to settle disputes. I would recommend mediation and arbitration. REBA is set up to do both.

Each unit owner should be a trustee. Decisions should require a 100 percent vote of the trustees and unit owners. Sometimes this can present a challenge.

Regarding collections in a two-unit condominium, the documents should give one trustee the ability to sue the delinquent unit owner who fails to pay after 60 days' notice from the trustee of the other unit.

Ideally, the units should be kept as separate as possible. For example, yard areas could be exclusive-use areas if that is what the unit owners want.

The rules and regulations that are on exhibit in the condominium trust should be as simple as possible.

The master insurance policy should be an "all in" policy that covers the units as well as the common areas. Each owner should get his own insurance as well, just for the contents of the unit and for liability within the unit.

Problems such as budgets, tenants, noise, smoking, collections and pets must be carefully addressed in the master deed or condominium bylaws.

There are some people who do not belong in a condominium. With a little luck, these people will not be in the condominium. If they are unit owners, you should expect trouble and we are not convinced that even the best drafted documents will be of any help.

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

Article 97 jurisprudence advanced in Westfield ruling

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ings for the proposition that only land taken, acquired or specifically designated for Article 97 purposes through deed or other recorded restriction qualifies for Article 97 protection.

The plaintiffs appealed. The SJC vacated the judgment for the city and remanded the case to the Superior Court for a judgment in favor of the plaintiffs. The ruling means the city must secure passage of an Article 97 bill by a two-thirds roll-call vote of both the Massachusetts House and Senate in order to change the land from playground to school use.

The SJC began its discussion by explicitly rejecting the argument that land not originally taken or otherwise acquired for Article 97 purposes would need a formal recording in the Registry of Deeds in order to trigger Article 97 protection. Although recording a deed or conservation restriction is one way to ensure Article 97 protection, the court made clear that "it is not the only way."

The SJC analyzed common law doctrines to offer context and to identify other ways in which municipal land may be designated for Article 97 purposes "in a manner sufficient to invoke" Article 97 protection.

The SJC grounded its analysis in Article 97's common law roots, explaining that "[t]he consequence of art. 97's ratification was that 'plain and explicit legislation authorizing the diversion' of public parkland under the prior public use doctrine, which previously could be enacted by a bare majority of the Legislature, now required a two-thirds vote of each branch."

The court concluded that Article 97 protection extends to parkland "dedicated by municipalities as public parks that, under the prior public use doctrine, cannot be sold or devoted to another public use without plain and explicit legislative authority." Specifically, "[L]and is dedicated to the public as a public park when the landowner's intent to do so is clear and unequivocal, and when the public accepts such use by actually using the land as a public park."

There are limits to this rule, the SJC added. Open space used as a park or playground temporarily, for example, would not trigger Article 97 protection, because there is no clear and unequivocal dedication for permanent use as a public park.

The court considered "the totality of the circumstances," meaning all relevant facts, in weighing whether the city clearly and unequivocally dedicated the Cross Street Playground to the public as a public park. The "determinative factor" in this case was the city's acceptance of LWCF grant money to rehabilitate the playground. A controlling statute prohibited the city from converting the playground to any use other than public outdoor recreation without federal approval, so the playground was clearly and unequivocally dedicated as a public park by virtue of the city accepting those funds.

The ruling is a victory for environmentalists and proponents of open space and outdoor recreation, as illustrated by the amicus briefs filed in support of the plaintiffs by the Massachusetts Association of Conservation Commissions (MACC), Conservation Law Foundation of New England, Inc. (CLF), The Trustees of Reservations (TTOR), Association to Preserve Cape Cod (APCC), Massachusetts Audubon Society, Massachusetts Land Trust Coalition (MLTC), Massachusetts Attorney General and Sanjoy Mahajan (lead plaintiff in another Article 97 case, *Mahajan v. Dept. of Envtl. Protection*).

This case offers several lessons for attorneys representing municipalities, land trusts or other conservation organizations, and private parties involved in donating or acquiring municipal land.

First, look to the chain of title. Certain actions do categorically designate land for Article 97 purposes, such as language in the deed or order of taking, a contemporaneous or subsequent conservation restriction, or a similar encumbrance for historic preservation or agricultural use.

Second, look to whether the municipality has accepted federal or state grant money or funds restricting future use of the land, which is quite common. Examples include federal LWCF grants and state Parkland Acquisitions and Renovations for Communities Program (PARC) monies, formerly the so-called Self-Help Program.

Third, look to town hall records of town meeting actions or other formal dedication of land following acquisition. These may include transferring the care, custody and control of the land to a municipal conservation commission, park department, water supply department or forest division.

Fourth, look to common sense. The SJC made clear that reviewing courts should consider "the totality of the circumstances" in determining whether a municipality has clearly and unequivocally dedicated open space to the public as a public park. While an individual action may carry relatively little weight, it might tip the scales if viewed together with other steps taken over time.

As the prescient SJC said in *Mahajan*, "[T]he ultimate use to which the land is put may provide the best evidence of the purposes of the taking" or other acquisition by a city or town.

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

Discovery due diligence yields favorable Land Court outcome

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portion, consisting of approximately 3 acres and lacking street frontage, is located in Millbury's Suburban IV Zoning District. PJM was using the property to store approximately 40 live-floor trailers, which it employs to haul municipal solid waste. As HAYR utilized its neighboring property, it began to experience harms associated with significant truck noise and odors.

Experiencing impacts from PJM's use of its property, HAYR investigated to determine whether the use thereof was lawful. HAYR's research revealed that use of the property as a trucking terminal was not permissible in Millbury's Suburban IV Zoning District and sought zoning relief.

Millbury's Zoning Enforcement Officer responded to the request, issuing a cease and desist order to PJM. PJM subsequently appealed the cease and desist order to the Board of Appeals, which rendered two decisions — first, a decision purporting to grant a variance to authorize the ongoing use of the PJM property as a trucking terminal; and second, a corrected decision purporting to overturn the cease and desist order and finding that the use of the property as a truck terminal had

existed since the mid-1970s, was preexisting, nonconforming, and could be continued as a matter of right. HAYR appealed both Board of Appeals decisions to the Land Court.

As a preliminary matter, HAYR sought to identify the effective date of the zoning bylaw that rendered PJM's use of its property lawfully preexisting, nonconforming. The Board of Appeals had apparently acted upon the belief that the relevant date was April 1981.

In conducting discovery, HAYR obtained all the zoning amendments and zoning maps relevant to the Suburban IV District from Millbury. Those documents revealed that, since the initial adoption of the town's zoning bylaw in 1957, the use of PJM's property as a trucking terminal and/or as a contractor's yard had never been permissible in the Suburban IV District. This meant that, in order for PJM to establish that its use was preexisting and nonconforming, it would need to trace its use back to the mid-1950s, rather than the mid-1970s.

After identifying the effective date of the applicable zoning bylaw, HAYR moved for summary judgment on the basis that, on the undisputed facts in the record, PJM would be unable to satisfy its burden at trial to satisfy the *Powers* test.

> Aerial photographs dating back to 1938 clearly and indisputably demonstrated a significant expansion and change in the use of the property from the mid-1950s to present day.

Powers sets forth the standard for determining whether a preexisting, nonconforming use is consistent with the use being undertaken on a property prior to a change in zoning and, therefore, may continue. "A change that is so substantial either in degree or physical expansion so as to constitute, in effect, a different use, will be determined to be 'different in kind' in its effect on the neighborhood, and therefore not entitled to §6 protection."

Viewing the summary judgment record in the light most favorable to PJM, the non-moving party, the court performed an analysis to determine whether PJM's use was consistent with an apparent gasoline filling service use that had been undertaken on the Worcester portion of the PJM property in the mid-1950s.

First, the court analyzed whether there was a difference in the quality, character, and degree of the use. As part of its inquiry, the court noted that the extent of clearing as of 1957 had seen "a pronounced physical expansion" to the present day, necessitating "a finding of change or substantial extension of the degree of use ***as a matter of law***." (Emphasis added.)

Second, the court determined that the current use of the property by PJM did not reflect the nature and purpose of its prior use. HAYR contended that, when zoning was adopted in Millbury in 1957, the site was not used as a truck terminal, construction materials storage yard or anything remotely similar. While PJM countered this contention, it relied upon an unverified report.

Further, the court concluded that, even if it had considered the report, PJM would have fared no better. "A small filling station is no more a cognizable predecessor to a large truck terminal for §6 purposes than a tailor shop doing some cleaning of clothes is to a large dry cleaning plant."

Accordingly, in light of the foregoing determinations, the court found and ruled that "the defendants' current use of the entire Locus as a truck terminal for forty live-floor trailers that transport municipal waste, and storage of other construction vehicles and construction materials, is different in purpose and nature from a use of the property as a gasoline filling station on a small portion of the Locus. Furthermore, the exponential physical expansion of the area occupied would render the current use different in kind in any event."

While this decision is consistent with previous cases discussing the inquiry to be undertaken to determine whether there has been an unlawful change to a preexisting, nonconforming use, it nonetheless sheds light on the importance of using the tools available in discovery to assist in streamlining a case.

Although it was not HAYR's burden to establish that PJM's use of its property was no longer protected as a preexisting, nonconforming use (instead, it is the party claiming protected status as a preexisting, nonconforming use that must prove grandfathering protection), HAYR nonetheless undertook discovery on this issue to identify whether PJM would be able to satisfy its burden.

This investigation revealed that the presumed effective date of the zoning bylaw differed substantially from the actual effective date, and PJM had produced no evidence that would enable it to establish a consistent use dating back to the mid-1950s. It also enabled HAYR to identify the significance of the aerial photographs and the role that they ultimately played in a favorable decision.

Why I'm a REBA member

As a newly admitted attorney, I was encouraged to join REBA by the colleagues at my firm. One piece of advice that I received at that time, which has proven to be true, is that REBA creates the opportunity to be a leader. More than any other bar association that I have been associated with, REBA encourages the involvement of young professionals and constantly seeks out their input to shape the future of the association. There are always opportunities to engage and network with other practitioners — whether it be by participating on a committee or section, attending networking events, or having articles published in REBA News. Since joining the association, I have also been struck by its far reach. While I practice in Braintree, I am on the Zoning Board of Appeals in Falmouth. Not only have attorneys from both areas commented on different articles that they have read in REBA News, but I also have the pleasure of seeing these individuals at the numerous REBA events. It is truly a small real estate bar, and I am tremendously grateful to REBA for fostering the connections that I have made, and will continue to make, as I practice.

Kim Bielan
Moriarty, Troyer & Malloy LLP
Member since 2013

Co-chair of the REBA strategic communications committee, Kim Bielan is an associate in the litigation and zoning and land use departments of the Braintree-based firm of Moriarty, Troyer & Malloy, LLC. She represents a variety of clients, including condominium associations, developers, and individual homeowners. Kim's practice focuses primarily on real estate litigation, with an emphasis on zoning and land use matters. She also represents clients on a variety of real estate permitting matters and frequently appears before municipal boards to permit projects and to represent the interests of abutters and neighborhood groups. She can be contacted by email at kbielan@lawmtm.com.

Decision issued on taxing of partially constructed 'units'

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to differentiate the partially constructed structures at issue in *R.I. Seekonk* based on (1) certain language in the condominium's master deed concerning the subject development rights and (2) the progress of construction performed.

The Massachusetts Condominium Act provides, in pertinent part, as follows:

"Each unit and its interest in the common areas and facilities shall be considered an individual parcel of real estate for the assessment and collection of real estate taxes but the common areas and facilities, the building and the condominium shall not be deemed to be a taxable parcel." G.L.c. 183A, §14

In *Spinnaker Island*, the Appeals Court considered whether municipalities may tax rights retained by the declarant of a condominium to build additional phases of a condominium. In that case, the assessors of Hull assessed real estate taxes on 10 parcels of condominium land where the declarant retained development rights but where units had never been "phased in" to the condominium.

The Appeals Court specifically held that these development rights, which had been reduced to the 10 "expansion parcels," are not subject to real estate taxation under G.L.c. 183A, §14. More specifically, the Appeals Court explicitly provided that "[b]y reason of the unambiguous exclusion in G.L.c. 183A, §14, of common areas from taxation except to condominium unit owners in proportion to their percentage interests, the expansion parcels are not subject, as separate parcels, to real estate taxation."

In *First Main Street*, the assessors of Acton — instead of assessing development rights as "real estate" under G.L.c. 59, §2A, like the assessors of Hull in *Spinnaker Island* — assessed development rights as "present interests" in real estate under G.L.c. 59, §11.

The assessors of Acton contended that the development rights were severable from the underlying fee — that whereas the underlying fee was common area, the retained right to build on that land was not common area (and, therefore, was subject to taxation). The Appeals Court rejected the assessors' argument and held that a declarant's development rights are not taxable as "present interests" in real estate under G.L.c. 59, §11.

The *R.I. Seekonk* case involved the Greenbrier Village Condominium located in Seekonk, Massachusetts. When the condominium was initially created in 2008, it consisted of eight units. Thirteen phases were subsequently added by phasing amendments — eventually creating 31 units at the condominium. The town of Seekonk assessed taxes against the declarant on structures that were under construction and prior to their addition to the condominium as "units" — via master deed phasing amendment.

The Appeals Court held that these partially constructed structures — unlike the development rights at issue in *Spinnaker Island* and *First Main Street* — were properly assessed by Seekonk. The Appeals Court seized upon the fact that language in the condominium's master deed clearly defined the developer's intent to exclude the structures from the condominium's common area.

Indeed, the condominium's master deed specifically provided as follows:

"The Common Areas and Facilities of the Condominium (sometimes herein also referred to as the "Common Elements") consist of the entire Land exclusive of the Units, all as hereinafter described and defined (and exclusive of any and all rights, interests and/or easements reserved by the Declarant), and any other property which is herein expressly included in the Common Areas and Facilities…Until such time as additional Phases are added to the Condominium by the recording of "Phasing Amendments" as described below, any buildings or portions thereof existing on the Land described in Schedule A (other than Phase 1), any other portions of the building(s) shown on the Site Plan, and any land not described in Schedule A shall not be part of the Condominium or subject to the Act, and shall be exclusively owned by, and shall be the exclusive responsibility of the Declarant or other owner thereof."

The Appeals Court in *Spinnaker Island* had specifically provided that "[o]nce it is recognized that the expansion parcels constitute common area of the condominium, it follows that they are not subject to real estate taxation because G.L.c. 183A, §14 … provides that 'common areas and facilities … shall not be deemed to be a taxable parcel."

The Appeals Court in *R.I. Seekonk* reasoned that, where this developer had gone to such lengths to specifically exclude the structures from the common area, the developer was not entitled to the tax exemption for common areas provided by G.L.c. 183A, §14.

Unfortunately for many developers holding development rights, master deeds — for whatever reason — are commonly drafted with the exclusionary language seized upon by the Appeals Court in *R.I. Seekonk*. As a practical matter, developers should seek to avoid the inclusion of such language in their condominium documents and, instead, employ simple language concerning the land that has been submitted to condominium status (e.g., "The Common Elements are all portions of the Condominium other than the Units.").

Perhaps more unfortunate for developers holding phasing rights is the fact that the Appeals Court in *R.I. Seekonk* went beyond distinguishing the case from *Spinnaker Island* based on the language in the master deed. The Appeals Court also held that the partially constructed structures could be taxed as present interests in real estate, under G.L.c. 59, §11.

The court distinguished this case from *First Main Street* based on the fact that the structures "were in fact mostly completed," whereas First Main Street involved assessed development rights where no construction had commenced. The court provided that "as the *First Main St.* court reasoned, an unexercised development right could be converted into a present interest by initiating affirmative actions, such as 'build[ing] the additional buildings and facilities.'"

Notably, the *R.I. Seekonk* court failed to complete the quote from the *First Main Street* decision, which provided that the condominium developer must "build the additional buildings and facilities and amend the master deed, before the expansion phase land is the holder's to deal with."

It appeared that the Appeals Court, in *First Main Street*, recognized that in order to tax a development right as a present interest, the subject unit actually had to be phased into the condominium by recording an amendment to the master deed. The *R.I. Seekonk Court*, however, eschewed the necessity of having a legally existing unit to tax

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— providing that a development right may be taxed once a structure is constructed on the property.

The Appeals Court's decision is problematic, to say the least.

Essentially, towns may now tax condominium "units" that do not legally exist. If such a tax goes unpaid, what property interest will the town place a lien on? What property interest would be foreclosed upon? Will the town take common-area land away from the unit owners of the condominium?

Additionally, the Appeals Court's term "mostly completed" would seem to be open to broad interpretation. Can a structure be assessed once a developer has poured a foundation? Framed walls? Nailed roof shingles? It is unfortunate that the court did not provide a stricter threshold than "mostly completed" (e.g., taxable as a present interest upon the issuance of a certificate of occupancy).

Also, towns typically tax common area proportionately to the unit owners of the condominium as "value added" to the condominium — in accordance with their percentage interest in the common area. Under the *R.I. Seekonk* decision, towns will essentially be able to (1) tax the unit owners in accordance with their percentage interest in the common areas and (2) tax partially-constructed structures existing on the common areas.

This would appear to be double taxation. The Appeals Court, in *First Main Street*, recognized this issue, providing that "[a]s the unit owners have already been taxed for their interest in the common area land, the assessors may not tax another slice of the same real property to others."

It is worth noting that, effective Jan. 1, 2017, G.L.c. 59, §11, was amended to provide local assessors with the discretion regarding whether to tax present interests in real estate. Previously, the statute authorized the imposition of a tax on a present interest upon written authorization from the Commissioner of Revenue.

Accordingly, local assessors will now be able to tax structures on condominium property that — in their opinion — are "mostly completed." A particularly aggressive town may now be emboldened to assess any partially constructed structure on condominium property, whether it is ultimately to become a unit or some common-area facility (e.g., a clubhouse).

The independent value of development rights, and the notion that a declarant of a condominium should be subject to taxation for same, has been acknowledged in the industry for more than three decades. Both the Uniform Condominium Act (UCA), which was most recently amended in 1980, and its successor act, the Uniform Common Interest Ownership Act (UCIOA) provide:

"Any portion of the common elements for which the declarant has reserved any development right must be separately taxed and assessed against the declarant, and the declarant alone is liable for payment of those taxes." UCA §1-105(c) (1980); UCIOA §1-105(c) (2014).

As explained in Comment 2 to the UCA provision, "Even if real estate subject to development rights is a part of the condominium and lawfully 'owned' by the unit owners in common, it is in fact an asset of the declarant…'" UCA §1-105(c), cmt. 2 (1980).

However, Massachusetts has its own unique condominium act codified at G.L.c. 183A, §1 et seq., which has no comparable provision to that contained in the UCA and UCIOA. "Massachusetts has not adopted either the UCA or its successor, the Uniform Common Interest Ownership Act." *Drummer Boy Homes Ass'n, Inc. v. Britton*, SJC-11969, 2016 WL 1191578, at *6 n.17 (2016).

And though "the UCA may serve as a guide to the reasonableness of developer control of the structure, management and marketing of a condominium, it cannot override the existing tax law of Massachusetts. That is a task for the Legislature." *First Main St.*, 49 Mass.App.Ct. at 29-30 (citing *Barclay v. DeVeau*, 384 Mass. 676, 685 n.17 (1981)).

Until such time as the Legislature has determined whether it is appropriate to assess a condominium's declarant for the value of its retained development rights, or partially constructed buildings on common area, this issue will likely find its way back to the appellate courts of the commonwealth.

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