MICHIGAN REAL PROPERTY REVIEW

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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 George J. Siedel, Editor, University of Michigan Business School, 701 Tappan Street, Ann Arbor, Michigan 48109-1234 (gsiedel@umich.edu). The publication of articles and the editing thereof are at the discretion of the Editor. A cumulative index of articles is printed annually in the Winter issue of the *Review* and is available on the Section website:

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CHAIRPERSON'S REPORT

by Mark Makower

As I begin my year as Chairman of the Section, I wish to thank my predecessor, Larry Dudek, and those who have come before him, for their hard work, initiatives and stewardship. I would also like to thank my colleagues on the Governing Council, the committee chairs, and the membership of the special committees, all of whom make this not only one of the largest, but one of the most active, vibrant and meaningful Sections of the State Bar of Michigan. To remain at this level, the Section needs the continued support and involvement of its members, especially the younger members of the real estate bar. Borrowing on the theme of my predecessor, we urge you to get involved and stay involved. We need and welcome your enthusiasm and your ideas.

As we look to the next year, the Section will continue many of the activities it has been involved in in the past, and take on new challenging projects as well. One of the most significant of these will be the new long range plan for the Section. Just prior to leaving office, Larry Dudek created the Long Range Planning Committee and charged it with reporting to the counsel within the next year on recommendations for a strategic five-year plan in the areas of technology, membership, and continuing legal education. Much like the 21st Century Committee, which set forth a long-range plan for the Section some four years ago, this Committee will advise the Counsel on the strategic plan for the next five years designed to help the Section meet and plan for the changing times.

In the summer of 2005, the Habitat for Humanity Jimmy Carter Build comes to the cities of Detroit and Benton Harbor. The Section is currently planning on sponsoring a house during the Jimmy Carter Build in Detroit, and during the next several months will be soliciting support from the major law firms within the Detroit metropolitan area to make that plan a reality. Of course, we will also need plenty of volunteers to provide labor and other logistical assistance during the build, and welcome everybody's support and involvement in whatever way you can.

Education remains a strong focus of the Section's activities. The Homeward Bound program, now under the leadership of David Nykanen, continues to be a strong performer. The upcoming lineup includes sessions on avoiding and solving closing problems, tips for drafting, amending and interpreting understandable real estate law,

what every practitioner needs to know about bankruptcy law, what every practitioner needs to know about title insurance, ground leases and financing, negotiating, documenting and closing real estate deals. This is assured to be another year of useful and informative sessions, which all members should endeavor to attend. We are also continuing the highly successful Breakfast Roundtables at the Townsend Hotel in Birmingham, with programs on like-kind exchanges and leasing clauses and concerns. As the Breakfast Roundtables usually sell out far out in advance of the program, arrangements should be made early to attend these sessions. Based upon the success earlier this year of a Homeward Bound program reconstituted in Grand Rapids, the Section is again instituting, on a test basis, the video conferencing of the Homeward Bound program in May of 2005 dealing with financing, negotiating, documenting and closing real estate deals. Indications from earlier this year showed an interest for these programs to be brought back to the western side of the state, and we are hopeful that they will be well attended and supported by our colleagues from Grand Rapids and surrounding environs. Based on the results of this test, expansion of the Section's educational activities into the western side of the state will increase proportionately. I look forward to continuing the Section's track record of providing timely and informative educational opportunities to the members of the Section.

In 2004, the Section saw the return of the Winter Conference after an absence of almost 10 years. The conference held in Toronto, Canada featured a very informative and well-presented program on handling cross border transactions between the United States and Canada. The conference was well-attended and a resounding success. The 2005 Winter Conference, scheduled for South Beach, Florida, continues the cross-jurisdictional theme and promises an outstanding program dealing with topics of interest to real estate practitioners handling transactions in Florida and Michigan. We look forward to another rousing success and encourage you to become part of the fun, education and comradery. The Summer Conference held in Gaylord at the Treetops Resort was also highly informative, and reflected the continuing growth of the summer conference from a participation standpoint. We look forward to seeing you all at the 2005 summer conference at the Grand Traverse Resort in Traverse City where, as usual, an outstanding program will be developed and presented under the watchful eye of CLE Director, Brian Henry, and program director, Richard Rattner.

The Section continues to take an active role in legislation and advocacy, spearheaded by the Section's Special Committees and the Vice Chairperson, Patrick Karbowski. One of the main focuses of the Special Committees is to review legislation in their areas of expertise, and advise the council when positions should be taken either for or against a proposed piece of legislation in the interest of the real estate bar as a whole. The Section also continues to be asked by the judiciary to file amicus curiae briefs on various matters of real estate law that come before the Michigan Supreme Court and the Michigan Court of Appeals. The judiciary welcomes the opinion of the Real Property Law Section, and the Section continues to welcome being involved in sound judicial decision making in the areas of real estate law. Brief writing or service on a Special Committee are excellent ways to become involved in the Section's activities, to meet and network with experts and practitioners in various real estate disciplines, and enhance knowledge, professional growth, and service to the real estate bar as a whole. All members of the Section are encouraged to become involved in these activities.

I look forward with excitement and enthusiasm to the year ahead, as we face the present and plan for the future. I urge all members of the Section to become involved, and I look forward to joining with you, sharing your ideas and continuing to serve the real estate bar.

2003-2004 ANNUAL REPORT REAL PROPERTY LAW SECTION

The Real Property Law Section continues to be one of the more active sections in the State Bar of Michigan.

Continuing Legal Education

We continued our long practice of presenting the Homeward Bound Series, which consists of monthly seminars on current real estate topics offered in conjunction with the Institute for Continuing Legal Education.

For a second time, the traditional afternoon format was replaced by a breakfast roundtable format for two of the sessions. The goal in using this format is to provide an opportunity for more interactive participation. In each case, one of the Section's special committees organized an introductory presentation by a key note speaker or panel, followed by discussions at each of the breakfast tables on topics led by designated people.

The Section also continued with its quarterly publication of the *Michigan Real Property Review*, containing articles of interest on topics of real estate law.

Summer Conference

In July, 2003, our summer conference was held at Crystal Mountain. Again, CLE was an important part of the event, with breakfast roundtables held on Thursday and Friday morning, and presentations and workshops on Thursday. The Section was especially honored to hear a presentation on Saturday morning by the Honorable Marilyn J. Kelly, Michigan Supreme Court Justice. The rest of the time was devoted to enjoying the resort facilities.

The Annual meeting of the section was held in conjunction with the 2003 Summer Conference will be at Crystal Mountain. This permitted much greater participation by Section members than was the case in prior years when the annual meeting was held in conjunction with the annual meeting of the State Bar of Michigan, which was generally held in September. Moving the annual meeting up to the summer conference in July also permitted the Council to have an earlier start on the activities for the upcoming year.

Winter Conference

In March, 2003, the Section held a Winter Conference at the Four Seasons Hotel in Toronto, Canada. The conference program had an international dimension and focused on Canadian law applicable to real estate purchases and its interaction with applicable Michigan law. The size of the group permitted a great deal of interaction and

participation in the conference programs.

Legislation

We continued to bring the expertise of Section members to bear on legislation. The Section provides draft legislation for areas that would benefit from clarification, comments on bills that potentially interfere with the operation of the real estate system, and provides suggested alternatives for bills that do not accomplish their stated purpose (often due to some misunderstanding about real estate law).

About ten years ago the Section Council decided to became more active on the legislative front after several bills were passed that inadvertently had an adverse impact on real estate issues. Initially we relied on a lobbyist and Section members located in Lansing to identify relevant bills. However, in recent years the Michigan Legislature created a web site that has become an increasingly powerful tool for identifying and tracking legislation. Today we use the lobbyist primarily to determine the political realities of bills that we have identified as relevant (is the bill likely to move forward, who are the interested constituencies, etc.), and to assist us in developing the most effective presentation of the Section's comments or positions.

A key development over the last year was the passage of the Judgment Lien bill, which was opposed by the Section as potentially interfering with and/or increasing the cost of real estate transactions. While the legislation did pass over the objection of the Section, the bill as passed did include many provisions suggested by the Section over a number of years that operate to at least minimize the adverse effects of the bill.

Amicus Briefs

The Section continues to take an active role in seeking permission to file amicus briefs. Most recently, the Section was asked by the Michigan Supreme Court to prepare an amicus brief in the case of Michigan Department of Natural Resources v Carmody-Lahti Real Estate, which involves the question of the extinguishment of an easement as a result of non-use and other actions of the grantee. The Section takes great pride in being called upon by the Michigan Supreme Court and Court of Appeals in being asked to provide its insight on issues of real estate law.

Technology

The Section continued to accelerate its use of computer technology as a mechanism to deliver information to its membership. The use of electronic communication has permitted the Council of the Section to take timely action on matters of some urgency, especially as related to the Section's public policy advocacy.

The Section's Council meets monthly, and substantial agenda materials are distributed to approximately 30 people prior to each meeting. This year, we continued the practice initiated in the prior year of distribution by e-mail, allowing materials to be considered on a very timely basis.

The Section continued to actively work on establishing listservs for each of our special committees, with the hope that, among other things, this will encourage participation by Section members across the state.

Long-Range Planning

The Section's bylaws include the following mandate:

> The purpose of this Section shall be to study the laws and procedures pertaining to Real Property Law and to promote the fair and just administration of Real Property Law; to study and report upon proposed and necessary legislation, including, but not limited to, pending legislation and drafting and introducing legislation; to study and report on pending litigation, including, but not limited to, the filing of amicus curiae briefs to promote throughout the State of Michigan the legal education of members of the Bar and the public on "Real Property Law" by sponsoring meetings, institutes and conferences devoted to Real Property Law, by the preparation and dissemination of books, booklets materials, pamphlets and brochures with respect thereto and by preparing and sponsoring and publishing legal writings in this field. The Section shall endeavor to promote professional responsibility and the prevention of malpractice among the members of the Bar. The term 'Real Property Law" shall include, but not be limited to. the law of mortgages, liens, encumbrances, property taxes, land titles, land use, zoning, leases, land sales, water law, riparian rights, conveyancing, taxation, condominiums and environmental law.

During the previous year the Council established an ad hoc committee to consider long range planning issues, including membership participation, continuing legal education, technology, pro bono, and other matters of interest. The committee commenced its work at the 2004 Summer Conference.

-Lawrence M. Dudek
2003-2004 Chairperson

MICHIGAN AND DELAWARE LIMITED LIABILITY COMPANY ACTS – A COMPARISON

by Mark G. Kaylian and Richard A. Shapack

Since the passage of the Michigan Limited Liability Company Act in 1993, limited liability companies have garnered widespread acceptance as useful business entities in Michigan. Indeed Michigan limited liability companies are often considered alternatives to Michigan corporations and limited partnerships, and to a significant degree, replacements of those more venerable entities. Michigan business lawyers have come to rely on Michigan LLCs as flexible entities that can be adapted to a wide range of business circumstances. When a Michigan practitioner decides to form a limited liability company, however, there may be situations (e.g., a lender requirement for the use of a non-economic member) where it may be beneficial to look beyond the Michigan Limited Liability Company Act and consider forming a Delaware LLC, due to certain greater flexibilities inherent in the Delaware Limited Liability Company Act.

This article will highlight the significant differences between the respective Limited Liability Company Acts in Michigan and Delaware. In light of these differences, and heavily dependent upon the intended use and size of the LLC, a Delaware LLC may be a more appropriate entity in some business situations. The differences that follow are not arranged in order of importance; rather their order corresponds to the life cycle of a limited liability company, beginning with formation.

Significant Differences between the Michigan and Delaware Limited Liability Company Statutes

1. Operating Agreement

Under Delaware law, the limited liability company agreement need not be in writing,[1] but can be an oral agreement, whereas an operating agreement for a Michigan LLC must be written.[2] In addition, a person will be considered to be a member of a Delaware LLC, even if that person has not executed a written operating agreement, as long as the person fulfills the conditions required of members set forth in any written instrument. By contrast, Michigan requires that members of a new LLC must sign the Articles of Organization or the operating agreement.[3]

This aspect is perhaps the greatest area of divergence between the respective statutes. Ten years ago, while serving on the ABA committee formed to work with the

National Conference of Commissioners for Uniform State Laws, one of the authors strongly advocated the requirement that any operating agreement provision that diverged from those set forth in the statutes be required to be set forth in a writing. Poor communications, particularly in smaller, less-sophisticated organizations, will only engender potential litigation as unhappy members take the position that the other member or members had orally agreed to changes in operating agreement provisions. Others took the position that a less formalistic approach, similar to that adopted by Delaware, would allow limited liability companies greater flexibility. Their argument was that smaller limited liability companies in particular would likely benefit from this greater flexibility, as an oral operating agreement will allow simpler and less expensive formation, and will readily accommodate a growing and evolving business. The concept that the requirement of a writing interferes with the fluid operation of a small business fails to consider the fact that the default provisions, as modified by the specific provisions of an operating agreement, will normally effectively govern any business relationship. If an arrangement is to be governed by provisions other than those contained in the default provisions of the LLC act, it is unlikely that those provisions will change other than at very infrequent intervals and, in the event of such a change, it becomes very important that all parties thoroughly understand the precise manner in which they will change. To avoid misunderstandings and potential litigation, those changes should be carefully documented and reflected in a writing signed by all parties. These differing opinions appear to be more relevant to small organizations inasmuch as larger ones are far more likely to require the formalistic written approach.

The early LLC statutes, as enacted by many of the states, contained "bulletproof" provisions to prevent both attorneys and members from inadvertently losing the anticipated pass-thru entity benefit by possessing too many of the "corporate" characteristics (i.e., free transferability of interests, centralization of management, limited liability and continuity of life) as set forth in the Kintner Regulations. With the issuance by IRS of the "Check-the-Box" Regulations in December, 1996, this concern evaporated and the state statutes were amended to remove these provisions. However, in the same vein, understanding that many of the practitioners and business persons utilizing LLCs will not be highly sophisticated, a strong argument can be made to the effect that the minimal loss of flexibility is more than offset by the benefit of requiring written documentation of any relationship change, thus significantly reducing potential misunderstandings and the litigation that such misunderstandings might engender.

2. Management

In both Michigan and Delaware, LLCs are presumed to be managed by all members of the LLC and any one or more of the members of the LLC may bind the company.[4] To establish a manager-managed LLC in Delaware, the LLC operating agreement must indicate that the LLC is to be managed by a manager or managers. In Michigan, a manager-managed LLC must be reflected in the Articles of Organization.[5] The concept reflected by the Michigan statute is that if the manager-managed provision is inserted into the Articles of Organization, third parties will be on notice that managers and not members have the authority to act as agents of the LLC. By contrast, in Delaware, the presumption of member management can be pre-empted by a provision in the LLC operating agreement indicating that the LLC will be managed by a manager, not by the members. The LLC operating agreement may also provide whether the members or managers may bind the company. The Delaware statue allows greater flexibility in structuring a LLC by avoiding formalistic requirements but provides less clarity to third parties regarding the issue of the party or parties authorized to bind the company. By requiring that a preference for manager-management be included in the Articles of Organization, the Michigan statute is plainly concerned with providing notice to the public as to who speaks for, and can bind, a LLC. By contrast, Delaware seems less concerned with providing constructive notice (perhaps relying on parties conducting business with the LLC to determine authority) and more concerned with ensuring that manager-management is simple to implement.

3. Members

Delaware law permits persons to be members of a LLC who have not made contributions to the entity and permits persons to be members of a LLC without having voting rights.[6] Similarly, the Michigan Limited Liability Company Act has been amended to explicitly permit a Michigan LLC to have non-contributing members (i.e., "*A LLC may admit a person as a member who does not make a contribution or incur an obligation to make a contribution to the LLC,*" as set forth in Section 501(2)) and also allows flexibility regarding voting rights. Allowing non-contributing individuals to become members provides practitioners additional flexibility in structuring LLCs; for instance, a LLC could be structured to provide a membership interest to a person who has important skills or has contributed other benefits, but will contribute little or no capital.

4. Non-Economic Members

Delaware law now appears to permit non-economic members under an amendment to Section 18-301(d) that states "*a person may be admitted to a LLC as a member of the LLC without acquiring a LLC interest in the LLC.*" Michigan law is silent regarding non-economic members, with the statute neither specifically permitting nor prohibiting the use of this concept. To the extent that entities (e.g., financial institutions, non-profit organizations, etc.) desire to obtain, directly or indirectly, a level of control without financial attributes through the use of a non-economic member, until the Michigan statute is amended, practitioners should carefully define that concept in the LLC operating agreement (e.g., The non-economic member ("Special Member") of the Company has no interest in or right to share in the profits, losses and capital of the Company and has no right to receive any allocations or distributions of Company assets; provided, however, that the Special Member may vote upon, and the written consent of the Special Member shall be required to take, any of the Material Actions set forth in Section xx of this Agreement.) and in those instances where a high level of certainty regarding utilization of the non-economic member concept is required, serious consideration should be given to the use of a Delaware LLC.

Over the past fifteen years there has been a significant and serial expansion of "carve-outs" in non-recourse loans, as well as the addition of other mechanisms so as to provide additional protection to lenders. Whereas in the late 1980's, the carve-outs generally included only fraud and environmental matters, those categories have been expanded to include distributions, bankruptcy, etc. If the lenders had sufficient comfort from a straight contractual provision in their standard loan documentation, they would not have instituted this "non-economic member" concept. Through the insertion of a provision in the LLC operating agreement requiring unanimity for the LLC to enter bankruptcy and by inserting itself or its nominee as a member, the lenders obviously are of the opinion that the courts will respect that provision, thus preventing the borrower from obtaining bankruptcy protection. Without having done any research to determine the response of the courts to this provision, what is apparent is that many of the conduit lenders have taken this approach.

Regarding the legitimacy of a non-economic member of a Michigan LLC, as noted above, it appears that the drafters of the Michigan LLC statute simply have not addressed the concept. As such, while one might expect that a Michigan court would recognize the concept of a non-economic member, one would have little comfort in signing an opinion stating that that would be the result. While the Delaware provision does not use the term "non-economic member," the language appears to cover that situation and thus would provide a much higher degree of comfort in an opinion relating to a Delaware LLC.

There are also non-lender related situations where the use of a non-economic member works well. A non-profit organization desiring certain control aspects is very sensitive about anything that could appear to be Unrelated Business Taxable Income (UBTI). Even though it could hold a nominal economic interest, it is the UBTI aspects that make this approach unacceptable. Utilization of a Delaware LLC appears to be an obvious alternative.

5. Distributions

In the absence of contrary arrangements made in the operating agreement, Michigan LLCs make distributions to members in equal shares.[7] Without a provision in the limited liability company operating agreement respecting distributive shares, Delaware LLCs divide distributions among the members in the same proportion as contributions were made by the members.[8] Unless one is dealing with a "plain vanilla" LLC, neither of these options is attractive and the operating agreement should set forth the members intentions so that the proper motivation can be provided to each class of membership.

Delaware LLCs provide substantially greater protection to members in the event of problematic distributions. Michigan law imposes joint and several personal liability on members who authorize distributions that violate provisions of the operating agreement or violate Section 307 of the Michigan Limited Liability Act. Section 307 prohibits distributions if, after having given effect to the distribution, the LLC would not be able to pay its debts or the LLC's total assets would be less than its total liabilities. Delaware has no provision imposing this type of liability on members.

Moreover, the Delaware Limited Liability Company Act shields a member who received a wrongful distribution so long as that member did not know that the distribution was wrongful. Delaware law defines a wrongful distribution as one that is made when the LLC's liabilities are greater than the LLC's assets.[9] Thus by not imposing liability on members who authorize wrongful distributions and protecting members who unknowingly receive wrongful distributions, Delaware LLCs do a better job of protecting members from personal liability. These provisions suggest a propensity to

provide more protection to those who manage and own the LLC, at a potential cost to other entities doing business with the LLC.

6. Indemnification

Delaware law permits indemnification of the members and managers of a LLC, subject only to limits imposed in the LLC operating agreement.[10] Michigan LLCs can only indemnify managers, not members, and Michigan law limits the scope of indemnification. Managers of Michigan LLCs may not be indemnified against (1) receipt of a financial benefit to which the manager is not entitled, (2) a knowing violation of law or (3) liability for approving a wrongful distribution.[11]

These exceptions significantly restrict the protection that Michigan LLCs can extend to their managers. Circumstances covered by these three exceptions could represent significant personal liability for the managers of a LLC. Moreover, the inability to indemnify members poses a significant issue for member-managed limited liability companies. This limitation seems particularly vexing in light of the popularity of member-managed limited liability companies.[12] Especially when combined with the Delaware statute's safe harbor for members who received wrongful distributions unknowingly,[13] Delaware LLC law provides better protection for managers and members with respect to liability arising from distributions and provides superior protection generally.

7. Conversion

Both the Delaware and Michigan limited liability statutes permit certain entities to convert into a LLC. When an entity desires to change its form, conversion is an attractive alternative to merger inasmuch as conversions are generally easier to execute than mergers. Delaware permits the conversion of a Delaware corporation, partnership or business trust into a Delaware LLC.[14] Delaware also permits the conversion of a Delaware LLC into a Delaware business trust, common law trust, corporation or partnership.[15]

Michigan only permits the conversion of Michigan partnerships into Michigan LLCs. Delaware law provides entities greater flexibility to change form, allowing entities to convert to and from Delaware LLCs. This provides management the ability to easily change entity form to respond to shifting business conditions. Michigan law, by contrast, is comparatively restrictive, affording Michigan entities less flexibility.

8. Merger

Michigan and Delaware limited liability statues have similar merger provisions, with one key difference. Under Michigan law, a merger of a LLC into another LLC or other entity requires the approval of all of the members of the LLC.[16] In Delaware, only the members owning 51 percent of the interest in the profits of the LLC must approve a merger.[17] While Michigan law provides that a LLC operating agreement can provide for approval by less than a unanimous vote, Michigan's unanimity requirement is still a significant difference between the Michigan and Delaware statutes. Michigan's statute is much more protective of minority interests in limited liability companies, while Delaware's statute emphasizes quicker consummation of mergers, again enhancing transactional efficiency.

9. Cost

The cost of forming and maintaining Delaware and Michigan limited liability companies is an important

CHART 1

	MICHIGAN	DELAWARE
Filing Fee for Articles of Organization	$50	$100
Filing Fee for Amendment to Articles	$25	$100
Filing Fee for Annual Statement	$25	$200
CT Corporation resident agent fee for foreign entity*	$280	$280

* A Michigan LLC operating in Michigan would not require the CT Corporation to act as the resident agent and thus not incur that fee.

consideration in the choice of jurisdiction. While the cost for filing Articles in both jurisdictions is similar, as is indicated in Chart 1, Delaware is more expensive in all other aspects, particularly the annual statement filing fees. CT Corporation charges the same fee to act as the registered agent in either Delaware or Michigan. However, a Michigan-based LLC will generally not require the services of CT Corporation or incur the expenses related to the foreign entity resident agent.

10. Series LLCs

Delaware incorporated an interesting provision when it amended its limited liability company statute to provide, in Section 18-215, for "series" of members, managers and/or interests. As such, operating under a single LLC, different members and/or managers can operate separate businesses or entities with different investment objectives. In pertinent part, subsection (b) of the above-referenced statute, states ". . . in the event that a LLC agreement creates one or more series, and if separate and distinct records are maintained for any such series and the assets associated with any such series are held (directly or indirectly, including through a nominee or otherwise) and accounted for separately from the other assets of the LLC, or any other series thereof, and if the LLC agreement so provides, and notice of the limitation on liabilities of a series as referenced in this subsection is set forth in the certificate of formation of the LLC, then the debts, liabilities and obligations incurred, contracted for or otherwise existing with respect to a particular series shall be enforceable against the assets of such series only, and not against the assets of the LLC generally or any other series thereof. . . ."

The good news is that the provisions of Delaware Statute Section 18-215 will allow many different operations to be grouped under one LLC, which, in turn, should significantly reduce the Annual Statement filing fees and perhaps allow more flexibility in the management of related entities. This approach might adapt well to the real estate investment firm that will be acting as the manager of multiple properties or even the venture capital group as it invests in multiple projects. However, given the lack of familiarity with this concept that would likely exist in Michigan courts, use of the series concept in a Delaware LLC doing business in Michigan could engender unexpected results or at least confusion for any matters that proceeded to litigation. Once again, this concept appears to be more adaptable for larger, more sophisticated entities.

Additional Differences Between Michigan and Delaware Limited Liability Company Statutes

Chart 2 details numerous other, less significant, differences between the Michigan and Delaware statutes. The chart also lists provisions found in the Delaware or Michigan statutes that appear not to be addressed in the statutes of the other state.

Conclusion

After careful consideration of the differences between the Michigan and Delaware limited liability company statutes, in most instances a Michigan-based business should elect to be a Michigan LLC. The Delaware act provides greater protection to members from wrongful distributions, broader indemnification, and more flexibility in formation, conversion, management and membership, as well as greater certainty when dealing with the non-economic member concept. Generally, the Delaware statute edges away from the more formalistic requirements of the Michigan statute and places a higher priority on business efficiency, although many of these perceived advantages can be considered and addressed in a carefully-crafted operating agreement. While there may be instances where greater flexibility may be beneficial to a Michigan-based Delaware LLC, upon closer review, the potential benefits appear to be limited and may be offset by the increased costs associated with maintaining a Delaware LLC, concerns with the potentially dangerous aspects of an operating agreement subject to oral modification (absent a specific provision in a written operating agreement requiring that all modifications be in writing), and the understanding that Michigan courts may not fully understand all the intricacies of Delaware law. Furthermore, most Michigan practitioners lack familiarity with the Delaware statute and the discomfort arising from unfamiliarity may outweigh otherwise attractive individual provisions in the Delaware act. Conversely, inasmuch as most conduit lenders are more conversant with the Delaware (than the Michigan) statute, at times those lenders will require the use of a single-purpose Delaware LLC. However, Delaware LLCs are generally not replacements for their Michigan cousins, except in those limited instances when a practitioner or client places a premium on one or more of the operator or owner-favorable aspects of a Delaware LLC.

MCLA	*Delaware Laws*	*Comments*
450.4101	18-1102	**SHORT TITLE**
450.4102	18-101	**Definitions** —Delaware defines Bankruptcy under 18-304; Michigan code does not. —Delaware includes "and having one or more members" in definition of Limited Liability Company. *18-101(6)* —Delaware includes "nominee or any other individual or entity in its own or any representative capacity" in its definition of "Person." *18-101(12)* —Delaware includes definition of "personal representative;" Michigan does not. *18-101(13)* —Delaware's definition of "operating agreement," which it defines as "Limited Liability Company Agreement," is much more expansive than Michigan's. May be an oral agreement, allows for one person agreements, and provides that a person can be a member, even if agreement not executed, if such person complies with the conditions of the agreement. *18-101(7)*
450.4103	18-204	**Articles of Organization–Signatures** —Delaware attributes specific penalties of perjury for executing a document that to the best of that person's knowledge is not true. *18-204(c)* —Delaware also allows agents of authorized persons to sign documents. *18-204(6)* Effective December 30, 2002, Michigan allows the same *450.4103(2) (Supp. 2004)*
450.4104	18-206	**Procedures for Filing Documents**
450.4105	NONE	**Refusal to File Documents**
450.4106	18-211	**Certificate of Correction** —Delaware provides that the certificate of correction is effective as of the original filing date except as to those persons who are "substantially and adversely" affected. *18-211(a)* Michigan standard is mere reliance. *450.4106(4)*
450.4201	18-106(a)	**Formation of LLC; Lawful Purpose** —Delaware lawful purpose provision is broader, providing that the LLC may carry on "any lawful business, purpose or activity," while in the Michigan Act limits it to "any lawful purpose for which a domestic corporation or domestic partnership could be formed." —Delaware specifically names insurance and banking as two businesses for which an LLC may not be formed. Michigan simply provides "except as otherwise provided by law."
450.4203	18-201	**Articles of Organization** —Delaware does not require a statement that the LLC is manager-managed, if that is the case. —Delaware statute specifically provides that the operating agreement may be entered into before, after or at the time of the filing of the Articles *18-201(d)*
450.4204	18-102	**Name of LLC**
450.4205	18-103	**Reservation of Name** —Delaware specifically provides that person reserving name has right to extend reservation. *18-103(b)*
450.4206	NONE	**Transaction of Business Under Assumed Name**
450.4207	18-104(a) & (b)	**Registered Office, Resident Agent, Service of Process**
450.4209	18-105, 18-109	—Delaware has very detailed service of process provisions *18-105, 18-109*
450.4207a	NONE	**Certificate of Good Standing**
450.4208	18-104(c) & (d)	**Resignation of Resident Agent** —Delaware provices that if Resident Agent resigns and no new Resident Agent is appointed within 120 days, the LLC Certificate of Formation is cancelled. Michigan has no penalty.

MCLA	*Delaware Laws*	*Comments*
450.4210	18-106(b)	**Powers of Company**
450.4211	NONE	**Power to Transfer Real or Personal Property, Actions to Enjoin**
450.4212	NONE	**Rate of Interest**
450.4213	NONE	**Documents Kept at Registered Office**
450.4214	NONE	**Conflict between Articles and Operating Agreement**
450.4301	18-501	**Contribution of Members**
450.4302	18-502	**Enforcement of Contribution** —Delaware does not require that the promise to contribute be in writing and signed by the Member. *18-502(a)* —Delaware specifies examples of particular remedies an LLC may have if a Member fails to make a contribution. *18-502(c)*
450.4303	18-504	**Allocation of Distributions** —Delaware has maintained, where not otherwise specified, that distributions be based upon contributions made by Members while Michigan provides for new LLCs that distributions shall be equal among Members, irrespective of contributions made.
450.4304	18-601	**Receipt of Distributions Before Withdrawal or Dissolution**
450.4305	18-604	**Withdrawal of Member; Entitlement to Distributions**
450.4306	18-605	**Cash Distributions** (No material difference)
450.4307	18-606, 18-607	**Inability to Make Distributions, Member's Remedies, Obligations to Make Distributions** —Delaware allows for the establishment of a record date with respect to allocations and distributions. *18-606* —Delaware excludes from definition of distribution amounts constituting reasonable compensation for present or past services or reasonable payments made in the ordinary course of business pursuant to a bona fide retirement plan or benefits program. *18-607(a)* —In Michigan, distribution is defined for the Act as direct or indirect transfer of money or other property or indebtedness according to membership interest. *450.4102(2)(g) (Supp. 2004)*
450.4308	18-607	**Unlawful Distributions** —Delaware specifically provides that if a member receives a distribution who did not know at the time it was a violation, the member shall not be liable to the LLC. *18-607 (b)* Michigan is silent on this. —Delaware – 3 year statute of limitation. *18-607(c)* Michigan – 2-year statute of limitation. *450.4308(5)* —Michigan imposes joint and several liability on members or manager who vote for a distribution in violation of operating agreement or statute. *450.4308(1)* Delaware imposes no such liability. Michigan imposes continuing liability even in case of a dissenting vote unless in writing. *450.4308(2)*
450.4401	18-402	**Management Vested in Members** —Unless otherwise agreed in the LLC agreement, Delaware votes based upon interest of members in profits while Michigan for new LLCs–votes are 1 member 1 vote.
450.4402	18-401, 18-402	**Management by Managers** —Delaware provides that, unless otherwise provided in the operating agreement, each member and each manager has authority to bind the LLC. *18-402.* Michigan provides that if the Articles of Organization state that the LLC is manager managed, then third parties on notice that members do not have agency authority. *450.4402(4)*
450.4403	NONE	**Filling of Managerial Positions or Vacancies**
450.4404	18-406	**Discharge of Managerial Duties, Good Faith, Ordinary, Prudent Person Standard**

MCLA	*Delaware Laws*	*Comments*
		—Delaware provides that a manager is fully protected if he/she reasonably relied on specific categories of information. —Michigan provides that a manager may rely on such similar information and is not liable so long as the actions or inactions are taken while exercising the "care an ordinary person in a like position would exercise under similar circumstances." *450.4404(1), (4)*
450.4405	18-404	**Multiple Managers–Voting** —Delaware allows operating agreements to provide for classes or groups of manager. *18-404(a)* Michigan does not specifically provide same but implies such by stating "except as otherwise provided in the articles of organization or an operating agreement." *450.4405(1)* —Delaware allows voting by managers to take place on any basis, as provided by the operating agreements (i.e., per capita, number, class, etc.). *18-404(b)* Michigan implies the same but is not specific. —Delaware provides that operating agreement may set elements to meeting (i.e., time, place, quorum, etc.). *18-404(c)*; Michigan does not.
450.4406	NONE	**Manager's Authority to Act as Agent of Company**
450.4407	18-405	**Breach of Duty** —Delaware allows complete flexibility for consequences of breach to operating agreement. —Michigan does the same except it specifically excludes certain categories in which liability cannot be eliminated or limited.
450.4408	18-108	**Indemnification** —Delaware allows complete flexibility. Allows indemnification standards to be set by operating agreement. —Michigan identifies specific areas of indemnification and specific exclusions from indemnification. *450.4408(1)*
450.4501	18-301, 18-303	**Members, Qualification** —Delaware includes additional ways that a person can be member: 1) by merger *18-301(b)(3)*; 2) by domestication of a non-U.S. entity *18-301(c)*; 3) by operating agreement without making a contribution.
450.4502	18-302	**Members, Voting** —Delaware specifically states that an operating agreement may provide that certain members have no voting rights. —Delaware provides for action without a meeting by written consent.
450.4503	18-305	**Member's Rights to Records** —Delaware provides procedure for enforcing rights under this section. 18-305(f)
450.4504	18-701	**Membership Interest; Personal Property**
450.4505	18-702	**Assignment of Membership Interest** —Delaware specifically provides that a membership interest may be evidenced by a certificate. *18-702(c)*
450.4506	18-704	**Rights of Assignees** —Delaware does not make assignee responsible for improper distributions to assignor *18-704(b)*; Michigan does *450.4506(2)* —Delaware does not make assignee liable for unknown liabilities unless disclosed in operating agreement. *18-704(b)* Michigan's is the same except if disclosed in financial statements. *450.4506(2)*
450.4507	18-703	**Judgment Creditors of Members**
450.4508		(No material difference)
450.4509	18-603	**Withdrawal** (No material difference)

MCLA	*Delaware Laws*	*Comments*
450.4510	18-1001, 18-1002	**Civil Suits by Members** —Michigan imposes many more restrictions on a member's ability to commence a suit on behalf of a LLC. Delaware's only condition is the same as that set forth in *450.4510(d)*. —Michigan requires the plaintiff first to make written demand requesting those authorized take suitable action. *450.4510(b)*. Delaware does not require demand if the plaintiff can establish that demand would be futile. *18-1001*.
450.4511-450.4513	NONE	**Derivative Proceedings**
450.4514	18-1004	**Derivative Proceedings–Reasonable Expenses** (No material difference)
450.4515	18-1001	**Actions by Members** —Delaware is much less specific than Michigan. Permits a cause of action on behalf of the LLC so long as the managers have first refused to bring an action or such an effort is futile. —Michigan does not require that demand first be made on the board. However, Michigan does provide some of the orders the court may issue.
450.4601-450.4603	18-202	**Amendment to Articles of Organization** (No material difference)
450.4604	18-208	**Restated Articles of Organization** (No material difference)
450.4701-450.4706	18-209	**Merger** —No material difference except that Michigan statute on mergers between domestic and foreign limited liability companies is much more detailed and includes many more requirements.
450.4707	18-214	**Conversion of Domestic Partnerships to LLCs** —Delaware provision provides for conversion of all entities to LLCs not just partnerships.
450.4801	18-801, 18-1108	**Dissolution** —Michigan statute implies less than unanimous vote is required but in case not stated in operating agreement, then unanimous vote required. *450.4801(c)* —Delaware if not provided then requires 2/3 vote. *18-801(a)(3)* —Delaware provides that dissolution occurs if no members remaining, subject to specific situations. *18-801(a)(4)* —Delaware does not explicitly provide automatic dissolution, but implies it when a LLC fails to pay taxes for 3 years. *18-1108(a)* —Michigan provides many specific instances that cause automatic dissolution. *450.4801(b), (d) (Supp. 2004)*
450.4802	18-802	**Application for Dissolution** (No material difference)
450.4804	18-203	**Certificate of Dissolution** —Delaware allows person filing certificate to include any information the party deems relevant. *18-203(5)* —Although not specifically stated, Delaware seems to require a certificate to be filed after dissolution and winding up in every case. *18-203*. In Michigan, certain events, such as judicial decree, cause the entity to automatically dissolve. In those cases, Michigan does not require the LLC to file a certificate of dissolution. *450.4804; 450.4801(b), (d) (Supp. 2004)*
450.4805	18-803, 18-805	**Winding Up Company; Trustees or Receivers for Limited Liability Companies; Appointment; Powers; Duties** —Delaware explicitly provides for the appointment and power of trustees or receivers to facilitate winding up. *18-805*

MCLA	*Delaware Laws*	*Comments*
450.4806	NONE	**Notice of Dissolution to Existing Claimants**
450.4807	18-1108	**Publication of Notice of Dissolution** —Delaware provides the Secretary of State shall publish a list on the Internet of those LLCs that have dissolved in the preceding year for failure to pay taxes. *18-1108(b)*
450.4808	18-804	**Distribution of Assets** —Delaware includes managers who are creditors. —Michigan only specifically references members who are creditors. *450.4808* —Delaware provides 3-year statute of limitation for improper distributions. *18-804(d)* Michigan only does so under notice provisions.
450.5001	18-901	**Foreign Limited Liability Companies; Governing Law** (No material difference)
450.5002	18-902	**Foreign Limited Liability Companies; Certificate of Authority** —Delaware provides that an authorized person must represent that the foreign LLC validly exists under the laws of the jurisdiction of its formation. *18-902(a)(1)(b)*
450.5003	18-903	**Foreign Limited Liability Companies; Issuance of Certificate** (No material difference)
450.5004	18-904(a)	**Foreign Limited Liability Companies; Satisfaction of Name Requirement** (No material difference)
450.5005	18-905	**Foreign Limited Liability Companies; Certificate of Correction** (No material difference)
450.5006	18-906	**Foreign Limited Liability Companies; Withdrawal from State** (No material difference)
450.5007	18-907	**Foreign Limited Liability Companies; Transaction of Business Without a Certificate** —Michigan fines are much more severe than Delaware. *450.5007(b)(6)*
450.5008	NONE	**Foreign Limited Liability Companies; Activities Not Constituting Transactions**
450.5009	NONE	**Foreign Limited Liability Companies; Loans or Participations**
450.5010	18-908	**Foreign Limited Liability Companies; Actions by Attorney General** (No material difference)

Listed below are Delaware statutes where there is no directly corresponding Michigan statute.

	18-107	**Business Transactions of Member or Manager with LLC** —Basically allows a member or manager to lend money to the LLC, act as a guarantor, transact business with the LLC and otherwise have same rights and obligations as any person who is not a manager or member.
	18-110	**Contested Matters Relating to Managers** —Upon application of any member or manager, a court may determine the validity of any admission of a manager, and the result of any vote of members or manager.
	18-111	**Interpretation and Enforcement of Operating Agreement** —Specifies that any action to enforce the operating agreement may be brought in the Court of Chancery.
	18-205	**Execution, Amendment or Cancellation by Judicial Order** —Specifically permits on the Court of Chancery to order the Secretary of State to record a proper certificate if a person refuses to do so. The court also has the same authority with respect to refusal to execute an operating agreement.
	18-210	**Contractual Appraisal Rights** —An operating agreement may provide for contractual appraisal rights for members.
	18-212	**Domestication of Non-U.S. Entities**

Delaware Laws	*Comments*
	—Delaware sets forth the procedures for domesticating a foreign LLC (this applies to LLCs formed in other countries, not in other states).
18-213	**Transfer or Continuance of Domestic LLCs** —Delaware sets forth the procedures for transferring to or domesticating in a foreign jurisdiction.
18-215	**Series of Members, Managers or LLC** —Allows for the establishment of designated series of members, managers or LLC interests having separate rights, powers or duties. —Allows a member or manager to be personally liable for the debts or liabilities of one or more series. —Allows a member or manager to be personally liable for the debts or liabilities of one or more series. *18-215(c)* —Provides that an operating agreement may provide that any member or class of members associated with a series shall have no voting rights.
18-216	**Approval of Conversion of LLC** —Allows for the conversion from an LLC to a corporation, partnership and other entities.
18-306	**Remedies for Breach of Operating Agreement** —Specifically permits an operating agreement to provide that a member violating same may be subject to specified penalties.
18-403	**Contributions by a Manager** —Specifically permits a manager to make contributions to a LLC.
18-407	**Delegation of Rights and Powers** —Unless provided in operating agreement, a member or manager has power and authority to delegate one or more persons to manage and control the business. Such delegation shall not affect the member's or manager's status.
18-503	**Allocation of Profits and Losses** —Allocated based upon operating agreement. If not provided, then allocated on basis of agreed value of the contributions of each member.
18-505	**Defense of Usury** —No obligation of a member arising under the operating agreement is subject to the dense of usury.
18-602	**Resignation of Manager** —Operating agreement may prohibit a manager from resigning. Manager may still resign, but then may be subject to remedies in operating agreement and damages for breach of operating agreement.
18-705	**Powers of Estate of Deceased Incompetent** —Personal representative may exercise all the member's rights for purpose of settling member's estate.
18-904	**Foreign LLC Registered Office, Resident Agent** —Sets forth specific provisions for naming the foreign LLC and establishment of registered office and resident agent.
18-910	**Service of Process on Registered Foreign LLCs** —May be made upon any managing or general agent or manager of foreign LLC or resident agent of foreign LLC. *18-910(a)* —If cannot be made as above, then service may be made on the Secretary of State.
18-911	**Service of Process on Unregistered Foreign LLCs** —Service may be made on the Secretary of State.
18-1101	**Construction and Application of Chapter and Operating Agreement** —To the extent a member or manager or other person has duties (including fiduciary duties) and liabilities to the LLC, such person shall not be liable to the LLC or any

Delaware Laws	*Comments*
	such member or manager for the member's or manager's good faith reliance on the term of the operating agreement.
18-1108	**Cancellation of Certificate of Formation for Failure to Pay Taxes** —To the extent a member or manager or other person has duties (including fiduciary duties) and liabilities to the LLC, such person shall not be liable to the LLC or any such member or manager for the member's or manager's good faith reliance on the term of the operating agreement.

End Notes

1. See DGCL §18-101(7).
2. See MCLA §450-4102.
3. See MCLA §450.4501.
4. See DGCL §18-402 and MCLA § 450.4401.
5. See DGCL §18-402 and MCLA § 450.4402.
6. See DGCL § 18-301(c) and DGCL § 18-302.
7. See DGCL § 18-504.
8. See MCLA § 450.4303.
9. See DGCL § 18-607.
10. See DGCL § 18-108.
11. See MCLA § 450.4408, MCLA § 450.4407.
12. See note 6 supra.
13. See note 10 supra.
14. See DGCL § 18-214.
15. See DGCL § 18-216.
16. See MCLA § 450.4702.
17. See DGCL § 18-209.

THE DECLINE OF TRADITIONAL FAMILY RESIDENTIAL ZONING IN MICHIGAN

*by Marilyn H. Mitchell**

During the last fifty years or so, a series of Michigan and federal cases and statutes have eroded the notion of the "traditional" family, defined as occupants of a single house who are related by marriage, biology or adoption, in single-family residential zoning.[1] Now, the definition of "family" has broadened to include varying numbers of unrelated individuals, some, but not all, connected only by age or a physical or mental disability. This article attempts to put in perspective the nature of some of these changes, as well as caution against thoughtless expansion of the definition of "family" and thoughtless erosion of the character of single-family neighborhoods.

Blurring the Distinction of Neighborhood and Work Place

As more and more people work from the home, this use has begun to change the character of the single-family residential zone. The City of Detroit, for instance, has rewritten its entire zoning ordinance, which will be brought before City Council and to the public for review, with passage anticipated in 2004. One section of the proposed ordinance would allow "home occupations," which go far beyond the professional person with a home phone, fax and e-mail, whose business activities are inside, unobtrusive and non-disruptive of the character of the residential neighborhood.

The proposed Detroit ordinance would allow a "home occupation" to occupy 25% of the total floor area of the home up to 500 square feet of floor space and employ two non-resident employees; provide at least one off-street parking space for each employee; allow for 12 customers to visit the home between the hours of 8 a.m. and 8 p.m.; and provide for the "home occupation" to be advertised to the public by a sign affixed to the home. Detroit proposed Zoning Ordinance, Sec. 61-12-383 through 61-12-388. The description of the "home occupation" resembles a store more than an incidental home business. If enacted, the ordinance could change the character of single-family neighborhoods to mixed use, blurring the separation of residential neighborhood from the work place.[2]

In *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9, 94 S. Ct. 1536, 1541, 39 L.Ed. 2d 797 (1974), the

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United States Supreme Court noted that setting land aside for single-family residences maintains the character of neighborhoods, preserving "zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." Opening up single-family neighborhoods for businesses and occupations, as the Detroit ordinance would do, clearly threatens those "values" and that "seclusion" and "sanctuary" lauded by the Supreme Court. Unlike the statutes and decisions discussed below, which have broadened the traditional definition of "family," there is no state or federal due process or equal protection requirement that "home occupations" be allowed. Further, the proposed Detroit ordinance would be virtually impossible to police and enforce.

Restrictive Covenants

It is not clear whether such an ordinance would override any neighborhood restrictive covenants that provide only for residential uses and prohibit commercial and business uses. The Michigan Supreme Court in *Terrien v. Zwit*, 467 Mich. 56, 648 N.W.2d 602 (2002) recently held that operation of "family day care homes" in a subdivision covered by a restrictive covenant prohibiting commercial or business uses violated that covenant. The case was remanded to the trial court to enjoin the operation of the day care businesses. The court found that a covenant precluding operation of a day care home in a single-family zoned neighborhood was not violative of public policy, Justice Markman stating:

Indeed, there is considerable public policy regarding the freedom of contract that affirmatively supports the enforcement of such a covenant. Id. at 73.

However, restrictive covenants will not absolutely bar placement of adult foster care facilities and various kinds of group homes in a neighborhood zoned single-family residential, even if those group homes are owned or leased by a commercial, profit-making enterprise. See, e.g., *City of Livonia v. Department of Social Services*, 423 Mich. 466 (1985) (holding that adult foster care facilities are exempt from local zoning ordinances and finding that persons living together in a residential "group home" constitute a "single family"); *Craig v. Bossenbery*, 134 Mich. App. 543, 553, 351 N.W.2d 596 (1984) (holding that the strong public policy favoring group homes trumps the public policy favoring the right of property owners to make restrictive covenants); *McMillan v. Iserman*, 120 Mich. App. 785, 793-95, 327 N.W.2d 559 (1982) (restrictive covenant prohibiting the use of lots for licensed group residential facilities is unenforceable as violating Michigan public policy promoting programs and facilities for the mentally handicapped).

The Effect of State and Federal Law on Single-Family Zoning

The following statutes, and the decisions interpreting them, have had a significant impact on traditional single-family zoning. Those statutes, in no particular order, are:

The Rehabilitation Act of 1973, 29 USC § 701 et seq.

Fair Housing Act, enacted as Title VIII of the Civil Rights Act of 1968 (FHA)

Fair Housing Amendments Act, 42 USC § 3601 et seq. (FHAA) (1988), particularly § 3604(f)

The Americans With Disabilities Act of 1990, 42 USC § 12101(b)(1)

Religious Freedom Restoration Act (RFRA), 42 USC § 2000bb et seq. (1993)[3]

Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA),

42 USC § 2000cc, et seq. (amending RFRA to remove constitutional infirmities)

Michigan statutes include:

MCL 125.216a and 125.583b (same language) a "state licensed residential facility" that provides services for six (6) or fewer persons under 24-hour supervision is considered a residential use for purposes of zoning and is expressly permitted in a single-family residential zone.

MCL 400.703(5), the Adult Foster Care Facility Licensing Act (AFCFLA), defined as a private residence approved for six (6) or fewer adults who are provided with foster care for 5 or more days per week, for two or more consecutive weeks. The licensee must be a member of the household and an occupant of the residence. This use is allowed as a matter of right in a single-family residential zone.

Initially, AFCFLA provided that a temporary license would not be granted to a facility "if the issuance of the license would substantially contribute to an excessive concentration of community residential facilities within a city, village or township." MCL 400.716(1). MCL 125.216a and 125.583b provided that 45 days before licensing the residential facility, the county where the facility was to open would be notified and entitled to review the number of existing such facilities to make sure no existing facility was within a 1500 foot radius of the proposed facility. The notification and linear foot limitation were both stricken by the United States District Court for the Eastern District of Michigan in 1994 in the case of *Larkin v. State of Michigan Department of Social Services* as violating the Fair Housing Amendments Act and the equal protection clause of the United States Constitution. This decision was affirmed by the Sixth Circuit in 1996. 89 F.3d 285 (6th Cir. 1996).

The Sixth Circuit held that the Fair Housing Act and its amendments (collectively referred to by the court as FHAA) preempts the spacing and notice requirements of the Michigan Adult Foster Care Licensing Act. 89 F.3d at 287. The court, citing *Smith & Lee Associates, Inc. v. City of Taylor, Michigan*, 102 F.3d 781 at 930 (6th Cir. 1996), held that the statutes were discriminatory on their face because they singled out group homes for regulation. 89 F.3d at 290. The Department of Social Services, asking the court to apply a "rational basis" test to the statute, argued that the 1500-foot limitation was necessary to prevent clustering of AFC facilities in a community ("ghettoization") and to further the goal of integrating the disabled into the community. Id. The court did reject the rational basis standard and found integration to be insufficient justification for maintaining "quotas." Id. at 291.

The *Larkin* decision is problematic because it did not consider any competing interests. "Ghettoization" is a genuine concern, not only for the disabled but also for the neighborhoods in which they may be placed. Older neighborhoods, especially inner-city neighborhoods with old, larger houses and historic districts (which in Michigan generally have larger houses) are particularly vulnerable to entrepreneurs who seek to buy houses at low cost and profit from housing the disabled, recovering alcoholics and addicts, parolees or the elderly. The needs of de-institutionalized people and their desires to reside in "family" neighborhoods should, however, be balanced against the need and desire of communities to maintain neighborhoods, prevent "dumping," and promote other goals such as preserving the character and integrity of historic districts.[4]

The Michigan Court of Appeals held in 1993 that the FHAA did not preempt or conflict with Michigan's Adult Foster Care Facility Licensing Act. *Plymouth Charter Township v. Department Of Social Services*, 198 Mich. App. 385, 501 N.W.2d 186 (1993). The Court of Appeals, following the Eighth Circuit's decision in *Familystyle of St. Paul, Inc. v. City of St. Paul*, 728 F. Supp. 1396 (D. Minn. 1990), aff'd 923 F.2d 91 (8th Cir. 1991), which *Larkin* expressly rejected, found that the spacing limitations and concerns for "excessive concentration" in the Michigan law regulated commercial enterprises in adult foster care and did not prohibit disabled or mentally ill people from residing where they wished. 198 Mich. App. At 391-2.

Larkin effectively reversed the Michigan case by holding that the FHAA conflicts with the Michigan statutes and thereby preempts them. 89 F.3d at 289.

Reasonable Accommodation

Another decision by the Sixth Circuit, affirming a decision of the U.S. District Court for the Eastern District of Michigan, increased the size of an AFC for elderly disabled in a single-family residential zone in Taylor beyond the six-person occupancy provided by state law. *Smith & Lee Associates, Inc. v. City of Taylor, Michigan*, 102 F.3d 781 (1996). (The District Court citation is *United States v. City of Taylor, Michigan*, consolidated with the lawsuit brought by Smith & Lee Associates, 872 F. Supp. 423 (1995).

Smith & Lee Associates, a for-profit AFC operator, owned an AFC home for elderly handicapped and wanted to double the occupancy of the facility. The owner petitioned the City to rezone the home from single-family to multiple-family use, but the city Planning Commission and the city Council rejected the petition, citing "spot zoning" concerns and the petition's incompatibility with the city's master plan. 102 F.3d at 786. The owner sued in U.S. District Court in Detroit, claiming the city violated FHAA, 42 USC § 3604(f)(1)(B) and (3)(B) by intentionally discriminating against the disabled elderly and failing to make "reasonable accommodations" for them. Id. "Reasonable accommodations" in the view of the petitioner and also of the U.S. District Court involved the city's acceding totally to the owner's request to double the size of the AFC, regardless of the city's legitimate concerns about spot zoning and interference with its master plan. The District Court "ordered" the city to send a letter to the Michigan Department of Social Services stating that the city did not oppose the owner's request to make its existing 6-person AFC into a 12-person AFC. U.S. District Court Judge Horace Gilmore also ordered Taylor to pay a

$50,000 fine to the United States and to pay Smith & Lee more than three times that figure for lost profits. The city appealed.

In *Smith & Lee Assoc., Inc. v. City of Taylor, Mich.*, 13 F.3d 920 (6th Cir. 1993), the Sixth Circuit reversed the decision and remanded to the District Court. The Circuit Court noted that municipalities traditionally have broad discretion in regulating land use and held the city's zoning ordinance definition of family was a "constitutional exercise of its legislative discretion to zone a residential neighborhood." 13 F.3d at 925. Taylor's ordinance excluded the operation of a for-profit AFC home for more than six people in a single-family zone. The court noted further:

> Proceeding to the reasonable accommodation issue, we held that the Court erred when it instructed Taylor to send a letter informing state officials that it had no objection to Smith & Lee operating Mortenview as a twelve-person AFC. The Council lacked authority to amend its zoning ordinances simply by sending a letter: "The Council, an elected body, was required to act in accordance with its required procedures. [T]hat the state was willing to accept a letter whether or not the Council had authority to give one does not enlarge the Council's authority." Id. at 929-30.

102 F.3d at 788, discussing and quoting from its first review of Judge Gilmore's decision. The court also reversed imposition of the $50,000 maximum fine under the FHAA on the ground that the law as to what accommodation was "reasonable" was "too uncertain to penalize the City's conduct." Id. at 932.

On remand, Judge Gilmore, undeterred, reaffirmed his earlier finding that the city intentionally discriminated and failed to make a reasonable accommodation. The court found "AFC homes are often the only means by which disabled adults are able to live in single-family type homes in residential communities." *United States v. City of Taylor, Mich.*, 872 F.Supp. 423, 426 (E.D. Mich. 1995). The court also found there was a shortage of AFC homes in the Taylor area, having found only three, only one of which was located in a single-family neighborhood. Id. at 438. The court further found that "the shortage of AFC homes for elderly disabled residents in the City of Taylor is caused, at least in part, by the fact that such homes are not economically viable with only six residents." Id. at 439.

Accordingly, the U.S. District Court, on its second look at the facts and the law, ordered Taylor to amend its zoning ordinance within 30 days of the entry of final judgment, by adding to the definition of family:

> a group of not more than twelve unrelated elderly disabled persons, each of whom is handicapped within the meaning of the Fair Housing Act, 42 U.S.C. Sec. 3602(h), living together as a single housekeeping unit in an adult foster care home licensed by the State of Michigan, with such nonresident staff as may be needed to assist the residents with their daily life activities, but not receiving funding through a contract with any State or community health or social service agency. Id. at 443.

In other words, Judge Gilmore crafted a decision that exactly paralleled Smith & Lee's fact situation. This is similar to "special legislation," which is illegal. It also points up the absurdity of a court, or a legislative body for that matter, determining what number of unrelated persons in a single-family home is constitutionally permissible. The state and Taylor found six persons to be permissible; the proposed Detroit ordinance, if passed, also will allow six; the Eighth Circuit in *Oxford House-C v. City of St. Louis*, 77 F.3d 249, 252 (8th Cir. 1996) found eight to be a reasonable number; on appeal for the second time, the Sixth Circuit found that nine was the correct number. Such disparity among the courts leaves municipalities to draft zoning ordinances at their peril.

On the second appeal, *Smith & Lee Associates, Inc. v. City of Taylor, Michigan*, 102 F.3d 781 (1996), again found error in the District Court's finding that Taylor intentionally discriminated ("Taylor had no duty to approve Smith & Lee's zoning petition to spot zone Mortenview Manor from RM-1 to R-1A." Id. at 790). Id. at 792. All Council members who testified at the evidentiary hearing stated that they were opposed to spot zoning and that rezoning the land could lead to future inconsistent uses. Id. at 794. This is not evidence of discrimination.

The Circuit Court further found that the District Court exceeded its authority when it ordered Taylor to amend its zoning ordinance to adopt the District Court's definition of "family."

> Although the District Court could have enjoined Taylor from enforcing those provisions of its zoning ordinance that violated the FHAA, it did not have power to order Taylor to pass the

> Court's own amendment. The choice of how to comply with this opinion by accommodating the elderly disabled rests with the City Council, not the Court. Id. at 797.

The Circuit Court then decided that a for-profit AFC home could operate profitably with nine residents and found that AFC homes for Taylor's elderly disabled would remain too few unless the City increased the occupancy maximum in the zoning ordinance to nine. While the Circuit Court stopped short of "ordering" the City of Taylor to amend its zoning ordinance to allow for nine, its finding that allowing nine is a "reasonable accommodation" as required by the FHAA amounts to the same thing.

> Weighing the benefits to the elderly disabled against the cost to Taylor, we conclude that permitting AFC homes for the elderly disabled to operate with nine residents in neighborhoods zoned for single family use is a reasonable accommodation. Id. at 796.

The Circuit Court stated further:

> The potential impact of a twelve-person AFC facility would be magnified now that Michigan may no longer disperse AFC homes throughout communities by refusing to license a proposed AFC home located within a 1,500 feet radius of an existing AFC home. *See Larkin v. State of Michigan Dep't of Social Servs.*, 89 F.3d 285 (6th Cir. 1996).
>
> Courts must inevitably draw lines. Although a nine-resident AFC home would not substantially alter the residential character of a single-family neighborhood, a twelve-resident AFC home is more likely to do so. Id. at 797, fn. 13.

The reasoning of the Sixth Circuit in finding "nine" to be a reasonable accommodation points up the speculative and arbitrary nature of the courts' varying determinations of what is required of municipalities under the FHAA.

The Sixth Circuit's decisions in *Larkin* and *Taylor* have been among the most expansive for rights of the disabled and the least deferential to the traditional right of the municipality to legislate its own zoning. The Eighth and Ninth Circuits, on the other hand, have used a "rational basis" standard in deciding challenges to municipal zoning. In *Oxford House-C v. City of St. Louis*, 77 F.3d 249, the Eighth Circuit determined that the city's single-family residential zoning code's definition of "single family dwelling" to include group homes of eight or fewer unrelated residents was reasonable and upheld the city's denial of a requested variance to increase occupancy to 10 in one Oxford House and to 12 in the second. The two Oxford Houses were group homes for recovering alcoholics and drug addicts. Id. at 250-1. The U.S. District Court, similar to the District and Circuit Courts in *Taylor*, had found that Oxford House would not be financially viable with eight occupants in each house and therefore found the City's eight-person limit to be discriminatory. However, the Eighth Circuit, in reversing and citing *Familystyle*, *supra* at 94, stated that even if the eight-person limit caused financial hardship for Oxford House, the ordinance did not violate the FHAA because the city had a rational basis for enacting the ordinance. Id. at 252.

> Cities have a legitimate interest in decreasing congestion, traffic, and noise in residential areas, and ordinances restricting the number of unrelated people who may occupy a single family residence are reasonably related to these legitimate goals. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9, 94 S.Ct. 1536, 1541, 39 L.Ed.2d 797 (1974). The City does not need to assert a specific reason for choosing eight as the cut-off point, rather than ten or twelve. Id.

The court also found that "Congress did not intend the federal courts to act as zoning boards by deciding fact-intensive accommodations issues in the first instance." Id. at 253, quoting *Oxford House, Inc. v. City of Virginia Beach*, 825 F.Supp. 1251, 1262 (E.D.Va. 1993). The Sixth Circuit in *Taylor* acted, in effect, as the zoning authority for the City of Taylor.

In *Gamble v. City of Escondido*, 104 F.3d 300 (9th Cir. 1997), the Ninth Circuit affirmed a decision of the U.S. District Court granting summary judgment for the city, which had denied a building permit and conditional use permit application of a land owner who wanted to construct a two-story complex in a residential neighborhood to house fifteen disabled elderly people on the second floor and provide an adult day care center on the first floor. The court concluded that the city's denial, based on a concern for the "character of the neighborhood," was legitimate and nondiscriminatory. Id. at 305. The court held further that denial of the permits was rationally related to the city's zoning goals. Id. at 307.

In an unusual case of an FHAA challenge to individual

land owners, as opposed to government zoning classifications and enforcement, the Ninth Circuit upheld the right of landlords to set occupancy limits on their property in order to preserve the value of their property. *Pfaff v. U.S. Dept. of Housing and Urban Development*, 88 F.3d 739, 749 (9th Cir. 1996). The Pfaffs owned several rental houses. They limited occupancy based on the size of the house, number of bedrooms, etc., and their many years of experience in renting property. When a family of five was not allowed to rent a house designated for a family of four, HUD sued under the FHAA, claiming discrimination on the basis of "familial status." 42 USC § 3604(a), (c). The Administrative Law Judge ruled in favor of the complainant, finding that the Pfaffs had failed to show a "compelling business necessity" or that occupancy limitation was the "least restrictive means" to their goal. 88 F.3d at 743. The Ninth Circuit reversed this subjective decision and also denounced HUD for its heavy handed tactics in bringing the case in the first place. Id. at 749.[5]

Finally, the United States Supreme Court has determined that an accommodation is "reasonable" unless it requires "a fundamental alteration in the nature of a program" or requires "undue financial and administrative burdens." *Southeastern Community College v. Davis*, 442 U.S. 397, 410, 412, 99 S.Ct. 2361, 2369-70, 60 L.Ed.2d 980 (1979). In *Davis*, the Court affirmed the college's rejection of the application of a deaf woman who wanted to be a nurse but could communicate with others only by reading lips.

Lawsuits brought to prevent discrimination in housing will, of necessity, continue to be decided on a case-by-case basis, with an emphasis on the facts but, hopefully, with some deference paid to competing interests, such as preservation of the character of a neighborhood, preservation of property, concern for traffic impact, and disruption of family neighborhoods. Congress intended to prevent discrimination, not to give the physically or mentally disabled, the elderly or recovering addicts a "super priority" to live wherever they choose, in as great numbers as they choose, in derogation of the rights of other residents.

Functional Family

All cases discussed above have dealt with the definition of "family" in single-family zoning ordinances. In Michigan, the definition of "family" began to retreat from the traditional concept of man, wife, biological or adopted children, and perhaps grandparents or other blood relatives with the case of *Boston-Edison Protective Ass'n v. Paulist Fathers, Inc.*, 306 Mich. 253, 10 N.W.2d 847 (1943) when the Michigan Supreme Court found that a number of priests residing in a home on West Boston Boulevard in Detroit did not violate the city's single-family zoning ordinance because the priests lived together as a "family."

In 1984, the Michigan Supreme Court used the term "functional family" in determining that the zoning ordinance of a township was unreasonable and arbitrary and violated the due process clause of the Michigan Constitution where it prohibited occupation of a residence zoned single-family by a husband and wife, their several children and six unrelated adults. *Charter Township of Delta v. Dinolfo*, 419 Mich. 253, 351 N.W.2d 831 (1984). Two households were involved, and all members of both households were members of The Work of Christ Community. Each household functioned as a single housekeeping unit and the members intended to remain together indefinitely. 351 N.W.2d at 834.

Plaintiff argued that the object of its ordinance was "preservation of traditional family values, maintenance of property values and population and density control." Id. at 840. However, the court was not persuaded that there was a rational relationship between the township's traditional limiting ordinance and those goals. Moreover, the court found that allowing six unrelated individuals to occupy the single-family dwelling would not open up the township to "college fraternities, hippie communes, motorcycle clubs, and assorted loosely structured groups of people associating for the purpose of enjoying a purely licentious style of living . . . ." Id. at 841. "The plaintiff is not, as a result of anything we say here today, without authority to regulate the behavior it finds inimical to its concept of a residential neighborhood, including a rational limitation on the numbers of persons that may occupy a dwelling." Id. at 843. As in the *Boston-Edison* case, the court was clearly encouraged to deny enforcement of the municipality's existing ordinance because the "functional families" were religious in nature.

Largely as a result of *Dinolfo*, cities have been changing, or in Detroit's case are planning to change, the definition of "family" in their zoning ordinances to allow for a number of unrelated individuals to reside together, provided they share the facilities, intend some kind of long-term relationship, and otherwise "function as a family."[6] Functional families do not, however, include licensed or unlicensed group homes or adult foster care facilities.

Religion May Trump Zoning

In 1993, Congress passed the Religious Freedom Restoration Act, 42 USC § 2000bb et seq.

Section 2000bb-1 provides:

(a) In general Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person –

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

This statute, on its face, does not seem to have anything to do with zoning, but the citizens of Farmington Hills, Michigan, learned otherwise when the Farmington Hills Zoning Board of Appeals was sued by The Jesus Center. *The Jesus Center v. Farmington Hills Zoning Board of Appeals*, 215 Mich. App. 54, 544 N.W.2d 698 (1996).

The Jesus Center rented a two-story building in Farmington Hills where it conducted Sunday services and weekly Bible study and prayer meetings. It also collected and distributed clothing and food to the poor. The conflict between The Jesus Center and the citizens of Farmington Hills began when The Jesus Center introduced a homeless shelter onto the property. The city told The Jesus Center that it would have to obtain zoning approval to operate the shelter as an "accessory use" because the center is located in a zone reserved for single-family residential dwellings, although churches "and other facilities incidental thereto" are also a permitted use. Id. at 56-7.

The city scheduled two public hearings on The Jesus Center's application to maintain the homeless shelter. Neighbors of The Jesus Center testified at those hearings that they had been approached by shelter residents and "pan-handled," that theft had increased in the area, and that people from the shelter were loitering, trespassing, and urinating in public and on private property. Id. at 57. Other residents supported the shelter. After hearing the evidence, the zoning board unanimously adopted a motion that the ordinance did not allow the shelter as an "accessory use." Id. at 58.

The Jesus Center petitioned for review in the circuit court, which ruled that operation of the homeless shelter was a permissible accessory use of the building as a church. The circuit court held that housing the homeless was a religious activity. The zoning board appealed.

On appeal, The Jesus Center claimed that the zoning ordinance of Farmington Hills violated the Religious Freedom Restoration Act (RFRA) by prohibiting it from providing shelter services as part of its religious mission. The Court of Appeals agreed, calling RFRA a "superseding law," which applies "retroactively to government action taken before its enactment," citing 42 USC § 2000bb-3(a).[7] (The application was denied before the RFRA became law in 1993). Id. at 61-2. The court assumed that the Zoning Board's action was to further a "compelling governmental interest" but concluded that it did not use "the least restrictive means" available. Id. at 67. The court noted that The Jesus Center had demonstrated its willingness to work with city officials to mitigate the impact of the shelter on the community. In a footnote, the court stated that if guidelines for operating the shelter were implemented but were not successful, then a complete prohibition of the use might be the "least restrictive means." Id. at 68, fn. 14.

Conclusion

As recognized by the U.S. Supreme Court in *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 733, 115 S.Ct. 1776, 131 L.Ed.2d 801 (1995), "reserving land for single-family residences preserves the character of neighborhoods, securing 'zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.'" *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9, 94 S.Ct 1536, 39 L.Ed.2d 797 (1974). Since *Belle Terre* was decided, the concept of what (or who) constitutes a "family" has undergone dramatic change as the lifestyles of Americans have changed. For example, in the sixties, people became aware of and generally tolerant of "communes;" non-traditional families became more prevalent as divorce rates continued to increase, and gay and lesbian people began to live more openly together. The "domestic servant" who was provided for in Detroit's zoning ordinance, quoted in footnote one, gave way to the unrelated "other" who moved into the single-family home for whatever reason (provided he/she did not openly pay rent).

While attempting to avoid "discrimination" in housing, cities and zoning boards and planning commissions should take care not to disadvantage existing residents or to create a situation that is rife for abuse by those whose primary goal is financial gain. Unfortunately, decisions by the U.S.

District Court for the Eastern District of Michigan, affirmed by the Sixth Circuit, have eliminated the ability of counties and municipalities to prevent the clustering of group homes in residential neighborhoods. Other federal courts have taken a more balanced approach that accommodates the rights of all.

Secondly, in the rush to adapt zoning ordinances to "modern" times, planning commissions, zoning boards and the city's legislative body should not reject the traditional division between home life and the work place. The fact that a seamstress, for example, makes clothing at home on a customer's order, does not mandate an ordinance, such as Detroit is proposing (now for more densely populated zones only), that would allow residents to make a public store, complete with advertising, of a private home. This expansion of use will be far more threatening to the character of the neighborhood than an attorney, realtor, etc. who sees an occasional client and relies on home e-mail, phones and faxes to serve clients.

Traditional classifications of zoning for specific uses must not be scrapped for the post-modern philosophy that everything is of equal value and fine distinctions are somehow "elitist" and should not be made.

Endnotes

1. For example, the definition of "family" in the Detroit Zoning Ordinance as of March 1, 2004 is "(a) One person, or a group of two or more persons living together, and inter-related by bonds of consanguinity, marriage, legal adoption, or guardianship, and occupying the whole or part of a dwelling as a separate housekeeping unit with a common and a single set of culinary facilities. The persons thus constituting a family may also include domestic servants employed solely on the premises. It may also include not more than four (4) foster children provided that the home is licensed as a foster home by the State of Michigan. (b) Two persons, inter-related by bonds of consanguinity, marriage, legal adoption, or guardianship, and one person not so inter-related, occupying the whole or part of a dwelling as a separate housekeeping unit with a common and a single set of culinary facilities. (c) Two persons not inter-related by bonds of consanguinity, marriage, legal adoption or guardianship, provided that such group lives together and occupies a dwelling as a single housekeeping unit with a single set of culinary facilities, and provided that both members of such group have full access to all portions of the dwelling. A dwelling occupied under the provisions of this subsection shall not be operated as a rooming house or an adult foster care home." Ord. No. 407-G, sec. 1, 2-18-69; Ord. No. 251-H, sec. 1, 5-24-78.

   The City of Detroit proposes to add to this definition, a provision that allows a licensed day care center with a maximum of seven minor children and a provision for a "functional family" defined as a "group of persons," but not more than six, "living in a dwelling unit as a single housekeeping unit and intended to live together as a group for the indefinite future." There are additional criteria the "functional family" is required to meet, e.g., all members are on the deed or sign the lease.

2. In February, 2004, representatives from various city departments met with representatives of thirteen historic neighborhoods – members of the Detroit Historic Neighborhoods Coalition – and discussed the neighborhoods' objections to the "home occupation" and "functional family" ordinances. As a result of that meeting, the City Planning Commission revised the ordinances to provide that the more commercial aspects of the "home occupation" ordinance would not be allowed in R1 and R2 zones, and further amended the "functional family" ordinance to provide that "no group shall occupy a dwelling as a functional family unless and until the Buildings and Safety Engineering Department has recognized the claim, in writing, as valid." These proposed amendments substantially ameliorate the effects the ordinances as originally drafted would have had on family neighborhoods.

3. Substantial sections of RFRA were declared unconstitutional by the U.S. Supreme Court in *City of Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997). However, Congress rushed to amend RFRA by enacting the Religious Land Use and Institutionalized Persons Act of 2000. RLUIPA prohibits governments from imposing a "substantial burden" on religious use of land unless restrictions are necessary to further a "compelling governmental interest." 42 U.S.C. § 2000cc (a)(1)(A).

4. For example, under the Michigan Local Historic Districts Act, MCL 399.201 et seq., homes in a historic district cannot be externally altered except after review by the local historic district commission and approval based on the proposed alteration's conformity with Secretary of the Interior standards. When the disabled and elderly are housed in single-family residences, certain alterations (such as exterior fire escapes, wheelchair ramps and the like) are required, and none of these alterations meet Secretary of the Interior standards. Permission is routinely given, however, in individual cases, but if a neighborhood becomes saturated with elderly or physically disabled group homes, the historic, architectural and residential character will be severely impacted. Those who know Detroit can see what has happened to East and West Grand Boulevards due to saturation by for-profit group and nursing homes.

5. The United States Supreme Court ruled in *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 115 S.Ct. 1776, 131 L.Ed.2d 801 (1995) that the city's zoning ordinance which defined "family" as persons related by blood, adoption or marriage or five or fewer

unrelated individuals residing together, was not a limitation on the number of occupants who could live in a single-family home, but rather was a definition of "family" and therefore was exempt from FHHA § 3607(b)(1) as a "reasonable restriction" on the maximum number of occupants of a building. Id. at 738. The ruling has nothing to do with "reasonable accommodation" and so adds nothing to the developing body of law interpreting the requirements of the FHAA.

6. East Lansing provides for a "domestic unit" family category, following *Dinolfo. Citizens For Fair Housing v. City of East Lansing*, 2001 WL 682491 (Mich. App.) unpublished, (2001). Ann Arbor defines as "family," *inter alia*, "a group of no more than 6 people plus their offspring, having a relationship which is functionally equivalent to a family. The relationship must be of a permanent and distinct character with a demonstrable and recognizable bond characteristic of a cohesive unit. . .." *Stegeman v. City of Ann Arbor*, 213 Mich. App. 487, 489, 540 N.W.2d 724 (1995). The City of Mount Pleasant defines "functional family" as "a group of people plus their offspring having a relationship which is functionally equivalent to a family. The relationship must be of a permanent and distinct character with a demonstrable and recognizable bond characteristic of a cohesive unit. Functional family does not include any society, club, fraternity, sorority, association, lodge, organization or group of students or other individuals where a common living arrangement or basis for establishment of a housekeeping unit is temporary." *Mid Michigan Rentals, Inc. v. City of Mount Pleasant*, 2003 WL 22439721 (Mich. App.) unpublished (2003). Mount Pleasant also requires the "functional family" to obtain a permit from the City Planner showing compliance with requirements to qualify as a functional family.

7. The fact that the U.S. Supreme Court subsequently struck down substantial portions of the RFRA (fn. 3, supra) would not have helped Farmington Hills because Congress amended RFRA with RLUIPA, which expanded the definition of the exercise of religion to mean "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A). Thus, in *Murphy v. Zoning Commission of Town of New Milford*, 289 F.Supp.2d 87 (D. Conn. 2003), homeowners who persisted in scheduling weekly prayer meetings that were attended by 25 or more non-family members, who parked their cars in the Murphys' backyard and elsewhere, was upheld under RLUIPA regardless of the municipality's and the neighbors' concerns about traffic, drainage and safety. Two other *Murphy* cases are found at 223 F.Supp.2d 377 (D. Conn. 2002) and 148 F.Supp.2d 173 (D. Conn. 2001).

Explore the Benefits of IRC Sections 121 and 1031 Before the Seller of Real Estate Reaches the Closing Table

*by Dawn M. Patterson**

A seller of real estate must address several issues, including the negotiation of the purchase agreement, ordering the title commitment, and complying with any requirements necessary to deliver title in accordance with the purchase agreement. One issue that has the attention of most sellers of real estate ("Taxpayer") is the tax consequences of their sale of real property.

Failure to address this issue prior to reaching the closing table may result in a taxable event to the Taxpayer. Depending on the circumstances, a tax exclusion under Title 26 USC Subtitle A, Chapter 1, Subchapter B, Part III, Section 121[1] ("Section 121") or the option for tax deferral under Title 26 USC Subtitle A, Chapter 1, Subchapter O, Part III, Section 1031[2] ("1031 Exchange") of the Internal Revenue Code ("the Code") may be available. Taking full advantage of the exclusions provided in Section 121 may be lost due to timing issues that could have been negotiated in the purchase agreement. Another tax planning strategy that will be lost, if not arranged prior to the real estate transaction closing, is the opportunity to perform a 1031 Exchange.[3] This will be discussed in detail below.

Prior to closing the transaction, Taxpayer should gather the relevant tax records and the title commitment or other information that indicates the vesting of the legal title or tax and/or legal ownership[4] of the real estate and consult a tax advisor or tax attorney. These professionals will be able to analyze the treatment of capital gains on the sale of real estate and the application of two of the provisions of the Code that address this issue: Sections 121 and 1031.

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Section 121: Treasury Decisions 9030 and 9031

The advantage for a taxpayer qualifying under Section 121 is its provision for an exclusion, as opposed to a deferral, of capital gain tax liability. Section 121 provides that a single taxpayer may exclude up to $250,000 of the capital gain and married couples, filing jointly, may exclude up to $500,000 of the gain if Taxpayer owned and used the property as Taxpayer's residence for at least two of the five years ending on the date of the sale or exchange. (The two years may consist of 24 full months or 730 days.[5]) A principal residence may include a house, houseboat,[6] house trailer, a house or apartment that taxpayer is entitled to occupy as a tenant stockholder in a cooperative corporation.[7] Whether property is Taxpayer's principal residence depends upon "all the facts and circumstances.[8]" This exclusion under Section 121 is available only once every two years. Recent treasury decisions provide for exceptions to this rule and permit a partial exclusion under Section 121.

Treasury Decision 9030[9] ("TD 9030") and Treasury Decision 9031[10] ("TD 9031") provide clarification of Section 121 issues. TD 9030 sets forth the final regulations regarding the exclusion of gain from the sale or exchange of a taxpayer's principal residence. TD 9031 clarifies a number of issues including exceptions to the two-year rules for use, ownership and claimed exclusion "safe harbors" when the primary reason for the sale is health, change in place of employment, or "unforeseen circumstances." Both the final regulations set forth in TD 9030 and the temporary regulations set forth in TD 9031 became effective December 24, 2002.

Section 121: Multiple Properties

If Taxpayer alternates between two properties, using each as a residence for successive periods of time, then a determination needs to be made as to which property is the principal residence. Ordinarily, the property Taxpayer uses a majority of the time during the tax year will be considered Taxpayer's principal residence. However, this is not controlling or dispositive of the issue. In addition to the Taxpayer's use of the property, a nonexclusive list of other relevant factors that are relevant in determining the principal residence include:

Taxpayer's place of employment;

The principal place of abode of Taxpayer's family members;

The address listed on Taxpayer's federal and state tax returns, driver's license, automobile registration, and voter registration card;

Taxpayer's mailing address for bills and correspondence;

The location of Taxpayer's banks; and

The location of religious organizations and recreational clubs with which Taxpayer is affiliated.[11]

Another source of information that the IRS may look to for an indication of Taxpayer's principal residence is the Homeowner's Principal Residence Exemption Affidavit, formerly known as the Homestead Exemption Affidavit,[12] which is filed at the local assessor's office. In this affidavit, Taxpayer certifies as to the location of his principal residence "under penalty of perjury."[13]

Section 121: Vacant Land

If Taxpayer owns vacant land adjacent to his principal residence, that parcel may qualify for an exclusion pursuant to Section 121. In order for vacant land to be considered part of Taxpayer's principal residence, the following conjunctive requirements must be met:

1) The vacant land must be contiguous to real estate containing the dwelling unit[14] of Taxpayer's principal residence;

2) Taxpayer must have owned and used the vacant land as part of Taxpayer's principal residence;

3) Taxpayer must sell the real estate containing the dwelling unit of Taxpayer's principal residence in a sale that meets the requirements of Section 121 within two years before or two years after the date of the sale of the vacant land; and

4) The requirements of Section 121 must otherwise have been met with respect to the vacant land.[15]

When vacant land and the real estate containing the dwelling unit of Taxpayer's principal residence are sold within two years of each other, they are treated as one sale. Therefore, there is only one maximum limitation of $250,000

for single filers and $500,000 for taxpayers married and filing jointly for the combined sale of vacant land and the sale of real estate containing the dwelling unit of Taxpayer's principal residence.

Section 121: Less than 100% Principal Residence

If Taxpayer has both residential and non-residential use of the property, Taxpayer may still qualify for an exclusion pursuant to Section 121. If the non-residential use occurs inside or within the dwelling unit, allocation is not required.[16] If the non-residential use occurs outside of the dwelling unit, allocation is required, and Section 121 will not apply to the gain allocated to the non-residential portion of property sold or exchanged.[17] Taxpayer should seek advice from a tax advisor or attorney for determination of the allocation of basis for any depreciation recapture. Taxpayer is required to use the same method to allocate the basis and the amount realized between the business and residential portions of the real estate as Taxpayer used to allocate the basis for purposes of depreciation. Depreciation taken after May 6, 1997 will be recognized up to the date of sale or exchange.

Section 121: Reduced Maximum Exclusion and Safe Harbors

If Taxpayer has not owned or used the home as a principal residence for two of the last five years, he may still qualify for an exclusion under Section 121. TD 9030 provides the final regulations regarding the allowance of an exclusion up to $250,000 of the capital gain on a principal residence for single taxpayers and $500,000 for a married couple filing jointly. To qualify, the taxpayer must own and use the home as a principal residence for 2 of the 5 years prior to the sale. The ownership and use periods do not need to be concurrent. The two years may consist of 24 full months or 730 days. These regulations essentially provide a pro-rated exclusion[18] available to a taxpayer who has sold or exchanged property owned and used as the taxpayer's principal residence for less than the two of the preceding five years or to a taxpayer who has excluded gain from the sale or exchange of a principal residence within the preceding two years.[19]

Treasury Decision 9031 clarifies a number of issues including exceptions to the two-year rules for use, ownership and claimed exclusion "safe harbors" when the primary reason[20] for the sale is change in place of employment, health or unforeseen circumstances[21] of a "qualified individual."[22] Generally, a qualified individual is the Taxpayer or Taxpayer's family member. Safe harbors[23] allowing a reduced maximum exclusion apply only if Taxpayer's primary reason for the sale or exchange is a result of one of the following:

1) *Change in place of employment*[24] *by Taxpayer or qualified individual.* The new place of employment must be at least 50 miles[25] farther from the old residence than the former place of employment. If there is not a former place of employment, then the distance between the new place of employment and the residence must be at least 50 miles. This safe harbor applies only if the change in place of employment occurs during the period of the taxpayer's ownership and use of the property as the taxpayer's principal residence.

2) *Health*[26] *of Taxpayer or qualified individual.* In order to qualify for this safe harbor, the primary reason for the sale or exchange of the principal residence is "to obtain, provide or facilitate the diagnosis, cure, mitigation, or treatment of disease, illness or injury of a qualified individual...or to obtain or provide medical or personal care for a qualified individual suffering from a disease, illness or injury" or if a physician[27] recommends a change of residence for health reasons.

3) *Unforeseen circumstances*[28] *of Taxpayer or qualified individual.* These include involuntary conversion of the residence, natural or man-made disaster, act of war or terrorism resulting in a casualty to the residence, or the following occurrences to a qualified individual: (A) death,[29] (B) cessation of employment where the individual is eligible for unemployment compensation,[30] (C) change in employment or self-employment status that results in the taxpayer's inability to pay housing costs and reasonable basic living expenses for the Taxpayer's household,[31] (D) divorce or legal separation,[32] or (E) multiple births resulting from the same pregnancy.[33]

If Taxpayer satisfies all of the elements set forth within one of the above safe harbors, then the primary reason for Taxpayer's sale or exchange is considered to be "by reason of a change in a place of employment, health or unforeseen circumstances." Accordingly, Taxpayer may claim a reduced maximum exclusion.

In the event Taxpayer does not satisfy the requirements for one of these three safe harbors, Taxpayer may still be eligible to claim a reduced maximum exclusion if it is determined that the primary reason for the sale or exchange is by reason of a change in a place of employment, health or unforeseen circumstances. The IRS Commissioner is given the discretion to determine other circumstances as

"unforeseen."[34] A non-exclusive list of factors that may be used by the Internal Revenue Service ("IRS") in making this determination are:

(1)The sale or exchange and the circumstances giving rise to the sale or exchange are proximate in time;

(2)The suitability of the property as the taxpayer's principal residence materially changes;

(3)The taxpayer's financial ability to maintain the property materially changes;

(4)The taxpayer uses the property as the taxpayer's residence during the period of the taxpayer's ownership of the property;

(5)The circumstances giving rise to the sale or exchange are not reasonably foreseeable when the taxpayer begins using the property as the taxpayer's principal residence; and

(6)The circumstances giving rise to the sale or exchange occur during the period of the taxpayer's ownership and use of the property as the taxpayer's principal residence.[35]

To illustrate the application of the provisions of TD 9031, the following examples are quoted directly from this Treasury Decision:

Example regarding Employment Reason

In July 2002, D buys a condominium that is 5 miles from her place of employment and uses it as her principal residence. In February 2003 D, who works as an emergency medicine physician, obtains a job that is located 51 miles from D's condominium. D may be called in to work unscheduled hours and, when called, must be able to arrive at work quickly. Therefore, D sells her condominium and buys a townhouse that is 4 miles from her new place of employment. Because D's new place of employment is only 46 miles farther from the condominium than is D's former place of employment, the sale is not within the safe harbor of paragraph (c)(2) of this section. However, D is entitled to claim a reduced maximum exclusion under section 121(c)(2) because, under the facts and circumstances, the primary reason for the sale is the change in D's place of employment.

Example regarding Health Reason

B, who has chronic asthma, purchases a house in Minnesota in 2002 that he uses as his principal residence. B's doctor tells B that moving to a warm, dry climate would mitigate B's asthma symptoms. In 2003 B sells his house and moves to Arizona to relieve his asthma symptoms. The sale is within the safe harbor of paragraph (d)(2) of this section and B is entitled to claim a reduced maximum exclusion under section 121(c)(2).

Example regarding Health Reason

In 2002, H and W purchase a house in Michigan that they use as their principal residence. H's doctor tells H that he should get more exercise, but H is not suffering from any disease that can be treated or mitigated by exercise. In 2003 H and W sell their house and move to Florida so that H can increase his general level of exercise by playing golf year-round. Because the sale of the house is merely beneficial to H's general health, the sale of the house is not by reason of H's health. H and W are not entitled to claim a reduced maximum exclusion under section 121(c)(2).

Example regarding Unforeseen Circumstances

In 2003, H and W buy a two-bedroom condominium that they use as their principal residence. In 2004 W gives birth to twins and H and W sell their condominium and buy a four-bedroom house. The sale is within the safe harbor of paragraph(e)(2)(iii)(E) of this section, and H and W are entitled to claim a reduced maximum exclusion under section 121(c)(2).

Example regarding Unforeseen Circumstances

In 2003, D and her fiancé E buy a house and live in it as their principal residence. In 2004 D and E cancel their wedding plans and E moves out of the house. Because D cannot afford to make the monthly mortgage payments alone, D and E sell the house in 2004. The safe harbors of paragraph (e)(2) of this section do not apply. However, under the facts and circumstances, the primary reason for the sale is unforeseen circumstances, and D and E are each entitled to claim a reduced maximum exclusion under section 121(c)(2).

These examples and the additional ones contained within TD 9031 provide guidance in reviewing Taxpayer's eligibility for a reduced maximum exclusion.

Section 1031

If Taxpayer is selling investment property and plans to acquire other investment property, a 1031 Exchange should be considered. Basically, a 1031 Exchange applies when Taxpayer intends to sell investment property ("relinquished property") and acquire other "like kind" investment property ("replacement property") within a maximum of 180 days[36] from the sale of the relinquished property. A 1031 Exchange allows Taxpayer to defer the capital gain taxes. IRC Section 1031 states that "no gain or loss shall be recognized on the exchange of property held for productive use in a trade or business or for investment if such property is exchanged solely for property of like kind that is to be held either for productive use in a trade or business or for investment." [37] "Like kind" property can include, but is not limited to, a single-family rental, duplex, apartment, commercial property or raw land.

One of the greatest pitfalls in this area is the mistaken belief by the Taxpayer that the funds can be held in escrow by the title company after the transaction has closed to allow Taxpayer time to make arrangements for a 1031 Exchange. The instant problem is constructive possession. Even though the cash or check for the sale proceeds is not in the Taxpayer's pocket, he is deemed in constructive receipt[38] of those proceeds and the tax liability attaches because it is considered a taxable sale. The same result would also occur if the Taxpayer's current attorney, accountant or real estate agent held the proceeds. All of these instances violate the safe harbor requirements of U.S. Treasury Regulations, Section 1.1031 (k)-1(g).

In order to not be deemed an agent of Taxpayer, which places Taxpayer in constructive receipt of any funds held by the agent, a Qualified Intermediary ("QI")[39] is used. A QI is a person who is not Taxpayer or a "disqualified person" and who enters into a written agreement with Taxpayer ("Exchange Agreement"). A "disqualified person" is a person who is the agent of Taxpayer at the time of the transaction or disqualified pursuant to Section 1.1031(k)-1(k)(2), (k)(3) or (k)(4). Section 1.1031(k) –1(k)(2) provides that an agent includes "a person who has acted as the taxpayer's employee, attorney, accountant, investment banker or broker, or real estate agent or broker within the 2-year period ending on the date of the transfer of the first of the relinquished properties." The Exchange Agreement between the Taxpayer and the QI must expressly limit Taxpayer's rights to receive the money or other property held by the QI. [40] The terms of the Exchange Agreement require that the QI acquires the relinquished property from Taxpayer, transfers the relinquished property to the buyer and holds the proceeds subject to certain restrictions, acquires the replacement property, and transfers the replacement property from a seller to Taxpayer.[41]

A valid 1031 Exchange requires a QI to limit Taxpayer's ability to access funds held in an exchange account in order to meet the safe harbor requirements specified in the U.S. Treasury Regulations. In a deferred exchange, U.S. Treasury Regulations, Section 1.1031 (k)-1(g)(6), place restrictions or guidelines that limit the Exchanger's ability "to receive, pledge, borrow or otherwise obtain the benefits of money or other property before the end of the exchange period. The Exchanger may have rights to receive, pledge, borrow, or otherwise obtain the benefits of money or other property upon or after:

> (a) The receipt by the Taxpayer of all replacement property to which the taxpayer is entitled under the exchange agreement[42]
>
> (b) The occurrence after the end of the identification period of a material and substantial contingency that
>
> (1) Relates to the deferred exchange,
>
> (2) Is provided for in writing, and
>
> (3) Is beyond the control of the Taxpayer and of any disqualified person (as defined in paragraph (K) of this Section), other than the person obligated to transfer the replacement property to the taxpayer."[43]

Although the deferred exchange rules provide an Exchanger with the flexibility to take up to 45 calendar days to identify and a maximum of 180 calendar days to purchase replacement property, there are specific restrictions placed on the ability of the Exchanger to access the exchange proceeds that are in the possession of the QI during this exchange period. These issues should be addressed in the Exchange Agreement. An experienced QI should be able to answer specific questions regarding the exchange account and what security mechanisms are provided during the exchange period.[44]

Section 1031 and Section 121: Split Treatment

If Taxpayer is selling a duplex, triplex or fourplex, and the owner lives in one unit and rents out the remaining units, both Section 1031 and Section 121 may apply. If the unit where the owner lives is considered the owner's principal residence, the owner may qualify for exclusion of capital gain taxes. The capital gain taxes associated with the remainder of the multi-family property may be deferred

by performing a 1031 Exchange on the rental units. This is possible even when there is one buyer for the entire complex. A tax professional should assist with a determination of the value allocated to the residence portion and the value allocated to the remaining units held for investment.

The sale of real estate usually involves a taxable event. It is essential to understand and plan ahead for the exclusion or deferral options available prior to closing a real estate transaction. Considering the issues prior to reaching the closing table may make the difference in whether all, part or none of the capital gain is excluded, recognized or realized. Sometimes the analysis is clear-cut, such as when owners sell the family home that they currently reside and have lived in for years. Other situations require detailed analysis. These include instances where there is vacant land, a principal residence that was recently converted to rental property, a second home that was converted into a principal residence, a change in ownership or marriage, and non-residential use of real estate containing the dwelling unit of the principal residence. The sale may qualify for a complete or partial exclusion under IRC Section 121 or an exchange may qualify for complete or partial deferral under IRC Section 1031. For the seller of real estate to fully benefit from the provisions of Sections 121 and 1031, planning and document preparation prior to closing the transaction are key.

Endnotes

1. Title 26 USC Subtitle A, Chapter 1, Subchapter B, Part III, Section 121.
2. Title 26 USC Subtitle A, Chapter 1, Subchapter O, Part III, Section 1031.
3. In some instances, a complete rescission of the closing may be possible. This is rarely a practical or real option.
4. When seeking a deferral pursuant to Section 1031 or an exclusion pursuant to Section 121, it is critical to determine the ownership of the property being sold and, in the case of a 1031 exchange, the intended title to the replacement property as well. A tax professional will be able to determine whether there is any consequence to a change in the ownership or vesting title. The IRC sets forth specific provisions for disregarded entities, such as a single member LLC or a grantor trust. Section 10121-1(c)(3)(i)-(ii).
5. Section 1.121-1(c)(1).
6. For purposes of analysis under Section 121, a "principal residence" is not necessarily real estate. A houseboat and an interest in a cooperative corporation are not considered real property under Michigan law. A house trailer may only be considered part of the realty if it is deemed affixed to the property pursuant to MCL 125.2330i.
7. Section 216(b) and (2).
8. Section 1.121-1(b)(1).
9. http://www.irs.gov/pub/irs-regs/td9030.pdf, Department of Treasury, IRS, 26 CFR Part I, (TD 9030), RIN 1545-AX28, published December 24, 2002, corrected February 7, 2003.
10. http://www.irs.gov/pub/irs-regs/td9031.pdf, Department of Treasury, IRS, 26 CFR Part I, (TD 9031), RIN 1545-BB02, published December 24, 2002.
11. Section 1.121-1(b)(2)(i)-(vi).
12. Michigan Department of Treasury Form 2368 (Rev. 6-99), formerly T-1056.
13. Michigan Department of Treasury Form 2368 (rev. 02-04).
14. The regulations provide that the term "dwelling unit" has the same meaning as in Section 280A(f)(1), but does not include any auxiliary structures or other property.
15. Section 1.121-1(b)(3).
16. Section 1.121-1(e).
17. Section 1.121-1(e).
18. The formula for the computation of the reduced maximum exclusion is provided at Section 1.121-3(g). The maximum dollar limitation of $250,000 ($500,000 for certain joint filers) is multiplied by a fraction. "The numerator of the fraction is the shortest of the period of time that the taxpayer owned the property during the 5-year period ending on the date of the sale or exchange; the period of time that the taxpayer used the property as the taxpayer's principal residence during the 5-year period ending on the date of the sale or exchange; or the period of time between the date of a prior sale or exchange of property for which the taxpayer excluded gain under section 121 and the date of the current sale of exchange. The numerator of the fraction may be expressed in days or months. The denominator of the fraction is 730 days or 24 months (depending on the measure of time used in the numerator)."
19. TD 9031, page 35, Section 1.121-2(b).
20. The primary reason is based on the facts and circumstances. The factors provided are suggestive only. Taxpayer's qualification for the reduced maximum exclusion is based on Taxpayer's facts and circumstances.
21. 26 CFR Part 1, Section 1.121-3T(b).
22. Section 1.121-3T(f) A "qualified individual means - -

(1) The taxpayer; (2) The Taxpayer's spouse; (3) A co-owner of the residence; (4) A person whose principal place of abode is in the same household as the taxpayer; or (5) For purposes of paragraph (d) of this section, a person bearing a relationship specified in sections 152(a)(1) through 152(a)(8) (without regard to qualification as a dependent) to a qualified individual described in paragraphs (f)(1) through (4) of this section, or a descendant of the taxpayer's grandparent."

23. A "safe harbor" is a procedure set forth in law or regulation that, if followed, will insulate certain arrangements from being declared in violation of that law or regulation.

24. Section 1.121-3T(c).

25. This standard was derived from Section 217(C) relating to the moving expense deduction.

26. Section 1.121-3T(d).

27. This is defined in Section 213 (d)(4).

28. Treasury Decision 9031, Section 1.121-3T(e).

29. Treasury Decision 9031, Section 1.121-3T(e)(2)(iii)(A).

30. Treasury Decision 9031, Section 1.121-3T(e)(2)(iii)(B).

31. Treasury Decision 9031, Section 1.121-3T(e)(2)(iii)(C).

32. Treasury Decision 9031, Section 1.121-3T(e)(2)(iii)(D).

33. Treasury Decision 9031, Section 1.121-3T(e)(2)(iii)(E).

34. Section 1.121-3T(e)(2)(iv).

35. Treasury Decision 9031, Section 1.121-3T(b)(1)-(6).

36. A maximum of 180 days or the date the Taxpayer's tax filing is due, whichever is earlier. When the tax filing date occurs prior to day 180, an extension for the tax filing is often sought to allow Taxpayers to use the full 180 days.

37. Section 1.1031(a)-1. (Emphasis added.)

38. Section 1.1031(k)-1(f)(2). The taxpayer is in constructive receipt of money or property at the time the money or property is credited to the taxpayer's account, set apart for the taxpayer or otherwise made available to the taxpayer.

39. Section 1.1031 (k)-1(g)(4).

40. Section 1.1031(k)-1(g)(4)(ii) and Section 1.1031(k)-1(g)(6).

41. Section 1.1031(k)-1(g)(4)(iii).

42. An example applying this:

    Scenario: The Exchanger identifies multiple replacement properties within the 45-day Identification Period, acquires one of these properties within the Identification Period, and would like to pay taxes on any remaining proceeds (referred to as "cash boot") in the exchange account.

    Possible Course of Action: Revoke the Identification of all other replacement properties, so the remaining proceeds can be released on day 46 by the Qualified Intermediary. If other properties remain identified after day 45, there is a possibility of performance (purchase of remaining identified replacement properties) by the Exchanger and the funds will not be able to be released on day 46. Unless one of the exceptions set forth in Section 1.1031(k)-1(g)(6) apply, the remaining proceeds cannot be released until day 181.

43. Section 1.1031(k)-1(g)(6)(iii).

44. Qualified Intermediaries are not federally regulated. Of prime importance is the security of the funds. For a list of questions to ask a QI, please see http://www.apiexchange.com/articles/pdf/Security%20of%20Funds%20(63).pdf.

THE ADMISSIBILITY OF OFFERS AND PURCHASE AGREEMENTS AS EVIDENCE OF VALUE IN CONDEMNATION TRIALS

by H. Adam Cohen & Jason C. Long***

I. Introduction

When private property is taken by a governmental agency for public use, the state and federal constitutions command that the property owner shall receive "just compensation" for the taking.[1] Just compensation is often measured by determining the market value of the property taken.[2] Though appraisers may employ a number of appraisal methods to determine a property's market value, perhaps the most common technique is the "sales comparison approach" to value, sometimes called the "market approach." That approach involves comparing and contrasting the taken property to (a) other "comparable" properties that were the subjects of transactions in the marketplace, or (b) prior transactions involving the taken property itself. Both types of transactions are referred to as "comparables."

In comparing the taken property to comparables, the appraiser adjusts the prices of the comparables to account for superior and inferior physical attributes of the taken property, locational differences, passage of time after the comparable transactions occurred, and numerous other factors. This comparative analysis provides an estimate of the taken property's market value and, therefore, just compensation.[3]

The comparables that appraisers analyze when estimating value are often properties that actually sold in the marketplace and proceeded to closings. But a closed sale is not necessary to qualify a property as a comparable for an appraiser's analysis. Rather, if a property was the subject of an offer to purchase, an executory purchase agreement, or an option, such a transaction may render

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the property useful as a comparable. Whether such a comparable can be admitted into evidence at a just compensation trial typically depends on the circumstances surrounding the particular transaction. This article examines the admissibility of offers and purchase agreements, as well as options, in valuation cases.

II. The Use of Comparables as Evidence

As an initial matter, whether they consist of consummated sales, offers, options, purchase agreements, listings, or otherwise, comparables are not admitted as direct evidence of a taken property's market value. That is, comparables are not independent, direct proof of value. Rather, comparable properties are admitted as the bases for a witness' opinion of that value.[4] Usually, the witness is an expert real estate appraiser who has analyzed such market data to arrive at an opinion of the taken property's value.[5]

A. Offers

Offers to purchase are one species of transaction that an expert appraiser may consider in determining a property's value. According to *The Dictionary of Real Estate Appraisal,* an offer is a "set of terms presented by the bidder, a prospective buyer or tenant, that are subject to negotiation. If the other party, a seller or landlord, accepts these terms, the offer will result in a contract."[6] In appraising property, offers "are relevant market phenomena that the appraiser considers in analyzing competitive supply and demand."[7] Offers "can be useful indicators of the values anticipated by sellers and buyers and reflect the likely turnover of competitive properties," though offers represent "the buyer's perspective" and "commonly set the lower limit of value."[8] Notably, Michigan's model jury instruction on the subject explains that "'comparables' may include sales, offers to sell, offers to buy and rentals."[9]

The Michigan Supreme Court first considered whether an offer could be admitted as evidence of land value, and set forth the general rule governing that issue, in the nineteenth century case *Perkins v People.*[10] In that case, Perkins had been convicted of forging a mortgage, resulting in a dispute over the subject property's value. As part of his defense, Perkins sought to elicit testimony concerning the amount that his neighbor had been offered for the land adjoining the subject property. The trial court refused the evidence. On appeal, Justice Cooley explained that the circumstances must demonstrate that the offer was made in good faith before it may be deemed admissible:

> What land has sold for may sometimes, and under some circumstances, be very satisfactory evidence of value; but testimony as to what has been offered for it, is so much open to suspicion and so inviting to fraud, unless the offer was at a judicial or other public sale, or under other circumstances furnishing like security of good faith in making it, that it must generally be very untrustworthy and unreliable.[11]

Because the circumstances in *Perkins* failed to indicate that the offer had been made in good faith, the Supreme Court affirmed the trial court's decision to exclude it from evidence.

Sixty years later, the Supreme Court provided significantly more detail concerning an offer's admissibility to prove property value in *City of Kalamazoo v Balkema.*[12] In that condemnation case, the trial court sustained an objection precluding defendant's witness from testifying as to the amount he was purportedly willing to pay for the taken property. When defendant appealed, the Supreme Court quoted *Perkins* and then turned to authority from the United States Supreme Court, which also imposes a duty upon the party proposing an offer as evidence to establish the offer's "good faith" before it will be admitted. The *Balkema* court identified some threshold qualities that an offer must possess to carry evidentiary value:

> To be of the slightest value as evidence in any court, an offer must, of course, be an honest offer, made by an individual capable of forming a fair and intelligent judgment, really desirous of purchasing, entirely able to do so, and to give the amount of money mentioned in the offer, for otherwise the offer would be but a vain thing.[13]

Interestingly, the court stated that the property owner's personal perception that the offer was "bona fide" can affect whether the offer will be admissible:

> Whether the owner himself, while declining the offer, really believed in the good faith of the party making it, and in his ability and desire to pay the amount offered, if such offer should be accepted, or whether the offer was regarded as a mere idle remark, not intended for acceptance, would also be material upon the question of the bona fides of the refusal.[14]

Finally, the court stated that mere oral offers "cast no light" on the issue of value, and are even "dangerous" as evidence:

> Oral and not binding offers are so easily made and refused in a mere passing conversation, and under circumstances involving no responsibility on either side, as to cast no light upon the question of value. It is frequently very difficult to show precisely the situation under which these offers were made. In our judgment they do not tend to show value, and they are unsatisfactory, easy of fabrication, and even dangerous in their character as evidence upon this subject.[15]

These concerns are particularly relevant, the court added, when the proofs are offered only by the offeree, leaving the litigants with no opportunity to cross examine the offeror. Finally, the court ruled that, "In order to establish market value by an offer, one must at least show that there has been a bona fide offer made for the property."[16] Under these standards, the Michigan Supreme Court in *Balkema* affirmed the trial court's decision to exclude the proffered evidence. Thus, under *Balkema* an offer must at least be evidenced by a writing, and qualify as "bona fide," before it will be admitted at trial.

The Michigan Supreme Court employed a similar analysis in *City of Grand Rapids v Ellis.*[17] In that condemnation action, the property owner wished to introduce evidence of an offer in the amount of $500,000 that it had previously received for the subject property. In response, the government contended that the offer was not "bona fide" because the offeror's assets amounted to only $831 in cash and $21,000 in receivables. Therefore, the government argued, the offeror lacked the financial capacity to deliver on its $500,000 offer, casting doubt on the offer's bona fides and rendering the offer inadmissible under the analysis from *Balkema*. Citing at length to *Balkema,* the Michigan Supreme Court affirmed the trial court's finding that the owner had not made a "showing of bona fides," and held that the offer was therefore properly excluded.

To borrow the language from *Balkema*, the decision in *Ellis* turned on whether the offeror was "entirely able" to "give the amount of money mentioned in the offer." After all, the offer was in writing, and the defendant offerees, it seems, perceived the offer to have been made in good faith and not as a mere "idle remark." The defendant offerees also addressed the concern from *Balkema* that some information about the offeror be presented to the court; they submitted testimony from the offeror's president. Still, the offeror's apparent financial inability to complete the transaction led to the judicial finding that the offer was not bona fide.

Therefore, if an offer to purchase is bona fide and supported by a writing, and evidences good faith and a capable offeror, the offer should be admissible as a "comparable." Absent those qualities, the court will likely exclude the offer.

B. Purchase Agreements and Options

A second type of transaction that expert appraisers may rely upon when estimating value is the executory purchase agreement.[18] A purchase agreement is, of course, a written contract for the sale of real property.[19] In *Western Michigan University Board of Trustees v Slavin,*[20] the Michigan Supreme Court analyzed the standards controlling admissibility of purchase agreements in condemnation actions.

In *Slavin*, shortly before trial defendants entered into a purchase agreement to sell their property,[21] which Western Michigan University then condemned to serve as the site for new college dormitories. At trial, defendants sought to introduce the purchase agreement as evidence of their property's value. The trial court observed that the agreement provided the purchaser, an Ohio corporation, with the ability to cancel the agreement if certain soil tests proved unsatisfactory. The court also stated that, despite hearing testimony from the purchaser's vice president for property acquisition, the court knew "practically nothing" about the purchasing corporation. Therefore, applying the standards that govern admissibility of offers, the trial court ruled that the purchase agreement was lacking "bona fideness," and excluded it from evidence.[22]

On appeal, the Michigan Supreme Court reversed. It seized upon the key evidentiary feature that distinguishes offers from purchase agreements -- offers are unilateral obligations whereas purchase agreements are bilateral:

> The law as to the admissibility of an offer to purchase is settled by *Balkema* and *Ellis*. We point out, however, that part of the *ratio decidendi* of *Balkema* and *Ellis* is to be found in the following sentence: "Witnesses testifying as to what they would give for property would be secure in the knowledge and belief that they

> would not be bound to carry out the offer."
>
> Such is not the situation with the case at bar. An offer is a unilateral declaration of intention. A sales agreement is by its nature bilateral, binding upon both parties, enforceable, if need be, by either. . . . We do not find that the settled law as to an offer is controlling as to a bilateral purchase and sale agreement.[23]

The Supreme Court therefore held that the purchase agreement, together with the supporting testimony from the purchasing corporation's vice president, was admissible. The court further observed that the presence of conditions in an agreement, such as the environmental conditions in that case, are sufficiently common that they affect the agreement's weight, not admissibility.[24] *Slavin* confirms that the standard for admissibility is far less rigorous for a purchase agreement than for an offer. To this day, *Slavin* stands as the seminal case treating admissibility of purchase agreements in Michigan condemnation actions.

Finally, while the Michigan Supreme Court has considered the admissibility of offers and purchase agreements to support opinions of property value, it has not squarely addressed the admissibility of options in condemnation actions. An option is a "legal contract, typically purchased for a stated consideration, that permits but does not require one to buy, sell, or lease real property for a stipulated period of time in accordance with specified terms; a unilateral right to exercise a privilege."[25]

While the "right to exercise" an option may be unilateral, an option contract itself is bilateral, signed by both parties. Additionally, options are typically supported by "hard money," where the optionor pays non-refundable consideration to secure the optionee's execution of the agreement. Options are therefore akin to purchase agreements, not offers. Like purchase agreements, options evidence a "meeting of the minds," and an option/due diligence period, permitting the optionor to "walk away," is substantially similar to typical conditions permitting purchasers to "walk away" from, or terminate, most purchase agreements. Thus, while no Michigan condemnation case is directly on point,[26] the foregoing "purchase agreement" analysis should govern admissibility of options in condemnation actions.

III. Conclusion

Though completed sales will often comprise the bulk of comparable properties supporting expert appraisers' opinions of value, completed sales are not the only transactions that can be used to support such opinions. Offers should be admissible to support valuation opinions if they are written, bona fide, and made in good faith by a capable offeror. As explained in *Slavin*, executory purchase agreements are typically admissible to support valuation opinions, particularly given their bilateral nature. And options should be admitted in valuation trials under the same basic analysis that applies to purchase agreements. Accordingly, appraisers are not limited to closed transactions when developing and supporting their opinions of market value.

Endnotes

1. US Const, amend V; 1963 Const, art 10, §2.
2. See, e.g., In re Bagley Ave, 248 Mich 1, 5; 226 NW 688 (1929).
3. Appraisal Institute, The Appraisal of Real Estate (12th ed., 2001), p 417; see also, State Hwy Comm'n v Abood, 83 Mich App 612, 615; 269 NW2d 247 (1978) (describing the sales comparison approach).
4. See Comm'r of Conservation v Hane, 248 Mich 473, 477; 227 NW 718 (1929). This principle has been incorporated into the Model Civil Jury Instructions on condemnation, which state that the jury "should bear in mind" that comparables "are not themselves direct evidence of value, but merely the basis on which the witnesses have formed their opinions of value." MCivJI 90.16.
5. See, e.g., City of Detroit v Campbell, 146 Mich App 295, 300; 380 NW2d 88 (1985) (referencing an appraiser's testimony regarding his opinion of value, which was based on an analysis of comparable properties). Notably, the Uniform Condemnation Procedures Act, MCL 213.51 et. seq. (the "UCPA"), provides that, aside from the owner of the taken property, only an appraiser licensed under Michigan law may testify to the property's value. See MCL 213.61(2).
6. Appraisal Institute, The Dictionary of Real Estate Appraisal (3d ed., 1993) (hereinafter The Dictionary of Real Estate Appraisal).
7. Appraisal Institute, supra note 3, at 151.
8. Id.
9. MCivJI 90.16.
10. 27 Mich 386 (1873).
11. Id. at 388.
12. 252 Mich 308; 233 NW 325 (1930). Before deciding Balkema, the Supreme Court applied the rule from Perkins in City of Grand Rapids v. Widdicomb, 92 Mich

92; 52 NW2d 635 (1892). Balkema, however, offers a more thorough explanation of the rules governing admissibility of offers, and it has been applied in modern cases. See Western Mich Univ Bd of Trustees v Slavin, 381 Mich 23, 30; 158 NW2d 884 (1968) ("The law as to the admissibility of an offer to purchase is settled by Balkema....")

13. Balkema at 312 (quoting Sharp v. United States, 191 US 341, 349; 24 S Ct 114; 48 L Ed 211 (1903)).

14. Id. at 312-13.

15. Id. at 313.

16. 252 Mich at 311.

17. 375 Mich 406; 134 NW2d 675 (1965).

18. See Appraisal Institute, supra note 3, at 422.

19. The Dictionary of Real Estate Appraisal, supra note 6, at 285. This is distinct from a closed sale, which may have involved a purchase agreement but has since become a completed transaction. This article discusses the admissibility of executory purchase agreements as distinguished from purchase agreements that were the basis for later completed sales.

20. 381 Mich 23; 158 NW2d 884 (1968).

21. *Id.* at 28. Defendants were actually challenging the necessity for the taking which, at the time, was adjudicated at the same trial where just compensation was determined. The possibility of prevailing on necessity allowed the defendants to enter into a purchase agreement shortly before that trial. Under the UCPA, which now governs procedure in all Michigan condemnation trials, necessity is determined at the beginning of the case and just compensation is adjudicated in a separate trial at the end of the case. See MCL 213.56, 62.

22. Slavin, 381 Mich at 29.

23. Id. at 30-31 (citation omitted).

24. Id. at 32-33.

25. The Dictionary of Real Estate, supra note 6, at 253.

26. In *In re Parkside Housing Project*, 290 Mich 582; 287 NW 571 (1939), the Supreme Court affirmed the exclusion of an option from evidence, but did so because the option was invalid: the party that had taken the option was an agent acting without authority from its principal. Id. at 588. The court did not address the admissibility requirements for a valid option.

CASE COMMENTS

by Stacey A. George

Condemnations on Behalf of Private Entities Do Not Meet the Public Use Requirement Except in Limited Circumstances

In *County of Wayne v Hathcock*, 471 Mich 445; 684 NW2d 765 (2004), the Michigan Supreme Court overruled the controversial 1981 case of *Poletown Neighborhood Council v Detroit*, 410 Mich 616; 304 NW2d 455 (1981). In *Poletown*, the court allowed the City of Detroit to condemn properties to allow for the construction and operation of a General Motors plant. Under Const. 1963, Art. 10, Section 2, the government can exercise its powers of eminent domain to advance a "public use." The court in *Poletown* expanded the definition of public use to include instances where the government could condemn property and turn it over to a private corporation with the hope that the taking would render an increased economic benefit to the public. In its most recent decision regarding condemnation of property for public use, the Michigan Supreme Court denied the county's request to condemn approximately 19 properties to develop the property as a business and technology park. The court overruled *Poletown* and its expansion of the scope of public use and determined that *Poletown* failed to provide any legitimate support for the proposed condemnations. It further held that although Wayne County does have the power to condemn the property, that it did meet the requirements of necessary in the law for condemnation, and the condemnation would be a public benefit, the proposed condemnation action failed because it did not meet the public use requirement under the Michigan Constitution. The court held that condemnations exercised on behalf of private entities only qualify as a public use when the corporation's "very existence" depends on condemnation, when the private entity would remain accountable to the public in its use of the property, or when the condemnation is based on facts of "independent public significance," such as when blighted areas are condemned for the public good. Because none of these conditions existed, condemning the property for private entity use was not deemed a public use. Most significantly, the majority of the court held that its decision should be applied retroactively in all cases which have relied on *Poletown's* erroneous expansion and interpretation of public use.

Landowner Not Liable to Employee of Independent Subcontractor for Injuries Resulting From Inherently Dangerous Activity

In *DeShambo v Nielsen*, 471 Mich 27; 684 NW2d 332 (2004), the Michigan Supreme Court overruled the previous case of *Vannoy v City of Warren*, 15 Mich App 158; 166 NW2d 486 (1968), and held that landowners are not responsible for injuries sustained by an employee of an

independent contractor resulting from inherently dangerous activities performed on their land. In *DeShambo*, defendant landowners hired a contractor to cut timber on their property. Plaintiff, an employee of the contractor, filed suit against defendants for injuries he sustained on their property when a tree fell on him. The court clarified that the inherently dangerous activity doctrine does not extend liability to landowners who hire independent contractors to perform inherently dangerous activity on their property when one of the contractor's employees is injured. The purpose of the doctrine is to protect innocent third parties, not those who are engaged in the dangerous activity. Justice Kelley, in her concurrence, added that in cases unlike the one at hand, a landowner who retains control of the inherently dangerous activity should remain liable.

Common Work Area Doctrine and Retained Control Doctrine Applies to Situations Involving General Contractor and Owner Liability

In *Ormsby v Capital Welding, Inc*, 471 Mich 45; 684 NW2d 320 (2004), plaintiff, an employee of a first subcontractor's subcontractor, filed suit against the first subcontractor and the general contractor, for injuries he sustained during construction. Although neither an owner nor a general contractor could be held liable for injuries to a subcontractor's employee arising from the negligence of the subcontractor under common law, under *Funk v General Motors Corp*, 392 Mich 91; 220 NW2d 641 (1974), the court set forth an exception to the rule. In applying and affirming the holding in *Funk*, the Michigan Supreme Court held that a general contractor could be liable under the common work area doctrine and further, an owner could be liable under the retained control doctrine. The court reversed the Court of Appeals and held that the common work area doctrine and retained control doctrine are not two distinct and separate doctrines. To establish liability under the common work area doctrine, a plaintiff must prove: "(1) that the defendant contractor failed to take reasonable steps within its supervisory and coordinating authority (2) to guard against readily observable and avoidable dangers (3) that created a high degree of risk to a significant number of workmen (4) in a common work area." All four elements must be met by a plaintiff to prevail against a general contractor under the common work area doctrine. If liability is sought against an owner, not only must the plaintiff prove that the common work area doctrine would apply, the plaintiff must also show that the owner retained control over the work area like that of the general contractor, such that the owner should likewise be liable for the negligence of its subcontractors. Therefore, the court held that the retained control doctrine is subordinate to the common work area doctrine and would only apply to owners in cases where all the elements of the common work doctrine have been met. The court affirmed the trial court's grant of summary disposition in favor of the first subcontractor because it was neither the general contractor nor the owner and could not be held liable under *Funk*. In addition, because plaintiff failed to prove the third element of the common work area doctrine – that the general contractor/owner created a high degree of risk to a significant number of workers—plaintiff's claim against the general contractor failed.

Misrepresentation Regarding Necessity for Condemnation Disallowed Condemnation

In *Alibri v Detroit Wayne County Stadium Authority*, 470 Mich 895; 683 NW2d 147 (2004), the Michigan Supreme Court reinstated the order of the trial court granting plaintiff's motion for partial summary disposition and dismissed the remaining claims. Defendant represented in a condemnation action that it needed certain properties, including plaintiff's for parking. Later, it was learned that Defendant's representation was not correct. Although there was nothing to indicate that Defendant was aware of the misrepresentation, the court held that rescission was justified based on innocent misrepresentation.

Recreational Land Use Act Applies to Recreational Use on all Types of Land

In *Neal v Wilkes*, 470 Mich 661; 685 NW2d 648 (2004), the Michigan Supreme Court held that the Recreational Land Use Act (RUA) applies in limited circumstances to particular activities that occur on any type of land. The RUA specifically finds liability on the part of a property owner where a recreational user pays to use the owner's land or when injury occurs due to the owner's gross negligence or willful and wanton misconduct. Liability applies when the property involved is a large tract, small tract, developed, undeveloped, etc. Here, plaintiff was injured while riding on an all terrain vehicle on the mowed portion of defendant's property. The court held that the RUA applied and exempted the owner from liability because plaintiff was neither a paying user, nor was defendant's conduct grossly negligent, willful, or wanton.

Slip and Fall Plaintiff Cannot Recover from Snow Removal Company

In *Fulz v Union-Commerce*, 470 Mich 460; 683 NW2d 587 (2004) plaintiff filed suit against a parking lot owner and a snow removal company after she slipped and fell on ice in defendant's parking lot. The court, in addressing the snow removal company's liability to plaintiff, held that

plaintiff could not maintain a cause of action against the company. Plaintiff claimed that based on its maintenance contract with the premises owner, defendant owed her a common law duty of reasonable care in maintaining the parking lot. The court stated that in actions where a defendant fails or refuses to perform a promise, plaintiff's claim lies in a contract action. If the defendant negligently performs a contractual duty or breaches a duty owed by implication through a contract, the action will lie in either tort or contract. Unless there is a duty to act separate and distinct from the promise made, there is no tort liability if a defendant fails to perform a promise. Because tort claims of nonperformance cannot be upheld on the basis of nonperformance of a contract, no duty existed between plaintiff and defendant service company separate from the contract defendant entered into with the premises owner and plaintiff's claim failed.

Determination of Necessity in Condemnation Case is an Issue for the Court, Not the Jury

The Court in *City of Kalamazoo v KTS Industries, Inc*, ____ Mich App ____; ____ NW2d ____ (2004 WL 1533252), held that the Uniform Condemnation Procedures Act ("UCPA") governs the issue of determination of whether condemnation of a defendant's property is necessary. Under the UCPA, a court, not a jury, has to determine the issue of necessity. This is contrary to the provisions within the Condemnation by State Agencies and Public Corporations Act ("CSAPCA"), which allows a jury to hear and decide the issue. The court held that although the UCPA did not explicitly repeal the CSAPCA, portions of the CSAPCA were repealed by the UCPA, and specifically, that portion that governs the determination of necessity. The UCPA governs the procedures to be followed by a governing body that is exercising its eminent domain powers established under the CSAPCA. The court held that the trial court erred in denying plaintiff's motion to strike that portion of defendants' demand for jury as it applied to a determination of necessity of the condemnation proceeding.

Ordinance Prohibiting Readily Changeable Signage Violates First Amendment

In *Outdoors Systems, Inc v City of Clawson*, 262 Mich App 716; ____ NW2d ____ (2004), the Michigan Court of Appeals held that defendant's ordinance banning billboard advertising violated plaintiff's rights of free speech. Although the ordinance allowed for signs of a certain size to be used for advertising both as an accessory to the adjacent business and as a non-accessory, it specifically banned billboards where the signage was readily changeable. The court held that although accessory and non-accessory restrictions are content neutral and do not violate free speech, there is no legitimate governmental interest in allowing signs of a certain shape and size and disallowing other signs of the same shape and size simply because the signage is more readily changeable on certain signs. Prohibiting signs based on the changeability of their contents violates the First Amendment Right to Free Speech.

Conduct Alleged in Complaint Must Occur in the Course of Advertising to be Covered as an Advertising Injury Under General Liability Insurance Policy

In *Shefman v Auto Owners Ins Co*, 262 Mich App 631; ____ NW2d ____ (2004), plaintiff insured filed suit against its insurer, alleging that defendant failed to defend and/or indemnify them under a commercial general liability coverage insurance policy in two separate lawsuits filed against them in both state and federal courts. Plaintiffs were sued by Timberlane Homes, who alleged that plaintiffs stole and duplicated Timberlane's designs in the construction of homes in its site condominium development. The court affirmed the trial court's finding in favor of defendants. The trial court held that the conduct alleged in Timberlane's suit against plaintiffs was not covered under defendant's policy as occurring in the course of advertising. The court looked to the case of *GAF Sales & Services, Inc v Hastings Mutual Ins Co*, 224 Mich App 259; 568 NW2d 165 (1997), which states that coverage for an advertising injury must meet three elements. Because Timberlane did not allege that the misappropriated designs were used in plaintiffs' advertising or that damages resulted from the advertising, plaintiffs could not prove the third element for coverage — that there is a causal connection between an advertising injury and the course of advertising — and therefore, summary disposition was properly granted in favor of defendants.

Non-Profit Groups Had Standing to Sue on Behalf of Their Members under the Michigan Environmental Protection Act

In *National Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608; 684 NW2d 800 (2004), the Michigan Supreme Court held that plaintiffs, non-profits groups, had standing to bring suit under the Michigan Environmental Protection Act on behalf of their members. Plaintiffs filed suit after defendant, a mining company, obtained a permit from the Michigan Department of Environmental Quality to expand mining operations. Plaintiffs sought an injunction

against the mining operation expansion. The court, in reviewing the particular facts of the matter, reviewed affidavits submitted by plaintiffs of their members, who lived near the mine and who described what type of activities they engaged in that would be impaired if mining operations were expanded, as well as one affidavit that discussed what effect the mining had on his property. The court held that these affidavits were deemed adequate to prove standing on behalf of plaintiffs, but that plaintiffs could not rely on the affidavits throughout the entire proceedings to prove standing exists. It pointed out that subject matter jurisdiction could be raised at any time.

Sign Size Limitation in Ordinance Constitutional

In *Norman Corp v City of East Tawas*, ____ Mich App ____; ____ NW2d ____ (2004 WL 1737346), plaintiff filed suit alleging that defendant's ordinance regulating the size of signs placed on the exterior of buildings was unconstitutional. The Michigan Court of Appeals, in reversing the trial court, held that the ordinance was constitutional, and that limiting the size of signs regardless of their placement on a single or multi-tenant building is permissible as long as it is rationally related to a legitimate governmental interest. The court held that the precedential case of *Art Van Furniture v City of Kentwood*, 175 Mich App 343; 437 NW2d 380 (1989), was an incorrect statement of the law. The court held that sign size limitations meant to avoid visual clutter are reasonably related to protecting the general welfare and in promoting aesthetics and decreasing the number of distractions to those who pass by the signs. Plaintiff's variance was properly denied by defendant because plaintiff's proposed sign exceeded defendant's ordinance limitations, its problem was self-created, it could continue to use its property absent the variance, and the denial did not unnecessarily burden the plaintiffs.

City's Method of Estimating Property Taxable Value Found to be Unconstitutional

In *Colonial Square Cooperation v City of Ann Arbor*, ____ Mich App ____; ____ NW2d ____ (2004 WL 1752855), plaintiff, a housing cooperative, filed suit against the city, alleging that the city's method of increasing taxable value of property was unconstitutional. Specifically, the court looked at whether the city could annually increase the taxable value of an entire parcel of property when individual units within the parcel are transferred. The court found that the city determined the percentage of units that were transferred over the course of a year and increased the taxable value of the entire piece of property based on the percentage, instead of keeping track of which individual units were transferred. The result of the city's method led to increasing the tax burden on those units that were not transferred. The court held that the city's use of such a method is unconstitutional.

Motion to Set Aside Consent Judgment Properly Granted Where Portions of Consent Judgment Void

In *Inverness Mobile Home Community, Ltd v Bedford Township*, ____ Mich App ____; ____ NW2d ____ (2004 WL 1779110), the Michigan Court of Appeals affirmed the trial court's decision to hear defendant's motion to set aside consent judgment and affirmed its finding that portions of the consent judgment were void as against public policy. In 1993, plaintiff and defendant entered into a consent judgment after plaintiff sought to expand its mobile home park and sought rezoning regarding the expansion. The consent judgment was entered on the record and contained paragraphs relating to a future option on the part of plaintiffs to develop other property. When plaintiff attempted to enforce the paragraphs relating to its option, defendant moved to set aside those portions of the consent judgment relating to the option and the future development. The court found that although defendant's motion to set aside the consent judgment was brought more than one year after its entry, such a motion could be made where terms of the consent judgment are sought to be voided as long as the motion is made within a reasonable time. The court held that the trial court did not abuse its discretion in hearing the motion and that the provisions of the consent judgment defendant sought to set aside were void for the reason that they improperly abrogated legislative powers from future township boards.

Severed Oil and Gas Interests are Not Merged with Surface Estates When Foreclosed Upon

In *Comben v State of Michigan*, ____ Mich App ____; ____ NW2d ____ (2004 _____, the Michigan Court of Appeals addressed the issue of severed mineral interests in the context of foreclosure. Specifically, the court focused on situations where property subject to severed gas and oil interests is taken through foreclosure proceedings by a foreclosing governmental unit ("FGU") after a surface owner fails to pay property taxes. The court held that notice of such foreclosure proceedings is not required to be given to subsurface owners because a FGU does not acquire any interest in the severed oil and gas rights on the property sought to be foreclosed. Furthermore, owners who pay an oil and gas severance tax on property cannot have that property foreclosed on for nonpayment of property taxes because the property is exempt from paying general property taxes.

Challenge to Zoning Ordinance is Dismissed; Density Requirements Held to be Constitutional

In *Conlin v Scio Twp*, 262 Mich App 379; 686 NW2d 16 (2004), the Court of Appeals reviewed plaintiffs' various challenges to defendant's ordinances and, specifically, the density restrictions contained within the ordinances. The Court of Appeals affirmed the trial court's decision that plaintiffs' "as applied" challenge was not ripe for judicial review and disagreed with plaintiffs' argument that they exhausted their administrative remedies. Although the trial court erred when it dismissed plaintiffs' claims that the ordinance was ultra vires and facially unconstitutional on the basis of the finality requirement, the court held that its grant of defendant's motion for summary disposition should be affirmed because plaintiffs' claims could not prevail after changes were made to the ordinance in 2003. The court also considered plaintiffs' arguments that defendant's ordinance was ultra vires because its density restrictions were preempted by the Land Division Act and the Condominium Act. The court disagreed with plaintiffs' argument and held that the ordinance did not conflict with either the Condominium Act or the Land Division Act. Finally, in analyzing plaintiffs' violation of substantive due process claim, the court applied the rational basis test and found that the zoning ordinance was rationally based on a legitimate governmental interest – that of avoiding overcrowding and preserving open space.

City Ordinance Could Not Be Enforced Until Supporting Guidelines Approved by City

In *Castle Investment Co v City of Detroit*, 470 Mich 875; 680 NW2d 877 (2004), plaintiff filed suit challenging the enforceability of defendant's ordinance which required that a certificate of approval be issued by the city before property could be sold or transferred. The city's ordinances also stated that the certificate of approval would be issued if it complied with guidelines established by the city that became effective upon approval by the city. At the time plaintiff filed this action seeking to declare the ordinance unenforceable, defendant had not approved the ordinance's guidelines. The Michigan Supreme Court held that because there were no approved guidelines, the ordinance requiring a certificate of approval based on the guidelines was unenforceable.

Breach of Covenants Affords Injunctive Relief Even Where No Damages Suffered by Plaintiff

In *Hickory Pointe Village of Homeowners Assoc v Smyk*, 262 Mich App 512; ____ NW2d ____ (2004), the Michigan Court of Appeals reversed the trial court's grant of summary disposition in favor of plaintiff. Plaintiff homeowners' association filed suit against defendants after defendants constructed a deck on their property, in violation of the subdivision's covenants. The court held that the intent of the covenants was clear – that the deck constructed by defendants required approval by plaintiff and that in the absence of approval, the deck could not be built. Plaintiff denied defendants' request to build the deck as the deck's railings did not comply with their architectural standards. Defendants built the deck as originally submitted to plaintiff, with the nonconforming railings. Although the trial court held that defendants breached the covenants, it held that the breach was de minimus and no damages were warranted because plaintiff suffered no substantial injury; and consequently, it dismissed the action. The Michigan Court of Appeals reversed, holding that where the covenants are clear and there has been a breach of the covenants, no matter how de minimus, the covenants may be enforced and injunctive relief is warranted.

Mineral Owner's Interest Not Subject to Restrictive Covenants Recorded After Mineral Owner's Interest Severed from Subsurface Estatate

In *The Mable Cleary Trust v The Edward-Marlah Muzyl Trust*, 262 Mich App 485; ____ NW2d ____ (2004), plaintiffs, owners of lots within a subdivision, filed suit against various defendants after defendants attempted to engage in mining operations in the subdivision. The court held that because defendant Otsego's mineral interest was severed from the land's surface rights prior to the recording of the subdivision's restrictive covenants, Otsego's interest was not burdened by the covenants. Furthermore, the court held that plaintiff's argument that defendant Otsego must be a majority in interest holder of the mineral rights to develop its mineral interest under MCL 319.101 was erroneous. The court agreed that Otsego was not a majority in interest holder because it only held a 50% interest in the mineral rights in the property; however, it found that a clear reading of the statute did not prohibit Otsego from developing its interest. As long as all owners consent to development, Otsego, along with the defendant developers, as owners with a majority in interest in the property, could consent to develop Otsego's mineral interest. This is true even though the defendant developer's interests were restricted by the subdivision's restrictive covenants.

Register of Deeds Required to Pay Costs Associated with Claims of Parties Involving Validity of Recorded Deeds

In *Central Ceiling & Partition, Inc v Dept of Commerce*, 470 Mich 877; 683 NW2d 142 (2004), the Michigan Supreme Court held that liens recorded with the Wayne County Register of Deeds were properly recorded, but that questions existed regarding whether the Register of Deeds properly performed its statutorily-imposed duties regarding the recording of the deeds. The court ordered the Register of Deeds to show cause why it should not pay the costs associated with the claims and defenses involved in the dispute over the recorded deeds and retained jurisdiction to hear further issues concerning the imposition of costs. In addition, the court ordered that the Register of Deeds mail quarterly statements to the court clerk regarding its progress in bringing its recording system into statutory compliance.

LEGISLATION AFFECTING REAL PROPERTY

by Stacey A. George

Termination of Tenancy Due to Possession, Delivery, or Manufacture of Controlled Substances

Public Acts 105 and 106 of 2004 apply to summary eviction proceedings where a tenant's lease is terminated because of the manufacture, delivery, or possession of controlled substances on the leased premises by the tenant, a person in the tenant's household, or a person under the control of the tenant. The Acts amend the Revised Judicature Act and allow a landlord to recover possession of the premises 24 hours after the landlord serves the tenant with written notice of termination of the lease. The Acts shorten the time the landlord can recover possession of the premises from 7 days to 24 hours. In order for the Acts to apply, the landlord must file a formal police report regarding the controlled substances involved. Under summary proceedings, a court must issue a summons to the tenant/defendant ordering him to appear for trial. Act 105 states that the summary proceeding action should be heard no later than when the defendant makes his appearance or attends a trial date. The court may also order the defendant to pay restitution for restoration of the premises in connection with termination of the lease due to the controlled substance violation.

Utility Tax Exemption for Start-Up Businesses

Public Act 322 of 2004, which became effective August 27, 2004, gives tax exemption to start-up businesses. Under the Act, a qualified start-up business would be exempt from paying taxes for utilities for a limited time. The business must file an exemption form with the city treasurer of the city in which taxes are issued within 60 days of becoming exempt. The exemption is effective only if the city adopts the provisions of the Act in its city utility users tax ordinance within 90 days after the Act's effective date. If the exemption becomes effective, it will be available for the tax years following December 31, 2004, for no more than five years beginning in the first year the business first claims a single business tax or income tax credit. The years the exemption is claimed do not have to be consecutive.

Obsolete Property Tax Exemption for Start-Up Businesses

Public Act 251 of 2004 amends the Obsolete Property Rehabilitation Act and applies to a qualified start-up business that owns a rehabilitated facility as defined under the Act. The Act gives the start-up business a tax

exemption from the obsolete properties tax, not including any tax levied for special assessments, debt millages, and school enhancement and sinking fund millages. The exemption is only available to business where the local taxing unit adopts a resolution approving of the tax exemption. The exemption is only available during the first year in which the resolution is adopted; however, a start-up business that has been eligible for the exemption will lose its eligibility to claim the exemption after five years.

Amendment to Downtown Development Authority Act

Public Act 158 of 2004 amends the Downtown Development Authority Act's definition of "downtown district." Downtown districts are designated business areas established by each municipality through their ordinances. The Act allows one or more separate and distinct geographic areas in a business district to operate as one downtown district in cases where a municipality surrounds another city that lies between two separate and distinct geographical areas.

County Planning Commission Must Consist of at Least One School Board Member or School Administrative Employee

Public Act 307 of 2004, effective August 17, 2004, amends Public Act 282 of 1945 and requires that at least one member of a county planning commission be a public school board member or an administrative employee of a school district that lies either partly or entirely within the county. The Act adds that education be one of the representative interests that make up the planning commission. Appointment of the educational member must be made upon the first vacancy following the effective date of the Act.

Property Tax Exemption for Innovation Centers and Qualified High-Technology Businesses

Public Act 244 of 2004 amends the General Property Tax Act and gives property tax exemption for personal property owned or used by the administration of an "innovations center" or by a "qualified high-technology business." An innovations center is defined as a building that houses at least one qualified high-technology business. Qualified high-technology business is defined as a business that utilizes approximately 25% of its operating expenses for research and development or whose primary business activity involves high technology activity that consists of advanced computing, materials, biotechnology, etc. The tax exemption must be applied for by the innovations center or business who seeks to claim the exemption.

Changes in Foreclosure by Advertisement Procedure

Public Act 186 of 2004, which became effective July 1, 2004, amends the Revised Judicature Act, MCL 600.3204, et al. The Act requires that, where the party foreclosing on the mortgage is not the original mortgagee, a record chain of title showing the current mortgagee exist prior to the date of the foreclosure sale, not prior to initiation of the foreclosure proceedings. In addition, the advertised notice of foreclosure must now include the date of the most recent assignment, if any has occurred, the name of the original mortgagee, the name of the mortgagor, and the name of any foreclosing assignee. This is in addition to previous foreclosure by advertisement requirements, which state that the date of the mortgage and the date the mortgage was recorded must also be included in the foreclosure notice.

CONTINUING LEGAL EDUCATION

by
Brian P. Henry
Chairperson
and
Arlene R. Rubinstein
Administrator

The purpose of the Continuing Legal Education programs is to help Michigan attorneys keep abreast of the latest developments in real property law. In our effort to accomplish this goal we would also like to present our programs to as many attorneys throughout the state as possible. We are piloting a program to bring the Homeward Bound seminars to Grand Rapids. This year we will videoconference the May 19, 2005 Homeward Bound seminar on Real Estate Financing: Negotiating, Documenting and Closing Deals from our Troy location to Grand Rapids. Grand Rapids and surrounding area attorneys are invited to Grand Valley State University-Pew Grand Rapids Campus-Eberhard Center to participate in this program.

The Section is going to South Beach! Last year, we learned about Canadian law in relationship to Michigan Law. This year we will present a program on Florida law for Michigan attorneys. Join us in Troy, Birmingham, Grand Rapids, South Beach and Grand Traverse Resort in Northern Michigan for timely and innovative programming. Become involved! The CLE committee is looking for new members to help plan and implement these excellent programs! We are always looking for new topics, speakers and Roundtable Discussion Leaders. To suggest a topic, volunteer to become a speaker or roundtable discussion leader or to just learn more about a committee, please email or call Brian Henry at 248-642-2255 or bhenry@fcnlaw.com or Arlene at 248-644-7378 or lawa1@aol.com. Following is a preview of our upcoming programs!

HOMEWARD BOUND AND GROUNDBREAKERS

The Continuing Legal Education Committee is pleased to announce its 29th season of ***"Homeward Bound"*** seminars and our third season of our ***"Groundbreakers"*** Breakfast Roundtables. This season's series is under the direction of Brian P. Henry of Freeman, Cotton & Norris, PC in Bloomfield Hills.

"Groundbreakers" Breakfast Roundtable Sessions

Our first ***"Groundbreakers"*** Breakfast Roundtable program will be held on October 21, 2004 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. ***Space is limited!***

Dean A. Rocheleau of Plante & Moran, PLLC in Southfield is the program coordinator for **"Like Kind Exchanges of Real Property."** Even with the Federal long-term capital gains tax rate currently at 15 percent, real estate owners are still trying to structure their real estate dispositions to qualify for like kind exchange treatment. Although most real estate will qualify for the tax deferral that a like kind exchange offers, there are many factors and limitations that may cause a client's deal from qualifying for this favorable tax treatment. Dean Rocheleau will highlight many of these limitations that the discussion leaders will be covering in greater depth at their roundtable discussions.

ROUNDTABLE DISCUSSION TOPICS AND LEADERS:

Basics of Like Kind Exchanges
Dean A. Rocheleau of Plante & Moran, PLLC

Reverse Exchanges
Anthony J. Viviani of Stewart Title Guaranty Co.

Construction Exchanges
William B. Acker of Kemp, Klein, Umphrey, Endelman & May, PC

Exchanges Involving Partnerships/LLCs
Jeffrey A. Robbins of Hertz, Schram & Saretsky, PC

Exchanges of Tenants-in-Common Interests
Charles W. Royer of Charles W. Royer Attorney at Law

Related Party Exchanges
Angelo V. Meli of Plante & Moran, PLLC

Documents for Delayed Exchange with Qualified Intermediary
Margo B. Rosenthal of Investment Property Exchange Services

Our second Breakfast Roundtable Session will be held on March 3, 2005 on ***"Cornucopia of Leasing Clauses and Concerns."*** The Program coordinator is Kenneth F. Posner of Couzens, Lansky, Fealk, Ellis, Roeder & Lazar, PC in Southfield. Further information will be available in January.

Homeward Bound

This year the Homeward Bound series will be held in Troy at the MSU Management Education Center, 811 W. Square Lake Road. The series will begin November 4, 2004 with ***"Keeping the Deal Together: How to Avoid Unnecessary Closing Problems and How to Solve Them."*** Margo Rosenthal, Thomas Richardson and Matt Keir of Liberty Title Company will speak. This presentation will cover common title problems, how to avoid them and what happens when they become a title claim and how they are resolved.

On **December 2, 2004** James C. Bruno of Butzel Long, PC in Detroit, Brian P. Henry of Freeman, Cotton & Norris, PC in Bloomfield Hill and Lawrence R. Shoffner of Lawrence Shoffner, PLLC in Detroit will present **"How to Create Better Real Estate Forms: Drafting Methods, Tips and Essential Clauses."** This seminar will cover merger clauses, the parole evidence rule and related legal concepts affecting the drafting of real estate documents. The speakers will review certain form real estate documents, including purchase agreements and leases and provide drafting tips.

Lisa S. Gretchko of Howard & Howard Attorneys at Law in Bloomfield Hills and Paula A. Osbourne of Butzel Long, PC in Detroit will speak on **January 13, 2005** on **"What Every Practitioner Needs to Know About Bankruptcy Law."** This seminar, aimed at real estate practitioners, will provide basic information regarding chapter 11 and 7 bankruptcy proceedings; the treatment of real property, residential and commercial leases in bankruptcy proceedings; and the relative rights of a property owner, residential and commercial leases in bankruptcy proceedings; the relative rights of a property owner and/or lessor vis-à-vis a trustee in bankruptcy or debtor-in-possession.

Registrations for individual Homeward Bound seminars are $80 for Section members and $90 for Non-section members. A *substantial savings* can be made by purchasing a "Series Subscription!" The registration fee is $240 for Section members and $390 for non-Section members. Section members can register for the full series and save $240!!

The "Groundbreakers" Breakfast Roundtable sessions are not included in the Homeward Bound Series registration fee. The cost is $45 for Section members and $55 for non-Section members. If you pay at the door the cost is $55 for Section members and $65 for non-Section members. A Homeward Bound/ Breakfast Roundtable Session brochure has been included in this issue. For more information please call Arlene Rubinstein at 248-644-7378 or e-mail at LAWA1@aol.com.

Mark your Calendars!
Make Your Reservations!
March 10-12, 2005
The National Hotel
Miami Beach, Florida

Florida Law for Michigan Real Estate Attorneys

Many Michigan residents and companies transact business or purchase property in Florida. To assist clients and effectively work with local Florida counsel. It is valuable for the Michigan attorney to be knowledgeable and conversant about how Florida real estate law may differ from Michigan real estate law. The Section would like to thank Mark Krysinksi of Jaffe, Raitt, Heuer & Weiss, PC in Southfield and Larry Shoffner of Lawrence Shoffner, PLLC in Detroit for planning this informative program.

Thursday, March 10, 2005 * 5:00 – 7:00 p.m.
Welcoming Reception sponsored by Concorde Exchange Group and Investment Property Exchange Services, Inc.
Located in the Zee Pool Lounge

Friday, March 11, 2005 * 8:15 – 9:00 a.m.
Breakfast Program (A full breakfast will be served 8:00 – 9:00 a.m.)
Located in the Oval Room.

Moderator:
Mark P. Krysinski
Jaffe, Raitt, Heuer & Weiss, PC

Title Practice in Florida
Catharine B. LaMont of LaMont Title Company
Detroit, Michigan

Kenneth C. Rossburg of First American National Commercial Services
Clearwater, Florida

9:00 a.m. – 12:30 p.m.
1031 Exchanges/Tenants in Common under Florida Law
Margo B. Rosenthal of Investment Property Exchange Services, Inc.
Farmington Hills, Michigan

Mark G. Kosanke of Concorde Exchange Group
Troy, Michigan

Issues Impacting Estate Planning In Florida
Christopher W. Boyett
Holland & Knight LLP
Miami, Florida

Why do Debtors Move to Florida?
Lisa S. Gretchko of Howard and Howard Attorneys at Law
Bloomfield Hills, Michigan

Arthur J. Spector, formerly U.S. Bankruptcy judge in Michigan
Ft. Lauderdale, Florida

5:00–7:00 p.m. Reception sponsored by Ruden, McClosky, Smith, Schuster & Russell, P.A.
6:30 – 7:30 p.m. Entertainment by Roger Chard and his accompanist Maurita Peterson Holland

Saturday, March 12, 2005 (Breakfast will be served 8:00 – 9:00 a.m.)
Located in the Oval Room

8:15 a.m. – Noon
Florida Real Estate Transactions
Marvin S. Rosen of Ruden, McClosky, Smith, Schuster & Russell, P.A.
West Palm Beach, Florida
and
John G. Cameron, Jr. of Warner Norcross & Judd LLP
Grand Rapids, Michigan

Mr. Rosen and Mr. Cameron will lead a panel of experts on Florida Real Estate Transactions.
Council Meeting at Noon * Lunch will be served in Boardroom 1 on the Mezzanine Level.

Register for this conference is $325 for Section members and $375 for non-members of the Section. Register today and save $75! After December 1, 2004 the registration fee will be $400 for Section members and $450 for non-Section members. We have a limited number of rooms reserved. To reserve your room call the hotel directly at 1-800-327-8370 and ask for the Real Property Section Winter Conference Group.

Room rates are as follows:

Ocean Front (1 King Bed)	**$259**
Ocean Front (2 Double Beds)	**$259**
Deluxe Cabanas (1 King Bed)	**$289**

Group rates will be honored 3 days before and after the dates based on availability. State and local taxes are currently 13 percent. These are subject to change. An $11 per room, per night service fee will be added. All registrants will be responsible for their own airfare and transportation to and from Florida and the hotel. Book early as this is high season in South Beach! **For further information call 248-644-7378 or email LAWA1@aol.com.**

Save the Date!
Thirtieth Annual Summer Conference
July 20-23, 2005
Grand Traverse Resort and Spa
Traverse City, Michigan

We would like to thank our sponsors to date!

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Fidelity National Title Insurance Company
National Title Services

The Grand Traverse Resort and Spa is the ideal setting for the 2005 Summer Conference. With over 250 miles of Lake Michigan shoreline, dozens of inland lakes and thousands of acres of heavily forested trails, there's something for everyone! Swim at the Resort's private Beach Club, hike, fish, sail or golf at one of the 3 exceptional golf courses.

Ronald E. Reynolds of Berry, Reynolds and Rogowski, PC in Farmington Hills and Richard D. Rattner of Williams, Williams, Ruby & Plunkett, PC in Birmingham are the program coordinators. Look for further information in January.

COURSE CALENDAR

Set forth is a schedule of Continuing Legal Education courses sponsored or co-sponsored by the Real Property Law Section through January 2004.

Date	Location	Program	Topic
October 21	The Townsend Hotel Birmingham	Breakfast Roundtable	Like Kind Exchanges of Real Property
November 4	Management Education Center MSU – Troy	HB	Keeping the Deal Together: How to Avoid Unnecessary Closing Problems And How to Solve Them
December 2	Management Education Center MSU – Troy	HB	How to Create Better Real Estate Forms: Drafting Methods, Tips and Essential Clauses
January 13	Management Education Center MSU -Troy	HB	What Every Real Estate Practitioner Needs to Know about Bankruptcy Law

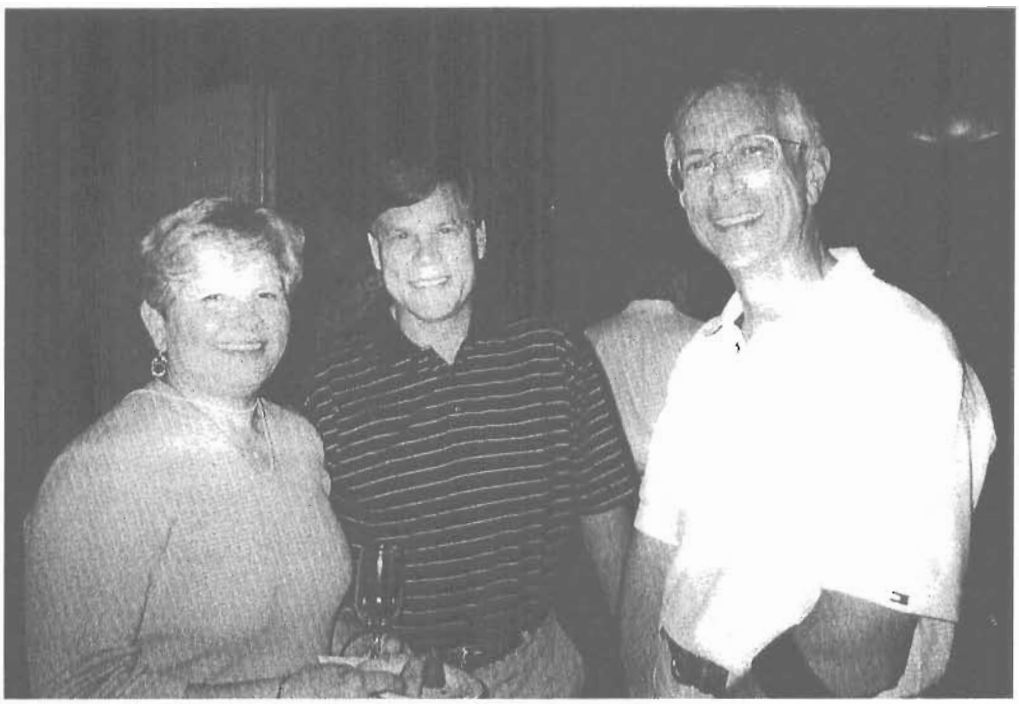
Further information on all Breakfast Roundtable Sessions and the Homeward Bound series can be found on the Sections website at: http://www.michbar.org/realproperty/

Summer Conference 2004

Treetops Resort • Gaylord, Michigan • July 21-24, 2004

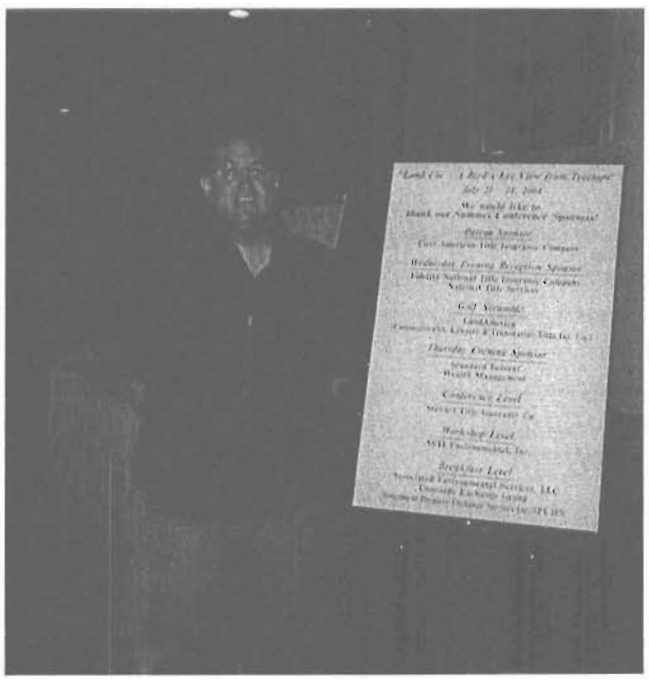
Peter Nathan, Carol Ann Martinelli of Land America Financial Group, Mark Makower, Chairperson, Dickinson Wright, PLLC, Diane Makower and Michael Goler of Goodman Weiss Miller PC

Treetops Resort • Gaylord, Michigan • July 21-24, 2004



Sue and Bob Nix, C. Robert Wartell Distinguished Service Award Recipient, and Ed Michalak, speaker, The Great Atlantic & Pacific Tea Company

Sherece Tolbert, Scholarship Recipient, Howard University with Bob Berlow, Summer Conference Co-chair



Ron Reynolds, outgoing CLE Chairperson, Berry, Reynolds and Rogowski, PC

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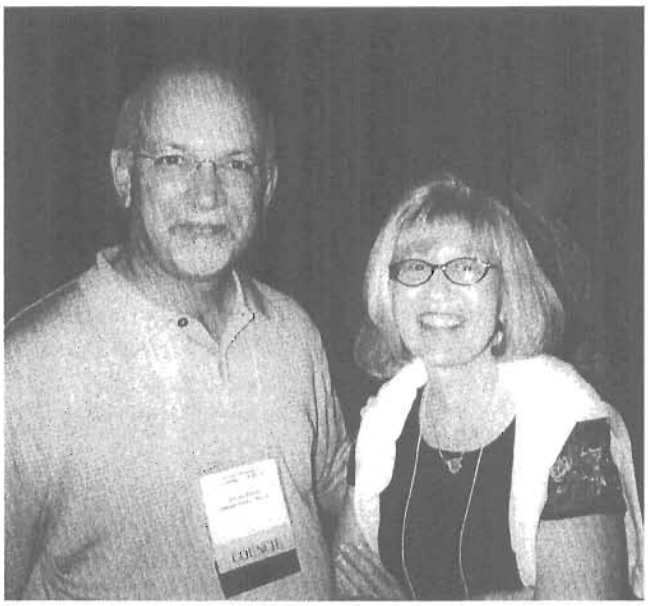
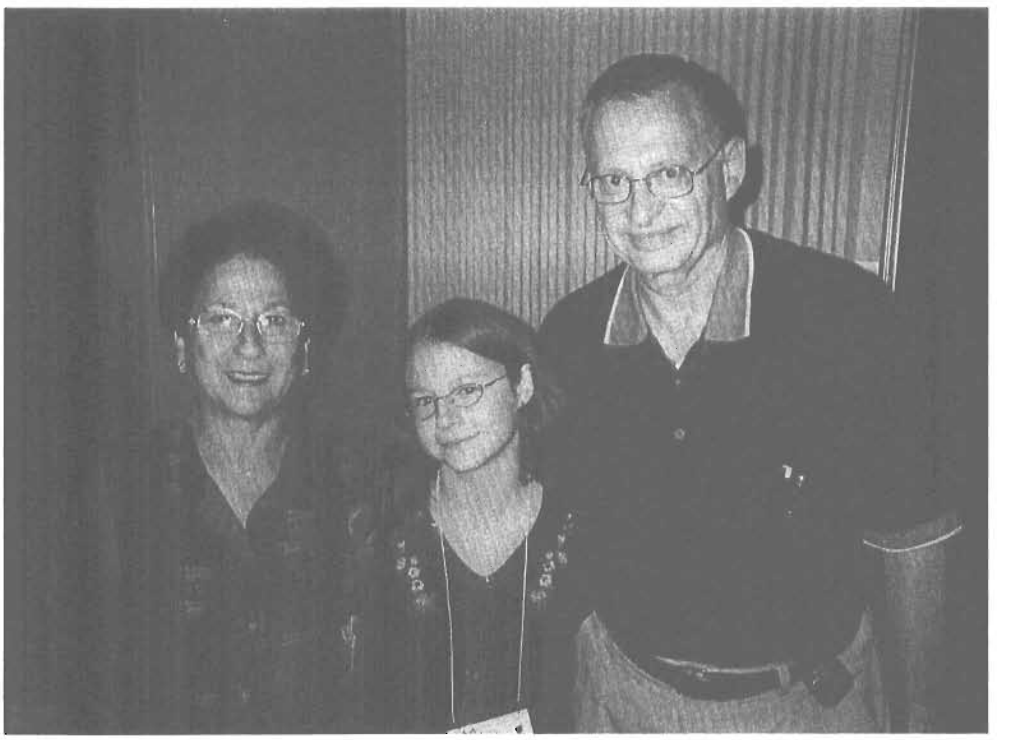


Jerry Pesick, Steinhardt, Pesick & Cohen, PC and attorney, Laura H. McMahon Lynch

Rick Rattner, Summer Conference Co-Chair, Williams, Williams, Ruby & Plunkett, PC



Arlene and Larry Weingarden, Larry A. Weingarden, PC with their granddaughter Allison

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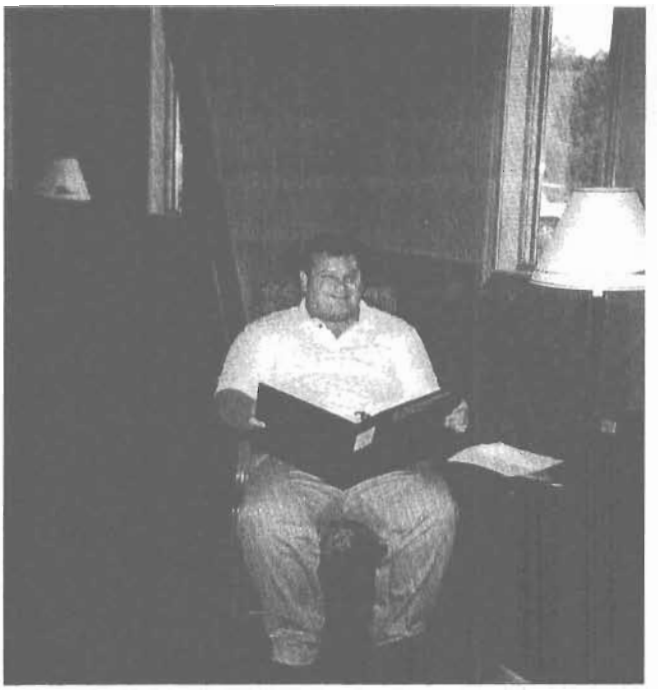
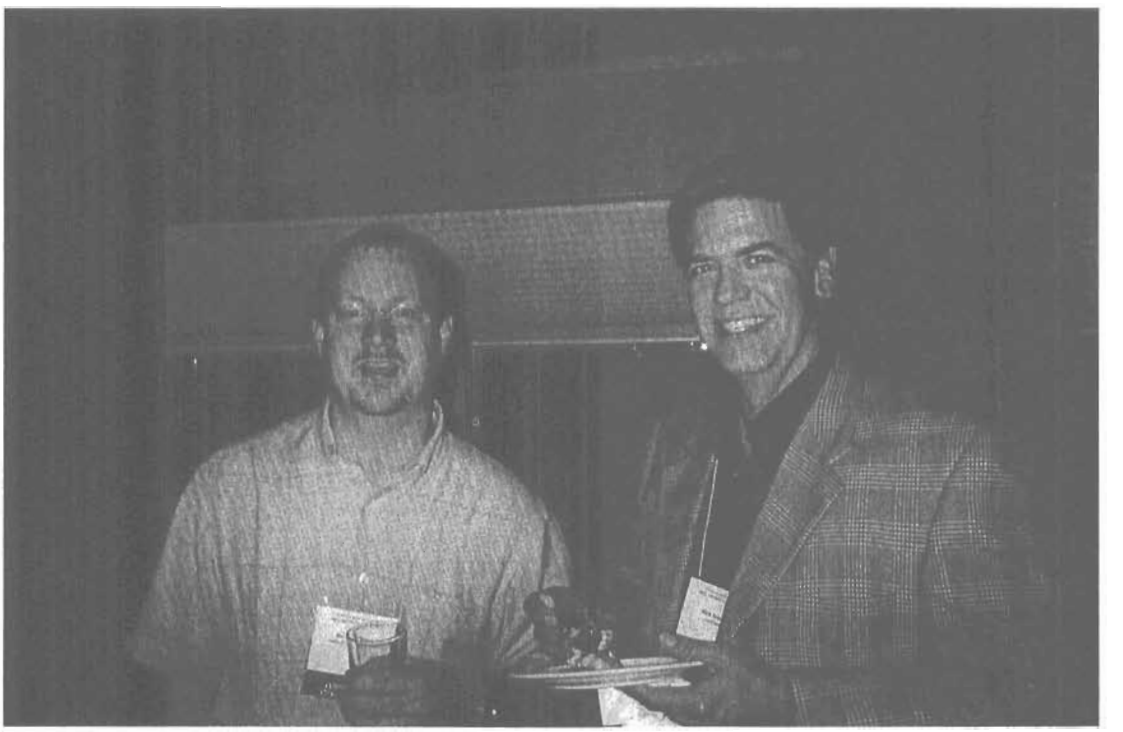
Bob Berlow, Summer Conference Co-Chair, Dykema Gossett



Chris McNeely, Mittelstaedt & McNeely, PC



David Nykanen, Homeward Bound Chairperson, Steinhardt, Pesick & Cohen, PC and Rick Sundquist, Clark Hill PLC