M I C H I G A N
REAL PROPERTY REVIEW

Published by the Real Property Law Section State Bar of Michigan

Spring 2007 Vol. 34, No. 1

CONTENTS

M I C H I G A N
REAL PROPERTY REVIEW

Published by the Real Property Law Section State Bar of Michigan

Spring 2007 Vol. 34, No. 1

The *Michigan Real Property Review* is the official journal of the Real Property Law Section of the State Bar of Michigan. The *Review* is published quarterly and is a significant part of the Section's program of publications, seminars, conferences, legislative liaison and other undertakings for the professional education and development of its members and the Bar.

The Section encourages interested members of the Bar to contribute articles and other publishable material relating to real property law and of interest to the profession. Manuscripts are reviewed by attorneys experienced in the subject matter covered by each article.

Readers are invited to submit articles, comments and correspondence to Lynda J. Oswald, Editor, University of Michigan Ross School of Business, 701 Tappan Street, Ann Arbor, Michigan 48109-1234 (ljoswald@umich.edu). The publication of articles and the editing thereof are at the discretion of the Publications Committee. A cumulative index of articles is printed annually in the Winter issue of the *Review* and is available on the Section website:

www.michbar.org/realproperty/

Articles in the *Review* may be cited by reference to the volume number, abbreviated title of the publication, the appropriate page number and the year of publication as, for example, 14 *Mich Real Prop Rev* 35 (1987).

The views, opinions and conclusions expressed in the *Michigan Real Property Review* are those of only the respective authors and do not necessarily reflect the position or opinion of the State Bar of Michigan, the Real Property Law Section, the *Michigan Real Property Review*, its editor or the Publications Committee of the Section. The publication in the *Review* of articles, letters and other materials does not constitute and should not be construed to be an endorsement of any views, opinions or conclusions that may be expressed or implied. The *Review* is prepared and published as a part of the legal education activities of the Real Property Law Section, for the benefit of its members and the Bar. In publishing the *Review*, the Real Property Law Section does not purport to engage in or to render legal or professional services. If legal advice or services are desired or appropriate, an attorney should be consulted.

The *Michigan Real Property Review* is published by the Real Property Law Section of the State Bar of Michigan. An annual subscription to the *Review* commences in September of each year and ends in August of the following year. Four issues are published each year. The subscription price is $45 annually, payable in advance. Orders for subscriptions should be sent, with the above-stated payment, to *Michigan Real Property Review*, Real Property Law Section, State Bar of Michigan, Michael Franck Building, 306 Townsend Street, Lansing, Michigan 48933-2083.

Published by the
Real Property Law Section, State Bar of Michigan

EX-OFFICIO MEMBERS

(PAST CHAIRPERSONS OF THE SECTION)

G. Norman Gilmore*

Patrick J. Keating
Detroit

Ralph Jossman*

Maurice S. Binkow
Detroit

Allen Priestly*

James W. Draper
Detroit

Myron Weingarden*

David S. Snyder
Southfield

William B. Dunn
Detroit

Allen Schwartz
Detroit

Stephen A. Bromberg
Bloomfield Hills

Richard E. Rabbideau
Detroit

Gary A. Taback
Southfield

Peter A. Nathan
Las Vegas, NV

Carl A. Hasselwander
Rochester Hills

James M. Tervo
San Francisco, CA

Nyal D. Deems
Grand Rapids

James R. Brown
Grand Rapids

Stephen E. Dawson
Bloomfield Hills

Thomas C. Simpson
Bloomfield Hills

Robert R. Nix II
Detroit

Lawrence D. McLaughlin
Detroit

C. Robert Wartell*

Jack D. Shumate
Bloomfield Hills

James N. Candler, Jr.
Detroit

Gail A. Anderson
Lansing

Carol Ann Martinelli
Troy

Robert A. Berlow
Bloomfield Hills

Vicki R. Harding
Detroit

Lawrence M. Dudek
Detroit

Mark F. Makower
Bloomfield Hills

David W. Charron
Grand Rapids

COMMISSIONER LIAISON

W. Anthony Jenkins
Detroit

*Deceased

CHAIRPERSON'S REPORT

by Patrick A. Karbowski

Although this is the Spring Issue of the *Michigan Real Property Review*, as I write this report there is still plenty of snow on the ground. Perhaps you too were perplexed by school closures in southeast Michigan due to the extremely cold temperatures in the waning months of winter. I've heard of "snow days" but "cold days"–it just doesn't sound right. Why, I can remember walking to school in . . . (you've heard it, said it, before). I can assure you, however, that there have been no "cold days" for the Section and its very active Council and committees.

There is no denying that winter left us with some very cold days as it relinquished the season to spring. Long before the onset of such cold weather, the Real Property Law Section had already concocted the perfect elixir: our Winter Conference at Disney's Yacht & Beach Club Resort in Walt Disney World®, in Lake Buena Vista, Florida. The conference theme was "Resort Communities and Second Homes: Following Your Clients 'Up North' and 'Down South.'" As of this writing, the conference is only days away and all of our allotted rooms at the Yacht Club have been booked, and rooms at the adjacent Beach Club are now being filled by conference attendees. Many thanks to our program coordinators, Gregory Gamalski and Ronn Nadis, and to all of our conference speakers, for their hard work. A special thank you to our Friday evening reception sponsor, Alliant Insurance Services.

The Homeward Bound Seminar Series continued its record breaking season at its new location at the Inn at St. Johns in Plymouth, Michigan. The February program featured Mark F. Makower and Thomas R. Schultz on the topic, "The Site Condominium Approval Process from the Developer and Municipal Perspectives–A View from Both Sides of the Fence." Thank you, Mr. Makower and Mr. Schultz, for a job well done. Remember that ICLE partners are able to attend Homeward Bound Seminars at no extra charge as part of their partnership, and webcasts of the seminars are available from ICLE both live over the internet and for a period of time after the live seminar at www.icle.org/seminars.

We are excited to announce that our "Groundbreakers" Breakfast Roundtable program on April 19, 2007 has been enhanced such that you are not going to want to miss it. The program will now be conducted in conjunction with a full day seminar sponsored by the International Council of Shopping Centers ("ICSC"), at the Townsend Hotel in Birmingham, Michigan. The ICSC program will have presentations by some of the top commercial and retail real estate lawyers in Michigan and Michigan real estate brokers, associate brokers, and salespersons that attend the ICSC will receive continuing education credits. The Section will kick-off the all day seminar with its Groundbreakers Breakfast Roundtable program from 8:00-9:30 a.m. Best of all, attendees at the Section's Groundbreakers program will have the option to stay for the entire ICSC program at no extra charge.

It is not too early to register for our Summer Conference, which, as you will see from the "Continuing Legal Education" section of this issue of the *Review*, promises to be an excellent program. Thank you to Melissa Collar and Larry Dudek for planning an excellent conference. Please contact Arlene Rubinstein at (248) 644-7378 or lawa1@aol.com, for more information on any of these great programs.

The Section's ad hoc committee on Recording Issues has been very busy meeting and communicating with several groups and individuals interested in improving access to and the means by which documents are delivered to and recorded by the various county Registers of Deeds. At many Register of Deeds offices, there have been periods of time in recent years where there has been a significant lag-time, or gap, between the date of delivery of an instrument to the Register of Deeds and the date the instrument is assigned a liber and page number by the Register of Deeds. Because Michigan is a "race-notice" state, this "gap" and the corresponding lack of a searchable "entry book" has led to much confusion with regard to the priority of instruments, and has contributed to the widespread problem of fraud in real estate transactions. The groups and individuals involved in these meetings and communications often have passionate views about issues such as the abandonment of the entry book by most Registers of Deeds, and the means by which the winner of the "race" may best be determined. These passions are well-founded; these issues are vital to the health and well being of real estate transfers and transactions in Michigan. The ad hoc committee members have devoted many hours to their task, and the Section remains committed to working with all

of the interested parties to define and reach mutually acceptable goals. Please stay tuned.

Although we are just at the start of a new legislative session, we have already seen several proposed bills of interest to the Section. Be sure to review Leslie Banas' report "Legislation Affecting Real Property" in this issue of the *Review* to stay up to date on legislative developments. If you are interested in the Section's positions on various public policy matters be sure to check out the State Bar of Michigan's Public Policy Updates Archive at www.michbar.org/publicpolicy.

Something I have said before may bear repeating: The Section offers tremendous opportunities for service and growth to its members, and, the Section needs your participation. It is virtually certain that if you invest some time in Section activities you will grow in your knowledge and understanding of real estate law. So, if you'll pardon the tortured cliché, as winter moves into spring and thoughts turn to new growth and opportunity, please contact me so we can discuss your investment and growth in the Section.

COUNTING ON REDIVISION RIGHTS?

*by David W. Charron**

Introduction

It is well known that one of the most contentious issues in the legislative process leading to the 1996 amendment of the Michigan Land Division Act ("LDA") was the subject of redivision rights for unplatted land.[1] So-called "redivision rights" grant landowners the renewed ability to divide unplatted land, without platting, following a statutory waiting period. Prior to the 1996 amendments, a property owner could generally create four parcels of land which were less than 10 acres in size from his or her property every 10 years, and an unlimited number of parcels 10 acres or larger at any time.[2] Many municipalities and planners opposed the automatic 10-year renewal of division rights on the basis that the redivision of unplatted land encouraged land development patterns they considered undesirable.[3] Representatives for agricultural, construction, and real estate interests promoted redivision rights as an inviolate privilege of land ownership. Both sides vehemently advocated for their positions. The failure of the parties to compromise on the issue was one of the principal reasons why the 1996 amendments to the LDA stalled until the eve of a legislative recess, and as a consequence, the current redivision provisions were negotiated by state legislators in the middle of the night.[4]

Common folklore attributes the ultimate success of the late-night legislative session to a pledge by the stakeholders to reconsider the subject of eliminating redivision rights when Michigan had taken satisfactory measures to streamline (e.g., speed up) the process of platting land.[5] Curiously, this same type of pledge was made at the time of the enactment of the Subdivision Control Act of 1967, and then subsequently ignored.[5]

The 10-year anniversary of the 1996 amendments is fast approaching and the first exercise of redivision rights should follow shortly after March 31, 2007.[6] This article discusses the operation of redivision rights under the LDA and the need to modify the current scheme.

Source for Redivision Rights

The exclusive source for redivision rights is Section 108 of the LDA. Subsection (5) contains the core principles governing the exercise of these rights, including the timing of the exercise of rights, and the number of new divisions which become available each time redivision rights arise. Subsection (6) provides that new redivision rights will continue to arise in the same manner in which the initial batch of redivision rights arose. These provisions read:

> (5) A parcel or tract created by an exempt split or a division is not a new parent parcel or parent tract and may be further partitioned or split without being subject to the platting requirements of this act if all of the following requirements are met:
>
> (a) Not less than 10 years have elapsed since the parcel or tract was recorded.
>
> (b) The partitioning or splitting results in not more than the following number of parcels, whichever is less:
>
> > (i) Two parcels for the first 10 acres or fraction thereof in the parcel or tract plus 1 additional parcel for each whole 10 acres in excess of the first 10 acres in the parcel or tract.
> >
> > (ii) Seven parcels or 10 parcels if one of the resulting parcels under this subsection comprises not less than 60% of the area of the parcel or tract being partitioned or split.
>
> (c) The partitioning or splitting satisfies the requirements of section 109.
>
> (6) A parcel or tract created under the provisions of subsection (5) may not be further partitioned or split without being subject to the platting requirements of the act, except in accordance with the provisions of subsection (5).

* David W. Charron is a member of Charron & Hanisch, PLC in Grand Rapids, Michigan. He is the immediate past Chairperson of the Real Property Law Section of the State Bar of Michigan. He concentrates his practice in land development issues.

Redivision Rights Only Arise from Exempt Splits or Divisions

The first concept expressed by Section 108(5) is that in order for redivision rights to be operative, the parcel or tract which is the subject of the splitting activity must be "created by an exempt split or a division." The term "created by" is neither a defined term nor a term used elsewhere in the LDA. The word "created" is used elsewhere but it does not appear to have anything other than a colloquial meaning.[8] An "exempt split" is a type of land split in which all of the resulting parcels are 40 acres or greater in size.[9] A "division" involves resulting parcels which are less than 40 acres in size, and which have obtained governmental approval after complying with Sections 108 and 109 of the LDA.[10]

One minor consequence of this threshold concept is that non-accessible parcels of 20 acres or more in size which resulted from land-splitting activities under Section 109b of the LDA will never qualify for redivision rights.[11] Presumably, there is no need to allow further divisions of these parcels as they could be divided an unlimited number of times as long as all of the resulting parcels were at least 20 acres in size.

An open issue is whether the redivision provisions will now require future "exempt splits" of resulting parcels created previously from exempt splits to be subject to municipal approval and, therefore, to otherwise be subject to the division process. The redivision language of Subsection 108(5) can be construed in this manner, although it is doubtful that this was intended.

Parent Parcels and Parent Tracts Do Not Change

Another principle expressed by Section 108(5) is that a parcel or tract created by an exempt split or a division is not a new "parent parcel" or "parent tract,"[12] and consequently new division rights do not automatically accrue to such newly-created parcels or tracts when they are created, nor do the number of division rights initially allocated to the parent parcel or parent tract change as land is combined or severed from the parent parcel or parent tract. The boundaries and acreage of parent parcels and parent tracts are forever fixed on March 31, 1997.

It may not have been fully appreciated by real estate practitioners during the last 10 years, but the "freezing" of the meaning of these critical terms under the LDA, as confirmed by *Sotelo v Township of Grant,*[13] provided a significant amount of certainty for those who administered division rights. We all enjoyed a definite moment in time when we counted acreage and determined how many splits could be derived from the formulas of Section 108. While redivision rights share many common attributes with the rights associated with the initial batch of division rights which were allocated to parent parcels and tracts, redivision rights lack some certainty about the starting point of any analysis. We will no longer have a common point in time to look to as a reference for the commencement of a land division analysis. Each separate parcel or tract must be analyzed from the time it is created, and this time may vary considerably from other parcels or tracts arising from the same parent parcel or parent tract, or from neighboring properties.

Section 108(5) next provides that a "parcel or tract created by an exempt split or a division may be further partitioned or split without being subject to the platting requirements of the LDA," if three enumerated conditions are satisfied: (1) a 10-year waiting period; (2) the availability of redivision rights under a new formula predicated on the acreage of the area being split; and (3) compliance with the same general criteria which otherwise apply to land divisions.

Ten-Year Waiting Period

To qualify for the exercise of redivision rights, the land owner must demonstrate that "not less than 10 years have elapsed since the parcel or tract (created by the exempt split or division) was recorded." This is a curious phrase for several reasons. First, the 10-year clock is tied to the date the parcel or tract "was recorded," rather than "created." Presumably, the act of recording is different from the act of creation. This may occur, for example, in the case when a deed to a parcel is executed and then not recorded for a period of time. Of course, "recording," rather than "creation," is probably a more desirable benchmark as the public act of recording provides objective and easily verifiable evidence of an intent to create parcels or tracts.

The "parcel or tract was recorded" language is a little strange to real estate practitioners. We routinely record deeds, land contracts, or memorandums of land contracts (in order to evidence the transfer of ownership of land).[14] We occasionally record leases or memorandums of lease in order to evidence lease transactions (divisions and exempt splits can also arise by the lease of land for a period in excess of one year).[15] The statutory language regarding the recording of "parcels or tracts" may have been a cautious attempt to encompass all possible ways that land transactions implicated by the LDA are effectuated.

Unfortunately, the broad scope of this language may be used to validate other types of recorded documents, such as surveys, and justify their use as a starting point for the running of the 10-year redivision clock. Prior to 1997, it was a regular practice to record surveys which complied with Section 132 of the LDA in order to evidence a proprietor's intent to split a parcel into resulting parcels, and thereby start a new 10-year clock running with respect to the recorded survey parcels, without transferring title to any of the parcels reflected in the survey.[16] If recorded surveys are indeed included within the meaning of the phrase "parcel or tract was recorded," this would certainly be an ironic result as it was largely regarded that the LDA incorporated the term "parent tract" for the sole purpose of aggregating and eliminating any benefit from so-called paper splits which arose from surveys of record before March 31, 1997.[17] Whenever one or more parcels which shared a common property line were under common ownership as of March 31, 1997, they were aggregated and treated the same as a single parcel. It is not evident why the legislature would craft the LDA to re-authorize so-called "paper splits" 10 years after they were consciously eliminated.

New Formula for Redivision Rights

The new base formula for redivision rights follows the format of the original formula for land divisions found in Section 108(2) of the LDA in substantial part, with a few significant changes. First, the new base redivision formula reduces the number of resulting parcels which may be available to a land owner for parcels or tracts which are smaller than 20 acres in size.[18] The original formula automatically allowed 4 resulting parcels, regardless of the size of the parent parcel or parent tract. Whether all of these authorized divisions could be taken in the real world generally depended upon limitations found outside of the LDA, such as density requirements in applicable municipal zoning ordinances. The redivision formula only allows 2 resulting parcels for the first 10 acres or fraction thereof, plus one for each additional whole 10 acres in the parcel or tract.

Unlike the division formula, the redivision formula includes two alternative caps on the maximum number of resulting parcels which may be generated from the base redivision formula. The statute introduces the caps by saying that a proprietor qualifies for a number of resulting parcels under either the base redivision formula or under the capped formula, "whichever is less." The "whichever is less" language means that the caps are only relevant if there is sufficient acreage in the parcel or tract for the cap to apply. In other words, the caps limit rights under the general redivision formula; they do not grant additional split rights. Since the two different caps are stated in the alternative and separated by "or," presumably the cap which allows the greater number of division rights will be applicable.

In general, the caps will allow up to 7 resulting parcels, unless certain cluster conditions apply, in which case up to 10 resulting parcels are allowed. This means that in the absence of the cluster conditions being applicable, the redivision formula stops benefiting property owners when the parcel or tract being measured has more than 60 acres. A 70-, 120-, or 240-acre parcel has the same number of resulting parcels from the formula as a 60-acre parcel. This is dramatically different from the original division formula, which continued to grant additional division rights indefinitely based upon the acreage of the parcel.

The clustering condition, which allows up to 3 additional resulting parcels if the parcel or tract otherwise has enough acreage to qualify for the additional resulting parcels, is simple and somewhat familiar because clustering of resulting parcels has been one way that a parent parcel or parent tract was allowed to qualify for additional division rights under Section 108(2) of the LDA. Under the redivision provisions, if all but one of the resulting parcels is situated on 40 percent or less of the area of the parcel or tract being evaluated, the higher 10-parcel cap applies. That's it. Of course, in order to claim 10 resulting parcels, you will need to have 90 acres or more of land area. This may not make the higher cap meaningful in the vast majority of land division transactions.

It is important to note that the redivision provisions do not have any mechanism which is similar to the two bonus provisions which authorized additional division rights as long as the parent parcel or parent tract was at least 20 acres in size. Bonus divisions were popular and most real estate practitioners have qualified their clients' property for additional division rights by creating and utilizing a new street, public or private, to service the resulting parcels, or by clustering the lots so that at least one resulting parcel was created with 60 percent or more of the land area of the overall parent parcel or parent tract.[19] Neither of these "good planning techniques" will generate bonus redivision rights in the future. The use of clustering will simply allow the cap on redivision rights to rise if a proprietor has sufficient acreage to take advantage of the higher cap.

Compliance with General Land Division Criteria

The LDA requires that all resulting parcels which arise from the exercise of redivision rights satisfy Section 109 of the Act. This final condition for redivision approval is probably the easiest to understand as we have all worked with Section 109 of the Act and our local municipalities' land division ordinances, when applicable, to obtain approvals for land splits.[20] The LDA sets forth several criteria which must be evaluated by the local municipality (city, township or village) or authorized county in order to determine whether a proposed land split qualifies as a division.

The applicant for a land division must first demonstrate to the governmental authority that each resulting parcel has an adequate and accurate legal description, by including the same in a tentative parcel map, drawn to scale, showing area, parcel lines, public utility easements, and accessibility. The tentative parcel map must also provide some historical background about the original parent parcel or parent tract associated with the divisions or exempt splits which are the subject of the redivision application, in a manner which is sufficient to demonstrate that redivisions are available to be taken.

Each applicant must demonstrate that the resulting parcels satisfy the State's lot width to depth ratio, or any local ratio adopted in place of the state standard under a land division ordinance.[21] The state standard, which applies to parcels or tracts of 10 acres or less which are not retained by the applicant, requires that each resulting parcel have a depth of not more than 4 times the width.[22] A municipality (or authorized county) may require a smaller or greater depth to width ratio in a land division through its land division ordinance.

The depth to width ratio also does not apply to any resulting parcels which are "retained by the applicant," regardless of the presence of any local land division ordinance.

Each resulting parcel must have a width and area not less than that required by an ordinance adopted to carry out the provisions of the Act.[23] If there is no applicable land division ordinance, width and area are not valid criteria for municipal review of a division. Each resulting parcel must be accessible in order to qualify for a division.[24]

Finally, if any of the resulting parcels are development sites, the applicant must prove that adequate easements for public utilities exist from the resulting parcel to existing public utility facilities.

Looming Problems with the Operation of the Redivision Provisions

Despite the apparent familiarity of the manner in which redivision provisions will operate, there are subtle and potentially serious gaps and problems lurking in the background of the LDA which will need to be addressed by the courts, if not earlier modified by legislative action. These problems may be summarized as: (1) the uncertain status of land retained by a proprietor; (2) the transfer of stacked division rights; (3) dealing with inchoate redivision rights; and (4) the problem with tracts. All of these issues will be discussed within the context in which they will likely arise, i.e., the undying quest by real estate practitioners to maximize the number of resulting parcels attributable to land.

Land Retained by a Proprietor

One of the first issues which will rise to the forefront of any redivision analysis is whether property retained by the proprietor who initiates a division or exempt split (the "remainder property") is also considered to be "created by an exempt split or a division" for purposes of Section 108(5) at the time the first resulting parcel is "created" from the parent parcel or parent tract.[25] If it is not "created" at the time the first division is taken, is it ever created? If so, when? The possible answers to this inquiry are best illustrated by an example. The answer to this question is important because it may affect the commencement of the 10-year redivision clock for all of the parcels or tracts created from the splitting of the parent parcel or tract.

Assume that a parent parcel contains 18 acres on March 31, 1997 and it is lawfully divisible into four resulting parcels. All four divisions are approved at the same time by the local municipality in April, 1997. A closing is held for the first three parcels on the same date in April, 1997, and they are simultaneously conveyed by deed to three unrelated parties. The proprietor retains the fourth parcel until it can be sold. The fourth parcel typically would not be described in any of the deeds for the three sibling parcels. It exists by implication because everything around it has been conveyed away and it is a remnant of the original parent parcel. Has it been created? Probably yes. Did it receive a separate tax parcel identification number and legal description by the local assessor, and separate property description? Yes. Has it been recorded? Yes, no, well, maybe. Certainly the deed to the parcel was recorded more than ten years ago. There would generally be no deed from the grantor to himself with the separate

legal description of the remainder parcel because this is not necessary to convey property one already owns to himself under general principals of Michigan real estate law.

Obviously, one can argue that the remainder parcel was created by implication when the other three deeds were recorded and, therefore, its 10-year clock began to run for redivision rights (like the other three parcels which were conveyed to third parties). There is some fairness to this position.[26] Otherwise, the remainder parcel will not enjoy redivision rights until it is conveyed. On the other hand, one can argue that the parcel has not been "recorded" until a deed (or other instrument of conveyance) containing its description has been recorded. The latter interpretation would deny redivision rights to the parcel until a reconveyance of the parcel. Each outcome has dramatically different consequences for the sibling parcels. As there is no definitive answer to this inquiry at this time, this pivotal issue will likely be one of the first redivision questions that the courts address.

Addressing the Uncertain Consequences of Stacking

Stacking (or layering) arises when the proprietor of a parcel or tract enjoys unused division rights and redivision rights at the same time. This situation will routinely happen under the LDA. This happens, for example, whenever a resulting parcel is transferred with division rights shortly after land division approval is obtained, and then simply retained by the grantee for the 10-year waiting period. Stacking does not pose any analytical difficulties in most factual situations. The fundamental problem with stacking is that the rights associated with exercise of redivision rights are slightly different than those with conventional division rights, and there is no conceptual framework in the LDA to deal with the consequences of "stacking" when the differences arise.

Division rights which initially arose on March 31, 1997 ("original division rights") can be used anywhere within the original parent parcel or parent tract. Divisions created by the exercise of redivision rights, however, appear limited to the geography of the parcel or tract created from a recorded exempt split or division that is at least ten years old. They may not be available for use anywhere within the parent tract or parent parcel. The original division rights may also be augmented by bonus provisions in the LDA which award two additional split rights if certain "good planning techniques" are utilized in the effectuation of the splits: (1) the creation of new drives or roadways, public or private; or (2) clustering.[27] These provisions do not apply to divisions created by the exercise of redivision rights. It is probably fair to assume that the original division rights are more valuable than the later-acquired redivision rights, because they are more applicable and/or versatile. Both types of rights may be sold and transferred, either at the time a division is made of such parcel or tract, or at any time subsequently. Both types of division rights are transferable by the same language which appears in a deed:[28]

> The grantor grants to the grantee the right to make [insert number] division(s) under section 108 of the land division act, Act No. 288 of the Public Acts of 1967.

The obvious question is whether there is any way to keep the "old" division rights separate from the new "redivision" division rights (and thereby retain the more valuable "conventional" division rights when a transfer of less than all rights is desired)? How does a proprietor use the statutory language and convey one type of division right but not another? What happens in the event no distinction is made? The LDA does not provide any clear answers to the inquiries. There is no "FIFO" (first in, first out) rule. In all likelihood, the statutory language will need to be augmented by the legislature or by language added to the deed by real estate practitioners. Whether the courts will respect additional deed language based upon the general notion that it is within the grantor's power to allocate such rights is unknown.

Dealing with Inchoate Redivision Rights

Original division rights simply arose from the LDA on March 31, 1997 and immediately vested in the proprietors of parent parcels and parent tracts. Redivision rights are more complicated. They are conceived when a parcel or tract is created from an exempt split or division and they must matriculate for ten years before they vest into a state of being which makes them divisions. The original boundaries of parent parcels and/or parent tracts do not change for LDA purposes as redivision rights matriculate, even though these parcels or tracts may change ownership, or physically change by being partitioned, split, or merged with other properties.[29]

The period of matriculation has caused and will likely continue to cause confusion and tensions between the original proprietor of land and his grantees until the courts or the legislature better define the ownership of redivision rights. It is not uncommon for proprietors to believe that ownership of the inchoate redivision rights (those rights, if any, which arise immediately following the creation of a resulting parcel from a division or ex-

empt split) gives them the right to control the destiny of the divisions which will result when the 10-year holding period has been satisfied, even if they do not own the subject property at the time the rights vest into divisions.[30] Most do not know why they believe what they believe but they generally trace the notion back to the concept that you only give away what you expressly give away under the LDA. Both sides to this issue agree that the statutory deed language of Section 109(3) does not purport to transfer anything other than full-blown division rights. Under this reasoning, if inchoate redivision rights can not transfer, they must remain in the hands of the original proprietor.

This argument runs into difficulties when Subsection 109(3) of the LDA is examined in closer detail. This provision also provides that "in the absence of a statement conforming to the requirements of this subsection, the right to make divisions under 108(2), (3) and (4) stays with the remainder of the parent tract or parent parcel retained by the grantor." It is obvious that this provision does not reference Section 108(5) of the LDA, the source of redivision rights. If one was preserving the status of inchoate redivision rights, this would have been the likely place to do so. The better reading of the LDA is that it rewards the proprietor of land who satisfies the requirements of the redivision provisions at the time a request for division approval is made to the local municipality. In other words, redivision rights appear to simply spring up in the hands of the land owner when conditions are ripe, just like the original batch of division rights arose on March 31, 1997. No action is required to be taken by the original proprietor of the parent parcel or parent tract to independently transfer inchoate redivision rights to a grantee. Redivision rights arise from the attributes of the resulting parcels alone.[31] They are not dependent upon any actions of a proprietor who may have owned the land for a period of time while the redivision rights were matriculating.

Is it necessary to deal with unripened–inchoate–redivision rights until they vest into being? The answer is a qualified "yes." Real estate practitioners will likely seek assurances from sellers, governmental authorities and title insurance companies about the status of such rights every time the parcel or tract to which they appertain is valued and transferred, just in the same manner that assurances were previously obtained from transferors of division rights. Properties with inchoate redivision rights which matriculate in 2 years may be worth more than similarly-situated properties whose rights do not matriculate for 8 years.

The Problem with Tracts

The most troublesome new concept in the redivision provisions involves the use of the tract concept as a starting point in the formulas for redivision rights. The redivision provisions are the only place in the LDA where the consequence of a division or exempt split is referred to as a "tract"; elsewhere, the consequence of splitting is always a "parcel." Section 109(2) of the LDA, for example, states that the right to make divisions exempt from the platting requirements of the LDA can only be transferred from "that parent parcel or parent tract *to a parcel created* from that parent parcel or parent tract."[32] The familiar form used by the State Tax Commission to administer the LDA–the Notice to Assessor of Transfer of the Right to Make a Division of Land (Form L-4260a)–uses the following phrases mandated by Section 109:

3. Were there any unallocated divisions transferred to the *newly created parcel?* If so, how many?

4. How many unallocated divisions were transferred to the *newly created parcel?*[33]

Even the redivision provisions say that the consequence of a splitting or partitioning action under their formulas is a resulting parcel (with no reference to the formation of a tract).[34]

Was the use of the term "tract" a calculated expression of legislative intent, or a simple mistake made in the rush of a legislative whirlwind to recess? For the reasons which will be discussed, real estate practitioners can only hope it was a mistake. Unfortunately, the term is used six times in Section 108(5) and (6), thus indicating that some conscious forethought may have been given to its inclusion.

What does it mean to be a tract created by the recording of an exempt split or division? At what point in time is the tract measured? May parcels outside of the original parent parcel or parent tract of the subject parcel be aggregated with the subject parcel to constitute a "tract" for purposes of a redivision analysis? How does the 10-year clock begin to run with respect to such tracts? What social policy is being implemented by the inclusion of this term? These are all great questions but unfortunately, there are few clues in the LDA about how they should be answered. The mere fact that parcels are being aggregated for counting purposes under the redivision formulas may allow parcels which were acquired at different times, and held for different holding periods, to be bootstrapped together, and thereby either accelerate

or delay the exercise of redivision rights, depending upon the circumstances. It all depends upon when a tract is measured.

When to Measure a Tract

The LDA is unclear as to when and how to measure a parcel or tract whose acreage is being used to compute redivision rights, in marked contrast to the way in which these terms were handled with the initial divisions of a parcel or tract.[35] There is no starting point with the definition of these terms. Section 102(g) of the LDA defines "parcel" as "a continuous area or acreage of land which can be described as provided in the act," and Section 102(h) of the LDA defines "tract" as "2 or more parcels that share a common property line and are under the same ownership." When these terms are used to determine whether an original division can be taken, they are always modified by the adjective "parent," and when used in this manner, they mean "a parcel or tract . . . lawfully in existence on the effective date of the amendatory act that added this subdivision," or March 31, 1997.[36] Similar treatment is used when the terms are employed in Section 109b of the LDA, dealing with certain non-accessible parcels of 20 acres or more.[37]

There is no parallel concept like "parent tract" or "parent parcel" which pegs a specific date or event for redivision purposes, nor does the LDA provide any clues about what date or event was intended. There are at least three possible dates which could be used for the purpose of determining the meaning of these terms and, as might be expected, each different date produces different results when a tract is involved. These dates are: (1) the date when the parcel or tract was first recorded;[38] (2) the 10-year anniversary of the date when the parcel or tract was first recorded; and (3) the date when a land division based upon the parcel or tract is approved or taken. There are vast differences in treatment based upon the date selected and quite frankly, since it is not clear what policy objective was sought by the inclusion of the term tract, it is not obvious which date makes sense and should be employed.

Examples

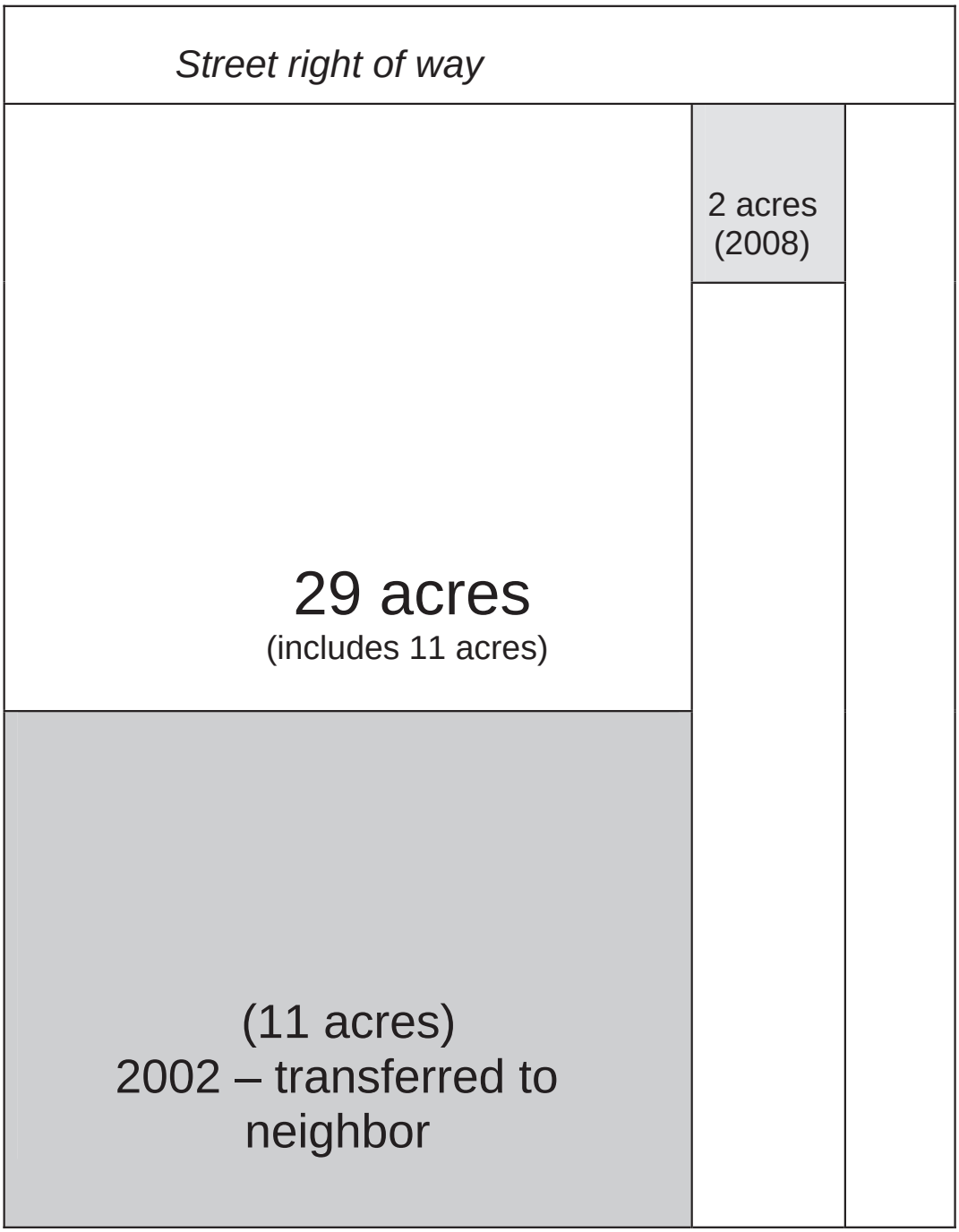
For example, assume that after March 31, 1997, a land owner purchases and records his deeds to two contiguous parcels (2 acres and 29 acres) from two different proprietors and two different parent parcels. Both grantors retained the balance of their parent parcels and no division rights were assigned. Five years later, the land owner conveyed 11 acres (from the 29 acre parcel) to his southerly neighbor as an exempt transfer of land to an adjacent parcel of land. Six additional years pass. The land owner conveys the 2 acre parcel (as originally configured) as a second exempt transfer of land to another adjacent owner of land. Twelve years after he received his initial conveyances of 31 acres, the land owner decides he wants to exercise his redivision rights and split his remaining land. He learns that his land must be aggregated into a tract in order to determine how many parcels are available by the exercise of his redivision rights. When are these determinations made?

If the status is determined when he initially acquired and recorded deeds to the two parcels–the date they were created and recorded and the first possible date a tract was formed–he would have two parcels (2 acres and 29 acres), or a tract of 31 acres. There may not be anything in the LDA which prevents land from two different parent parcels or parent tracts to be aggregated for purposes of redivision analysis.[39] Presumably, the formulas of subsection 108(5)(b) require us to aggregate the land as a tract to determine the number of redivision rights because it will result in a lesser number.[40] This would give the landowner the possibility of creating 4 resulting parcels under the formulas of Section 108(5), depending upon the configuration of the splits (and local zoning). This interpretation basically ignores what happens during the 10-year matriculation period of the redivision rights. What happens to the grantee of the 11 acres and the grantee of the 2-acre parcel? Aren't they part of the same tract which is being analyzed? When, if ever, are they considered severed from such tract? The LDA does not say.

If the tract status is determined on the date when the land owner first owned the two parcels for 10 years (presumably the date his redivision rights vested), he would have two parcels (2 acres and 18 acres), or a tract of 20 acres and he would have 3 resulting parcels available to him, depending upon the configuration of the resulting parcels (and local zoning). This conclusion begs some questions. Do all of the parcels of a tract have to be owned for the same period to be counted? Is the tract's identity forever established on the 10-year anniversary? If the description of the tract changes for any reason during the 10-year period, does a new 10-year clock start running? Doesn't Section 108(5)(a) refers to the concept of "parcel" or "tract" as if it was determined in the past, when "the parcel or tract was recorded?" The LDA does not provide any clear answers.

If the tract status is determined when the land owner applies for divisions by exercising his redivision rights, or takes the redivisions by recording a deed or other

Example 1: 31-acre tract as of March 31, 1997



conveyance, the land owner would only have one parcel of 18 acres and he would be limited to the creation of two resulting parcels. While this is not as many redivision rights as are available under the other scenario, this result is certainly easier to calculate and more predictable. It also recognizes the dynamic nature of land ownership patterns and provides opportunities for planning by placing the date of reckoning entirely within the control of the land owner who undertakes the splitting activity. Better planning by the land owner may have resulted in more divisions–for example, if he had waited until after he had exercised redivision rights to transfer land to his neighbors, he would have more split rights. In this last example, the land owner who makes otherwise exempt transfers of land to his neighbors, before he applies for redivision approval, is treated differently from a land owner

who first obtains redivision approval before transferring land to a neighbor.

What if the example is more complicated and the landowner acquired his initial parcels at different times, e.g., the first 2-acre parcel in April, 1997, a second 3-acre parcel on April 1, 1999, a third 22-acre parcel in 2002, and a fourth 4-acre parcel in 2003? If we assume no transfers to adjacent parcels of land, how many acres are in the land owner's tract on April 2, 2009–5 or 31? In other words, is it possible to include the additional 26 acres in the "tract" which the land owner acquired in 2002 and 2003, because he now owns four parcels which share a common property line (e.g., the definition of a "tract"), or is the land owner limited to considering only the first 5 acres which he acquired in 1997 and 1999 as part of the "tract" because only 10 years have lapsed on those parcels? If the third parcel to be acquired is not included in the bundle of land aggregated for the "first tract," is there a second composite "tract" which arises after the third parcel is owned for 10 years, or would the land owner only have one earlier tract and two extra parcels which have not yet achieved tract status–a tract with 5 acres, one parcel with 22 acres, and one with 4 acres? If separate, do each qualify for the minimum redivision rights under the formulas of Section 108(5) which would allow the land owner to create two resulting parcels for each parcel or tract, for a total of six parcels (two for the first tract, and one for each subsequent parcel which trips the 10-year mark)?

If the status of the "tract" is determined on the 10-year anniversary of ownership of the first parcel the land owner acquired in 1997, or on the date he applied for a land division based upon his redivision rights on April 2, 2009, he could either have one tract of 31 acres (because he owned all four parcels), or one tract with 5 acres, and one tract with 26 acres, depending upon whether it is necessary for him to own both parcels for the full 10-year period.

If the status of the "tract" is determined without regard to whether 10 years of ownership has lapsed on all of the parcels in the tract, the land owner would have a single tract of 31 acres and qualify for 4 resulting parcels, depending upon the configuration of the splits (and local zoning). If a second, third or fourth parcel is aggregated for purposes of determining whether a tract exists, it would not make any difference whether the land owner acquired the additional parcels five years after the first, or five minutes before the land division application was made.[41]

If the status of the "tract" is determined by having all of the parcels in the tract qualify for the 10-year holding period, no redivision of the parcels of the tract could occur prior to 2013 in the foregoing example.

The uncertainty about how to administer the tract provisions, as well as the real possibility that land areas under ownership by different parties at different points in time may have to be included in each party's land division analysis, and possibly counted differently by each party and to the exclusion of the other party, will make any analysis under the redivision provisions extremely complicated and fraught with peril. This peril will increase significantly if it involves a tract with multiple parcels which have changed hands. The uncertainty about the new redivision provisions may also encourage something we have not seen for at least ten years–a rush to the local register of deeds to record splits before some one else grabs them. The only way to make the process more certain is to ask the municipality for approval and record the divisions before anyone else in your possible tract does the same.

Conclusion

This is one of those moments in history when every Michigan real estate practitioner should pause and reflect upon whether the mechanism which has been created to regulate the splitting and partitioning of unplatted land has become too complicated and unpredictable to administer, and in fact, is worse than the societal ills it seeks to avoid, e.g., land-locked parcels and the inefficient use of land resources. The redivision provisions will cause needless costs and expense to Michigan municipalities and courts at a time when budget resources are tight. They will cause heartache and pain to Michigan real estate practitioners who attempt to make sense of a scheme which is no longer rooted in any identifiable public policy, and which is fraught with unknown snarls and pitfalls. The probability of legislative change is remote, given the historical difficulty of achieving political solutions to these issues. It appears likely that gaps in the LDA will be filled by the courts on a case by case basis. As you tackle these issues in trial and appellate courts, please keep the Real Property Law Section advised of your progress and of your ideas to make things better. We have to find a better way to operate.

Endnotes

1. MCLA 560.101 *et seq.*; MSA 26.430(101) *et seq.*

2. Subdivision Control Act of 1967, PA 1967 No. 288.

3. Mark A. Wycoff, *Analysis of Proposed Changes to the Subdivision Control Act*, Planning and Zoning News, Feb. 1996, p. 5.

4. SB 112 was passed by the Senate on December 12, 1996 and signed in law on January 22, 1997, becoming P.A. 591 of 1996. The redivision provision was added in the House and later incorporated to the Senate's version of the bill. The bill was not given immediate effect and therefore became effective 90 days after sine die adjournment, March 31, 1997.

5. Memorandum from Bea Raymond, Administrative Assistant to Sen. Leon Stille, to all interested parties, dated January 22, 1997.

6. *See* Wycoff, *supra* note 3, at p. 5.

7. The original amendments to the LDA were effective March 31, 1997.

8. MCLA 560.108(3)(a), (4), and MCLA 560.109(2) & (2)(b).

9. MCLA 560.102(e); MSA 26.430(102)(e).

10. MCLA 560.102(d); MSA 26.430(102)(d).

11. MCLA 560.109b; MSA 26.430(109b).

12. It is apparent when reading the provisions that Section 108(5) is one of those compound sentences that contains too many thoughts, and probably should have been broken into separate smaller sentences. In fact, the original text of Senate Bill 112 ended the sentence after "this act." The House expanded the sentence to create redivision rights in the bill it adopted.

13. 470 Mich. 95; 680 N.W.2d 381 (2004).

14. The language of Section 108(5)(a) and Sections 109(3) and (4) of the LDA may tie the creation of a parcel to the delivery of a deed which grants or withholds division rights.

15. MCLA 560.101; MSA 26.430(101).

16. OAG No. 5929, p. 237 (June 25, 1981).

17. *See* James R. Brown & David W. Charron, *Working with the New Rules of the Land Division Act*, 24 Mich Real Prop Rev 113 (1997).

18. It is curious to note that the redivision provisions use the permissive "may" rather than the mandatory "shall" to describe the number of resulting parcels which may result from splitting activities. The context of each phrase in each formula does not appear to produce a different result.

19. MCLA 560.108(3); MSA 26.430.(108)(3).

20. *See* Brown & Charron, *supra* note 17, at p. 113; David E. Pierson, *Update on the Land Division Act: 1996 PA 591 and 1997 PA 87*, 25 Mich Real Prop Rev 71 (1998).

21. MCLA 560.109(1)(b); MSA 26.430(109)(1)(b).

22. MCLA 560.109(1)(b); MSA 26.430(109)(1)(b).

23. MCLA 560.109(1)(c)-(d); MSA 26.430(109)(1)(c)-(d).

24. MCLA 560.109(1)(e); MSA 26.430(109)(1)(e).

25. The term "parcel" is used for purposes of an example. The same analysis could apply to a "tract."

26. It is an interesting exercise to vary the example slightly and reconsider the equities of the situation if the proprietor only conveyed one parcel at the first closing event, and retained the three remaining parcels. Do all of the future sibling parcels from the parent tract or parcel start their 10-year clock for redivision rights from the date of the earliest division or exempt split of a sibling parcel? Why does this alternative fact pattern seem less compelling?

27. MCLA 560.108(3); MSA 26.430(108)(3).

28. MCLA 560.109; MSA 26.430(109).

29. MCLA 560.108(6); MSA 26.430(108)(6).

30. This tension is similar to the conduct of parties under the pre-1997 version of the LDA. It was a routine practice for land proprietors to use deed covenants to restrict the ability of grantees to take splits of land which were less than 10 acres in size, in order to preserve these resulting parcels for the proprietor.

31. *See* OAG No. 5929, *supra* note 16, and OAG No. 5361, p. 610 (September 12, 1978) for a discussion of the pre-1997 amendment operation of the LDA.

32. Emphasis added. *See also* MCLA 560.108(3)(a) & (4); MSA 26.430(108)(3)(a) & (4).

33. Emphasis added. It should be assumed that municipalities have established systems to track division rights transferred to parcels based upon the form, and no separate accounting for transfers to "tracts" has occurred.

34. MCLA 560.108(5); MSA 26.430(108)(5); *but see* MCLA 560.108(6); MSA 26.430(108)(6) where the consequence of a partitioning or splitting under Section 108(5) is referred to as a "parcel or tract."

35. See OAG dated October 28, 1977, and OAG dated December 12, 1977, for a discussion on the meaning of the words "parcel" and "tract" prior to the 1996 amendments.

36. The preface "parent" is conspicuously absent from Section 108(5) of the LDA, and applying a start date of March 31, 1997 would not make any sense anyway.

37. The one other place the terms are used without the adjective "parent" is in Section 109b of the LDA. This section, however, pegs the date of determination as March 31, 1997. The terms also appear in the definitions of "Division," "Exempt split," "Subdivide," "parent tract," and "Lot," found in Section 102 of the LDA, MCLA 560.102; MSA 26.430(102). The concept of parent tract was employed to limit the initial number of divisions attributable to a land owner by ignoring "paper splits" which were otherwise operative under the LDA, before the 1996 amendments.

38. The date a "parcel or tract" was first created will always be the date a parcel arising from a division or exempt split was first recorded. Some support for this position comes from Section 108(f)(a) of the LDA which refers to 10 years having elapsed "since *the* parcel or tract was recorded." (Emphasis added.) "The parcel or tract" appears to be something created in the past.

39. David Pierson, a well-known scholar of the LDA, has suggested that the use of the prefixes "an" and "a" before the terms "exempt split" and "division" in Section 108(5) may denote a connection to the "parent parcel" and "parent tract" from which they arise, and consequently, a limitation on the types of parcels which may be aggregated for the purpose of determining a tract (e.g., they must be from the same parent parcel or parent tract).

40. This inference may not be accurate. The term "whichever is less," which appears in subparagraph (b), may be referring solely to whether option (i) or (ii) is employed. It is possible to read subparagraph (b) to allow either the number resulting from the acreage of the parcels to be used or the number resulting from the acreage of the tract to be used, for both (i) and (ii).

41. This would effectively result in the acceleration of redivision rights for the acquired parcel.

ENHANCING THE DEAL: INTEGRATING GOVERNMENT INCENTIVES INTO REAL ESTATE TRANSACTIONS

*by Grant W. Williams**

Whenever real estate counsel is involved in advising on commercial real estate transactions, counsel should be cognizant of the fact that an investment is about to be made for which significant tax credits, abatements and low-cost financing may be available to partially offset the costs of the investment. By some estimates, more than $50 billion in incentives are awarded each year by the federal, state and local economic development agencies.[1] If these estimates are correct, acquiring even a small portion of this award for one's client could make a significant difference.

Thus, apprising one's client of available incentives and assisting in acquiring such awards becomes a key component of the advice provided. Because the activities which qualify for such incentives vary, counsel must not only be aware of incentives available for actual investment in bricks and mortar, but also of incentives available for activities which drive those brick and mortar investments. For example, if negotiating a lease of new industrial space, counsel should ask if newly-created jobs will be filling that space and if newly-acquired equipment will be installed. Counsel familiar with available incentives will be better equipped to ask such relevant questions.

This article will review several categories of incentives commonly offered by states and local jurisdictions for commercial and industrial development, focusing in particular on Michigan's offerings. It does not address those offered for residential development or federal incentives. The article first provides an overview of incentives offered in the form of tax credits and rebates available for the creation of jobs and investments tied to the creation of jobs. It includes a brief discussion of valuation of such credits. It then addresses incentives which abate real and personal property taxes, followed by a review of incentives offered in conjunction with investments made in certain locations, such as enterprise zones or brownfields. The article concludes with a brief discussion about timing factors and use of specialized legislation used to obtain incentives.

Tax Credits and Rebates

Generally, most states offer some form of tax credit for investment in developing headquarter locations and in high tech or industrial facilities. Many states also offer tax credits for new jobs created by such investment. Depending upon the state, the tax credits can come in the form of credits against the recipient's corporate income tax, franchise tax, or some other state levy. Because governments desire to steer investment to certain distressed areas and to see remediation of brownfields, they often offer more generous credits to a developer or company willing to invest in those areas.

Tax Credits Offered for Job Creation

Michigan's MEGA Credits. Faced with the prospect of unemployment and job drain from the local economy, the State of Michigan has responded aggressively to stem such loss and make it fiscally advantageous for companies to not only create jobs but also retain jobs in Michigan. As a part of the effort, Michigan's legislature granted the Michigan Economic Growth Authority ("MEGA") the ability to award, for both qualified job creation and qualified job retention, refundable[2] single business tax credits.[3] These credits, commonly referred to as MEGA credits, can potentially equal up to 100% of the amount of personal income tax generated by newly-created or retained jobs for up to 20 years. Thus, a company creating 100 jobs with an average salary of $50,000 could potentially receive MEGA credits worth $3.9 million over the following 20 years. The potential amount of MEGA credits statutorily available can vary significantly from the MEGA credit actually granted. The exact amount of tax credits granted is determined by the MEGA Board based on a number of factors.[4]

Qualifications for created jobs. Michigan has continued to reduce the requirements for a company to qualify for the MEGA credits in order to entice a greater range of companies to relocate and retain jobs in Michigan.

* Grant W. Williams is an attorney in the Real Estate Group at Miller, Canfield, Paddock & Stone P.L.C. He graduated from the University of Michigan Law School and was a member of the Order of the Coif. He focuses his practice on commercial real estate transactions, which include obtaining government incentives for clients both in Michigan and throughout the United States.

In 2003, it amended the MEGA Act so that credits could be granted for retained jobs as well as jobs created. In July, 2006, the state reduced the number of jobs that must be created.[5] Currently, in order for a company to obtain MEGA credits for job creation, certain key criteria must be met, including the number and classifications of full-time jobs, as well as the level of employee compensation.[6] A company new to the state must create a total of 100 jobs within 12 months of locating within the state. However, a company already employing workers within the state and now expanding its Michigan workforce need only create 50 jobs. The required number of jobs is further reduced to only 25 new jobs if the business will operate in a facility located within an Empowerment or Renaissance Zone (discussed below). Finally, if the new jobs are created by a high technology business[7] or an eligible rural business, only 5 jobs need be created, although other stipulations apply.[8] This minimal requirement of only 5 jobs illustrates that even in small transactions real estate counsel should investigate which potential incentives could benefit the transaction.

Jobs eligible to be counted toward the MEGA credit include jobs in manufacturing, mining, R&D, wholesale and trade (though not retail), office operations and qualified high tech businesses.[9] The amount of capital investment made in conjunction with job creation and local government cooperation, although not specified as requirements, are still crucial criteria used by the MEGA Board when evaluating whether and the extent to which any MEGA credits will be granted. This capital investment can be new or replacement construction, including certain tenant build-out expenses, and qualified equipment purchases.[10]

Qualifications for retained jobs. MEGA job retention credits are available for qualifying jobs that, but for the tax credit, would otherwise be terminated or transferred outside of the state. The MEGA job retention tax credit is generally aimed towards larger companies (i.e., companies with more than 1,000 full-time employees working within Michigan), or to companies also making capital investments of over $10 million to their Michigan facilities.[11] The other requirements that a qualifying company faces for MEGA's job retention tax credits are similar to those applicable for job creation except that it must retain, rather than create, a specified number of qualified jobs in Michigan.[12] Most companies are required to retain between 100 and 300 jobs within the state.[13] Because part of the award calculation is the benefit the State receives from the retained jobs over time, the company must agree to maintain any retained jobs through the term of the credits. A claw back of benefits,[14] as well as other penalties, will be applied if the level of retained jobs falls below the baseline.[15] The company and the State must enter into an agreement memorializing the awarded credits, as well as many restrictions and penalties.[16]

Sample of Other States' Credits for Job Creation. Pennsylvania and Ohio are just two examples of states offering tax credits for job creation and capital investment. Pennsylvania's Job Creation Tax Credit Program ("JCTC"), administrated by Pennsylvania's Department of Community and Economic Development ("DCED"), offers up to a $1,000 tax credit for each job created under the program for qualifying companies who, within a specified three-year time frame, create at least 25 new jobs or increase employment by 20%. The credit, approved by the DCED based on statutory criteria, can be applied against various Pennsylvania state taxes.[17]

Ohio also maintains a JCTC,[18] offering a refundable credit. Similar to Michigan's MEGA credit, Ohio's credit is based on a percentage of personal state income tax generated by the new jobs. In extraordinary situations, the credit can be as much as 100% of the newly-hired employees' state withholding taxes for up to 15 years, but is generally granted in an amount equaling approximately 50% to 75% of such withholdings. In order to qualify for the credits, the company must agree to maintain its operations at the location of the new jobs for twice the duration of the credits. In most cases, the credits cannot be given for jobs relocated from other areas in Ohio. Other requirements and criteria apply, many similar to those found in Michigan.[19]

Tax Rebates Offered for Job Creation

In lieu of offering tax credits for job creation, some states rebate the amount of withholding tax attributable to the new jobs. Such rebates correlate the amount of financial incentive awarded to the amount of income created by such jobs more precisely than simply the total number of jobs created. If a business hires 20 new employees with an average salary of $50,000 and pays withholding taxes of 5%, and the state rebates 50% of the withholding paid, the company could receive $25,000 each year the rebate is in place. If the average salary level, and thus income brought into the state, were increased to $75,000, the rebate awarded increases proportionately to $34,500 per year. As more jobs are created, the company's rebates again increase in proportion to the wealth brought into the state.

One example of a rebate program is Mississippi's Advantage Jobs,[20] which offers a rebate of the withholding

taxes for newly-created jobs for a period of 10 years. In order to be eligible, the company must be qualified and must create a minimum number of jobs within qualifying industries and at specified wage levels. According to the state's publication, the "amount of the Advantage Jobs rebate is tied directly to the net economic benefit received by the state. This net benefit is shown as a withholding percentage that, based on the number of jobs and average annual salary estimates provided by the company, is allowable given the economic impact of the project."[21] The rebated percentage of withholdings eligible is capped between 70% and 90%, depending on the percent by which the new employees' average annual salary exceeds the area's average salary and further limited by the state's cost/benefit analysis.[22]

Tax Incentives Offered for Investment Tied to Job Creation

While Michigan primarily bases the award on the number of jobs and uses the amount of capital investment only as a weighted factor, many states award the tax credits in direct proportion to the capital investment made in the state. An example is Alabama's Capital Investment Tax Credit,[23] which provides an income tax credit of up to 5% of the initial capital costs of qualified projects connected with a headquarters facility or an industrial, warehousing, or research activity facility.[24] The Capital Tax Credit can be applied over 20 years, which, disregarding the time value of money, would provide credits equal to 100% of the cost of the project. Job creation, however, is still a factor. In order to be eligible, the investment must be accompanied by a specified amount of newly-created jobs,[25] with wages meeting specified minimum levels.[26] Generally, at least 20 new jobs must be generated, although exceptions are made for certain geographic areas and small business addition projects.[27]

New York also ties credits awarded for certain investments to job creation when it offers an investment tax credit ("ITC") by which businesses creating new jobs and making new investment in production property and equipment can qualify to receive tax credits of up to 10% of their eligible investment.[28]

Determining the Value of Income Tax Credits

Valuation. Because tax credits offered can be spread out over many years and can come in the form of either refundable or non-refundable credits, ascertaining the value of credits available to the client is crucial, especially if the value of the credit is incorporated in the financial pro forma of the project. A non-refundable credit's value can vary greatly for different companies because the credit's value is based, in part, on the current and anticipated tax liability of that company. A non-refundable income tax credit may be of negligible value for a new business anticipating limited taxable income and expecting a delay before actually generating any substantial taxable income. A credit's value is further reduced if the state also limits the utilization of the credit to a certain percentage of the company's tax liability for any given year. Carry backs and carry forwards can address this to a certain extent, but new businesses are not likely to use a carry back. Thus, unless the state's incentive program has other provisions to address this issue, the only value derived from the credit would stem from the offset against anticipated future liability.

Addressing Value Issues. New York previously attempted to address this issue by allowing newly-created businesses to carry their ITCs forward for 15 years,[29] which conceivably would be enough time to recoup all the credits. However, carrying forward credits 15 years, especially with the likelihood that such credits will be applied in the later years, significantly reduces the net present value of such credits and raises accounting issues pertinent to the value of the referred tax amounts.

New Jersey has addressed this issue by allowing new or expanding emerging technology and biotechnology companies to transfer or sell unused Research and Development Tax Credits, as well as the companies' net operating loss carry forward, to non-affiliated companies.[30] The ability to transfer the credits and losses may be particularly appropriate for start-up high tech research companies often susceptible to deferred returns on investment.

Tax rebates and refundable credits can also answer this dilemma because neither is affected by the anticipated tax liability. In the event the company is not able to apply the whole amount of the refundable credit for a given tax year, the portion of the credit not applied is delivered to the company in the form of cash. Of course, as with any form of incentive applicable over a period of years, the net present value of a refundable credit or rebate to be claimed in the future must be calculated in order to ascertain the true value of the credit.

Abatement of Real and Personal Property Taxes

Along with offering tax credits, many state and county governments are willing to abate taxes on real and personal property when the value of such property

is enhanced through new investment and development. It may be that the governments have reasoned that should the new construction and development never occur, the property base from which the taxes are levied would not have otherwise changed. Thus, an abatement of the increase in the investor's tax liability will not lessen the stream of tax revenue derived from that segment of taxable property. Such abatements, however, are a balancing act between a community's need for new investment and need to maintain or grow its revenue stream.

Michigan's Industrial Facilities Tax Abatement

In Michigan, property tax abatement is available through an Industrial Facilities Tax Exemption ("IFTE").[31] Its stated purpose is to encourage and enable new construction, renovation and expansion of aging, industrial plants. As an encouragement of high tech investment, the IFT Act includes qualifying high tech facilities. The IFT Act can abate real and/or personal property taxes for both: (1) newly-acquired and/or -constructed property; and (2) property replacing or restoring obsolete property, for up to 12 years.[32] The calculation for each abatement varies significantly. For newly-acquired qualified personal and real property, the IFT Act abates 50% of the property taxes by replacing those taxes with the Industrial Facilities Tax ("IFT"). The IFT is calculated in the same manner as those taxes it replaced except the rate of taxes assessed is one-half that of the otherwise imposed taxes.[33] For qualified property replacing/restoring otherwise obsolete property, the IFT freezes the assessed value of the replacement/restored property at the SEV that the obsolete property was assessed prior to the replacement, thus abating 100% of any increased tax liability that would have been incurred as a result of investment in improvements.[34]

What Qualifies as Abatable Property. In order to qualify under the IFT Act, the property must either be industrial property within a new facility,[35] or a facility replacing obsolete industrial property (i.e., industrial property which is substantially less than economically efficient).[36] The IFT Act's definition of "industrial property" includes the land, improvements, buildings, structures, and other real and personal property which comprise any integrated whole, and has a primary general purpose and use of manufacturing or processing, by physical or chemical change or a high technology activity.[37] Most facilities related to the manufacturing facility which are under the same ownership also qualify as Industrial Property, as well as certain research labs, agricultural processing plants and power plants. Although certain real property improvements qualify as industrial property, the actual land is excluded from eligible property. Inventory of the manufacturing facility is also excluded.[38]

The Process. In Michigan, the local government holds a key role in the IFT abatement process, although the abatement is subject to the review of the Property Services Division and the Michigan Economic Development Corporation ("MEDC"), and must be approved and issued by the State Tax Commission. In order for an abatement to be granted, the local jurisdiction, be it village, city or township, must first create an industrial development district in which the current tax may be replaced by the IFT.[39] If the jurisdiction agrees to create such a district, it may choose to designate the dimensions of such district so that the district only encompasses that property for which abatement will be granted. Timing parameters are key to obtaining the abatement. The Act requires that the abatements only be granted as an inducement, without which the company would not make the investment (commonly referred to as a "but for" requirement). An official request for the creation of a district must precede any construction, and the required application for abatement, which is filed after the district is established, must be submitted within 6 months of the commencement of any construction.[40] A company which begin construction of a project without requesting abatement has demonstrated its willingness to make the investment regardless of any abatement, and thus fails to meet the abatement's "but for" requirement.

When the abatement is granted, the local jurisdiction will also designate the duration of the abatement. As a practical matter, when negotiating an IFT, it is best to ensure that the resolution creating the district clarifies that the abatement will terminate 12 years (or whatever term the jurisdiction grants) after the construction is completed and the property is operational. This allows the abatement to be extended for up to 2 years of construction time, so that such portion of the abatement term is not depleted during the time when the property's value is considerably less than the value it will have when completed and operational.[41]

An applicant for the Industrial Facilities Tax Exemption is generally required to enter into an agreement with the local jurisdiction certifying that it will create, retain or preserve such number of jobs and make such investment as both terms are set forth in the IFT application. Such agreement will often provide that if the application fails to meet its commitment with respect to the jobs or the investment the exemption may be revoked and the applicant may be required to pay the taxes which had been exempted or abated pursuant to the IFT.

Abatement of Personal Property Tax in Michigan

A company acquiring new personal property which does qualify for abatement under the IFT Act (i.e., personal property that is either not a part of a new facility or replacing obsolete property) may still find that the personal property is eligible for abatement under Michigan's New Personal Property Tax Abatement.[42] The process for obtaining the abatement is similar to that for the ITF abatement, in that the local assessing district adopts a resolution exempting the new personal property from that tax assessed under the General Property Tax Act ("Property Tax").[43] Qualified companies include manufacturing, mining, research and development, wholesale trade, not including retail trade, and office operations which are either otherwise eligible for MEGA tax credits or located in a municipality which contains an eligible distressed area.[44] Only personal property placed within a qualified area[45] is eligible for such abatement. In addition, the personal property must be "new." "New" property is personal property not previously subject to the Property Tax and placed in the qualified area only after the assessing district's passage of the resolution exempting the personal property. Thus, property used in a prior state or subject to a previous exemption may still qualify as "new" so long as the company has not already placed it within the qualified area.

Obsolete Property Rehabilitation Act

Rehabilitation of properties that qualify as obsolete may also be eligible for real property tax abatement under the Obsolete Property Rehabilitation Act.[46] The Obsolete Property Tax operates much like the IFT Tax. The local jurisdiction establishes the district for which the valuation of the obsolete property (which excludes the land and certain personal property) will be frozen for a period of up to 12 years at the value assessed in the year prior to the issuance of the exemption certificate. However, the increase in value above the frozen assessment is still subject to education taxes, including the state's State Education Tax ("SET").[47] Unlike the IFT program, the property is not limited to industrial property, but includes commercial property which is deemed functionally obsolete, "blighted" (as defined in the Brownfield Act), or a "facility" as a result of the release of, or contamination by, hazardous substances.[48]

Other States' Abatement Programs

Like Michigan, most other states offer some sort of abatement packages. Dalehite, Mikesell and Zorn, in their article "Variation in Property Tax Abatement Programs Among States," noted that 35 states offered economic incentive programs which provide reduction in tax liability for select parcels of real estate.[49] Some of these states tie the abatement to increases in jobs and payrolls.[50] Louisiana and South Carolina require that job retention also occur.[51] Michigan's neighbors also offer abatements. Indiana allows a local jurisdiction to create an Economic Revitalization Area (ERA) in which certain improvements to the real property or installations of new manufacturing equipment can be eligible for a tax deduction.[52] The deduction is equal to the tax liability created by the increased assessed value of the property resulting from the rehabilitation or redevelopment of the property. Although the deduction can be granted for up to 10 years, the statute requires it to be phased out in fairly equal increments over the term of the deduction granted.[53] As in Michigan, the land itself does not qualify for the tax deduction, and used manufacturing equipment qualifies only so long as it is new to the state of Indiana. Although Ohio abatements, offered through Ohio's Community Reinvestment Area Program, appear to be primarily for residential property, certain commercial and industrial remodeling and new construction can qualify for up to 12 or 15 years respectively.[54] Depending on the size of the abatement, local school district approval may be necessary.

Pilot Payments

In contrast to Michigan, which replaces the exempted ad valorem tax with a statutorily-created IFT, some states simply require the entity completely exempted from the normal ad valorem tax to enter into a separate agreement by which it commits to make replacement payments, though substantially less than the exempted tax (referred to as Payment In Lieu of Taxes or "PILOT"). In many states, the amount that will be paid as a PILOT is a negotiated amount. Arkansas is unique in that it cannot offer a statutory abatement program, as its Supreme Court has ruled such unconstitutional.[55] However, abatement can be achieved by financing the improvements through the issuance of industrial revenue bonds, by which the local jurisdiction owns the property, essentially holding it as collateral for the bonds while leasing, via a capital lease, the property back to the entity desiring the abatement. Once the local jurisdiction owns and issues the bonds, the property becomes tax exempt.[56]

Abatement of Sales and Use Tax

Not only do states provide abatement of real and personal property, but many states will often offer an abatement of the sales and use tax. Robert M. Bortnick, in his article "Sales And Use Tax Incentives: An Over-

looked Opportunity In Site Selection Or Expansion," found that "[s]tates are becoming more competitive by offering companies an abundance of sales and use tax incentives in the form of exemptions and refunds for companies that locate within a designated enterprise zone, invest in new projects, expand existing facilities, or create new employment opportunities."[57]

This exemption can come in several forms, including: (1) exemptions of certain types of property all together; (2) abatement on sales and use tax on certain property purchased for qualifying purposes or purchased by certain qualifying entities; or (3) exemptions of property purchased and used by businesses operating within certain zones. An example of a state that offers all three of these is Alabama, which exempts equipment or materials purchased primarily for the control, reduction or the elimination of air or waste pollution,[58] offers a Sales Tax Enterprise Zone Exemption,[59] and has passed the Tax Incentive Reform Act of 1992 giving local governments the power to abate certain sales and use taxes for construction-related transactions of qualified industrial and research enterprise projects.[60] Although some states, like New York, simply exempt tax on purchases of any production machinery/equipment or R & D property used in any manufacturing or R & D, other states have strict limitations as to what type and size of projects qualify and require the company to obtain an exemption certificate prior to the purchase of the property.

Some states rebate the sales and use tax rather than abating it. For example, Louisiana rebates a percentage of its sales and use tax on purchases of qualifying materials used in construction of or additions to buildings, equipment, and machinery within its enterprise zones.[61] New York offers a similar incentive on its sales or use tax paid on building materials that are incorporated into a qualifying commercial or industrial structure that is being constructed, expanded, or rehabilitated within a New York Empire Zone.[62] Often the local jurisdiction will offer a rebate as well. A local taxing authority within a New York Empire Zone may provide a refund on its local sales or use tax imposed on the sale or use of qualified personal property. The City of Los Angeles offers a 20% rebate of its use tax for those companies making direct payment to the State of California.[63]

Location-Specific Incentives

Enterprise Zones

Choice of location can make a significant difference in the availability and amount of incentives and abatement. Federal and state governments desire to focus investment and jobs into poverty-stricken and blighted areas. Thus, they have created various zones in which they offer substantial credits and/or abatements for the investments made and the jobs created within such zones. Keeping track of all of the various zones and accompanying benefits and criteria can be difficult, not only because both the state and federal government provide for multiple zones with varying characteristics but also because the states and federal government have chosen to label the zones with the same or similar-sounding names.

Federal Empowerment Zones. The federal government offers Empowerment Zones in which qualified employers operating out of the Empowerment Zone can receive a federal income tax credit equal to 20% of the qualified wages of its employees who both work and live within the Empowerment Zone.[64] To encourage capital investment within the zone, the federal government replaces normal depreciation with the increased Section 179 deductions for qualifying investments.[65] Certain tax breaks are also provided for capital gain on sale of appreciated property and stock. The federal government also offers Enterprise Communities for those areas that cannot meet the Empowerment Zone's criteria for population and geographic size.

State Zones. At the state level, the government will often allow local communities, guided by statutory criteria, to determine where enterprise zones are needed. However, in most cases, the local communities will then need to obtain the state's approval or consent for the designated zone. For a company desirous of the benefits provided within a zone, but interested in areas currently outside of the designated zones, it may be that, prior to making any investment, the company could negotiate the creation of a new zone or the expansion of an existing zone into that area in which it would like to invest.

Michigan Zones. Michigan offers investors Renaissance Zones,[66] and the incentives available within the zones are fairly aggressive. Some states offer abatement of taxes for investments within the zones; others offer tax credits. Michigan's Renaissance Zones allows for both, essentially creating a virtually "tax-free" zone.[67] Almost all property taxes are abated, including the SET. The only non-abated property taxes are those property taxes attributable to local bond indebtedness, school sinking funds and special assessments. With respect to the SBT taxes, the credit is calculated based on the percentage of business activity, or adjusted services, performed by the company within the zone in proportion to the company's business activity performed outside of the zone.[68] Appli-

cation of this SBT credit basically negates any SBT tax attributable to the company's activities within that "tax free" zone. Local income taxes are completely abated as well.[69] The qualifications for such incentives are solely the company's location and operation within the Renaissance Zone. As well, Michigan offers Neighborhood Enterprise Zones where tax incentives are used to encourage residential housing development and rehabilitation in eligible distressed communities.[70]

Other States' Zones. Ohio allows the local jurisdictions to create enterprise zones, but, recognizing the danger of the intrastate competition for the same industry, has established two varieties of zones: distressed zones and non-distressed zones. Generally, only distressed zones can offer abatements to companies relocating from other locations in Ohio without approval from the Ohio's Department of Development Director.[71] A business locating within an Ohio enterprise zone can abate between 50% to 75% of its personal and real property taxes for up to 10 years, although exceptions can be made that allow abatement of 100% of the taxes for up to 15 years.[72]

Florida is somewhat unique in its approach to the incentives it offers to businesses locating within its enterprise zones. Rather than abate local taxes, and thus reduce tax revenues available to the blighted community, the company pays the local taxes, but then is allowed a state income tax credit equal to the local property taxes it paid. Florida also offers businesses operating within the zone a choice between: (1) corporate income tax credits based on the wages paid to new employees residing within the zone; or (2) two sales tax refunds of a maximum of $10,000 each on qualifying equipment and building materials.[73]

Tiers v Enterprise Zones. Several southern states segment the state into tiers and adjust qualification requirements and the degree of incentives awarded based on the tier in which the investment is made. The tiers are established based upon the per capita income, poverty rate, amount of industry and other similar factors. As with an enterprise zone, the state attempts to steer investment into the more distressed zones by sweetening the ability of, and degree to which, a company may take advantage of the incentives. For instance, in order to be eligible for a certain credit for investing within a first tier area, the company may need to create 100 jobs and will receive as an incentive a credit of 50% of the withholding taxes, while the company would only need to create 50 jobs within a fourth tier community to be credited with 90% of the withholding taxes. Unlike development zones, which basically operate on the all-or-nothing principle, tiers allow a company to be eligible for the state's incentives, even if it chooses to invest in thriving districts. It will simply face higher threshold requirements for less reward. Tiers also allow the state more flexibility in that the state can remap the tiers based on the most recent economic data each year without needing to create new zones and disqualify old ones.[74]

Michigan Brownfield Incentives

A company may also consider developing or locating within a brownfield as another source of significant incentives.[75] In Michigan, brownfields include environmentally contaminated property as well as property that is functionally obsolete or blighted, so long as such properties are located within a qualifying area of the state.[76] Michigan's brownfield credit statute offers an SBT credit of up to 10% of all qualified costs or "eligible investments."[77] Two of the key requirements affecting eligibility of the clean up investments are the establishment of a Brownfield Redevelopment Authority by a local governmental unit, and the approval, by the MEDC, of a brownfield clean up plan.[78] Cost of remediation or improvements incurred prior to receipt of a pre-approval letter do not qualify as eligible investments.

The approval process and amount of credits available for a project are affected by the total amount of eligible cost. For approved projects with eligible cost of $10 million or less, the credits will be equal 10% of eligible cost. The pre-approval letter for such limited projects can be issued by the MEGA Chairperson. Once a project's eligible cost exceeds $10 million, however, the percentage used to determine the amount of credits is subject to reduction. If the company desires to receive more than $1 million in tax credits for a project of this size, an application for credits must be made to the MEGA Board, which will determine the actual percentage, up to 10%, of the eligible cost to be awarded as credits based on the Board's established criteria.[79] In addition, a credit package awarded between $1 million and $30 million must be approved by the Michigan's state treasurer's office as well. Michigan's statutes limit the number of brownfield awards the MEDC can grant. In each of the last two years, the MEDC has granted its maximum amount of credits under the program, perhaps indicating not only the competition for the credits but also the willingness of the state to expend resources to encourage development in these areas.

For investments in and remediation of contaminated Michigan property associated with: (1) the creation of jobs; (2) considerable private investment; and/or (3)

significant resulting property value increases, a company should investigate potential Brownfield Redevelopment Grants. These grants of up to $1 million are awarded to both local governments and Brownfield Redevelopment Authorities and can be used for base-line evaluation assessments, due care activities and qualified environmental response activities.

As with many other tax credits, timing can be a critical factor. Applicants are advised to meet early on with both MEDC and MEGA representatives. Prior to any project proceeding, a local brownfield plan and a Brownfield Redevelopment Credit Project Pre-approval Application must have been submitted and the applicant must have received a pre-approval letter.

Historical Tax Credits

Federal Historical Credits. A company choosing to invest within a historical district may qualify for both federal and state historical tax credits. Federal Historical Preservation Tax Credits, offered by the coordinated efforts of the National Park Service ("NPS") and the IRS, come in two amounts. A credit of 10% of a qualified investment is available for the rehabilitation of non-historical, non-residential buildings built before 1936, and a credit of 20% of a qualified investment[80] can be awarded for "certified rehabilitation" of certain structures, including residential properties.

In order for the planned project to qualify as a certified rehabilitation, the NPS must find that the planned project is consistent with the historic nature of the rehabilitated building and any relevant historical district. Although a project can include a limited degree of alterations to the historic building, a project that damages, destroys or covers material or features that define the building's historic character cannot be approved. The certified rehabilitation must be of a certified historical structure (i.e., either listed on the National Register of Historic Places or a building certified by NPS as a contribution to the historic significance of a registered historic district).[81] To qualify, the total rehabilitation investment, during a given two-year period, must exceed the adjusted basis of the building and its structural components, with a minimum investment of $5,000.[82] Investment in buildings not yet certified as historic structures may still become eligible for the tax credits. The owner must request such certification from the NPS on or before the date that the building is returned to use, or placed in service, and have a reasonable expectation that such certification will be granted. Under such circumstances, the qualified investment becomes eligible when the certification has been issued.[83]

The historical tax credit is generally claimed in the year in which the property is returned to use. If the owner transfers ownership of the structure within five years after claiming the credit, the statute requires the owner to recapture the amount of the credit previously taken in proportion to the early transfer of the property (i.e., if the property is sold in the second year, 80% of the credit must be recaptured).[84]

Michigan's Historical Tax Credits. Michigan's program, closely modeled after the federal program and administrated by the State Historical Preservation Office ("SHPO") and the State Department of Treasury, provides SBT credits for rehabilitation of historic commercial and certain residential property.[85] Key requirements for eligibility include: (1) the project's contribution as a resource to a local historic district established under Michigan's Local Historic Districts Act (i.e., the project's qualification as a "certified historical resource" as determined by the SHPO); (2) the conformity of the improvements made with the Secretary of the Interior's Standards for Rehabilitation; and (3) an investment in the rehabilitation of at least 10% of the State Equalized Value ("SEV") of the rehabilitated property.[86] Michigan's credit also provides for recapture of the credit if within five years of claiming the credit, the rehabilitated property is sold or non-qualifying alterations are made to the project.[87]

Incentive-Specific Legislation

Many states legislatures pass legislation laying out in the broadest parameters the largest award available, but subject the amount awarded to the approval of a certain board or authority (in Michigan, the MEGA Board), thus giving the state continued control over the recipients and amount of the award. Other states create this control by awarding incentives for the larger investments through the passage of special legislation. For larger projects in any state, counsel should not discount presenting a request for such specialized legislation to the legislature through the state's economic development agency. In addition, when a large project would be of the type that the state would want to encourage, but the statute's technical requirements create an obstacle to qualification, counsel should consider requesting legislation modifying such requirement in a manner which would allow his/her client to qualify for the incentive.[88]

Timing Traps

Counsel should be aware that many incentives include a requirement that "but for" the incentive, the

company would not: (1) locate in the state; (2) make the investment; or (3) create the jobs. As a result, a company needs to be very careful regarding the timing of any announcements or the commencement of construction. A company's announcement of its long-term plan to relocate in a certain state may void its opportunity to qualify for various incentives. In addition, a company eager to commence construction prior to finalizing an incentives package may jeopardize that package by breaking ground. In Michigan, both the IFT abatement and MEGA credits are subject to these timing considerations. Because many incentives have notice provisions and periods for public comment, counsel should calculate the likely period of time needed for approval of the applicable incentives. For some clients, the need to go forward with construction, relocation or expansion may outweigh the time that would be lost obtaining approval.

Conclusion

In the current economy, pursuing the widely-available economic incentives becomes part of planning any large investment. This article has sampled various incentives that may be available to a company considering making a real estate investment as a part of the growth of its company or as a part of updating its plants. Common aspects of real estate investment, such as creation of jobs, large capital investments, and choice of location, can trigger eligibility for some form of incentive, whether it be tax credits, rebates, or abatements. The choice of location of the investment can increase the amount and degree of incentives offered. Even if the company is not interested in locating within an established zone, counsel should consider the area of interest to see whether a request to create a new zone is reasonable. In pursuing incentives, timing can be crucial and securing the incentive prior to making commitments or breaking ground is essential if the incentive includes a "but for" requirement. Awareness of the incentives available, the means of increasing the incentives, and potential traps accompanying such allows a real estate attorney to provide richer and more complete advice to the business client about to enter a real estate transaction.

Endnotes

1. *Labyrinth of Incentives*, <http://www.fdimagazine.com/news/fullstory.php/aid/187/Labyrinth_of_incentivesUnited_States.html> (last accessed February 23, 2007).

2. MCL 208.37c(5).

3. *See* MCL 207.801 *et seq*. Although not discussed in this article, a great concern of those who are applying for or who have been granted MEGA credits is the effect of the repeal of the SBT and any replacement tax passed by the legislature. Governor Granholm has encouraged Michigan's legislature to act quickly to protect SBT credits issued or to be issued, including amending the Michigan Renaissance Zone Act and Sections 38g and 39c of the SBT which relate to brownfield and historic preservation tax credits. Jennifer Granholm, *Special Message to the 93rd Michigan Legislature*, June 9, 2006 <http://www.michigan.gov/documents/Special_Msg_ to_Legislature_on_Repeal_of_SBT_ 6-9-06_161989_7.pdf> (last accessed July 22, 2006). The House recently passed "a measure that would retain some historic preservation and brownfield tax credits related to the Single Business Tax . . . [and] allow companies whose credits are not scheduled to mature until 2008 or 2009 to take their credits against their 2007 SBT liability, giving the credits value even after the tax expires." *House votes to keep portions of the SBT*, Lansing St J, June 15, 2006 <http://www.lsj.com/apps/pbcs.dll/article?AID=/20060615/NEWS01/606150326/1001 /news> (last accessed July 22, 2006). Currently, both the replacement tax package proposed by Governor Granholm and the replacement plan proposed by the Republicans includes provisions whereby the MEGA tax credits can be applied against replacement tax liability, and whereby the MEGA tax credit incentives will continued to be offered. Ohio, which phased out its franchise tax and replaced it with a Commercial Activity Tax ("CAT"), is an example of a state which has resolved this same type of issue. Ohio law now provides that "any credit not fully used against the franchise tax for taxable years ending before 2008 generally will then automatically convert to a credit against the CAT." Warren B. Lubliner, *Companies Going Through Downsizing Still May Benefit From Incentives*, J Multistate Tax'n 20 (March 2006). *See also* Ohio Rev. Code 122.171.

4. These factors would include the number of jobs retained and created, the average wage level of the jobs, the total capital investment made, the cost differential between retaining the jobs in Michigan or locating them elsewhere, and the economic impact on Michigan of losing the jobs. MCL 207.808 (2). The cost of the tax credits, along with any other governmental economic assistance that state and local governments provide, is also considered.

5. 2006 PA 283.

6. MCL 207.808 *et seq*.

7. Qualified high technology businesses include qualified businesses with over 25% of their budgets dedicated to research and development and businesses involved in high technology activities, such activities even including qualified product development, tool and die manufacturing and medical device development. *See* MCL 207.803(k) & (m).

8. MCL 207.808(1)(d),(e) & (m). Again, as example of Michigan relaxing requirements in order to allow companies to qualify for MEGA credits, the wage level for high tech employees has been reduced from 400% to 300% of the federal minimum wage.

9. MCL 207.803(g). Other requirements and criteria also apply, including: (1) the financial soundness of the company; (2) whether, but for the SBT credits, the jobs would otherwise be relocated; and (3) a cost-benefit analysis of the award.

10. MCL 207.803(l).

11. MCL 207.808 (5). Lesser requirements are offered for companies operating in rural areas or which are distressed or in risk of closure.

12. MCL 207.808(5). The recent amendment to this section allows the MEGA Board to choose to disregard certain requirements in extenuating circumstances in three instances each year.

13. This does not include a company making a capital investment exceeding $250 million. The statute allows companies who employ 1,000 Michigan workers, or who can aggregate this amount as provided by the statute, to qualify by retaining 150 Michigan jobs. A qualified business in danger of closing and rural businesses not making the above-mentioned investment or not employing 1,000 Michigan workers may still qualify if the business retains 300 Michigan workers. Provisions are also made for distressed businesses.

14. Penalties requiring a taxpayer to repay to the taxing authority credits or deductions that it has been awarded for failure to continue to meet certain criteria are often referred to as "claw backs."

15. MCL 207.808(5).

16. As a part of that agreement, the company must agree to use a competitive bid process for any construction that would be part of the new capital investment and must agree that it will make a good faith effort to contract with Michigan firms for that work. It also will have to make at least a good faith effort to hire Michigan residents for job openings that are created. For other examples of a state offering refundable tax credits for job retention, see Ind. Code Ann. 6-3.1-13-15.5, N.J. Stat Ann. 34:1B-113, Ohio Rev. Code Ann. 122.171.

17. *See* 72 Pa. Stat Ann. 8801-B *et seq*.

18. *See* Ohio Rev. Code Ann 112,71, 718.15 and Ohio Admin Code 122.7-1.

19. Another example of a state offering JCTCs is Maryland. *See* MD Code Ann art 83A, 5-1101—5-1103.

20. Miss Code 57-62.

21. *Advantage Jobs Incentive Program* <http://www.mississippi.org/content.aspx?url=/page/3138&> (last accessed February 23, 2007).

22. Miss Code 57-62-9(a)(1) In no event can the rebate exceed 4% of the gross wages paid. Miss Code 57-62-5(g)(i).

23. *See* Ala Code 40-18-190 *et seq*. The minimum investment amount for most projects is $2 million, although for small business projects that amount may be reduced to $1 million, and for certain geographic regions, $500,000.

24. *Id.*, 40-18-190(7).

25. *Id.*, 40-18-193(a).

26. *Id.*, 40-18-190(1) & 40-18-193(a).

27. For another example of a state for which the number of jobs to be created depends on the type and/or location of the company, *see* Kan Stat Ann 79-32,160a.

28. *Taxes and Incentives* <http://www.empire.state.ny.us/Tax_and_Financial_Incentives/Taxes_and_Incentives/default.asp> (last accessed February 21, 2007).

29. *See* N.Y. Tax Law 210-12A(e) and 2006 NY Legis 61 (approved and effective April 20, 2006). New

York now will refund the new business 50% of the unused credit.

30. N.J. Stat Ann 34:1B-7.42a. "This program allows unprofitable technology and biotechnology companies to raise cash by selling New Jersey tax losses and R & D credits to other New Jersey businesses for at least 75 percent of their value. The $60 million available annually through the program is open to expanding companies with less than 225 employees that have at least 75 percent of their workforce in New Jersey. Money raised may be used for working capital, to buy equipment or facilities, or for other business expenses." New Jersey Economic Development Authority *Tax Credits* <http://www.njeda.com/taxcredits.asp> (last accessed February 21, 2007).

31. MCL 207.551 *et seq*. (herein referred to as the "IFT Act").

32. MCL 207.566.

33. MCL 207.564(3). Mills levied under the State Education Tax are not automatically reduced although they may be reduced by other means.

34. MCL 207.564(1). Confusion between new and replacement property can occur when the replacement construction actually increases the size of the replaced premises. Michigan's Department of Treasury believes that so long as the floor space is not increased by more than 10%, the increase is deemed a replacement and no increase in tax liability will occur as a result of that improvement. On the other hand, if the resulting floor space is increased by more than 10%, then the entire increase will be deemed a new facility and that qualified space will be assessed at the IFT's 50% rate. *Industrial Facilities Tax Abatement Process: Questions and Answers Regarding the Administration of the Industrial Facility Exemption*, <http://www.michigan.gov/documents/1012_packet_ 94624_7.pdf > (last accessed February 23, 2007).

35. Because the IFT Act defines a "new facility" as "new industrial property other than a replacement facility to be built in a plant rehabilitation district or industrial development district," MCL 207.552(4), questions have arisen about what constitutes new industrial property. The Tax Commission has concluded that property new to the tax base in Michigan qualifies for abatement; thus, the threshold criterion is whether the property has been subject to Michigan property taxes at any time previous to its installation in the new facility. *Frequently Asked Questions, Industrial Facilities Exemption* <www.co.bay.mi.us/bay/home.nsf/public/CA746DCFAE279AD285256E74006DC8C7/$file/IFT_FAQ.pdf > (last accessed February 23, 2007).

36. "Obsolete industrial property" is defined in MCL 207.552(7) as "industrial property the condition of which is substantially less than an economically efficient functional condition." "Economically efficient functional condition" is further defined in MCL 207.552(8) as "a state or condition of property the desirability and usefulness of which is not impaired due to changes in design, construction, technology, or improved production processes, or from external influencing factors which make the property less desirable and valuable for continued use."

37. MCL 207.552(6).

38. *Id.*

39. For new facilities, the district is referred to as an Industrial Development District and for rehabilitation, a Plant Redevelopment District.

40. *See* MCL 207.554(c) & MCL 207.559(2)(c). An exception to this exists for facilities constructed for industrial operations that do not yet have a purchaser/lessor identified.

41. Even more time may be available with approved extensions.

42. MCL 211.9f.

43. *Id.* Such resolution is also subject to the approval of the state tax commission, which is advised by the state treasurer and the president of Michigan's strategic fund. MCL 211.9f(3).

44. An eligible distressed area includes: (1) a municipality with a qualified decrease in population 1970, or whose overall increase in SEV of real and personal property trails that of the statewide average SEV increase, whose unemployment trails that of the state's unemployment rate or any municipality that has a poverty rate; (2) a qualified blighted area; and (3) a Michigan Enterprise Zone. *See* MCL 125.1411. For the most recent list of municipalities containing such eligible distressed areas, see http://www.michigan.gov/documents/mshda_eligible_distressed_05_111713_7.pdf (last accessed February 23, 2007).

45. MCL 211.9f (5)(b). Such districts include Industrial Development Districts as defined under the IFT Act, Michigan Renaissance Zones and Federal Empowerment Zones.

46. MCL 125.2782 *et seq*.

47. The state treasure may exclude one-half of the education tax mills for up to 6 years under certain conditions. MCL 125.2797-17.

48. MCL 125.2782 (2)(i). Limitations also exist on the local jurisdictions that can establish obsolete property rehabilitation districts. *See* MCL 125.2783.

49. Dalehite, Mikesell & Zorn, *Variation in Property Tax Abatement Programs Among States*, 19 Econ Dev Q 2 157, 166 (May 2005). Such programs also have limited durations and can be used in conjunction with other programs offered by the states.

50. For example, Kansas offers a 10-year property tax exemption for manufacturing and R & D and the storage of interstate commence goods so long as the job generation requirements are met. *See* Kan Stat Ann Const Art 11, §13.

51. Dalehite, Mikesell & Zorn, *supra* note 49, at 162-63.

52. Ind Stat 6-1.1-12.1-1 *et seq*.

53. *See* Ind Stat 6-1.1-12.1-4.

54. *See* Ohio Rev Code 3735.65 *et seq*.

55. *Wayland v Snapp*, 232 Ark. 57, 334 S.W. 2d 633 (1960).

56. Again, before such a transaction could take place, a PILOT agreement would need to be executed generally requiring the entity to pay not less than 35% of the taxes that would have otherwise been applicable.

57. Robert M. Bortnick, *Sales And Use Tax Incentives: An Overlooked Opportunity In Site Selection Or Expansion*, J Multistate Tax'n 18, 20 (June 2003). This article provides a concise 50-state survey on the sales and use tax exemption incentive in effect in 2003.

58. Ala Code 40-23-4(a)(16) & 40-23-62-(18).

59. *Id.*, 41-23-20 *et seq*.

60. *Id.*, 40- 9B-1 *et seq*.

61. La Rev Stat 51:1781 *et seq*.

62. N.Y. Tax Law 1119(a)(6).

63. *Use Tax Brochure* < http://www.lacity.org/finance/pdf/Use%20Tax%20Brochure_FINAL_1.pdf> (last accessed February 23, 2007).

64. 26 USC 1396 *et seq*.

65. 26 USC 1397A.

66. Michigan has also created a Michigan Enterprise Zone in Benton Harbor. However, other than Benton Harbor, the Michigan Enterprise Zone program is now closed.

67. *See* MCL 125.2689.

68. MCL 208.39b.

69. *See* MCL 125.2689.

70. MCL 207.771 *et seq*.

71. Ohio Rev Code 5709.633.

72. *Property Tax Abatement Programs* <http://tax.ohio.gov/publications/ta.pdf#search='ohio%20enterprise%20zone%20tax%20abatement'> (last accessed February 23, 2007).

73. *See* Florida Stat Ann 290.001 *et seq*.

74. North Carolina, Georgia and Arkansas are examples of southern states using the tier system.

75. At the federal level, an income deduction is available for qualifying companies that is equivalent to the total of all eligible costs of clean up, including cost for site assessment and investigation, site monitoring, clean up, operation and maintenance, certain state fees and removal of demolition debris.

76. Blighted property includes property which has been declared a public nuisance or is an attractive nuisance, a fire hazard or otherwise dangerous, or for which the utilities, plumbing, heating, or sewerage has been permanently disconnected or rendered

ineffective, as well as certain tax reverted property owned by a qualified local governmental unit. *See* MCL 125.2651(e). Functionally obsolete property is generally defined as property unable to be used to adequately perform the function for which it was intended. *See* MCL 125.2651(g). The qualifying property must be held by the taxpayer for business or income-generating purposes, which can include property held for investment or inventory and certain long term leases.

77. Eligible investments for Michigan's brownfield credits include expenses for demolition, construction, restoration, alteration, renovation, or improvement of buildings or site improvements and the addition of machinery, equipment and fixtures to qualifying property, but only those approved activities on the qualifying property that commenced in accordance with an approved brownfield plan, and after the date that a required pre-approval letter is issued by the state. *See* MCL 208.38g(34)(e).

78. *See* MCL 125.2651 *et seq*.

79. *See* MCL 208.38g *et seq*. See also John V. Byl, *Effective Use of Brownfield Financial Incentives in Michigan* (presented at Environmental Law Boot Camp, February 17, 2006). The established criteria include: (1) local community involvement and investment; (2) improvements made to the condition of the property; (3) the need of the clean up project for financial assistance; (4) appropriate, rather than inflated, cost of the property; (5) the degree of positive effect on the proposed clean up to the surrounding properties; (6) the location of the project, whether the project involved historical buildings; (7) whether the project is mix-used or only retail; and (8) re-use of manufacturing facilities. High growth potential high tech companies within the Technology Tri-Corridor and qualifying Michigan-based manufacturers responding to preserve or create jobs are given preference. Statutory criteria also apply. *See* MCL 208.38(g)(6).

80. *See* 26 USC 47. Qualified rehabilitation expenditures include costs associated with the work undertaken, including architectural and engineering fees, site survey fees, legal expenses, development fees, and other construction-related costs, if such costs are added to the basis of the property and are determined to be reasonable and related to the services performed. Cost of acquisition and furnishings, new additions expanding the existing structure, new building construction, and parking lots, sidewalks, landscaping are excluded from qualified expenditures.

81. 26 USC 47(C)(3).

82. 26 USC 47(C)(1)(c).

83. 26 USC 47(D)(2). The building must also be depreciable.

84. 26 USC 50(a)(1)(B).

85. MCL 208.39(c) *et seq*.

86. MCL 208.39(c)(3)(a).

87. MCL 208.39(c)(9).

88. A possible example of this is the recent amendment to the MEGA statute, which allows a company to qualify for credits for increased jobs, even though it would not continue to employ all of its original workers as a result of the sale of a portion of its company to another company operating in Michigan. The amendment provided a means where that company could still meet the requirement of retaining those employees for the duration of the credit.

FORFEITURE ROAD MAP

by Jonathan T. Walton, Jr. and Laura S. Donnelly***

Introduction

The use of land contracts to finance sales of real property has traditionally been popular in Michigan, especially during times of high mortgage interest rates. Michigan is currently experiencing rising interest rates, coupled with tough economic times that put financial pressure on property buyers. Given these factors, it is likely that a growing number of Michigan land contract vendees will fall into default on their land contract payments. Therefore, one can expect an increase in the number of land contract vendors who will be seeking attorney assistance in recovering their property.

Foreclosure and forfeiture are the two principal remedies in Michigan for recovering possession of real property sold on a land contract that has gone into default. Most cases will go the route of forfeiture, which generally provides the vendor with a faster and less expensive procedure. This article outlines the basic steps for handling a land contract forfeiture action under Michigan's Summary Proceedings Act (the "Act").[1]

Preliminary Considerations

A vendor that opts for forfeiture, as opposed to foreclosure, gains expediency in exchange for the chance to collect the full sale price. This is because the Act mandates an election of remedies. The vendor is allowed to pursue a relatively fast track procedure for recovering the property, but is generally barred from collection of the full contract balance.[2] The alternate remedy of foreclosure enables the vendor to accelerate the entire debt (if allowed by the contract), and collect a deficiency if the price paid at the foreclosure sale is less than the accelerated balance.[3] However, foreclosure can be a lengthy process, in which just getting to trial may take up to a year. Forfeiture cases, on the other hand, usually come to trial within weeks after filing.

It makes sense more often than not to go the more expeditious path of forfeiture. Typically, vendees stop paying because they do not have the money, and a deficiency judgment obtained through foreclosure will likely be uncollectible. The vendor's best bet is to utilize the forfeiture process to recover the property as quickly as possible so that it may be resold to a (hopefully) more solvent vendee. The drawback of forfeiture is that the vendee usually can reinstate by paying just the current arrearage. Multiple forfeiture actions may be required to recover property from a serial defaulter.

The choice of which remedy to pursue will usually turn on practical considerations such as the vendee's collectibility, the value of the property, and the amount of the unpaid contract balance and how much the vendee has already paid. The land contract must also allow forfeiture as a remedy for non-payment or other material breach.[4] Assuming that forfeiture makes legal and practical sense and that the land contract provides for the remedy, the vendor's lawyer is ready to proceed.

Basic Reference Points

The primary sources of law and procedure governing forfeiture actions are the Act, Michigan Court Rule 4.202, and the State Court Administrative Office ("SCAO") forms issued for use in forfeiture cases. The Act establishes preconditions to bringing a forfeiture action. It also sets forth the relief the court may grant and forfeiture's impact on other types of remedies. The court rule spells out the procedural nuts and bolts on subjects such as the contents of pleadings and other papers, joinder of parties and claims, and appeals.

* Jonathan T. Walton, Jr., is a graduate of Dartmouth College and of the University of Michigan Law School. He is a founding member of the law firm of Walton & Donnelly, P.C., located in downtown Detroit. His practice is concentrated in commercial, real estate, and construction litigation.

** Laura S. Donnelly is a graduate of Wheaton College and the University of Michigan Law School. She is a founding member of Walton & Donnelly, P.C., and concentrates her practice in commercial litigation. She previously authored the Case Notes section of the Michigan Real Property Review.

The SCAO forms dovetail with the requirements of the Act and the court rule. They provide a "fill in the blanks" method of ensuring that pleadings and other papers are correct in both content and form. Another reason to use the SCAO forms is that the personnel of the district courts, which have virtually exclusive jurisdiction over land contract forfeiture proceedings, tend to be familiar with the forms and prefer them for ease of handling.[5]

A final reference to be checked is the local rules and practice of the district court where the property is located, which is generally the required venue for a land contract forfeiture action.[6] A number of Michigan's district courts have adopted local court rules specifically dealing with aspects of land contract forfeiture proceedings. Some courts and even individual judges also have preferences and procedures (some written and some unwritten) concerning scheduling, use of the carbon paper SCAO forms, and other subjects.

Basic Time Line

The vendor who is advised to choose forfeiture for reasons of expediency will naturally want to know just how quickly the process will move. A forfeiture action consists of four principal phases: (1) notification; (2) trial; (3) the redemption period; and (4) eviction. A number of variables can impact the duration of each.

The process begins with sending written notice of forfeiture.[7] The notice advises that the contract is in default, and that the vendee or other party in possession must either cure the default or vacate the property.[8] The Act requires giving fifteen days to cure, unless the contract specifies a longer cure period.[9] The cure period begins to run on the date of delivery if the notice is personally served, or if service is by mail, on the next day of mail delivery after the date of mailing.[10] If personal service or service by mail cannot be made, service may be accomplished by publication over three weeks.[11]

If the vendee fails to cure or move out within the cure period, the next step is to file and serve the complaint. Under the Act, trial is to be scheduled within thirty days after issuance of the summons.[12] The Act allows courts to adopt a local rule requiring the defendant to appear in ten days, and a number of courts have done so.[13] These courts set the trial date when the defendant appears. If the defendant does not appear, a default may be entered. The Act also prohibits adjournments of more than seven days except upon stipulation of the parties.[14]

Assuming the vendor prevails at trial and judgment for possession is entered, the vendee has the right to redeem by paying the delinquent amount and/or curing non-monetary breaches. The redemption period runs for ninety days if less than one-half the purchase price has been paid as of the entry of the judgment.[15] Six months to redeem is allowed if more than one-half of the purchase price has been paid.[16]

An appeal may extend the process. Appeals are heard in circuit court as of right.[17] A claim of appeal must be filed within ten days after the entry of judgment or the denial of a motion for a new trial or similar relief.[18] The vendee pursuing an appeal is permitted to toll the redemption period by posting a stay bond.[19]

If the vendee does not timely redeem, the vendor may apply for an order of eviction.[20] If any part of the judgment amount has been paid, the application must be scheduled for a hearing with notice to the vendee.[21] A court officer carries out the actual eviction. The timing of the eviction will depend on how fast the order makes its way through the court and the officer's availability. In non-payment situations where a hearing is not required, this stage usually can be completed in a week or two.

In summary, the length of the process is mainly dependent upon the vendee's willingness and/or ability to contest the issue and ultimately to redeem. In the run of the mill case, where the vendee cannot pay, but will not move, possession may be recovered in as little as four to five months, assuming the vendee is entitled to only the ninety-day redemption period. Vigorously contested proceedings, appeals, and cases involving the six-month redemption period will take longer.

A note about self-help: possession may be recovered almost immediately in the case of vacant land, or if the vendee has abandoned the property. If the vendor is able to do so without physically dispossessing the vendee, the vendor can reoccupy the property as soon as the notice of forfeiture is served and the cure period has expired.[22] However, a vendee that loses possession in this manner may file an action seeking equitable relief to resurrect its right to redeem. In such a case, the maxim that "equity abhors a forfeiture" comes into play, and success for the vendor is not preordained. Instead, the court will weigh the competing equities of the parties, such as the vendee's payment history, the amount of equity the vendee stands to lose, the existence of any waivers, acquiescence in late payments or other grounds for estoppel against the vendor, and other potentially mitigating factors.[23] Consequently, the vendor taking possession based on a

notice of forfeiture alone remains subject to having the dispossessed vendee contest title in the future. Indeed, title insurers may balk at insuring marketable title for a vendor that has recovered its property without prosecuting a forfeiture action to conclusion. Under the Act, entry of judgment, expiration of the redemption period, and the issuance of an order of eviction must all take place to extinguish "any equitable right of redemption."[24]

Forfeiture Procedure

Preparation

Getting ready to handle a land contract forfeiture involves the usual preparatory steps for any contract-based litigation, i.e., gathering documents, factual investigation, and review with the client. The land contract should be carefully examined to verify that forfeiture is allowed as a remedy for default, to ascertain notice requirements, and to determine the exact nature of the parties' obligations. The vendor's attorney should also obtain an accurate accounting of vendee's payment history and all past due amounts. These figures will be needed for the notice of forfeiture, the complaint, and the judgment. A review of the parties' correspondence or other communications will be useful to give a "heads up" on potential defenses.

Notice of Forfeiture

The Act requires that the notice of forfeiture be in writing and contain specified information about the contract, the property, and payments.[25] Under the Act, the notice must "declare forfeiture of the contract" and inform the vendee of the past due amount, the nature of any non-monetary breaches of the contract, and the period allowed to cure. SCAO form DC101 ("Forfeiture Notice") contains all the language the Act generally requires, plus spaces to add all the necessary information that is specific to the transaction. The form should be utilized to ensure the notice complies with the Act.

Service is also prescribed by statute, and may be accomplished by: (1) direct personal service on the vendee; (2) delivery to a member of the vendee's "family or household or an employee, of suitable age and discretion" with a request for forwarding to the vendee; or (3) service by mail to the vendee's last known address.[26] If service cannot be made by those methods, there is an available statutory procedure for service by publication.[27]

If the vendees are a married couple, both spouses must be served with the notice.[28] The original vendee may have sold or otherwise assigned the contract. If so, any known assignees should be served with notice. Tenants and others "holding possession under the vendee" must also get the notice.[29]

Commencing the Action—The Complaint

If the vendee fails to cure as specified in the notice, the forfeiture action is commenced by filing a complaint in the district or municipal court with jurisdiction over the property's location.

MCR 4.202(C) specifies that necessary parties defendant are: (1) the vendee (including both spouses if holding as tenants by the entireties);[30] (2) any person claiming under the vendee (e.g., assignees or mortgagees); and (3) any person in possession of the property (unless that person has previously been released from liability). The rule also requires the complaint to "comply with the general pleading requirements," and MCR 4.202(D) and (E) set out a list of additional requirements for the complaint and the summons, respectively. Use of SCAO forms DC103 for the complaint and DC104 for the summons, which have blanks, boxes, and preprinted text for all the necessary information, is recommended. If the facts warrant pleading details beyond the contents of the complaint form, additional pages may be attached. A copy of the notice of forfeiture and proof of its service must be attached to the complaint.

In preparing the complaint, questions can arise concerning election of remedies and joinder of claims. Generally, the Act's remedy for recovery of possession is "in addition to, and not exclusive of, other remedies, legal, equitable or statutory," and a judgment for possession will not merge or bar other claims.[31] This rule is, however, subject to two important exceptions: (1) entry of a judgment for possession of the property bars any claim to recover money "due or in arrears under the contract at the time of trial;" and (2) if an order of eviction is issued following entry of the judgment for possession, the vendor may not seek payments that would have become due after the issuance of the order.[32] The consequence of these provisions is that the vendor recovering possession under the Act forgoes claims to recover contract payments falling due both before and after entry of the judgment.[33]

As noted above, the Act preserves other remedies. For example, a vendor that has regained possession through a forfeiture action may sue the vendee to recover damages for waste.[34] The Act also allows the vendor to bring a civil action "for damages from the time . . . of the notice of forfeiture . . . ." This provides a means to recover the reasonable rental value of the property where a vendee

in default has refused to relinquish possession.[35] Such damages claims may be joined in the forfeiture complaint, but may be subject to removal to circuit court if they exceed the district court's jurisdictional limit.[36]

Equitable claims may also arise in a forfeiture action, particularly disputes concerning the validity of assignments, liens, or other title issues. Although Michigan district courts generally cannot try equitable matters, MCL 600.8302(3) sets up an exception that allows a district court hearing a summary proceeding under the Act to make equitable determinations concerning title issues. This grant of limited equitable jurisdiction provides a means for resolving all claims pertaining to the property in the context of the forfeiture action.

Trial and Judgment

The Act's requirements concerning the content of the summons in a forfeiture action set the basic timetable for scheduling the forfeiture trial. Generally, the summons must set a date for trial within thirty days after its issuance, and must be served at least ten days prior to the trial date.[37] As noted above, individual courts may, by local rule, require the defendant to appear within ten days after service of the summons.[38] The trial date may not be adjourned more than seven days unless the parties so stipulate.[39]

A defendant may respond with a counterclaim in addition to an answer. If an award on the counterclaim would impact the amount required to reinstate the contract (e.g., by set off), MCR 4.202(I)(3) requires the counterclaim to be tried at the same time as the claim for possession. Otherwise, the court has the option of trying money claims and counterclaims separately from the summary proceeding on the claim for possession.[40]

All parties have a right to a trial by jury.[41] On the claim for possession, the issues to be tried will be: (1) whether there is an uncured breach of contract entitling the vendor to possession; and (2) the amount that must be paid to reinstate the contract. Under MCL 600.5741, this amount must be stated in the judgment. The judgment must also set the length for the redemption period, and provide that an order of eviction shall be issued if the amount required to redeem is not timely paid. The SCAO judgment form number DC106 has the necessary text and spaces to fill in.

Redemption

The length of the redemption period depends on how much of the contract price the vendee had paid before going into default. If less than 50% of the principal amount of the purchase price was paid, the redemption period lasts ninety days from the date the judgment is entered. A vendee that has paid more than 50% of the contract principal is allowed six months to redeem.[42]

Questions may arise as to whether amounts over and above the principal amount of the purchase price appearing on the face of the contract should be taken into consideration in determining whether the 50% threshold has been met. In *Entingh v Grooters*,[43] the Court of Appeals stated that the benchmark was the "actual sales price," which the court held to be the principal price stated on the face of the contract. In that case, the vendee had defaulted, *inter alia*, on its responsibility to pay real estate taxes. The vendor paid the taxes and contended, based on the language in the contract, that those tax payments should be added to the principal balance, which would have put the vendee below the 50% mark. The Court of Appeals rejected the vendor's argument.

On the issue of how to redeem, Michigan courts have adopted what amounts to a "perfect tender" rule. The payment must be delivered in the full amount[44] required in the judgment and without conditions or contingencies. The payment may be delivered to the vendor, the vendor's attorney, or the clerk of the court.[45] Mailing payment to the vendor's attorney on the last day of the redemption period has also been held sufficient.[46] On the other hand, a vendee that placed the payment in escrow and conditioned its release on the delivery of discharges of mortgages encumbering the property was held to have failed to effectively redeem.[47]

If a vendee against whom judgment has been entered timely moves for a new trial or files an appeal, and posts a bond, the redemption period is tolled until the disposition of the motion or the appeal.[48]

Eviction

If the vendee does not redeem within the period specified in the judgment, the vendor may apply to the court for an order of eviction, which directs a court officer to remove the vendee from the property. The SCAO form for the order, form no. DC107, should be filled out and submitted to the court once the redemption period has run. On the form, the vendor must indicate whether any portion of the judgment amount has been paid. If nothing was paid, the order will be issued without a hearing. Otherwise, a hearing will be scheduled.[49]

When the court enters the order, the vendor's attorney will then need to work with the court officer to conduct

the eviction. Local practice on this aspect of the proceeding varies widely. In some localities, the court officer will handle logistics, such as lining up labor to remove the vendee's belongings and a locksmith to change the locks (all at the vendor's expense, of course). In other places, the vendor or the vendor's attorney will need to make the necessary arrangements. It is advisable for the vendor or a representative to be present at the eviction to record the condition of the property when it is vacated, and to ensure the property is secured.

Conclusion

In most situations, the procedures specified in the Act and MCR 4.202, coupled with the use of SCAO forms and adherence to local court practice, will provide a relatively expeditious method for recovering possession of real property subject to a defaulted land contract. However, pitfalls are present, such as the rules concerning election of remedies. The Act's relatively detailed procedural and documentation requirements also need to be strictly followed. The vendor's attorney must recommend the proper course of action in light of the client's particular situation, and follow through by correctly executing the Act's procedures.

Endnotes

1. MCL 600.5701 *et seq*.

2. MCL 600.5756 & 600.5750; *but see Day v Lacchia*, 175 Mich. App. 363, 375; 437 NW2d 400 (1989) (upholding an order conditioning redemption upon vendees' payment of the entire contract balance because a balloon payment for that balance had come due prior to entry of the judgment).

3. *See generally* MCL 600.3101 *et seq*.

4. MCL 600.5726.

5. As of this writing, district courts operate in all areas in Michigan except for the five Grosse Pointes, which retain municipal courts. Jurisdiction and venue for forfeiture actions involving property in those communities lies with their respective municipal courts. MCL 600.5704 & 600.5706(3).

6. MCL 600.5706. *See also* note 5 *supra*.

7. Some older forms of land contracts also require the vendor to send notice of intent to forfeit as a precondition to sending the notice of the forfeiture. If so, then this preliminary notice must first be given.

8. For brevity's sake, this article will refer to any party against whom relief is sought as the "vendee." However, as pointed out in the description of various aspects of the procedure, other parties who may have become involved with the property, such as mortgagees, assignees, or tenants of the vendee, also must be given notice of forfeiture and joined in the action.

9. MCL 600.5728.

10. MCL 600.5730.

11. MCL 554.301 & 554.302.

12. MCL 600.5735(2)(a).

13. MCL 600.5735(4)(a); *see, e.g.*, First Judicial District Court Local Rule 4.201 (Monroe County); Twelfth Judicial District Court Local Rule 4.201 (Jackson County); Eighty-Second Judicial District Court Local Rule 4.201 (Alcona, Oscoda and Ogemaw Counties).

14. MCL 600.5735(6).

15. MCL 600.5744(3).

16. *Id.*

17. MCL 600.5753.

18. MCR 4.202(L) & 7.101(B).

19. MCL 600.5744(5).

20. MCL 600.5744(1); MCR 4.202(K)(1). The Act still refers to this type of order as a "writ of restitution." The Court Rule, which has been more recently amended, calls it an "order of eviction," and this article will do likewise.

21. MCR 4.202(K)(2).

22. *Day v Lacchia*, 175 Mich App at 373.

23. *See, e.g., Rothenberg v Follman*, 19 Mich App 383, 387-89; 172 NW2d 845 (1969). A thorough analysis of *Rothenberg* and the general application of equitable principles to a vendee's redemption rights appears in

Ovarec, *Forfeiture Under Land Contracts: To Possess or Not to Possess*, Mich Real Prop Rev (Feb. 1981), p. 2.

24. MCL 600.5744(7).

25. *See* MCL 600.5728.

26. MCL 600.5730.

27. MCL 554.301 and 554.302.

28. *Reinecke v Sheehy*, 47 Mich App 250; 209 NW2d 460 (1973).

29. MCL 600.5730. To identify all possible adverse claimants, the vendor should obtain a title search to determine all holders of recorded interests. Cameron, Mich Real Prop Law (3d ed 2005), § 16:16, p. 621. Those parties should be served with the notice of forfeiture and joined as defendants in the action. *See, e.g.*, MCL 565.360(2)(a), which specifically requires that a vendor pursuing forfeiture provide any mortgagee of the vendee's interest with "the same notices…of forfeiture" as the vendee and join the mortgagee as a party in the forfeiture action.

30. *Reinecke*, 47 Mich App 250.

31. MCL 600.5750. The Supreme Court's decision in *Gruskin v Fisher*, 405 Mich 51; 273 NW2d 893 (1979), extensively discusses election of remedies in the forfeiture context. In that case, the Court ruled that the vendors had not elected forfeiture as their only remedy by simply sending a notice of forfeiture. Evidently because the value of the property had declined, obtaining a deficiency judgment became a preferable objective, so the vendors changed direction and began a foreclosure. The Court upheld the vendors' action. *See also* Cameron, *supra* note 29, § 16.21, pp. 634-37.

32. *Van Elsacker v Erzberger*, 137 Mich App 552; 357 NW2d 891 (1984). *See also Mazur v Young*, 2006 WL 1547701 (ED Mich 2006) (stating in *dicta* that a vendor's forfeiture proceeding constituted an election of remedies barring a subsequent collection action against a guarantor of the vendee's debt).

33. In *Michigan National Bank v Cote*, 451 Mich 180; 546 NW2d 247 (1996), the Supreme Court held that this bar precluded recovery of unpaid real property taxes the vendee was obligated to pay, even though under the land contract such taxes were to be remitted to taxing authorities rather than the vendor. *But see Ames v Maxson*, 157 Mich App 75; 403 NW2d 501 (1987), in which the Court of Appeals allowed a vendor that had recovered possession to maintain a claim for unpaid property taxes. *Cote* seems to have undercut any further validity of *Ames*.

34. *Ames*, 157 Mich App 75.

35. *Durda v Chembar Development Co*, 95 Mich App 706; 291 NW2d 179 (1980) (allowing recovery of rental value from the end of the cure period stated in the notice of forfeiture until the property was vacated).

36. MCL 600.5739(1); MCR 4.202(I)(1) & (4).

37. MCL 600.5735(2)(a).

38. MCL 600.5735(4).

39. MCL 600.5735(6).

40. By local rule in Detroit's 36th District Court, money claims must be tried separately, except as required by MCR 4.202(I)(3); *see* Thirty-Sixth Judicial District Court Local Rule 4.202.

41. MCL 600.5758.

42. MCL 600.5744(3).

43. 236 Mich App 458; 600 NW2d 415 (1999).

44. *Karakas v Dost*, 67 Mich App 161; 240 NW2d 743 (1976).

45. *Id.*

46. *Birznieks v Cooper*, 405 Mich 319; 275 NW2d 221 (1979).

47. *Flynn v Korneffel*, 451 Mich 186; 547 NW2d 249 (1996).

48. MCL 600.5744(5).

49. MCR 4.202(K)(2).

DEED RESTRICTIONS IN MICHIGAN

*by William E. Hosler**

Overview

This article is a companion to the author's 1998 article, *Restrictive Covenants in Michigan*,[1] which provided a general background on the law and application of restrictions in conveyancing instruments and other documents recordable or otherwise effective against real property. This article reviews a selection of recent Michigan cases, both published and unpublished, representing a variety of legal and equitable concepts affecting deed restrictions and other limitations on the use or development of Michigan real property.

In order to assist the advocate, as well as discern current trends of the Michigan judiciary, the cases are organized into categories where the court enforced the restrictions, or determined that the restrictions as presented were partially or wholly avoidable. They are further arranged according to general subject matter.

Also considered are the condemnation cases, *Kelo v City of New London*[2] and *County of Wayne v Hathcock*[3] and their effect on related deed restrictions.

Enforcing Deed Restrictions

Right of First Refusal

Randolph v Reisig[4] This case involves the enforceability of a right of first refusal to purchase adjacent lakefront property in Newaygo County being offered for sale. The court of appeals concluded that the express and unambiguous terms of the property owner's agreement directs that the right runs with the land and binds the owners and their heirs, successors, representatives and assigns. The court found that the text of the agreement did not render the option ambiguous, and that a renewal provision did not transform the agreement into one of indefinite duration. This was relevant in part because the defendant claimed that the rule against perpetuities applied. The court found that the rule concerns rights of property only, and because an option contract did not create any interest in land, the rule against perpetuities was inapplicable.

Construction Without Approval

Pointe Rosa Homeowners Association v Cicchini[5] This case concerns restrictive covenants involving a waterway in Macomb County. The defendant installed three pilings in the canal leading to Lake St. Clair that ran alongside his lot without first seeking or obtaining approval from the homeowners association. The plaintiff alleged a violation of the subdivision covenants and sought removal and an injunction. Negative covenants restricting land use are grounded in contract, and are valuable property rights. Enforcement is construed in light of the "general plan under which the restrictive district was platted and developed." The court referred to dictionary definitions for assistance in interpreting the restrictive covenants, and particularly the term "boathouse." The defendant testified that the three pilings constituted the first step of a fourteen piling structure that would not be covered, but would store watercraft. The court found the defendant violated the restrictive covenants by, in part, beginning construction without first obtaining written approval from the plaintiff.

Lauren Hills Home Owners Improvement Ass'n v Kokko[6] This case from Oakland County shows the risks of ignoring deed restrictions. Mr. Kokko decided to build a detached two-car garage, despite express limitations in his subdivision's deed restrictions that any garage was to be attached to the residence. His reasoning was the belief that the homeowners association had waived the right to enforce such restrictions since it had over the years allowed other detached buildings like sheds and playhouses, of varying sizes, to exist despite those also being prohibited by the restrictions. In fact, the association told Mr. Kokko that he could build a smaller detached storage shed. But construction of the garage commenced and after being sued by the association,

* William E. Hosler is a shareholder in the Birmingham law firm of Williams, Williams, Rattner & Plunkett, P.C. A member of the Real Property Law Section of the State Bar of Michigan, and its standing committee on Land Title Standards, Mr. Hosler is also a member of the Michigan Land Title Association and past chair of the Oakland County Bar Association Real Estate Law Committee. He concentrates his practice in the areas of real estate law, title insurance law, and litigation.

the defendant convinced the trial court to dismiss the case. The court agreed that the association had indeed waived its right to enforce the deed restrictions "by failing to restrain other lot owners in the subdivision from erecting similar structures." The court of appeals reversed. The appellate court reasoned that the character as well as the number of claimed violations needed to be considered in determining whether the complaining property owners had waived or forfeited the benefit of the restriction. The court found that "[e]ven after one or more breaches, equity will grant relief if the restriction can be shown to be of value to complainant, and such breaches have not resulted in a subversion of the original scheme of development resulting in a substantial, if not entire, change in the neighborhood." The court reviewed several Michigan cases on the topic, before revisiting the facts of the instant case and pointing out that while the association may have allowed sheds and other smaller structures of a temporary character, it had consistently refused to allow the construction of larger detached garages of a permanent nature like the defendant's. The court reversed the trial court, and remanded for entry of an order expressly requiring Mr. Kokko to raze the detached garage he just finished.

Village of Hickory Pointe Homeowners Ass'n v Smyk[7] This is another case where the home owners built at their own peril. Mr. and Mrs. Smyk constructed a backyard deck on their property in Washtenaw County. They initially submitted their plans for approval, but the plans did not meet the association's specifications. Specifically, the Smyks' plans called for the deck railing to be connected to the deck floor around the perimeter, but the association wanted a clearance of some inches between the floor and the bottom of the railing. The Smyks built anyway, and the association sued. On cross-motions for summary disposition, the trial court dismissed the case, finding that while the Smyks indeed violated the subdivision covenants which gave the architectural committee sole and exclusive discretion to approve or disapprove virtually any plan or design, the breach was "*de minimis*," a technical violation without substantial injury to plaintiff. On appeal, the court of appeals reversed, and remanded for entry of judgment in favor of the plaintiff. Under Michigan law, a covenant is a contract, and a valuable property right. The court confirmed that: "[A] breach of a covenant, no matter how *de minimis* the damages, can be the subject of enforcement. . . . If the construction of the instrument be clear and the breach clear, then it is not a question of damage, but the mere circumstance of the breach of the covenant affords sufficient ground for the court to interfere by injunction." And, to make matters worse for the defendants who had to re-work their deck, the subdivision covenants also provided that any party successfully suing to enforce the covenants may also recover damages, including attorney fees and costs. The court awarded the association recovery of all of its reasonable attorney fees and costs from the Smyks.

Amendments

Kamphaus v Burns[8] This case considers enforcement of size and placement restrictions regarding single family residences in a subdivision near Lake St. Clair in Macomb County. The original restrictions, created and recorded in 1943, were applicable to all ninety lots in the subdivision (including lot 47 at issue) and involved height and setback requirements. They were binding on all parties and ran with the land until 1975 when they would be automatically extended unless a majority of the then owners voted otherwise. Despite this restriction, they were amended in 1947. In 1975, the restrictions were expanded, purportedly by the required majority, adding prohibitions against "obstruction of the lakeward view of abutting property owners" with screens, fences, buildings or pools. The defendants bought lot 47, razed the existing house, and built a house without obtaining approval of the plans from the association, and allegedly in violation of the restrictions. The suit which followed from the association was dismissed by the trial court, which agreed with the defendants that the restrictions were not enforceable, in part because they had allegedly been improperly amended and therefore rendered invalid. The appellate court reversed. It concluded that the admitted evidence, while incomplete, suggested that the restrictions may have been effectively amended if all the owners of the lots voted in favor of the changes. The court worked through a thoughtful analysis of the history of the amendments, ultimately remanding the case with instructions. The significance of the case is the reminder that recorded restrictions may be effective despite questionable amendments.

Maatta v Dead River Campers, Inc[9] The plaintiffs owned lots in a subdivision in the Upper Peninsula's Marquette County where most buyers had for many years maintained "camps" or cabins on the land under license from the previous owner. The defendant was the new corporate association, and retained ownership of lot 4 which had been used as a public access site, including a concrete boat ramp, pit toilets, and a parking lot. After experiencing numerous problems with excessive public use, the plaintiffs unsuccessfully tried to pass a shareholder resolution closing the site. The plaintiffs then sued and sought a permanent injunction against public access to lot 4, claiming that it violated restrictive covenants limit-

ing the use of lots in the development to "single-family residential purposes and incidental recreational uses," and also forbade activities that were offensive, annoying, or created a nuisance. The plaintiffs successfully obtained a temporary injunction closing lot 4. In response, defendant drafted, and passed, a resolution that exempted lot 4 from the covenants at issue. After a bench trial, the court agreed that the resolution exempted lot 4 from the covenants, and that the "fair thing to do" would be to deny plaintiffs the relief sought. The court of appeals reversed. The court found that it was impermissible to amend by majority vote the restrictive covenants to remove restrictions from one lot while leaving them intact for the remaining lots. "The mutuality of restrictive covenants would be destroyed if we were to allow the majority of owners, who might not be adversely affected because of their insulated location in the subdivision, to authorize offensive consequences for the minority by removing or imposing restrictions only on certain lots within the minority's areas." The court observed that lot owners have a right to rely on the restrictions, that all owners are bound equally. The court held that any non-uniform covenant amendments require the unanimous consent of the affected property owners.

Dean v Hanson[10] Plaintiff subdivided a 20-acre parcel of land in Washtenaw County into five parcels. Parcel A consisted of approximately 10 acres, and the remaining lots B through E were approximately 2.5 acres each. The survey showed Parcel A contained a 7-acre easement for "common usage." Parcels D and E were sold to the defendants. A dispute arose when plaintiff decided to further subdivide the remaining three parcels he owned, including the land in Parcel A reserved for "common usage." The defendants recorded a claim of interest against this area, resulting in plaintiff's lawsuit. The complaint alleged various violations by the defendants of the building and use restrictions. (The case provides a good overview of recent Michigan case law interpreting and applying judicial treatment of deed restrictions.) The defendants counterclaimed for a declaratory judgment barring the plaintiff from constructing more than one residential structure on the remaining lots, and barring the development of the area of "common usage" through the doctrine of reciprocal negative easements. Both the trial court and the court of appeals found for the defendants. A grantor of restrictions is not free to modify those restrictions once others have purchased a portion of the restricted property. The court found that "even with the knowledge that deed restrictions can be amended, lot owners have a right to rely on those restrictions in effect at the time they embark on a particular course of action regarding the use of their land, and subsequent amended deed restrictions should not be able to frustrate such action already begun." As to the plaintiff's claims, the court dispensed with them through an analysis of the three equitable exceptions to the strict enforcement of property restrictions fashioned by Michigan courts: 1) technical violations and absence of substantial injury; 2) changed conditions; and 3) limitations and laches.

Remsing v Hackney[11] This case comes from Eaton County where the plaintiff, Mr. Richard W. Remsing, sued his subdivision homeowners association for an accounting and for violation of certain deed restrictions. After discovery, the defendants moved for summary disposition on the basis that the offending covenants and restrictions had been amended and plaintiff could no longer allege non-compliance. The defendants argued, and the trial court apparently agreed, that the amendments "clarified" the drafter's intent regarding certain restrictions, rendering plaintiff's case moot. The court of appeals disagreed. Because deed restrictions are grounded in contract, they cannot simply be "clarified," particularly without the involvement of the developer to explain his intent when they were drafted. The court found that what actually occurred was an "amendment" to the deed restrictions. And even though the defendants obtained approval for amending the restrictions from over eighty (80) percent of the lots as required by the covenants, they did not actually record those changes in an instrument, as also required by the restrictions. So, the court of appeals deemed them ineffective, reversed the summary disposition, and remanded the case for further proceedings.

Conflict with Code

Benz v Pittsfield Charter Township[12] Mr. and Mrs. Benz sued the Township, alleging that the defendant violated their rights and the law by enforcing a covenant in their deed restricting their property in Washtenaw County to residential use and a limited density of homes. The plaintiffs' claimed that the developer placed the restrictive covenant in its deed to the plaintiffs as a condition to the defendant's approval of the developer's planned unit development for a shopping center. The plaintiffs argued that the Township Zoning Act (repealed, now Zoning Enabling Act, Public Act 110 of 2006, MCL 125.3101, *et seq.*), did not specifically allow restrictive covenants and their use as zoning tools improperly circumvents procedural protections. The court disagreed. Under the old act (and continued in the new act), the Township has "vast conditioning authority" and an otherwise reasonable and related condition is not rendered invalid simply because it burdens property outside the PUD's bounds.

Bloomfield Estates Improvement Association v City of Birmingham[13] This dispute involved lot 52 of the Bloomfield Estates subdivision in Oakland County where the city of Birmingham was attempting to develop an off-leash dog recreation area (dog park). The plaintiff association sought to enjoin the dog park as a violation of a deed restriction recorded in 1915 where each lot was to be used for strictly residential purposes. In 1928, Bloomfield Township purchased the subject lot as part of a voter approved plan to include the property in its park land. Years later, the property was conveyed to the City of Bloomfield Hills, and later to the defendant via quit claim deed which included the reference "subject to the building and use restrictions of record." In the following years, although efforts were apparently directed to removing the restrictions, there was no evidence in the record that the deed restrictions were ever formally removed. In 2004, the defendant fenced off a portion of lot 52 pursuant to the dog park project and the plaintiff sued to enforce the deed restriction. The trial court found for the city, determining that the deed restriction was not violated because a dog park was consistent with both a residential use and the defendant's zoning ordinance. The court of appeals reversed for the plaintiff. It confirmed that restrictions, like other legal language, should be interpreted to preserve, if possible, the intention of the restrictor as ascertained from the entire instrument. Unambiguous restrictions are enforced as written. The court of appeals found the trial court erred as a matter of law by considering the defendant's zoning ordinance. The deed restriction contained no language indicating any intent to define residential purposes based on a municipality's permitted uses. The defendant could not affect the operation of a restrictive covenant through a definition in a zoning ordinance. "To so consider it would be to permit the legislative authority of the city to impair the obligation of the contract entered into between the parties to the conveyance." The court found that read in context and as a whole, the intent of the deed restriction was to ensure that lot 52 would be used only for a single family to live on. Some amount of deviation from that use is permissible where it is primarily being used for residential purposes and the deviation is incidental and harmless. In this case, the manner in which lot 52 was being used was clearly not a residential purpose, and it was irrelevant whether other lots or lot owners in the subdivision were harmed thereby. However, finding the deed restrictions applicable and that defendant was in violation of them did not end the court of appeals' inquiry. It further concluded that the generations involved had clearly acquiesced in the defendant's use of lot 52 as part of a municipal park. To that extent, equity will no longer permit plaintiff to seek enforcement of the deed restriction against that use. But, "plaintiff is only estopped from challenging the use to which it has acquiesced because estoppel can go no farther than the consent." Consequently, the plaintiff may not challenge the general use of lot 52 as a park, but may challenge the use of lot 52 as a dog park. The Michigan Supreme Court has since granted leave to appeal.

Waiver/Change of Circumstances

Matthews v Winstanley[14] The parties all lived in a subdivision adjacent to Woodward Avenue in Oakland County. The plaintiffs filed an action for declaratory relief to invalidate a deed restriction limiting their property to residential usage. The defendants filed a counterclaim seeking to enforce the same restriction. The plaintiffs complained that the expansion of Woodward Avenue created such extensive change in the character of the neighborhood in which the subdivision is located that the original purpose of the deed restriction cannot be achieved. The trial court granted the defendants summary disposition of the plaintiffs' complaint, and the court of appeals affirmed. Restrictions for residential purposes are particularly favored by public policy and are valuable property rights. The court adopted analyses from earlier cases where the fact that substantial changes in the character of the neighborhood outside the subdivision took place did not make it inequitable to enforce the restrictions. Although Woodward Avenue has changed substantially since the lots were platted, the plaintiffs did not show that their subdivision had been substantially eradicated. They could not show that their lots have been rendered unfit for residential use due to excess noise, traffic, dust or other harmful conditions resulting from increased commercialization or expansion of the road.

Tottis v Dearborn Hills Civic Association, Inc[15] This case involves the doctrine of waiver applied to restrictive covenants. The plaintiffs purchased a vacant lot in a subdivision in Wayne County burdened by two deed restrictions. The first restriction would prohibit plaintiffs from building any structure on the lot because it was not one entire residential lot as platted, but instead a split lot. The second restriction would prohibit the placement of plaintiffs' garage as indicated in the architectural plans. The plaintiffs sued, claiming the character of the neighborhood had changed in a manner that indicated the residents had abandoned the deed restrictions. The trial court found in favor of the defendants and permanently enjoined the construction of any structure on plaintiffs' vacant lot. The court of appeals reversed. It reviews equitable actions *de novo*, and further considers the findings of fact by a trial court sitting without a jury under the "clearly erroneous"

standard. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed. In this case, the court of appeals found the evidence established that the character of the neighborhood intended and fixed by the restriction had changed. Because there was no record of the defendants ever insisting on compliance with the deed restriction, and because the plaintiffs would be damaged if defendants were now allowed to enforce the restriction, the court found that defendants had waived any right to enforce the restriction. "The right to enforce a restrictive covenant may be lost by waiver if, by one's failing to act, he leads another to believe that he will not insist upon the covenant and the other is thereby damaged. However, where variations from deed restrictions constitute minor violations, the concept of waiver does not apply. There is no waiver where the character of the neighborhood intended and fixed by the restrictions remains unchanged." There was an extensive dissenting opinion which disagreed that the evidence showed that the neighborhood had changed, or that the trial court's factual findings were clearly erroneous. On appeal to the Supreme Court, the Court agreed with the dissenting view and reversed, reinstating the opinion and order of the trial court. The Court agreed that the trial court's conclusions the neighborhood had not undergone extensive changes was not clearly erroneous. There was no waiver of restrictions where the character of the subdivision had not been so altered as to defeat the original purpose of the restrictions.

Equity/Public Policy

Stevens v Great American Title Company[16] This case involves the application of the doctrine of equitable servitudes to enforce deed restrictions against new purchasers. The plaintiffs owned two adjacent parcels of land with frontage on Lake Angelus in Oakland County. In 1995, the Stevenses sold one of their parcels to Carpenter, the defendants' predecessor in interest, on land contract and executed a warranty deed conveying the property to Carpenter. However, the parties regarded this as only a partial closing because those documents did not reflect the intent of the parties and some changes were necessary. In early 1996, Stevens and Carpenter executed an addendum to the land contract which provided for more restrictive building limitations on the parcels sold than what was provided for in the deed. The deed was never amended. After they bought the property, the Nesses attempted to avoid the deed restrictions claiming that the doctrine of merger precluded enforcing restrictions not memorialized in the deed. Both the trial court and the court of appeals disagreed. Both courts found that the doctrine of equitable servitudes was applicable to the facts of this case. "Equity will enforce a lawful restrictive agreement concerning land against a person who takes with notice of the contract. In such a case, the person violating the agreement, though not a party to it, is a privy in conscience with the maker." The court found that, despite no proof of actual notice (defined by the court as actual possession of the land contract addendum), the evidence suggested the Nesses had sufficient constructive notice of the restrictions to determine they were enforceable against them.

Terrien v Zwit[17] The Michigan Supreme Court held that covenants restricting family day care homes in Muskegon County did not violate Michigan public policy and were enforceable. It reversed the decisions of the circuit court and the court of appeals, as well as several other published and unpublished cases on the topic. The Supreme Court concluded that a covenant barring any commercial or business enterprises was broader in scope than a covenant permitting only residential uses. The Court found significant the fact the restrictions at issue not only prohibited commercial or business activities, they also prohibited the mere storing of any equipment used in such activities. The Court found this a strong and emphatic statement of the restrictions' intent to prohibit any type of commercial or business use of the properties. The Court was not persuaded by an argument that "public policy" was in favor of such uses. It found that making social policy is a job for the legislature, not the courts. The majority quoted Chief Justice Marshall's famous injunction to the bench in *Marbury v Madison* that the duty of the judiciary is to assert what the law "is," not what it "ought" to be. The court distinguished prohibitions such as racial covenants which would be clearly unenforceable. "It is not the function of the courts to strike down private property agreements and to readjust those property rights in accordance with what seems reasonable upon a detached judicial view. Rather, absent some specific basis for finding them unlawful, courts cannot disregard private contracts and covenants in order to advance a particular social good." Again, the court felt such a decision should come from the legislature, not the judiciary. Both Justice Kelly and Justice Weaver authored separate dissenting opinions.

Lakes of the North Association v Twiga Limited Partnership[18] This dispute involved lots in a resort subdivision in Antrim County which were sold by the state at tax sale. The plaintiff was the purchaser and refused to pay the post-tax sale assessments, arguing the lots were no longer subject to the assessment because when title

vested in the state, all encumbrances were extinguished pursuant to MCL 211.67. The trial court, court of appeals and Michigan Supreme Court all disagreed. The Court concluded that the term "encumbrance" as used in MCL 211.67 is ambiguous and judicial construction is appropriate. The Court analyzed the historic reasons for canceling past due taxes, assessments, and liens against foreclosed property, and concluded that restrictive covenants, especially those pertaining to residential use, enhance and preserve the value of real estate. "Preservation of property value will facilitate, not impede, the objective of the tax statute to restore the property to the tax rolls. Destruction of such covenants following a tax sale reduces the value of the property, and perhaps the other properties within the community, because land owners would no longer be able to preserve its planned character. Planned unit developments are a modern trend in residential living. Deed restrictions and covenants are vital to the existence and viability of such communities, and if clearly established by proper instruments, are favored by definite public policy." The Court felt that the legislature did not intend to cancel such restrictions and covenants in the event of a tax sale. Finally, MCL 211.78k states that "all existing recorded and unrecorded interests in that property are extinguished, except a visible or recorded easement or right-of-way, private deed restrictions . . . , or other governmental interests." This was further confirmation that the restrictive covenants and covenants to pay association assessments were private deed restrictions not intended by the legislature as covenants to be canceled by a tax sale.

O'Connor v Resort Custom Builders, Inc[19] This case involves the enforcement of restrictions against interval ownership (time shares) of resort property. The Michigan Supreme Court reversed the court of appeals, finding such restrictions enforceable. The property is the Shanty Creek Resort in Antrim County. The restrictions require that no lot be used except for residential purposes, and occupied by not more than one family for residential purposes. The defendant constructed a home in the restricted subdivision and marketed "interval ownership" shares in the home. The plaintiff association sued to enjoin the sales, and the trial court granted that injunction. The court of appeals reversed, reasoning that the law favors the free use of property and deemed interval ownership not incompatible with "residential purposes." The Supreme Court disagreed. The Court reviewed the historical importance of restrictive covenants, and the fact that the resolution of any dispute must focus on the activity involved and how it parallels the ordinary and common meaning of use for residential purposes. The Supreme Court had never considered whether a residential-purposes restriction barred interval ownership or time sharing. It reviewed governing principles in previous opinions which seemed to be premised on two essential principles. That is, owners of land have broad freedom to make legal use of their property, and courts must normally enforce unwaived restrictions on which the owners of other similarly burdened property have relied. The Court recognized the necessity of deciding such matters on a case-by-case basis. Ultimately, the Supreme Court adopted the reasoning of the trial court which compared an owner's expectation and right to leave their belongings in a "residence," as compared to a time share participant who had to remove their belongings at the end of their weekly occupancy because someone else was coming in behind them. There was no permanence to their presence, either psychologically or physically. Accordingly, it was not "residential" within the definition of the restrictions. The Supreme Court further concluded that the plaintiffs had not waived the use restriction by allowing short term rentals, which they agreed was different in character to interval ownership.

Privity/Standing

Ronan v Hofmann[20] This case involves neighboring owners of property in the Arlington Heights subdivision in the city of Petoskey, Emmet County. At issue are recorded deed restrictions which limit the development of the plaintiffs' property. The plaintiffs purchased several lots which included a recorded restriction that "no one shall build" or cause to be built any structure on any of the lots "that would tend to obstruct the view on the west side of said lots." The Ronans sold one of the lots to one of the defendants. When the plaintiffs attempted to sell the remaining lots, the defendants informed the plaintiffs that they were enforcing the deed restriction regarding view that affected all of the lots. In the ensuing litigation, the trial court granted the defendants' dispositive motion, concluding that sufficient privity existed with the original owners and that the property was intended to benefit from enforcement of the building restriction. The plaintiffs argue, in part, that the restrictions did not run with the land, but were rather a covenant personal to the original grantor and grantee 50 years ago. Both the trial court and the court of appeals disagreed. They found that the restriction was indeed related to the land, and not a personal covenant. The court felt it concerned the occupation and enjoyment of the property, passed with ownership, and was related to acts to be done or permitted with regard to the land or the estate conveyed. The court also found that because the restriction appeared in the recorded chain of title for both the grantor and grantee that the plaintiffs had constructive notice of it.

The reference in the restriction that "no one shall build" was further confirmation that the restriction was not a personal one. The court disagreed that the plaintiffs were entitled to relief on the basis of a reciprocal negative easement, nor was the court persuaded that conditions at the property had changed the circumstances to render the restriction no longer enforceable.

Avoiding Deed Restrictions

Conflict with Code

McCabel v Horizons Unlimited, Remsing[21] Another case involving Mr. Remsing from Eaton County, this time as a defendant, involving signage in a residential subdivision. The defendant homeowner owned a home in a subdivision with deed restrictions against placing certain business signs within the subdivision. Mr. Remsing ran his real estate business out of his home and persisted in placing his business signs and brochures on his property, and on a trailer stored on the street in front of his house. Based on an interpretation of the relevant deed restrictions, the trial court enjoined certain activity, including the trailer sign and Mr. Remsing's home address sign which had the home numbers inscribed on a large wooden display suspended behind his mailbox from a stand made of PVC piping. The court of appeals affirmed all of the trial court's rulings except the trailer sign. The court of appeals noted that a local ordinance required that signs on trailers be imprinted with the owner's name and address for purpose of identification. Because this statutory requirement is incompatible with a covenant that prohibits placement of a sign on a trailer, that specific aspect of the deed restrictions was against public policy. "Contracts founded on acts prohibited by a statute, or contract in violation of public policy, are void."

Amendments

Slatterly v Madiol, Shorewood Association[22] This case involved neighbors holding lots in a community of summer homes in Saugatuck, Allegan County, and a dispute over the use of a driveway area. The plaintiffs had for years parked on the disputed space in exchange for access over a walkway on their lot leading to the beach. When the Madiols moved to the neighborhood and acquired the lot adjacent to the parking area, their survey disclosed that a portion of the disputed area was on their lot. Eventually, the Madiols informed the Slatterlys they could not park on their property, and placed a pile of landscaping timbers and sand on the disputed area which was "landscaped" into a barrier against any vehicle accessing the area. Soon thereafter, the Shorewood Association (the owner of all the lots) amended the bylaws to include a provision requiring prior approval for a number of landscaping projects, including the building, removal or barrier of roads or driveways. The amendment also stated that any structure erected without the Board's prior approval "shall, in the sole discretion of the Board of Directors, constitute a nuisance and shall be subject to removal by the Board of Directors" in any manner they deem proper, at the stockholder's expense. Lawsuits ensued between many parties with multiple theories for relief. In pertinent part, the trial court deemed the amendment of the bylaws effective and ordered the Madiols to remove their barrier. On appeal, the appellate court reversed in favor of the Madiols. In part, the court found that the language of the amendment contained no manifestation of intent to effect retroactive application. The word "shall" in a statute indicates a prospective operation unless accompanied by other words indicating a contrary intent, and the court found no such words in the amendment.

Interpretations/Definitions

Darnell v Garett R. Kern Construction, Inc[23] This case involves a plaintiff homeowner upset because he perceived a "modular home" being built in his Washtenaw County subdivision when he saw four square boxes on trailers parked on the defendant's lot. The restrictive covenants clearly prohibit "modular homes" and in fact the developer of the subdivision expressly rejected a purchase agreement with language about building a modular home. The defendant's real estate agent then replaced the phrase "modular home" with the phrase "systems built home." Nothing else changed. This time, the agreement and plans were approved by the developer. The court found that the deed restrictions gave the developer "sole and exclusive" authority to approve construction plans and whether they fit within the restrictions. In reviewing the language of the restrictions, the court also noted that the term "modular home" was not defined. Consequently, the defendants were entitled to rely on whatever definition the developer gave the agreement, and his subjective approval was a confirmation that the plans complied with the restrictions.

Ribick v Inverrary[24] This decision involves a group of homeowners suing to enforce deed restrictions that require, among other things, that "no building" other than "one detached single family dwelling" shall be erected upon any "lot" within this Oakland County subdivision. The plaintiffs were concerned because the plat included a 6.5 acre lot identified as "Outlot A," a piece which had been

separately reserved in the plat and, in 1976, conveyed from the developer by warranty deed to Oakland County for the purposes of providing a site for county water system pumping facilities with the stipulation that once it was no longer used for that purpose, the land would revert to the developer or its heirs or assigns. Over time, the homeowners association had maintained the parcel, and improved it with a baseball backstop and basketball court. In 2003, the County reconveyed Outlot A to developer's estate after the pumping facilities were abandoned. The estate then conveyed the property to the defendant for the purpose of developing a site condominium project with ten separate single family sites and a public road between the plaintiffs' properties. The plaintiffs sued to enjoin the sale and intended use. Both the trial court and court of appeals held for the defendant. They found that Outlot A was specifically reserved as an easement, separate and apart from lots 1 through 41. The restrictions for single family detached homes only applied to the lots. The court held that "[b]ecause it is improper to enlarge or extend the meaning of a restrictive covenant by judicial interpretation when there is no ambiguity present…we will not infer restrictions that are not expressly provided for in the controlling document." The court also disagreed that the doctrine of reciprocal negative easements applied because there were no facts to show any intent that the common grantor of the properties intended that Outlot A ever be treated the same as the other platted lots. Simply, these deed restrictions were avoided because they did not apply.

Soden v Lakes of the North Association[25] The plaintiffs were some of the 8,028 lot owners in an Antrim County subdivision who sued the defendant owners' association over special assessments and the manner in which the votes for the assessments were obtained. The covenants required a quorum of 60 percent of all voting Members by proxy or in person. Thirty days advance notice was required. The covenants allowed the board to call another meeting if the quorum was not attained at the initial meeting. The quorum requirement at any subsequent meeting would be reduced by one-half the number at the preceding meeting. Because 4,816 votes would be needed to meet an initial quorum, which the defendant believed was "unattainable," the defendant gave just one 30 day notice which declared that an indefinite number of successive meetings on September 4th would occur beginning at 9:00am until quorum was met. At the initial meeting, only 1,721 votes were represented. After a series of adjournments, just three "meetings" were required to achieve a quorum and approve the assessments later the same day. The trial court found that the defendant's interpretation of the notice requirements in the covenants were met and granted summary disposition in favor of defendant. The court of appeals reversed, agreeing with the plaintiffs that the quorum and notice requirements required the defendant to call and notice another meeting after the initial meeting failed to meet quorum, subject to fresh notice requirements rather than the procedure used by the defendant. The court recognized its authority to read the covenants "as a whole to give effect to the ascertainable intent of the drafter." As such, the court concluded that defendants' interpretation was "strained and overly technical" and effectively nullified the substance of the quorum requirement. A dissenting judge supported the trial court's decision, finding that the majority read a "sequence" requirement into the covenants which he did not believe existed.

Dunham Lake Property Owners Ass'n v Baetz[26] The defendants owned property in the Dunham Lakes Estate South subdivision in Livingston County. On the same lot where they built their residence they constructed a detached, enclosed structure approximately ten feet by twelve feet which was used primarily for storing lawn equipment. It had been characterized as a "building," "a storage building," and an "outbuilding." The plaintiff sued the defendants alleging a violation of the deed restrictions and seeking the removal of the "outbuilding." The trial court denied the relief requested and granted judgment to the defendants. The trial court opinion discussed in detail the inconsistencies in the plaintiff's interpretation of the deed restrictions, specifically regarding the definition of "building." The trial court did not expressly find that the defendants' structure was a building. Rather, the trial court found the evidence justified the application of various equitable defenses, including estoppel. The court of appeals affirmed. The court felt that the plaintiff had not carried its burden of proof to establish a violation of the restriction that no "building" other than a single-family dwelling and a garage may be constructed. "Courts will not grant equitable relief unless there is an obvious violation." The term "building" was not defined in the restrictions. Apparently, the evidence taken from the plaintiff's witness created so many inconsistencies, and suggested so many examples of other "buildings" that the plaintiff had allowed that were not dwellings or garages, that the court did not believe strict enforcement of the covenant was contractually required or equitably appropriate.

Schoenherr v Vernier Woods Development, LLC[27] The residential parcels at issue are all part of the Pine Woods, a group of four parcels comprising the Lothrop subdivision in the City of Grosse Pointe Farms, Wayne County. They are bordered on the east end by Lothrop Road and on the west end by Charlevoix Road. They

were platted in 1949 and conveyed with common deed restrictions. Each parcel was subsequently developed so that the homes, all of a contemporary design, were built on the east side of the parcels with the west side left in a natural wooded state. After purchasing one of the parcels, defendants razed the existing home and obtained preliminary approval from the city to divide the parcel into two home sites. The plaintiffs sued for injunctive relief and a declaration which would preclude the defendants' development on the bases it violated deed restrictions and a general plan of development. The trial court held in favor of the plaintiffs, enjoining the defendants' construction plans. The court of appeals reversed. The court concluded the deed restrictions did not expressly prohibit dividing defendants' parcel into two building sites, or limiting construction of the home to the east end of the parcel, or to a contemporary design. However, the court did agree that the deed restrictions expressly preserved the plaintiffs' right to enforce the restrictions obligating the defendants to seek approval of all construction plans, in a reasonable manner. Further, the court found no basis to conclude that a reciprocal negative easement barred defendants' development plan. The evidence did not show a scheme of restrictions imposed on the defendants' parcel. "A reciprocal negative easement cannot be created retroactively by mutual agreement among common land owners to act in a certain way. Reciprocal negative easements arise, if at all, out of a benefit accorded land retained, by restrictions upon neighboring land sold by a common owner." The court felt that the commonalities of the other parcels merely reflected the choices made by the original purchasers.

Mineral Rights

The Mable Cleary Trust v The Edward-Marlah Muzyl Trust[28] This case involves mineral rights and the ability to exercise them in proximity to restrictive covenants affecting surface lands in Otsego County. The Otsego Ski Club sold land to a developer. The ski club retained an undivided fifty percent interest in the mineral rights. This interest was severed over a year before restrictive covenants were recorded against the surface lands. The court confirmed that the ski club's interest was not burdened by the covenants. "[O]nce a person's mineral rights have vested through the proper conveyance, no subsequent conveyance of or restriction placed on the surface estate will affect the mineral owner's rights."

Waiver/Change of Circumstances

Becker v Richards[29] This case involves the plaintiff's failed effort to enforce what he viewed to be a negative reciprocal easement. Both plaintiff and defendants live in single family dwellings in a residential neighborhood along the northeast shore of Duncan Lake in Barry County. They live across the street from each other, in different plats created by the same developer. They also both own property in the other's plat, and also land in unplatted property abutting the backline of their respective property in one of the subdivisions. The suit was filed when plaintiff objected to the defendants' attempts to construct a pole barn upon the parcel defendants owned in the unplatted land, and which was also not adjacent to the defendants' residential parcel. The plaintiff claimed the proposed pole barn violated the restrictive covenants affecting the subdivision he lived in which required the lots to be used for residential purposes. The trial court took much testimony, including an affidavit from the wife of the developer which seemed to support the plaintiff's argument. But the court also gained an understanding of how all the parties in the area used their property, including residential purposes, access and storage. Ultimately, the trial judge felt "it's just not common sense" for the defendants to be denied the ability to use their land as they intended, and rendered a judgment of no cause of action on plaintiff's complaint. The court of appeals affirmed. The appellate court, in a lengthy opinion, found that although it is settled law that owners of property may invoke a court's jurisdiction for even *de minimis* violations of restrictive covenants, "whether to grant relief is still within the discretion of the trial court." Negative covenants in deeds are construed strictly against the grantors and those claiming the right to enforce them, and all doubts are resolved in favor of the free use of property. The court found the facts of this case significant. The two subdivisions were platted by common grantors essentially comprising one residential neighborhood. Subdivision residents on the non-lake side of the road freely use or intend to use adjoining property outside the subdivision for pole barn storage. Under these circumstances, like the trial court, the appellate court concluded it was illogical to conclude the defendants' proposed use of a pole barn is not also a residential use incidental to their single-family dwelling on the lakeside of the road. In fact, the court found that, even if plaintiff's interpretation of the restrictive covenants was correct and a pole barn had to be located on a lot with a supporting residential dwelling, the plaintiff had waived strict compliance with that restriction.

Marino v Grayhaven Estates Ltd, LLC[30] Plaintiffs sought to enforce certain deed restrictions in the Grayhaven development along the Detroit River in Wayne County. The conflict involved interpreting and applying the 1926 deed granted by the original developer, and certain

waivers of "all" deed restrictions in 1974 granted by the plaintiffs' predecessor in title. There was no dispute that the waiver included restrictions on single family residences, but the plaintiffs claimed the 1974 waiver did not also include restrictions related to the road and the lagoons. The court of appeals reversed in favor of the defendants. The court found that in Michigan, "building" restrictions can include "use" restrictions. Because these terms are not rigidly defined by Michigan case law, and because "restrictions" was used interchangeably with "restrictions and agreements" in the deed, the court concluded that the intent of the parties to the deed should be construed not to create separate categories but to aggregate all of the limitations. The language of the waiver was unambiguously broad and inclusive. Thus, while pursuant to the waiver the plaintiffs were no longer bound by the restrictions in their own deed, they also lost the ability to force other Grayhaven property owners to adhere to the restrictions. However, the court also found in favor of the plaintiffs to the extent that it remanded the case for further consideration whether defendant's activities overburdened the easement and interfered with the plaintiffs' right to use the reciprocal easements on other property in the subdivision. "An easement holder may not materially increase the burden on a servient estate beyond what as originally contemplated." In a dissenting opinion, Judge White noted a distinction between "restrictions" and "agreements." She would have remanded the case for analysis of whether waiver of the restrictions also included any agreements.

Privity/Standing

Neal v Miramichi Utilities, Inc[31] The plaintiffs were lot owners in the plat of Lake Miramichi subdivision in Osceola County. The plaintiffs commenced the action against the defendant and various governmental defendants seeking revocation of restrictive covenants prohibiting private water wells and requiring payment to defendant utility company for water service. The government defendant was voluntarily dismissed. The trial court held for the plaintiffs and was affirmed by the court of appeals. The subject restrictive covenants indicated that after January 1977, the covenants may be amended or revoked upon the written agreement of at least two-thirds of the lot owners. The defendant objected, arguing basically that if the revocations were granted, and a majority of lot owners sink wells, the defendant would be forced out of business, leaving those lot owners unable to obtain well permits without access to potable water. The court found that defendant was without standing to assert this claim. Public health and safety was not a valid defense to the owners' rights to exercise their ability to agree under the terms of the restrictive covenants because the revocations themselves do not create a threat to public health and safety. The defendant's arguments failed to produce any evidence other than contingent speculation that some lot owners might be without potable water, thereby violating the subdivision's residential purpose restriction.

Equity/Public Policy

Ridgewood Associates v McKinnon[32] This case involves plaintiffs' assertion that defendants' day care operation in Montcalm County was prohibited by restrictive covenants governing use of land in the subdivision. The restrictions generally called for each lot to be used for single-family residences. The trial court granted plaintiffs' motion for summary disposition, but the court of appeals reversed. Although building and use restrictions in residential deeds are favored by public policy, restrictive covenants are construed strictly against the grantors and all doubts are resolved in favor of the free use of property. The court found that operation of a licensed day care home allowing no more than seven unrelated children was a residential use. (MCL 722.111). Although, the Michigan Supreme Court found in *Terrien v Zwit*, *supra*, that a day care provider who charges a fee for child care services may be involved in a commercial activity that may be barred by a restrictive covenant, the court of appeals in the instant case determined that defendants' day care home was a residential use and not barred by the residential restriction. The court felt the language in the restriction barring custodial use, construed strictly against the proponent of the restriction, was too vague to bar a day care home. The restrictive covenant at issue did not directly bar commercial use. It barred buildings and structures intended for or "modified to" commercial use. The defendants presented evidence that no modifications were made to the four bedroom single family home at issue. The court found the parties to the covenant could reasonably seek to limit the type of structures allowed, rather than to bar commercial activities that do not conflict with the character of the structures.

Kelo v City of New London & Wayne County v Hathcock: What effect of condemnation on the rights of property owners similarly deed restricted?

Consider the example of a large subdivision comprised of lots typically restricted for development and use as single family residences, with additional deed restrictions for assessments related to interests in common areas. Then consider a *Kelo*- or *Hathcock*-type

condemnation by the municipality of only a relatively small part of that subdivision. What are the rights or remedies of the other lot owners in the subdivision far from the property actually taken? Do deed restrictions fail of purpose because of significant condemnation? Do owners of restricted property that is not being condemned have any cause of action or right to damages as a result of the condemnation of other similarly restricted lots in their development?

The Michigan Supreme Court in *Johnstone v Detroit, G H & M Railway Co*[33] found:

> [O]wners of property in a subdivision in which, under a general plan, the property is restricted to specified uses, and in which the restrictions are valid, subsisting, and enforceable against the lands in the hands of private owners, are entitled to compensation upon the taking of any part of such subdivision for public use in violation of such restrictions; that, aside from nominal damages for destruction of the easement, the compensation is measured by the actual diminution in value of the premises of such owner as a result of the use to which the property taken is put; and that, in determining such diminution, the effect, by way of benefit as well as by way of injury, of such use is to be taken into account.

In *Allen v Detroit*,[34] the Supreme Court also found that: "[B]efore [the condemning authority] can use a lot charged with [a deed] restriction for a purpose prohibited by the restriction, it must obtain, by purchase or condemnation, the title of all owners of any interest therein, and, when it has not done so, equity may properly intervene to preserve the status quo until such interests are acquired."

Even after *Kelo* and *Hathcock*, it almost certainly remains true that "restrictions will not be lifted unless the character of the subdivision has changed in such a way as to subvert the original purpose of the restrictions,"[35] and even then the covenant holders will have to be justly compensated for their deprivation.[36] In *O'Connor, supra*, the Court noted that "in strictly residential neighborhoods, where there has always been compliance with the restrictive covenants in deeds, nullification of the restrictions has been deemed a great injustice to the owners of property."[37]

Valuation might be difficult since "Michigan courts generally enforce valid restrictions by injunction."[38] However, just compensation will be the subject of hearings in every case implicating condemnation of land burdened by covenants, where "[o]wners may enforce negative easements regardless of the extent of the owners' damages."[39]

Conclusion

The eight years between articles shows consistency in Michigan law. Deed restrictions and covenants clearly established by proper instruments are still favored by definite public policy. The case law confirms that not only will historical reliance on enforced restrictions be protected, but modern trends in residential living such as planned unit developments will be supported and accommodated whenever reasonably possible. The Michigan Supreme Court has generally refrained from interpreting restrictive uses, concluding that disputes of such nature are typically better addressed by the legislature. But as communities wrestle with their evolving power of condemnation, unhappy property owners with affected deed restrictions and covenants will necessarily add to the equally evolving role of the judiciary.

Endnotes

1. William E. Hosler, *Restrictive Covenants in Michigan*, 25 Mich Real Prop Rev 81 (1998).

2. *Kelo v New London*, 545 U.S. 469; 125 S. Ct. 2655; 162 L. Ed 2d 439; 2005 U.S. LEXIS 5011 (2005).

3. *County of Wayne v Hathcock*, 471 Mich 445; 684 NW2d 765 (2004).

4. *Randolph v Reisig*, an uncorrected published opinion of the Michigan Court of Appeals, issued October 3, 2006 (Docket No. 259943); ___ Mich App ___; ___ NW2d ___ (2006). *See also Brauer v Hobbs*, 151 Mich App 769; 391 NW2d 482 (1986).

5. *Pointe Rosa Homeowners Association, Inc v Cicchini*, unpublished opinion per curiam of the Michigan Court of Appeals, issued September 5, 2006 (Docket No. 267101). *See also Mable Cleary Trust v Edward-Marlah Muzyl Trust, infra; Village of Hickory Pointe Homeowners Ass'n v Smyk, infra; Terrien v Zwit, infra.*

6. *Lauren Hills Home Owners Improvement Ass'n v Kokko*, unpublished opinion per curiam of the Michigan Court of Appeals, issued April 26, 2005 (Docket No. 253523). *See also O'Connor v Resort Custom Builders, Inc, infra; Carey v Lauhoff*, 301 Mich 168; 3 NW2d 67 (1942).

7. *Village of Hickory Pointe Homeowners Ass'n v Smyk*, 262 Mich App 512; 686 NW2d 506 (2004). *See also Terrien v Zwit, infra; Cooper v Kovan*, 349 Mich 520; 84 NW2d 859 (1957); *Borowski v Welch*, 117 Mich App 712; 324 NW2d 144 (1982).

8. *Kamphaus v Burns*, unpublished opinion per curiam of the Michigan Court of Appeals, issued August 23, 2005 (Docket No. 261586). *See also Sanborn v McLean*, 233 Mich 227; 206 NW 496 (1925).

9. *Maatta v Dead River Campers, Inc*, 263 Mich App 604; 689 NW2d 491 (2004). *See also Ardmore Park Subdivision Association v Simon*, 117 Mich App 57; 323 NW2d 591 (1982); *McMillan v Iserman*, 120 Mich App 785; 327 NW2d 559 (1983); *Hubner v Trowbridge Farms Association*, unpublished opinion per curiam of the Michigan Court of Appeals, issued June 16, 2005 (Docket No. 260783).

10. *Dean v Hanson*, unpublished opinion per curiam of the Michigan Court of Appeals, issued November 18, 2003 (Docket No. 241317). *See also Pyne v Elliott*, 53 Mich App 419; 220 NW2d 54 (1974); *Webb v Smith* (*after second remand*), 224 Mich App 203; 568 NW2d 378 (1997); *Sampson v Kaufman*, 345 Mich 48; 75 NW2d 64 (1956).

11. *Remsing v Hackney*, unpublished opinion per curiam of the Michigan Court of Appeals, issued October 12, 2006 (Docket No. 259284). *See also Stuart v Chawney*, 454 Mich 200; 560 NW2d 336 (1997).

12. *Benz v Pittsfield Charter Township*, unpublished opinion per curium of the Michigan Court of Appeals, issued January 27, 2004 (Docket No. 243133).

13. *Bloomfield Estates Improvement Association v City of Birmingham*, unpublished opinion per curiam of the Michigan Court of Appeals, issued March 14, 2006 (Docket No. 255340).

14. *Matthews v Winstanley*, unpublished opinion per curiam of the Michigan Court of Appeals, issued December 18, 2003 (Docket No. 242472). *See also DeMarco v Palazzolo*, 47 Mich App 444; 209 NW2d 540 (1973); *Rolfe v Robinson* (*after remand*), 415 Mich 345; 329 NW2d 704 (1982).

15. *Tottis v Dearborn Hills Civic Association, Inc*, 467 Mich 945; 656 NW2d 525 (2003). *See also O'Connor v Resort Custom Builders, supra*.

16. *Stevens v Great American Title Company*, Ness, unpublished opinion per curiam of the Michigan Court of Appeals, issued September 16, 2003 (Docket No. 233778). *See also Sun Oil Co. v Trent Auto Wash*, 379 Mich 182; 150 NW2d 818 (1967); *Nib Foods, Inc v Mally*, 70 Mich App 553; 246 NW2d 317 (1976).

17. *Terrien v Zwit*, 467 Mich 56; 648 NW2d 602 (2002). *See also Beverly Island Association v Zinger*, 113 Mich App 322; 317 NW2d 611 (1982); *Oosterhouse v Brummel*, 343 Mich 283; 72 NW2d 6 (1955); Susan Hlywa Topp, *Severed Minerals: Restrictive Covenants as Restrictions on Surface Use by the Mineral Owner*, 32 Mich Real Prop Rev 208 (2004).

18. *Lakes of the North Ass'n v Twiga Ltd P'ship*, 241 Mich App 91; 614 NW2d 682 (2000), *app den*, 465 Mich 924; 636 NW2d 521 (2001), *reconsideration denied*, 641 NW2d 855 (2002).

19. *O'Connor v Resort Custom Builders, Inc*, 459 Mich 335; 591 NW2d 216 (1999), *reconsideration denied*, 459 Mich 1251; 595 NW2d 843 (1999).

20. *Ronan v Hofmann*, unpublished opinion per curiam of the Michigan Court of Appeals, issued October 24, 2006 (Docket No. 263106). *See also Greenspan v Rehberg*, 56 Mich App 310; 224 NW2d 67 (1974).

21. *McCabe v Horizons Unlimited*, Remsing, unpublished opinion per curiam of the Michigan Court of Appeals, issued September 14, 2006 (Docket No. 260439).

22. *Slatterly v Madiol, Shorewood Association*, 257 Mich App 242; 668 NW2d 154 (2003).

23. *Darnell v Garett R. Kern Construction, Inc*, unpublished opinion per curiam of the Michigan Court of Appeals, issued May 16, 2006 (Docket No. 257277).

24. *Ribick v Inverrary, LLC*, unpublished opinion per curiam of the Michigan Court of Appeals, issued June 6, 2006 (Docket No. 257468). *See also O'Connor v Resort Custom Builders, Inc, supra; Margolis v Wilson Oil Corp*, 342 Mich 600; 70 NW2d 811 (1955).

25. *Soden v Lakes of the North Association*, unpublished opinion per curiam of the Michigan Court of Appeals, issued January 24, 2006 (Docket No. 263459); appeal denied, 475 Mich 873; 714 NW 329 (2006). *See also Mable Cleary Trust v Edward-Marlah Muzyl Trust, infra*.

26. *Dunham Lake Property Owners Association v Baetz*, unpublished opinion per curiam of the Michigan Court of Appeals, issued June 19, 2003 (Docket No. 237047). *See also O'Connor v Resort Custom Builders, Inc, supra; Stuart v Chawney, supra*.

27. *Schoenherr v Vernier Woods Development, LLC,* unpublished opinion per curiam of the Michigan Court of Appeals, issued November 22, 2002 (Docket No. 235601). *See also Sylvan Glens Homeowner's Association v McFadden*, 103 Mich App 118; 302 NW2d 615 (1981); *Doxtator-Nash Civic Association v Cherry Hill Professional Building, Inc*, 12 Mich App 468; 163 NW2d 262 (1968).

28. *The Mable Cleary Trust v The Edward-Marlah Muzyl Trust*, 262 Mich App 485; 686 NW2d 770 (2004). *See also Borowski v Welch, supra*; Topp, *supra* note 17.

29. *Becker v Richards*, unpublished opinion per curiam of the Michigan Court of Appeals, issued August 3, 2004 (Docket No. 245423), appeal denied, 471 Mich 922; 688 NW3d 826 (2004). *See also Webb v Smith* (after remand), 204 Mich App 564; 516 NW2d 124 (1994); *R.R. Improvement Association v Thomas*, 374 Mich 175; 131 NW2d 920 (1965).

30. *Marino v Grayhaven Estates Ltd, LLC*, unpublished opinion per curiam of the Michigan Court of Appeals, issued June 19, 2001 (Docket No. 215764). *See also Stuart v Chawney, supra; O'Connor v Resort Customer Builders, Inc, supra; Great Lakes Gas Transmission Co v MacDonald*, 193 Mich App 571; 485 NW2d 129 (1992).

31. *Neal v Miramichi Utilities, Inc*, unpublished opinion per curiam of the Michigan Court of Appeals, issued October 22, 2002 (Docket No. 239746); *appeal denied*, 469 Mich 946; 671 NW2d 46 (2003).

32. *Ridgewood Associates v McKinnon*, unpublished opinion per curiam of the Michigan Court of Appeals, issued August 20, 2002 (Docket No. 232281). *See also Beverly Island Association v Zinger, supra*.

33. *Johnstone v Detroit*, *G H & M Railway Co*, 245 Mich 65, 84; 222 NW 325 (1928).

34. *Allen v Detroit*, 167 Mich 464, 473; 133 NW 317 (1911).

35. *Rofe v Robinson*, 415 Mich 345, 352; 329 NW2d 704 (1982).

36. *Johnstone v Detroit*, 245 Mich at 84-85.

37. *O'Connor*, 459 Mich at 341 (citing *Boston-Edison Protective Ass'n v Goodlove*, 248 Mich 625; 227 NW 772 (1929)).

38. *Webb v Smith*, 224 Mich App 203, 211; 568 NW2d 378 (1997) (citing *Cooper v Kovan*, 349 Mich 520, 530; 84 NW2d 859 (1957)).

39. *Id.* at 211.

LEGISLATION AFFECTING REAL PROPERTY

by C. Leslie Banas

The Section is active in the legislative process in a variety of ways, including appearing before Senate and House committees, lobbying for and against bills, and monitoring legislation of interest to real estate lawyers. The goal of this quarterly report is to apprise you of new statutes affecting real property, to keep you informed of the Section's efforts regarding legislation that may ultimately become law, and to keep you advised of new bills that may have an impact on your practice.

Bills that Became Law Since the Last Issue of the *Review*

2006 PA 677. The Act amends 1949 Public Acts 208 and 1945 Public Acts 344 to define "blighted property," and authorizes a municipality to acquire title to blighted property by condemnation. It provides that a municipality may institute and prosecute eminent domain proceedings in accordance with the State constitution of 1963 and the laws of the State or provisions of local charter relative to condemnation.

For the full text, see http://www.legislature.mi.gov/documents/2005-2006/billenrolled/House/pdf/2006-HNB-6639.pdf

2006 PA 667. The Act amends Sec 8 of the Obsolete Property Rehabilitation Act (1945 PA 344) by making an exception in certain cases to the requirement that the rehabilitation of property may not begin before the establishment of an obsolete property rehabilitation district.

For the full text, see http://www.legislature.mi.gov/documents/2005-2006/billenrolled/House/pdf/2006-HNB-6108.pdf

2006 PA 664. The Act amends the General Property Tax Act (1893 PA 206) to provide a formula for calculating the principal residence portion of the taxable value of property used as a bed and breakfast. The principal residence portion of such property is exempt from the tax levied by the local school district for school operating purposes.

For the full text, see http://www.legislature.mi.gov/documents/2005-2006/billenrolled/House/pdf/2006-HNB-6030.pdf

2006 PA 662. The Act amends the Revised Judicative Act to extend until January 1, 2023 the $4.00 fee (up from $2.00) for recording an instrument with the register of deeds.

For the full text, see http://www.legislature.mi.gov/documents/2005-2006/billenrolled/House/pdf/2006-HNB-5966.pdf

2006 PA 660. The Act amends the Neighborhood Enterprise Zone Act (1992 PA 147) to permit an application for a neighborhood enterprise zone certificate to be filed after a building permit has been issued.

For the full text, see http://www.legislature.mi.gov/documents/2005-2006/billenrolled/House/pdf/2006-HNB-5947.pdf

2006 PA 645. The Act amends the State License Fee Act (1979 PA 152) to identify certain licensing and other fees for real estate brokers, associates, salespersons and branch offices and to establish a real estate enforcement fund and real estate education fund.

For the full text, see http://www.legislature.mi.gov/documents/2005-2006/billenrolled/House/pdf/2006-HNB-6267.pdf

2006 PA 612. The Act amends the General Property Tax Act (1893 PA 206) to allow a local governing body to exempt certain "eligible non profit housing property" (i.e., single family dwellings or duplexes owned by charitable non profit housing organization) from property tax. The exemption will remain in effect until the earliest of (1) the expiration of two years, (2) the property is occupied by a low-income person under a lease agreement or (3) ownership of the property is transferred.

For the full text, see http://www.legislature.mi.gov/documents/2005-2006/billenrolled/Senate/pdf/2006-SNB-0065.pdf

2006 PA 579. The Act amends Chapter 32 of the Revised Judicature Act (regarding foreclosure by advertisement) by abbreviating the redemption period for property sold at a foreclosure sale that is deemed to be abandoned.

Abbreviated redemption periods (which can be as little as 30 days) apply to various types of abandoned property. The Act specifically provides that property may be determined to be abandoned between the dates of the foreclosure sale and the expiration of the redemption period. For properties not exceeding 4 units, abandonment is conclusively presumed if (1) the mortgagee has made a personal inspection of the premises and the inspection does not reveal that the mortgagor or others claiming under the mortgage are occupying or will occupy the premises; (2) the mortgagee posts a notice at and mails the notice to the mortgagor stating that it considers the premises to be abandoned and that the mortgagor will lose rights of ownership 30 days after the foreclosure sale unless the mortgagor provides the notice identified in (3); and (3) within 15 days of the mortgagee's notice, the mortgagor has not given the mortgagee written notice that the premises are not abandoned.

For the full text, see http://www.legislature.mi.gov/documents/2005-2006/billenrolled/Senate/pdf/2006-SNB-1203.pdf

2006 PA 572. The Act contains various amendments to the Construction Lien Act (1980 PA 497). A project owner may no longer avoid a lien on his property by a subcontractor, supplier or laborer by making a payment to his contractor after receipt of a sworn statement, even if the sworn statement identifies all subcontractors, suppliers and laborers who provided a notice of furnishing to the owner. The project owner must also notify each subcontractor, supplier and laborer who provided a notice of furnishing or is listed in the sworn statement that he has received a sworn statement from the contractor. The notice may be given in writing, in person or by telephone. In addition, the Act requires an owner to verify the authenticity of each full or partial, unconditional or conditional waiver of lien.

New forms of a (1) sworn statement, (2) partial unconditional waiver of lien, (3) partial conditional waiver of lien, (4) full unconditional waiver of lien and (5) full conditional waiver of lien are set forth in the Act.

The Act also makes various changes to the process of applying to the Homeowner Construction Lien Recovery Fund for payment, and the fees charged in connection with the Fund.

Finally, the Act allows a property owner to bring an action to discharge a lien recorded by an unlicensed person.

For the full text, see http://www.legislature.mi.gov/documents/2005-2006/billenrolled/Senate/pdf/2006-SNB-0405.pdf

2006 PA 528. The Act amends the Natural Resources and Environmental Protection Act (1994 PA 451) to, among other things, provide for a lien in favor of the State of Michigan for the costs of cleaning up scrap tires. A lien will arise when the State first incurs the clean up costs. The lien will have priority over all liens and encumbrances, other than those recorded before the date the lien is recorded.

For the full text, see http://www.legislature.mi.gov/documents/2005-2006/billenrolled/House/pdf/2006-HNB-6475.pdf

2006 PA 510. The Act amends the Michigan Notary Public Act (2003 PA 238) to exempt a licensed attorney who applies for appointment as a notary public from the requirement of posting a surety bond. The Secretary of State is required to send reappointment applications to attorneys who are notaries before their appointments expire.

For the full text, see http://www.legislature.mi.gov/documents/2005-2006/billenrolled/Senate/pdf/2006-SNB-1266.pdf

2006 PA 466. The Act amends Part 781 (Michigan State Waterways Commission) of the Natural Resources and Environmental Protection Act (1994 PA 451) to allow a township to regulate, by ordinance, activities at a boating access site owned by the Michigan Department of Natural Resources and located on an inland lake or stream, as long as the ordinance's scope does not exceed DNR rules or orders.

For the full text, see http://www.legislature.mi.gov/documents/2005-2006/billenrolled/House/pdf/2006-HNB-5960.pdf

2006 PA 446. The Act amends the General Property Tax Act (1893 PA 206) definition of "transfer of ownership" to exclude a transfer of land (but not buildings or structures located on the land) (1) which is subject to a conservation easement under the Natural Resources and Environmental Protection Act or (2) which is eligible for a deduction as a qualified conservation contribution under Section 170(h) the federal Internal Revenue Code.

For the full text, see http://www.legislature.mi.gov/documents/2005-2006/billenrolled/Senate/pdf/2006-SNB-1004.pdf

Bills Introduced Since the Last Issue of the *Review*

SB 0062 (*Property, Conveyances*): Termination of tenancy by the entireties; allow in cases of spousal abandonment. Amends sec. 1 & 2 of 1927 PA 210 (MCL 557.101 & 557.102). 1/24/2007 - Referred to Comm on Judiciary. Monitor

SB 0112 (*Land Use*): Land use leadership council, establish. Amends 1994 PA 451 (MCL 324.101 - 324.90106) by adding pt 364 & repeals (See Act). 1/31/2007 - Referred to Comm on Nat'l Resources and Environmental Affairs.

SB 0115 (*Land Use*): Joint planning commission; provide for phased transfer of powers and duties to. Amends secs. 5 & 7 of 2003 PA 226 (MCL 125.135 & 125.137). 2/27/2007 - Referred to Comm of the Whole with Substitute S-1.

SB 0193 (*Property Tax*): Assessments; adjustment following transfer of ownership; revise. Amends sec. 27a of 1893 PA 206 (MCL 211.27a). 2/13/2007 - Referred to Comm on Finance.

SB 0201 (*Environmental Protection*): Environmental covenants; adopt uniform act. Amends secs. 20120b & 21310a of 1994 PA 451 (MCL 324.20120b & 324.21310a) & adds pt. 207. 2/15/2007 - Reassigned to Comm on Natural Resources and Environmental Affairs.

SB 0206 (*Land Use*): Planning; planning law consolidation; provide for. Creates new act & repeals (See bill). 2/27/2007 - Referred to Comm of the Whole with Substitute S-2.

SB 0209 (*Property Tax*): Appeals; alternative start dates for board of review; provide for. Amends sec. 53b of 1893 PA 206 (MCL 211.53b). 2/20/2007 - Referred to Comm on Local, Urban and State Affairs.

HB 4010 (*Property Tax Appeals*): Alternative start date for board of review. Amends sec. 53b of 1893 PA 206 (MCL 211.536). 1/23/2007 - Printed bill filed.

HB 4025 (*Property Tax Assessments*): Agricultural property assessment based on agricultural use value. Amends secs. 7dd, 7ee, 10, 24, 24c, 27a, 27b, 27c, 34, 34c & 34d of 1893 PA 206 (MCL 211. 7dd *et seq.*); Adds sec. 27e & repeals sec. 7a of 1893 PA 206 (MCL 211.7a). Tie bar with: HJR D'07. 1/23/2007 - Printed bill filed.

HB 4049 (*Property Tax Assessments*): Phased increase in taxable value of homestead when sold; implement. Amends sec. 27a of 1893 PA 206 MCL 211.27a); Tie bar with HJR B'07. 1/23/2007 - Printed bill filed.

HB 4052 (*Land Use, Land Division*): Certain land preserved from development; exempt from limit on number of parcels under land division act. Amends sec. 108 of 1967 PA 288 (MCL 560.108). 1/23/2007 - Printed bill filed.

HB 4053 (*Property, Assessments*; *Exemptions*): Transfer of ownership; revise to exclude transfer to active duty military personnel. Amends sec. 27a of 1893 PA 206 (MCL 211.27a). 1/23/2007 - Printed bill filed.

HB 4054 (*Occupations*, *Appraisers*): Prohibition on setting, developing, and communicating an appraisal based upon certain outcomes; provide for. Amends sec. 2635 of 1980 PA 299 (MCL 339.2635). 1/23/2007 - Printed bill filed. Monitor.

HB 4055 (*Financial Institutions, Mortgage Brokers and Lenders*): Coercing or inducing appraisers to inflate value of mortgaged property; prohibit. Amends sec. 29 of 1897 PA 173 (MCL 445.1679). 1/23/2007 - Printed bill filed. Monitor.

HB 4083 (*Financial Institutions, Mortgage Brokers and Lenders*): Coercing or inducing appraisers to inflate value of real property offered as collateral for secondary mortgage loan; prohibit. Amends sec. 27 of 1981 PA 125 (MCL 493.77). 1/23/2007 - Printed bill filed. Monitor.

HB 4137 (*Property Tax, Delinquent Taxes*): Foreclosure on senior citizen's or handicapped person's home for delinquent taxes; prohibit. Amends 1893 PA 206 (MCL 211.1 - 211.157) by adding sec. 70d. 1/26/2007 - Printed bill filed.

HB 4181 (*Land Use, Zoning and Growth Management*): No-net-run off standard; require zoning ordinances to incorporate. Amends 2006 PA 110 (MCL 125.3101 - 125.3702) by adding sec. 513. 1/31/2007 - Printed bill filed.

HB 4189 (*Property Tax, Assessments*): Transfer of ownership resulting from the termination of a joint tenancy; revise. Amends sec. 27a of 1893 PA 206 (MCL 211.27a). 2/2/2007 - Printed bill filed.

HB 4215 (*Property Tax*): Principal residence exemption; additional principal residence exemption on

2 properties up to 3 years; allow under certain circumstances. Amends sec. 7cc of 1893 PA 206 (MCL 211.7cc). 2/8/2007 - Printed bill filed.

HB 4236 (*Property*): Affidavits to correct errors or omissions relating to previously recorded documents; allow. Amends 1915 PA 123 (MCL 565.451a - 565.453) by adding sec. 1d. 2/8/2007 - Printed bill filed.

HB 4249 (*Property*): Adverse possession of certain property; prohibit if property taxes are paid by title owner. Amends sec. 5867 of 1961 PA 236 (MCL 600.5867) & adds sec. 5867a. 2/14/2007 - Printed bill filed.

HB 4254 (*Land Use*): Zoning and growth management; Michigan zoning enabling act; provide for definition and regulation of wind energy systems. Amends 2006 PA 110 (MCL 125.3101 - 125.3702) by adding sec. 510. 2/14/2007 - Printed bill filed.

HB 4257 (*Property Tax*): Payment and collection; eligibility for deferral of delinquent property tax fees for certain individuals; modify. Amends sec. 59 of 1893 PA 206 (MCL 211.59). 2/14/2007 - Printed bill filed.

HB 4264 (*Property Tax*): Nonresident protest to board of review by letter; allow. Amends sec. 30 of 1893 PA 206 (MCL 211.30). 2/14/2007 - Printed bill filed.

HB 4268 (*Property Tax*): Assessments; adjustment following transfer of ownership; revise. Amends sec. 27a of 1893 PA 206 (MCL 211.27a). 2/15/2007 - Printed bill filed.

HB 4278 (*Land Use*): Farmland and open space; expiration or relinquishment of development rights agreement; modify lien payment. Amends sec. 36111 of 1994 PA 451 (MCL 324.36111). 2/20/2007 - Printed bill filed.

HB 4286 (*Property Tax*): Delinquent taxes; notice and redemption process; modify. Amends secs. 1a, 59, 78b, 78c, 78f, 78g, 78i & 78k of 1893 PA 206 (MCL 211.1a *et seq.*). 2/21/2007 - Printed bill filed.

As a member of the Real Property Law Section, you can have a voice in commenting on proposed legislation that impacts real property law issues. Each of the Special Committees of the Section covers a substantive area of real estate law. Membership in a Special Committee offers the opportunity to network with your fellow practitioners and learn about your areas of practice. Special Committee chairs are encouraged to actively seek member input on proposed legislation. Your active involvement and participation as a committee member is highly recommended and most welcome.

In addition, even if you are not a member of a Special Committee, your comments on any proposed legislation affecting real property are welcome and encouraged. Written comments should be forwarded to:

C. Leslie Banas
Honigman Miller Schwartz and Cohn LLP
38500 Woodward Avenue
Suite 100
Bloomfield Hills, MI 48304-5048
lbanas@honigman.com

Current information can be obtained about pending legislation through the web site of the Michigan Legislature at: www.michiganlegislature.org.

JUDICIAL DECISIONS AFFECTING REAL PROPERTY

by C. Leslie Banas

The Section is active in the judicial process in a variety of ways, including the preparation of *Amicus* briefs and monitoring cases of interest to real estate lawyers. The goal of this quarterly report is to keep you informed of the Section's efforts to maintain the integrity of the law and to keep you advised of various published decisions that may have an impact on your practice.

The Section has Taken Formal Positions on the Following Cases.

Positions adopted by the Section: The Real Property Law Section is not the State Bar of Michigan, but rather a Section which members of the State Bar choose voluntarily to join, based on common professional interest. The positions expressed are those of the Real Property Law Section. The total membership of the Real Property Law Section is 3,674. The positions were adopted by vote of Council of the Section.

Highland-Howell Dev Co LLC v Marion Twp
____ Mich App _____; ___ NW2d ___;
2006 WL 234882 (Mich App, Jan 31, 2006),
leave to appeal granted Oct 10, 2006

It is the Section's position that: (1) the property owner has been deprived of a benefit without notice and hearing in violation of due process law; (2) the reason for the special assessment has been eliminated, which amounts to a taking of property; and (3) a possible mutual mistake exists because both parties believed at the time the special assessment was established that a sanitary sewer project was going to be constructed over plaintiff's property.

In this case, the Township levied a special assessment to construct a sanitary sewer that would run across plaintiff's property. After the period to appeal the assessment had expired, the Township decided not to build the sewer. Despite the fact that the sewer was not built as contemplated, the Township refused to reduce the amount of the special assessment on plaintiff's property. The issue presented to the Michigan Supreme Court is whether the property owner should be entitled to appeal a special assessment if the improvements contemplated by the special assessment will not be installed.

Hendee v Putnam Twp
unpublished opinion of the Court of Appeals
(Docket No. 270594)

The Section has not taken a substantive position on the underlying facts and issues of this case. Its position in this matter has been to attempt to clear up confusion engendered in the litigation with respect to the distinction between ripeness and remedy.

The litigation was prompted by the property owner's request for a change in the property's zoning from agricultural to R1 B in order to build a 95 unit site condominium development. The Township board denied the request, and the zoning board of appeals likewise denied a variance to permit the development. The property owner sued. The complaint raised violations of due process and equal protection and alleged an unconstitutional taking. The trial court agreed that the agricultural zoning of the property violated the owner's constitutional rights and enjoined the Township from applying it. By the time of trial, the property owner had changed its intended use to a 498 pad mobile home park, and in the remedy phase of the trial, the court ruled that this proposed use was reasonable and appropriate for the property.

The determination made by a court to address whether the zoning of property is unconstitutional turns on whether the existing zoning unreasonably restricts the use of the property or fails to reasonably advance a legitimate governmental objective. Once the court has made that determination and found that the existing zoning is unconstitutional, the court fashions a remedy. During the remedy phase the petitioner may propose a use (which may or may not be the same as in the original application) and the court rules on whether it is reasonable. If it is reasonable, the court can enjoin the municipality from preventing it. The Township has argued that the court is limited to the originally proposed use and that if the use changes, the petitioner must start over. Without asking for that specific use, the Township contends, the case is not ripe, and the owner may not seek, and the court may not order, that use as a remedy. Further, the Township argues that the owner must ask for the minimum variance needed to make the property of value.

The Section believes that the Township's position confuses ripeness and remedy issues and would impose new rules not justified under Michigan law. Although styled as an argument that petitioner doesn't meet the ripeness rule for a taking claim, the Township's position would dramatically limit the remedy that a court can order to remedy unconstitutional or exclusionary zoning, and add new requirements for bringing a due process, equal protection, or exclusionary zoning challenge.

McDowell v Detroit
264 Mich App 337; 690 NW2d 513 (2004)
leave to appeal granted Jan 13, 2006

The case presents a fairly narrow real estate issue (the case is primarily a personal injury action) regarding, (1) in general, whether a lease includes both the inner and outer walls of the leased premises, see, e.g., *Forbes v Gorman*, 159 Mich 291, 294 (1909), and (2) whether that supposed "general rule" is modified when the subject lease limits the tenant's right to make "alterations or repairs or redecoration to the interior of the Premises or to install additional equipment or major appliances without the written consent of Management."

The Section believes that it is not possible to answer the first issue without reference to the development of landlord tenant law in the last century. That law would clearly hold that the landlord in a multi-unit residential facility retains sufficient control of the rest of the property to make the landlord responsible for the maintenance of electrical circuits inside the walls of the leased premises. This conclusion is supported by current custom and practice (landlords retain control of the space between demising walls as part of the common areas in which the tenant has limited use rights).

As to the second issue, the Section believes that if the landlord's control makes it responsible for the maintenance of electrical circuits inside the walls of the leased premises, then, *a fortiori*, the express lease restrictions on the tenant's ability to make alterations or repairs to that outlet further demonstrates the extent of the landlord's control.

The Following Cases Involving Real Property Issues have been Published Since the Last Issue of the *Review*

Special thanks: The Section extends its sincere appreciation to the SBM and the e-Journal staff for use of the following case summaries. The summaries were originally prepared for and published in the e-Journal, a free daily online publication of the State Bar of Michigan that provides case summaries organized by areas of legal practice, legal news and updates, public policy, calendar of events, and classified and fields of practice listings. The e-Journal is an invaluable tool for keeping current on Michigan law. You can sign-up to receive the e-Journal by visiting the SBM website at www.michbar.org.

Randolph v Reisig
272 Mich App 331; __ NW2d __ (2006)
leave to appeal granted Jan 4, 2007

Issues: Dispute over the interpretation of covenants contained in a property owners' association agreement; The right of first refusal in the agreement; *Brauer v Hobbs*; Whether the right of first refusal is a property right subject to the rule against perpetuities; MCL 554.51; *Hubscher & Son, Inc. v Storey*; *Marina Bay Condos., Inc. v Schlegel; Windiate v Leland.*

Court: Michigan Court of Appeals
Case Name: *Randolph v Reisig*
Judges: Sawyer, Fitzgerald, and O'Connell

The trial court, in this dispute over the interpretation of covenants in a property homeowners' association agreement, erred by concluding the renewal provision in the agreement made the agreement one of indefinite duration, and erred in finding the rule of perpetuities applied to the right of first refusal. Thus, the trial court erroneously granted defendants summary disposition. The property owners on a lake created a property owners' association. They entered into an association agreement containing, inter alia, a right of first refusal and a racially restrictive covenant. Plaintiffs own property on the lake and defendants-Reisig owned adjacent property. The Reisigs executed a contract to sell their property to the defendants-Hinkley, who were not landowners on the lake. The Reisigs notified the lake property owners of their contract with the Hinkleys. Plaintiffs attempted to exercise their right of first refusal, tendering $500, and offering to purchase the property under the same terms provided in the Hinkleys' land contract. The Reisigs returned plaintiffs' money and refused to sell them the property. Plaintiffs sued and the defendants later conveyed their property to the Hinkleys. After remand, defendants argued the right of first refusal is a property interest subject to the rule against perpetuities, or violates the rule the first refusal right must be for definite time. The court held there was nothing indefinite about the initial and successive terms of the covenant and there is no authority for the trial court's conclusion the contract

was limited to the original term of the covenant in the absence of a specified condition. The trial court erred in concluding the renewal provision in the agreement transformed it into one of indefinite duration. The court also held the right of first refusal does not create an interest in land and the rule of perpetuities did not apply. Reversed and remanded.

Toll Northville Ltd v Northville Twp
272 Mich App 352; 726 NW2d 57 (2007)

Issues: Taxable value of public service improvements; The constitutionality of MCL 211.34d(1)(b)(viii); *WPW Acquisition Co. v City of Troy*; The meaning of "additions"; Const. 1963, art. 9, § 3 as amended by Proposal A; Whether the installation of public services falls within the scope of "new construction" or "a physical addition of equipment or furnishings" as the terms were understood before the Proposal A amendment; Effect of the fact the property in question was subdivided land; Whether the public service improvements were assessable against the developers; The General Property Tax Act; The Land Division Act; The defendant-township's Code of Ordinances; Whether there was an actual controversy for the court to resolve; *Leahy v Orion Twp*.

Court: Michigan Court of Appeals
Case Name: *Toll Northville, Ltd. v Township of Northville*
Judges: Whitbeck, Hoekstra, and Wilder

Concluding the installation of public services by the plaintiffs-developers did not fall within the scope of "new construction" or "a physical addition of equipment or furnishings" as the terms were understood before the Proposal A amendment, the court held MCL 211.34d(1)(b)(viii) was unconstitutional as it purported to increase the taxable value of property because of the installation of public service improvements. The case arose out of a dispute between the plaintiffs and the defendant-township concerning the taxable value of public service improvements made to 537 residential parcels of real property in the township. Plaintiffs argued the township did not have authority to increase the taxable value of the parcels because MCL 211.34d(1)(b)(viii), which purports to increase the taxable value of real property because of the installation of public service improvements, was unconstitutional. The court concluded public service improvements on real property did not constitute "additions" as provided for by Article 9, § 3 of the Michigan Constitution before the Proposal A amendment. MCL 211.34d(1)(b)(viii) is unconstitutional because it is inconsistent with the meaning of the term "additions" as established by Proposal A. To the extent the township relied on this unconstitutional statute to increase the assessment on the parcels, solely on the basis of the public service improvements, it violated the cap on annual increases in taxable value imposed by Article 9, § 3. Summary disposition for plaintiffs was affirmed.

Special Prop VI LLC v Woodruff
__ Mich App __; __ NW2d __; 2007 WL 91447
(Mich App, Jan 11, 2007)

Issues: Quiet title action; The plaintiff's burden to establish a prima facie case of title; *Beulah Hoagland Appleton Qualified Personal Residence Trust v Emmet County Rd. Comm'n; VanderWall v Midkiff; VonMeding v Strahl; Horvath v National Mortgage Co*.

Court: Michigan Court of Appeals
Case Name: *Special Prop. VI, L.LC. v Woodruff*
Judges: Hoekstra and Owens; Concurring in part, dissenting in part – White

The trial court erred in quieting title to the disputed property in the plaintiff because plaintiff failed to meet its burden to establish a prima facie case of title where defendant-New Century produced evidence the chain of title through which plaintiff claimed its interest fraudulently arose through forgery of a deed and plaintiff offered nothing to dispute the forged nature of this deed. Plaintiff argued it was insulated from any fraud in its chain of title as a bona fide purchaser without notice. However, it is well settled there can be no such thing as a bona fide holder under a forged deed. As a matter of law, plaintiff could claim no interest in the property through the conveyance to it by the individual to whom the forged deed purported to convey the property. The fact plaintiff recorded its claimed interest in the property before New Century recorded its interest did not change this result since the recording of an instrument cannot make an invalid grant valid. Further, while it was undisputed a portion of the proceeds plaintiff gave in consideration for the conveyance to it were used to pay taxes owing against the property, plaintiff failed to provide any substantive argument or authority this fact somehow sustained its claim of title to the property. The court reversed the trial court's order granting plaintiff summary disposition and remanded the case for entry of an order granting New Century summary disposition. The court further directed the trial court to also enter a judgment providing New Century held its claimed inter-

est in the property unencumbered by any right, claim, or interest of plaintiff.

Minerva Partners Ltd v First Passage LLC ___ Mich App ___; ___ NW2d ___; 2007 WL 397356 (Mich App, Feb 6, 2007)

Issues: Quiet title action concerning an abandoned portion of a road; The trial court's decision to divide the property down the centerline of the abandoned road and split it between the parties; *Kalkaska v Shell Oil Co.* (After Remand); MCL 224.18(3) (abandonment of a road or road portion by a county board of road commissioners); *Rusk v Grande*; Consideration of the deeds in the chains of title for the parties' properties; Private easement for ingress or egress across the disputed property owned by the other party; Estoppel; *Cook v Grand River Hydro-electric Power Co.*

Court: Michigan Court of Appeals
Case Name: *Minerva Partners, Ltd. v First Passage, LLC*
Judges: Per Curiam – Murray, Fitzgerald, and Owens

The trial court erred in quieting title to the abandoned road by dividing it along the centerline and ruling each party held title to the portion of the road abutting its property because, considering the terms of the deeds in the chains of title for each party's property, the court concluded defendant now had fee title to the access route and title to the access route on both sides of the centerline should have been quieted in defendant. The road was not created pursuant to statutory dedication and acceptance, and the county only received an easement over the property. The road commission abandoned the road in 1997. To decide who owned title to the land under the road, the court considered the terms of the deeds in the parties' respective chains of title to determine if each grantor intended to convey the land under the road and had title to the land when making the conveyance. The court concluded since defendant purchased the property interest of every entity possessing an interest in the access route, defendant now had fee title to the access route. The court further held the trial court properly ruled neither party had a private easement for ingress and egress across any part of the road owned by the other party. When an unplatted road is abandoned and the public's right to use it is relinquished, an adjoining property owner may only use the abandoned road if it has an independent easement right or other property interest in the land under the road. Plaintiff failed to establish it had private ingress and egress rights to its property from the disputed portion of the road. Affirmed in part, reversed in part, and remanded.

Kay Inv Co LLC v Brody Realty I LLC ___ Mich App ___; ___ NW2d ___; 2006 WL 3824887 (Mich App, Dec 28, 2006)

Issues: Declaratory judgment action; Whether the 1969 original contracting parties formed a joint venture or a partnership and whose assent was required to sell the property; Partnership (MCL 449.6); The Uniform Partnership Act (MCL 449.1 et seq.); *Byker v Mannes*; Joint venture; *Berger v Mead; Hathaway v Porter Royalty Pool*; A partnership may own real property or the partners may own as tenants in partnership; *Wengel v Wengel*; Joint venturers hold real property as tenants in common (MCL 554.43); *Swan v Ispas; Quinlan Inv. Co. v Meehan Cos.*; Effect of the parties to the 1969 agreement joining their wives in the agreement to bind their dower rights (MCL 449.25(2)(e))

Court: Michigan Court of Appeals
Case Name: *Kay Inv. Co., LLC v Brody Realty I, LLC*
Judges: Saad and Whitbeck; Dissent – Schuette

Concluding the original contracting parties formed a joint venture in 1969, the court held the property is held as tenants in common and under Michigan law, the property may be partitioned or all of the owners must consent to the sale of the property. The purpose of the 1969 agreement was to develop and manage a shopping center. Some of the successors to the original contracting parties now want to sell the property. They claim the property is owned by a partnership and under Michigan law, unanimity of assent by all the partners is not required to sell the property. Plaintiff-Kay filed this declaratory judgment action against defendants-Brody Realty and the George Brody Trust seeking a ruling the 1969 agreement formed a partnership, the shopping center is partnership property, and can be sold without unanimous consent. The court concluded the original parties to the agreement intended to and did create a joint venture, with the sole purpose of developing and renting a retail shopping center. The significance of whether the parties created a partnership or a joint venture is that a partnership may own real property, or the partners may own as tenants in partnership. However, joint venturers hold real property as tenants in common. Because there is unity of possession, "one cotenant cannot ordinarily bind cotenants by contracts with third persons or transfer or dispose of the interest of another cotenant in such a manner as to be binding, unless duly authorized to do so, or unless his or her act is later ratified by the other cotenants." Thus, no party holding title to the property as a tenant in common may sell the entire property to the third party offerors, notwithstanding the fact Kay and

the George Brody Trust wish to sell. Summary disposition for plaintiff was reversed and the case remanded.

Chirco v Crosswinds Communities Inc
474 F3d 227; 81 USPQ2d 1414 (CA 6, 2007)

Issues: Claim the defendants copied the plaintiffs' architectural design protected by copyright and to which plaintiffs had exclusive rights of construction; The statute of limitations in the Copyright Act (17 USC § 507(b)); Laches; *Elvis Presley Enters., Inc. v Elvisly Yours, Inc.; Herman Miller, Inc. v Palazzetti Imps. & Exps.*; Whether the equitable doctrine of laches can trump the statutorily-prescribed period for filing suit under § 507(b); *Tandy Corp. v Malone & Hyde, Inc.; Hoste v Radio Corp. of Am.; Broadcast Music, Inc. v Roger Miller Music, Inc.*; Whether the plaintiffs were less than diligent in pursuing their copyright infringement claims; Whether plaintiffs' failure to file suit in a timely manner resulted in undue prejudice to the alleged infringers.

Court: US Court of Appeals Sixth Circuit
Case Name: *Chirco v Crosswinds Cmtys., Inc.*
Judges: Daughtrey, Cole, and Graham

To the extent plaintiffs sought only monetary damages and injunctive relief, the court gave effect to the Sixth Circuit's presumption the statute of limitations provided by the Copyright Act (§ 507(b)) must prevail, but to the extent the relief sought was the destruction of the allegedly infringing condo complex, the facts suggested this was "the extraordinary case in which the doctrine of laches is properly interposed." Plaintiffs-real estate developers sued the defendants alleging they copied plaintiffs' architectural design for a "twelve-plex" condo building, which was protected by copyright and to which plaintiffs had exclusive rights of construction. The district court granted defendants summary judgment, finding they were prejudiced by unnecessary delay between when plaintiffs learned construction was planned and when they filed suit, even though the action was filed within the period provided in § 507(b). In Broadcast Music the court stated, "laches is available as an affirmative defense in a copyright action in the Sixth Circuit." While plaintiffs argued this was mere dicta, the court concluded, "it constitutes dicta that is fated to be followed." The court held a flat proscription against the defense of laches in cases involving a federal statutory claim was unnecessary and unwise. Finding defendants established plaintiffs knew of their challenged construction plans and activities but failed to take readily available actions to abate the alleged harm, and defendants and innocent third parties "had been unduly prejudiced" by this inaction, the court affirmed the district court's judgment insofar as it dismissed plaintiffs' efforts to mandate destruction of the project, but reversed in all other respects and remanded.

Omimex Energy Inc v Blohm
____ Mich App ___; __ NW2d ___; 2006 WL 2700849 (WD Mich, Sep 19, 2006)

Issues: Ownership of oil and gas interest; Action for a declaratory judgment determining and the parties' respective rights and interest with regard to a mineral deed; Request for quiet title to the mineral interest in the property and a declaration the mineral deed had been extended due to certain events; Whether the amended complaint stated a claim; Effect of the plaintiffs' failure to comply with MCR 3.411(C); MCL 600.2932; Subject matter jurisdiction; Whether the plaintiffs showed the amount in controversy exceeded $75,000; *Massachusetts Cas. Ins. Co. v Harmon; Exxon Mobil Corp. v Allapattah Servs., Inc.*; Aggregation of claims; *Sellers v O'Connell*; Whether the plaintiffs were required to attach evidence of their claim of title to the complaint; Whether the mineral interest reverted to defendant and her deceased husband; *Port Huron Ass'n, MEA/NEA v Port Huron Area Sch. Dist.*; Effect of subsequently executed documents; Parol evidence

Court: US District Court Western District of Michigan
Case Name: *Omimex Energy, Inc. v Blohm*
Judges: Quist

Concluding the plaintiffs were not required to comply with MCR 3.411(C) and subject matter jurisdiction was not lacking because plaintiffs demonstrated the amount in controversy exceeded $75,000, the court denied defendant's motion for judgment on the pleadings. Plaintiffs asserted claims based on a mineral deed defendant and her deceased husband executed in 1983 conveying an interest in the oil, gas, and other minerals in certain real property. The court concluded plaintiffs stated a claim for declaratory relief because the parties' dispute concerning the mineral deed presented a case of actual controversy within the court's jurisdiction, and plaintiffs' allegations also provided an adequate basis for a quiet title action under MCL 600.2932 because the parties asserted conflicting interests. Federal courts considering non-federal questions in diversity cases such as this apply federal rules of procedure while following state law to resolve issues of substance. The court also concluded the plaintiffs were entitled to aggregate their claims because they sought to enforce their common and undivided interest as successors in interest to the original grantees under the mineral deed, two oil and gas leases, a pooling

agreement, and an amendment to the agreement. The court also denied defendant's motion for summary judgment, concluding plaintiffs presented sufficient evidence to show the parties understood the pooling of certain parcels to provide a single drilling unit met the condition for extending the initial term of the mineral deed.

CONTINUING LEGAL EDUCATION

by David E. Nykanen, Chairperson
and
Arlene R. Rubinstein, Administrator

2007 WINTER CONFERENCE

March 8–10, 2007
Disney's Yacht & Beach Club Resorts
Walt Disney World® Resort
Lake Buena Vista, Florida

Resort Communities and Second Homes: Following Your Clients "Up North and Down South"

We would like to thank our 2007 Winter Conference Sponsor!

FRIDAY EVENING RECEPTION

Alliant Insurance Services
Contact: David B. Kramer 248-540-3131

The 2007 Winter Conference at *Disney's Yacht and Beach Club* Resorts was a huge success. Gregory Gamalski of Cox, Hodgman & Giamarco, PC and Ronn S. Nadis of Taubman, Nadis & Neuman, PC planned a fantastic program. We would like to thank our Friday morning speakers Robert J. Webb of Baker & Hostetler, Jorge Beltran of Butzel Long PC and William H. Horton of Cox, Hodgman & Giamarco, PC. Our Saturday morning speakers were Stuart J. Hollander of Law Offices of Stuart J. Hollander, PC, Paul V. McCord of Varnum Riddering Schmidt & Howlett, LLP and J. Patrick Lennon of Miller, Canfield, Paddock & Stone, PLC.

Mark your Calendars! The 2008 Winter Conference will be held at the spectacular Sofitel Chicago Water Tower. Designed by the French architect Jean Paul Viguier, the view of Chicago is fantastic! We will be just steps from the famous Magnificent Mile, Michigan Avenue. We have secured a rate of $199 per night plus a 15.4% city and state tax. For further information please call Arlene Rubinstein at 248-644-7378.

"GROUNDBREAKER" BREAKFAST ROUNDTABLE

April 19, 2007
The Townsend Hotel
8:15 – 9:15 a.m.

Overcoming Hurdles and Getting to the Finish Line

We are very excited to advise you of the following enhancement of our April 19th program. The Real Property Law Section's Commercial Leasing and Management of Real Estate is presenting a Roundtable program at the Townsend Hotel on Thursday, April 19, 2007, from 8:15 – 9:15 a.m. The program will be conducted in conjunction with a full day seminar sponsored by the International Council of Shopping Centers (ICSC), also at the Townsend. The ICSC program will have presentations by some of the top commercial and retail real estate lawyers in Michigan and Michigan real estate brokers, associate brokers, and salespersons that attend the ICSC will receive continuing education credits.

The title for the Commercial Leasing Roundtable program has been changed from "**Common Mistakes Made while Negotiating Leases (and How to Avoid them)"** to **"Overcoming Hurdles and Getting to the Finish Line."** The cost will be $75. Registrants can choose to attend the Breakfast only or attend the entire day at no additional charge. Michigan Attorney General Mike Cox will be the key note speaker.

Roundtable discussions will consist of 2, 30 minute sessions.

A preliminary list of topics include:

Bankruptcy Reform Act of 2005
Broker Commission Letters and Enforcement
Common Area Maintenance
Condemnation Clauses in Commercial Leases
Exclusive Use Clauses
Go Dark, Recapture, Cotenancy and Operating Clauses
Guaranties and Letters of Credit
Leasing in a Mixed-use Condominium Project
Letters of Intent
Michigan Read Estate Taxes – Where are we?
Opportunities of Public Funding
Title Issues
Understanding Standards for Lenders
Understanding the Site Plans: Different Perspectives
Work Letters

Information and registration forms are available on the Section website: www.michbar.org/realproperty/ Click on Breakfast Roundtable.

For further information please call Arlene Rubinstein at 248-644-7378.

HOMEWARD BOUND

May 10, 2007
2:00–5:00 p.m.

New Location!
The Inn at St. John's, Plymouth

Real Estate Tax Savings Ideas for Your Client

William B. Acker of Kemp Klein Law Firm in Troy and Dean A. Rocheleau of Plante & Moran, PLLC in Southfield will present the May 10, 2007 Homeward Bound seminar entitled ***Real Estate Tax Savings Ideas for Your Client*** at 2:00 p.m. at The Inn at St. John's in Plymouth. Ownership of real property has tax consequences, and you must know how to properly advise your clients about the most advantageous options. Do you know how to help your clients reduce their tax liability? Expert faculty will guide you through tax saving approaches, including family LLC ownership of real property, contributions of property to LLCs, and use of conservation easements.

Attend live or by webcast! Walk–ins are welcomed!

Registration fee per seminar:
$80 – Members of Real Property Law Section
$90 – General Admission
ICLE Partners – No Additional Fee (consult your Partnership agreement)

To register:
Call (with credit card) toll free – (877) 229-4350
Fax (with credit card) toll free – (877) 229-4351
Online (with credit card) – www.icle.org/hb

Mail (with payment) – ICLE, 1020 Greene St, Ann Arbor, MI 48109-1444

MARK YOUR CALENDARS!

THIRTY SECOND ANNUAL SUMMER CONFERENCE
Michigan Makeover: Development Edition
Crystal Mountain Resort
Thompsonville, Michigan
July 18–21, 2007

We would like to thank our sponsors to date!

Patron Sponsor
FIRST AMERICAN TITLE INSURANCE COMPANY

Wednesday Evening Reception Sponsor
FIDELITY NATIONAL TITLE INSURANCE
NATIONAL TITLE SERVICES

Thursday Evening Sponsor
LANDAMERICA
(COMMONWEALTH, LAWYERS & TRANSNATION TITLE INSURANCE CO.)

Conference Sponsor
STEWART TITLE GUARANTY COMPANY

Workshop Sponsors
ROSE & WESTRA, INC.
UNITED GENERAL TITLE INSURANCE COMPANY

Breakfast Sponsors
ENTRUST GREAT LAKES, LLC
PHILIP F. GRECO TITLE COMPANY

Melissa N. Collar of Warner Norcross & Judd LLP in Grand Rapids and Lawrence M. Dudek of Miller, Canfield, Paddock and Stone, PLC in Detroit have planned a great program sure to be of interest to all real estate attorneys. The conference begins at 6:30 p.m. on Wednesday, July 18, 2007 behind the Lodge and ends on Saturday, July 21, 2007 with a Special presentation by George Siedel, past editor of the ***Michigan Real Property Review***. Brought back by popular demand he will speak on the **Psychological Tools and Traps in Negotiations**. Melissa and Larry have selected a program of informative and timely issues. We hope you will bring your family and take time to explore, and learn at Crystal Mountain. A Summer Conference brochure is elsewhere in this issue.

Thanks to our generous sponsors we have many great activities to be enjoyed by registrants at the Summer Conference.

Wednesday, July 18, 2007

- ***6:30 – 8:30 p.m.* Welcoming Reception:** Bill Dungjen will entertain on the guitar.

Thursday, July 19, 2007

- ***1:00 p.m.* Golf Scramble:** The Golf Scramble will be held at 1:00 p.m. on Mountain Ridge. To register for the golf scramble please email Arlene Rubinstein at LAWA1@aol.com and provide the names of the individuals you would like to play in your foursome. The cost is $72 and includes a cart. All golfers will be billed individually at the resort. Prizes will be awarded for Longest Drive, Closest to the Pin and Longest Putt.

- ***6:30 – 7:30 p.m.* Entertainment at the Reception:** Back by popular demand! "As Close to Magic" Keith Kocher will perform for children of all ages! Keith has performed professionally for over 14 years and was recently voted Magician of the Year by the Magician's Guild of Lansing. Located on the West Front Porch.

- ***8:00 – 9:00 p.m.* Section Dinner:** The Annual Section dinner is a private banquet for conference registrants, their families and guests. We will serve a mixed grill of filet and white fish. $44 per person, chicken fingers will be available for the children for $12. For dessert we will make s'mores at our tables!

- ***9:00 – 10:00 p.m.* A (Habeas) Chorus Line will perform:** Formed in 1992, AHCL is a Detroit-based musical parody troupe whose members are all lawyers (with one exception), Satire is their game!

We hope you will join us for informative seminars and fun filled days of activities at Crystal Mountain Resort. Crystal Mountain is one of the Midwest's premier golf destinations. This mountain resort community offers 36 holes of challenging golf, hiking, biking, swimming and tennis, a fitness center and is home to the Michigan Legacy Art Park. Other attractions in the area include the Sleeping Bear Dunes and the Point Betsie Lighthouse.

Please note: We have changed the registration procedure for the Summer Conference. We are pleased to announce we will now have online registration available for both the resort and the conference registration fee.

Conference registration fee payment options will be as follows:

- On line registration is available at http://e.michbar.org
- Mail completed form to: State Bar of Michigan
  Attn: Real Property Law Section Summer Conference Registration
  306 Townsend Street
  Lansing, Michigan 48933-2082
- Fax completed form to 517-346-6365
  At this time non-members of the State Bar of Michigan must mail or fax their registration forms.
- No phone registrations will be accepted

Early registration ends May 1, 2007!

A Summer Conference brochure is elsewhere in this issue. Further information on the Summer Conference is on the website at www.michbar.org/realproperty/ or call Arlene Rubinstein @ 248-644-7378.

COURSE CALENDAR

Set forth below is a schedule of Continuing Legal Education courses
sponsored or co-sponsored by the Real Property Law Section through July 2007.

Key: HB = Homeward Bound
ICLE= Courses co-sponsored by the Institute of Continuing Legal Education

Date	Location	Program	Topic
April 19	The Townsend Hotel	Breakfast Roundtables/ICSC	Overcoming Hurdles and Getting to the Finish Line
May 10	The Inn at St. Johns Plymouth	HB	Real Estate Tax Savings ideas for your Client
July 18 –21	Crystal Mountain Resort Thompsonville, Michigan	SC	Extreme Development: Michigan Edition

For further information on all Homeward Bound Seminars and the Summer Conference
can be found on the Internet at: http://www.michbar.org/realproperty/ and ICLE Courses at: http://www.icle.org/

2007 WINTER CONFERENCE

DISNEY'S YACHT & BEACH CLUB RESORTS
Walt Disney World® Resort

Lake Buena Vista, Florida

Mickey Mouse meets the conference registrants!

Marie Racine of Racine & Associates and Catharine LaMont of LaMont Title Corp. of Detroit

Mike Alberty of United States Guaranty Exchange LLC in Rochester Hills and Chris McNeely of Mittelstaedt and McNeely PC in Rochester Hills

Mark Krysinksi is with Jaffe Raitt Heuer & Weiss PC in Southfield and Jerome Pesick of Steinhardt Pesick & Cohen, PC in Birmingham

Melissa Collar of Warner Norcross & Judd LLP in Grand Rapids

Past Council Chair Larry Dudek of Miller, Canfield, Paddock & Stone, PLC in Detroit

Past Council Chairs Peter Nathan of Las Vegas and Carol Ann Martinelli of Land America Financial Corp. in Troy

Sue and Richard Guilford of Richard A. Gulford PC in Portland

Speaker Bill Horton and Program Co-chair Greg Gamalski and Lori Lutz of Cox Hodgman & Giarmarco PC in Troy with Speaker Stuart Hollander and his wife Rose Hollander

Barbara and Boris Yakima of Monaghan LoPrete McDonald Yakima Grenke & McCarthy PC in Bloomfield Hills

Richard and Karen Robinson and Robert and Suzanne Robinson of J. Richard Robinson PC in Grand Ledge

The David Nykanen Family of Steinhardt Pesick & Cohen PC in Birmingham

Speaker Stuart Hollander of Law Offices of Stuart J. Hollander, PLC in Sutton Bay

Speakers Paul McCord of Varnum, Riddering in Novi and Patrick Lennon of Miller, Canfield, Paddock & Stone, PLC in Kalamazoo with Ron Hodess of Miller, Canfield, Paddock & Stone, PLC in Troy and Larry Dudek

Terrance Hiller, Jr. of Kupelian Ormond & Magy, PC and Ward Kuhn of Zimmerman Kuhn Darling Boyd Quandt & Phelps PLC in Traverse City

Bruce Inosencio of Law Offices of Bruce Inosencio Jr. in Jackson

Real Property Law Section

State Bar of Michigan

Michael Franck Building