// MICHIGAN REAL PROPERTY REVIEW

REAL PROPERTY LAW SECTION

STATE BAR OF MICHIGAN

Vol. 10, No. 4 — Winter, 1983

Chairman: Allen Schwartz — Editor: George J. Siedel, III

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The only sure things in life are death and taxes, but death doesn't get worse every time Congress meets . . . .

Attributed to Will Rogers

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Readers are invited to submit their own articles, comments and opinions to George J. Siedel, Editor, 526 Business Administration, University of Michigan, Ann Arbor, Michigan 48109. Manuscripts submitted to the **Review** are customarily reviewed by attorneys experienced in the field covered by the article. Publication and editing are at the discretion of the Editor. Because of time constraints, galley proofs are not forwarded to authors.

A cumulative index of **Review** articles is printed annually in the Winter issue of the **Review**.

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DEVELOPMENTS IN REAL PROPERTY LAW: 1982-83

by
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INTRODUCTION

There have been numerous major developments in the real property field during the past year. This outline will emphasize those cases and statutes deemed to be of particular significance, although it does not and cannot include every case and piece of legislation. It was prepared for publication in July, 1983, and covers only cases decided or released for publication and legislation enacted from and after June, 1982.

ADULT FOSTER CARE FACILITIES

The Michigan Court of Appeals decided an unusual number of cases concerning Adult Foster Care Facilities during the past year. These cases were decided in the context of the following prior Court of Appeals' decisions:

(a) **Bellarmine Hills Association v The Residential Systems Company**, 84 Mich App 554 (1978), permitted foster care and treatment of six or less mentally retarded children in a leased home in a subdivision composed entirely of single family homes, by giving greater weight to the public policy for promotion of foster care than to the public policy of upholding deed restrictions, and by extending the legal definition of "family" in that context.

(b) **Jayno Heights Landowners Association v Preston**, 85 Mich App 443 (1978), held that the language of building and use restrictions which provided for "not more than one single family dwelling house" to "be occupied by not more than one single family unit" could be enforced to preclude use of a single family residence as a foster care facility for six elderly women notwithstanding MCLA 125.216(a), MSA 5.2961(1), of the County Rural Zoning Enabling Act (containing the 1976 amendment) which provided:

> In order to implement the policy of this state that persons in need of community residential care shall not be excluded by zoning from the benefits of normal residential surroundings, a state-licensed residential facility providing supervision or care, or both, to 6 or less persons shall be considered a residential use of property for the purposes of zoning and a permitted use in all residential zones, including those zoned for single family dwellings, and shall not be subject to a special use or conditional use permit or procedure different from those required for other dwellings of similar density in the same zone.

Judge McGregor, in dissent, believed the Court should have applied the **Bellarmine** doctrine to reach a contrary result.

(c) **Malcolm v Shamie**, 95 Mich App 132 (1980), held that five mentally retarded women living with a foster parent in effect constituted a "family" within the **Bellarmine** doctrine. Here the building and use restrictions allowed only "one detached single family dwelling." The court distinguished that language from the **Jayno** language which "not only covered the type of dwelling, but it also regulated who could live in such a dwelling."

(d) **Leland Acres Homeowners Association, Inc. v R. T. Partnership**, 106 Mich App 790, 796 (1981), in reviewing the above three cases, held:

> Reflecting upon these three cases, we gleaned three factors that were considered by the Court in each of them. First, in each opinion the Court considered the specific language of the covenant. Second, it considered the nature of the operation with particular regard as to whether it was commercial or nonprofit. Finally, the Court in each case considered the basis of the affiliation of the residents in the home.

On this basis, a leased home used by six developmentally disabled adults supervised by a professional staff was allowed in a subdivision with restrictions permitting only "a private dwelling house."

(e) **Erickson v Department of Social Services**, 108 Mich App 473 (1981), held that the Child Care Organizations Act, MCLA 722.111 et seq., MSA 25.358(11) et seq., providing for state-operated residential child care facilities, did not partake of the benefits of Section 16a(2) of the Township Rural Zoning Act, MCLA 125.286a(2), MSA 5.2963(16a)(2), making a state-licensed residential facility with six or less persons a residential use sufficient to meet local zoning requirements. Judge Bronson dissented.

(f) **Brandon Township v North-Oakland Residential Services, Inc.**, 110 Mich App 300 (1981), applied Section 16a of the Township Rural Zoning Act, MCLA 125.286a(2), MSA 5.2963(16a)(2), to permit establishment of an adult foster care home for six mentally retarded adults, notwithstanding the local zoning ordinance to the contrary. The state statute was held to control. Adoption of the Adult Foster Care Facility Licensing Act ("AFCFLA") in 1979, MCLA 400.701 et seq., MSA 16.610(51) et seq., without amending the reference in Section 16a(1) of the Township Rural Zoning Act to refer to the new adult foster care statute rather than the prior one, was deemed to be "a legislative oversight." Further, it was held:

> It may be argued that the Legislature failed to amend Section 16a because it felt the exemption was no longer needed in light of Section 33 of the new AFCFLA, which provides:
>
> 'This act supersedes all local regulations applicable specifically to adult foster care facilities. Local ordinances, regulations or construction codes regulating institutions shall not be applied to adult foster care small group homes, or adult foster care family homes. This section shall not be construed to exempt adult foster care facilities from local construction codes which are applicable to private residences. MCL 400.733; MSA 16.610(83)'
>
> We read this section as notice by the Legislature of state preemption in the field of adult foster care facilities.

The Court of Appeals cases during the past year all upheld adult foster care facilities for six or less individuals.

(a) **City of Livonia v Department of Social Services**, 119 Mich App 806 (1982), held that six or less developmentally disabled persons in an adult foster care home would be permitted notwithstanding the contrary local zoning ordinance, because of the statutory exemption for adult foster care family homes included in MCLA 125.583(b), MSA 5.2933(2), on the reasoning of the **Brandon Township** case. Rejected were constitutional law arguments that such an exemption "in the Zoning Enabling Act for cities and villages violates the stricture on statutes having more than a single object" in Const. 1963, Art. 4, Sec 24. The **Brandon** "oversight" doctrine was reemphasized. It was pointed out that the city can still enforce its building codes if the operation of the facilities result in code violations, but it was held that such question was "not right for judicial consideration." Finally, the deed restrictions argument was summarily disposed of, citing the three factors utilized in the **Leland** case and also citing the **Bellarmine** and **Malcolm** cases.

(b) **Oxford Township v Department of Social Services**, 120 Mich App 103 (1982), held that Section 16a of the Township Rural Zoning Act, MCLA 125.286a, MSA 5.2963(16)(a), exempts adult foster care facilities from compliance with the township zoning ordinances, summarily citing the **Brandon** reasoning. It further extended the adult foster care concept to "mentally ill adults," finding that the words "emotionally disturbed" as utilized in the definition of an "adult foster care facility," MCLA 400.703(4), MSA 16.610(53)(4), were "intended to be interchangeable" with the words "mentally ill." The legislative policy behind the various statutes "to provide and protect placement of the mentally handicapped in normal residential communities where appropriate" was cited.

(c) **City of Dearborn v Department of Social Services**, 120 Mich App 125 (1982), again upheld an adult foster care small group home for five persons, notwithstanding the city ordinance, stating "it is well-established as a general principle of law that local zoning ordinances are subordinate to otherwise permissible legislative enactments." The "title object clause" and legislative oversight holdings were affirmed.

(d) **McMillan v Iserman**, 120 Mich App 785 (1982), upheld a lease for an adult foster care facility notwithstanding an amendment to deed restrictions, which included provisions allowing such amendment. (See the complete discussion under heading "Restrictive Covenants.")

(e) **City of Livonia v Department of Social Services**, 123 Mich App 1 (1983), again upheld an adult foster care small group home for six or less persons as being exempt from local zoning ordinances pursuant to MCLA 125.583(b)(2), MSA 5.2933(2), rejecting an argument relative to alleged divestiture of authority of home rule cities, the "title object clause" argument, the alleged lack of statutory standards, the "mentally ill" definition argument, and due process, equal protection and other arguments. In addition, building and use restrictions limiting use to "residential purposes" were held not to preclude such use because of the "liberal construction of the word 'family'" given in the **Bellarmine**, **Malcolm** and **Leland** cases.

(f) **Greentrees Civic Association and City of Southfield v Pignatiello,** 123 Mich App 767 (1983), again upheld the use of a licensed adult foster care facility for the care of not more than six adults, affirming the extension of the statutory language to include "mentally ill" persons, notwithstanding Judge Bronson's dissent to the contrary. The Court applied the exemption in Section 3b of the City or Village Zoning Act, MCLA 125.583(b)(2), MSA 5.2933(2), to exempt such a facility from compliance with the local zoning ordinance and rejected the "title object clause" argument.

The emerging consistency of the Court of Appeals' decisions, notwithstanding varying panels being involved, is noteworthy. Enforcement of public policy considerations favoring adult foster care facilities, as evidenced by the above cited statutes, seems to be controlling. However, it should be emphasized that leave to appeal was denied by the Supreme Court in the **Bellarmine, Jayno, Erickson** and **Brandon Township** cases and none of the foregoing cases have been decided by the Michigan Supreme Court. For a more complete analysis, see the fine articles in Planning & Zoning News, Vol. 1, No. 5 (March, 1983) and Vol. 1, No. 6 (April, 1983).

BANKRUPTCY

In **In re Troy Lee James,** 9 BCD 208 (**E.D. Mich** 1982), four separate Chapter 13 debtors sought to suspend the redemption period of mortgages on their foreclosed residences and to have the respective mortgages reinstated. In each case, the mortgagees had obtained foreclosure judgments and held foreclosure sales, but the debtors had filed for bankruptcy before the statutory redemption period had expired. Judge Graves held that the debtors could not reinstate the defaulted mortgages after the pre-petition foreclosure sales under Section 1322(b)(5) of the Bankruptcy Reform Act of 1978. Judge Graves further held that the Bankruptcy Court could not stay or extend the statutory period of redemption. The **James** decision is contrary to **In re Gary T. Thompson,** 8 BCD 1040 (**W.D. Mich** 1982), which has been appealed. In **Thompson** Judges Nims and Howard held under Section 1322(b)(5) a Chapter 13 debtor could cure a mortgage default after foreclosure sale, but before the period of the equity of redemption expired, because the debtor still retained an interest (the right to redeem) under state law prior to the expiration of the redemption period, whereupon such interest (and consequently the jurisdiction of the Bankruptcy Court to grant relief) would terminate. Also to the contrary, see **In re Grayling Taylor,** 9 BCD 399 (W.D. MO 1982).

CONDOMINIUMS

The "Condominium Deregulation Act" was adopted in 1982 as Public Act 538 (MCLA 559.101 et seq.; MSA 26.50(101) et seq.). The purpose of this statute was to eliminate administrative review of condominium documents. However, the Act had significantly more impact, in that it set forth procedures to be followed in the absence of such administrative review and greatly increased responsibilities of the escrow agent in the areas which could raise significant practical problems to the completion of future condominiums. Further problems were raised with reference to the timing of the application of the Act relative to pending condominium projects. See the article, "Condo Deregulation Arrives — Complete With Questions" in **Michigan Real Property Review,** Vol. 10, No. 1, p. 42.

CONSTRUCTION LIENS

Although the new Construction Lien Act (MCLA 570.1101 et seq.; MSA 26.316(1101) et seq.) became effective March 1, 1982, there were no significant cases construing this Act (which may well be a tribute to the draftsmen thereof).

In litigation under the prior Mechanic's Lien Act (MCLA 570.1 et seq.; MSA 26.281 et seq.) the Court of Appeals in **Renshaw v Samuels,** 117 Mich App 649 (1982), held that an owner is not responsible for the omission by a general contractor from sworn statements submitted to the owner of a reference to a subcontractor, in that MCLA 570.4, MSA 26.284, relating to sworn statements, was enacted to protect owners as well as subcontractors. Owners were felt not to be responsible for insuring the accuracy of the sworn statements, or these statements would serve no purpose. Thus, in order to protect himself, a subcontractor must either see to it that the original sworn statement embodied his claim or serve a notice of intent to claim a lien. In this case, the subcontractor did neither. The exception to the notice of intent requirement for those dealing directly with the owner is noted. **Burton Drywall, Inc. v Kaufman,** 402 Mich 366 (1978). However, this subcontractor was employed by the general contractor and sent his invoices, sworn statements and waivers of lien to the general contractor and expected payment therefrom. Under these facts, direct dealing with the owner was not present, even though the subcontractor took out building permits in his own name, talked to the owner's architect and visited the job site.

The distinction between publicly and privately owned buildings was emphasized in **Milbrand Co. v Department of Social Services**, 117 Mich App 437 (1982). The general contractor had begun constructing an office building in the City of Detroit to be occupied as offices by the defendant governmental agency. The land was owned by private owners in the form of a partnership. Plaintiff subcontractor performed work on the office building at the request of the general contractor. The general contractor later defaulted its obligations to plaintiff subcontractor. Plaintiff filed suit in the Court of Claims against defendant agency alleging that since the building being constructed was a public building, it required a payment bond under MCLA 129.201 et seq., MSA 5.2321(1) et seq. Thus, plaintiff subcontractor claimed that it was a third party beneficiary entitled to benefit from this payment bond which the statute required for "any public building." This argument, by a subcontractor which had failed to comply with the mechanic's lien statute, was rejected. The Court of Appeals held that the office building was not a "public building" under the statute since it was privately owned. Thus, the subcontractor was given protection under the law by the mechanic's lien statute and could not avail itself of the public building payment bond legislation.

INTEREST AND USURY

Public Act 193, 1982, amended the usury statute applicable to mortgages and land contracts, MCLA 438.31(c), MSA 19.15(1c), to extend the expiration dates of subsections (2) and (10) to December 1, 1982. It further made a major change by insertion of subsection (7) in order to permit charging of interest rates at eleven (11%) percent per annum on both purchase money mortgages (whether first or junior liens) taken or retained by sellers of real property or second mortgages taken by residential builders and their sales person agents or by real estate brokers and their real estate sales persons. The loans made by these "third persons" must be in connection with the sale of the real property serving as collateral under such "second mortgages" and must comply with the Secondary Mortgage Licensing Act, MCLA 493.51 et seq., MSA 26.568(1) et seq., except for Section 2 of that Act. Public Act 322, 1982, further amended this section to extend said dates in subsections (2) and (10) from December 1, 1982 until March 1, 1983. Public Act 1, 1983, in turn extended such said dates until April 1, 1985.

The foregoing acts did not deal with the Federal preemption of certain interest rates under the Depository Institutions Deregulation and Monetary Control Act of 1980, 12 USCA 3501 et seq. Further, House Bill 4321, directed toward overriding the Federal preemption under that Act, did not come out of committee prior to the April 1, 1983 deadline. Thus, the 1980 Federal Act continues to be applicable in Michigan.

Under MCLA 438.61, MSA 19.15(71), state or national chartered banks, insurance carriers or finance subsidiaries of manufacturing corporations could grant loans to a "business entity" (consisting of a corporation, partnership or natural person submitting a sworn statement in writing specifying the type of business and business purpose for which the loan proceeds would be used), and the borrowing business entity could agree in writing "to any rate of interest." Public Act 20, 1983, has added the very important additional subparagraph that states:

> . . . [I]t is unlawful in connection with an extension of credit to a business entity by any person other than a state or a nationally chartered bank, insurance carrier or finance subsidiary of a manufacturing corporation for the parties to agree in writing to any rate of interest not exceeding 15% per year.

Public Act 43, 1983, amends the Secondary Mortgage Act, MCLA 493.51 et seq., MSA 26.568(1), by revising in Section 21 thereof the interest rate which may be charged by a licensee "on a secondary mortgage loan" to "an interest rate not exceeding 18% per year and on a secondary mortgage loan executed after December 31, 1983, an interest rate not exceeding 15% per year, computed by the actuarial method."

Public Act 213, 1982, which became effective January 1, 1983, MCLA 449.1101 et seq., MSA 20.1101 et seq., is the revised Uniform Limited Partnership Act. This Act constitutes a complete rewriting of the statutes and laws of Michigan in relation to limited partnerships. (See "The New Michigan Uniform Limited Partnership Act," Joel S. Adelman, Esq., Homeward Bound Seminars, Real Property Law Section, April 19, 1983.) Among other things, this Act provides for centralized filing with the administrator (who is the chief officer of the Michigan Department of Commerce) and other provisions making limited partnerships more comparable to corporations. MCLA 449.1109, MSA 20.1109, provides that a limited partnership, whether or not formed at the request of a lender, by written agreement, may "agree to pay a rate of interest in excess of the legal rate, and in such case the defense of usury is prohibited," subject to the limitations of criminal usury.

In addition to the foregoing extensive and important legislative developments, the Court of Appeals in **Heberling v Palmer's Mobile Feed Service, Inc.**, 119 Mich App 150 (1982) held that a lender would not be permitted to add an $80,000.00 Promissory Note obligation together with an additional guaranty obligation of $30,000.00 in order to reach an amount exceeding $100,000.00 so that the exemption in MCLA 438.31(c)(10), MSA 19.15(1c)(10), would apply to permit charging in writing of any rate of interest on an indebtedness of $100,000.00 or more, the bona fide primary security for which is a lien against real property other than a single family residence.

LANDLORD AND TENANT

In **Frenchtown Villa v Meadors**, 117 Mich App 683 (1982), the Court of Appeals dealt in a summary proceeding for possession of a space in a mobile home park with the defense of retaliatory eviction under MCLA 600.5720, MSA 27A.5720. This section provides in pertinent part that a judgment for possession of premises for an alleged termination of tenancy will not be entered if it is established that "the alleged termination was intended primarily as a penalty for the defendant's attempt to secure or enforce rights under the lease or agreement" or under applicable laws. The court distinguished this statute from the judicial doctrine of **Edwards v Habib**, 130 US App DC 126; 397 F2d 687 (1968), cert. den. 393 US 1016 (1969), "which purports to prohibit the use of judicial process to accomplish an eviction for retaliatory purposes." That is, the statutory language relates to alleged **termination** as opposed to use of judicial process for **eviction** for retaliatory purposes. In this case, upon expiration of a written lease which had been entered into after prior litigation between the parties, the plaintiff commenced this summary proceeding action. The defendants raised the affirmative defense that the termination was in retaliation for their prior demand for the written lease pursuant to statutory rights guaranteed to them under the Mobile Home Commission Act, MCLA 125.1128(1)(g), MSA 19.855(28)(1)(g). The Court of Appeals distinguished between (a) a month-to-month tenancy, under which a notice to quit in retaliation for prior assertion of rights would be a termination intended primarily as a penalty, and, therefore, within the defense of the statute, and (b) rights of a tenant expiring upon termination of the lease. The court pointed out that "a landlord seeking repossession of premises upon the expiration of the term of a fixed lease does not terminate the tenancy, but merely seeks repossession pursuant to the termination that has otherwise taken place." Thus, because the landlord had "not independently caused the termination," his motivation in seeking repossession was held to be irrelevant to the operation of the retaliatory defense statute. That is, "the retaliatory eviction defense does not extend to summary proceedings instituted at the expiration of a fixed-term lease." Reaching this conclusion, the court acknowledged that its holding placed "a severe limitation upon the retaliatory eviction defense," but felt constrained to follow the dictates of the legislature.

MORTGAGES

Due-On-Sale Clauses

In **Fidelity Savings and Loan Association v De La Cuesta**, 102 S. Ct. 3014, 73 L. Ed. 2d 664 (1982), the Supreme Court held that the federal regulation of the Federal Home Loan Bank Board permitting federally chartered savings and loan associations to utilize and enforce due-on-sale clauses was a proper exercise of federal statutory authority which preempted state law restrictions, such as those in Michigan under **Nichols v Ann Arbor Federal Savings and Loan Association**, 73 Mich App 163 (1977). However, state chartered institutions were not covered by the **De La Cuesta** doctrine and questions remained concerning the date of application thereof to certain security instruments.

The Garn-St. Germain Depository Institutions Act of 1982, Public Law 97-320, creates a uniform national policy for the exercise of due-on-sale clauses by all classes of lenders, whether individuals or institutions. The preemption provisions of this Act are without exceptions and apply to all lenders (other than federally chartered savings and loan associations and savings banks whose rights are restated), subject to the three year "window period exception." Under this exception, the "window period" begins on the date the state law prohibited the exercise of due-on-sale clauses and ends October 15, 1982. As to whether this begins in Michigan with **Lemon v Nicholas**, 33 Mich App 646 (1971), or with **Nichols**, supra, see "Bank Board Final Regulations for Due-on-Sale Under Garn-St. Germain Act" by the Honorable William B. Dunn, **Michigan Real Property Review**, Vol. 10, No. 2, p. 90. Loans originated or assumed during this "window period" continue to be subject to the restrictions of state law until October 15, 1985, unless the state legislature or certain federal agencies take action to regulate such loans. However, loans made before or after the "window period" cannot be regulated.

The Garn-St. Germain preemption covers all real estate loans secured by a lien of whatever priority on real property, including land contracts. For a more extensive analysis, see the article "Garn-St. Germain and Due-On-Sale

Clauses'' by Timothy A. Fusco, Esq., in Financial Institutions and the Real Estate Industry in the 80's, Homeward Bound Seminars, Real Property Law Section, March 15, 1983.

Equitable Mortgages

In **Schultz v Schultz,** 117 Mich App 454 (1982), brother Hubert executed a warranty deed transferring 53 acres of their father's larger farm to brother Lawrence "forever" and "without exception." In exchange, Lawrence transferred $9,000.00 to Hubert. Later, Hubert sued seeking return of the 53 acre parcel, alleging that the deed was executed as part of an oral mortgage agreement. The trial court held that Hubert had shown such oral agreement by a preponderance of the evidence and that an equitable mortgage should be declared. The Court of Appeals, while noting that a mortgage and interest in real property is within the statute of frauds, stated "A court may declare a deed absolute in its face to be an equitable mortgage." However, for this to occur, there had to be either (1) a situation where a deed is between parties where one party stands in a relationship of trust or guidance to the other (such as attorney to client or guardian to ward or a parent to child) and the relationship has been abused, or (2) a situation in which a creditor abuses the "power of coercion" which he may have by the force of circumstances over a debtor. The court found that there was no relationship of trust or guidance present because the parties were brothers. It further found that there was no power of coercion present because Hubert testified that he was not under any financial straits or duress, was not being hounded by creditors and that the farm was not being foreclosed. In addition, Hubert's own expert witness testified that the value of the property at the time of the transaction was between $10,600.00 and $13,000. The court thus held that since neither ground for invocation of the doctrine of equitable mortgage existed, the statute of frauds barred the relief Hubert sought under the purported oral mortgage agreement.

The **Schultz** decision should be compared with **Feldman v MJ Associates**, 117 Mich App 770 (1982), in which an equitable mortgage was found to be present in circumstances justified by "equitable considerations" which "dictated the imposition" of such a mortgage. No reference was made to the **Schultz** case or the rationale found therein. See the discussion under the heading "Vendor and Purchaser."

OIL AND GAS LEASES

In **Michigan Wisconsin Pipeline Company v Michigan National Bank**, 118 Mich App 74 (1982), the question was raised whether, in the complex fact situation of that case, oil and gas leases would automatically expire due to lack of production by the assignee of the lessee's interests. It was held that the lessors did not meet the burden of proving that the assignee of the lessee failed to act as "a reasonable and prudent operator." Thus, under the reasonable and prudent operator standard, a lessee as an operator is expected to act in its own best interest as long as the interests of the lessor are not substantially impaired. In this case, the court found that the sale of the oil and gas field to another assignee of the lessee's interest for purposes of storage satisfied the standard. Thus, the habendum clause in the oil and gas lease, providing that the term of the lease shall extend as long as oil and gas is produced by the lessee, was satisfied and the burden of proof on the lessor claiming forfeiture of the lease was not met. Judge Daniels, in dissent, would have found that the requirements of the habendum clause were not met since oil and gas were no longer being "produced," so that the lease was terminated when the lessee failed to either market gas or pay the shut-in royalty. He did not agree that the reasonable and prudent operator standard applied in such circumstances, but rather that the provision of the lease requiring shut-in royalties must be satisfied, and was not in this instance. See "Has My Oil and Gas Lease Expired? The Habendum Clause," **Michigan Real Property Review**, Vol. 10, No. 2, p. 113.

PLATS

Arrowhead Development Company v Livingston County Road Commission, 413 Mich 505 (1982), involved platting by Arrowhead in order to develop 140 acres into a residential subdivision. The proposed subdivision abutted Chilson Road in two locations. When the plat was submitted to the Livingston County Road Commission for approval, it required reworking of the subdivision layout to create a new intersection with Chilson Road where there had previously been a cul-de-sac. Because a steep hill crested on Chilson Road somewhat away from the newly proposed intersection, the commission required Arrowhead to remove the hill and regrade and resurface the road, even though this area of Chilson Road was located entirely outside the proposed subdivision. Arrowhead posted a performance bond and the plat was approved. Arrowhead then proceeded with the development, but not the Chilson Road activities. Thereafter, the road commission threatened to eliminate the hill, regrade and resurface and charge Arrowhead with the cost. This was a suit to enjoin such activity.

The Court of Appeals in reviewing the Subdivision Control Act of 1967 (MCLA 560.101 et seq.; MSA 26.430(101), et seq.) initially noted that Section 105 of that Act provides that approval of plats shall be conditioned upon compliance with that Act, and with ordinances or published rules of municipalities or counties or published rules of county road commissions or county plat boards adopted to carry out such provisions. However, the court then noted that Section 106 declares:

> No approving authority or agency having the power to approve or reject plats shall condition approval upon compliance with, or base a rejection upon, any requirement other than those included in Section 105.

The court then noted that Sections 181 through 184 are concerned with the imposition of conditions for approval of a proposed plat by municipal, county, and state road authorities. Section 181 provides that all streets shown "on a plat" shall comply with these sections as a condition of approval of the final plat. While Section 182 deals with conditions which may be imposed by municipalities, and Section 184 with conditions which may be imposed by the State Highway Department, Section 183 deals with conditions for plat approval which may be imposed by the county road commissions. These conditions include "adequate provision for traffic safety in laying out drives which enter county roads and streets." The Court then held that because of the language of Section 181, the references in these sections to roads are "to roads **within** a proposed subdivision." Thus, it was determined that "the responsibilities of a subdivision developer do not extend beyond the borders of the subdivision itself unless explicitly imposed by the Legislature." This conclusion is buttressed both by common sense and by the fact that these are not costs "historically imposable upon the subdivision developer," but are met by taxation and special assessments to benefited individuals and properties. Accordingly, this case appears to serve as a strong authority to limit not only county road commissions but also municipalities and the State Highway Department so that they cannot impose on a subdivision developer the obligation to make improvements entirely outside the subdivision as a condition to plat approval.

RESTRICTIVE COVENANTS

Changed Character

In **Rofe v Robinson**, 415 Mich 345 (1982), deed restrictions in Hickory Knolls Subdivision restricted all 45 lots in that subdivision to single family residential use. The subdivision is triangular in shape with lots 1 through 12 being located on and accessible only from Telegraph Road, a major traffic artery. Each of these lots is vacant except lot 2, which in 1971 was a residence which was converted to office use. Such office use had continued without objection from that time. In 1968, these lots were rezoned from single family to office use. Office use was present immediately across the street to the north. Residential use was present along Telegraph Road but behind earth beams separating such use from that road. The Supreme Court enforced the deed restrictions. It held that (a) economic impracticability does not itself justify lifting building restrictions, (b) that a change in zoning by itself cannot override prior restrictions placed in deeds, (c) that the character of the area had not changed to such an extent as to subvert the original purpose of the restrictions, (d) that the use of one of the lots for office purposes would not materially change the character of the subdivision, and (e) that the widening and evolution of Telegraph Road as a major traffic artery had not so changed the character of the subdivision. The thrust of the decision seems to be directed to the concept that the many changes involved had not affected the subdivision as a whole. However, all of the factors cited certainly indicated very substantial changes for these specific lots, with at least some testimony to support the concept that the prior office use on lot 2 and clear inability to utilize these lots for single family residential purposes had in fact so changed the character of these lots as to render enforcement of the restrictions inequitable.

Amendments

The Court of Appeals in **Ardmore Park Association, Inc. v Simon**, 117 Mich App 57 (1982), held that where deed restrictions allowed a majority or greater percentage of lot owners in a particular subdivision to amend such restrictions, and they were so amended, other non-consenting owners were bound by such properly passed and recorded amendments, in the same manner as those contained in any original restrictions. This was a case involving a six foot high fence (the time of building of which is not given in the decision) where the amended restrictions prohibited fences over four feet in height. However, in a much more difficult fact situation involving adult foster care facilities, **McMillan v Iserman**, 122 Mich App 785 (1982), reached a contrary result. In this case, the original deed restrictions permitted amendment by a ¾ vote. It did not initially have any prohibition against adult foster care facilities. Before any amendment,

a lease for such for such facilities was executed. Then the restrictions were amended by the required ¾ vote to preclude adult foster care facilities. In an extensive analysis, the majority noted that reciprocal negative easements cannot be retroactively applied. However, where an amendment clause was present in the original restrictions and an amendment is properly passed pursuant thereto, it was held that this was not a retroactive application of the restrictions. It was further held that the power to amend restrictions under such a clause was recognized even if such amendment imposed restrictions which were more restrictive than those originally applied. However, in order to avoid a result which the majority felt "to be manifestly unfair," it held that "an amended deed restriction does not apply to a lot owner who has, prior to the amendment, committed himself or herself to a certain land use which the amendment seeks to prohibit providing: (1) the lot owner justifiably relied on the existing restrictions (i.e. had no notice of the proposed amendment); and (2) the lot owner will be prejudiced if the amendment is enforced as to his or her lot." Based upon this, the majority then held that the plaintiffs were estopped from asserting that the amended deed restrictions applied to the lot leased for the adult foster care facilities. However, the majority then went further and also held that in weighing the two competing public policies of (1) upholding of building and use restrictions and (2) promoting adult foster care facilities, the latter prevailed. Thus, the decision finally held that "the amended deed restriction here, specifically prohibiting state-licensed residential facilities for the mentally handicapped, is manifestly against the public policy and thus unenforceable on public policy grounds." Judge MacKenzie dissenting felt that neither estoppel nor detrimental reliance was present and that the amended restrictions should be enforced.

Adult Foster Care Cases In General

Clearly, the **McMillan** decision follows the thinking and doctrines of the **Bellarmine, Malcolm** and **Leland** cases in the adult foster care facilities area. Following this approach in the other adult foster care facility cases noted above (all of which included issues concerning deed restriction language), the Court of Appeals did not enforce deed restrictions against such facilities in **Livonia v Department of Social Services**, 119 Mich App 806 (1982), where there was a summary application of the three rules found in the **Leland** case, or in **Livonia v Department of Social Services**, 123 Mich App 1 (1983), in subpart VIII, where the word "family" was again very broadly construed.

Miscellaneous

In a case in which the original restrictive covenants in deed restrictions precluded house trailers, trailers and coaches from being parked except in a garage, it was held that this language as a whole indicated a clearly ascertainable intent of the restrictive covenants to prohibit the general class of large vehicles and that motor homes were thus prohibited, even though not specifically mentioned in the restrictions. **Borowski v Welch**, 117 Mich App 712 (1982).

RIPARIAN RIGHTS

In **Bott v National Resources Commission** and **Nicholas v McDaniel**, 415 Mich 45 (1982), the Michigan Supreme Court, by a 4-3 vote entered an important decision in the area of riparian rights relating to inland lakes and streams. In **Bott**, there was an inland lake surrounded by the property of the land owner which had one inlet or outlet. In **Nicholas**, there was a creek surrounded by property of one owner located between two lakes. In both the majority opinion of Justice Levin and the dissenting opinion of Justice Moody adopted by Justices Williams and Ryan, there appeared to be no issue that the state owns from the waterline of the Great Lakes, while in inland waterways private (littoral) owners own to the center of such waterways. Moreover, both agree that (a) if the inland waterways were navigable, they were subject to a public trust with public use permitted, while (b) if not navigable, they were not subject to such trust and no public use need be permitted by the private owners.

However, Justice Levin reiterated the "log flotation test" of **Moore v Sanborne**, 2 Mich 519 (1853), to determine navigability. This concept was based upon the encouragement of commercial and industrial uses at an earlier time, when commercial development implicit in the flotation of logs had significance. It led to the determination in **Winans v Willetts**, 197 Mich 512 (1917), that even though there is a navigable means of access, the littoral owner of all the land surrounding a small inland dead-end lake has the sole right to use it because the unified ownership precludes the right of passage even though there is navigable means of access to the dead-end lake. Thus, while "the public-trust doctrine applies only to navigable waters and not to all waters of the state," the public-trust doctrine does not attach to lakes unconnected to other waterways or to lakes with only one inlet or outlet (held in **Winans** to be unnavigable). Since riparian and littoral land has been purchased in reliance on these "rules of property," they should be enforced. The creek to the **Bott** Lake is at one point 8 inches in depth and the creek surrounded by the **Nicholas** property is at one

point 6 inches in depth. Therefore, Justice Levin held that both were too shallow to permit the flotation of logs and were thus non-navigable, not subject to public-trust or use and only the private littoral owners had the right to use of these waters.

Justice Moody reviewed English history which provided that tidal waters were public, while those which were navigable in fact were privately owned but subject to public rights. This compared with his analysis of history in the United States where "navigable in fact" became "navigable in law." Justice Moody felt that Michigan had adopted a navigable in fact test similar to the federal test. Waterways capable of supporting large vehicles in commerce in Michigan were referred to as "strictly navigable" while those inland waterways capable of floating logs or timber were "qualifiedly navigable." Title held by private persons to the beds of "strictly navigable" waters were early declared to be qualified titles subject to the public's right of navigation which was held "paramount." Eventually, title held by private persons to beds of waters deemed qualifiedly navigable were also determined to be a qualified title subject to the public uses of the waters. Since he felt that after many years the log flotation test for determination of navigability has outlived its usefulness and has become impractical, Justice Moody would have opted for a "recreational boating test." Under this test, if waters were capable of being navigated by small crafts propelled by oar, paddle or motor, the water would be navigable and thus open to the public for navigation, fishing and recreational use. This pragmatic test has been adopted in a number of states and, he felt, should be adopted in Michigan. With reference to the problem where there is a single inlet or outlet to a lake, if that inlet or outlet "is capable of supporting navigation by small recreational crafts, and if the lake itself is boatable" the public has lawful access to the lake and the right to make reasonable use of the lake's surface. However, if there is "no navigable inlet or outlet and a lake is completely surrounded by land owned by a private person to which the public has no other ordinary lawful means of access, then such lakes are private." Members of the public have a right to make use of waters of a navigable stream, although not to improve a stream to make it more readily navigable. He opined that **Winans** was "an ill-conceived decision" and should thus be overruled. Since the evidence was that the **Nicholas** stream had afforded passage of boats (although with difficulty) over a number of years, that stream was navigable. Since the evidence with reference to the **Bott** stream was unclear, that matter should be remitted to the trial court for further proceedings. **Bott's** "rules of property" are subject to change with time.

In **Boekeloo v Kuschinski**, 117 Mich App 619 (1982), a quiet title action was undertaken between two contiguous land owners on the Lake Michigan shoreline. The issue was whether the frontage on the lake was divided by the original meander line or the present shoreline of these properties. It was held that the water's edge or shoreline was the true boundary. This determination was based upon the fact that there was no evidence that any portion of the land in dispute was the result of accretion, so that the rules related to dividing accreted property were not applicable.

SALES AGREEMENTS

In **Groh v Broadland Builders, Inc.**, 120 Mich App 214 (1982), plaintiff Groh brought action under a purchase agreement for construction of a new home against defendant-builder Broadland four years after taking possession of that home, alleging breach of contract and breach of warranty and damages for mental anguish. In examining whether plaintiff could recover damages for mental anguish arising out of a breach of contract, the court referred to **Hadley v Baxendale**, 9 Exch 341, 156 Eng Rep 145 (1854), and **Kewin v Massachusetts Mutual Life Ins. Co.**, 409 Mich 401 (1980), in support of "the general rule" that damages recoverable for breach of contract are those arising naturally from the breach or those "in the contemplation of the parties at the time the contract was made." Therefore, as was stated in **Kewin, supra**, 414-415:

> Thus, it is generally held that damages for mental distress cannot be recovered in an action for breach of a contract.

Further, the Court cited **Jankowski v Mazzotta**, 7 Mich App 483 (1967), and **Caradonna v Thorious**, 17 Mich App 41 (1969), as determining "that damages for mental anguish may not be recovered by a home owner for the breach by a contractor of a commercial contract to construct a home." Since there were no factual allegations that damages for mental anguish resulting from possible breach of contract were within the contemplation of the parties at the time the contract was made, it was held that no damages for mental anguish could arise from a breach of contract.

With reference to the possibility that such damages could arise from a breach of implied warranty, the court reviewed **Weeks v Slavik Brothers, Inc.**, 24 Mich App 621, aff'd 384 Mich 257 (1970), which "extended the concept of an implied warranty of fitness from the field of personal property to the purchase of new homes in Michigan."

After noting that no facts had been alleged from which it could reasonably be inferred that damages for mental anguish were within the contemplation of the parties at the time of the contract, the court held that the damages for mental anguish under a theory of breach of implied warranty should not be extended beyond the parameters of such damages under a theory of breach of contract. Thus, claims for mental anguish damages from contracts for construction of homes appear greatly limited.

SOLID WASTE DISPOSAL

In this most controversial of fields from a political viewpoint, the Court of Appeals in **Township of Cascade v Cascade Resource Recovery, Inc.**, 118 Mich App 580, 584, 585 (1982), allowed use of land for solid and hazardous waste disposal pursuant to a "solid waste disposal area construction permit" from the Department of Natural Resources, and did not require compliance with applicable township ordinances under which the township was claiming the right to enjoin construction of the disposal area. This holding was based upon the determination that the Hazardous Waste Management Act, MCLA 299.501 et seq., MSA 13.30(1) et seq., had preempted the field. The court cited **People v Llewellyn**, 401 Mich 314 (1977), cert den 435 US 1008 (1978), for the doctrine that:

> 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 preempts 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.

The Court of Appeals stated that:

> A direct conflict exists when the ordinance permits what the statute prohibits or the ordinance prohibits what the statute permits.

The Court further stated that there were four guidelines for determination whether a statutory scheme is "occupying the field," i.e., (1) where state law expressly so provides, (2) where preemption is applied from legislative history, (3) where pervasiveness of the state statutory scheme may support a finding of preemption, while (4) if the nature of the regulated subject matter calls for regulation adapted to local conditions and local regulation does not interfere with the state regulatory scheme, supplementary local ordinances are generally allowed, but if the subject matter calls for uniform state regulatory action, local ordinances are preempted.

In this case, the court found that the Hazardous Waste Management Act had preempted the field because of its express language and also because the comprehensiveness of the statutory scheme showed preemptive intent, and also because the nature of the regulated subject matter demands uniform statewide treatment.

In an allied ruling, **County of Delta v Department of Natural Resources**, 118 Mich App 458 (1982), held that while the Solid Waste Management Act, MCLA 299.401 et seq., MSA 13.29(1) et seq., created a statutory mandate requiring local units of government to dispose of solid waste products, and these duties resulted in increased costs to such units, the provisions of this Act violated the so-called "Headlee Amendment" to the Constitution, Const 1963, art 9, Sec. 29, in the absence of state funding for those costs.

TAXATION OF REAL PROPERTY
(Prepared by David W. Berry)

Exemptions

In **American Legion Memorial Home Association of Grand Rapids v City of Grand Rapids**, 118 Mich App 700 (1982), the Court was asked to decide whether a building consisting of an auditorium, meeting room, bar, kitchen, storage room and office was entitled to an exemption under MCLA 211.7(d); MSA 7.7(d). The building was used for a number of purposes consistent with those of the National American Legion Organization, including regular monthly business meetings, organizational meetings for parades and festivities, church memorial services for deceased veterans, meetings to plan and promote charitable activities, various banquets and dinners for post-members, and also by various civic organizations on a non-profit basis. The court held that notwithstanding the language of the statute requiring that the building be used "solely for the purposes for which (they) were incorporated . . ." the building was

entitled to exemption. Although the tax years in question were 1978 through 1980, the court looked to 1980 PA 142 (MCLA 211.7; MSA 7.7) which amended the relevant sections of the exemption statute to establish the legislature's intent. The operative language to the amendment states, "Incidental or casual rental or leasing for non-veteran purposes is no bar to the exemption." The court indicated that although the amended statute did not govern the action, it served as a "persuasive guide in the ascertainment of the intent of the legislature in originally exempting Memorial Homes from property taxation."

Retirement Homes v Silvan Township, 416 Mich 340 (1982), relying on **Michigan Baptist Homes and Development Company v City of Ann Arbor**, 396 Mich 660 (1976), held that to qualify for charitable or benevolent tax exemptions, property must be used in such a way that it "benefit(s) the general public without restriction." Residents of the home were charged a monthly fee which was designed to cover utility and other costs of operation and to amortize the cost of construction over a twenty year period. The plaintiff claimed that no one had ever been refused care or evicted from the home for inability to pay the monthly fee. However, some residents of the home who became unable to pay the monthly fee were asked to transfer to one of the other facilities owned by the corporation. The court indicated that voluntary services provided by residents of the home could not justify the tax exemption. Moreover, the recreational, social and religious endeavors taking place at the home appeared to be incidental to providing a comfortable apartment for the residents. The court indicated, as it had in **Michigan Baptist Homes, supra**, that the legislature gave no clear mandate to exempt all elderly housing. The second rationale for the holding was that the home was not incident or auxiliary to the primary facility, but was in fact the primary facility on the property. Finally, the court concluded that "the legislature did not intend that housing for the elderly should be tax exempt where only those persons who can afford the cost of the housing benefit." **Retirement Homes**, supra, 353.

Assessment and Valuation

In **Tatham v City of Birmingham**, 119 Mich App 583, petitioner claimed that although its property was assessed at 50% of its true cash value, the average level of assessment for the city as a whole was 43%. Therefore, their assessment should be reduced to a level of 43% of the property's true cash value based upon the uniformity clause of the state constitution, Const. 1963, art 9, Sec. 3. Although the City of Birmingham had agreed that the subject property was assessed at 50% of its true cash value, the Court of Appeals declined to honor that stipulation. Rather, the court chose to remand the case to the Tax Tribunal to give the petitioners an opportunity to prove that under a market analysis, their property was assessed at a level higher than 43% of true cash value. Presumably, if the burden on that issue was sustained by the petitioner, the Court of Appeals would order that the assessment on that property for the tax year in question be lowered to the average level of assessment for other properties in the city. In the process of remanding the case to the Tax Tribunal, the court struck down use of the "adjusted-cost-of-reproduction-less-depreciation" method for determining true cash value of "residential properties." Moreover, the court struck down the State Tax Commission's mandate that assessors use a 30-month study (starting on tax day and going back thirty months) for determining true cash values apparently for either assessment or equalization purposes. The court stated that in inflationary times, property assessments would continually be less than 50% of the true cash value and, conversely, in a deflationary market, the 30-month study would consistently result in over-assessment of the various properties.

In **First Federal Savings and Loan Association of Flint v City of Flint**, 415 Mich 702 (1982), First Federal owned a building in downtown Flint upon which it spent approximately $475,000.00 to renovate the building, adding improvements that enhanced the bank's "image." There had been no recent sales of comparable properties and, therefore, the assessor based the portion of the assessment dealing with the image enhancing improvements on a reproduction cost less depreciation basis. Both the Tax Tribunal and the Court of Appeals had held that this basis was proper for assessment purposes. However, the Michigan Supreme Court held, "the law does not tax expenditures that merely enhance the image or business of the owner, only expenditures that add to the cash value or selling price of the property." Id at 705. The court went on to indicate that the constitution and statute do not authorize a tax on the value of lumber or marble incorporated into a building, but on the market value of the completed structure and land. The Supreme Court remanded to the Tax Tribunal for further proceedings to determine whether the image enhancing improvements would add to the selling price of the building.

In a similar case, **Genesee Towers v City of Flint**, MTT Docket No. 51712 and 63370, petitioner was the owner of an office building in downtown Flint. The building had been built specifically in contemplation of a long term lease with Genesee Bank. The primary lease provided that the owner would allow rent credits equivalent to the cost of making leasehold improvements in "first class office space." A similar lease was signed with the University Club

which occupied the top floor of the office building. Various improvements were made by the bank and the University Club that were in excess of "first class office space" improvements. All of the improvements were made prior to acquisition of the building by the petitioner. It was admitted by all parties that a purchaser of the petitioner's interest would not consider paying a premium for the fact that it would acquire the right to possess these various leasehold improvements at some time in the future. In the case of the bank, the lease had a 40 year remaining term. Tribunal Judge Charles P. McDonald held that **CAF Investment Company v Saginaw Township,** 410 Mich 428 (1981), governed. If a purchaser would not pay the owner a premium for the privilege of possessing the tenant leasehold improvements 40 years from now, then those leasehold improvements could not be taken into consideration in establishing an assessment. Moreover, the statute calls for valuation on the basis of "value in exchange," not "value in use." (The effects of **CAF Investment Company** on the tax valuation process have been negated by 1982 PA 539.)

Special Assessments

In **Samuel Frankel v Charter Township of Pontiac,** MTT Docket Nos. 40042 and 48298, the Township levied special assessments to obtain funds to meet a deficiency in the sum of money needed to pay Oakland County for the Township's contractual obligations for intercepter sewer extensions. The Township applied a credit formula to allocate the special assessment obligation for each year. All previously connected parcels were given a credit toward the special assessment in the amount of their connection charges. If a particular owner had paid connection charges, the balance due on the special assessment would be reduced to zero. The formula for the special assessment placed the burden of meeting the shortfall in the Township's contractual obligations on non-users until such time as those non-users connected to the sewer. Upon connection, the non-users would likewise receive a credit for the special assessment previously paid against their connection charges, to the extent that they would owe nothing for connecting to the sewer. There was no challenge to the procedural aspects of the levy. The Tribunal held that the approach used by the Township, while not perfect, was not violative of the Township's statutory authority, case law or constitutional law. The court indicated that granting refunds in special assessment cases was approved by the Supreme Court in **Sawicki v City of Harper Woods,** 368 Mich 435 (1962). Moreover, the court indicated that if the subject special assessment was construed as prepayment of a connection charge, it was not objectionable because no statute prohibited such a prepayment. The number and complexity of the issues involved in this case prevent a full discussion of all of the issues. However, for anyone with a special assessment problem, the case represents an exhaustive and detailed review of special assessment law in the State of Michigan.

In **Alexis J. Rogoski, Trustee v City of Muskegon,** MTT Docket No. 37145, Muskegon had levied a special assessment for mall maintenance. The City had previously enclosed a substantial portion of the downtown business district in hopes of increasing business for the area. The special assessments levied by the City were for the annual maintenance costs, including controlled heating and air conditioning, lighting, cleaning, security and added police protection. The Tribunal held that the maintenance services were in excess of the level of services received by other areas of the City. The special assessment formula, which considered both square foot areas and lineal distance of stores abutting the common area, was a legitimate formula for determining the amount of the special assessment. Although certain abutting owners were charged for vacant or unused areas, the court held that "potential use" is to be considered not actual use for special assessment purposes and relied on **Crampton v City of Royal Oak,** 362 Mich 503 (1961).

Valuation of Low and Moderate Income Housing

In **Congresshills Apartments v Township of Ypsilanti,** 102 Mich App 668 (1981), the court held, relying on **CAF Investment Company v State Tax Commission,** 292 Mich 442 (1974), that in valuing subsidized moderate income housing by the capitalization of income approach, actual rents rather than market rents must be used since governmental restrictions prevent collection of market rents. In other words, "present economic income" under MCLA 211.27(1), MSA 27.27(1), means "actual income." Furthermore, the Court of Appeals held that "actual expenses" must be used in determining the true cash value of the property via the income approach, relying on **Northwood Apartments v City of Royal Oak,** 98 Mich App 721 (1980). The Court of Appeals then remanded the case to the Tax Tribunal for a recalculation of the true cash value for the tax years in question.

On remand, the Tax Tribunal correctly decided that the government's subsidy of the mortgage interest payment must be added to income in calculating true cash value via the income approach. (The subsidy can be reflected either by adding subsidy income to rental income and other forms of income in calculating gross income or it may be

reflected in a lower cap rate.) However, in calculating the capitalization rate to apply to the net income stream, the Tribunal used 1% as the debt service portion of the rate, (a 1% return on debt was used rather than the 8½% rate stated in the mortgage because the owner was effectively paying 1%.) The Tribunal reasoned that since it had not included subsidy income in the gross income figures, a 1% cap rate for the cost of debt would reflect the fact that the owner had received an interest subsidy equivalent to 7½%. During the tax years under appeal, the market mortgage rates exceeded the 8½% interest rate under the existing mortgage. Although the quantum of the Tax Tribunal's reduction on the debt service rate correctly reflected the interest subsidy, their starting point of the 8½% interest rate reflected in the mortgage was incorrect. The starting point for the 7½% reduction should have been the relevant market mortgage rate for the tax year in issue. Otherwise, the value of favorable financing is reflected in the valuation conclusion. The goal is the determination of the true cash value of the real property, not the value of the federally guaranteed financing.

In **Antisdale v City of Galesburg**, 109 Mich App 627 (1981), a similar valuation error was made in calculating the true cash value of the property for tax purposes. In **Antisdale**, the primary credible approach to valuation was a market approach done on behalf of the City. Essentially, the assessor's market approach analyzed sale prices of "comparable" sales of low and moderate income housing projects throughout the State of Michigan on a per unit basis. Those per unit sale prices were then multiplied by the number of units contained in the subject property to establish the true cash value for the property. No adjustments were made in the sale price for favorable financing or the value of federal income tax shelters.

Several decisions came out of the Tax Tribunal relating to low and moderate income housing valuation, including **Colonial Square Cooperative v City of Ann Arbor**, MTT Docket No. 46435 and **Lakeside Apartment Company v City of Cadillac**, MTT Docket No. 51014. Both decisions followed **Congresshills** and **Antisdale**.

However, in **County of Washtenaw v State Tax Commission**, Michigan Court of Appeals Docket No. 64939, the court held:

> Although we join Judge Allen in Issues II, III and IV, we cannot join in Issue I because we do not agree that "usual selling price" necessarily means whatever a buyer pays for property.
>
> Because of the extraordinarily high interest rates, some real estate buyers and sellers have recently used different forms of "creative financing" to finance their property sales. Using such financing, a buyer might pay more for a property where the payments are made over an extended number of years than he or she would have if the sale were financed through a conventional mortgage. Although the property's value remained constant, the selling price would differ considerably.

County of Washtenaw v State Tax Commission, supra, was consolidated with similar cases brought by Lapeer and Oakland Counties against the State Tax Commission to alter the tax commission's practice of equalizing among the counties without discounting sale prices indicated in deeds for the fact that the sale took place on the basis of a land contract at 11%, substantially below market interest rate during the years on appeal. The Court of Appeals indicated that although the legislature failed to amend MCLA 211.27(1) and (3), MSA 27.27(1) and (3) to permit adjustments to sale prices for "creative financing," it was not a matter of statutory law but rather a matter of Michigan Constitutional law. In particular, Const. 1963, art 9, sec. 3 provides:

> The legislature shall provide for the uniform general ad valorem taxation of real and tangible personal property not exempt by law. The legislation shall provide for the determination of true cash value of such property; the proportion of true cash value at which such property shall be uniformally assessed, which shall not, after January 1, 1966 exceed 50 percent; and for a system of equalization of assessments.

The court cited a convention comment relating to this constitutional provision which stated:

> The important constitutional objective is uniformity of assessment, regardless of the level at which property is commonly assessed.

The court went on to hold:

> This uniformity requirement means that all real property owners within a taxing district must be taxed at an unvarying standard and at a uniform rate. It implied equality in the burden of taxation. **Titus v State Tax Comm,** 374 Mich 476; 132 NW2d 647 (1956). See also **Pine Grove Twp v Talcott,** 86 US (19 Wall) 666; 22 L Ed 227 (1873). A tax rate imposed by a single taxing unit must be identical throughout its territory. **East Grand Rapids School Dist v Kent County Tax Allocation Bd,** 415 Mich 381; _______ NW2d _______ (1982). This goal of equalization is to be achieved both within and among the different counties. **Ann Arbor Twp v State Tax Comm,** 393 Mich 682, 688; 227 NW2d 784 (1975). Finally, the courts of this state have often held that sales price does not necessarily determine the true cash value of property. See **Fisher-New Center Co v State Tax Comm,** 380 Mich 340, 362; 157 NW2d 271 (1968); **Antisdale,** supra, p 636, (Bronson, J., dissenting).
>
> Therefore, a tax assessment system which does not consider creative financing is in fact unconstitutional. . . . Consequently, we conclude that defendant has applied the wrong method for assessing property for equalization by not accounting for the effects of creative financing on the sales price. As such, we are remanding all three cases to defendant to develop a method to account for creative financing.

Therefore, it appears that **County of Washtenaw v State Tax Commission** is at odds with **Congresshills Apartments v Township of Ypsilanti, supra,** and **Antisdale v City of Galesburg, supra,** since true cash value for assessment purposes and equalization purposes **must** be the same value.

The above cases may become moot as a result of 1982 PA 539 discussed more fully below.

Amendment of General Property Tax Act
By 1982 PA 539

Amended MCLA 211.27(4), MSA 7.27(4), redefines "present economic income" to mean the "ordinary, general and usual economic return realized from the lease or rental of property negotiated under current contemporary conditions between parties equally knowledgeable and familiar with real estate values." This has the effect negating **CAF Investment Company v Saginaw Township,** 410 Mich 428 (1981), holding that true cash value must be computed via the income approach based upon actual, not market, income. Moreover, the amendment should have the effect of negating **Congresshills** and **Antisdale,** relating to valuation of low and moderate income housing projects, because "present economic income" will now be the "ordinary . . . usual economic return" negotiated under "contemporary conditions." Therefore, those properties subject to long term uneconomic leases or mortgages can no longer use those situations to achieve tax assessment reductions below an assessment produced by a current economic lease or mortgage. This Act represents a substantial departure from the current interpretations of the existing law.

VENDOR AND PURCHASER

Because of the prior absence of definitive case law establishing rules for a waiver of the right of redemption by a defaulted land contract purchaser, the case of **Russo v Wolbers,** 116 Mich App 327, 338 (1982), is most helpful. On rather peculiar facts involving a trial court agreement for waiver of the right of redemption in the event of a future breach of provisions for land contract payments required under that agreement, and the subsequent occurrence of such breach of that agreement, the Court of Appeals upheld the waiver of the right of redemption upon the foreclosure undertaken after such breach. In examining the question of the vendee's waiver of right of redemption, the court noted the absence of land contract decisions and thus referred to decisions concerning the waiver of the right of redemption on mortgage foreclosures. Based upon this analysis, the court found that the statute providing for foreclosure of mortgages and land contracts did not contain language which "precludes any waiver nor indicates waiver is against public policy." After citing authorities to the effect that courts carefully scrutinize any waivers of statutory rights of redemption as to fairness of the contract, unconscionability, fraud or duress and reasonably adequate consideration, the court stated:

> The doctrine against clogging the equity of redemption is part of the common law of specific performance. It is an inherent and essential characteristic of every mortgage and land contract . . . .

> It is also well established, in the absence of a contrary statutory provision, that a mortgagor may sell and convey his equity of redemption to a mortgagee by a separate and distinct contract entered into in good faith and for good consideration.

As indicated, any contract by which the mortgagor sells or conveys his interest to the mortgagee is viewed suspiciously and is carefully scrutinized by an equity court. The exchange must be "fair, frank, honest and without fraud, misconduct, undue influence, oppression or unconscionable advantage of the poverty, distress or fears of the mortgagor."

Further, a mortgagee may not contract for the waiver of redemption rights at the time of the loan.

Applying these principles from waiver of mortgage redemption rights to the land contract area, the court upheld the agreement of waiver of the land contract vendee's redemption rights on the basis of the lower court's close scrutiny of the agreement, whereby it was satisfied that "it was freely and fairly made, that no undue advantage was taken of the defendants, and that it was for a good and valuable consideration."

In **Feldman v MJ Associates**, 117 Mich App 770 (1982), an apparent chain of land contracts was involved. Upon default in the chain, the original owner-vendor foreclosed. MJ Associates, the ultimate land contract purchaser which had originally defaulted, and thus caused the foreclosure action, redeemed the property from the judicial sale. Shortly thereafter, Indian Hills, the holder of the vendor interest to MJ Associates in the prior land contract chain, attempted unsuccessfully to redeem. The court noted that although MCLA 600.3140, MSA 27A.3140, provides for redemption of the premises within six months from the time of the sale, it is silent on the problem of priority between parties entitled to redeem. It was stated by the court,

> . . . absent overriding equitable considerations, we believe that the fairest approach is to grant priority to the first party to exercise its rights of redemption . . . . [W]e hold that a valid redemption of property generally operates to cut off the redemption rights of other parties entitled to redeem.

Thus, although Indian Hills owed the plaintiffs in the foreclosure action $54,401.00, and the redeeming defaulted ultimate vendee, MJ Associates, owed Indian Hills $205,000, since MJ Associates had redeemed prior in time, it thereby cut off all of the rights of Indian Hills. Nonetheless, the court imposed an equitable mortgage stating that it did not believe under the circumstances that MJ Associates should be permitted to utilize its redemption of the property to defeat Indian Hills security interest under its prior vendor's lien as provided in the contract between those two parties, i.e., "as between those two parties, the contract remains in force." This holding while clearly equitable in nature, seems to involve reasoning to an end and certainly fails to take into account the elements utilized to determine the presence of an equitable mortgage as set forth in **Schultz v Schultz, supra**.

In **Lenawee County Board of Health v Messerly**, 417 Mich 17 (1982) the Supreme Court reversed the prior decision of the Court of Appeals in 98 Mich App 478 (1980). In the **Lenawee** case, a prior owner of a three unit apartment building located on 600 square feet of land had installed a bad septic system thereon (it being later determined that 2,500 square feet was needed for an appropriate septic field, even though that square footage was not available). After purchase of the property, Messerly in turn sold the property to Pickles under a land contract containing an "as is" clause. Thereafter, the septic problem was discovered for the first time by both Messerly, the innocent land contract vendor, and Pickles, the innocent land contract vendee. In this litigation, the Lenawee County Board of Health obtained an injunction against use of the apartment building, under the provisions of the county sanitation code. Upon default of Pickles under the land contract, Messerly sued for foreclosure. Pickles in turn counter-claimed for rescission. In examining the approach to rescission, the Supreme Court held (at p 29-30):

> Instead, we think the better-reasoned approach is a case-by-case analysis whereby rescission is indicated when the mistaken belief relates to a basic assumption of the parties upon which the contract is made, and which materially affects the agreed performances of the parties. (citations omitted) Rescission is not available, however, to relieve a party who has assumed the risk of loss in connection with the mistake.

The Supreme Court then stated that rescission is an equitable remedy which is granted only in the sound discretion of the court. In this instance, there had been a "mistake by two equally innocent parties" which required the court "in the exercise of our equitable powers, to determine which blameless party should assume the loss." In this case, the

Court held that the "as is" clause in the land contract assigned the risk of loss to the vendee. Therefore, the court refused to grant rescission and instead enforced foreclosure against Pickles. In footnotes, the Supreme Court indicated that the "as is" clause waived implied warranties, such as those which accompanied the sale of a new home or sale of goods, but did not preclude a purchaser from alleging fraud or misrepresentation as a basis for rescission. However, in this case, there were no allegations or proofs of any fraud or misrepresentation.

Miller v Varilek, 117 Mich App 165 (1982), was a case almost comparable on the facts. This involved a land contract sale followed by discovery of an inoperable septic system caused by a water level in the drain field which was only 16 inches below ground level as opposed to the four feet required by county standards. Both land contract vendors and vendees contended they were theretofore unaware of the problem. The vendees brought action for rescission and the vendors counter-claimed for foreclosure. Testimony indicated that the septic system was not repairable with anything other than an unusual remedy requiring very great expense. The Court of Appeals based its decision upon the prior 1980 Court of Appeals' decision in **Lenawee** (see pages 170-171 in which **Lenawee** is recited at great length). It is stated on page 171:

> In Lenawee, this court concluded that whether the issue was stated in terms of mutual mistake, failure of consideration, or innocent misrepresentation, the facts disclosed that the purchasers had agreed to pay a great deal of money for something, rental property, which did not in fact exist.
>
> We find that the decision in Lenawee requires a finding in the instant case that rescission was proper on the basis of mutual mistake or failure of consideration.

In **Miller**, no reference is made to the presence or absence of an "as is" clause. Query as to the effects of the Supreme Court reversal of **Lenawee** on the Court of Appeals decision in **Miller**?

There were four cases decided relating to various land contract matters:

(a) In **Cole v Michigan Mutual Insurance Company**, 116 Mich App 51 (1982), the Court of Appeals held that land contract vendors are in the same position and have the same status as mortgagees under the mortgage clause of a fire insurance policy, and that such clause created an independent contract between a fire insurer and the vendor such that vendor's rights under the policy were not subject to forfeiture because of any act or omission by the original insured, who was the land contract vendee.

(b) In **Bishop v Brown**, 118 Mich App 819 (1982), in construing land contract language with reference to taxes on the Calhoun County Bar Association land contract form, the court noted that this form provided that the purchaser agreed "to pay when due" all taxes which were to become a lien on the property during the term of the land contract. The land contract further provided that in default of any such payment, the vendor could accelerate the land contract balance or exercise other remedies available at law. The court held that the payment of taxes by the vendee was not "past due" until they are delinquent, i.e., when the county treasurer may first impose a penalty for a late payment as set forth in Section 44 of the General Property Tax Act, MCLA 211.44, MSA 7.87. In this instance, that date was February 15. The court further held that although the land contract gave the vendor the option of paying the taxes which were past due, it did not restrict them to such remedy and the vendors could foreclose in Circuit Court or forfeit in summary proceedings in District Court upon default by the vendee in paying such taxes. However, unless the vendors paid the taxes themselves, they could not demand that the vendee pay the delinquent sums to the vendors, but rather only demand that the delinquency be paid to the township or county treasurer.

(c) In **Tenney v Springer**, 121 Mich App 47 (1982), the court examined the language in MCLA 600.5744(6), MSA 27A.5744(6), in the summary proceedings statute which stated that "the writ of restitution shall not issue if, within the time provided, the amount as stated in the judgment, together with the taxed costs, is paid to the plaintiff . . . ." In this case, two checks were remitted by a purchaser from the defaulting vendee. These checks were payable respectively to the plaintiff-vendor and the mortgagee of the property and filed with the District Court. The Court of Appeals held that this was a valid tender. The court noted the absence of any language as to "who" is to pay the plaintiff or "how" the plaintiff is to be paid. In this instance, the court felt that the vendee had offered to pay the vendor through the checks remitted by his purchaser and that this was not inconsistent with the "is paid" language of the statute. Further, the fact that one of the checks was payable to the mortgagee as well as to the plaintiff (in a joint check) did not negate proper tender under the statute since the plaintiff was not prejudiced thereby. Further, payment into the Court rather than to the plaintiff personally was not improper tender.

(d) In **Hoch v Hitchens**, 122 Mich App 142 (1982), the court concluded that, where land contract payments are made by mail pursuant to a course of dealing between the partners, a payment mailed the day before the due date is not late if received by the land contract vendor after the due date. In such an instance, the risk of loss or delay in delivery of a payment made by mail is borne by the creditor who has agreed to accept payments by mail.

ZONING

Turkish

There have been many commentators who have expressed grave doubts concerning the doctrine of **Turkish v Warren** and **Ed Zaagman, Inc. v Kentwood**, 406 Mich 137 (1979). In effect, these cases stand for the proposition that once a determination has been made that a zoning classification is invalid, i.e., the substance of the zoning matter has been determined in favor of the land owner, the matter should be remanded to the trial court for a determination of a "mid-satisfactory use" which would involve giving the municipality an opportunity for sixty days to adopt an amending ordinance, i.e., there is a "second round" to determine the remedy. As submitted by Norman Hyman in his article "The Turkish Tree Bears Bitter Fruit," Planning and Zoning News, Vol. 1, No. 7, p 7, May, 1983, "the Turkish remedial approach has not worked out well" for a series of reasons. First, there appears to be an irrebuttable presumption that there is always a "mid-satisfactory use." Secondly, the trial court is discouraged from inquiring into whether the use initially proposed by the land owner is more reasonable than any "mid-satisfactory use." Third, although one of the purposes of the **Turkish** decision was to "relieve the burden on the courts," it has in fact increased that burden. Finally, **Turkish** has deterred resolution of zoning issues at the municipal level, because municipalities have no downside risk by adopting unreasonable and restrictive zoning classifications, knowing that matter could go on for years before any determination is reached.

A perfect example of the problems raised by **Turkish** is **Schwartz v Flint**, 120 Mich App 449 (1982). In this case, plaintiffs requested a rezoning of property in Flint, Michigan in January, **1967** (not a misprint). Due to various delays, suit was not filed until October, 1971. After trial and appeal, a decision was rendered by the Court of Appeals in **Schwartz v City of Flint**, 92 Mich App 495 (1979), holding that the zoning ordinance as applied to the plaintiff's property was arbitrary and unreasonable, and thus invalid. The matter was thereupon submitted to the trial court for the "**Turkish** second round." During this second round, the City of Flint failed to pass an amending ordinance during the sixty day period required by the trial court. A motion was brought by the City to extend the time so to do, but that motion was not finally determined for a period of approximately seven months, whereupon the motion was denied and a hearing was ordered approximately six months thereafter. Subsequently, its plan commission action was rejected by the Flint City Council, and the City Council finally adopted an amending ordinance approximately five weeks before the court hearing. Hearings and testimony were then taken over a period of months. This resulted ultimately in the entry of a judgment involving a very complex remedy for the property. In its turn, the second round trial court decision was then appealed.

Finally, the second round appeal to the Court of Appeals was decided in October, 1982, which again revised the determination of the trial court somewhat as to the remedy. Leave to appeal has now been filed with the Supreme Court, over **sixteen years** after the original application for rezoning.

Extraction Cases

Whittaker & Gooding Company v Scio Township, 117 Mich App 18 (1982), involved an application for a conditional use permit to mine a gravel pit owned by plaintiff. The Township Board of Appeals granted a conditional use permit for a term of five years. The permit contained various other limitations as well. The plaintiff brought action for superintending control against the Township and its Board of Appeals seeking modification of the permit, primarily for an extension of the five year term. The Court of Appeals held that the Environmental Protection Act provides that actions may be brought to protect natural resources from pollution, impairment or destruction, but does not provide protection for development of resources so that plaintiff could not use that act to prevent the township from inhibiting mining of gravel. The court further confirmed that the Circuit Court was not empowered to consider evidence which had not been previously presented to the Township Zoning Board of Appeals pursuant to MCLA 125.293(a), MSA 5.2963(23a).

Thereafter, in **Silva v Ada Township**, and **Ottawa Silica Company v Brownstown Township**, 416 Mich 153, 156 (1982), Justice Levin issued the majority opinion for the Supreme Court. **Silva** was a case seeking rezoning of property

in Ada Township to permit gravel mining. **Ottawa** involved denial of a request for rezoning of property to permit mining of silica sand. As stated by Justice Levin:

> We reaffirm the rule of **Certain-teed Products Corp. v Paris Twp.**, 351 Mich 434; 88 NW2d 705 (1958), that zoning regulations which prevent the extraction of natural resources are invalid unless **"very serious consequences"** will result from the proposed extraction.

This **"very serious consequences"** doctrine has apparently been adopted "because of the important public interest in extracting and using natural resources" which has caused the court to apply "a more rigorous standard of reasonableness when the zoning would prevent the extraction of natural resources." In reviewing these cases, the Court of Appeals held that **Kropf v Sterling Heights**, 391 Mich 139 (1974), **Kirk v Tyrone Township**, 398 Mich 429 (1976), and the **Turkish** case were controlling. Justice Levin noted that these cases concerned the validity of zoning ordinances in general, but that the Court of Appeals had given no consideration to the "very serious consequences" rule of **Certain-teed**. Justice Ryan points out in his dissent that while Justice Levin does not overrule **Kropf, Kirk** or **Zaagman**, his opinion effectively does so by holding, for the first time, "that zoning regulations which prevent the extraction of natural resources are invalid unless 'very serious consequences' will result from the proposed extraction." He felt that this holding preserves the presumption of validity accorded zoning ordinances and creates a "preferred use" doctrine in favor of removing natural resources, contrary to the decision in **Kropf** which specifically abolished the "preferred use" doctrine. See the article, "A Secondary Impact of Silva," **Michigan Real Property Review**, Vol. 10, No. 2, p 68.

In **Compton Sand & Gravel Company v Dryden Township**, _______ Mich App _______ (No. 60858) (1983), application for mining of sixty-five acres was denied and that denial was appealed. The Court of Appeals applied the "very serious consequences" doctrine to state that zoning regulations which prevent extraction of natural resources are invalid unless very serious consequences would occur from the mining. After noting that the trial court did not address this problem, the Court of Appeals emphasized the expense of $430,000 required to improve the hauling route to handle the mining traffic and many other problems which would arise therefrom. Based thereby and without what would appear to have been appropriate remand for fact determination, the Court of Appeals concluded from the record before it that the mining company would not have been entitled to proceed with mining even if the trial court had considered the very serious consequences rule.

EPA Effect

In an allied field, **Committee for Sensible Land Use and City of Traverse City v Garfield Township and John F. Porritt**, _______ Mich App _______ (No. 58740) (1983), examined the rezoning of land from single and multi-family to a shopping center district. The court held that the argument that this rezoning violated the Michigan Environmental Protection Act, MCLA 691.1201 et seq., MSA 14.528(201), had no application since that claim was premature where other administrative permits had to be obtained. However, the Court of Appeals also concluded that case law and the Township Rural Zoning Act, MCLA 125.286, MSA 5.2963, "clearly require the township to **consider the environmental effect** of its zoning decision on the surrounding region." Inasmuch as the lower court did not address these matters, the Court of Appeals reviewed them and found that the township had "complied with its obligation to reasonably consider the environmental impact."

Freedom of Expression

The Michigan Court of Appeals in **Jeffrey Lauren Land Company v City of Livonia**, 119 Mich App 682 (1982), upheld the precluding of a new motion picture theater because of traffic and other problems under a local ordinance, pursuant to which the land owner had sought to rezone the property for such use. These police power determinations were distinguished by the court from first and fourteenth amendment cases involving freedom of expression and their effects on zoning. However, in **CLR Corporation v Henline**, _______ F2d _______ (Docket No. 81-1612, CA 6) (1983), the Wyoming Township ordinance requiring adult book stores and theaters to locate in a particular business district, and not less than specified numbers of feet from churches, residences, etc., was held to be unconstitutional because of failure of the Township to assert factual justifications compelling a severe infringement of free expression, which was actually involved in the factual determinations of the case. Comparison was made by the court of this case to **Young v American Mini-Theatres**, 427 US 50 (1976), and **Shad v Borough of Mt. Ephraim**, 452 US 61 (1981).

MISCELLANEOUS

Builders Trust Fund Act

Renshaw v Samuels, 117 Mich App 642 (1982), reviewed above concerning mechanic's lien matters, held that while the Builders Trust Fund Act, MCLA 570.151, MSA 26.331, provides that a contractor or subcontractor is to be considered a trustee of funds paid thereto pursuant to a building contract, that Act does not provide for imposition of a trust upon funds withheld from a contractor by an owner.

Builders Liability Insurance

In **Fresard v Michigan Millers Mutual Insurance Company**, 414 Mich 686 (1982), the facts involved a builder who obtained a standard comprehensive general liability policy. He then constructed a house with a normal drain system. Thereafter, the system failed because of abnormal soil conditions, and not because of bad workmanship or materials. As to whether there was question of bad design, the court was unable to reach a decision. By an equally divided court, the trial court and Court of Appeals decisions were affirmed. These held that the insurer was liable for the settlement reached previously by the builder with the purchaser of the house. Three Justices examined the exclusions in the policy very carefully and felt that these exclusions, including one for damages caused by design or planning error, precluded liability. Three Justices held that the policy was ambiguous and should therefore be construed against the drafter and reached a summary result of liability.

THE LEGAL RIGHTS OF THE PUBLIC IN THE FORESHORES OF THE GREAT LAKES*

by

Diana V. Pratt

Introduction

In recent years the shorelines of the Great Lakes have become the focus of increasing demand and concern. The demand comes from both the public and the private spheres. The public is seeking access to the waters for recreational purposes, while the private competition for purchase of shoreline property is intense. Problems of erosion, pollution, and wetland protection are of public concern and a matter for legislative action. The legislative mandate includes both awareness of present constituencies and responsibility for future generations. The various interests and concerns converge on the wet beach or foreshore, the area between ordinary high watermark and ordinary low watermark.

Although there is considerable variation in the physical features of different wet beaches of the Great Lakes, their ownership and use are governed by relatively uniform legal principles. The purpose of this article is to summarize those principles. On the ocean shores the water touches both of these marks daily. On the Great Lakes, water levels change as the result of a small tide, the action of the winds and waves, and seasonal and yearly precipitation variations.

On either the landward or lakeward side of the wet beach, the rights of the public and the littoral owner are well established. The foreshore is of particular interest because it is the area where public and private rights and responsibilities overlap and occasionally clash. Analysis of rights to the wet beach is therefore particularly appropriate.

Definition of the "public." The rights of three distinct "publics" are the focus of this article. One is the federal government as owner of a navigational servitude over the surface of the waters of the Great Lakes. The second is the state government as holder, in a trust capacity, of title to the submerged lands under navigable waters and to the foreshore. The state's rights include the power to regulate the use of those waters and lands. The beneficiaries of the state's trust are the third "public," the people who use the waters for fishing, navigation, or other recreational or commercial purposes. They include commercial and private boating and fishing interests, the swimmer, the ice fisherman, the wader, the photographer, and everyone else who uses the Great Lakes.

Water law and property law. The wet beach is conceptually the place where private and public rights meet. It is also the area where the concepts of land use, water law, and property law intersect. Water law has its origins in property law. While property law is concerned with questions of ownership and title, water law emphasizes questions of use, since historically the notion of water rights has been that of usufruct, recognizing that water is not easily captured and enclosed in usable quantities.

Variations based on types of water bodies. Issues regarding public rights in the foreshores of the Great Lakes involve international law, federal law, and the laws of eight different states. They differ from inland navigable lakes and oceans — obvious from physical characteristics of size and juxtaposition alone. Principles of law derived from other types of water bodies may not be applicable to the Great Lakes. Variations also exist among the laws of the several Great Lakes jurisdictions. The differences may reflect differences in the type of water bodies prevalent within each of the respective jurisdictions. For example, New York has extensive ocean frontage, Pennsylvania water law relates primarily to rivers, and Wisconsin's water law is concerned largely with inland navigable lakes.

Historical base. United States laws relating to the foreshores and submerged lands originated in English common law. Public rights in these areas can be traced to rights of the English Crown in "that ground that is between ordinary

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*This publication is a result of work sponsored by the Michigan Sea Grant Program with a grant, NOAA-04-07-158-44078, Project number R/CZ-13, from the National Sea Grant College Program, National Oceanic & Atmospheric Administration (NOAA), U.S. Department of Commerce, and funds from the State of Michigan.

high-watermark and low-watermark."[1] A full discussion of the English antecedents is found in an article by Deveney.[2] It is sufficient for our purposes to note the three categories of interests in coastal areas identified by Hale and his modern counterparts:

1. The "jus privatum" — public rights and title, held by private individuals, the Crown, a state, or the federal government for proprietary purposes.

2. The "jus regium" or royal right — the power of the king to regulate water resources for the public welfare, now the "police power" of the state, federal, and local governments in the United States.

3. The "jus publicum" — rights of the general public, narrowed in Hale's conception to "an interest in navigation and a public right to have navigable rivers and the ports of the kingdom free of nuisances."[3] In its modern formulation the "jus publicum" comprises rights reserved to the general public under the "public trust doctrine" discussed here later.

Navigability. The extent of public rights in water bodies depends upon their status as navigable in fact or in law. While navigability in England referred solely to tidal waters washed by the ebb and flow of the tide, navigability in this country has several meanings. For the purpose of determining title, navigability depends on whether the water body was in fact navigable at the time statehood was acquired. Under the common law as it was imported from England title to all the submerged lands under navigable waters to ordinary high watermark was vested in the Crown. When the original thirteen colonies became independent, they acquired the title rights previously held by the King.[4] Under the "equal footing" doctrine, states later admitted to the Union acquired rights to the submerged lands equal to those belonging to the original thirteen states.[5] Title vested to ordinary high watermark[6] of all waters navigable in fact at the time the state entered the Union. The Great Lakes were navigable at the time each of the eight states entered the Union.

The determination of navigability is also important for purposes of regulation of navigable waters. The "navigational servitude" reaches to the ordinary high watermark of all bodies of water that are navigable in fact at the time of the

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1. Sir Matthew Hale, "De Jure Maris er Brachiorum ejusdem" (Concerning the Law of the Sea and its Arms) (1666), found in the Appendix to Hale's Essay on the "Rights of the Crown and the Privileges of the Subject in the Sea Shores of the Realm," p. ix. (Stevens & Hayes, Law Publishers, London, 1875).

2. Deveney, "Title, Jus Publicum, and the Public Trust: An Historical Analysis," 1 Sea Grant Law J. 13, at 41 ff. (1976).

3. Deveney, **see** note 2, **supra**, at p. 46.

4. **Shively v. Bowlby**, 152 U.S. 1, 18, 26 (1893).

5. **Pollard's Lessee v. Hagan**, 44 U.S. (3 How.) 212 (1845); **United States v. Utah**, 283 U.S. 64, 75 (1930).

6. There are some exceptions to the general rule where the original states by laws and usage allowed riparian owners rights and privileges below ordinary high watermark. **Shively, see** note 4, **supra**, at p. 18. Massachusetts Ordinance of 1641, passed in 1647. In **Opinion of the Justices**, 313 N.E.2d 561 (1974), the Supreme Judicial Court of Massachusetts considered the question of the public right of passage and held that it did not exist as the riparians had been granted title to "mean low watermark or 100 rods from the mean high water line, whichever was the lesser measure," under the ordinance. Its purpose was to encourage riparian construction of wharves where the distance between ordinary high and low watermarks was considerable. The public rights of fishing, fowling, and navigation were expressly reserved. Because the public right of passage was not specifically mentioned, the court held it had not been reserved under the ordinance.

regulation.[7] The navigational servitude emanates from the commerce clause of the United States Constitution.[8] The federal regulatory power exercised by the federal government under the navigational servitude is superior to any rights of use a littoral owner may have below ordinary high watermark. When the regulation affects the use of land below that point, the government need not compensate the owner under the "just compensation" clause of the Constitution.[9]

State standards for defining navigable waters for purposes of ownership and state regulation are comparable to those under federal law.[10]

The Public Trust Doctrine

The navigable waters of the several states are impressed with a public trust. In order to understand this concept, it is necessary to consider the nature of the resource involved. Although water law is derived in great measure from property law, ownership of water cannot be viewed in the same light as title to land. As anyone who has flown over the middle and western portions of the United States can readily appreciate, the range and township lines laid out by the United States government surveyors in the nineteenth century are intact, permanent boundaries. The meander lines, however, used by the surveyors for tracing out the edges of bodies of water, have only a random relationship to the present limits of these waters. "Ownership" of water is best defined in terms of use. On a non-navigable lake, for example, the surrounding landowners hold title to the lake in pie-shaped wedges extending from their shorelines to the center of the lake. One cannot prevent the fish from swimming out of a segment. All the littoral owners have a right to use the entire water body for purposes of boating, fishing, swimming, and taking water for domestic use.

The public enjoys similar rights of use in navigable waters. The essence of the public trust doctrine has been described as follows:

> Finally, there is often a recognition, albeit one that has been irregularly perceived in legal doctrine, that certain uses have a peculiarly public nature that makes their adaption to private use inappropriate. The best known example is found in the rule of water law that one does not own a property right in water in the same way he owns his watch or his shoes, but that he owns only a usufruct — an interest that incorporates the needs of others. It is thus thought to be incumbent upon the government to regulate water uses for the general benefit of the community and to take account thereby of the public nature and the interdependency which the physical quality of the resource implies.[11]

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7. **The Daniel Bell**, 10 Wall 557, 563 (1870).
   . . . Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the Acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or in unity with other waters, a continued highway over which commerce is or may be carried on with other states or foreign countries in the customary modes in which such commerce is conducted by waters.

8. United States Constitution, Article I, Section 8.

9. **Ibid.**, Fifth Amendment; **United States v. Virginia Electric & Power Co.**, 365 U.S. 624 (1961); **United States v. Twin City Power Co.**, 350 U.S. 222 (1956); **United States v. Commodore Park, Inc.**, 324 U.S. 386 (1945); **United States v. Chicago, M., St. P. & P.R. Co.**, 312 U.S. 592, 596-7 (1941), modified 313 U.S. 543 (1941); **United States v. Chandler-Dunbar Power Co.**, 229 U.S. 53, 73-74 (1913); **Scranton v. Wheeler**, 179 U.S. 141 (1900); **Gibson v. United States**, 166 U.S. 269, 275-6 (1897).

10. **Pigorsh v. Fahner**, 386 Mich. 508 (1972); **Lamprey v. State**, 52 Minn. 181, 198-200 (1893); **State ex rel Brown v. Newport Concrete Co.**, 336 N.E.2d 453 (1975).

11. Sax, Joseph, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention," 68 Mich. L. Rev. 471, 485 (1970).

It was judged important that these public rights be protected and preserved.[12] The public trust doctrine is lodged in the representatives of the people — the state legislatures. These representatives are trustees of the public's rights below ordinary high watermark and they may not abrogate their responsibility.[13]

The public trust doctrine, as it developed in England, applied only to the oceans and their outlets; as noted earlier, salt waters were considered to be prima facie navigable. In the United States the public trust doctrine applies to fresh navigable waters as well. In the **Illinois Central Railroad v. Illinois** case, the U.S. Supreme Court found no distinction between the waters of the Great Lakes and the oceans:

> The Great Lakes are not in any appreciable respect affected by the tide, and yet on their waters . . . a large commerce is carried on, exceeding in many instances the entire commerce of States on the borders of the sea. When the reason of the limitation of admiralty jurisdiction in England was found inapplicable to the condition of navigable waters in this country, the limitation and all its incidents were discarded. So also, by the common law, the doctrine of the dominion over and ownership by the Crown of lands within the realm under tide waters is not founded upon the existence of the tide over the lands, but upon the fact that the waters are navigable, tide waters and navigable waters, as already said, being used as synonymous terms in England. The public being interested in the use of such waters, the possession by private individuals of lands under them could not be permitted except by license of the Crown, which could alone exercise such dominion over the waters as would insure freedom in their use so far as consistent with the public interest. The doctrine is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment, a reason as applicable to navigable fresh waters as to waters moved by the tide. We hold, therefore, that the same doctrine as to the dominion and sovereignty over and ownership of lands under the navigable waters of the Great Lakes applies, which obtains at the common law as to the dominion and sovereignty over and ownership of lands under tide waters on the borders of these, and that the lands are held by the same right in the one case as in the other, and subject to the same trust and limitations.[14]

The public trust on the Great Lakes extends over the entire surface of the water and the submerged lands up to the point of ordinary high watermark. The states may not relinquish control of the trust.[15] In the Illinois Central case the state legislature gave the railroad company one square mile of Lake Michigan bottomland bordering on the central business district of the City of Chicago. Four years later, in 1873, a new legislature attempted to recover the land. The Supreme Court held:

> The legislature could not give away nor sell the discretion of its successors in respect to matters, the government of which, from the very nature of things, must vary with varying circumstances. The legislation which may be needed one day for the harbor may be different from the legislation that may be required at another day. Every legislature must, at the time of its existence, exercise the power of the State in the execution of the trust devolved upon it. We hold, therefore, that any attempted cession of the ownership and control of the State in and over the submerged lands in Lake Michigan, of the act of April 16, 1869, was inoperative to affect, modify or in any respect to control the sovereignty and dominion of the State over the lands, or its ownership thereof, and that any such attempted operation by the act was annulled by the repealing act of April 15, 1873, which to that extent was valid and effective. There can be no irrepealable contract in a conveyance of property by a grant in disregard of a public trust, under which he was bound to hold and manage it.[16]

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12. **Martin v. Waddell,** 41 U.S. 367 (1842).

13. **Shively, see** note 4, **supra.**

14. **Illinois Central Railroad v. Illinois,** 146 U.S. 387, 436-7 (1892).

15. **Ibid.** at p. 453.

16. **Ibid.** at p. 460.

The submerged lands of the Great Lakes, including the foreshore to ordinary high watermark at times of low water, are trust lands, which state legislatures have only a limited power or authority to alienate. Any alienation of public trust lands must take into account the responsibility of successive legislatures and generations of the public. Illinois Central is an example of an alienation which was so overreaching as to be an example of a violation of this trust. The land was important as a site for harbor development for the Port of Chicago. In alienating the land, the legislature not only gave up a valuable resource, but also diminished its power to plan for and regulate commerce at the Chicago port.

Lesser grants for value have been disallowed as a violation of the public trust. In one case United States Steel agreed to purchase 194.6 acres of Lake Michigan bottomland for the construction of a steel mill. The steel company contended that the plant would create employment and would, therefore, constitute a benefit to the public. The court found the public benefit of only incidental value and too remote, so concluded that the sale would violate the state's trust.[17]

The foreshores are clearly within the protection of the public trust. Whether the trust is absolute or can be alienated by a state legislature under some circumstances, despite Illinois Central, is yet to be determined. At least one writer believes that interests in public trust lands may be alienated, and that the permissibility of such alienation will depend upon the application of four criteria taken from other public trust cases:

> First, has the public property been disposed of at less than market value under circumstances which indicate that there is no very obvious reason for the grant of a subsidy?
>
> Second, has the government granted to some private interest the authority to make resource-use decisions which may subordinate broad public resource uses to that private interest?
>
> Third, has there been an attempt to reallocate diffuse public uses either to private uses or public uses which have less breadth?
>
> The fourth guideline that courts use in determining whether a case has been properly handled at the administrative or legislative level is to question whether the resource is being used for its natural purpose — whether, for example, a lake is being used "as a lake."[18]

It is submitted, then, that a state legislature might make a finding that a particular stretch of foreshore is no longer useful for the purposes for which it is impressed with the public trust. The judiciary would not overturn the action of the legislature in authorizing the release of the land from the trust where it appeared that market value had been paid for the land or that there was a reason for a subsidy in an amount equal to the difference between the price paid for the foreshore and the reasonable market value. Illinois Central makes clear that responsibility for the trust rests with the legislature and that only it might be able to alienate the trust.

Title to the Foreshore

The chief competitor of the public for rights to the foreshore is the littoral property owner. The competition is for both ownership rights and user rights. Problems of title will be examined first, followed by a review of user rights from the perspectives of both the littoral owner and the public.

The limits of littoral ownership on the Great Lakes for purposes of title have been explored in Michigan. The lands in the Great Lakes region were settled to a large extent under federal land grant programs.[19] Federal surveyors divided the territory by range and township lines into sections. Meander lines were drawn around bodies of water for purposes of calculating the areas of the various grants. Although the meander lines were approximations of the boundaries between water and land that existed in the mid-nineteenth century, they very quickly ceased to be accurate boundaries. The deeds to shoreline property are even less specific. The lakeward boundary is often described simply as

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17. **People ex rel Scott v. Chicago Park District**, 360 N.E.2d 773 (1976).

18. Sax, **see** note 11, **supra**, at 562-5.

19. Swamp Lands Act of 1850, 43 U.S.C. Sec. 982 et seq.

"Lake Michigan." In some cases title was said to extend to the water line,[20] to the high watermark,[21] to the low watermark,[22] or even to the lowest watermark.[23] But where the water had receded from the meander line, as it had in many cases, the effect of this rule was to withdraw from the owner his littoral rights. In order to establish a consistent and workable rule, the court in **Hilt v. Weber**[24] adopted the "movable freehold" theory, which for purposes of title placed the littoral owner's lakeward boundary at the water's edge, wherever the water was at any particular moment. The theory preserved rights for those who continued as littoral owners from the date of the original surveys. The theory has been interpreted by the Michigan Attorney General to mean the low watermark;[25] and by the court in one case as the high watermark.[26] The **Hilt** decision did not consider nor affect public rights. The limits of title are important only for determining the status of littoral ownership and the rights inherent in that status.

The title issue was recently refined in Michigan in **McCardel v. Smolen.**[27] The plaintiffs were given littoral rights on an inland navigable lake, even though their lands were separated from the water's edge by an undeveloped boulevard. In the original plat, the boulevard had been dedicated to the public in fee. Because the plat explicitly set forth the uses of the boulevard to the exclusion of all others, including riparian rights, these were given to the adjacent landowners. Although the case involves an inland lake, it is likely that the holding on the title issue would apply equally to the Great Lakes.

Use of the Foreshore: Littoral Rights

Traditionally, littoral rights have consisted of the right to accretion, the right of access to navigable waters, the right to wharf out, and the right to use the water for domestic purposes.

Accretion is the process by which sand and gravel are deposited on the shoreline, adding to the area of land. Denied a right to accretion, the landowner could be deprived of littoral status. The courts have considered it fair for the owners to gain in this way as they may lose land to erosion on other occasions. A littoral owner deprived of accretions through the action of another owner who has in some way influenced the flow of the water may bring an action to protect his right to accretion.[28] If the federal government were to interfere with the natural process, however, the littoral owner would not have a cause of action.[29] (In **Meyer** the right abridged was that to subsurface drainage.) The navigational servitude allows governmental regulatory actions for purposes of navigation. Compensation for exercise of those regulatory powers is not necessary unless and until the littoral owner's rights are affected above the ordinary high watermark.[30]

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20. **People v. Warner,** 116 Mich 228 (1898).

21. **State v. Venice of America Land Co.,** 160 Mich 680 (1910).

22. **People v. Silberwood,** 110 Mich 103 (1896).

23. **La Porte v. Menacon,** 220 Mich 684 (1922).

24. **Hilt v. Weber,** 252 Mich 198 (1930).

25. 1943-1944 AG Mich 743-744.

26. **People ex rel Director of the Department of Natural Resources v. Murray,** 54 Mich App 685 (1974).

27. **McCardel v. Smolen,** 71 Mich App 560 (1976).

28. **Freeland v. Pennsylvania Railroad Co.,** 197 Pa 529 (1901).

29. **United States v. Meyer,** 133 F.2d 387 (1940).

30. **See** note 9, **supra.**

The littoral owner's right to mine sand and gravel from the foreshore has been upheld.[31] Sand and gravel as normal components of the foreshore are to be distinguished, however, from unusual mineable substances that happen to be found in the foreshore area. The right to mine iron ore below the low watermark was denied and would have been permitted on the wet beach, but not below, only upon a finding that the mining did not interfere with the public's right to navigate and use the area for other public purposes.[32]

The littoral owner's right of access to the water is along the entire length of the shoreline and no permanent obstructions will be tolerated.[33] If, however, a member of the public sets up an umbrella on the wet beach of the ocean, where a public right of passage is permitted, and does not interfere with the owner's access to navigable waters, the sunbather may remain.[34] The distinction is both (1) in the permanence of the interference with access, and, if the interference is only transitory, (2) whether there is in fact an obstruction to access. If a boat is moored in the wet beach area in a manner preventing access to navigable waters, the public right to moor on the wet beach depends on the permanence of the interference.[35] Temporary mooring is an incident of navigation and, therefore, permissible. Longer mooring, even if it is not an inconvenience to the littoral owner, constitutes a trespass. When the purpose for mooring vessels in front of the littoral owner's land is to make temporary repairs or to protect a ship in danger of foundering in a storm, the littoral owner has no cause of action. One court extended this rule to cover the construction of vessels.[36]

The right of access to the water at navigable depths and the right to wharf out are related. A simple mode of access is generally sufficient when the littoral owner wishes to bathe or use small water craft. When commercial access is desired, the shoreline is rarely deep enough to permit the vessels to land for purposes of taking on or discharging cargo or passengers. The littoral owner has a right to build a wharf between high and low watermarks,[37] and to charge for the use of the facility.[38] The construction of a wharf is an aid, rather than an impediment to navigation. A wharfboat moored to the shore is equivalent, for legal purposes, to a wharf. Interference with a wharf cannot be abated unless it constitutes a direct trespass touching the wharf.[39] The construction of a wharf requires a federal permit,[40] and may require state permission as well.[41] Large commercial wharves may aid, but also may interfere with, navigation and are, therefore, subject to federal regulation.

The state interest derives from the state ownership of the bottomlands under the navigable waters. Although state legislatures have occasionally granted title in the bottomlands to the littoral owners, the submerged lands under the

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31. **Sloan v. Biemiller,** 34 Ohio St. 492 (1878).

32. **State v. Korrer,** 127 Minn. 60 (1914).

33. **Tiffany v. Town of Oyster Bay,** 192 App Div 126, 182 NY Supp 738 (1897), modified 234 NY 15 (1922).

34. **Johnson v. May,** 189 App Div 196, 178 NY Supp 742 (1919).

35. **Wall v. Pittsburgh Harbor Co., Ltd.,** 152 Pa 427 (1893).

36. **Pollock v. The Cleveland Ship Building Co.,** 56 Ohio St. 655 (1897).

37. **Barnes v. The Midland R.R. Terminal Co.,** 193 NY 378 (1908).

38. **Ensminger v. People ex rel Trover,** 47 Ill 384 (1868).

39. **Sherlock v. Bainbridge,** 41 Ind 35 (1872).

40. Rivers and Harbors Act of 1899, 33 U.S.C. 403.

41. **Obrecht v. National Gypsum Co.,** 361 Mich 399 (1960); Great Lakes Submerged Lands Act, MSA Sec. 13.700 (1-15), MCLA Sec. 322.701-15; New York Environmental Conservation Law, Sec. 15-0503; Illinois Statutes 19 Sec. 65.

Great Lakes are vested in the respective states. In Illinois the right to wharf out into Lake Michigan is no longer a littoral right.[42]

If a littoral owner is allowed to wharf out, a natural extension of the doctrine would be to permit the filling out to navigable waters. Where the river bank is very steep, filling has been upheld.[43] Where the proposed filling, however, would be detrimental to public rights, it has not been permitted (e.g., where the filling would have retarded the flow of a river, increasing the accumulation of pollutants).[44] In **Tiffany**,[45] where the owner filled the foreshore along the ocean, the court ruled that the fill interfered with the public right of navigation of high water and the right of public passage at low water. The fill was not used to build a wharf; it was an attempt to increase the upland area the entire length of the shoreline.

If the littoral owner's land is diminished by a flood control project, he is entitled to compensation for the land taken above high watermark.[46] The **Minnetonka** case is somewhat inconsistent with rulings in the other Great Lakes states that the littoral owners on inland navigable lakes have title to the low watermark.

At times, littoral owners have tried to assert an exclusive right to fish in the waters off their lands. Their claims were rejected on the ground that the right to use navigable waters is a public one, shared by all members of the public.[47]

In summary, a littoral owner has the right to accretions that pile up on his shore, be they sand, gravel, or seaweed. At both high and low water he has the right of access to the water along the entire length of his shoreline. A permanent or excessive obstruction to the right of access is a trespass, even if the owner of the shoreland is not inconvenienced. If the access is impeded in only a transitory way, the court will then consider whether the owner has, in fact, been injured. Wharfing out to navigable waters for purposes of navigation is an extension of the access doctrine. This is not an absolute right and may be regulated by the federal and state governments. Trespass to a littoral owner's wharf must be actual; mere obstruction is not a violation of his rights. He may be permitted to fill, rather than building a wharf, if the purpose of the fill is to gain access to navigable waters and the public right to navigate is not compromised. Littoral owners have no greater right to use the waters and the fish than any other member of the public. For purposes of the fifth and fourteenth amendments to the United States Constitution and the parallel state guarantees, the littoral owner's title ends at the high watermark. Assuming they do not create a permanent or even a temporary obstruction, nothing in existing case law denies the members of the general public a right of public passage along the foreshore.

Littoral rights are also limited by the rights of other owners. Where a wharf and a wharfboat were located so close together that boats attempting to land interfered with each other, the court held that the rights to the location were equal and that by such interference they did not violate each others' rights unless there was in fact a trespass.[48] Where a wharf obstructed access to a neighboring beach, the court held that the wharf was permissible if it did not obstruct public passage along the foreshore.[49] Adjacent littoral owners in a Great Lakes case objected to a large commercial wharf that produced noise, smoke, dust, and bilge water to their detriment. Because the wharf had already been

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42. **Revell v. People**, 177 Ill 468 (1898); **Gordon v. Winston**, 181 Ill 338 (1899); **Cobb v. Commissioners of Lincoln Park**, 202 Ill 427 (1903); **Commissioners of Lincoln Park v. Fahrney**, 250 Ill 256 (1911).

43. **Zug v. Commonwealth**, 70 Pa 138 (1871).

44. **People ex rel Director of Conservation v. Babcock**, 38 Mich App 336 (1972).

45. **See** note 33, **supra**.

46. **In re Minnetonka Lake Improvement**, 56 Minn 513 (1894).

47. **Lincoln v. Davis**, 53 Mich 375 (1894).

48. **See** note 39, **supra**.

49. **See** note 37, **supra**.

constructed, the court would not enjoin its use, but damages were awarded.[50] As noted above, a littoral proprietor may not interfere with the deposit of accretions on another littoral owner's shore.[51] In each case the court did not decide absolutely in favor of one party or the other, but tried to accommodate both sides.

Use of the Foreshore: Public Rights

The public rights to the foreshore vary with the level of the water. When the water stands at high watermark or above high watermark, the public has the right to use the entire surface of the navigable water body for purposes of navigation and the incidents of navigation. Where the littoral proprietor wishes to make use of the foreshore, this use must give way to the superior public right of navigation at high water. Consequently, a littoral owner may not mine the foreshore if it interferes with the public right,[52] or fill the wet beach, raising it above the ordinary high watermark and thereby extending the upland.[53]

At high water, the public rights associated with navigation include the right to fish, to float logs, and to seek refuge when the ship is in peril, whether precipitated by natural causes or mechanical breakdown. The right to temporarily moor a ship in the foreshore at high water has been adjudged to be only a slight variation of the common law right to seek refuge "in extremis."[54] The floating of logs is analogous to commercial navigation.[55]

Littoral owners and members of the public have identical fishing rights.[56] The right to fish extends over the entire surface of a navigable body of water, whether or not the entire water body is in fact navigable.[57] The fisherman need not be fishing from a boat. Even if both sides of a navigable river are in single ownership, the fisherman is free to wade the stream, and the riparian may not interfere with that right.[58]

Where the water is at any level below ordinary high watermark, the law is unsettled with regard to public rights to the wet beach. It is clear that where members of the public have access to navigable waters on either inland waterways or the Great Lakes, they may cross the foreshore to the water. Access is obtained through public lands and from roads. If a highway runs perpendicular to the shoreline, the public users of the highway enjoy littoral benefits and consequently have a right of access.

If the road parallels the shoreline, the result hinges on the proximity of the road to the present shoreline. A Michigan court held that, where the dry land between the highway and the water was composed of fill deposited by the road commission to prevent erosion, the area from which the public could have access to the beach extended to the water, and fences preventing such access should be removed.[59] If, however, due to accretion the road easement is some

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50. **Obrecht, see** note 41, **supra.**

51. **See** note 28, **supra.**

52. **See** note 32, **supra.**

53. **See** note 33, **supra.**

54. **See** note 36, **supra.**

55. **Lorman v. Benson,** 8 Mich 19 (1860); **Pursell v. Stover,** 110 Pa 43 (1885).

56. **See** note 47, **supra.**

57. **Winous Point Shooting Club v. Slaughterbeck,** 96 Ohio St. 139 (1917).

58. **Collins v. Gerhardt,** 237 Mich 38 (1926); **Attorney General ex rel Director of Conservation v. Taggart,** 306 Mich 432 (1943).

59. **Cass County Park Trustees v. Wendt,** 36 Mich 247 (1960).

distance from the water's edge, the littoral owner's territory will have been increased and the public will not have a right of access.[60]

McCardel presented a variation of the problem of defining and extending public uses. The original plat dedicated to the public a boulevard along the shore of an inland lake. Unlike the common situation, where a highway is constructed on an easement, the public held title to the boulevard in fee. The court held the public had the right to lounge and picnic on the boulevard and to use it as a means of access to the water. The court recognized the right of the public to the enjoyment of the "scenic presence" of the water, a right supported by the privilege of access from the boulevard.[61] The holding explicitly extended recreational use of water from swimming, fishing, boating, and water skiing to aesthetic enjoyment.

Only one Great Lakes case addressed the right of public passage, traditionally viewed as one of the incidents of navigation.[62] In this case the owner of shore property had exercised his right of wharfing out by filling out to navigable waters. Later, the State of Minnesota condemned the land for purposes of constructing a highway. The court held that the state had to pay for the land taken between ordinary high and ordinary low watermark, because highway use is not an incident of navigation.

The courts have consistently recognized the right of public passage along the ocean foreshore in coastal states. Under applicable law in those states, whether title extends to ordinary high or ordinary low watermark, the shore owner's rights are subject to the public right of passage.[63]

Pennsylvania and New York are the only Great Lakes states bordering on the ocean. Although Pennsylvania courts have not had an opportunity to speak on the issue, in New York the courts have recognized a right of passage along the foreshore. The public has the right to pass and repass, to fish, to hunt, to bathe, and to navigate on the foreshore.[64] As long as they do not interfere with the littoral owner's right of access, members of the public have the right to set up an umbrella or blanket on the foreshore.[65] The owner of ocean shoreland who exercises his right of access and wharfing out to the detriment of the public right of passage will be restrained.[66]

The right of public passage along the foreshores of the Great Lakes has not been confirmed by the courts. The Wisconsin Justice Department and Department of Natural Resources state there is no right of public passage on the foreshores of the Great Lakes. Public agencies in Michigan agree.[67] These opinions are based on the holding in **Doemel v. Jantz,**[68] despite the fact that it applied to the shores of an inland lake, not of the Great Lakes. In **Doemel**, a member of the public who walked on the land of a littoral owner was treated as a trespasser. The court reasoned that the owner held title to the low watermark. As noted earlier, rights of title and use of the foreshore are not synonymous.

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60. **Meridian Township v. Palmer,** 279 Mich 586 (1937).

61. See note 27, **supra.**

62. **State v. Slotness,** 289 Minn 485 (1971).

63. Comment, Waters and Watercourses — Right of Public Passage Along Great Lakes Beaches, 31 Mich. L. Rev. 1134 (1933).

64. **People v. Brennan,** 142 Misc. 225 (1931).

65. **See** note 34, **supra.**

66. **See** note 37, **supra.**

67. Communication from the Office of the Attorney General for the State of Michigan and Booklet entitled, "What you need to know about the Great Lakes Submerged Lands Act," printed by the Michigan Department of Natural Resources.

68. **Doemel v. Jantz,** 180 Wis 225 (1923).

Although title may vest to the low watermark on inland navigable lakes and rivers on the Great Lakes, the navigational servitude extends to ordinary high watermark. Under the equal footing doctrine, the Submerged Lands Act, and the public trust doctrine, states hold title to the submerged lands under the waters of the Great Lakes to the ordinary high watermark. For purposes of assuring a shore owner that he will not lose his littoral rights when the water is below ordinary high watermark, the Michigan "movable freehold" theory is useful.[69] It does not, however, give the littoral owner anything more than that. It does not authorize him to bar public passage along the foreshore.

The Great Lakes have some characteristics of inland lakes and some characteristics of the oceans. Their waters are fresh and their tides are minimal. Yet, they are comparable in size to the Irish Sea and support international commerce. Ships that ply the Great Lakes weigh in the thousands of tons, unlike the pleasure craft measured in pounds that travel inland lakes. From the perspective of size, use, and importance, the law of the Great Lakes foreshore should logically follow ocean precedent and not that of inland lakes.

The analogy of the Great Lakes to the oceans is strengthened by federal legislation made applicable to the Atlantic, Pacific, Gulf, and Great Lakes coastlines, but not including inland navigable waterways.[70]

The custom of foot passage incident to navigation in the Great Lakes region is a long-standing one. The Northwest Ordinance enacted by the United States Congress in 1787 gave written expression to this custom in the following:

> The navigable waters leading into the Mississippi and Saint Lawrence, and the carrying places between the same shall be common highways, and forever free, as well to the inhabitants of the said Territory as to the citizens of the United States, and those of any other states that may be admitted into the conference, without any tax, impost, or duty therefore.

As a matter of tradition, public passage has been allowed for access to the water for bathing, fishing, boating, and logging. There is also a right to land a boat "in extremis" and proceed from it by foot. Logging workers visit the shore sporadically to break up log jams and ensure a smooth flow of timber downstream to the sawmills. This type of transitory human presence along the Great Lakes foreshores is also felt when fishermen walk ashore to avoid water they cannot wade and voyagers portage around falls or rapids.[71]

Legislative enactments support public rights in and around water bodies. Thus, Illinois law provides:

> (The) Department of Transportation shall, for the purpose of protecting the rights and interests of the State of Illinois, or the citizens of the State of Illinois, have full and complete jurisdiction of every public body of water in the State of Illinois, subject only to the paramount authority of the Government of the United States with reference to the navigation of such stream or streams, and the laws of Illinois, but nothing in this Act contained shall be construed or held to be any impairment whatsoever of the rights of the citizens of the State of Illinois to fully and in a proper manner enjoy the use of any and all of the public waters of the State of Illinois, and the jurisdiction of said Department of Transportation shall be deemed to be for the purpose of preventing unlawful and improper encroachment upon the same, or impairment of the rights of the people with reference thereto, and every proper use which the people may make of the public rivers and streams and lakes of the State of Illinois shall be aided, assisted, encouraged, and protected by the Department of Transportation.[72]

In Minnesota, on state lands bordering measured lakes and other public water courses,

> . . . a strip two rods in width, the ordinary high watermark being the water side boundary thereof, and the land-side boundary thereof being a line drawn parallel to the ordinary high watermark and two rods

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69. **See** note 24, **supra**.

70. Federal Statutes on marine sanctuaries, 16 U.S.C. 1431 et seq., estuarine areas, 16 U.S.C. 1221 et seq., and beach erosion, 33 U.S.C. 426a, and the Coastal Zone Management Act, 16 U.S.C. 1451 et seq.

71. Minnesota Statutes 160.06.

72. 19 Illinois Statutes 73.

> distant landward therefrom, hereby is reserved for public travel thereon, and wherever the conformation of the shoreline or conditions require, the commissioner shall reserve a wider strip for such purposes.[73]

Although the statute deals only with a two-rod strip above ordinary high watermark, we may assume a public right of passage in the foreshore. The importance of public access has also been recognized by legislatures in New York and Wisconsin, and by the federal government through coastal zone management.[74]

Conclusion

Title to the submerged lands under the Great Lakes up to ordinary high watermark is held by the individual states in trust for the public. Public control of the foreshores for purposes of regulation extends to ordinary high watermark. The United States Army Corps of Engineers has the power to grant or withhold permits for dredging, filling, or the construction of wharves and dams in waters that are deemed navigable for federal purposes. The federal "navigational servitude" also gives the federal government regulatory powers under the Commerce Clause. State interest in the foreshores stems from state ownership of the bottomlands up to ordinary high watermark. A number of state and federal statutes regulate different aspects and uses of the Great Lakes foreshore, generally designating ordinary high watermark as the landward boundary for this control. Public title and regulation do not vary with the level of the water, as do rights and uses enjoyed by the general public in the foreshore.

The public is free to navigate commercially or for recreation, to swim, and to fish over the entire surface of the water, even above ordinary high watermark. However, when the foreshore is exposed, the rights of the general public are limited to a right of passage. A strong case can be made for confirmation of the public's right of passage along the foreshore, despite the absence of a clear and convincing judicial decision on the issue. Public passage includes the right to pass and repass over the foreshore, to lounge and recline upon it, and to bathe, hunt, fish, and enjoy the aesthetic pleasures of the water from it. The right of public passage is limited, however, by a superior littoral right of access to navigable waters the entire length of the littoral lands.

73. Minnesota Statutes 92.45.

74. New York Environmental Conservation Law 15-0103(5) and 15-1103; Wisconsin 236.16(3); 16 U.S.C. 1454(b)(7).

THE MENNONITE DECISION
by
Allen E. Priestley

MENNONITE BOARD OF MISSIONS v RICHARD C. ADAMS, _______ US _______, 77 L Ed 2d 180, 103 S. Ct 2706 (1983)

The Mennonite Board of Missions (MBM) was the holder of a duly recorded mortgage on property in Elkhart, Indiana which it had sold to Moore, the record titleholder. Under the terms of the mortgage, Moore was responsible for paying all property taxes but failed to do so.

Indiana law provides for the annual sale of real property on which property taxes are delinquent for 15 months or longer. Prior to sale the county must post notice of the sale in the courthouse, publish notice once each week for three consecutive weeks and send notice to the owner of the property by certified mail to his last known address. At the time of the sale in question, the statute did not provide for notice by mail or personal service on mortgagees of property to be sold on tax sale.

The tax sale is followed by a two year redemption period and before executing and delivering a tax deed at end of this period, the county auditor must notify the owner of his right to redeem.

In the instant case, the property was sold to Adams for delinquent taxes after proper compliance with the statutory procedure. At no time was MBM given any notice of the pending tax sale. After receiving the deed, Adams sued to quiet his title.

MBM challenged Adams' title claiming that the tax sale proceedings did not meet the due process requirements of the Fourteenth Amendment of the United States Constitution. From a decision quieting title to Adams in the state courts, MBM appealed to the United States Supreme Court.

The Supreme Court reversed and remanded, holding that, under Indiana law, a mortgagee possesses a substantial property interest that is significantly affected by tax sales, and since he has a legally protected property interest, he is constitutionally entitled to notice reasonably calculated to apprise him of a pending tax sale. The court further held that: (1)notice by mail or other means as certain to insure actual notice is a minimum constitutional precondition to proceedings which will adversely affect liberty or the property interests of any party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable; (2) the mortgagee's knowledge of delinquency in the payment of taxes is not equivalent to notice that a tax sale is pending; and (3) notice as required under the Indiana statute, by posting and publishing an announcement of the tax sale and mailing a notice to the mortgagor by certified mail, did not meet the requirements of the due process clause of the Fourteenth Amendment.

Justice O'Connor, joined by Justice Powell and Justice Rehnquist, dissented, claiming that the opinion of the majority was unwarranted both as a general rule and as the rule of this case.

COMMENT: Fear has been expressed by some students of the law that the decision in this case may cast doubt upon the validity of the notice provisions in the Michigan statute providing for non-judicial foreclosure of mortgages by advertisement pursuant to a power of sale contained in the mortgage on the ground that said provisions may not meet the requirements of the due process clause of the Fourteenth Amendment. It is this reporter's opinion that, since the Sixth Circuit Court of Appeals in its 1975 opinion in **Northrip v Federal National Mortgage Association,** 527 F 2d 23, held that the Michigan foreclosure by advertisement pursuant to a power of sale procedure was a matter of private contract and not state action within the purview of the Fourteenth Amendment, the **Mennonite** case is not applicable to the Michigan statutory procedure.

It is this reporter's opinion, however, that the **Mennonite** case does confirm the opinion of the Michigan Supreme Court in **Dow v State of Michigan,** 396 Mich 192, 240 NW 2d 450 (1976), wherein it was held that the then notice provisions of the Michigan statute pertaining to tax sales did not meet the requirements of the Fourteenth Amendment.

CHAIRMAN'S REPORT

by
Allen Schwartz
Miller, Canfield, Paddock and Stone

Approximately one year ago, the Real Property Law Council, which governs the Real Property Law Section, decided that the Chairman of the Section should write a brief report for the **Michigan Real Property Review** at the beginning and end of his term. My report at the commencement of my term is as follows:

The Real Property Law Section's purpose is to serve attorneys in Michigan in the area of their real estate practice. In connection therewith, the Section, through its governing body, the Real Property Law Council, which meets once a month usually on the second Saturday of the month, has done the following:

1. Published quarterly the **Michigan Real Property Review**, which attempts to keep the attorneys current on new legislation and new cases, as well as containing several articles on matters thought to be of interest in the real estate field.

2. Organized and presented a winter and summer conference on important real estate topics.

3. Organized and presented a "Homeward Bound" series which is presented monthly in the Detroit area starting at 3:30 p.m. and ending at approximately 6:30 p.m.

4. Organized and presented a program for the annual State Bar meeting, as well as presenting, at that meeting, a report on new developments and the state of the law in the real estate area.

5. Coordinated with the Institute of Continuing Legal Education in their educational efforts.

6. Proposed, reviewed and otherwise assisted with legislation in the real estate area.

7. Formed various committees which are working in certain specified areas.

This year we again plan four excellent issues of the **Michigan Real Property Review**, which I believe is the best and most informative publication of any section of the State Bar. The winter conference will be in Lake Tahoe, Nevada on February 29th through March 3rd, with a program on real estate syndications from both a developer and investor standpoint, as well as current developments in the real estate field. Lake Tahoe is reputed to be one of the prettiest places in the country, with skiing, gambling and other recreational facilities. Do not miss this conference. The "Homeward Bound" series is being expanded to present programs in Grand Rapids. Most people familiar with this series have found it helpful and informative. The committees are hard at work and expect another exciting year. The Council is also working diligently to improve the Section. You will receive a report from Richard Rabbideau quarterly in the **Review** on the activities of the committees. You will receive a report quarterly in the **Review** on current Section continuing legal education programs from Stephen Dawson.

To paraphrase a president of the United States, the question is not what your Real Property Law Section can do for you, but what you can do for your Section.

What can you do? I have the following suggestions:

1. Join a committee. There is a list of committees in this issue of the **Review**. *We especially need people for the* Legal Forms Committee, whose emphasis this year will be on critiquing forms rather than developing them (Gary Taback and Benson Barr, who serve as the coordinator and chairman of this Committee, are enthusiastic about this year's program), the Commercial Leasing and Management of Real Estate Committee (Michael Maddin has numerous interesting projects, but needs people), and the Historical Preservation Committee (Allen Priestley and Kingsley Buhl need people for this Committee, which has just been formed). We also need a chairman for the Real Estate Legal Practice Methods Committee. Any volunteers?

2. Write an article for the **Review**. Many of you have interesting problems in your practices. Share them with others. Please clear articles with George Siedel and myself before beginning preparation thereof.

3. Attend the summer and winter conferences, the "Homeward Bound" series, and the ICLE programs. Read the **Review**. Attend the annual meeting and the state of the law program on real estate developments. A national survey reports that malpractice claims are more frequent in the real estate area than any other area.

4. Tell others about the Real Property Law Section. For the $15 annual membership fee they will receive four copies of the **Review** per year, as well as discounts at the various Section programs.

5. Give us your suggestions to better serve you. What topics would you wish to see covered in the **Review**, in future "Homeward Bound" programs, in other programs? What projects would you like to see the committees work on? Let me know in writing and I will communicate the information to the Council and the Committees.

REPORT OF THE COMMITTEE ON CONTINUING LEGAL EDUCATION

by
Stephen E. Dawson, Chairman
Dickinson, Wright, Moon, Van Dusen & Freeman

Members of the Real Property Law Section have already received a great deal of information regarding the Section's Winter Conference which will be held from February 29 through March 3, 1984, in Lake Tahoe. Lake Tahoe will be an ideal location for the Winter Conference, for it offers great entertainment opportunities during the day and evening hours together with a quiet atmosphere in which we can conduct our business. We are pleased with the registrations for the Conference and look forward to a fine turn-out of members of the Section. In order for us to plan daytime and evening entertainment and activities, it is important that we know as soon as possible how many people will be attending the Conference. Therefore, if you have not done so already, please register now on the forms previously mailed to you. If you have lost the registration form, please contact Catherine Merrick at 505 N. Woodward Avenue, Suite 3000, Bloomfield Hills, Michigan 48013, (313) 540-0798.

The presentation of the "Homeward Bound" seminars in Grand Rapids has been extremely well received. Indeed, registrations for the Grand Rapids seminars are rapidly approaching the number of registrations for the Troy seminars. The Committee anticipates continued expansion and improved reception of those seminars in Grand Rapids during the next several months.

Finally, the principal task of the Committee on Continuing Legal Education is to afford members of the Real Property Law Section an opportunity to enhance their knowledge in all areas of real property law. In order to insure that members of the Section have available a broad variety of real property law programs, we would appreciate receiving any comments members of the Section may have regarding their preference for topics for future continuing legal education programs. We are particularly interested in learning about topics that have not been covered or that you think are not covered frequently enough. Please submit your comments to me at 525 North Woodward Avenue, P.O. Box 509, Bloomfield Hills, Michigan 48013.

COURSE CALENDAR

Set forth below is a schedule of continuing legal education courses sponsored or cosponsored by the Real Property Law Section through June, 1984:

Key: HB = Homeward Bound; ICLE = courses cosponsored by the Institute of Continuing Legal Education

Date	Location	Program	Topic
December 8	Amway Grand Plaza Grand Rapids	ICLE	Financing of Commercial Real Estate
December 13	Northfield Hilton Troy	HB	The Use of the Land Contract in Commercial Transactions
December 15	Amway Grand Plaza Grand Rapids	HB	The Use of the Land Contract in Commercial Transactions
January 10	Amway Grand Plaza Grand Rapids	ICLE	Real Estate Law and Practice
January 13	Sheraton Southfield Southfield	ICLE	Real Estate Law and Practice
January 17	Northfield Hilton Troy	HB	Real Estate Brokerage Law and Practice
January 19	Amway Grand Plaza Grand Rapids	HB	Real Estate Brokerage Law and Practice

Date	Location	Program	Topic
February 21	Northfield Hilton Troy	HB	Real Estate Equity Financing (Joint Ventures, Options and Kickers)
February 23	Amway Grand Plaza Grand Rapids	HB	Real Estate Equity Financing (Joint Ventures, Options and Kickers)
February 29 through March 3	Hyatt/Lake Tahoe Lake Tahoe, Nevada	Winter Conference	Real Estate Syndication — Representing the Partnership, its General Partner and Prospective Limited Partners
March 20	Northfield Hilton Troy	HB	Condominium Law and Practice under the New Act
March 22	Amway Grand Plaza Grand Rapids	HB	Condominium Law and Practice under the New Act
April 10	Amway Grand Plaza Grand Rapids	ICLE	Real Estate Sales Transactions
April 10	Northfield Hilton Troy	HB	The Standard Forms: Part I
April 12	Pontchartrain Detroit	ICLE	Real Estate Sales Transactions
April 12	Amway Grand Plaza Grand Rapids	HB	The Standard Forms: Part I
May 15	Lansing	ICLE	Oil and Gas — Update 1984
May 15	Northfield Hilton Troy	HB	The Standard Forms: Part II
May 17	Amway Grand Plaza Grand Rapids	HB	The Standard Forms: Part II
June 12	Northfield Hilton Troy	HB	The Confidential Offering Memorandum in Real Estate Syndications
June 14	Amway Grand Plaza Grand Rapids	HB	The Confidential Offering Memorandum in Real Estate Syndications

THE LEGISLATIVE SCENE

A package of bills (House Bills 4904-4925) has been introduced to revise certain condemnation procedures.

A package of bills (House Bills 4979-4986) has been introduced to remove interest rate limitations, other than the criminal limit, on various types of loans, including mortgages and land contracts (House Bill 4981).

The "plain language" bill (House Bill 4065) is still in Committee in the Senate.

ACTION ON PREVIOUSLY REPORTED LEGISLATION

HB 4336 — Authorizes 11% financing for sales of mobile homes on land contract — 11/10/83, general orders with amendment(s); 11/14/83, 3rd reading with amendment(s).

HB 4618 — Provides for technical amendments to the housing development authority act with respect to condominiums and mobile homes — 9/22/83, general orders with amendment(s); 10/18/83, 3rd reading with amendment(s); 10/25/83, passed; 11/1/83, Senate amendment(s) concurred in; ordered enrolled; 11/16/83, approved by Governor as Act 217 of the Public Acts of 1983.

HB 4621 — Extends the granting of exemptions from property tax for energy conversion devices — 10/5/83, 2nd reading with amendment(s); 10/6/83, 3rd reading with amendment(s), passed; 10/11/83, Committee on Finance and Municipalities; 10/12/83, general orders with amendment(s); 11/1/83, 3rd reading with amendment(s); 11/15/83, passed; 11/16/83, Senate amendment(s) concurred in, ordered enrolled; 11/17/83, enrollment vacated, vote reconsidered, Senate amendment(s) concurred in as amended; 11/21/83, House amendment(s) concurred in; 11/22/83, ordered enrolled.

HB 4643 — Provides the state tax commission with authority to mediate disputes in valuation of property adjacent to railroad rights of way — 11/8/83, 2nd reading with substitute; 11/10/83, 3rd reading with substitute; 11/14/83, amended, passed; 11/15/83, Committee on State Affairs and Transportation.

HB 4662 — Eliminates the requirement that certain statements connected with the transfer of an interest in mobile homes be notarized — 11/3/83, general orders; 11/14/83, 3rd reading; 11/17/83, passed; 11/17/83, ordered enrolled; 11/21/83, presented to Governor.

HB 4816 — Increases certain fees for the Register of Deeds — 9/20/83, 2nd reading; 9/21/83, 3rd reading; 9/22/83, passed; 9/27/83, Committee on Judiciary.

SB 183 — Clarifies and extends the sunset date on the interest rate under the second mortgage loan act — 9/14/83, 2nd reading.

SB 287 — Provides for the summer collecting unit to send a bill for deferred summer taxes — 9/14/83, 3rd reading with amendment(s); 9/20/83, passed; 9/20/83, Committee on Taxation; 10/11/83, 2nd reading; 10/13/83, 3rd reading; 10/17/83, passed; 10/19/83, ordered enrolled; 10/24/83, presented to Governor; 11/1/83, approved by Governor as Act 191 of the Public Acts of 1983.

SB 370 — Requires new property owners to pay special assessments when they are pledged for the repayment of bonds issued to finance public improvements — 10/5/83, general orders; 10/27/83, 3rd reading; 11/8/83, passed; 11/8/83, Committee on Taxation.

SB 372 — Requires county equalization directors to be certified by the state assessor's board — 9/21/83, general orders; 10/4/83, 3rd reading; 10/12/83, passed; 10/12/83, Committee on Taxation.

NEWLY INTRODUCED LEGISLATION

HB 4856 — Increases the availability of tavern and resort liquor licenses under certain conditions — introduced by Rep. Porreca on 9/21/83 and referred to the Committee on Liquor Control.

HB 4864 Provides an exemption from property tax for county fairgrounds even if used for revenue producing purposes — introduced by Rep. Hayes on 9/21/83 and referred to the Committee on Taxation.

HB 4881 Prohibits abandonment of a dwelling by an occupant without 48 hours notice to the owner or other designated person — introduced by Rep. Bryant on 9/22/83 and referred to the Committee on Urban Affairs.

HB 4897 Allows certain property to qualify for a commercial redevelopment district if zoned commercial or industrial for three years prior to adoption of a resolution to form such a district — introduced by Rep. Hayes on 9/22/83 and referred to the Committee on Urban Affairs.

HB 4904 Provides for uniform condemnation procedures for township public highways — introduced by Rep. Nye et al on 9/27/83 and referred to the Committee on Judiciary; 10/11/83, 2nd reading with substitute; 10/19/83, 3rd reading with substitute; 10/20/83, passed; 10/25/83, Committee on Judiciary.

HB 4905 Provides for uniform condemnation procedures for union depot companies — introduced by Rep. Nye et al on 9/27/83 and referred to the Committee on Judiciary; 10/11/83, 2nd reading; 10/13/83, 3rd reading; 10/18/83, passed; 10/20/83, Committee on Judiciary.

HB 4906 Provides for uniform condemnation procedures for county drains — introduced by Rep. Nye et al on 9/27/83 and referred to the Committee on Judiciary; 10/11/83, 2nd reading; 10/13/83, 3rd reading; 10/18/83, passed; 10/20/83, Committee on Judiciary.

HB 4907 Provides for uniform condemnation procedures for separate grades for highways — introduced by Rep. Nye et al on 9/27/83 and referred to the Committee on Judiciary; 10/11/83, 2nd reading; 10/13/83, 3rd reading; 10/18/83, passed; 10/20/83, Committee on Judiciary.

HB 4908 Provides for uniform condemnation procedures for grade crossings — introduced by Rep. Nye et al on 9/27/83 and referred to the Committee on Judiciary; 10/11/83, 2nd reading with substitute; 10/19/83, 3rd reading with substitute; 10/20/83, passed; 10/25/83, Committee on Judiciary.

HB 4909 Provides for uniform condemnation procedures for railroad bridge and tunnel companies — introduced by Rep. Nye et al on 9/27/83 and referred to the Committee on Judiciary; 10/11/83, 2nd reading with substitute; 10/19/83, 3rd reading with substitute; 10/27/83, substitute adopted, passed; 11/1/83, Committee on Judiciary.

HB 4910 Provides for uniform condemnation procedures for inland lake levels — introduced by Rep. Nye et al on 9/27/83 and referred to the Committee on Judiciary; 10/11/83, 2nd reading; 10/13/83, 3rd reading; 10/18/83, passed; 10/20/83, Committee on Judiciary.

HB 4911 Provides for uniform condemnation procedures for school districts — introduced by Rep. Nye et al on 9/27/83 and referred to the Committee on Judiciary; 10/11/83, 2nd reading with substitute; 10/19/83, 3rd reading with substitute; 10/20/83, passed; 10/25/83, Committee on Judiciary.

HB 4912 Provides for uniform condemnation procedures for county department of public works — introduced by Rep. Nye et al on 9/27/83 and referred to the Committee on Judiciary; 10/11/83, 2nd reading; 10/13/83, 3rd reading; 10/17/83, passed; 10/25/83, Committee on Judiciary.

HB 4913 Provides for uniform condemnation procedures for cities — introduced by Rep. Nye et al on 9/27/83 and referred to the Committee on Judiciary; 10/11/83, 2nd reading with substitute; 10/19/83, 3rd reading with substitute; 10/24/83, passed; 10/26/83, Committee on Judiciary.

HB 4914 Provides for uniform condemnation procedures for fourth class cities — introduced by Rep. Nye et al on 9/27/83 and referred to the Committee on Judiciary; 10/11/83, 2nd reading with substitute; 10/19/83, 3rd reading with substitute; 10/24/83, passed; 10/26/83, Committee on Judiciary.

HB 4915 Provides for uniform condemnation procedures for highways — introduced by Rep. Nye et al on 9/27/83 and referred to the Committee on Judiciary; 10/11/83, 2nd reading; 10/13/83, 3rd reading; 10/17/83, passed; 10/25/83, Committee on Judiciary.

HB 4916 Provides for uniform condemnation procedures for village sewer disposal and water — introduced by Rep. Nye et al on 9/27/83 and referred to the Committee on Judiciary; 10/11/83, 2nd reading with substitute; 10/19/83, 3rd reading with substitute; 10/24/83, passed; 10/26/83, Committee on Judiciary.

HB 4917 Provides for uniform condemnation procedures for township health board cemeteries — introduced by Rep. Nye et al on 9/27/83 and referred to the Committee on Judiciary; 10/11/83, 2nd reading; 10/13/83, 3rd reading; 10/17/83, passed; 10/25/83, Committee on Judiciary.

HB 4918 Provides for uniform condemnation procedures for villages — introduced by Rep. Nye et al on 9/27/83 and referred to the Committee on Judiciary; 10/11/83, 2nd reading with substitute; 10/19/83, 3rd reading with substitute; 10/24/83, passed; 10/26/83, Committee on Judiciary.

HB 4919 Provides for uniform condemnation procedures for state agencies — introduced by Rep. Nye et al on 9/27/83 and referred to the Committee on Judiciary; 10/11/83, 2nd reading; 10/13/83, 3rd reading; 10/17/83, passed; 10/25/83, Committee on Judiciary.

HB 4920 Provides for uniform condemnation procedures for public utilities in cities — introduced by Rep. Nye et al on 9/27/83 and referred to the Committee on Judiciary; 10/11/83, 2nd reading; 10/13/83, 3rd reading; 10/17/83, passed; 10/25/83, Committee on Judiciary.

HB 4921 Provides for uniform condemnation procedures for state transportation commission — introduced by Rep. Nye et al on 9/27/83 and referred to the Committee on Judiciary; 10/11/83, 2nd reading; 10/13/83, 3rd reading; 10/17/83, passed; 10/25/83, Committee on Judiciary.

HB 4922 Provides for uniform condemnation procedures for electric and gas corporations — introduced by Rep. Nye et al on 9/27/83 and referred to the Committee on Judiciary; 10/11/83, 2nd reading; 10/13/83, 3rd reading; 10/17/83, passed; 10/25/83, Committee on Judiciary.

HB 4923 Provides for uniform condemnation procedures for private property for state use — introduced by Rep. Nye et al on 9/27/83 and referred to the Committee on Judiciary; 10/11/83, 2nd reading; 10/13/83, 3rd reading; 10/18/83, passed; 10/20/83, Committee on Judiciary.

HB 4924 Provides for uniform condemnation procedures for municipal housing commissions — introduced by Rep. Nye et al on 9/27/83 and referred to the Committee on Judiciary; 10/11/83, 2nd reading; 10/13/83, 3rd reading; 10/18/83, passed; 10/25/83, Committee on Judiciary.

HB 4925 Provides for uniform condemnation procedures for state lands — introduced by Rep. Nye et al on 9/27/83 and referred to the Committee on Judiciary.

HB 4944 Imposes a one-year moratorium on the issuance of construction permits for solid waste landfills — introduced by Rep. Dunaskiss et al on 9/28/83 and referred to the Committee on Conservation and Environment.

HB 4945 Imposes a one-year moratorium on construction of hazardous waste facilities — introduced by Rep. Dunaskiss on 9/28/83 and referred to the Committee on Conservation and Environment.

HB 4950 Reduces the qualifying requirements for a senior citizen deferment from property tax payment and collection — introduced by Rep. DeLange et al on 9/28/83 and referred to the Committee on Taxation.

HB 4951 Clarifies that Act 20 of the Public Acts of 1983 (amending the business entity statute) does not impair a transaction or rate of interest otherwise lawful — introduced by Rep. Keith on 9/28/83 and referred to the Committee on Corporations and Finance.

HB 4979 — Permits any rate of interest not in excess of the criminal usury limit for credit union loans — introduced by Rep. Stacey et al on 10/4/83 and referred to the Committee on Corporations and Finance.

HB 4981 — Permits any rate of interest not in excess of the criminal usury limit for land contracts and mortgages — introduced by Rep. Stacey et al on 10/4/83 and referred to the Committee on Corporations and Finance.

HB 4982 — Permits interest at any rate not in excess of the criminal usury limit for savings and loan association loans — introduced by Rep. Stacey et al on 10/4/83 and referred to the Committee on Corporations and Finance.

HB 4983 — Permits a finance charge of any amount not in excess of the criminal usury limit for home improvement finance — introduced by Rep. Stacey et al on 10/4/83 and referred to the Committee on Corporations and Finance.

HB 4986 — Permits licensees under the second mortgage loan act to charge any rate of interest not in excess of the criminal usury limit — introduced by Rep. Stacey et al on 10/4/83 and referred to the Committee on Corporations and Finance.

HB 5055 — Excludes from the definition of security deposit amounts paid to purchase membership in a cooperative housing corporation — introduced by Rep. Hollister on 10/24/83 and referred to the Committee on Consumers.

HB 5066 — Exempts senior citizens from payment of property taxes assessed for school purposes and provides for state reimbursement to affected local units for taxes lost — introduced by Rep. Runco et al on 10/25/83 and referred to the Committee on Taxation.

HB 5070 thru HB 5072 — Provides for local control over site selection for state licensed mental health residential facilities — introduced by Rep. Runco et al on 10/25/83 and referred to the Committee on Mental Health.

HB 5083 and HB 5084 — Requires certification in a conveyance or land contract that the sale is not in violation of the subdivision control act — introduced by Rep. Stacey on 11/2/83 and referred to the Committee on Towns and Counties.

HB 5105 thru HB 5109 — Requires and regulates environmental impairment insurance with respect to waste disposal areas — introduced by Rep. Cherry et al on 11/9/83 and referred to the Committee on Conservation and Environment.

HB 5116 — Conditions property tax abatement on no job transfer being effectuated by the development — introduced by Rep. Bennane et al on 11/10/83 and referred to the Committee on Urban Affairs; 11/15/83, Committee on Taxation with substitute.

HB 5146 — Delays the effective date of use of present economic income in determining true cash value for property tax assessments — introduced by Rep. Stabenow et al on 11/22/83 and referred to the Committee on Taxation.

HB 5147 — Eliminates the use of present economic income as a factor in determining true cash value of leased or rented property for property tax assessments — introduced by Rep. Stabenow on 11/22/83 and referred to the Committee on Taxation.

HB 5148 — Includes certain leasehold interests in the definition of personal property for personal property tax purposes — introduced by Rep. Stabenow et al on 11/22/83 and referred to the Committee on Taxation.

SB 443 — Clarifies the uses to which county fairgrounds may be put and still retain a property tax exemption — introduced by Sen. Hart et al on 9/20/83 and referred to the Committee on Finance and Municipalities.

SB 455 — Provides for a two-year moratorium on issuing new construction permits and operating licenses for solid waste landfills — introduced by Sen. Serotkin et al on 9/21/83 and referred to the Committee on Natural Resources and Environmental Affairs.

SB 463 — Requires 40 hours of instruction prior to taking the real estate examination — introduced by Sen. DiNello et al on 9/22/83 and referred to the Committee on State Affairs and Transportation; 11/10/83, general orders.

SB 464 — Removes the requirement that a claimant state that his property tax credit was needed to pay taxes before the county can waive interest, fees and penalties on property tax — introduced by Sen. Posthumus et al on 9/22/83 and referred to the Committee on Finance and Municipalities; 10/5/83, general orders; 11/1/83, 3rd reading; 11/8/83, passed; 11/8/83, Committee on Taxation.

SB 465 — Includes agricultural real property, regardless of classification, within the deferment from payment of summer property taxes — introduced by Sen. Posthumus et al on 9/22/83 and referred to the Committee on Finance and Municipalities; 10/5/83, general orders with amendment(s); 11/1/83, 3rd reading with amendment(s); 11/8/83, amended, passed; 11/8/83, Committee on Taxation.

SB 484 — Establishes low interest loans for persons whose homes contain urea-formaldehyde insulation — introduced by Sen. Miller et al on 10/5/83 and referred to the Committee on Health and Social Services.

SB 495 thru SB 497 — Creates a department of housing — introduced by Sen. Holmes on 10/6/83 and referred to the Committee on State Affairs and Transportation.

SB 520 — Exempts cottage or recreational property from school property tax — introduced by Sen. DiNello et al on 10/18/83 and referred to the Committee on Finance and Municipalities.

SB 530 — Eliminates the sunset provision on the exemption from property tax for horse racing tracks — introduced by Sen. Hart on 10/25/83 and referred to the Committee on State Affairs and Transportation; 11/10/83, general orders; 11/27/83, 3rd reading; 11/21/83, passed; 11/22/83, Committee on Taxation.

SB 546 — Permits the creation of special assessment districts in economic and industrial development areas for the ongoing maintenance, security and continued operation of a redevelopment project — introduced by Sen. Conroy et al on 11/9/83 and referred to the Committee on Corporations and Economic Development.

SB 560 — Conditions property tax abatement on no job transfer being effectuated by the development — introduced by Sen. Corbin et al on 11/17/83 and referred to the Committee on Corporations and Economic Development.

Submitted by: Robert J. McCullen, Chairman
Committee on Legislation

RECENT DECISIONS

by
Joseph Lloyd
Lloyd, Rutzky & Dodge

OAK PARK VILLAGE v GORTON, _______ Mich App _______, _______ NW2d _______ (Docket No. 66977, Sept. 13, 1983)

Landlord-Tenant — Security Deposits — Time Limitations

The defendants were tenants at one of the plaintiff's apartments. The tenants asserted that they had vacated the apartment on August 31, 1980. The landlord asserted that it first became aware that the unit was vacant on September 23. The landlord sent notice of damages by October 16. The defendants failed to respond and suit was commenced on January 16 of the following year.

The first question addressed by the court was the effect of failure of a tenant to give the required notice of forwarding address, etc. The court, interpreting the Landlord-Tenant Relationship Act ("LTRA"), MCLA 555.601, MSA 26.1138(1), held that if the tenant fails to give the appropriate notice, the landlord is relieved of the obligation to give any notice whatsoever itemizing damages.

The second question addressed by the court was the effect of failure to institute suit within the 45 day period prescribed by statute. The court held that failure of a landlord to institute suit within the required time did not bar non-statutory claims. The question was whether the 45 day provision was intended as a general statute of limitations on both statutory and common law claims. The court held that it was not, noting that if it were a statute of limitations, it would be unreasonably short. The longer period of limitations on common law actions, therefore, continues to apply.

The decision raises a number of interesting questions concerning the relationship of statutory and non-statutory claims. The court did not address the scope of the common law remedies. Presumably it would include damage claims in excess of one and one-half month's rent. Whether it includes such things as cleaning charges, etc., for which a security deposit may not be retained, has not been decided. Similarly, there are a number of questions concerning how exactly a landlord would raise his common law remedies. Query, for example, whether if a landlord returns a security deposit within the 45 day period, he may thereafter, on the 46th day, sue for the amount of the deposit as well as his excess damages?

MANUFACTURERS NATIONAL BANK v PINK, _______ Mich App _______, _______ NW2d _______ (Docket No. 61470, Sept. 13, 1983)

Usury — Variable Interest — Married Woman's Property Act

The defendant gave the plaintiff bank a mortgage on 77 acres of unimproved land in 1974 to secure repayment of $250,000. The debt was a pre-existing debt of the husband and no separate consideration ran to the wife. The interest rate on the mortgage was set at 1.5% over prime, but not less than 8.5%. The defendants appealed from a judgment of foreclosure and raised defenses based on the Married Woman's Property Act (MCLA 557.1, MSA 26.261) and based on usury.

As regards the Married Woman's Property Act, the court followed **Michigan National Leasing Corp v Cardillo,** 103 Mich App 427 (1981) and held that a married woman may be bound by her contracts even though no consideration passes to her separate estate.

As regards usury, the court interpreted the statutory language which states that a mortgage "may not provide that the rate of interest initially effective may be increased for any reason whatsoever." MCLA 438.31(c)(2); MSA 19.15(1c)(2). The court held that the term "rate of interest" referred to the 1.5% and held that even though the prime rate may float upwards the interest rate was not usurious. The court stated: " . . . where the interest rate is tied to an objective standard beyond the control of either party, the advancing or declining of such prime interest rate and ergo the amount of interest, which the debtor must pay, does not constitute a change in the rate of interest charged and hence, does not violate the cited statute."

MICHIGAN UNITED CONSERVATION CLUB v LANSING TOWNSHIP, _______ Mich App _______, _______ NW2d _______ (Docket No. 60105, Sept. 26, 1983)

Property Taxes — Charitable Exemption — Political Action

The plaintiff's property consisted of two adjacent lots containing an office building and a warehouse. The warehouse was used to store the plaintiff's publications, camping supplies etc. The office building contained conference rooms, work facilities, a wildlife art collection and offices for staff. The plaintiff is a non-profit corporation organized for the purposes of furthering environmental and conservation concerns, and, inter alia, defending the right of citizens to bear arms. The group lobbied extensively on public issues. The plaintiff sought exemption from property taxes based on the statutory provisions applied to a "benevolent, charitable or educational institution." The tax tribunal denied the exemption and the plaintiff appealed.

The court of appeals, following **Ladies Literary Club v Grand Rapids,** 409 Mich 748; 298 NW2d 422 (1980), held that the club was not an educational institution within the ambit of MCLA 211.7, MSA 7.7. The test is whether the activities of the group fit into the State's general scheme of education as commonly understood and whether they sufficiently relieve the government's educational burden. On review of the facts, the court held this not to be the case.

On the question of the charitable or benevolent purpose of the corporation, the court held that the Plaintiff did not appear to be operated in such a way that there was "a gift for the benefit of the general public without restriction or for the benefit of an indefinite number of persons." The court conceded that certain of the Plaintiff's actions met this test, but held that the effort spent lobbying for specific forms of conservation and for the right to bear arms rendered the organization a political organization and not entitled to the exemption sought.

BLAKE v CONSOLIDATED RAIL CORPORATION, _______ Mich App _______, _______ NW2d _______ (Docket No. 64948, _______, 1983)

Premises Liability

The plaintiff's decedent was murdered while in the employ of defendant. The murder took place in an area of the workplace restricted to employees and authorized personnel. The plaintiff brought suit under FELA alleging negligence inter alia, in failing to warn employees of an unsafe and unguarded condition on the premises. The court of appeals, following **Samson v Saginaw Professional Bldg. Inc,** 393 Mich 393; 224 NW2d 843 (1975), held that the possessor of land has a special duty to protect invitees from the unreasonable risk of harm, including protection from foreseeable intentional criminal acts of third parties. The court of appeals held that any evidence which indicates that an assault might foreseeably occur was relevant, even though such evidence dealt with assaults occurring at different premises.

WOODLAND v MICHIGAN CITIZENS LOBBY, _______ Mich App _______, _______ NW2d _______ (Docket No. 64388, Sept. 13, 1983)

Shopping Malls — Free Speech

The plaintiff is the owner and operator of an enclosed shopping mall, surrounded by a parking lot, containing three large department stores as well as numerous smaller stores. The tenants are not permitted to solicit business or to distribute handbills or any other advertising in the common areas. The defendant sought to enter the mall, place tables and signs in the center of the mall and solicit shoppers to sign petitions to initiate state legislation. The lobbyists were turned back by security guards and eventually the plaintiff sought an injunction restraining such solicitation on its premises. The issue before the court of appeals was whether the defendant had the right to trespass on the plaintiff's private property for political reasons where the public is invited on the property for limited purpose, and where the political activity does not comport with the public nature of the property.

A divided court of appeals ruled in favor of the shopping mall, following **Commodities Export Co. v City of Detroit,** 116 Mich App 57, 321 NW2d 842 (1982). The court held that there was no open-ended invitation to the public to use the mall for any and all purposes. It was invited for the limited purpose of shopping for retail goods and services. The court further found that the shopping mall had made a substantial commitment both in terms of financial investment and legal obligations, to construct and maintain common areas suitable for its purposes, and found that

lobbying activities would irreparably harm the mall's planned and peaceful atmosphere. The court rejected application of tests related to the size of the mall or to the vitality of surrounding business districts.

In dissent, Judge Hood would have ruled that the state constitution granted broader public lobbying rights than did the federal constitution, especially when the speech was related to public initiative. He would have adopted a balancing test, reviewing the time, place and manner of restrictions and weighing them against the degree of infringement of the mall owner's rights.

SECTION NEWS

About the authors:

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REAL PROPERTY SECTION

STATE BAR OF MICHIGAN

1983-84

ROSTER OF COMMITTEE CHAIRMEN AND COMMITTEE MEMBERS

Note: Set out below is a list of Section Committees and Committee memberships. This Committee Roster represents membership appointments based on the questionnaires which were published in the **Review** in the fall of 1982 and spring of 1983, and other requests and appointments made known to the Chairman and the Vice-Chairman of the Section. We have also asked the Committee Chairmen to review these lists for errors and omissions and make corrections as appropriate. In other words, these lists are based upon the best information available to us at the time. Committee membership appointments may be made during the year. If you are interested in becoming a member of any of these Committees, please contact the Chairman of the Committee directly. Committee membership entails a commitment to work on Committee projects. If you are serving as a member of a Committee and your name does not appear on the Roster, please notify the Chairman of that fact, and the omission will be corrected.

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