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Feature Story

The Cutting Edge Of Real - Estate Evidence

State - Of - The - Art Visual Tools Are Becoming Affordable And Accessible For All Lawyers

By Jason M. Scally

Defense attorneys display shadow study

Gone are the days when disputes over proposed property developments in Massachusetts were settled by dueling experts using *words* to describe cryptic plans and pictures.

Today's fact-finders do not want to *hear* someone's explanation of why or why not a proposed building may affect the surrounding properties, they want to *see* it for themselves, and see it accurately.

With some of the technology available to lawyers today, they can.

"This kind of [sophisticated] evidence is bridging the gap where expert opinion leaves off," says Boston attorney Adrienne M. Markham. "It allows fact-finders to form their own views on impact instead of having to believe or disbelieve those of an expert."

High-tech architectural renderings have long been used by lawyers as evidence in cases involving large commercial projects like skyscrapers, where shadow studies and other light and air impact studies are required.

But while sophisticated visual evidence has become more prevalent in the commercial real-estate arena over the last decade, two recent Massachusetts real-estate cases show that the means and methods once reserved for tall skyscrapers and other large downtown projects are now being used more frequently in smaller residential disputes.

Whether trying to obtain an injunction from a court or a permit from a town planning board, these sophisticated means of presenting persuasive visual evidence are no longer out of reach for lawyers with smaller budgets because the cost for the software has dropped dramatically.

In one of Markham's cases, a computer-generated model of a house superimposed on a photo of the existing land helped the lawyers for a housing association on Cape Cod prove that a proposed house would block ocean views and violate restrictive deed covenants.

The depictions were so persuasive that the judge noted them in his decision, and specifically said that more lawyers and litigants could benefit from this technology in presenting evidence.

In another case, a shadow study showed how a one-story addition to a residential apartment building in the North End would not significantly cast more shadows on an abutter's property. In that case, the defendants successfully countered the plaintiff's expert's black and white, two-dimensional architectural rendering with their own detailed study showing the amount of light that would be blocked at almost every hour of the day, at three different times of the year when the sun was highest, lowest and at the middle.

Although these cases were ultimately settled in a court of law, experts say that these types of improved visual evidence can also bolster cases brought before zoning boards — the bread and butter of many real-estate practitioners' work — and some are already using them.

But no matter what type of case is brought or what venue it appears in, lawyers are praising the technological advances for their accuracy in portraying a visual impact in situations where an expert's verbal description might not be enough.

Kenneth L. Kimmell of Boston, an attorney who represents developers and who has employed sophisticated shadow study technology in some of his cases, says that "the value of these technologies is that they give accurate depictions that are easy to understand.'

He explains that "if you're representing a developer and have a project that is not going to cause a significant impact, these presentations can be very helpful to debunk horror stories from the neighbors."

But on the other side, Kimmell says the studies can be equally helpful in supporting the neighbors' position. "Use them for cases where visual impact is a major issue," the real-estate development attorney advises. 'They're not going to be helpful if you're trying to address noise or traffic, but for visual issues, they really are helpful."

Super Models

While the technology itself may not be 'new' or "innovative," its use in a routine Cape Cod development case caught the attention of at least one judge.

The case - *Shearwater Association, Inc. v. Kline* - centered around a new property owner's plan to knock down the home he bought in a beachfront subdivision and build a bigger one. The other property owners objected, saying the building would dramatically affect their ocean views. So the neighborhood association took the matter to court, arguing that there were deed restrictions that prohibited any dwelling on the property from being more than 4,000 square feet.

Although the property owner, Donald Kline, argued that he should have a right to build his proposed dwelling, Superior Court Judge Gary A. Nickerson found that his plans violated the protective covenants in the deed, which he found enforceable.

In his decision, the judge specifically mentioned that the association's visual evidence offered by Markham most accurately showed the visual impact the proposed dwelling would have on the surrounding property.

Nickerson stated: "While it is difficult to quantify, the threatened loss of view is best appreciated by examining the computer-assisted renderings which make up [the plaintiff's exhibits] ... [T]he loss of ocean view translates into a significant loss in the dollar value of each home so affected."

Markham remarks that her presentation “ended up being hugely helpful at trial, and I think it would be even more critical in a jury case.”

To create her presentation, the association’s attorney employed the services of Geller Graphics, a division of Geller Associates, Inc. located in Boston, which routinely provides accurate architectural renderings for developers and architects.

Joseph Geller, the founding partner of Geller, says that Markham’s case was the first one in which they provided evidence for trial, but he says they have frequently assisted lawyers with photo imaging in the “permitting process.”

Chuck Lounsberry, the director of information technology at Geller, demonstrates how the company’s presentation helped out the association’s case and how similar presentation can help other lawyers who need an accurate depiction of a proposed building in dispute.

He explains that his company is able to take a photograph of the site and create a “real world landscape” on the computer.

The IT director says that “the part that makes this process so special is matching up the proposed conditions with the existing conditions in the photograph, and when the two match up, it gives the public a more accurate representation of what the view from the site is going to be.”

Geller adds that “with this technology, it makes it a much more accurate representation using real-world images and forms. It looks like what you would see if you were standing there and the project was actually built.”

In the *Kline* case, for maximum accuracy the Boston-based design company even employed the use of global positioning technology to get the proposed building “within inches” of where it was actually going to be located.

Markham says that she was “convinced that using Geller’s imaging was much more effective than using the traditional method of putting plans on a poster board and having an expert testify as to the difference.

“This [technology] really puts it together in a way that’s scientific enough to be admissible,” Markham says.

Juliane Balliro of Boston, who represented the defendant in the *Kline* case and who employed her own sophisticated visual evidence, agrees with Markham’s assessment that high-tech presentations make more of an impact.

“If a picture is worth 1,000 words, then a virtual picture is probably worth 10 times that much,” Balliro says. “Models can be helpful, but what models don’t give you is the ability to place the virtual house or virtual addition in the spot where it’s going to be and take views of that spot from various locations.”

Although Markham’s evidence ultimately won the day, both the plaintiff’s and defendant’s attorneys recall that Dickerson made several comments during and after the trial that he found both sides presentations extremely helpful.

The judge even asked the attorneys if they would share information about what they used with other attorneys because “he was very interested in how affordable it was to the typical real-estate litigant,” recalls Balliro.

But to illustrate how accurate evidence has to be in today's modern real-estate dispute, both Balliro and Markham note that what made the difference in the case came down to some relatively minute differences in their two experts' approaches.

Apparently, the judge determined that the plaintiff's expert's presentation more accurately depicted the view of the proposed house because the choice of camera lens and the height of the camera showed a more realistic view of what the average human eye would see.

No Shadow Of Doubt

Another case decided earlier this year shows the use of technology in conducting shadow studies - studies performed in order to determine how one property's light would be affected by another nearby structure.

Shadow studies have been common in cases involving skyscrapers and smokestacks, but like the computer-generated before-and-after pictures employed in the *Kline* case, more and more practitioners are able to take advantage of this increasingly accessible technology.

In *McGee, et a!. v. Dennis, et* al., (Lawyers Weekly No. 12-029-02), the defendant, William J. Verdi, owned a three-and-a-half story building in the North End in Boston and wished to add one more floor, making it four-and-a-half stories with a roof deck.

The plaintiffs, owners of an abutting property situated behind the defendant's budding, opposed the variance the defendant had been granted, claiming the additional story would restrict air and light access to their building and obstruct their view.

But Superior Court Judge John C. Cratsley upheld the zoning board's decision because "Verdi's proposal will not adversely impact the plaintiffs' sources of light or air or restrict their view in any way substantially different than occurs at the present time without the addition."

In representing the defendant, attorneys William G. Ferullo, Mitchel S. Ross and Michael W. Ford, all of Boston, hired a shadow expert to prove that their client's new addition would not create a substantial difference in the amount of light the plaintiffs' building received.

Ferullo, who mostly represents clients before zoning boards, says that he used the high-tech shadow study in this case because "it is a more sophisticated art form and it gives a board more of an insight as to what the effect will be, especially with a densely populated area."

Ross maintains that shadow studies have become "standard operating procedure" even for smaller projects in recent years.

Ferullo agrees that "the majority of cases today that Involve new construction or extensions of existing buildings is going to involve some type of shadow study."

For their case, the defense attorneys hired Bradford J. Prestbo, president of P2 Design Inc., in Cambridge, to provide a detailed study to counter the plaintiffs' expert. The entire study was completed for about $1,500.

Prestbo took his own measurements of the building as well as the architect's proposed designs and then built a virtual model on a computer using the AutoCAD program.

He also prepared a detailed report describing the procedures he uses and his findings so that he could also be qualified as an expert in the case if the need arose.

Although this was the first time he has been employed by a law firm to provide a presentation of evidence in litigation, Prestbo says that he now sees how useful his services can be for lawyers in similar situations.

“Using the three-dimensional model, I can depict accurately where the sun’s position will be at any given time during the day and at any given time during the year,” he says.

For his work in the *McGee* case, Prestbo provided the attorneys with three-dimensional, color, computer-created images showing the shadows cast from the proposed addition – as well as the shadows that already exist from taller buildings 500 feet away - at one-hour intervals at three points during the year when the sun was at it’s highest point, lowest point and right in the middle.

Ross was impressed with the presentation.

“Compare that to what lawyers used to do,” he says, showing an example of a two-dimensional, blue-and-white drafting plan that shows the sun’s rays as a straight line at only one point in the middle of one day.

Ross, who was brought in on the case for his litigation experience in such matters, notes that the old way of providing shadow studies doesn’t take into account other factors that may affect the study, such as the shape of a building or the shadows cast by other buildings in the area.

“Accuracy persuades fact-finders,” Ross maintains. “If you can show a fact-finder literally hour by hour what the impact of a proposed building is going to be, whether it’s a board, judges or a jury, they’re going to get a sense of things much faster than if they’re shown something that illustrates the effect on a building ... the old way.”

Ferullo agrees, noting that many zoning boards are now looking for a greater degree of accuracy in proposals. “We do quite a bit of zoning work in Boston, and what we’re seeing more and more is the zoning board wanting to see specific detail on such things as shadow studies for developments of any size,” the real-estate attorney says. “That [used to be] more common if you were doing a high-rise construction project.”

Ford adds that with the old presentations, it was easier for fact-finders to misinterpret shadow studies with their two-tone appearance that often led to confusion between “shad& and “darkness.”

“Shadows are lust blocking direct light,” he says. “It’s shade, and when you have shade, you still have ambient light.”

Ford observes that with a sophisticated, three-dimensional presentation such as theirs, that difference is more apparent.

Price Is Right

With all of the high-tech equipment that goes into making such presentations, many attorneys might expect it to be cost prohibitive. But that is not necessarily the case anymore.

Prestbo says that he typically provides his clients with a shadow study, complete with a detailed analysis and report, for a price around $1500 on a project similar to the North End shadow study. But it could go up or down depending on the volume of work involved.

He notes that an attorney could get a shadow study for “under $1,000” if much of the basic research is completed beforehand.

Both Ferullo and Ross concur, saying the shadow study was relatively inexpensive given the thoroughness of the study.

The technology his company uses has been available for the “past five or six years, but it’s only until recently that the hardware and software has become inexpensive enough to use it,” says Lounsberry, from Geller Graphics.

He says that while it used to take “hundreds of man-hours or a really expensive computer,” as the technology becomes less expensive and more readily available, the question is not who can use it but “who can use it to the highest efficiency?”

Although the total price tag for the *Kline* case (which required multiple images) was in the neighborhood of $25,000, a Geller spokesperson says that “depending on the complexity of the image, the price per image can range anywhere from $800 [to] $5,000.”

Attorneys on both sides of the *Kline* case say the technology they each used was well worth the cost.

“It’s not inexpensive, but it’s certainly no more expensive than hiring an expert in a malpractice case, says Balliro. “I was presently surprised by the cost. Our other alternatives ... would have been of very limited help and would have been very expensive.”