MICHIGAN
REAL PROPERTY REVIEW

Published by the Real Property Law Section State Bar of Michigan

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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).

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CHAIRPERSON'S REPORT

by Jerome P. Pesick

More years ago than I care to remember, I was invited to attend a meeting of the Real Property Law Section Eminent Domain Committee. It was my first formal connection with the Section, and at that time I would have never dreamed that I would someday have the opportunity to serve as the Chair of this Section. But after several years as a committee chair, council member, and officer, that day has come, and I am truly honored to undertake this important position for the upcoming year.

I formally had the Chair's gavel passed to me at our very successful 2009 summer conference, which was held this past July at the Grand Hotel on Mackinac Island. Over 150 section members and many of their families joined us for a truly outstanding program and enjoyable social gatherings. Included among the topics addressed were distressed properties, and financing and tax issues to be considered in these difficult economic times. The program concluded with a very informative presentation by Mark Haas, the chief deputy treasurer of the State of Michigan, on the economic outlook for our state. Thank you to our conference co-chairs, Dawn Patterson and Lorri King, and all of our speakers, for a job extremely well done.

At the Summer Conference, we also had the pleasure of honoring Robert Berlow with the C. Robert Wartell Distinguished Service Award. This Award is presented only to individuals who have provided exemplary service to and on behalf of the section over an extended period of time. The service, commitment, and guidance that Bob has provided to the Section for many years, including a term as the chair, made him a clear and unanimous choice to receive the award. Thank you, Bob, for all you have done for us and congratulations.

As we begin the new year we also look back at the achievements of the past year. Under the able leadership of my predecessor, C. Leslie Banas, the Section undertook numerous important initiatives, including:

- Starting a new special committee, "Commercial Real Estate Development and Ownership." A tremendous amount of interest has been shown by our members in this very dynamic committee and I encourage those of you who are interested to sign up for membership in this committee.

- Entering into a contract with Westlaw to have future articles in the Michigan Real Property Review available for downloading by subscribers to the Westlaw library. This will provide Review authors with far greater exposure for their excellent work product than has historically been made available to them.

- Adding a new virtual publication, an e-newsletter, to provide an outlet for prompt dissemination of news and time sensitive information to our members.

- Developing a layperson-oriented informational pamphlet regarding foreclosure, which is being disseminated to homeowners through various non-profit agencies.

- In an attempt to reach out to law students, funding a book award, which will be presented to students demonstrating outstanding achievement in real estate law, at each of Michigan's five law schools.

- Developing and launching a membership initiative to attract new members, including members who are not necessarily in private practice and, of course, younger members.

Thank you, Leslie, for your commitment, dedication, and hard work on behalf of our Section. I hope to continue to support and expand on all of these initiatives during the upcoming year, perhaps the most important of which is to continue to appeal to new and younger lawyers to join and participate in our Section activities and to become the future leaders of our Section.

Planning for the upcoming year is already well underway. Our Continuing Legal Education Committee already has a great series of programs in place, including our Homeward Bound afternoon seminar series, which is presented in conjunction with ICLE, and our Breakfast Groundbreakers program. The season will kick off on October 9, 2009, with a Breakfast Roundtable entitled "Foreclosure and Beyond," to be held at the Townsend Hotel. If you have not already, you will be receiving formal programming announcements throughout the course of the year.

With all of this in mind, I encourage all of our members to not only help us grow by recommending membership to your friends and colleagues, but to feel free to contact me or any other Section leader with ideas you may have for membership activities or programming. I look forward to a very exciting year, and to meeting and working with all of you on Section activities.

A NEW LEGAL LANDSCAPE FOR PLANNING AND ZONING: USING FORM-BASED CODES TO PROMOTE NEW URBANISM AND SUSTAINABILITY

*by H. William Freeman**

Early in this century, the zoning of property was introduced as a method of separating uses and protecting residential areas both from congestion and from the disturbance caused by industrial and commercial uses. Until ten years ago, there were few alternatives to conventional zoning. Now the primary alternatives are Form-Based Codes. Form-Based Codes address the relationship between building facades and the public realm, the form and mass of buildings in relation to one another, and the scale and types of streets and blocks. Today, there are more than 170 communities nationwide that have adopted these codes. In Michigan, at least five communities have adopted a Form-Based Code and another twenty are working on or considering it.

Moving Away from the Urban Core

The history of real estate development since the end of World War II has been evidenced by the movement away from the urban core. Particularly in Michigan, where the automobile was the primary mode of transportation for all citizens, freeways were built everywhere and were designed to take city residents everyplace. As a result, many urban centers lost a significant portion of their population to areas outside of the downtown. This ultimately had a negative impact on the stability of urban areas, as there was an imbalance created between the resources committed to the downtown versus those committed to the suburbs. This caused the decline of urban areas over the course of the last half of the 20th century.

Late in the 20th century, there was a movement in some cities to recreate their downtowns, and to revitalize the vibrant centers that existed before the exodus to suburbia. This concept met with mixed success, as residents were still hesitant to occupy the urban core, since many amenities were often lacking and everyday life was more of a challenge. There were exceptions, in those cities which have always had a strong residential attraction, such as New York, Chicago and San Francisco. There were also cities that managed to make their downtowns attractive to residents, particularly young residents now known as the "creative class,"[1] such as Portland, Denver and Austin. In Michigan, this occurred to a lesser extent in Ann Arbor, where the attraction to young residents was buoyed by the University of Michigan. Despite these exceptions, older industrial cities like Detroit and Cleveland were unable to create a true residential core, despite the introduction of attractions in the downtown area such as stadiums, museums and theaters.

During the 1990s, however, a group of visionaries expanded on a concept which had in the early 1980s resulted in the creation of Seaside, a new urban community in the Florida panhandle. Seaside succeeded financially and was touted in the media as an example of a "traditional neighborhood." Seaside defined the concept of developing a small town, with all the components

1 The concept was first discussed by Richard Florida in his book, *The Flight of the Creative Class: The New Global Competition for Talent,* Harper Collins Publishers, New York (2005).

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of small town life, as an attractive alternative to the American city, which had been in decline throughout the prior decades.[2] The planners of Seaside, Andres Duany and Elizabeth Plater-Zyberk, along with other leading planners, such as Peter Calthorpe, Bob Gibbs, Dan Solomon, Stephanos Polyzoides, Elizabeth Moule and Geoffrey Ferrell, with a number of other participants, founded the Congress for the New Urbanism in 1993. From this point forward, there was an increasingly concentrated effort on the part of many planners to promote New Urbanism as a model for new development.

What is New Urbanism?

The Congress for the New Urbanism describes the focus of "New Urbanism" to be "the restructuring of public policy and development practices to support the following principles: neighborhoods should be diverse in use and population; communities should be designed for the pedestrian and transit as well as the car; cities and towns should be shaped by physically defined and universally accessible public spaces and community institutions; urban places should be framed by architecture and landscape design that celebrate local history, climate, ecology and building practice." [3] New Urbanism attempts to manage growth in a manner that raises the quality of life for the residents of a community. There are ten main principles to be applied in New Urbanism, which are: walkability, connectivity, mixed-use & diversity, mixed housing, quality architecture & urban design, traditional neighborhood structure, increased density, smart transportation, sustainability and quality of life. [4] Many of these principles are otherwise utilized as part of general planning concepts. However, it is important to note that New Urbanism in theory may not be appropriate in all geographic areas, for a number of reasons such as the local economy, demographics and/or employment mix.

In the early years, a number of conventional planners and developers viewed the New Urbanism as an idyllic movement, which could be successful in resort areas such as Seaside or other special places where the amenities lent themselves to the promotion of new urban principles, but not in conventional suburban areas. For instance, Celebration was developed by Disney as a new urban community outside of Disney World in the Orlando area. Many people thought that Celebration could not have survived without the artificial support of Disney to keep the commercial area viable in the early years. Yet Celebration has nonetheless become a model traditional neighborhood. The lack of new urban communities in states like Michigan and other parts of the Midwest, however, made such areas less amenable to the concepts of the traditional neighborhood. In addition, many proponents of the New Urbanism were hesitant to endorse any variation from the strict components of the charter. Even though there was a general interest in traditional neighborhood planning concepts which were incorporated into conventional development, New Urbanism planners were more interested in an all or nothing approach. As a result the initial growth of the New Urbanism was disconnected. The principles of New Urbanism, however, when applied to existing urban areas, still resulted in an increase of persons living in the downtown areas during the 1990s. Now, in the 21st century, many of the traditional neighborhood principles have been applied on a much broader scale, and have been combined with traditional principles to have a huge effect upon planning philosophy.

Sustainability

Chief among the areas that have been affected by the New Urbanism is the sustainability of communities. In addition to planning concepts, sustainability has been introduced as a method of development that will preserve our environment into the future. Sustainable development was defined in the 1987 report of the World Commission on Environment and Development, known as the "Brundtland definition," as follows: sustainability means "meeting the needs of the present without compromising the ability of future generations to meet their own needs."[5] The US National Environmental Policy Act of 1969 declared as its goal a national policy to "create and maintain conditions under which humans and nature can exist in productive harmony and fulfill the social, economic and other requirements of present and future generations of Americans."[6] Theodore Roosevelt, who in retrospect was well before his time in the promotion of sustainable issues and the environment, was quoted as saying: "Conservation means development as much as it does protection. I recognize the right and duty of this generation to develop and use the natural resources of our land; but I do not recognize the right to waste them, or to rob, by wasteful use, the generations that come after us. . . . The object of government is the welfare of the people." [7]

2 www.seasidefl.com
3 www.cnu.org/charter
4 www.cnu.org
5 www.un-documents.net/ocf-02
6 42 USC § 4331, NEPA Section 101(a).
7 The "New Nationalism" speech, Osawatomie, Kansas, August 31, 1910.

Like the new urbanism movement, the green building movement has become increasingly popular during the late 20th century and early 21st century. These two related movements grew independently during their early expansion, despite the fact that they had a number of very similar objectives. The concern of new urbanism with walkability and traditional neighborhood design, which can conserve resources through planning principles, corresponds with the goal of sustainability to conserve natural resources. This conservation is a necessary byproduct of less driving and more walking, green building and transit-oriented development. Until very recently, green building was, like new urbanism in its early stages, more of a theoretical exercise, more geared towards specific buildings and the ability of their planners and builders to make those buildings LEED certified.[8] Only recently have the proponents of sustainability and new urbanism realized that as the two concepts work together, sustainability can apply to communities, not just individual buildings, and New Urbanism can serve as a model for all communities, not just specific traditional neighborhood outposts.

The ultimate result of the combination of New Urbanism and sustainability has been the development of a third party review standard, which is referred to as Leadership, Energy and Environmental Design for Neighborhood Design, commonly known as LEED ND. LEED ND, as a new certification program, will certify certain real estate projects as achieving standards for New Urbanism, sustainability and smart growth. Properties are often classified for purposes of development as a greenfield, brownfield or greyfield. A greenfield property is one that is currently vacant and yet underdeveloped. A brownfield property is typically a former industrial property that is either vacant or obsolescent. Brownfield development is a very popular method of reusing existing sites, particularly due to the tax credits available. Greyfield properties are more commonly malls in inner suburban areas that have become obsolete. The purpose of distinguishing these properties relates to the prioritization of developable sites. The policies of both New Urbanism and sustainability prefer redevelopment to the development of greenfield sites.

Based on the principles of traditional neighborhood development and sustainability, the planning of communities has become much more than finding a way to maximize the use of land. Planning is now finding a way to create a community that is attractive in its traditional nature and sustainable in its ecological nature. Unfortunately, during the time that it has taken to reach these planning principles, the state of zoning law has not progressed in a manner that can accommodate such development.

History of Zoning

A. Traditional Euclidian Zoning

The concept of zoning was first created due to an overcrowding in cities and the intrusion of industry into residential and retail areas. In Michigan, the initial legislation related to zoning was the City and Village Zoning Act.[9] As with most state codes, the City and Village Zoning Act traces its origin to similar roots as the Standard State Zoning Enabling Act (SZEA), which was subsequently published by the US Department of Commerce in 1924. Historically, the aspect of that legislation most cited is the portion that has to do with the separation of uses. Thus, since that time the emphasis in zoning has been placed upon the creation of individual use districts such as Single-Family, Multi-Family, Commercial, Industrial and Agricultural. At about the same time as the introduction of SZEA, in the seminal zoning case of *Village of Euclid, Ohio vs. Ambler Realty Co.*,[10] the United States Supreme Court found that this conventional method of zoning was constitutional. The Court in *Euclid* determined that: "The segregation of industries, commercial pursuits, and dwellings into particular districts in a city, when exercised reasonably, may bear a rational relation to the health, morals, safety and general welfare of the community."[11] As a result, the Court opined that there is a valid governmental interest in maintaining the character of and regulating land use. This decision is the basis for what is commonly known as Euclidian Zoning, which has been prevalent in communities from 1926 to the present.

However, both the SZEA and the decision in *Euclid* involved more than the regulation of uses and the assignment of those uses into corresponding districts. The SZEA states in Section 1, as follows:

> Grant of Power. For the purpose of promoting health, safety, morals, and the general welfare of the community, the legislative body of cities and incorporated villages is hereby empowered to regulate and restrict the height,

8 LEED stands for Leadership in Energy and Environmental Design, and is an internationally recognized green building certification system developed by the US Green Building Council (USGBC).

9 Public Act 207 of 1921.

10 272 US 365(1926).

11 *Id.* at 392.

> number of stories, and size of buildings and other structures, the percentage of the lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, and other purposes.[12]

This legislation clearly seeks to enable something more than the conventional zoning ordinance of today. Furthermore, the decision in *Euclid*, while preoccupied rather specifically with the separation of uses stipulated in the 1922 Village of Euclid Zoning Ordinance, in the end further looked to the comprehensive nature of that ordinance in finalizing its decision. The Court stated: "Therefore, it is enough for us to determine, as we do, that the ordinance in its general scope and dominant features, so far as its provisions are here involved, is a valid exercise of authority . . . . "[13] As it turns out, the Euclid ordinance was somewhat comprehensive in nature too, including separate categories of zones, and corresponding restrictions, regarding both building heights and yard areas.

The United States and the State of Michigan are in a very different economic and environmental state today than they were almost 90 years ago. No longer is the primary concern the intrusion of industrial development into residential neighborhoods. Rather, the focus in the planning community is on the uncontrolled sprawl and the use-segregated suburbs where it is not possible to walk to a local store or school. Communities have attempted to resolve these issues with conventional zoning through techniques such as Planned Unit Developments (PUD), Planned Residential Developments (PRD) or mixed use condominium projects. These methods enable areas of land to be zoned for several different uses. However, instead of becoming mixed-use, the areas would become multi-use, where the various uses would still be separate and distinct, just within a larger area. Therefore, there would be many different uses in one area but many of the uses would not be integrated. Despite these limitations, these new developments have helped to begin a movement to change the way zoning policies separate the use of land and development.

12 Department of Commerce, Herbert Hoover, Secretary. (1926). A Standard State Zoning Enabling Act. Washington, DC: Washington Government Printing Office.

13 *Euclid*, 272 US at 397.

B. Form-Based Code Zoning

Form-Based Code zoning is a land development regulatory tool based on place and mixture of use. According to the Form-Based Code Institute, this new form of zoning is "a method of regulating development to achieve a specific urban form."[14] Form-Based Codes allow for a mixture of land uses based upon building form and they are more focused on what is desired by the population and less on what is forbidden in the area. The zoning can therefore achieve more predictable results, which in turn help to manage growth, promote character and flexibility and reduce development time.

Form-Based Codes include five elements:

1. **A Regulating Plan.** A plan or map of the area designating the locations where different building form standards apply based on community intentions regarding the physical character. It is similar to a zoning map except that it provides many more specific details about the space.

2. **Public Space Standards.** Specifications for the elements within the public realm, such as sidewalks, street parking and the landscaping on the street.

3. **Building Form Standards.** Regulations and policies controlling the configuration, features and functions of buildings that define and shape the public realm.

4. **Administration.** A very specific and defined application and project review process.

5. **Definitions.** A glossary of technical terms to ensure the correct use of the Regulating Plan's implementation.[15]

A Form-Based Code also includes an "Organizing Principle," which divides the area by principles such as building type, frontage-based standard, street characteristics, urban-planning model or local landscapes. These principles help to set a standard that requires that a new development fit into the existing community and connect the private and public realms as one. A distinct feature of a Form-Based Code is that, although the buildings are aesthetically integrated, they

14 www.formbasedcodes.org/definition

15 www.formbasedcodes.org/definition

allow for a mixture of uses in the same development. These codes are being used to preserve and enhance traditional character, to change an already developed area and also for new projects. The key is to have the use of the buildings, along with the characteristics of the building and the street, to all be incorporated and working together.

C. Differences between Traditional Euclidian Zoning and Form-Based Code Zoning

In Euclidian Zoning, the land is divided based on use, while a Form-Based Code divides land by the characteristics and distinctions of certain areas. By avoiding the division of land by use, Form-Based Codes enable a mixture of users to construct both public and private developments in the area. In doing this, each individual building can be used to shape the streetscape and embrace the diversity of the area. This ensures more of a neighborhood feel, as opposed to Euclidian Zoning, where the designation of each individual lot for a particular use can create a look of uniformity throughout designated areas. Communities have begun to realize that the old method of zoning has left their surroundings bleak and often undesirable. Thus, many communities are now looking to Form-Based Codes as a way to revitalize land development.

The Form-Based Code Institute has developed a list of eight advantages to using Form-Based Code zoning over traditional zoning. First, Form-Based Codes allow a community to state what they *do want* out of their developments rather than what they *do not want*, which produces a more predictable outcome. Second, the Form-Based Code encourages public participation and allows citizens to see what is going to be developed. Third, the development can be regulated on an individual scale of each building, thereby promoting different developments for each individual property and avoiding the need for large land assemblies. Fourth, Form-Based Code zoning allows for a more diverse community in terms of architecture, materials, uses and ownership, because of the independent nature of the development. Fifth, Form-Based Code zoning can fit well within an existing neighborhood and the design can be used to promote infill development compatible with surrounding structures. Sixth, the documents in Form-Based Code zoning are easier to read, more concise and organized in a more efficient way, which makes it easier to determine if compliance has been achieved. Seventh, Form-Based Codes are easier to apply consistently and require less oversight than conventional design guidelines, which are much more subjective, therefore saving both time and money for review and enforcement. Finally, Form-Based Codes are also easier to enforce because of the public good the codes are attempting to achieve and the desire of participants to shape a high quality public realm.[16]

Today most Form-Based Codes are developed and customized by local governments rather than private developers. The regulation of Form-Based Codes is based on the streetscape and how the buildings that line the street help to define it. It is important for the implementation of consistent regulations throughout the area to ensure proper building placement and site orientation. However, the regulations of Form-Based Codes do not disregard use all together. The code is designed to allow the building uses to be flexible and to allow the area surrounding it to determine the building's use. Due to the importance of the streetscape in the Form-Based Code, the building placement and site orientation must be regulated. For instance, in a downtown area there would be a front line to which the building must be built, while in a residential area there would be a specific set back from the front line. There are also regulations regarding what elements may be used in the design of the buildings, streets, sidewalks, parking, landscaping and public spaces. Because Form-Based Codes are relatively new, the manner in which these regulations are enabled, written and then administered will be more closely scrutinized. Form-Based Codes are certainly not a solution to all of the problems arising out of traditional zoning. The drafting of Form-Based Codes can cost over twice as much as a traditional zoning plan. They can also be seen as restrictions on creativity by certain developers and designers. And, there may be limitations to the implementation of Form-Based Codes because they may not specifically be allowed by the Michigan Zoning Enabling Act, which is discussed in more detail below. Nevertheless, this new method of planning will be an important tool in the development of traditional neighborhood and sustainable communities.

D. Legal Basis of Form-Based Codes

To be legally defensible, planning regulations must be developed for the purpose of benefiting the public health, safety, and welfare, as established by *Euclid*. Therefore, Form-Based Codes will have to be justified both by conventional public benefits, such as alleviating traffic congestion and encouraging the orderly and economic development of cities and by other previously unrecognized benefits to the public welfare, such as encouraging healthy pedestrian lifestyles, protecting air and water quality and conserving resources (by

16 www.formbasedcodes.org/definition

providing transportation alternatives to the automobile), supporting transit viability with higher densities, and reducing impervious surfaces with smaller parking lots and multi-story buildings.

There were, at one time, several statutes in Michigan related to zoning, all of which had been based upon the SZEA: The City and Village Zoning Act mentioned above,[17] The County Zoning Act,[18] and The Township Zoning Act.[19] These were all repealed and concurrently replaced by the singular Michigan Zoning Enabling Act of 2006,[20] which also bears a noticeable resemblance to SZEA. This statute, although it does not address Form-Based Codes specifically, provides a framework under which the adoption of Form-Based Codes can be implemented. Section 125.3201(4) of Zoning Enabling Act reads: "A local unit of government may adopt land development regulations under the zoning ordinance designating or limiting the location, height, bulk, number of stories, uses, and size of dwellings, buildings, and structures that may be erected or altered…."[21] This language is certainly broad enough to support the adoption of a Form-Based Code in Michigan.

Additionally, there is considerable precedent in Michigan and across the country for the institution of zoning stipulations that are not inherently limited by the Euclidian Zoning model. The PUDs mentioned above have included various developments, such as clustered housing, common open space and recreational facilities, the integration of mixed land uses, and/or higher than conventional residential densities. During this period of time, however, state zoning enabling legislation has not always enabled these PUDs directly. Nevertheless, despite the lack of clear authority from state legislatures, local governments throughout the country have adopted PUD-oriented amendments to their Zoning Ordinances and approved PUD projects on their own. Additionally, most of the early Traditional Neighborhood Developments (TNDs) were PUDs and, indeed, Duany Plater-Zyberk & Company (planners of Seaside and authors of the SmartCode) advocated the use of PUDs for TNDs and developed their first Form-Based Codes for PUDs.

There are three methods by which a community can replace its existing Zoning Ordinance with a Form-Based Code. The community can implement a new Form-Based Code, a hybrid code (a hybrid being a Form-Based Code that incorporates features of a conventional Zoning Ordinance) or an optional overlay code, which leaves the existing Zoning Ordinance in force, but provides various incentives encouraging developers to follow a Form-Based Code instead. If the Form-Based Code is to be a mandatory code, one that replaces either the Zoning Ordinance or both the Master Plan and the Zoning Ordinance, then the steps needed to render the code legally defensible are rather straightforward. The municipality will need to update or substantially amend its Master Plan to reflect its new vision for the community. Once that vision has been agreed upon, a careful study of objective market and environmental data, as well as existing and proposed facilities, will need to be undertaken in order to identify and justify the appropriate locations for future development. Subsequently, the Form-Based Code itself can be written in a manner consistent with this updated or amended plan. Because the Zoning Ordinance (the Form-Based Code in this instance) will have been based upon a plan, it will meet the requirements of Section 125.3203(1) of the Michigan Zoning Enabling Act of 2006. In addition, the locations of allowable development will not have been determined in an arbitrary manner, and the new Form-Based Code can be legally defended.

Also, once a resulting mandatory Form-Based Code has taken effect, the following must be true: 1) that some profitable use of every parcel remains; 2) that the action has not reduced the value of any particular parcel by more than 10-30%, depending on the circumstances and political environment; 3) that similarly situated parcels are regulated in the same manner and thus not in an arbitrary or capricious fashion; 4) that there is benefit to the public good and particularly not to any specific private entity or individual; and 5) that the Form-Based Code does not result in exclusionary zoning. Together, these should help ensure a mandatory Form-Based Code that survives judicial scrutiny, assuming it complies with other local, state and federal laws and regulations. Because a hybrid code also includes features of a mandatory Form-Based Code, except that it also includes features of a conventional Zoning Ordinance, the same steps will need to be followed to insure its enforceability.

If the new Form-Based Code is to instead be an overlay code, the process for rendering it legally defensible will be more complex. Proponents of overlay codes generally contend that such a code cannot be legally challenged in court because it is not mandatory, due to the fact that developers may utilize the existing underlying code. Therefore, the ability to choose places no new restrictions on private property. Such an analysis implies

17 The City and Village Zoning Act, Act 207 of 1921.
18 The County Zoning Act, Act 183 of 1943.
19 The Township Zoning Act, Act 184 of 1943.
20 Michigan Zoning Enabling Act of 2006, P.A. 110 of 2006 (MCL 125.3101 *et seq*.).
21 MCL 125.3201(4).

competing visions for the community, one conventional and suburban, the other more new and urban. As a result, in order to maintain internal consistency within the Master Plan itself and then, subsequently, between that Master Plan and both the conventional Zoning Ordinance and the proposed overlay code, there needs to be one vision expressed within the community's Master Plan. One possibility is a vision that endorses the status quo (conventional suburban development) while also having vibrant, mixed-use, and transit viable town centers situated in appropriate locations. Another goal expressed within such a Master Plan could, while embracing suburban development for its low-density characteristics, also include the goal of preserving open space in the form of wholly undeveloped land. This would support a Purchase of Development Rights Program (PDR)[22] or substantial density bonuses (bonuses for setting aside open space within the development and/or elsewhere within the region) in association with the new mixed-use town centers to be developed under the overlay Form-Based Code. These types of benefits to developers can encourage more new urban and sustainable development in communities. Such density bonuses could also be designed to have the additional benefit of encouraging the actual use of the optional Form-Based Code, where it is feared that market forces alone are generally inadequate to promote that option.

Finally, in order for an overlay code to avoid legal challenges, the municipality must also be careful that it has not been arbitrarily applied. Thus, in addition to a more conventional Master Plan Land Use Map, there will also need to be the objective designation of Receiving Zones. This could be completed as an overlay to the Land Use Map. Receiving Zones are the locations or areas determined as appropriate, based on GIS information, market data, and various existing and proposed facilities, for the sort of new higher-density, mixed-use developments that the Form-Based Code is intended, in part, to regulate.

Implementation of Form-Based Codes in Michigan

Form-Based Codes are being implemented more frequently as communities are becoming educated with respect to their potential. In Michigan, a number of communities have instituted Form Based Codes. In Birmingham, Michigan, the city created an overlay Form-Based Code for the Triangle District, which is located east of Woodward and south of Maple. Because it is an overlay, the existing zoning districts still apply and any existing use is permitted to continue. The area is described by the city as a "vibrant, mixed use neighborhood filled with interesting destinations that attract people from across the region, and provide residents with an integrated neighborhood in which to live, work, shop, and recreate."[23] It is further described as a "transitional growth area between the central business district and the residential neighborhoods to the east."[24] This process involved a series of public meetings, followed by public hearings held by the planning board and city commission. A discussion group, which was comprised of representatives of various city boards and commissions, staff, development professionals, and area business owners and residents, served as an intermediary between the planning board and the public. A two-day design charette was held to develop goals, objectives, concepts and recommendations.

A similar Form-Based Code overlay zoning district was adopted in Genoa Township for a location identified as the Genoa Town Center. This code requires all new developments to follow strict requirements for a more traditional form of development that is more characteristic of a small town. It includes placement requirements and detailed design standards for buildings, streetscapes and public open spaces.[25]

In the town of Fremont, Michigan, northwest of Grand Rapids, the city adopted a new Fremont Hybrid Form-Based Zoning Ordinance in October of 2007, which replaced the previous zoning ordinance in its entirety. The stated intent of the new code is as follows: "Great neighborhoods, main streets and cities do not happen by accident. They should be orchestrated with a physical vision as places that will be enlivened by commercial and civic activities and in turn, supported by the local residents. The Fremont Zoning Ordinance is designed to foster a vibrant city through a lively mix of uses- with shop fronts, cafes, and other commercial uses at the street level, overlooked by canopy shade trees, upper story residences and offices- surrounded by healthy neighborhoods."[26]

The Congress for the New Urbanism has just recently started a Michigan Chapter, CNU-Michigan, Inc., which has as one of its goals the promotion and education

22 *See, e.g.,* Washtenaw County Purchase of Development Rights Program, www.ewashtenaw.org/government/departments/planning-environment/planning/farmland

23 www.ci.birmingham.mi.us/index.aspx?page=1208

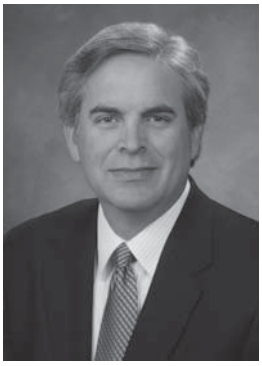
24 www.ci.birmingham.mi.us/index.aspx?page=1208

25 *See* Art. 9, www.genoa.org/government/ordinances/ordinance-zoning

26 www.cityoffremont.net/web/planzone.htm

with respect to Form-Based Codes. Part of its education effort will be a seminar to be presented at the Michigan Municipal League statewide convention on September 23, 2009, and, in partnership with the Form-Based Code Institute and Michigan Municipal League, the publication of a manual called "Form-Based Codes in 7-Steps: The Michigan Guidebook to Livability." Through the efforts of these groups, Form-Based Codes will become a fixture in planning and zoning as a vehicle to address the needs of new urban and sustainable communities.

The development that has occurred since the end of World War II has been outward and expansive. With a few exceptions, the value of real estate has steadily increased since that time. Since 2005, particularly in Michigan, this outward growth and increase in value has stopped, and retreated. If the growth and values ever return to previous levels, it will be many years from now. During this time, the focus should be upon recreation of neighborhoods and sustainable growth, which will create a more measured development of real estate, and better communities for the future. Zoning codes that have been adopted during the last sixty years favor the spread of single use development, with minimum lot sizes, building setbacks and other restrictions that separate uses. The built and natural environments of the future, as well as the demographics, require the introduction of zoning reform, and that has made its presence known through the increasing use of Form-Based Codes.



CHALLENGING TIMES CALL FOR LAYERED INCENTIVES FOR DISTRESSED PROPERTIES

by Richard A. Barr and Megan C. McCulloch***

Introduction

Distressed properties present unique redevelopment challenges even in the best of economic times. With the change in the economic landscape, making redevelopment projects feasible (or projects feasible, for that matter) has become even more challenging. During tough economic times, creative blending, combining, or layering of various property redevelopment incentives is a key to increasing the viability of a project. Unfortunately, some incentive programs cannot be used together, so an early evaluation of which combination of incentives will maximize the benefits for a proposed project is imperative. As project conditions and assumptions change, this evaluation may need to be revisited.

To illustrate the benefits of leveraging, several of Michigan's strong distressed property redevelopment incentives are highlighted, which include a suite of tax abatements, tax exemptions, tax credits, tax increment financing, and other sources of funds, such as grants and revolving loan programs. General incentives principles that require consideration are also discussed.

Major Michigan Incentives to Consider for Distressed Properties

Two key questions to ask before evaluating which incentives are available for distressed property are:

1. Is the distressed property in a qualified local unit of government (also known as a "Core Community") or a "Distressed Area"? Several incentives are reserved for distressed properties in these Core Communities[1] or Distressed Areas.[2]

2. What was the former use of the property, what is the current use of the property, and what is the future use of the property? Property use affects the availability of various incentives. For example, tax abatements under Public Act 198 of 1974 (PA 198)[3] generally are available for

1 List of Qualified Local Units of Government (Core Communities): http://www.michigan.gov/documents/deq/deq-rrd-Qualified-LUGs-3-23-09_272341_7.pdf

2 List of Eligible Distressed Areas: http://www.michigan.gov/mshda/0,1607,7-141--181277--,00.html

3 MCL § 207.551 *et seq*.

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manufacturing businesses that are expanding/building new facilities or are rehabilitating existing facilities, and the scope of other eligible projects under this 35 year old law has been expanded in recent years.

These key questions go to the heart of a proposed project's eligibility for certain incentives and help define the universe of potentially available incentives. Many of the key Michigan incentives available for distressed properties are discussed below.

A. Tax Abatements and Exemptions

Tax abatements and exemptions often provide very favorable benefits to owners of distressed property. Several of the most common tax abatements and exemptions that are applied to distressed properties are discussed below.

1. Obsolete Property Rehabilitation Act

The Obsolete Property Rehabilitation Act (OPRA)[4] offers a partial property tax "freeze" for certain rehabilitated housing and commercial facilities in Core Communities. Upon issuance of an OPRA exemption certificate by the State Tax Commission, the taxable value added to the property's building and improvements as a result of the rehabilitation project is not added to the taxable value prior to the addition or rehabilitation for the purpose of most property taxes for up to 12 years. The partial "tax freeze" generally does not affect school operating taxes or the state education tax. However, the State Treasurer may exempt one-half of those taxes for a period of up to 6 years, but only 25 such additional exemptions may be approved per year by the State Treasurer. Land and personal property continue to be fully taxed.

To qualify for this program, the aggregate cost of improvements must equal at least 10% of the property's value at the time the rehabilitation project commenced. Additionally, to obtain an OPRA exemption certificate, the local unit of government must first approve an OPRA district and an OPRA exemption certificate for the project. The local unit of government has discretion over the duration of the OPRA. Please note that under current law, no new OPRA exemption certificates may be issued after December 31, 2010.

4 Obsolete Property Rehabilitation Act, Public Act 146 of 2000, MCL § 125.2781 *et seq*.

2. Commercial Rehabilitation

The Commercial Rehabilitation Act (CRA)[5] is similar to the OPRA with a few important exceptions. First, the program is not limited to Core Communities. Second, the county government where the property is located must approve the CRA exemption. Third, the exemption may only be approved for up to 10 years (as opposed to up to 12 years under OPRA). Fourth, the building must be at least 15 years old or have been allocated New Markets Tax Credits or the property must be intended for use primarily as a retail supermarket, grocery store, or produce market (referred to as a "qualified retail food establishment"). Fifth, the property comprising the commercial rehabilitation district must meet certain size requirements unless it is located in a downtown or business area or unless it contains a qualified retail food establishment. Finally, the State Treasurer does not have the authority to exempt a share of school operating taxes or state education taxes. Thus, because of the significant differences between OPRA and CRA, the OPRA abatement is a more valuable abatement. Note that no new exemption certificates may be issued by the State Tax Commission under the CRA after December 31, 2015. The CRA and the OPRA are two of the few programs that provide a real property tax freeze or exemption for retail, mixed-use, and commercial redevelopment projects.

3. Commercial Redevelopment

The Commercial Redevelopment Act[6], restored in 2008 after expiring in the 1980s, allows *cities or villages* to offer a 50% property tax abatement for new commercial facilities and a frozen tax base for rehabilitation projects. All commercial property qualifies except for some bank properties and apartments/housing, and property owned by public utilities. The abatement may be granted for up to 12 years and the State Treasurer may exempt one-half of the state education tax for up to 6 years, but only 25 such additional exemptions may be approved per year by the State Treasurer.

4. Industrial Property Tax Abatement ("Act 198")

Any local government in Michigan may offer 50% property tax abatements for new construction and equipment related to manufacturing, high-technology,

5 Commercial Rehabilitation Act, Public Act 210 of 2005, MCL § 207.841 *et seq*.

6 MCL § 207.651 *et seq*.

and certain other activities for up to 12 years.[7] The State Treasurer may exempt real property from one-half or all of the number of mills levied under the state education tax. (Industrial personal property may already be exempt from the state education tax.[8]) For rehabilitated or replacement facilities, a freeze of the taxable value of the property for up to 12 years may be approved. A construction period of typically up to 2 years may be added to the abatement term. A written agreement with the local governmental unit is required in connection with the approval of abatements under Act 198; communities often seek claw-back provisions or other penalties if a company does not complete and operate the promised project for the entire abatement period.

5. Neighborhood Enterprise Zones

The Neighborhood Enterprise Zone (NEZ) Act[9] allows Core Communities to offer a tax reduction in the form of a reduced tax millage rate for owner-occupied new residential construction, rental units in a mixed-use building located in a qualified downtown revitalization district, the rehabilitation of existing structures for residential uses, and owner-occupied units in neighborhoods that were platted before 1968. A certificate may last between 6 and 15 years, as determined by the local unit of government. In the case of rehabilitation projects in qualified historic buildings, the certificate may last for up to 17 years.

The tax reduction differs depending on the type of unit. A newly constructed unit will be taxed at a rate equal to one-half of the statewide average property tax rate, which in Detroit results in an approximate 70% property tax reduction. The tax on a rehabilitated unit will include all current taxes that apply in the local municipality, but will be applied against the pre-rehabilitation value of the unit for the duration of the certificate. A homestead facility will be taxed at a rate equal to one-half of the applicable city and county operating millages plus the full rate of the other taxing entities. A "phase-out" provision is included in the law, providing that the abatement is reduced incrementally during the last three years of the certificate.

6. Wayne County TURBO

To facilitate investment in Wayne County, this innovative program uses the Wayne County Land Bank to provide benefits of up to a 100% real property tax exemption in the first year, followed by up to 5 years of reimbursement of the equivalent of 50% of the total real property taxes. If the 100% real property tax exemption is sought, concurrence by the local unit of government usually is required. To utilize this program, title must be transferred to the Wayne County Land Bank and a development agreement must be executed with the Wayne County Land Bank. The program was developed under the Land Bank Fast Track Act.[10]

7. Public Act 328 Personal Property Exemption

Under Public Act 328 of 1998,[11] local governments with eligible "distressed areas" can offer a 100% property tax exemption for all new personal property acquired by businesses that are engaged primarily in manufacturing, mining, research and development, wholesale trade, or office operations, and are located within one of several different types of zones or districts within the local unit.[12] Retail is not an eligible activity. If the business is not located within one of the zones, the local unit must create a district before the exemption may be approved. The exemption must be approved by the State Tax Commission to become effective. The exemption is available for all newly purchased or leased personal property, as well as any used property that will be moved to Michigan for the first time from another state or otherwise initially becomes subject to property tax in Michigan. The local unit may set the duration of the exemption; there is no statutory limit to the duration of the exemption. Some local units have granted exemptions for as long as 50 years under this program.

8. Renaissance Zones

One program that is exclusively targeted to economically distressed or disadvantaged areas is the Renaissance Zone program.[13] Renaissance Zones are

7 Plant Rehabilitation and Industrial Development Districts Act, Public Act 198 of 1974, MCL § 207.551 *et seq*.
8 The Revised School Code, MCL § 380.1211.
9 Neighborhood Enterprise Zone Act, Public Act 147 of 1992, MCL § 207.771 *et seq*.
10 Public Act 258 of 2003, MCL § 124.751 *et seq*.
11 Public Act 328 of 1998, MCL § 211.9f.
12 "Eligible districts" mean industrial development districts (Public Act 198 of 1974, MCL § 207.551 *et seq*.), renaissance zones (Public Act 376 of 1996, MCL § 125.2681 *et seq*.), enterprise zones (Public Act 224 of 1985), brownfield redevelopment zones (Public Act 381 of 1996, MCL § 125.2651 *et seq*.), empowerment zones (subchapter U of chapter 1 of the Internal Revenue Code of 1986, 26 USC § 1391 *et seq*.), authority districts or development areas from the Tax Increment Finance Authority Act (Public Act 450 of 1980, MCL § 125.1801 *et seq*.), authority districts from the Local Development Financing Act (Public Act 281 of 1986, MCL§ 125.2151 *et seq*.), or downtown districts or development areas from the Downtown Development Authority Act (Public Act 197 of 1975, MCL § 125.1681 *et seq*.). MCL § 211.9f(7)(e).
13 Michigan Renaissance Zone Act, Public Act 376 of 1996, MCL § 125.2681 *et seq*.

state designated zones scattered across approximately 152 locations in 38 counties in Michigan[14] in which businesses are exempt from virtually all state and local taxes attributable to its activity within the zone. Taxes that are subject to the exemption include the personal income tax (for residents of the zone), Michigan Business Tax, property taxes imposed for operating purposes and the utility users tax.[15] Property taxes levied for non-operating purposes (e.g., debt millages) and state sales tax are not exempted in the zones. Eligibility for exemption is not restricted with respect to type of business activity, and existing facilities qualify as well as new ones. Several special Renaissance Zones to promote particular activities include: Tool and Die Recovery Zones,[16] Agricultural Processing Facilities,[17] Renewable Energy Facilities,[18] Forest Products Processing Facilities,[19] Pharmaceutical Recovery Zones,[20] and Alternative Energy Zones.[21]

Benefits for the first zones established begin to expire in 2008; however, recently enacted legislation allows for the extension of many of the existing zones and permitted local jurisdictions that already have zones to create new ones. Taxpayers who are delinquent in any state or local tax are disqualified from the exemptions.

B. Brownfield Redevelopment Incentives

In addition to traditional brownfields created by past releases of hazardous substances, many brownfields now exist in Michigan not because of contamination, but because they are "functionally obsolete" or "blighted" properties. Functionally obsolete properties include those that are unable to be used to adequately perform the function for which it was intended due to a substantial loss in value resulting from factors such as overcapacity, changes in technology, deficiencies or superadequacies in design, or other similar factors that affect the property itself or the property's relationship with other surrounding property.[22] Blighted properties include those that are (1) declared a public nuisance in accordance with a municipality's code or ordinance, (2) an attractive nuisance to children, (3) are a fire hazard or otherwise dangerous to public safety, (4) have had the utilities, plumbing, heating, or sewerage permanently disconnected, destroyed, removed, or rendered ineffective so that the property is unfit for its intended use, (5) are tax reverted, (6) are owned by a land bank fast track authority, or (7) have substantial subsurface debris rendering the site unfit for its intended use.[23] Thus, there are many ways for properties to qualify as brownfields even if they are not environmentally contaminated.

9. Brownfield Redevelopment Tax Increment Financing

Brownfield tax increment financing (TIF) is the core brownfield redevelopment incentive in Michigan. Under a "Brownfield Plan," which must be approved by a local governmental unit, a developer may receive dollar-for-dollar reimbursement of certain eligible brownfield redevelopment expenses. In general, TIF incentives are available for "eligible activities" on "eligible property." The scope of these terms differs depending whether the property is located in a Core Community or a non-Core Community or whether the property is owned by a land bank fast track authority.[24]

Eligible activities in all communities include site investigation, baseline environmental assessments, due care activities, demolition, additional environmental response activities, lead and asbestos abatement,[25] and the cost of preparing a Brownfield Plan and related work plans.[26] In the 104 "Core Communities" (which typically are Michigan's more urbanized or economically impaired communities), the eligible activities also include site preparation, relocation of public buildings, public infrastructure improvements, and the acquisition of property by a public "land bank."

Under the TIF process, a "Brownfield Redevelopment Authority" (BRA) captures tax increment revenues generated by the redevelopment of eligible property and applies those revenues to reimburse a developer for the cost of eligible activities on the property, and also may fund a local site remediation revolving fund for use at other eligible properties in the community. In some circumstances, a BRA can fund a project through the issuance of bonds, or by using TIF revenues generated by other projects. State approval is required for some of the eligible activity costs if tax increment revenues

14 For a list of Renaissance Zones, see: http://ref.michigan.org/medc/services/sitedevelopment/renzone/
15 The exemption may be provided in the form of a tax credit. See MCL § 125.2689.
16 MCL § 125.2688d.
17 MCL § 125.2688c.
18 MCL § 125.2688e.
19 MCL § 125.2688f.
20 MCL § 125.2688a.
21 MCL § 125.2688a.
22 MCL § 125.2652(r).
23 MCL § 125.2652(e).
24 MCL § 125.2652(m).
25 Under Part 201 of the Natural Resources and Environmental Protection Act, MCL § 324.20101 *et seq*., a property is not considered contaminated solely because of the presence of lead or asbestos in buildings.
26 MCL § 125.2652(m) (definition of eligible activities); MCL § 125.2652(n) (definition of eligible property).

from school operating taxes or the state education tax (SET) will be captured by a BRA.[27]

10. MBT Brownfield Redevelopment Tax Credits

A Michigan Business Tax (MBT) Brownfield Redevelopment Credit[28] of up to 20% of eligible investment for a project can be obtained by an owner or lessee of a property that is the subject of a Brownfield Plan. The credit can be approved at a rate of up to 12.5% for most projects, and up to 20% (15% after December 31, 2010) for urban development area projects (defined generally to include Core Community downtowns, central business districts, and traditional commercial corridors). The credit can be as high as $30 million (12.5% of a $240 million eligible investment or 20% of a $150 million eligible investment).[29] The credit can be carried forward for up to 10 years and can be assigned, or can be claimed as a discounted refundable credit at the rate of 85% of the face amount of the approved credit.[30] The project expenses eligible for calculation of the credit include most "hard" and some "soft" costs expended on the development (excluding acquisition costs and those costs covered by TIF), including demolition of existing structures; construction, restoration, alteration, renovation, or improvements to buildings; and additions of machinery, equipment, or fixtures to the property. This program has been an effective tool to offset potential cost differentials between developing in urban areas and "green space" (a rural or previously undeveloped area). The number of credits that may be awarded in any one year is limited, and various policies are employed by the State to allocate credits to the projects that best fit those policies.

C. Other Tax Increment Financing Authorities

Other tax increment financing authorities (TIFAs) that may be available to provide support for a redevelopment project include Local Development Finance Authorities,[31] Downtown Development Authorities,[32] Corridor Improvement Authorities,[33] and SmartZones.[34] These TIFAs may provide funding for site costs and infrastructure, including roads, sewers, and utilities.

27 MCL § 125.2665.
28 MCL § 208.1437.
29 MCL § 208.1437(1)-(4).
30 MCL § 208.1437(18).
31 Local Development Financing Act, Public Act 281 of 1986, MCL § 125.2151 *et seq*.
32 Downtown Development Authority Act, Public Act 197 of 1975, MCL § 125.1651 *et seq*.
33 Corridor Improvement Authority Act, Public Act 210 of 2005, MCL § 125.2871 *et seq*.
34 SmartZones are created under the Local Development Financing Authority Act.

D. Other Tax Credits

Other tax credits that may be available include Historic Preservation Credits (State and Federal), New Markets Tax Credits, MEGA Job Credits, Federal Job Credits, Low Income Housing Tax Credits, Film Incentives, Alternative Energy, and Advanced Battery Credits. Eligibility for these credits is highly fact-specific.

E. Other Sources of Funding

For environmentally contaminated properties, site assessment and/or cleanup assistance may be available through the local unit of government or other public bodies in the form of revolving loan programs (e.g., revolving fund capitalized by United States Environmental Protection Agency (U.S. EPA) revolving loan fund, Clean Michigan Initiative Brownfield Redevelopment Loan Program, Michigan's Revitalizing Revolving Loan Program, local site remediation revolving fund), site assessment grants (e.g., funds from U.S. EPA's site assessment grant program, Clean Michigan Initiative Brownfield Redevelopment Grant Program, Michigan's Site Assessment Fund Grants[35]), and site remediation grants (e.g., U.S. EPA's cleanup grant program, Clean Michigan Initiative Brownfield Redevelopment Grant Program, Michigan Site Reclamation Grants). The availability of these types of funds should be evaluated as early as possible in a project because they have their own eligibility requirements and timelines as well as limited funding or appropriations.

General Incentive Principles

A. "But For" Principle

Many incentives programs subscribe to the "but for" principle: "But for" the taxpayer receiving the incentive, the project would not move forward in the proposed location. For those incentives programs that do not explicitly apply the "but for" principle, the "but for" principle often creeps into discussions with incentives managers and is important for bargaining leverage. Thus, it is key to avoid commitments to a location, making announcements about the proposed project, signing leases, or commencing construction prior to discussing, applying for, and receiving the desired incentives.

35 Funding for Michigan's Site Assessment Fund Grants has been exhausted and no additional funding rounds are anticipated. Michigan Department of Environmental Quality Grants and Loans Catalog, available at http://www.michigan.gov/documents/deq/deq-essd-grantsloans-catalog_210643_7.pdf

B. Location and Timing

Location, location, location. Some incentives programs are only available in certain areas of the State (e.g., "eligible distressed areas," "Core Communities," Renaissance Zones). Evaluating whether the property of interest is within these areas is an important first step in determining which incentives are appropriate for the proposed project.

Timing, like location, is critical. In addition to the "but for" principle, which adds an element of timing into a project, many incentives programs have statutory requirements regarding deadlines and the sequence of approvals and other events. Some of these deadlines and sequences of approvals and events can be time consuming and lengthy and because they are required by statute, cannot be waived or "speeded up." Thus, incentives and their timing should be evaluated as early as possible in the life of a proposed project to increase the opportunities to obtain incentives and to minimize the potential disruption to the proposed project's schedule (financing and construction schedules).

C. Turning Incentives Into Equity

Some incentives may be turned into sources of equity for the redevelopment project. For example, MBT Brownfield Redevelopment Credits[36] may be sold by developers, who typically lack significant tax liability under the MBT Act,[37] to entities that have significant tax liability under the MBT Act. Or, for developers who do not opt to sell their MBT Brownfield Redevelopment Credits, recent changes to the law allows them to claim the credit as a refundable tax credit calculated at 85% of their value.[38] These tax credits may plug gaps in financing or, depending on their size, be a significant source of equity for a project.

Principles of Leveraging

A. Understanding How the Current Taxable Value and Anticipated Future Taxable Value of The Property Affects the Value of the Incentives

The current taxable value and the anticipated taxable value of the property when the project is complete strongly influences the value of the incentives and which mix of incentives is appropriate for a particular redevelopment project. For example, the greater the difference between the initial or current taxable value and the anticipated taxable value (e.g., the "delta"), the more valuable an OPRA freeze on the real property becomes compared to a 5 year–50% rebate under Wayne County's TURBO program. The timing/staging of the construction also influences the value of the incentives because it directly affects how the annual taxable value of the property increases. The expected delta along with the timing/staging of the construction should be evaluated to determine which mix of incentives is most valuable for the project.

B. Specific Taxes Versus Ad Valorem Taxes

Some tax abatements and tax exemptions are actually specific taxes as opposed to general ad valorem taxes. These specific taxes are, for the most part, capturable by tax increment financing authorities (e.g., brownfield redevelopment authorities), which makes leveraging these incentives as part of a brownfield redevelopment project possible. However, it is important to carefully evaluate each incentive tool and confirm which, if any, of the incentives can be combined with other incentives under consideration for a project.

C. Knowing When to Say "When" and Not to Ask For More (aka "Politics")

Often the decision about which combination of incentives to pursue involves an evaluation of the politics of "asking for more." Understanding the political dynamics at both the state and local levels is imperative because asking and pushing for "too much" may lead a state or local governmental body or agency to turn down the request for incentives either in its entirety or to approve a much narrower incentives package than it would have had the initial request from the developer been perceived as reasonable. At the same time, creatively finding ways for the developer, the municipality, and the state to each "win" may result in greater incentives for the proposed project. Thus, in determining what package of incentives will yield the greatest benefit for the proposed project, politics and perceptions of fairness cannot be ignored.

Hypothetical Case Study

A large, functionally obsolete building in Detroit will be redeveloped into a modern mixed-use, commercial/office building. The current taxable value of the property is roughly $1,000,000. The redevelopment is expected to increase the taxable value to approximately $4,400,000 over the course of four years. The capital investment

36 MCL § 208.1437.
37 Michigan Business Tax Act, Public Act 36 of 2007, MCL § 208.1101 *et seq*.
38 MCL § 208.1437(18).

in the project is anticipated to be $8,900,000 and the brownfield tax credit eligible investment is anticipated to be $7,600,000. The following incentives may be available for the project:

- 20% MBT Brownfield Redevelopment Credit of $1,520,000
- Brownfield Tax Increment Financing of $1,300,000 (possibly plus interest)
- OPRA property tax savings of $2,600,000 over 12 years

Thus, approximately $5,420,000 in incentives (possibly plus interest) may be leveraged for the project.[39]

39 Additional incentives may be available through other programs, such as Wayne County's TURBO Program.

Conclusion

Leveraging redevelopment incentives with other incentives can make projects feasible. Michigan has a broad range of incentives available for redevelopment projects. To maximize the benefits from incentives programs, the range of potential incentives should be evaluated early in the life of a proposed project because many incentives programs have eligibility requirements and statutory timelines for application and approval that can affect how the project is structured. Additionally, some incentives programs cannot be combined, so the early evaluation of the range of incentives available should also include an analysis of which combination of incentives will provide the maximum benefit. Thus, when it comes to incentives, the earlier they are considered in the life of a project, the greater the likelihood of maximizing their benefit.

THE RULES OF CONSTRUCTION: LEGAL RELATIONSHIPS IN THE DESIGN-BUILD AND INTEGRATED PROJECT DELIVERY ERA

*by Steven K. Stawski**

Introduction

This article juxtaposes three project-wide construction contracting models to highlight privity-related risks following the recent clash of competing lines of jurisprudence in *Keller Construction v U.P. Engineers & Architects.*[1] *Keller* employs the Supreme Court's decision in *Fultz v Union-Commerce Associates*[2] to overrule the construction law cases that follow *Williams v Polgar.*[3] This conflict breathes life into the centuries-old debate between first-party obligations and third-party duties, which is relevant to almost all forms of civil practice.

Owners, architects, engineers, and contractors are entering into new contractual arrangements that shift traditional design and construction responsibilities in ways that challenge our common law and statutes. These recent changes are fueled by industry trends, such as sustainable design and Building Information Modeling (BIM), which broaden planning, design and construction perspectives, force earlier collaboration and coordination among participants, and focus attention on the delivery of a product to expecting owners.

Under *Keller*'s reasoning, a construction project's overall privity structure is critical to the stakeholder risk, especially as contracting models continue to evolve. Can an owner sue for defective plans and specifications when the architect is a sub-contractor to the design-builder? Can a contractor sue an architect for negligence in a design-bid-build model? Does a design-builder that promises a certain LEED rating imply a warranty to the owner? Do the common law rules of construction apply to Integrated Project Delivery? If the respective remedies arise in tort, what protections does the common law provide as precedent? As new project-centered contracting models separate construction law stakeholders from their traditional privity relationships, contractual term and extra-contractual interpretations by our judicial system become increasingly important to define the rights and obligations of the owner, architect, and contractors on projects.

Judicial Developments in Extra-Contractual Liability

Foreseeable Reliance

Assessments of extra-contractual liability are important for successful project planning and useful for risk analysis if a project stalls or fails. Michigan jurisprudence speaks to two lines of extra-contractual liability: the first expands duty to third parties by focusing on foreseeable reliance; the second, and more recent, limits duty based on an analysis of the obligations between the contracting parties.

1 *Keller Construction v U.P. Engineers & Architects*, unpublished opinion of the Court of Appeals per curiam, issued July 8, 2008 (Dkt No 275379), 2008 Mich. App. LEXIS 1378 (Mich Ct App July 8, 2008), *lv den, Keller Construction v U.P. Engineers & Architects*, 482 Mich 1068; 757 NW2d 500 (2008).

2 *Fultz v Union-Commerce Assoc*, 470 Mich 460, 467; 683 NW2d 587 (2000).

3 *Williams v Polgar*, 391 Mich 6; 215 NW2d 149 (1974).

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In the widely-quoted *Williams* opinion, the Michigan Supreme Court placed foreseeable reliance as the hallmark of tort actions that survive absent privity of contract in holding that "there is a valid tort cause of action in the nature of negligent misrepresentation arising from a contract for an abstracter's services in favor of a non-contracting damaged third-party whose reliance on the abstract could be foreseen."[4]

Williams translates to the construction environment in *Bacco Const Co v American Colloid Co,*[5] where a contractor maintained a tort action against a design professional despite lack of privity arising out of defective plans and specifications for the lining material for wastewater lagoons. The *Bacco* Court held that such negligence actions are viable despite lack of privity:

> It is certainly foreseeable that an engineer's failure to make proper calculations and specifications for a construction job may create a risk of harm to the third-party contractor who is responsible for applying those specifications to the job itself. The risk of harm would include the financial hardship created by having to cure the defects which may very well not be caused by the contractor.[6]

Similarly, in *National Sand, Inc v Nagel Construction,*[7] an excavation subcontractor sued Progressive Engineering, Inc. in tort when it incurred damages associated with two failed site plans. Specifically, Progressive failed to locate the sewage pits in an area that contained sufficient clay deposits to re-use as a lining. As a result, National Sand incurred $258,000 in costs for extra excavation work for the two failed footprint locations and sued Progressive to recover based on the plans. In reversing the Trial Court's dismissal of National Sand's negligence action against Progressive Engineering, the Court of Appeals rejected the lack of privity as a defense:

> Thus, what can be concluded is not, as plaintiff suggests, that a breach of contract claim can be maintained regardless of privity; rather, it is that a plaintiff may maintain an action *in tort* where he is injured by the defendant's negligent performance of contract even where there is no privity between the parties. Thus, in the case at bar, the trial court properly dismissed plaintiff's breach of contract claims against Progressive Engineering and the drain commission since there was no contractual relationship between plaintiff and those two defendants. *However, that does not preclude plaintiff from maintaining its tort claim against Progressive Engineering.*[8]

Extra-Contractual Duty

The second, and more recent, line of cases under *Fultz* limits the rights of non-signatory third parties to sue in tort absent a duty that is separate and distinct from contractual obligations between signatories to the contract. "Specifically, the threshold question is whether the defendant owed a duty to the plaintiff that is separate and distinct from the defendant's contractual obligations. If no independent duty exists, no tort action based on contract will lie."[9] These cases place the primary emphasis on the language of a contract to which the aggrieved person is not a signatory. "[T]he jurisdictional question is not to be resolved by mere allegation, but rather by analysis of whether the facts pled give rise to a legal duty in tort independent of breach of contract."[10]

The *Keller* Opinion

These two conflicting lines of cases recently collided in *Keller*,[11] which arises from the construction of a water treatment and distribution system for the Village of Ontonagon. The Village entered into separate contracts for design and for construction services, using the design-bid-build model of contracting. Keller Construction sued the Village's design professional, U.P. Engineers & Architects (UPE&A), in tort for malpractice, negligence, and tortious interference. In dismissing the tort-based claims against the design professionals, the *Keller* court concluded that *"Bacco and Nat'l Sand* have been overruled to the extent they are inconsistent with *Fultz*" and found no independent duty exists outside the design professional's contract with the Village.[12]

The open question is whether the *Rinaldo*[13] and *Fultz* line of cases, which arise in the commercial dispute and personal injury contexts respectively, are

4 *Williams*, 391 Mich at 26.
5 *Bacco Const Co v American Colloid Co*, 148 Mich App 397; 384 NW2d 427 (1986).
6 *Id.* at 416 (emphasis added).
7 *National Sand, Inc v Nagel Construction*, 182 Mich App 327; 451 NW2d 618 (1990).
8 *Id.* at 331 (emphasis added).
9 *Fultz,* 470 Mich at 467 (citing *Rinaldo's Construction Corp v Michigan Bell Telephone Co*, 454 Mich 65; 559 NW2d 647 (1997)).
10 *Rinaldo*, 454 Mich at 82.
11 *Keller* 2008 Mich. App. LEXIS 1378 (Mich Ct App July 8, 2008) (unpub. op).
12 *Id.* at *10.
13 *Rinaldo's Construction Corp v Michigan Bell Telephone Co*, 454 Mich 65; 559 NW2d 647 (1997).

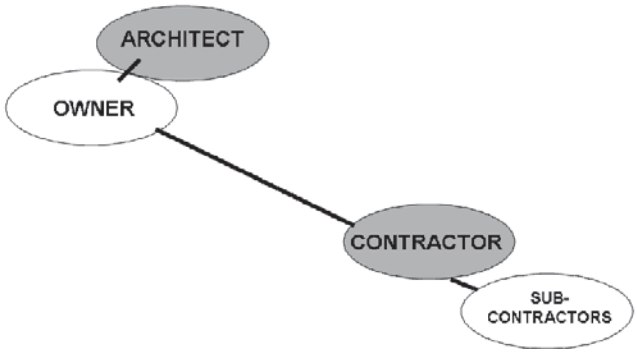
distinguished from the construction law environment. Construction contracting environments are replete with interlocking relationships that, as a practical matter, require foreseeable reliance and dependence on the plans and work of others. While the *Keller* opinion remains unpublished and not binding on Michigan courts, the changing contract models in construction law are important to all stakeholders in construction, especially those whose rights may be limited by a mere shift in privity relationships.

Shifting Privity Relationships on a Project-Wide Scale

The Design-Bid-Build Model

Michigan's common law rules of construction are founded on the traditional design-bid-build model. The owner contracts with the architect for design services and with a general contractor for construction services.

Design-Bid-Build
Traditional Roles and Responsibilities



Generally speaking, the interests of the architect and related design professionals are aligned with the owner. The architect produces Instruments of Service, which include drawings, specifications, and related documents for use on the project.[14] During construction, the Architect reviews submittals and pay certifications, issues bulletins, observes construction for compliance with the design intent, and sometimes serves as the first arbiter of disputes between the owner and contractor. For example, an owner may use an AIA B101-2007 Standard Form of Agreement Between Owner and Architect (based upon the B151-1997) as a base agreement with a design professional. Design professional services progress through schematic design, design development, and construction documents phases, which result in plans and specifications for the project.

The Contractor is responsible for the means and methods of construction. An owner may use an AIA A101-2007 (formerly, A101-1997) Standard Form of Agreement Between Owner and Contractor where the basis of payment is a Stipulated Sum. The Contractor's role increases if the Architect issues performance specifications, in contrast to product specifications. The AIA Owner-Contractor contract incorporates the AIA A201-2007 (formerly, A201-1997) General Conditions of the Contract for Construction. While this General Conditions Contract speaks to the relationship of the owner, contractor, and architect (including the rights and responsibilities of the architect), it is not signed by the architect and does not control the architect's legal obligations to the owner during construction.

Traditional design-bid-build contracts often leave the risk of defective plans and specifications open to resolution by common law. For design services, architects in Michigan are not warrantors of their plans and specifications and the law does not imply such a warranty or guarantee of perfection.[15] In *Borman's, Inc v Lake State Development Co,*[16] the Michigan Court of Appeals rejected Plaintiff's (the tenant's/owner's) claim of an implied warranty against an architect that a drainage system was to be fit for its intended use, stating that "[w]e find this position to be untenable and contrary to law in this state." The *Borman's* Court quoted the rule of law in *Chapel*, affirming that "[t]he law does not imply such a warranty, or the guaranty of the perfection of his plans." [17]

Instead, architects are held to a professional standard of care: "The responsibility of an architect is similar to that of a lawyer or physician. The law requires the exercise of ordinary skill and care common to the profession."[18]

During construction, however, the burden of defective plans and specifications rests with the owner. Contractors in Michigan are not liable to the owner for defective construction so long as the work is performed in accordance with the plans and specifications provided

14 Generally, the ownership of the Instruments of Service is retained by the architect and the owner is provided with a nonexclusive license.

15 *Chapel v Clark*, 117 Mich 638, 640; 76 NW 62 (1898).
16 *Borman's, Inc v Lake State Development Co,* 60 Mich App 175; 230 NW2d 363 (1975).
17 *Id.* at 182.
18 *Ambassador Baptist Church v Seabreeze Heating and Cooling Co*, 28 Mich App 424, 426; 184 NW2d 568 (1970); *see also Chapel v Clark*, 117 Mich 638; 76 NW 62 (1898).

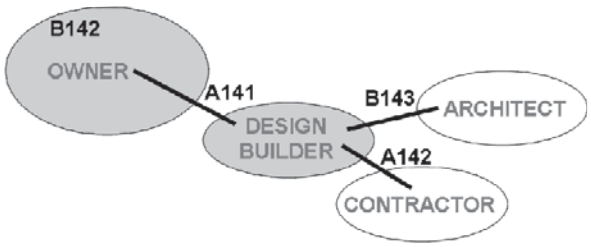
by the owner. In *L.W. Kinnear, Inc. v Lincoln Park*,[19] a contractor was held not responsible for the collapse of a sewer where the contractor installed the type of sewer required by the specifications, but the sewer was found to be unsuitable for use under the existing conditions. This limitation of liability of the contractor to the owner is referred to as the *Spearin* Doctrine: "if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications. [The] responsibility of the owner is not overcome by the usual clauses requiring builders to visit the site, to check the plans, and to inform themselves of the requirements of the work . . . ."[20]

Architects and contractors alike have benefited from these longstanding common law protections. These benefits are eroding, however, as the industry turns to new forms of project-wise design-build and integrated project development contracting models.

The Design-Build Model

In contrast to design-bid-build, a design-build contract structure (whereby the owner engages a contractor or party other than an architect to serve as the design-builder) eliminates the owner's privity relationship with the architect. The architect becomes a member of, or subcontractor/subconsultant to, the design-builder. The design-builder promises to perform or obtain design and construction services for the owner in the form of a "turn-key" product.

Design/Build Contracting:
AIA Family (2004)



This realignment of privity relationships effectively changes the rules of construction. The owner's single contract with the design-builder becomes increasingly important, as its provisions may replace previous common law protections afforded to the owner, architect, and contractor. Under *Fultz*, the owner loses the ability to bring an action in tort against the architect for defects in the plans and specifications. The contractor loses *Spearin* protections because the owner is not providing the plans and specifications for the project. The architect effectively loses common law protections under *Chapel* because it is no longer performing design services directly for the owner.

Arguably, the design-builder, who is not delivering a product to the owner, may be subject to warranties and other such guarantees, particularly if the owner is expecting certain characteristics and results, such as a certain level of LEED certification or building performance upon commissioning. Lost tax incentives from the failure to achieve a certain LEED designation may become a form of consequential damages.

In the design-build environment, the rights of the stakeholders are determined by the contracts between the stakeholders, the terms of which vary greatly depending on the industry groups that produce the documents. Design-build contract families produced by the AIA, the Design-Build Institute of America (DBIA), Associated General Contractors (AGC), Consensus Docs, Construction Owners Association of America (COAA), and the National Society of Professional Engineers' Engineers Joint Contract Documents Committee (EJCD) vary greatly in form and substance, departing from traditional roles and responsibilities.

For example, in the AIA design-build family, the owner reviews submittals, inspects and certifies final completion, approves pay applications, and rejects non-conforming work. These changes, which represent tremendous shifts in owner control and responsibility, are one reason why the AIA design-build family of contracts includes the B142 Standard Form of Agreement Between Owner and Consultant, which the owner can use to secure the assistance of a design professional.

The DBIA contract between the design-builder and design-build subcontractor defaults to the local standard of care for an architect but specifically authorizes the parties to agree on specific performance standards for certain aspects of the work. An architect that contracts to a standard of care higher than what is required under the common law may be contracting out of professional

19 *L.W. Kinnear, Inc v Lincoln Park*, 260 Mich 250; 244 NW 463 (1932) (citing *United States v Spearin*, 248 US 132, 136 (1918)).
20 *Spearin*, 248 US at 136.

lability coverage depending on the terms and conditions of the architect's professional liability policy.

Some design-build contract documents specifically exclude any third-party beneficiary rights, which further limit actions by those who are not in privity of contract.

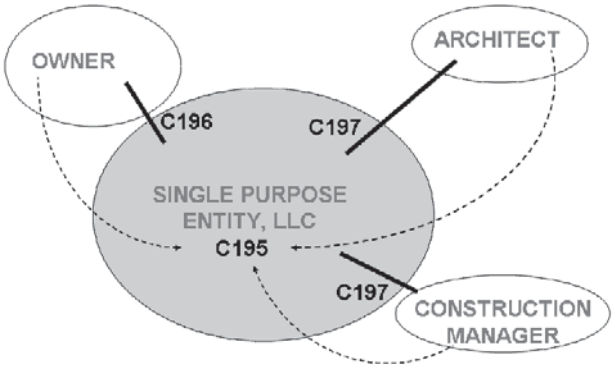
As a further consideration, Michigan statute restricts design-build entities from engaging in the practice of architecture or engineering without proper licensing: "[a] firm may engage in the practice of architecture, professional engineering, or professional surveying in this state, *if not less than 2/3 of the principals of the firm are licensees*."[21] Recognizing this type of limitation, some design-builder contracts provide that when the design-builder is not an architect and engineer, the architectural and engineering services shall be procured from licensed and independent design professionals retained by the design - builder. As previously noted, the owner lacks privity of contract with the design-builder's contracted architect. If the design-builder is a project-specific entity without significant assets, then the owner's remedies may be limited by a judgment-proof party.

The Integrated Project Delivery Model

The Integrated Project Delivery Model (IPD) is a radical departure from the design-bid-build and design-build privity structures.[22] The AIA 2008 C-family of Integrated Project Management documents center around a Single Purpose Entity LLC (SPE, LLC), which is formed jointly by the owner, architect, and construction manager as its initial members. This company serves the sole purpose of planning, designing, constructing, and commissioning improvements to real property.

Like spokes radiating from a central hub, all privity relationships attach directly to the SPE, LLC, including contracts with the owner, the architect, the construction managers, contractors, and suppliers.

Integrated Project Delivery:
AIA Family (2008)



Unlike the design-bid-build and design-build contact models, this form of IPD contracting includes entity-based considerations that are governed by the Michigan Limited Liability Company Act.[23] Specifically, the terms of the SPE, LLC's operating agreement control the privity relationships for the project and minimum content of the contracts between the SPE, LLC and the owner and non-owner members, including the architect and construction manager.

In the standardized member agreements, the owner and non-owner SPE, LLC members will generally waive their rights to pursue claims and disputes against one another, except for claims arising out of a member's willful misconduct. The SPE, LLC also waives its rights to pursue claims and disputes against the owner, architect, and construction manager members, along with all other non-owner members, if any. These layered mutual-waiver provisions, which are supported by liability exculpation and indemnification provisions in the SPE, LLC operating agreement, constitute a radical departure from other construction law contracting models. All disputes between members and the LLC arising in equity, law, or contract are resolved privately through a private dispute resolution process, not through the courts or by arbitration.

The need for this entity-based structure is driven by technological advancements such as Building Information Modeling (BIM) that enable architects, engineers, and contractors to create three-dimensional, object-oriented, virtual models that can actively model and test various

21 MCL 339.2010 (emphasis added).

22 This article recognizes that multiple industry groups publish different versions of integrated project delivery contracts and that the AIA produces a "transitional" set of integrated project delivery documents that centers around the A295-2008 General Conditions of the Contract for Integrated Project Delivery. The AIA C-family is highlighted for its novel and unique structure.

23 MCL 450.4101 *et seq.*

components and characteristics of buildings before they are constructed. For example, a BIM model identifies, and helps to resolve, conflicts between ducts and electrical systems that must pass through, above, or below certain structural components before construction begins.

While this form of IPD eliminates some of the common law issues associated with extra-contractual risk in the design-bid-build and design-build models, it opens a host of potential legal issues that will undoubtedly surface among members within the LLC operating agreement itself.

Conclusion

New legal relationships in the design-build and integrated project delivery era are shifting roles and responsibilities and altering the construction law landscape. Owners are focusing on an ultimate product, such as a building designed and built by a design-builder that qualifies for a certain LEED rating or achieves a certain functionality based on commissioning tests. The terms of owner-driven, coordinated, and comprehensive project-centered contracting models are replacing traditional notions of the design-bid-build process. Different privity relationships have rendered the long-established common law protections afforded to architects and contractors as irrelevant. New jointly-formed entities employ a sophisticated use of operating agreements to dictate privity relationships and control the content of member and non-member contracts. These developments, combined with the recent clash in jurisprudence as to extra-contractual liability, are replacing the commonly accepted rules of construction with contractually agreed upon rights and remedies negotiated between and among the construction stakeholders.

THE DANGER OF THE UNINTENDED UNCAPPING: ISSUES IN ESTATE PLANNING AND FINANCING TRANSACTIONS

*by David E. Nykanen**

Introduction

This article analyzes the impact of the General Property Tax Act's[1] cap on the increase in the taxable value, and the unintended uncapping of that taxable value in certain estate planning or financing transactions. Michigan voters adopted Proposal A on March 15, 1994.[2] Proposal A imposed a cap on the increase of the taxable values for real estate assessment purposes.[3] In addition, homeowners were given an 18 mill cut in property tax rates on their "homestead," and the State Real Estate Transfer Tax Act was introduced.

As a result of Proposal A's enactment in 1994, assessment notices now contain a "taxable value," and a "state equalized value."[4] The General Property Tax Act caps the annual increase of taxable value to the lesser of: (a) five percent; or (b) the inflation rate.[5] In no event, however, can the taxable value exceed the state equalized value.[6] Unlike taxable value, the state equalized value increases without a cap, and is to represent fifty percent of the property's true cash value.[7] If a property is transferred, the taxable value is increased to the state equalized value in the next tax year.[8]

Even in the currently depressed economic environment, many parcels still enjoy a gap between their taxable and state equalized values; for example, more than one-half of the tax parcels in Oakland County still had a gap between the taxable and state equalized values in 2008.[9] Therefore, structuring transactions to insure the cap on taxable value is not lifted remains important for many property owners. This article will address recent decisions that provide examples of transactions that were not structured in a manner to avoid an uncapping.

1 MCL 211.1 *et seq.*

2 *See* Goodin, "Assessments Up; Prop A Keeps Tax Rates Level," *Crain's Detroit Business*, May 1, 1995, at p. 19. For a discussion of the practical effects of Proposal A on homeowners, see Christoff, "Proposal A Has Pricey Pitfall," *Detroit Free Press*, April 25, 2002, at p. A1.

3 *See* Goodin, *supra* note 2. Proposal A also increased Michigan's sales and use tax from four percent to six percent.

4 Technically, assessment calculations include a capped value, a state equalized value, and a taxable value. The taxable value is the lesser of the capped value and the state equalized value. Until approximately 2006, Michigan real estate values increased each year at a rate greater than the rate of inflation, and the taxable value was almost without exception equal to the capped value. *See* State Tax Commission Bulletin No. 16 "Transfers of Ownership," September 20, 1995. However, in the current economic climate, the state equalized value has substantially decreased, and, therefore, a large percentage of property now has a taxable value equal to the state equalized value.

5 MCL 211.27a(2)(a). The statute also allows for inclusion of "additions" and subtraction of "losses." For further discussion of these issues, see Rhoades and Itnyre, "Property Tax Cap and Transfer Taxes," 27 Mich. Real Prop. Rev. 63 (Summer 2000).

6 MCL 211.27a.

7 MCL 211.27(1); MCL 211.27a(1).

8 MCL 211.27a(3).

9 Oakland County 2009-2010 Outlook, Oakland County Equalization Department, February, 2009 Presentation.

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Conveyances Intended For Estate Planning Purposes

Practitioners, particularly those dealing with clients whose assets are limited and who do not require the creation of trusts for tax planning purposes, sometimes attempt to avoid the necessity for a trust by instead drafting a deed that conveys the client's home to heirs. Those deeds are executed and sometimes dated prior to the grantor's death. This deed is often held and not recorded until after the death of the grantor. Recent decisions confirm that one of the flaws of this approach is the unintentional uncapping of the taxable value of the property.

In *Nelson v Village of Leroy*,[10] the Michigan Tax Tribunal,[11] after a small claims division hearing, determined that a deed signed and dated prior to the death of the mother of the petitioners was a valid transfer of the property *as of the date of the deed*. This decision was reached notwithstanding the fact that the deed had not been recorded until four years later, after the grantor's death. The "predated" deed caused the assessor for the Village of Leroy to retroactively uncap the taxable value of the subject property, effective as of the year after the date of the deed.[12]

The Tribunal's decision tracks the statutory language of the General Property Tax Act, which includes within the definition of a transfer a "conveyance by deed."[13] The decision does not, however, necessarily comport with the alleged intention of the parties to the deed. The petitioners noted that the grantor "retained the right to use, occupy, and control the subject property after the deed was executed and until the time of her death on December 30, 2003."[14] The grantees did not occupy the subject property during the life of the grantor.[15] Further, the grantor paid the property taxes and deducted those taxes on her tax returns for the years at issue.[16] In fact, it was stated by the petitioners that "the deed was executed as part of [grantor's] estate plan and that the purpose of the deed was to provide her with a life lease."[17] The reservation of a life estate would have delayed uncapping until the grantor's death.[18] However, this stated intention was not contained in the written language of the deed.[19]

The Tribunal determined that its analysis was restricted to the four corners of the deed.[20] The Tribunal noted that pursuant to the Michigan statute of frauds,[21] the life estate/life lease intended to be created by the grantor was required to be contained within the language of the deed itself. Therefore, the Tribunal found it was barred by the parol evidence rule from considering any testimony regarding the grantor's intent, because that intent is not contained within the deed's language. The deed's language was an unambiguous conveyance by the grantor to the grantees.[22] Because the language of the deed did not provide for the reservation of a life estate, the Tribunal ruled against the Petitioner, and confirmed the retroactive uncapping of the taxable value.

Significantly, uncapping can occur even if a deed has not been executed. In *Reid v Williamstown Township*,[23] the Court of Appeals ruled that a Memorandum of Land Contract recorded with the Register of Deeds was sufficient to demonstrate a transfer of property, notwithstanding the petitioner's claims that a "present" transfer was not intended. In *Reid*, the petitioner owned a family farm.[24] The petitioner apparently intended to convey the farm to her son at "some unspecified future date," as part of her estate planning process.[25] In November 2002, the petitioner executed a Memorandum of Land Contract stating that she had conveyed the parcel to her son pursuant to a land contract.[26] Under the GPTA, entry into a land contract uncaps the taxable value in the following year.[27] After the property's taxable value was uncapped in tax year 2003, the petitioners filed a Petition before the Michigan Tax Tribunal challenging the uncapping and claiming that: (a) the Memorandum of Land Contract was intended only to allow the son to obtain a building permit for the property; and (b) the

10 MTT Docket No. 311866 (Feb 28, 2006).
11 The Michigan Tax Tribunal has exclusive and original jurisdiction for challenges to the uncapping of the taxable value. MCL 205.731.
12 *Nelson, supra* note 10, slip op. at 2. An assessor can file an Assessor Affidavit Regarding Uncapping of Taxable Value, Michigan Department of Treasury Form 3214 (formerly L-4054) when a transfer occurred but was not reported. *Id.* MCL 211.27b.
13 *See* MCL 211.27a(6)(a).
14 *Nelson, supra* note 10, slip op. at 3.
15 *Id.*
16 *Id.*
17 *Id.*
18 MC 211.27a(7)(c).
19 *Nelson*, *supra* note 10, slip op. at 4-5.
20 *Id.* at 7.
21 MCL 566.106.
22 Not noted within the Tribunal's Opinion and Judgment was whether the deed was actually delivered to the grantees, which would be an essential element of the conveyance of the subject property. Presumably, the deed was delivered.
23 Michigan Court of Appeals Docket No. 271284, Nov 27, 2007.
24 *Id.*, slip op. at 1.
25 *Id.*
26 *Id.*
27 MCL 211.27a(6)(b). However, when the deed in fulfillment of the land contract is delivered, there is not a subsequent uncapping of the taxable value. *Id.*

parties had not intended to "transfer" the property.[28] In fact, both the grantor and grantee indicated that no land contract had ever been executed.[29] But the Tax Tribunal denied the Petition and confirmed the uncapping, ruling that the Memorandum of Land Contract, along with a Property Transfer Affidavit and Homestead Exemption Affidavit (whereby the son claimed the property as his principal residence), were sufficient to demonstrate that a transfer had in fact occurred.[30] The Court of Appeals affirmed the Tribunal's decision, finding that believing the petitioner would "require the conclusion that petitioner and her son presented fraudulent documentation in order to facilitate her son's use of the property."[31]

The lesson from these two cases is clear. The "quick and dirty" approach to estate planning can quickly run afoul of the General Property Tax Act, and lead to an unintended lifting of the cap on taxable value. Practitioners should take careful note of the potential for an uncapping of the taxable value before drafting any documents that convey, or may be construed to convey, property.

Conveyances Intended For Financing Purposes

When clients are financing or refinancing property, practitioners (and often title companies) sometimes draft documents that result in "transfers." Those documents are drafted without giving proper attention to the potential for an uncapping. Often, when a second home is held in an entity's name for liability or tax purposes, the owners/members of the entity will convey the home back into their individual names for the purposes of obtaining residential mortgage financing.[32] This was exactly the scenario in *Lakewood Cottages, LLC v Township of Sanilac*.[33] In this small claims matter, the Michigan Tax Tribunal found that there was no exemption from the definition of a "transfer"[34] for a transaction where a property had been conveyed several times into and out of an entity, for the purposes of refinancing the loan secured by the property.[35] The petitioner in *Lakewood* argued that because the members of the entity were also the individuals to whom the property was conveyed, and those individuals subsequently re-conveyed the property back to the entity after re-financing the loan secured by the property,[36] there was no "transfer."[37] The petitioners alleged that the transfer was exempt because it was a transfer among "commonly controlled entities."[38] The Tribunal ruled that because the property was conveyed by an entity to two individuals, and then by those two individuals back to the entity, it was not a transfer among commonly controlled entities.[39] The Tribunal concluded that even if individuals were entities under the General Property Tax Act, the phrase "under common control" could not apply to two individuals.[40]

This result likely comes as a surprise to many who believe that there is an exemption from uncapping for the contribution of property into a limited liability company or a conveyance from a limited liability company to its members. While there may be an exemption from uncapping in any particular transaction, that exemption is not the "entities under common control" exemption. The Tribunal has concluded that individuals can not be under common control under the General Property Tax Act's exemptions from the definition of transfer.

This decision should put practitioners on alert that an apparently common practice of many practioners and title companies will trigger an uncapping of the taxable value for property taxation purposes. This process appears to be especially prevalent among those handling the refinancing of second homes titled in an entity's name. The practice can lead to the unintentional uncapping of the taxable value, and should only be undertaken after an attorney has fully analyzed the potential for an uncapping, and the impact of that uncapping on the property's taxes.

28 *Reid, supra* note 23, slip op. at 1-2.
29 *Id.* at 1.
30 *Id.*
31 *Id.* at 2.
32 Many financial institutions have much simpler procedures for loaning money to individuals for the refinance or purchase of a home, versus a loan to an entity.
33 MTT Docket No. 302715 (Jan 6, 2005).
34 The GPT A first defines a transfer, MCL 211.27a(6). It then provides exemptions from the definition of a transfer. MCL 211.27a(7).
35 *Lakewood Cottages, supra* note 33, slip op. at 3.
36 For the purposes of this discussion, we will ignore the fact that the conveyance back to the LLC likely triggered a default on the mortgage financing that was obtained when the property was held in the individuals' name.
37 *Lakewood Cottages, supra* note 33, at 3.
38 *Id.* The exemption claimed by the Petitioner is as follows: "A transfer of real property or other ownership interests among corporations, partnerships, limited liability companies, limited liability partnerships, or other legal entitles if the entitles involved are commonly controlled." MCL 211.27a(7)(l). Petitioner also alleged another exemption applied. MCL 211.27a(7)(j) exempts transfers among affiliated groups. This argument was quickly dismissed by the Tribunal, because it requires the transfer to be between "1 or more corporations connected by common stock ownership to a common parent corporation." MCL 211.27a(7)(j). The entity here was a limited liability company, not a corporation.
39 *Lakewood Cottages, supra* note 33, at 7.
40 *Id.*

Conclusion

The cap on taxable value, a concept introduced by Proposal A in 1994, limits the rate of increase of taxable value for properties in the State of Michigan. Many properties still enjoy a gap between the state equalized value and the taxable value. Therefore, particular attention must be paid to structuring even seemingly simple transactions to avoid an unintended uncapping of the taxable value.

MICHIGAN LEGISLATURE MAKES SWEEPING CHANGES TO FORECLOSURE PROCESS

*by Jeffrey D. Weisserman**

It is no secret that foreclosure rates continue to rise throughout the nation. According to at least one source, nationwide foreclosure filings rose 17.8% in May, 2009 compared to May, 2008.[1] Michigan has been no exception to this rule—in fact, its May, 2009 unemployment rate of 14.1%[2] has combined with decreased property values to place Michigan in the top 10 in state foreclosure rates.[3]

In an effort to combat the rising number of foreclosures in Michigan, the Michigan Legislature passed, and Governor Granholm signed, Public Acts 29-31, which amended Michigan's Foreclosure by Advertisement statute and made significant changes to the Michigan foreclosure process. These changes will become effective on July 5, 2009, 45 days after enactment.

The relevant changes to the process were an attempt to reduce the number of foreclosures by encouraging borrowers and lenders to meet early in the foreclosure process. This was achieved by giving borrowers the ability to request a mandatory, face-to-face meeting with their lenders (or the lenders' designee). Legislators chose this avenue rather than the more Draconian possibilities of a moratorium[4] or abolishment of foreclosure by advertisement. The relevant changes build many existing loss mitigation efforts into the statutory framework of the foreclosure process.

Essentially, the changes, which are intended to apply only to principal residences,[5] are as follows:

1. A new written notice must be sent to the borrower via first class *and* certified mail, return receipt requested, with delivery restricted to the borrower.[6] This notice must contain:

1 "Michigan Foreclosure Rate in Top 10", Detroit Free Press, June 11, 2009, available at http://www.freep.com/article/20090611/BUSINESS06/906110499/

2 According to the Michigan Department of Labor's seasonally adjusted figures, this is a 5.9% increase from May, 2008. Figures available at www.milmi.org

3 Specifically, Michigan is sixth in foreclosure rates in the US for May, 2009. *See* "Michigan Foreclosure Rate in Top 10", Detroit Free Press, June 11, 2009\, available at http://www.freep.com/article/20090611/BUSINESS06/906110499/

4 *See, e.g.,* HB 4034 (one year moratorium) and SB 29 (two year moratorium).

5 A "principal residence" for purposes of these Acts is property claimed as a principal residence exempt from tax under section 7cc of the General Property Tax Act, MCL 211.7cc.

6 MCL 600.3205a (1) – (3).

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a. The reason for default and the amount due and owing;

b. The names, addresses, and telephone numbers of the mortgage holder, the mortgage servicer, or any designee thereof, as well as a designation of the person to contact and that has the authority to make agreements to modify the loan under the Act;

c. That enclosed with the notice is a list of housing counselors prepared by the Michigan State Housing Development Authority and that within 14 days after the notice is sent, the borrower may request a meeting with the designated person to attempt to work out a modification of the mortgage loan;

d. That if the borrower requests a meeting with the designated person, foreclosure proceedings will not be commenced until 90 days after the date of the original notice;

e. That if the borrower and the designated person reach an agreement to modify the mortgage loan, the mortgage will not be foreclosed if the borrower abides by the terms of the agreement;

f. That if the borrower and the designated person do not agree to modify the mortgage loan but it is determined that the borrower meets certain specified criteria for a modification, foreclosure of the mortgage will proceed judicially; and

g. That the borrower has the right to contact an attorney, and the telephone numbers of the state bar of Michigan's lawyer referral service and of a local legal aid society

2. In addition to mailing the notice, an additional, somewhat different notice must be published once within 7 days after mailing of the notice.[7] This notice must contain:

   a. The borrower's name and the property address;[8] and

   b. A statement that informs the borrower of all of the following:

      i. That the borrower has the right to request a meeting with the mortgage holder or mortgage servicer;

      ii. The name of the designated person to contact and that has the authority to make agreements under the Act (i.e., the Designee);

      iii. That the borrower may contact a housing counselor by visiting the Michigan State Housing Development Authority's website or by calling the Authority;

      iv. The website address and telephone number of the Michigan State Housing Development Authority;

      v. That if the borrower requests a meeting with the Designee, foreclosure proceedings will not be commenced until 90 days after the date notice is mailed to the borrower;

      vi. That if the borrower and the Designee under subsection (1)(c) reach an agreement to modify the mortgage loan, the mortgage will not be foreclosed if the borrower abides by the terms of the agreement; and

      vii. That the borrower has the right to contact an attorney, and the telephone number of the state bar of Michigan's lawyer referral service.

3. The borrower may opt in to the program by requesting a meeting through a housing counselor within 14 days of the notice's mailing. The housing counselor must then notify the lender's designee within 10 days.[9]

4. If the borrower requests a meeting, the foreclosure process may not commence for 90 days from the date the notice was mailed to allow the required meeting to occur.[10] The meeting is to be held at a time and place convenient for all parties or in the county where the property is located.[11] The borrower may request the presence of a housing counselor.[12]

5. After the borrower has requested a meeting, the designated person may request financial documents be provided in order to determine eligibility for a modification. The borrower must provide the requested documents.[13]

6. If no agreement to modify the loan or otherwise resolve the matter is reached at the meeting, a separate analysis must be made to determine whether the borrower

7 MCLA 600.3205a(4).
8 This inclusion of the borrower's address is a new requirement under Michigan law. It is expected that the inclusion of the borrower's address will greatly increase contact by "stop-foreclosure" groups, both legitimate and non-legitimate.
9 MCLA 600.3205b(1).
10 MCLA 600.3204(4)(c).
11 MCLA 600.3205b(3).
12 *Id.*
13 MCLA 600.3205b(2).

would have qualified for a modification under either terms outlined in the statute or applicable investor guidelines. If the borrower would have qualified under these terms, foreclosure must proceed judicially. If the borrower would not have qualified, foreclosure may recommence after 90 days from the date of the initial notice. [14]

7. The statutory test for whether a modification should have been made is a modified version of President Obama's Home Affordable Modification Plan ("HAMP"). The process targets a ratio of the borrower's housing-related debt (including principal and interest, taxes, insurance and association fees) to the borrower's gross income of 38% or less. To reach the 38% target the parties should utilize one or more of the following features:

   a. An interest rate reduction, as needed, subject to a floor of 3%, for a fixed term of at least 5 years;

   b. An extension of the amortization period for the loan term, to 40 years or less from the date of the loan modification;

   c. Deferral of some portion of the amount of the unpaid principal balance of 20% or less, until maturity, refinancing of the loan, or sale of the property; and/or

   d. Reduction or elimination of late fees.[15]

However, the "filter" for determining whether a file must be foreclosed judicially where a meeting has not resulted in a deal is different for government loans or loans sold to a government-sponsored entity like FNMA or FHLMC. In those cases, the test to be used is that entity's loan modification guidelines.[16]

The program will not apply to loans that have previously been modified under the program and defaulted within one year of the modification.[17] Further, foreclosure by advertisement may commence if the borrower is offered a good-faith modification agreement under this program and does not execute and return the agreement within 14 days.[18]

There is no question that this change will slow down the current rate and pace of foreclosures. Even in the event that a borrower does not request a meeting, a delay of at least 30 days in the process is expected. However, the changes encourage dialogue between lender and borrower and should result in a greater number of loan modifications.

At the same time, the legislated requirement of loss mitigation efforts during the foreclosure process will make redundant many of the efforts currently being taken by lenders/servicers. It is expected that many of these efforts will be shifted to the statutory process to avoid duplication of efforts.

14 MCLA 600.3205c(6).

15 MCLA 600.3205c(1). It is critical to note that this "filter" is not a mandatory loss-mitigation standard. Rather, it is simply a filter to determine whether an unsuccessful meeting will result in a non-judicial foreclosure or a judicial foreclosure. In fact, the statute specifically provides that it does not prohibit a loan modification on other terms, or any other loss mitigation strategy agreed to by the parties. MCLA 600.3205c(4).

16 MCLA 600.3205c(2) – (3).

17 MCLA 600.3205a(6).

18 MCLA 600.3205c(7).

JUDICIAL DECISIONS AFFECTING REAL PROPERTY

by C. Kim Shierk and Ravi K. Nigam

The Section is active in the judicial process in a variety of ways, such as preparing amicus curiae briefs and monitoring cases of interest to real estate lawyers. This Article provides a quarterly report designed to inform Section members about the Section's efforts to maintain the integrity of the law and to advise Section members about published decisions that may impact real estate practice.

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. The original drafts to these case summaries were prepared for and published in the *e-Journal*. The *e-Journal* is a daily publication that provides case summaries organized by areas of practice, legal news and updates, public policy information, a calendar of events, and classified and fields of practice listings. The *e-Journal* is an invaluable tool to keeping current on Michigan law. Subscriptions to the *e-Journal* are free. You can subscribe by visiting the State Bar of Michigan website at www.michbar.org, and selecting the publications and advertising tab.

Greendome Petroleum, L.L.C. v. Fast Track Ventures, L.L.C.
Michigan Court of Appeals (Unpublished)
Lower Court Docket No(s) LC 07-713813-CH

Issues: Interpretation of a restrictive covenant; *Johnson Family Ltd. P'ship v. White Pine Wireless, LLC*; *Department of Natural Res. v. Carmody-Lahti Real Estate, Inc.*; *Webb v. Smith (After Remand)*; Applicability of the "rule of practical construction"; *North W. MI Constr., Inc. v. Stroud*; Injunctive relief; *Taylor v. Currie*

Judge(s): Per Curiam - O'Connell, Bandstra, and Donofrio

Concluding the trial court erred in interpreting the second restrictive covenant to allow the plaintiffs to obtain products from another distributor as long as the products were also distributed by defendant-Atlas, the court vacated the trial court's order permanently enjoining Atlas and defendant-Fast Track Ventures from interfering with plaintiffs' obtaining products from other distributors. Atlas is an authorized Marathon fuels distributor and a manager of Fast Track. Fast Track entered into a lease agreement with an option to purchase the property at issue. The option was later assigned to plaintiff-Greendome, which exercised the option. An exhibit attached to the warranty deed contained two relevant restrictive covenants. The first restrictive covenant prohibited the use of the property to sell, etc. non-Marathon motor fuels for 20 years. The second restrictive covenant stated the grantee agreed for 10 years from the date of the deed to not use the premises for the sale, etc. of petroleum fuels except the trademarked products distributed by Atlas or one of its subsidiaries. According to plaintiffs' attorney, Atlas refused to sell plaintiffs gas unless they signed a seven-year contract. They began selling non-Marathon fuel products and filed this 20-count suit against Atlas, Fast Track, and Marathon, seeking to enjoin the enforcement of the second restrictive covenant. Plaintiffs asserted they needed the restriction removed to be able to purchase Marathon products from another distributor. On the basis of the trial court's interpretation of the second restrictive covenant, it enjoined Atlas from interfering with plaintiffs' obtaining Marathon fuel, a product distributed by Atlas, from other distributors and stated Atlas did not have exclusive delivery rights to plaintiffs. The court concluded the trial court's interpretation of the second covenant rendered it meaningless. Pursuant to the plain language of the first covenant, plaintiffs were obligated

to sell only Marathon's trademarked products for 20 years. Pursuant to the plain language of the second covenant, they were obligated to use Atlas or one of its subsidiaries as the sole distributor of the Marathon products referenced in the first covenant for 10 years. "In other words, the second restrictive covenant sets forth the source of distribution of the Marathon products clearly described in the first covenant." Since the language of the restrictive covenants was unambiguous, they had to be enforced as written. Vacated and remanded.

Spruce Ridge Dev. v. Big Rapids Zoning Bd.
Michigan Court of Appeals (Unpublished)
Lower Court Docket No(s) LC 06-017468-AA

Issues: Whether the respondent-ZBA's decision denying the petitioners' requested variances was supported by competent, material, and substantial evidence on the record; MCL 125.3606(1)(c) and (d); *C & W Homes, Inc. v. Livonia Zoning Bd. of Appeals*; *Janssen v. Holland Carter Twp. Zoning Bd. of Appeals*; *Puritan-Greenfield Improvement Ass'n*; Whether the ZBA applied the applicable use and non-use variance standards in rendering its decision

Judge(s): Per Curiam - Zahra, Whitbeck, and M.J. Kelly

Since the record supported the conclusion the respondent-ZBA's decision represented the reasonable exercise of discretion granted by law to the ZBA, the decision was supported by competent, material, and substantial evidence on the record, and in affirming the ZBA's decision the trial court applied correct legal principles and did not misapprehend or grossly misapply the substantial evidence test, the court affirmed the denial of the petitioners' variance requests. The property at issue was zoned as R-1 residential district and consisted of 35 acres of unimproved land. Petitioners argued at the ZBA hearings on the northwest part of the property they wanted to mix duplexes with single-family structures. They did not specify how many structures would be single-family and how many would be duplexes and did not indicate how the mixed structure area would be designed. They also asserted an assisted living center might be built in the southwest corner of the property, which would be adjacent to apartment complexes to the south. They also indicated the east half of the property would contain single-family structures with no variances, and eight acres of the property on the east half would not be developed. In order to facilitate this planned development, petitioners requested two non-use variances to allow the lot size for the single-family homes to be reduced from 11,250 square feet to 7,500 square feet and the maximum lot coverage to be increased to 30 percent from 25 percent. The ZBA denied the requested variances. Petitioners' primary claim was no market existed in a price range where they could make a profit on the sale of lots developed according to the R-1 zoning because of the high infrastructure costs, but ordinance § 13.5:1 provides the "possibility of increased financial return shall not of itself be deemed sufficient to warrant a variance." Petitioners did not present, *inter alia*, a drawing of the purported project, or specific figures to show how the infrastructure costs would be reduced or how those decreased costs would impact a reasonable rate of return. Also, the ZBA noted the estimated infrastructure costs were based on all of the property being developed and did not exclude the eight acres, which were not going to be developed. The ZBA found petitioners' inability to get a greater rate of return was primarily due to them paying too much for the property. In addition to these concerns, the ZBA made several findings, applied them to the standards for variances, and concluded the request should not be granted.

2000 Baum Family Trust v. Babel
Michigan Court of Appeals (Published)
___ Mich App____; ___ NW2d ___ (2009)
2009 Mich. App. LEXIS 1411
2009 WL 1794787, Mich.App.,
June 23, 2009 (NO. 284547)

Issues: Whether the plaintiffs have riparian rights where their lots abut a roadway running contiguous to the lakeshore created by a dedication in an approved plat; Whether the dedication of the road running parallel and immediately adjacent to the lake to the public conveyed an absolute fee interest in the land on which the road was maintained; *Thies v. Howland*; *Klein v. Kik*; *Brown v. Brown*; *Dobie v. Morrison*; *Martin v. Beldean*; Common law dedications; *People ex rel Dir. of Dep't of Conservation v. La Duc*; *Bain v. Fry*; *De Witt v. Roscommon County Rd. Comm'n*; Statutory dedications; *Beulah Hoagland Appleton Qualified Personal Residence Trust v. Emmet County Rd. Comm'n*; The Land Division Act (MCL 560.101 *et seq.*); 1887 Plat Act; *Oneida Twp. v. City of Grand Ledge*; *Tyson Foods, Inc. v. Department of Treasury*; *City of Warren v. Detroit*; *Keifer v. Markley*; *Alvan Motor Freight, Inc. v. Department of Treasury*; *Wayne County v. Miller*; Whether the public holds fee title to the dedicated alleys and streets in the plat pursuant to a statutory dedication; *Tomecek v. Bavas*; *City of Huntington Woods v. Detroit*; *Jacobs v. Lyon Twp.*; "Use" defined; *People v. Zujko*; *Apsey v. Memorial Hosp.*

Judge(s): Per Curiam - Fort Hood, Cavanagh, and K.F. Kelly

The court held the plaintiffs had no riparian rights based on the dedication because the language of the statutory dedication indicated an intent to grant to the public an unlimited use in fee of the alleys and roadways. Although the trial court's failure to specifically analyze the language of the dedication was error, it was harmless error, and the court affirmed the trial court's denial of the plaintiffs' motion for partial summary disposition. Plaintiffs are owners of lots fronting Lake Charlevoix, but separated from the water by Beach Drive, a road dedicated in the approved plat to the use of the public running parallel and immediately adjacent to the lake. Plaintiffs claimed the dedication merely transferred a limited fee for the sole purpose of maintaining the road, and had no effect on their riparian rights because the dedicatory language limited the public's interest in the alleys and streets to maintaining those roadways. The court disagreed and held a statutory dedication under the 1887 Plat Act vested a fee title interest in the public limited to the uses and purposes delineated by the plattors. After reviewing the language of the statutory dedication, the court concluded the plattors did not intend to vest any riparian rights in plaintiffs' properties. This inquiry required a two-tier analysis - first, whether a valid statutory dedication was created under the 1887 Plat Act and, second, if so, what type of fee interest was vested in the public. The latter inquiry required an interpretation of the plattors' intent. Conversely, had the dedication been one at common law, it would merely have created an easement in Beach Drive, and plaintiffs would retain riparian rights to Lake Charlevoix. The court held the trial court's analysis concluded prematurely, holding the plat created a statutory dedication creating a fee interest cutting off plaintiffs' riparian rights, which will not always be the case. Affirmed.

Razzook's Prop., LLC v. Yono
Michigan Court of Appeals (Unpublished)
Lower Court Docket No(s) LC 03-077470-CZ

Issues: Whether the trial court properly denied the defendant's motion for specific performance of the contracts between the parties; Whether rescission was a fair remedy in the absence of a breach; *Omnicom v. Giannetti Inv. Co.*; *McFerren v. B & B Inv. Group*

Judge(s): Per Curiam - Murphy, Sawyer, and Murray

Since the Supreme Court held the defendant was not obligated to insure the premises at the time the fire occurred and the trial court's injunction prevented operation of the grocery store on the premises depriving him of all beneficial use of the property, any lease agreement was terminated, and the court held rescission was not a fair remedy in the absence of a breach. The case involved three separate transactions between the parties - an agreement to purchase real estate, a lease, and a business purchase agreement. In June 2003, the parties entered into an agreement for the sale of plaintiffs' business, inventory, fixtures, supplies (the business purchase agreement) for a purchase price of $70,001. Under the agreement, defendant was to tender a $10,000 earnest money deposit, and pay $60,000 in 36 consecutive monthly payments at 5 percent. The parties also entered into an agreement in which plaintiffs would convey property known as 1401 Dayton, together will all improvements, appurtenances, and defendant would tender a purchase price of $195,000. The parties also entered into a lease agreement where plaintiffs leased the premises at 1401 Dayton for a term of 10 years, and defendant was required to pay $3,000 per month, real estate taxes, assessments, replacement value insurance, and all maintenance expenses. Plaintiffs claimed defendant tendered a check for $10,000, but the check was returned as "uncollected funds." Plaintiffs also admitted the receipt of about $70,000 from defendant for inventory. They sought to evict defendant from the store for failing to pay debts to the state, including unemployment, income, and worker's compensation taxes, and for operating under plaintiffs' lottery and liquor licenses but failing to pay the applicable fees. Defendant's delinquency would cause plaintiffs to lose the licenses, and they would be irreparably harmed if the trial court did not grant them a preliminary injunction. The trial court granted the temporary injunction, ordered defendant to cease and desist operating the store, vacate the building, and issued several other orders. He filed a claim of appeal to the court. A fire damaged the store and defendant withdrew the appeal. Plaintiffs moved to rescind the agreements on the basis of impossibility due to the fire and defendant's material breach by not insuring the property. The Supreme Court held defendant was not obligated to insure the premises at the time of the fire, and when the trial court granted the injunction, defendant was "deprived of all beneficial use of the property . . . . When defendant vacated the premises, any lease agreement then operating was terminated." Plaintiffs argued the court's equitable rescission of the business purchase agreement and the agreement to purchase real estate should remain operative even if defendant did not breach the lease agreement. The court held this argument was without merit where it explained

its rationale for rescinding the "series of contracts" in a prior opinion. The court held its decision to rescind additional agreements was dictated by the defendant's alleged material breach of the lease agreement. The fact the agreements remained interrelated was an insufficient basis for rescission in the absence of a material breach of the lease agreement. Reversed and remanded for further proceedings.

Slater v. F.H. Martin Constr. Co.
Michigan Court of Appeals
(Unpublished) Lower Court Docket
No(s) LC 2006-079246-NO

Issues: "Common work area" (CWA) doctrine claim; *Funk v. General Motors Corp*; *Ormsby v. Capital Welding, Inc.* (four requirements to establish general contractor liability); *Latham v. Barton Malow Co.*; Number of employees present in the "common work area"; *Hughes v. PMG Bldg., Inc.*; *Groncki v. Detroit Edison Co.*

Judge(s): Per Curiam - Borrello, Meter, and Stephens

Since the record established the plaintiff could satisfy each of the four-prong "common work area" doctrine requirements, the trial court erred in granting the defendant general contractor-F.H. Martin Construction's motion for summary disposition. The first prong of the CWA doctrine requires a plaintiff to show the defendant, as the general contractor, failed to take reasonable steps within its supervisory and coordinating authority. The trial court noted defendant's agent, C, told plaintiff to remove the chain securing a 32-foot ladder to the building by going to the roof and cutting it from there. The trial court concluded this recommendation was a reasonable step, it was plaintiff's disregard of the recommendation which caused his fall and his "feeling" and "honest beliefs" about the method were not sufficient to create a question of fact as to the first prong. Plaintiff testified in his deposition, C said "if it were him that was responsible for cutting the chain, he would do it from the roof." Thus, the issue was whether it was reasonable for C, when faced with plaintiff's inquiries about the ladder, to instruct him to remove the ladder and to *suggest* doing so by first accessing the roof. The court held there was a genuine issue of material fact as to whether C's suggestion qualified as a reasonable step. The record showed there was a slight pitch to the roof, there had been a recent snowstorm, and plaintiff was concerned about traction problems on the roof. As to the second prong-the trial court found there was no genuine issue of material fact because the ladder was not a readily observable and avoidable danger. The court held this was erroneous. The ladder was chained to the building by a subcontractor and left in the way of plaintiff and his crew. Plaintiff did not have a key to unlock the chain, and C instructed him to remove the ladder by cutting the chain. In order to do so, defendant knew plaintiff would have to access the roof or climb the ladder. Plaintiff had not been trained to execute the removal methods and did not have fall protection. The court held there was a genuine issue of material fact as to this prong. Next, the trial court held there was no genuine issue of material fact as to the third prong of the CWA doctrine, which requires a showing the readily observable danger created a high degree of risk to a significant number of workers. The trial court held plaintiff could not show anyone else was endangered by the decision to climb the ladder. The court held the dangerous condition at the site created a high degree of risk for six people, which "is a significant number of workers." The court held the fact six workers faced potential injury was not insignificant. Finally, the trial court erroneously held he failed to prove the accident when the 215 pound plaintiff fell off the 32-foot ladder occurred in a CWA. Another workman testified he and other workers from a subcontractor were planning to work in the area of the accident on the day the accident occurred. It was undisputed five other employees were in the immediate area at the time the accident occurred and two separate contractors would have eventually worked in the area. The court held the area qualified as a CWA. Reversed and remanded.

Langford v. Jenkins Constr., Inc.
Michigan Court of Appeals (Unpublished)
Lower Court Docket No(s) LC 06-604007-NO

Issues: Defendant-ABC's claim the trial court erred in granting summary disposition for defendant-Industrial by misinterpreting the indemnity provision in their subcontract; *DaimlerChrysler Corp. v. G-Tech Prof'l Staffing, Inc.*; *Triple E. Produce Corp. v. Mastronardi Produce, Ltd.*; Industrial's claim its subcontract with ABC and its indemnification provision should be rescinded or voided based on fraud in the inducement or material misrepresentations as to ABC's failure to disclose issues about the quality of the topsoil before the sod installation; *Rooyakker & Sitz, PLLC v. Plante & Moran*; "Silent" fraud; *M & D, Inc. v. McConkey*

Judge(s): Per Curiam - Fitzgerald and Talbot; Concurrence - Shapiro

In this contract dispute involving the applicability of an indemnity provision, the court affirmed the trial court's denial of defendant-Industrial's claims of fraud, vacated the trial court's ruling granting summary disposition for Industrial, and remanded to the trial court for further proceedings consistent with its opinion. The litigation arose from an injury incurred by the minor plaintiff while performing as a cheerleader for a high school at a game on the school's football field. She was injured when her hand slipped into a depression in the field resulting in her falling and injuring her arm. Plaintiff sued the school and related entities in addition to the contractors and subcontractors involved in construction of the school and its football field, asserting defects in its construction, design, and inspection. Defendant-Jenkins was the general contractor and construction manager for the construction of the high school project. Jenkins subcontracted construction of the football field to defendant-ABC, which was responsible for laying out the field, placement of topsoil, and installation of sod. ABC subcontracted the sod installation to defendant-Industrial, and it subcontracted the installation of sod to defendant-Quick Green, which subcontracted the job to defendant-B & L. Allegedly defendant-Beckett tested the topsoil used by ABC and decided it was not up to specification. ABC argued there were no soil specifications and contended the dispute with Jenkins as to the quality and placement of the topsoil was resolved before it contracted with Industrial for the sod installation. Industrial challenged whether Jenkins accepted the soil provided by ABC in its fraud claim for failure to disclose. There was a subcontract between Industrial and Quick Green for sod installation, which contained an express indemnification provision. The court concluded there were deficiencies in the content of the lower court record and it could not definitively ascertain whether Quick Green actually performed any work on the sod installation or merely subcontracted the job to B & L. Thus, the court held, *inter alia*, the trial court's grant of summary disposition for Industrial was premature until a determination was definitively made as to Quick Green's acts in conformance with its subcontract with Industrial giving rise to plaintiff's claims and the implementation of the indemnification provision, which required remand to the trial court.

Colucci v. Evangelista
Michigan Court of Appeals (Unpublished)
Lower Court Docket No(s) LC 07-713466-CH

Issues: Injunctive relief regarding an express utility easement; *Higgins Lake Prop. Owners Ass'n v. Gerrish Twp.*; *Maldonado v. Ford Motor Co.*; *Woodard v. Custer*; *Kernen v. Homestead Dev. Co.*; *Thermatool Corp. v. Borzym*; *Department of Natural Res. v. Carmody-Lahti Real Estate, Inc.*; The "equities of the case"; Prescriptive parking easement; *Fast Air, Inc. v. Knight*; *Sutton v. Oak Park*; *Plymouth Canton Cmty. Crier, Inc. v. Prose*; *Maiden v. Rozwood*

Judge(s): Curiam - Borrello, Meter, and Stephens

The court held the trial court's balancing of the equities (the benefit to plaintiff of an injunction against the inconvenience to defendants) in this case was reasonable and affirmed its order denying plaintiff's motion for summary disposition and request for an injunction prohibiting the defendants from interfering with an express utility easement burdening their property and instead ordering defendants to pay the cost of relocating plaintiff's utility services from their property to her property. The properties at issue were once owned by a common owner, who located the utilities for both properties on what is now defendants' property and serviced what is now plaintiff's property through utility service lines and meters located on defendants' property. Defendants intended to demolish the building housing at least one of the utility meters serving plaintiff's property and requested she remove her water meter from the property within 14 days. Plaintiff obtained a TRO and filed a complaint for a permanent injunction. On appeal, she argued the trial court erred in refusing to grant a permanent injunction to protect her utility easement. The court concluded the nature of the interest protected, plaintiff's utility easement, was not an interest that can only be protected by the issuance of an injunction. There was "a quantifiable measure of damages based on the cost of relocating the utilities to plaintiff's property." Thus, there was an adequate remedy at law and no irreparable harm to plaintiff. Her need for utility services was adequately protected by the trial court's order requiring defendants to relocate plaintiff's utility lines and meters onto her property at their expense. According to the testimony of a building and planning inspector for the city, plaintiff's utility easement was an unusual arrangement. Arguably, the value of plaintiff's property would be increased by relocating the utilities from defendants' property onto her property, and she would not bear the economic burden of relocating the utilities. "In short, this is simply not the sort of property interest that could only be preserved by the granting of an injunction." Further, the trial court also properly denied plaintiff's request for injunctive relief because of the hardship to defendants if an injunction were issued. They sought to demolish the building housing the utility lines and meters servicing plaintiff's property because

the buildings on their property were dilapidated and abandoned, and they wanted to improve and redevelop the property. The trial court's ruling, which essentially terminated the easement, "was proper in light of the equities of the case." The granting of an injunction would have prevented defendants from improving and redeveloping their commercial property during a difficult economic time. The hardship to defendants if the trial court granted plaintiff an injunction would have been much greater than the hardship to plaintiff caused by denial of the injunction. Affirmed.

Daley v. Charter Twp. of Chesterfield
Michigan Court of Appeals (Unpublished)
Lower Court Docket No. LC 2007-002847-AW

Issues: Zoning dispute involving township ordinance § 76-331(a)(2) prohibiting attached or detached garages from housing more than three cars and exceeding 920 square feet; Whether the defendant-township properly denied plaintiff's request for a variance to build a four-car garage; The Construction Code (MCL 125.1511(1)); Whether plaintiff's revised plans complied with § 76-331(a)(2)(a); Whether an appeal by plaintiff would be futile; *Citizens for Common Sense in Gov't v. Attorney Gen.*; *Papas v. Gaming Control Bd.*; Exhaustion of administrative remedies; Whether plaintiff had to appeal the township's denial of the requested variance to the ZBA before bringing his 42 USC § 1983 claim; *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*; *Electro-Tech v. Campbell Co.*

Judge(s): Per Curiam - Murphy, Sawyer, and Murray

Concluding the proper avenue for plaintiff-Daley's appeal was to the defendant-township's ZBA, not the construction board of appeals and he failed to exhaust all available administrative remedies by appealing to the township's ZBA, the court held the trial court properly granted the defendants' motion for summary disposition. Plaintiff sought to build a 910 square-foot garage with two 16-foot-long garage doors to house 4 cars. In 2004, he applied to the ZBA for a variance, which was denied. He failed to appeal the decision and filed a complaint in the trial court alleging the ordinance provision was unconstitutionally vague. The trial court dismissed the complaint and the court affirmed. In 2007, plaintiff submitted a revised plan with space for 3 cars and a 100 ft. craft room and calling for 2 16-foot doors. The township denied the plans as not complying with the ordinance. Plaintiff argued the township was obligated to approve the plans because he complied with the ordinance, and he requested an appeal to the township's construction board of appeals. Defendants argued the decision was not a construction code dispute, but a zoning ordinance dispute. Plaintiff then filed this case seeking approval of his revised plans without appealing to the township ZBA or applying for a variance. Thus, the ZBA had not already made a final decision on the issue against plaintiff. The court noted the 2007 plans were revised to include the craft room, which could rebut the presumption decided in the first ZBA decision "that two 16-foot garage doors means a four-car garage." The court held the crux of the 2004 and 2007 plans was not exactly the same pursuant to MCL 125.3603(1), and an appeal as to the 2007 revised plans must be taken to the ZBA. Although plaintiff contended an appeal to the ZBA would be futile, the court held the futility exception to the exhaustion of administrative remedies does not apply when a plaintiff maintains the zoning board is biased against him when bias is impossible to determine because the plaintiff has failed to obtain a final decision from the board. Affirmed.

Tuses v. Hurt
Michigan Court of Appeals (Unpublished)
Lower Court Docket No(s) LC 06-000910-CH

Issues: Quiet title action; *Fowler v. Doan*; *Deutsche Bank Trust Co. Ams. v. Spot Realty, Inc.*; *Stokes v. Millen Roofing Co.*; *Advanta Nat'l Bank v. McClarty*; *Ameriquest Mortgage Co. v. Alton*; MCL 600.5803; Standing; *Department of Consumer & Indus. Servs. v. Shah*; Whether there was a satisfaction of judgment; *Becker v. Halliday*; *Eltel Assocs., LLC v. City of Pontiac*; Fraud, accident, or mistake; MCL 600.3201 *et seq.*; MCL 600.3240; MCL 600.3240(8); *Heimerdinger v. Heimerdinger*; *Senters v. Ottawa Sav. Bank, FSB*; Unjust enrichment; *Morris Pumps v. Centerline Piping, Inc.*; *Sweet Air Inv., Inc. v. Kenney*

Judge(s): Per Curiam - Zahra, Whitbeck, and M.J. Kelly

The trial court erred in quieting title in favor of plaintiffs-the Tuses where the trial court's decision to quiet title in the Tuses' names, despite the determination defendant-Sterling Mortgage & Investment Company (Sterling) was lawfully entitled to foreclose on the mortgage, constituted an impermissible attempt to act in equity to avoid the application of a statute. On October 10, 1990, WH and Sterling entered into a 15-year mortgage agreement on the property, in the amount of $76,500. The mortgage was recorded on October 11, 1990. A payment of almost $58,000

was made against the principal balance of the loan within a few weeks. It was followed by two additional payments totaling approximately $9,500, leaving a balance of approximately $9,000. As a result of the large payments made, Sterling lowered the monthly payment. However, the last payment Sterling received was in May 1991. In February 2000, WH executed a quitclaim deed conveying the property to himself and his wife, defendant-Hurt. She then became the sole owner of the property when WH passed away. On June 28, 2000, the Tuses purchased the property from Hurt, and a closing was held. In 2005, after discovering its misplaced file related to the mortgage, Sterling instituted foreclosure proceedings by publishing a notice for sale. A foreclosure sale was held and Sterling acquired a sheriff's deed. The trial court concluded Sterling was legally entitled to start a foreclosure proceeding when it did based on its mortgage. The Tuses did not establish this finding was clear error. The foreclosure of a mortgage operates to extinguish subordinate liens and interests. The Tuses' predecessor in title executed a promissory note and granted the mortgage in favor of Sterling in October 1990. Sterling duly recorded the mortgage. Sterling's mortgage remained a matter of public record in June 2000, when the Tuses purchased the property. There was no dispute the mortgage was not satisfied by the proceeds from the sale, or at any other time. The Tuses' interest in the property was subordinate to Sterling's interest. The lawful foreclosure extinguished the Tuses' interest, notwithstanding available redemption remedies. The Tuses failed to redeem within the statutory period. They contended the trial court reached the correct result because Sterling "sat on its hands for almost 15 years" and because Sterling's representative testified the mortgage was misfiled or misplaced. However, Sterling was entitled to foreclose on the mortgage up to 15 years from the date of the last payment. Thus, the admitted delay did not affect its right to foreclose on the property. Reversed in part, affirmed in part, and remanded.

Kenefick v. City of Battle Creek
Michigan Court of Appeals
___ Mich App____; ___ NW2d ___ (2009)
2009 Mich. App. LEXIS 1476
2009 WL 1397179, Mich.App.,
May 19, 2009 (NO. 282319)

Issues: Whether the ordinance requiring "owners of abandoned residential structures" to pay a monitoring fee was unconstitutionally vague on its face; *Houdek v. Centerville Twp.*; *Straus v. Governor*; *Proctor v. White Lake Twp. Police Dep't*; "Fair notice" of the regulated conduct; *STC, Inc. v. Department of Treasury*; *People v. Noble*; Whether the terms "vacant," "abandoned," and "potential hazard or danger to persons" were vague; Whether the defendant-city had unlimited discretion in applying the ordinance; *English v. Blue Cross Blue Shield of MI*; Effect of the use of the word "shall"; *AFSCME v. Detroit*; Whether the ordinance violated the Equal Protection Clause because it singled out residential structure owners from owners of all other types of structures; *Crego v. Coleman*; Application of the "rational-basis" test; *Muskegon Area Rental Ass'n v. Muskegon*; *FCC v. Beach Communications, Inc.*; *Lehnhausen v. Lake Shore Auto Parts Co.*; Protecting and promoting public health, safety, and general welfare as legitimate governmental interests; *Norman Corp. v. City of E. Tawas*; Whether the defendant had to articulate a purpose or rationale to support the classification; *Heller v. Doe*

Judge(s): Per Curiam - K.F. Kelly, Cavanagh, and Beckering

[This opinion was previously released as an unpublished opinion on 5/22/09.] The challenged ordinance requiring "owners of abandoned residential structures" to pay a monitoring fee was not unconstitutionally vague on its face because a person of ordinary intelligence would be placed on fair notice of what it required or proscribed and the defendant-city did not have unlimited discretion in applying the ordinance. The ordinance defined "abandoned structure" as a structure which has become "vacant or abandoned" for a given time and meets 1 of 12 enumerated conditions. One of those conditions stated any vacant or abandoned structure posing a "potential hazard or danger to persons" constitutes an "abandoned" structure for purposes of the ordinance. Plaintiff argued the terms "vacant," "abandoned," and "potential hazard or danger to persons" were unduly vague. Reviewing the common dictionary definitions of the words used in the ordinance, the court concluded the ordinance was not unduly vague. The definitions of "abandoned" and "vacant" indicated a residential structure left deserted, empty, or unoccupied was subject to the ordinance provisions. The phrase "potential hazard or danger to persons" required abandoned or vacant structures posing a risk of harm, injury, or peril or which are a menace to be subject to the monitoring fees. Further, the defendant did not have discretion to apply the ordinance, which stated any owner of an "abandoned residential structure shall register such properties with the City and pay a monthly administration fee." The word "shall" indicates mandatory conduct. Also, there

was no evidence defendant acted in an arbitrary manner in applying the ordinance. Plaintiff's claim the ordinance violated the Equal Protection Clause because it singled out residential structure owners from owners of all other types of structures also failed. The court concluded the "rational-basis" test applied, the general reduction of blight is undisputedly a legitimate governmental purpose, and the classification was rationally related to this purpose since there was a "reasonably conceivable state of facts that could provide a rational basis for the classification." The trial court properly dismissed plaintiff's complaint for declaratory relief.

Ludlow v. Hackett
Michigan Court of Appeals (Unpublished)
Lower Court Docket No(s) LC 06-009356-CH

Issues: Claims related to the scope of a title insurance policy; Whether the trial court properly granted third-party defendants-Petoskey Title and Lawyers Title summary disposition holding the Lawyers Title policy did not extend coverage to the public streets appearing in a recorded subdivision plat; *Citizens Ins. Co. v. Pro-Seal Serv. Group, Inc.*; *Heniser v. Frankenmuth Mut. Ins. Co.*; Unpreserved issue; *In re Nestorovski Estate*; Right result for different reason; *Coates v. Bastian Bros., Inc.*; Whether Michigan recognizes tort claims against title insurers; *Mickam v. Joseph Louis Palace Trust* (ED MI)

Judge(s): Per Curiam - Whitbeck, Davis, and Gleicher

Concluding the trial court reached the correct result in granting third-party defendants-Petoskey Title and Lawyers Title summary disposition of the third-party complaint but for a different reason based on the language of the Lawyers Title policy which the court held did not encompass "any right, title, interest, estate or easement in abutting streets, roads, avenues, alleys, lanes [or] ways," the court affirmed. The underlying property dispute related to Block 16 in a plat in Emmet County. The block consists of eight lots bordered by various streets. Four lots border on a lake and an alley separates four northerly lots from the four southerly lots. The owner of the plat certified in 1927 the streets and alleys were dedicated to the use of the public. Defendants-Hackett and James purchased Block 16 in 2003, which was conveyed by warranty deed mentioning conveying one half of two streets and an alley. Hackett and James alleged they obtained title insurance from Petoskey Title and Lawyers Title. In 2004, they conveyed Block 16 by warranty deed to plaintiff-Ludlow. He filed suit alleging Hackett and James misrepresented the status of their property ownership and breached the promises in the warranty deed. He claimed the county had rejected a proposal for a development he wanted to place on Block 16, because there were questions as to the ownership condition of the "vacated" streets mentioned in the deed. Hackett and James filed a third-party suit against Petoskey and Lawyers Title alleging breach of contract in refusing to pay the policy's coverage limit or defend against Ludlow's case. The title companies moved for summary disposition on the third-party complaint, which the trial court granted and dismissed. The court noted it need not analyze the precise nature of Hackett's and James's ownership of the streets and alleys adjacent to Block 16 because it found dispositive the language of the Lawyers Title policy. The court concluded the clear and unambiguous terms of the policy did not afford coverage to the streets and alleys abutting Block 16 where review of Schedule A and the definition of "land" indicated the policy did not cover any interest in abutting streets, roads, *etc*. Affirmed.

Held v. Arthur W. Jewett Trust
Michigan Court of Appeals (Unpublished)
Lower Court Docket No(s) LC 08-000553-CH

Issues: Quiet title action; Adverse possession; MCL 600.5801(4); *West MI Dock & Mkt. Corp. v. Lakeland Invs.*; "Tacking"; *Dubois v. Karazin*; "Privity"; Effect of an unstated intent to include the disputed property in the conveyance; *Siegel v. Renkiewicz Estate*; Reliance on alleged adverse possession by the plaintiff's grandparents; Effect of the defendants' conveyance of an easement to plaintiff's grandparents; *Kipka v. Fountain*; Acquiescence for the statutory period; *Sackett v. Atyeo*; *Walters v. Snyder*; *Jackson v. Deemar*; *Walters v. Bank of Marquette*

Judge(s): Per Curiam - O'Connell, Bandstra, and Donofrio

The trial court properly dismissed the plaintiff's action to quiet title on the basis of adverse possession and acquiescence for the statutory period because he failed to establish an adverse possession claim and where there was no uncertainty on the parties' part as to the true boundary, the boundary line could not be established by acquiescence. Plaintiff owned land adjacent to properties owned by the defendants to the east, north, and west. Defendants previously owned his property, which they conveyed to his grandparents via warranty deeds in 1946 and 1952. The legal description of plaintiff's property excluded land to the east and north he claimed was

his by adverse possession or acquiescence. Defendants were the record owners of the property at all relevant times. However, they gave plaintiff's grandparents an easement over the entire eastern part of the disputed property in the 1946 deed. The court concluded plaintiff failed to establish any question of fact about privity to permit him to "tack" on his predecessors' prior possession. He conceded the disputed property was not included in his deed, and there was no evidence the property or its dimensions were mentioned at the time of conveyance. There was also no evidence parol statements about the disputed property were made by any grantor in the chain of title. Thus, his proofs did not create a question of fact about the existence of a parol transfer. While he claimed the grantors intended to convey the disputed land as part of the property to which they held title, and no oral or written statements were necessary due to this knowledge, "an unstated intent to include the disputed property is insufficient." Further, defendants' conveyance of an easement to his grandparents amounted to permissive use of property, which cannot result in an adverse possession. Nothing in the record supported plaintiff's predecessors' use of the disputed property was exclusive. There was evidence defendants continued to use it throughout the years. The court also rejected plaintiff's claim it was unnecessary he or his predecessors in interest believed the true boundary line was other than where his deed indicated and acquiescence to his proposed boundary line was established. There was no Michigan case precedent applying the doctrine of acquiescence absent a boundary dispute or an issue about the true location of a property line. Affirmed.

Department of Transp. v. Wilson
Michigan Court of Appeals (Unpublished)
Lower Court Docket No(s) LC 05-036519-CC

Issues: Condemnation; Trial court's award of $37,564.87 in attorney fees to defendant; Whether plaintiff's payment of the attorney fee award resulted in the issue being moot; *Horowitz v. Rott*; *Grand Valley Health Ctr. v. Amerisure Ins. Co.*; *City of Jackson v. Thompson-McCully Co. LLC*; *B P 7 v. Bureau of State Lottery*; *Becker v. Halliday*; Whether the attorney fee order was paid by mistake; Applicability of *Wilson v. Newman* and *Pingree v. Mutual Gas Co.*

Judge(s): Per Curiam - Borrello, Meter, and Stephens

Since the attorney fee award to the defendants-Wilson in this condemnation case was satisfied by the plaintiff, the court dismissed the appeal as moot. Prior to filing the claim of appeal, the plaintiff paid the attorney fees, and argued on appeal the payment was a "bureaucratic mistake" and it was entitled to relief based on the trial court's erroneous basis for the award. The general rule is "a party who accepts satisfaction in whole or in part waives the right to maintain an appeal or seek review of the judgment for error, as long as the appeal or review might result in putting at issue the right to relief already received" and the reasoning "applies with equal force to the satisfaction of the judgment as it does to acceptance of the satisfaction of judgment." The court held under the general rule the plaintiff's appeal was moot. Plaintiff completely satisfied the order entered in defendants' favor. Once the order was entered, plaintiff could either seek review of the order in the court or satisfy the judgment. It could not do both. When the order was satisfied the case was at an end.

Americor Mgmt. Servs, L.L.C. v. Sammond
Michigan Court of Appeals (Unpublished)
Lower Court Docket No(s) LC 06-003449-CH

Issues: Applicability of protective covenants; Summary disposition under MCR 2.116(C)(8) and (10); The doctrine of "reciprocal negative easements"; *Sanborn v. McLean*; *Cook v. Bandeen*; Whether the properties had a comm+on grantor; Actual or constructive notice of the restrictions; Whether the trial court was required to limit its consideration to the four corners of plaintiff-Americor's deed; Whether the trial court relied on inadmissible evidence in granting summary disposition; *Maiden v. Rozwood*; MCR 2.116(G)(6); Whether Americor must become a dues paying member of the intervening defendant-Maggie Lakes Owners Association; *City of Grosse Pointe Park v. Michigan Mun. Liab. & Prop. Pool*; Distinguishing between patent and latent ambiguities; Summary disposition under MCR 2.116(C)(9); *Slater v. Ann Arbor Pub. Sch. Bd. of Educ.*; Whether Americor was liable for the association's attorney fees

Judge(s): Per Curiam - Whitbeck, Davis, and Gleicher

The trial court correctly determined there was no question of material fact whether the properties had a common grantor and ruled the protective covenants applied to the property at issue under the doctrine of "reciprocal negative easements." The case involved the applicability of protective covenants to the Kalla Walla Lodge property, which plaintiff-Americor acquired in 2004, and whether Americor had to become a dues

paying member of intervening defendant-Maggie Lakes Owners Association and comply with its rules. Plaintiff-Smith (Americor's president and managing member) argued the doctrine of reciprocal negative easements did not apply because the properties at issue did not have a common grantor. Americor acquired the Kalla Walla property from the John S. Sammond Revocable Trust of 1999, while the defendant-Secluded Land Company acquired its property from the Sammond Family Limited Partnership. The court concluded the evidence established Sammond exercised control over the limited partnership and two trusts, and he transferred various properties from one entity to another at will. The evidence also showed he co-authored the protective covenants and incorporated them into each of three purchase agreements with Secluded governing the residential development of most the properties owned by the Sammond entities. The scheme of restrictions arose from a common owner, despite the fact Secluded first recorded documentation containing the protective covenants. The protective covenants ran with the land purchased and developed by Secluded, "and the Secluded parcels and the Kalla Walla property both come within the same geographical area occupied by Sammond's general plan of development." Smith's affidavit reflected his awareness of the covenants, which were attached to the Kalla Walla property purchase offer Americor made to the Sammond 1999 trust. The court held the trial court correctly ruled as a matter of law the protective covenants applied to the Kalla Walla property and granted the association summary disposition on this issue. However, the court reversed the trial court's order granting Americor summary disposition on the association's claim Americor had to join the association as a dues paying member and comply with its rules, finding a latent ambiguity in the purchase agreement. Affirmed in part, reversed in part, and remanded.

Richmond Street, LLC v. City of Walker
Michigan Court of Appeals (Unpublished)
Lower Court Docket No(s) LC 00-337980

Issues: Separate taxation of a tract of vacant land designated in the condo master deed as "general common element and convertible area"; The Michigan Condominium Act (MCA)(MCL 559.101 *et seq.*); "Common elements" (MCL 559.103(7)); "Condominium unit" (MCL 559.104(3)); Property taxes for condo projects (MCL 559.231); MCL 559.161; "Limited common elements" (MCL 559.107(2)); MCL 559.137(5); Claim the respondent was authorized to tax the petitioner under the General Property Tax Act because petitioner was the co-owners' "agent"; MCL 211.3; Michigan Tax Tribunal (MTT)

Judge(s): Per Curiam - O'Connell, Bandstra, and Donofrio

Concluding the MTT erred in finding petitioner's reservation of rights was contrary to the MCA and under the MCA, the MTT had no authority to tax any part of a condo project separately from the units unless the part has been withdrawn according to the MCA's procedures, the court held the MTT should have denied the respondent's motion for summary disposition and entered judgment for petitioner. Petitioner was the developer of a condo project, which currently provided for 17 units but potentially could include over 100 units. Much of the project's real property remained vacant. Petitioner filed a master deed including a reservation of development rights, retaining an unconditional ability to withdraw lands from the project and develop them into an entirely separate project by amending the master deed. Respondent's tax assessor assigned a separate permanent parcel number to a tract of vacant land designated in the master deed as "general common element and convertible area," and respondent assessed this parcel individually. The MTT agreed with respondent the parcel could be taxed separately and granted respondent summary disposition. The court noted under the MCA, a condo project consists only of "units" and "common elements." Any part of the project not constituting a unit must be a common element. Pursuant to MCL 559.231, each unit is assessed for its individual value, and then the value of the common elements is prorated by the value of each unit and added to the unit's tax bill. The MTT determined since the land at issue could be withdrawn from the project or developed without the other co-owners' consent, the land could not be considered "inseparable from" the units. Using its own definition of "common elements" rather than the statutory definition, the MTT concluded "'common elements' could only include land over which all co-owners had equal control, so the land was not a common element." The court noted some common elements might include "limited common elements," which by definition are not subject to all co-owners' equal use. "Although a developer may retain rights to withdraw or develop land within the project, until it records an amended master deed the land remains part of the project and, under MCL 559.231, no part of the project is taxed separately from the units." Reversed and remanded.

Turner v. Zimmerman
Michigan Court of Appeals (Unpublished)
Lower Court Docket No(s) LC 03-002576-CH

Issues: Property rights in a private park abutting a lake in a dedicated plat; Whether the original proprietors lost all ownership rights to the private park once it was dedicated and all the subdivision lots were sold; The law regarding private dedication of land; The Land Division Act (LDA)(MCL 560.101 *et seq.*); *Little v. Hirschman*; *Martin v. Beldean*; *Dobie v. Morrison*; Deed and dedication language consistent with conveyance of only an easement interest; *Department of Natural Res. v. Carmody-Lahti Real Estate, Inc.*; Validity of a quitclaim deed conveying the fee interest to the plaintiffs; Whether MCL 560.221 *et seq.* was implicated; Riparian rights; *Thies v. Howland*

Judge(s): Per Curiam - Meter, Murray, and Beckering

Rejecting the defendant-association's claim the original proprietors (the Garchows) lost all ownership rights to the private park once it was dedicated and all the subdivision lots were sold, the court affirmed the trial court's determination the Garchows retained the fee interest in the park, which was validly transferred to the plaintiffs in 2004, and plaintiffs had full riparian rights to the abutting lake. The court noted the law concerning private dedication of land differs from a public dedication of land. While a grantor generally retains no rights to land dedicated to the public, dedications of land for private uses occurring before the enactment of the LDA "convey *at least* an irrevocable easement in the dedicated land." The law did not support the association's position after dedicating and selling all the lots (which occurred before the enactment of the LDA), the Garchows' fee interest automatically transferred to the lot owners as tenants in common. Retention of the fee also was not at odds with the irrevocability of the other lot owners' use rights, since the fee owner could not use the burdened land in any manner interfering with the easement holders' rights. Whether a pre-1968 private dedication conveyed more than an easement depends on the platter's intent as shown by the dedication language and the surrounding facts and circumstances. The dedication language stated the park was "dedicated to the use of the owners of lots 16 to 18 inclusive." The Turner plaintiffs' deeds and plaintiff-Wong's predecessor-in-interest's deed referred to "rights of ingress and egress" and "access" to the lake via the park. While there was no evidence the Garchows tried to assert control over the park after the dedication, the deed and dedication language did not show an intent to convey a fee interest. As the court held in a prior appeal in the case, the language used was consistent with an easement interest only. Thus, the trial court did not clearly err in finding the Garchows retained a fee interest in the park upon its dedication and sale of the lots. Further, none of the association's arguments challenging the validity of the 2004 quitclaim deed conveying the property to plaintiffs had merit. Since the trial court did not err in finding the Garchows retained a fee interest in the park and the 2004 deed was a valid transfer of this interest, it also did not err in ruling plaintiffs acquired riparian rights to the lake. Affirmed.

Huntington Nat'l Bank v. Dale
Michigan Court of Appeals (Unpublished)
Lower Court Docket No(s) LC 07-082915-CK

Issues: Whether the trial court properly granted the plaintiff-bank summary disposition regarding a debt owed following a foreclosure on real property; Defendant's claim the foreclosure of the first mortgage on the property resulted in the discharge of the second mortgage; Inadequate briefing; Moses, Inc. v. SEMCOG; Whether summary disposition was premature; MCR 2.116(H); Coblentz v. Novi; Whether plaintiff mitigated its damages by exercising its right to redemption and/or assured a better price was obtained for the property; Blackwood v. Sawinski

Judge(s): Per Curiam - Talbot, Fitzgerald, and Hoekstra

Since the defendant failed to adequately brief his argument the foreclosure of the first mortgage resulted in discharge of the second mortgage, failed to comply with MCR 2.116(H) as to his claim summary disposition was premature, and the inadequacy of price cannot vitiate a statutory foreclosure sale which is otherwise regular and did not afford ground for holding a second mortgage note satisfied, the court held the first issue was abandoned, he did not technically comply with the court rule, and there was no basis to support defendant's claim as to the plaintiff-bank's failure to mitigate its damages. Defendant owned real estate in Oakland County. He obtained a first mortgage with First Nationwide/First Chicago. He later applied for and received a line of credit from plaintiff secured by a second mortgage on the same property for $99,000. Both mortgages were recorded and the second mortgage acknowledged the prior mortgage to First Nationwide. Defendant had financial difficulties and received notice plaintiff would start foreclosure proceedings due to the default on his second mortgage. Plaintiff did not initiate any

proceedings. Later, the first mortgage was foreclosed through a sheriff's sale, which resulted in the receipt of $188,559 for the property. Defendant claimed he contacted plaintiff's agent, who told him the foreclosure of the first mortgage would result in a discharge of the second mortgage and he had relied on this information. Plaintiff moved for summary disposition, which the trial court granted, and entered an order for $93,866.97 including court costs, attorney fees, and interest pursuant to MCL 600.6013. As to the discovery issue, the court noted the mere promise or assertion additional facts could be established is insufficient to preclude summary disposition. Thus, defendant should not be permitted to now assert summary disposition was premature. Finally, defendant argued plaintiff failed to mitigate its damages. The court held there was no support for the claim. Affirmed.

Whitney Props., LLC v. Philip F. Greco Title Co.
Michigan Court of Appeals
(Unpublished) Lower Court Docket No(s) LC 2005-003636-CH

Issues: Breach of contract; Res judicata; ANR Pipeline Co. v. Department of Treasury; Jones v. State Farm Mut. Auto. Ins. Co.; Estes v. Titus; Staple v. Staple; "Privity"; Baraga County v. State Tax Comm'n; Collateral estoppel; Monat v. State Farm Ins. Co.; Whether the trial court properly found defendant-Greco Title's sole duty as an escrow agent was to carry out closings in accordance with the option agreement; Alan Custom Homes, Inc. v. Krol; Hills of Lone Pine Ass'n v. Texel Land Co.; Breach of fiduciary duty; Negligence; New Freedom Mortgage Corp. v. Globe Mortgage Corp.; In re Duane V. Baldwin Trust; Schultz v. Consumers Power Co.; "Duty"; Oja v Kin; Smith v. First Nat'l Bank & Trust Co. of Sturgis; Whether defendants breached their duty by conducting closings contrary to plaintiff's instructions and by conveying the builders' interests to the homebuyers; Alleged lost opportunity to achieve a settlement more favorable than an available legal remedy; Motion for sanctions under MCR 2.114 and MCL 600.2591; Kitchen v Kitchen; Attorney Gen. v. Harkins; Jerico Constr., Inc. v. Quadrants, Inc.

Judge(s): Per Curiam - Talbot, Fitzgerald, and Hoekstra

In Docket No. 283120, the court held although the trial court judge's decision was based on his independent interpretation of the option agreement, rather than res judicata or collateral estoppel, he reached the right result in concluding the defendants did not breach any duties arising from their status as escrow agent when they acted in accordance with another trial judge's interpretation of the option agreement in a related case. Defendant-Greco Title acted as an escrow agent to the execution of a series of option agreements between plaintiff and four builders in connection with a residential development. A disagreement arose between plaintiff and the builders about the interpretation of the option agreement. Plaintiff sued two of the builders in another case (the Palazzolo/Woodlake case). This case was stayed pending the outcome of the Palazzolo/Woodlake case. Plaintiff's interpretation of the option agreement was rejected by another trial court judge in the Palazzolo/Woodlake case. After a bench trial in this case, the trial judge entered a judgment of no cause of action for the defendants. Plaintiff maintained neither res judicata nor collateral estoppel precluded it from relitigating the interpretation of the option agreement. However, the prior Palazzolo/Woodlake case was decided on the merits when the trial court directed a verdict for the builders and the parties later stipulated to a judgment based on the verdict. Further, plaintiff's claims against defendants in this case could have been raised in the prior case against the builders. Plaintiff's asserted right to relief against the builders and the defendants in this case arose from the same series of transactions involving the execution of an option agreement. Further, the interpretation of the option agreement was common to both cases. The only remaining issue was whether defendants were in privity with the builders. Greco Title and the builders had a substantial identity of interests where they both asserted the same interpretation of the option agreement in opposition to plaintiff's contrary interpretation. Although the builders' interest in the interpretation of the option agreement in the Palazzolo/Woodlake case arose from their status as parties to the agreement, while defendants' interests in this case arose from their status as escrow agents under the agreement, plaintiff's claims against both sets of parties depended on it successfully asserting its interpretation of the agreement. Thus, the interests of the builders in the Palazzolo/Woodlake case and defendants in this case were substantially identical. The cornerstone of plaintiff's action against defendants was the proper interpretation of the option agreement with the builders. This question was actually litigated and determined in the Palazzolo/Woodlake case, and plaintiff had a full and fair opportunity to litigate the issue in the prior case. Both res judicata and collateral estoppel operated to preclude plaintiff from re-litigating the interpretation of the option agreement. In Docket No. 285076, the trial court properly denied defendants' motion for sanctions. Affirmed.

Pleasant Cmty. Circle v. Township of Casco
Michigan Court of Appeals (Unpublished)
Lower Court Docket No(s) LC 06-039927-PZ

Issues: Action to vacate the public dedication of a subdivision park pursuant to MCL 560.221 et seq.; Whether the park dedication was accepted by the defendant-township; *Vivian v. Roscommon County Bd. of Rd. Comm'rs; Eyde Bros. Dev. Co. v. Roscommon County Bd. of Rd. Comm'rs; Marx v. Department of Commerce; Higgins Lake Prop. Owners Ass'n v. Gerrish Twp.;* Whether the trial court properly determined the township did not formally accept the public dedication of the park when it accepted the plat in a township meeting; Whether acceptance of the plat constituted acceptance of the dedication; Kraus v. Department of Commerce; Whether the township was entitled to rely on the statutory presumption of acceptance in § 255b of the Land Division Act (LDA)(MCL 560.255b)(effective 12/22/78); Whether the dedication was withdrawn; Evidence of regular public use; *Village of Lakewood Club v. Rozek; Smith v. Auditor Gen.*

Judge(s): Per Curiam - Beckering, Wilder, and Davis

While the trial court did not err in concluding the defendant-township did not formally accept the public dedication of the subdivision park when it accepted the subdivision plat, the court held it erred in granting plaintiffs' summary disposition motion and vacating the public dedication because the evidence established a genuine issue of material fact whether there was "an informal acceptance by public user." The subdivision was platted in 1925. The plat contained a dedication of the platted streets and a park to the public. The township accepted the plat in 1925. The plaintiffs, including an association of homeowners who resided in the subdivision, sued to vacate the public dedication of the park. On cross-motions for summary disposition on the issue of whether the township ever accepted the park dedication, the trial court concluded there was never any formal or informal acceptance of the park property and vacated the dedication of the park. The minutes of the relevant township meeting indicated the subdivision plat was presented for approval, a motion was made the township board accept the plat, and the motion was granted. The minutes did not contain any specific reference to acceptance of dedicated land. Thus, pursuant to *Marx*, the trial court properly determined the township board did not formally accept the public dedication. The township tried to distinguish this case from *Marx* by pointing out the township in *Marx* only "approved" the plat, while here the township "accepted" the plat. However, the court in *Marx* emphasized "in order to formally accept dedicated property, a public authority must accept it by a manifest act. The authority must make specific reference to accepting the dedicated property, not merely accepting or approving the plat that dedicates the property." The township also argued it was entitled to rely on the statutory presumption of acceptance in § 255b of the LDA. While the plaintiffs argued the public dedication was withdrawn because the lot owners used the park in a manner inconsistent with the notion of a public dedication, the court concluded "the evidence created an issue of fact whether there was a withdrawal of the dedication due to inconsistent use." Many of the cited activities by lot owners or the association before 1978 were not necessarily inconsistent with public ownership. "Continued and regular public use by the general public is all that is necessary for there to be acceptance by public use of a park," and there was evidence of regular public use. Reversed and remanded.

Jackson v. Estate of Green
Michigan Supreme Court
___ Mich ____; ___ NW2d ___ (2009)
2009 Mich. LEXIS 1597
2009 WL 2342463, Mich.,
July 30, 2009 (NO. 136423)

Issues: Whether an action to partition real estate may go forward when the joint tenant who filed the action died before an order of partition entered; *Cardinal Mooney High Sch. v. Michigan High Sch. Athletic Ass'n;* Michigan's survival statute (MCL 600.2921); Right of survivorship; *Albro v. Allen; Smith v. Smith; Heintz v. Hudkins* (MO App.); Whether the various oral loans at issue were barred by the statute of limitations

Judge(s): Corrigan, Young, Jr., and Markman; Concurring in part, Dissenting in part - Young, Jr. and Corrigan; Concurring in part, Dissenting in part - Markman; Dissent - Cavanagh and Kelly; Voting to deny leave to appeal - Weaver and Hathaway

Deciding whether an action to partition real estate may go forward when the joint tenant who filed the action died before an order of partition entered, the court held title vested in the surviving joint tenant on the decedent's death because the mere filing of a partition action does not sever a joint tenancy and no order granting partition was entered before the death. Thus, in this case the defendant's filing of the partition action did not sever the joint tenancy because no order granting partition was entered before his death, title vested in plaintiff when defendant died, and nothing remained to

partition. At issue were two parcels of real estate held by plaintiff and defendant as joint tenants and a series of oral loans from plaintiff to defendant. Plaintiff filed a breach of contract action, alleging defendant had failed to repay the loans. Plaintiff also sought to force defendant to relinquish his right to the two parcels of land. Defendant filed an action for partition of the parcels. At plaintiff's request, the partition action was stayed pending the appeal in this case. Defendant unexpectedly died while the appeal was pending in the Court of Appeals. His estate was substituted as the plaintiff in the partition action and as the defendant in this case. Defendant's interest in the parcel of land automatically reverted to plaintiff when he died. Thus, his estate had no interest in the property even if his partition action survived his death under Michigan's survival statute. The Court of Appeals also properly held the statute of limitations did not bar plaintiff's breach of contract action for repayment of the loans because the claim did not accrue until plaintiff demanded repayment by filing her complaint. Affirmed.

Justices Young, Jr. and Corrigan agreed with the analysis set forth in Justice Corrigan's opinion, which affirmed the Court of Appeals on the partition issue. However, the justices believed the statute of limitations did not bar plaintiff's breach of contract claim for repayment of the loans because she did not make a demand for repayment until she filed the lawsuit and no breach of contract could have occurred unless and until a demand was made and refused or a reasonable amount of time had elapsed without a demand.

Justice Markman agreed with Justice Corrigan's opinion, which would affirm the Court of Appeals on the partition issue and that title vested in the surviving joint tenant on the decedent's death because the mere filing of a partition action does not sever a joint tenancy when no order granting partition was entered before the death. However, he would reverse the judgment of the Court of Appeals on the statute of limitations issue related to the loans. The justice disagreed the statute of limitations does not bar recovery on any of the loans. Instead, he would hold the statute of limitations bars recovery on all but the last loan because it is the only one to fall within the six-year limitations period.

Justices Cavanagh and Kelly disagreed with the separate opinions of Justices Corrigan, Young, and Markman. On the partition issue, they would allow the merits of defendant's partition action to be heard because it came within the purview of the survival statute. Regarding the statute of limitations on the loan issue, they found *Smith v. Smith Estate* to be controlling, and would apply its rule here to hold all the claims were timely made except those related to the first two loans. Accordingly, the justices would reverse the judgment of the Court of Appeals on both issues.

Justices Weaver and Hathaway believed leave to appeal was improvidently granted because the result reached by the Court of Appeals was correct.

Redmann v. Leete
Michigan Court of Appeals (Unpublished)
Lower Court Docket No(s) LC 07-000611-NO

Issues: Landlord/tenant; Statutory duty to keep the rental property fit for its intended use (MCL 554.139(1)(a)); *Allison v. AEW Capital Mgmt.;* Lessor's duty to maintain the premises "in reasonable repair" (MCL 554.139(1)(b)); "Defect"; Whether the lease required defendant-Longfellow Street, LLC to eradicate the spiders on the premises; *De Bruyn Produce Co. v. Romero;* Contract interpretation; *Phillips v. Homer (In re* Smith Trust); "Repair"; "Habitability"

Judge(s): Per Curiam - Talbot and Fitzgerald; Concurring in the result only - Hoekstra

The court affirmed the trial court's order granting defendant-Longfellow Street summary disposition, holding while "a spider infestation may not be an 'ideal condition,'" plaintiff failed to establish it rendered the rental premises "unfit as a dwelling house." She argued there was a genuine issue of material fact whether Longfellow Street breached the statutory duty to keep the rental property fit for its intended use. After plaintiff rented the house in August 2004, she began noticing an increasing number of spiders in the home in April 2005 and she was allegedly bitten by a spider. She reported the problem to Longfellow Street's agent, defendant-Phillip Leete, but the defendants denied responsibility for eradicating the problem. Two months later, plaintiff was allegedly bitten by a spider and became ill. Defendants were again informed of the spider infestation. Plaintiff moved out of the home in July 2005. She asserted Longfellow Street had a duty under MCL 554.139 to eliminate the spider infestation. MCL 554.139(1)(a) provides a covenant premises "are fit for the use intended by the parties." The court held assuming a spider infestation was present, plaintiff could not prevail on her statutory claim as a matter of law. The presence of spiders in the home, similar to the ice and snow in *Allison*, appeared to be seasonal. Also, plaintiff did not establish a genuine issue of material fact as to whether the house was unfit for living. The record indicated she

was still able to eat, sleep, and live on the premises as provided for in the lease - she did so for 11 months. MCL 554.139(1)(b) warrants the lessor must maintain the premises "in reasonable repair." However, plaintiff did not identify any defect in the premises Longfellow Street could have "mended" to eliminate the spiders. Since she did not show there was any damage to the premises caused by the spiders or contributing to their presence, she failed to show a genuine issue of material fact Longfellow Street breached the duty to keep the premises reasonably repaired. Affirmed.

Miller-Davis Co. v. Ahrens Constr., Inc.
Michigan Court of Appeals
___ Mich App____; ___ NW2d ___ (2009)
2009 Mich. App. LEXIS 1657
2009 WL 2391790, Mich.App.,
August 04, 2009 (NO. 284037)

Issues: Breach of contract; The statute of repose (MCL 600.5839(1)); *Abbott v. John E. Green Co.; Tenneco Inc. v. Amerisure Mut. Ins. Co.; Citizens Ins. Co. v. Scholz; Pendzsu v. Beazer E., Inc.; Michigan Millers Ins. Co. v. West Detroit Bldg. Co., Inc.; Weeks v. Slavik Builders, Inc.; Beauregard-Bezou v. Pierce; City of Litchfield v. Union Constr. Co. (Unpub. Ct. App.); Travelers Ins. Co. v. Guardian Alarm Co.; Ali v. Detroit; Huhtala v. Travelers Ins. Co.;* Whether the 6-year limitation period in § 5839(1) expired before plaintiff filed its complaint on May 12, 2005; Natatorium moisture problem (NMP)

Judge(s): Per Curiam - Jansen, Hoekstra, and Markey

The trial court erred by awarding the plaintiff-general contractor/construction manager damages for breach of contract because the defendant-subcontractor was entitled to judgment based on the statute of repose. Plaintiff brought this breach of contract action against defendant-Ahrens Construction and its bondsman, defendant-Merchants Bonding Company, alleging faulty workmanship by Ahrens in installing a wooden roofing system covering the natatorium of a recreational complex. Plaintiff's claims against defendant, for both breach of contract and indemnity, rested on the allegation defendant's defective workmanship on the natatorium's roof caused the NMP. The court held defendant was a "contractor" who made an improvement to real property. The wooden roof deck system it "constructed or installed, with its component parts of T's, sub-T's, vapor barrier, insulation, sleepers, and OSB, was itself an integral component of the natatorium's roof to which another subcontractor added roofing felt and an outer steel skin." The completed roof was an integral component of the building. The wooden roof deck system was a permanent addition to real property enhancing its capital value, involved the expenditure of labor and money, and was designed to make the property more useful or valuable. Thus, defendant was a "contractor" who made "an improvement to real property." Further, the case law suggested plaintiff's claim against defendant for defective workmanship was within the ambit of the statute. However, plaintiff argued § 5839(1) did not apply because its claim was for breach of an express promise, not "for damages for any injury to property." The court concluded plaintiff's claim was not one for breach of warranty, it was for shoddy workmanship. While arguably the underlying claim in this case was closer to the roofing tiles not performing as warranted in *Weeks* than to the roof collapsing in *Michigan Millers*, the court still held the *Litchfield-Huhtala-Weeks* reasoning was inapplicable to this case. Plaintiff's claim was one for "any injury to property" within the meaning of § 5839(1). It did not matter whether plaintiff's legal theory was based on an express promise when it was "a claim for injury (harm or damage) to or caused by an improvement to real property a contractor has made." Reversed and remanded for entry of judgment for defendant.

LEGISLATION AFFECTING REAL PROPERTY

by C. Kim Shierk

The Section is active in the legislative process in a variety of ways, such as appearing before House and Senate committees, lobbying for and against bills, and monitoring legislation of interest to real estate lawyers. This Article provides a quarterly report designed to inform Section members about new legislation affecting real property, the Section's efforts regarding legislation that may become law, and bills that may have an impact on real estate practice.

The Section has taken Formal Positions on the following Pending Legislation

Positions adopted by the Section: The Real Property Law Section is not the State Bar of Michigan, but rather a Section that 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 Real Property Law Section's total membership is 3,249. The positions were adopted by vote of the Section Council which has a total of 18 voting members .

The Council of the Real Property Law Section opposes **SB 610,** which would create a statutory commercial real estate broker's lien. The reasons for opposition are as follows:

1. The proposed legislation provides for a non-consensual lien that interferes with basic property rights.

2. The proposed legislation makes brokers a special preferred class of persons and provides a very extraordinary remedy of a lien against real property.

3. Brokers deal directly with owners, purchasers, landlords and tenants and have adequate remedies at law for the collection of their commissions.

4. Providing lien rights to brokers will encourage other parties dealing with real estate, such as appraisers, property managers, property inspectors, lawyers, title companies, escrow agents and accountants, to request similar rights.

5. Once broker's liens are granted for commercial property, there will be a substantial risk that lien rights will be subsequently extended to include residential property.

6. The proposed legislation is patterned after the Construction Lien Act, but the justification for protecting artisans who create physical improvements to property does not apply to brokers.

7. The proposed legislation seeks to force parties to a transaction to close the transaction and escrow funds sufficient to satisfy a lien, even though the validity of a lien is in dispute.

8. The proposed legislation is complex, will add substantial costs, expenses, litigation, delays and disruptions to closing real estate transactions.

9. The proposed legislation will result in the filing of more documents affecting property, problems of timely discovering such documents, and will

create additional underwriting risks for title insurance companies.

Of 15 voting members in attendance at the council meeting, 14 supported the motion and 1 abstained.

The Council of the Real Property Law Section also opposes **HB 4869** for the reasons as follow:

It appears that HB 4869 intends, within the context of the summary proceedings act, to extend the right to represent parties (in other words, to act as their lawyers) before the court to any property manager. The proposed legislation conflicts with the fundamental public policy reflected in MCL 600.901, which states that "[n]o person is authorized to practice law in this state unless he complies with the requirements of the supreme court with regard thereto." The Section believes that the various obligations imposed upon attorneys by the Rules of Professional Conduct, and their status as officers of the court, bring an important level of professionalism to these proceedings as well as some basic assurance that the fundamental due process requirements of the Michigan Court Rules and the summary proceedings act are being honored. Unrestricted and typically unlicensed management "agents" are not bound by the Rules of Professional Conduct and are not likely to share an attorney's training, experience or concern regarding legal procedure. Eviction actions impact fundamental interests (for example, basic shelter), which in the residential context are subject to extensive statutory regulation. Forfeiture actions may determine legal and equitable title to real estate under land contract. In neither case does the "past due" amounts upon which these cases are commenced reflect the total economic or social value of the interests. These are not simply collection actions; the summary proceedings act and the Michigan Court Rules impose extensive due process requirements on summary proceedings (requirements that do not exist in small claim actions) because the right to possession is so important. Despite the importance of the summary proceedings process, the proposed legislation actually imposes far less restriction on representation than currently exists in the small claims division. For example, a claim by a corporate plaintiff in the small claims division can only be filed by "a full-time, salaried employee having knowledge of the facts surrounding the complaint." MCL 600.8407; MCR 4.302(B)(2). No such restriction is imposed on summary proceedings under HB 4869; a part-time "agent" can apparently act in the full capacity of a lawyer (but with none of the corresponding restrictions imposed by the Rules of Professional Conduct). Additionally, MCL 600.8408 expressly precludes the use of collection agencies or agents in small claims actions. Since management companies will effectively be acting as "collection agents" within the eviction and forfeiture context, the legislation significantly expands the scope of layperson representation beyond that allowed in the small claims division. The proposed legislation goes well beyond any prior model and is not justified by any existing problem with the summary proceeding process. The Rules of Professional Conduct provide important restrictions on advocacy and representation, and they should not be circumvented in the summary proceedings context.

All 15 voting members in attendance at the council meeting supported the motion.

Bills of Interest That Have Become Law Since the Last Issue of the Review

2009 PA 29, 30 and 31 (HB 4453, HB4454 and 4455) provide for a mediation program for certain residential properties that are in default. Effective July 5, 2009, the revised procedures for foreclosure by advertisement give homeowners an opportunity to negotiate with their lender to modify their primary residence mortgage loan before foreclosure.

Bills of Interest That Have Been Introduced Since the Last Issue of the Review

HB 4869 Property managers representing landlords in eviction proceedings. This bill adds a new section to 1961 PA 236 and allows property managers to handle evictions on behalf of landlords within the context of the summary proceedings act. The filed bill was printed on May 1, 2009.

HB 5136 Inclusionary zoning. The Inclusionary Zoning Act is created by this bill. The proposed Act

promotes affordable housing by permitting the local unit of government to grant the permission to construct dwellings that otherwise exceed density limitations. The bill was referred to the Committee on Intergovernmental and Regional Affairs on June 23, 2009.

HB 5201 Land Sales Act. This bill repeals the Land Sales Act. The bill was printed on July 15, 2009.

HB 5202 and SB 697 Renaissance zones. This bill would create entrepreneurial renaissance zones. The printed bill was filed on July 16, 2009.

HB 5227 Property tax assessments. This bill revises the transfer tax to exclude transfer to children of principal residence property. Referred to the Committee on Tax Policy on August 4, 2009.

SB 610 Commercial Real Estate Broker's Lien Act. This bill would create the Commercial Real Estate Broker's Lien Act, which provides for the creation of liens for claims for commissions arising out of commercial transactions. This bill was referred to the Committee on Economic Development and Regulatory Reform on May 27, 2009.

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 seek member input on proposed legislation. Your active involvement and participation as a committee member is highly recommended and most welcome.

Non-members of a Special Committee are also welcome to comment on any proposed legislation affecting real property. Written comments should be forwarded to:

C. Kim Shierk
Myers Nelson Dillon & Shierk, PLLC
40701 Woodward Avenue, Suite 235
Bloomfield Hills, Michigan 48304
kshierk@mnds-pllc.com

Consult the Michigan Legislature web site for current information regarding pending legislation: www.michiganlegislature.org.

CONTINUING LEGAL EDUCATION



Richard D. Rattner and Gregory J. Gamalski
Co–Chairs CLE Committee
and Arlene R. Rubinstein Administrator

2009 Summer Conference

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Distinguished faculty, great networking and a beautiful location all describe the 2009 Summer Conference held at the Grand Hotel on Mackinac Island. The Section would like to thank our co–chairs Lorri B. King of the Law offices of King and King PLLC in Cadillac and Dawn M. Patterson of United General, a division of First American Title Insurance Company in Northville for planning the 34th Annual Summer Conference. We had 150 registrants plus families and guests attend this timely and informative program. A special thanks to our sponsors for their generous commitment to our programming. Please view our pictures elsewhere in this issue.

Mark Your Calendars!

35th Annual Summer Conference
July 14-17, 2010
Crystal Mountain
Thompsonville, Michigan

HOMEWARD BOUND

The Continuing Legal Education Committee is pleased to announce its Thirty-fifth season of "Homeward Bound" seminars. This season's series is under the direction of Melissa N. Collar of Warner Norcross & Judd LLP in Grand Rapids. The Section will be working with ICLE in producing the 2009-2010 Homeward Bound series. This year's topics include Developing a Medical Office Building on a Health Care Campus; Brownfields to Boontown; Demystifying Insurance Provisions and Coverages and the Fundamentals of Real Estate Due Diligence.

If you belong to the ICLE Partnership, there will be no separate charge for attending the seminar series. (Section members who are not ICLE Partners will still be able to sign up for any or all Homeward Bound programs at the low Section price of $80 per seminar). The seminars will run from 2 p.m. to 5 p.m. and will be held at The Inn at St. John's in Plymouth. All seminars will be webcast.

November 5, 2009
2:00 p.m. – 5:00 p.m.

THE INN AT ST. JOHN'S
44045 FIVE MILE ROAD
PLYMOUTH

"Developing a Medical Office Building On or Near a Health Care Campus: A Prescription for Success"

C. Leslie Banas of C. Leslie Banas and Associates in Birmingham will moderate the **November 5, 2009** Homeward Bound seminar.

Faculty includes

Karen Glorio Luther, Senior Corporate Counsel, William Beaumont Hospital in Royal Oak, Jeffrey H. Miller Executive Vice President Operations and General Counsel, Health Care REIT, Inc in Toledo, Ohio, Mark E. Wilson, Miller Canfield Paddock & Stone PLC in Troy.

In today's economy, medical office building projects are still on track despite the otherwise-slow construction industry. Many variants exist regarding what entity will own the building and who will occupy it, and unique regulatory, ownership and real estate issues abound. Get practical guidance from top experts in MOB developments on what you need to know when your client becomes a participant in a medical office building venture.

A brochure with topics, speakers and registration information is elsewhere in this issue of the Review.

Real Property Law Section
State Bar of Michigan
"Groundbreaker" Breakfast Roundtable

The first "Groundbreakers" Breakfast Roundtable program of 2009-2010 was held on October 8, 2009 at the Townsend Hotel in Birmingham. Entitled **Foreclosure and Beyond**, this program presented issues on foreclosure and creditor's rights issues related to real estate. We would like to thank the co-chairs of the Bankruptcy Debtor Creditors Rights Committee, Rozanne M. Giunta of Lambert Leser Isackson Cook & Giunta, PC in Bay City and John T. Gregg of Barnes & Thornburg LLP in Grand Rapids for planning the program on Foreclosure and Beyond.

Our next program will be held on Thursday, January 14, 2010 at the Townsend Hotel with the Real Property Law Section's Construction Committee and the Insurance Section planning the program. We would also like to introduce the new "Groundbreaker" Breakfast Roundtable Chairperson, Stephen R. Estey of Dykema Gossett PLLC in Bloomfield Hills.

Prepare to Win the Real Estate Revolution
Attend the 23rd UM/ULI Real Estate Forum

There is a revolution underway, and it is not taking place in some obscure, far away land. Indeed, the battle is being fought right here in Michigan and throughout the nation's ravaged real estate community.

"The economic climate and the real estate landscape have changed dramatically over the last few years and it continues to evolve," said Tom Wackerman, president of ASTI Environmental and chairman of the UM/ULI Real Estate Forum. "The question our industry now faces is what factors will drive the new economy and how do we, as an industry, position ourselves to respond to and capitalize on those factors."

With that in mind, the University of Michigan and the Urban Land Institute Detroit District Council will host the **23rd Annual UM/ULI Real Estate Forum** with *REAL ESTATE REVOLUTION:* Preparing for the New Real Estate Reality as its theme.

Slated for November 11 and 12, the Forum will be held on the campus of the University of Michigan in Ann Arbor at the Michigan League. The event typically draws several hundred professionals from the real estate and related industries, including developers, architects, attorneys, lenders and urban planners.

Planning is nearing completion and the 2009 Forum will examine the role that the financial markets, education, green technology, mass transit and other factors will play in fostering economic growth and real estate development.

The Forum format will include breakout sessions, case studies, keynote addresses, the ULI Emerging Trends in Real Estate 2010 and roundtable discussions, as well as a narrated bus tour of real estate development opportunities in downtown Ann Arbor and the surrounding area.

The 2009 UM/ULI Real Estate Forum is sponsored by *Crain's Detroit Business*, *BuyLeaseBuild Magazines* and the Grand Rapids Business Journal. For details or to register for the **UM/ULI Real Estate Forum,** visit www.umuliforum.com

2010 Winter Conference

March 11–13, 2010

BEING AN AGENT OF CHANGE

The Westin Kierland Resort and Spa

Scottsdale, Arizona

The Real Property Law Section is pleased to announce that the 2010 Winter Conference will be held at the Westin Kierland Resort and Spa, located just 10 minutes from downtown Scottsdale and 20 minutes from downtown Phoenix. Surrounded by beautiful views of the McDowell Mountains and Pinnacle Peak, the resort offers a full service spa, 24 hour fitness center, an adventure water park, and 27 holes of championship golf. Visit the Winter Conference website to learn more about the features of the resort at http://www.michbar.org/realproperty/winterconf.cfm

This program promises to be timely and informative. Our speakers will present the information that real estate practitioners need to know regarding trends in sustainability and emerging technologies; current issues associated with Michigan and Arizona water rights; how to avoid pitfalls in handling the relocation of your client's home or business to Arizona; plus a legislative update for our Michigan attorneys.

The Section would like to thank Laura McMahon Lynch, of Law Office of Laura McMahon Lynch PLC in Grosse Pointe, and Margaret Van Meter, of Warner Norcross & Judd LLP in Southfield, for planning the 2010 Winter Conference.

Accommodations:

All registrants are responsible for making their own room reservations and flight arrangements. The guest room rates are as follows:

Traditional Singles and Doubles: $269
Additional persons in the room $50

Room Rates do not include the state and local taxes (currently 12.27%). These guest room rates will be offered by the Hotel two days prior and two days after the meeting date subject to the availability of guest rooms in the Hotels group inventory at the time of reservation.

To learn more about the venue and to book a reservation, registrants can access this site.

(copy and paste the following link into a web browser)
http://www.starwoodmeeting.com/StarGroupsWeb/res?id=0908114727&key=1B9E or call the Reservations Department at 800-354-5892.

Conference Registration

Registration fees will remain the same as last year.
Please register online at http://e.michbar.org
or
use the conference registration form is elsewhere in this issue of the Review.

COURSE CALENDAR

Set forth is a schedule of Continuing Legal Education courses sponsored or co-sponsored by the Real Property Law Section through January 2010.

Key:

RPLS – Real Property Law Section
ICSC – International Council of Shopping Centers
ICLE – Institute of Continuing Legal Education
HB – Homeward Bound
SC – Summer Conference

Date	Location	Program	Topic
October 8	Townsend Hotel Birmingham	Groundbreaker	Foreclosure and Beyond
November 5	The Inn at St. John's Plymouth	ICLE /RPLS	Developing a Medical Office Building on or Near a Health Care Campus
November 11-12	University of Michigan Ann Arbor	UM/ULI Real Estate Forum	Real Estate Revolution: Preparing for the New Real Estate Reality
November 19	ICLE Building Ann Arbor	ICLE/RPLS	Practice Strategies for a Down Economy Series: Advising the Homeowner in Defaul
November 19	ICLE Building Ann Arbor	ICLE/RPLS	Practice Strategies for a Down Economy Series: The Troubled Real Estate Project - Options & Answers
December 3	The Inn at St. John's Plymouth	Homeward Bound /ICLE	From Brownfields to Boomtown
January 14	Townsend Hotel	Groundbreaker	Emerging Issues in Sustainable and Green Development
January 28	Rock Financial Showplace Novi	ICLE/RPLS	ICSC 2010 Michigan Continuing Education Program for Real Estate Professionals

Further information on all Breakfast Roundtable Sessions and the Homeward Bound series can be found on the Sections website at: http://www.michbar.org/realproperty/

2009 SUMMER CONFERENCE
GRAND HOTEL










SBM State Bar of Michigan | REAL PROPERTY LAW SECTION

2010 Winter Conference

Being an Agent of Change

March 11-13, 2010
The Westin Kierland Resort and Spa
Scottsdale Arizona

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Accommodations: To learn more about the venue and to book a reservation, registrants can access the following site (copy and paste the link into a web browser), http://www.starwoodmeeting.com/StarGroupsWeb/res?id=0908114727&key=1B9E

Conference materials: Registrants will receive a book of specially prepared materials.

Cancellations: $100 of the registration fee made in connection with the Winter Conference of the Section shall be non-refundable. A registrant who does not attend shall be entitled to receive a refund of all but $100 of his or her registration fee and shall be entitled to receive the conference materials. There shall be no exception to this policy.

For further information: Contact Arlene Rubinstein, Administrator 248-644-7378 Email: LawA1@aol.com

Register online at http://e.michbar.org

STATE BAR OF MICHIGAN | REAL PROPERTY LAW SECTION

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Registration

Winter Conference
March 11-13, 2010

Register Now! Cost:
Before December 1, 2009
First time Winter Conference Section Attendees: $300
Section Members: $350 Non-Section Members: $400

After December 1, 2009
First time Winter Conference Section Attendees: $375
Section Members: $425 Non-Section Members: $475

Mail your check and completed registration form to:
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Michael Franck Building
306 Townsend Street, Lansing, MI 48933

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