

# SECTION REVIEW

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## REAL ESTATE LAW

**FINELY SLICING THE PUBLIC'S INTEREST: SJC HOMEOWNER'S REHAB CASE HAS SIGNIFICANT IMPLICATIONS FOR TAX CREDIT DEVELOPERS AND SYNDICATORS****BY GREG KATZ, BART LLOYD AND DENA XIFARAS**

The Massachusetts Supreme Judicial Court's decision this past June in the case of *Homeowner's Rehab Inc., et al. v. Related Corporate V SLP LP, et al.* is a triumph of public interest jurisprudence. Just as importantly, within the narrow niche of affordable housing practice, it is a far-reaching decision with significant potential implications on the prospects for preserving as affordable housing the 3 million apartments financed with low-income housing tax credits nationwide.

On its face, it was a simple contract dispute: One partner sought a declaratory judgment against the other partner as to its ability to exercise a right of first refusal (ROFR) to purchase the property and own it outright after 15 years, as negotiated at the inception of the partnership agreement.

Beneath that straightforward surface, however, lay a complex and nuanced struggle of important public interests wrestling with common-law principles. The right of first refusal at issue, which allows for the purchase of a low-income housing tax credit (LIHTC) project by a non-profit at a discounted value, was authorized under Section 42 of the IRS code. The for-profit partner (the LP, originally an affiliate of Related, whose interest was subsequently sold to a third party, who pursued the litigation) sought to use common-law principles and select contract provisions to prevent the non-profit partner (Homeowner's Rehab, or HRI) from exercising its rights under the contract, rights that were dependent on the statutory scheme created in Section 42.

The SJC, on its own initiative, transferred the case from the Appeals Court, and issued a decision that crafted a set of fine judicial lines that will support the public's interest in the preservation of LIHTC properties nationwide. Within the affordable housing LIHTC community, it is the first appellate decision on the subject. And while it is not controlling precedent in other states, it represents helpful thinking and language that may influence other courts, and will affect contracting behavior.

**HISTORY OF THE CASE**

HRI and the LP were partners in a low-income housing property (808 Memorial Dr.

in Cambridge) purchased and preserved as affordable housing using the LIHTC. HRI sponsored the project in furtherance of its mission, and the LP invested capital in return for tax benefits, including LIHTCs. As part of its agreement, the LP gave HRI the ROFR — a right to purchase the property at the end of the 15-year "compliance" period at a discounted price that is authorized under Section 42(i)(7) of the IRS code. At the end of the compliance period, HRI sought to exercise the ROFR. The LP claimed that, under common-law principles (and pursuant to the general provisions of the partnership agreement), the LP's consent (which it had no desire or obligation to give) was needed prior to its exercise. HRI sought a declaratory judgment in Superior Court that it had taken all necessary action to exercise the ROFR. The Superior Court agreed, and the LP appealed.

The importance of the case to Massachusetts was evidenced by the number and breadth of amicus briefs filed in favor of HRI: four Massachusetts-based housing non-profits (including one by Preservation of Affordable Housing Inc., associated with the authors); three Massachusetts-based associations of distinctly different real estate and community-interest groups; three Massachusetts-created "quasi" governmental entities involved in the production and preservation of affordable housing, as well as the Massachusetts Department of Housing and Community Development (the state agency that allocates tax credits and oversees the LIHTC program).

Three amicus briefs were also filed on behalf of the LP, all of which seemed to have been attracted primarily by the "first impression" nature of the case (none of them represented a similarly situated party).

**THE DECISION**

The decision is notable in two respects: The first is that it made important points on issues related to the exercise of a 42(i)(7) ROFR (with the caveat that it only decided the language of the agreement that was in front of them); the second is that it deliberately read the agreements in a way that supported and was favorable to the public policy underlying the LIHTC statutory scheme.

Regarding the exercise of the ROFR, the court resolved an important ambiguity as to

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what kind of offer was necessary to trigger a 42(i)(7) ROFR. In the common-law context, where there exists a long and sordid history of specious offers at inflated prices that unjustly undermine the intended preemptive nature of rights of first refusal, there is a judicially imposed requirement that a qualifying offer be a "bona fide" offer. But, as the court noted, in the LIHTC ROFR context, the existence of the non-profit's right to buy the property at a statutory discounted price will likely significantly dampen the interest of otherwise "bona fide" offerors. The court established that, in the 42(i)(7) ROFR context, any enforceable offer from a third party was sufficient to trigger the ROFR. Typically, an enforceable offer is merely one from a party financially capable of exercising it if accepted — a substantially lower bar than a "bona fide" offer. In the underlying case, HRI had solicited and received an offer from Madison Park CDC, a mission-aligned (and capable) local non-profit developer and owner/operator of affordable housing. The court explicitly noted that there was nothing in the agreements that precluded HRI from soliciting and obtaining such an offer.

The court also deftly drew a fine line between a partnership's ability to decide to

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**HOMEOWNER'S REHAB CASE  
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accept an offer from a third party (which it deemed did not require the LP's consent), and its ability to actually accept a third-party offer (which it deemed would require the LP's consent). In the underlying agreements at issue, the trigger for exercising the ROFR was having received an offer that the partnership had decided to accept. As the court noted:

“The decision to accept does not constitute an acceptance of the offer — it need not be communicated to the third party — but a decision must be made.”

In drawing this fine line, the court drew its scalpel-like distinction directly from the public policy underlying the ROFR, noting that:

“The agreement was intended to operate in accordance with § 42 (i)(7),”

and from there reaching directly into the legislative report that accompanied the LIHTC statute at its authorization:

“Congress intended for nonprofit organizations to exercise their right of first refusal only when ‘the owner decide[s] to sell.’” H.R. Rep. No. 101-247, *supra* at 1195.

With that distinction as its foil, the court concluded that HRI's decision to accept the Madison Park offer was authorized under the agreements, and that decision, coupled with the appropriate notices to the LP, was sufficient to trigger the ROFR, thereby confirming the decision of the Superior Court below.

**IMPACT OF THE DECISION**

As a statutory mechanism with only some of the characteristics of the common-law right of first refusal, the LIHTC-authorized ROFR has long been a drafting challenge for practitioners. Its unambiguous goal is to preserve, at the lowest cost possible, the public investment in affordable units that were created with tax credits — by supporting below-market preservation transactions

“while doing the least violence to the traditional principles of tax law.” Threading that needle can be critical to successful housing preservation, and the court's decision provided good guidance on a number of fronts.

The specific language in the contract still matters a great deal. 42(i)(7) is a permissive safe-harbor only. The court did a lot of close analysis of contractual language, reading the contract as a whole and considering the overall purpose of the partnership in order to get to a decision that was consistent with both contract law and the original expectations of the parties.

The court noted that the ROFR, using the language of a right of refusal, is a statutory creation; and while “not completely unanchored from its common-law reading,” it is different in many material ways, and should not be read so as to “contravene the purpose of § 42 (i)(7).”

The court's opinion was broadly and explicitly informed by deep dives into legislative intent and public purpose, including legislative history (noted above), as well as noting that the LIHTC is currently the largest source of affordable housing production and preservation in the country. Generally, the court decided each question of law in a manner that promoted the original legislative intent — to preserve affordable housing by allowing below-market acquisitions by non-profits, without negative tax consequences. The ROFRs at issue are common to many LIHTC transactions — and the language in the individual agreements has a wide range of clarity and sophistication. National non-profits, such as Preservation of Affordable Housing (POAH) and The Community Builders (who filed a joint amicus brief on behalf of HRI), have ROFRs maturing on hundreds of properties over the next five years. Far beyond its precedential value, this case will have significant impact in favor of the non-profit sponsors in negotiating the disposition of those properties and their continued preservation as affordable rental housing.

In addition, as the court noted, Massachusetts has a very distinct and real housing affordability problem. One indicator is the amount of income a family must earn in order to afford the rent on an average three-bedroom apartment: \$75,000, according to a recent study by the National Low Income Housing Coalition — which also determined that Massachusetts was the sixth-most expensive housing market in the country. Another indicator of the scale of the local problem was the number of amicus briefs supporting HRI, mostly from non-profit or quasi-governmental organizations whose work is dedicated to creating or preserving affordable housing. A third indicator can be seen in the underlying facts of the case: the economic pressures caused by rising market values of housing in Massachusetts. The subject property, 808 Memorial Dr. in Cambridge, is a mixed-income development overlooking the Charles River — a very high-priced rental area, and the market-rate units have had quite significant rent increases over the 15-year period. Presumably, that increased value made it economically worthwhile for the LP to litigate to avoid the ROFR in the hopes of obtaining a higher purchase price under the alternative Fair Market Value option.

All in all — this decision is a trifecta win: a big win for non-profits in the Massachusetts affordable housing community, and for non-profits in the industry nationally — with enormous beneath-the-surface impact on the negotiations between non-profits and the limited partners that have invested in their tax-credit projects; a big win for states and local governments that have invested in affordable housing — as projects with existing investments will be preserved at lower cost; and a big win for the affordable housing legal community — as the case represents a veritable treasure trove of helpful language directing courts to find, cherish and preserve the public part of public-private partnerships. ■



## HOW TO SUBMIT ARTICLES

To inquire about submitting an article to *SECTION REVIEW*, contact Kelsey Sadoff (KSadoff@MassBar.org).



## YOUNG LAWYERS DIVISION

## ATTORNEYS AS COMPLIANCE OFFICERS: USING THE LAW AS A PREVENTATIVE MEASURE INSTEAD OF A LAST RESORT

BY SUZANNE ENGLOT

The public's interaction with attorneys often occurs at moments when there is no other option, and something has happened to create a situation where knowledge of the law, and how to navigate the judicial system, is a necessity. These can be high-pressure moments when a person's life or livelihood hangs in the balance.

So many of these moments could have been avoided if the client had sought legal counsel beforehand, but that is often not a person's or company's first instinct, which speaks to precisely what needs to change in the way our profession interacts with the public. Because, the truth is, in addition to being able to provide help when all goes wrong, lawyers are uniquely equipped to prevent things from going wrong in the first place. We can interpret the laws that are already enacted, as well as ones that have yet to take effect; determine which ones are applicable to our clients; and make suggestions that will ensure that they will not encounter any legal issues down the road.

This preemptive service is particularly useful for companies, big and small, who are struggling to keep on top of their many regulatory obligations. Attorneys in all types of practice can offer their corporate clients peace of mind by reviewing the laws that apply to their businesses and targeting areas of their compliance framework that could use more work. We can help establish safety training schedules, environmental monitoring and measurement programs, permit re-

newal procedures, and so much more.

Best of all, compliance systems developed by lawyers would not exist in a vacuum, because of our understanding of the way that laws are intended to be implemented and enforced. Our legal experience can help us to identify key actors within our clients' organizations, like site managers and risk-facing personnel, who have institutional knowledge that, when incorporated, supports a compliance program that is not only good on paper, but is feasible to implement internally.

Recently, OSHA published new regulations on the sort of equipment that must be in place to protect employees who walk and/or work at heights from injury due to falls. Most of the regulations were already in place by the end of 2017, but a shrewd legal eye would note that a couple of the provisions concerning ladders above 24 feet became effective on Nov. 19, 2018. A slow rollout of regulatory provisions like this, which address an area of work safety that leads to a lot of injuries, could result in serious issues for a company that is not devoting resources to identifying exactly this type of liability.

What if an employee fell from a 25-foot ladder on Nov. 20, and not only was the ladder improperly equipped, but the employee was overdue to be retrained in ladder safety? The injury could have been easily prevented, as well as the ensuing workers' compensation claim and OSHA investigation. An attorney consulted on compliance issues could not only have helped put systems in place to try to prevent that injury, but could also then

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prepare a strong defense, based on firsthand knowledge, that their client controlled the controllables and established a program that would pass muster by the standards set forth in the relevant regulations.

Building up strong regulatory compliance programs is a company's best defense from legal challenges. The upfront work you do to protect your clients' interests will save them time and money in the long term, and proves your value as a resource, making it more likely that your clients will come to you with issues and concerns long before a court appearance would be necessary. ■

## WHAT'S HAPPENING? THE IMPACT OF FRE 902(14) ON EDISCOVERY

BY MANLEEN SINGH AND LIANA NEWTON

*Be careful what you post on the internet.*

Not everyone listens to this warning, and those who ignore it could see their posts, tweets, shares and likes front and center . . . in court.

But how are tweets and other forms of social media admitted into evidence? The answer: Federal Rule of Evidence (FRE) 902(14).

## WHAT IS FRE 902(14)?

In general, the comprehensive and widely

used FRE 902 allows certain self-authenticating evidence to be admitted without extrinsic evidence of authenticity. Litigators rely on this rule for certain documents, such as public records, newspapers and other documents.

On Dec. 1, 2017, subsection 14 was added to FRE 902 to streamline the admission of electronic evidence by replacing in-person testimony with written certifications.

**Rule 902. Evidence That Is Self-Authenticating:**

“The following items of evidence are self-authenticating; they require no ex-

trinsic evidence of authenticity in order to be admitted:

...

**(14) Certified Data Copied from an Electronic Device, Storage Medium, or File.** Data copied from an electronic device, storage medium or file, if authenticated by a process of digital identification, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent also

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must meet the notice requirements of Rule 902 (11).”

Since social media is considered data from an electronic device, it is subject to FRE 902(14).

### INTERPRETING FRE 902(14)

FRE 902(14) can be divided into three elements. It permits authentication of social media and other similar evidence if:

- ✓ Copies are made through a digital identification process;
- ✓ A qualified person can submit a written certification regarding the digital identification process; and
- ✓ Reasonable notice of the intended use is given to opponent.

**Digital Identification Process:** In their comments to FRE 902(14), the official Advisory Committee describes one acceptable digital identification process. This process involves a specialized software that compares two documents’ “hash value.” A hash value is an alphanumeric sequence of characters that is unique to that document. Thus, if the original document, e.g., a Facebook page, and a copy of the Facebook page have the same hash value, there is a very high probability that the documents are identical — at least in the eyes of the court. Despite the description of only one digital identification process, the committee notes that “[t]he rule is flexible enough to allow certifications through processes other than comparison of hash value, including by other reliable means of identification provided by future technology.”

**Qualified Person and Written Certification:** Not anyone can attest to the digital identification process. Under FRE 902(14), proponents must submit written certification by a “qualified person.” A qualified person is someone who knows how data systems operate and who would be able to establish authenticity through testimony at trial. Acceptable written certification replaces in-person testimony. Whether submitted by certification or testimony, the information contained therein must be sufficient to authenticate the proffered evidence.

**Reasonable Notice:** FRE 902(14) adopts FRE 902(11)’s notice requirement. FRE 902(11) requires proponents to give any ad-

verse party reasonable written notice — before trial — of the proponent’s intent to use the social media evidence. What is considered reasonable notice, however, is case-specific. Nevertheless, per FRE 902(11), proponents must make the certification available for inspection so “that the [adverse] party has a fair opportunity to challenge them.”

### FRE 902(14)’S EFFECT ON DISCOVERY PRACTICE

FRE 902(14) provides specific steps and instructions to determine the admissibility of social media evidence. As a result, litigators likely will have seen in the past year, and will continue to see, a reduction in trial costs, lessening of unnecessary evidentiary disputes, and a streamlined discovery process.

### FRE 902(14) SOLVES AUTHENTICATION, BUT REMAINS VULNERABLE

For all its benefits, FRE 902(14) also has limitations. While the rule addresses authentication of social media evidence, it is silent on accuracy, relevance, ownership or control of such evidence. It also does not overcome any hearsay objections. For example, written certification can establish that the web page is what the proponent says it is (e.g., a LinkedIn account listing the defendant as a Harvard graduate). But it does not prove the substance (i.e., that the defendant actually graduated from Harvard).

### STRATEGIES FOR LAWYERS

Considering the prevalence of social media and the increasing impact of social media activity at trial (one need only to look at the impact of the president’s tweets in lawsuits against his administration), below are strategies for every lawyer — whether a litigator or a corporate attorney, in-house or outside general counsel:

- Keep staff and IT departments up-to-date on eDiscovery certifications and forensic techniques.
- Keep up-to-date on emerging technology and other ways electronic evidence can be digitally identified.
- When issuing legal hold notices, consider including metadata, social media posts, and the preservation of social media accounts.
- Identify social media information, such as Twitter handles, Facebook or LinkedIn name(s), etc. in initial disclosure, automatic disclosures, joint statements, and in requests for production.

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efficiency and creativity. Singh represents large and small companies in a variety of sectors, including retail, food and beverage, and manufacturing, on matters involving litigation and business relationships. On the litigation front, Singh thoroughly investigates the facts and engages in strategic negotiations, all with an eye towards efficient dispute resolutions that are in line with her clients’ goals and interests. Singh’s experience in business litigation includes fraud, consumer protection, contractual disputes, conversion of corporate assets, and trade secrets. On the transactional front, Singh carefully manages multimillion-dollar acquisitions, commercial real estate transactions and general corporate governance issues to put her clients and their businesses in the best position to be successful.

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Newton represented BU Law at the 2018 Willem C. Vis International Commercial Arbitration Moot held in Vienna, Austria. She credits her success and noted preparation to her participation in Robins Kaplan LLP’s Exceptional Advocate Training Program. Newton completed the program while serving as a summer associate and diversity fellow for Robins Kaplan in 2017 and 2018. After two successful summers, she continues working as a semester law clerk at the firm. Newton plans to join Robins Kaplan’s Boston office as an associate in the fall of 2019.

- Preserve electronically stored information as it relates to social media for a reasonable amount of time (what is reasonable could depend on the size and nature of the business).
- Be familiar with companies’ online presence and how online activity can be verified, including identifying knowledgeable personnel. ■





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