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CONTENTS

Page

A Survey of Public Financial Assistance to Real Estate Development — 3
by Frank L. Andrews, Gerald P. LaHaie, Thomas S. Leven, Dennis R. Neiman, and Jefferson F. Riddell

Summary of the Public Acts of 1982 Relating to Real Property Law — 25
by Thomas L. Lapka, Gregory L. McClelland and Robert J. McCullen

Michigan Land Title Standards, Fourth Edition — 30
by Ralph Jossman

Madhaven v. Sucher-Revisited — 35
by Jeffrey B. Larkin

The Descent and Distribution of Property When the Owner Does Not Make a Will — 37
by Allen E. Priestley

Condo Deregulation Arrives — Complete With Questions — 42
by Jeffery R. Jones and James P. Babcock

The Legislative Scene — 48
by Robert J. McCullen

Recent Decisions — 51
by Joseph A. Lloyd

Section News — 56

Did I ever repeat to you my division of "able lawyers" into kitchen knives, razors and stings?

Oliver Wendell Holmes, Letter to Pollock, September 19, 1919

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Readers are invited to submit their own articles, comments and opinions to George J. Siedel, Editor, 526 Business Administration, University of Michigan, Ann Arbor, Michigan 48109. Publication and editing are at the discretion of the editor.

A SURVEY OF PUBLIC FINANCIAL ASSISTANCE TO REAL ESTATE DEVELOPMENT

by
Frank L. Andrews, Gerald P. LaHaie, Thomas S. Leven
and Jefferson F. Riddell
Edited by Dennis R. Neiman

INTRODUCTION

The following survey is intended as a brief discussion and overview of certain of the various forms of governmental financial assistance to real estate development in the State of Michigan. Governments, in modern times, have been actively involved in real estate markets in a regulatory, taxing, and/or participatory mode. Government participation has changed in nature frequently, but has generally grown in scope and impact. For example, federal government programs have played a major role in the development of a secondary mortgage market in the United States and many other programs enhance the financial feasibility and marketability of specific types of projects, such as low income housing or certain health care facilities. Such programs generally provide a specific form of financial assistance, such as mortgage insurance and interest and rent subsidies, to qualifying projects, and are generally premised on the social desirability of the specific type of project.

Of more recent vintage is a trend toward broader assistance premised upon the general desirability of development, without qualification as to specific uses of particular social importance. Broad social impacts and job generation are the primary premises of these programs, which include tax abatement, tax exempt financing, tax increment financing, and grant-in-aid programs such as the Urban Development Action Grant program. This trend toward greater participation has been given added emphasis by the recent disruptions in financial and real estate markets which have spawned greater governmental participation, which may be expected to continue.

The same disruptions which have lent greater impetus to such programs have also engendered increased concern and scrutiny of the cost of governmental assistance programs, particularly at the federal level. Fortunately for real estate development interests, recent years have seen a substantial increase in the number of state and local governmental assistance programs. At present, there is the potential for a developer to profitably combine a variety of programs in a single project. Many of the programs mentioned in the following survey may be combined in such a manner.

The number and variety of governmental actions affecting real estate development and markets are too multitudinous to permit a complete cataloguing. Members of the Public Finance Subcommittee have selected the following topics as both representative of the range of programs and as being of the greatest utility to Michigan real estate attorneys and their clients. Although such governmental programs as special assessment bonds and other types of "traditional" governmental financings are not discussed herein, the most notable omission from this survey is discussion of industrial development revenue bond ("IDRB") or economic development corporation ("EDC") financings. This topic will be covered in a future article.

This survey is intended to introduce real estate practitioners unfamiliar with the field to the wide variety of governmental assistance programs and the salient features of the most prominent programs. It has been structured by project use and form of assistance in order to facilitate a

quick review and scan for programs which may be of value in addressing specific concerns of any proposed project under consideration.

HOUSING AND URBAN DEVELOPMENT ("HUD") MORTGAGE AND MORTGAGE MARKET PROGRAMS

Contributed by Jefferson F. Riddell

The HUD programs discussed below are authorized by federal statute. Many are contained in the National Housing Act as amended by such federal statutes as the Housing and Urban Development Act of 1965 and the Housing and Community Development Act of 1974. The statutes generally authorize HUD to promulgate regulations for these programs. The regulations are published in the Code of Federal Regulations and are updated and amended periodically. The statutory authorizations as expanded by the regulations are generally considered to be the law relative to each program. The practical explanations and intricate details of each program are contained in various HUD Handbooks. All of the Handbooks available are listed in the HUD publication called Classification Numbers and Indexes which itself is referred to as Handbook #000.1. Often the Handbooks include the regulations. The Handbooks are generally available from the HUD stockroom on the 17th Floor of the Patrick V McNamara Federal Building in Detroit.

Governmental National Mortgage Association

The Government National Mortgage Association ("GNMA") purchases, services and sells mortgages insured or guaranteed by HUD and VA and guarantees privately issued securities backed by trusts or pools of mortgages or loans which are insured or guaranteed by HUD and VA. GNMA is a federal corporation which was carved out of the Federal National Mortgage Association ("FNMA") by the Housing and Urban Development Act of 1968, which spun off the remainder of FNMA as a private corporation.

In recent years, GNMA direct funding for apartment development mortgages has been known as the "Tandem Plan." The Tandem Plan makes mortgage money available at rates which are more favorable than private lenders would offer. Under the program, the GNMA permanent loan at below market interest rates is used to pay off a construction lender. The GNMA mortgage is then sold at discount to a private investor and any losses incurred by GNMA in these transactions are ultimately covered by government appropriations.

The GNMA programs are announced through the FNMA and GNMA "Sellers Guide." These announcements are received by all lenders who are involved in the program of selling to GNMA mortgage loans which they have made.

On December 21, 1982, President Reagan signed a multi-purpose continuing spending resolution which includes $500 million for the tandem program. However, the Office of Management and Budget is opposed and the funding is in jeopardy. GNMA mortgage-backed securities may or may not be available as a financial tool at any given time. A local bank, savings and loan association or mortgage broker who is a "GNMA Seller" should be contacted concerning the current status of these financing tools and GNMA assistance generally.

Recently, a somewhat controversial financing tool for hospital construction involving GNMA mortgage-backed securities has emerged. In a typical situation, an FHA approved lender obtains a

HUD commitment to insure a mortgage loan under the 242 program. Prior to closing, the lender enters into a mortgage-backed securities agreement with GNMA. Armed with this guarantee, the lender and borrower arrange for an EDC type entity to issue tax exempt bonds to provide the mortgage money. Based upon the HUD mortgage insurance and the GNMA guarantee, the bonds often receive an AAA rating. Since the income to bondholders is tax free, the lower interest rate is passed along to the owner. However, HUD and the U.S. Treasury are opposed to the program and it is unclear whether it will survive.

Low Income Residential — Rent Subsidies: Section 8

The primary vehicle for the Federal government's current subsidy of apartment units for low income families and individuals is the Section 8 Housing Assistance Payments program. Under the program HUD establishes a maximum contract rent for each apartment unit which may be charged by the owner. The contract rents are established by reference to the Fair Market Rents prevailing in the area as published by HUD. Qualified tenants will generally pay 30% of their gross income, after certain adjustments, as rental. The federal government then pays a subsidy to the owner of the apartment development equal to the balance of the contract rent for the apartment unit. This subsidy permits the developer to set rents at a level necessary to make the project economically feasible. However, the Section 8 program is currently under attack in Washington largely due to concern over the assumption by the Federal government of rent subsidy costs for periods of up to 20 years.

The subsidy program is used by state and local housing agencies as the basic method of subsidizing rents in developments owned or financed by public housing groups. Private owners of certain kinds of apartment developments may also obtain a Section 8 contract under which the federal government agrees to pay subsidies for some or all of the apartments in the development. In Michigan, Section 8 projects have been financed both through HUD directly and through the Michigan State Housing Development Authority, as discussed below.

Recently, developers have shown interest in the Section 8 Moderate Rehabilitation Program. Under the program, HUD makes available to a public housing authority Section 8 rent subsidy units for revitalization and rehabilitation of existing apartment projects. Such public housing authority then advertises the availability of the contract authority. The successful applicants for the rent subsidy then apply to a conventional lender for the rehabilitation loan. Since the rent subsidy agreement provides a guaranteed income stream, the owner may receive a conventional mortgage loan which would otherwise be unobtainable. Return for the owner is limited to 8% of cash equity. A developer may contract to purchase a project in need of such rehabilitation and then apply for Section 8 assistance under this program. Of course any such purchase arrangement should be made contingent upon a successful application for the Section 8 assistance.

"Market Rate" Apartment — Mortgage Insurance: Section 221(d)(4)

The Section 221(d)(4) program for market rate apartment developments for moderate income families is by far the most popular HUD program for apartment development. The program is intended to provide mortgage insurance for non-recourse project development mortgage loans to assist private industry in the construction or substantial rehabilitation of apartment developments.

Section 221(d)(4) mortgagors are usually private, profit motivated partnerships or limited partnerships. The mortgage loan is normally 90% of replacement cost. It should be noted that the vast majority of the apartment developments which have been foreclosed by and are now owned by HUD were developed with the assistance of Section 221(d)(4) insured mortgages. In recent years most of the permanent loans for Section 221(d)(4) projects have been held by GNMA. Projects developed under this program are often syndicated since the tax benefits far outweigh the profit potential in most cases. Currently, apartment unit rental rates in these projects are controlled by HUD. It is expected that these projects will be freed from such regulation in the near future making the program even more popular if interest rates reduce to a level where new construction of such projects is feasible.

Apartment Refinancing — Mortgage Insurance: Section 223(f)

Section 311 of the Housing and Community Development Act of 1974 established a new Section 223(f) of the National Housing Act. Section 223(f) authorizes HUD to insure a mortgage in connection with the purchase or refinancing of an existing multi-family apartment project. The program marks the first time HUD mortgage insurance is authorized for existing projects without the requirement for substantial rehabilitation. The program was instituted to assist in the conservation of existing housing resources. Generally the program provides a refinancing tool which has several advantages. The new mortgage can include an amount of money necessary for moderate rehabilitation of the project, the loan is non-recourse, and the monthly payments may be less than the owner was paying on previous financing since the loan term is the lesser of 35 years or 75% of the estimated remaining economic life of the building. HUD is currently considering increasing the amount of a 223(f) insured loan which is earmarked for rehabilitation from a maximum of $3,000 per apartment unit to $15,000.

In the past, an additional incentive was provided by the availability of permanent financing under the GNMA below market interest rate Tandem program. It is doubtful that any of the $500 million of 1983 tandem funds will be available for the 223(f) program.

Non-Profit Elderly/Handicapped Projects — Direct Loans: Section 202

Section 202 of the Housing Act of 1959 provides direct Federal loans to non-profit sponsors of housing for the elderly (62 or over) and the handicapped. Generally such loans are available annually on a competitive basis. Church groups, veterans groups and other private non-profit sponsors are the only entities currently receiving such loans.

In 1976 and 1977 HUD operated the Section 202 program from its Washington central office. Since then, applications have been processed in the local HUD offices. The program requires applications in response to a notice of fund availability.

After the successful applicant receives a fund reservation, processing for a conditional commitment and a firm commitment takes place. It is not unusual for a period of 2 or 3 years to pass between receipt of a fund reservation and commencement of construction.

The loans provide for 100% financing. The sponsor is required to escrow approximately $10,000 with HUD for three years following completion of construction. Unless the money is needed to pay for operating deficits, the money is returned to the sponsor after three years.

All Section 202 projects also have 100% Section 8 rental assistance. Generally the projects are extremely desirable and 100% occupied with long waiting lists. The private sector can benefit from a Section 202 development only as the seller of the land or as general contractor.

Rental Housing For the Elderly — Mortgage Insurance: Section 231

Section 231 of the National Housing Act was authorized by the Housing Act of 1959. It was designed to aid in the development of rental housing for occupancy by persons 62 years of age or older.

The program provides mortgage insurance for a mortgage loan made to the developer by a HUD approved lender. Normally the loan is 90% of the project's replacement cost. The loan is non-recourse.

Projects developed under the program usually contain efficiency and one bedroom apartments with kitchenettes. Congregate dining facilities and a central kitchen providing one or two meals per day to the tenants also have worked well with such projects. In addition to the approved rent for the apartment unit, HUD will allow the owner to charge a flat monthly rate for various services including meals, medical services and transportation, but an owner may not require as a condition to occupancy that the tenant accept the benefit package.

It is possible to obtain a Section 8 Housing Assistance Payments Contract in connection with a Section 231 development and, as indicated previously, Section 8 rental assistance guarantees the owner's income stream since the tenant usually pays 30% of income and HUD pays the balance of the contract rent for the apartment unit.

Health Service Facilities — Mortgage Insurance: Title XI

The HUD Group Practice Facilities mortgage insurance program authorized under Title XI of the National Housing Act was conceived in recognition of the potential of group practice in delivering efficient, comprehensive health services. It is intended to assure the availability of credit on reasonable terms to finance construction and equipment of medical, dental and optometric group practice facilities. Medical groups proposing to build a facility under this program must be comprised of five or more full time physicians; at least one of which must be in either general practice or internal medicine. The group must also include physicians or have arrangements for patient treatment by physicians qualified in surgery and obstetrics. The program is not intended to provide support for single-specialty groups. A group proposing a dental facility must be comprised of three or more full time dentists with at least one of the group providing general dental care. Groups proposing an optometry facility must be comprised of at least three full time optometrists. The mortgagor is normally a non-profit corporation which both owns and operates the facility. The mortgage is normally 90% of HUD's estimate of replacement costs and the loan must exceed $5,000,000. Amortization is over a period of 25 years and a maximum interest rate is provided by current HUD regulations. Rehabilitation of an existing facility may be an alternative to new construction and the mortgage loan will normally include funding for fixed equipment and major movable equipment.

Nursing Homes — Mortgage Insurance: Section 232

Section 232 of the National Housing Act, authorizing a program of mortgage insurance for profit motivated nursing homes, was included in the Housing Act of 1959. The Housing Act of

1964 extended the program to non-profit facilities; the Housing and Urban Development Act of 1968 authorized the inclusion of major movable equipment; and the Housing and Urban Development Act of 1969 extended the program to include intermediate care facilities.

90% non-recourse mortgage loans are available for profit motivated nursing homes and 100% mortgage loans are available for non-profit facilities. In each case the term may be as long as 40 years. A Certificate of Need from a state health agency is required and clearance from the local health care planning body must also be obtained. Consultant fees may be included in the mortgage loan for non-profit facilities. In addition to traditional loan sources, EDC type bonds have recently been a popular source of loan funding for nursing home construction and rehabilitation under the Section 232 program.

Hospital Financings — Mortgage Insurance: Section 242

Recognizing the need for long term financing of hospitals at reasonable rates, Section 242 of Title II of the Housing and Urban Development Act of 1968 authorized HUD to insure mortgage loans for construction and rehabilitation of non-profit hospitals. The Housing and Urban Development Act of 1970 extended the program to profit motivated hospitals. HUD has delegated authority to the Department of Health and Human Services (formerly HEW) for much of the loan processing and inspections during construction.

The maximum mortgage loan is 90% of estimated replacement cost. Approved lenders include banks, mortgage companies, insurance companies and savings and loan associations. Permanent loans are also eligible for purchase by FNMA, and GNMA mortgage backed securities have been a popular but controversial source of loan funds recently. The loan term is 25 years.

In addition to buildings and fixtures, major movable equipment may be included within the mortgage loan. The initial application is submitted to the state health agency which is required to approve the project and issue a Certificate of Need. After the Certificate of Need is obtained, the sponsor will deal exclusively with the regional office of the Department of Health and Human Services during feasibility processing. The commitments will be issued by HUD and the initial and final closings will take place at HUD. Because of the dual processing, a liaison person will be designated by HUD and the Department of Health and Human Services to coordinate processing.

Residential Subdivision Development — Mortgage Insurance: Title X

The Title X program provides HUD mortgage insurance for residential subdivision development. The non-recourse HUD insured loan normally is in an amount equal to 90% of the development cost plus 80% of the value of the land before development.

The loan is made by an FHA approved mortgagee and is normally used for primary improvements, such as utilities, roads and sidewalks, as necessary, to prepare the land primarily for single family residential house construction. Generally loan proceeds are not to be used for construction of any buildings.

Cooperative Housing — Mortgage Insurance: Section 213

The Department of Housing and Urban Development insures project mortgages on cooperative housing projects under Section 213 of the National Housing Act. Several separate kinds of cooperative mortgages are provided under the Section 213 program.

Pre-sold "management type" cooperatives are owned by a non-profit cooperative housing corporation where the occupancy of the units is restricted to members of the corporation. The mortgage amount cannot exceed 98% of the HUD estimated replacement cost of the project. The term of the mortgage in these management type cooperatives cannot exceed 40 years.

Investor-sponsor cooperatives involve a profit-motivated corporation which constructs the project and agrees to sell it within 2 years after it has been completed. The buyer must be an approved cooperative. If a sale is not made within 2 years, the developer must agree to run the project on a rental basis. Again the mortgage amount is normally 98% of HUD's estimate of the replacement cost of the project.

Mortgages may also be obtained for existing projects where the mortgagor is a cooperative that acquires an existing project that was built before the Section 213 mortgage insurance application was filed.

In the sales type cooperative, the mortgagor is a non-profit housing corporation formed to contract for the purchase of land and construction of individual homes for its members. The blanket mortgage may not exceed the sum of the insurable mortgages allowed on the individual homes. Each home is released from the blanket mortgage when the project has been completed. Each member can then take title to one of the homes and finance it with a mortgage that has terms similar to those under FHA's basic program for home buyers.

Condominium Project and Purchaser — Mortgage Insurance: Section 234

Section 234 was added to the National Housing Act in 1961. Project mortgages covering new construction or rehabilitation of a condominium project are insured under Section 234(d). Mortgages on individual family units are covered under Section 234(c).

The Section 234(d) project mortgage insurance commitment is in essence a dual commitment. In the event that the project is sold out prior to the final endorsement closing, the mortgagee is paid off and the HUD mortgage terminates. In the event the project is not entirely sold, a final endorsement closing can take place under the program if the lender is willing to commit to a permanent loan. The loans are generally 90% of HUD's estimated replacement cost and are non-recourse.

The Section 234(d) mortgage is somewhat difficult to process at HUD since the HUD forms for such things as master deed and by-laws are somewhat archaic and are difficult to coordinate with requirements of the State of Michigan. The primary advantage of such a project development mortgage is that there is no personal liability and the developer can thereby limit the risk of an otherwise risky venture.

MICHIGAN STATE HOUSING DEVELOPMENT AUTHORITY ("MSHDA")
Contributed by Gerald P. LaHaie

Since its statutory creation in 1966,[1] the Michigan State Housing Development Authority has been one of the most powerful forces in providing quality housing to low and moderate income residents in Michigan. Through June 1982, MSHDA has financed the construction of 31,483 units of multi-family housing, 10,304 single family homes and 654 units of special housing. MSHDA finances this high level of production with the proceeds from the sale of tax-exempt bonds and notes.

These sources of funds, together with Section 15a[2] property tax exemption and various forms of federal insurance and subsidy programs, have enabled MSHDA to achieve its purpose of providing housing for state residents.

A combination of persistently high interest rates, changes in federal laws and the lack of federal subsidies has temporarily reduced the ability of the Michigan State Housing Development Authority to continue the same level of housing production of the 1970's. Despite these conditions, the need to provide housing for low and moderate income persons still exists. The following is a short summary of current MSHDA programs and, to the extent information was available, a look at new programs proposed to meet this need.

MSHDA Multi-Family Housing Programs

1. Section 8 Rental Subsidy. This MSHDA Rental Subsidy program combines the Section 8 rent subsidy program previously discussed with tax-exempt financing of construction and permanent loans for construction or rehabilitation of rental housing for families of low and moderate income.[3] These non-recourse loans from MSHDA are for 90% of the total development cost and a term of 30 to 40 years. Interest rates on these loans are lower than conventional rates because of the lower rates paid by MSHDA on its tax-exempt note and bond issues which are the source of the loan proceeds.

Tenant rents are subsidized under the Section 8 program of HUD administered through MSHDA. However, this mainstay of rental housing since the mid-1970's is winding down and it is unlikely that MSHDA will be able to process developer applications for mortgage loans under this program unless Section 8 subsidies have already been reserved at HUD.

MSHDA has also participated with conventional lenders to make construction loans for rental housing under HUD's Section 221(d)(4)/Section 8 combined program. In each of these loans, GNMA was the permanent lender and, subject to the availability of permanent take-out lenders, MSHDA is still receptive to such loan participations.

2. Turnkey Public Housing. Under Section 5 of the Housing Act of 1937,[4] HUD makes a loan to a local authority (usually a city) for the construction of a public housing development. Should the city not wish to construct the development itself, it will obtain a developer through a bid process. The successful bidder purchases the property, obtains its own construction financing and turns the keys of the development over to the city upon completion. The city, with the loan proceeds from HUD, purchases the completed development from the developer at the accepted bid price.

In early September, 1982, MSHDA closed its first construction loan with a turnkey developer. This recourse loan was secured by, among other things, the Contract of Sale Proceeds between the developer and the city. Application for construction loans from turnkey developers are still being accepted.

3. Mentally Retarded (MR). As an alternative to institutionalization, the MR program[5] seeks to provide a method of community placement of the mentally retarded. Under this program, a qualified sponsor applies for a construction and permanent MSHDA loan (a 90% loan in the case of for-profit sponsors and a 100% loan for non-profit sponsors) to construct a 12 to 16 rental unit building. Rentals generally are subsidized under HUD's Section 8 program as described above. As in the case with MSHDA's Section 8 program, it is unlikely that applications for mortgage loans can be processed unless sponsors already have Section 8 subsidies reserved at HUD.

4. Alternate Intermediate Services (AIS). The AIS program[6] which also facilitates the community placement concept described in (3) above has largely replaced the MR program. The Department of Management and Budget for the State of Michigan (DMB) selects a developer through a bidding system. The successful bidder is required to construct a new building to house 6 residents. DMB enters into a 20 year lease with the developer, with lease payments covering debt service, taxes and insurance. The developer must obtain its own construction loan which is taken out by a permanent, fixed rate, 20 year, non-recourse MSHDA loan. Typical permanent loans are for $90,000 - $100,000 (80% loan-to-value) at 12%. Since its inception, 20 permanent loans have closed with another 80 to 100 additional loans anticipated.

5. Moderate Rehabilitation. MSHDA has authorized the funding of a pilot program of moderate rehabilitation of rental properties by providing low interest loans to rental property owners on structures with one or more units. Initially $2.3 million in MSHDA reserves will be available to fund this program. Additional funding is anticipated through the sale of tax-exempt obligations should certain changes be made in Internal Revenue Code regulations under Section 103 thereof.

MSHDA financing will be combined with Community Development Block Grant Funds of selected cities to enable the loans to be economically feasible. Currently, the cities of Ann Arbor, Flint, Jackson, Kalamazoo, Lansing, Monroe and Saginaw are expected to participate in the program.

The extent of improvements contemplated is something less than substantial or "gut" rehabilitation, but more than just cosmetic improvement. Examples of moderate rehabilitation include repair or replacement of major mechanical systems and energy improvements.

While no loans have been made yet, it is anticipated that the loan terms would be as follows: maximum rehabilitation cost per unit of $10,000 and a 15 year recourse loan at 10% secured by a mortgage on the property.

The Michigan legislature recently amended MSHDA's Act to allow rehab loans to be made to individuals as well as limited dividend housing corporations. This legislation also permits MSHDA to charge up to 15% interest on loans secured by other than first liens on the property.[7]

6. Deep Equity Elderly Housing. MSHDA staff is currently exploring the feasibility and legal structure of providing housing to elderly residents without HUD involvement. Since a large portion of the elderly residents are income poor, but equity rich because of homeownership, alternatives proposed involve the use of this equity. The most promising plan would require elderly homeowners to invest a portion of the proceeds from the sale of their home in a cooperative housing development. A large equity contribution should result in reduced development and mortgage costs per unit with an attendant reduction in rents.

MSHDA Single Family Homeownership Programs

MSHDA's Equity-Builder Mortgage provides permanent financing at below market interest rates to qualified borrowers purchasing newly constructed housing, including single-family homes, condominium units not previously occupied and certain kinds of manufactured homes (mobile homes).

These loans carry a simple interest rate of 12-7/8% with amortization based on a 30 year mortgage. However, the monthly principal and interest payments are reduced the first three years by 9%, 6%, and 3% successively followed by no reduction in the fourth year and 3% increases in the monthly payment of principal and interest entered each year thereafter. Because the interest rate is fixed, the payment increases beginning in the fifth year are applied toward principal only resulting in the loan being repaid in less than 18 years and a substantial interest savings to the borrower. Additionally, because of the possibility of lower payments in the first 3 years, persons who may not qualify for a standard 30 year loan at the same interest rate may qualify for the Equity-Builder Mortgage.

A variation of this structure is available. This option provides for a monthly payment of principal and interest for the first 4 years at the same rate as that for a standard 30-year loan at 12-7/8%. The 3% increases beginning in the fifth year operate as described above.

The Mortgage Subsidy Bond Tax Act[8] enacted by Congress (MSBTA) has imposed several restrictions on the use of tax-exempt financing for single family loans. These restrictions limit loans to first time homebuyers who intend to occupy the home as their principal residence. The restrictions also limit the maximum sales price of the home. For targeted areas, as defined in the MSBTA, some of these restrictions are modified. Current underwriting standards allow a maximum mortgage loan of $60,000 with a maximum household income limit of $31,748. Effective 12-31-82, MSHDA's Act was amended to allow the permanent financing of previously occupied single-family homes.[9]

FARMERS HOME ADMINISTRATION ("FmHA")

Contributed by Gerald P. LaHaie

Title V of the Housing Act of 1949[10] empowers the Secretary of Agriculture through FmHA to provide financing for the construction of housing for low and moderate income residents in rural communities. Since borrowers must generally show inability to obtain financing from conventional sources, FmHA is considered a lender of last resort. The two basic programs offered by FmHA are the Section 515 Multi-Family Rental Housing Program[11] and the Section 502 Homeownership Program.[12]

FmHA Multi-Family Rental Housing — Direct Loans: Section 515

This program provides direct loans to eligible sponsors of multi-family rental housing projects. Non-profit, limited dividend and profit-motivated sponsors are all eligible mortgagors under this program.

Section 515 mortgages are generally written on a (1) non-recourse basis; (2) a 95% loan-to-value; (3) a 50 year term and (4) at the current FmHA interest rate, which as of December 1, 1982, was 11.5%. Although mortgages are available for both new construction and substantial rehabilitation, substantial rehabilitation has proven to be economically unfeasible. Developments must be located in rural areas which are defined as an area with 10,000 or fewer residents if within a Standard Metropolitan Statistical Area (SMSA) and between 10,000 and 20,000 residents in a non-SMSA area.

If the mortgage is subsidized, the mortgagor receives an interest credit which reduces the effective interest rate to 1% in a manner similar to the Section 236 program.[13] Even with the interest credit, rental rates may be beyond the capacity of low-income persons. Consequently, two additional

forms of subsidy may be used with the Section 515 interest-credit mortgage: (1) rural rental assistance payments and (2) Section 8 subsidies. Rural rental assistance payments are similar to Section 8 subsidies, but are administered by the FmHA and the tenant contribution toward rent cannot exceed 25% of the tenant's income. When Section 8 subsidies are used, the interest rate on the mortgage loan is one or two percentage points below the FmHA note rate. Tenants who are eligible for occupancy in buildings financed by FmHA are low and moderate income families, senior citizens and handicapped persons.

FmHA Homeownership Assistance — Direct Loans: Section 502

Under Section 502, eligible individual applicants can receive a direct loan from FmHA to purchase or rehabilitate new and/or existing homes. The home must not be of elaborate design and must be used as the borrower's principal residence, since no part of the loan proceeds can be used for income producing property. In some instances, refinancing existing mortgage debt is permissible.

Income limits for eligibility are established for each designated area and are based on the following definitions: very low income is 50% of median area income, low income is 80% of median income, and moderate income is $5,500 above low income. The maximum loan term is 33 years. The average loan size, based on the maximum income limit of $22,500, is approximately $34,000. Loans must be secured by a first mortgage on the property. Loan-to-value ratios vary from 90% to 100%. Like the Section 515 program, an interest credit is available to certain eligible borrowers which has the effect of reducing the effective annual interest rate to 1%. Eligibility for interest credit is based on an income and net worth test.

TAX INCREMENT FINANCING PROGRAMS

Contributed by Thomas S. Leven

All programs discussed above rely on federal authorization, budgeting and funding and are targeted to particular uses such as low income housing or nursing facilities. Tax increment financing programs are state and local in nature (except as they are predicated upon the issuance of bonds or notes exempt from federal income taxes), and such programs rely upon locally generated revenues, and are not limited to particular uses. Thus, the programs may enjoy increased vitality in the face of reduced federal funding of other programs. Tax increment financing — also known as tax allocation financing — may be accomplished through either of two vehicles in Michigan, a Downtown Development Authority or a general Tax Increment Financing Authority, both of which are briefly discussed below.

Downtown Development Authorities

Tax increment financing was introduced to Michigan in 1975 as a part of the Downtown Development Authority Act (the "DDA Act").[14] The DDA Act enables cities, villages, and townships to establish downtown development authorities for the purpose of correcting and preventing deterioration in the municipality's business district, i.e. the area in the downtown of a municipality zoned and used principally for business, and encouraging historic preservation through the establishment of an authority having broad powers to create, implement and finance development plans.

The most significant power of the authority, exercisable only through the ordinance procedure of the local governing unit's legislative body, is the ability to implement a tax increment financing plan. Tax increment financing is most often utilized to finance the public costs or improvements in development projects having both public and private components. By enabling the local community to finance those costs from the additional tax revenues generated by private portions of the project, public improvements and amenities necessary to private development but not otherwise feasible may be financed.

If the authority determines that it is necessary for the achievement of the purposes of the Act, the authority prepares and submits a Tax Increment Financing Plan to the governing body of the municipality.[15] Plans for future development of a designated Development Area, including land uses, specific improvements, financing, resident relocation plans, and other related matters, are set forth in a Development Plan encompassing a variety of statutorily mandated topics.[16] A Tax Increment Financing Plan must include a Development Plan.[17] To be effective, a Tax Increment Financing Plan and a Development Plan must be adopted by the municipality by ordinance.[18] The Tax Increment Financing Plan must state the expenditures which the Authority intends to make from the tax increment funds, the anticipated impact of the Tax Increment Financing Plan upon the assessed value of all taxing jurisdictions, the duration of the plan in years, the portion of the tax increment which the Authority expects to expend in connection with the Development Plan, and numerous similar statutorily mandated matters.[19]

The financial resource of the tax increments, computed as described below, may be utilized as it accrues to fund continuing public improvement programs not requiring major capital infusions at one time. Examples might include improvement of a seawall or waterfront area, street or sidewalk improvements and beautification, and certain park or recreational developments. Major capital projects may also be financed under a variety of bonding mechanisms through the authority, the municipality, or a related entity. The Authority has the power to issue revenue bonds.[20] Issuance of general obligation bonds by the municipality or a related entity provides another means of financing the development program.[21] The issue may be supported by a pledge of tax increments pursuant to the Tax Increment Finance Plan.

The crux of tax increment financing lies in the funding of the Tax Increment Financing Plan. Under such a plan, the Authority receives from the municipal and county treasurers that portion of the tax levy of all taxing bodies paid each year on real and personal property in the "Development Area" on the "Captured Assessed Value."

Captured Assessed Value is defined[22] as the amount in any year by which the current assessed value of the Development Area exceeds the Initial Assessed Value of the Development Area. The Initial Assessed Value is defined[23] as the most recently assessed equalized value of all taxable property within the boundaries of the Development Area at the time the ordinance establishing the Tax Increment Financing Plan is approved.

Thus, the other taxing jurisdictions receive the same revenue from the Development Area as prior to the establishment of the Tax Increment Finance Plan, and the increased revenues are devoted to betterment of the Development Area pursuant to an officially adopted plan subjected to public examination and comment prior to adoption by local elected officials. Ideally, the Development Plan and the associated Tax Increment Financing Plan, and DDA actions and expenditures pursuant thereto, will prevent deterioration of the Development Area (and concomitant

loss of tax revenues to all taxing authorities), as well as encourage development in the area (which development will be subject to tax after the expiration of the Tax Increment Financing Plan), and thus ultimately enhance the revenues of all taxing authorities.

A DDA is a public body corporate which may sue or be sued and, in addition, possesses all the powers necessary to carry out the purposes of its incorporation. Procedurally, a DDA may be created by the governing body of a municipality upon a determination that it is necessary to halt property value deterioration and increase property tax valuation in its business district. The statutory procedures provide for the adoption of a resolution of intent to create and provide for the operation of the authority, a public hearing, and the adoption of an ordinance to establish the authority and designate the boundaries of the Downtown District, i.e., the area in the business district within which the DDA exercises its powers.

The DDA is supervised and controlled by a board which includes the chief executive officer of the municipality who appoints not less than 8 nor more than 12 additional members, a majority of whom have an interest in property located in the Downtown District. If the Downtown District has 100 or more residents, at least one member of the board must be a resident of that district.

The DDA is given broad powers to plan the redevelopment of the district and to implement those plans through acquisition, lease and sale of property, and through the improvement of property including multi-family dwellings by construction, rehabilitation and restoration.

Financing of the Authority must be from one or more of the following sources: (a) donations to the Authority, (b) proceeds of a tax imposed pursuant to the Authority's power, subject to approval by the municipality, to levy an ad valorem tax (not to exceed 1 mill if the population of the municipality exceeds 1,000,000 and not to exceed 2 mills if the population is less than 1,000,000)[24] on real estate and tangible personal property in the Downtown District or from tax anticipation notes issued by the municipality at the request of the Authority to be repaid from the levy of the ad valorem tax, (c) monies from revenue bonds or notes issued by the Authority, (d) revenues from property owned, operated, licensed or leased by the Authority or under its control, (e) proceeds from a Tax Increment Financing Plan established pursuant to Section 17 of the DDA Act, (f) proceeds from a special assessment district and (g) monies obtained from other sources approved by the municipality.

The revenue bond authority is conditioned upon approval of the local governing body. The revenue bonds are not deemed a debt of the municipality unless the governing body of the municipality shall pledge its full faith and credit to the issue.

If the project is to be financed by revenue bonds a Development Plan must be submitted to the governing body of the municipality for approval. If project financing is to be through tax increment financing, the Development Plan must incorporate a Tax Increment Financing Plan restricting and directing the expenditure of tax increments received by the DDA.

Additionally, the DDA Act requires that before the public hearing on a Tax Increment Financing Plan is held, the Authority fully inform members of the county board of commissioners and affected school boards of the fiscal and economic implications of the Development Area. Before the hearing, the governing body must provide those officials with a reasonable opportunity to meet with the governing body. Additionally, those officials may present their recommendations

at the public hearing on the plan. Ultimately, the governing body of the municipality controls the establishment of a Development Plan or a Tax Increment Financing Plan by exercise or non-exercise of its ordinance power under the DDA Act. However, the Act specifically authorizes agreements with other taxing jurisdictions regarding distribution of tax increment proceeds in addition to requiring that the proposal run the gauntlet of public hearing and comment.

During the term of the Tax Increment Financing Plan, any tax increment in excess of that required pursuant to the Tax Increment Financing Plan shall revert proportionately to the various other taxing authorities. Similarly, upon termination or expiration of the Tax Increment Financing Plan, further tax revenues of the Development Area are received by the various taxing authorities in the same manner as if no Tax Increment Financing Plan had previously existed.

In the event the governing body of the municipality shall determine that the objectives of the Authority have been achieved, the governing body may dissolve the Authority but only after satisfaction of all of its objections. Upon dissolution, the property and assets of the Authority after satisfaction of its obligations revert to the municipality.

Tax Increment Finance Authority

The Michigan legislature increased the availability of tax increment financing in Michigan by enactment of the Tax Increment Finance Authority Act (the "TIFA Act").[25] While similar to the DDA Act, the TIFA Act expanded the eligible geographical area beyond the central business district. The TIFA Act is applicable only to cities and, again, the purpose of the legislation is to prevent urban deterioration and to encourage neighborhood revitalization, economic development and historic preservation through an authority which creates, implements and finances development plans pursuant to those purposes.

A TIFA is a public body corporate which may sue or be sued, and, in addition, possesses all the powers necessary to carry out the purposes of its incorporation. The formation of the authority is initiated by the governing body of a city through a resolution of intent to create and provide for its operation. The resolution is based upon the governing body's determination that it is in the public interest to halt a decline in property values, increase property tax valuation, eliminate the causes of the decline in property values and promote growth in an area of the municipality.

Procedures for establishing the TIFA, the TIFA district, Development Areas, the Development Plans, and Tax Increment Financing Plans are very similar to the DDA Act procedures. The principal actor in each instance is the governing body of the municipality.

Similar to a DDA, the control and supervision of the TIFA is under a board chosen by the governing body. If the city has in existence an Economic Development Corporation, Downtown Development Authority, Urban Redevelopment Corporation or a commission for the rehabilitation of blighted areas established pursuant to statute, then the governing body may appoint the supervisory group of any one of the above entities to act as the TIFA board. In the alternative, the governing body may designate that a board consisting of not less than 7 nor more than 13 members be appointed by the mayor of the city subject to approval by the City Council or Commission.

The TIFA is given broad powers to plan the redevelopment of the TIFA district and to implement those plans through the acquisition, lease and sale of property, and through the improvement of property including multi-family dwellings by construction, rehabilitation and restoration.

Financing of the authority must be from one or more of the following sources: (a) contributions; (b) revenues from property owned, leased, licensed, or operated by the Authority or under its control, (c) tax increments received pursuant to a tax increment financing plan, (d) proceeds from tax increment bonds, (e) proceeds from revenue bonds, (f) money obtained from other sources approved by the governing body of the municipality.

TAX ABATEMENT UNDER ACTS 198 AND 255

Contributed by Frank L. Andrews

Michigan law provides procedures for exemption of certain projects from **ad valorem** real estate and personal property taxes. The two principal enactments in this area are the Plant Rehabilitation and Industrial Development Act, P.A. 1974, No. 198 (hereinafter referred to as "Act 198")[26] and the Commercial Redevelopment Act, P.A. 1978, No. 255 (hereinafter referred to as "Act 255").[27]

New, Restored, or Replacement Industrial Property — Tax Abatement: Act 198

Act 198 provides a means by which an owner or lessee (provided the lessee is the payor of property taxes) may be relieved of taxation upon restoration or replacement of an industrial facility, or may have the effective rate of tax on a new facility reduced by 50%, for a period of up to 12 years.[28]

Under Act 198, an owner or lessee (provided the lessee is the payor of property taxes) of industrial property may receive an "Industrial Facilities Exemption Certificate." A certificate holder is exempt from ad valorem real and personal property taxes, and pays an "Industrial Facilities Tax" in lieu thereof. The facility must be located within an "Industrial Development District" established by the municipality. The application must relate to a construction, restoration, or replacement program, which when completed constitutes a new facility or the replacement or restoration of obsolete industrial property.

"Obsolete industrial property"[29] is defined under Act 198 as industrial property, the condition of which is substantially less than an economically efficient functional condition, i.e. property, the desirability and usefulness of which has been impaired due to changes in design, construction, technology, or improved production processes, or from external influencing factors which make the property less desirable and valuable for continued use. "Replacement"[30] is defined as the complete or partial demolition of obsolete industrial property and the complete or partial reconstruction or installation of new property of similar utility. "Restoration"[31] means changes to obsolete industrial property, other than replacement, required to restore it to an economically efficient functional conditions. Restoration is specifically stated not to include delayed maintenance or the substitution or addition of personal property without major renovation. A program involving expenditures aggregating less than 10% of the value of the industrial property is deemed to be delayed maintenance. Conversely, major renovations are deemed to be within the scope of restorations, and would include but not be limited to: (a) the improvement of floor loads, (b) correction of deficient or excessive height, (c) new or improved building equipment, including, heating, ventilation, and lighting, (d) reducing multi-story facilities to one or two stories, (e) the improvement of structural support including foundations, (f) the improvement of roof structure and cover, (g) floor replacement, (h) improved wall placement, (i) improved exterior and interior appearance of buildings, or improvements or modifications of machinery and equipment in order to improve efficiency,

decrease operating costs, or increase productive capacity, and (j) other physical changes required to restore the industrial property to an economically efficient functional condition.[32]

"Industrial property"[33] means real estate other than land (but including land improvements), machinery, equipment, furniture, and fixtures, the primary purpose of which is the manufacture of goods or materials for processing thereof by physical or chemical change, or operation of a theme and recreation park located in an industrial park district, or agricultural processing facilities. If under common ownership, related facilities may be included, such as office, engineering, research and development, warehousing, and parts distribution facilities. Land, property of public utilities, and inventory are not included and are not exempt.

The local governing unit is the principal body involved in the industrial facility exemption certificate process. A qualifying local government unit[34] must establish an "industrial development district"[35] pursuant to the Act. Thereafter an owner or lessee of a qualifying facility may make application for the certificate from the local governing unit. The local unit then notifies the assessor and other taxing units, and provides an opportunity for hearing. Section 6[36] of the Act requires the local unit to approve or deny the application within 60 days of receipt thereof. Denials are appealable to the state tax commission. The legislative determination of the local governing unit must include a finding that the exemption will not substantially impede operation of the local government or impair the financial soundness of any affected taxing unit. In certain cases this determination must also be made by the tax commission, with approval of the State Treasurer.[37]

Completion of the facility must also be found to be calculated to, and to likely result in, creation or retention of employment, or prevention of loss thereof, in the subject community.[38] Further, completion of the facility shall not cause a transfer of employment between Michigan local government units without consent of each local governmental unit involved. A local governing unit refusing its consent must state reasons therefore.[39]

Application must be made not later than 12 months after commencement of the project to be eligible for the maximum 12 year term of the certificate. Applications may be made within the second 12 month period after commencement, but the maximum term of the exemption shall then be 11 years.[40] The exemption certificate shall be effective for such period of time as the local governing unit shall determine, but may not exceed 12 years.[41] The local governing unit may determine that a shorter period of time is appropriate and act accordingly.

The certificate may be revoked upon request of the holder thereof, or by the state tax commission upon the request of the local governing unit if the facility has not been completed within 2 years of the certificate date without authorization based upon good cause, or if the purposes for which the certificate was originally issued are not being fulfilled as a result of failure of the holder of the certificate to proceed in good faith, without the presence of circumstances beyond the control of the certificate holder. In any event, the certificate may only be revoked after concerned parties have been provided an opportunity for hearing.[42] Industrial facilities exemption certificates may be transferred, but only to a new owner or lessee of the facility, and then only with the approval of the local government unit and the state tax commission after application by the new owner or lessee, and notice and hearing in the same manner as required for initial issuance.[43]

The certificate exempts the holder thereof from ad valorem real or personal property taxes in connection with the facility. In lieu thereof, an industrial facility tax is imposed. In the case of

restoration or replacement projects, this tax is computed by multiplying the total millage levied by all taxing units by the state equalized value of the eligible property for the tax year immediately preceding the effective date of the certificate. In other words, the net increase in value due to the restoration and replacement program escapes taxation during the term of the certificate. With respect to new facilities, the tax is computed by multiplying the millage rate levied by all taxing units by the state equalized valuation of the eligible property and dividing the resultant amount in half. In other words, new facilities will receive the equivalent of a 50% tax abatement on eligible property (excluding land and other ineligible elements) equivalent to a 50% tax abatement.

New, Restored or Replacement Commercial Property — Tax Abatement: Act 255

Act 255,[44] the Commercial Redevelopment Act, parallels Act No. 198 in its essential features, but is oriented to commercial development. The Commercial Redevelopment Act permits the owner or lessee of commercial property located within a "commercial redevelopment district" to receive a "commercial facility's exemption certificate" resulting in substitution of a "commercial facilities tax" in lieu of ad valorem taxation.

"Obsolete commercial property"[45] means commercial property, the condition of which is impaired due to changes in design, construction, technology, or improved production processes, or damage due to fire, natural disaster, or general neglect.

"Commercial property"[46] means, in essence, buildings and building improvements, the primary purpose and use of which is operation of commercial business enterprises such as office, engineering, research and development, warehousing, parts distribution, and retail sales. Excluded items and uses are land, property of a public utility, housing, and financial institutions (subject to certain qualifications).

A commercial facilities exemption certificate may be available for new, replacement, and restoration projects. The requirements and procedures for approval, computation of the tax, duration of the exemption, and bases for revocation are all analogous to Act 198. The primary difference that may relate to availability of the exemption for a given project is the absence under Act 255 of a requirement that the applicant secure relocation consent from other Michigan municipalities.

URBAN DEVELOPMENT ACTION GRANTS ("UDAG")
Contributed by Frank L. Andrews

Urban development action grants ("UDAGs") have found more varied usage than any other program of governmental assistance to real estate development. UDAG funds have few programmatic limitations. Due to their flexibility and the encouragement given to innovative financing and combinations of various assistance programs, they have made a variety of contributions to a wide array of projects. UDAG is, however, a real estate development program, and the funds cannot be used to provide public services, working capital or losses, or inventory financing.

The UDAG program was initiated by the Housing and Community Development Act of 1977[47] to provide grants to "severely distressed cities and urban counties to help alleviate physical and economic deterioration." Under the Omnibus Reconciliation Act of 1981,[48] the purpose of the grants is to help stimulate economic development activity needed to aid in economic recovery. The grants are not made directly to developers or private entities, but rather are awarded to municipalities

on a nationwide competitive basis. Typically, the municipality then uses the proceeds either to fund a public improvement or to provide below market rate financing for a private improvement, taking back a subordinate lien or in some cases, equity or quasi-equity interests.

Grant awards are the product of a quarterly competitive application process. Program regulations are set forth in 24 CFR 570, including the criteria for the selection decision at 24 CFR 570.459. The two major elements of competition are the community distress factors and the project impact upon the community.

Not all municipalities are eligible recipients, and therefore the UDAG program is irrelevant to projects located in ineligible communities. Therefore, the first step in determining the possible contribution of a UDAG grant to a real estate development is determination of the eligibility of the municipality. In most cases this can be readily determined by inquiry at the economic development office of the municipality. Additionally, HUD criteria of economic and social distress determine the eligibility of a municipality or a "pocket of poverty" within an otherwise ineligible municipality.

Measures of economic and social distress not only determine basic eligibility of a municipality, but also are considered in the competitive process. Project impact is measured at least initially in terms of ratios of UDAG dollars to jobs created and to private investment induced into the project. The higher the levels of economic and social distress, the lower the job creation and private investment leverage ratios may need to be in order to receive a grant award.

Communities meeting the minimum standards qualifying as distressed are published from time to time in the Federal Register. Michigan "large cities" (over 50,000 population) listed in the Federal Register as of June 7, 1982[49] are Battle Creek, Bay City, Benton Harbor, Dearborn, Detroit, Flint, Grand Rapids, Jackson, Kalamazoo, Lansing, Lincoln Park, Muskegon, Muskegon Heights, Pontiac, and Saginaw. The most recent listing for "small cities" includes 241 Michigan communities.[50]

A community meeting necessary standards of distress may become eligible by requesting a Determination of Eligibility on HUD Form 424. A determination of eligibility requires communities to meet fair housing and equal opportunity determinations of HUD. Not all communities listed in the Federal Register will be able to meet the HUD eligibility standards in these areas, or necessarily be desirous of participating in the UDAG process.

If the subject community is eligible and willing to participate, the next step is preparation and submission of the application. While minimum standards are established for various competitive factors, they will be well exceeded in the vast majority of applications, and extremely individualized decisions are made in selecting winning projects for the competitive grant awards. A well-prepared presentation can be very important to ultimate success in the competitive context. A premature or ill-prepared application, of which there are a significant number, may well harm the chances for ultimate acceptance.

At the risk of stating the obvious, preparers of applications should keep the following in mind:

1. Define the project clearly,

2. Determine the feasibility of the project, and the nature of the assistance necessary to attain that feasibility,

3. Make the private financial commitments from private sector debt and equity participants as firm as possible, as soon as possible,

4. Determine the applicable job creation and private investment leverage ratios and their competitiveness with recent grant announcements under similar circumstances,

5. Explore all possible means of improving the application's leverage ratios and other competitive aspects without impairing project feasibility,

6. Evaluate and demonstrate how the project will alleviate community physical, economic, or fiscal problems,

7. Determine the level of environmental clearance necessary for the project, and begin the environmental review process as early as possible,

8. Resolve conflicts in zoning or other local or state requirements as early as possible,

9. Determine the status of historically significant structures, and if an historic preservation review is required, begin the review process as early as possible, and

10. Secure land control for the project or, if infeasible, determine the procedures to secure such, such as condemnation. As usual, condemnation is to be the least favored means of acquisition and would preferably be completed prior to application.[51]

The most promising UDAG applications are those offering immediacy of impact, with firm financial commitments for debt and equity (and for other public financial assistance, if any) sufficient to commence and complete the project, but contingent upon receipt of the UDAG participation. The participants must generally be prepared to state and support the assertion that with the UDAG participation the project will proceed to completion, and that without the UDAG participation it will not.

In the event that the UDAG funds contribute to the financing of a private development, a repayment of funds is generally required. As mentioned above, this contribution may be in the form of favorable subordinate mortgage financing, funding of contingencies or guaranties, or purchase of an equity or quasi-equity interest for the benefit of the municipal recipient. The repayment terms are the subject of negotiation between the developer, the municipality as recipient of the grant, and the Office of Action Grants at HUD, responsible for administering the UDAG program. Projects offering more favorable repayment terms would, of course, be favored over similar projects offering a lesser repayment. The municipality is permitted to recycle the repaid funds to other eligible uses. The private obligation to repay action grant funds for subsequent uses may, if appropriately structured, effectively increase the leverage ratio of private investment to UDAG dollars, and thereby make the project application more competitive.

In addition to financial leverage ratios, the number and nature of permanent and temporary jobs created or retained by the project is a competitive factor. Since applications are divided into three broad categories — industrial, commercial, and neighborhood or residential — projects of a given nature are compared to similar uses. Thus, commercial projects, generally creating far fewer jobs per dollar of investment than industrial projects, are not disadvantaged by virtue of this

factor. The financial leverage ratios are also typically higher for commercial than for industrial projects.

The application is essentially an exercise in advocacy, and should feature the manner in which the proposed project will halt or deter economic deterioration or generate new public revenues such as income taxes and property taxes. Beneficial impacts on physical and economic conditions of the community are favorable. Minimization or elimination of involuntary displacement is preferred. Other relevant factors are the extent of citizen participation, the extent of minority business participation, the extent of assistance made available by the state or other public entities, and the existence of special or unique circumstances and opportunities to meet local priority needs which are consistent with economic revitalization.

The competitive selections and announcements are made on a quarterly cycle. Generally within 4 to 6 weeks after grant announcement, the HUD Office of Action Grants forwards a UDAG grant agreement further specifying the terms of the grant and the provisions for repayment to the recipient municipality by the developer, in the event of private use of the funds. Attorneys will generally focus upon Exhibit E of the Grant Agreement, that being the required evidentiary materials relating to the capacity and commitments of various parties to the transaction. After conclusion of the Grant Agreement negotiations, fund disbursement is generally pursuant to a standard federal letter of credit procedure.

CONCLUDING NOTE

The areas surveyed by the foregoing article are rapidly changing as new programs are adopted and legislative authority and/or funding for others may be diminished or eliminated. Often multiple programs can be productively combined in a single project, and real estate actors and advisers should be alert to such possibilities. Increasingly the very broad forms of assistance are being narrowed to emphasize development of specific projects and areas, as reflected by the Tax Equity and Fiscal Responsibility Act of 1982 amendments restricting somewhat the availability of Section 103 financings and by the UDAG limitation to "distressed areas." Simultaneously, many programs requiring federal funding have been restricted or eliminated, necessitating greater reliance on state and local programs. The "enterprise zone" concept of recent national debate reflects both such trends. No doubt many of the traditional federal programs will retain great vitality, but the field is also one where significant and continuing program innovation may be expected in the 1980's.

FOOTNOTES

1. Act No. 346 of the Public Acts of 1966, as last amended by Act No. 534 of the Public Acts of 1982, MCLA 125.1401.

2. Act No. 346 of the Public Acts of 1966, as last amended by Act No. 534 of the Public Acts of 1982, MCLA 125.1415a.

3. Act No. 346 of the Public Acts of 1966, as last amended by Act No. 534 of the Public Acts of 1982, MCLA 125.1444.

4. 42 USC 1437b, 42 USC 1437c.

5. Act No. 346 of the Public Acts of 1966, as last amended by Act No. 534 of the Public Acts of 1982, MCLA 125.1444.

6. Act No. 346 of the Public Acts of 1966, as last amended by Act No. 534 of the Public Acts of 1982, MCLA 125.1444.

7. Act No. 506 and Act No. 534 of the Public Acts of 1982 (effective December 31, 1982).

8. 26 USC 103A.

9. Act No. 506 and Act No. 534 of the Public Acts of 1982.

10. 42 USC 1471.

11. 42 USC 1485.

12. 42 USC 1472.

13. 12 USC 1715z-1.

14. Act No. 197 of the Public Acts of 1975, as last amended by Act No. 151 of the Public Acts of 1981, MCLA 125.1651 **et seq.**, MSA 5.3010(1) **et seq.**

15. MCLA 125.1664(2), MSA 5.3010(14)(2).

16. MCLA 125.1667(2), MSA 5.3010(17)(2).

17. MCLA 125.1664(2), MSA 5.3010(14)(2).

18. MCLA 125.1668(1), MSA 5.3010(18)(1).

19. MCLA 125.1664(2), MSA 5.3010(14)(2).

20. MCLA 125.1663, MSA 5.3010(13).

21. MCLA 125.1666, MSA 5.3010(16).

22. MCLA 125.1664(1)(a), MSA 5.3010(14)(1)(a).

23. MCLA 125.1664(1)(b), MSA 5.3010(14)(1)(b).

24. MCLA 125.1662(1), MSA 5.3010(12)(1).

25. Act No. 450 of the Public Acts of 1980, MCLA 125.1801 **et seq.**, MSA 3.540(201) **et seq.**

26. MCLA 207.551 **et seq.**, MSA 7.800(1) **et seq.**

27. MCLA 207.651 **et seq.**, MSA 7.800(51) **et seq.**

28. MCLA 207.566(1), MSA 7.800(16)(1).

29. MCLA 207.552(7), MSA 7.800(2)(7).

30. MCLA 207.553(5), MSA 7.800(3)(5).

31. MCLA 207.553(6), MSA 7.800(3)(6).

32. MCLA 207.553(6), MSA 7.800(3)(6).

33. MCLA 207.552(6), MSA 7.800(2)(6).

34. MCLA 207.554, MSA 7.800(4).

35. MCLA 207.553(2), MSA 7.800(3)(2).

36. MCLA 207.556, MSA 7.800(6).

37. MCLA 207.559(1), MSA 7.800(9)(1).

38. MCLA 207.559(2)(c), MSA 7.800(9)(2).

39. MCLA 207.559(2)(d), MSA 7.800(9)(2)(d).

40. MCLA 207.559(2)(a), MSA 7.800(9)(2)(a).

41. MCLA 207.566(1), MSA 7.800(16)(1).

42. MCLA 207.565, MSA 7.800(15).

43. MCLA 207.571, MSA 7.800(21).

44. MCLA 207.651 **et seq.**, MSA 7.800(51) **et seq.**

45. MCLA 207.654(3), MSA 7.800(54)(3).

46. MCLA 207.653(3), MSA 7.800(53)(3).

47. Pub. L. 95-128 91 Stat. 1111. The Housing and Community Development Act of 1977 amended the Housing and Community Development Act of 1974, 42 USC 5301 **et seq.** by addition of Section 119 authorizing the UDAG program. Section 119 is codified as 42 USC 5318.

48. Pub. L. 97-35.

49. V. 47, No. 109, p. 24653.

50. V. 47, No. 110, p. 24829.

51. The author has adapted this procedural checklist from that set forth in the May, 1980, draft **Urban Development Action Grant User Guidebook** prepared by the Department of Housing and Urban Development.

SUMMARY OF THE PUBLIC ACTS OF 1982 RELATING TO REAL PROPERTY LAW

by

Thomas L. Lapka, Gregory L. McClelland, and Robert J. McCullen

A number of the bills reported on during the last year eventually passed and were enacted into law. What follows is a brief summary of each of those bills.

1982 PUBLIC ACT 4 [MCLA 559.109 and MCLA 559.115; MSA 26.50(109) and MSA 26.50(115)]

This amendment to the Michigan condominium act includes "the state or an agency of the state" as within the definition of a "person" as set forth in section 9 of the Act, thereby permitting state agencies to participate in condominium projects. However, these agencies may be limited in their participation by section 15. Section 15 recognizes and incorporates the state constitution of 1963 as controlling the type of indebtedness the state may assume.

1982 PUBLIC ACT 5 [MCLA 211.24e; MSA 7.24(5)]

This legislation is an addition to the act governing property tax assessments, including levy and collection of those taxes. It basically prohibits the governing body of a taxing unit from levying property taxes for an ensuing fiscal year in an amount that is more than the sum of the taxes levied at the base tax rate on additions within the taxing unit without first providing notice and a public hearing of the governing body. This revision also contains several definitions which must be read in relation to the entire act.

1982 PUBLIC ACT 6 [MCLA 339.2403; MSA 18.425(2405)]

This amendment to the residential building contractor's act increases the amount of the exemption to $600.00 per project before a person is required to be licensed as a residential builder under the act.

1982 PUBLIC ACT 10 [MCLA 570.101; MSA 26.321] and 1982 PUBLIC ACT 11 [MCLA 129.201; MSA 5.2321(10)]

These amendments allow a contractor, if the contractor is a railroad company, to use irrevocable letters of credit from a state or national bank or a savings and loan association, rather than a bond, when engaged in the construction or repair of a public building or a public works project.

1982 PUBLIC ACT 13 [MCLA 211.53; MSA 7.97]

This amendment enables a person to pay taxes or special assessments by making partial payments, which must be accepted by the treasurer of the local collecting unit. However, acceptance of payment that is less than the total amount of the taxes or special assessment due does not serve to waive interest on those amounts not paid by the due date.

1982 PUBLIC ACT 17 [MCLA 570.1103 et seq.; MSA 26.316(103) et seq.]

This legislation enacted additional technical amendments to the Michigan Construction Lien Act. The amendments include changes to several definitions of terms, including the definitions of

"actual physical improvement" and "designee." In addition, changes were enacted regarding the timing of the various notices to be provided and the persons who are required to provide such notices under the act.

1982 PUBLIC ACT 28 [MCLA 338.883; MSA 18.204(3)]

This amendment requires a person applying for an electrical contractor's license to pay, in addition to the licensing fee, a separate fee to the Department of Licensing and Regulation for deposit in the homeowner construction lien recovery fund.

1982 PUBLIC ACT 31 [MCLA 338.908; MSA 14.458]

This amendment requires a person applying for a master plumber's license to pay, in addition to the licensing fee, a separate fee to the Department of Licensing and Regulation for deposit in the homeowner construction lien recovery fund.

1982 PUBLIC ACT 42 [MCLA 559.222a; MSA 26.50(122a)]

This amendment to the Michigan condominium act requires notice from a developer to tenants of a mobile home park that the mobile home park will be converted to a condominium. The notice must be physically delivered or sent by first class mail to each tenant. Tenancy in a mobile home may not be terminated without cause until one (1) year after the tenant's receipt of the notice or the term of the tenant's lease, whichever is longer.

1982 PUBLIC ACT 67 [MCLA 299.2; MSA 13.2] and 1982 PUBLIC ACT 69 [MCLA 322.401; MSA 13.70]

These two pieces of legislation prohibit drilling operations for oil or gas from the lake bottomlands of the Great Lakes and connecting bays, harbors or waterways. Specifically, the Natural Resource Commission is prohibited from contracting with anyone to allow such drilling operations.

1982 PUBLIC ACT 156 [MCLA 125.19; MSA 5.3008(9)]

This legislation basically revised and clarified the powers of a regional planning commission. A regional planning commission is now empowered to coordinate the development of plans for the social, physical and economic development of the region, and to adopt, by resolution of its governing body, a plan or any objective consistent with a plan as its official recommendation for the development of the region. Additionally, the commission may distribute reports on its purposes, objectives, and findings. The commission may, by resolution of its governing body and with the consent of the affected governmental units or other public or private bodies, provide service to other governing units, the state or private bodies.

1982 PUBLIC ACT 193 [MCLA 438.31c; MSA 19.15(1c)]

This legislation extended the then applicable usury ceilings for mortgages and land contracts from July 1, 1982 to December 1, 1982. It also raised the permissible interest rate to eleven (11%) percent on purchase money mortgages and second mortgages which secure an extension of credit from a residential builder or real estate broker or salesperson. This amendment to the usury

statute did not expressly override the preemption of the Depository Institutions Deregulation and Monetary Control Act of 1980, and thus, presumably, federal preemption under that act continued.

1982 PUBLIC ACT 213 [MCLA 449.1101 et seq.; MSA 520.1101 et seq.]

This legislation repealed the prior statutes governing limited partnerships (MCLA 449.201 **et seq**; MSA 20.51 **et seq.**) and enacted the "Michigan Revised Uniform Limited Partnership Act." Effective January 1, 1983, the legislation substantially modified prior law regarding limited partnerships, including the following changes: (1) the filing of a limited partnership certificate with the Michigan Department of Commerce; (2) conferring the right under a limited partnership to waive applicable civil usury ceilings; (3) requiring foreign limited partnerships to register with the Department of Commerce in order to transact business in the State of Michigan; and (4) requiring a limited partnership to continuously maintain an office and a registered agent and to keep certain records available at the office for inspection at any time by any partner. A limited partnership formed under the prior act shall continue in existence and need not file the certificate specified in the legislation until such time as it may amend its present certificate of limited partnership.

1982 PUBLIC ACT 216 [MCLA 557.21 et seq.; MSA 26.165(1) et seq.]

This legislation basically recodified the rights of married women as formerly set forth in the statutes. However, revisions were added to provide, generally, that the separate property of a married woman may be utilized to satisfy any judgment by reason of a married woman entering into a written contract to guaranty the debt of another person or pledging or assigning her interest in her separate property as security for the debt of another person. The separate property of the married woman need not derive benefit from the pledge or assignment or guaranty in order to be used to satisfy a judgment rendered for payment of the debt.

1982 PUBLIC ACT 303 [MCLA 425.1101 et seq; MSA 18.594(101) et seq.]

This legislation is designated the "Michigan Surface and Underground Mine Reclamation Act." It was enacted pursuant to the provisions of the federal Surface Mining Control and Reclamation Act of 1977 in order to assume exclusive state jurisdiction over surface coal mining and reclamation operations in Michigan. In addition to regulating coal mining and the reclamation of land subject to coal mining, the act provides for fees and the creation of a fund, as well as fines and criminal penalties.

1982 PUBLIC ACT 322 [MCLA 438.31c; MSA 19.15(1c)]

This amendment extended the usury ceilings for mortgages and land contracts again, this time until March 1, 1983. Like the previous amendment to the usury statute (see 1982 Public Act 193 above) this amendment did not expressly override the preemption of the Depository Institutions Deregulation and Monetary Control Act of 1980. The legislature still has until April 1, 1983 to do so.

1982 PUBLIC ACT 336 [MCLA 286.194; MSA 14.529(114)]

This amendment to the toxic substance control commission act extended the expiration date of the act from January 1, 1983 until December 31, 1984.

1982 PUBLIC ACT 347 [MCLA 211.7y; MSA 7.7(4v)]

This amendment to the property tax act revises and expands the definition of "landing area" within certain airports exempt from taxation under the act.

1982 PUBLIC ACT 361 [MCLA 493.71; MSA 26.568(21)]

This amendment to section 21 of the secondary mortgage loan act permits lenders licensed under the act to now charge interest at 18% per annum rather than 15% per annum.

1982 PUBLIC ACT 386 [MCLA 211.51; MSA 7.95]

This amendment to the property tax act permits deferment from collection of summer property taxes for agricultural real property meeting specified income restrictions. The amendment also permits certain local taxing units to provide for levy and collection of summer property taxes.

1982 PUBLIC ACT 410 [MCLA 339.2409 and MCLA 339.2411; MSA 18.425(2409) and MSA 18.425(2411)]

This amendment to the occupational code permits the renewal of the license of a residential builder or residential maintenance or alteration contractor without retaking the examination if the application is submitted within two years of the expiration of the previous license and certain other specified conditions are met.

1982 PUBLIC ACT 430 [MCLA 338.883; MSA 18.204(3)]

This amendment increased the annual license fees for electricians.

1982 PUBLIC ACT 457 [MCLA 123.1007, MCLA 123.10010a and MCLA 123.10012b; MSA 5.2242(7), MSA 5.2242(10a) and MSA 5.2242(12b)

This amendment to the boundary commission act provides a separate method for incorporation as a city of territory of a township all of which is included within the boundaries of a village or villages.

1982 PUBLIC ACT 476 [MCLA 205.29; MSA 7.657(29)]

This amendment extends the effectiveness of state tax liens filed by the revenue division of the department of treasury from six years to seven years after the date of attachment.

1982 PUBLIC ACT 486 [Portions of MCLA 299.501 et seq; MSA 13.30(1) et seq]

This legislation amended the title and 38 sections of the hazardous waste management act.

1982 PUBLIC ACT 506 [Portions of MCLA 125.1401 et seq; MSA 16.114(1) et seq]

This legislation amended nine sections of the housing development authority act. It provides for financial assistance for the purchase of existing single-family residences and for the rehabilitation of existing residential rental property.

1982 PUBLIC ACT 529 [MCLA 560.192 and MCLA 560.192a; MSA 26.430(192) and MSA 26.430(192a)]

This amendment to the subdivision control act permits a requirement of providing storm water retention basins as a condition for approval of a plat, and also permits defraying the cost of operation and maintenance by special assessments.

1982 PUBLIC ACT 530 [Portions of MCLA 125.1101 et seq; MSA 19.855(1) et seq]

This legislation amended 13 sections of the mobile home commission act and added a new section (16a) permitting mobile homes located in a seasonal mobile home park to be occupied on a full-time basis for specified portions of the year.

1982 PUBLIC ACT 538 [Portions of MCLA 559.101 et seq; MSA 26.50(101) et seq]

This legislation is the so-called "condominium deregulation act." It has been given that name by observers because the basic purpose of the legislation was to eliminate the state's administrative review of condominium documents. The act does that plus much more. It amends 48 sections of the existing condominium act, and adds 10 new sections. Perhaps the most significant change is the increase in responsibilities of the escrow agent, which in some cases can include administering completion of improvements.

1982 PUBLIC ACT 539 [Portions of MCLA 211.1 et seq; MSA 7.1 et seq]

This legislation amends 19 sections of the property tax statutes and adds one new section. The amendments cover a number of different areas of property tax law. Among other things, the amendments transfer certain responsibilities of the state tax commission to the department of commerce, revise the requirements for notices of increases in assessments, and define "present economic income" as used in determining "cash value" for rental property.

MICHIGAN LAND TITLE STANDARDS, FOURTH EDITION

by

Ralph Jossman

The fourth edition of the Michigan Land Title Standards, containing 189 Standards, has recently been approved by the Title Standards Committee and published by the State Bar. This edition contains the new and/or amended Standards which have been discussed in articles appearing in this publication. (See Jossman, Michigan Land Title Standards, 5 Mich. Real Property Review, No. 1, p. 2; New Title Standards, 7 Mich. Real Property Review, No. 1, p. 9). In addition, the fourth edition includes a number of Standards that have subsequently been revised or adopted, and which will be discussed here.

Standard 3.4, dealing with deeds which fail to state the marital status of a male grantor, has been revised in light of the amendment of MCLA 565.221, MSA 26.581 by 1980 PA 489, which took effect January 21, 1981. The cited section requires deeds and mortgages to disclose this information in order to be entitled to record. It had previously been amended by 1937 PA 163, effective July 9, 1937, so as to provide that when a deed not disclosing such marital status had "heretofore" been recorded for a period of ten years, the record thereof should constitute constructive notice and might be introduced in evidence. There has, however, never been any judicial determination as to whether the word "heretofore" related only to those instruments which had been recorded ten years before the effective date of the 1937 amendment, or could be applied to validate the recording of any similar instrument after the expiration of a ten year period. The Title Standards Committee had called attention to this lack of certainty by a comment to Standard 3.4, but took no position with respect to the applicability of the 1937 legislation. 1980 PA 489 deleted the word "heretofore," thus making it clear that the validating provisions of the cited section are now applicable to all conveyances which have been recorded for ten years.

A similar revision has been made in Standard 3.5, relating to deeds executed in Michigan which had been recorded although lacking the two witnesses prescribed by MCLA 565.8, MSA 26.527. It has been held that such an instrument will not constitute constructive notice, **Brown v King**, 172 Mich 355, 137 NW 729 (1912), and that the recorded instrument could not be introduced in evidence, **Nelson v Scofield**, 219 Mich 595, 189 NW 185 (1922). The cited section was amended by 1937 PA 162, effective July 9, 1937, so as to provide that the recording of such instruments, "heretofore" recorded, should constitute constructive notice and they might be introduced in evidence. But, because of the uncertainty resulting from the use of the word "heretofore," the Title Standards Committee had taken no position as to how far the 1937 amendatory act was applicable. Now that 1980 PA 488 has amended this section by deleting the word "heretofore," thereby making the section clearly applicable to all improperly witnessed Michigan deeds that have been of record for ten years, Standard 3.5 has been changed accordingly.

Although not a matter dealt with in the Michigan Land Title Standards, it might be noted in passing that 1980 PA 488 also deleted reference to the taking of acknowledgments by such nonexistent officers as justices of the peace, circuit court commissioners, and masters in chancery (an office abolished by the Michigan Constitution of 1850).

Slight changes have been made in Standard 4.1, dealing with those interests in real property to which a right of dower will attach. A reference to MCLA 554.2, MSA 26.2, which defines estates of inheritance, has been added to the Standard.

Standard 4.2 has been changed to make reference to the sections of the Revised Probate Code which replace the authorities which had been previously cited.

Standards 4.9 and 4.10, both of which related to a non-resident wife not having inchoate dower in Michigan real property owned by her husband during his lifetime, have been consolidated into a single new Standard, designated 4.9. There has been no substantive change as a result of this consolidation.

Standards 4.11 and 4.11-1 have been renumbered 4.10 and 4.11, respectively. The latter Standard has been revised in the light of MCLA 700.291, MSA 27.5291, authorizing a wife to release her right of dower to her husband after full disclosure. The cited section replaces previously applicable MCLA 702.74a, MSA 27.3178(144a), which has been repealed by the Revised Probate Code.

Standard 6.14, relating to the effect of the failure of a divorce judgment to dispose of real estate held by the spouses in joint or entireties tenancy, has been expanded to reflect the case of **Brown v. Prisel**, 97 Mich App 188, 293 NW2d 729 (1980). It was there held that MCLA 552.102, MSA 25.132, providing that under such circumstances the real estate shall be held after the divorce as tenants in common, is applicable even though the judgment of divorce was entered outside of Michigan.

Adoption of the Revised Probate Code has resulted in extensive revision of Chapter VII of the Michigan Land Title Standards. This Chapter deals with estate fiduciaries and title to real property which is derived through conveyances from estate fiduciaries. Standards 7.1 and 7.2, relating to titles derived through intestate and testate decedents respectively, have been amended to reflect the Revised Probate Code provisions which set forth the rights to election and allowances of a surviving spouse and minor children. Some of these rights did not exist in favor of a surviving husband before the Revised Probate Code took effect.

Reference to the presently applicable sections of the Revised Probate Code has been added to Standard 7.5, dealing with deeds executed under a power of sale given to more than one personal representative, and to Standard 7.6, dealing with the right of a surviving or successor personal representative to exercise a power of sale. In addition, cross-reference has been made in these Standards to Standards 7.1 and 7.2 for rights and interests which must be satisfied in connection with sales of real property held by an estate.

Standard 7.7, which states that a testamentary power to sell does not include a power to mortgage, has been expanded by the addition of a comment to the effect that while this rule is applicable to an independent personal representative, such a fiduciary is given statutory power to mortgage by the Revised Probate Code.

Reference to the applicable sections of the Revised Probate Code has been added to Standard 7.8, relating to limitations on a testamentary power of sale, and Standard 7.9, relating to dower as affecting probate sales. Also, in the latter Standard a new comment calls attention to the right of a surviving widow to remain in the dwelling house of her husband, as conferred by MCLA 700.288, MSA 27.5288. A similar right exists in favor of a surviving husband.

Because of certain changes made by the Revised Probate Code, the Title Standards Committee has decided to devote two Standards, 7.10 and 7.11, to the purchase of estate lands by fiduciaries.

Prior to enactment of the Code, such transactions were at least voidable, and were generally held to be void **ab initio**, thus impairing the marketability of title so derived. Standard 7.10 sets forth this rule, with respect to such purchases prior to July 1, 1979, when the Revised Probate Code went into effect. The Revised Probate Code, however, now permits these transactions, if they are entered into pursuant to court authorization which is obtained after hearing and proper notice to all interested parties. It also permits such transactions in an independent probate if the will or a contract entered into by the decedent expressly authorized the transaction or if all interested parties have consented to it after fair disclosure. The Title Standards Committee believes that a purchase by a fiduciary which has been authorized may be carried out in supervised, as well as independent, probate proceedings. The Revised Probate Code provisions now applicable to purchases by fiduciaries, being MCLA 700.345, 700.482, 700.642, 700.664; MSA 27.5345, 27.5482, 27.5642, 27.5664, are referred to in Standard 7.11.

Three Standards are now devoted to the conveyance of Michigan lands by a foreign fiduciary. Standard 7.12 reiterates the rule that such a fiduciary, in the absence of qualification in Michigan, cannot convey marketable title to Michigan lands. Standards 7.13 and 7.14 state that a foreign fiduciary who has qualified in Michigan by filing the will with the probate court, pursuant to MCLA 700.152, MSA 700.5152, or by complying with MCLA 700.235, MCLA 700.5235, will have the same power over the assets of the decedent that a personal representative appointed in Michigan might exercise, MCLA 700.153, 700.236; MCLA 27.5153, 27.5236. It should be noted, however, that the powers of the foreign fiduciary are wholly derived from qualification in Michigan under the cited sections and not from the original appointment elsewhere. While the powers of a foreign personal representative acting under MCLA 700.235, MSA 27.5235 are terminated by a petition for local administration, a bona fide purchaser from him is protected under MCLA 700.237, MSA 27.5237.

Standard 7.15, relating to probate court hearings, is a revision of former Standard 7.13, to reflect the repeal of certain statutory sections by the Revised Probate Code and to include reference to MCLA 700.31, MSA 5031 and PCR 16.

Newly adopted Standards 7.16 and 7.17 deal with the authority given an independent personal representative by the Code to sell or mortgage real property.

Some changes have been made in Standard 8.2 which states that the word "Trustee," following the name of a party to an instrument containing no other reference to a trust, does not of itself constitute notice of a trust. The Standard itself has not been changed, but the reference to designation of other "capacities" has been deleted. One comment has been rewritten to include reference to MCLA 555.11, 555.20, MSA 26.61, 26.70, and another one to refer to MCLA 700.627, MSA 27.5627.

Various changes have been made in Standard 8.3, which is entitled "Validity Of Deed By Trustee Under An Express Trust." An additional problem has been supplied, the former caveat expanded, and an additional caveat included. The latter caveat calls attention to an apparent conflict between MCLA 555.21, MSA 26.71 and MCLA 700.833, MSA 27.5833.

No substantive changes have been made to Standard 8.3, which states that a deed from a trustee, under a trust whose terms are expressed in a trust instrument, does not vest marketable title of record unless the trust instrument is of public record, establishes a valid trust, and contains valid authority for the conveyance. At present the Title Standards Committee is still unwilling to

rely solely on statements of the trustee in the deed (by affidavit or otherwise) as to his authority to convey the property in question, since the trust may actually be invalid, have expired by its own terms, or fail to authorize the conveyance.

Standard 8.5, which deals with deeds by successor trustees under disclosed non-testamentary trusts, has been revised to reflect the power of the probate court to appoint such successor trustees as conferred by MCLA 700.805, MSA 27.5805.

In revising Chapter XV, relating to subsurface rights, the Title Standards Committee has withdrawn former Standard 15.1, which was to the effect that there was no right of dower in an oil and gas lease. While this is a correct statement of the law, the Title Standards Committee believes that such a statement should be included in that portion of Standard 4.1 which sets out those estates to which a right of dower does not attach. This has been done. A new Standard 15.1 has been added which discusses the creation of a mineral interest through grant or reservation, and the transfer of such interests by conveyance or succession.

Standard 16.7 dealing with discharge or assignment of mortgages by Michigan probate fiduciaries has been rewritten to reflect the sections of the Revised Probate Code presently applicable thereto. The Standard has been written to reflect the Title Standard Committee's opinion that a foreign personal representative, who is qualified in Michigan under the sections of the statutes discussed in connection with Standards 7.13 and 7.14, may deal with a mortgage in the same manner as a personal representative originally appointed in this State.

Standard 16.8, which relates to the discharge or assignment of a Michigan mortgage by a foreign fiduciary who has not qualified in Michigan, has been revised in view of certain provisions of the Revised Probate Code. It has long been held that a foreign fiduciary is without authority to assign, discharge or foreclose a Michigan mortgage. **Reynolds v McMullen**, 55 Mich 568, 22 NW 41 (1885); **Weaver v Shevitz**, 253 Mich 535, 235 NW 244 (1931). A newly added comment calls attention to MCLA 700.232, 700.233, under which a debtor of the decedent may make payment to a foreign fiduciary in the absence of local administration. These sections do not, however, authorize a foreign fiduciary receiving payment to discharge the mortgage. It should be noted, however, that a person who has made full payment of a mortgage to a foreign fiduciary could, if necessary, obtain a judicial discharge thereof by utilizing MCLA 600.3175, MSA 27.3175.

In the third edition of the Michigan Land Title Standards, Standard 16.10 was entitled "Effect Of Bankruptcy Or Receivership Proceedings On Right To Foreclose." The Title Standards Committee has decided to deal with this topic in three Standards instead of a single Standard only. Standard 16.10 is now limited to the effect of receivership. Its contents are largely taken from the former Standard. The greatest change that was made has been to state that a sale without the consent of the proper court is voidable.

Newly added Section 16.10-1 is limited to the effect of bankruptcy proceedings, filed prior to October 1, 1979, on the right to foreclose a mortgage. The former problems have been rewritten and additional ones added. The Standard itself, however, is similar to the former Standard 16.10. The effect of bankruptcy proceedings filed after October 1, 1979 is dealt with in new Standard 16.10-2. While this Standard is not a detailed one, the Title Standards Committee believes that the effect of the Bankruptcy Code on foreclosures has not yet been fully determined. The Standard may be expanded at some later date.

Additional information has been added to Standard 16.25, relating to sales in foreclosure by advertisement when the mortgage covers several parcels of land. This is principally due to the case of **Metropolitan Life Insurance Co. v Foote**, 75 Mich App 399, 290 NW2d 158 (1980), leave to appeal denied 412 Mich 889 (1981). It was held in this case that a provision in a mortgage authorizing a foreclosure sale **en masse** would be given effect in a judicial foreclosure. As originally adopted, this Standard had stated that such a provision might be effective in foreclosure by advertisement. In the light of **Metropolitan Life Insurance Co. v Foote**, the Title Standards Committee now believes that it would, in fact, be effective in the absence of third party rights or bad faith on the part of the mortgagee.

There has also been added to Standard 16.25 a reference to newly enacted provisions relating to sales of distinct tracts in foreclosure of mortgages held by the Michigan State Housing Authority.

In Standard 20.2, dealing with scope of the general federal tax lien, the citation to MCLA 557.53; MSA 26.183 has been deleted as an authority for Problem B because it was repealed by MCLA 557.29; MSA 26.165(9).

Recently added Standard 23.2 deals with ambiguous descriptions, and sets forth the various rules of construction which may be used by the courts in resolving problems created thereby. However, it should be noted, as the Standard expressly states, that the intention of the parties to the instrument will override any other rules of construction.

At the present time, the Title Standards Committee is considering possible further expansion of Chapters X, XIV, and XV which deal with partnership conveyances, subsurface rights and easements, respectively. Some change in Chapter X will be necessitated because of the enactment of the Michigan Revised Uniform Limited Partnership Act, being 1982 PA 213. Some revisions will also be made in Chapter XVII, now entitled Mechanics' Liens, because of the recently effective Construction Lien Act. Furthermore, several bills are now pending in the Michigan legislature, which, if enacted, will oblige the Title Standards Committee to revise various Standards. These bills include the Uniform Federal Lien Registration Act, bills limiting the effectiveness of state tax liens and the duration thereof, and a proposal to permit a creditor of one tenant by the entireties to reach the interest of that tenant through an execution sale.

The new Michigan Land Title Standards Fourth Edition may be obtained from the office of the State Bar of Michigan in Lansing, Michigan for $20.00, which includes a new binder to accommodate the expanded size of the Title Standards and anticipated future revision and additions.

Members of the profession wishing to suggest changes in the present Michigan Land Title Standards or subject matter for new ones are urged to communicate their ideas to Title Standards Committee Chairman John R. Baker, 2290 First National Building, Detroit, Michigan 48226, or to any other member of that committee.

MADHAVEN v. SUCHER — REVISITED

by
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Currie, Kendall, Keith, Larkin, Pommerville and Merrill, P.C.

MADHAVEN v. SUCHER, 105 Mich. App. 284, 306 N.W.2d 481 (1981) was reported as a case note under Recent Decisions on page 91 of the June, 1981 issue of the REVIEW. However, the case note may not have fully outlined the implications of the court's decision on the law of marketability of title within Michigan. The purpose of this article is not to question the court's conclusion as it affects the parties in this particular case. The purpose is to highlight another conclusion reached by the court in rendering its decision, the conclusion that ". . . marketable title . . . must be FULLY INSURABLE . . . ." (emphasis supplied).

Mr. and Mrs. Madhaven executed an agreement to purchase a residence from Mr. and Mrs. Sucher. The agreement was prepared by the Suchers' real estate agent and, in part at least, contained rather typical language. The two provisions with which we are concerned are: 1) that the sale was ". . . subject to the existing building and use restrictions, easements, and zoning ordinances, if any . . . ." and 2) that the sellers would convey by ". . . the usual Warranty Deed conveying marketable title." A mortgage survey revealed the encroachment of a drainage easement upon a portion of the concrete patio which was attached to the back of the residence. The commitment for title insurance, which was obtained by sellers, excepted the drainage easement from coverage under the policy. Although the buyers' mortgagee was prepared to proceed with the closing, the buyers refused claiming that the existence of the drainage easement prevented the sellers from transferring marketable title.

The court correctly determined that the sellers were required "to convey marketable title" and went on to cite and to quote a number of Michigan cases on the law of marketable title. Among them is BARNARD v. BROWN, 112 Mich. 452, 70 N.W. 1038 (1897), which is often cited for its definition that: "Marketable title is one of such character as should assure to the vendee the quiet and peaceful enjoyment of the property, which must be free from incumbrance."

The court then adopted the lower court's determination that the sellers' obligation "to provide marketable title" superseded the contractual provision to take "subject to easements" because "the easement constituted such an incumbrance as to nullify marketable title." By assigning a level of severity to the easement, the court may have successfully side-stepped the rule of construction issue of interpreting the contract so as to leave the "subject to" provision without force and effect.

The court apparently dismissed as being insignificant the willingness of the buyers' mortgagee to close, and Michigan case law would support such a position (see DELNAY v. WOODRUFF, 244 Mich. 456, 221 N.W. 613 [1928]). However, the court did place significance upon the fact that the title insurance company refused to insure against the easement, finding the easement to be ". . . a sufficiently subtantial incumbrance . . . PARTICULARLY SINCE THE TITLE INSURANCE COMPANY REFUSED TO INSURE AGAINST THIS INCUMBRANCE" (emphasis added). The court did not cite, and this author has not located, any case law in support of the court's position that ". . . marketable title . . . must be FULLY INSURABLE . . ." (emphasis supplied).

On the contrary, two New York cases reached the opposite conclusion. KIRKWALL CORP. v. SESSA, 400 N.Y.S.2d. 349 (1978), involved a purchase agreement which even required an "insurable

title.'' In this case the New York court approached the subject completely opposite to the **Madhaven** court, concluding in part that: ''There are two aspects to this case, one involving marketability, and the other insureability.''

The purchase agreement in LABA v. CAREY, 277 N.E.2d. 641 (1971), also required seller to prove ''title such as any reputable title company would approve and insure.'' The purchase agreement also provided that conveyance was subject to: ''Covenants, restrictions, utility agreements and easements of record, if any . . . .'' The title company found marketable title but excepted a telephone easement. The New York court found, by reading the ''subject to'' and the ''insurance'' clauses together, that seller ''had tendered an INSURABLE TITLE'' (emphasis added). The New York court found the exception to be a matter specifically contemplated by the contract and said: ''A conclusion that the seller would nevertheless be required to furnish title insurance without exception would not only render nugatory the 'subject to' clause, but would also give every purchaser dissatisfied with his bargain a way of avoiding his contractual responsibilities.''

A literal application of the **Madhaven** court's conclusion that marketable title is synonymous with insurable title would provide the exact result with which the New York court was concerned in LABA, without even the presence of an insurance clause.

THE DESCENT AND DISTRIBUTION OF PROPERTY WHEN THE OWNER DOES NOT MAKE A WILL

by

Allen E. Priestley

The enactment of the "Revised Probate Code," Public Act 642 of 1978 (MCLA 700.1 et seq; MSA 27.5001 et seq), effective July 1, 1979, materially changed the rights of inheritance of persons who were entitled to inherit property of a decedent who died intestate after the effective date of the Code. The distinction between rights of inheritance in real and personal property was abolished. The following table has been designed to enable one to determine at a glance the descent and distribution of property in all ordinary cases of intestacy and reflects the laws of intestate succession as set forth in Sections 104, 105 and 106 of the Code (MCLA 700.104, 700.105, and 700.106; MSA 27.5104, 27.5105 and 27.5106).

Such rights of inheritance are, of course, subject to the various other rights which are reserved in the Code and other applicable statutes, such as:

(1) the surviving spouse's right to remain in the dwelling house (MCLA 700.288; MSA 27.5288);

(2) the widow's right to elect dower (MCLA 700.282a; MSA 27.5282(1));

(3) the surviving spouse's and minor childrens' rights to homestead, exempt property and family allowances (MCLA 700.285, 700.286, 700.287; MSA 27.5285, 27.5286, 27.5287);

(4) the right and duty of the personal representative to possess the estate and to receive the income therefrom (MCLA 700.165, 700.601; MSA 27.5165, 27.5601; Casper v. Ralph, 323 Mich 173, 35 NW 2d 151 (1948));

(5) the possibility of sale for any purpose permitted by the Revised Probate Code (MCLA 700.635, 700.638; MSA 27.5635, 27.5638);

(6) the lien of any federal estate tax or Michigan inheritance tax (26 USCA 6324(a); MCLA 205.201 to 205.203a; MSA 7.561 to 7.564, inclusive); and

(7) any state tax that is required to be paid before the estate can be closed (intangible tax, MCLA 205.139; MSA 7.556(9); Michigan income tax, MCLA 206.451; MSA 7.557(1451); single business tax, MCLA 208.98; MSA 7.558(98)).

DESCENT AND DISTRIBUTION OF PROPERTY OF INTESTATES IN MICHIGAN
(Per Revised Probate Code, P.A. 642 of 1978)

Spouse-Husband or Widow	Lineal Descendants [Take equally if of same degree of kinship, otherwise by right of representation					
$60,000, plus ½ of balance of intestate estate	½ of balance of intestate estate, if all issue of surviving spouse					
½ of intestate estate	½ of intestate estate if 1 or more is not issue of surviving spouse					
None Surviving	All	Immediate Ancestors [Surviving parents take equally, sole survivor takes all]				
All	None Surviving	None Surviving				
$60,000 reduced by amount given by will if partial intestacy, plus ½ of balance of intestate estate	None Surviving	½ of balance of intestate estate				
None Surviving	None Surviving	All	Collateral Relatives [Brothers and Sisters and Children of Deceased Brothers and Sisters*]			
None Surviving	None Surviving	None Surviving	All	Next of Kin Grandparents and issue of Deceased Grandparents**		
				Paternal	Maternal	
None Surviving	None Surviving	None Surviving	None Surviving	½	½	State of Michigan
				None Surviving	All	
				All	None Surviving	
None Surviving	None Surviving	None Surviving	None Surviving	None Surviving	None Surviving	All

*If they are all in the same degree of kinship to the decedent they shall take equally, but if of unequal degree, then those of more remote degree take by representation.

**The issue to take equally if they are all of the same degree of kinship to the decedent, but if of unequal degree then those of more remote degree shall be excluded.

Sections 107 to 113 inclusive of the Code (MCLA 700.107 to 700.113 inclusive; MSA 27.5107 to 27.5113 inclusive) are set forth in full below. These sections of the Code interpret and clarify certain questions which may arise as to rights of heirs-at-law.

SURVIVAL

Sec. 107. A person who fails to survive the decedent by 120 hours is deemed to have predeceased the decedent for purposes of homestead allowance, exempt property, and intestate succession and the decedent's heirs are determined accordingly. If the time of death of the decedent or of the person who would otherwise be an heir, or the times of death of both cannot be determined, and, it cannot be established that the person who would otherwise be an heir survived the decedent by 120 hours, it is presumed that the person failed to survive for the required period. (MCLA 700.107; MSA 27.5107)

REPRESENTATION, DIVISION OF ESTATE; POSTHUMOUS CHILDREN

Sec. 108. When representation is called for by Section 106(a), (c) or (d) the estate shall be divided into as many equal shares as there are surviving heirs in the nearest degree of kinship and deceased persons in the same degree who left issue who survived decedent, each surviving heir in the nearest degree receiving 1 share and the share of each deceased person in the same degree being divided among his issue in the same manner. Posthumous children are considered as living at the death of their parent. (MCLA 700.108; MSA 27.5108)

RELATIVES OF HALF BLOOD; HEIRS CONCEIVED DURING LIFE OF DECEDENT BUT BORN THEREAFTER

Sec. 109. (1) Relatives of the half blood shall inherit the same share which they would have inherited if they had been of the whole blood.

(2) Heirs of the decedent conceived before his death but born thereafter shall inherit as if they had been born in the lifetime of the decedent. (MCLA 700.109; MSA 27.5109)

PARENTAL RIGHTS TERMINATED: ADOPTED PERSONS

Sec. 110. (1) The permanent termination of parental rights to and concerning a minor child by order of a court of competent jurisdiction, by a release for purposes of adoption by the parent, but not a guardian, to a licensed child placement agency or before a probate or juvenile court, or, excepting termination by emancipation or death by any other process recognized by the law governing the parent-child status at the time of termination, ends kinship between the parent whose rights are so terminated and the child for all purposes of intestate succession.

(2) The entry by a court of competent jurisdiction of an interlocutory decree of adoption which is not thereafter vacated or reversed makes the adopted child kin of the adopting parents for all purposes of intestate succession.

(3) If a person was adopted or in the future is adopted, the adopted person is an heir of the adopting parents and an heir of the lineal and collateral kindred of the adopting parents and the adopted person shall no longer be an heir of his natural parent or an heir of the lineal and collateral kindred of his natural parents, except that a right, title or interest before this act shall not be divested by this section. (MCLA 700.110; MSA 27.5110)

LEGITIMACY AND ILLEGITIMATES

Sec. 111. (1) For all purposes of intestate succession, a child is the heir of each of his or her natural parents notwithstanding the relationship between the parents except as otherwise provided by Section 110.

(2) If a child is born or conceived during a marriage, both spouses are presumed to be the natural parents of the child for all purposes of intestate succession. A child conceived following artificial insemination of a married woman with the consent of her husband shall be considered as their child for all purposes of intestate succession. Consent of the husband is presumed unless the contrary is shown by clear and convincing evidence. If a man and woman participated in a marriage ceremony in apparent compliance with the law before the birth of a child, even though the attempted marriage is void, the child is considered to be their child for all purposes of intestate succession.

(3) Only the person presumed to be the natural parent of a child under Subsection (2) may disprove any presumption that may be relevant to the relationship, and this exclusive right to do so terminates upon the death of the presumed parent.

(4) If a child is born out of wedlock or if a child is born or conceived during a marriage but not the issue of that marriage, a man is considered to be the natural father of that child for all purposes of intestate succession if any of the following occurs:

(a) The man joins with the mother of the child and acknowledges that child as his child in a writing executed and acknowledged by them in the same manner provided by law for the execution and acknowledgment of deeds of real estate and recorded at any time during the child's lifetime in the office of the judge of probate in the county in which the man or mother of the child reside at the time of execution and acknowledgment. It shall not be necessary for the mother of the child to join in the acknowledgment if she is disqualified to act by reason of mental incapacity, death, or any other reason satisfactory to the probate judge of the county in which the acknowledgment may be recorded.

(b) The man joins with the mother in a written request for a correction of certificate of birth pertaining to the child which results in issuance of a substituted certificate recording the birth of the child.

(c) The man and the child have borne a mutually acknowledged relationship of parent and child which began before the child became age 18 and continued until terminated by the death of either.

(5) Property of a child born out of wedlock or a child born or conceived during a marriage but not the issue of that marriage passes in accordance with the law of intestate succession except that the father and his kindred shall not be considered as relatives of the child unless the child might have inherited from the father as provided in this section.

(6) If a person is considered or presumed by a provision of this section to be natural parent of a child born out of wedlock or a child born or conceived during a marriage but not the issue of that marriage, that child shall bear the same relationship to that person as a child born or conceived during a marriage for all other purposes and shall have identical status, rights, and duties of a child born in lawful wedlock effective from birth. (MCLA 700.111; MSA 27.5111)

DEBT OWED TO DECEDENT, EFFECT ON SHARES

Sec. 112. A debt owed to the decedent shall not be charged against the intestate share of any person except the debtor. If the debtor fails to survive the decedent, the debt shall not be taken into account in computing the share of the debtor's issue. (MCLA 700.112; MSA 27.5112)

ALIENAGE DOES NOT DISQUALIFY

Sec. 113. A person is not disqualified to take as an heir because he or a person through whom he claims is or was an alien. (MCLA 700.113; MSA 27.5113)

CONDO DEREGULATION ARRIVES — COMPLETE WITH QUESTIONS

by
Jeffery R. Jones and James P. Babcock

On January 17, 1983, Governor James Blanchard signed into law PA 538 of 1982, commonly known as the "Condominium Deregulation Act." The Act takes effect immediately. Consequently, clarification of certain portions of the Act becomes essential. Should the economy improve, the Spring of 1983 will yield new condominium projects to be governed specifically by this Act. The Act's relationship to existing projects is of major importance as well.

Condominium practice in states which have no governmental prerecordation review requirements (i.e. Massachusetts, Indiana, Texas, Louisiana, Missouri, Connecticut, and Maryland to name but a few) tends to involve prerecordation review by parties whose financial interest dictates such action. Construction financiers, end loan financiers, title companies, engineers, surveyors, real estate brokers, and others often require attorney opinion letters to fill the void of statutory clarification or governmental review. With an eye to our profession's responsibility to the citizens of Michigan, and with an eye to the contents of our individual errors and omissions insurance policy, this article will attempt to discuss, with some specificity, various general categories of questions raised by interpretation of the new Act.

THRESHOLD QUESTION: APPLICABILITY

Does the Act apply to **all** condominium projects, existing as well as future projects? If so, to what extent does the Act apply to existing projects? The Michigan Department of Commerce will formally request an Attorney General's opinion concerning those two questions. The Department has stated it will request that the opinion be rendered as soon as possible. These issues involve Sections 170 and 173 of the Act.

One concern stems from a "correct" definition of certain words in the first sentence of Section 170(1) and 170(2). The sentences read as follows:

> 170(1) — This act does not impair or affect any act done, offense committed or **right accruing** (emphasis added), accrued, or acquired, or a liability, penalty, forfeiture, or punishment incurred before this act takes effect, but the same may be enjoyed, asserted, and enforced, as fully and to the same extent as if this act had not been passed.

> 170(2) — The 1982 amendatory act which added this subsection does not impair or affect any act done, offense committed, or **right accruing** (emphasis added), accrued, or acquired, or a liability, penalty, forfeiture, or punishment incurred before this 1982 amendatory act takes effect, but the same may be enjoyed, asserted, and enforced, as fully and to the same extent as if this 1982 amendatory act had not taken effect.

Subsection (1) relates to PA 229 of 1963 and Subsection (2) relates to PA 59 of 1978.

If an existing project wishes to amend its documents, and desires to have the Department of Commerce review such amendment, does the association, or any co-owner have such a "right accruing" by virtue of the previous Acts as well as its recorded documents? In effect, must the Department of Commerce provide continuing review capability? Such a conclusion appears to be contradictory to the general intent of a "Deregulation" Act.

Section 173 specifically discusses applicability of the Act. Subsections (1)(a)(b) and (c) are concise statements of applicability. Those subsections state the Act:

(a) Shall apply to a condominium project for which a permit to sell has not been issued before the effective date of this section.

(b) Shall apply to a condominium project for which a permit to sell has been issued before the effective date of this section, if the developer has not, before that date, entered into a binding purchase agreement with respect to any unit in the project.

(c) Shall apply to an expandable or contractable phase, of a condominium project, which phase is established after the effective date of this section.

Subsection (1)(d) creates ambiguity in certain areas. The subsection reads as follows:

(d) May apply to a condominium project, at the option of a developer, if a permit to sell has been issued for the project before the effective date of this section, and the developer has, before that date, entered into a binding purchase agreement with respect to any unit in the project.

If an appropriate developer exercised his Section 173(1)(d) "option," the Act does not appear to require notice of such election. There is no restriction concerning any extinguishment of such an option. The "option" appears to be solely that of the developer, not the association.

Certain situations demand clarification. If a developer of a half-sold but three fourths-constructed project elects to amend the documents for a properly reserved purpose, must he also then create the escrow required in Section 103a? If an association of a completely sold and constructed project wishes to amend its documents for a proper purpose that is reserved by the developer must it request the (hopefully still existing) developer to make the appropriate election so that it may record without Department of Commerce approval? Does an existing association, of its own right, come under this Act? If a developer of a partially completed project does **not** elect to come under the new Act, does the association have the right to impose the provisions of Section 52 (wherein, under certain circumstances, board representation is specifically mandated)?

The Attorney General's opinion may not completely answer all of the limited (in number) hypothetical questions raised and there may be need for rules clarification and, possibly, additional legislation.

PURCHASE AGREEMENT DEPOSIT MONEY ESCROW

The Act creates the possibility that a developer might acquire the use of the deposit money prior to closing. Section 83 and 84 discuss the requirements (in both content of the agreement and results of certain actions) of entering into either a preliminary reservation agreement or a purchase agreement. Section 84(3) reads as follows:

Upon receipt of payment under a purchase agreement, the developer shall deposit all funds in an escrow account with an escrow agent. After the expiration of the withdrawal period provided in Subsection (2), the developer shall retain amounts in escrow or provide

> other adequate security as provided in Section 103a to assure completion of only those uncompleted structures and improvements labeled under the terms of the condominium documents, 'must be built.'

Section 103a(3) states in part:

> Except as provided in Subsections (4), (5), and (6), amounts **required to be retained** (emphasis added) in escrow in connection with the purchase of a unit shall be released to the developer only upon all of the following: . . .

The amounts "required" to be retained relate exclusively to items that "must be built." Theoretically, if a developer had no items that remained "must be built," **and** the purchase agreement was completely binding (i.e., appropriate documents given and nine business days elapsed), the developer might technically be able to demand and receive the deposit monies. A conversion developer could also be in the same position immediately upon the expiration of nine business days after he records his documents, assuming proper distribution of required documents.

The ability to find agreement among prospective escrow agents to this plan may pose problems. The advisability of such action by an attorney causes further concern. Potential action by the administrator seems likely if such activity becomes the norm. There also exists the possibility of criminal liability for the developer who violates the Act.

The intent of the Act on this point is unclear. If such a possibility is **not** the intent of the Act, the specific provisions of Section 84(3), 84(4)(c) and the other specific language cited would seem superfluous. If a developer is unable to use deposit money, would the Act not simply state that no escrowed funds shall be released prior to closing on the unit? If the Act signals a public policy shift on the subject, prudent practitioners will take note. If the literal possibilities were not intended, clarification and legislative amendment is required.

The escrow agreement provided for under the earlier Act will have to be modified to allow for the expanded obligations of the escrow agent especially pursuant to Section 103a. The escrow agent is charged with the task of confirmation that "those portions of the phase of the condominium project in which the condominium unit is located, which under the terms of the condominium documents are labeled 'must be built' are substantially complete or that sufficient funds to finance substantial completion of those portions of the phase of the condominium project in which the condominium unit is located are being retained in the escrow account." Substantial completion shall be evidenced by a certificate of substantial completion stating that all utility mains and leads, all major structural components of buildings, all building exteriors, all sidewalks and driveways, if any, landscaping, and at least one access road, if any, located within or servicing that phase of the condominium project are substantially complete. Since the Act limits escrow agents to "a bank, savings and loan association, or title insurance company" agents of title insurance companies may not be acceptable. Practically speaking it is a problem for an escrow agent to adequately monitor all projects, models and activities of a developer for a project for which it is acting as escrow agent. Initially several title insurance companies have expressed concern about potential liability, and their reluctance to act in this capacity and expose themselves to this liability.

EXISTING ASSOCIATIONS

The Act creates different operating concerns for existing associations as well as future associations. Participation in Board of Directors' activity is mandated pursuant to Section 52. Amendments of documents will be made in a slightly different manner. Financial reports will be required only once a year. Leases of units may be for virtually any period of time.

Section 52 sets forth a rather complex mandatory outline for co-owner participation in Board of Directors activity. The developer gains a continuing right to representation on the Board in the final sentence of Subsection (2). The sentence reads as follows:

> No later than 120 days after conveyance of legal or equitable title to non-developer co-owners of 75% of the units that may be created, and before conveyance of 90% of such units, the non-developer co-owners shall elect all directors on the board, except that the developer shall have the right to designate at least 1 director as long as the developer owns and offers for sale at least 10% of the units in the project or as long as 10% of the units remain that may be created.

Section 32 limits expansion of the project to a time period of six years. It would then appear that a developer has a right to retain one seat on the Board for at least six years provided "10% of the units remain that may be created."

Co-owners and associations may be subject to highly transient neighbors under the new Act. Section 112 (in part) states:

> (1) Unless the developer provides to the contrary in the condominium documents, the co-owner, including the developer, may rent any number of units at any time, without limitation as to the term of occupancy.
>
> (2) A co-owner, including the developer, desiring to rent or lease a condominium unit for period of longer than 30 consecutive days, shall disclose that fact in writing to the association of co-owners at least 10 days before presenting a lease form to a potential lessee, and at the same time, shall supply the association of co-owners with a copy of the exact lease form for its review for its compliance with the condominium documents. A developer proposing to rent condominium units before the transitional control date shall notify either the advisory committee or each co-owner in writing.

There appears no requirement that the association even receive knowledge of who resides in a unit. Realistically, it would appear difficult to impose a minimum period of time for rentals. Section 90(4) requires that any amendment to the documents which imposes a minimum rental period must be approved by the co-owner of such units.

The removal of prerecordation review of amendments by the Department of Commerce is an important feature of the Act. Amendments to the documents are covered in Section 90 of the Act. A reservation, in the documents, of specific amendatory rights gives the developer wide latitude to amend the documents. The second sentence of Subsection (3) states: "Reserved rights may not be amended except by or with the consent of the developer." It appears that the sentence means that an association may not amend the documents to remove a right the developer has reserved. The

sentence might also prohibit an association, on its own, from properly amending the documents to achieve the same result contemplated by the reservation. Dependent upon the subject matter of the reservation, there is a potential built-in conflict between association and developer.

PROCEDURE FOR ESTABLISHING A CONDOMINIUM FOR NEW CONSTRUCTION

Unlike the former practice (which required submission of documents to the Department of Commerce, approval and recordation of those documents with certificates of approval and permits), the new Act establishes no pre-recordation procedure. A condominium is established upon recordation of the required documents. Escrow agents, mortgagees, title insurance companies and register of deeds will inherit the responsibility of determining whether or not those documents are sufficient to establish the condominium project. Review of the essential documents and procedures required for establishing and conveying a condominium, with the respective changes in those documents and procedures, will hopefully clarify the expected practices under the new Act.

FUTURE CONVERSION PROJECTS

Future conversion projects will be potentially the least affected by the new Act. Absent developer desires to construct any new structures, the escrow provisions of Section 103a would not apply to the converter. Under the above circumstances, Section 66(2)(j) would not require the drawings to show "Need Not Be Built" or "Must Be Built," but just identify existing structures and improvements.

Section 104 offers the converter two forms of notice to the tenants of the existing apartment complex. Subsection (3) gives the tenant receiving a Subsection (2) notice the unequivocal right to terminate tenancy upon 60 days written notice to the developer. The 104(2) notice triggers the 104(A) et seq. senior citizen extended lease provisions in the new Act as well as in PA 59, 1978 (as amended). Section 104(2) reads:

> Before offering any unit for sale, the developer of a conversion condominium project shall notify each existing tenant of any unit in the proposed conversion condominium project of all of the following:
>
> (a) The proposed conversion.
>
> (b) The right of a prospective purchaser to receive the disclosure documents enumerated in Section 84a.
>
> (c) The right to remain in the unit of residence for 120 days after receipt of this notice, or until expiration of the term of the lease, whichever is longer.
>
> (d) The right to terminate tenancy after receipt of this notice upon 60 days notice to the developer. The notice shall be physically delivered or sent by first class mail to each unit, addressed to the tenant. A tenancy in a conversion condominium, whether month to month or otherwise, shall not be terminated by the lessor without cause within 120 days after delivery of notice under this subsection, or until expiration of the term of the lease, whichever is longer.

Section 104(4) reads:

> If a developer of a conversion condominium project desires to take reservations before delivery of the notice required under Subsection (2), the developer shall, before taking any reservation, notify each existing tenant of any unit in the proposed conversion condominium of both of the following:
>
> (a) The tenant's lease is not affected by the taking of reservations for units in the proposed conversion condominium.
>
> (b) If a conversion condominium project is established, the tenant may obtain from the developer a full statement of the rights and options available to the tenant.

Should a developer elect to give only the Subsection (4) notice, it would appear that the developer need **never** give a Subsection (2) notice if he decides not to go forward with the project. However, a Subsection (4) notice is the vehicle by which a prospective developer may test the potential market **while** he holds his tenants to their leases. A Subsection (4) notice does **not** give the tenant the right to terminate a tenancy upon 60 days notice. Ultimately, however, the Subsection (2) notice must be given in order to create a binding purchase agreement.

THE ROLE OF THE ADMINISTRATOR

The administrator (the Department of Commerce) is removed from the pre-recordation process by the passage of the new act. The administrator does retain the power to define terms, promulgate rules and forms, make investigations and require response to complaints. Section 71(c) names the administrator as a proper party to receive the notice of intent to establish a condominium. The administrator is also the one who must define the size of plans going to the register of deeds office, accept process for non-resident developers and promulgate a new condominium buyers' handbook. Processing complaints and advising parties of their rights is provided for under Section 145, which supplements Sections 151, 155 and 157 of the 1978 Act.

The Act also contains a provision that two years after the effective date the administrator shall submit a report and recommendation to the Senate and House of Representatives regarding the prospective repeal of Sections 151, 152, 153, 154, 155 and 157 of the 1978 Act. Presumably if the escrow protections, disclosure requirements and other provisions of the new Act are sufficiently effective the administrator will not need to be the one who continues to police violation of the Condominium Act or rules promulgated under it.

THE LEGISLATIVE SCENE

USURY STATUTE EXTENDED UNTIL 1985

Senate Bill 57, extending the usury statute applicable to mortgages and land contracts (MCLA 438.31c; MSA 19.15(1c)) until April 1, 1985, passed in the House, with immediate effect, on March 1, 1983 and was signed by the Governor on the same day. It became Act 1 of the Public Acts of 1983. The Act does not override the federal preemption under the Depository Institutions Deregulation and Monetary Control Act of 1980.

A bill requiring "readability" of all consumer contracts (House Bill 4065) was introduced on February 1, 1983 and referred to the Committee on Consumers.

ACTION ON PREVIOUSLY REPORTED LEGISLATION

Those bills reported on in previous issues of the Review which eventually became Public Acts are discussed in the summary of the Public Acts of 1982 found elsewhere in this issue.

NEWLY INTRODUCED LEGISLATION

HB 4006 — Alters provisions for payment and collection of certain transportation related property taxes — introduced by Rep. Brown et al on 1-12-83 and referred to the Committee on Taxation.

HB 4012 — Extends the sunset date to December 31, 1983 on the authority for a 16.5% interest rate for home improvement finance — introduced by Rep. Keith on 1-12-83 and referred to the Committee on Corporations and Finance; 1-26-83, 2nd reading; 2-2-83, 3rd reading; 2-3-83, passed; 2-8-83, Committee on Corporations and Economic Development; 2-24-83, general orders with amendment(s).

HB 4018 — Eliminates the exemption from property tax for free-standing, outpatient, ambulatory or surgical care clinics — introduced by Rep. Dressel on 1-12-83 and referred to the Committee on Taxation.

HB 4031 — Eliminates references to the Department of Conservation in the statutes dealing with lands bid into the State for delinquent property taxes — introduced by Rep. Porreca et al on 1-12-83 and referred to the Committee on Conservation and Environment; 1-25-83, 2nd reading; 2-1-83, amended; 2-2-83, Committee on Conservation and Environment.

HB 4037 — Clarifies the place for filing state tax liens — introduced by Rep. Jondahl on 1-12-83 and referred to the Committee on Taxation; 1-25-83, 2nd reading with amendment(s); 2-1-83, 3rd reading with amendment(s); 2-2-83, passed; 2-3-83, Committee on Finance and Municipalities; 2-10-83, general orders; 2-15-83, 3rd reading; 2-22-83, amended; 2-23-83, passed; 2-24-83, Senate requests return.

HB 4056 — Requires tornado shelters for mobile home parks with 100 or more spaces — introduced by Rep. Fitzpatrick on 1-26-83 and referred to the Committee on Towns and Counties.

HB 4062 Exempts school district and intermediate school district property from local zoning ordinances under certain circumstances — introduced by Rep. Sitz on 2-1-83 and referred to the Committee on Towns and Counties.

HB 4063 Provides procedures for sale of 10% of tax reverted lands per year for the next five years through the Department of Natural Resources — introduced by Rep. Gingrass et al on 2-1-83 and referred to the Committee on Agriculture and Forestry.

HB 4065 Requires "readability" of consumer contracts — introduced by Rep. Ciaramitaro et al on 2-1-83 and referred to the Committee on Consumers.

HB 4095 Exercises the option under the bankruptcy act to prohibit use of federal exemptions and provides for revision of state exemptions — introduced by Rep. Kirksey et al on 2-3-83 and referred to the Committee on Judiciary.

HB 4097 Includes city income taxes paid in addition to property taxes in calculating the tax burden relative to household income for tax credits for farm land and open space — introduced by Rep. Gilmer et al on 2-3-83 and referred to the Committee on Taxation.

HB 4104 Provides exemptions from property tax for certain senior citizens and provides for reimbursement for revenue lost to school districts — introduced by Rep. Bennett on 2-8-83 and referred to the Committee on Taxation.

HB 4125 Extends the usury statute applicable to mortgages and land contracts to December 31, 1984 — introduced by Rep. Dutko et al on 2-9-83 and referred to the Committee on Corporations and Finance; 2-16-83, 2nd reading with amendment(s); 2-17-83, amended; 2-23-83, 3rd reading with amendment(s), passed; 2-24-83, Committee on Corporations and Economic Development.

HB 4133 Provides for a one percent per month late fee for public agency construction contracts — introduced by Rep. Hillegonds et al on 2-9-83 and referred to the Committee on State Affairs.

HB 4141 Provides for additional topics to be added to the required course of instruction for licensing real estate brokers and salespersons and provides for continuing education — introduced by Rep. Fitzpatrick on 2-10-83 and referred to the Committee on State Affairs.

HB 4142 Increases the license fee for real estate brokers and salespersons by $3.00 — introduced by Rep. Fitzpatrick on 2-10-83 and referred to the Committee on State Affairs.

HB 4163 Exempts $6,500.00 of state equalized valuation from property tax for senior citizens or disabled persons and provides for reimbursement to local units — introduced by Rep. Dutko on 2-15-83 and referred to the Committee on Taxation.

HB 4164 Provides for an exemption of $6,000.00 of state equalized valuation from property tax for senior citizens and disabled persons — introduced by Rep. Dutko on 2-15-83 and referred to the Committee on Taxation.

HB 4167	Eliminates the exemption from property tax for non-profit free-standing outpatient ambulatory or surgical care clinics — introduced by Rep. Dressel on 2-16-83 and referred to the Committee on Taxation.
HB 4193	Enacts a new residential rental housing quality enforcement act — introduced by Rep. J. Young, Jr. et al on 2-23-83 and referred to the Committee on Urban Affairs.
SB 7	Eliminates restrictions on purposes for which property taxes may be used for downtown development authorities — introduced by Sen. DeMaso on 1-25-83 and referred to the Committee on Corporations and Economic Development.
SB 8	Provides that unused mineral rights revert to the property owner from the DNR after 25 years of ownership of land — introduced by Sen. DeMaso on 1-25-83 and referred to the Committee on Natural Resources and Environmental Affairs.
SB 32	Provides for and sets conditions for exemptions from property tax for senior citizens — introduced by Sen. Gast et al on 2-2-83 and referred to the Committee on Finance and Municipalities.
SB 33	Provides that assessors shall not recognize on the tax roll a property split in violation of the subdivision control act — introduced by Sen. Gast on 2-2-83 and referred to the Committee on Finance and Municipalities; 2-10-83, general orders; 2-24-83, 3rd reading with amendment(s).
SB 46 thru SB 48	Requires the state to reimburse one-half the cost of property tax abatements under certain circumstances if facilities are located in an economic growth area — introduced by Sen. Kelly et al on 2-15-83 and referred to the Committee on Corporations and Economic Development.
SB 51	Requires smoke detectors in all new residential buildings — introduced by Sen. Brown on 2-15-83 and referred to the Committee on State Affairs and Transportation.
SB 53	Creates a homestead protection authority to pay property tax payments and provides for tax deferral for unemployed persons — introduced by Sen. Corbin et al on 2-15-83 and referred to the Committee on Finance and Municipalities.

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

RECENT DECISIONS
by
Joseph Lloyd
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FIRST FEDERAL SAVINGS & LOAN v CITY OF FLINT, ____ Mich ____; ____ NW2d ____ (No. 66947, Dec. 23, 1982)

Tax Tribunal — determination of market value

The city of Flint assessed improvements to the Bank's property on the basis of cost of construction. The Tax Tribunal approved, reasoning that the improvements had special value to the Bank over and above the increase they caused in the building's market value, since the improvements enhanced the Bank's image. The Bank argued that the assessment should be based on capitalization of rents of comparable buildings. The Supreme Court reversed the Tax Tribunal, holding that the General Property Tax Act requires that the assessment be based on market value, not on value to the owner. While actual and reproduction costs are some evidence of value, the court held that the proper standard is market-based.

ROFE v ROBINSON, ____ Mich ____; ____ NW2d ____ (No. 65728, Dec. 22, 1982)

Deed Restrictions — Changed Character of Subdivision

The deed restrictions in the subdivision in which the plaintiff homeowners resided provided that all lots be restricted to single family use. The defendant sought to construct a one-story office building on two of the lots in the subdivision. The trial court upheld the deed restrictions and granted a permanent injunction against construction of the office building. The Court of Appeals reversed, finding a change in character of the subdivision. The Supreme Court reversed and remanded the case to the Court of Appeals for further consideration of issues not addressed in its earlier opinion.

In its opinion, the Supreme Court, per Justice Levin, reasoned that deed restrictions are property rights and should be protected as long as they are of value to the owner and as long as the owner is not estopped from raising same. The fact that it was not economically practical to use the lots for other than office purposes was not sufficient ground for lifting the restrictions. Nor was a change in the zoning of the property or the fact that one lot in a subdivision of 45 was being used for office purposes sufficient evidence of changed character of the neighborhood to warrant lifting the deed restrictions.

SILVA v ADA TOWNSHIP, ____ Mich ____; ____ NW2d ____ (No. 65815, Dec. 23, 1982)

Zoning — extraction of natural resources — constitutionality

The Plaintiffs sought rezoning of their land to permit mining of silica sand. The Township denied the appeal. The trial court held the zoning statute unconstitutional and the Court of Appeals reversed. The Supreme Court, divided 4-2, in an opinion by Justice Levin, held that the zoning ordinance was unconstitutional. The specific question was what standard should be used in determining whether a zoning ordinance could prohibit the extraction of natural resources. The

Court held that any ordinance which does not consider whether "very serious consequences" would result from extraction is unconstitutional.

The reasoning of the court was that natural resources can only be extracted from the place where they are located and found. To prevent the mining of the resource prevents all use of the resource, and harms the interests of the public as well. This holding, however, was not intended to change the presumption of validity of the ordinance, and the burden of showing that there are no "very serious consequences" rests with the party challenging the ordinance. The court noted, moreover, that extraction is often a temporary use of the land, that the land can be restored for other uses, and that appropriate assurances with adequate security for restoration can be demanded as a precondition to commencement of extraction operations.

BOTT v NATURAL RESOURCES COMMISSION, ____ Mich ____; ____ NW2d ____ (No. 60947, Dec. 8, 1982)

Inland lakes — rights of littoral owners — navigability

The littoral owners on two lakes brought suit against the Natural Resources Commission in a dispute over whether the public had the right to make recreational use of the lakes. The lakes in question were connected by several small creeks which were too shallow to permit the flotation of logs. Prior case law would have held that the creeks were therefore not navigable and that only the littoral owners of the lakes had the right to use the lakes. Similarly, the pre-existing case law would have held that even if the creek leading to a lake is navigable, the owner of a small inland dead-end lake is the only one entitled to use same. The only recreational use recognized by the prior case law was fishing. The question before the court was whether the prior law should be "modernized" and expanded.

Four Justices of the Supreme Court, in an opinion by Justice Levin, declined to expand the prior case law. In dissent, Justices Williams and Ryan, adopting an opinion by the late Justice Moody, would have established a recreational boating test to replace the log floating test as the determination of navigability, would have overruled the dead-end rule, and would have enlarged the uses permitted beyond fishing to include navigation and other recreational use.

CHRISTY v PRESTIGE BUILDERS, INC., ____ Mich ____; ____ NW2d ____ (No. 64580, Dec. 23, 1982)

Implied Warranty — Duties of Vendor to Subvendee

The Plaintiffs were subdivision homeowners who discovered that the water supply in their recently purchased new home was unfit for normal residential use. Named as defendants were (a) the builder-vendor; (b) the property owner who had platted the property and sold it to the builder; and (c) the well driller. The grounds asserted as the basis of recovery were (1) express warranty, (2) implied warranty, (3) negligence, and (4) fraud. After jury trial, the builder was found liable on the basis of express and implied warranty and negligence and the original owner was found liable on the basis of implied warranty and negligence. The original owner was granted judgment n.o.v. on the issue of warranty, but judgment n.o.v. was denied on the issue of negligence. The owner appealed on the issue of negligence on the ground that he owed the Plaintiff no duty. The Court of Appeals affirmed the trial court. The Supreme Court granted leave to appeal.

On the question of the owner's duty to subsequent vendees of his property, the Supreme Court found that the relationship of owner to subvendee did not create, per se, any duty. The court reiterated the common law that when the vendor surrenders title, possession and control of the property, the doctrine of caveat emptor prevails as to all subsequent purchasers unless he has concealed any condition which involves unreasonable danger, or unless there is a condition which is dangerous to those off the property which has not been discovered by the purchaser. Once the purchaser discovers the defect and has opportunity to remedy same, the subvendees have no further recourse to the vendor. In the case at bar, it was found that the builder-vendee knew of the defect and neither of the exceptions applied. The court, therefore, held that judgment n.o.v. should have been granted on the issue of negligence. The court, however, remanded the case for trial on the limited issue of whether the owner was liable to the subvendee for injury arising out of alleged violation of the plat act.

LENAWEE COUNTY BOARD OF HEALTH v MESSERLY, ____ Mich ____; ____ NW2d ____ (No. 65513, Dec. 23, 1982)

Mutual Mistake — Recission — "As Is"

The Plaintiff purchasers bought rental property from the defendants. At the time the sale was closed, neither party had reason to believe that there was any problem with the sewage and septic systems. It subsequently became known that the septic system was unusable without extensive modifications, and that the property was essentially worthless as income property. The trial court granted recission on the grounds of mutual mistake. The Court of Appeals affirmed. On appeal to the Supreme Court, the judgment of recission was reversed.

The Supreme Court, in an opinion by ____________________, extensively analyzed the doctrine of mutual mistake and found that there was indeed such a mistake in the case at bar. The distinction between "collateral" mistakes, as found in A & M Land Development Co v Miller, 354 Mich 681; 94 NW2d 197 (1959) and mistakes relating to the essential quality and consideration given in the contract, Sherwood v Walker, 66 Mich 568; 33 NW 919 (1887) (the famous "barren cow" case), were disavowed, and those cases were both limited to their facts. The court held that the better-reasoned approach involved case-by-case analysis, and recission is indicated when "the mistaken belief relates to basic assumption of the parties upon which the contract is made, and which materially affects the agreed performance of the parties."

Had the analysis of the case stopped at this point, it appears that the court would have upheld the recission granted by the lower courts. The court, however, went on to hold that on the facts of the case, equity did not justify the remedy of recission. Recission, being a matter of the sound discretion of the court, need not be granted in every case. In a case of mutual mistake by two equally innocent parties, the court held it is necessary to undertake analysis of whether either party should assume the risk of loss, based on the court's notions of what is reasonable and just under all the surrounding circumstances. In the case at bar, the court suggested that risk of loss should be allocated to the purchasers, citing both Restatement of Contracts, Second, Section 154, and the "as is" clause in the sales agreement between the parties. In a footnote the court observed that an "as is" clause waives those implied warranties even in the case of a new home, and certainly operates as a waiver when there are no implied warranties. This case is certainly one with potentially far-reaching effects. The court did not create a formal implied warranty of habitability in used residential sales, but it would appear that many of the cases which would have been framed as

warranty cases can be reframed as cases of mutual mistake, and the court has left open the door allowing case-by-case analysis of the risk of major defect.

HOCH v HITCHENS, ____ Mich App ____; ____ NW2d ____ (No. 60749, Dec. 20, 1982)

Land Contracts — Risk of late payment

The Purchaser under a land contract delivered payment to the Seller one day after the date on which the Seller had the contractual right to accelerate the balance. The late payment was delivered by mail, and it appeared that the delay was the due to error of a post office employee. The trial judge granted acceleration. The Court of Appeals reversed, noting that where there is a course of dealing which justifies a debtor in believing that some other means and forms of tender will suffice, actual delivery is not required, and the risk of loss or delay in delivery must be borne by the creditor who has agreed to accept the payments by the alternate method.

BENISON v SHARP, ____ Mich App ____; ____ NW2d ____ (No. 58097, Dec. 6, 1982)

Ownership of Church property — Constitutional issues

St. Paul's Episcopal Church, an ecclesiastical corporation, held title to real property on which sat a church, parish house and rectory. A majority of the members of the local church seceded from the general church with which St. Paul's is affiliated, the Protestant Episcopal Church in the United States (PECUSA). The Plaintiff, bishop of the diocese of Western Michigan of PECUSA brought an action to enjoin the defendants from transferring the church properties, and seeking declaratory judgment that the plaintiff was entitled to possession and control of the property. The trial court granted summary judgment for the plaintiff. On appeal, the defendants claimed that improper legal standards were applied in determining title, and that the court could not constitutionally involve itself in the ecclesiastical dispute.

The Court of Appeals held that the courts, without question, have general authority to resolve disputes over the ownership of church property. Resolution of the dispute may be based either on neutral principles of law or on a theory of religious polity. Under a polity theory, when a subordinate congregation or faction secedes from a hierarchical church, it has no right to retain church property where the governing body of the church determines that it is no longer the congregation for which the property was originally purchased. The courts must therefore make a sufficient investigation of the internal workings of the church to determine which is the main church and which is the splinter group. Under a neutral principles of law theory, resolution of the dispute is made by reference to the language of deeds, church charters and provisions in the state statutes governing ownership and control of church property.

In the case at bar, the trial court and the appellate court analyzed and applied the polity theory, noting that the locus of control of the property was apparent from a brief review of the church's internal workings and that no searching inquiry need be made. It was held that the plaintiff, representing the main body of the church, was entitled to the property. The appellate court, although not applying the neutral principles of law theory, noted that it believed the result would have been the same under that case as well.

BACHUS v TOWNSHIP OF WEST TRAVERSE, ____ Mich App ____; ____ NW2d ____ (No. 64905, Jan. 19, 1983)

Adverse Possession — Payment of Taxes

In this case the Township claimed title to land which it had been using for park purposes, notwithstanding the fact that it had been assessing and collecting taxes on that land from the Plaintiffs. A divided panel of the Court of Appeals, reversing the trial court, held that no adverse possession would lie under such circumstances.

BUTLER v BUTLER, ____ Mich App ____; ____ NW2d ____ (No. 57913, Jan. 10, 1983)

Joint Tenancy — Partition

An established line of Michigan cases holds that when a joint tenancy is created using the words "with right of survivorship" the result is a joint life estate followed by a contingent remainder to the survivor. The resulting tenancy is not subject to partition. In the present case the deed conveyed title to the plaintiff, defendant, and their three children, as joint tenants with right of survivorship. The three children reconveyed to the plaintiff and defendant as tenants in common. The plaintiff sought partition, arguing that because she and the defendant were married at the time of the original conveyance, she and her husband were tenants by the entireties, becoming tenants in common at the time of their divorce. The trial court denied the action for partition and the Court of Appeals reversed. The fact that the plaintiff and defendant were husband and wife was apparent on the face of the deed, although the conveyance said nothing specific about a tenancy by the entireties. The court found, however, that the survivorship language in the deed was not sufficiently strong to negate the common law presumption in favor of a tenancy by the entireties.

SECTION NEWS

About the authors:

The article "A Survey of Public Financial Assistance to Real Estate Development" was prepared by the following members of the Section's Public Finance Committee:

Frank L. Andrews is associated with the law firm of Miller, Canfield, Paddock and Stone. Mr. Andrews received his Bachelor of Science degree from Michigan State University and his Juris Doctor from Harvard Law School. He specializes in real estate including governmental aids to development and finance.

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The article was edited by Dennis R. Neiman. Mr. Neiman is a partner in the law firm of Miller, Canfield, Paddock and Stone and is the present chairman of both the Public Finance Committee of the Real Property Law Section of the State Bar of Michigan and the Finance and Taxation Committee of the Public Corporation Law Section of the State Bar of Michigan. He received a Bachelor of Science Degree from the University of Illinois and a JD Degree from Northwestern University and has lectured extensively for various organizations, primarily in the area of municipal financing of commercial and industrial development. He specializes in municipal law with an emphasis on municipal finance as well as bankruptcy law.

The summary of 1982 Public Acts was prepared by three members of the Committee on Legislation. Thomas L. Lapka is a graduate of Central Michigan University (B.S., 1978) and Thomas M. Cooley Law School (J.D. cum laude, 1982). He practices in the areas of banking, administrative, municipal and real estate law for the Lansing firm of Foster, Swift, Collins & Coey, P.C.

Gregory L. McClelland is a graduate of the University of Kansas (B.S., 1975) and the University of Illinois (J.D. magna cum laude, 1978). He served in the U.S. Marine Corps from 1969 to 1972. Mr. McClelland is associated with Dickinson, Wright, Moon, Van Dusen & Freeman.

Robert J. McCullen, who chairs the Committee on Legislation, graduated from the University of Michigan (B.S., 1968; J.D., 1972). He is a shareholder and a member of the Board of Directors of Foster, Swift, Collins & Coey, P.C.

Ralph Jossman received the degrees of A.B. and L.L.B. from Wayne State University. He has been a member of the Title Standards Committee since it was established in 1953, and served for three years as its Chairman. A former Chairman of the Real Property Law Section, Mr. Jossman has contributed several articles to the **Review**. The article in this issue was written on behalf of the Title Standards Committee.

The article by Jeffrey B. Larkin was also written on behalf of the Title Standards Committee. In addition to his work on this committee, Mr. Larkin serves on the Section Council. Our special thanks to John R. Baker of the Title Standards Committee for his efforts in securing and reviewing both of these articles.

Allen E. Priestley graduated cum laude from Detroit College of Law in 1944. He was formerly the Senior Vice President and General Counsel of Burton Abstract and Title Company and St. Paul Title Insurance Corporation. Mr. Priestley has served as Section Chairman and now is a member of the Section Council. He also served as the Editor of the A.B.A. **Real Property, Probate, and Trust Journal**.

The authors of the article on condominium deregulations published another article on this topic in the August, 1982, issue of the **Review**.

James P. Babcock, who is a graduate of Georgetown University and the Detroit College of Law, is currently a partner in Caputo, Babcock & Company in Warren and works in various phases of real estate law. He is a member of the Real Property Law Section of the State Bar, Vice President of the St. Clair Shores Bar Association, and a member of the Condominium Committee of the Builders Association of Southeastern Michigan. Mr. Babcock is a licensed residential builder and real estate broker and was formerly associated with C. W. Babcock & Sons, who have developed, sold, and currently manage over sixty-five co-operative and condominium complexes in the Metropolitan Detroit area.

Jeffery R. Jones is a graduate of American University in Washington D.C. and was admitted to both the Virginia and Michigan Bars in 1976 and the District of Columbia Bar in 1977. He is currently a sole practitioner in Birmingham working in the area of real estate law and specifically developer and association condominium representation. He has been the legal counsel for over 25 condominium conversion projects in over ten (10) states. He is a member of the Real Property Sections of the American Bar Association and State Bar. He is currently a member of the Condominium Committee of the Real Property Section and Chairman of its New Legislation subcommittee. He has lectured and provided seminars on condominium conversions to various real estate broker and salesperson associations.

Our special thanks to William B. Dunn and William K. Van't Hof for their review of the deregulation article.

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From time to time we pass along to the members of the Section information brought to our attention with regard to associations of specialists in the real estate field. Without the implication of any endorsement whatsoever, we wish to let you know of the existence of an organization known as the Institute of Real Estate Management of the National Association of Realtors. The

Institute is comprised of people who have specialized in administering real estate assets. Members of the Institute are designated "Certified Property Manager" which, according to the Institute, is awarded to an individual only after satisfaction of established standards of competency, experience, education and ethical conduct in the property management area.

Lawyers are called on periodically for advice concerning real property-related specialists, including property managers, and we bring to your attention the existence of the Institute of Real Estate Management as a source of further information which may be quite helpful in this particularly difficult aspect of real estate. For further information, the address of Michigan Chapter No. 5 of the Institute is 2950 E. Jefferson Ave., Detroit 48207.