MICHIGAN REAL PROPERTY REVIEW

Vol. 25, No. 4 Winter, 1998

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

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

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

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

The **Michigan Real Property Review** is published by the Real Property Law Section of the State Bar of Michigan. An annual subscription to the **Review** commences in September of each year and ends in August of the following year. Four issues are published each year. The subscription price is $25 annually, payable in advance. Orders for subscriptions should be sent, with the above-stated payment, to **Michigan Real Property Review**, Real Property Law Section, State Bar of Michigan, Michael Franck Building, 306 Townsend Street, Lansing, Michigan 48933-2083.

The **Michigan Real Property Review** is published by the Real Property Law Section of the State Bar of Michigan. An annual subscription to the **Review** commences in September of each year and ends in August of the following year. Four issues are published each year. The subscription price is $25 annually, payable in advance. Orders for subscriptions should be sent, with the above-stated payment, to **Michigan Real Property Review**, Real Property Law Section, State Bar of Michigan, Michael Franck Building, 306 Townsend Street, Lansing, Michigan 48933-2083.

MICHIGAN REAL PROPERTY REVIEW

Published by the
Real Property Law Section, State Bar of Michigan

MICHIGAN REAL PROPERTY REVIEW

CHAIRPERSON'S REPORT

by *James N. Candler, Jr.*

As stated in the Special Committee Chairperson's Guide, which was prepared principally by Lisa Gretchko, Jack Shumate, Gail Anderson and Carol Ann Martinelli and presented to new committee chairs on October 10, 1998, there are three distinct areas of responsibility which should be delegated to individual committee members so as to provide an objective test of leadership potential.

The first two areas, legislative and publications/CLE coordination, were described in this column in the Fall issue of the **Review**. The third area of responsibility is the digesting of recently published judicial decisions impacting Michigan real property law or practice. For many years, Joseph Lloyd, as Decisions Committee chairperson, has published a quarterly article in the **Review** with respect to recently published decisions of Michigan appellate courts. In the past this article has been selective rather than exhaustive in scope, because a more complete collection of decisions with Michigan real property law implications has traditionally been included in the Section's annual State of the Law materials. Since the State of the Law program was canceled last year, we have decided to broaden the scope of Mr. Lloyd's article. Various means will be employed to get recently published decisions into the hands of the Decisions Committee as soon as possible. Whenever it would appear that specialized input is necessary or desirable, Mr. Lloyd will send the opinion to the decisions coordinator for the relevant special committee. It is expected that individual committee members, whenever they become aware of significant new decisions, will also bring such matters to the attention of their decisions coordinator. It will then be the coordinator's responsibility to promptly digest the case in a few short paragraphs suitable for inclusion in Mr. Lloyd's quarterly article. The first article to implement the new reporting system will appear in the Spring issue of the **Review**.

To complement the article on judicial developments, there will also be a quarterly article on legislative developments, prepared by the Section Vice-Chairperson, Carol Ann Martinelli, all to the end that the information previously provided annually in the State of the Law materials will now be available in four more timely installments.

While much attention has been given in recent Chairperson's Reports to our efforts to restructure special committee operations consonant with the recommendations of the 21st Century Committee, that is not to say that the existing committee structure does not function well. Indeed, a number of recent accomplishments are worthy of mention.

The hard working Pro Bono Committee has prepared a fourth public education brochure, entitled "Purchase and Sale of a Home," the full text of which is printed in this issue of the **Review**. This committee, comprised of Carol Ann Martinelli (chair), Vicki Harding, David Haron, Pat Karbowski, Gregg Nathanson, Allen Schwartz and Robert Wartell, is undertaking a fifth brochure regarding casualty and liability insurance issues relevant to homeowners.

The Section's legislative program has been productive and successful. Perhaps most noteworthy is the enactment of 1998 PA 106, which creates formal recognition of land contract mortgages and specifies the rights and remedies not only of the mortgagor and mortgagee, but also those of non-mortgaging vendors, vendees and assignees. The act was drafted by an ad hoc committee comprised of Gary Taback (chair), John Amerman, Stephen Bromberg, James Candler, Howard Lax, Carol Ann Martinelli and Robert Nix and is explained in detail in an article appearing in this issue of the **Review**. No less than seventeen members of the Committee on Condominiums, PUDs and Cooperatives, chaired by Mark Makower, contributed to the drafting of SB 1365, constituting a comprehensive reworking of problematic provisions of the Condominium Act, and SB 1366, which would enable foreclosing mortgagees to add the amount of condominium assessments and similar charges paid by them after a foreclosure sale to the redemption price. While these bills were introduced too late for the legislature to deal with them in 1998, they will be reintroduced by Senator Bullard in January and we are optimistic that they will be passed in 1999.

Less conspicuous but equally important has been the negative impact which our lobbying efforts have had upon bills which the Council determined to oppose. Among these accomplishments were the removal of a provision requiring arbitration of condominium disputes from HB 5225 and the removal of augmented estate provisions from the Estates Settlement Act (SB 209). Other bills which the Council opposed and which were not enacted in the 1998 legislative session are: HB 4028, the so-called plain English bill, which would have created substantial uncertainty in sale and lease documentation; HB 4555, which would have singled out site condominiums for treatment different than for other forms of condominiums, without providing a workable definition of what is a site condominium; HB 4929, which would have amended the general property tax act to require sellers and purchasers of real property to prorate taxes on a calendar year basis, in direct conflict with another section of the act providing for proration on a due date basis or as the parties shall otherwise agree; and SB 417 and 418, which would have effectively abolished the doctrine of adverse possession and easements by prescription.

The recording requirements problems caused by 1996 PA 459 continue to bedevil real estate practitioners. An ad hoc committee chaired by Vicki Harding is attempting to come up with a bill which will solve these problems in a manner which is acceptable to the Michigan Register of Deeds Association.

Throughout the past year the quality of the Section's continuing legal education programs at the Summer Conference, the Annual Meeting and the Homeward Bound Series have been nothing less than outstanding. Five sessions of the Homeward Bound Series remain: Avoiding and Resolving Title Problems (January 21, 1999), AIA Contracts – General Conditions (February 25, 1999), AIA Contracts – Defaults and Remedies (March 25, 1999), Negotiating a Lease for an Older Commercial Facility (April 15, 1999) and Negotiating Land Contracts and Land Contract Mortgages (May 20, 1999). You can register for any one of these sessions at the door.

Because federal funding for legal services for the poor has been severely cut, the Michigan State Bar Foundation has created the Access to Justice Fund. Gifts are eligible (up to $400) for the 50% Michigan income tax credit and are entirely deductible for federal income tax purposes. Furthermore, a $300 gift will satisfy the State Bar Voluntary Standard for Pro Bono Participation. As instructed by the donor, funds will either be used to support legal services programs and pro bono services directly or to build an endowment the income from which will support such programs. For further information and pledge forms, contact Thomas G. Kavanagh, Jr., at the State Bar offices, whose phone number is (517) 346-6372 and whose e-mail address is tkavanagh@michbar.org.

REPLATTING AND SUBDIVISION CHANGES: THE FRUSTRATING PAPER CHASE

by *Marc Daneman**

Introduction

There has been a resurgence of interest in the plat amendment and subdivision review process. Recent changes in the Land Division Act involving road-end vacations along waterfronts and cases like the **Brookshire Big Tree Association v Oneida Township, et al**,[1] have altered the development process, changing even the procedures that the state has followed. The impact among municipal attorneys has been so great that at the 1998 State Bar Annual Meeting the Public Corporation Section devoted its annual update seminar to the issue of plat revisions.

The reason for this interest may be due in part to frustration with the subdivision revision process. Those who have practiced in this area know it is an extraordinary paper chase, one that many would like to see improved and clarified. In the discussions leading to the recent changes in the Land Division Act ("act") there was some hope that the legislature would address the replatting and plat amendment process.[2] It has been acknowledged that one of the primary reasons behind the amendments to the former Subdivision Control Act was to reform and streamline the process of platting or subdividing land.[3] The same concern over bureaucratic delays and procedural hurdles necessary to plat lands exists for the plat revision process. The process has led to delays in development, increased development and home ownership costs, barriers to redevelopment, and loss of local control over land development. This article will identify the more important issues and concerns as it reviews various options and processes to effect replatting and subdivision changes.

*Marc Daneman is a solo attorney and planner, with Daneman & Associates in Grand Rapids, Michigan. His practice includes municipal, real estate and land use law, and community planning consulting for both public and private clients. He has recently lectured on the Land Division Act and completed numerous street and plat vacations, replats and amendments for both local government agencies and private clients. The author wishes to acknowledge *Planning and Zoning News* for permission to use the basis of his January 1998 article "Replats and Other Plat Changes; Why Reform is Needed" for this article and the presentation from the State Bar's Corporations Section 1998 Annual Session for guidance in preparing this article.

A Land Use Problem for All

Attorneys are often confronted with a client's request to clear title over platted property to achieve some development objective. This may occur when a lending institution will not finance a project that fails to conform to the platted land patterns. Or a zoning ordinance impedes development options where underlying street patterns encumber the existing plat. And typically a title company will not insure over encroachments or title defects raised by development on previously platted property.

Many problems result from "antiquated" subdivisions.[4] These are subdivisions that are not functional or are built to out-of-date standards. They often have small or narrow lots, or roadways designed on traditional grid patterns or with no relationship to present use. Many have "dedicated" alleys, walkways, boulevards and parkways that have no practical reason for existence.

Other problems arise from nonexistent "paper plats" (or "paper streets") that encumber the ability to develop land. These are platted and recorded subdivisions (or streets) on paper that were never or only partially developed. Many were platted on speculation; however, because of market or economic conditions, poor design, or for other reasons, they were not completed or fully developed. In addition to raising questions of dedication and use, these antiquated subdivisions, and paper plats and streets place a cloud over the marketability of title, a cloud which properly should be removed by replatting or subdivision change.

A completely different type of problem, but one with equally frustrating results was raised in **Brookshire Big Tree Association v Oneida Township**.[5] Until recently, some thought that owners of property in one plat could simply and unilaterally replat property they owned into an adjacent subdivision, particularly where the change did not involve dedicated property. This was the situation in **Brookshire**, where the developer of a residential subdivision attempted to secure access to its landlocked parcel through a platted residential lot that it owned in the Brookshire Subdivision. The subdivision association and others objected, arguing that proper replatting procedures were not followed, as the act requires all property owners in the plat to consent to a replat[6] and that the platted lot was limited to exclusively single family uses in the restrictive covenants – thus the lot could not be used for road access purposes. The developer argued that because it owned the lot providing access, it could replat the lot in Brookshire and add it to a new development. The developer further argued that since the "access lot" was simply permitting access to the development in the rear, the deed restrictions were not violated. The developer was essentially using the lot for the "residential use" of its own property. This argument had been supported by an unwritten policy of the Subdivision Control Unit,[7] and was followed by many surveyors, engineers and developers.

The court agreed with the association, making it clear that owners could not effect a replat by unilaterally removing themselves from the plat. It held that under the Subdivision Control (now Land Division) Act, to change the boundaries of a subdivision is a replat as defined by Section 102u of the Land Division Act. Further, all owners in the plat must agree in writing to the replat as provided in Section 104(a), unless a court ordered plat change is undertaken.

This case, and the other development limitations described above, illustrates that replatting and the subdivision revision process are critical for implementing new development. This process and alternatives that may exist are explained below.

The Plat Change Process

Historically, the solution to the development issues noted above was to vacate, replat or otherwise amend an existing subdivision. The vacation of a plat results in the area vacated ceasing to exist as originally platted. If the area is a street or alley, the vacated portion merges with the adjoining lots. If it is another common area, it generally reverts to the rightful owner as determined by the court. A revised plat prepared under the vacation action will identify the new ownership characteristics of the area vacated. A plat amendment, on the other hand, is an alteration, correction or other revision of a portion of the plat, which again is shown in an amended plat. If the amended plat is later vacated, the original configuration resurfaces.[8]

In Michigan, because the platting process is statutory, the statute governs the process to replat, amend, vacate or otherwise change a subdivision. It is a legal action as opposed to an equitable claim, as it was under an earlier law.[9] An action to quiet title or a declaratory judgment is not the appropriate method to adjudicate a plat revision.[10] This statutory process is dictated by the Land Division Act.[11] Under the act there are at least six different ways to change or modify an existing plat: court order as described in the "Plat Changes" section of the act (Section 221 **et seq**),[12] unanimous consent of all property owners (i.e., a replat under Section 104(a)),[13] urban renewal actions under 344 PA 1945,[14] municipal vacation for certain

publicly-dedicated property as referenced under various sections of the act, in particular Section 226(1)(c),[15] assessor's plat, in Sections 201 through 213,[16] and lot split, under Section 263.[17] Although in limited cases, assessor plats, urban renewal plats, a simple lot split or municipal resolution with proper recording will be adequate to make the necessary plat change, by far the most common plat changes require formal court proceeding under Sections 221 through 229 of the act.

Procedures for Court Ordered Plat Changes

The typical court proceeding to change an existing plat is commenced by filing a complaint in the circuit court of the county where the subdivision is situated.[18] The complaint must be filed by a property owner, a person claiming under the owner, or a municipality.[19] It must properly describe the part or parts sought to be vacated and any other corrections and revisions. The legal description of the area affected must be precisely stated. Using a survey or map can be very helpful as an exhibit in the complaint. The complaint must also allege the reasons for change. Stating that the change is necessary to clear a cloud over the title or insuring marketability is sufficient reason.[20] However, it is common to claim that there is no further public interest being served in maintaining the original plat. Also useful to include in the complaint are exhibits noting any governmental approvals already received and any maps and photographs of the area affected.[21]

The complaint need have only one count, the statutory action. But a number of practitioners have added additional counts as an independent basis of a claim to clear title[22] and to remove restrictive covenants, if necessary.[23] These actions are supplemental. Practitioners find the quiet title action useful when there are questions regarding the status of title or where there may be an interest by parties outside of the subdivision. The restrictive covenant claim will declare the rights and uses permitted with a completed plat revision action.

The statute is clear about whom must be joined as defendants.[24] These include the municipality where the subdivision is located, the Michigan Department of Consumer and Industry Services (although the act says "state treasurer"),[25] the County Drain Commissioner and Chairman of County Road Commission, and each public utility known to have facilities or recorded easements in the subdivision (now including cable and communications companies). Also named are the Directors of the Michigan Department of Transportation (MDOT) if the subdivision borders on a state highway or federal aid road, or the Michigan Department of Natural Resources (MDNR) if the action may result in a public highway or a portion of the highway that borders on, crosses, is adjacent to, or ends at a lake or stream, such that the vacation or alteration results in a loss of public access. The water access issue is rather new and gives the township or MDNR the option to maintain the property for public access.[26] For those who contemplate a road-end vacation, effort should be made to contact the municipality and local MDNR officials prior to filing the complaint to determine their interest in maintaining the property for public access.

Finally, the complaint must name all owners of record title, and those persons of record claiming under those owners of each lot or parcel of land located in or within 300 feet from the area petitioned for change. This last category can create significant problems, particularly in older platted areas. Persons claiming under the record owner include land contract vendors and vendees and all other lien holders (i.e., mortgagees, land contract vendees holding second tier interests, and arguably mechanic lien holders of record). The complaint should also name individually both the husband and wife, those with joint ownership interests, trusts, and other entities. Securing this information requires a title search, as tax records will not necessarily identify individuals claiming under those owning the property. This typically results in a large number of individuals being named and personally served as defendants. It is not unusual to have more than fifty defendants.

In recognition of the potential service problems, the act allows for service by registered mail to the municipality and state officials, and to the record title owners when their numbers exceeds twenty persons.[27] All other parties are served according to the court rules. As it is common to have a number of parties who cannot be served, because they have died, moved or otherwise cannot be found, the petitioner must often go back to court for alternate service (usually by publication and posting).

To make this process smoother, particularly for those "neighbors" who are now being sued, a public relations effort is encouraged before or concurrently with the action. The petitioner should contact all who reside or own property within 300 feet of the area affected to seek their written consent. When the summons and complaint are served, include a brief explanatory letter to ease any fear or answer questions. Also, it is useful to seek the municipality's approval before the complaint is filed. This approval is required[28] and it is comforting for others to see that the municipality has sanctioned the action. In addition, the municipality, if necessary, can mediate between the petitioner and opposing neighbors.[29]

Once service is made, defaults may be entered for those who do not respond. There are often a large number of defaults.[30] Those who have consented are not defaulted even though they may have not formally answered. They are also given all pleading and papers.

The petitioner must have the approval of MDOT and MDNR if the action involves their facilities or are adjacent to their resources, as noted above. The municipality must also approve if the action is a vacation of a public street or alley, is a property under its jurisdiction, or has been publicly dedicated. In particular, where plat revision involves access to a water body in a township, the township must specifically decide if it wishes to maintain the property as an ingress and egress point to the water.[31] The approving municipal and county action can be by resolution or ordinance. If utilities are involved, then an easement must be reserved for their benefit. One particularly thorny issue that often arises is the need for municipal approval if property affected is not under the jurisdiction of the municipality or is publicly dedicated. Recent cases have suggested that where property is not properly dedicated or within their jurisdiction, that municipal or county approval may not be necessary.[32]

The act contemplates a trial or hearing to determine if the petition is in the public's interest.[33] If the petition is contested, pretrial discovery may be necessary and a full trial would be held to determine the propriety of the action. Unopposed actions can be heard in a summary proceeding. Some courts have allowed a show cause hearing; however, the Attorney General opposes that procedure, arguing that it shortcuts the due process requirements contemplated by the statute and that there is no authority.[34] Most uncontested actions are concluded with a stipulated judgment. The court's order incorporates the default judgment and other issues which may be conditioned on the agencies' or utilities' approval. Typical conditions might include removing any physical evidence of the underlying development, providing utility easements or relocating utilities, constructing barriers, or making other improvements (i.e., curb cuts or approaches). The judgment must also include a requirement for filing a replat or amended plat.

After receiving the order, the petitioner must record the order in the offices of the register of deeds within 30 days. The clerk will place a notation of the order on the original plat.[35] The petitioner must then have a new plat or an amended plat prepared reflecting the change.[36] There is no specific time required for this filing. The Attorney General often insists on a date certain for the filing. (i.e., 90 to 120 days).[37] Petitioners should verify with their engineer or land surveyor that an amendment or replat can be completed in the time expected.

With the court's order, the title to any property vacated vests in the rightful owner of that part.[38] Lots abutting the vacated street or alley take title to the center line of the vacated street or alley. The rationale is that the property, in effect, reverts back to the original owners.[39] Where the vacated street borders the subdivision, the vacated property vests in only the adjacent lot owners, not the owners of property outside of the plat.[40] The vacated property becomes joined with the abutting property owner's title by operation of law (Section 227a) and is not intended to be a separate parcel.[41]

The formal plat amendment or replatting procedure in court alone takes a minimum of three to four months to complete, assuming there are no substantial objections and service can be easily made. With alternate service, the process can be extended another couple of months. Preliminary work before filing the complaint, which includes ordering and reviewing the title work, seeking neighbor consents and the municipal approval, and preparing the initial survey can take several months before the formal action is initiated. After all approvals are secured and the order is entered, additional time is necessary to have a registered land surveyor or engineer prepare an amended plat or replat. The entire process in an uncontested action can easily take six to nine months.

A contested action proceeds like any other case to trial, with the attendant discovery and settlement strategies. The petitioner has the general burden of persuasion and going forward with evidence. Objectors must establish the reasonableness of the claimed objection.[42] In **In Re Petition of Upjohn**, the court placed upon the objectors the burden of showing "reasonable" objections to the replat.[43] These objections must be fair as distinguished from carping and trifling.[44] Contested actions are often fact driven, usually decided on a case-by-case basis, and, of course, will add months and substantial expense to the process.

Other Methods of Replatting or Effecting Subdivision Changes

As noted above, the Land Division Act has several other methods to affect plat changes. These are generally used in specialized circumstances.

Replatting by Agreement. Section 102u defines a replat to mean "the process of changing, or the map or plat which changes, the boundaries of a recorded subdivision plat or part thereof."[45] Section 104 requires that a replat be effected by a court action unless all the owners of lots which are part of the replat agree in writing and

record an agreement with the register of deeds.[46] As discussed above, **Brookshire** clarified that all owners in the plat being changed must participate, not just the owners of the replatted area. This arguably also involves, in a related action, the changes affecting recorded deed restrictions. Municipal approval is necessary if the land involved is dedicated to the public. Notice must also be given to abutting property owners. Unfortunately, it is often very difficult or almost impossible to get all owners to agree and sign off. For this reason, especially under **Brookshire**, this process will see less use.

Assessor Plat. Sections 201 to 213 of the Land Division Act offer an involved procedure which only invokes the court's review as an appellate mechanism. Assessor's plats are common where platted descriptions are sufficiently uncertain, inadequate or complicated for assessment purposes or tax administration.[47] They can also be used where leased land has been improved (since January 1, 1968) and the lot sizes are smaller than permitted by local (zoning) ordinance or the act,[48] or where there are four or more residential structures and each lot is served by an approved sewage and water supply.[49] If the municipality determines that an assessor's plat is necessary, it adopts a resolution instructing the assessor to retain a surveyor to prepare a survey. The proposed assessor's plat must, as closely as possible, match the layout of the boundaries of each parcel, street and alley dedicated to the public or private use according to the records of the register of deeds and other available evidence.[50] The owners of property affected must review and comment, and then approve the survey in a written lot agreement. When completed, the assessor's plat is forwarded to the township clerk who publishes a notice advising anyone with objections that they have 30 days to file an action in circuit court to challenge the proposed assessor's plat.[51] The court will then adjudicate the dispute as necessary. In addition to municipal approval, the county road commission must approve if the plat involves public roads. Once all local approvals are received, the plat is submitted to the state (Subdivision Control Unit). Following the state's approval and recording, the assessor' plat is recorded with the county, like other proprietor plats.

The cost of preparing an assessor's plat is born by the property owners in the area affected, as a special assessment. The costs are apportioned by a statutory formula.[52] This procedure has often been used by developers in leasehold resort situations, and where there have been significant encroachments over a number of lot lines. Property owners or developers may find it easier to redevelop a project under this scheme rather than vacating an existing plat and filing a new proprietor's plat or preparing a complete replat – if the municipality agrees and the circumstances permitted in Sections 201, 201a or 201b exist.

Municipal Action. A more controversial alternative is to utilize the municipality to vacate certain public roads under the provisions of Sections 226(1)(c), referencing Sections 255a to 257. Section 226 (1)(c) states that "neither this section nor any other section shall limit or restrict the right of a municipality under sections 256 and 257 to vacate the whole or any part of a street, alley, or other land dedicated to the use of the public."[53] Sections 256 and 257 authorize a municipality to open, vacate, extend or widen streets or alleys and change names. These sections restrict the limits of a municipal action to those publicly dedicated lands used for pedestrian or vehicular travel not within 25 meters (approximately 82 feet) of a lake or the general course of a stream.[54]

The procedure only requires a formal action by municipal resolution or ordinance. When taking such action, the municipality may reserve easements for any existing utilities or other public purposes. Once the action is taken, a copy is recorded with the register of deeds and with the state (Subdivision Control Unit). To ensure that the interests of the public are fully extinguished, where the roadway is under the county's jurisdiction, the county road commission should complete an abandonment proceeding under the county road law.[55]

There has been no case authority to support this municipal vacation procedure. And some attorneys have criticized it as an incomplete action. They suggest that, notwithstanding the language of Section 226(1)(c), municipalities or property owners must still go to court to clear private property rights which underlie the vacated public ways. The only rights vacated by the municipality are the public's interests in the dedication.

In **Nelson v Roscommon County Road Commission**, the court held that notwithstanding the failure of a dedication, a grantee of property in a platted subdivision may acquire a private property right in the use of streets and ways laid down in the plat.[56] The Attorney General issued a similar opinion regarding the private rights that remain following the proceedings under the County Road Law or the former Plat Act.[57] However, these opinions seem to contradict the purpose of Section 227a, which vests title in the vacated property to those adjacent to the vacated property, assuming the legislature intended that title to be clear.[58]

Lot Split. Section 263 permits the splitting of individual lots, outlots, or other parcels of land in a plat, provided that no lot is split into more than four parts.[59] The lots must be split in accordance with local (zoning) ordinances and if the new parcels are not served by public water or sewer, they must be no smaller than permitted under the act. The act does not specify whether this is an administrative or legislative act. Many communities regulate lot splitting under their subdivision control ordinance.[60]

Urban Renewal Plat. As referenced in Section 104(c), municipalities are permitted to utilize the procedures under the Blighted Areas Rehabilitation Act[61] to reassemble lands both within and outside of a subdivision for purposes of redevelopment as an urban renewal project. Although little used in the recent past, this section may be a vehicle for redevelopment of brownfields and other areas that qualify under Act 344. The procedures for plat approval are the same as preparing a new proprietor's plat, but it avoids the process of filing a vacation action in court. Like any other amended plat, the urban renewal plat "sits on top" of the original plat. If it is later vacated, the original plat returns.[62]

The Impact of the Subdivision Revision Process

Practitioners and courts must appreciate the impact that the process of replatting and subdivision changes can have on their clients, the property owners affected, and the community. Except for the limited exceptions noted above, almost all other plat changes require the court action described above. This is true for both simple and complex plat corrections, even when the municipality is altering the plat for its own purposes. The process significantly affects development costs, which impacts all parties. As described above the process takes months to complete. It is common for title costs, legal proceedings, and replatting or amendment preparation and recordings to approach $10,000 for a simple uncontested action (and these matters are rarely simple). Where substantial objections cannot be resolved prior to a trial or hearing, or if the action requires alternate methods of service, or if utilities or other infrastructure improvements must be moved or accommodated, the costs and time can escalate rapidly. The unexpected time and cost necessary to complete these actions often complicate closings, delay final payoffs, and set back development schedules – frustrating the client and others.

To avoid the plat amendment process, parties will attempt to have the community "fix" the problem. Developers or prospective petitioners may request variances from lot size or other requirements under the zoning or subdivision control ordinance. If the project requires a road vacation, they may ask the municipality to vacate it for them (municipal vacation). Developers can also establish condominiums "over" the existing plat for reassembly; however, this further complicates the land ownership arrangements. Finally, the developer may attempt to develop as originally platted – often at densities in excess of what is now permitted or with standards that are inadequate for today's needs. Or they will look for "greener fields" in less developed rural or suburban areas.[63]

Conclusion

The subdivision revision process is clearly a paper chase that frustrates everyone involved. The procedural hurdles, time, and cost to replat or alter a portion of a plat make this an option of last resort. Conceptually it is simple to understand and explain; however, in application and use it is involved, costly, time-consuming, and often unwieldy. Clients rarely understand these factors, particularly when the revision itself is often only a small part of the means to a much larger end. Absent legislation to reform the plat revision process, little will occur to make this a welcome task for attorneys. The result will be greater expense for development and the community.

ENDNOTES

1. 225 Mich App 196; 570 NW2d 294 (1997).
2. The original bills in 1996 and 1997 dealt with the replatting process. Legislation was again introduced last year to reform the plat revision process; however, it died in committee. Senator Leon Stille is planning on reintroducing new legislation in 1999.
3. See, "Working with the New Rules of the Land Division Act," in the *Michigan Real Property Review*, Vol 24, No 2, p 113, (Summer, 1997) and numerous lay articles in *Planning and Zoning News* (February 1996, February, July 1997, January 1998 and others).
4. See, American Planning Association's *Zoning News*, "The Problem of Antiquated Subdivisions" (April 1997), which discusses this problem in detail.
5. 225 Mich App 196; 570 NW2d 294 (1997).
6. See, Section 104(a) and 102u for the definition of replat and the discussion that follows later in this article.
7. The Subdivision Control Unit is the administrative agency responsible for administering the act. It is located in the Department of Consumer and Industry Services, Corporation, Securities and Land Development Bureau, Property Development Division.
8. OAG 1958, No 3065, p 101 (April 1, 1958).

9. **Binkley v Agire**, 335 Mich 89; 55 NW2d 742 (1952).

10. **Binkley, supra**. (as to quiet title actions), and **Darnton v Hayes Township**, 22 Mich App 570, 177 NW2d 706 (1970) (as to declaratory judgment involving dedicated land).

11. Reference in the Land Division Act is made to either the "act" or to the specific section numbers of the act as appropriate. In addition, other statutory procedures may impact plat revisions – i.e., creating a condominium over the existing subdivision, abandonment or alteration of county or state roads, adjustments in summer resort associations, precise plats, urban renewal and brownfield development projects, and others; but these are not discussed at any length in this article.

12. MCL 560.221 to .229; MSA 26.430(221) to (229).

13. MCL 560.104 (a) and 102u; MSA 26.430(104 (a)) and (102u).

14. MCL 125.77a; MSA 5.3505(1).

15. MCL 560.226 and .255a to .257; MSA 26.430(226) and (255a) to (257).

16. MCL 560.201 to .213; MSA 26.430(201) to (213).

17. MCL 560.263; MSA 26.430(263).

18. See MCL 560.221 through .229; MSA 26.430(221) to (229), for the general Plat Changes procedures requiring court review. Also note that MCL 560.255a; MSA 26.430(255a) specifically calls for all revisions, alterations or vacations to occur in the county in which the land is situated.

19. See, MCL 560.222; MSA 26.430(222). Under the prior plat act there was a requirement that 2/3 of the proprietors had to join in the revision process. This was repealed by 367 PA 1978.

20. **Vivian v Roscommon County Board of Road Commissioners**, 433 Mich 511; 446 NW2d 161 (1989).

21. Municipal offices or county planning, mapping and description or equalization departments often have aerial photographs which are overlaid on the existing plat. These are very helpful in showing the purpose or impact of the subdivision change.

22. MCL 600.2932; MSA 27A.2932.

23. MCL 600.601, MSA 27A.601, which provides for a general jurisdiction to the circuit court.

24. MCL 560.224a; MSA 26.430(224a).

25. The Department of Consumer and Industry Services is the successor to the state treasurer, and functions as the state administrator through its Subdivision Control Unit, under Executive Order 1996-2 and previous executive orders.

26. See, MCL 560.226; MSA 26.430(226), which builds in an elaborate procedure to insure and maintain access and to deal with nuisances related to the use of the right-of-way for public access.

27. MCL 565.224a(2); MSA 26.430(224a(2)).

28. MCL 560.226(1)(c); MSA 26.430(226)(1)(c)).

29. Remember, the municipal and other local agency approvals are intended to secure some measure of local control. They represent the interests of others in the plat and community who may be affected by the change. For the same reason it is useful to include copies of the municipal and road commission resolutions, along with those consents already received as exhibits to the complaint.

30. Take this into account when filing the defaults with the court late in the afternoon; the court staff appreciate being advised in advance.

31. MCL 560.226(2); MSA 26.430(226)(2).

32. See, **Kraus v Department of Commerce**, 451 Mich 420; 547 NW2d 870 (1996), and **Vivian v Roscommon County Board of Road Commissioners**, 433 Mich 511; 446 NW2d 161 (1989).

33. MCL 560.226; MSA 26.430(226).

34. There are no specific court rules or other summary procedures for these actions.

35. MCL 560.228; MSA 26.430(228).

36. MCL 560.229; MSA 26.430(229).

37. **Sroka v State Treasurer**, 169 Mich App 616; 426 NW2d 726 (1988). The Attorney General takes the position that failure to prepare or file an amended plat by that date voids the order **nunc pro tunc**.

38. MCL 560.227a; MSA 26.430 (227a)(2).

39. **Kirby Terminal v City of Detroit**, 339 Mich 155; 64 NW2d 63 (1954).

40. MCL 560.227a; MSA 26.430 (227a)(1).

41. **Valoppi v Detroit Engineering & Machine Co.**, 339 Mich 674; 64 NW2d 884 (1954).

42. **Gondek v Neal**, 69 Mich App 73; 224 NW2d 361 (1976).

43. 256 Mich 181; 239 NW2d 359 (1931).

44. **RH Improvement Association v Thomas**, 374 Mich 175; 131 NW2d 290 (1965).

45. MCL 560.102u; MSA 26.430 (102)u.

46. MCL 560.104; MSA 26.430 (104).

47. MCL 560.201; MSA 26.430(201).

48. MCL 560.201a; MSA 26.430(201a).
49. MCL 560.201b; MSA 26.430(201b).
50. MCL 560.204; MSA 26.430(204).
51. MCL 560.209; MSA 26.430(209).
52. MCL 560.203; MSA 26.430(203).
53. MCL 560.226; MSA 26.430(226).
54. MCL 560.255a; MSA 26.430(255a).
55. MCL 224.18; MSA 9.118.
56. 117 Mich App 125; 313 NW2d 621 (1982).
57. OAG No 1736, p 278 (January 4, 1954), referencing Section 224.18, CL of 1948 and Section 560.65, CL of 1948.
58. MCL 560.227a; MSA 26.430(227a).
59. MCL 560.263; MSA 26.430(263).
60. Some have suggested that lot splits are only permitted if there is a lot splitting ordinance, as Section 263 reads: "No lot ... shall be further partitioned or divided unless in conformity with the ordinances of the municipality." But no court has ruled on that issue.
61. MCL 125.77a; MSA 5.3505(1).
62. OAG 1958, No 3065, p 101 (April 1, 1958).
63. Since many of these problems often occur in the inner core of developed communities, this results in prospective development looking at alternate sites, often further out. This frustrates public policy and does not foster good planning by discouraging in-filling of development and the correction of out-of-date land use standards.

ARE THE RULES CHANGING? NAVIGATING REASONABLENESS IN COMMERCIAL LEASING

by *David A. Kreis** and *Aaron D. Sims***

INTRODUCTION[1]

The commercial leasing arena has begun to see a movement away from the traditional common-law rule on assignability, which gave the landlord the sole discretion to rely on an assignment clause in withholding its consent to tenant subletting and assigning.[2] Many courts are now refusing to enforce assignment provisions if the landlord acts unreasonably.[3] The intent of this article is to outline the traditional majority and emerging minority views regarding assignment provisions, discuss various doctrines other jurisdictions have used to interpret the enforceability of these provisions, and review current Michigan law.[4]

THE TRADITIONAL AND MICHIGAN VIEW

The lease transaction has been treated as a conveyance of an estate in land under property law since the fifteenth century.[5] Under traditional property law a tenant has been free to alienate all or part of its leasehold interest either through an assignment or sublease.[6] Generally, unreasonable restraints on alienation have been strongly disfavored in Michigan as well as other states[7] and have been strictly construed against the party seeking to enforce such restrictions.[8]

* David A. Kreis is a graduate of the Detroit College of Law at Michigan State University and a member of the Real Property Law (Commercial Leasing and Management of Real Property Committee), Business and Environmental Law Sections of the State Bar of Michigan. He is also a member of the Real Property Probate and Trust Law Section of the American Bar Association and is currently completing his LL.M. in Corporate Finance at Wayne State University School of Law.

** Aaron D. Sims is a graduate of the Detroit College of Law at Michigan State University and is an associate with the law firm of Moblo & Fleming, P.C. in Novi, Michigan. He is a member of the New Lawyers Committee of the Oakland County Bar Association and a member of the Litigation Law Section of the State Bar of Michigan.

Landlords have been permitted, however, to place limited restrictions on the assignment and sublease of leasehold property, ostensibly to protect their investment in the property.[9] The leading Michigan case outlining the traditional rule is **White v Huber Drug Co.** The **White** court held that a consent clause in a lease is a "fair and reasonable covenant."[10] Should the landlord choose to restrict tenant assignment, the landlord must explicitly reserve that right within the lease. This explicit reservation is commonly known as the sole discretion standard. If the landlord reserves this right, the landlord may arbitrarily decline to grant its consent for any reason. The **White** court also held that when a landlord clearly reserves consent, the landlord may, without regard to the qualifications of the proposed assignee, withhold its consent as it wishes. The predominant rationale for this result is that the landlord, as the fee simple owner of the leasehold property, should be free to decide to whom any or all of the leasehold interest is assigned. Furthermore, the **White** court held that the trier of fact should not second-guess the landlord or make any determination on the acceptability of the proposed tenant.

While a landlord may negotiate for a sole discretion standard, tenants often insist that the landlord's consent will not be unreasonably withheld. This more equitable reservation is commonly known as the reasonable standard. However, difficulty arises when the landlord reserves the right to consent to the assignment, but the language is silent regarding the type of consent reserved. The majority of jurisdictions interpret this reservation, known as a silent consent provision, as granting the landlord the sole discretion to withhold its consent. This article will explore differing interpretations of this silent consent provision. The traditional view, held by a diminishing majority of jurisdictions, is that, in the absence of specific lease language imposing reasonableness, a landlord may withhold consent to the assignment of a lease by the tenant for any or no reason at all.[11]

THE MINORITY BUT EMERGING TREND

All transfers of real property involve some aspect of contract law, inevitably causing the principles of contract law and property law to come into conflict. Many jurisdictions have begun to move away from the traditional arbitrary sole discretion approach based in property law to a more equitable or "reasonable" approach based in contract law. Although this new minority contract view still permits the landlord to reserve the right to withhold its consent for any reason, the landlord must specifically reserve this right. The growing minority has held that should the landlord fail to specifically reserve this right, the landlord may only withhold its consent to a tenant assignment based upon "reasonable" considerations.[12]

Many of the existing cases[13] have dealt with assignment clauses requiring the tenant to obtain the written consent of the landlord prior to the proposed assignment. These cases affirm the traditional property law rule that the landlord may arbitrarily withhold its consent. However, many of these cases conclude that contemporary society needs a more equitable outcome, especially for the tenants. That is, many of these jurisdictions are adopting a basic "good faith" or "reasonable" approach based in contract law when determining a landlord's right to refuse to grant its consent in silent consent clauses.[14] Essentially, these courts have implied a reasonableness requirement on the landlord, *even if the parties freely negotiate that the* landlord has discretion to give consent. Although attempting to be fair to both parties, the courts have apparently tipped the scales in favor of the tenant in reviewing the contract, not at the time of its execution, but at the time the landlord refuses its consent.

In light of this emerging trend implying a reasonableness standard within the silent consent clause, landlords have been placed at a disadvantage. When courts interpret the lease after the parties have freely negotiated a sole consent clause, they are failing to honor the parties' bargained-for agreement, that the landlord may make decisions based upon future events, namely consenting to the assignment to a new tenant. It is difficult to ascertain whether landlords will be able to continue to use lease language permitting them to make future decisions about the proposed new tenant. Courts adopting this emerging reasonableness trend have primarily based their holdings on: (1) concerns over restraints on alienation, (2) the "freely negotiated" standard proposed by the Restatement of Property, Second, and (3) concerns of good faith, commercial reasonableness and fair dealing.

1. Restraints on Alienation

The common-law doctrine of restraints on alienation ("restraint doctrine") has long been used to reconcile the conflict between property and contract law. Courts often used the restraint doctrine to review provisions that the court disfavored, such as the due-on-sale provisions of the 1980's, even if the provision was clearly written and unambiguously drafted.[15] Courts have also used the doctrine to review the reasonableness of provisions it felt were unfair or harsh.[16] Although fundamentally different, due-on-sale clauses offer some insight into the mood of the courts as they interpret contract clauses in the real property context. It is worth noting that a due-on-sale clause is not

a true restraint on alienation, but only a financial consequence of the current economic conditions, while a consent clause that may limit a tenant's right to completely alienate its leasehold is a true restraint on alienation.[17]

In keeping with the due-on-sale application, courts use the restraint doctrine to assure the reasonableness of the silent consent clause. A leading consent provision case is **Kendall v Ernest Pestana and Co.**[18] The **Kendall** court based a portion of its decision on the restraint doctrine by utilizing a balancing test of the parties' interests at the time the restraint had been imposed by the landlord, *i.e.*, at the time the landlord refused its consent. The **Kendall** court neglected to consider the bargain of the parties at the time the lease was executed.

Attorneys representing landlords should be prepared to defend the landlord's decision not to consent on the basis of the facts at the time the landlord refused its consent. The landlord should not rely solely on the underlying lease for support, but should take the time to emphasize specific economic considerations affecting the increased risk to the landlord should the tenant be permitted to assign the lease.[19] The landlord might also draft certain economic thresholds into the lease, in an effort to further justify its refusal at a later date.[20]

Often a basis for a landlord's refusal to consent to an assignment is that the current market will bring significantly higher rentals, sometimes referred to as the "bonus value." The **Kendall** court did suggest, albeit in a footnote,[21] that there may be some circumstances in which the landlord may retain the increased value of the leasehold during a rising market. However, the court was quick to emphasize that it is the parties' responsibility to make their own arrangements regarding the allocation of appreciated rentals. Apparently the **Kendall** court, while holding that the consent clause restrained alienation and was repugnant of public policy, further decided that the parties could contract around the public policy considerations and agree in advance to allocate any increased bonus value.

Even in light of the apparent conflict between the public policy considerations and property law principles, the parties should still attempt to negotiate specific provisions preserving any potential "bonus value," especially in today's rising market.[22] While it is almost impossible for the parties to anticipate all the factors the landlord may consider when deciding the acceptability of a new tenant, the more specificity drafted into the lease regarding the reasonableness of the consent clause will not only increase the parties' comfort level regarding their negotiated benefit of the bargain but will also decrease litigation.

2. Restatement of Property, Second

Another basis courts have utilized to invalidate silent consent provisions is the "freely negotiated" doctrine as set forth in the Restatement of Property, Second ("Restatement").[23] The Restatement provides that a landlord may not unreasonably withhold consent to a proposed assignment unless a "freely negotiated" provision gives the landlord the absolute right to withhold consent. In other words, this approach implies a reasonableness standard in silent consent clauses. While very similar to the restraint on alienation doctrine, this approach is less rigid from a public policy standpoint, permitting the parties to agree to give the landlord sole discretion if the provision is "freely negotiated."[24] Many courts have begun to impliedly or expressly adopt the Restatement approach when reading a reasonableness standard into silent lease clauses. In **Basnett v Vista Village Mobile Home Park**, a Colorado court, expressly adopting the Restatement view, held that the Restatement approach is preferable, since it incorporates the principles of fair-dealing and reasonableness and also preserves the parties' freedom to contract.[25] Furthermore, in **Tucson Medical Center v Zoslow,** an Arizona court holding in favor of the tenant expressly adopted the Restatement, which was consistent with Arizona's contract interpretation of good faith and fair dealing.

Few, if any, of the jurisdictions adopting the Restatement's reasonableness standard have adequately defined a "freely negotiated" consent provision. Of particular concern is that "freely negotiated" can be interpreted numerous ways. One such interpretation may permit a tenant to avoid the consent clause either for a price or other negotiated contract provisions. Assuming that a landlord may consider leasing the premises at a lower rate for inclusion of a reasonable consent clause, many landlords would still find it difficult to concede relinquishing their right to control who will ultimately occupy the property.

Still other interpretations suggest that the parties could separately initial the consent provision or draft the consent clause in a conspicuous manner or even in a separate document, all of which could make the clause less "unconscionable" to the tenant. However, this may lead to a holding that the consent provision was not part of the overall negotiated lease, but instead was an addendum clause. Even the converse may surface in that a court could hold the other lease provisions were not "freely negotiated," thereby opening the door to further litigation.[26] While these equitable interpretations may support attaching a "fully disclosed" rationale to the Restatement's "fully negotiated" standard, they nevertheless lead to further confusion.

A "freely negotiated standard" may needlessly open the door to judicial interpretation. Whether a clause was freely negotiated would ultimately be a fact question. Would the consent language be sufficient? Would making the consent language more conspicuous be enough? Would a "fully disclosed" silent consent clause be adequate to satisfy the implied reasonableness required by the "fully negotiated" standard? According to the official comments to the Restatement, although the consent provision may be conspicuously drafted, such a provision cannot be "freely negotiated where [the tenant] has no significant bargaining power in relation to the terms of the lease."[27] Does this mean that the tenant must possess significant bargaining power with respect to the entire lease for the silent consent clause to be valid? Again, although the law is not settled in this area, the parties would be wise to at least attempt to "fully disclose" the silent consent provision in an effort to comply the Restatements "freely negotiated" standard.

Instead of defining the "freely negotiated" provision or what is meant by "significant bargaining power," some courts adopting the Restatement approach discuss the reasonableness of the refusal to consent. According to the Restatement, comment g, reasonable consent must be objective and based on some sensible and significant concerns and may not be based on mere caprice, whim or personal prejudice. The **Tucson Medical Center** court defined examples of good faith and reasonable objections to consent as an inability to fulfill the terms of the lease, financial irresponsibility or instability, unsuitability of the premises for the intended use, or the intended lawful or undesirable use of the premises.[28] Other objections have also been held reasonable, such as the Arkansas Supreme Court holding in **Warmack v Merchants National Bank of Fort Smith** that the effect of the proposed new tenant's use on the remainder of the shopping center, sometimes referred to as "tenant mix," was a reasonable objection.[29] Whatever the court's reasoning in jurisdictions that adopt the Restatement approach, the parties to a commercial lease should be aware of the potential ramifications that may result from the application of the Restatement view.

3. Good Faith and Fair Dealing

A well accepted principle in property law is that a lease is more than a conveyance of real estate; a lease is also a mutually dependant contract between the landlord and tenant.[30] Therefore, contract law must be considered when interpreting the obligations of the parties under a lease agreement. Inherent in every contract is an implied obligation of good faith and fair dealing.[31] Good faith and fair dealing have been defined, *inter alia*, as "honesty in fact and the observance of reasonable commercial standards of fair dealing," "honesty in fact in the conduct or transaction concerned," and "faithfulness to an agreed common purpose and consistency with the justified expectations of the other party."[32] In the commercial lease context, courts have relied on this implied obligation, especially when construing the silent consent clause language. In fact, many courts have taken a decidedly more liberal, and often pro-tenant, approach. For instance, some courts' rationale when interpreting such a contract is that each party must assume that the other party will exercise its duties under the contract in a commercially reasonable manner, *i.e.*, act within the reasonable expectations of the other party.[33]

Applying this standard to the commercial leasing context, the **Kendall** court based a large part of its holding on an attempt to define the boundaries of good faith and reasonableness with respect to the consent provisions. The court held that the trier of fact should determine the reasonableness of the consent withholding based on the nature of the occupancy, whether the new tenant would require modifications or alterations to be made to the demised premises, suitability and legality of the proposed use, and the financial capacity of the proposed tenant.[34]

Another leading silent consent clause case basing its holding on the commercial reasonableness standard is **Julian v Christopher**.[35] In **Julian**, the Maryland Court of Appeals not only held that the landlord could not withhold its consent to obtain the "bonus value," but also determined that the landlord could not seemingly mislead the tenant into believing that it would reasonably grant its consent to a future assignment and then unreasonably withhold its consent at the time of the proposed assignment. On its face, the **Julian** holding may be easy to comply with – simply prohibit all assignments, thus providing the tenant no basis in which to believe the landlord might agree to consent. However, although the "freely negotiated" dilemma under Restatement theory still exists to some extent, the **Julian** approach may offer a middle ground by suggesting that a "fully disclosed" consent provision may meet the "freely negotiated" test. The rationale is that the basis of the **Julian** court decision is that the tenant not be misled and a fully disclosed consent provision leaves little room for misleading.[36]

IS MICHIGAN MOVING TOWARD IMPLIED REASONABLENESS? LAFOND V RUMBLER

LaFond v Rumbler,[37] a recent Michigan court of appeals case, may have far reaching effects on Michigan

landlords and tenants. Although the **LaFond** decision concerned a land contract provision, the court of appeals' reasoning and application of the law to a vendor's consent rights strongly parallels the commercial lease context and may indicate a change in Michigan's interpretation of its traditional silent consent view.

In **LaFond**, the plaintiff-vendee in a land sale contract brought suit against the defendant-vendor arguing that the vendor unreasonably restrained the alienation of the vendee's land contract interest. The vendor agreed to sell the property for $60,000 to the vendee. The parties agreed there would be a $20,000 deposit and the remainder would be payable through an installment sale contract. The vendor then found another potential purchaser for the property willing to pay $80,000, but who could only make a $10,000 down payment. The vendor, needing a large cash deposit, agreed with the vendee that the vendor would sell the property to the vendee and the vendee would immediately sell the property to the new purchaser for $80,000, the profits to be shared equally by the vendor and vendee. The vendor then contracted with the vendee to sell the property for $60,000 and included a broad provision stating that should the vendee sell the property within a specified period of time, the parties would share the profit equally. The profit-sharing provision also included a clause granting the vendor the sole discretion to consent to the proposed sale. The contract further stated that the vendor had the absolute right to reject any offer made to the purchaser. The vendee then attempted to sell the property on land contract to the $80,000 buyer but the vendor, needing the cash, would not consent unless the sale was for cash. The vendee believed, and argued, that the consent provision unduly restricted the purchaser's right to sell the property at a fair and reasonable price.

The court held that the consent clause unreasonably restrained alienation of the property by restricting the vendee's right to sell the property at its chosen price.[38] In continuing to apply a reasonableness doctrine to restraints on alienation, the **LaFond** court adopted the holdings of **Lemon v Nicolai**, **Sloman v Cutler**, and **Pellerito v Weber**,[39] all of which outlined, in some respect, the reasonableness required by a party attempting to restrict alienation in some fashion. Without fully analyzing the **Lemon**, **Sloman**, and **Pellerito** holdings, the **LaFond** court simply held that the vendor's attempt to unreasonably withhold consent to the sale in an effort to extricate a cash sale violated the vendor's duty to act reasonably.

The court's holding continued Michigan's application of the reasonableness doctrine as applied to restraints on alienation.[40] As reasserted by the **LaFond** court, Michigan follows the common-law rule against unreasonable restraints on alienation.[41] That is, provided one has a fee simple interest in the land, a "restriction on his right of alienation is void as repugnant to the grant.... [However,] [w]here the grantor retains an interest in the property granted, such as a reversionary interest to him as lessor, the interest generally will support the imposing of a restriction on alienation."[42] Further, the **LaFond** court, distinguishing the land contract assignment transaction from a fee simple conveyance transaction,[43] considered the land contract vendor's right to protect its reversionary interest and the security under the contract.[44] Analogous to the land contract reversionary interest, a lease is a transaction in which the owner of an interest in land transfers the right of possession to another while retaining a reversionary interest.[45] Therefore, the **LaFond** court's rationale and the vendor's right to protect its security argument may easily be applied to the landlord and tenant in the commercial leasing context.

Furthermore, and more importantly, the **LaFond** court focused on the "reasonableness" of the restraint by adopting the Restatement of Property's definition of reasonableness as applied to restraints on alienation.[46] That is, any restraint language, whether permissible or not, must always be reasonable.[47] According to **LaFond**, reasonable restraints include the prevention of waste or impairment to the property and the loss of security. Also, the court's reasoning (regarding the vendor's refusal to consent because the vendor needed cash) may be applied to the lease context where the landlord refuses consent in an effort to obtain bonus value, which has often been held an unreasonable objection to consent.

The **LaFond** case may indicate Michigan's departure from the traditional common-law view on restraints on alienation within the land contract arena and may also be indicative of where the courts may be leaning with regard to the implied reasonableness doctrine within the commercial leasing context. Parties should be aware of recent trends and draft their provisions accordingly.

RECOMMENDATIONS

The results of the reasonableness approach appear to be mixed. Although the reasonableness standard appears to benefit tenants, the costs of landlord forbearance of this right will likely be passed on to tenants to the extent that landlords can anticipate the costs of compliance. Furthermore, since the standard of reasonableness is rarely defined the same way, this new standard invites litigation. The result will likely be a restriction in tenant choice rather than expansion of the equitable contract doctrine intended by the courts.[48]

In addition, the new minority adoption of the implied doctrine of reasonableness not only invites litigation, it creates uncertainty. Both tenants and landlords have traditionally negotiated, interpreted, and used the majority and traditional rule of the silent consent doctrine to mean exactly what it purports to say – that the landlord may withhold its consent – for whatever reason it chooses. Nevertheless, recognizing the parties' freedom to contract and the judicial willingness to read a reasonableness standard into silent consent clauses, it would be in the parties' best interests to draft specific provisions outlining what the parties agree to be reasonable reasons to refuse consent to an assignment. As outlined above, among the factors the **Kendall** court considered relevant in determining reasonableness were the financial standing of the proposed new tenant, the nature of the occupancy, any modifications the new tenant may need to make to the premises, and the suitability and legality of the proposed use.[49] Although **Kendall** rejected, as a reasonable grounds for refusal to consent, the landlord's attempt to realize an increased value of its property more than its original bargain, the court's footnote does provide some contractual relief to parties desiring to allocate the "bonus value." To protect the landlord's ability to retain any increased rents and to provide assurance to the tenant of landlord consent to an assignment, at the time when the tenant desires to assign the premises the parties should negotiate a provision addressing the possibility of increased value of the leasehold. The parties could build in and draft periodic rent increases from the beginning or address the distribution of any increased rent, including percentage rent, received through subletting or assignment.[50]

Other grounds that the courts may consider "reasonable" would be minimum financial standards of financial capacity that include creditworthiness, net worth and history of profitability in the proposed business. The parties should also agree on the type of substitute use, if any, or the types of products that the proposed tenant sells. Still another consideration may be the "tenant mix" or the composition of the type of tenants in a location. In light of the judicial tendency to imply a reasonableness standard into commercial leases, it would be in the parties' best interests to draft specific lease provisions addressing the reasonableness of silent consent clause provisions.

CONCLUSION

Courts are beginning to read a reasonableness requirement into commercial lease consent provisions. Although the new reasonableness approach has yet to be adopted in Michigan and is far from consistent in other jurisdictions, it is best not to rely on the dwindling majority position. In an effort to anticipate the direction that the Michigan courts are heading, in light of the **LaFond** decision, parties should consider how other jurisdictions utilize the reasonableness doctrine when drafting consent provisions.

ENDNOTES

1. The authors would like to gratefully acknowledge and thank Lawrence R. Shoffner and Mark P. Krysinski from the firm of Jaffe, Raitt, Heuer and Weiss, P.C., Kenneth F. Posner, Attorney at Law, and James N. Candler from Dickinson Wright PLLC for their assistance in editing this article and Richard A. Sundquist from the firm of Cross Wrock, P.C. for his research assistance.

2. The difference between a sublease and an assignment is not critical for the purposes of this article. Nevertheless, there are some important differences, mainly that an assignment is a transfer of the tenant's entire leasehold interest and a sublease is a transfer of something less than all of the leasehold interest. **See generally** Milton R. Friedman, **FRIEDMAN ON LEASES**, § 7.401, 7.501 (1990).

3. **Kendall v Ernest Pestana, Inc.**, 709 P2d 837 (Cal 1985) (adopting the restraint on alienation doctrine and the commercial reasonableness standard); **Warmack v Merchants National Bank of Fort Smith**, 612 SW2d 733 (Ark 1981) (adopting the Restatement (Second) Property); **Julian v Christopher**, 575 A2d 735 (Md 1990) (adopting the commercial reasonableness standard).

4. **See Id. See also Warmack v Merchants National Bank of Fort Smith**, 612 SW2d 733 (Ark 1981); **Hendrickson v Fredericks**, 620 P2d 205 (Alaska 1980) (dicta); **Homa-Goff Interiors, Inc. v Cowden**, 350 So2d 1035 (Ala 1977); **Gamble v New Orleans Housing Mart, Inc.**, 154 So2d 625 (La App 1963); **Boss Barbara v Newbill**, 638 P2d 1084 (NM 1982); **Fernandez v Vasquez**, 397 So2d 1171 (Fla 1981); **Comini v Union Oil**, 562 P2d 175 (Or 1977); **Newman v Hinky Dinky Omaha-Lincoln, Inc.**, 427 NW2d (Neb 1988); **Julian v Christopher**, 575 A2d 735 (Md 1990); **Jack Frost Sales v Harris Trust & Sav. Bank**, 433 NE2d 941 (Ill App 1982) (citing **Arrington v Walter E. Heller International Corp.**, 333 N2d 50 (Ill App 1975)); **Shaker Building Co. v Federal Lime & Stone Co.**, 277 NE2d 584 (Ohio 1971); **but see**; **F & L Center v Cunningham Drug Stores**, 482 NE2d 1296 (Ohio App 1984); **First Federal Savings Bank v Key Markets**, 559 NE2d 600 (Ind 1990); **Vaswani v Wohletz**, 396 SE2d 393 (Ga 1990); **Snortlan v Larson**, 364 NW2d (ND 1985); **Danpar Assocs. v Somersville Mills Sales Room, Inc.**, 438 A2d 708 (Conn 1980); **B & R Oil Co. v Ray's Mobile Homes, Inc.**, 422 A2d 1267 (Vt 1980); **Mann Theatres v Mid-Island Shopping Plaza Co.**, 464 NYS2d 793 (NY App 1983); **Iseby v Crews**, 284 SE2d 534 (NC App 1981).

5. Roger A. Cunningham, William B. Stoebuck, & Dale A. Whitman, **THE LAW OF PROPERTY**, Second Edition, § 6.1, p. 249 (West 1993).

6. **RESTATEMENT (SECOND) PROPERTY**, § 15.2 (2) (1986).

7. **See Moffit v Sederlund**, 145 Mich App 1 (1985); **Albro v Allen**, 434 Mich 271 (1990); **Stenke v Masland Development Co, Inc**, 152 Mich App 562 (1986); **see generally** Robert L. Kehr, **The Assignability of Commercial Leases**, 9 REAL EST. L.J. 197, 199 (1981).

8. **White v Huber Drug Co.**, 157 NW 60 (1916); **see also Friedman, supra** note 2 at § 7.303.

9. **White v Huber Drug Co.**, 157 NW 60 (1916).

10. **White** at 215.

11. **See** Paul J. Weedle, **Pacific First Bank v New Morgan Park Corporation: Reasonable Withholding of Consent to Commercial Lease Assignments**, 31 WILLAMETTE L. REV. 713, 715 (1995). As mentioned in the text, while a landlord may negotiate for a sole discretion standard, tenants often (while conceding that the landlord retains discretion to grant its consent) negotiate that the landlord's consent will not be withheld unreasonably. In other words, if the landlord and tenant agree that the landlord must not unreasonably withhold its consent to an assignment, the landlord must act reasonably. Still, the majority view in the United States and Michigan remains; provided the parties negotiate a sole discretion standard, the landlord may withhold its consent for any reason whatsoever.

12. **Id.**

13. **See generally, Funk v Funk**, 633 P2d 586 (Idaho 1981); **Tucson Medical Center v Zoslow**, 712 P2d 459 (Ariz App 1985); **Basnett v Vista Village Mobile Home Park**, 699 P2d 1343 (Colo App 1985), **rev'd on other grounds**, 731 P2d 700 (Colo 1987); **but see also, Bert Bidwell v LaSalle & Schiffer**, 797 P2d 811 (Colo App 1991).

14. **See infra** Part 2.

15. **See** Martha Wach, **Withholding Consent to Alienate: If Your Landlord is in a Bad Mood, Can He Prevent You From Alienating Your Lease?**, 43 Duke L. J. 671, 672 (1993).

16. **See** The Commercial Property Lease, American Bar Association, Ch.15, **Coping with the New Rules on Assignability of Commercial Leases**, Patrick A. Randolph (1993).

17. **See generally** Wach, **Supra** Note 15.

18. 709 P2d 837 (Cal 1985).

19. **See** Recommendation section, **infra**.

20. **See generally**, ALI-ABA Commercial Real Estate Leases § 1.01 (1997) (discussing assignment clauses, Joel R. Hall, Associate General Counsel, The Gap, Inc., Commercial Real Estate Leases, Selected Issues in Drafting and Negotiating in Current Markets, American Law Institute – American Bar Association (ALI-ABA) Course of Study, Materials, June 5-6, 1997 Chicago, IL.)

21. **Kendall v Ernest Pestana, Inc.**, 709 P2d 837, 848 (Col 1985).

22. **See generally** ALI-ABA Commercial Real Estate Leases, § 1.04-2 (1997).

23. **Restatement (Second) Property**, § 15 (2) (1986).

24. **Id.**

25. 699 P2d 1343, 1346 (1987), **rev'd on other grounds** 731 P2d 811 (1991).

26. Randolph, note 16, at 196. Randolph is a professor at the University of Missouri and operates a discussion group on commercial leasing at http://cctr.umkc.edu/dept/dirt.

27. **Id.** at 197.

28. **Tucson Medical Center** at 462.

29. 612 SW2d 733, 735 (1981).

30. **Fernandez v Vasquez**, 397 So 2d 1171, 1173-74 (Fla. Dist. Ct. App. 1981).

31. **See generally** Thomas A. Diamond & Howard Foss, **Proposed Standards for Evaluation When the Covenant of Good Faith and Fair Dealing Has Been Violated: A Framework for Resolving the Mystery**, 47 HASTINGS L.J. 585 (1996); **Dumas v Auto Club Ins. Ass'n.**, 437 Mich 521, 473 NW2d 652 (1991).

32. **See UNIFORM COMMERCIAL CODE** § 1-201 (19) (1990); **Atlas Auto Rental Corp. v Weisberg**, 281 NYS2d 400 (N.Y. App. Div 1967); **Restatement (Second) Contracts**, § 205, cmt. A (1981); **Dumas v Auto Club Ins Ass'n**, 437 Mich 521, 473 NW2d 652 (1991).

33. **See Julian v Christopher**, 575 A.2d 735 (Md. 1990); **see also Newman v Hinky Dinky Omaha-Lincoln, Inc**, 427 NW2d 50 (Neb. 1988).

34. **See Kendall, supra**, note 21.

35. 575 A2d 735 (Md 1990).

36. **See** Jon M. Laria, **Julian v Christopher: New Standards for Landlords' Consent to Assignment and Sublease**, 50 Md. L. Rev. 464 (1991).

37. 574 NW2d 40 (1998) (decided November 18, 1997 and released for publication February 10, 1998).

38. **See** Marcia M. McBrien, **Land Sale Contract Resale Clause Void: Needed Seller's OK**, Mich. Law. Wkly., Dec. 1, 1997, at 1, 36 (reviewing **LaFond v Rumbler**).

39. **Lemon v Nicolai**, 33 Mich App 646, 190 NW2d 549 (1971); **Sloman v Cutler**, 258 Mich 372, 242 NW 735 (1932); **Pellerito v Weber**, 22 Mich App 242, 177 NW2d 236 (1970).

40. **LaFond, supra** note 37, at 42.

41. **See Braun v Klug**, 335 Mich. 691, 57 NW2d 299 (1953); **Moffit v Sederlund**, 145 Mich. App. 1, 378 NW2d 491 (1985); **Pellerito v Weber**, 22 Mich App 242, 177 NW2d 236 (1970); **Lemon v Nicolai**, 33 Mich App 646, 190 NW2d 549 (1971).

42. **Sloman v Cutler**, 258 Mich 372, 374-75, 242 NW 735 (1932).

43. **LaFond, supra** note 37, at 43.

44. **Id.** (citing **Sloman v Cutler**, 258 Mich 372; 242 NW 735 (1932) (considering a land contract provision against assignment by the purchaser without the written consent of the vendor as a valid provision and not a restraint on alienation)); **Jankowski v Jankowski**, 311 Mich 340, 18 NW2d 848 (1945).

45. **Restatement Property**, § 9 (1936); **See also** Weedle, **supra** note 11.

46. **See Pellerito**, at 245; **Restatement Property**, § 406, p. 2406 (1944).

47. **See Pellerito** at 245; **Lemon** at 648-49.

48. **See generally** Randolph, **supra** note 16.

49. **Kendall, supra** note 21, at 848.

50. **See** ALI-ABA Commercial Real Estate Leases § 1.01 (1997).

THE "LAND CONTRACT MORTGAGE" – IT'S BRAND NEW!

by *Gary A. Taback, Esquire**

For many years, Michigan has provided by statute for the mortgaging of real estate interests. Michigan has also provided for a security interest in personal property; first by way of a chattel mortgage, and more recently by way of a security agreement, under the Michigan Uniform Commercial Code (the "UCC"). The mortgage and the security agreement provide the requisite vehicles, in most situations, to pledge collateral as security for a debt or obligation. However, some states, including Michigan, provide a method of buying and selling real estate, generally called a "contract for deed," or in Michigan nomenclature, a "land contract." The land contract sale divides the ownership and economic considerations between the seller ("Vendor") and purchaser ("Vendee"). The Vendor retains legal title and the Vendee obtains equitable title (the right to obtain legal title upon payment of the land contract in full). The Vendor obtains the income-stream of the land contract payments and the Vendee obtains the right of possession and related rights, such as the right to rental income from a tenant occupying the property. These economic benefits, as well as their respective market value equity in the real estate, are assets which Vendors and Vendees should be able to pledge as collateral for a loan in the same way as mortgages upon fee-ownership interests ("Real Property Mortgages"); however, these assets to date were generally illiquid because most commercial lending institutions have historically been unwilling to loan money secured by a Vendor's or Vendee's land contract interest. The financing of land contract interests has been subject to many legal uncertainties. It is unclear whether a document purporting to take as security a land contract interest will be treated as security upon a real property interest or a personal property interest. It was equally unclear whether foreclosure and enforcement remedies were governed by mortgage foreclosure laws or laws involving personal property under the

* Gary A. Taback is a principal in the Southfield office of Sommers, Schwartz, Silver and Schwartz P.C., specializing in all aspects of real estate law, including commercial real estate financing. He is a former chairperson of the Real Property Law Section of the State Bar of Michigan, a founding member of the American College of Real Estate Lawyers, and a fellow of the American College of Mortgage Attorneys. He has been a contributor to the **Review** on several previous occasions and a frequent Homeward Bound speaker.

UCC. Thus, institutional lenders, such as banks and credit unions, were reluctant to lend money on the security of a land contract interest. In some cases, the lender simply would not lend on that proffered security. In other cases it would lend, but would extract a higher interest rate than on a conventional mortgage loan, for its perceived greater risk in taking such land contract "security."

PRIOR TO ACT 106

In the early years of this writer's legal career, a loan officer of an institutional lender client called and advised he was about to make a loan to a borrower to be secured by a purchaser's (Vendee) interest in a land contract. He asked for assistance in documenting the loan, and delivered that lender's "quick and dirty" form. It was entitled "Assignment of Purchaser's Interest in Land Contract as Security." This form purported to take a "security interest," though it did not specify that it was a UCC interest, nor did it read as a Mortgage. This writer was told to simply fill in the blanks, have it executed, witnessed and notarized, and then to have it recorded with the county register of deeds. This "form" immediately appeared to be deficient in several respects. Assuming for the moment that the purchaser's interest in a land contract is, in fact, a personal property interest (i.e., not an interest in real estate), in Michigan, the UCC, Article 9, would apply, and the "Assignment" would have to meet the minimum requirements for a security agreement and be filed centrally with the State of Michigan, Secretary of State, UCC Section, to perfect this statutory security interest. But this security interest has at least two shortcomings. First, it is argued that for at least some purposes, the land contract Vendee is said to have "equitable title" to the real estate (the land contract Vendor retaining "bare legal title"). If this is the case, should not the lender be taking a mortgage? And, second, and more problematic, should theVendee/ borrower pay off the land contract, and thereby acquire title to the real property, the lender, with this "Assignment" of a land contract interest, would be left with no security thereafter, because the assignment is only a security interest in personal property (the land contract is a contract) whereas, a mortgage (with warranty language) provides an automatic mortgage lien on after-acquired title, not part of the "Assignment."

The writer's suggestion to his lender client was to take both an "Assignment of Purchaser's Interest in Land Contract as Security" **and** a mortgage. Thereafter, there evolved a new form for this particular institutional lender, entitled "Assignment of Land Contract as Security and Mortgage." It purported to be a UCC security interest in the land contract (a UCC-1 Financing Statement was signed by the borrower, and it was filed with the State); and a Mortgage on the Vendee/borrower's real estate interest in the property under contract, be it "equitable" title, or legal fee simple title (and this Assignment/Mortgage was recorded in the county where the real estate was located).

Assuming this Assignment/Mortgage constitutes a valid perfected security interest in a land contract Vendee's interest (both personal property **and** real property interests), and it has been generally believed to so be, this security vehicle falls well short of that afforded to a conventional mortgage on real estate. One major shortfall is that under Michigan law a lender employing such an Assignment/Mortgage cannot obtain an assignment of rents. The Michigan Assignment of Rents Statute (MCLA § 554.23, et.sec.) only affords an assignment of rents to a mortgagee of a "mortgage on commercial or industrial **property**." Query: is an Assignment/Mortgage of a land contract Vendee's interest this intended **property**? This question does not appear to have any common law legal precedent. Further, the assignment of rents statute is in derogation of the common law and, therefore, there can be no common law assignment. At common law it is thought that rents and profits are an integral part of possession, and a party lawfully in possession is entitled to remain in possession until he/she has been legally ejected, i.e., after a writ of restitution has been issued. This would include the period during default, foreclosure, and the statutory redemption periods. Therefore, there is a school of thought that at common law there can not be a valid assignment of rents as security that would permit the secured party the rent and profits prior to a writ of restitution; that is why the Michigan Assignment of Rents Statute with respect to mortgages and trust deeds is said to be in derogation of the common law. Another major shortfall has been the foreclosure procedure under the Assignment/Mortgage. If you foreclosed utilizing the procedures provided in Article 9 of the UCC, the foreclosing party would, at best, acquire title to the Vendee/ borrower's personal property interest in the land contract, but not the Vendee/borrower's real estate interest in the land contract property. If you desired to foreclose under Michigan's real estate foreclosure statutes, you could not foreclose by advertisement, because the statute does not provide this non-judicial foreclosure remedy to a mortgage on a land contract Vendee's interest, which has never been held to be "an interest in real property" for this purpose. At best, it could be argued to be an *equitable* mortgage, deserving of foreclosure by judicial action. This is an arduous legal task, time consuming, costly, and affording the defaulting borrower a legal forum to contest the lender's assertions. None of the numerous advantages of the non-judicial

foreclosure by advertisement were available to the lender holding a defaulted obligation, secured by an Assignment/ Mortgage.

Attempting a security interest in a land contract Vendor's interest was a "horse of a different color." The Vendor is said to have "bare legal title" to the real estate, and the contract right to the land contract purchase price. The land contract security interest of the vendor's land contract interest could equate to both a mortgage of the fee, and an assignment for security of the Vendor's contract right to the purchase price. The lender taking an Assignment/Mortgage of a Vendor's interest could foreclose by advertisement (assuming there was a due power of sale, etc., set forth in the Assignment/Mortgage). And the lender could foreclose in a judicial action. But one major problem remained for a lender, should it take an assignment of purchaser's or Vendor's interest in the land contract: what if the Vendee tendered payment in full and demanded a deed to the property while the Vendor was in default under the loan? Most likely the lender was entitled to the stream of contract payments under the assignment portion of the Assignment/Mortgage, but the lender had no ability to provide a deed in fulfillment of the land contract.

It was, therefore, the conclusion of this writer (having the dubious distinction of representing an institutional lender who **was** willing to go that extra step), in providing the borrowing community with land contract interest secured loans, that the State of Michigan needed a new statute that would sanctify a statutory "Land Contract Mortgage." This "Land Contract Mortgage" would statutorily create (1) a security interest in the personal property, equitable and legal title interest of both a Vendee's and a Vendor's land contract interests, **and** (2) a mortgage in the real property interest of both (the Vendor having a present bare legal title interest, and the Vendee having, first, equitable title and then legal title).

To this end, the Real Property Law Section of the State Bar of Michigan ("RPLS") created a special committee to draft a proposed statute that would fill the apparent void. After a herculean effort, including a multitude of drafts and spanning a three-year period, the RPLS committee (chaired by this writer) proposed a final version of the proposed statute, which was approved by the RPLS Council, and submitted to the Michigan Legislature in 1997. The bill, House Bill 5282, was introduced in October, 1997, by no less than fourteen State Representatives. It sailed through the House Committee, was passed by the House of Representatives by a vote of 99 to 0, sailed through the Senate Committee and was passed by the Senate by a vote of 29 to 7. It was approved by the Governor and on June 3, 1998 became Act No. 106, Public Acts of 1998.

Act 106 amends Public Act 237 of 1879 (which prior to Act 106, provided for the execution, acknowledgement and recording of land contracts), to, *inter alia*, allow the creation, recording and enforcement of mortgages granted against land contracts, in the same general fashion as Real Estate Mortgages.

ACT 106, PA OF 1998, EFFECTIVE JUNE 3, 1998

Act 106 (the "Act") supplements existing law and, to the extent possible, adopts statutory and common law schemes for creating, recording, prioritizing and enforcing Real Estate Mortgages. Prior to the effective date of the Act, 1879 PA 237, as amended, contained five sections; the first three deal with execution and acknowledgment of land contracts in this state, other states and in other counties, respectively; the fourth section deals with recording land contracts, and priority thereof; and, the fifth section (which was incorporated, in substance in various sections of the Act, the fifth section having been repealed by the Act) dealt with the penalty for refusal to discharge a land contract, and the provision that want of acknowledgement and recording does not invalidate the land contract. The Act adds six additional sections to the 1879 PA 237, being Sections 6 through 11.

Section 6 contains various definitions relating to the Land Contract Mortgage, *inter alia*, its attributes, creation, recording, perfection, and enforcement. Through its definitions of "Land Contract Mortgage" and "Real Estate Mortgage," the Act declares that a Land Contract Mortgage is not a Real Estate Mortgage; and, that a Real Estate Mortgage is created when both the Vendor and Vendee join in or subject their respective interest to a single mortgage.

Section 7 provides the substantive heart of a Land Contract Mortgage. It states that:

> A Vendor or a Vendee under a land contract may grant a Land Contract Mortgage to secure any debt or obligation that may be secured by a Real Estate Mortgage....

This is the first of several instances where the Act applies both the statutory and common law of Real Estate Mortgages to Land Contract Mortgages, thus creating a security instrument that, from its inception, is steeped with an expansive array of additional substance over and above that set out specifically in the Act. Subsection 2 provides that:

> The respective interests of a Vendor or a Vendee subject to a Land Contract Mortgage includes all of the respective rights of a Vendor or Vendee including, without limitation, the Vendor's rights to conveyance.

This subsection further provides that the interest of Vendors and Vendees subject to a Land Contract Mortgage are real property interests. This statutory pronouncement adds to the body of land contract law yet another instance where both the Vendor's and the Vendee's interests are deemed to be real (not personal) property interests. The subsection also states that a Land Contract Mortgage encumbers all of Vendor's or Vendee's interests, whether real, personal, or mixed, "in the same manner and the same extent as a Real Estate Mortgage" (yet another incorporation of real estate mortgage law).

Section 8 covers the minimum requisite provisions to create a Land Contract Mortgage, and, yet again, incorporates in references to what would constitute a Real Estate Mortgage. Subsection 2 provides that a Land Contract Mortgage shall be in form, and shall be executed, acknowledged, and recorded in the same manner as provided for Real Estate Mortgages. Subsection 4 states that a Land Contract Mortgage is perfected for all purposes when recorded in the manner provided for Real Estate Mortgages, without a UCC filing, without any notice to the nonmortgaging land contract Vendor or Vendee, and without taking possession of the land contract document, or otherwise. Finally, subsection 4 creates the priority of a Land Contract Mortgage over all other encumbrances or interests, except those as to which a Real Estate Mortgage would be subordinate.

Section 9 contains provisions for enforcement of Land Contract Mortgages in accordance with any existing procedure for enforcement of a Real Estate Mortgage, *including* foreclosure by advertisement. Subsection 2 creates rights and remedies available to a Real Estate Mortgagee, including *assignments of rents*, receiverships and future advance mortgages.

Section 10 protects the rights and remedies of the nonmortgaging Vendor or the nonmortgaging Vendee, except that (a) a nonmortgaging Vendor must provide the same forfeiture and foreclosure notices to a land contract mortgagee as are provided to the Vendee, (b) the land contract mortgagee must be named as a party in interest in any legal proceeding that would terminate the Vendee's interest and, (c) a nonmortgaging Vendor must accept any cure from the land contract mortgagee, where the Vendor would have had to accept it from the Vendee.

The nonmortgaging Vendee must continue to make payments per the land contract: (a) until notice of the completion of foreclosure of the Land Contract Mortgage, after which all payments shall be made to the successful foreclosure party (except that during redemption, payments may be made to the register of deeds, per MCLA § 600.6058), and (b) unless the Land Contract Mortgage contains an assignment of the payments, in which event when a notice of default is given as set out in this subsection, payments are thereafter to be paid as provided in the notice.

Pursuant to subsection 4, a third party, asserting a prior lien or interest to that of a land contract mortgagee, must: (a) provide the land contract mortgagee copies of all notices that must go to the Vendor or Vendee in order to enforce the third party's rights or remedies, (b) name the land contract mortgagee as a party in interest in any legal proceeding to terminate or enforce the prior encumbrance, and (c) accept a cure from the land contract mortgagee, where so obligated to accept it from the land contract mortgagor.

Section 11 provides for rights of the land contract parties on performance of their respective obligations or remedies vis-à-vis the Vendee, Vendor, and the land contract mortgagee, including the penalties for failure to convey or discharge, as the case may be.

CONCLUSION

As the foregoing summary shows, the Act will place land contract Vendors and Vendees on a footing akin to fee owners in their ability to obtain mortgages for loans and other obligations. This will contribute to the economic growth of the State of Michigan by providing a predictable method for obtaining and enforcing land contract mortgage loans.

JUDGMENTS AND THE ENTIRETIES

by *Barbara Muller-Wilson**

A judgment lien is synonymous with the saying "close, but no cigar." Attorneys understand that when the money is owed, judgment liens support their mission to "get it." Getting it can be the hardest part. The client, however, doesn't always understand. It knows that the judge has ruled in its favor, so what could be so hard? The defendant has a house, a car and surely a sizable bank account to fund those expensive clothes and dinners. After a few investigative measures, you find the car is leased, the charge cards are "maxed," there is no bank account and the house it titled with his/her spouse (held by the entireties).

If the judgment is against both husband and wife, the next step in resolving the lien is straightforward – one proceeds with levy. In the event the judgment is against only one spouse, collection of that judgment becomes questionable.

The query that judges have grappled with for years is whether a judgment creditor with a judgment against one spouse can attach and levy on property held by the entireties.

Entireties property is unique. Under Michigan law, property held by the entireties (property held by a married couple, both parties hold title to the land, parties received land by same conveyance, parties have equal interest, and parties have the same right to use the property) is held under a single title, where neither husband or wife (acting alone) can alienate the property and neither spouse possesses a separate interest in the land. **Cole v Cardoza**, 411 Fed 2d 1337 (6th Cir 1971); **US v 44133 Duchess Drive, Wayne County, Mich**, 863 F Supp 492 (E.D. Mich 1994). Since one spouse cannot separate his or her interest, it would follow that creditors without dual judgments would be prohibited from dividing the entireties interest as well. The cases, however, have not been consistent in following that logic.

In **Cole, supra**, the court contemplated whether a federal tax lien against the debtor husband could attach

* Barbara Muller-Wilson has practiced law in the areas of commercial collections, real estate and probate for ten years with the firm of Muller, Muller, Richmond, Harms, Myers & Sgroi. She frequently speaks on the topics of bad debt, collections, and real estate. Ms. Wilson received her undergraduate from the University of Michigan and her law degree from the Detroit College of Law.

to entireties property. The innocent spouse contended that the lien constituted a cloud on the title to their home creating a detriment to her. The court agreed. It did so, however, with the dicta that caused courts in future cases to re-examine the issue in a different light. The court in the **Cole** case determined that state law applies on the issue of attachment to entireties property. Citing **Ferrell v Paulas**, 309 Mich 441, 445 (1944), the court in **Cole** (**supra**, at 1343) ruled that without a dual judgment the lien could not attach. However the court then looked to whether the lien constituted a cloud on the title. The court defined the concept as one that "can be merely an apparent defect and that if it has a tendency even in the slightest degree to cast doubt upon the owners' title and to stand in the way of full and free ownership," it should be removed. **Cole**, **id** at 1343. Stating that no Michigan Supreme Court had made a decision on point as to whether a lien would constitute a cloud on title, the court without much discussion declared that a tax lien would without question constitute a cloud on the title, as it was ambiguous as to whom the lien was against. Hence "a prospective purchaser or mortgagee of the property would be hesitant to commit." This decision would have an alarming impact on subsequent cases.

When the 6th Circuit had to consider the issue of whether the federal government could enforce a forfeiture action against one criminal spouse where the property was held in entireties, in **United States v Certain Real Property Located at 2525 Leroy Lane, West Bloomfield**, 910 F2d 343 (6th Cir 1990), the court also referred to Michigan law. The court distinguished the criminal forfeiture statue from that of a judgment creditor, yet then took the liberty to set forth the proposition that while a judgment creditor cannot levy on property held by the entireties, it could under certain circumstances attach the lien. The court noted that entireties property could change in the future by death of the innocent spouse, divorce or an agreed-upon transfer. These future interests are individual interests that can be levied upon. Hence a judgment lien that is not ambiguous as to whom the judgment is against can attach to entireties property but is unenforceable except as to future individual rights of the debtor.

The **Cole** case was once again referenced as well as distinguished in **Fischre v US**, 862 F Supp 628 (WD Mich 1994) and **US v 44133 Duchess Drive, Canton, Wayne County, Michigan, supra**. The courts clearly state that while a creditor of one spouse cannot force the sale of entireties property to enforce a judgment lien, where the lien is not ambiguous, they are not precluded from attaching a creditor's lien on one spouse's potential future interest. **Duchess, id**, at 502; **Fischre, supra**, at 630.

In April, 1998, the small window of opportunity for judgment creditors to attach entireties property was apparently closed. The U.S. Court of Appeals took up this issue again in **Craft v US Through CIR**, 140 F3d 638 (1998). Similar to **Cole, supra**, the lien in question stemmed from a tax debt. In its attempt to resolve the controversy, the **Craft** court proclaimed the ancient law in Michigan that tenants by the entireties hold a single title; neither spouse possesses a separate interest nor can either spouse acting alone alienate the land. The court then stated that because Michigan law does not recognize separate interest in entireties property, a tax lien against one spouse cannot attach to that property. **Craft, Id**, at 643. Next the court addressed the issue of whether a creditor's judgment lien could attach to inchoate or the potential future interests of a debtor spouse. Citing **Sanford v Betrau**, 204 Mich 244; 169 NW 880, 881 (1918), the court declared that a "future interest" held by one spouse in the entireties property cannot be attached as the future interests are an incident of the estate, not a remainder interest held by right. In its analysis, the court references but disregards **Fischre** and **Duchess** based on the **Betrau** holding. The court then makes the general statement while entireties property is not attachable without a dual judgment, one spouse may not create a fraudulent transfer to avoid a judgment lien. MCLA 566.11 **et seq**.

In summary, because the lien in the **Cole** case was a tax lien, the court was concerned with the failure of the lien to reveal who the actual debtor was, resulting in a cloud on the title of the entireties property. The court in **Fischre** acknowledged that concern and set forth the insight that when a lien is not ambiguous, clouding title is not at issue. Consequently, the lien could attach to entireties property but would not be actionable until the estate changed in nature. In **Leroy Lane** the court distinguished future interests of entireties property from present interests. The court ruled that a creditor's lien could attach to entireties property but, again, was unenforceable until the debtor spouse had title in fee simple. The **Duchess** case solidified the past rulings and went so far as to suggest that the government "put itself" in the place of a judgment creditor in an effort to resolve its claim against the defendant. The last word on this point comes from **Craft**, where the court robs creditors of their rights with a single swoop. They cite a case that dates back to 1918 without reference to its content. The court bases its decision on whether one spouse with entireties property has future rights as an incident of the estate, as opposed to a right of remainder. In doing so, the court does not consider the possibility of the "innocent" spouse predeceasing the debtor spouse, leaving the debtor spouse with a windfall and the creditor

empty-handed. The court likewise does not entertain the possibility that the spouses will jointly change the nature of the estate, resulting in a profit to the debtor spouse and the creditor looking for another way to collect the debt.

At present one could argue that **Fischre** and **Craft**, as well as **Cole**, could be distinguished. Nevertheless, before attaching entireties property it is imperative to be familiar with MCLA 600.2907(a).

(1) A person who violates section 25 of chapter 65 of the Revised Statues of 1846 being section 565.25 of the Michigan Compiled Laws, by encumbering property through the recording of a document without lawful cause with the intent to harass or intimidate any person is liable to the owner of the property encumbered for all of the following:

(a) All of the costs incurred in bringing an action under section 25 of chapter 65 of the Revised statutes of 1846, including actual attorney fees.

(b) All damages the owner of the property may have sustained as a result of the filing of the encumbrance.

(c) Exemplary damages.

(2) A person who violates section 35 of chapter 65 of the Revised Statutes of 1846, by encumbering property through the recording of a document without lawful cause with the intent to harass or intimidate any person is guilty of a felony punishable by imprisonment for not more than 3 years or a fine of not more than $5,000.00, or both.

The penalties at issue are high. Hence, it would be prudent to carefully consider whether a court would find a judgment lien on entireties properties unlawful under **Craft** or justified under **Fischre**. In any event, it is the opinion of this author that the court in **Craft** rendered its decision without due consideration to relevant issues regarding creditor rights. The long-term and practical effect of this opinion will be to allow debtors to avoid their obligations and leave creditors to either pass along their loss or possibly file bankruptcy.

DEL MONTE DUNES v CITY OF MONTEREY

by *Susan K. Friedlaender**

On October 7, 1998, the US Supreme Court heard oral argument in **Del Monte Dunes v City of Monterey**,[1] a land use case that could have significant impact on the practice of law in this often difficult and controversial area. In 1981, **Del Monte Dunes** began its long and tortuous course to the Supreme Court when the original land owner applied for permission to develop 344 residential units in an area known as the Del Monte Dunes.[2] The Del Monte Dunes consist of 37.6 oceanfront acres located in Monterey, California (the "City"). Previously, the Dunes had been used as a petroleum tank farm. The Dunes was zoned for multi-family, commercial and industrial use and were located adjacent to a multi-family residential development. The City claimed that the property was environmentally sensitive because the native flora included the buckwheat plant, which is the natural habitat for the endangered Smiths-Blue Butterfly. Only one such butterfly had ever been spotted at the site. Moreover, the tank farm owners had planted vegetation that was slowly diminishing the natural flora and that would, with no development, eventually overcome the buckwheat plant – thus completely destroying the butterfly's habitat.

The City rejected the developer's initial application for 344 residential units. The developer eventually submitted four more applications over a five-year period. It was undisputed that all the applications met the City's general land use plan and zoning regulations. In 1985, the City finally approved a plan for 190 residential units subject to 15 conditions. However, during the ensuing process, the council reversed its prior position and rejected the plan. Accordingly, in 1986, **Del Monte Dunes** filed a law suit. The complaint contained, in part, taking, substantive due process and equal protection claims.

In 1988, the City filed a motion for summary judgment on ripeness grounds. The federal District Court dismissed the claims, finding that they were not ripe for adjudication. In 1990, in **Del Monte Dunes v City of Monterey**,[3] (Del Monte I) the 9th Circuit reversed the District Court's holding. The 9th Circuit found that the developer's five futile attempts to obtain site plan approval for a use permitted by the zoning ordinance provided a basis for ripe constitutional claims.[4] The **Del Monte Dunes I** court, therefore, reversed the district court and remanded the

* Ms. Friedlaender is the chairperson of the Land Use and Zoning Special Committee of the State Bar of Michigan's Real Property Section. She practices with Butzel Long devoting much of her time to land use and zoning law.

matter for trial on the plaintiff's taking, equal protection and substantive due process claims.

The trial proceeded on Del Monte's taking and equal protection claims. Following the trial, the jury awarded Del Monte $1,450,000.00 on both its claims. The damages were awarded to compensate the developer for the City's delay in reviewing and denying the land use request. The trial court rejected the City's post-trial motions for a new trial and judgment notwithstanding the verdict. The City appealed. The 9th Circuit affirmed.

The 9th Circuit's decision presents three principal issues and two sub-issues for the Supreme Court's review.

The first issue is whether the developer was entitled to a jury trial on an inverse condemnation claim under either the Seventh Amendment or 42 USC §1983. The 9th Circuit held that an inverse condemnation claim was sufficiently similar to trespass, trover, detinue and replevin claims at common law in finding that a right to a jury trial existed under the 7th Amendment. The court further found that a right to a jury trial existed because Del Monte sought a damage remedy. The court also held that the developer had a right for a jury to hear its Section 1983 claim. Section 1983 provides a vehicle for obtaining equitable or monetary relief for the violation of federal constitutional rights. The court concluded that Del Monte was entitled to a jury under Section 1983 because this section provides a remedy for actions at law to recover damages for a constitutional violation. Courts have generally permitted jury trials in other Section 1983 cases. Del Monte has argued in its Supreme Court brief that it is improper to define the taking claim as one for inverse condemnation. Del Monte argues that the claim is for a violation of constitutional rights arising under the 14th Amendment and Section 1983 provides a mechanism for an action at law to vindicate such rights.

The sub-issue is this: regardless of whether a property owner is entitled to a jury trial, did the District Court err by submitting the issue of liability to the jury? The City claimed that the liability issue presented only questions of law and should have been decided by the court. The court gave the jury an instruction that provided that a governmental entity may be liable for a taking if its actions or the relevant regulation fails to substantially advance a legitimate governmental interest or denies the property owner an economically viable use of its land. The 9th Circuit held that although the legal standard contains mixed questions of law and fact, such questions may be submitted to a jury, if the primary question is essentially factual. The 9th Circuit noted that the U.S. Supreme Court has repeatedly observed that a determination whether the government has deprived an owner of use of its land is "essentially an ad hoc factual inquiry."[5] The court also concluded that the inquiry whether a City's action substantially advances a legitimate interest is a question of reasonableness. The court held that juries often determine questions of reasonableness as an issue of fact.

The second issue arising out of the City's appeal of the District Court's denial of the City's JNOV motion concerns whether the legal standard the Court adopted in **Dolan v Tigard**[6] applies to all regulatory taking claims or only "exaction" cases. In **Dolan**, the court held that a municipality may not condition the granting of a development permit on the landowner dedicating property to the public unless the condition advanced a legitimate governmental interest and the condition was roughly proportional to the impact of the development. The **Del Monte** court held that the developer produced sufficient evidence to sustain the first prong of its taking claim by demonstrating that the City's legitimate interest in denying Del Monte's development was not roughly proportional to furthering that interest. The City has argued to the Supreme Court that the more searching **Dolan** standard is only applicable in "exaction" cases and not in "regulatory denial" cases. The developer argues that all regulatory taking cases require a determination of the fit between the interest the government seeks to achieve by its regulatory action and the means used to effectuate that interest. The developer further argues that the **Dolan** articulation of the required fit between the regulatory ends and means is a standard that should apply in all regulatory taking cases. This is a very significant issue that could result in a more searching standard of judicial review in land use cases.

The sub-issue is whether sufficient evidence existed for the jury finding that the City's actions resulted in denying Del Monte all economically viable use of its property. The Del Monte plaintiff eventually sold the Dune property to the State of California for use as an open space preserve for $800,000.00 more than it paid for the land. The City argued, therefore, that economically viable uses of the property must have existed and that the jury finding that a taking occurred was precluded as a matter of law. The developer argued that despite the sale to the state, it was entitled to damages for a temporary taking for the period during which the City delayed development of the land. The developer claimed in its Supreme Court brief that the sale of the land to the state was for less than half of its market value. The 9th Circuit rejected the City's argument that the sale precluded a taking claim, finding that "It is not difficult to conceive of the circumstance in which there are no economically viable uses for a piece of property,

but the property owner can sell it to the government at a higher price than what he paid for it."[7] The court concluded, therefore, that the jury properly awarded damages for a temporary taking and that the damages were not excessive.

The final and very key issue the City has raised is whether a court or jury may subject a government's land use decision to a de novo trial. The City has argued that it is impermissible to allow either a court or a jury to reweigh evidence that was presented before a land use board and to reach a different conclusion than the board.

The developer was accorded a de novo trial on its constitutional claims. In such a de novo review the fact finder, of course, weighs the evidence, resolves factual disputes and determines the credibility of witnesses. The City argued that neither a court nor jury should be able to employ a reviewing standard that permits a substitution of the government's judgment. The City is essentially advocating a mixture of an administrative standard of review that only permits a court to determine whether the City's decision denying the permit was supported by substantial, material and competent evidence and a low level "rational basis" standard of reviewing legislation. Under the City's proposed standard, the court reviewing a government's land use decision may not resolve factual disputes or make any credibility determinations. The City's position is that a municipality's decision to deny a land use request must be upheld even if the City's reasons for denial have no factual basis, as long as the reasons have some rational connection to a legitimate governmental interest and could conceivably further those interests. Applying this low level standard of review is almost always outcome determinative in favor of the government. Del Monte has vigorously argued in its Supreme Court brief that denying a land owner de novo review of constitutional claims raises serious due process concerns.

Many lawyers, regulators and land owners will be anxiously awaiting the Court's impending decision. If the Court squarely deals with the issues raised in the appeal it could have a profound impact on the trial of constitutional claims arising from land use disputes.

ENDNOTES

1. 95 F3d 1422 (9th Cir 1996) **reh'g granted**, 118 F3d 660 (1997), **reh'g en banc denied**, 127 F3d 1149 (1997), **cert. granted**, 140 L Ed 2d 509, 118 S Ct 1359 (1998).
2. The plaintiff, Del Monte Dunes, purchased the property during the development process.
3. 920 F2d 1496 (9th Cir 1990).
4. **Id.** at 505.
5. **Id.** at 1427.
6. **Dolan v Tigard**, 512 US 374; 129 L Ed 2d 304; 114 S Ct 2309 (1994).
7. **Id.** at 1431.

K & K CONSTRUCTION

by *David W. Berry*

In a recent opinion, the Michigan Supreme Court has overruled a holding of a Michigan Court of Appeals panel in **K & K Construction Company v Department of Natural Resources**, ___ Mich ___ (1998). The Michigan Supreme Court reversed the holding of the Court of Appeals but remanded the case to the trial court for further factual findings.

Plaintiffs, JFK Company and Resorts and Company, owned 82 acres of property near M-59 in Waterford Township. K & K Construction Company had no ownership interest in the property but had contracted with the property owners to build a C.J. Barrymore's restaurant and sports complex on the property. The property consists of 4 distinct parcels, all of which are contiguous. Parcel 1 consists of 55 acres, 27 acres of which are wetlands. All of parcel 1 was zoned for commercial use. Parcel 2 consists of 16 acres, only a small portion of which are wetlands. Parcel 3 is 9.34 acres, all uplands. Parcel 4 is 3.4 acres, with no wetlands. Parcels 2, 3 and 4 were zoned for multiple family residential housing but only parcel 3 had been developed for that purpose.

Plaintiffs had previously applied for a permit to fill approximately 14 acres of parcel 1 to build a sports complex and restaurant, referred to as the "Barrymore Plan." The permit was denied. Thereafter, plaintiffs filed their complaint in the Michigan Court of Claims. Before trial, plaintiffs filed a second application with the DNR, which involved filling only approximately 3 acres of wetland while providing mitigation by converting 5 acres of upland to wetland, referred to as the "Goga Plan." The Goga Plan was also initially rejected but later approved by the DNR.

The trial court held that the DNR owed plaintiffs damages both for a temporary taking of the land that could be developed under the Goga Plan for the period of time development was delayed by the DNR and also for a permanent taking of the entire fair market value of the 27 acres of wetland rendered useless under the Wetlands Protection Act. The damages totaled $3.5 million. The Court of Appeals affirmed the trial court's judgment. The Michigan Supreme Court reversed both the trial court and the Court of Appeals' judgments. But all is not lost.

The court, roughly following U.S. Supreme Court precedent, held that, "... land use regulations effectuate a taking in two general situations: (1) where the regulation does not substantially advance a legitimate state interest, or (2) where the regulation denies an owner economically viable use of his land."

The Court went on to recognize that there are two situations in which a taking can be established when dealing with the economic viability of the uses that may be made of the property. The first is a "categorical" taking where an owner is deprived of "all economically beneficial or productive use of land . . . ." The second situation involves a regulation that prevents the use of some but not all of a given parcel of property. The Court indicates that in this situation courts will engage in an "ad hoc, factual inquiry" in which they will balance the owner's right to use the property against the public's need to regulate. This is accomplished by analyzing the economic effect of the land use regulation on the property, the extent to which the regulation has interfered with investment-backed expectations of the owner and the character of the government's action in regulating or preventing the owner's use of the land. The "balancing test" only occurs when less than all of the economic uses of the property are denied by virtue of the land use or environmental regulation.

In the **K & K** case, there was no claim that the land use regulation did not substantially advance a legitimate state interest. In fact, the property owner had agreed that wetland regulations do advance substantial, legitimate state interests. Therefore, the only inquiry was whether there was an economically viable use left for the land.

When determining whether a taking has occurred, the court said it is necessary to first define what constitutes the parcel of land to which the taking inquiry should be applied. The court indicated that "when evaluating the effect of a regulation on a parcel of property, the effect of the regulation must be viewed with respect to the parcel as a whole." Therefore, in any takings case, the court must define what land constitutes the "parcel as a whole" to determine whether there has been a taking. The trial court had held that parcel 1 was the only relevant parcel for determining whether there had been a taking as a result of the wetland regulations. The Court of Appeals had affirmed the trial court on this issue. The Michigan Supreme Court reversed the holding. The court held that the factors to be analyzed in defining the parcel are identity of ownership, degree of contiguity and the unity of use proposed by plaintiffs' comprehensive development plans. Here, the plaintiffs had proposed a comprehensive development plan using portions of parcels of 1, 2 and 4. As a result, the court found that there was unity of use of all three parcels. The court also found that all four parcels were under one ownership and contiguous to one another. Therefore, the court held that at least parcels 1, 2 and 4 should be considered part of the parcel to which the taking analysis would be applied. With respect to parcel 3, which had been previously developed, the court remanded the issue to the trial court for a determination of whether it should be included in the "parcel as a whole."

Along with remanding the issue of defining what was the "parcel as a whole," the court directed the trial court to determine whether there had been a taking under the balancing test.

The Michigan Supreme Court in **K & K** did not overturn the ruling by the Michigan Court of Appeals that the portion of the Wetlands Protection Act that provides that just compensation is limited to twice the assessed value of the property was unconstitutional, and that rule of law remains intact.

RECENT DECISIONS

by *Joseph Lloyd*
Chard & Lloyd
201 E. Washington
Ann Arbor, Michigan 48104

Republic Bank v Modular One LLC, ___ Mich App ___; ___ NW2d ___ (No. 203358, November 3, 1998)

Construction Lien – Unlicensed Contractor

The question before the court was whether an unlicensed contractor who placed a modular home on property had lien rights vis-a-vis a mortgage lender in a quiet title action. The trial court granted summary disposition in favor of the lender. The court of appeals, noting that the quiet title action brought by the lender was equitable in nature, reversed and required that the contractor be paid. It was noted that the lack of licensure was a shield for the homeowner, not a sword with which to attack the contractor. The contractor's claim, however, was based on the value of his work, and not on any contract sum.

Additionally, it should be noted that the court did not bar the contractor's claim even though no suit was brought within the statutory one year.

Horton v Verhelle, ___ Mich App ___; ___ NW2d ___ (No. 198929, September 29, 1998)

Construction Lien fund – Defenses

A homeowner contracted with a general contractor to build a house. Before completion, and before final payment, the contractor became insolvent. A number of unpaid subcontractors filed liens and brought suit. The homeowner filed the requisite affidavit to invoke the assistance of the Construction Lien Fund. On behalf of the fund, the Attorney General raised a number of defenses against the claimants, the results of which, on appeal, are as follows:

The court held that the fact that the homeowner made payments to the general contractor pursuant to sworn statements did not defeat the rights of subcontractors where the sworn statements were defective. Specifically the sworn statements must be both signed and notarized. Payments made pursuant to allegedly forged waivers did not defeat the rights of subcontractors. The actual entity that claims rights against the fund must be a member of the fund. It is not sufficient that a principal officer be a member of the fund. A claimant is not entitled to a time-price differential. Claimants who are not members of the fund are not entitled to be compensated by the fund, but they are entitled to share equally in the contract balance paid by the homeowner. The fund, therefore, is not entitled to any priority with regard to the unpaid part of the price.

Adams Outdoor Advertising v City of East Lansing, ___ Mich App ___; ___ NW2d ___ (No. 200655, November 20, 1998)

Billboards – Personal Property – Regulation and Taking

The city of East Lansing had passed an ordinance which would require the removal of existing advertising billboards. The Plaintiff brought an action claiming that the ordinance was an unconstitutional taking without compensation. The city argued that no compensation was appropriate where the property right in question was a right to personalty such as a leasehold. The court of appeals rejected this argument as misapprehending the true nature of the property interest. The court went on to hold that the city does not have the power to eliminate off-premises advertising without compensation. The court rejected the "amortization" argument, that would have allowed a taking without compensation if the owner were given a reasonable period in which to recapture his investment.

Secura Insurance Co v Auto-Owners Insurance Co, ___ Mich App ___; ___ NW2d ___ (No. 205256, November 20, 1998)

No-fault Auto Insurance – Damage to Home

A motorist struck a utility pole and the falling wire allegedly caused a residential fire. The trial court held that there was a one-year statute of limitations on bringing an action against the motorist's insurance company for property damage. The court of appeals affirmed.

CONTINUING LEGAL EDUCATION

by
Lawrence M. Dudek, Chairperson
and
Arlene R. Rubinstein, Administrative Assistant

HOMEWARD BOUND

The Real Property Law Section's Twenty-Second Homeward Bound Series continues in January with our program entitled "Avoiding and Resolving Title Problems." Dennis W. Hagerty, state counsel for Metropolitan Title Company in Howell, Michigan and Catharine B. LaMont, Vice President and counsel for First American Title Insurance Company in Troy will speak on January 21, 1999. The speakers will address common title and closing problems and provide practical suggestions and solutions for avoiding and resolving such problems.

"HOT TIP" to be presented at the January 21 Homeward Bound Seminar!

The rules for bankruptcy sales have changed in the Eastern District of Michigan. Effective October 1, 1998, the judges of the U.S. Bankruptcy Court for the Eastern District of Michigan will no longer enter "comfort orders" authoring sales of bankruptcy estate assets by trustees or debtors in possession under the amended local bankruptcy rules. As a general rule, sales may instead proceed based solely upon the notice provided creditors and others under applicable bankruptcy rules. This change in practice affects all participants in bankruptcy sales, including sellers, buyers, lenders and title companies.

Marc M. Bakst or Bodman, Longley & Dahling, L.L.P. of Detroit and Judith Greenstone Miller of Clark Hill, P.L.C. in Birmingham will explain the legal basis for the changes to the local bankruptcy rules and local practice and offer practical advice for all participants in bankruptcy sales in light of the changes to the local bankruptcy rules.

Kevin J. Gleeson of Sullivan, Ward, Bone, Tyler & Asher, P.C. in Southfield; Sharon LaDuke of Jaffe, Raitt, Heuer & Weiss, P.C. in Detroit and Mark L. McAlpine of McAlpine and McAlpine in Bloomfield Hills will present the February 25, 1999 seminar on "AIA Contracts – General Conditions". This seminar will focus on the major changes and new concepts the 1997 edition of AIA documents A-201 "General Conditions of the Contract for Construction" and B-141 "Standard Form of Agreement Between Owner and Architect with Standard Form of Architect's Services" introduce and how they affect the contractual relationship from the perspective of the owner, general contractor and architect.

The March 25, 1999 program is "AIA Contracts – Defaults and Remedies." Dennis B. Schultz and Kenneth H. Adamczyk of Butzel Long's Detroit office will discuss the new AIA Contract provisions in AIA Document A201-1997 "General Conditions of the Contract for Construction" and AIA Document B141-1997 "Standard Form of Agreement Between Owner and Architect with Standard Form of Architect's Services," focusing on the default and remedies provisions as they relate to the owner, contractor and architect.

Walk-ins are welcome at the Troy location! We meet 3:30 - 6:30 p.m. at the Management Education Center, 811 W. Square Lake Road. Registration is $75 for Section members and $85 for non-section members. Please call Arlene Rubinstein at 248-644-7378 or e-mail at LAWA1@aol.com. for further Homeward Bound information.

TWENTY-FOURTH ANNUAL SUMMER CONFERENCE GRAND TRAVERSE RESORT JULY 21 - 24, 1999

Mark your calendars! This year's Summer Conference is not to be missed!

The Twenty-Fourth Annual Summer Conference will be held at Grand Traverse Resort, July 21-24, 1999. The Grand Traverse Resort is located just six miles northeast of beautiful Traverse City on 1200 acres of spectacular Northern Michigan property. The resort hosts 3 championship courses – The Bear, The Gary Player Signature Golf Course and the Spruce Run with a new club house; refurbished health club, pool, fine dining and the sparkling waters of the Grand Traverse Bay.

William M. Schlecte of William M. Schlecte & Associates, PC, in Ann Arbor/Southfield/Jackson and of counsel, to Bassey & Selesko, P.C. is the program chairperson. The Summer Conference will provide valuable insight into how to bring your real estate practice into the new millennium. Presenters will focus on: preliminary considerations (e.g. entity and tax considerations; investor concerns); structuring the deal, including entrepreneur, lender and buyer perspectives; drafting tips; REIT pros and cons; effective use of the Internet; and of course, "Hot Tips"– emerging bankruptcy issues; addressing new USEPA and MDEQ requirements; suggestions to improve lawyer professionalism; and making sense of varying recording requirements.

Further details will be mailed in March. For more information please call Arlene Rubinstein at 248-644-7378 or e mail LAWA1@aol.com.

COURSE CALENDAR

Set forth below is a schedule of continuing legal education courses sponsored or co-sponsored by the Real Property Law Section through March 1999:

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

DATE	LOCATION	PROGRAM	TOPIC
January 21	MSU Management Education Center - Troy	HB	Avoiding and Resolving Title Problems
February 25	MSU Management Education Center - Troy	HB	AIA Contracts – General Conditions
March 25	MSU Management Education Center - Troy	HB	AIA Contracts – Defaults and Remedies

Further information on all Homeward Bound Seminars and ICLE courses can be found on the Internet.

The address is: http://www.icle.org/.

PURCHASE AND SALE OF A HOME: PUBLIC EDUCATION BROCHURE

The Report of the Real Property Law Section's 21st Century Committee recommended that the Pro Bono Committee draft and distribute its fourth brochure on the topic of the purchase and sale of a home. This brochure was completed and approved by Council at its October 1998 meeting. Brochures will be distributed to Legal Services Corporation offices throughout Michigan and various Macomb, Oakland and Wayne County Human Services Agency offices.

The brochure is printed on the following **Review** pages in a format that may be easily reproduced as a double-sided brochure for distribution to clients, education centers or other community agency offices. Alternatively, if a Section member would like to purchase, at a minimum cost, copies of this brochure or any of the three following Pro Bono Committee brochures:

- Tenant/Landlord Information:
  Security Deposits & Property Maintenance

- Tenant/Landlord Information:
  Eviction, Illegal Eviction & Utility Access

- Land Contract Information

Please contact Arlene Rubinstein, Section Administrator, at:

Real Property Law Section
State Bar of Michigan
P.O. Box 473
Birmingham, MI 48012
(248) 644-7378 – telephone
(248) 540-2771 – fax

If our Section members make this brochure more accessible to the public, the information presented would benefit a greater number of our communities.

Please call Carol Ann Martinelli, Pro Bono Committee Chairperson, at (248) 362-0599, with suggestions for additional brochure topics to be considered by the Pro Bono Committee.

MICHIGAN REAL PROPERTY REVIEW

Vol. 25, No. 4 Winter, 1998

CONTENTS

Published by the
Real Property Law Section
State Bar of Michigan

MICHIGAN REAL PROPERTY REVIEW

Vol. 25, No. 4 Winter, 1998

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

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

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

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

SPECIAL COMMITTEES

REAL PROPERTY LAW SECTION
COMMITTEE CHAIRPERSONS & COUNCIL COORDINATORS
1998 - 1999

Committee	Chairperson	Coordinator
Bankruptcy Debtor Creditor Rights	Marc M. Bakst Bodman, Longley & Dahling 100 Renaissance Center, 34th Floor Detroit, Michigan 48243-1002 (313) 393-7530 - telephone (313) 393-7579 - fax	Lisa Sommers Gretchko Pepper Hamilton LLP 36th Floor 100 Renaissance Center Detroit, Michigan 48243-1157 (313) 393-7307 - telephone (313) 259-7926 - fax
Broker & Mortgage Services	Harry Steven Ellman Fidelity Title Company Suite 215 32100 Telegraph Road Bingham Farms, Michigan 48025 (248) 642-1115 - telephone (248) 642-0935 - fax	Reuben A. Munday Lewis & Munday 1300 First National Building Detroit, Michigan 48226 (313) 961-2550 - telephone (313) 961-1270 - fax
Commercial Leasing and Management of Real Estate	Larry R. Shoffner Jaffe, Raitt, Heuer & Weiss, PC Suite 2400 One Woodward Avenue Detroit, Michigan 48226-3412 (313) 961-8380 - telephone (313) 961-8358 - fax	Robert A. Berlow Dykema Gossett PLLC Suite 300 1577 North Woodward Avenue Bloomfield Hills, Michigan 48304-2820 (248) 203-0771 - telephone (248) 203-0763 - fax
Condominiums, PUDs and Cooperatives	Mark F. Makower Mark F. Makower & Associates, P.C. Suite 100 28535 Orchard Lake Road Farmington Hills, Michigan 48334 (248) 553-4460 - telephone (248) 553-5840 - fax C. Kim Shierk Dykema Gossett PLLC Suite 300 1577 North Woodward Avenue Bloomfield Hills, Michigan 48304 (248) 203-0774 - telephone (248) 203-0763 - fax	Gail A. Anderson McClelland & Anderson Suite 102 1305 South Washington Avenue Lansing, Michigan 48910 (517) 482-4890 - telephone (517) 482-4875 - fax

SPECIAL COMMITTEES (continued)

Committee	Chairperson	Coordinator
Construction	Matthew C. Norris Drolet, Freeman, Cotton & Norris, PC Suite 100 33 Bloomfield Hills Parkway Bloomfield Hills, Michigan 48304-2945 (248) 642-2255 - telephone (248) 642-6460 - fax	Lawrence M. Dudek Miller, Canfield, Paddock & Stone Suite 2500 150 West Jefferson Detroit, Michigan 48226 (313) 963-6420 - telephone (313) 496-8451 - fax
Decisions	Joseph A. Lloyd Chard & Lloyd 201 East Washington Ann Arbor, Michigan 48104-2007 (734) 668-1522 - telephone (734) 665-4112 - fax	James N. Candler, Jr. Dickinson Wright PLLC Suite 4000 500 Woodward Avenue Detroit, Michigan 48226-3425 (313) 223-3513 - telephone (313) 223-3598 - fax
Eminent Domain	Frederick D. Steinhardt Mason, Steinhardt, Jacobs & Perlman, PC Suite 1500 4000 Town Center Southfield, Michigan 48075 (248) 358-2090 - telephone (248) 358-3599 - fax	Howard A. Lax Mason, Steinhardt, Jacobs & Perlman, PC Suite 1500 4000 Town Center Southfield, Michigan 48075 (248) 358-2090 - telephone (248) 358-3599 - fax
Environmental Law and Energy Law	Grant R. Trigger Honigman Miller Schwartz & Cohn 2290 First National Building Detroit, Michigan 48226 (313) 465-7584 - telephone (313) 465-7585 - fax	Jack D. Shumate Butzel Long Suite 200 32270 Telegraph Road Birmingham, Michigan 48025-2457 (248) 258-1405 - telephone (248) 258-1439 - fax
Federal Tax Aspects of Real Estate Transactions	William B. Acker Kemp, Klein, Umphrey & Endelman, P.C. Suite 600 201 West Big Beaver Road P.O. Box 4300 Troy, Michigan 48099-4300 (248) 528-1111 - telephone (248) 528-5129 - fax	Susan K. Friedlaender Butzel Long Suite 200 32270 Telegraph Road Birmingham, Michigan 48025-2457 (248) 258-1402 - telephone (248) 258-1439 - fax

SPECIAL COMMITTEES (continued)

Committee	Chairperson	Coordinator
State & Local Taxation	Joanne B. Faycurry Miller, Canfield, Paddock & Stone Suite 2500 150 West Jefferson Detroit, Michigan 48226 (313) 496-7678 - telephone (313) 496-8452 - fax	Willard G. Moseng Michigan State Housing Development Authority 401 South Washington Square P.O. Box 30044 Lansing, Michigan 48909 (517) 373-8295 - telephone (517) 373-2450 - fax
Titles and Conveyancing	Margaret A. Meyers Michigan State Housing Development Authority 401 South Washington Square P.O. Box 30044 Lansing, Michigan 48909 (517) 373-2036 - telephone (517) 373-2450 - fax	Denise J. Lewis Honigman Miller Schwartz & Cohn 2290 First National Building Detroit, Michigan 48226 (313) 465-7464 - telephone (313) 465-7465 - fax
Water Law	Douglas S. Loomer Nemier, Tolari, Landry, Mazzeo & Johnson, P.C. Suite 300 37000 Grand River Avenue Farmington Hills, Michigan 48335 (248) 476-6900 - telephone (248) 476-6564 - fax	Mary M. Fowlie Standard Federal Bank 2600 West Big Beaver Road Troy, Michigan 48084-3323 (248) 643-9600 - telephone (248) 637-2768 - fax
Zoning and Land Use	Susan K. Friedlaender Butzel Long Suite 200 32270 Telegraph Road Birmingham, Michigan 48025-2457 (248) 258-1402 - telephone (248) 258-1439 - fax	Michael W. Maddin Maddin, Hauser, Wartell, Roth, Heller & Pesses, P.C. Third Floor Essex Centre 28400 Northwestern Highway Southfield, Michigan 48034 (248) 827-1880 - telephone (248) 354-1422 - fax

SPECIAL COMMITTEES (continued)

Committee	Chairperson	Coordinator
Legislation	Carol Ann Martinelli Commonwealth Land Title Insurance Company Suite 305 900 Wilshire Drive Troy, Michigan 48084-1600 (248) 362-0599 - telephone (248) 362-4494 - fax	Gail A. Anderson McClelland & Anderson Suite 102 1305 South Washington Avenue Lansing, Michigan 48910 (517) 482-4890 - telephone (517) 482-4875 - fax
Mortgages & Related Financing Devices and Security Agreements	Wilfred A. Steiner, Jr. Dykema Gossett PLLC 400 Renaissance Center Detroit, Michigan 48243-1504 (313) 568-6924 - telephone (313) 568-6701 - fax	William B. Acker Kemp, Klein, Umphrey & Endelman, P.C. Suite 600 201 West Big Beaver Road P.O. Box 4300 Troy, Michigan 48099-4300 (248) 528-1111 - telephone (248) 528-5129 - fax
Partnership, Joint Ventures & Other Investment Vehicles	C. Leslie Banas Honigman Miller Schwartz & Cohn 2290 First National Building Detroit, Michigan 48226 (313) 465-7310 - telephone (313) 465-7311 - fax	David W. Charron Charron & Hanisch, P.L.C. Suite D 5242 Plainfield Ave., N.E. Grand Rapids, Michigan 49525 (616) 363-0300 - telephone (616) 363-0339 - fax
Professional Responsibility	Michael J. Sullivan Collins, Einhorn, Farrell & Ulanoff Suite 909 4000 Town Center Southfield, Michigan 48075-1473 (248) 355-4141 - telephone (248) 355-2277 - fax	Vicki R. Harding Pepper Hamilton LLP 36th Floor 100 Renaissance Center Detroit, Michigan 48243-1157 (313) 393-7324 - telephone (313) 259-7926 - fax
Residential Transactions	Gregg A. Nathanson Couzens, Lansky, Fealk, Ellis, Roeder & Lazar, P.C Suite 200 39395 West Twelve Mile Road P.O. Box 9057 Farmington Hills, Michigan 48333-9057 (248) 489-8600 - telephone (248) 489-4156 - fax	Carol Ann Martinelli Commonwealth Land Title Insurance Company Suite 305 900 Wilshire Drive Troy, Michigan 48084-1600 (248) 362-0599 - telephone (248) 362-4494 - fax

REAL PROPERTY LAW SECTION
STATE BAR OF MICHIGAN

STANDING COMMITTEES
1998 - 1999

BUDGET AND FINANCE

Gail A. Anderson, Chairperson (as Chairperson-Elect of Section)
Reuben A. Munday (as Treasurer)
Carol Ann Martinelli

ON COMMITTEES

Gail A. Anderson, Chairperson (as Chairperson-Elect of Section)
Carol Ann Martinelli (as Vice Chairperson of Section)
Gary A. Taback (as past Section Chairperson)
Michael W. Maddin

CONTINUING LEGAL EDUCATION

Lawrence M. Dudek, Chairperson
James N. Candler, Jr. (as Chairperson of Section)
William B. Acker
Gail A. Anderson
Patrick A. Karbowski
Reuben A. Munday
Robert R. Nix, II
William M. Schlecte
Jack D. Shumate
Thomas C. Simpson
Gary A. Taback
C. Robert Wartell
Benham R. Wrigley, Jr.

LAND TITLE STANDARDS

Dennis W. Hagerty, Chairperson
Ronald T. Barrows
James R. Brown
William H. Darbee
Gary E. Gottlieb
Carl A. Hasselwander
Anne H. Hiemstra
Janet L. Kinzinger
Kevin M. Kohls
Gerard K. Knorr
Catharine B. LaMont
James P. Lanzetta
James M. Marquardt
Carol Ann Martinelli
Douglas S. McDougal
Donald R. McMillan
Russell A. McNair, Jr.
John E. Mogk
Robert D. Molhagen
Robert R. Nix, II
Brian J. Page
Russell E. Prins
James E. Reed
Michael H. Rhodes
John P. Rooney
Thomas C. Simpson
Kevin T. Smith
Margaret Van Meter
C. Robert Wartell

EMERITUS MEMBERS

John R. Baker
Maurice S. Binkow
James W. Draper
Saverio Mistretta
Allen Schwartz
Gary A. Taback
Nicholas Volino

STANDING COMMITTEES (continued)

MEMBERSHIP

Vicki R. Harding, Chairperson
Robert R. Nix, II
Reuben A. Munday

NOMINATING

1998-1999 Committee was:

Gary A. Taback, Chairperson
James N. Candler, Jr.
Mary M. Fowlie
Patrick A. Karbowski
Robert R. Nix, II

PRO BONO

Carol Ann Martinelli, Chairperson
Vicki R. Harding
David L. Haron
Patrick A. Karbowski
Gregg A. Nathanson
Allen Schwartz
C. Robert Wartell

PUBLICATIONS

George J. Siedel, Co-Chairperson (as Editor of **Review**)
Gail A. Anderson, Co-Chairperson (as Chairperson-Elect of Section)
Carol Ann Martinelli
and all special committee publications coordinators

REAL PROPERTY LAW SECTION
STATE BAR OF MICHIGAN

AD HOC COMMITTEES
1998 - 1999

RECORDING REQUIREMENTS

Vicki R. Harding, Chairperson
James N. Candler, Jr.
Carol Ann Martinelli
Robert R. Nix, II
Wilfred A. Steiner, Jr.

TECHNOLOGY

Lawrence M. Dudek, Chairperson
Gail A. Anderson
James N. Candler, Jr.
Susan K. Friedlaender
Vicki R. Harding
Howard A. Lax
Denise J. Lewis
Robert R. Nix, II
Gary A. Taback
Arlene Rubinstein (Section Administrator)

STATE OF MICHIGAN

FRANK J. KELLEY, ATTORNEY GENERAL

LAND DIVISION ACT: Land Division Act requirement that deed recite whether it contains right to make further divisions exempt from platting requirements

PLATS:

REAL ESTATE:

A grantor, when conveying his or her entire interest in unplatted land, where no divisions from the parcel have been made since March 31, 1997, is not required by the Land Division Act to include in the deed of conveyance a statement on whether the right to make further exempt divisions is being conveyed. The right to make further exempt divisions is conveyed with the land.

Opinion No. 7005 DEC 30, 1998

Honorable Pat Gagliardi
State Representative
The Capitol
Lansing, MI

Honorable Michael E. Nye
State Representative
The Capitol
Lansing, MI

You have asked whether a grantor, when conveying his or her entire interest in unplatted land, where no divisions from the parcel have been made since March 31, 1997, is required by the Land Division Act to include in the deed of conveyance a statement on whether the right to make further exempt divisions is being conveyed.

The Land Division Act,[1] 1967 PA 288, MCL 560.101 *et seq;* MSA 26.430(101) *et seq* (Act), regulates the division of land. Section 102(d) of the Act defines the term *division* to mean:

> [T]he partitioning or splitting of a parcel or tract of land by the proprietor thereof or by his or her heirs, executors, administrators, legal representatives, successors, or assigns for the purpose of sale, or lease of more than 1 year, or of building development that results in 1 or more parcels of less than 40 acres or the equivalent, and that satisfies the requirements of sections 108 and 109.

Section 102 also defines the terms *exempt split* and [s]*ubdivide* and *subdivision*. All of these definitions have in common the partitioning or splitting of a parcel or tract of land. Section 102(i) defines the terms *[p]arent parcel* and *parent tract* as a parcel or tract "lawfully in existence on the effective date of the amendatory act that added . . . subdivision[(i)]" to the Act. Amendatory 1996 PA 591 became effective on March 31, 1997.

Amendatory 1996 PA 591 added a new section 108 to provide that a *division* of land is not subject to the platting requirements of the Act but the same parent parcel or parent tract could not, without platting, be divided into more than a further specific number of parcels depending upon the size of the parcel or tract. New section 109(3) of the Act, as added by 1996 PA 591, provides, in pertinent part:

> A person shall not sell a parcel of unplatted land *unless the deed contains a statement as to whether the right to make further divisions* exempt from the platting requirements of this act under this section and section 108 is proposed to be conveyed. The statement shall be in substantially the following form: "The grantor grants to the grantee the right to make [insert number] division(s) under section 108 of the land division act, Act No. 288 of the Public Acts of 1967." In the absence of a statement conforming to the requirements of this subsection, the right to make divisions under section 108(2), (3), and (4) stays with the remainder of the parent tract or parent parcel retained by the grantor.

(Emphasis added.)

The Act's meaning of the term *division* contains no ambiguity requiring interpretation or construction. It should, therefore, be applied as written by the Legislature. *People v Ewing, Jr.*, 101 Mich App 51, 59; 301 NW2d 8 (1980).

The proprietor of a parcel of land who has not divided that parcel by conveying a portion of it on or after March 31, 1997, may convey the entire parcel without complying with sections 108 and 109, since by conveying the entire parcel no division is being made.[2] The Act, therefore, does not apply to such conveyances. The section 108 limitation on the number of parcels that may be created by the proprietor and the section 109(3) language required to be included in the deed of conveyance as to the right of the grantee to make further divisions depend on the act of *division*. Since your question is premised on no divisions being made by the proprietor on or after March 31, 1997, and no portion of the parent parcel or parent tract is retained by the grantor, sections 108 and 109(3) of the Act do not apply, and the right to make further divisions is conveyed with the land.

It is my opinion, therefore, that a grantor, when conveying his or her entire interest in unplatted land, where no divisions from the parcel have been made since March 31, 1997, is not required by the Land Division Act to include in the deed of conveyance a statement on whether the right to make further exempt divisions is being conveyed. The right to make further exempt divisions is conveyed with the land.

/s/ Frank J. Kelley
FRANK J. KELLEY
Attorney General

1. Through 1996 PA 591, the Legislature made several amendments to the act, including changing its title from the Subdivision Control Act of 1967 to the Land Division Act.
2. Your question does not address, and this opinion does not consider, restrictive convenants which a grantor's conveyance may affirmatively impose upon further divisions of a parcel or tract being conveyed.

CUMULATIVE ARTICLE INDEX

BANKRUPTCY

BROKER AND MORTGAGE SERVICES

CIVIL RIGHTS

CONDOMINIUMS, SUBDIVISIONS, COOPERATIVES AND PUDS

CONSTRUCTION/LIENS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

EMINENT DOMAIN

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

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

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

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

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

ENVIRONMENTAL LAW

NAVIGATING TO CERCLA'S SAFE HARBOR: EPA'S LENDER LIABILITY RULE – by Peter D. Holmes – Winter, 1993, p. 161.

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

STRUCTURING REAL ESTATE TRANSACTIONS IN THE ERA OF THE POLLUTERS PAY LAW – by Jack D. Shumate and Paul S. Lewandowski – Fall, 1992, p. 93.

THE AMENDED SAND DUNES PROTECTION AND MANAGEMENT ACT: DNR GETS SOME POTENTIAL NEW ALLIES – by Michael F. Skinner – Fall, 1990, p. 129.

MICHIGAN WETLAND PROTECTION ACT: THE STATE'S PERSPECTIVE – by John Arnsman and Steve Sadewasser – Spring, 1990, p. 23.

REGULATION OF UNDERGROUND STORAGE TANKS IN MICHIGAN – by Robert A. Hykan and John C. Burchett – Winter, 1989, p. 215.

PROPERTY TAX RELIEF FOR CONTAMINATED PROPERTY – by Julianna B. Miller – Fall, 1989, p. 167.

ASBESTOS AND CONSTRUCTIVE EVICTION: DETERMINING A STANDARD OF FITNESS FOR LEASEHOLDS – by Lawrence R. Shoffner – Spring, 1989, p. 11.

CITIZEN SUITS UNDER THE CLEAN WATER ACT – GWALTNEY MUDDIES THE WATERS – by Peter D. Holmes – Spring, 1989, p. 17.

ENVIRONMENTAL RISK ASSESSMENT FOR REAL ESTATE TRANSACTIONS – by James M. Harless – Winter, 1987, p. 81.

NEGOTIATING ENVIRONMENTAL PROVISIONS IN REAL ESTATE TRANSACTIONS – by Alan S. Levine – Winter, 1987, p. 74.

FIRST AID FOR THE BUYER – REMEDIES FOR THE PURCHASE OF CONTAMINATED PROPERTY – by John D. Dunn – Winter, 1987, p. 87.

REAL ESTATE TRANSACTIONS IN THE AGE OF SARA – by Jack D. Shumate – Winter, 1987, p. 70.

CURRENT DEVELOPMENTS IN MICHIGAN ENVIRONMENTAL LAW – by Joseph M. Polito – Fall, 1985, p. 113.

ENVIRONMENTAL IMPAIRMENT LIABILITY INSURANCE – by Jack D. Shumate – Summer, 1985, p. 87.

THE ENVIRONMENTAL PERILS OF LAND OWNERSHIP – by Jack D. Shumate – Summer, 1985, p. 92.

RECENT MICHIGAN SUPERFUND ACTIONS – by Jack D. Shumate – Summer, 1985, p. 97.

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

ESTATE PLANNING

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

ESTATE PLANNING FOR OWNERS OF REAL ESTATE: PART II – by William B. Acker – Fall, 1997, p. 211.

FORECLOSURE/FORFEITURE

LEASING

MORTGAGE AND LENDING ISSUES

A SELECTED SURVEY OF PUBLIC FINANCING ALTERNATIVES – by James W. Bliss, Cynthia B. Faulhaber, Terrence P. Grady, Michael L. Lencione, Jeffrey M. McHugh, and Timothy D. Sochocki – Summer, 1991, p. 43.

LENDER LIABILITY: SHOULD LENDERS CARE ABOUT "DUE CARE"? – by James L. Allen – Summer, 1989, p. 83.

LENDER LIABILITY: THE DONE DEAL? – by John E. Anding – Winter, 1988, p. 259.

SHARE LOAN FINANCING FOR THE COOPERATIVE MEMBER – by Michele Cubbison and James N. Candler, Jr. – Spring, 1988, p. 9.

EVERYTHING YOU EVER WANTED TO KNOW BUT WERE AFRAID TO ASK ABOUT ORIGINAL ISSUE DISCOUNT (OID) AND IMPUTED INTEREST – by Mark L. Robinson and Warren J. Ligan – Fall, 1986, p. 77.

MORTGAGE FORECLOSURE SALES AS FRAUDULENT CONVEYANCES – by Ronald P. Strote – Spring, 1986, p. 8.

A COMMENTARY UPON AND CRITIQUE OF ACT 351, PUBLIC ACTS OF 1984: MICHIGAN'S ANSWER TO FEDERAL PREEMPTION OF STATE LAW GOVERNING ENFORCEABILITY OF DUE-ON-SALE CLAUSES – by William B. Dunn – Summer, 1985, p. 80.

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

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

BANK BOARD FINAL REGULATIONS FOR DUE-ON-SALE UNDER GARN-ST. GERMAINE ACT – by William B. Dunn – Summer, 1983, p. 90.

A SURVEY OF PUBLIC FINANCIAL ASSISTANCE TO REAL ESTATE DEVELOPMENT – by Frank L. Andrews, Gerald P. LaHaie, Thomas S. Leven, Dennis R. Neiman, and Jefferson F. Riddell – Spring, 1983, p. 3.

GARN-ST. GERMAINE AND DUE-ON-SALE CLAUSES IN MICHIGAN – by Timothy A. Fusco – December, 1982, p. 275.

FIRST MORTGAGE INTEREST RATE ON RESIDENTIAL REAL PROPERTY IN MICHIGAN – by Patrick D. Hanes – August, 1982, p. 169.

THE TIME PRICE DIFFERENTIAL: A BOND CLAIMANT'S VEHICLE FOR RECOVERY OF SERVICE CHARGES – by Robert R. Nix, II – June, 1982, p. 121.

MICHIGAN STATUTORY INTEREST RATE CEILINGS IMPOSED BY STATE LAW – February, 1982, p. 10.

SYNDICATIONS AND OTHER AREAS OF REAL ESTATE FINANCING IN THE 1980's – by Craig Hall – December, 1981, p. 189.

AN ANALYSIS OF MICHIGAN'S NEW USURY STATUTES – by James Marshall – June, 1980, p. 86.

FEDERAL PREEMPTION OF STATE USURY CEILINGS UNDER PUBLIC LAW 96-161 – by Robert H. Janover – June, 1980, p. 76.

OFFERING LIMITED PARTNERSHIP INTERESTS UNDER THE NEW MICHIGAN PRIVATE OFFERING EXEMPTIONS – by Joel J. Morris – February, 1980, p. 2.

OIL, GAS AND MINERAL RIGHTS

IMPLIED COVENANT OF REASONABLE DEVELOPMENT [Oil and Gas Leases] – by Deborah L. Bruce – Winter, 1993, p. 181.

REAL ESTATE CLOSINGS AND OUTSTANDING OIL AND GAS RIGHTS – DO THEY MIX? – by Mark A. Van Allsburg – Spring, 1993, p. 17.

THE GENERAL PROPERTY TAX AS IT PERTAINS TO INTERESTS IN OIL AND GAS – by J. Donel Moore – Fall, 1991, p. 91.

POOLING AND UNITIZATION IN MICHIGAN – by Thomas A. Nelson – Summer, 1989, p. 103.

STATUTES PROMOTING MARKETABILITY OF OIL AND GAS TITLES: THE MICHIGAN DORMANT MINERALS ACT AND ITS COUNTERPARTS AFTER TWENTY-FIVE YEARS – by James R. Brown – Fall, 1988, p. 145.

CURING TITLE OF AN UNRELEASED OIL AND GAS LEASE – by David A. Lawler – Fall, 1984, p. 417.

FARMOUT AGREEMENTS IN THE OIL AND GAS INDUSTRY – by William H. Stephens – Fall, 1984, p. 421.

IMPLIED COVENANTS OF EXPLORATION AND DEVELOPMENT IN OIL AND GAS LEASES – by James R. Brown – Fall, 1984, p. 391.

INTERESTS ARISING UNDER AN OIL AND GAS LEASE – by T. T. Thompson – Fall, 1984, p. 386.

POTENTIAL RULE AGAINST PERPETUITIES EFFECTS ON COMMON OIL, GAS AND MINERAL TRANSACTIONS – by E. Dan Stevens – Fall, 1984, p. 437.

THE MICHIGAN DORMANT MINERALS ACT – by James R. Brown – Summer, 1983, p. 116.

ANATOMY OF AN OIL AND GAS LEASE – by Lawrence M. Elkus – Summer, 1983, p. 100.

COMMON OIL AND GAS TERMS – by David A. Lawler – Summer, 1983, p. 96.

HAS MY OIL AND GAS LEASE EXPIRED? THE HABENDUM CLAUSE – by T. T. Thompson – Summer, 1983, p. 113.

SPACING AND POOLING IN MICHIGAN – by Terence V. Lynam and William H. Stephens, III – Summer, 1983, p. 136.

U.S. SUPREME COURT DENIES CERTIORARI IN MICHIGAN DORMANT MINERAL ACT CASES – by Allen E. Priestley – June, 1982, p. 139.

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

PARTNERSHIPS, CORPORATIONS, GOVERNMENTS AND OTHER ORGANIZATIONS

OPPRESSION OF MEMBERS OF LIMITED LIABILITY COMPANIES – by Jeffrey A. Supowit – Summer, 1998, p. 103.

PUBLIC ACT 52: A COMPREHENSIVE AMENDMENT OF THE MICHIGAN LIMITED LIABILITY COMPANY ACT – by C. Leslie Banas – Fall, 1997, p. 225.

A REAL PROPERTY PRACTITIONER'S GUIDE TO THE UTILIZATION OF LIMITED LIABILITY COMPANIES IN REAL PROPERTY TRANSACTIONS – by Tara E. Barr – Winter, 1995, p. 217.

PROFESSIONAL RESPONSIBILITY

PREMISES LIABILITY

PROPERTY SALES AGREEMENTS

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

RESIDENTIAL TRANSACTIONS

MICHIGAN'S NEW SELLER DISCLOSURE ACT: SELLER BEWARE – by Gregg A. Nathanson – Summer, 1994, p. 71.

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

THE LAW OF MUTUAL MISTAKE AND LENAWEE: SHOULD MICHIGAN ABANDON ROSE 2nd OF ABERLONE? – by George D. Cameron, III – Spring, 1984, p. 315.

RESIDENTIAL CLOSING PROBLEMS – by Philip R. Seaver – Summer, 1983, p. 85.

TAXATION

CHECK-THE-BOX: A MAJOR STEP TOWARD TAX SIMPLIFICATION – by Richard A. Shapack and William B. Acker – Spring, 1998, p. 53.

CURRENT ABUSES OF THE ANTI-RAIDING PROVISION OF ACT 198 AND PROPOSED REFORMS [Property Tax Abatement] – by Thomas P. Martin and Paul J. Mastrangel – Fall, 1997, p. 249.

THE "SPECULATIVE BUILDING" DESIGNATION IN ACT 198 [Property Tax Abatement] – by Paul J. Mastrangel and Thomas P. Martin – Fall, 1997, p. 253.

OFF-BALANCE SHEET FINANCING: SYNTHETIC REAL ESTATE – by John C. Murray – Spring, 1997, p. 5.

A ROAD MAP THROUGH THE TAX SALE MINE FIELD: A TITLE INSURER'S PERSPECTIVE – by Catharine B. LaMont – Fall, 1996, p. 149.

"SUPERCAP" IS UNCONSTITUTIONAL, SAYS ATTORNEY GENERAL KELLEY – by Samuel J. McKim, III and Joanne B. Faycurry – Fall, 1996, p. 157.

MICHIGAN'S PROPERTY TAX "CAP" – NOT AS SIMPLE AS IT SOUNDS – by Samuel J. McKim – Summer, 1995, p. 109.

LOCAL ASSESSORS RECEIVE A BELATED CHRISTMAS PRESENT: ACT 415 REQUIRES THE SUBMISSION OF VALUATION DATA – by Gail A. Anderson, James M. Marquardt and Michael W. Maddin – Spring, 1995, p. 5.

EXCHANGE REAL ESTATE AND SAVE TAX: RECENT DEVELOPMENTS CLARIFY PRACTICE APPLICATIONS – by William B. Acker – Winter, 1994, p. 195.

FEDERAL AND MICHIGAN TAX ASPECTS OF REAL ESTATE PARTNERSHIP WORKOUTS AND FORECLOSURES – by John J. Grant and William B. Acker – Fall, 1992, p. 103.

FEDERAL AND MICHIGAN TAX ASPECTS OF REAL ESTATE PARTNERSHIP WORKOUTS AND FORECLOSURES – by John J. Grant and William B. Acker – Winter, 1991, p. 147.

EXPANDED REAL ESTATE REPORTING REQUIREMENTS IMPACT MANY REAL ESTATE TRANSACTIONS – by William B. Acker – Summer, 1991, p. 69.

TITLES AND CONVEYANCING

RESTRICTIVE COVENANTS IN MICHIGAN – by William E. Hosler – Summer, 1998, p. 81.

DOWER: IMPORTANT PROTECTION OR SEXIST ANACHRONISM? – by Margaret A. Meyers, Willard G. Moseng and Clarence A. Stone – Spring, 1996, p. 5.

ENTIRETIES PROPERTY: CERTAINLY UNSETTLING NEWS – by John S. Regan – Spring, 1995, p. 39.

RECORDING CORRECTIVE DOCUMENTS – by Willard G. Moseng – Spring, 1995, p. 29.

THE IMPACT OF PARTNERSHIP DISSOLUTION WITH RESPECT TO CLAIMS UNDER A POLICY OF TITLE INSURANCE – by James F. Altman – Summer, 1993, p. 69.

LAND TITLE STANDARDS, FIFTH EDITION – by Russell A. McNair – Fall, 1992, p. 111.

THE 40 YEAR MARKETABLE TITLE ACT: RESTRICTIONS OF RECORD REDUX – by Clarence L. Stone, Jr. and Willard G. Moseng – Spring, 1992, p. 17.

COVENANTS AND PRIVITY: A NEW PERSPECTIVE – by Willard G. Moseng and Clarence L. Stone, Jr. – Spring, 1991, p. 7.

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

MICHIGAN REGISTERS OF DEEDS PRACTICE – by Willard G. Moseng – Summer, 1989, p. 91.

THE UNIFORM STATUTORY RULE AGAINST PERPETUITIES: FIXING WHAT ISN'T BROKEN – by William A. Siebert – Summer, 1989, p. 99.

ALTA TITLE POLICY FORMS: 1987 REVISIONS – by Ronald E. Hodess – Spring, 1988, p. 39.

TITLE INSURANCE FOR THE OWNER: COMMITMENT AND POLICY – by Robert S. Olivier, Lee P. Mohnkern and James P. Lanzetta – Spring, 1987, p. 3.

THE FORTY YEAR MARKETABLE TITLE ACT – AFTER FORTY YEARS – by Ralph Jossman – Fall, 1986, p. 82.

RECORDING LAND CONTRACT AND LEASE MEMORANDA – by Carol Ann Martinelli and Willard G. Moseng – Summer, 1986, p. 31.

FROM FEE SIMPLE TO FEE COMPLEX – by Ralph Jossman – Winter, 1985, p. 183.

MADHAVEN v SUCHER - REVISITED – by Jeffrey B. Larkin – Spring, 1983, p. 35.

MICHIGAN LAND TITLE STANDARDS, FOURTH EDITION – by Ralph Jossman – Spring, 1983, p. 30.

MICHIGAN'S NEW STATUTE ON MARRIED WOMEN'S CONTRACTUAL CAPACITY: THE END OF COVERTURE? – by George D. Cameron, III – December, 1982, p. 280.

CLOGGING THE EQUITY – by John C. Murray – October, 1981, p. 132.

MAKING CLAIMS ON TITLE POLICIES – by Alan A. Knox – August, 1981, p. 119.

COVERTURE'S LAST STAND: THE MARRIED WOMAN'S LACK OF CONTRACTUAL CAPACITY IN MICHIGAN – by George D. Cameron, III – June, 1981, p. 75.

WATER LAW

ZONING AND LAND USE

MICHIGAN COURTS PAINT WITH A BROAD BRUSH IN RECENT ZONING CASES – by Gerald A. Fisher – Summer, 1986, p. 45.

A SECONDARY IMPACT OF SILVA – by Norman Hyman – Summer, 1983, p. 68.

TURKISH AND THE FUTURE – by Michael H. Feiler – October, 1980, p. 142.

MISCELLANEOUS

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

TREBLE DAMAGES FOR INJURY TO LAND – by N. Q. Stockmeyer, Jr. – Fall, 1990, p. 135.

RECENT DEVELOPMENTS IN REAL PROPERTY LAW – by Richard E. Rabbideau and William L. Cooper – Spring, 1985, p. 3.

DEVELOPMENTS IN REAL PROPERTY LAW: 1982-1983 – by Stephen A. Bromberg and Jeffrey R. Kravitz – Winter, 1983, p. 217.

REAL PROPERTY LAW, 1981–82 – by William B. Dunn and Edward C. Dawda – October, 1982, p. 189.

REAL PROPERTY LAW 1981 (PART II) – by Allen Schwartz and Sally S. Harwood – December, 1981, p. 179.

REAL PROPERTY LAW 1981 (PART I) – by Allen Schwartz and Sally S. Harwood – October, 1981, p. 137.