Real Property Law Section NEWSLETTER

State Bar of Georgia

A Publication for Real Property Lawyers **Winter 2006**

COMMENTS FROM THE CHAIR

Linda B. Curry
Weissman, Nowack, Curry & Wilco, P.C.

Attorneys after hours: What do we do with all that free time that we have when we are not practicing law? How do we represent our profession when we interact in our larger community? These are questions that the Real Property Law Section and the State Bar are both trying to address in a positive way. The Section has launched the Pro Bono Matchmaker Project to provide opportunities for transactional attorneys to participate in pro bono representation. Already, over 50 members of the Section have registered for this program and the Pro Bono Committee is working to set up contacts with worthy organizations that need legal services to match them with Section attorneys. More information is available on our website and I urge all of you to consider giving some of your time to this valuable project. There have long been pro bono opportunities for litigation attorneys, but we hope that our program will broaden the scope of available representation and allow real estate attorneys to use their valuable knowledge and experience to provide needed legal services to those less fortunate.

The State Bar of Georgia is also concerned about the public's perception and trust in the legal profession and the judicial system and is taking a significant step to educate the public and foster a better relationship between lawyers and the larger community. The Foundation of Freedom Project has been created to do just that through speeches, mock trial programs, the Bar's Legal History Museum and curriculum materials for schools. At the Midyear Bar Meeting a program was held to explain this program and to encourage participation by local bars and sections. A power point presentation was shown and a DVD given to those who attended on the history of the constitution and judicial system that can be used by any of us to speak at schools or to community groups. Another goal of the Project is to develop good relationships with our state legislators and to encourage Bar

Continued on page 2

REAL PROPERTY LAW SECTION SPONSORS COMMERCIAL REAL ESTATE SEMINAR

The Real Property Law Section sponsored the annual Commercial Real Estate seminar on November 10, 2005. Edward Hudson, Hudson Law Offices, Columbus, served as chair of the seminar which was held at the Cobb Galleria Centre in Atlanta. As in previous years, the seminar was well-attended, with approximately 109 attorneys participating in the 6-hour seminar.

The morning session included presentations on commercial purchase contracts by Mark Moeller of Morris, Manning & Martin, LLP of Atlanta, transit-oriented development by Jay Levin of Powell Goldstein, LLP of Atlanta and Elton Gogolin of E. W. Gogolin & Associates of Marietta, litigating cases involving security deeds by Ed Burch of Smith, Gambrell & Russell, LLP of Atlanta, and military base closures under BRAC by John Daniel of Powell Goldstein LLP of Washington, D.C.

The afternoon session consisted of presentations on the new bankruptcy act by Laura Woodson of Smith, Gambrell & Russell LLP of Atlanta, the new Atlanta Beltline by Angie Graham of the Trust for Public Land in Atlanta, eminent domain after the Kelo decision by Buck Ruffin of Gambrell & Stolz LLP of Atlanta, and ethical issues in a zoning practice by Rob McKenna of Page, Scrantom, Sprouse, Tucker & Ford in Columbus.

This annual seminar is intended to cover topics that are timely and helpful to commercial real estate attorneys. Please forward any questions regarding the seminar topics or suggestions for topics for future seminars to Edward Hudson at: ehudson@hudsonlawoffices.com.

***Law Student Recipients of RPLS** Scholarships exchange greetings and well wishes from Section Board Members at annual Dinner at Canoe following the November Commercial Seminar. From left to right are: Linda Curry, Chair, RPLS; Brandon Shepard, UGA scholarship recipient; Sarah Babcock, recipient from Emory; Edward Hudson, Chair Commercial Seminar, RPLS; Amanda Bell, Mercer School of Law, and Shelli Willis, Chair RPLS Awards and Recognition Committee*

Letter From The Chair Cover-2
Commercial Real Estate Seminar . . . . Cover
"All Appropriate Inquiries" Under the New EPA Standards . . . Page 2
Tips for Fixing HOA Problems . . . . Page 3
Pro Bono Matchmaker Project Announcement . . . . Page 3
Revisons to the Title Standazrds . . . . Page 4
Mentor Volunteers Needed . . . . Page 4
2005 ALTA/ACSM Standards . . . . Page 4
Current Legislative Issues . . . . Page 5
Trust Account Regulations in Georgia . . . . Page 6
Upcoming Events . . . . Page 7
Tips Based on Experience . . . . Page 7
RPLS Listserve . . . . Back Cover
To Sell or Not to Sell . . . . Insert

Comments from the Chair, continued from page 1

members to participate and run for state office. In recent years there are less and less attorneys in the state legislature and some of the newer legislators do not have favorable impressions of attorneys or of our profession. The Bar is urging all its members to take their representatives to lunch in the month of April to build relationships and talk about common goals. Please think about participating in this effort.

I know that all of us are very busy and, in reality, have very little free time. However, part of our commitment as lawyers should be to give back to our profession and our communities to make them both the best that they can be. We are truly blessed to have the opportunity to have successful lives and careers in this great state and great country. I encourage you to think about ways that you too can give back and contribute to our continued success.

"ALL APPROPRIATE INQUIRIES" UNDER THE NEW EPA STANDARDS

*A. Michelle Willis, Esq.**
TROUTMAN SANDERS LLP
(with assistance from the Troutman Sanders LLP Environmental and Natural Resources Practice Group)

The U.S. Environmental Protection Agency ("EPA") recently published a Final Rule adopting standards for conducting "all appropriate inquiries" as required under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9601 et seq. ("CERCLA"), as amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), and the Small Business Liability Relief and Brownfields Revitalization Act of 2002 ("Brownfields Act").

Under CERCLA, persons may be held strictly liable for cleaning up hazardous substances at properties they own or operate or used to own or operate, without regard to fault or negligence. The "innocent landowner" defense to CERCLA liability under the Brownfields Act exists for those who demonstrate that they "did not know and had no reason to know" of a hazardous substance release or threatened release prior to acquisition of the subject property, after conducting prior to the date of acquisition of the property "all appropriate inquiries" into the previous ownership and uses of the property consistent with good commercial or customary standards and practices. 42 U.S.C. § 9601(35)(B) (2005). Until now, there has been no legal standard for conducting "all appropriate inquiry," although most have followed the industry guideline, known as the ASTM 1527-00 standard. The Final Rule, set forth at 70 Fed. Reg. 66070 (Nov. 1, 2005); 40 C.F.R. Part 312 (2005), will be effective November 1, 2006, one year after initial publication in the Federal Register. In the interim, compliance with either the Final Rule or EPA's interim standards will satisfy CERCLA's statutory requirement for "all appropriate inquiries." After November 1, 2006, EPA has indicated that compliance with either the Final Rule or the ASTM Phase I Standard E1527-05 will satisfy the requirements of the Final Rule. See EPA, Comparison of the Final All Appropriate Inquiries Standard and the ASTM E1527-00 Environmental Site Assessment Standard, EPA-560-F-05-242 (October 2005). The ASTM E1527-05 Standard is available through www.astm.org.

The "all appropriate inquiries" requirements are applicable to any public or private party who may potentially claim protection from CERCLA liability as an innocent landowner, bona fide prospective purchaser, or contiguous property owner. Prospective landowners of nonresidential property who do not conduct all appropriate inquiries prior to obtaining ownership of the property may lose their ability to claim such protection. The requirements also must be followed by any party who receives a Brownfields grant awarded under Section 104(k)(2)(B) of CERCLA. See EPA-560-F-05-242 (October 2005). The requirements do not apply to property purchased by a non-commercial entity for "residential use or other similar uses" where an inspection and title search have revealed no basis for further investigation. Pub. L. 107-118 § 223 and 42 U.S.C. § 9601(35)(B) (v) and (40)(B)(iii) (2005). Lenders interested in maintaining the value of their collateral that is subject to the Final Rule will insist on environmental site assessments conducted in accordance with the standards set forth in the Final Rule.

The Final Rule revises the definition of "environmental professional" and imposes minimum standards for licensing, education and relevant work experience. Each assessment must be overseen by a professional meeting these criteria, which will likely increase the cost of Phase I environmental assessments. The Final Rule also expands the scope of due diligence required to conduct "all appropriate inquiries." The following key requirements should be noted:

- An interview with the current owner or occupant (and, to some extent, past owners or occupants) of the subject property is now mandatory.
- An interview with neighboring or nearby property owners or occupants is mandatory for certain abandoned properties.
- The review of past uses and potential historical sources of contamination of the subject property must extend from the present to when the property first contained structures or was first used for residential, agricultural, commercial, industrial or governmental purposes.
- The review of existing institutional controls and environmental cleanup liens with respect to the subject property must now include all liens filed or recorded under federal, state, tribal or local law. The review is no longer limited to reasonably ascertainable land title records, but it is now limited to the subject property.
- Gaps in the data collected by the environmental professional must be identified and commented on with regard to the significance of each data gap.
- An on-site visual inspection must be performed on the subject property (unless a limited exemption applies), and a visual inspection must be performed for adjoining properties.
- An assessment of the relationship between the actual purchase price of the subject property and its fair market value must be conducted.
- Any specialized knowledge or experience of the prospective purchaser must be disclosed.
- All environmental due diligence, as well as written reports

documenting such diligence, must be completed within one year prior to the subject property transaction, and certain elements must be updated to ensure that those elements have been satisfied during the 180 days prior to the transaction.

As you can see, the standards for preparing a Phase I have changed considerably, and when the Final Rule becomes effective, if not well before, it is expected that those investing in and purchasing real property, and their lenders, will require strict compliance with the new EPA standard.

TIPS FOR FIXING HOA PROBLEMS

Nancy Wasdin, Attorney
O'Kelley and Sorohan, LLC

"The title comes back saying there is a mandatory HOA. When I called the seller to inquire, they told me that there is no HOA in their subdivision. They have lived there for 10 years; they have never heard about an HOA and they have never paid dues. What now?"

1. Go to the Corporate Search on the Georgia Secretary of State's website: http://www.sos.state.ga.us/corporations/corpsearch.htm
2. Enter the name of the subdivision. (You are looking for "Subdivision Name Homeowner's Association, Inc.")
3. Print the results for the file. (If no results, skip to #9)
4. Look at the results. Check the address listed to see if the street, city and/or zip code matches our property address.
5. If one matches, or you think it is close, click on the "officers" link.
6. Print the page of officers for the file.
7. Call someone with the HOA. Start with the main address listed for the HOA, and call the officers as well. You can find the phone numbers by doing a "Reverse Address" lookup: http://www.whitepages.com/10001/reverse_address
8. Once you get in touch with someone, ask them if there is an HOA. If there is a question whether it is the correct HOA, ask if our property address is in their subdivision. Try to get something in writing for the file regarding the status of the HOA.
9. If there are no results on the Secretary of State's website, call the listing agent. They are usually familiar with the subdivision and can tell you whether this issue has come up in this neighborhood before. If they know of the HOA, they will hopefully be able to tell you how to get in touch with it, or perhaps they will know the name so you can try the Secretary of State's website again.
10. If the agent doesn't know or everyone still insists that no HOA exists, come to the title-clearing attorney. Get the issue approved through a title insurance company before closing – usually an affidavit signed by both the buyer and seller will do, but some like the real estate agents to sign the affidavit as well.

PRO BONO MATCHMAKER PROJECT ANNOUNCEMENT

Attention Real Property Law Section Members: The RPLS is pleased to announce the creation of the Pro Bono Matchmaker Project, a program designed to encourage participation by real property attorneys in pro bono activities by matching attorneys with pro bono opportunities.

How the Program Works: The RPLS Pro Bono Committee has begun to establish points of contact with qualifying organizations that need real property legal services. You can volunteer to be part of a pool of attorneys available to take on such projects. Once an organization communicates a real property pro bono project to us, we send an e-mail with a project description to the pool of volunteer attorneys. Once volunteer(s) respond to the e-mail agreeing to assist with the project, we will put the organization and volunteer(s) in contact with each other to coordinate handling of the project. Potential projects include land closings, declarations, easements, affordable housing, single-family housing, property tax appeals, etc.

How to Join: Simply send an e-mail to Angela McCord at AMccord@pogolaw.com with your name, address, telephone number and e-mail address so that you may be added to the pool of volunteer attorneys. It's that easy! Please note that by agreeing to be included in the pool of volunteer attorneys, you are only agreeing to receive e-mails about possible pro bono projects. You are not obligated to take on any projects.

We are aware of how difficult it can be for attorneys to identify quality pro bono opportunities that involve real estate. This project has been specifically designed to make that process easier. We have already had over **fifty** attorneys volunteer to be a part of this program. Please consider submitting your name to be included in the pool of volunteer attorneys.

QUESTIONS?????

Suggestions for future Newsletter articles ????
Volunteers for writing an article????
Ideas for topics for future Seminars????

Please contact: Jeril S. Cohen
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REVISIONS TO THE TITLE STANDARDS

The RPLS membership is advised that the various revisions to the Title Standards that were prepared and adopted by the Section in 2005 have been approved by the State Bar. The revisions appear in blacklined form in a PDF file on the Section's website under the heading "Revised Title Standards", which will remain posted to the website for a limited time. After approval by the Executive Committee of the Section on April 19, 2005, the revisions were submitted and approved by the Section membership at the annual meeting and Real Property Law Institute seminar at Amelia Island on May 14. On August 18, 2005, the revised Title Standards became effective when they were adopted by the Board of Governors of the State Bar of Georgia.

In addition to a general updating of cases and statutory cites throughout the Title Standards, substantive changes were made to Section 11.1, dealing with limited liability partnerships; Section 14.7, relating to cancellation of deeds to secure debt; Section 15.8, relating to cancellation of mechanics liens; Section 16.5, dealing with cancellation of judgments; and Section 31.12, covering federal estate tax liens.

We encourage the members of our Section to contact Leon Adams at ladams@alston.com with any suggestions for future revisions to the Title Standards.

MENTOR VOLUNTEERS NEEDED

The Supreme Court of Georgia and the State Bar are looking for members in the metro Atlanta area with residential and/or commercial real estate transaction experience to give back to the profession by dedicating their time to serve as Outside Mentors to newly admitted Georgia attorneys who are sole practitioners interested in the practice area of real estate transactions.

The new mandatory Transition Into Law Practice Program (which replaced the "Bridge the Gap" program as of Jan. 1, 2006) places a beginning lawyer with a mentor for the first 12 months of their practice. The goal of the program is to afford every lawyer, newly admitted to the State Bar of Georgia, with meaningful access to a mentor equipped to teach the practical skills, seasoned judgment, and sensitivity to ethical and professionalism values necessary to practice law in a highly competent manner. Mentors are appointed by the Supreme Court of Georgia for one-year terms and may serve for more than one term. They must meet minimum qualifications, including being a member in good standing with at least five years practice experience and a reputation in their local legal community for competence and ethical and professional conduct.

How To Volunteer: Download a Mentor Volunteer Form at: http://www.gabar.org/programs/transition_into_law_practice_program/volunteer_to_serve_as_a_mentor/
Questions? Download the Manual for Beginning Lawyers & Outside Mentors at:
http://www.gabar.org/programs/transition_into_law_practice_program/information_for_mentors/

For More Information: Contact the Program Director, Doug Ashworth, by phone at (404) 527-8704, or by email at tilpp@gabar.org.

2005 ALTA/ACSM STANDARDS

Update your due diligence requirements! The 2005 ALTA/ACSM standards took effect on January 1, 2006. The new standards are called "2005 Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys as adopted by American Land Title Association and National Society of Professional Surveyors." Here are a few highlights from the new standards:

- Width of adjoining right-of-ways are shown only if available from the controlling jurisdiction
- All ways of accessing the property must be shown (including any access from adjoining waterways such as boat ramps and slips
- Both the record legal title and the survey legal description must be on the face of the plat or otherwise accompany the survey
- The source of all setbacks, height, and floor space restrictions must be disclosed
- Certain utility lines are shown only if they are readily observable

For a complete list of the changes, please see the blacklined standards at :http://data.memberclicks.com/site/ucls/ALTA2005withchanges.pdf.

For more information please visit the American Land Title Association's web site at http://www.alta.org/standards/standards.cfm

CURRENT LEGISLATIVE ISSUES

Patrise Perkins-Hooker
Hollowell, Foster & Gepp, PC
Legislative Committee Chair, Real Property Law Section

Overview

The Georgia Legislature has just recently convened its 2006 Legislative Session. Presented here is some information on the status of various bills that the Real Property Law Section sponsored or monitored during the last legislative session, and a discussion of bills that were introduced as of January 13, 2006 that may impact the real property law area.

2005 Legislative Initiatives of the Real Property Law Section

For the 2005 legislative session, the Real Property Law Section proposed three bills for consideration by the Georgia General Assembly. The State Bar Board of Governors supported one of our proposals and the other two were deferred to be included in other legislation. The Section's three legislative proposals were as follows:

1) Under current Georgia law, (O.C.G.A. Sections 8-2-181 to 8-2-183), manufactured housing that is permanently attached to the ground may be converted from a personal property interest subject to the Georgia Motor Vehicle Certificate of Title Act into a real property interest subject to Georgia real property law, but not until all of the following four steps have been followed: (i) if the manufactured housing is newly manufactured, its manufacturer's certificate of origin is sent to the Georgia Department of Motor Vehicle Safety to issue a motor vehicle certificate of title; (ii) once the motor vehicle certificate of title is issued, a Certificate of Permanent Location is filed with the clerk of the superior court of the county in which the land is located, (iii) the filed Certificate of Permanent Location is returned by the clerk and a copy of the filed Certificate of Permanent Location and the original certificate of title for the manufactured housing is delivered to the Georgia Department of Motor Vehicle Safety, and (iv) the Georgia Department of Motor Vehicle Safety confirms back to the clerk that the motor vehicle certificate of title for the manufactured housing has been cancelled in the Department's records. The time period required to accomplish all four steps (three steps for pre-owned manufactured housing that already has a motor vehicle certificate of title) has limited the access of manufactured housing owners to mortgage financing since mortgage lenders want assurance they have a valid and immediate mortgage lien on both the manufactured housing structure and manufactured housing lot upon filing their mortgage. The multi-step conversion process has discouraged attorneys, title insurance companies and mortgage lenders from making and closing mortgage loans for Georgia manufactured housing. After lengthy discussions with the Georgia Manufactured Housing Association, the Georgia Department of Motor Vehicle Safety, the Georgia Community Bankers Association and other manufactured housing lenders, the Section agreed to a proposal that would permit new manufactured housing to be converted to real property using only the manufacturer's certificate of origin and eliminate the need altogether to obtain a motor vehicle title certificate. This proposal was introduced by Senator Preston Smith (R-Rome) as **Senate Bill 253**, which passed the Senate and the House Judiciary Committee, but did not reach the House floor before the General Assembly adjourned *sine die* on March 31, 2005.

Current Status- Senate Bill 253 is currently pending in the House for consideration during this legislative session. We anticipate this bill passing the House in 2006.

2) The Section also proposed a bill allowing out-of-state trusts that have corporate attributes, such as Maryland REITs, to hold title to real estate in their trust name, rather than in the name of their trustees as is required under Georgia law for all other trusts. This proposal received approval by the State Bar's Advisory Committee on Legislation, but was deferred to be included in a general revision of the Georgia trust statute presently being drafted by the Fiduciary Law Section.

Current Status-This issue is still being considered by the Fiduciary Law Section and although they have proposed changes to the Fiduciary Code sections, these changes relate to corrections to the Guardianship Act which was passed in 2004 and effective July 1, 2005. We anticipate these concerns to be addressed in future proposed revisions to the trust section of the code when the same are completed by the Fiduciary Law Section.

2006 Legislation of Interest to the Real Property Law Section

As described above, the Legislative Committee of the Real Property Law Section will be closely monitoring the reintroduction and passage of the two proposals that were still pending in either the House or Senate and carried over from 2005 to 2006. In addition, we have been asked to comment on the following:

Senate Bill 241: This bill seeks to change the law relating to the use of electronic signature by notaries.

Senate Resolution 652 and SB 391: This resolution and the resulting bill are designed to curtail governmental abuses of eminent domain powers for private urban development. The bill is entitled the Urban Redevelopment Law and it is designed to limit the ability of a governmental entity to exercise its powers of eminent domain in reaction to the broad powers granted to a municipality by the U.S. Supreme Court in *Kelo v. City of New London, Connecticut. 125 S.Ct. 2655, 162 L.Ed. 2d 439 (2005).* The Section is in favor of limits on the use of eminent domain, such that the rights of private citizens are not abridged without a valid public purpose.

HB 631: This bill would allow counties to add an additional real estate transfer tax to the existing transfer tax obligation for local use. If this bill passes, closing attorneys would be responsible for collecting and remitting the additional real

estate transfer tax, just as they are for the current transfer tax.
HB 989: This bill is designed to extend the sunset provisions for the $5.00 recording surcharge fee for deeds from the current two year limit. This fee helped the Georgia Superior Court Clerks Cooperative Authority institute the on-line automated information system for deed recording and retrieval. The Section previously agreed to not oppose this fee being continued, if the on-line deed recording project was moving forward. We feel that this initiative has been moving forward, so we are not opposed to granting this extension. We will have an opportunity again in two years to review the performance of the on-line deed recording and retrieval service and oppose the extension at anytime that we feel that the service is not operating as intended.

In addition to the above bills, the Real Property Law Section has been requested to provide input on SB 372, 377 & 378 which are bills designed to revise several requirements regarding the sexual offender registry. Initially, the bill contained provisions which would have obligated the real estate agent and the closing attorney to notify or disclose information about the location of a registered sex offender in proximity to a particular residence. These provisions were deleted based upon our input.

The Legislative Committee will continue to track the status of pending legislation and be available to review proposed legislation which would have an impact on the areas practiced by real estate professionals. If you have any questions concerning any pending legislation, please forward those concerns to the committee through me at pph@hfglaw.net.

TRUST ACCOUNT REGULATIONS IN GEORGIA

J. Noel Schweers III
Augusta, Georgia

The primary rules for handling and disbursing of closing funds by Georgia attorneys are imposed by the Georgia Rules of Professional Conduct. Rule 1.15(II) and 1.15(III) set for the minimum standards for handling closing proceeds. Rule 1.15(II) requires that each attorney handling clients' funds maintain an IOLTA bank account (Interest on Lawyer's Trust Account). It states that "[a]ll funds held by a lawyer for a client … shall be deposited in and administered from such account." This rule further obligates the payment by the financial institution of interest, net of appropriate fees, to the Georgia Bar Foundation.

Rule 1.15(III) requires that the trust account be clearly identified as such, that it be used only for clients' funds and that the financial institution notify the Bar of any overdrafts on the account. Further, Rule 1.15(III) grants the Bar the right to audit an attorney's trust account "for cause". The purpose of the Bar rules are clearly the protection of the client and the public in general.

Another source of regulation is found in OCGA Section 44-14-13. This Code Section imposes certain requirements for the collection and disbursement of funds relating to "transactions involving purchase money loans made by a lender, or loans made to refinance, directly or indirectly, a purchase money loan made by another lender, which loans will be secured by deeds to secure debt or mortgages on real estate containing not more than four residential dwelling units, whether or not such deeds to secure debt or mortgages have a first-priority status". The law applies to any "settlement agent" which is defined to clearly include a real estate closing attorney. Under the Act a settlement agent is required to disburse only if they have "collected funds". Collected funds are "funds deposited, finally settled, and credited to the settlement agent's escrow account". The following are exceptions set forth in the Act to the collected funds requirement:

- (A) check or draft representing the loan funds issued by, (B) a certified check, cashier's check, or treasurer's check issued by or drawn on, or (C) other similar primary obligation of a federally insured bank, savings bank, savings and loan association, or credit union or of any holding company or wholly owned subsidiary of any of the foregoing;
- a check or draft issued by a lender approved by the United States Department of Housing and Urban Development;
- a check issued by a lender qualified to do business in Georgia;
- a check drawn on the escrow account of an attorney licensed to practice law in the State of Georgia or on the escrow account of a real estate broker licensed under Chapter 40 of Title 43, if the settlement agent has reasonable and prudent grounds to believe that the deposit will constitute collected funds in the settlement agent's escrow account within a reasonable period;
- a check issued by the United States of America or any agency thereof or the State of Georgia or any agency or political subdivision of the State of Georgia; and
- a personal check or checks in an aggregate amount not exceeding $5,000.00 per loan closing.

The Act imposes liability on a settlement agent who fails to follow these requirements. This liability includes responsibility for losses suffered due to their failure and an obligation to pay "the borrower an amount of money equal to $1,000.00 or double the amount of interest payable on the loan for the first 60 days after the loan closing, whichever is greater". While the Act is limited to loan closings, the rules it sets forth seem prudent for all types of closings.

Recent developments in the banking laws will also likely impact the real estate closing practice. These include the Check 21 federal legislation which went into effect on October 28, 2004. 12 U.S.C.A. § 5001 et seq. Check 21's goal is to modernize the check processing system by allowing banks to process images of checks instead of the actual paper checks. This legislation promises to greatly speed up the check clearing process. Quicker processing of checks will require attorneys to be even more diligent in making timely deposits and requiring collected funds at closings.

Tips Based on Experience

Diedra Sorohan and Katharine Browder
O'Kelley and Sorohan, LLC

Conducting a successful closing is not something we are taught in law school. It is an art learned from experience over time. Our practice, though rewarding, requires us to entertain while simultaneously juggling colossal stacks of paperwork and certifying that every number has been counted. Luckily, we are supported behind the scenes by the wonderful pre closers and closers who work to set the stage for a smooth closing. Ultimately, however, it is up to us, as the attorney, to bring the final show off without a hitch. So, with the help of other attorneys in my office, I have compiled a selection of five practice tips to help you make your next closing a success.

TIP ONE: Funding. There is nothing worse than finishing a closing only to make everybody wait another thirty minutes while you fax the lender a stack of signed documents. This annoys the people in the closing and it can back up your closing schedule for the rest of the day. Why not get the lender's required funding documents signed at the beginning of the closing and send them to the lender before you finish signing the rest of the package. Everybody at the closing table will see that you have done this and it will be greatly appreciated.

TIP TWO: Creativity. Every person at the closing table looks to the attorney to find a solution to any problem that may arise. Try not to say no. Always look for a solution even if it means asking fellow attorneys. You might not be able to do exactly what a party wants, but often there is a way around the issue. Use your fellow attorneys as a source of information. Then after the closing, follow up. Never assume an issue will resolve itself. Make sure you have done all you have promised. Real estate agents in particular will be grateful for your extra effort.

TIP THREE: Discretion. There are times during a closing when your ability to be discreet is essential. For example, when you begin discussing the note with the borrower try not to announce their interest rate to the entire room. The interest rate can be a signal about one's credit and that might be a sensitive subject for your borrower. All you need to do is point to it and say "this is your interest rate." Further, when going over the name affidavit just let the borrower know that these were the names that appeared on their credit report. Some attorneys have embarrassed borrowers and opened old wounds by announcing past husbands names in front of a current husband. Similarly, sellers appreciate it when you are discreet about the payoff of liens and judgments against them appearing on the settlement statement. Of course all of these issues need to be addressed during the closing, but address them tactfully and discreetly. Borrowers, sellers, and agents alike will appreciate your subtlety.

TIP FOUR: Checks. One of the most important times to be discreet is when discussing the realtors' commissions and handing out checks. Try not to call attention to the realtors' often multi-thousand dollar check. Simply hand the realtors their checks as you hand them a copy of the settlement statement and any other documents for which they have asked. Everybody knows they are getting paid, but most realtors do not want to have it emphasized. Realtors will remember this as they fill out the closing attorney section in their next contract.

TIP FIVE: Be nice! I know it sounds obvious, but there is nothing more important than having a friendly face guide you through a closing. Try to keep everybody engaged in the process. Ask the sellers where they are moving and ask the buyers when they are moving into their new home. You should also make sure you know who is at your closing table. There may be loan officers, realtors, friends or family at the closing. Try to remember their names and try to use them. Most importantly, smile and make eye contact. If everybody at the table feels good when they leave, then they will be more likely to come back or to recommend you in the future.

UPCOMING CALENDAR DATES REAL PROPERTY LAW SECTION STATE BAR OF GEORGIA

2006

FEBRUARY 21st, 2006
RPLS EXECUTIVE BOARD MONTHLY MEETING, ONE ALLIANCE CENTER
4th FLOOR • 4:00 – 6:00 PM

MARCH 21st, 2006
RPLS EXECUTIVE BOARD MONTHLY MEETING, ONE ALLIANCE CENTER
4th FLOOR • 4:00 – 6:00 PM

APRIL 7th, 2006
FORECLOSURE SEMINAR

APRIL 18th, 2006
RPLS EXECUTIVE BOARD MONTHLY MEETING, ONE ALLIANCE CENTER
4th FLOOR • 4:00 – 6:00 PM

MAY 4th - 6th, 2006
REAL PROPERTY LAW INSTITUTE, DESTIN, FL

MAY 19th, 2006
CONSTRUCTION MATERIALMEN'S & MECHANICS' LIEN SEMINAR

NOTICE

If you know someone who has not joined the Real Property Law Section, please encourage them to do so.

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RPLS LISTSERVE

Last month we launched the Real Property Law Section Listserve e-mail discussion service that allows members to post questions and answers to subscribers. We have had an amazing response with over 200 members signing up in the first few days! There was a lot of email traffic to the group in the first week with everyone signing up, but that has settled down and we are now averaging 2-3 e-mails per week. The topics that have been posted on the listserve have been interesting and the responses very helpful and prompt. This will be a great resource and oportunity for our members to access the knowledge of Georgia's real estate practitioners.

This is a free service provided to RPLS members. To subscribe, go to http://mailman.listserve.com/listmanager/listinfo/garealpropertylaw. If you have any questions or need more information please contact me at drew.marlar@kutakrock.com or (404) 222-4688.

To Sell, or Not to Sell ...

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… that is the question: And it is a question that the Georgia Court of Appeals recently answered on behalf of Georgia's tax collectors in its recent decision in E-Lane Pine Hills v. Ferdinand.

The E-Lane case involved an Atlanta developer's lawsuit attacking Fulton County Tax Commissioner Dr. Arthur Ferdinand's practice of selling tax executions, or writs of fieri facias to third parties for delinquent property taxes.

E-Lane purchased approximately four acres of land off West Roxboro Road in Fulton County, developed the property, and sold it as single family lots. After the subdivision, E-Lane was left with a .33 acre remnant that it considered incapable of being developed. The Fulton County Tax Assessor's office, however, valued the remnant at $130,000, which E-Lane considered to be well above the property's actual value.

Based upon tax assessors valuation, Dr. Ferdinand claimed that E-Lane owed more than $25,000 in delinquent taxes. E-Lane disagreed, contending that it never filed a return or paid any property taxes on the remnant because it had never received any assessments on the property. When E-Lane learned that Dr. Ferdinand intended to issue a tax execution on the property, which would be transferable to third parties, E-Lane filed a property tax return declaring the value of the remnant to be $10,000. E-Lane then sued to enjoin Dr. Ferdinand from selling or transferring any tax executions issued against the property, and challenged his authority to do so. After the trial court denied E-Lane's request for an injunction, the subject appeal ensued.

The original statutory authority governing the transfer of executions dates back to 1872. In 1933, however, the Georgia Code was reorganized, laying the groundwork for the E-Lane lawsuit more than 70 years later. During the reorganization, the provision dealing with the sale and transfer of tax executions was decoupled from the provision dealing with the sale and transfer of other executions. While the statutes were subject to additional renumbering over the years, the provision dealing with the transfer of tax executions eventually became O.C.G.A. § 48-3-19, and the provision dealing with the transfer of all other executions became O.C.G.A. § 9-13-36.

The most significant difference between the two statutes is a result of the 1997 amendments to O.C.G.A. § 48-3-19, which added certain procedures and safeguards to be followed before a tax execution may be transferred to a third-party. O.C.G.A. § 9-13-36 contains no such safeguards. In 2002 Georgia's General Assembly repealed O.C.G.A. § 48-3-19 due to the failure of its "safeguards" and widespread reports of abuse stemming from the transfer of tax executions. Later that year, however, Vesta Holdings (the largest third-party purchaser of Fulton County's tax executions) sued Dr. Ferdinand to force the sale of tax executions under O.C.G.A. § 9-13-36. Fulton County Superior Court Judge Jerry Baxter agreed with Vesta, and ruled that O.C.G.A. § 9-13-36 required Dr. Ferdinand to sell and transfer the tax executions to any third-party that sought the transfer and tendered the total amount of the execution.

In its appeal, E-Lane argued that the General Assembly never intended O.C.G.A. § 9-13-36 to apply to tax executions. According to E-Lane, to the extent the statute could be read to apply to tax executions, it was impliedly repealed with the repeal of the specific provisions contained in O.C.G.A. § 48-3-19. The Court of Appeals agreed, holding that the transfer of tax executions since the repeal of O.C.G.A. § 48-3-19 was not allowed under O.C.G.A. § 9-13-36 and therefore, any such transfer was void. The case was remanded back to the trial court for further proceedings consistent with that ruling.

Former Governor Roy Barnes, who was Georgia's Governor when O.C.G.A. § 48-3-19 was repealed, says it was clear at the time that "the intent of the repeal was to stop the bulk sale of tax executions," and that any attempt to argue that O.C.G.A. § 9-13-36 allows or demands the transfer of tax executions is a "strained construction" at best. Barnes' biggest concern with the practice of transferring tax executions is that it creates a private remedy for the collection of a public debt which, in his opinion, should only be conducted with the full accountability of elected officials, and not by private entities.

Dr. Ferdinand, however, argues that his record of increasing Fulton County's tax collections from 90% in 1997 to 99% today is due in large part to his policy of selling tax executions to third-parties. According to Dr. Ferdinand, the court's decision, and the resulting inability of his office to sell tax executions, will make it virtually impossible for his office to collect Fulton County's delinquent taxes—costing the county millions of dollars in revenue to which it is entitled but could never collect.

Opponents of the tax execution transfer process argue that Dr. Ferdinand could collect Fulton County's delinquent taxes by exerting the effort necessary to collect them, instead of transferring the responsibility to third-parties who have no accountability to the general public. They argue that Dr. Ferdinand is one of only a handful of tax collectors who still use the sale of tax executions as a collection tool. Other

counties are able to collect delinquent taxes and there is no reason Dr. Ferdinand's office should not be able to do the same. In fact, opponents of the practice often note that DeKalb County has a similar collection rate to Fulton County, but does not engage in the transfer of tax execution, and instead conducts tax sales to collect delinquent taxes.

Since the Court of Appeal's decision in the E-Lane matter issued, the case has garnered increasing interest, especially among the real estate community. Dr. Ferdinand has asked the Court of Appeals to reconsider the decision, arguing that the court erred in finding that his office's ability to sell tax executions under O.C.G.A. § 9-13-36 was impliedly repealed in 2002. After the initial briefing and oral argument in the Court of Appeals, Dr. Ferdinand felt that, due to positions the county attorney's office had taken in other matters, it could not adequately represent his office's interests in the case. Dr. Ferdinand hired Henry Bauer, with the law firm Bauer & Deitch, P.C., to represent him as the case progresses. When asked for comment about the Court of Appeals' initial decision, Mr. Bauer stated that he was "disappointed that there was absolutely no record from the trial court to assist the Court of Appeals in making a measured decision." Furthermore, Mr. Bauer is concerned that the failure to create a full record in the trial court did not allow the Court of Appeals to "fully appreciate the gravity of their ruling, especially the unintended consequences of the decision."

Because of those potential unintended consequences, numerous amicus briefs have been filed in support of Dr. Ferdinand's motion to reconsider. The primary issue of concern with the decision for the interested non-parties appears to be the open question of whether the decision will be applied retroactively or prospectively. Notably, a group of title insurance companies filed an amicus brief arguing that even if the transfer of tax executions was not appropriate, the decision should not be applied retroactively. Their concern is that the retroactive application of the decision could be seen as a defect in the title of properties subsequently sold, making the title of those properties uncertain.

Still other interested non-parties, especially those involved with the purchase of tax executions and the sale and re-sale of those properties, argue that the retroactive application of the decision could create confusion in the real estate community as well as an unintended administrative burden for Dr. Ferdinand's office—which may be forced to unravel the transactions or even buy back all of the tax debt sold to third-parties. Additionally, if the decision is applied retroactively, it is not entirely clear how the holding would affect the status and title of the numerous properties sold by third-party tax-execution purchasers at tax sales. For example, the statutory right of redemption may have been foreclosed on many of those properties, or the original property owner or a lien holder may have redeemed the property by paying the statutory redemption amount—which included a 20% penalty tacked on to the tax sale amount. The ownership of those properties and the validity of the redemption amounts paid could also be uncertain.

Some in the real estate community feel that the decision must be applied retroactively because, if the transfers are ruled void by the Court of Appeals, they must therefore have been void from their initial transfer by the taxing authority. They also contend that the repeal and retroactive application should cause little confusion or chaos. The properties likely most affected by the decision—those properties where executions have been sold at a tax sale and then sold to an alleged bona fide purchaser—may in fact be a very small percentage of the total tax executions sold since 2002, and therefore more easily managed. Those tax executions that have not yet been sold by the third-party transferee will necessarily be void, and the tax debt will still be owned and held by the tax commissioner (who would be required to re-purchase the executions).

In yet another twist, Georgia State Representative Wendell Willard, who represents Fulton County's 49th House District, has introduced House Bill 931 in the current General Assembly session. HB 931 would essentially reinstate O.C.G.A. § 48-3-19, but would require additional procedures and safeguards prior to the transfer of the execution. Representative Willard feels that the Court of Appeals' decision was well researched regarding the history of the tax execution statutes, but that he planned to "wait and see" what actions, if any, the courts took. The passage of HB 931 could make much of the prospective effect of the Court of Appeals' decision moot. However, depending upon whether the Court of Appeals' ruling is considered retroactive or prospective, the validity of any tax execution transfers occurring between the 2002 repeal of O.C.G.A. § 18-3-19 and the effective date of HB 931 could remain uncertain.

What is certain is that the full effect of the Court of Appeals decision has likely not yet been realized. The Court of Appeals could reconsider; the Supreme Court may review the decision; or the holding could be rendered at least partially moot by subsequent actions of the General Assembly. Stay tuned …