MICHIGAN
REAL PROPERTY REVIEW

Published by the Real Property Law Section State Bar of Michigan

Spring/Summer 2014, Vol. 41, No. 1 & 2

Contents

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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 complied annually and is available on the Section website: www.michbar.org/realproperty/realproperty.cfm in January of each year.

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 Ronald E. Reynolds

A year goes by quickly at the Section. The Section has started into a new season of continuing legal education with timely and substantive topics being offered through the Groundbreakers and Homeward Bound series.

For those of you that were unable to make it to the Summer Conference at the Grand Traverse Resort & Spa in July, you missed an excellent opportunity for education, networking and fun. Thanks to Leslie Lewis and Mike Luberto, Co-Chairs, for their efforts in making the conference a success. A highlight for me was presenting Larry Dudek with the C. Robert Wartell Distinguished Service Award at the Summer Conference Dinner. This is not an annual award, but rather is more guardedly presented only in recognition of outstanding service to the Section over an extended period of time. Larry certainly deserved it, and it was an honor for me to be in a position to present him with it.

The Section heads to Texas in March. The Winter Conference will be held March 5-7, 2015, at the Four Seasons Hotel in Austin, Texas. Look to receive further information on the conference in the near future. Tom Kabel is serving as Chair of the conference again. Tom chaired the very successful conference held earlier this year in Las Vegas. In addition to great programming, past attendees of the Winter Conference have remarked that they enjoy the more intimate feel of the conference and the opportunity it offers to interact. We hope that you can make it.

For the moment, things appear somewhat quiet on the issue of mandatory versus voluntary bar. As reported earlier this year, the Council voted to oppose the voluntary bar legislation based on its ad hoc committee's recommendation. David Pierson represented the Section on a committee composed of several Sections of the State Bar attempting to provide further recommendations to the Supreme Court on the issue. As of the date of this report, we are waiting to hear from the Michigan Supreme Court on the issue.

There is much to celebrate about the Real Property Law Section. The Section remains strong in its membership, its finances are in excellent shape, and its programming remains outstanding. The Section offers both new and old members the opportunity to learn from and network with bright and talented lawyers. If you know lawyers who are not active in the Section, please let them know what the Section offers and encourage them to get involved. The Section is always looking for new topic suggestions, speakers and authors for our CLE events and our publications.

David Pierson is Chair of the Section in 2014-15, and you can be assured that the Section will prosper under his leadership. I greatly appreciate having had the opportunity to serve as Chair this past year. Thank you to the Council members, committee chairs, speakers and authors who make this job worthwhile. Most importantly, thank you to Karen Schwartz, the Section's Administrator, for her hard work and support throughout the year, and for helping to keep the Section (and its Chair) focused and on the right path.

Foreclosure by Advertisement and Summary Proceedings:

Still Some Bumps in the Road

*by Roger B. Chard**

In a series of amendments to Michigan's foreclosure by advertisement statute, the Legislature generated and then substantially revised provisions of that statute, apparently intending to allow summary proceedings to recover possession of property and to terminate redemption periods early after mortgage foreclosure sales, when the property is damaged or when owners refuse to allow inspection. The interaction of these amendments with the Summary Proceedings Act,[1] requires careful examination, and the mix of terms from several areas of the law does not make the task easy.

Michigan's foreclosure by advertisement redemption statute[2]was amended (effective January 10, 2014) by 2013 PA104. But almost immediately, the statute was further amended (effective June 19, 2014) by 2014 PA125, which amended sections 3204, 3240, and 3278. It also extracted subsection (13) from MCL 600.3240, reworked it, and re-inserted it into the statute as new sections MCL 600.3237 and 3238.

Most relevant to summary proceedings practitioners are these two new subsections, and this discussion is confined almost exclusively to those provisions. Purchasers of foreclosed property at sheriff's sales, mortgagors whose property is purchased there, and courts determining summary proceedings cases allegedly arising under PA125 must be mindful of the interplay of the amended act and the summary proceedings act, including issues created but unresolved by the current iteration of the amended statute.

1 MCL 600.5701-5759.

2 MCL 600.3201-3285

* *Roger B. Chard received his J.D. from the University of Michigan in 1972. He practiced law in Ann Arbor, Michigan from 1973 through 2010. He worked for Legal Services of Southeastern Michigan for ten years, including five as its executive director, and was a partner in the firm of Chard & Lloyd from 1988 until his retirement. Throughout his career, he practiced in the area of real estate law, particularly emphasizing landlord-tenant law. Mr. Chard is a member of the State Bar of Michigan and the Washtenaw County Bar Association, together with the Real Property Sections of each. He also is a member of the American Blind Lawyers Association. Mr. Chard has lectured frequently for the Institute Of Continuing Legal Education's Foundation Series and other ICLE seminars on leasing and summary proceedings to recover real estate; he delivered the "Summary Proceedings to Recover Possession of Real Property" lecture for the Real Estate Section of the State Bar Association (2000) and presented a seminar with Lawrence Shoffner on the same subject for the Real Estate Section of the State Bar Association (2004). He coauthored a manual on landlord-tenant law with attorney Robert Reed of Michigan Legal Services, was a long time contributing author to Gilmore on Michigan Civil Procedure Before Trial, "Summary Proceedings to Recover Possession of Premises in Landlord-Tenant and Land Contract Cases " (ICLE 2d ed, 3d ed & Supps), and he contributed to Michigan Basic Practice Handbook, "Sale of a Home" [ICLE 5th ed 2001 & Cum Supp] ; "Residential Landlord-Tenant Matters" [ICLE 5th ed 2001 & Cum Supp]; " and Michigan Law of Damages and Other Remedies, "Damages Recoverable in Statutory Real Property Actions" (ICLE 3d ed 2002). Mr. Chard is the coauthor (with Lawrence Shoffner) of Michigan Lease Drafting and Landlord-Tenant Law, ICLE, 2003, 2009, 2013; and he authored the current How-To Kit: "Evict A Residential Tenant For Nonpayment" (part of the ICLE Online Partnership Series).*

I sincerely thank attorney Lawrence Shoffner and the Hon. Virginia Morgan for assisting with research in this article and for discussing and debating with me the ideas that are contained in it.

I. Property Inspection During Redemption Period

PA104 allowed purchasers of foreclosed property under MCL 600.3220 to inspect it after the sale and "periodically" throughout the redemption period[3] and to sue mortgagors for possession of the property and immediate extinguishment of their right to redeem if inspections were unreasonably refused or if property damage was imminent or had occurred.[4] It did not define "inspect" or "periodically," or specify any level of reasonableness for inspections (e.g., prior notice, when inspections could be conducted, limit of their duration, scope, frequency, who was permitted to conduct and be present at them, or any other behavioral guidelines).

PA125 mandates dual prior notices before conducting interior inspections[5] and a single prior notice before conducting unlimited exterior inspections of the property and its structures during the redemption period.[6] After buying property at a sheriff's sale, purchasers wishing to inspect the interior or exterior of the property must activate their right by giving "the mortgagor and any other person that has possession of the property" (such as tenants) written notice of purchasers' "intent to conduct an initial inspection under section 3238 during the redemption period."[7] Content requirements for these notices of intent are contained in MCL 600.3237(1). Extreme care must be given to preparing and evaluating validity of this notice.[8] Not giving it nullifies the purchaser's right to conduct interior and exterior inspections, and defects in it also could nullify the right.[9] If notice content and service under MCL 600.3237 are proper, additional notice is not required for exterior inspections,[10] but an additional notice to the mortgagor is required for each interior inspection a purchaser wishes to conduct during the redemption period. Additional notices must notify a mortgagor of the "purchaser's intent to inspect the property *at least 72 hours in advance* and shall set the time of the inspection *at a reasonable time of day, in coordination with the mortgagor if possible.*"[11] Notices under MCl 600.3237 and 3238 must be in writing and served "by certified mail, physical posting on the property, or in any manner reasonably calculated to achieve actual notice of the purchaser's intent to inspect."[12]

PA125 dramatically curtails a purchaser's right to interior inspections afforded by PA104 and eliminates the right to "periodically" inspect. Assuming that notices under MCL 600.3237(1) and 3238(2) are valid and served properly, purchaser conducts an interior inspection, and that there is no existing or imminent damage,[13] purchaser and mortgagor are put into a relationship mildly akin to pretrial discovery, and further interior inspection is largely precluded:

> *After the initial inspection described in subsection (2),* the purchaser may request by certified mail, physical posting on the property, or in any manner reasonably calculated to achieve actual notice that the mortgagor provide information on or evidence of the condition of the interior of any structures on the property, in any form reasonably necessary to assess the condition of the property. The purchaser shall not make such a request more than once in a calendar month or more often than 3 times in any 6 months of the redemption period, unless the purchaser has reasonable cause to believe that damage to the property is imminent or has occurred.[14]
>
> And:
>
> If the mortgagor provides the information or evidence requested under subsection (4) and damage has not occurred or does not appear imminent, the purchaser *shall not conduct an interior inspection* under this subsection related to that request.[15]
>
> But:
>
> If the mortgagor refuses to provide information or evidence requested under subsection (4) with-

3 Former MCL 600.3240(13).

4 *Id.*

5 MCL 600.3237(1), MCL 600.3238(1), (2), (5).

6 MCL 600.3237(1), MCL 600.3238(1) and (3).

7 MCL 600.3238(1).

8 *See, e.g.*, MCL 600.3237(1)(d) ("The details of the purchaser's rights of inspection under section 3238.").

9 MCL 600.3238(1).

10 MCL 600.3238(3).

11 MCL 600.3238(2) and (5).

12 MCL 600.3237(1), MCL 600.3238(2) and (5). *See* Nyal D. Deems, *Michigan Real Estate Practice and Forms* ch 22 (ICLE 2013); Roger B. Chard & Lawrence R. Shoffner, *Michigan Lease Drafting and Landlord-Tenant Law* ch 6 (ICLE 2013); and MCL 600.5718, concerning regular first class mail service.

13 *See* MCL 600.3238(4) and (5).

14 MCL 600.3238(4) (emphasis added).

15 MCL 600.3238(5).

> in 5 business days after receipt of the request, or if the information or evidence provided reveals that damage has occurred or is imminent, the mortgagor [sic] may schedule an inspection of the interior of any structures on the property.[16]

Alternatively, if any interior or exterior inspection that the purchaser is entitled to conduct ever is unreasonably refused or if, following an inspection or the mortgagor's response to the purchaser's request for information, purchaser discovers that "damage to the property is imminent or has occurred," the purchaser may seek possession of the property in summary proceedings or file suit for other necessary protective relief.[17] Purchasers also may join any person who may redeem the property under section 3240 as a party.[18]

By imposing pre-inspection requirements and eliminating periodic inspections, PA125 removes two shortcomings of PA104, relative to interior inspections. It also makes admirable improvements where scheduling and frequency of interior inspections are concerned. But it still provides little if any guidance on issues like duration, scope, and who is permitted to conduct and be present at inspections. Purchasers and mortgagors would be wise to have a witness present or to video inspections, in order to confirm what is or is not found, as well as the overall conduct of the parties. On balance, the new notice requirements are more of a good thing than a bad, but compliance with them introduces potential stumbling blocks when it comes to conducting or objecting to proposed inspections and new, or at least different, burdens of proof and defenses at trial.

II. Pursuing Summary Proceedings Or Other Relief

Unlike PA104, PA125 requires written notice to mortgagor before filing a summary proceedings suit for possession:

> Before commencing summary proceedings for possession of the property under this section, the purchaser shall provide notice to the mortgagor by certified mail, physical posting on the property, or in any other manner reasonably calculated to achieve actual notice, that the purchaser intends to commence summary proceedings if the damage or condition causing reasonable belief that damage is imminent is not repaired or corrected within 7 days after receipt of the notice.[19]

Mortgagors can avoid possessory suits by repairing or correcting the damage or condition causing a reasonable belief that damage is imminent within the 7-day period of the notice or in accord with alternative procedures and deadlines to which the mortgagor and purchaser agree.[20] Curiously though, when suit is based on unreasonable refusal of an inspection, the prescribed notice language is silent as to the reason for the suit and does not permit a mortgagor to avoid suit by permitting the inspection within the notice period, although nothing prevents the purchaser from so specifying. The statute does not require prior notice of suits that do not seek possession but which seek "other relief necessary to protect the property from damage."[21] Prior notices that are required are analogous, if not identical to, demands for possession or notices to quit under the Summary Proceedings Act, except their seven days do not begin to run until after notice is received, so purchasers should consider service by regular first class mail, instead of certified mail. "If the demand is mailed, the date of service for purposes of this chapter is the next regular day for delivery of mail after the day when it was mailed."[22]

Chapter 57 is the Summary Proceedings Act. MCL 600.5714(1) prescribes the circumstances under which "a person entitled to premises may recover possession," and it is jurisdictional.[23] Summary proceedings may be used to recover possession of the premises under the following circumstances:

- nonpayment of rent;
- termination of the lease pursuant to a lease clause allowing termination because of unlawful manufacture, delivery, possession with intent to deliver, or possession of a controlled substance on the leased premises;
- holding over after termination of the lease pursuant to a power to terminate in the lease or implied by law; holding over after the term of the lease expires;
- holding over after termination of the tenant's estate

16 *Id.*

17 MCL 600.3238(6).

18 *Id.*

19 MCL 600.3238(7). Suits for "other relief necessary to protect the property from damage" do not require prior notice.

20 *Id;* MCL 600.3238(8).

21 MCL 600.3238(6)-(7).

22 MCL 600.5718.

23 Park Forest of Blackman v Smith, 112 Mich App 421; 316 NW2d 442 (1982).

by a notice to quit; willful or negligent creation of a serious and continuing health hazard or physical injury to the premises;

- causing or threatening physical injury to an individual by the tenant, a member of the tenant's household, or a person under the tenant's control on the landlord's property;
- possession by forcible entry or trespass or holding the premises by force;
- holding over *after the expiration of a redemption period* following a sale or an execution on the property; and
- holding over after a sale of the premises under a will or an order of a probate court.[24]

MCL 600.3238(6) purports to allow suits for possession under Chapter 57, based upon unreasonable refusal to inspect, damage that has occurred, or damage that imminently may occur during the redemption period. With the possible exception of MCL 600.3238(11)(f), discussed later in this article, however, PA125 does not add a new jurisdictional ground to the Summary Proceedings Act or an incorporating cross reference within that act to MCL 600.3238. Thus, purchasers are confined to the existing grounds of MCL 600.5714(1) for seeking possession, and where foreclosure is concerned, suit for possession is authorized solely for "holding over *after the expiration of a redemption period* following a sale or an execution on the property."[25]

The Michigan Court of Appeals has stated that "[t]he Legislature is presumed to be aware of the consequences of the use, or omission, of language when it enacts the laws that govern our behavior,"[26] and that "[i]n construing a statute or court rule, omissions in the language are deemed to be intentional."[27] Moreover, if a new statute is enacted or an existing statute is amended so as to require something more from other existing statutes to prevent conflict with, or less than full operation of, the new or amended statute, the Michigan Legislature is fully conversant with the need to amend said other existing statutes to harmonize them with its new legislative scheme.[28] Whatever the reason for the legislative omission, purchasers currently are saddled with it, mortgagors are benefitted by it, and courts are constrained by it. As the Michigan Supreme Court states, "Courts may not speculate regarding legislative intent beyond the words expressed in a statute."[29]

III. Property Damage

PA125 does not make it easy for courts to decide suits based on damage that is "imminent or has occurred." Since the act does not mandate that either circumstance must have started or developed after the sheriff's sale, if there is pre-sale damage to the property that has occurred or that is imminent, purchasers might commence summary proceedings for possession upon discovering it, subject to notice and inspection procedures earlier discussed and other intricacies of PA125. "Damage" is defined in MCL 600.3238(11):

> As used in this section, "damage" includes, but is not limited to, any of the following:
>
> (a) The failure to comply with local ordinances regarding maintenance of the property or blight prevention, if the failure is the subject of enforcement action by the appropriate governmental unit.
>
> (b) An exterior condition that presents a significant risk to the security of the property or significant risk of criminal activity occurring on the property.
>
> (c) Stripped plumbing, electrical wiring, siding, or other metal material.
>
> (d) Missing or destroyed structural aspects or fixtures, including, but not limited to, a furnace, water heater, air-conditioning unit, countertop, cabinetry, flooring, wall, ceiling, roofing, toilet, or any other fixtures. As used in this subdivision, "fixtures" means that term as defined in section 9102 of the uniform commercial code, 1962 PA174, MCL 440.9102.

24 MCL 600.5714(1)(a) through (h) (emphasis added).

25 MCL 600.5714(1)(g).

26 People v Ramsdell, 230 Mich App 386, 392; 585 NW2d 1 (1998).

27 Davidson v Bugbee, 227 Mich App 264, 267; 575 NW2d 574 (1997); *see also* Johnson v Marks, 224 Mich App 356, 358; 568 NW2d 689 (1997) ("omissions are deemed to be intentional"); Williams v Coleman, 194 Mich App 606, 613; 488 NW2d 464 (1992) ("all omissions should be understood as exclusions").

28 *See, e.g.*, MCL 600.5714(1)(c)(iii), or 2013 HB-5069.

29 Omne Financial, Inc v Shacks, Inc, 460 Mich 305, 311; 596 NW2d 591 (1999).

(e) Deterioration below, or being in imminent danger of deteriorating below, community standards for public safety and sanitation that are established by statute or local ordinance.

(f) A condition that would justify recovery of the premises under section 5714(1)(d).

MCL 600.3238(11(a) blurs the traditional concept of property damage (i.e., injury or harm), by declaring that every noncompliance, no matter how profound or nominal, with "local ordinances *regarding maintenance of the property or blight prevention*" constitutes "damage."[30] Within the same subsection, this broad definition is narrowed sharply and made more imprecise by deeming such noncompliance to be damage only if it is "the subject of enforcement action by the appropriate governmental unit." "Ordinances regarding maintenance of the property or blight prevention" are not defined or prioritized, but "noncompliance" with any of them is swept into the definition of "damage," so long as the noncompliance also is "the subject of enforcement action by the appropriate governmental unit."

But what are "ordinances regarding maintenance of the property or blight prevention?" For that matter, what is "enforcement action," and when does ordinance noncompliance become "subject" to it? Might these ordinances be so narrow as to concern only snow removal, condition of sidewalks on or bordering the property, trimming of hedges and trees, condition of terraces, driveways, retaining walls, and fences, or might they comprise the full scope of local building, housing, and construction codes, particularly when abetted by the rascally word "regarding?" Given the vast array of local ordinances directly or indirectly "regarding" maintenance of property or blight prevention, is it a stretch to think some defendants may ask courts to find certain violations of a local ordinance "regarding maintenance" of property or blight prevention, together with the approach to those violations adopted by the relevant government agency, to fall outside the scope of "damage"? Is it a stretch to think some courts might entertain the argument, particularly when extinguishing the right of redemption is at stake? For example, what should courts do when the mortgagor is not complying with a local ordinance regarding maintenance of property or blight prevention, but the local governmental unit deems the noncompliance de minimis, or for whatever reason does not issue a citation, and works with the mortgagor to cure the noncompliance, allowing time to remedy the noncompliance that exceeds the time in the notice of suit or perhaps the entire action? Is such conduct "damage"; can such "damage" ever be "imminent"?[31] Traditional notions of "maintenance" and "damage" have been blurred. The former is substituted for the latter when defining "damage."[32] Instead of actual, material damage to foreclosed property, now it is the coupling of noncompliance with ill-defined local ordinances "regarding" maintenance and blight prevention with undefined governmental "enforcement action" thereon that constitutes "damage" and the tipping point for seeking possession, early extinguishment of the redemption right, or other necessary protective relief.[33]

A comprehensive list of damage, like that set out in MCL 600.3238(11)(b) through (d), provides a relatively straightforward definition of damage with which to work. When the subsections described above, 11(a), (e), and (f), are added to the mix, however, even subsections 11(b), (c), and (d) lose their precision. Not all localities where foreclosed property are sold at sheriff's sales will have ordinances "regarding maintenance of the property or blight prevention," of course, and when they do not, (11)(a) becomes irrelevant. But when such ordinances exist, they easily could "regard" the damages described in (11)(b), (c), or (d), and suddenly those types of damage no longer may be evaluated independently. Instead, they will fall within ordinances contemplated by 11(a), and suits for possession or other necessary protective relief based on them only may be brought if they violate the ordinance and are "the subject of enforcement action by the appropriate governmental unit."

MCL 600.3238(11)(e) and (f) further muddy the water. In the case of subsection (11)(e): "damage" includes "(e) Deterioration below, or being in imminent danger of deteriorating below, community standards for public safety and sanitation that are established by statute or local ordinance." So suits pursuant to MCL 600.3238(6), based on violation of community standards for public safety and sanitation, may be founded on standards promulgated by either statute or local ordinance. But where such standards originate from "local ordinance," they stem from a local ordinance "regarding maintenance of the property," and alleged noncompliance also must be "the subject of en-

30 Emphasis added.

31 *See generally* Smolen v Dahlmann Apts, Ltd, 127 Mich App 108; 338 NW2d 892 (1983) for a discussion of damage to premises.

32 MCL 600.3238(11)(a).

33 MCL 600.3238(6) and (10).

forcement action by the appropriate governmental unit" before purchaser may seek possession or other property protection.[34] If the standards come solely from a statute, this enforcement analysis is inapplicable, unless the local ordinance incorporates the statute's community standards for public safety and sanitation.

In subsection 11(f), the amended act finally comes close, but only close, to linking itself to an identifiable jurisdictional ground for seeking possession found in MCL 600.5714(1): "As used in this subsection, 'damage' includes: . . . (f) A condition that would justify recovery of the premises under section 5714(1)(d)." While the damages on which suit for possession under MCL 600.3238(11)(f) or MCL 600.5714(1)(d) will be identical, the prior notice rights afforded to defendants for the former and the prior notice rights afforded to defendants for the latter are not identical and differ importantly. MCL 600.3238(7) provides: "purchaser shall provide notice . . . that the purchaser intends to commence summary proceedings if the damage or condition causing reasonable belief that damage is imminent *is not repaired or corrected* within 7 days after receipt of the notice."[35] MCL 600.5714(1)(d), however, provides: "A person entitled to premises may recover possession of the premises by summary proceedings ... when the person in possession neglects or refuses for 7 days after service of a demand for possession of the premises *to deliver up possession of the premises or to substantially restore or repair* the premises."[36] To be sure, purchasers must be extremely careful of their notice language to ensure that they are seeking the correct relief, but even then, it is not clear that suit brought pursuant to the notice of MCL 600.3238(7), advising that damage must be "repaired or corrected," complies, or can comply, with the notice requirements of MCL 600.5714(1)(d), advising that the damage or condition must be "substantially restored or repaired." Likewise, it is not clear that the broader language notice of MCL 600.5714(1)(d) suffices to commence suit based on damage described in MCL 600.3238(11)(f) and to obtain all the relief (possession and extinguishing the right to redeem) described in MCL 600.3238(10).

Not every alleged "serious and continuing health hazard" in the premises or every "extensive and continuing physical damage to the premises,"[37] necessarily constitute violation of "local ordinances relating to maintenance of the property or blight prevention." As previously discussed, however, the "enforcement action" filing prerequisite applies when they do.[38] Finally, even when the person in possession willfully or negligently causes a serious and continuing health hazard or extensive and continuing physical injury in or to the premises, proper notice is given, and the property is not surrendered or substantially restored or repaired within the applicable time, suit still may not be entertained if the hazard or damage were "discovered or should reasonably have been discovered by the party seeking possession not earlier than 90 days before the institution of proceedings."[39] It is beyond the scope of this article to consider whether the "90 days" or any part of them may antedate the sheriff's sale, and what should happen if they do, but suffice it to say that purchasers proceeding under MCL 600.3238(11)(f) must meet many prerequisites and are vulnerable to many procedural defenses, not to mention the substantive issues of whether health hazards and serious and continuing physical damages ever existed and/or whether the premises were "substantially restored or repaired."

Some argue that "[a]s used in this subsection, damage includes, but is not limited to, any of the following" means that each subsection of subsections (11)(a) through (f) stands independently, and, therefore, that subsection (11)(a) has no overarching significance for those subsections. But when the alleged conduct described in subsections (11)(b) through (f) actually constitutes noncompliance with a local ordinance "regarding maintenance of the property or blight prevention," and has not been the "subject of enforcement action by the appropriate governmental unit," allowing suit for possession or other property protection to proceed, based on noncompliant conduct alone, would render subsection (11)(a) meaningless.

> When faced with questions of statutory interpretation, our obligation is to discern and give effect to the Legislature's intent as expressed in the words of the statute. We give the words of a statute their plain and ordinary meaning, looking outside the statute to ascertain the Legislature's intent only if the statutory language is ambiguous. Where the language is unambiguous, "we presume that the Legislature intended the meaning clearly expressed—no further judicial construction is required or permitted, and the statute

34 *See* MCL 600.3238(11)(a).

35 Emphasis added.

36 Emphasis added.

37 MCL 600.5714(.1)(d)

38 MCL 600.3238(11)(a).

39 MCL 600.5714(1)(d).

> must be enforced as written." Similarly, courts may not speculate about an unstated purpose where the unambiguous text plainly reflects the intent of the Legislature. When parsing a statute, we presume every word is used for a purpose. As far as possible, *we give effect to every clause and sentence*. "The Court may not assume that the Legislature inadvertently made use of one word or phrase instead of another." Similarly, *we should take care to avoid a construction that renders any part of the statute surplusage or nugatory.*[40]

The legislature could have exempted some or all of the circumstances in subsection (11)(b) through (f) from subsection (11)(a)'s enforcement requirement. Since it did not, it is reasonable to assume it intended that the requirement apply across the board or that it did not object thereto. Simultaneously, however, it did preserve the items described in subsections (11)(b) through (f) as grounds for seeking possession when there are no "local ordinances regarding maintenance." Scrupulously adhering to the "enforcement action" prerequisite to suit whenever "local ordinances regarding maintenance ... or blight prevention" are applicable preserves the integrity of all six subsections of MCL 600.3238(11), while still permitting suit in situations where such ordinances are not involved. It also may tend to preserve and promote integrity of local administrative schemes and even discourage excessive resort to the courts.

IV. Obtaining Judgment

Under PA104, whether repairs of damage that were the basis of the suit had been completed by the time of the hearing was the only substantive measurement for entering or not entering a judgment—i.e., a kind of bright-line test: "A court shall not enter a judgment for possession in an action under chapter 57 if, before the hearing for possession, the mortgagor repairs any damage to the property that was the basis for the action." But the legislature quickly backed away from that exceedingly narrow standard. MCL 600.3238(9) affords courts far more leeway to assess positions and fashion remedies than did PA104:

> In determining whether to enter judgment for possession in favor of the purchaser in summary proceedings under this section, *the judge shall consider the totality of the circumstances surrounding the damage or condition that threatens imminent damage,* including, but not limited to, all of the following:
>
> (a) The cause of the damage or condition.
>
> (b) Whether the mortgagor has taken appropriate steps to repair the damage or correct the condition and to secure the property from further damage.
>
> (c) Whether the mortgagor has promptly contacted the purchaser and any property insurer regarding the damage or condition.
>
> (d) Whether any delay in repairs or corrections is affirmatively caused by the purchaser or the property insurer.[41]

With judicial decisions based on the totality of the circumstances, no single factor is the deciding one. The test originally was announced by the U.S. Supreme Court in *Illinois v. Gates*,[42] a case arising from a dispute over a search warrant under the Fourth Amendment. The Court previously had required a bright-line test for a finding of probable cause, requiring a showing of the reasons to support the conclusion that an informant is reliable and credible and a showing of the underlying circumstances upon which the person providing the information relied. In a 6-3 decision written by Justice Rehnquist, the Court held that these requirements were not absolutes, but were intertwined issues useful to answer the common sense, practical question of whether there was probable cause. The judge should consider "all the circumstances ... including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, [to decide whether] there is a fair probability that contraband or evidence of a crime will be found in a particular place."[43] The Court recognized that fact patterns in cases are complex and variable and that judges should have the flexibility to consider all the facts, the background, and the context in reaching a conclusion.

The Court recently extended the "totality of the circumstances" concept to the civil area in a patent case regarding an attorney fee award under the fee-shifting provision. In *Octane Fitness LLC v ICON Health & Fitness Inc*,[44] the Court rejected as "unduly rigid" and "inflexible"

40 Pohutski v Allen Park, 465 Mich. 675, 684; 641 NW2d 219, (2002) (emphasis added; citations omitted).

41 MCL 600.3238(9) (emphasis added).

42 462 US 213 (1983).

43 *Id* at 238.

44 572 US _____, 134 S Ct 1749 (2014).

the framework set forth by the U.S. Court of Appeals for the Federal Circuit in *Brooks Furniture Mfg v Dutailier Int'l, Inc.*[45] There, the Federal Circuit required a two-prong, bright-line test of (1) materially inappropriate conduct and (2) subjective bad faith litigation that is objectively baseless. The Supreme Court found that the formula was too inflexible and that all the statute required was a "simple discretionary inquiry; it imposes no specific evidentiary burden."[46] In an ERISA case from the Sixth Circuit, the Supreme Court found a "totality of circumstances" approach was appropriate to use in assessing a conflict of interest for decisions made by ERISA plan sponsors who make benefit decisions and also fund payments of benefits.[47] Bankruptcy courts also use the totality of the circumstances test, which is set forth by the terms of the governing statute[48] in determining whether a chapter 7 bankruptcy case should be dismissed based on the debtor's financial condition. While providing a bright-line for abuse through a means test, the statute provides an alternative through an evaluation of the totality of the circumstances.[49]

Courts handling cases under MCL 600.3238 must "consider the totality of the circumstances surrounding the damage or condition that threatens imminent damage," and the four examples for inquiry are just that: examples. The inquiry mandate includes but "is not limited to" them.[50] Including this standard in the amended statute allows litigants to raise, and judges to consider, all relevant concerns and should provide a heightened level of due process to both sides, compared to PA104.

The amended legislation allows purchasers to acquire unencumbered title to the property prior to expiration of the complete redemption period, MCL 600.3238(6) and (10). Beyond the shoals of jurisdiction, it will be important to assess the time at which the breach of MCL 600.3238 occurred, the nature of the breach, the type of mortgagor who possesses the property, and the motivation of the purchaser, individually or in some combination thereof, prior to seeking summary proceedings.

Even assuming an unreasonably refused inspection or a breach of a damage provision of MCL 600.3238(11), is there still a point during the redemption period at which it becomes unreasonable to seek a judgment for possession because: (1) the time saved by obtaining it will be inconsequential, compared to letting the redemption period expire of its own accord and seeking possession, if need be, under the already existing MCL 600.5714(1)(g); (2) the job of repairing the alleged damage during the notice period is nominal; (3) the economic and/or emotional investment in bringing suit will exact an unacceptable toll on the purchaser (particularly a non-institutional purchaser); or (4) the mortgagor is serious about redeeming and likely will do whatever is necessary to ward off a judgment by vigorously contesting the suit? When a mortgagor only intends to retain possession as long as possible and not to redeem, then (1) and (2) probably are the purchaser's only concerns, and merely serving notice of intent to sue might prompt departure.

But since repair of alleged damage during the notice period precludes suit for possession, when a mortgagor is intent on redeeming, suits for possession, based upon refusal to allow inspection or violation of the damage provisions of subsection (11)(a) through (f), could mean: demand for jury trial; time consuming discovery; summary disposition motions on issues of ordinance noncompliance, restoration or repair, and/or local government enforcement; enlarging the compass of the trial from whether the mortgagor unreasonably refused inspections and/or caused damages to whether there is some reason under MCL 600.3238(10) for not granting judgment; post trial motions to reconsider; and appeals. In this event, (1) through (4) are all in play. A lender interested only in getting the property back if the mortgagor does not redeem may have far different motives than an individual who actually hopes to acquire the property, regardless of the mortgagor's legitimate intention and ability to redeem. Ironically, some defendants actually may not object but actually may wish to have their conduct deemed violative of a local ordinance regarding maintenance of their property, particularly if there has been no "enforcement action by the appropriate governmental unit" when suit is commenced. Given the type of noncompliance, the financial resources, staffing, and attitude of the applicable governmental unit, "enforcement action" may be initiated very slowly or never initiated.

V. Post-judgment Proceedings

If a case under PA125 is tried and the mortgagor prevails, that is the end of it, but if the purchaser prevails, it will get a judgment for possession, and, subject to the time restrictions of MCL 600.5744, "a writ

45 393 F3d 1378 (CAFC 2004).

46 *Octane Fitness,* slip op at 11.

47 *See* Met Life Ins. Co. v. Glenn, 554 US105 (2008).

48 Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA), § 707(b)(3).

49 In re Zaporski, 366 BR 758, 769 (Bankr ED Mich 2007).

50 MCL 600.3238(10).

commanding the sheriff, or any other officer authorized to serve the process, to restore the plaintiff to, and put the plaintiff in, full possession of the premises."[51] MCL 600.5744(5) provides:

> If an appeal is taken or a motion for new trial is filed before the expiration of the period during which a writ of restitution shall not be issued and if a bond to stay proceedings is filed, the period during which the writ shall not be issued shall be tolled until the disposition of the appeal or motion for new trial is final.

A successful summary proceedings plaintiff under PA125 will receive a judgment for possession, the mortgagor's right of redemption will be extinguished upon entry of the judgment, and full title to the property will vest immediately in the purchaser. Expiration of the right to redeem is among the writs for which plaintiffs must wait ten days after entry of judgment to apply.[52] But in cases involving health hazards and/or serious and continuing damage to the property, and "on conditions determined by the court," the purchaser may obtain a writ immediately after entry of judgment, but only when purchaser has "pleaded and proved, with notice, to the satisfaction of the court":

> (e) That tenant, willfully or negligently, is causing a serious and continuing health hazard to exist on the premises or is causing extensive and continuing injury to the premises and is neglecting or refusing either to deliver up possession after demand or to substantially restore or repair the premises.[53]

SCAO form complaints do not include language concerning requests for immediate writs, so plaintiffs must draft complaint language that asks for that relief and fairly notifies mortgagors that it is being sought. The immediate writ of restitution language under MCL 5744(2)(e) is specifically aimed at "the tenant," and some courts mistakenly may consider that such specificity does not allow immediate writs based on judgments of possession that extinguish a redemption period early under PA125. In fact, however, a mortgagor whose estate has been terminated by foreclosure proceedings is a tenant at sufferance.[54] If the trial is delayed or if there is an appeal following entry of the judgment, plaintiffs should seek interim protection from the court pursuant to MCR 4.201(H) and MCR 4.201(N) respectively.[55]

VI. Conclusion

PA125 clearly aims to keep pressure on mortgagors during foreclosure redemption periods, but, like PA104, the vehicle was pushed off the assembly line too hurriedly, raising many questions that could have been avoided with slightly more engineering. The nexus between the amended legislation and the Summary Proceedings Act is sketchy, and purchasers, mortgagors, and courts are left with a variety of issues to resolve that could have been avoided.

Post Scripts to Ponder

First, the federal Protecting Tenants at Foreclosure Act of 2009 (PTFA), part of the Helping Families Save Their Homes Act of 2009,[56] protects tenants by placing certain requirements on successors in interest to foreclosed properties that are subject to foreclosures on federally related mortgage loans or on any dwelling or residential real property. The act expires on December 31, 2014.[57] The Sixth Circuit Court of Appeals recently stated:

> We hold that the PTFA does not provide a private right of action. Nonetheless, the PTFA requires successors in interest to foreclosed properties to provide bona fide tenants with 90 days' notice to vacate and to allow them to occupy the premises until the end of their lease term unless certain conditions are met. The PTFA's requirements preempt state laws that provide less protection to tenants. While tenants may not bring a federal cause of action for violations of the PTFA, they may use such violations to establish the elements of a state law cause of action.[58]

51 MCL 600.5744(1).

52 MCL 600.5744(4).

53 MCL 600.5744(2)(e); (emphasis added).

54 Barron v Federal Home Loan Mortgage Corp, No 07-CV-11580, 2008 US Dist LEXIS 6995, at *3 (ED Mich Jan 31, 2008); Allen v Carpenter, 15 Mich 25 (1866).

55 For further discussion of immediate writs, interim orders before trial, and protective orders during appeals, see Chard & Shoffner, *supra* note 12, ch 6.

56 Pub L No 111-22.

57 12 USC 5220 note.

58 Mik v. Federal Home Loan Mortgage Corp, 743 F.3d 149, 154

Foreclosed mortgagors may be landlords in a bona fide lease or tenancy.[59] In such a situation, beware of the layer of additional considerations beyond those discussed above that comes into play for purchasers, mortgagors, and mortgagors' tenants alike.

Second, the foreclosure by advertisement scheme has regularly been held to sound in contract, given the absence of State Action. While the amendatory language of PA104 and PA125 does not increase court involvement on the front end of foreclosures, does it sufficiently draw courts into the process, via the backdoor (determining whether to shrink or terminate redemption rights), to merit reassessment of the contractual status of foreclosure by advertisement?

Third, in reworking and potentially reducing mortgagor redemption rights, do MCL 600.3237 and 3238 encroach upon the protective border of Article IV, § 24 of the Michigan Constitution ("title-body," "multiple-object," and/or "change of purpose"[60]) so as to subject them to constitutional challenge?

(CA6 2014). For further discussion of the PTFA, see Chard & Shoffner, *supra* note 12, ch 6.

59 *Mik*, Op. Cit.

60 *See* Toth v. Callaghan, 995 F. Supp. 2d 774 (D Mich) (pending appeal to Sixth Circuit March 25, 2014, Case No. 14-CV-01351 as Gould-Werth v Callaghan); People v Kevorkian, 447 Mich 436, 453; 527 NW2d 714 (1994); Alan v County of Wayne, 388 Mich 210 (1972); Detroit Building & Savings Ass'n v Mok, 30 Mich 511 (1875).

Hydraulic Fracturing – The Case for State Regulation

Environmental Issue or Revolutionary Technological Discovery?

by Stephen R. Estey and Shaun Johnson***

The technique of extracting natural gas from deep, dense sedimentary rock formations (shale) using a high pressure water and sand mixture is commonly known as "hydraulic fracturing" or simply "fracking." While the general concept of fracking has existed for the past 60 years,[1] the current advancements in technology using high volume horizontals (as opposed to the traditional shallow vertical wells) have only been available since approximately 2007. As new methods of fracking evolve and the practice increases in various areas of the United States, legislatures and citizen action groups are scrambling to address alleged environmental concerns and establish laws to regulate and govern the use of this technology.

As companies seeking to utilize this technology turn attention toward Michigan, both local and state government representatives are assessing the law and how it may impact the future of fracking activity within our State. It

1 Fracturing was first employed in Michigan in 1952. There are currently more than 12,000 wells throughout the Lower Peninsula.

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appears that many local governments may exercise their police powers to regulate or even prohibit fracking within their boundaries. Given the possibility of a patchwork of conflicting local rules, ordinances and regulations—and the likelihood that some local governments will attempt to simply prohibit fracking—this article will examine the need for the legislature to evaluate and expand the present regulatory scheme and approval process for fracking wells that would allow local governments to provide input, but limit their ability to prohibit fracking outright, similar to those in place for electric transmission, gas pipelines, and wind energy under Act 30 of 1995 (Act 30), Act 9 of 1929 (Act 9) and Act 295 of 2008 (Act 295).

I. Local Resolutions and Ordinances

There is currently no general federal regulation of fracking that would preempt state or local regulation. In Michigan, Part 615 of the Natural Resources Environmental Protection Act[2] gives the Supervisor of Wells—housed within the Michigan Department of Environmental Quality (MDEQ)—authority to regulate certain aspects of fracking. Indeed, the MDEQ has recently proposed rules that will expand MDEQ's regulation of fracking in order to address public health and safety concerns, including addressing issues related to disclosure of chemical information.[3] But Part 615 and the regulations promulgated under Part 615 do not preempt all local police powers. Indeed, although not in the fracking context, the Michigan Supreme Court has concluded that the Supervisor of Wells' jurisdiction "does not extend to all aspects of the production process."[4] This means that, while a local government may not be able to regulate issues covered by Part 615 and MDEQ regulation, local governments still have authority to exercise certain police powers to impact and regulate fracking—including activities ancillary to fracking.[5] For example, while generally a municipality may not completely exclude a particular land use, it is possible to justify certain exclusions based on health, safety and welfare concerns and to regulate in areas not otherwise pre-empted, so long as such regulation is in furtherance of a reasonable governmental interest and is not arbitrary and capricious.[6]

The lack of federal or state preemption has caused many local governments to directly address the effects of fracking in their communities. As of June 11, 2014, an estimated 15 local governments in Michigan have passed resolutions in support of state or national restrictions on fracking.[7] Most of these resolutions have called for either outright bans on fracking or moratoriums until further research can be conducted on the risks.

A few local governments have gone further by passing resolutions or ordinances that attempt to regulate or discourage fracking activity within their borders. These local governments include the townships of Cannon, Courtland, Mayfield, and West Bloomfield. The townships of Cannon and Courtland passed almost identical moratoriums on any actions by the township that relate to "applications, proposals, [or] requests for zoning approval, zoning or other permits, or similar review and approval by the Township of any oil or gas well, or facilities or operations ancillary to the operation of such wells which are subject to Township regulation."[8] The moratoriums for Cannon and Courtland stated that the moratoriums were "not intended to infringe upon the jurisdiction reserved to state or federal agencies

2 MCL 324.61501 et seq.

3 MDEQ's proposed rules are available at: http://www7.dleg.state.mi.us/orr/Rules.aspx?type=dept&id=EQ.

4 Addison Twp v Gout, 435 Mich 809, 813; 460 NW2d 215 (1990).

5 *See* R. Hammersly & K. Redman, "Local Government Regulation of Large-Scale Hydraulic Fracturing Activities and Uses," Mich Bar J, June 2014, pp 37-38 (proposing that there is "still ample room for carefully designed and reasonable local regulation of these types of activities, facilities, and uses").

6 Houdek v Centerville Twp, 276 Mich App 568; 741 NW2d 587 (2007); Robinson Twp v Knoll, 410 Mich 293; 302 NW2d 146 (1981); MCL 125.3207.

7 The fifteen local resolutions that were identified were in Burleigh Township (05/17/2012), Cross Village Township (03/06/2012), Dearborn Heights (09/25/2012), Detroit (07/22/2011), Ferndale (09/12/2011), Heath Township (10/08/2012), Ingham County (05/14/2012), Orangeville Township (07/02/2012), Reno Township (05/14/2012), Southfield (05/14/2012), Thornapple Township (04/26/2012), Waterford Township (07/23/2012), Wayne County (07/22/2011), Yankee Springs Township (05/10/2012), and Ypsilanti (09/18/2012). Copies of these resolutions are available at http://www.foodandwaterwatch.org/water/fracking/fracking-action-center/local-action-documents/.

8 Township of Cannon, Resolution No. 2013-17, Moratorium on Issuance of Permits for Oil and Gas Related Activities, available at http://documents.foodandwaterwatch.org/doc/Frack_Actions_CannonTownshipMI.pdf#_ga=1.201585617.197767249.1402443680. For reference of the resolution in meeting minutes, see http://www.cannontwp.org/egov/documents/1391550342_87366.pdf); Township of Courtland, Resolution No. 2013-08, Moratorium on Issuance of Permits for Oil and Gas Related Activities, available at http://documents.foodandwaterwatch.org/doc/Frack_Actions_CourtlandTownshipMI.pdf#_ga=1.38395875.197767249.1402443680.

which have exclusive jurisdiction over such subjects." The moratorium for Courtland is still active, while Cannon's was set to expire no later than June 13, 2014.[9]

West Bloomfield's moratorium targeted all actions by the township on "applications, proposals, requests, permits, approvals, zoning compliance or certificates regarding drilling operations in the Township."[10] The moratorium also stated that "during the moratorium period, no drilling operation shall be allowed in the Township."[11] The moratorium was initially passed on September 1, 2012 for a period of six months.[12] It was then extended for another year through February, 2013.[13]

Mayfield Township passed an ordinance that could be relevant to fracking activity even though it targets injection wells rather than wells where gas is extracted.[14] (Injection wells are used to deposit wastewater from fracking operations, among other things, and can be far from the fracking sites.[15]) The ordinance requires that special use permits be obtained for the operation of injection wells, and the permits are contingent on the operator complying with a number of regulatory criteria.[16] These criteria include: (1) providing a yearly report of the waste stream; (2) allowing Mayfield to conduct random samples of the waste stream; (3) conducting a groundwater analysis from at least three wells placed near the proposed well; and (4) conducting soil tests near the proposed well.[17]

II. Potential Regulations on the Horizon

In addition, a number of local governments have initiated the process of developing regulations that target fracking activities. Several more local governments, including Cannon, Conway, Gun Plain, and West Bloomfield Townships have expressed a general interest in developing local regulations.[18] Three out of these four townships are participating in a program administered by the FLOW organization called "FLOW Local Ordinance Program," which claims to provide "technical planning assistance to Michigan townships interested in crafting ordinances to regulate the ancillary industrial processes of fracking."[19]

III. Other States' Actions

Local governments' actions in other states have demonstrated that Michigan is not alone in grappling with localized regulation of hydrofracking. Despite a New York statewide moratorium on fracking that has been in place since 2008, several municipalities in New York have banned fracking activity within their borders (presumably to have the bans in place if the moratorium is suddenly lifted).[20] The fracking bans for two towns are facing legal challenges,[21] which

9 For reference to the expiration of Cannon's moratorium, see meeting minutes for Cannon Township board meeting on Jan 13, 2014, available at http://www.cannontwp.org/egov/documents/1391550342_87366.pdf.

10 Township of West Bloomfield, Resolution Continuing and Extending Moratorium on All Natural Resource Exploration and Extraction Activities in the Township, Feb 11, 2013, available at http://documents.foodandwaterwatch.org/doc/Frack_Actions_WestBloomfieldTownshipMI.pdf.

11 *Id.*

12 *See* Township of West Bloomfield, Resolution Continuing and Extending Moratorium on All Natural Resource Exploration and Extraction Activities in the Township, Feb 11, 2013, Exhibit #11, available at http://documents.foodandwaterwatch.org/doc/Frack_Actions_WestBloomfieldTownshipMI.pdf.

13 *See* Township of West Bloomfield, Resolution Continuing and Extending Moratorium on All Natural Resource Exploration and Extraction Activities in the Township, Feb 11, 2013, available at http://documents.foodandwaterwatch.org/doc/Frack_Actions_WestBloomfieldTownshipMI.pdf.

14 Mayfield Township, Class I Injection Well Ordinance, adopted Oct 11, 2010, available at http://flowforwater.org/wp-content/uploads/2013/07/5770.00-Mayfield-Township-SUP-Ordinance-8-19-10l.pdf. *See generally* http://www.acmetownshiparchives.info/agendas/Packets/PC/12-17-12/Groundwater%20Maps.pdf.

15 Drillers Begin Reusing 'Frack Water,' The Wall Street Journal, Nov 20 2012, available at http://online.wsj.com/news/articles/SB10001424052970203937004578077183112409260.

16 Mayfield Township, Class I Injection Well Ordinance, adopted Oct 11, 2010, available at http://flowforwater.org/wp-content/uploads/2013/07/5770.00-Mayfield-Township-SUP-Ordinance-8-19-10l.pdf.

17 *Id.*

18 *See* FLOW, FLOW Local Ordinance Program Brings Fracking Protection to Two Michigan Townships, available at http://flowforwater.org/wp-content/uploads/2013/05/2013-05-23-Township-Fracking-Ordinance-FLOW-Program-press-release.pdf; FLOW, FLOW Local Ordinance Program Addresses Fracking Impacts in Conway Township, MI, available at http://flowforwater.org/wp-content/uploads/2014/02/2014-02-10-Conway-Township-1st-meeting-press-release.pdf.

19 FLOW, Enacting Township Ordinances to Protect Communities from the Impacts of Fracking, http://flowforwater.org/wp-content/uploads/2014/02/2013-12-03-fracking-program-overview-ONLY.pdf.

20 http://www.bloomberg.com/news/2014-06-03/cuomo-ponders-drilling-as-fracking-bans-reach-top-court.html.

21 Matter of Norse Energy Corp USA v Town of Dryden, 108

were being considered in the state's highest appellate court at the time this article was being written.[22]

The two municipalities whose bans are the subject of the legal challenges are Drydan and Middlefield. The challenges to both bans center on whether the bans are preempted by New York's Oil, Gas, and Solution Mining Law,[23] which regulates oil and gas extraction in New York. This statute states that "[t]he provisions of this article shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries; *but shall not supersede local government jurisdiction over local roads* or the rights of local governments under the real property tax law."[24] The bans in both townships were in the forms of amendments to zoning ordinances. For Drydan, the zoning ordinance was amended to ban all activities involving the extraction, production, and storage of oil and natural gas.[25] For Middlefield, the zoning ordinance made oil, gas, and solution extraction activities prohibited land uses.[26]

In both cases, the New York Supreme Court (the intermediate appellate court in New York) dismissed the challenges to the bans, finding that the New York statute neither expressly nor impliedly preempted the locality's power to prohibit oil and gas related activities through their zoning ordinances.[27] For the question of express preemption, the court analyzed the text and legislative history of the New York statute,[28] concluding that the statute: (1) primarily sought to regulate the *operational* aspects of oil and gas activities, and (2) did not seek to "usurp the authority traditionally delegated to municipalities to establish permissible and prohibited uses of land within their jurisdictions."[29]

For the question of implied preemption, the court held that the local bans did not conflict with the provisions or policy of the New York statute. The court again noted that the state statute focused on the operational aspects of oil and gas activities rather than land use considerations.[30] The court also disagreed with the challengers' assertion that the state statute intended to maximize the recovery of oil and natural gas within the state and that the local bans interfered with that goal.[31] The court asserted that *minimizing waste* of oil and gas resources, which is an explicit goal of the statute, does not equate to *maximizing recovery* of oil and gas resources without regard to land use considerations.[32]

In June, 2014, the decision of the lower courts was affirmed by New York's highest court, which upheld local bans on hydrofracking, holding that the state's oil and gas mining law does not trump local zoning laws.[33]

The Drydan and Middlefield cases are being closely watched by both opponents and advocates of hydrofracking, especially since it has been reported that more than 75 municipalities in New York have banned fracking, and New York's governor has said that the statewide moratorium will be reconsidered in the next few years.[34]

Similarly, Pennsylvania's Act 13 of 2012 amended the Pennsylvania Oil and Gas Act by repealing certain parts of the Act and adding provisions affecting a wide variety of policies related to oil and natural gas extraction, production, and use.[35] Most relevant to this article was the addition of Chapter 33, which prohibited all local regulations that directly regulate oil and gas operations (section 3303).[36] Chapter 33 also provided uniform requirements for all local zoning ordinances within the state as they relate to oil and natural gas operations (section 3304).[37]

In *Robinson Twp v Commonwealth*, Act 13 was challenged by a group of citizens, organizations, and

AD3d 25 (NY App Div 3d Dep't 2013); Cooperstown Holstein Corp v Town of Middlefield, 106 AD3d 1170 (NY App Div 3d Dep't 2013).

22 *Id.*

23 NY CLS ECL § 23-0301 et seq. (emphasis added).

24 NY CLS ECL § 23-0303(2).

25 *Matter of Norse Energy Corp*, 108 AD3d at 27-28.

26 *Cooperstown Holstein Corp*, 106 AD3d at 1170.

27 *See Matter of Norse Energy Corp*, 108 AD3d at 38; *Cooperstown Holstein Corp*, 106 AD3d at 1171.

28 *See Matter of Norse Energy Corp,* 108 AD3d at 31-36.

29 *Id* at 34; *Cooperstown Holstein Corp,* 106 AD3d at 1171 (citing the analysis from *Matter of Norse Energy Corp*).

30 *Id*; *Cooperstown Holstein Corp*, 106 AD3d at 1171 (citing the analysis from *Matter of Norse Energy Corp*).

31 *Matter of Norse Energy Corp*, 108 AD3d at 34 (distinguishing between the statute's goal of minimizing waste and the concept of maximizing total oil and gas recovery within the state); *Cooperstown Holstein Corp*, 106 AD3d at 1171 (citing the analysis from *Matter of Norse Energy Corp*).

32 *Matter of Norse Energy Corp,* 108 AD3d at 37-38.

33 Importantly, the language of the New York statewide mining laws did not contain the strong pre-emption language of Michigan's regulatory statutes, such as Act 30 and Act 295.

34 http://www.bloomberg.com/news/2014-06-03/cuomo-ponders-drilling-as-fracking-bans-reach-top-court.html.

35 *See* Robinson Twp v Commonwealth, 83 A3d 901, 915 (Pa 2013).

36 58 PaCS § 3303.

37 58 PaCS § 3304.

localities.[38] The plaintiffs asserted that Act 13 violated five provisions of the Pennsylvania Constitution as well as the separation of powers doctrine and due process clause of the U.S. Constitution.[39] After the Pennsylvania Commonwealth Court found certain provisions of Act 13 unconstitutional, the case was appealed to the state supreme court. The state supreme court held that both the prohibition on local regulations directly regulating oil and gas (section 3303) and the zoning ordinance requirements (section 3304) were unconstitutional. However, the court failed to issue a majority opinion.

A plurality of the court held that sections 3303 and 3304 were unconstitutional because they violated Article I, Section 27 of the Pennsylvania Constitution.[40] Referred to as the "Environmental Rights Amendment," Article I, Section 27 states:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.[41]

The plurality found that section 3303's prohibition on local regulations directly regulating oil and gas "commands municipalities to ignore their obligations under Article I, Section 27."[42] The plurality noted that the Pennsylvania legislature cannot "remove necessary and reasonable authority from local governments" that local governments use to carry out their "constitutional duties."[43]

For section 3304's zoning ordinance requirements, the plurality provided two primary reasons for finding them unconstitutional. The first was that, due to the differing terrain and natural conditions from one municipality to another, the statewide requirements for zoning ordinances were incapable of protecting certain constitutionally protected aspects of the environment (e.g. as it related to the quality, quantity, and well-being of natural resources), given their failure to take specific local conditions into account.[44] The second (and related) reason was that the failure to take local conditions into account would result in more of a burden on certain properties and communities than others, resulting in a disparate impact that would conflict with Pennsylvania's duty under Article I, Section 27 to act as a trustee of natural resources "for the benefit of all the people."[45]

The justice who voted with the plurality on the unconstitutionality of Act 13 but disagreed with the plurality's reasoning asserted that Act 13 was unconstitutional because it violated substantive due process rights granted by the Pennsylvania Constitution as well as the Fifth and Fourteenth Amendments of the U.S. Constitution.[46] This justice's concurring opinion argued in part that municipalities have a constitutional obligation to enforce "ordered zoning" to protect property owners from being unduly burdened by their neighbors.[47] The concurrence found that Act 13 substitutes "irrational classifications" for the constitutionally-sound zoning scheme that would ordinarily apply to oil and gas operations in Pennsylvania.[48]

There were two dissenting opinions in *Robinson*, which both argued that Act 13 was well within the Pennsylvania legislature's policymaking purview (particularly given the high-level of deference that the judicial branch has traditionally afforded to the policy choices of legislatures).[49] In addition, the dissenters emphasized that municipalities in Pennsylvania are creatures of the legislature (as provided by the Pennsylvania Constitution) whose power to regulate land is granted exclusively by the legislature.[50] Therefore, the dissenters argued, it is illogical to find that a municipality has a constitutional entitlement to regulate land use that trumps the legislature's power to regulate land use.[51]

38 Robinson Twp v Commonwealth, 83 A3d 901, 917-25 (Pa 2013).

39 *Id* at 915-16. Plaintiffs also asserted that Act 13 was unconstitutionally vague. *Id.* The five provisions of the Pennsylvania Constitution alleged to be violated were: "Article I, Section 1 (relating to inherent rights of mankind); Article I, Section 10 (relating in relevant part to eminent domain); Article I, Section 27 (relating to natural resources and the public estate); Article III, Section 3 (relating to single subject bills); and Article III, Section 32 (relating in relevant part to special laws)." *Id.*

40 *Id* at 977-82.

41 Pa Const Art I, § 27.

42 *Robinson Twp*, 83 A3d at 978.

43 *Id* at 977-78.

44 *Id* at 979.

45 *Id* at 980 (quoting Pa Const Art I, § 27).

46 *Id* at 1008.

47 *See id* at 1001-04.

48 *See id* at 1001-08.

49 *See id* at 1009-16.

50 *See id* at 1010-11, 1015.

51 *See id.*

From the foregoing, it is clear that conflicting ordinances and rules as well as related legal disputes may arise to create a patchwork of conflicting precedent and laws relating to hydrofracking regulations. There is also conflict as to issues relating to preemption and State governance over conflicting local zoning regulations.

IV. The Need for a Centralized Optional System

Other states' experiences with local government actions indicate that the recent steps taken by local governments in Michigan are likely just the beginning. Any time a large number of local governments begin attempting to regulate a publicly controversial and complex issue like fracking, there is significant risk that such actions create a patchwork of conflicting ordinances and rules. In other words, each local government might have its own different ordinances and rules applicable to fracking—each with its own nuances. Such a process welcomes a statewide centralized solution that allows private industry to have uniformity while also allowing local governments to have significant input. Unlike the New York and Pennsylvania situations discussed above, such a solution is possible under Michigan law.

In Michigan, local units of government have no inherent authority on their own to regulate zoning. The State must specifically grant them authority.[52] Furthermore, a local government's ability to enact ordinances is limited by statutory enactments. As the Supreme Court in *People v Llewellyn* held:

> A municipality is precluded from enacting an ordinance if 1) the ordinance is in direct conflict with the state statutory scheme, or 2) if the state statutory scheme pre-empts the ordinance by occupying the field of regulation which the municipality seeks to enter, to the exclusion of the ordinance, even where there is no direct conflict between the two schemes of regulation.[53]

Similarly, the Michigan Supreme Court has confirmed that although the Michigan Constitution grants local governments control over "highways, streets, alleys, and public places"[54] any regulation passed under this authority "cannot impinge upon matters of statewide concern nor can a municipality regulate in a manner inconsistent with state law."[55] In *City of Taylor v Detroit Edison Co,* the plaintiff city passed an ordinance that required the underground relocation of electric utility lines along Telegraph Road at the electric utility's cost.[56] Under statutory authority granted to it by the Michigan Public Service Commission Act[57] (the MPSC Act), however, the MPSC had promulgated rules governing the replacement of existing overhead distribution lines.[58] The electric utility challenged the City of Taylor's ordinance, claiming that it conflicted with the MPSC's rules.[59] The Supreme Court recognized that "if" a state law conflicts with a local ordinance, the local ordinance must cede. Although the Court transferred the case to the MPSC to ultimately determine if there was a conflict between the ordinance at issue and the MPSC's rules, in so doing, the Court pronounced that "a local unit of government may exercise control over its 'highways, streets, alleys, and public places' *as long as that regulation does not conflict with state law*."[60] In other words, if the Commission found that the City of Taylor's ordinance conflicted with the MPSC's rules, the City's ordinance would be invalid.

Based on the holdings from *Llewellyn* and *City of Taylor*, it is possible for the Legislature to establish a process overseen by a state agency allowing entities seeking to establish new wells the option to apply for a certificate that would preempt local regulations and rules impacting fracking. Such legislation would specifically provide that if a certificate were issued by the agency, that certificate takes precedence over local ordinances, rules, and regulations regulating fracking locations or operations, but also allow the agency to place limiting conditions on a certificate. While the specific factors the legislation should direct the agency to consider are beyond the scope of this article, such a process should require that an applicant identify all local regulations and ordinances sought to be preempted, and require the applicant to provide local residents and the local government with notice of the application. This would allow the local governments to defend their interests and request that the agency either deny the certificate or place limiting conditions on the certificate.

52 Lake Township v Sytsma, 21 Mich App 210, 212; 175 NW2d 337 (1970).

53 People v Llewellyn, 401 Mich 314, 322; 257 NW2d 902 (1977).

54 Mich Const 1963 Art 7, § 29.

55 City of Taylor v Detroit Edison Co, 475 Mich 109, 118; 715 NW2d (2006).

56 *Id* at 118-19.

57 PA 3 of 1939, MCL 460.6.

58 *Id* at 118.

59 *Id.*

60 *Id* at 108.

This process would balance development and economic interests with the local concerns over fracking. Importantly, a similar framework is currently in place before the Michigan Public Service Commission for other important infrastructure projects, and the process has worked well in recent years.

Act 30 provides one approach to state legislation that would further uniform regulation of fracking. The history of Act 30 provides some insight into such an approach. In 1995, the Legislature determined that electric transmission lines were so important that the State should create a centralized siting authority. Before Act 30, transmission line projects were governed by a localized process that resulted in a patchwork of differing regulations. At that time, transmission line projects exposed "multi-county projects, *designed primarily for the economic benefit of the state,* to the construction and siting whims and uncertainties of each local jurisdiction traversed by the planned transmission line."[61] Accordingly, a "[s]tate-level siting authority would be preferable to what they consider a patchwork of regulations, and would ensure the uniform balancing of competing interests."[62] In other words, the Legislature, recognizing the statewide importance of transmission projects, determined that in certain instances, a centralized siting authority should be able to consider evidence and issue an order taking precedence over a patchwork of local regulations aimed at stopping transmission line projects. Any applicant must provide the local government and local landowners with notice of its application, and the Michigan Public Service Commission may place conditions on any certificate. Under Act 30, when a utility obtains a certificate of public convenience and necessity, pursuant to the requirements of the Act, "that certificate shall take precedence over a conflicting local ordinance, law, rule, regulation, policy, or practice that prohibits or regulates the location or construction of a transmission line for which the commission has issued a certificate."[63]

Act 295 includes a similar process for transmission lines enabling wind potential in Michigan's wind zones. Act 295 contains similar language to Act 30, in that if a certificate is granted under Act 295, it preempts local ordinances, laws, rules and regulations which regulate the location or construction.[64]

Act 30 and Act 295 serve as perfect examples of ways to address and protect local concerns while dealing with important state issues when developers face a patchwork of local regulations. Should local governments' interest in regulating fracking and issues ancillary to fracking continue, the Legislature should follow a similar procedure for fracking wells.

V. Conclusion

Michigan has a significant opportunity to be in the forefront of state wide legislation with respect to new fracking technologies. To ensure that our State has a consistent and streamlined approach to this practice, we need a clear statutory scheme that: (1) provides for technical oversight at a state agency, and (2) allows for preemption over conflicting local ordinances, laws, rules and regulations while still permitting local governments to protect their interests; and (3) avoids a patchwork of conflicting local laws and standards. Given the current framework in place for high voltage transmission lines, there is a precedence to establish similar legislation within the fracking arena, which will place Michigan among the leaders nationally in addressing these modern technological advancements.

61 Senate Majority Policy Analysis: Electric Line Certification, Tom Atkins, SB 408, March 22, 1995 (emphasis added).

62 *Id.*

63 MCL 460.570(1).

64 MCL 460.1153(4).

Bonner v City of Brighton:

A Critique of the Michigan Supreme Court's Decision on How to Abate a Public Nuisance

*by Norman Hyman**

The Michigan Supreme Court reversed the opinions and orders of the trial court and the Court of Appeals in *Bonner v Brighton*,[1] finding instead that the city may force the demolition of an unsafe building which the owner wants to repair. To reach that conclusion, the Court read into the ordinance an alternative, not found by the trial court or the Court of Appeals,[2] to the irrebuttable presumption against repair where the cost to repair exceeds the value based on the tax rolls. However, the alternative itself fails to pass constitutional muster. The result, though it serves the goal of blight elimination, unfortunately departs from longstanding precedent in Michigan and across the country protecting due process rights.

I. *Bonner v City of Brighton*

Leon and Marilyn Bonner own two houses and a garage in the City of Brighton (the "structures"). The structures have been unoccupied for over 30 years and are not well maintained. In 2009, the City's building official notified the Bonners that he had deemed the structures "unsafe" in violation of the City's building code–a public nuisance—and the building official ordered the Bonners to demolish the structures within 60 days. The Bonners appealed the building official's determination to the City Council because the building official's order had not given them the option to put the structures in compliance with the code by repairing them to eliminate the unsafe condition, thus abating the nuisance. The City Council, after hearing, ordered that the structures be demolished, even though the Bonners had agreed to abate the nuisance by repairing the structures. There were no exigencies that compelled demolition due to an existing or emergent public safety hazard.

The Bonners filed suit to challenge the City's decision. Both the trial court and the Court of Appeals held that the City had violated the Bonners' constitutional rights by not giving the Bonners the option to abate the nuisance by repairing the structures.

Pausing at this moment, one would have expected that the trial court and Court of Appeals, following commonly accepted rules in Michigan and throughout the United States, would rule as they did.

Yet the Michigan Supreme Court reversed and allowed the demolition order to stand. How could this be possible? How could the Supreme Court allow the imposition of the drastic remedy of demolition instead of a less invasive and less drastic abatement remedy? The answer lies in a provision of the City's applicable ordinance and the Supreme Court's interpretation of the ordinance.

The Brighton ordinance ("BCO") § 18-59 relied on by the City states:

> *Whenever the city manager, or his designee*, has determined that a structure is unsafe and *has determined that the cost of the repairs would exceed*

1 495 Mich 209 (2014). A petition for writ of certiorari to the U.S. Supreme Court was field by the Bonners on July 21, 2014. It was denied on October 6, 2014.

2 298 Mich App 693; 828 NW2d 408 (2012).

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100 percent of the true cash value of the structure as reflected on the city assessment tax rolls in effect prior to the building becoming an unsafe structure, *such repairs shall be presumed unreasonable and it shall be presumed for the purpose of this article that such structure is a public nuisance which may be ordered demolished without option on the part of the owner to repair*. [Emphasis in original]. *This section is not meant to apply to those situations where a structure is unsafe as a result of an event beyond the control of the owner, such as fire, windstorm, tornado, flood or other Act of God. If a structure has become unsafe because of an event beyond the control of the owner, the owner shall be given by the city manager, or his designee, reasonable time within which to make repairs and the structure shall not be ordered demolished without option on the part of the owner to repair.* [Additional emphasis added]. If the owner does not make the repairs within the designated time period, then the structure may be ordered demolished without option on the part of the owner to repair. The cost of demolishing the structure shall be a lien against the real property and shall be reported to the city assessor, who shall assess the cost against the property on which the structure is located.[3]

It should be noted that this section of the BCO:

(1) Establishes a presumption that if the cost of repairs exceeds 100% of the true cash value of the structure on the tax roll "such repairs shall be presumed unreasonable (and) may be ordered demolished without option on the part of the owner to repair";

(2) Provides no standards for rebutting the presumption; and

(3) Gives some owners the right to repair an unsafe structure without regard to cost of repair.

The Supreme Court appears to agree in a footnote that the "unreasonable-to-repair presumption" turns on whether the cost to repair exceeds 100% of the true cash value of the structure for assessment purposes.[4] The ordinance sets forth no other presumption, nor does it set forth any standards for rebutting the presumption; rather, it gives the property owner only the right to rebut the building official's determination as to cost to repair.

The ordinance goes on to provide:

> An owner of a structure determined to be unsafe may appeal the decision to the city council. The appeal shall be in writing and shall state the basis for the appeal…. The owner or his agent shall have an opportunity to be heard by the city council at a regularly scheduled council meeting. The city council may affirm, modify, or reverse all or part of the determination of the city manager, or his designee.[5]

The building official determined that the structures were unsafe in violation of the BCO and were a public nuisance. That determination was not an issue on the appeal. But the building official went on to determine, without hearing, that the cost to repair exceeded the true cash value of the structures and therefore "it was unreasonable to repair these structures consistent with the standard set forth in BCO § 18-59 …."[6] The record discloses that cost to repair was the only standard in § 18-59 and the only issue considered by the building official. The building official then ordered the Bonners to demolish the structures.

The Supreme Court's decision does not refer to any findings made by the City Council on the Bonners' appeal relating to the unreasonable–to-repair presumption of BCO § 18-59 other than "that the structures were unreasonable to repair under BCO § 18-59." It appears that the City Council simply chose to accept the building official's "finding" on cost to repair and to reject the evidence the Bonners proffered to the Council on the cost issue, without specific reference to any proofs on the unreasonable-to-repair presumption. As I suggest *infra*, in discussing the unreasonable-to-repair presumption, the Supreme Court did not address the threshold, and I submit, the key question: Does a presumption which is based on cost to repair, whether rebuttable or not, violate due process?

II. Abatement of Nuisances: Precedent in Michigan and Throughout the United States

As pointed out by the trial court in *Bonner*, "due process demands … that the means selected shall have a real and substantial relation to the object sought to be attained."[7]

3 Brighton Code of Ordinances ("BCO") § 18-59.

4 495 Mich at 215 n 2.

5 BCO § 18.61.

6 *Bonner*, 495 Mich at 215.

7 McAvoy v HB Sherman Co, 401 Mich 419, 436; 258 NW2d

Applying that due process principle to the *Bonner* facts, the trial court stated:

> Two rationales for this provision of the ordinance [§18-59] have been proffered, but neither the proffered rationales nor any other conceived of by this Court can support the contested provision of this ordinance. The City argues that there is a legitimate interest advanced by the ordinance because the demolition of unsafe buildings promotes the public safety. Certainly, the demolition of unsafe structures promotes the legitimate interest of public safety. However, public health and safety is not advanced any more by the provision denying property owners an opportunity to repair than the interest in public health and safety would be advanced if the ordinance required the City to permit a reasonable opportunity to make such repairs. If an owner voluntarily repairs the home and brings it up to code, then the property is no longer a public health and safety hazard. Therefore, the interest is no more advanced if the property is demolished by the City than if the property is repaired by the owner to the City's standards.[8]

In affirming the trial court, the Court of Appeals held:

> We hold that BCO § 18-59 violates substantive due process because it is arbitrary and unreasonable, constituting a whimsical ipse dixit; it denies a property owner the option to repair an unsafe structure simply on the basis that the city deems repair efforts to be economically unreasonable. When a property owner is willing and able to timely repair a structure to make it safe, preventing that action on the basis of the ordinance's standard of reasonableness does not advance the city's interest of protecting the health and welfare of its citizens. We do not dispute that a permissible legislative objective of the city under its police powers is to protect citizens from unsafe and dangerous structures and that one mechanism for advancing that objective can entail demolishing or razing unsafe structures. But BCO § 18-59 does not bear a reasonable relationship to this permissible legislative objective. *Kyser,* 486 Mich at 521. There are two ways to achieve the legislative objective, demolition or repair, either of which results in the abatement of the nuisance or danger of an unsafe structure. There is simply no sound reason for prohibiting a willing property owner from undertaking corrective repairs on the basis that making such repairs is an unreasonable endeavor, given that the repairs, similar to demolition, will equally result in achieving the objective of protecting citizens from unsafe structures.[9]

The Court of Appeals also held that BCO § 18-59 violates procedural due process:

> We also determine that BCO § 18-59 does not provide adequate procedural safeguards to satisfy the Due Process Clause. Before potentially depriving plaintiffs or any city property owners of their constitutionally protected property interests through demolition predicated on a determination that a structure is unsafe, the city was constitutionally required to provide plaintiffs with a reasonable opportunity to repair the unsafe structure, regardless of whether doing so might be viewed as unreasonable because of its cost. In addition to notice, a hearing, and an impartial decision-maker, which are provided for in § 18 of the BCO, the city should have also provided for a reasonable opportunity to repair an unsafe structure, limited only by unique or emergency situations. Precluding an opportunity to repair on the basis that it is too costly in comparison with a structure's value or that making repairs is otherwise unreasonable can result in an erroneous and unconstitutional deprivation of a property interest, i.e., a deprivation absent due process of law. Giving a property owner the procedural protection of a repair option is the only way the city's ordinances could withstand a procedural due process challenge.[10]

BCO § 18-59, by its terms, in fact establishes that the goal of the ordinance— elimination of unsafe structures—can be met by means less invasive than demoli-

414 (1977) (quoting Nebbia v New York, 291 US 502, 525 (1934)).

8 Bonner v. City of Brighton, Case No. 09-24680-CZ (Liv. Cty. Cir. Ct. Nov 23, 2010), *reprinted at* Petition for Writ of Certiorari to the Michigan Supreme Court, App. D, available at http://sblog.s3.amazonaws.com/wp-content/uploads/2014/08/Bonner-Petition.pdf.

9 *Bonner*, 298 Mich App at 714-15 (footnotes omitted).

10 *Id* at 716-17 (footnotes omitted).

tion. It exempts from the no-option demolition requirement structures that have become unsafe as a result of events "beyond the control of the owner." Of course, if a structure is unsafe, whether its unsafe condition results from events within or beyond the control of the owner has no relation to the goal of eliminating unsafe structures. This disparity in treatment has no connection with the purpose of the ordinance and no rational basis. The exemption leads to the conclusion that the cost of repair test of BCO § 18-59 does not meet the constitutional requirement of a "real and substantial relation to the object sought to be attained."[11]

A reading of the Court of Appeals and Supreme Court *Bonner* decisions and the record before the City shows that on the demolition issue, the entire focus was on cost to repair. Cost to repair was the only factor considered at any level of the case. In their appeal to the City Council, the Bonners offered testimony that the repairs needed to bring the structures to code would cost less than the true cash values of the structures, but the City Council accepted the building official's determination that the structures should be demolished. The Court of Appeals and the Supreme Court both accepted the City Council's approval of the building official's factual finding on cost to repair. There was no discussion before the City Council on any issue other than the cost to repair/unreasonable-to-repair presumption. And neither the Court of Appeals nor the Supreme Court discussed any issue other than cost to repair. In essence, the Court of Appeals concluded that cost to repair was irrelevant, while the Supreme Court thought it could be the basis of a demolition order and accepted without review the City Council's upholding of the building official's determination.

BCO §18-59 states that there is no option other than demolition if it is determined that the cost of repair exceeds the true cash value of a structure based on the City's assessment rolls. In spite of some language in the opinion that will be discussed *infra*, the totality of the Supreme Court's decision, including its footnote 2, shows that the Court focused on the "unreasonable-to-repair presumption" created by§18-59, which provided that if cost to repair exceeds the true cash value of a structure, demolition is the only option.[12]

To support its holding, the *Bonner* Court of Appeals relied in part on *Comm'r of State Police v Anderson.*[13] In *Anderson*, the question was whether the defendant should be required to demolish his building in order to abate a fire hazard. The *Anderson* Court stated:

> As plaintiff concedes, this statute must be administered with caution. The remedy prescribed should be no greater than is necessary to achieve the desired result. It was shown that the principal and only source of fire would be from trespassers or vandals. To say that the houses are old and dilapidated does not alone justify their razing or make them a nuisance.
>
> ***
>
> It has been decided in a number of cases that something less than destruction of the entire building should be ordered where such will eliminate the danger or hazard. See 14 ALR2d 92; 9 Am Jur, Buildings § 40, p 236. The need for repairs and alternations [sic] does not in this case constitute the fire hazard and therefore it is not necessary that we order them. The purpose of the statute is to eliminate the hazard, not to make the houses tenantable. This purpose can best be achieved in this instance by action less drastic than razing.[14]

In *Bonner*, the Supreme Court did not refer to *Anderson*, and, I suggest, *sub-silentio* strayed from *Anderson.*

The *Bonner* Court of Appeals also cited cases elsewhere in the United States in support of its decision, and its decision was in line with the discussion and cases in the ALR2d and Am Jur notes cited in *Anderson.* Our constitutional jurisprudence makes clear that where a police power goal can be achieved by more than one remedy, due process requires that the remedy that is least intrusive or invasive of personal rights, including property rights, be allowed.[15]

In *Lawton v* Steele, the U.S. Supreme Court stated that in effectuating an exercise of a valid police power interest, "the means [must be] reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals." [16] Thus, as the Michigan Supreme Court stated in *Anderson*, "the remedy prescribed should be no greater than is necessary to achieve the desired result."[17]

I have found no Michigan case that allowed a municipality to prohibit repair of a structure to bring it into

11 *See McAvoy,* 401 Mich at 435-36.

12 495 Mich at 215 & n 2.

13 344 Mich 90; 73 NW2d 280 (1955).

14 *Id* at 95-96.

15 *See* Shelton v Tucker, 364 US 479, 488 (1960).

16 152 US 133, 137 (1894).

17 344 Mich at 95.

compliance with code or to abate a nuisance, public or private, because the cost to repair exceeds the value of the structure. Moreover, I am not aware of any Michigan cases, excluding cases of hazards posing an imminent threat to public safety, which have excluded abatement less invasive than demolition. I submit the Supreme Court's *Bonner* decision is a departure, and an unacceptable one, from established Michigan law.

The Michigan Supreme Court has also recognized in other contexts the principle that extreme and drastic remedies will be avoided when less extreme remedies are available. Thus, the Supreme Court has held that dismissal of a case under MCR 2.313(B)(2)(c) for discovery violations "is to be applied only in extreme cases."[18]

Likewise, in a nuisance abatement case, the Court of Appeals stated:

> We recognize that the appointment of a receiver is a remedy of last resort, and should not be used where another, less drastic remedy exists. However, the appointment of a receiver is appropriate when other attempts have failed and a property owner has repeatedly refused to comply with the court's orders. [19]

The record in *Bonner* not only supports the Court of Appeals' holding that BCO § 18-59 deprived the Bonners of their substantive due process rights, but also that § 18-59 deprived them of their procedural due process rights as well. By focusing only on the § 18-59 cost to repair/unreasonable-to-repair presumption, the Supreme Court held that the Bonners' willingness to repair the structures to conform to code, without regard to cost, was irrelevant. On the contrary, I submit, it was the Supreme Court's attention to the cost to repair provision that is irrelevant. Rather, I submit that BCO § 18-59, as interpreted by the City and the Supreme Court, prohibited the Bonners from proffering to abate the unsafe condition of the structures by bringing the structures to code. Thus, the Bonners were deprived of a meaningful remedy. That procedural due process includes the right to a meaningful remedy was stressed by the Michigan Supreme Court in *Mudge v Macomb County*:

> The touchstone of procedural due process is the fundamental requirement that an individual be given the opportunity to be heard "in a meaningful manner." Many procedural due process claims are grounded on violations of state-created rights as is the case here, rights that do not enjoy constitutional standing. However, the right to a hearing prior to the deprivation is of a constitutional stature and does not depend upon the nature of the right violated.[20]

In his important and oft-cited opinion for the U.S. Supreme Court in *Mullane v Central Hanover Bank & Trust*, Justice Jackson stated that the words of the Due Process Clause "at a minimum … require that deprivation of life, liberty or property by adjudication be proceeded by notice and opportunity for a hearing appropriate to the nature of the case."[21] In short, "within the limits of practicability,"[22] a state must afford to all individuals a *meaningful* opportunity to be heard if it is to fulfill the promise of the due process clause.[23]

III. The Brighton Ordinance Creates an Irrebutable Presumption

The *Bonner* Supreme Court seems to have recognized that a presumption such as

> the demolition presumption of BCO § 18-59 must be rebuttable.[24] But to avoid the plain language of BCO § 18-59 that there is no option to demolition and to save § 18-59 from its infirmity, the Supreme Court determined that the Bonners could, in fact, rebut the presumption. After stating that "BCO § 18-59 does not specify the manner in which the unreasonable-to-repair presumption might be overcome," the opinion nevertheless posits:
>
> > A showing of reasonableness could therefore be established by presenting a viable repair plan; evidence from the challenger's own experts that, contrary to the City's estimates, the repair costs would not exceed 100 percent of the

18 Schell v Baker Furniture Co, 461 Mich 502, 509; 607 NW2d 358 (2000) (internal citations and quotation marks omitted). *Accord* Vicencio v Ramirez, 211 Mich App 501, 506; 536 NW2d (1995) ("Dismissal is a drastic step that should be taken cautiously.").

19 Ypsilanti Twp v Kircher, 281 Mich App 251, 273; 761 NW2d 761 (2008) (citations omitted).

20 458 Mich 87, 101; 580 NW2d 845 (1998) (citations omitted).

21 339 US 306, 313 (1950).

22 *Id* at 318.

23 *Id* (emphasis added).

24 *See also* Livonia Hotel v City of Livonia, 259 Mich App 116; 673 NW2d 763 (2003).

> property value; or evidence that the structure subject to demolition has some sort of cultural, historical, familial, or artistic value.[25]

This explanation ignores the express language of BCO § 18-59 that once a finding has been made that the cost of repair exceeds the true cash value of the structure, there is no option other than demolition.

Moreover, I submit that the Supreme Court's suggestion that the sole ordinance option of demolition can be rebutted by a showing "that the structure subject to demolition has some sort of cultural, historical, familial, or artistic value,"[26] posits a rebuttability which is not meaningful and is, for all practical purposes, illusory.

In *Lucas v South Carolina Coastal Council*,[27] the U.S. Supreme Court discussed whether an act that barred the homeowner from building homes on his land constituted an unconstitutional taking. Although the case was remanded to the lower court, the majority refused to accept Justice Blackmun's statement in his dissent:

> The Court creates its new takings jurisprudence based on the trial court's finding that the property had lost all economic value. This finding is almost certainly erroneous. Petitioner still can enjoy other attributes of ownership, such as the right to exclude others, "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna v. United States*, 444 US 164, 176 (1979). Petitioner can picnic, swim, camp in a tent, or live on the property in a moveable trailer.[28]

While *Lucas* was a takings case, the principle that non-realistic or illusory rights will be given slight consideration in evaluating whether constitutional property rights have been invaded applies equally here. Not only are the rebuttal factors posited by the Michigan Supreme Court so unrealistic as to be illusory, but it is hard to imagine how a court could subject a City's subjective findings on such factors to meaningful review. BCO § 18-59 thereby did not give the Bonners a reasonable, realistic means of rebutting the demolition requirement.

Michigan's courts have dealt with illusory remedies in considering limitations period provisions in contracts. In *Cheboygan Cement Prods v Glawe, Inc*,[29] the Michigan Court of Appeals discussed a contract provision that required a purchaser to make complaints about the product in writing within three days of receiving the product. The court stated, "it is clear that a three-day period for a purchaser to make 'exceptions and claims' after a delivery is insufficient to discover the consequences of using a mixture of concrete that includes slag, thereby working a hardship that would materially alter the contract."[30] Although the contract offered a remedy period, the remedy period was so short that it was found to be unreasonable. Michigan courts establish that "a contractual limitation period must be reasonable if it is to be enforced in the face of a longer statutory period."[31]

In *Rory v Continental Ins Co,*[32] the court evaluated a one-year statute of limitations period in an insurance contract. The court concluded that contractual time periods may be shortened as long as the time period is considered reasonable. However, based on the facts, the court held that "the one-year time limit was so short that it acted as a practical abrogation of the right to bring a lawsuit."[33]

The due process requirement of a meaningful remedy is also implicated by the Supreme Court's attempt to justify BCO § 18-59 by imagining possible ways to rebut the ordinance's demolition presumption (ways the decision acknowledges are not contained in the ordinance). I submit that the rebuttability suggested by the Supreme Court is not meaningful, is illusory, and the ordinance's demolition presumption is for all practical purposes irrebuttable.

As acknowledged by the Supreme Court, § 18-59 contains no standard other than cost to repair relating to the demolition repair standard. In an attempt to avoid the problem caused by the invalidity of the only standard for demolition in § 18-59, the Supreme Court posited possible ways of rebutting the standard. First, even if the

25 *Bonner,* 495 Mich at 233.

26 *Id*. Moreover, unless the City's findings on cost-to-repair and these other factors are not subject to *de novo* judicial review, a new area of litigation is opened up. And if the City's findings are not subject to *de novo* judicial review, procedural due process is implicated.

27 505 US 1003 (1992).

28 *Id* at 1043-44.

29 2014 Mich App LEXIS 989 (May 29, 2014).

30 *Id* at *30.

31 Myers v Western-Southern Life Ins Co, 849 F2d 259, 260 (CA6 1988).

32 473 Mich 457, 512; 703 NW2d 23 (2005).

33 *Id* at 468.

standard were valid, none of the rebuttal standards posited by the Supreme Court are in the ordinance. Second, adding standards for rebutting an invalid ordinance cannot validate an invalid ordinance.

In *Saginaw v Budd*,[34] the Supreme Court invalidated a building code ordinance that authorized the City's building official to order demolition of a house and garage because of "inadequate maintenance, dilapidation, and abandonment." The Supreme Court stated:

> The ordinance discloses that there was an improper delegation of authority without definable standards, a greater delegation of authority without definable standards than delegations we have passed judgment upon and have declared unconstitutional in previous opinions.[35]

The Court then ruled:

> We cannot, however, approve a judgment based on an invalid ordinance and, therefore, are granting appellants' request for relief:
>
> "That section 201(a) of ordinance D-511 of the City of Saginaw, Michigan be declared unconstitutional as an improper exercise of the police power of the municipality, and as an improper delegation of legislative authority to an administrative official without precise standards to guide his actions, and that the action taken under said ordinance be set aside."[36]

Saginaw v Budd teaches that a court cannot make an invalid ordinance valid by inserting standards which did not exist in the ordinance.

The *Bonner* Supreme Court recognized that "the essence of due process is the requirement that 'a person in jeopardy of serious loss [be] given a meaningful opportunity to present their case … before they are permanently deprived of the interests at stake.'"[37] The author submits that the ordinance deprived the Bonners of that opportunity by depriving them of a meaningful opportunity to avoid demolition by repairing the property.

IV. Conclusion

Bonner arose in the context of a concern with eliminating blight, fueled by the recent economic problems confronted by Michigan. *Bonner* also involved facts, including structures not well maintained for a long period and property owners who were not fully cooperative with city officials, which makes the City's actions in the case perhaps understandable. However, these facts did not justify a departure by the Supreme Court from accepted due process law. The Court of Appeals decision should have been affirmed.

34 381 Mich 173; 60 NW2d 906 (1988).

35 *Id* at 178 (citations omitted).

36 *Id*.

37 495 Mich at 238-39 (citations omitted).

An Agricultural Law Analysis of Green Acres and the City:

A Curly Pig Tale of a Problem

by Gregory J. Gamalski and Jacob High***

A lawyer who does not work regularly with real estate clients in rural areas might be surprised by some of the statutes and rules that affect rural real estate, especially agricultural real estate. The ten million acres of agricultural land in Michigan contain 56,000 farms, which produce $5.7 billion in products annually. These farms and other lands are eligible for favorable treatment under certain legislation and can take advantage of real property tax relief and transfer exemptions under the General Property Tax Act,[1] and Farmland and Open Space Preservation Act.[2]

Other statutes and programs are available to farmers, regardless of local population density or location, be it rural Leelanau County in the bucolic "Little Finger" of Michigan near Traverse City or urban areas like the City of Detroit. Some of these enactments can also be applied to so-called urban agriculture and urban farms. For instance, exemptions under the General Property Tax[3] for certain transfers[4] of agricultural property allow certain property owners to avoid the so called "uncapping"(or, more exactly, the reassessment),[5] of real property upon transfer. In addition, there are certain tax credits available to farm owners enrolled in farmland preservation programs (but not available to mere home dwellers) that can help agricultural enterprises survive and thrive.[6]

As Oliver Wendell Douglas learned, Green Acres can contain some surprising situations for a city lawyer.[7] Paul

1 MCL 211.1 et seq.

2 MCL 324.36101 et seq.

3 General Property Tax Act, MCL 211.1 et seq; PA 206 of 1893, as amended.

4 Under MCL 211.27a(6), transfers are defined as "the conveyance of title or a present interest in property, including the beneficial use of the property, the value of which is substantially equal to a fee interest but there are myriad exemptions." *See* MCL 211.27a (6) and (7) regarding conveyances of agricultural land.

5 The transfer allows an assessor to reassess. *See* MCL 211.27a(3). Assessment does not mean "evaluate" or "appraise" in this context. It really means something more like "levy." The assessment term means the property stands as surety for the taxes owned and is thus assessed or, if one likes, burdened with the taxes. Likely, this is a distinction without a difference in the end since the assessor does evaluate the value in arriving at the amount to be assessed as taxes.

6 *See, e.g.*, the Farmland and Open Space Preservation Act, MCL 324.36101 et seq.

7 Oliver Wendell Douglas was a befuddled lawyer turned farmer

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Henning and Jay Sommers, Eddie Albert, and Eva Gabor would appreciate some legal tools an ambitious country mouse might try to apply when he or she arrives in the Big City with high hopes of plying the farm-steading trade in the urban milieu.[8] Using some of these statutes, that country mouse might apply rural business savvy and legal guile in the Big City in a fashion that one must think would greatly amuse Mr. Haney or that enigmatic sage of Hooterville and schoolboy genius, Arnold Ziffel.[9] Thus, with the table set, let's embark on a discussion that might be called "An Agricultural Law Analysis of Green Acres and the City."

I. Exemption Generally: Residential, Agricultural and Forest Property

The Michigan Constitution states that "[t]he legislature shall provide for the uniform general ad valorem taxation of real and tangible personal property not exempt by law except for taxes levied for school operating purposes."[10] The General Property Tax Act mirrors the requirement of the Michigan Constitution, governs property taxes generally in the State of Michigan, and lists several exemptions from taxation.[11]

In 1994, voters passed Proposal A, amending Article 9, § 3 of the Michigan Constitution to limit the annual increase in property tax assessments and to authorize enabling legislation.[12] Many changes to the ad valorem taxation of Michigan real property followed, including acts implementing a principal residence exemption[13] from local school taxes and exemptions for qualified agricultural property.[14] For instance, a principal residence is exempt from up to eighteen mills of local school operating purposes provided by law.[15] This is colloquially referred to as the "homestead" or principal residence exemption (PRE). The owner may claim the PRE by filing an affidavit with the local tax-collecting unit on or before June 1 or on or before November 1 of any given year (the latter affecting only the December 1 tax bill). Once claimed, the PRE continues until circumstances change, such as when the property is no longer the claimant's principal residence. The form for the affidavit is available on the Department of Treasury web site.[16]

As a general rule, Michigan residents may only have one principal residence.[17] However, in 2008 the Legislature amended the statute to allow the owner of a property that has a current PRE to retain the PRE for up to three years on another property that was previously exempt as a principal residence.[18] An owner will qualify for this exception if the property is not occupied, is for sale, is not leased, and is not used for any business or commercial purpose. Thus in practice, one who has purchased a new home can continue the PRE on one's old home if is not sold for up to three years. Mortgagees and land contract vendors who foreclose their interests and become owners can also claim the exemption on the property. The Department of Treasury requires the owner to submit a form for this exemption.[19]

Stege v Dep't of Treasury, heard by the Michigan Court of Appeals in 2002, opened another exception to the "one principal residence."[20] Petitioners were William and Cher-

in the rural situation comedy *Green Acres*. *See* http://www.imdb.com/title/tt0058808/ and http://en.wikipedia.org/wiki/Green_Acres

8 Paul Henning was the producer of *Beverly Hillbillies*, *Petticoat Junction*, and *Green Acres*, the so-called "rural comedies," which all regretfully ended in 1971 in a night of the long knives series of cancellations called the "rural purge"; *Lassie* was put out to pasture too, along with the mentioned programs. *See* http://en.wikipedia.org/wiki/Green_Acres#.22Rural_purge.22_cancellation

9 Mr. Haney was the scheming local businessman often attempting to enmesh Oliver Wendell Douglas in various madcap commercial investments or schemes. Arnold Ziffel was the porcine prodigy and "son" of Fred and Doris Ziffel, fellow residents of the hamlet Hooterville that was the setting for most of the *Green Acres* antics.

10 Michigan Const, Art 9, § 3.

11 MCL 211.1 et seq.

12 School Finance Reform in Michigan Proposal A: Retrospective; Office of Treasury Analysis, Dec 2002;, available at http://www.michigan.gov/documents/propa_3172_7.pdf

13 MCL 211.7cc and MCL 211.7dd; *see also* Form 2368 Principal Residence Exemption Affidavit, available at http://www.michigan.gov/documents/2368f_2605_7.pdf

14 *See* Form 2368 and Instructions.

15 *See* MCL 211.7cc(1). The Michigan Department of Treasury has published guidelines on the principal residence exemption. *See* Publication 2856 9Rev.03-13, available at http://www.michigan.gov/documents/2856_11014_7.pdf

16 Form 2368, Principal Residence Exemption Affidavit.

17 MCL 211.7cc(2).

18 MCL 211.7cc(5).

19 Form 4640, available at http://www.michigan.gov/documents/taxes/4640_231633_7.pdf

20 Stege v Dep't of Treasury, 252 Mich App 183; 651 NW2d 164 (2002). Note further the teapot tempest that swirled around a high-ranking government official, (*see Detroit Free Press*, Aug 27, 2014), which suggests the PRE process is fraught with

rie Stege, a married couple who lived separately. William lived in Illinois where he lived and maintained his principal residence, and Cherrie lived in Suttons Bay, Michigan where she maintained her principal residence. William and Cherrie Stege claimed a property tax credit on their Illinois state income tax returns toward their income tax liability for the Illinois home. On their Michigan return, petitioners claimed a Michigan homestead exemption each year for Cherrie's home in Suttons Bay, Michigan.

The court held that "the Michigan homestead exemption does not prohibit both a Michigan property tax homestead exemption for a Michigan home and a simultaneous Illinois homestead income tax *credit* for a separate Illinois home [italics added]."[21] The court reasoned that although "the Michigan homestead provision prohibits the claiming of more than one exemption in any state, it only prohibits the claiming of more than one exemption, *not* the claiming of an exemption and a credit."[22] Further, "[e]xemptions and credits are distinct creatures of tax law—exemptions preclude any tax liability, while credits are applied to tax liability, if any."[23]

The court's holding opens the door to other owners in similar situations. But those are not the only exemptions or credits available, and the rural practitioner should be aware of other exemptions that are not typical of the suburban residential real estate situation. Having established some concepts related to the PRE as a framework, we now turn to the agricultural and timberland exemptions. These exemptions are available to some rural or agricultural real estate owners. One should keep in mind that, for the purposes of these statutes, "agricultural" use need not be based on the zoning classifications alone. While the zoning classifications may be determinative at times, the agricultural exemption under MCL 211.7dd(d) is based on actual use, not just zoning classifications. Perhaps Oliver Wendell Douglas need not have moved to the country at all if he wanted to be a gentleman farmer, at least in Michigan.

Under the General Property Tax Act Section 211.7ee, agricultural land is entitled to the Qualified Agricultural Property Exemption. The Qualified Agricultural Property Exemption exempts certain defined property from eighteen mills of school operating purposes. As an example, Holly Township in Oakland County levies a total of about 56 mills. On a non-homestead or property that is not a principal residence with a true cash value of $400,000 (and therefore an assumed taxable value of $200,000), the property tax bill is about $11,200.[24] But if the Qualified Agricultural Exemption is used, the real property taxes are reduced by 32%, to about $7,600; likewise, a PRE yields the same result.

A. Agricultural Exemption Issues and Procedures

For these purposes, "Qualified Agricultural Property" is either: (1) property that is classified as agricultural, or (2) property that is not classified as agricultural, but which nonetheless uses more than 50% of its acreage for agricultural uses.[25]

The definition allows for some interesting alternative scenarios. For example, in theory, a property may be classified or zoned as residential, but be eligible for the exemption if more than 50% of the acreage is used for agricultural purposes regardless of the zoning classification. Or, if a property is classified by zoning as agricultural, the owner can still qualify for the exemption even if none of the property is used for agricultural purposes.

Imagine if porcine urban pioneer Arnold Ziffel and his cousin Daisy Ziffel[26]— perhaps on the advice of Mr. Haney or maybe Oliver Wendell Douglas, Esq., doughty legal mind that he is—claim the Qualified Agricultural Exemption for three-quarters of an urban acre on which they have planted asparagus, radicchio, escarole, and arugula on a farm near Detroit's own Green Acres.[27] Assuming that their plots are in fact in true agricultural production with these high-priced delicacies, might not even Oliver Wendell Douglas win that case in front of the as-

subtle peril. It appears that Mr. Baird bought a house and that his sellers did not rescind the PRE. Baird, unwittingly or not, did not notify the assessor—and the exemption continued for three years. During the same period, his wife and family lived in a home in Illinois, which also had an exemption. Baird might have benefited from the counsel of a Michigan attorney familiar with the *Stege* holding and the PRE rules.

21 252 Mich App at 195.

22 *Id* at 194 (citing MCL § 211.7cc, 211.7dd).

23 *Id* at 194.

24 *See* State of Michigan Property Tax Estimator, https://treas-secure.state.mi.us/ptestimator/PTEstimator.asp Holly Township, Holly Schools, Oakland County, Michigan.

25 MCL 211.7dd(d); MCL 324.26101; State Tax Commn Bulletin No. 4 of 1997, available at http://michigan.michigan.gov/treasury/1,1607,7-121-1751_2228-7871--,00.html

26 Daisy Ziffel is Arnold's younger cousin with whom Arnold lives in the *Green Acres* reunion film called *Return to Green Acres*, CBS May 1990. *See* http://www.imdb.com/title/tt0100481/

27 Green Acres is a neighborhood in Detroit bordered on the north by Eight Mile Road and on the West by Livernois.

sessor or Michigan Tax Tribunal? Regardless of zoning, if more than 50% of the land is used for agriculture, the exemptions should apply.

Additionally, the *sale* of Qualified Agricultural Property is not a "transfer of ownership" or an uncapping event that reassesses the property.[28] Likewise, a sale of Qualified Forest Property is not a transfer for re-assessment purposes.[29] In most other instances when real property in Michigan is sold, the sale triggers a so-called uncapping event, and the taxable value—which is usually lower than the State Equalized Value (SEV)—rises to the SEV, thus increasing total property taxes. Transfers of Qualified Agricultural Properties and Qualified Forest Properties do not uncap provided that: (1) the property remains Qualified Agricultural Property or Qualified Forest Property after the transfer, and (2) the new owner files certain forms with the local assessor's office and the register of deeds where the property is located after the transfer is made.[30]

B. Practical Examples

In any of these instances, there are a number of fact-specific scenarios that require deeper analysis. Improved parcels, especially those with a functioning house or related commercial operation, may only partially qualify for the Qualified Agricultural Exemption, and the local unit of government may require satisfactory proof that land not zoned for agricultural use is indeed being farmed before granting the exemption or credit. Thus, Arnold and Daisy may have a tough row to hoe. Nonetheless, note that the modest urban homestead in which they reside on an adjoining lot gets the PRE. An owner may also be able to claim the Qualified Agricultural Exemption on a contiguous parcel owned by the same taxpayer, so long as certain conditions are met.[31]

Meanwhile, back in Hooterville, Michigan, Oliver Wendell Douglas can in fact claim the Qualified Agricultural Exemption on land that is zoned as agricultural or classified as such by the Assessor or State Tax Commissioner. Even fallow land that is not actively farmed, if designated as such under local ordinance, can claim Qualified Agricultural Exemption[32]—a good thing for Mr. Oliver Wendell Douglas, given the limited success he usually has at his second profession. In any case, a real farmer, a fictional farmer, or an owner of agriculturally designated land has several steps to follow in order to claim the exemption if the property is not already exempt. And the steps are more complicated when the Qualified Agricultural Property changes hands.

Let us start with an assumption that there is possible Qualified Agricultural Property that could use the exemption. If the land is not zoned or classified by the assessor as agricultural, in order to claim the Qualified Agricultural Property Exemption based on more than 50% of the land being used for agricultural purposes, one must file Form 2599 on or before May 1 of a given year. If no exemption has yet been claimed and Form 2599 is filed, the exemption becomes effective for taxes in that year if the May 1 deadline is met.

If one is buying land currently designated as Qualified Agricultural Property, one must proceed with caution in order to preserve the exemption. There are several forms to file, and the unwary might miss a step without a proper checklist or at least an understanding of how to proceed. First, one will, of course, file the required Property Transfer Affidavit. Note that more recent changes in the law have increased the fines for failure to file that form—up to $1,000 for non-residential property in some cases.[33] Thus, Oliver Wendell Douglas, if buying more land, must make sure he files the Property Transfer Affidavit, Form 2766.

But, having filed Form 2766 with the local assessor, one must still make sure to preserve an existing Qualified Agricultural Property exemption on the added acreage just bought by completing Form 3676. That form is then sent to the local assessor, who in turn signs the form and returns it to Oliver Wendell Douglas (or any other agricultural land buyer intending to preserve the Qualified Agricultural Exemption), and that form is then recorded

28 MCL 211.27a(7)(n).

29 MCL 211.27(a)(7)(o).

30 *See* Form 3676, available at http://www.michigan.gov/documents/3676f_2690_7.pdf, regarding Qualified Agricultural Property as an example.

31 MCL 211.34c(2)(a) more precisely defines "contiguity" and the type of parcel that qualifies. *See also* "Property Classification: Issued by the Michigan State Tax Commission, Issued December 2013," available at http://www.michigan.gov/documents/treasury/ClassificationRealProperty_195107_7.pdf pg. 5. For instance, contiguity is not broken if: (1) the parcels are in different taxing units (part in one city and another in adjoining township), or (2) if a road or right of way is dedicated after the property is acquired. Contiguity does require all parcels for which the exemption is claimed be immediately adjacent to each other.

32 *See* State Tax Comm'n Qualified Agricultural Property Exemption Guidelines, Dec 2013, p 2, available at http://michigan.gov/documents/Qualified_Agricultural_Prop_139854_7.pdf [hereinafter Exemption Guidelines].

33 MCL 211.27b (1). The fine can go as high as $20,000 should a rare property worth more than $100 million be affected.

in the Register of Deeds by the buyer.[34]

The important takeaway for the unwary practitioner is that *both* Property Transfer Affidavit Form 2599 and a Qualified Agricultural Exemption Affidavit Form 3676 must be filed when agricultural land is purchased or one risks losing the favored property tax treatment and incurring an uncapping event.

If a property is uncapped and the assessment goes up, the property can be recapped by filing the affidavit at a later date–even years later. No refund of the taxes paid is issued, but the owner can at least reclaim the capped assessment prior rate. Five conditions must be met in order for this to happen, however: (1) the purchaser of the property must qualify—and would have—except for the fact a timely Form 3676 has not been filed; (2) the assessor uncaps in the year following the transfer; (3) the purchaser either discovers or chooses to claim the exemption; (4) the purchaser files Form 3676; and (5) the property was qualified for the exemption for each year back to and including 1999.[35] The same exemption process, but with different forms, is used for Qualified Forest Property.

Farm margins being tight, every nickel saved counts, and those saved mills are nothing to sneeze at. But if both Form 2599 and Form 3676 are filed, there is no uncapping event and the exemption from school operating millage will be preserved. One curious aside to be noted by a real estate investor's lawyer or an estate planner is that a transfer of Qualified Agricultural Property from say, parents, to a family limited liability company, does not result in an uncapping event even if the total ownership has changed. This would be true of any sale of Qualified Agricultural property or Qualified Forest Property, even to unrelated third parties *as long as proper forms and procedures are followed.*

C. Beware Recapture Trap

Still, a trap for the porcine Arnold Ziffel and other Michiganders exists in one additional provision of Michigan's Qualified Agricultural Property Exemption: there is a recapture provision so that if Qualified Agricultural Property is subsequently used for non-agricultural use, the county treasurer must recapture the previous seven years of capped assessments. This also applies to the Qualified Forest Property Exemption.[36] Translated, this means that if the exemption is claimed today, in 2014, and then in 2020 the land is developed as a shopping center or subdivision, the treasurer figures out the higher assessment based on the 2014 assessment without the Qualified Agricultural Property Exemption; the treasurer then collects those taxes for past years at a higher rate. There is a continuous seven year look back. Thus, if the Qualified Agricultural Exemption were in place in 2014, and the land was developed in 2035 while still subject to the Qualified Agricultural Exemption, the look back would be to 2028, and the assessment recapture would be based on the previous seven years. This is designed to forestall speculation and encourage preservation of agricultural land. Similar rules apply when land is sold.

If the new buyer does not intend to continue the Qualified Agricultural Property Exemption, the buyer should file Form 3673, Notice of Intent to Rescind the Qualified Agricultural Exemption. This is different than Form 2743, Request to Rescind Qualified Agricultural Property Exemption. Form 2743, is filed by an *owner* after the owner changes the use. Thus, Form 2743 is like the rescission of a PRE.

By contrast, Form 3673 serves a different function. A buyer files Form 3673 before a change in use occurs. For example, assume the sales closes. If Form 3673 is properly filed with the local unit of government, the change in use occurs when Form 3673 is filed but it will not become effective if the actual sale does not close within 120 days. A buyer of Qualified Agricultural Property who intends to change the use would be very wise to file Form 3673 because if the buyer does so and the sale closes, the recapture obligation is that of the seller and not the buyer. Otherwise, the recapture of the taxes is collected from the buyer, not the seller. Thus, buyers of any suspected Qualified Agricultural Property are wise to inquire if the land is subject to a Qualified Agricultural Property Exemption, especially if a change in use is contemplated.

D. Qualified Forest Property Program

Additionally, there are other rules that can exempt certain timberlands from the eighteen mill state school operating millage under Michigan's Qualified Forest Program.[37]

To qualify as forest property, the parcel must meet conditions as determined by the Michigan Department of

34 *See* Form 3676 and Instructions, available at http://www.michigan.gov/documents/3676f_2690_7.pdf

35 MCL 211.27a(8). *See also* instructions, pp 21-22, available at http://www.michigan.gov/documents/Qualified_Agricultural_Prop_139854_7.pdf

36 *See* Exemption Guidelines, *supra* note 32, App, p 24, Question 4 and Answer.

37 MCL 211.7jj[1].

Agriculture and Rural Development Agency.[38] First, the parcel must be not less than 20 contiguous acres in size. If the parcel is less than 40 acres, then at least 80% of the property must be stocked with productive forest capable of producing forest products. If the parcel is 40 acres or more, not less than 50% of the property must be stocked with productive forest.[39]

If an owner meets these conditions, the owner can contact the local conservation district or the Department of Agriculture and Rural Development for further instructions.[40] The Department will advise the owner of the exemption process, which also includes obtaining a forest management plan, filling out a form provided by the department, and a $50 filing fee.

The seemingly-difficult task of obtaining a "forest management plan" may frighten owners. However, it appears that the Legislature intentionally tried to make this exemption very easy for owners to obtain—the statutes direct the Department to assist owners in obtaining this exemption if they ask. Regretfully, the rural television comedy canon suggests no great characters whose foibles can provide illustrations, though Michigan folklore provides a mythic hero who might suffice. Thus, Paul Bunyan and his Babe, the Blue Ox, could perhaps qualify some of their holdings.

Note also that a Christmas tree farm is considered an agricultural use, not a forest property use.[41]

E. Farmland and Open Space Preservation

Aside from the exemption from the eighteen mill education millage as Qualified Agricultural Property or Qualified Forest Land, land owners can enroll agricultural properties in the Farm Land and Open Space Preservation tax credit program. This program gives a landowner a credit against income taxes due the State of Michigan (not a mere deduction against income).[42] Under this statute, the landowner receives a tax credit on property taxes in excess of 3.5% of the landowner's income. The Michigan Department of Agriculture gives the following example:

> [I]f the owner has an income of $20,000 and property taxes on the farm total $2,000, he/she would subtract $700 (3.5 percent of $20,000) from the $2,000 property tax for an income tax credit of $1,300.[43]

However, at some point, a landowner's income can be too large to take advantage of the credit (i.e., the value of the credit declines as income rises). But the Farm Land and Open Space Preservation Act also has other benefits that might nonetheless justify enrollment. Land enrolled in the program cannot be assessed for a future water and sewer improvements assessment, though it does not avoid payments for an assessment already levied and it does not eliminate road improvement and paving assessments.[44] But a gentleperson farmer on the edge of urban sprawl might wish to enroll, if only to avoid that potential future assessment burden on his or her bucolic past time. However, there is a catch: once enrolled, the special assessments can be recaptured if the land is sold and developed.[45] But the amount of the recapture cannot exceed the amount the assessment would have been at the time of the exemption and does not include any interest or penalty. Also, if the land is sold and it is not used for agricultural purposes (i.e., it is developed), then there is a recapture of part of the actual income tax credit (usually the past seven years' credits).[46]

II. Qualified Agricultural Property Exemptions and Farmland and Open Space Preservation Agreement in the Urban Context

Could an oversized herb or flower garden in Detroit qualify an owner to take advantage of these benefits? The answer depends on the amount of land being used for that purpose. But if the use exceeds 50% of the land area, there is no reason stalwart urban pioneers could not claim the exemption.[47]

38 *See* Instructions for New Applicants to Qualified Forest Program, available at http://www.michigan.gov/documents/mdard/Instructions_for_New_QFP_Applicants_426797_7.pdf

39 MCL 211.7jj[1](16)(h)(i-iii).

40 MCL 211.7jj[1](2).

41 Exemption Guidelines, *supra* note 32, p 8.

42 MCL 324.36101 and Farmland and Open Space Preservation Frequently Asked Questions, available at http://michigan.michigan.gov/mdard/0,4610,7-125-1599_2558-10312--,00.html

43 *Id.*

44 MCL 324.36108. Also note the point raised in note 5 *supra* that assessment means "stands as surety for payments." It does not mean the value of the land is lowered because of the Qualified Agricultural Exemption; rather, it means that the land cannot be taxed for the special assessment.

45 MCL 324.36108(3).

46 MCL 324.36111(5); *see also* http://michigan.michigan.gov/documents/MDA_Releasing_Land_132546_7.html

47 Michigan Department of Treasury FAQ states: "*Does my parcel have to be classified as agricultural by the assessor to be eligible for the qualified agricultural property exemption*? Answer: No. For example, a parcel that is classified residential can be eligible

Again, one must keep in mind that zoning is not necessarily the key issue, and the actual use as agricultural land is the deciding factor.[48] Thus, production of agricultural products is the requirement, and a tough urban pioneer with an orchard of heritage apples or a truck garden of designer vegetables raised for sale at the local farmers market should by statutory right and administrative interpretation be allowed to claim this.

Similarly, there should be no reason not to enroll in the Farmland and Open Space Preservation Tax Credit program for the purposes of availing oneself to that modest credit, which could marginally—but perhaps critically—improve the slim margins of urban farmers and perhaps have the added benefit of assuring that some of the urban landscape is preserved as green space into the future. Note however that the enrollment in the Farmland and Open Space Preservation Tax Credit program does require local approval,[49] and the standard for acceptance or rejection is not clear. However there is an appeal process to the Department of Agriculture and Rural Development.[50] The final step is then approval by the Department of Agriculture and Rural Development.[51] Thus a farm can be placed in the program, the green space can be preserved, and the farmer can gain a modest, but perhaps critical, tax credit.

Consider again Daisy and Arnold Ziffel and their desire to contribute to the booming urban agricultural scene. They acquire several lots, let us say just over five acres, scattered between Doyle and Mt. Olivet Streets and between French Road and Van Dyke near Detroit's City Airport. Let us also assume, for argument's sake, all lots but one are essentially vacant, there being a house on one parcel and a rather large garage on another vacant lot. The land is fallow. The house is indeed fit for pigs, but they believe they can make suitable for their needs with a little effort. They intend to put the lots into production as: (1) a flower garden for cutting and sale; (2) an herb garden (including several sub-species of cilantro, even though Arnold hates the stuff); (3) hops for the booming craft ale trade; and (4) a small specialty Jerusalem artichoke or "sunchoke" operation. Thus, much of their acreage is clearly going to be used for specialty farming (hops, cilantro and sunchokes).

What can they do to make their little, new homestead more financially viable based on what we have discussed?[52] They have paid $50,000 to assemble their non-contiguous but compact tract crisscrossed by several streets and alleys, still not vacated. City of Detroit assessing being what it is, the SEV is nonetheless shown at an amount equal to what they paid for it, $50,000. They believe they can use the large garage to support the planned farm and garden operation. The house on the tract would be entitled to the PRE in any case, but the rest of the tract cannot be so claimed, as it is a quilt of nearby but not contiguous parcels. But the Qualified Agricultural Exemption would reduce the possible tax bill of $4,288 on the tract to $3,387 (based on 76.74 mills with the exemption versus 85.75 mills without). That is a savings of $901, or about 21%, on property taxes—decent chicken feed for the price of filling out Form 2599 and the postage. Since they need to be in agricultural production, they closed on the property in September, did their preliminary work in the fall, planted as soon as frost cleared, and filed the Form 2599 just as the green shoots popped up (well before the May 1, 2015 deadline). Thus, they satisfied the requirements of the statute quite easily and substantiated their claim for the Qualified Agricultural Property Exemption.

Furthermore, should their efforts contribute to making the area flourish and becoming attractive to other farmers, a farmer who buys their now well-tended Eden five years

for the qualified agricultural property exemption if more than 50% of the parcel's acreage is devoted to an agricultural use as defined by law." Exemption Guidelines, *supra* note 32, at p 2.

48 MCL 324.36101(b) states:

> "Agricultural use"' means the production of plants and animals useful to humans, including forages and sod crops; grains, feed crops, and field crops; dairy and dairy products; poultry and poultry products; livestock, including breeding and grazing of cattle, swine, captive cervidae, and similar animals; berries; herbs; flowers; seeds; grasses; nursery stock; fruits; vegetables; maple syrup production; Christmas trees; and other similar uses and activities. Agricultural use includes use in a federal acreage set-aside program or a federal conservation reserve program. Agricultural use does not include the management and harvesting of a woodlot.

49 MCL 324.36104(1).

50 MCL 324.36104(6).

51 MCL 324.36104(7) (rejection by Department of Agriculture and Rural Development can be only for the reason that the agreement does not satisfy MCL 324.36101(f)).

52 One often encounters raised eyebrows about soil contamination, so tests should be done. Raised beds are often suggested for an abundance of caution. But, views differ. *See, e.g.*, David, E. Stilwell, et al., *Lead and Other Heavy Metals in Community Gardens,* The Connecticut Agricultural Experiment Station, New Haven, Bulletin 1019, Aug 2008, available at http://insideurbangreen.typepad.com/files/lead-and-other-heavy-metals-in-community-gardening-soils-in-connecticut-.pdf

in the future for, let us say, $60,000, will not see the assessment uncapped as long as the agricultural use continues. Thus, the future owners, who would have paid perhaps as much as $5,145 on 85.75 mills if there was no exemption at all, both: (1) preserve the exemption the Ziffels had and (2) avoid a bump in taxes to $4,064 because the assessment remains capped when the Ziffels sold them the land. Their tax bill remains $3,387 even though the land changed owners. Arnold and Daisy might feel fairly pleased with that modest bit of tax relief. But being, what might we say, greedy…people, they start to think further.

During one rainy day they fill out a Farmland and Open Space Preservation Program Application for Farmland Agreement,[53] figuring they can certainly have it done before the November 1 deadline so it will effective for the following year. First, they are struck with dismay. A specialty farm must have 15 acres according to the Application Instructions and statute! But Arnold had been to school in nearby Croswell Corners when he lived with his parents and, reading further, sees that if they have more than five acres under cultivation and gross an average of $200 per acre in agricultural sales, they still qualify. They know that they are sure to exceed the modest $1,000 for their holdings. They then settle down to work through the Application form and Instructions. They are pleased to note the clear statement that seems to confirm, as they hoped, their non-contiguous tracts do not disqualify them:

> Parcels of land in one ownership that are not contiguous but which constitute an integral part of farming operations being conducted on land otherwise qualifying as farmland may be included in an application under this part.[54]

Their faith in hoped-for approval of the Application is buttressed by their prior submission for and subsequent approval under the City of Detroit's recently enacted Urban Agricultural Ordinance,[55] with which they were careful to comply, submitting the required abbreviated site and related materials as are required. Counting their chicks well before hatching, they have figured that based on hoped-for income of $35,000 and a property tax bill of $3,387 (as calculated above), their credit should be about $2,664. And, applying this credit to a hypothetical State of Michigan tax bill (claiming two exemptions) of $1,151.75 at the current 4.35% rate, they will pay no state income taxes, possibly for the full term of the Farmland Agreement, assuming income stays level. But even if it goes up, they likely do not pay income taxes for the near future to the State of Michigan. Thus, assuming the Application is approved, they will file for their credit when income taxes are filed in Michigan by 2016.[56] The same credits are available for any eligible and approved applicant in the State of Michigan under Public Act 116.

Also note that their residence and garage, even though on the tract, should not bar eligibility. They conclude that an initial 10-year term seems sensible and send the form to a local governing body having jurisdiction over the land cited in the Application as being the "the legislative body of a city or village." This causes them some consternation since they are not sure who that might be in the context of financial managers, bankruptcy judges, and elected councils. But they assume correctly that the Detroit Department of Planning and Development and the local clerk should be recipients of the Application, or can at least guide them. That Application is still pending.

They suspect, perhaps, the recently adopted City of Detroit Urban Agriculture Ordinance should be examined for impact. One cannot consider the Detroit Urban Agriculture Ordinance without considering the Right to Farm Act,[57] enacted in 1981 in response to suburban development expanding into traditional farming communities. The Right to Farm Act essentially protects agricultural operations from nuisance abatement suits brought by neighbors who have moved into agricultural areas,

53 Farmland and Open Spaces Preservation Program, Application for Farmland Agreement, available at http://www.michigan.gov/documents/PA_116_Application_Form_36531_7.pdf The application is often called an Act 116 Agreement after former Act 116 of 1974, which is within Part 361 of the Natural Resources and Environmental Protection Act, PA 451 of 1994; MCL 324.36101 et seq.

54 Farmland and Open Space Preservation Program, Farmland Agreement Application, Eligibility & Instructions, available at http://www.michigan.gov/documents/PA_116_Eligibility_Requirements_36532_7.pdf

55 City of Detroit Ordinances, Sections 61-12-77; 61-3-121; 61-3-128; 61-3-141; 61-3-142; 61-12-326 through 339; and 61-12-411 through 413. The Ordinance, by all accounts, was a labor of love and intellect of Kathryn Lynch Underwood and Laura Buhl of the City of Detroit Department of Planning and Development, among numerous other well-intentioned and thoughtful people.

56 Individuals, partnerships, and some trusts file form MI-1040CR-5 to claim the credit; estates, some other types of trusts, and corporations must complete and file form 4594. *See* MCL 286.473(b).

57 MCL 286.471; PA 93 of 1981.

i.e., "who have moved to the nuisance."[58] Additionally, a party who brings a nuisance complaint against a farming operation and does not prevail is liable for actual costs and "reasonable and actual attorney fees."[59] Under the Right to Farm Act, regulation of farm activities is through so-called Generally Accepted Agricultural Management Practices (GAAMPs). If a farm is operated consistent with GAAMPs, then it is per se acceptable and not a nuisance.

The GAAMPs were largely drafted by agricultural interests. Not being any more capable at farming than Oliver Wendell Douglas, the authors cannot comment on their effectiveness or utility except to say that in terms of management and best practices, GAAMPs seem to be more aspirational than directive as compared to the Occupational Code[60] or the Construction Code.[61] The bar seems pretty low to these city slickers.[62] Also, the Right to Farm Act precludes local units of government from adopting ordinances related to agricultural uses[63] at odds with the Right to Farm Act and applicable GAAMPs unless approved by the Director of the Michigan Department of Agriculture and Rural Development. Approval of such ordinances has proven problematic because agricultural interests resisted the approval of any ordinance anywhere, even in urban areas, for fear that it would produce a wave of local enactments. That pressure slowed adoption of the Detroit Urban Agricultural Ordinance by all accounts.

On the converse side, urban areas were faced with a conundrum: how does one control a farm operation started in an urban area absent a local ordinance? There were and are some reasoned views that speculated once a farm started and was in place, perhaps the Right to Farm Act precluded some local enforcement and controls.[64] In 2012, the Department prefaced the GAAMPs with a statement that they do "not apply in municipalities with a population of 100,000 or more."[65] Thus, at least Daisy Ziffel and Arnold Ziffel would appear to be arguably legally kosher, cloven hooves or not, under Detroit's Urban Agriculture Ordinance.

The Right to Farm Act is a common issue. While it only applies to commercial farming, it is the commercial purpose, not the size of the farm, which makes it applicable. Thus, a small shrimp farm on three-quarters of an acre might be protected under the Act as much as a large tract in rural Hooterville would. When advising a commercial farming operation, familiarity with the GAAMPs is a must. Some GAAMPs even incorporate aspects of zoning controls, such as site selection issues for certain uses.

Thus, satisfied with their lots in life, Daisy and Arnold seek to expand and enlarge their niche and wonder what other support and incentives they might seek and find. A quick perusal of the internet takes them to the Michigan Department of Agriculture and Rural Development web site. While they note the January 10, 2014 deadline for the Value Added/Regional Systems Grant System Program[66] has passed, they are intrigued and mark their calendar to see if the program will open again in late 2014 or 2015. The Program suggests any agricultural group (such as a cooperative of farms or a league of sunchoke growers) could submit a proposal, the gist of which should be to expand value-added agricultural processing or to develop regional food systems by facilitating aggregation and distribution of Michigan grown products. The

58 MCL 286.473.

59 MCL 286.473(b).

60 MCL 339.101; PA 299 of 1980.

61 MCL125.1501; PA 230 of 1972.

62 Generally Accepted Agricultural Management Practices (GAAMPs) can be found at the Michigan Department of Agriculture and Rural Development website at http://www.michigan.gov/mdard/0,4610,7-125-1599_1605---,00.html There are eight GAAMPs currently: Manure Management Utilization, Pesticide and Pest Control, Nutrient Utilization, Care of Farm Animals, Cranberry Production, Site Selection and Odor Control for New and Expanding Livestock Production Facilities, Irrigation Water Use, and Farm Markets. Note, for example, the sage guidance of on page 64 of the GAAMP on Farm Animals, Handling and Transportation: "Mink are routinely handled with heavy leather gloves, while fox are most commonly handled with metal tongs" and "Euthanasia: The animals should be dispatched as quickly and painlessly as possible."

63 MCL 286.474(6) & (7).

64 *See* Melanie J. Duda, Note, *Growing in the D: Revising Current Laws to Promote a Model of Sustainable City Agriculture*, 89 U. Det. Mercy L. Rev. 181, 184-85 (2011-2012); John E. Mogk, Sarah K. Wiatkowski & Mary J. Weindorf, *Promoting Urban Agriculture as an Alternative Land Use for Vacant Properties in the City of Detroit: Benefits, Problems and Proposals for a Regulatory Framework for Successful Land Use Integration*, 56 Wayne L. Rev. 1521, 1530 (2010); Patricia Norris, Gary Taylor & Mark Wyckoff, *When Urban Agriculture Meets Michigan's Right to Farm Act: The Pig's in the Parlor*, 2011 Mich. St. L. Rev. 365 (2011).

65 *Farm Law Change May Produce More Fruitful Urban Agriculture*, State Bar of Michigan Real Property Law Section E-Newsletter, April 2012, available at http://www.michbar.org/realproperty/eNews/eNews_April12.cfm

66 Agricultural Value Added/Regional Food Systems Grant Program, Overview (Oct 13, 2013); http://www.michigan.gov/documents/mdard/Value_Added_Food_System_Grant_Program_Overview_439050_7.pdf.

maximum $75,000 grant could really boost the neighborhood farming groups they know and they could promote the production and sale of cottage or prepared foods by their soon-to-be-formed cooperative venture with other local urban farmers. An award would likely make them as happy as the proverbial pigs in slop.

They are also thinking of how they might format a modest proposal to submit under the Specialty Crop Block Grant Program.[67] Perhaps their sun-dried sunchoke product or an heirloom tomato growing cooperative might have a decent shot at a grant to provide marketing and technical assistance. Arnold, full of ambition, is of a mind that he and his crew might really make a go of it if they started a Made in Detroit Christmas Tree growing operation with Paul and Babe. Arnold often surprised us; thus, who knows? In any event, a grant for a pine plantation Christmas tree program supported by a cooperative effort might prove viable. Imagine a detailed submission of such a notion, different from the Hantz Farms tree planting scheme[68] had it been submitted before the April, 2014 deadline! But, perhaps there might be another round of applications in 2015. A quick walk through the project purpose question[69] suggests an urban tree farm or other endeavor might have decent prospects and, in answer to that series of Proposal questions, the outline of an application takes place:

> (A) *Specific Problem*: Deforested neighborhoods, vacant grass lands, the need for and benefit of carbon capture and pollution reduction by trees; youth unemployment and need training in forestry management;
>
> (B) *Importance and Timeliness*: Pollution and erosion are controlled, watersheds are protected, and mature Christmas trees are harvested near the ultimate consumer further reducing pollution; a forest will reduce the urban heat sink;
>
> (C) *Objectives*: Promotion of existing for sale Christmas tree industry in Michigan; creation of forestry jobs; modest "tourist" appeal for "cut your own tree operations" in nearby urban areas; contribute to renewal of the forest canopy in the city; enhancement of the urban environment; promotion of a well-known and viable Michigan specialty crop; reduction of transportation costs; and fresh and thus, more, longer lasting trees can be acquired by consumers sooner.

The Application Proposal requires greater detail, of course, but one could likely make a compelling case for heirloom tomatoes as well as sunchokes or Christmas trees. The point is that urban farmers can avail themselves of programs to promote their cause and products. Even if these programs are not renewed every year, the imaginative urban farmer should seek these grants when the occasion arises.

But what of Arnold and Daisy Ziffel? Finally, the harvest arrives and the bumper crop of sunchokes is in. Happily for Daisy and Arnold, the Detroit Urban Agricultural Ordinance allows them to operate a market stall or produce stand on their little piece of heaven so near Mt. Olivet.[70] Business is brisk but the crop is large. Arnold, an aficionado of the Top Chef, has been experimenting with a dehydrated sunchoke chip. Daisy, ever creative, reviews the Cottage Food Law[71] and concludes that the dehydrated recipe qualifies since the process does not require time or temperature controls for safe processing. Their resuscitated house having a working domestic kitchen, the team is soon processing their "Sunchoke Chips" steadily. While Daisy cautions that Cottage Food gross sales cannot exceed $20,000 per year, the sanguine Arnold assures they have a way to go to reach that mark (thinking to himself that production will surely ramp up when the limit increases to $25,000 in 2017).

III. Conclusion

Thus, what might we conclude from our tale of two Ziffels in the city as they wrap themselves in blankets and turn to bed, visions of sugar plums (next year's cottage crop product, perhaps) dancing in their heads? A checklist is offered:

1. Anyone transferring agricultural land or timber land must be aware of the Qualified Agricultural

67 Specialty Crop Block Grant Program-Farm Bill, Program Overview, Jan 31, 2014, available at http://www.michigan.gov/documents/mdard/Specialty_Crop_Block_Grant_Program_Overview_FINAL_446476_7.pdf

68 Hantz Farms is an ambitious and sometimes controversial proposal to re-develop a large swath of Detroit's eastside as an agricultural development. http://www.hantzfarmsdetroit.com/

69 See Specialty Crop Block Grant Program-Farm Bill (FY14) Application Proposal; http://www.michigan.gov/documents/mdard/SCBG_Application-_SF424A_2014-15_FINAL_446473_7.pdf

70 Detroit Ordinance § 61-12-327; *see also* Farm Market GAAMPs.

71 MCL 289.4102; PA 112 of 2010.

Property or Qualified Forest Land exemptions from certain property tax assessments;

2. Rural property transfer transactions must include inquiry about Qualified Agricultural Property or Qualified Forest Land exemptions;
3. Beware of tax recapture should Qualified Agricultural Property or Qualified Forest Land Exemptions expire;
4. New farmers, urban or otherwise, should be encouraged to apply for the Qualified Agricultural Exemption to which they are statutorily entitled;
5. Urban farms *might* be eligible for the Farmland and Open Space Preservation Tax Credit;
6. When buying agricultural land subject to an agreement under the Farmland and Open Space Preservation Act, one must analyze the impact such an Agreement might have on the buyer and seller;
7. When counseling an urban farmer, imagination is the key since grant programs and statutory rights may exist that one's initial intuition might be to ignore; "agricultural" and "rural" are not identical concepts, and thus an open mind is needed;
8. GAAMPs and local ordinances must be consulted on occasion;
9. As Oliver Wendell Douglas too often discovered to his dismay, agricultural problems and issues can befuddle the city slicker new to the rural world; and
10. Urban and rural farmers can benefit from well-informed legal counsel. We should all strive to be so.

Judicial Decisions Affecting Real Property

by Regina Slowey

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 or significant unpublished decisions that may affect real estate practice.

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 for 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. The summaries below include some editorial matter added by the author and may not represent the views of the SBM or the *e-Journal*.

The Following Cases Involving Real Property Issues Have Been Published Since the Last Issue of the *Review*

Sholberg v Truman
496 Mich 1; NW2d 89 (2014)

In this specific but poignant holding by the Michigan Supreme Court, the entire bench, in an opinion written by Justice Markman, held that title owners of a property may not be held liable for a public nuisance that arose from the property, where someone other than the title owners is in possession of the property, is exercising control over the property, and is the one who created the alleged nuisance.

The action arose from an accident that occurred in 2010. Terri Sholberg, while driving her car, hit a horse that was standing in the road and died as a result. Plaintiff, the personal representative of the estate, brought an action against Daniel Truman, the owner of the horse and the occupant of the farm, and Robert and Marilyn Truman, the title owners of the farm, for public nuisance. Plaintiff presented evidence of at least 30 instances of animal elopement (escape and wandering) between 2003 and 2010 from the property. Defendant Daniel Truman was defaulted, and was not a part of the appeal to the Court of Appeals or to the Supreme Court. Defendants Robert and Marilyn defended the action on the basis that even though they were the owners of record of the property, they did not have possession or control of the property, and thus, liability for a nuisance springing from the property could not attach. The trial court granted summary disposition in favor of these Defendants, but the Court of Appeals reversed, holding that ownership was sufficient to bring a nuisance claim against them.

The Supreme Court ordered oral argument to address "whether, and under what circumstances, a property owner who is not in possession of the property and does not participate in the conduct creating an alleged nuisance may be liable for the alleged nuisance."

The Supreme Court sets forth a thorough analysis of possession and control of property, reciting over 100 years' worth of case law for the proposition that mere ownership (or co-ownership) of property does not in itself create liability for torts committed in the land by others. The issues of control and possession are the determinative factors in imposing liability. In a case such as this, in which Plaintiffs presented no evidence that Defendants actively managed, supervised, maintained, possessed, or controlled the subject property, the trial court was correct in granting summary disposition in favor of the Defendants.

Waisanen Family Trust v Twp of Superior
305 Mich App 719 (2014)

The Court of Appeals confirmed that in a property dispute between a homeowner and a municipal corporation based on the theories of adverse possession and/or

acquiescence, the party who files the complaint first wins, assuming elements of either cause is established by the homeowner.

In this action, Plaintiff Trustee purchased the home in 1971. The property abutted First Street, a lake access public right of way. At the time of purchase, the property contained a break wall on First Street. In 1981, Plaintiff built an addition to the home.

In 2008, the Township Defendant commissioned a survey of the entire area, and it was first discovered that the break wall encroached the public right of way by approximately 10 feet, and the 1981 addition by approximately 3 feet. Plaintiff commenced a quiet title action regarding the encroachment area onto First Street in the Chippewa County Circuit Court, and Defendant filed a counter claim for possession of the same portion of First Street. The trial court granted summary disposition in favor of the Plaintiff Homeowner, and Defendant Township appealed.

The Court of Appeals was comfortable in ruling the elements of adverse possession and acquiescence were established. The interesting arguments surrounded MCL 600.5821(2), and whether the municipal corporation was protected by the language in the statute that states "actions brought by any municipal corporations for the recovery of the possession of any… public ground are not subject to the periods of limitations." In other words, Defendant argued, because it filed a counter-claim for possession, Plaintiff could not use adverse possession or acquiescence as a basis for ownership.

The Michigan Court of Appeals disagreed. Following its previously issued opinion in *Mason v City of Menominee,* 282 Mich App 525; 766 NW2d 888 (2009), and using additional analysis under the Michigan Court Rules, the Court held that the plain language of the statute holds that an action must be brought by a municipal corporation in order to bar adverse possession or acquiescence. Pursuant to MCR 2.101(B), an "action" is begun by the "filing of a *complaint*" (emphasis added). Though a counterclaim is included in the definition of a "pleading," the court rules are specific in what constitutes what commences an action; i.e., solely a complaint. Thus, MCL 600.5821(2) does not provide protection for a municipal corporation which has counterclaimed rather than bringing its own action. Let the race to the courthouse begin.

Federal Home Loan Mortgage Assn v Kelley
2014 Mich App. LEXIS 1599 (2014)

In this ruling, vacating part of a Court of Appeals opinion issued two months prior, the Court of Appeals clarified that: (1) that the Federal Home Loan Mortgage Association ("Freddie Mac") is not a "federal actor" for purposes of statutory foreclosure, and (2) the Court was not going to rule as to whether a distinct assignment of mortgage was necessary following a merger when the mortgagor did not allege or show prejudice as a result of the lack of such an assignment.

The dispute involved a residential property and the mortgage encumbrance, later assigned to ABN-AMRO Mortgage Group, Inc. ("ABN-AMRO"). That assignment was recorded in November 2003. ABN-AMRO merged with CitiMortgage, Inc. in 2007, and maintained the name CitiMortgage ("Citi"). In June 2011, Defendants defaulted. The foreclosure by advertisement proceeded without assignment from ABN-AMRO to Citi, and Freddie Mac purchased the property. Defendants did not redeem the property. At the eviction proceedings, Defendants argued that Freddie Mac is a federal actor, and so precluded by the due process requirements of the 5th Amendment from foreclosing by advertisement. Defendants also argued the foreclosure was void *ab initio* because a recorded assignment of mortgage did not exist between ABN-AMRO and Citi. The district court ruled completely in Freddie Mac's favor and granted a Judgment of Possession to Freddie Mac; the circuit court reversed and held Freddie Mac is a federal actor to which Fifth Amendment considerations apply, and because an assignment of mortgage did not exist between ABN-AMRO and Citi, the foreclosure was void *ab initio.*

The Court of Appeals overturned the circuit court, and reinstated the district court's Judgment of Possession. The Court of Appeals first found that Freddie Mac is not a government actor. In a thorough analysis of the leading US Supreme Court case to determine whether an entity is a government actor, *Lebron v Nat'l RR Passenger Corp,* 513 US 374 (1995), the Court of Appeals followed other jurisdictions, including the United States Court of Appeals for the Sixth Circuit, in concluding that the dispositive element is whether the federal government exercises permanent control over the entity, and that indefinite control does not equate to permanent government control.

However, the first *Kelley* opinion of the Court of Appeals agreed with the circuit court in one important area. The Court held, contrary to practice in the past few years, that a voluntary merger still requires an assignment of record from the old entity into the entity resulting from the merger. In other words, because Citi voluntarily entered into a merger agreement with ABN-AMRO, Citi is subject to the recordation requirement of MCL 600.3204(3).

The Court of Appeals later vacated this part of the opinion, and stated it did not need to rule on the necessity to record a distinct assignment since the Defendants failed to show actual prejudice resulting from the failure to record the mortgage assignment.

Federal Nat'l Mortgage Ass'n v Lagoons Forest Condominium Ass'n
305 Mich App 258; 852 NW2d 217 (2014)

In this action involving condominium liens, the Court of Appeals made two important rulings in clarifying when a purchaser at a foreclosure sale is liable for dues and assessments to the home owner association.

The owners of a condominium had failed to pay their condominium association fees as of 2006, and the Defendant condo association filed a lien on the property in January 2006. The homeowners had also stopped making mortgage payments, and the condo was foreclosed and went to sheriff's sale on March 1, 2011. RBS Citizens Bank purchased the property at the sheriff's sale, and subsequently transferred the property to Plaintiff Federal National Mortgage Association ("Fannie Mae") on April 7, 2011. Redemption expired September 1, 2011, without the previous owners redeeming the property.

Defendant filed an Amended Lien on September 9, 2011, claiming a sum in excess of $13,000due, and sent Fannie Mae a letter claiming that because Fannie Mae never requested a written statement from the condo association prior to the conveyance from RBS, pursuant to MCL 559.211(2), it owed all unpaid assessments, including those assessed before the foreclosure sale. Fannie Mae responded by filing a complaint in circuit court requesting declaratory relief from Defendant's claim.

The Court analyzed the Condominium Act and ruled that the specific provision, MCL 559.158, which states that if a party obtains title as a result of a foreclosure, the party is not liable for assessments due prior to the acquisition of title, prevails over the more general provision (MCL 559.211) assessing full liability for all assessments prior to a transfer. Further, the failure of Plaintiff to comply with MCL 559.211(2) in making a written request from Defendant does not restore assessments or liens extinguished by the foreclosure sale. However, the Court then proceeded to determine that "acquisition of title," in the context of MCL 559.158, is at the foreclosure sale, and not, as Plaintiff argued, at the expiration of redemption when the sheriff's deed vested full and absolute title in the purchaser or purchaser's successor. The Court explained that the statute does not require "absolute title," just "title," and the "equitable title" a purchaser at a foreclosure sale obtains is enough. Thus, a purchaser at a sheriff's sale, or its assign, is liable for all assessments from the sheriff's sale onward.

The Reserve at Heritage Village Ass'n v Warren Financial Acquisition
305 Mich App 92; 850 NW2d 649 (2014)

This Court of Appeals opinion examines the equitable doctrine of merger, and whether a third party's rights are affected by the intention to keep the mortgage alive.

Plaintiff is the home owners' association for The Reserve at Heritage Village ("The Reserve"), a condominium complex. Defendant Warren Financial Acquisition, LLC ("Warren") was the holder of a mortgage interest on 76 units of The Reserve. The 76 units were subsequently conveyed, on May 18, 2009, to Warren by covenant deed, which provided that the transfer was "without merger of the Mortgage." On December 7, 2011, Plaintiff recorded a lien for unpaid condominium assessments against Warren, and on January 11, 2012, commenced a lawsuit to collect the unpaid assessments. Following the filing of the complaint, Warren assigned the mortgage to Defendant Reserve, who proceeded to foreclose by advertisement. The sheriff's sale was held July 20, 2012. Warren executed a waiver of statutory and equitable rights of redemption to Reserve on July 27, 2012. Plaintiff amended its complaint twice during this time, adding 28 counts, including fraud. The Court of Appeals addressed several procedural issues in its opinion, regarding amendments and relating back to the original complaint.

The trial court, in assessing the merger issue, stated that the express content of the parties at the time of the conveyance was controlling. Because the covenant deed specifically noted that the mortgage was *not* to merge into the ownership interest and no third parties were affected by the conveyance since no assessments were due at the time of the conveyance, the foreclosure was valid.

The Court of Appeals disagreed, and remanded the action for the trial court to vacate and set aside the foreclosure. The Court of Appeals ruled that even if an express non-merger clause is stated in the deed of conveyance, merger will occur if an adverse or inequitable result affects a third party. Moreover, and contrary to the trial court ruling, the time for considering the effect on a third party is not limited. Thus, because the non-merger had the effect of allowing Warren to avoid the assessments by foreclosing on the mortgage and extinguishing Plaintiff's lien, the Court ruled the fee and the mortgage had merged and Warren could not foreclose on the mortgage.

Legislation Affecting Real Property

by Brian P. Henry

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. Before taking a formal public position for or against a bill, the Section follows procedures specified in its bylaws, and members with an interest in particular legislation should bring it to the attention of members of the Section Council or the chairs of the Special Committees listed on the Section's website. Policy Positions of the Section can also be found there.

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 links in the article for each public act take you to the original bills and public acts on the Michigan Legislative Website. In most cases, the most useful version to read is the last one *before* the public act version. Unless a bill creates an entirely new act (and there are very few of those every year), the version before the public act shows the existing statute with the amendments that the bill makes to it. Language that is repealed is shown by strikethrough text; new language is shown in all capitals. Changes made on the floor of either house may be shown by red or blue text. The public act version simply shows the statute with all the changes already made.

The following are the bills of interest that became law or are being monitored by the Section since the last issue of the *Review*.

Bills of Interest that Have Become Law Since The Last Issue of the *Review*

HB 5069 through 5071 are now PA 223, 224, and 225 of 2014

Effective on September 24, 2014, this legislation: (i) permits the use of force to remove squatters; (ii) makes squatting a misdemeanor for the first offense and a felony thereafter; and (iii) makes the felony punishable by a fine of up to $10,000.

HB 5277 is now PA 125 of 2014

Effective on June 19, 2014, this legislation changes some of the procedures to shorten the redemption period after a non-judicial foreclosure. This legislation also eliminates the mediation provisions of MCL 600.3206 that applied to the parties to the National Mortgage Settlement.

Bills of Interest Presented to the Governor Awaiting Signature

House Bill 4638 through 4640 (Pettalia/Lane)

The House and Senate passed these bills and presented to the Governor on October 7, 2014. The bills amend various acts to modify the rules under which affidavits regarding unrecorded mortgages are recorded and indexed in the county register of deeds.

Bills Opposed by the Section

HB 5057 (Johnson)

This bill provides an exception to the 15 year statute of limitation for recovery of possession of real estate if "an adverse party is asserting a claim to the property based upon adverse possession or acquiescence." The Section

opposed this legislation since the bill would eliminate the doctrine of adverse possession and acquiescence, which for hundreds of years have been effective methods for resolving boundary disputes and conflicting claims to the ownership of real property. Please visit the State Bar website to review the complete position taken by the Section.

Bills of Interest Being Monitored by the Section

HB 5560 (Price)

This bill, regarding the publications of legal notices electronically by government entities, is an attempt to streamline publication notices.

HB 4626 (Yonker)

This bill amends the Land Bank Fast Track Act to establish protocols that address situations where a land bank authority purchases or acquires a tax reverted property in violation of the Land Bank Fast Track Act.

SB 1048 (Booher)

SB 1048 addresses with the impact of a mortgage foreclosure upon the priority of oil and gas lease rights.

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 always 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:

Brian P. Henry
Orlans Associates, PC
1650 W. Big Beaver,
Troy, MI 48084
bhenry@orlans.com

Consult the Michigan Legislature's website for current information regarding pending legislation.

Continuing Legal Education

by Thomas A. Kabel, Chair of CLE Committee,
and Karen Schwartz, Administrator

Thirty Ninth Annual Summer Conference

July 16 – 19, 2014

Rebuilding the Dream: Michigan Real Estate Revitalized
Grand Traverse Resort & Spa
Traverse City, Michigan

The 2014 Summer Conference was a great success. We had over 150 registrants plus their families attend. The section would like to thank Leslee M. Lewis of Dickinson Wright PLLC in Grand Rapids and Michael A. Luberto, Chirco Title Agency Inc., St. Clair Shores, for planning this dynamic and thought provoking conference. Pictures can be found on the Section's Facebook page. Join us on facebook.com/RPLSMI.

A special thanks to our Sponsors for their generous commitment to our programming.

Thank you 2014 Summer Conference Sponsors!

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Homeward Bound

The Continuing Legal Education Committee is pleased to announce its Fortieth season of "Homeward Bound" seminars. This season's series is under the direction of Stephen R. Estey of Dykema in Bloomfield Hills. The Section will be working with ICLE in producing the 2014-2015 Homeward Bound series. This year's topics include: Energy - Michigan's New Era; Eminent Domain - Practice and Pitfalls; Land Use and Zoning - Issues for the Comeback; and Detroit - Redevelopment Symposium.

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 $85 per seminar). The first two seminars will run from 2 p.m. to 5 p.m. and will be held at The Inn at St. John's in Plymouth. The third seminar will be an on-demand webcast and the fourth seminar will be held at the Antheneum Suite Hotel in Detroit. All seminars will be webcast.

Further information can be found on the Section website at www.connect.michbar.org/realproperty or www.icle.org/hb

State Bar of Michigan Real Property Law Section

"Groundbreaker" Breakfast Roundtable Programs

Planning is underway for the 2014-2015 "Groundbreaker" Breakfast Roundtable Programs. The first program "Real Property Acquisitions: Caveat Emptor" was held on October 16, 2014 at the Townsend Hotel in Birmingham. The second "Groundbreaker" will also be at the Townsend and is scheduled for January 22, 2015. The third "Groundbreaker" program will be held on April 16, 2015 from 3:30-6:00 p.m. at the Downtown Market in Grand Rapids.

We need your input. For topic suggestions or if you are interested in leading a discussion roundtable, please contact Glen Zatz at gzatz@bodmanlaw.com.

MARK YOUR CALENDARS!

RPLS Goes to Austin

2015 Winter Conference

March 5 – 7, 2015

The Real Property Law Section is pleased to announce that the 2015 Winter Conference will be held at the Four Seasons Hotel in Austin. This is a great opportunity to learn and network with other Section members.

We are in the process of planning our program. The Section would like to thank Program Chair Thomas A. Kabel, Butzel Long PC, Bloomfield Hills.

Photo Credit: Austin Convention and Visitors Bureau

Course Calendar

Set forth below is a schedule of continuing legal education courses sponsored or co-sponsored by the Real Property Law Section through August 2014.

Date	Location	Program	Topic
November 6	Inn at St. John's Plymouth, Michigan	Homeward Bound	Energy - Michigan's New Era
December 4	Inn at St. John's Plymouth, Michigan	Homeward Bound	Eminent Domain - Practice and Pitfalls

Further information on all Section programs can be found on the Section website at http://www.michbar.org/realproperty/.

ICLE Courses can be found at http://www.icle.org/.