MICHIGAN
REAL PROPERTY REVIEW

Published by the Real Property Law Section State Bar of Michigan

Winter 2007 Vol. 34, No. 4

CONTENTS

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

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

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

www.michbar.org/realproperty/

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

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

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CHAIRPERSON'S REPORT

by Lawrence R. Shoffner

Land Title Standards 6th Edition

The 6th Edition of the Michigan Land Title Standards is nearing completion after many years of hard work by the Land Title Standards Committee. The Standards were first published in 1956 by the State Bar Committee on Title Standards (then a Committee of the State Bar). The 1st Edition was published serially in the Michigan State Bar Journal from 1956 to 1963, and consisted of 164 Standards. The 5th Edition was published in 1988 in binder format and was last supplemented in 2004.

The Michigan Land Title Standards are statements of the law of real property and land titles, which have been relied upon by bench and bar since inception. The Standards are regarded as among the most complete and authoritative of all state land title standards in the country. The 6th Edition will have several new standards and all of the Standards in the 5th Edition have been thoroughly reviewed and updated to reflect changes in statutory and case law.

The 6th Edition will be available for purchase in the traditional binder format in the next few months. I am excited to announce that, for the first time, the Michigan Land Title Standards will also be posted on the Real Property Law Section website without charge. Beginning in the Summer of 2008, the entire 6th Edition with full search and download capabilities will be available. While this might appear to be a break from tradition, it is entirely consistent with the original purpose of the Michigan Land Title Standards. As Albert Blashfield explained in his President's Page in the August 1956 State Bar Journal containing the first 108 Standards, "[t]he Michigan Land Title Standards are distributed by the board of commissioners to the entire active membership of the bar of this state without charge. This is in keeping with the policy that the fruits of the labor of a State Bar committee belong to the bar as a whole."

The Michigan Land Title Standards are, and will continue to be, a valuable resource for lawyers and judges across the state. I encourage all to take advantage of the greater accessibility to the Standards that the upcoming website posting will provide.

Real Property Law Section Winter Conference

This year's Winter Conference is being held in Chicago on March 6-8, 2008. The program is entitled "Chicago Style: Deep-Dish Development" and the location is the Sofitel Chicago Water Tower hotel. Discounted rooms are available on a limited basis, so make your reservations as soon as possible to get the best rate. As always, there will be many opportunities for socializing and entertainment in this delightful city. The Program Chairpersons are Marie Racine and Gregory Gamalski, who have worked hard to bring you an extraordinary program. For more information, go to www.michbar.org/realproperty/winterconf.cfm.

Foreclosure Initiative

Janet Welch, SBM's Executive Director, recently approached the Section to help address the rising number of inquiries being made regarding foreclosure. The "Perfect Storm" created by the Subprime Crisis and our own State's unique economic difficulties has resulted in record numbers of foreclosures. The Section currently provides information and useful links regarding predatory lending on the Pro Bono Committee's webpage of the Section's website: www.michbar.org/realproperty/probono.cfm. Additionally, the Committee has prepared a pamphlet entitled "Mortgage Loans & Predatory Lending," which can also be viewed at the Committee's webpage, and which is available in both English and Spanish language versions.

Unfortunately, the problems confronting most borrowers are not related to predatory lending practices, so in addition to the existing materials, the Pro Bono Committee and the Section's Special Committee on Commercial Real Estate Finance are currently working on a new pamphlet that will provide a much-needed overview of the foreclosure process for non-lawyers. The Committees' chairpersons, MaryAnn Kanary, Jeffrey Weisserman and Jessica Wood, are currently at work on this extremely important project and should have the materials ready in the next few months.

Once completed, printed copies of the pamphlet will be available for distribution (free of charge), so if you are aware of community organizations that should be provided with copies of this valuable resource, please contact Arlene Rubinstein at (248) 644-7378 or e-mail at LAWA1@aol.com.

COMMERCIAL LEASE CLAUSES CONCERNING CONSTRUCTION OF TENANT IMPROVEMENTS

*by Mark Krysinski**

I. In General

Most commercial premises require some degree of physical work to make them ready for the tenant's use. This article addresses issues arising out of the construction of tenant improvements. In most instances, the landlord will be responsible for construction. The challenge in such provisions is describing in sufficient detail the improvements to be performed and the method of their execution.

II. Common Law and Statutes

Under Michigan common law, a lease is considered the equivalent of a sale of the premises for the duration of the lease term.[1] Because a lease is considered a conveyance of real estate, there are generally no implied terms regarding its condition.[2] Moreover, MCL 565.5 prohibits implied covenants in "any conveyance of real estate, except oil and gas leases, whether such conveyance contains special covenants or not." Nevertheless, the Michigan Court of Appeals has held that an agreement to lease may imply that any tenant improvements performed by the landlord must be reasonably suited to the tenant's needs.[3]

The degree of specificity established by the parties with respect to tenant improvements can impact the issue of basic contract formation, as illustrated by the opinions in *Hansen v Catsman*[4] and *Brodsky v Allen Hayosh Industries, Inc.*[5] In *Hansen*, the Michigan Supreme Court held that the agreement to lease presented in that case did not constitute an enforceable contract due to its lack of certainty. The *Hansen* Court noted that several essential terms had been left for future negotiations, specifically with respect to the tenant improvement plans. Apparently, the plans had not been formalized as of the signing of the agreement to lease. The *Hansen* Court found that "[t]his left, perhaps, the most significant feature of the venture open for further discussion and negotiations"[6] and therefore negated the existence of an enforceable contract. In *Brodsky*, the parties entered into an agreement to lease in which the landlord agreed to construct a commercial building containing a specified number of square feet of factory space and air-conditioned offices, both according to plans and specifications to be attached to lease. The plans and specifications were never actually agreed upon. The tenant sought to avoid the agreement on the grounds that it failed to address a material term, specifically the tenant improvement plans. The *Brodsky* Court found that the language of the Brodsky agreement contrasted with the language of "speculation and possibility" in *Hansen*.[7] Although the parties had never actually agreed upon the precise specifications, the *Brodsky* Court was not of the opinion "that the parties intended formulation of specifications to be a prerequisite to the binding force of the contract."[8] The *Brodsky* Court stated that the agreement did not leave anything to speculation, but specified the amount of factory and air-conditioned office floor space. The Court held that "[t]his agreement would imply a physical plant reasonably suited to defendant's manufacturing and office needs" and that "[n]o more certain specifications are needed for purposes of enforcing this lease agreement."[9] *Hansen* and *Brodsky* demonstrate the importance of a reasonably specific description of tenant improvements to be included in the lease, as well as some guidance on the amount of specificity required to achieve an enforceable contract.

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This article will also be published as part of the 2006 Supplement to Chard & Shoffner, *Michigan Lease Drafting and Landlord-Tenant Law* (ICLE 2003), which is published by the Institute of Continuing Legal Education, Ann Arbor, www.icle.org

Michigan also follows the majority common law rule that there is no implied warranty of fitness with respect to improvements to commercial real estate.[10] This is dramatically different from the rule with respect to residential leases, where the common law has been modified by statute to include implied covenants of habitability and to require compliance with applicable health and safety laws.[11] However, there is much commentator discussion as to whether there should be an "implied warranty of habitability" in commercial lease settings.[12] The rationale for the majority view is that, unlike residential tenants, commercial parties are not disadvantaged by "unequal bargaining power."[13] However, Richard Posner, in his treatise *Economic Analysis of Law*,[14] argues that size and knowledge of the bargaining entity are irrelevant; rather, market conditions are the true determining factor in "bargaining power."[15] This area of the law is in flux and it would not be surprising if the majority view has indeed become the minority view in fact.[16]

When a lease calls for the construction of tenant improvements by the landlord before the commencement of the lease, the issue of substantial performance becomes an important consideration. In the absence of an agreement to the contrary, rent begins to accrue upon substantial performance by the landlord.[17] Substantial performance requires a good-faith attempt to construct the tenant improvements in accord with the agreement. "Substantial performance means not doing the exact thing promised, but doing something else that is just as good, or good enough for both obligor and obligee."[18] It requires a good-faith attempt to perform the contract without intentional or material departures.[19] The *Gordon v Great Lakes Bowling Corp.* Court presented an in-depth analysis of substantial performance in the commercial lease context, holding that imperfections in matters of detail, which do not constitute a deviation from the general plan contemplated for the work, do not prevent the performance from being regarded as substantial performance.[20] Such imperfections may, however, provide a basis for recovery of damages.[21]

Finally, the landlord and the premises may be bound by a construction lien for tenant improvements performed by the tenant's contractor if the improvements are required by the lease.[22] By requiring the tenant to make the improvements, the landlord has appointed the tenant as its agent.[23] However, as the construction lien statute is based on contractual relationships, a landlord who permits – but does not require – improvements has not created a principal-agent relationship with the tenant.[24] Even though notice may be given to the landlord (as required by MCL 570.1), if no agency relationship exists between the tenant and landlord, no lien attaches to the property.[25]

III. Trips, Traps and Thoughts

Most commercial premises require some degree of physical work to make them ready for the tenant's use. The sample clauses in this section are generally more detailed than those found in most commercial leases. In many instances, the lease simply provides that the landlord will construct the improvements as described in a sentence or two without any level of detail. There is obviously risk in this approach. Even if sufficient for purposes of contract formation, a "Landlord's Work" clause without a meaningful description of the work may be too vague to show damages. For example, in *Brookside Mills, Inc v Specialty Retail Concepts, Inc*,[26] the build-out clause only required the landlord to "recondition the parking lot." Even though the tenant was shown an architect's rendition which may have implied additional improvements, because the landlord did not commit to repave the entire lot and add new lights, the landlord was not obligated to make such improvements. Specificity is important, particularly from the tenant's perspective. In addition, from a landlord's perspective, one of the most frustrating events is to have a non-responsive tenant who is difficult to put in default. Accordingly, "deemed approval" language if the tenant is non-responsive after a reasonable period of time is important.

For most commercial leases, the building containing the premises already exists at the time the lease is executed and thus construction of the building does not need to be addressed in the lease. However, the demising walls of the premises may not yet exist and detailed plan and specifications for the improvements to the premises may not have been developed at the time the lease is signed. Thus, some procedure for developing the tenant improvement plans and specifications, as well as for payment for the construction costs incurred, must be provided in the lease.

Construction of tenant improvements is usually done either on a "turnkey" basis, or on the basis of a tenant improvement allowance. If the lease is done on a turnkey basis, the lease will provide that the landlord will construct the tenant improvements without regard to cost. If the lease is done on a tenant improvement allowance basis, then the landlord will have the obligation to pay for the tenant improvements up to a specified amount, and the tenant will be responsible for any

additional costs. Regardless of how the financial risk is managed, the landlord is usually responsible for performing the construction.

Landlords typically want the size of the premises, determined in square footage, established at the outset of the lease, and assurance that such determination cannot be challenged so it cannot be argued about later in a dispute over rent. If the space does not yet exist, some mechanism for measuring the space must be provided. There are many ways to measure space in a commercial building. For most office and other non-retail space, the "BOMA" standard will commonly be used to determine both the usable and rentable square footage of the space. BOMA is an acronym for the Building Owners and Managers Association, a trade group of owners and property managers which has promulgated standards for the uniform measuring of space in certain types of buildings. Typically, BOMA measures interior space from the interior surface of the demising walls to the exterior surfaces of the exterior walls, and it excludes major vertical shafts (such as stairwells and elevators). BOMA measures common areas of the building (i.e., entryways, lobbies and hallways) in the same way and applies a load factor to the usable square footage to arrive at the rentable square footage. Thus, the rentable square footage contains, in effect, some allocated portion of the common areas of the building. Common areas vary widely from building to building, and so the load factor can also vary widely. Rent is typically based on the rentable square footage and thus the total economic costs to a tenant will vary significantly depending on the size of the common areas and the allocation method used by the landlord. Thus, at the early stage of the relationship the tenant and his counsel should strive to understand how the usable square footage was determined so they can make an apples-to-apples comparison of the cost of leasing space in one building versus another.

Once the square footage is determined, the lease should set forth some process for determining what must be built and, if the project is done on a tenant improvement allowance basis, when allowance dollars will start to be spent. These sections of the lease can become very complex; failure to pay attention to detail can result in significant litigation if the tenant simply stops responding to requests for approval and as a result the space is not built. For instance, in *Capital Centre, LLC v Wilkinson*,[27] the tenant (a Washington Redskins player) did not submit his plans for improvements. The express terms of the lease placed him in default, requiring him to accept the premises as is. Subsequently he was traded to the Detroit Lions (things going from bad to worse) and wanted to get out of the lease. His failure to submit his plans was deemed a breach and made him liable for damages.

If the leased premises are constructed on a turnkey basis, tenants will want to make sure that they will be receiving the quality of the build-out they expected when they signed the lease. In a turnkey situation, the landlord has an incentive to save as much money as possible, so the tenants will want to make sure that detailed plans and specifications are agreed to and that internal costs paid to landlord are minimized in the form of construction management or similar fees. If the project is being done on a tenant improvement allowance basis, the tenant will want to make sure there is some competitive bidding or other check on costs so the landlord does not run up the bill that the tenant will be responsible for over and above the tenant allowance. Again, some check on the landlord's internal fee structure may also be appropriate.

The definition of when the project is done is also important because it usually ties in with the commencement date of the lease. Inevitably, the construction will not be completely finished and some minor items will be required to be completed after possession. Hence, the necessity for arriving at a punch list should be spelled out in the lease. Most tenants will want completion to be defined as the issuance of a certificate of occupancy for the property, and landlords will argue that a temporary certificate of occupancy should be acceptable, provided that the conditions of the temporary certificate do not materially interfere with tenant's use and enjoyment of the premises and its operation of the business therein. Once completion is defined, the risk of delays caused by landlord to tenant and delays caused beyond the control of either must be assumed. A landlord will typically take on the risk of the landlord delay and will require the tenant to assume the risk of the tenant delay, both in terms of delaying the time when landlord is required to complete the project, as well as possible acceleration of the rent commencement date if the delays become unreasonable. The risk beyond the control of both parties (typically defined as the *force majeure* risk or excusable delays) will usually not be assumed by the landlord. However, tenants with significant bargaining power may be able to argue for termination or other rights if a *force majeure* risk delays a completion date beyond a specified period; this would provide some certainty that if a project is not finished in a reasonable period of time, the tenant can move on and find other space necessary to conduct its business.

Finally, if work is to be performed by the tenant, the landlord will be concerned about construction liens. It is a good idea to address these concerns in the lease. Negating the possible agency relationship (which could result in the lien being imposed on the fee, not just the tenant's leasehold interest) is important.

IV. Sample Clauses

Description and measurement of space

The Premises described in Section *[insert cross reference]* is depicted on the Space Plan attached as Exhibit *[insert cross reference]*. Within [insert number] days after the date the demising walls for the Premises are installed, Landlord's architect will calculate and certify in writing to Landlord and Tenant the "Rentable Area" and "Usable Area" of the Premises, measured in accordance with the methods specified in the BOMA publication ANSI Z65.1 1996. If Tenant disagrees with the determination of the Rentable Area as calculated by Landlord's architect, Tenant will provide Landlord with notice of Tenant's disagreement (Notice of Disagreement) within *[insert number]* days after the date on which Tenant receives the calculation by Landlord's architect. If Tenant fails to deliver the Notice of Disagreement within such period, then the Rentable Area set forth in the Landlord's architect's certification will be deemed acceptable to both Landlord and Tenant. If Tenant timely delivers Notice of Disagreement, then the parties will diligently attempt in good faith to resolve the disagreement over the Rentable Area within *[insert number]* days after the date on which Landlord receives the Notice of Disagreement. If the parties are unable to resolve the disagreement within that period, the dispute will be resolved by arbitration under Section [insert cross reference] of this Lease, except that the arbitrator(s) must be licensed architect(s) with a minimum of *[insert number]* years experience in designing buildings similar to the Building, and the arbitrator(s) must render a final decision within *[insert number]* days after the date on which the arbitrator(s) are selected. Upon the final determination of the Rentable Area, if the Rentable Area is different from that stated in the Basic Lease Definitions, then the Rentable Area, Rent, Allowance and Proportionate Share will be adjusted in accordance with that final determination. On recalculation, the parties will execute an amendment to this Lease stating the recalculated Rentable Area, Rent, and Proportionate Share. Execution of the amendment will not be a condition precedent to the effectiveness of the Lease or the recalculated Rent. Once the Rentable Area is determined or deemed to be determined in accordance with this Section, Tenant will not have the right to challenge, demand, request or receive any change in any term of this Lease as a result of any claimed or actual error or omission in the square footage of the Premises, the Building, or the determination of the Proportionate Share.

Definition of tenant improvements

Landlord has previously prepared a preliminary space plan dated *[insert date]*, which has been approved by Tenant and is attached as Exhibit *[insert cross reference]* (Space Plan). The Space Plan shows the location of partitions, demising walls, doors and cabinets, and generally indicates all work to be done by Landlord. Landlord will construct the interior build-out and other improvements to the Premises described in the Space Plan, supplemented by the specifications set forth in Exhibit *[insert cross reference]* (Concept Specifications) in accordance with the provisions of this Section (collectively the Tenant Improvements). In the event of a conflict between the Space Plan and the Concept Specifications, the Space Plan will control.

Definition of tenant improvement plans

Landlord's architect will work with Tenant to prepare the design, engineering, construction drawings and specifications required for the construction of the Tenant Improvements (as they may be amended by approved change orders, (the Tenant Improvement Plans). In connection with the development of the Tenant Improvement Plans by Landlord's architect and Tenant, Landlord and Tenant will be furnished copies of the Tenant Improvements Plans on an ongoing basis for review, comment and approval by Landlord and Tenant, which process must be completed on or before *[insert date]*. If Tenant fails to approve or reject in detail, stating with specification the nature of the rejection, any aspect of the Tenant Improvement Plans with five (5) business days after delivery of them to Tenant, then all matters not so approved or objected to shall be deemed approved. The Tenant Improvement Plans must conform to the Space Plan and the Concept Specifications and, in any event, must comply with all Applicable Laws.

Definition of construction costs

Construction Costs includes all hard and soft costs of design and construction, including all labor and materials, all planning, architectural and engineering fees, the cost of obtaining plan approval, building permits

and other required permits and licenses, developer's or general contractor's fee (*[insert number]*% of total costs), insurance and all other out–of-pocket costs paid or incurred by Landlord to plan, design, permit and build the Tenant Improvements.

Definition of excusable delays

Excusable Delays include any delay caused by Tenant, and any other delays due to acts of God, war, terrorism, civil commotion, riots, labor dispute, strike, lockout, fire or other casualty, unavailability of materials, unanticipated construction delay, acts or omissions of governmental authorities, severe weather, or other causes beyond the reasonable control of Landlord and its contractors.

Express exclusions from excusable delays

Excusable delays will not, however, include any delays due to the neglect, imprudent management, financial inability, delay in obtaining financing, or default of Landlord or its contractors.

Definition of "ready for occupancy"

The Premises will be conclusively deemed "ready for occupancy" upon the earlier of the following: (a) Tenant Improvements have been substantially completed by Landlord in accordance with the Tenant Improvement Plans, and a conditional or temporary certificate of occupancy has been issued for the Premises (provided the conditions set forth in the conditional or temporary certificate of occupancy do not materially interfere with Tenant's use of the Premises), or (b) Tenant takes possession of the Premises and begins its business operations within the Premises. The Premises will not be considered unready or incomplete if only minor or insubstantial details of construction, decoration or mechanical adjustments remain to be done within the Premises, or if interior finish, architectural details or similar work requested by Tenant remains incomplete, provided such conditions do not materially interfere with Tenant's use of the Premises.

Tenant improvement allowance

Landlord will pay all the Construction Costs to complete the design and construction of the Tenant Improvements up to a maximum total charge of $*[insert amount]* (Allowance). Landlord will not be required to expend any amounts in excess of the Allowance in order to construct the Tenant Improvements. Any portion of the Allowance not used toward the Tenant Improvements will be credited toward the Rent, until such credit is exhausted. The charges for the Tenant Improvements will include all Construction Costs, but will exclude any financing costs. In connection with the development of the Tenant Improvement Plans, Landlord will develop a line item budget estimating the cost of the Tenant Improvements. In the event the estimated Construction Costs of completing the Tenant Improvements in accordance with the Tenant Improvement Plans will exceed the Allowance, Tenant will have the opportunity to request changes to the Tenant Improvement Plans in order to reduce the expected Construction Costs. In such event, Landlord will (a) provide Tenant a revised construction cost estimate and further opportunities to make changes to the Tenant Improvement Plans until the expected Construction Costs do not exceed the Allowance, and (b) Landlord will approve such changes unless the changes require the use of materials inferior to building standard materials, or adversely affect the structural integrity of the Premises. However, in all events Tenant will pay Landlord, within *[insert number]* business days of request for payment (which request will come no more than monthly), any Construction Costs in excess of the Allowance. Within *[insert number]* days after the completion of construction, Landlord will determine the actual Construction Costs for completing the Tenant Improvements in accordance with the Tenant Improvement Plans and the amount, if any, by which they exceeded the Allowance. Landlord will provide Tenant with an itemized breakdown of all the Construction Costs. Any underpayment will be paid by Tenant to Landlord, within *[insert number]* business days of request for such payment, and any resulting over payment will be promptly refunded to Tenant or, at Tenant's option, credited against the Rent.

Turnkey provisions

Landlord will pay all the Construction Costs to complete the design and construction of the Tenant Improvements. Tenant will not be required to pay or reimburse Landlord for any Constructions Costs in connection with the Tenant Improvements, other than for Tenant Change Orders. Within *[insert number]* business days after the Lease Date, Landlord will, at its sole cost and expense, prepare and furnish to Tenant for review and approval, the architectural, mechanical, plumbing, lighting, and all other construction drawings and specifications necessary to perform completely all of the work to be done by the Landlord. It is intended that the work to be done by Landlord will encompass all work necessary to take the Premises from its condition

as of the Lease Date, to the condition represented by the Tenant Improvement Plans. The Landlord will submit a breakdown of cost for all work to be done by the Landlord. Only upon receipt of written authorization may the Landlord proceed with the work. After receipt of the Tenant Improvement Plans, the Tenant will approve or disapprove the same within *[insert number]* business days of its receipt. If the Tenant does not approve the Tenant Improvement Plans as submitted, the Tenant will approve those portions that are acceptable to the Tenant and will disapprove those portions that are not acceptable to it, and will state with specificity the nature of its objections to the Tenant Improvement Plans. Landlord will then, at its sole cost and expense, do all that is necessary to correct the Tenant Improvement Plans to the satisfaction of the Tenant and resubmit them for the Tenant's review and approval within *[insert number]* business days of receipt of Tenant's disapproval comments. If Tenant fails to approve or reject in detail, stating with specification the nature of the rejection, any aspect of the Tenant Improvement Plans within five (5) business days after delivery of them to Tenant, then all matters not so approved or objected to shall be deemed approved. The approved Tenant Improvement Plans, when completed, will be attached as Exhibit *[insert cross reference]*. Approval by the Tenant will be a non-technical approval and will not be deemed to mean approval of structural capacity, size of ducts and piping, adequacy of electrical wiring, system, or equipment capacities and without limitation, other technical or code related matters; and will not relieve the Landlord of responsibility for proper and adequate design of the work.

Landlord change orders

Any material changes from the Tenant Improvement Plans which Landlord reasonably determines may be necessary during construction, other than those due to code requirements or field conditions, will be submitted to Tenant for Tenant's approval or rejection, which will not be unreasonably withheld, conditioned or delayed. Tenant will have *[insert number]* business days to approve or reject such changes. If Tenant fails to notify Landlord of Tenant's approval or rejection of such changes such period, Tenant will be deemed to have approved such changes.

Tenant change orders

Any change to the Tenant Improvement Plans desired by Tenant after the mutual approval of the Tenant Improvement Plans pursuant to Section *[insert cross reference]*, will be subject to Landlord's consent, which will not be unreasonably withheld, conditioned or delayed, and must be set forth in a written change order prepared by Landlord and accepted by Tenant (Tenant Change Order). The Tenant Change Order will describe in detail (a) the requested change, (b) an estimate of the additional construction time, if any, that will be required to complete the Tenant Improvements as a result of the change, and (c) an estimate of the Construction Costs to be incurred as a result of such change order. Once submitted to Tenant, the Tenant Change Order must be approved by Tenant in writing within *[insert number]* days or else the Tenant Change Order will be deemed rejected. Such approval will be deemed to include Tenant's agreement to pay the actual excess Construction Costs and to incur any actual delay regardless of the estimate. Also, all delivery dates which Landlord has committed to satisfy will be extended one day for each day of additional construction time that is required as a result of a Tenant Change Order. Landlord will have no obligation to do any work described in a Tenant Change Order on an overtime basis to avoid incurring construction delays. Landlord will approve Tenant's requested changes unless the requested changes would cause or create (a) an adverse effect on the structural integrity of the Building, (b) noncompliance with Applicable Laws, (c) an adverse effect on the systems and equipment of the Building, (d) an adverse effect on the exterior appearance of the Building, or (d) a material deviation from the Building standard specifications and descriptions.

Bids for landlord work

On completion of the Tenant Improvement Plans, Landlord contractor will solicit a minimum of three competitive bids from all trades and major building material suppliers. The bids that Landlord's contractor proposes to accept will be submitted to Tenant for review and approval, which will not be unreasonably withheld, conditioned or delayed. Landlord's contractor will be paid a *[insert percentage]* fee on all materials, labor, subcontract, and general conditions. General conditions will be charged at the fixed monthly rates established by the contractor's cost proposal breakdown to be submitted to Tenant and approved by Tenant.

Landlord warranties

Landlord unconditionally guarantees all Landlord Work against defective workmanship and materials and will remedy any such defects which appear within a period ending one year after the Commencement Date. At the end of the warranty period, Landlord

will upon the request of Tenant, assign to Tenant any guarantees of workmanship and materials which Landlord may receive in connection with the Premises for items Tenant is required by this Lease to maintain. Landlord will obtain manufacturers' warranties covering the HVAC equipment serving the Premises for a period of at least five years.

Early access to premises

Within *[insert number]* days prior to the completion of construction and subject to compliance with all Applicable Laws, Landlord will grant Tenant access to the Premises for the purpose of installing its furniture, fixtures and equipment. Tenant will be subject to reasonable guidelines, rules and requests communicated by Landlord to Tenant from time to time, and Tenant will not interfere with or delay the construction of the Premises or the completion of Landlord Work. Any entry by Tenant prior to the Occupancy Date will be at its own risk, and Tenant will be responsible for obtaining and complying with all necessary governmental permits and approvals in order to permit such work.

Punch list procedure

Landlord will notify Tenant when Landlord considers the Premises "ready for occupancy" and for a punch list inspection (Notice of Punch List Inspection). Landlord and Tenant will then arrange to meet at the Premises within *[insert number]* days to inspect the Landlord Work and the Premises and to produce a punch list of remaining items to be completed or corrected by Landlord. Any item not listed on the punch list will be deemed acceptable to Tenant in its then existing condition. Landlord acknowledges that (a) Tenant will not be obligated to conduct the punch list inspection until such time as Landlord has given the Notice of Punch List Inspection, and (b) Tenant will not be obligated to accept possession of the Premises until Landlord and Tenant have conducted the punch list inspection and Landlord Work is substantially complete. Landlord will diligently pursue completion of the punch list items within *[insert number]* days.

Remedies for failure to complete in a timely manner (setoff)

If Landlord fails to deliver the Premises "ready for occupancy" or before the Scheduled Occupancy Date, then Tenant may deduct as liquidated damages from the Rent (a) one day's rent for each day of the first 30 days of the period from the Scheduled Occupancy Date until the Occupancy Date; and (b) two days' rent for each day after the first 30 days of the period from the Scheduled Occupancy Date until the Occupancy Date. Both parties acknowledge that if the actual Occupancy Date does not occur on or before the Scheduled Occupancy Date, Tenant's damages will be difficult, if not impossible, to ascertain and the amount of liquidated damages is a reasonable estimate of the damages which would be suffered by Tenant, including, but not limited to, lost sales, lost profits, and additional costs incurred for storage, rescheduling, payroll, inventory, advertising and carrying costs.

Remedies for failure to complete in a timely manner (termination)

Notwithstanding anything to the contrary, in the event the Occupancy Date does not occur on or before the date which is *[insert number]* months after the approval of the Tenant Improvement Plans by Landlord and Tenant, except for Excusable Delays, then Tenant, as its sole and exclusive remedy, will have the right to notify Landlord of Tenant's intent to terminate this Lease by the delivery of written notice to Landlord of such failure. If Landlord fails to deliver the Premises to Tenant "ready for occupancy" within *[insert number]* days after such notice, this Lease will automatically terminate and neither Landlord nor Tenant will have any further obligations to the other. Otherwise, Landlord will not be subject to any liability for failure to deliver possession of the Premises to Tenant "ready for occupancy" on the Scheduled Occupancy Date and the validity of the Lease will not be impaired by such failure, however Landlord will diligently pursue completion of the Tenant Improvements in accordance with the provisions of this Lease.

"As-Is" Work Performed by Tenant

Tenant has inspected the Premises and is satisfied with the condition of the Premises, the *[Building/Shopping Center]*, and the Property. Tenant agrees to accept the Premises and the *[Building/Shopping Center]* in its condition "as-is" without any representation or warranty as to its condition or fitness for Tenant's use. Tenant agrees that Landlord shall have no obligations to make any alterations, additions or improvements to the Premises, other than Landlord's repair and maintenance obligations set forth in Section *[insert cross reference]*. Rather, Tenant will make all alterations, additions, or improvements necessary to conduct its business on the Premises (Tenant Work). All Tenant Work must be

approved by Landlord prior to commencement, which approval will not be unreasonably withheld, conditioned or delayed. Landlord's approval of Tenant Work will not create any responsibility for their accurancy, sufficiency, or compliance with Applicable Laws. Tenant Work must be performed in a good and workmanlike manner in accordance with Applicable Laws. Failure to complete Tenant Work on or before the Rent Commencement Date will not excuse payment of the Rent.

Tenant contractor's insurance

Tenant will require any contractor performing Tenant Work to carry and maintain, at no expense to Landlord, a non-deductible (a) commercial (comprehensive) liability insurance policy, including contractor's liability coverage, contractual liability coverage, completed operations coverage, broad form property damage endorsement and contractors protective liability coverage, to afford protection, with respect to bodily injury or property damage, of not less than $*[insert amount]* per occurrence combined single limit / $*[insert amount]* general aggregate (but not less than $*[insert amount]* per location aggregate), (b) comprehensive automobile liability insurance policy with limits for each occurrence of not less than $*[insert amount]* with respect to bodily injury, and $*[insert amount]* with respect to property damage, and (c) worker's compensation insurance policy or similar insurance in form and amounts required by law. Proof of such coverage must be provided to Landlord prior to commencement of Tenant Work.

Prohibition against liens for tenant work

If any lien is filed against the Premises, the Property, or Tenant's leasehold interest as the result of Tenant Work, or as the result of any other work undertaken by Tenant, Tenant must discharge the lien by paying the indebtedness or filing a statutory bond as security within *[number]* days after receiving notice of the lien. If Tenant fails to discharge the lien, Landlord may discharge it by filing the required statutory bond and Tenant must pay the cost of the bond to Landlord as Additional Rent immediately upon demand.

Disclaimer of agency for tenant work

Tenant is not the Landlord's agent with respect to the Tenant Work, nor with respect to any other alterations, additions, or improvements made to the Premises by Tenant. Furthermore, nothing in this Lease enables Tenant to subject either the Premises or any portion of the Property to construction liens as a result of any alterations, additions, or improvements made to the Premises or the Property by Tenant.

Endnotes

1. *McCurtis v Detroit Hilton*, 68 Mich App 253, 255; 242 NW2d 541 (1976).
2. *Walker & Co v Davis*, 257 Mich 316, 318; 241 NW 169 (1932).
3. *Brodsky v Allen Hayosh Industries, Inc*, 1 Mich App 591, 596; 137 NW2d 771 (1965) ("This agreement would imply a physical plant reasonably suited to defendant's manufacturing and office needs.").
4. 371 Mich 79; 123 NW2d 265 (1963).
5. 1 Mich App 591; 137 NW2d 771 (1965).
6. 371 Mich at 83.
7. 1 Mich App at 593.
8. *Id*. at 595.
9. *Id*.
10. *See Clancy v Oak Park Village Athletic Center*, 140 Mich App 304, 308-09; 364 NW2d 312 (1985).
11. *See* MCL 554.139(1); *Rome v Walker*, 38 Mich App 458; 196 NW2d 850 (1972).
12. *See* Note, *An Economic Analysis of Implied Warranties of Fitness in Commercial Leases*, 94 Colum L R 658 (1994); *but see* Note, *The Unwarranted Implication of a Warranty of Fitness in Commercial Leases - An Alternative Approach*, 41 Vand L R 1057, 1080-83 (1988).
13. *See Muro v Superior Court*, 184 Cal App 3d 1089; 229 Cal Rptr 383, 388 (1986).
14. Richard Posner, Economic Analysis of Law (Boston: Little, Brown and Company, 4th ed., 1992).
15. *Id*. at 114-15.
16. *See generally* 57 Am Jur POF 3d 127 (2007).
17. *Gordon v Great Lakes Bowling Corp*, 18 Mich App 358; 171 NW2d 225 (1969).
18. *Rogers Plaza, Inc v SS Kresge Co*, 32 Mich App 724, 745; 189 NW2d 346 (1971).
19. *Id*.
20. 18 Mich App at 361–62.
21. *Id*.
22. *Rowen & Blair Electric Co v Flushing Operating Corp*., 399 Mich 593; 250 NW2d 481 (1977).

23. *Id.* at 600-01.
24. *Sewell v Nu Markets*, Inc, 353 Mich 553, 558-59; 91 NW2d 861 (1958).
25. *J & I Service Station, Inc v Wash Wagon of Michigan, Inc*, 120 Mich App 533, 536; 327 NW2d 518 (1983).
26. 1987 WL 26206; 1987 Tenn. App. LEXIS 3101 (Tenn. App. Dec. 8, 1987).
27. 2006 WL 827375; 2006 U.S. Dist. LEXIS 13121 (D. Md. Mar. 27, 2006).

USE OF SUBDIVISION DEVELOPMENT ANALYSIS IN A CONDEMNATION CASE

*by Arthur C. Spalding**

When a person seeks to purchase a home, that person is likely to be concerned with a number of factors, which might include the community in which the home is located; the school district in which the home is located; the size of the home and the lot on which it is located; the physical condition of the home; the type, size and condition of other homes in the neighborhood; and the price of similar homes which have recently sold in the same neighborhood. An appraisal of a home would likely be based on an analysis that addressed such factors using what is known as the "sales comparison" method of appraisal.

A person who seeks to purchase vacant land for development of multiple building sites, however, is not so concerned with the sale price of other vacant land parcels, except perhaps to use the same for negotiating strategy with the seller. The buyer of vacant land to be developed for multiple building sites is concerned with the number of lots that can legally and physically be developed on the vacant land; the cost of constructing roads, utilities and other improvements that are necessary for the development; the price that is likely to be obtained for the lots after they are developed; the demand for such lots; the length of time that will be necessary to sell all of the lots; and the profit that will be realized after all the lots are sold. An appraisal of vacant land based on an analysis of these factors is known as the "subdivision development" method or "subdivision development analysis."

Certain governmental bodies, including the Michigan Department of Transportation ("MDOT"), have sought trial court rulings that "subdivision development analysis" is inadmissible in a condemnation case in the state courts of Michigan. Such contention would seem no longer to be viable as a result of the ruling in *MDOT v Weaver*[1] and the denial of MDOT's application for leave to appeal to the Michigan Supreme Court.[2] An unpublished opinion of the Court of Appeals is, of course, not precedentially binding under the rule of stare decisis;[3] however, *MDOT v Weaver* may be persuasive if cited because the opinion arguably satisfied certain of the requirements for publication.[4] Denial of an application for leave to appeal, likewise, is not to be regarded as precedent,[5] but in its order of denial the Supreme Court stated that the denial was issued "because we are not persuaded that the questions presented should be reviewed by this Court."[6]

The Fifth Amendment to the United States Constitution guarantees property owners the right to just compensation when a governmental body takes property for a public use. Every Michigan Constitution has had a similar clause and the current Constitution provides that "[p]rivate property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law."[7]

The Michigan Supreme Court has elaborated upon the meaning of the term "just compensation" under Michigan's 1963 Constitution in the case of *Silver Creek Drain District v Extrusions Division, Inc*.[8] In doing so, the Court focused on the historical determination of the meaning of that term:

> The meaning of "just compensation" cannot be discerned merely by a careful reading of the phrase. The words themselves, as the Court of Appeals found, just do not inform a court about the potential complexity and variety of factors to be considered in determining value. . . .
>
> Throughout our history and clearly by the 1960s, it was uncontroversial that a determination of "just compensation" required the consideration of all the multiplicity of factors that go into making up value. In the nineteenth century, while summarizing just compensation and its meaning in American constitutional law, Michigan Supreme Court Justice THOMAS M. COOLEY, in his treatise *The General Principles of Constitutional Law in the United States of America*, said:

* Arthur C. Spalding is a 1968 graduate of Wayne State University Law School. He became a member of Rhoades McKee in Grand Rapids after graduation and is now "of counsel." His practice is concentrated in condemnation, zoning and other real estate-related litigation. Mr. Spalding is a member of the Eminent Domain Committee of the Real Property Law Section and represented the Weavers in *MDOT v Weaver*.

> The rule by which compensation shall be measured is not the same in all cases, but is largely affected by the circumstances. If what is taken is the whole of what the owner may have lying together, it is clear that he is entitled to its value, judged by such standards as the markets and the opinions of witnesses can afford, and that this, except in extraordinary cases, must be the full measure of his injury.

The United States Supreme Court has had a similar and unvarying view of this matter, holding in [1890] . . . that the value of land must include "every . . . element entering into its cash or market value, as tested by its capacity for any and all uses . . . ." Then, again, in 1933, the Supreme Court held that "the requirement that 'just compensation' shall be paid is comprehensive and includes all elements . . . ." The calculation is to "include any element of value that [property] might have by reason of special adaptation to particular uses." Yet again in 1956, the high court held that just compensation includes all elements of value that inhere in the property . . . ."

Michigan's understanding of just compensation has been identical in all relevant particulars. . . . Thus, in our law, "just compensation" was a legal phrase of art in 1963 that meant, and still means, that the proper amount of compensation for property takes into account all factors relevant to market value.[9]

As the Michigan Supreme Court explained in *In Re Widening of Gratiot Avenue*: "Many technical rules have been promulgated for determining value, none of which is important. The determination of value is not a matter of formulas or artificial rules, but of sound judgment and discretion based upon a consideration of all the relevant facts in a particular case."[10] The Court, in *Silver Creek Drain District*,[11] emphasized that it had reiterated the general rule found in *Dep't of Transportation v VanElslander*, where it described what is relevant to just compensation as "any evidence that would tend to affect the market value of the property as of the date of condemnation . . . ."[12] The Michigan Court of Appeals has stated in *State Highway Commission v Minckler* that: "fair market value is found by considering and evaluating all the factors and possibilities that would have affected the price which a willing buyer would have offered to a willing seller for the land under the circumstances."[13] Jury instructions used in Michigan trial courts for many years have, in part, defined "*market value*" as buying property "with knowledge of all of the uses and purposes to which it is adapted" and "*highest and best use*" as "the most profitable and advantageous use the owner may make of the property."[14] Thus, we see that the range of evidence that is admissible to demonstrate "*just compensation*" is indeed the consideration of all the multiplicity of factors that make up the value of property.

In *MDOT v Weaver*, the expert witnesses/appraisers for both the Weavers and MDOT agreed that the highest and best use of the Weavers' vacant land was for subdivision development. They all testified at trial that such a venture was not speculative. They all agreed that streets and utilities already existed that would obviate the need for their construction. The trial court allowed the Weavers' expert witness to testify as to the value of the Weavers' property using subdivision development analysis.

The trial court denied MDOT's two pre-trial motions in limine. MDOT's first motion in limine, for which the trial court conducted an evidentiary hearing, sought to preclude the admissibility of subdivision development analysis as a matter of law. In response, the Weavers offered the testimony of an expert appraiser, who was a Member of the Appraisal Institute (an "MAI"), regarding the reliability of the "principal and method" of subdivision development analysis. The trial court also denied MDOT's second motion in limine, which argued that the Weaver's expert witness had misapplied the rules applicable to subdivision development analysis. The Court of Appeals, in its per curiam opinion, affirmed the trial court's rulings and specifically held that subdivision development analysis is admissible through an expert appraiser in a condemnation case and "to the extent that [one] argues the subdivision development method itself is improper, [that] argument has no merit."[15]

A trial court's decision to admit or exclude evidence is reviewed by an appellate court for an abuse of discretion.[16] Relevance is the threshold of admissibility and evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.[17] Thus, any evidence that would tend to affect the market value of the property as of the date of condemnation is relevant.[18] In this regard, *The Appraisal of Real Estate*,[19] published by the Appraisal Institute, recognizes that subdivision development analysis can provide useful and reliable information if appropriate steps are taken to assure that it is based upon adequate factual data. Similarly, *Subdivision Analysis*, also published by the Appraisal

Institute,[20] recognizes subdivision development analysis as a legitimate form of analysis to determine the raw land value of proposed subdivisions.

In *MDOT v. Weaver*, MDOT asserted that a majority of jurisdictions throughout the country have held that appraisals using subdivision development analysis should be inadmissible in evidence in condemnation cases. For example, MDOT quoted from the Virginia Supreme Court in what is perhaps the most cynical statement by an appellate court that this writer has encountered:

> The trial court cannot be too careful in excluding evidence of this character, as witnesses can always be found who will, in their imagination, cover the most hopelessly unmarketable vacant land in the neighborhood with apartment houses filled with desirable tenants, and with the aid of a little figuring, capitalize the prospective net income at ten times the actual value of the land.[21]

In contrast, the Sixth Circuit Court of Appeals has recognized the legitimacy of subdivision development analysis:

> There is some authority for the proposition that valuation based on the lot method of appraisal should never be admitted in condemnation cases involving unimproved raw land. The Government would apparently have us adopt such an exclusionary rule in this case. We think the better view, however, is that a lot method appraisal can be admitted in appropriate cases if the proponent offers credible evidence of the costs of subdivision – e.g., the expense of clearing and improving the land, surveying and dividing it into lots, advertising and selling, holding it, and paying taxes and interest until all lots are sold. Juries in condemnation cases should be permitted to consider any factors "that might fairly be brought forward and given substantial weight in bargaining between an owner willing to sell and a purchaser desiring to buy." The potential value of land if subdivided could well be considered by a willing buyer and a willing seller where subdivision is a reasonable possibility and the costs of subdivision are not speculative or uncertain.[22]

If property has value for sale as building lots, it would be a very harsh rule which would deny the owner the benefit accruing by reason of having property so favorably located. It is proper that each case should be considered under its own peculiar circumstances. Exceptional circumstances will modify even the most carefully guarded rule.

It has also been argued that testimony by an expert appraiser using subdivision development analysis was deemed inadmissible in Michigan courts, as a matter of law, in a condemnation case in Michigan more than 80 years ago. In *City of Detroit v Hartner*,[23] the City of Detroit condemned property owned by the Hartners for use as a municipal park. At trial, the Hartners offered witnesses who projected a plat of the acreage to show its present value for the purposes for which it could be used. The trial judge instructed the jury that there were certain contingencies that must arise before the owner realizes on it, such as marketing costs, investment, improvements and many other things. Review of the jury instruction given by the trial judge and quoted by the Supreme Court is essential to the understanding of the holding.

> Now the rule of law is this: What is the present full, fair market price of the property for the best use it can be used. Now the owners of this property are entitled to the present, full, fair, market price of the property for the best purposes for which it can be used, and, as I said before, I think it can be fairly inferred in this case that its best use is to plat it and sell the lots at retail. In other words, it will bring more money from that than from any other use they can put it to. Now that is what they claim.
>
> * * *
>
> In placing a value upon this property, you place the value just as you find it now, contemplating all the purposes for which it can be used best, giving it the value that it would sell for under this test, contemplating the best use that can be made of it.
>
> The purpose of allowing the witnesses to go on and project into the future a plat of the acreage out there was to show not only the present value, but to show its present value for the purposes for which it could be used. Now you can readily see that when a man has ten acres of land and he is going to plat it, there are certain contingencies that must arise before he realizes on it. There is the cost of putting it on the market. There is the investment. There are many things that you cannot tell just how they will turn out. Maybe they will be this, and maybe they will be that. It is, to some extent, more or less of a speculation as to just exactly what a man would realize in dollars and cents at a certain period when he has put in improvements and changed the character and aspect of his property up there. So you see, gentlemen of the jury, if you roam off

> into that field, you are in a field of uncertainty. You should only take that testimony and that projected platting and selling and the income from it, to ascertain what you would pay for it in its naked state as acreage before you started to do it. Therefore, when the question was asked, what is that worth an acre now as it stands for the purposes for which is can be used best, platting, -- that is the basis of your calculation.[24]

The Hartners claimed this jury instruction was too narrow. The Supreme Court, however, stated that: "The rule seems to be well settled in accordance with the instruction given by the trial judge . . . ."[25]

Based on the testimony of their witnesses, the Hartners had sought an award of $208,000. Such testimony, as reflected in the instruction to the jury by the trial judge, included the "cost of putting it on the market," "the investment," "many things that you cannot tell just how they will turn out," and "improvements [which] changed the character and aspect of his property."[26] The jury decided that the Hartners were entitled to only $116,341.51. The Hartners, not the City of Detroit, appealed the jury verdict, claiming that they were losing the benefit of platting the property themselves, selling it and receiving the profits of such sales. The Supreme Court noted that the jury had apparently considered and rejected the Hartners' appraisal and, in a unanimous opinion, held that: "The compensation awarded by the jury is within the evidence submitted and cannot be disturbed. We find no reversible error."[27]

Quoting from *Pennsylvania Railroad Co v Cleary*,[28] *Hartner* further explained that the jury's proper role was to determine "what a present purchaser would be willing to pay for [the property] in the condition it is now in."[29] As the Pennsylvania Supreme Court stated in *Cleary*: "it is the tract, and not the lots into which it might be divided, that is to be valued."[30] Thus, *Hartner* clearly drew the distinction between what a buyer "would pay for [the land] in its naked state as acreage"[31] and the valuation of lots that a speculator "might be able to realize out of a resale in the future."[32]

While not specifically describing it as such, *Hartner* was dealing with testimony based on subdivision development analysis, while *Cleary* was dealing with the valuation of lots that would result from a platting. In effect, *Cleary* was dealing only with the revenue side, while *Hartner* dealt with both the revenue and expenses associated with lot development. Neither court specifically addressed the issue of "profits," which are sometimes discussed in opinions from other jurisdictions, but the deduction of "entrepreneurial profit," as is suggested by *The Appraisal of Real Estate*, is an extension of *Hartner* that favors a condemning body.

The *Hartner* trial court allowed the jury to consider subdivision development evidence. This decision was sustained by the Michigan Supreme Court. The holding in *Hartner* is consistent with the subsequent holding of the Michigan Supreme Court in *VanElslander* and *Silver Creek Drain District*, which opinions broadly interpret the evidence that may be offered in a condemnation case to include all elements of value that inhere in the property and any evidence that tends to affect the market value of property.

It has been argued that the opinions in *Dep't of Conservation v Connor*[33] and *State Highway Commissioner v Snell*,[34] both citing *Hartner*, stand for the proposition that the development approach is per se inadmissible. In *Connor*, the trial court admitted evidence concerning the resale value of timber found on property being acquired via condemnation. The Supreme Court noted that the defendant/property owner's experts' testimony was less than credible, surmised that the jury may not have believed the defense's obviously inflated calculations, but nevertheless found that the jury's verdict was within the acceptable limits (i.e., lower than the defendants' experts, but higher than the plaintiff's). Therefore, like *Hartner*, *Connor* affirmed the decision of the jury which had heard and rejected the evidence concerning development analysis.

Snell simply misreads *Hartner*. In *Snell*, the property owner sought to introduce development analysis testimony regarding the cost of building a service road. Summarizing *Hartner*, *Snell* noted: "The [*Hartner*] court did not allow the jury to consider the various costs involved in platting and developing the property."[35] This statement was not correct. The *Hartner* jury was allowed to consider all of the subdivision development analysis testimony at trial and its decision was upheld on appeal.

It has been claimed that the Court of Appeals acknowledged MDOT's interpretation of *Hartner* in *City of Detroit v King*.[36] This claim is incorrect. The Court of Appeals, in *King*, merely acknowledged that the City made an assertion based on *Hartner*, but the Court proceeded to say "this is not such a case."[37]

The Michigan Rules of Evidence, and those cases examining the use of expert testimony, support the

proposition that an appraisal of vacant land, based upon subdivision development analysis, should be placed before a jury, whose responsibility it is to determine how much weight and credibility the testimony is afforded. MRE 702 governs the admissibility of expert testimony and the trial court's "gatekeeping" role and grants the trial court the discretionary authority, reviewable for its abuse, to determine reliability in light of the peculiar facts and circumstances of the particular case.[38]

Although market participants cannot foresee the future, it is unrealistic to believe that market participants do not attempt to prognosticate the future when estimating the value of real property. One would never purchase income-producing property if a belief did not exist as to the quantity and quality of an expected future income stream. Nor would a knowledgeable vacant land developer ever consummate a purchase of vacant land without considering and evaluating all of the elements of subdivision development analysis. To argue otherwise is to ignore market reality. Subdivision development analysis recognizes that market participants, although not omniscient, would consider the entire mass of information affecting the market value of the property prior to a transaction. Likewise, expert testimony in a condemnation case must examine all the relevant information.

How would a prospective buyer of vacant land, knowing the highest and best use was for subdivision development, value such property? How would a knowledgeable seller, knowing how a buyer could develop a property, establish a selling price? It is not unreasonable to surmise, under such circumstances, that both a knowledgeable buyer and a knowledgeable seller would utilize subdivision development analysis to assist them in arriving at the fair market value of the property for purposes of a transaction. The profit to be realized from such a development is extracted before estimating the land value. The "profit deduction" step is a necessary corollary to subdivision development analysis. To the extent that any owner of vacant land must accomplish the development of such property by sale to a "developer," they have "lost" the so-called developer's profit and it is not recoverable as just compensation in a condemnation case. Notwithstanding the loss of developer's profit, property owners are entitled to receive the "highest" price the property will bring when sold to a buyer knowledgeable of all of the uses and purposes to which the property is adapted and for which it is capable of being used.[39]

The Appraisal of Real Estate, Subdivision Analysis, opinions of the United States Supreme Court and the Sixth Circuit Court of Appeals, proper application of the Michigan Supreme Court's opinion in *Hartner*, and now the opinion and orders of the Court of Appeals and Supreme Court in *MDOT v Weaver* all support the proposition that subdivision development analysis is recognized in Michigan as a reliable method to determine the valuation of vacant land that is best suited for development into a subdivision and that subdivision development analysis is admissible through an expert witness in a condemnation case.

Endnotes

1. 2006 Mich App LEXIS 2055 (Mich. Ct. App. June 27, 2006) (unpublished per curiam op, Docket No. 257798, 257799, 258087, 258088).
2. 477 Mich 997; 725 NW2d 668 (2007).
3. MCR 7.215(C)(1).
4. MCR 7.215(B)(3, 4, & 5).
5. MCR 7.321.
6. *Weaver*, 477 Mich at 997.
7. Const 1963, art 10, § 2.
8. 468 Mich 367; 663 NW2d 436 (2003).
9. *Id*. at 375-79 (citations omitted).
10. *In re Widening of Gratiot Avenue*, 294 Mich 569, 574; 293 NW 755, 757 (1940).
11. *Silver Creek Drain District*, 468 Mich at 379, n14.
12. 460 Mich 127, 129-30; 594 NW2d 841 (1999).
13. *State Highway Commission v Minckler*, 62 Mich App 273, 277; 233 NW2d 527, 529 (1975) (citing *US v Miller*, 317 US 369, 374; 63 S Ct 276, 280; 87 L Ed 336, 343 (1943) and *State Highway Commissioner v Eilender*, 362 Mich 697, 699; 108 NW2d 755, 756 (1961)).
14. M CIV JI 90.06a; M CIV JI 90.09.
15. *Weaver*, 2006 Mich App LEXIS 2055, at *9-*10.
16. *Craig v Oakwood Hospital*, 471 Mich 67, 76; 684 NW2d 296, 303 (2004).
17. *VanElslander*, 460 Mich at 129.

18. *Id*. at 130.

19. Appraisal Institute, The Appraisal of Real Estate (12th ed. 2001).

20. Douglas D. Lovell & Robert J. Martin, Subdivision Analysis (Appraisal Inst., 1993).

21. *Fruit Growers v Alexandria*, 216 Va. 602, 608; 221 SE2d 157 (1976).

22. *United States v 47.3096 Acres*, 583 F2d 270, 271-72 (6th Cir. 1978).

23. *City of Detroit v Hartner*, 227 Mich 132; 198 NW 839 (1924).

24. *Id*. at 137-38.

25. *Id*. at 138.

26. *Id*. at 137-38.

27. *Id*. at 139.

28. 17 A 468; 125 Pa 442 (1889).

29. *Hartner*, 227 Mich at 139.

30. *Id*. at 138 (quoting *Cleary*, 125 Pa at 451).

31. *Id*. at 138.

32. *Id*. at 139 (quoting *Cleary*, 125 Pa at 451).

33. 316 Mich 565; 25 NW2d 619 (1947).

34. 8 Mich App 299; 154 NW2d 631 (1967).

35. *Id*. at 309.

36. 207 Mich App 169; 523 NW2d 644 (1994).

37. *Id*. at 184.

38. *Gilbert v Daimler Chrysler Corp*, 470 Mich 749, 780; 685 NW2d 391, 408 (2004); *Kumho Tire Company Ltd v Carmichael*, 526 US 137, 158; 119 S. Ct. 1167, 1179 (1999).

39. *Consumers Power Co v Allegan State Bank*, 20 Mich App 720, 744-45; 174 NW2d 578, 591 (1969).

TITLE INSURANCE POLICY ENDORSEMENTS

*by Michael A. Luberto**

Title insurance for lenders and buyers is an integral part of modern real estate transactions. Understanding title insurance endorsements first requires basic knowledge of what is covered by a title insurance policy.

Subject to its exclusions, exceptions and conditions, an owner's policy of title insurance insures against loss or damage due to:

1. Title being vested other than as stated in the policy;

2. Any defect in, or lien or encumbrance on, the title;

3. Unmarketable title;

4. No right of access to and from the land;

5. Violations or enforcement of zoning laws, the exercise of governmental police powers and the power of eminent domain, and governmental takings, to the extent recorded in the public records;

6. Fraudulent conveyances and preferential transfers (a) occurring prior to the transfer of title being insured, and (b) resulting from the failure to timely record the deed or give third parties constructive notice; and

7. A defect in, or lien on, title to the property created between the date of the policy and the recording date of the vesting deed.

In addition to the items insured by an owner's policy of title insurance, a loan policy of title insurance further insures against loss or damage due to:

8. The invalidity or unenforceability of the lien of the insured mortgage upon the title;

9. The priority of any lien or encumbrance over the lien of the insured mortgage;

10. Lack of priority of the lien of the insured mortgage over certain statutory liens for services, labor or material; and

11. The invalidity or unenforceability of any referenced assignment of the insured mortgage.[1]

Title insurance endorsements modify or extend insurance coverage provided under a title insurance policy. There are two types of endorsements. The first are endorsements that change the terms of the policy itself, such as the defenses, exclusions or terms and conditions of a policy.

The second type is those that provide affirmative insurance for specific matters. As policy forms have changed to exclude matters outside the scope of a title insurance policy, requests to change or delete certain exclusions or policy terms have followed. The title industry has responded by providing endorsements addressing these concerns.

This is a brief explanation of commonly requested endorsements. It is not a complete list of all endorsements, nor is it a detailed analysis of the endorsements. The underwriting standards for issuing the endorsements may vary among title insurers.

Some endorsements are available at no cost; others require payment of additional premium. The typical cost, if any, of the endorsements addressed in this article is indicated below. The actual cost of the endorsements may differ from insurer to insurer.

While many endorsements can be issued with either owner's policies or loan policies, the coverage given under an endorsement can vary slightly, depending upon the type of policy.

1. LOAN POLICY ENDORSEMENTS. Some endorsements, by their nature, apply only to loan policies of title insurance. They include:

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Construction Loan Disbursement Endorsement. A construction loan disbursement endorsement is issued with a loan policy insuring a construction mortgage. It limits the amount of insurance to the amount of the loan actually disbursed by the lender as of the date of the endorsement. This endorsement also insures against construction liens from work performed as of a date specified in the endorsement. This date is normally the date of the sworn statement provided with the borrower's request for a disbursement.

To issue this endorsement, the title insurer will review sworn statements and lien waivers from the owner or general contractor, as well as a copy of the construction budget. An updated examination of the title records is also necessary, in case construction liens have been recorded since the date of the last title examination.

Usury Endorsement (10-15% of the Basic Rate). Loan policies of title insurance do not insure losses suffered by a lender because the loan is found to be usurious. This endorsement modifies the policy by insuring a lender against losses sustained because of a determination that the mortgage is invalid or unenforceable because the loan violates state usury law.

Issuance of this endorsement typically requires the title insurer to review the loan documents. If the loan documents do not identify which state's usury laws apply, the analysis is more complicated because of rules governing the conflicts of laws.

Assignment of Rents Endorsement. Because of the frequency with which borrowers assign rents as collateral, lenders request assurance that there are no other assignments of rents with priority over the insured lender's assignment. The insurance provided by this endorsement is an assurance to the lender that there are no other prior recorded assignments of rents.

Variable Rate Mortgage Endorsement. This endorsement insures a lender against loss from a finding that the mortgage is invalid, unenforceable or has lost its priority because of changes in the interest rate on the debt secured by the mortgage. Lenders should request this endorsement when the loan secured by the insured mortgage bears interest at a variable rate. If the note secured by the insured mortgage provides for negative amortization, then the lender should request the **Variable Rate Mortgage–Negative Amortization** endorsement. In addition to the coverage provided by the Variable Rate Mortgage endorsement, it insures against loss arising from the invalidity, unenforceability or lost priority due to interest being charged on interest, and the addition of unpaid interest to the principal balance of the loan. The title insurer will usually require that the insured mortgage include references to the variable rate of interest on the loan, and the index by which changes in the interest rate are determined. These endorsements do not insure losses caused by violations of usury laws, truth-in-lending or other consumer credit protection laws.

Future Advance and Revolving Credit Endorsement (10% of Basic Rate). The standard loan policy excludes from coverage any debt created after the issuance of the policy. Lenders should seek a future advance and revolving credit endorsement when the insured mortgage secures a revolving credit and/or future advance mortgage.

Under Public Act 348 of 1990, advances made under a future advance mortgage have equal priority as an advance given on the date the mortgage was recorded regardless of whether the advance was optional or required.[2] However, Public Act 35 of 1992 mandates that a "residential future advance mortgage" does not have the priority status given under Public Act 348 of 1990, unless the first page of the mortgage conspicuously includes statements that "THIS IS A FUTURE ADVANCE MORTGAGE" and the maximum principal amount of the loan, other than protective advances.[3]

This endorsement insures against loss incurred as a result of the lien of the mortgage being invalid or unenforceable because of: (a) loan advances made by the lender after the date of the policy; (b) changes in the rate of interest on the loan; and (c) repayments made during the term of the revolving loan. It also insures against damages incurred because of a loss of priority of the lien of the mortgage because of future advances made by the lender, and due to changes in the rate of interest. Coverage under this endorsement is subject to federal tax liens, taxes and assessments, bankruptcy and liens of which the lender has actual knowledge before making a future advance. There is no coverage afforded if the borrower has conveyed title prior to the future advance, or if the lender has declared a default under the loan documents prior to the advance.

Mortgage Modification Endorsements (From $120 to 15% of Basic Rate). Because of the variety of modifications to commercial loans, there are a few different forms of mortgage modification endorsements. Not all modifications are the same, and there could be issues with the priority of the modified mortgage.

Commercial lenders should inform the title insurer of the modifications to the insured mortgage so the title insurer may fully assess whether the modification creates issues with respect to the priority of the insured mortgage over other liens or encumbrances. The title insurer will usually require that some evidence of the mortgage modification be recorded to give notice of the terms of the mortgage, as modified. If there are liens recorded between the effective date of the policy and the date of the mortgage modification, the title insurer will require a subordination agreement from the intervening lien claimant to establish the priority of the modified mortgage.

Doing Business Endorsement. This endorsement insures the lender against a loss incurred because of a final judicial determination that the lien of the mortgage is unenforceable because the lender did not comply with Michigan's "doing business" laws in making the loan.

First Loss Endorsement (10% of the Basic Rate). This endorsement is used in transactions involving a loan with mortgages on more than one site. It insures a lender that if there is an insured loss, the insurer's liability will be determined without requiring the lender to accelerate the maturity date of the entire debt and without requiring the lender to seek remedies against any other properties which may be collateral for the loan.

Tie-In Endorsement (15% of Basic Rate). This endorsement is also used where there is one loan secured by mortgages on more than one property. In those transactions, the lender and insurer must decide whether to have a single policy insuring all of the land or separate policies for each property. Separate policies for each property limit the amount of insurance for each parcel to the amount of insurance stated in each policy. On the other hand, one policy for all of the real estate aggregates the amount of insurance, with the potential result that the insured amount could be applied to just one insured property. This endorsement gives the lender the best of both worlds. In order to obtain this endorsement, the loan-to-value ratio on all of the mortgages must be the same. Separate policies are issued for each property, and the lender must determine the amount of insurance allocated to each property (which is not the total amount of the loan).

Letter of Credit Endorsement. This endorsement is useful where the credit facility includes a letter of credit. It insures the lender for future advances made under the letter of credit. The insured mortgage must state that it secures future advances made under the letter of credit.

Environmental Lien Endorsement. This endorsement insures the lender against damages caused by a lack of priority of the mortgage over: (a) an environmental protection lien, recorded as of the policy date; and (b) any environmental protection liens provided for by state statute except those which arguably provide for "super priority."[4]

Condominium Endorsement. This endorsement provides additional insurance to a lender whose mortgage encumbers a condominium unit. It insures against loss arising out of: (a) the failure of the unit and its common elements to be part of the condominium; (b) the failure of the condominium documents to comply with applicable law, to the extent it affects title to the unit and its common elements; (c) current violations of covenants in the condominium documents restricting the use of the unit (except those relating to environmental protection and those for which a notice of violation has been recorded); (d) the priority of any lien for unpaid assessments set forth in the condominium documents and statutes; (e) the failure of the unit and common elements to be entitled to be assessed for real estate tax purposes as a separate tax parcel; (f) the obligation to remove existing improvements due to encroachments; and (g) a failure of title to the subject property due to a right of first refusal exercised (or which could have been exercised) on the effective date.

Commercial Restrictions Endorsement ($250). This endorsement insures a lender against loss incurred from a final judgment denying the right to construct and maintain improvements on the property because of a violation of recorded restrictions. Issuance of this endorsement requires completion of the improvements by a specified date.

2. ENDORSEMENTS REQUIRING A SURVEY. Many endorsements, available for both loan policies and owner's policies, require the review of a current survey by the insurer. Those endorsements include:

Comprehensive Endorsement. The comprehensive endorsement (sometimes referred to as an "ALTA 9") insures against loss or damage resulting from: (a) violations of building or use restrictions; (b) exercise of rights to remove minerals; (c) encroachments; (d) certain liens for private assessments; and (e) certain options or rights of first refusal. The loan policy comprehensive endorsement also insures the priority of the insured mortgage as a result of a violation of recorded covenants, conditions or restrictions affecting the insured property.

The requirements for issuance of this endorsement will depend on the nature of the transaction, such as whether the land is improved, vacant or under construction. The title insurer will usually review a survey of the land and all recorded building and use restrictions affecting the land.

Survey Endorsement. This endorsement insures the insured that the land described in the policy is the same as the land described in a specified survey of the subject property. The survey must be certified by the surveyor to the title insurance agent and title insurer.

Location Endorsement. This endorsement insures that there is a specific type of improvement on the insured land, and the current address of the improvement.

Contiguity Endorsements. There are a couple of variations of this endorsement. Most commonly used in transactions involving multiple parcels, this endorsement insures that the various parcels of land described in the policy are contiguous to each other, and along which boundary lines. Another variation insures contiguity between the insured land and adjacent property that is not described in the policy. To obtain this endorsement, the title company will need certification from a surveyor that the separate parcels are contiguous to each other, without any gaps or overlaps.

Access Endorsements. Absent a specific exception for a lack of a right of access, a title insurance policy insures that there is a right of access to the insured land. The policy does not, however, insure a specific means of access to the insured land. Since the insured may be concerned about the exact means of access to land, it may request assurance from the insurer that the insured land either abuts a physically open public street or is benefited by an easement that abuts a physically open public street. These endorsements provide that assurance.

Because the title company must determine that the land abuts a physically open street or abuts an appurtenant easement that abuts a physically open street, it often will require a survey showing the location of the insured land and an abutting street or appurtenant easement.

Encroachment Endorsement. This endorsement insures against a final judgment ordering the removal of improvements due to an encroachment of improvements noted as an exception to the title policy. The insurer will consider several factors before deciding whether to issue the endorsement, including the type of encroaching improvement, the extent of the encroachment, and where the encroachment occurs (onto an easement, setback or adjacent property). This coverage is typically not given with owner's policies, as it would immediately provide the insured owner with a basis for a claim under the policy.

Rights, Final Judgment Endorsement. This endorsement insures against loss sustained as the result of a final judgment ordering the forced removal of improvements due to the exercise of specified rights (such as an easement) identified as an exception in Schedule B of the policy.

3. OTHER ENDORSEMENTS. Other common endorsements to both loan and owner's policies include:

Tax Parcel Endorsement. This endorsement insures that the land described in the policy is the same land assessed under a specific tax identification number. The title insurer must determine that the description of the insured land for tax purposes includes all of the insured land, and only the insured land.

Creditors' Rights Endorsement. Title insurance policies currently in use exclude from coverage certain claims based on fraudulent conveyances, preferential transfers, and in the case of loan policies, equitable subordination. The creditors' rights endorsement deletes these exclusions from the policy. The issuance of this endorsement can involve substantial risk, and is therefore carefully underwritten. The insured must disclose all of the details of a transaction if a creditors' rights endorsement is requested, including details of the use of any loan proceeds. Lenders should be aware that there are some transactions where the title insurer is not prepared to accept the risk of issuing a creditors' rights endorsement.

Zoning Endorsement (10-15% of Basic Rate). There are a few different zoning endorsements. One is for vacant land, and it insures the zoning classification of the insured land and the uses permitted under that zoning classification. The others, which are for improved land, also insure the zoning classification, permitted uses, and compliance with the ordinance as it relates to setbacks, area restrictions, and in some cases, parking space requirements. Issuance of these endorsements requires a review of the zoning map and ordinance, and written confirmation from the municipality that there

are no outstanding zoning violations. If it is determined that rezoning has resulted in the improvements on the subject property no longer being a conforming use, an endorsement may be obtained insuring that the structure is a permitted non-conforming use. To do so, the title insurer will require written confirmation from the municipality that the use is lawful, based upon a grandfather clause in the zoning ordinance.

Nonimputation Endorsements (10% of Basic Rate). These endorsements are issued when a partnership, corporation or limited liability company is experiencing a change in its ownership. These endorsements are usually requested by an incoming owner because it does not want the knowledge of the existing owners to be imputed to it. Otherwise, the insurer could deny liability for a loss because the title defect is one known by the insured.

Date Down Endorsement. This endorsement changes the effective date of the policy to a more current date. It also amends the policy to make exception for matters recorded since the previous effective date of the policy.

Arbitration Endorsement. This endorsement eliminates the policy provision allowing the insured or the insurer to demand arbitration of disputes covered by policies with an amount of insurance under $2,000,000.

4. CONCLUSION. Endorsements to title insurance policies provide the insured with improved coverage, often at no, or relatively modest, cost. Here are some things to consider when requesting title insurance endorsements:

A. Sometimes title insurance endorsements are requested shortly before closing, which can put the title insurer in the position of having to deny issuing the endorsement because it is unable to obtain or review the required information. Ideally, endorsements are requested when the title commitment is ordered, or with enough time for the title insurer to obtain and evaluate the information necessary to underwrite the requested endorsement. Delays in closing can be avoided as long as the parties and their attorneys anticipate and communicate the concerns of the prospective insured. The zoning, survey and contiguity endorsements, for example, require a review of a survey or other information that is not in the public record and not readily available to a title insurer. Although requests for many endorsements are not uncommon, it is important to consider and understand what kind of information a title company may require before it is able to issue the endorsements.

B. Which endorsements you request should be carefully considered. Identify potential risks in the particular transaction, and then consider whether that risk can be managed through a particular endorsement. Requesting numerous endorsements without evaluating if they will cover an identified risk can result in delays and increased costs.

C. The State of Michigan's Office of Financial and Insurance Services regulates the forms of title insurance policies and endorsements. As such, title insurers must issue endorsements in the forms filed with the State of Michigan. The requested endorsements should be distributed to the insured and their attorney in advance of the closing, so they can review the insurance provided by the endorsement.

Endnotes

1. ALTA Owner's Policy of Title Insurance (6-17-06) and ALTA Loan Policy of Title Insurance (6-17-06).
2. MCLA 565.902.
3. MCLA 565.903a.
4. MCL 324.11101 *et seq*., MCL 324.20101 *et seq*., and MCL 3324.21301 *et seq*.

LEGISLATION AFFECTING REAL PROPERTY

by *Jerome P. Pesick and Jason C. Long*

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

The Section has taken Formal Positions on the Following Pending Legislation

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

HB 5032 (*Land use, zoning and growth management*): Land use; zoning and growth management; zoning enabling act; make corrective and technical revisions. Amends secs. 102, 103, 202, 208, 301, 401, 601, 604, 606, and 702 of 2006 PA 110 (MCL 125.3102 *et seq*.).

The Section opposes HB 5032, which revises the Michigan Zoning Enabling Act, MCL 125.3102 *et seq*., for reasons including that the bill would create differing time periods for appeals from county and township zoning boards of appeal than those applicable to appeals from city and village boards of appeal, and would alter the power of courts reviewing decisions by zoning boards of appeal in a manner that is inconsistent with prior Michigan law.

HB 4249 (*Property, other; property tax, other*): Property; other; adverse possession of certain property; prohibit if property taxes are paid by title owner. Amends sec. 5867 of 1961 PA 246 (MCL 600.5867) and adds sec. 5867a. 02/14/2007 -- printed bill filed 02/14/2007.

The Section opposes HB 4249 for reasons including that the bill does not require the person against whom a claim for adverse possession is being asserted to be the title holder of the property at issue. As such, the bill creates the potential for injustice by basing title on taxpayer status, rather than principles of title and longstanding doctrines of real estate law. Furthermore, the bill does not address "tacking" and other issues inherent in resolving a dispute involving a claim of adverse possession. In certain circumstances, this bill would also negate the doctrine of acquiescence, which for well over 100 years has been an effective method for resolving boundary disputes, including boundary disputes involving claims of adverse possession. Finally, the bill would further work an injustice under circumstances where, for tax parcel inventory purposes, land has been assigned by a local assessor to a taxpayer who did not otherwise have, or previously claim, any right of ownership to the parcel.

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

2007 PA 58. This Act amends the Inspection of Records and Files Act, MCL 565.551, to permit a register of deeds to remove or obscure, or require an individual to remove or obscure, all or at least the first five digits of a social security number in the reproduction of a recorded instrument before the individual may take a copy of the instrument. The bill also permits an individual whose social security number appears in a recorded instrument to request that a register of deeds remove or obscure a portion of his or her social security number from a copy of the recorded instrument.

The full text of this Act is available online at http://www.legislature.mi.gov/documents/2007-2008/publicact/htm/2007-PA-0058.htm.

2007 PA 57. This Act amends the Recording Judgment Affecting Title to Realty Act, MCL 565.401, to provide that a register of deeds cannot receive a judgment for recording that contains a social security number unless at least the first five digits of the number are removed or obscured from the judgment. A register of deeds may receive a judgment containing a social security number, however, if federal or other state law requires that the number appear in the judgment.

The full text of this Act is available online at http://www.legislature.mi.gov/documents/2007-2008/publicact/htm/2007-PA-0057.htm.

2007 PA 56. This Act amends the Recording Requirements Act, MCL 565.201 *et seq*., which prescribes conditions for the execution of instruments to be recorded with a register of deeds. The conditions apply to an instrument by which title to or any interest in real estate is conveyed, assigned, encumbered, or otherwise disposed of. Under this Act, beginning on September 12, 2007 or, for an instrument presented to a register of deeds by the Michigan Department of Treasury, beginning on April 1, 2008, the conditions include a requirement that the first five digits of any social security number appearing in or on the instrument be obscured or removed. *See* MCL 565.201.

The full text of this Act is available online at http://www.legislature.mi.gov/documents/2007-2008/publicact/htm/2007-PA-0056.htm.

2007 PA 55. This Act amended the Records of Deeds and Other Conveyances Act, MCL 565.581 *et seq*., which authorizes the board of supervisors of a county that is attached to another county for judicial purposes, to direct its register of deeds to record a complete copy of all deeds, mortgages, powers of attorney, or other instruments relating to the title of land in the county and on record in the county to which it is attached. Under this Act, if the register of deeds provides a person with a copy of an instrument from a book of records that contains a social security number, the register of deeds may obscure or remove all or at least the first five digits of the number from the copy. An individual whose social security number is contained in one or more instruments in a county's books of record may request that the register of deeds obscure or remove all or at least the first five digits of the number from copies made of those instruments by recording an affidavit identifying the instruments' liber and page numbers. The Act also specifies that the term "books" includes a computerized recording system for instruments relating to the title of land. *See* MCL 565.581.

The full text of this Act is available online at http://www.legislature.mi.gov/documents/2007-2008/publicact/htm/2007-PA-0055.htm.

2007 PA 54. This Act amended the Recording Affidavits Affecting Real Property Act, MCL 565.451 *et seq*., to prohibit a register of deeds from receiving an affidavit for recording unless the first five digits of any social security number appearing in or on the affidavit are obscured or removed. *See* MCL 565.452.

The full text of this Act is available online at http://www.legislature.mi.gov/documents/2007-2008/publicact/htm/2007-PA-0055.htm.

2007 PA 53. This Act amended the Recording of Deeds, Mortgages, and Instruments of Record Act, MCL 565.491 *et seq*., to prohibit a register of deeds from receiving an instrument or reproduction of an instrument for recording unless the first five digits of any social security number appearing in or on the instrument or reproduction are obscured or removed. The prohibition is effective on September 6, 2007, or, for an instrument presented to the register of deeds by the Michigan Department of Treasury, on April 1, 2008. *See* MCL 565.491.

The full text of this Act is available online at http://www.legislature.mi.gov/documents/2007-2008/publicact/htm/2007-PA-0055.htm.

Bills Introduced Since the Last Issue of the *Review*

SB 700 (*Land use, zoning and growth management; Vehicles, equipment; Vehicles, automobiles*): Land use; zoning and growth management; local ordinance banning automotive collecting and restoration activities; prohibit. Amends sec. 204 of 2006 PA 110 (MCL 125.3204). 09/04/07 -- Referred to committee on local, urban and state affairs.

SB 749 (*Liens, foreclosure; liens, mortgages; consumer protection, other; military affairs, other*): Liens; foreclosure; prohibition of foreclosure of mortgages given by certain active military personnel; provide for. Amends 1961 PA 236 (MCL 600.101-600.9947) by adding secs. 3185 and 3285. 09/06/07 -- Referred to committee on senior citizens and veterans affairs.

SB 826 (*Financial institutions, mortgage brokers and lenders; occupations, individual licensing and regulation*): Financial institutions; mortgage brokers and lenders; regulation of and registration of mortgage loan officers; create mortgage industry advisory board. Amends sec. 33 of 1987 PA 173 (MCL 445.1683). Tie-bar with HB 5287, 5288, 5289, 5290, 5291; SB 827, 828, 829, 830, 831, 832, and 833. 11/01/2007 -- Placed on order of third reading with substitute S-1.

SB 827 (*Criminal procedure, sentencing guidelines; financial institutions, mortgage brokers and lenders; occupations, appraisers; consumer protection, other*): Criminal procedure; sentencing guidelines; violation of mortgage company act or secondary mortgage loan act; reflect reduction of penalty to misdemeanor. Amends sec. 14h, ch. XVII of 1927 PA 175 (MCL 777.14h). Tie-bar with HB 5287, 5288, 5289, 5290, 5291; SB 826, 828, 829, 830, 831, 832, and 833. 11/01/2007 -- Placed on order of third reading with substitute S-1.

SB 828 (*Financial institutions, mortgage brokers and lenders; occupations, individual licensing and regulation*): Financial institutions; mortgage brokers and lenders; regulation and registration of mortgage loan officers; revise definition section of mortgage broker act. Amends title and sec. 1a of 1987 PA 173 (MCL 445.1651a). Tie-bar with HB 5287, 5288, 5289, 5290, 5291; SB 826, 827, 829, 830, 831, 832, and 833. 11/01/2007 -- Placed on order of third reading with substitute S-1.

SB 829 (*Financial institutions, mortgage brokers and lenders; occupations, individual licensing and regulation*): Financial institutions; mortgage brokers and lenders; regulation and registration of mortgage loan officers; establish registration renewal process. Amends 1987 PA 173 (MCL 445.1651-445.1684). Tie-bar with HB 5287, 5288, 5289, 5290, 5291; SB 826, 827, 828, 830, 831, 832, and 833. 11/01/2007 -- Placed on order of third reading with substitute S-1.

SB 830 (*Financial institutions, mortgage brokers and lenders; occupations, individual licensing and regulation*): Financial institutions; mortgage brokers and lenders; regulation and registration of mortgage loan officers; establish effect of surrender, revocation, or suspension of registration. Amends sec. 8 of 1987 PA 173 (MCL 445.1658). Tie-bar with HB 5287, 5288, 5289, 5290, 5291; SB 826, 827, 828, 829, 831, 832, and 833. 11/01/2007 -- Placed on order of third reading with substitute S-1.

SB 831 (*Financial institutions, mortgage brokers and lenders; occupations, individual licensing and regulation*): Financial institutions; mortgage brokers and lenders; regulation and registration of mortgage loan officers; establish fees. Amends sec. 10 of 1987 PA 173 (MCL 445.1660). Tie-bar with HB 5287, 5288, 5289, 5290, 5291; SB 826, 827, 828, 829, 830, 832, and 833. 11/01/2007 -- Placed on order of third reading with substitute S-1.

SB 832 (*Financial institutions, mortgage brokers and lenders; occupations, individual licensing and regulation*): Financial institutions; mortgage brokers and lenders; regulation and registration of mortgage loan officers; prohibit certain activities by loan officers. Amends sec. 22a of 1987 PA 173 (MCL 445.1672a) and adds sec. 22b. Tie-bar with HB 5287, 5288, 5289, 5290, 5291; SB 826, 827, 828, 829, 830, 831, and 833. 11/01/2007 -- Placed on order of third reading with substitute S-2.

SB 833 (*Financial institutions, mortgage brokers and lenders; occupations, individual licensing and regulation*): Financial institutions; mortgage brokers and lenders; regulation and registration of mortgage loan officers; prohibit acting without registration and establish penalties and remedies for violating act. Amends sec. 29 of 1987 PA 173 (MCL 445.1679). Tie-bar with HB 5287, 5288, 5289, 5290, 5291; SB 826, 827, 828, 829, 830, 831, and 832. 11/01/2007 -- Placed on order of third reading with substitute S-1.

SB 835 (*Property tax, assessments*): Property tax; assessments; assessing procedures; revise. Amends sec. 24 of 1893 PA 206 (MCL 211.24). 10/17/07 -- Referred to committee on finance.

SB 886 (*Property tax, principal residence exemption; property tax, assessments; military affairs, other*): Property tax; principal residence exemption; active duty individual renting out principal residence while away; allow to retain exemption. Amends sec. 7dd of 1893 PA 206 (MCL 211.7dd). 11/08/2007 -- Referred to committee on finance.

SCR 20 (*Mortgages*): A concurrent resolution to urge the Michigan office of financial and insurance services to continue its participation in the states-based development of the Nationwide Mortgage Licensing System. 10/25/2007 -- Placed on order of resolutions.

HB 5109 (*Property tax, assessments*): Property tax, assessments; 7-year adjustment following transfer of ownership; provide for under certain circumstances; Amends sec. 27a of 1893 PA 206 (MCL 211.27a). 8/22/07 -- Printed bill filed.

HB 5183 (*Housing, landlord and tenants; income tax, property tax credit; housing, housing development authority*): Housing; landlord and tenants; service fee housing and the homestead property tax credit; require disclosure to tenants under certain circumstances.

Amends sec. 15a of 1966 PA 346 (MCL 125.1415a). 9/07/2007 -- Printed bill filed.

HB 5206 (*Housing, inspection*): Housing; inspection; period between inspections of multiple dwelling or rooming house rental units; revise to 6 years. Amends sec. 126 of 1917 PA 167 (MCL 125.526). 9/13/2007 -- Printed bill filed.

HB 5272 (*Consumer credit, predatory lending; local government, other; financial institutions, mortgage brokers and lenders*): Consumer credit; predatory lending; regulation of certain predatory lending practices by municipalities; allow. Amends secs. 14 and 15 of 2002 PA 660 (MCL 445.1644 and 445.1645). 9/29/2007 -- Printed bill filed.

HB 5286 (*Property tax, assessments*): Property tax; assessments; assessment of commercial rental property; revise. Amends sec. 34d of 1893 PA 206 (MCL 211.34d) and adds sec. 7ll. 10/11/2007 -- Printed bill filed.

HB 5287 (*Financial institutions, mortgage brokers and lenders; occupations, individual licensing and regulation*): Financial institutions; mortgage brokers and lenders; regulation and registration of mortgage loan officers; revise compensation provisions. Amends sec. 2 of 1987 PA 173 (MCL 445.1652). Tie-bar with HB 5288, 5289, 5290, and 5291. 10/11/2007 -- Printed bill filed.

HB 5288 (*Financial institutions, mortgage brokers and lenders; occupations, individual licensing and regulation*): Financial institutions; mortgage brokers and lenders; regulation and registration of mortgage loan officers; establish registration application process. Amends 1987 PA 173 (MCL 445.1651-445.1684) by adding sec. 2a. Tie-bar with HB 5288, 5289, 5290, and 5291. 10/11/2007 -- Printed bill filed.

HB 5289 (*Financial institutions, mortgage brokers and lenders; occupations, individual licensing and regulation*): Financial institutions; mortgage brokers and lenders; regulation and registration of mortgage loan officers; require notices when employment of loan officer is terminated. Amends 1987 PA 173 (MCL 445.1651-445.1684) by adding Sec. 2c. Tie-bar with HB 5288, 5289, 5290, and 5291. 10/11/2007 -- Printed bill filed.

HB 5290 (*Financial institutions, mortgage brokers and lenders; occupations, individual licensing and regulation*): Financial institutions; mortgage brokers and lenders; regulation and registration of mortgage loan officers; clarify authority of OFIS commissioner and revise administrative process concerning revocation or suspension of registration. Amends secs. 11 and 12 of 1987 PA 173 (MCL 445.1661 and 445.1662). Tie-bar with HB 5288, 5289, 5290, and 5291. 10/11/2007 -- Printed bill filed.

HB 5291 (*Financial institutions, mortgage brokers and lenders; occupations, individual licensing and regulation*): Financial institutions; mortgage brokers and lenders; regulation and registration of mortgage loan officers; revise provisions applicable to investigations by OFIS. Amends sec. 14 of 1987 PA 173 (MCL 445.1664). Tie-bar with HB 5288, 5289, 5290, and 5291. 10/11/2007 -- Printed bill filed.

HB 5292 (*Land use, zoning and growth management; courts, circuit court*): Land use; zoning and growth management; referees for litigation under the Michigan zoning enabling act; provide for. Amends 1961 PA 236 (MCL 600.101-600.9947) by adding sec. 2977. Tie-bar with HB 5293. 10/11/2007 -- Printed bill filed.

HB 5293 (*Land use, zoning and growth management; courts, circuit court*): Land use; zoning and growth management; qualifications of individuals designated as referees for certain litigation; provide for. Amends 1961 PA 236 (MCL 600.101-600.9947) by adding sec. 2978. Tie-bar with HB 5292. 10/11/2007 -- Printed bill filed.

HB 5294 (*Consumer credit, predatory lending; liens, mortgages; consumer protection, other*): Consumer credit; predatory lending; general revision to consumer mortgage protection act; revise title and general definitions. Amends title and secs. 1 and 2 of 2002 PA 660 (MCL 445.1631 and 445.1632). Tie-bar with HB 5295, 5296, 5297, 5298, 5299, 5300, 5301, 5302, and 5303. 10/11/2007 -- Printed bill filed.

HB 5295 (*Consumer credit, predatory lending; liens, mortgages; consumer protection, other*): Consumer credit; predatory lending; general revision to consumer mortgage protection act; prohibit certain lending practices. Amends secs. 3 and 4 of 2002 PA 660 (MCL 445.1633 and 445.1634). Tie-bar with HB 5294, 5296, 5297, 5298, 5299, 5300, 5301, 5302, and 5303. 10/11/2007 -- Printed bill filed.

HB 5296 (*Consumer credit, predatory lending; liens, mortgages; consumer protection, other*):

Consumer credit; predatory lending; general revision to consumer mortgage protection act; regulate rate spread and high-cost home loans and revise default provisions. Amends sec. 5 of 2002 PA 660 (MCL 445.1635) and adds sec. 4a. Tie-bar with HB 5294, 5295, 5297, 5298, 5299, 5300, 5301, 5302, and 5303. 10/11/2007 -- Printed bill filed.

HB 5297 (*Consumer credit, predatory lending; liens, mortgages; consumer protection, other*): Consumer credit; predatory lending; general revision to consumer mortgage protection act; revise provisions concerning notices and disclosures. Amends secs. 6 and 7 of 2002 PA 660 (MCL 445.1636 and 445.1637). Tie-bar with HB 5294, 5295, 5296, 5298, 5299, 5300, 5301, 5302, and 5303. 10/11/2007 -- Printed bill filed.

HB 5298 (*Consumer credit, predatory lending; liens, mortgages; consumer protection, other*): Consumer credit; predatory lending; general revision to consumer mortgage protection act; revise remedy provisions. Amends 2002 PA 660 (MCL 445.1631-445.1645) by adding secs. 7a and 7b. Tie-bar with HB 5294, 5295, 5296, 5297, 5299, 5300, 5301, 5302, and 5303. 10/11/2007 -- Printed bill filed.

HB 5299 (*Consumer credit, predatory lending; liens, mortgages; consumer protection, other*): Consumer credit; predatory lending; general revision to consumer mortgage protection act; revise claims and defenses in civil actions. Amends 2002 PA 660 (MCL 445.1631-445.1645) by adding secs. 7c and 7d. Tie-bar with HB 5294, 5295, 5296, 5297, 5298, 5300, 5301, 5302, and 5303. 10/11/2007 -- Printed bill filed.

HB 5300 (*Consumer credit, predatory lending; liens, mortgages; consumer protection, other*): Consumer credit; predatory lending; general revision to consumer mortgage protection act; revise authority of OFIS commissioner. Amends secs. 8 and 9 of 2002 PA 660 (MCL 445.1638 and 445.1639). Tie-bar with HB 5294, 5295, 5296, 5297, 5298, 5299, 5301, 5302, and 5303. 10/11/2007 -- Printed bill filed.

HB 5301 (*Consumer credit, predatory lending; liens, mortgages; consumer protection, other*): Consumer credit; predatory lending; general revision to consumer mortgage protection act; prescribe civil sanctions and penalties. Amends secs. 10 and 11 of 2002 PA 660 (MCL 445.1640 and 445.1641). Tie-bar with HB 5294, 5295, 5296, 5297, 5298, 5299, 5300, 5302, and 5303. 10/11/2007 -- Printed bill filed.

HB 5302 (*Consumer credit, predatory lending; liens, mortgages; consumer protection, other*): Consumer credit; predatory lending; general revision to consumer mortgage protection act; general applicability of act. Amends secs. 12 and 13 of 2002 PA 660 (MCL 445.1642 and 445.1643). Tie-bar with HB 5294, 5295, 5296, 5297, 5298, 5299, 5300, 5301, and 5303. 10/11/2007 -- Printed bill filed.

HB 5303 (*Consumer credit, predatory lending; liens, mortgages; consumer protection, other*): Consumer credit; predatory lending; general revision to consumer mortgage protection act; revise references to home loans in local preemption provisions. Amends secs. 14 and 15 of 2002 PA 660 (MCL 445.1644 and 445.1645). Tie-bar with HB 5294, 5295, 5296, 5297, 5298, 5299, 5300, 5301, and 5302. 10/11/2007 -- Printed bill filed.

HB 5304 (*Consumer credit, other; consumer protection, unfair trade practices; financial institutions, generally; financial institutions, credit unions*): Consumer credit; other; home loan protection act; require compliance by domestic credit unions. Amends 2003 PA 215 (MCL 490.101-490.601) by adding sec. 425. Tie-bar with HB 5294, 5295, 5296, 5297, 5298, 5299, 5300, 5301, 5302, and 5303. 10/11/2007 -- Printed bill filed.

HB 5305 (*Consumer credit, other; consumer protection, unfair trade practices; financial institutions, generally; financial institutions, banks*): Consumer credit; other; home loan protection act; require compliance by state banks. Amends 1999 PA 276 (MCL 487.11101-487.15105) by adding sec. 4206. Tie-bar with HB 5294, 5295, 5296, 5297, 5298, 5299, 5300, 5301, 5302, and 5303. 10/11/2007 -- Printed bill filed.

HB 5306 (*Consumer credit, other; consumer protection, unfair trade practices; financial institutions, generally; financial institutions, savings banks*): Consumer credit; other; home loan protection act; require compliance by state savings banks. Amends 1996 PA 354 (MCL 487.3101-487.3804) by adding sec. 435. Tie-bar with HB 5294, 5295, 5296, 5297, 5298, 5299, 5300, 5301, 5302, and 5303. 10/11/2007 -- Printed bill filed.

HB 5307 (*Financial institutions, mortgage brokers and lenders; consumer credit, other; consumer protection, unfair trade practices; financial institutions, generally*): Financial institutions; mortgage brokers and

lenders; home loan protection act; require compliance and impose additional duties with respect to borrowers. Amends sec. 22 of 1987 PA 173 (MCL 445.1672) and adds sec. 24a. Tie-bar with HB 5294, 5295, 5296, 5297, 5298, 5299, 5300, 5301, 5302, and 5303. 10/11/2007 -- Printed bill filed.

HB 5308 (F*inancial institutions, mortgage brokers and lenders; consumer credit, other; consumer protection, unfair trade practices; financial institutions, generally*): Financial institutions; mortgage brokers and lenders; home loan protection act; require compliance by mortgage brokers in secondary market and impose additional duties with respect to borrowers. Amends sec. 24 of 1981 PA 125 (MCL 493.74) and adds sec. 24a. Tie-bar with HB 5294, 5295, 5296, 5297, 5298, 5299, 5300, 5301, 5302, and 5303. 10/11/2007 -- Printed bill filed.

HB 5309 (*Consumer credit, other; consumer protection, unfair trade practices; financial institutions, generally; financial institutions, savings and loan associations*): Consumer credit; other; home loan protection act; require compliance by savings and loan associations. Amends 1980 PA 307 (MCL 491.102-491.1202) by adding sec. 737. Tie-bar with HB 5294, 5295, 5296, 5297, 5298, 5299, 5300, 5301, 5302, and 5303. 10/11/2007 -- Printed bill filed.

HB 5310 (*Consumer credit, other; consumer protection, unfair trade practices; financial institutions, generally*): Consumer credit; other; home loan protection act; provide for enforcement in the Michigan consumer protection act. Amends sec. 3 of 1976 PA 331 (MCL 445.903). Tie-bar with HB 5294, 5295, 5296, 5297, 5298, 5299, 5300, 5301, 5302, and 5303. 10/11/2007 -- Printed bill filed.

HB 5319 (*Local government, other; housing, other; property, abandoned; property, other*): Local government; other; penalties for noncompliance with order; expand to include a blight violation under certain circumstances. Amends sec. 141b of 1917 PA 167 (MCL 125.541b). 10/17/07 -- Printed bill filed.

HB 5334 (*Property tax, principal residence exemption*): Property tax; principal residence exemption; prorated homestead exemption if filed after May 1; provide for. Amends sec. 7cc of 1893 PA 206 (MCL 211.7cc). 10/18/2007 -- Printed bill filed.

HB 5340 (*Civil procedure, foreclosure; liens, foreclosure; liens, mortgages; law, contracts*): Civil procedure; foreclosure; acceleration of balance due under mortgage; prohibit if foreclosure commenced within 18 months after payment default. Amends secs. 3110, 3120, 3204, and 3212 of 1961 PA 236 (MCL 600.3110 *et seq*.). 10/24/2007 -- Printed bill filed.

HB 5341 (*Construction, safety; construction, other; health, other; safety; fire; state agencies*): Construction; safety; requirement for carbon monoxide alarms to be installed in new residential structures; provide for. Amends 1972 PA 230 (MCL 125.1501-125.1531) by adding sec. 4d. 10/24/2007 -- Printed bill filed.

HB 5365 (*Property tax, appeals; property tax, tax tribunal*): Property tax; appeals; reimbursement of tax tribunal fees to individuals who win property tax appeal; provide for. Amends sec. 52 of 1973 PA 186 (MCL 205.752). 10/26/2007 -- Printed bill filed.

HB 5374 (*Income tax, credit; housing, landlord and tenants; energy, conservation*): Income tax; credit; credit for landlords who upgrade energy efficiency of residential rental property; provide for. Amends 1967 PA 281 (MCL 206.1-206.532) by adding sec. 273. 10/26/2007 -- Printed bill filed.

HB 5376 (*Consumer credit, other; financial institutions, generally; housing, other; state financing and management, funds*): Consumer credit; other; Michigan homeownership preservation fund; create, and finance with civil fines. Amends title and sec. 10 of 2002 PA 660 (MCL 445.1640). 10/29/07 -- Printed bill filed.

HB 5385 (*Property tax, assessments*): Property tax; assessments; transfer of ownership on conveyance of certain improved industrial property; provide exemption. Amends sec. 27a of 1983 PA 206 (MCL 211.27a). 10/31/2007 -- Printed bill filed.

HB 5430 (*Local government, public services; liens, other; property, leases; public utilities, municipal utilities*): Local government; public services; liens against property for unpaid water or sewer bills; extend exemption for leased property to tenancies at will or by sufferance. Amends sec. 5 of 1939 PA 178 (MCL 123.165). 11/13/2007 -- printed bill filed 11/09/2007.

HB 5433 (*Torts, property interests; torts, liability; property, other; torts, personal injury; torts, remedies*): Torts; property interests; duty of owners and possessors of property to protect business invitees against criminal activity; provide for. Amends 1846 RS 66 (MCL 554.131-554.139) by adding sec. 40. 11/13/2007 -- printed bill filed 11/09/2007.

HB 5436 (*Income tax, credit; energy, conservation; housing, landlord and tenants*): Income tax; credit; tax credits for homesteads with energy efficient property and participation in a net metering program; provide for. Amends 1967 PA 281 (MCL 206.1-206.532) by adding sec. 253. 11/13/2007 -- printed bill filed 11/09/2007.

HB 5451 (*Environmental protection, other; land use, land division*): Environmental protection; other; land division act; modify certain fees. Amends secs. 102, 117 and 118 of 1967 PA 288 (MCL 560.102 *et seq*.). Tie bar with HB 5450. 11/13/2007 -- printed bill filed 11/09/2007.

HB 5452 (*Environmental protection, other; housing, condominium*): Environmental protection; other; condominium act; modify certain fees. Amends sec. 71a of 1978 PA 59 (MCL 559.171a). Tie bar with HB 5450. 11/13/2007 -- printed bill filed 11/09/2007.

HJR CC (*Property tax, assessments; constitutional amendments, state*): Property tax; assessments; blighted property; amend constitution to allow assessment at different level. Amends sec. 3, art. IX of the state constitution. 10/11/2007 -- Printed joint resolution filed.

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

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

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

JUDICIAL DECISIONS AFFECTING REAL PROPERTY

by *Jerome P. Pesick and Jason C. Long*

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

The Section has taken Formal Positions on the Following Cases

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

Dep't of Transp. v. Tomkins 270 Mich App 153; 715 NW2d 363 (2006 Supreme Court Case No. 132983

This is a condemnation action in which the Court of Appeals concluded that a provision in the Uniform Condemnation Procedures Act ("UCPA"), MCL 213.51 *et seq*., is unconstitutional. The provision attempts to limit the factors that may be taken into account when determining the change in a property's market value, which is the basis for "just compensation" in eminent domain actions, to those factors that would be sufficient to create a claim for inverse condemnation:

> The general effects of a project for which property is taken, whether actual or anticipated, that in varying degrees are experienced by the general public or by property owners from whom no property is taken, shall not be considered in determining just compensation. A special effect of the project on the owner's property that, standing alone, would constitute a taking of private property under section 2 of article X of the state constitution of 1963 shall be considered in determining just compensation. MCL 213.70(2).

This language had been added to the UCPA in a package of 1996 amendments.

The Section believes that this language in the UCPA is inconsistent with established law governing the calculation of "just compensation" in eminent domain actions. Under that law, when a governmental agency takes property through eminent domain, determining just compensation requires considering all factors that affect the property's market value. Attempting to restrict condemned property owners to compensation for only those factors that, standing alone, would render a governmental agency liable for a taking in an inverse condemnation action is an unconstitutional limitation on property owners' right to just compensation.

Houdini Properties, L.L.C. v. City of Romulus Court of Appeals Case No. 266338

This case involves a property owner's appeal to circuit court from the Romulus Zoning Board of Appeals' (the "ZBA") decision to deny the owner a use variance. The property owner also filed a separate action alleging that the ordinance from which the owner sought a variance denied it substantive due process of law and effected a taking of its property without just compensation. The circuit court affirmed the ZBA in the appeal, and the owner applied for leave to appeal to the Court of Appeals. Next, the circuit court granted the City summary disposition in the constitutional action. The Court of Appeals affirmed the circuit court's decision, explaining that the constitutional claims arose directly from the ZBA denying the use variance. The Court of Appeals concluded that the constitutional claims therefore should have been joined in the appeal from the ZBA under MCR 2.203, and because they were not, they were barred by the doctrine of res judicata.

The Section believes that the courts' decisions that the constitutional claims had to be joined in the appeal from the ZBA are inconsistent with Michigan law. Since *Paragon Properties Co. v. City of Novi*, which required owners to seek a variance before a taking claim would be ripe, Michigan courts have held that the request for a variance to ensure ripeness is legally distinct from a claim that an ordinance is unconstitutional. Therefore, a trial court's decision affirming the denial of a variance

is not res judicata barring a taking or substantive due process claim. Likewise, an appeal from the denial of a variance is not required for a taking claim to become ripe because *Paragon's* requirement that the owner request a variance is to determine how the municipality will apply its ordinance in the first instance. Finally, an appeal from a ZBA decision is distinct from a constitutional challenge because a ZBA has no jurisdiction to address a constitutional claim in any event.

The Supreme Court has ordered oral argument on the property owner's application for leave to appeal. The Section is preparing an *amicus curiae* brief in support of its views in this case.

D.F. Land Development, L.L.C. v. Ann Arbor Twp.
Court of Appeals Case No. 275859

This case is pending in the Court of Appeals on leave granted. It involves property zoned for agricultural use; the owner's request to rezone the property for multi-family use was denied. The property owner alleged that the Township's refusal to rezone denied the owner substantive due process, and that the Township engaged in exclusionary zoning. The trial court held that the substantive due process claim was not ripe because the owner had not requested that the Township permit multi-family use of the property as a planned unit development and had not sought the minimum variance necessary to allow productive economic use of the property. Likewise, the trial court denied the exclusionary zoning claim on a ripeness rationale.

The Section is preparing an *amicus curiae* brief to explain that Michigan law does not require either claims that an ordinance violates substantive due process, or claims for exclusionary zoning, to meet the ripeness requirements under *Paragon Properties Co. v. City of Novi*.

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

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

Mazur v. Young
__ F3d __ (CA 6, 2007)

Issues: Whether under Michigan law the guarantor of a land contract is liable to the seller for any deficiency once the seller elects forfeiture as his remedy; Effect of the guaranty agreement; Whether the defendants assumed a lasting obligation to the plaintiff in the guaranty agreement continuing past forfeiture; Forfeiture as opposed to "release"; Consent; Effect of the defendants' consent to the discharge of the corporate buyer; Fairness; "Foreclosure plus."

Court: U.S. Court of Appeals Sixth Circuit
Judges: Moore and Daughtrey; Dissent – Shadur

In this diversity action governed by Michigan law, the court considered whether a land contract guarantor was liable to the seller for any deficiency once the seller elected forfeiture as his remedy. The court concluded that "a judgment for possession after forfeiture extinguishes the land contract, leaving no legal basis to pursue further claims against the guarantor." Thus, the court affirmed summary judgment for the defendants-guarantors because they were not liable.

The facts of this case involved the defendants finding a vacation home they wanted to purchase. One of the defendants contributed the down payment and the plaintiff purchased the property, taking out a mortgage for the rest of the purchase price. The parties agreed that the plaintiff would sell the property to a corporation, EBIS, of which one of the defendants was the sole shareholder. Under the terms of the land contract, EBIS was to pay the plaintiff according to the payment terms of the mortgage. The defendants entered into a guaranty contract with the plaintiff guaranteeing the performance of EBIS's covenants and obligations under the land contract. EBIS later stopped making payments on the land contract, and the plaintiff served EBIS and the defendants with a notice of forfeiture. The plaintiff and EBIS entered into a consent judgment in which the plaintiff took possession of the property, EBIS agreed that the land contract was forfeited, and EBIS waived redemption rights. The plaintiff later sued the defendants, alleging that they were liable as guarantors

for all damages resulting from EBIS's breach of the land contract. The guaranty agreement overrode the default contract rules regarding forfeiture, the plaintiff argued. The court held while a guaranty agreement is an independent contract, this alone did not create liability for the guarantor after the buyer was discharged and the defendants did not assume a lasting obligation to plaintiff in the guaranty agreement continuing past forfeiture. Forfeiture extinguished the land contract, meaning that the defendants, as guarantors, could not be held liable for damages due to breach of the extinguished contract.

Harbor Park Market, Inc. v. Gronda
__ Mich App __; __ NW2d __ (2007)

Issues: Whether the defendants' act of simultaneously submitting two purchase agreements to their attorney for his approval interfered with the condition precedent contained in the first signed purchase agreement.

Court: Michigan Court of Appeals
Judges: Murray, Hoekstra, and Sawyer

The court held that the defendants', the Grondas', act of simultaneously submitting two purchase agreements to their attorney for his approval did not interfere with the condition precedent contained in the first signed purchase agreement. Therefore, the trial court erred by granting judgment for the plaintiff and ordering specific performance of a contract for the sale of a liquor license and fixtures between the Grondas as sellers and the plaintiff, Harbor Market, as buyer.

The parties agreed, and the trial court found, that the attorney approval clause was a condition precedent to their contract. If the condition was not satisfied, there was no cause of action for a failure to perform the contract. But the Grondas, as promisors, could not avoid liability on the contract for the failure of a condition precedent where they caused the failure of the condition. The language of the contract was clear and unambiguous. The agreement stated that the Grondas' acceptance of Harbor Market's offer was subject to their attorney's review and approval of "this agreement." Thus, because there was no limitation on which aspects of the agreement were subject to the attorney's approval, the attorney was authorized to review and approve (or disapprove) any part of the contract, or the entire contract as a whole. Because the parties failed to include an express limitation in the language of the condition precedent restricting the attorney's approval authority, the court would not judicially impose one. Further, because the contract language granting the Grondas' attorney complete discretion to approve or disapprove the agreement was clear and unambiguous, it had to be accepted and enforced as written. The attorney approval clause in Harbor Market's agreement required the Grondas to submit the purchase agreement to their lawyer for review. They did so in a timely manner, and the agreement required them to do no more. It could not be disputed that the Grondas did not fail to perform as required under the contract. Because the condition precedent in the Harbor Market agreement was not satisfied, the purchase agreement was not enforceable, and the trial court's opinion ordering specific performance of that agreement was erroneous. Reversed and remanded.

Nestle Waters North America, Inc. v. Bollman
__ F3d __ (CA 6, 2007)

Issues: Declaratory and injunctive relief regarding rights to certain subsurface waters; Whether the plaintiff's claim arose primarily out of the Deed or the Purchase and Sale Agreement; Whether the arbitration clause in the Purchase and Sale Agreement applied; Federal Arbitration Act, 9 USC 1 *et seq*.; Whether and when an arbitration clause in one contract encompasses a dispute arising out of a related agreement; Whether any evidence of a contrary intent of the parties rebutted the presumption.

Court: U.S. Court of Appeals, Sixth Circuit
Judges: Boggs, Martin, and Sutton

This case involved an issue of first impression whether an arbitration clause in an earlier contract applied to a dispute arising out of a later agreement, the execution of which was required by the first contract. The court of appeals held the district court properly dismissed the plaintiff's claims against the defendants because the parties intended the arbitration clause in the contract establishing and defining their relationship to govern the subject dispute. The plaintiff sought declaratory and injunctive relief regarding its rights to certain subsurface waters that the defendants had deeded to the plaintiff. The Deed was silent regarding arbitration. The defendants contended that the dispute fell within the scope of an arbitration clause that the parties had included in their initial contract establishing their business relationship, the parties' Purchase and Sale Agreement. Because the dispute arose primarily from the Deed, which was silent regarding arbitration, the dispute was arbitrable only upon a finding that the arbitration clause in the

Purchase and Sale Agreement encompassed the Deed. Applying *Fazio v. Lehman Bros., Inc*., the court held that the arbitration clause in the Purchase and Sale Agreement encompassed the dispute. As an initial matter, the arbitration clause in this case governed any controversy "arising out of" the Purchase and Sale Agreement, and the court has previously held such an arbitration clause is "extremely broad." Thus, the presumption of arbitrability weighed in favor of finding the dispute covered by the arbitration clause. Further, *Fazio* instructs that "the proper method of analysis is to ask if an action could be maintained without reference to the contract or relationship at issue. If it could, it is likely outside the scope of the arbitration agreement." In this case, the court was convinced that the proper interpretation of the Deed could not be determined without reference to the Purchase and Sale Agreement and the ongoing relationship between the plaintiff and the defendants. In return for consideration from the plaintiff, the Purchase and Sale Agreement required the defendants to execute a series of documents. The form of each of the subsequent documents, including the Deed, was attached to and made a part of the Purchase and Sale Agreement. In the course of interpreting the terms of the Deed, it was almost certain reference would be made to the other documents, as well as the Purchase and Sale Agreement, because it was the Purchase and Sale Agreement creating the relationship between the plaintiff and the defendants in the first place. Thus, *Fazio* did not dictate this dispute was outside the scope of the arbitration clause.

Adams v. Adams (On Reconsideration)
__ Mich App __; __ NW2d __ (2007)

Issues: Quiet title action under MCL 600.2932; Whether the trial court should have applied the 15-year statute of limitations in MCL 600.5801(4); Whether the plaintiff's claim sounded in fraud or undue influence and the trial court properly applied the six-year limitation period in MCL 600.5813; The effect of the enactment of MCL 600.2932; When the plaintiff's claim accrued.

Court: Michigan Court of Appeals
Judge: Servitto, Jansen, and Schuette

On reconsideration, the court vacated its prior published opinion and issued a new opinion holding that the trial court had erred in ruling that the plaintiff's claim sounded in fraud or rescission and was barred by the 6-year limitations period, concluding on reconsideration that the claim was in fact governed by the 15-year limitation period for quiet title actions. Thus, the court of appeals reversed the trial court's order granting the defendants summary disposition and remanded the case for further proceedings.

The plaintiff was the second wife of the late Robert J. Adams. In 1988, a deed purportedly signed by Mr. Adams and the plaintiff conveyed their 1/3 interest in the property in question to him as trustee of his trust. The plaintiff contended that she never signed the 1988 deed, or if she did, that her signature was procured through her late husband's fraud or undue influence. He died in 1997 and the deed was found in his safe-deposit box. Although the deed was recorded, neither the plaintiff nor the defendants apparently knew of it until the safe-deposit box was opened. The defendants continued paying the plaintiff part of the rent generated by the property until 1998. She sued in 2005 to determine the parties' interests in the property, contending that she was not disseised of the property until 1997 or 1998 and that her complaint was timely under the 15-year limitations period. The court held that the enactment of MCL 600.2932 eliminated the distinction between law and equity in actions to determine interests in land, and that the Supreme Court's decisions in *Lecus v. Turns* and *Gragg v. Maynard* had lost the meaning that they once had in this context. The court implicitly held that in *Carpenter v. Mumby*, "even when a claimant seeks to set aside a deed or conveyance, his or her claim to determine interests in land nonetheless retains the essence of a claim to quiet title." Though the plaintiff sought to cancel a deed based on her late husband's alleged fraud or undue influence, the gravamen of her complaint was to quiet title under MCL 600.2932 and her claim was therefore subject to the 15-year limitations period in MCL 600.5801(4). The court also concluded that the plaintiff was not disseised of her 1/3 interest until 1997. This was when her quiet title action accrued and her action was timely filed in 2005.

Mulcahy v. Verhines
__ Mich App __; __ NW2d __ (2007)

Issues: Easement by prescription; Whether a prescriptive easement is established when a use is made pursuant to the terms of an intended but imperfectly created servitude; Whether the plaintiffs established the adverse or "hostile" use element of a prescriptive easement.

Court: Michigan Court of Appeals
Judges: Whitbeck, Wilder, and Borrello

The court of appeals held that the trial court erred by granting summary disposition in favor of the defendants because the plaintiffs had satisfied all of the

elements necessary to establish a prescriptive easement. The property in dispute was a driveway and parking area, which is split in half between the parties, who were siblings. The plaintiffs' property included a muffler shop, and the defendant's property included a furniture restoration business. Before the dispute arose, customers could access both businesses by entering the parking lot via the plaintiffs' property; customers would then exit the parking lot through the defendants' property. According to the defendants, the plaintiff's tenant parked so many cars on the lot that the use became burdensome, there was no room for the defendants' customers, and the defendants' business suffered as a result. The plaintiffs argued that they had a prescriptive easement over the disputed portion of the parking lot. The plaintiffs contended that the parties' deceased father, who had sought to split the lot comprising the parking lot in conjunction with a site plan submitted to the City of Wayne, intended to create an express easement. He failed to comply with the formal requirements for establishing such an easement, however, because the proposed easement drafted by his attorney was not signed and was not recorded. The plaintiffs therefore argued that a prescriptive easement is established when a use is made pursuant to the terms of an intended but imperfectly created servitude. Were it not for the fact the City of Wayne, in approving the father's site plan for the construction of the muffler shop on the eastern half of the property, required the father to establish an easement agreement, the court would be disinclined to assume that the father's failure to sign and record the easement agreement was inadvertent, or a mistake or accident. In light of the city's approval of the father's site plan and the city's requirement that he execute an easement, the father was not at liberty to simply change his mind regarding the establishment of an easement. The city did not follow up to ensure that the easement agreement was signed and recorded. Nevertheless, the court held that the father intended to create an easement, but inadvertently failed to sign and record the easement agreement. Thus, the court held that the plaintiffs' and their tenant's use of the parking lot was made pursuant to an intended but imperfectly created servitude. The court also held that the plaintiffs' and their tenant's use of the defendants' property was sufficiently adverse to establish the hostile and adverse elements of a claim for a prescriptive easement. Therefore, the court reversed and remanded for entry of an order granting summary disposition in favor of plaintiffs.

CONTINUING LEGAL EDUCATION

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

HOMEWARD BOUND

February 7, 2008 • 2:00 – 5:00 p.m.
The Inn at St. John's, Plymouth

Current Issues in Construction Law

Lawrence M. Dudek, Miller Canfield Paddock and Stone PLC in Detroit will moderate the February 7, 2008 Homeward Bound seminar entitled **Current Issues in Construction Law** at 2:00 p.m. at The Inn at St. John's in Plymouth. Faculty include James R. Case of Kerr, Russell & Weber PLC in Detroit, Michael T. Lynch of Harley Ellis Devereaux in Southfield, John M. Sier of Kitch Drutchas Wagner Valitutti & Sherbrook in Detroit and Ronald P. Strote of May Simpson & Strote PC in Bloomfield Hills. No matter the size or complexity of a construction project, disputes may arise on a multitude of issues. Be a more effective advocate in your next construction case with advice from our expert faculty. Learn the proofs needed for claims of defect, design problems, or delay. Understand the available remedies and what insurance will cover. Plus, discover when to use mediation or arbitration to resolve a dispute.

March 20, 2008 • 2:00 – 5:00 p.m.
The Inn at St. John's, Plymouth

Dealing with Drop Downs, Drop Ups, Defeasance, and Other Complex Transactional Real Estate Issues

Mark P. Krysinski of Jaffe, Raitt, Heuer & Weiss in Southfield will moderate the March 20, 2008 Homeward Bound seminar entitled **Dealing with Drop Downs, Drop Ups, Defeasance and Other Complex Transactional Real Estate Issues** at 2:00 p.m. at The Inn at St. John's in Plymouth. Faculty include Vicki R. Harding of Pepper Hamilton LLP in Detroit, Noam Y. Raz of Jaffe, Raitt, Heuer & Weiss in Southfield, Charles W. Royer of Harper Woods, and Michael A. Indenbaum of Honigman Miller Schwartz & Cohn LLP in Detroit. The dominance of securitized lending in real estate transactions and the increased use of Section 1031 to defer gain has turned what used to be everyday "simple" tasks into complex transactions requiring multiple disciplines. Tax and bankruptcy specialists are a necessary part of many financing and sales, and your clients expect you to be able to help them understand the REITs and 1031 options they hear discussed in the marketplace. Unless you are involved in these transactions on a regular basis, you may not be up to speed on the most effective strategies to give your client the best result. Learn from the experts how to deal with securitized loan origination and refinancing options, when a tax deferred exchange may be used and its advantages, and the choices available for using real estate investment trusts.

Attend Live or by Webcast! Walk-Ins are Welcomed!

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

To Register:
Call (with credit card) toll free – (877) 229-4350
Fax (with credit card) toll free – (877) 229-4351
Online (with credit card) – www.icle.org/hb
Mail (with payment) – ICLE, 1020 Greene St, Ann Arbor, MI 48109-1444

"GROUNDBREAKERS" BREAKFAST ROUNDTABLES

TITLE INSURANCE 2008: New Policies, New Rules

January 17, 2008

The Townsend Hotel • Birmingham
8:00 – 9:30 a.m.

The First "Groundbreakers" Breakfast Roundtable will be held at the Townsend Hotel, 100 Townsend Street in Birmingham on Thursday, January 17, 2008. The program coordinator is Michael A. Luberto of Chirco Title Company. A full breakfast will be served. Space is limited! Roundtable Discussion Topics and Leaders to be presented:

The Title Insurance and Mortgage Foreclosures
John Bommarito of LandAmerica

Affiliated Business Arrangements
Paul Chirco of Chirco Title Company

Resolving Title Disputes
Darren M. Findling of Findling Law Firm PLC

Mortgage/Appraiser Fraud
Bruce M. Gorosh of Lefkofsky & Gorosh PC

Update Michigan Land Title Standards
William E. Hosler of Williams Williams Rattner & Plunkett, PC

Title Insurance Endorsements
Michael A. Luberto of Chirco Title Company

Construction Lien Litigation
Jason M. Milstone of Lefkofsky & Gorosh PC

ALTA 2006 Policy Forms
Dawn M. Patterson of United General Title Insurance Company

Fees:
Advance Registration:
Section Member: $65
Non-Section Members: $85

At the Door:
Section Members: $75
Non-Section Members: $95

Zoning and Land Use
April 10, 2008

The Townsend Hotel
8:00 – 9:30 a.m.

Our second "Groundbreaker" Breakfast Roundtable Session will be held on April 10, 2008 at the Townsend Hotel, 100 Townsend Street, Birmingham. The Program will begin at 8:00 a.m. and end at 9:30 a.m. A full breakfast will be served. $65 for Section members/$85 for non-Section members. At the door the cost is $75 for Section members/$95 for non-Section members. ***Space is limited!***

The Program Coordinator for the April program is David Pierson of McClelland and Anderson, PC in Lansing. Roundtable discussion topics will include Conditional rezoning agreements, Damages in land use litigation and Dividing land. Are local regulations making condominiums as cumbersome as plats? Has the limited plat reform helped? Ripeness – what do you need to file and when? Form based zoning – new urbanism in zoning. Discussion leaders include Norman Hyman of Honigman Miller Schwartz & Cohn, Joseph F. Galvin of Miller Canfield Paddock & Stone, PLC, Ronald E. Reynolds of Berry Reynolds & Rogowski, PC, Richard D. Rattner and Richard E. Rassel III of Williams Williams Rattner & Plunkett PC.

Bankruptcy
June 5, 2008

New Location! Detroit Athletic Club
241 Madison Street, Detroit
8:00 – 9:30 a.m.

Our third "Groundbreaker" Breakfast Roundtable Session will be held on June 5, 2008 at the Detroit Athletic Club in Detroit. The program chairs are Rozanne Giunta of Lambert Leser Isackson Cook & Giunta in Bay City and Brian Henry of Strobl & Sharp PC in Bloomfield Hills. The Program will begin at 8:00 a.m. and end at 9:30 a.m. A full breakfast will be served. $65 for Section members/$85 for non-Section members. At the door the cost is $75 for Section members/$95 for non-Section members. ***Space is limited***!

A registration form is elsewhere in this issue. For further information on all Section programs, please call Arlene Rubinstein at 248-644-7378 or go to the Section website at www.michbar.org/realproperty/

2008 WINTER CONFERENCE

March 6–8, 2008

CHICAGO STYLE: Deep Dish Development

Sofitel Chicago Water Tower
Chicago, Illinois

This program has been approved for 5.5 general MCLE credits in Illinois.

We would like to thank the 2008 Winter Conference Sponsors to date!

Friday Evening Reception Sponsor

Inland Securities

Breakfast Sponsor

Carrie Cole Financial Services

Marie Racine of Racine and Associates in Detroit and Gregory Gamalski of Giarmarco Mullins & Horton PC in Troy have planned a fantastic program!

Ms. Racine established her own firm in 1985. Over the years Racine & Associates has represented numerous businesses, startup companies as well as established organizations, multi-billion dollar pension trust funds and national companies doing business throughout the United States, including mortgage companies, Detroit area developers, contractors, entrepreneurs and businesses, as well as Greektown Casino, a credit union and automotive suppliers. The firm provides a variety of services, with a primary focus on business and commercial real estate matters.

Mr. Gamalski's practice is focused on real estate law, primarily working with residential builders and developers on condominium and land development matters. He is a past President of the University of Detroit – Mercy Law Alumni Board, Associate Member of the Michigan Society of Professional Surveyors, active in the Builder Industry Association of Southeastern Michigan, a former chairman of the Oakland County Bar Association Real Estate Committee and a member of the State Bar of Michigan Real Estate Section and current co-chairman of the Condominium Cooperatives and Planned Unit Developments Committee.

Robert G. Lorente, MBA, JD, CFP will speak with Fred Fisher on "How Non-traded Reits Work and The Current Commercial Real Estate Environment." From 1998 to 2005, Mr. Lorente was registered representative and securities principal with SII investments, Inc. and served as Director and Executive Vice President of CTE Pension Advisors, Inc. directing research and marketing asset managers for that company. He is a member of the State Bar of Michigan, the American Bar Association, and the Foundation for Financial Planning. Mr Lorente also holds NASD series 4, 7, 8, 24 and 63 licenses.

The 2008 Real Property Law Section Winter Conference entitled, ***Chicago Style: Deep Dish Developmen***t, will focus on real property development and the regulatory process in Illinois, with particular focus on the Chicago market. What Can Michigan learn from Chicago? Our conference begins Thursday evening March 6, 2008 with our opening reception from 6:00 – 7:00 p.m. Tentatively planned for that evening is a trip to Second City. Cost to be determined. The conference will end on Saturday, March 8, 2008 at Noon.

A Winter Conference brochure has been enclosed in this issue.

Call Arlene Rubinstein at 248-644-7378 or email: LawA1@aol.com

Mark Your Calendars!

THIRTY-THIRD ANNUAL SUMMER CONFERENCE

**"What Goes Down Must Come Up:
Advising Clients About Real Estate in Michigan"**

Grand Traverse Resort and Spa

July 16 – 19, 2008

We would like to thank our sponsors to date!

Thursday Evening Reception Sponsor

**LandAmerica
(Commonwealth, Lawyers, Transnation Title Insurance Compnay)**

Planning for the 2008 Summer Conference is almost complete! Dawn M. Patterson of United General Title Insurance in Northville and Melissa N. Collar of Warner Norcross & Judd LLP in Grand Rapids have been identifying topics and speakers sure to be of interest to all real estate attorneys. The conference begins at 6:30 p.m. on Wednesday, July 16, 2008 in the Pavilion and ends on Saturday, July 19, 2008 with a Special presentation by Mary Jane Pories of "Fishladder". Mary Jane Pories (Master of Arts in Education, Actor's Equity Association) is the president of Fishladder Inc. and an award-winning actor/improviser and writer. Mary Jane performed on the main stage of The Second City and has appeared in numerous theatrical productions, independent films and commercials. She is also the producer, director and performer in the sketch comedy troupe Fishschtick, winning the Silver Townie Award for Best Improv Troupe for the last several years. Mary Jane established Fishladder Inc. in 1999 in response to specific needs within the business community that called for an innovative, effective, fun and customized corporate training approach. All will be invited to attend!

The Thursday, July 17, 2008 program is under the direction of Nyal Deems of Varnum, Riddering, Schmidt and Howlett in Grand Rapids and Mark Krysinksi of Jaffe, Raitt, Heuer and Weiss in Southfield. The program entitled ***"Your Real Estate Transaction After the Purchase Agreement: issues, problems, screw-up's and how to address them (good luck!)"*** will discuss the tough closing issues which can arise following the signing and delivery of the purchase agreement. The speakers will discuss these issues and negotiate possible resolutions as well as share documents that might be used in resolving these closing challenges. The presentations will incorporate real life factual situations from actual closings, with a few facts adjusted slightly to protect the innocent (and the guilty). Issues arising in residential transactions to complicated commercial transactions will be included in the discussion. You won't want to miss the great real estate closing practice tips of our distinguished panel of speakers!

Our breakfast roundtable programs will begin on Friday morning and then we hope registrants will attend the Section business meeting. This year we will honor the Michigan Land Title Standards committee and will unveil the online version of the 6th Edition. The morning will continue with our workshops.

Grand Traverse Resort and Spa is the ideal setting to meet, learn and relax. Situated on the Lake Michigan Shoreline and with acres of forested land, enjoy hiking, fishing and golf at one of the three exceptional golf courses. Bring your family!

Further information will be available early spring.

COURSE CALENDAR

Set forth below is a schedule of continuing legal education courses
sponsored or co-sponsored by the Real Property Law Section through April 2008.

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

Date	Location	Program	Topic
January 17	Townsend Hotel Birmingham	Breakfast Roundtable	Title Insurance 2008: New Policies, New Rules
February 7	The Inn at St. John's Plymouth	HB	Current Issues in Construction Law
March 6-8	Sofital Chicago Water Tower Chicago, Illinois	Winter Conference	Chicago Style: Deep Disk Development
March 20	The Inn at St. Johns Plymouth	HB	Dealing with Drop Downs, Drop Ups, Defeasance and Other Complex Transactional Real Estate Issues
April 10	Townsend Hotel Birmingham	Breakfast Roundtable	Zoning and Land Use

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

YOUNG LAWYERS SECTION LUNCH AND PROGRAM

The 2007-2008 Homeward Bound Series began with a lunch co-sponsored with the Young Lawyers Section. All participants were then invited to the November 15, 2007 Homeward Bound "Basic Michigan Real Estate Practice-Buying, Selling and Renting at a discounted rate. The lunch was an opportunity to meet seasoned real estate law attorneys to share how to establish a practice and provide tips on how to develop a real estate law practice. At the lunch Howard Lax of Lipson Neilson Cole Seltzer & Garin PC in Bloomfield Hills and Stephanie Fowler of ICLE in Ann Arbor presented online resources available through the Real Property Law Section and ICLE. The Section would like to thank Kim Shierk of Myers Nelson Dillon & Shierk PLLC in Bloomfield Hills for coordinating this program. We would also like to thank all the speakers and Council members who participated. It was a great success!

Bob Fergan, Brinks Hofer Gilson & Lione PC in Ann Arbor and Kim Shierk, program chair, Myers, Nelson Dillon & Shierk PLLC.

November Homeward Bound Program Speakers: Roger B. Chard of Chard & Lloyd, Karen Quinlin Valvo of Reach Reach Fink & Valvo PC, and Joseph H. Wener of Couzens Lansky Fealk Ellis Roeder & Lazar PC.

Lunch Program Speakers: Howard Lax of Lipson Neilson Cole Seltzer & Garin PC & Stephanie Fowler of ICLE.

Brian Henry of Strobl and Sharp PC, Malinda Jensen, Mary Novrocki and Stephanie Fowler of ICLE.

SBM
State Bar of Michigan

2008 "Groundbreakers" Breakfast Roundtables

Thursday, January 17, 2008
8:00 – 9:30 a.m.

Topic: Title Insurance

Program Chair: Michael A. Luberto - Chirco Title Company

The Townsend Hotel
100 Townsend, Birmingham, Michigan

Thursday, April 10, 2008
8:00 – 9:30 a.m.

Topic: Zoning and Land Use

Program Chair: David E. Pierson - McClelland & Anderson LLP

The Townsend Hotel
100 Townsend, Birmingham, Michigan

Thursday, June 5, 2008
8:00 – 9:30 a.m.

Topic: Bankruptcy

Program Chairs:
Brian P. Henry - Freeman Cotton & Norris PC
&
Rozanne M. Giunta - Lambert Leser Isackson Cook & Giunta PC

DAC - Detroit Athletic Club
241 Madison St, Detroit, MI 48226

Advance Single Program Registration Fee: Section Members $65 Non-Section Members $85

- At this time non-members of the State Bar of Michigan must mail or fax their registration forms
- No phone registrations
- For further information, please call Arlene Rubinstein at (248) 644-7378 or e-mail *LAWA1@aol.com*

— — — Members may register online at http://e.michbar.org. (Easy login now available.) — —

State Bar of Michigan | Real Property Law Section

Registration

"Groundbreakers" Breakfast Roundtables

- ❑ January 17—Title Insurance, Townsend Hotel
- ❑ April 10 —Zoning and Land Use, Townsend Hotel
- ❑ June 5 —Bankruptcy, Detroit Athletic Club

Cost (per program):
Section Members $65 Non-Section Members $85

P #:_____

Name (to appear on name badge): _____

_____

Your Firm/Organization:_____

Address:_____

City:_____ State: _____Zip: _____

Telephone: (_____) _____

Enclosed is check # _____ for $_____

Please make check payable to: State Bar of Michigan

Please bill my: ❑ Visa ❑ MasterCard ❑ American Express

Card #:_____

Expiration Date:_____

Please print name as it appears on credit card:

_____

Authorized Signature: _____

Mail your check and completed registration form to:

State Bar of Michigan
Attn: Seminar Registration
Michael Franck Building
306 Townsend Street, Lansing, MI 48933

OR

Fax (ONLY if paying by credit card) the completed form and credit card information to:

Attn: Seminar Registration at (517) 346-6365
Payment MUST be received on or before date of seminar.

REAL PROPERTY LAW SECTION
STATE BAR OF MICHIGAN

SPECIAL COMMITTEES
CHAIRPERSONS AND COUNCIL COORDINATORS
2007 – 2008

Committees	Co-Chairperson(s)	Coordinator
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Condominiums, PUDs and Cooperatives

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Real Estate Ownership and Investment Entities *continued*

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REAL PROPERTY LAW SECTION

STANDING COMMITTEES 2007 – 2008

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Land Title Standards	Russell E. Prins	Assistant Attorney General State of Michigan Dept of Attorney General PO Box 30754 Lansing, MI 48909 Phone: (517) 373-3203 Fax: (517) 335-4880 E-mail: prinsr@michigan.gov
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MICHIGAN REAL PROPERTY REVIEW
CUMULATIVE ARTICLE INDEX
(THROUGH VOLUME 34)

Articles are indexed under the following subject headings:

ACQUISITIONS AND SALES

SALE-LEASEBACKS: THINGS MAY NOT BE WHAT THEY SEEM - by John C. Murray - Spring 2006, p. 9.

DUE DILIGENCE ISSUES IN REAL PROPERTY ESTATE ACQUISITIONS AFTER SARBANES-OXLEY - by Mark R. High - Summer 2005, p. 73.

DRAFTING ADR PROVISIONS FOR REAL ESTATE TRANSACTION DOCUMENTS - by Asher N. Tilchin - Fall 2003, p. 127.

ACCORD AND SATISFACTION: HAVE THE TENDER BACK REQUIREMENTS REALLY BEEN CHANGED BY A RECENT COURT OF APPEALS DECISION? - by Stephon B. Bagne - Spring 2002, p. 25.

PROPOSAL A OF 1994 AND LEASES: OWNER, TENANT AND BUYER BEWARE - by David E. Nykanen - Spring 2001, p. 29.

THE SALE OF COMMERCIAL PROPERTY: IF YOU CAN'T SAY SOMETHING NICE, DON'T SAY ANYTHING AT ALL - by Judy J. Donegan - Summer 1998, p. 97.

PITFALLS IN CLOSING REAL ESTATE TRANSACTIONS - by W. A. Steiner, Jr. - Winter 1993, p. 189.

TRUTH AND CONSEQUENCES: THE STATUTE OF FRAUDS AND ADMISSIONS IN COURT - by George D. Cameron, III - Winter 1985, p. 186.

ANOTHER ACRONYM COMES OF AGE, OR WILL FIRPTA'S NEW WITHHOLDING REQUIREMENTS FREEZE FOREIGN INVESTMENT IN THE UNITED STATES? - by Kaplin Jones and Nyal Deems - Summer 1985, p. 29.

BANKRUPTCY AND RECEIVERSHIP

THE TREK OF MICHIGAN EXEMPTIONS IN THE UNIVERSE OF BANKRUPTCY - by Winnifred P. Boylan and Melanie R. Beyers - Summer 2006, p. 85

THE IMPACT OF THE BANKRUPTCY REFORM ACT OF 2005 ON NONRESIDENTAIL REAL ESTATE LEASES - by Lisa S. Gretchko - Fall 2005, p. 107.

A POTENTIAL DANGER FOR LESSEES AND LEASEHOLD MORTGAGEES: THE PRECISION INDUSTRIES CASE - by Stephen E. Dawson and Patrick E. Mears - Summer 2004, p. 91.

THE BANKRUPTCY ESTATE AND THE ENTIRETIES ESTATE IN MICHIGAN: AN UNEASY MARRIAGE OF LEGAL FICTIONS - by Scott W. Dales - Summer 2004, p. 67.

THE ENTIRETIES ESTATE IN BANKRUPTCY AFTER CRAFT - by Peter A. Teholiz - Winter 2002, p. 171.

USE OF SPECIAL PURPOSE ENTITIES IN REAL ESTATE FINANCING TRANSACTIONS - by John C. Murray - Fall 2002, p. 107.

IN RE MORRIS: IS THE SIXTH CIRCUIT INVITING REAL ESTATE CONSTRUCTIVE TRUST CLAIMS IN BANKRUPTCY CASES? - by John A. Simon - Spring 2002, p. 21.

LAND CONTRACTS: CLOGGING AND BANKRUPTCY ISSUES - by John C. Murray - Winter 2001, p. 183.

FOR WHOM THE STAY TOLLS: BANKRUPTCY CODE §§ 108 AND 362 - DO THEY TOLL REDEMPTION AND CURE PERIODS? - by Sean P. Byrne - Spring 2001, p. 21.

WAIVERS OF AUTOMATIC STAY - by John C. Murray and Judith Greenstone Miller - Winter 1999, p. 195.

U.S. SUPREME COURT RULES ON "NEW VALUE," OR DOES IT? - by Judith Greenstone Miller and John C. Murray - Summer 1999, p. 67.

SALES OF REAL ESTATE AND OTHER PROPERTY OF BANKRUPTCY ESTATES UNDER THE REVISED LOCAL BANKRUPTCY RULES OF THE U.S. BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF MICHIGAN - by Judith Greenstone Miller and Marc M. Bakst - Spring 1999, p. 19.

RECENT DEVELOPMENTS IN "NEW VALUE" AND SINGLE ASSET REAL ESTATE CASES - by John C. Murray and Judith Greenstone Miller - Spring 1998, p. 23.

FITTING THE ROUND PEG INTO THE SQUARE HOLE: CONDOMINIUM ASSESSMENTS IN CHAPTER 13 BANKRUPTCY - by Steve Sowell - Fall 1997, p. 233.

LANDLORD BEWARE! WHAT HAPPENS TO THE OPTION TO RENEW WHEN THE TENANT FILES BANKRUPTCY? - by Judith Greenstone Miller - Summer 1997, p. 135.

STATUS OF REAL PROPERTY TAXES IN BANKRUPTCY CASES - REVISITED - by Harold E. Nelson and William R. VanderSluis - Spring 1996, p. 13.

BANKRUPTCY REFORM ACT OF 1994: HOW THE RULES HAVE CHANGED - by Vicki R. Harding - Spring 1995, p. 13.

SINGLE-ASSET CHAPTER 11 REAL ESTATE CASES: BAD FAITH AND NEW DEBTOR SYNDROME AFFIRMED BY THE SIXTH CIRCUIT COURT OF APPEALS - by Lisa Sommers Gretchko - Spring 1995, p. 19.

IMPUTING THE MISDEEDS OF ONE PARTNER TO ANOTHER PARTNER UNDER THE BANKRUPTCY CODE - by Michael I. Conlon - Winter 1994, p. 203.

THE SECURED LENDER: VICTIM OR VILLAIN? - THE BATTLE TO PREVENT SEPARATE CLASSIFICATION OF UNSECURED DEFICIENCY CLAIMS IN BANKRUPTCY - by Robert A. Weisberg - Fall 1994, p. 129.

SINGLE-ASSET CHAPTER 11 REAL ESTATE CASES: BAD FAITH, NEW DEBTOR SYNDROME, AND OTHER PITFALLS - by Lisa Sommers Gretchko - Summer 1994, p. 49.

THE USES OF A RECEIVERSHIP OVER REAL PROPERTY - by Lawrence M. Dudek - Summer 1994, p. 41.

PITFALLS IN CLOSING REAL ESTATE TRANSACTIONS - by W. A. Steiner, Jr. - Winter 1993, p. 189.

HOTEL REVENUES AS CASH COLLATERAL IN BANKRUPTCY CASES - ARE HOTEL REVENUES PERSONAL PROPERTY OR REAL PROPERTY? - by Douglas L. Lutz - Fall 1993, p. 119.

BANKRUPTCY "CRAMDOWN": MORTGAGE FINANCING OF LAST RESORT - by Vicki R. Harding - Spring 1993, p. 23.

ASSIGNMENTS OF RENTS IN BANKRUPTCY UNDER MICHIGAN LAW - by Julia Goatley Moreno and Laura J. Eisele - Winter 1992, p. 137.

EFFECT OF BANKRUPTCY ON NON-RESIDENTIAL REAL ESTATE LEASES - by Lisa Sommers Gretchko - Winter 1992, p. 157.

REMEDIES OF THE SUBCONTRACTOR OR SUPPLIER WHEN THE OWNER OR GENERAL CONTRACTOR FILES FOR BANKRUPTCY - by Lawrence M. Dudek - Summer 1992, p. 49.

BANKRUPTCY v ASSIGNMENT OF RENTS: A CASE TO BE DECIDED - by Michael E. Baum - Spring 1992, p. 7.

LAND CONTRACTS IN BANKRUPTCY: TERRELL REVISITED - by Robert A. Hendricks and Joan Schleef - Summer 1991, p. 57.

STATUS OF REAL PROPERTY TAXES IN BANKRUPTCY CASES - by Harold E. Nelson - Spring 1991, p. 13.

A PRIMER FOR MICHIGAN REAL ESTATE PRACTITIONERS ON BANKRUPTCY TRUSTEE AVOIDANCE POWERS - by Jacqueline K. Vestevich and Robert D. Mollhagen - Winter 1989, p. 223.

THE REORGANIZING DEBTOR AND UNEXPIRED LEASES OF NONRESIDENTIAL REAL PROPERTY - by Brian L. Donovan - Winter 1988, p. 243.

TREATMENT OF MICHIGAN LAND CONTRACTS IN CHAPTER 11 AND CHAPTER 13 CASES: IMPACT OF THE VENDEE'S BANKRUPTCY - by Patrick E. Mears - Winter 1988, p. 231.

AN OVERVIEW OF THE BANKRUPTCY JUDGES, UNITED STATES TRUSTEES AND FAMILY FARMER BANKRUPTCY ACT OF 1986 - by Jay L. Welford - Winter 1986, p. 129.

HEAD START vs. FRESH START: WHEN WILL THE ABUSES STOP? - by Robert S. Hertzberg and Michael J. Ryan - Spring 1986, p. 13.

TIME SHARE LAW AND THE 1984 BANKRUPTCY AMENDMENTS - by John D. Fershee - Spring 1986, p. 3.

TREATMENT OF LAND CONTRACTS IN BANKRUPTCY-EXECUTORY CONTRACTS OR LIENS? - by Louis P. Rochkind and Jay L. Welford - Winter 1984, p. 484.

THE EFFECT OF BANKRUPTCY AMENDMENTS AND FEDERAL JUDGESHIP ACT OF 1984 ON THE REAL ESTATE PRACTITIONER - by Louis P. Rochkind and Jay L. Welford - Fall 1984, p. 442.

STATEMENT CONCERNING HOUSE BILL NO. 4095 - by Louis P. Rochkind - Summer 1983, p. 146.

THE EFFECT OF AUTOMATIC STAY PROVISIONS OF THE BANKRUPTCY REFORM ACT OF 1978 ON THE STATUTORY RIGHT OF REDEMPTION - by Wallace M. Handler - October 1982, p. 211.

BROKERS AND SALESPERSONS

LIABILITY OF SELLERS AND REAL ESTATE LICENSEES FOR NONDISCLOSURE OF DEFECTS - by Gail Anderson - Summer 2003, p. 53.

HUD TREK VIII: THE UNDISCOVERED BROKER FEE, OR HI! I'M FROM HUD AND I'M HERE TO HELP YOU - by Howard A. Lax - Spring 1998, p. 37.

PRICE v LONG REALTY - REVISITING THE APPLICABILITY OF THE MICHIGAN CONSUMER PROTECTION ACT TO CERTAIN CONDUCT OF REAL ESTATE LICENSEES - by Gail A. Anderson and Deborah A. Lee - Fall 1993, p. 135.

REGULATION OF REAL ESTATE BROKERS AND SALESPERSONS IN MICHIGAN - AN UPDATE - by Gregory L. McClelland and Gail A. Anderson - Fall 1993, p. 131.

BUYER BROKERING - CHANGING SOME OF THE RULES IN RESIDENTIAL REAL ESTATE TRANSACTIONS - by Gregory L. McClelland, Gail A. Anderson and Paula A. Charland - Fall 1991, p. 113.

REAL ESTATE BROKERS - COMMISSION DISPUTES - by Gregory L. McClelland and Gail A. Anderson - Fall 1990, p. 115.

THE MORTGAGE BROKERS, LENDERS, AND SERVICERS LICENSING ACT OF 1987 - by Murray E. Brown - Spring 1988, p. 27.

REGULATION OF THE REAL ESTATE PROFESSION IN MICHIGAN - by George J. Siedel, III - June 1982, p. 124.

BUILDER'S TRUST FUND ACT

PERSONAL LIABILITY OF A CORPORATE OFFICER FOR VIOLATION OF THE MICHIGAN BUILDER'S TRUST FUND ACT - by Eric I. Lark and Matthew C. Norris - Summer 2000, p. 93.

MICHIGAN'S BUILDER'S TRUST FUND ACT REVISITED: IS A "SUPPLIER" A SUBCONTRACTOR/TRUSTEE? - by Ronald P. Strote and Clifford J. De Vine - Summer 1999, p. 77.

THE MICHIGAN BUILDERS TRUST FUND ACT: AN OVERLOOKED REMEDY? - by Daniel M. Morley - Spring 1994, p. 13.

ANALYSIS OF PRIORITY CLAIMS UNDER THE MICHIGAN BUILDERS TRUST FUND ACT IN THE BANKRUPTCY SETTING - by Clifford J. DeVine and Ronald P. Strote - Summer 1986, p. 39.

COMPETING PRIORITY CLAIMS UNDER THE MICHIGAN BUILDER'S TRUST FUND ACT - by Stanley M. Weingarden and Clifford J. DeVine - Summer 1983, p. 70.

EXPANDED APPLICATION OF BUILDER'S TRUST FUND ACT - by Stanley M. Weingarden -April 1980, p. 46.

CIVIL RIGHTS

A PRACTICAL APPROACH TO LANDLORD/TENANT OBLIGATIONS UNDER THE FEDERAL FAIR HOUSING ACT AND THE MICHIGAN HANDICAPPERS' CIVIL RIGHTS ACT - by Thomas E. Moorhead, J.D. - Summer 1998, p. 111.

U.S. DISTRICT COURT HOLDS THAT THE CITY OF TAYLOR'S REFUSAL TO ALLOW A TWELVE-PERSON ADULT FOSTER CARE HOME TO LOCATE IN A SINGLE-FAMILY RESIDENTIAL DISTRICT VIOLATED THE FAIR HOUSING AMENDMENTS ACT - by Gregory Bator - Summer 1995, p. 123.

U.S. DISTRICT COURT HOLDS THAT THE 1500-FOOT RULE AND NEIGHBOR NOTIFICATION RULE VIOLATE THE FAIR HOUSING AMENDMENTS ACT AND THE EQUAL PROTECTION CLAUSE OF THE U.S. CONSTITUTION - by Gregory Bator - Summer 1995, p. 119.

CONDEMNATION AND EMINENT DOMAIN

NEW USE OF SUBDIVISION DEVELOPMENT ANALYSIS IN A CONDEMNATION CASE - by Arthur C. Spalding - Winter 2007, p. 208.

KELO V CITY OF NEW LONDON: HOW WE GOT HERE: AND WHERE WE'RE GOING - by Jerome P. Pesick and Jason C. Long - Winter 2005, p. 163.

THE "PUBLIC USE" LIMITATION ON THE TAKING OF PROPERTY: BACK TO THE FUTURE - by David W. Berry and Ronald E. Reynolds - Spring 2005, p. 29.

THE ADMISSIBILITY OF OFFERS AND PURCHASE AGREEMENTS AS EVIDENCE OF VALUE IN CONDEMNATION TRIALS - by H. Adam Cohen and Jason C. Long - Fall 2004, p. 157.

THE "PUBLIC USE" LIMITATION ON THE TAKING OF PROPERTY: IN NEED OF LIFE SUPPORT? - by David W. Berry and Ronald E. Reynolds - Fall 2003, p. 123.

THE BAR IS RAISED? AN ANALYSIS OF CITY OF NOVI v ROBERT ARDELL CHILDREN'S FUNDED TRUST, *et* al. - by Arthur C. Spalding and Eric R. Starck - Spring 2003, p. 15.

REGULATORY TAKINGS AND THE RIGHT OF OPTION HOLDERS TO PURSUE DAMAGES FOR JUST COMPENSATION - by Robert J. Siebert - Summer 2002, p. 63.

UNITED STATES SUPREME COURT STANDS UP FOR PROPERTY OWNER IN REGULATORY TAKINGS CASE - by Richard E. Rassel - Winter 2001, p. 187.

THE "PUBLIC USE" LIMITATION ON THE TAKING OF PROPERTY: ALIVE AND WELL IN MICHIGAN - by David W. Berry and Ronald E. Reynolds - Fall 2001, p. 145.

GOVERNMENTAL DAMAGES: REAL ESTATE AND RELATED DAMAGES RESULTING FROM INTENTIONAL AND UNINTENTIONAL GOVERNMENT ACTS - by Jerome P. Pesick and H. Adam Cohen - Fall 2000, p. 123.

BUSINESS CLAIMS FOR GOING CONCERN VALUE IN CONDEMNATION CASES - by Thomas J. McCarthy - Fall 1999, p. 143.

PUBLIC PURPOSE CHALLENGES IN CONDEMNATION PROCEEDINGS - by Mark Zausmer - Fall 1996, p. 165.

LEASE CONDEMNATION CLAUSES - THE LANDLORD'S WINDFALL - by Gary A. Taback -Summer 1996, p. 95.

DETERMINING REASONABLE ATTORNEY FEES UNDER THE UCPA: COMMENTS ON DEPARTMENT OF TRANSPORTATION v D&T CONSTRUCTION COMPANY - by Patrick F. Isom - Fall 1995, p. 191.

WHAT IS THE PROPER STANDARD FOR REIMBURSEMENT OF ATTORNEY FEES UNDER THE UNIFORM CONDEMNATION PROCEDURES ACT? - by Frederick D. Steinhardt - Fall 1995, p. 187.

CONSIDERATION OF ENVIRONMENTAL ISSUES WITHIN A CONDEMNATION PROCEEDING - by Richard A. Barr and Jerome P. Pesick - Fall 1994, p. 153.

U.S. SUPREME COURT HOLDS THAT DEDICATION REQUIREMENT TO OBTAIN APPROVAL OF DEVELOPMENT CONSTITUTES A TAKING - by David W. Berry and Susan K. Friedlaender - Fall 1994, p. 159.

IMPACT OF LUCAS v SOUTH CAROLINA COASTAL COUNCIL ON MICHIGAN'S WETLAND ACT - by David W. Berry and Susan K. Friedlaender - Winter 1992, p. 177.

BURDEN OF PROOF, RANGE OF TESTIMONY AND APPELLATE REVIEW IN CONDEMNATION PROCEEDINGS - by Allan T. Ackerman and Gregory A. Buss - Winter 1991, p. 155.

EMINENT DOMAIN LAW FOR THE GENERAL PRACTITIONER - by David W. Berry and Clara DeMatteis Mager - Winter 1989, p. 233.

REIMBURSEMENT OF ATTORNEY FEES AND LITIGATION COSTS UNDER THE UNIFORM CONDEMNATION PROCEDURES ACT - by Boris K. Yakima - Winter 1989, p. 249.

ATTORNEY FEES IN CONDEMNATION CASES - by Walter B. Mason, Jr. and Frederick D. Steinhardt - Fall 1986, p. 73.

PRACTICE UNDER THE UNIFORM CONDEMNATION ACT - by Walter B. Mason and Frederick D. Steinhardt - Fall 1983, p. 177.

CONDOMINIUMS, COOPERATIVES, TIMESHARES AND PUDS

NEW DISPUTE RESOLUTION ALTERNATIVE FOR THE MICHIGAN CONDOMINIUM AND OTHER COMMON INTEREST COMMUNITY (CIC) PROPERTIES: A CASE FOR DRAFTING COMPREHENSIVE ADR PROVISIONS INTO CIC DOCUMENTS - by Asher N. Tilchin – Summer 2007, p. 78.

ISSUES IN CONDOMINIUM ASSOCIATION VOTING AND ASSESSMENTS - by H. William Freeman - Fall 2006, p. 151.

ARE RETROACTIVE AMENDMENTS TO CONDOMINIUM BYLAWS ENFORCEABLE? - by Adam Zuwerink - Fall 2005, p. 113.

MIX AND MATCH: ISSUES WITH MIXED-USE CONDOMINIUMS - by H. William Freeman - Spring 2004, p. 21.

UPDATES TO THE NEW AMENDMENT TO THE MICHIGAN CONDOMINIUM ACT - by C. Kim Shierk - Fall 2002, p. 137.

THE NEW AMENDMENTS TO THE MICHIGAN CONDOMINIUM ACT - KNOW THE CHANGES THAT WILL AFFECT THE PRACTICE OF CONDOMINIUM LAW - by Mark F. Makower and C. Kim Shierk - Summer 2002, p. 69.

CHANGES TO CONDOMINIUM DEVELOPMENT AND OPERATION - by C. Kim Shierk - Winter 2001, p. 191.

ATTORNEY FEES IN CONDOMINIUM ENFORCEMENT ACTIONS - THE LIMITS OF JUDICIAL DISCRETION - by Mark F. Makower and Christopher S. Hartman - Winter 2000, p. 197.

ASSOCIATION GOVERNANCE AT THE CROSSROADS: THE INTERSECTION OF PRIVATE RESTRICTIONS AND PUBLIC POLICY - by John A. Stevens and Robert M. Meisner - Winter 1999, p. 203.

FITTING THE ROUND PEG INTO THE SQUARE HOLE: CONDOMINIUM ASSESSMENTS IN CHAPTER 13 BANKRUPTCY - by Steve Sowell - Fall 1997, p. 233.

CONDOMINIUM ASSOCIATIONS GET A BREAK - OR DO THEY? - by Steve Sowell - Winter 1995, p. 235.

A SUBJECT INDEX OF THE CONDOMINIUM ACT AND REGULATIONS - by Ethan M. Powsner - Winter 1994, p. 209.

THE CONDOMINIUM ACT REVISITED - TEN YEARS AFTER "DEREGULATION" - by Mark F. Makower - Fall 1993, p. 125.

CONDOMINIUM SUBDIVISION PLAN - A PRACTITIONER'S CHECKLIST - by Jeffery R. Jones - Fall 1992, p. 115.

MARKETABLE TITLE TO THE CONDOMINIUM - by Asher N. Tilchin - Winter 1990, p. 173.

MARINA CONDOMINIUMS OR "DOCKOMINIUMS" - by C. Peter Theut and James Y. Stewart - Spring 1990, p. 17.

AN ANALYSIS OF A "PHENOMENON" - SITE CONDOMINIUM PROJECTS - by Mark F. Makower and Jeffery R. Jones - Winter 1989, p. 241.

TIME SHARE LAW AND THE 1984 BANKRUPTCY AMENDMENTS - by John D. Fershee - Spring 1986, p. 3.

CONDOMINIUM DEREGULATION ACT CLARIFIED - by Jeffery R. Jones, Paul L. Nine and James P. Babcock - Fall 1983, p. 182.

PROCEDURE TO ESTABLISH A CONDOMINIUM UNDER THE DEREGULATION ACT - by James P. Babcock and Jeffery R. Jones - Fall 1983, p. 184.

COMMENDING THE PLANNED UNIT DEVELOPMENT - by Gerald A. Fisher - Summer 1983, p. 61.

CONDO DEREGULATION ARRIVES - COMPLETE WITH QUESTIONS - by Jeffery R. Jones and James P. Babcock - Spring 1983, p. 42.

AN INTRODUCTION TO TIME-SHARING CONDOMINIUMS UNDER THE MICHIGAN CONDOMINIUM ACT - by Mark S. Keegan - August 1982, p. 164.

CONDOMINIUM DEREGULATION IN MICHIGAN - by James P. Babcock and Jeffery R. Jones - August 1982, p. 157.

THE LAND CONTRACT CONDOMINIUM PURCHASER - THE DISENFRANCHISED OWNER - by John A. Stevens - February 1982, p. 3.

TIME SHARE CONDOMINIUMS - by Gary J. McInerney - December 1981, p. 164.

CONDOMINIUMS: HASSLE OR CASTLE - by Earl I. Sherman - December 1980, p. 172.

CONSTRUCTION CONTRACTS, LIENS AND BONDS

NEW

RECENT AMENDMENTS TO THE CONSTRUCTION LIEN ACT - by Marilynn K. Smyth - Summer 2007, p. 102.

RIGHTS AND PRIVILEGES OF BUILDER LICENSEES UNDER ARTICLE 24 OF THE OCCUPATIONAL CODE - by Gregory J. Gamalski - Summer 2006, p. 101.

THE HISTORY AND APPLICATION OF THE MICHIGAN BUILDING CONTRACT FUND ACT - by Paul J. Mastrangel - Spring 2006, p. 32.

IS AN OWNER LIABLE FOR CONSTRUCTION LIENS WHEN A TENANT OR LAND CONTRACT PURCHASER FAILS TO PAY? - by Marty A. Burnstein - Summer 2005, p. 78.

STOKES - REDUX - by Mark S. Frankel - Winter 2003, p. 201.

CONSTRUCTION SUBCONTRACTS: SHIFTING THE RISK OF NON PAYMENT THROUGH "PAY IF PAID" CLAUSES - by Brian H. Holt - Spring 2003, p. 9.

STOKES v MILLEN ROOFING CO.: THE MICHIGAN SUPREME COURT PUTS TEETH BACK INTO THE RESIDENTIAL BUILDERS ACT'S PROHIBITION AGAINST SUITS FOR COMPENSATION BY UNLICENSED RESIDENTIAL CONTRACTORS - by Mark E. Merlanti - Spring 2003, p. 21.

ADVISING CLIENTS AFTER STOKES - by Mark S. Frankel - Summer 2001, p. 79.

ANALYSIS OF EFFECT ON SUBCONTRACTORS AND SUPPLIERS OF CONTINGENT PAYMENT CLAUSES - by Eric I. Lark and Matthew C. Norris - Fall 1998, p. 173.

CONSTRUCTION LIENS FOR "SOFT SERVICES" AND "HIDDEN IMPROVEMENTS" - by John A. Stevens - Spring 1998, p. 49.

RAISING THE ROOF FOR THE HOMEOWNER: REJECTING THE PASSIVE APPROACH TO HOMEOWNER REPRESENTATION IN RESIDENTIAL CONSTRUCTION LIEN FORECLOSURES - by Marilynn K. Arnold - Summer 1997, p. 129.

ENFORCEABILITY OF THE "PAY-IF-PAID" PROVISION IN A CONSTRUCTION CONTRACT - by Lawrence M. Dudek - Summer 1996, p. 87.

THE CASE FOR PROMPT PAY LEGISLATION FOR PRIVATE CONSTRUCTION PROJECTS - by Clark C. Johnson and Jerome W. Zimmer - Summer 1995, p. 103.

SMALLEY TO PRICE TO ERB: A TIME-PRICE TRILOGY - by Ronald P. Strote - Summer 1995, p. 115.

CONSTRUCTION LIENS IN MICHIGAN - OWNER'S OR INSURER'S RISK? - by Stephanie M. Zimmerman - Spring 1995, p. 25.

RECOVERY OF CONSEQUENTIAL DAMAGES AND DELAY/DISRUPTION DAMAGES FROM PAYMENT BOND SURETIES - by Clifford J. DeVine and Mark W. McInerney - Summer 1993, p. 63.

SUMMARY OF DECISIONS UNDER THE CONSTRUCTION LIEN ACT - by Matthew Norris, Marty A. Burnstein and Ronald L. Cornell, Jr. - Summer 1993, p. 53.

FRAUDULENT PUBLIC WORKS BONDS: NO RIGHT, NO REMEDY - by Sheryl A. Collins - Summer 1992, p. 53.

THE CONSTRUCTION CONTRACT REVISITED: KEY CONTRACT CLAUSES - by Ronald P. Strote - Summer 1990, p. 87.

RESOLVING CONSTRUCTION PROJECT CHANGES - by David M. Hayes and Sheryl A. Moody - Fall 1989, p. 151.

ANALYSIS OF CONSTRUCTION SUBCONTRACT AGREEMENTS - by Clifford J. DeVine -Summer 1989, p. 67.

RESOLVING CONSTRUCTION DISPUTES: ALTERNATIVES TO LITIGATION - by Mary A. Bedikian - Winter 1988, p. 249.

LABOR AND MATERIAL PAYMENT BONDS: AN OVERVIEW - by Ronald P. Strote - Summer 1988, p. 101.

RECOVERY OF INTEREST OR FINANCE CHARGES IN CONSTRUCTION LIEN FORECLOSURE ACTIONS - by Lawrence M. Dudek - Summer 1987, p. 3.

ALTERNATIVE THEORIES FOR RECOVERY OF CONSTRUCTION CLAIMS - by Clifford J. DeVine and Dana I. Avrunin - Fall 1985, p. 168.

HOME CONSTRUCTION - by John W. Steckling - Summer 1984, p. 366.

HOMEOWNER CONSTRUCTION LIEN RECOVERY FUND - by Dayna Milbrand - Summer 1984, p. 339.

LIEN CLAIMANTS AND NON-TITLEHOLDERS, LESSEES AND LAND CONTRACT PURCHASERS: NEW ACT, OLD PROBLEMS - by E. Peter Drolet and Ronald P. Strote - Summer 1984, p. 345.

MICHIGAN'S NEW CONSTRUCTION LIEN ACT - by Robert S. Bolton, Patrick D. Hanes, A. Deane Malaker, Peter A. Nathan, Richard W. Pennings, and Stanley M. Weingarden - April 1982, p. 41.

A TITLE INSURER LOOKS AT THE CONSTRUCTION LIEN ACT - by Deane Malaker - June 1981, p. 42.

WILLIAMS & WORKS v SPRINGFIELD CORPORATION REVERSED - by James W. Batchelor -August 1980, p. 111.

MECHANIC'S LIENS AND RESIDENTIAL BUILDERS' LICENSES - by Gary A. Trepod - April 1980, p. 52.

PENDING LEGISLATION REGARDING MICHIGAN'S MECHANIC'S LIEN LAW - by Richard W. Pennings - April 1980, p. 38.

STATUS OF WILLIAMS AND WORKS, INC. v SPRINGFIELD CORPORATION, ET AL - by James W. Batchelor - April 1980, p. 55.

EASEMENTS AND RIGHTS OF WAY

CONSERVATION EASEMENTS IN MICHIGAN: SEEKING COMMON GROUND BETWEEN LANDOWNERS AND LAND TRUSTS - by Robert L. Brackenbury - Fall 2001, p. 117

SOLAR EASEMENTS UNDER HB 4083 and HB 4127 - by Deane Malaker - June 1980, p. 66.

ENVIRONMENTAL PROTECTION

THE NEW FEDERAL ENVIRONMENTAL DUE DILIGENCE RULES - by R. Craig Hupp - Spring 2006, p. 44

A PROGRESS REPORT ON THE PROMULGATION OF RULES FOR "ALL APPROPRIATE INQUIRY" UNDER CERCLA - by R. Craig Hupp - Winter 2004, p. 215.

NOT ANOTHER DAY AT THE BEACH - MICHIGAN'S NEW GREAT LAKES SHORELINE MAINTENANCE REGULATIONS - by Patricia Paruch, Winter 2003, p. 193.

CONSERVATION EASEMENTS IN MICHIGAN: SEEKING COMMON GROUND BETWEEN LANDOWNERS AND LAND TRUSTS - by Robert L. Brackenbury - Fall 2001, p. 117

THE 2000 BROWNFIELD AMENDMENTS: HOW TO TURN CONTAMINATED, BLIGHTED OR OBSOLETE PROPERTY INTO SUCCESSFUL BROWNFIELD REDEVELOPMENT PROJECTS - by Grant R. Trigger and Richard A. Barr - Winter 2000, p. 179.

HOW TO PROTECT BUYERS OF CONTAMINATED PROPERTY FROM ENVIRONMENTAL LIABILITY WITH CERCLA PROSPECTIVE PURCHASER AGREEMENTS—AND THE LIMITATIONS OF DOING SO - by Christopher J. Dunsky - Winter 1999, p. 183.

PROPERTY TAX AND ENVIRONMENTAL INDEMNIFICATION: IS SWEEPSTER SWEEPING SUPPORT FOR VALUES OF CONTAMINATED REAL PROPERTIES? - by Patricia Paruch, Ronald S. Nixon and William B. Acker - Fall 1999, p. 147.

IN RE FORTY ACRES - JUDICIAL INTERPRETATION OF THE MICHIGAN SUPERPRIORITY ENVIRONMENTAL LIEN STATUTE POSES NEW PROBLEMS - by Jack D. Shumate and Patrick A. Karbowski - Spring 1999, p. 25.

NEW BROWNFIELDS OPPORTUNITIES IN MICHIGAN - THROUGH LIABILITY REFORM, CLEANUP COST REDUCTION AND FINANCIAL INCENTIVES - by Grant R. Trigger - Winter 1997, p. 281.

UNEARTHING THE STATE'S "HIDDEN PRIORITY" ENVIRONMENTAL LIEN, OR HOW TO LOSE YOUR LIEN PRIORITY WITHOUT EVEN TRYING - by Patrick A. Karbowski - Spring 1997, p. 41.

FEDERAL LEAD-BASED PAINT DISCLOSURE REQUIREMENTS: AN UPDATE - by Gregg A. Nathanson - Winter 1996, p. 213.

THE U.S. SUPREME COURT CLARIFIES THE LAW ON RCRA CITIZEN ENFORCEMENT ACTIONS - by Jack D. Shumate - Summer 1996, p. 91.

ONLY POLLUTERS PAY - MAYBE: IMPLICATIONS OF ACT 307/PART 201 AMENDMENTS FOR MORTGAGE LENDERS - by Vicki R. Harding - Winter 1995, p. 225.

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FORECLOSURE AND FORFEITURE

IS THERE POSSESSION AFTER FORFEITURE? - by Thomas W. Hall, Jr. and Diane M. Kuhn - Spring 1993, p. 29.

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GOVERNMENTAL HOUSING PROGRAMS, GOVERNMENT SPONSORED ENTITIES, TIFs AND OTHER GOVERNMENTAL INCENTIVE PROGRAMS

NEW ENHANCING THE DEAL: INTEGRATING GOVERNMENT INCENTIVES INTO REAL ESTATE TRANSACTIONS - by Grant W. Williams - Spring, 2007, p. 18.

THE MICHIGAN STATE HOUSING DEVELOPMENT AUTHORITY - by Willard G. Moseng - Summer 2006, p. 93.

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LAND CONTRACTS

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LEASING

NEW COMMERCIAL LEASE CLAUSES CONCERNING CONSTRUCTION OF TENANT IMPROVEMENTS - by Mark Krysinski – Winter 2007, p. 199.

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NEW COMMERCIAL LEASE PRESUMPTIONS UNDER MICHIGAN LAW - By Andrew D. Hakken - Summer 2007, p. 84.

RES JUDICATA AND SUMMARY PROCEEDINGS: THE SUPREME COURT SETS THE RECORD STRAIGHT - by Kevin A. S. Fanning - Winter 2006, p. 229.

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LICENSING MATTERS

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ADVISING CLIENTS AFTER STOKES - by Mark S. Frankel - Summer 2001, p. 79.

LIMITED LIABILITY COMPANIES, PARTNERSHIPS AND OTHER ENTITIES

LETTING THE STATUTE BE THE DEAL: THE DELAWARE STATUTORY LLC DEFAULT RULES - by Robert R. Nix, II and Steven A. Waters - Spring 2005, p. 7.

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VOTING RIGHTS FOR LIMITED PARTNERS UNDER MICHIGAN'S REVISED UNIFORM LIMITED PARTNERSHIP ACT - by Thomas S. Vaughn - December 1982, p. 261.

MALPRACTICE AND PROFESSIONAL RESPONSIBILITY

ATTORNEY MALPRACTICE LIABILITY FOR FAILURE TO FILE UCC FINANCING STATEMENT - by John C. Murray - Fall 2003, p. 137.

ATTORNEYS ARE NOT LEGAL CONTRACTORS FOR PURPOSES OF FILING CONSTRUCTION LIENS - by John Koby Robertson - Summer 2001, p. 87.

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MOBILE HOMES

PERFECTING LIENS ON MOBILE HOMES IN MICHIGAN - by Kelly M. Hagan - Summer 2003, p. 73.

MORTGAGES, MORTGAGE LOANS AND USURY

NEW EQUITABLE SUBROGATION: WHY THE REFINANCE LENDER'S SECURITY INTEREST MAY NOT BE AS SECURE AS IT THINKS - by Thomas A. Kabel - Fall 2007, p. 134.

NEW MORTGAGE SUBORDINATION AGREEMENTS: SOME COMPELLING REASONS TO RECONSIDER A LEAN AGREEMENT - by Nicholas P. Scavone, Jr. - Fall 2007, p. 160.

CONDOMINIUMS AS COLLATERAL: WHAT LENDERS SHOULD KNOW - by Scott A. Steinhoff and Casey Koppelman - Summer 2004, p. 79.

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INSURANCE COVERAGE CONCERNS IN LENDER-BORROWER RELATIONSHIPS - by Michael S. Hale and Joel D. Kellman - Winter 2002, p. 177.

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HUD AND FANNIE MAE REQUIREMENTS FOR BORROWER ENTITIES - by C. Leslie Banas - Winter 2000, p. 213.

MORTGAGE WORKOUTS: DEEDS IN ESCROW - by John C. Murray - Fall 2000, p. 133.

FEDERAL PRIVATE MORTGAGE INSURANCE LEGISLATION: PROTECTION IN A REGULATOR-FREE ENVIRONMENT - by Elliot A. Spoon - Summer 2000, p. 85.

THE NEW FANNIE MAE/FREDDIE MAC UNIFORM NOTE AND MORTGAGE: A BRIEF REVIEW - by Mark K. Rabidoux - Fall 1999, p. 151.

THE "LAND CONTRACT MORTGAGE" - IT'S BRAND NEW - by Gary A. Taback - Winter 1998, p. 211.

LENDING TO A LIMITED LIABILITY COMPANY - A LENDER'S CONCERN - by W. A. Steiner, Jr. - Winter 1996, p. 217.

LOAN DOCUMENTS IN PERPETUITY? - by Robert R. Nix II - Winter 1996, p. 221.

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ORAL PROMISES TO LEND UNDER MICHIGAN'S ACT 245 - by David E. Doran and Daniel J. Brondyk - Winter 1993, p. 175.

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WARNING: THE BANK MUST SIGN THE PROMISSORY NOTE (OR AT LEAST A WRITING) - by Gary A. Taback - Winter 1992, p. 185.

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OIL, GAS AND MINERAL RIGHTS

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DORMANT MINERAL ACT HELD CONSTITUTIONAL - by Allen E. Priestley - June 1981, p. 80.

PREMISES LIABILITY AND CASUALTY INSURANCE

INSURANCE COVERAGE CONCERNS IN LENDER-BORROWER RELATIONSHIPS - by Michael S. Hale and Joel D. Kellman - Winter 2002, p. 177.

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PROBATE AND ESTATE PLANNING

THE AUGMENTED ESTATE: A REAL PROPERTY NIGHTMARE? - by Margaret A. Meyers - Spring 1998, p. 43.

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RESIDENTIAL TRANSACTIONS

NEW LEGISLATION IMPACTS TAX TREATMENT OF PRINCIPAL RESIDENCE CONVERTED FROM A 1031 REPLACEMENT PROPERTY - by Dawn M. Patterson - Winter 2004, p. 222.

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SECURITIES AND SYNDICATIONS

INFORMATIONAL REQUIREMENTS FOR SMALL REAL ESTATE PRIVATE OFFERINGS - by Gail A. Berry - Spring 1984, p. 303.

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SUBDIVISIONS AND THE LAND DIVISION ACT

NEW COUNTING ON REDIVISION RIGHTS? - by David W. Charron - Spring, 2007, p. 7.

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TITLE INSURANCE

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TITLES AND CONVEYANCING

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