

# REAL PROPERTY LAW SECTION

Vol 2, No 4

## *Newsletter*

**STATE BAR OF MICHIGAN**

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G. Norman Gilmore  
Chairman

Frank S. Sengstock  
University of Detroit Law School  
Editor

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### ANNUAL REPORT OF COUNCIL (May 28, 1975)

TO THE BOARD OF COMMISSIONERS:

In the first full year of its existence, the Real Property Law Section believes it has accomplished much more than we had any right to expect. Starting with about 625 members in December, 1973, there are now over 850 lawyers on the roster. Our Newsletter, edited on a bimonthly basis by Prof. Frank S. Sengstock of the University of Detroit Law School, has proven to be a huge success. Timely articles and informative critiques of interest to lawyers with real estate clients have attracted favorable attention all over Michigan, and even outside the state.

Among other constructive activities of the Section has been an earnest effort to keep abreast of new legislation affecting real property and to make available to Section members our best thinking on its effect and, in some cases, on procedures for compliance. We also, through our Legislative Reports Committee and the Section Council, continually are monitoring pending bills as well. In some instances, we have taken a position either in full support of or in total opposition to specific legislation. In others, we have attempted to advocate amendments we felt were necessary or desirable. In individual cases, this has taken the form of section or council action. At other times, we have requested assistance from the Board of Commissioners when the particular matter was felt to be of sufficient importance, or where immediate action became imperative.

The Section has been most fortunate in having within its scope of activity the formerly separate Title Standards Committee. This body, now a committee of the Real Property Law Section, remains quite autonomous in selecting its own members and officers. The section, though, has been able to lend considerable assistance and encouragement to the committee in the production of a new edition of the Michigan Title Standards which, hopefully, will be available to the Bar sometime this fall. These standards, which constitute a consensus on various elements of a marketable title, are very useful to real estate practitioners. They represent thousands of man-hours of effort on the part of an erudite group of title examiners. The Standards probably will be sold by the State Bar in looseleaf form so that they may be amended or updated periodically without the necessity for later complete republication. The section is proud to be a part of that enterprise.

Another means of helping busy lawyers to maintain familiarity with real property matters lies in our collaboration with the Institute of Continuing Legal Education, arranging seminars in various parts of the state on topics of general interest. To assist us in finding out what subjects lawyers must want to get into, we sent out a questionnaire to section members last year requesting their advice. The replies were very numerous, helpful, and instructive, and ICLE has cooperated fully in setting up and running the appropriate sessions. Our first such seminar was held in April of this year in Detroit, and early in May in Grand Rapids. This first effort, presided over by Russ Paquette and with Ralph Jossman and Jim Egan as speakers, dealt primarily with basics involved in common real estate transactions. Both sessions brought capacity audiences and extremely favorable reaction. Additional seminars are in the planning stage. We hope they will be equally interesting and worthwhile.

On several occasions the section has received requests for technical assistance either just in answering a particular question or in helping to solve a general problem. One typical request, presently being brought to fruition by section member Dan Henry, was for the updating of the "Primer of Real Estate Law" furnished by the Michigan Department of Licensing and Regulation to applicants for licenses as salesmen and brokers.

The hard working Section Council has held regular monthly meetings (with an average attendance of about 12 out of 16, - not bad for busy men). These meetings have been quite productive and, we believe, should assist in a continued healthy growth. Enthusiastic committee activity has kept the council on top of current problems and given invaluable help in their solution.

Added to all of our other activities, there are a number of long-range goals we are trying to keep in sight. Among them are a complete redrafting of the Mechanics Lien Law in Michigan, the abolition of dower, and a solution to the chaotic situation surrounding statutory mortgage foreclosures. We hope that in the foreseeable future we can do something about all of these things. In any case, we're on our way.

Respectfully submitted,

Officers and Council -

G. Norman Gilmore - Chairman, Detroit  
Ralph Jossman - Vice-Chairman, Grosse Pointe  
Patrick J. Keating - Chairman-Elect, Detroit  
John F. Wolnewitz - Secretary, Mt. Clemens  
Allen E. Priestley - Treasurer, Troy  
Maurice S. Binkow, Detroit  
Clarence M. Burton, Detroit  
Marvin A. Canvasser, Southfield  
James W. Draper, Detroit  
Edward D. Gold, Southfield  
Leonard J. Grabow, Detroit  
Frank S. Sengstock, Detroit  
David S. Snyder, Southfield  
Maurice V. Victor, Southfield  
Myron Winegarden, Flint  
Benham R. Wrigley, Jr., Grand Rapids

Committee Restructuring

by

Council of the Real Property Section

WHEREAS, it appears that certain committees of the Section have not fully utilized the membership because of the limited nature of their activity and the membership of other committees in the Section have been over utilized because of the volume of work required of them; and

WHEREAS, a study of the matter has been made by Messrs. Gilmore, Victor and Binkow and they have reported to the Council and have recommended that certain committees should be eliminated and their function taken over by existing committees, certain new committees created and that the By-Laws of the Section be amended to provide for the restructuring of committees of the Section.

IT IS HEREBY RESOLVED,

1. That the committee on liens, encumbrances, and property taxes and the committee on land sales and the committee on syndications shall be dissolved effective at the annual meeting of September, 1975.

2. There is hereby created the following additional committees:

- (a) Committee on mechanics liens;
- (b) Committee on mortgages and mortgage foreclosures;
- (c) Committee on significant legal decisions.

3. The following committees shall be restructured and renamed by virtue of their additional functions as indicated by their new titles:

- (a) Real Estate titles, taxes and encumbrances;
- (b) Committee on land use and land sales;
- (c) Committee on commercial transactions and syndications.

IT IS FURTHER RESOLVED that an amendment to the By-Laws to accomplish the restructuring of the committees in accordance with the above portion of the resolution, shall be prepared and published in the next issue of the Section Newsletter for presentation to the Section members at the annual meeting in September, 1975.

Passed unanimously by the Council - August 9, 1975

NOTICE OF PROPOSED AMENDMENT  
to the Bylaws of the  
REAL PROPERTY LAW SECTION

At a special meeting of the Council on Saturday, August 9th, 1975, a petition to submit to the Annual Meeting a proposed Amendment to the Bylaws relating to standing committees was presented, endorsed by the requisite ten members of the Section. After a discussion, at which it was pointed out that some of the existing committees were engaged in several varied projects while others had had no activity whatever, the Council unanimously approved the petition, which is as follows:

To amend Article VII, Section 2 A of the Bylaws to read as follows:

"Section 2 A. The Chairman shall appoint the following standing committees and their Chairmen from Section members:

- (a) Real estate titles, taxes and encumbrances.
- (b) Land Use and Land Sales Regulation.
- (c) Residential, Multiple, Cooperatives and Condominums.
- (d) Commercial Real Estate Transactions and Syndications.
- (e) General Liaison.
- (f) Seminar, Workshops and Meetings Committee.
- (g) Publications.
- (h) Legislation Reports.
- (i) Specialization Committee.
- (j) Mechanics Liens.
- (k) Mortgages and Mortgage Foreclosures.
- (l) Significant Legal Decisions Committee.

The Council may authorize the Chairman to appoint other committees and their chairmen from Section members to perform such duties and exercise such powers as the Council may direct. The chairman on direction from the Council shall remove any Chairman or member from such committee and fill vacancies on such committees.

FORECLOSURE OF MORTGAGES AND LAND CONTRACTS SEMINAR

LIVE PRESENTATIONS

Friday, September 26  
Sheraton-Cadillac Hotel  
Detroit, Michigan

Friday, October 3  
Pantlind Hotel  
Grand Rapids, Michigan

VIDEOTAPED PRESENTATIONS

Friday, October 17  
Kalamazoo Center Inn  
Kalamazoo, Michigan

Friday, October 31  
General Motors Institute  
Flint, Michigan

Friday, October 24  
Sheraton-Southfield Hotel  
Southfield, Michigan

Friday, November 14  
Park Place Motor Inn  
Traverse City, Michigan

Course Schedule

9:00 - 9:30 INTRODUCTION

- A. Common Events of Default
- B. Examination of Mortgage Documents
- C. Alternatives to Foreclosure

Speaker: James N. Candler, Jr., Esq.

FORECLOSURE BY ADVERTISEMENT

9:30 - 9:45 A. Standard Procedure

9:45 - 10:00 B. Abandoned Property Procedure

Speaker: Peter E. O'Rourke, Esq.

10:00 - 10:15 BREAK

10:15 - 11:15 C. Special Problems

- 1. Prior Liens
- 2. Federal Tax Liens
- 3. Bankruptcies and Related Matters
- 4. Reinstatement
- 5. Physical Damage
- 6. Condemnation
- 7. Title Problems
- 8. Soldiers and Sailors Relief Act
- 9. Financing Statements

Speakers: Ralph Jossman, Esq.  
Peter E. O'Rourke, Esq.

11:15 - 11:35 D. Impact of Recent Judicial Decisions

Speaker: James N. Candler, Jr., Esq.

11:35 - 12:00 QUESTION AND ANSWER SESSION

12:00 - 1:00 LUNCH

1:00 - 1:50 JUDICIAL FORECLOSURE

- A. Statutory Procedure
- B. Special Problems
  - 1. Receivers
  - 2. Assignment of Rents
  - 3. Others

Speaker: Paul A. Ward, Esq.

1:50 - 2:20 POST SALE PROBLEMS

- A. Redemption Period
- B. Post-Redemption Period

Speaker: Patrick J. Keating, Esq.

2:20 - 2:30 BREAK

2:30 - 3:05 DEFENSES AVAILABLE TO MORTGAGOR

Speaker: David S. Snyder, Esq.

3:05 - 3:35 INSURED OR GUARANTEED MORTGAGES

Speaker: Russell M. Paquette, Esq.

3:35 - 4:20 SELLER'S REMEDIES UNDER LAND CONTRACTS

- A. Summary Proceedings
- B. Foreclosure in Equity

Speaker: G. Norman Gilmore, Esq.

4:20 - 5:15 PENDING COURT ACTIONS AND LEGISLATION

Speakers: James N. Candler, Jr., Esq.  
Peter E. O'Rourke, Esq.

5:15 - 5:30 QUESTION AND ANSWER SESSION

FORECLOSURE OF MORTGAGES AND LAND CONTRACTS

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PROPOSED AMENDMENT TO CHAPTER 32, REVISED JUDICATURE ACT

(MCL SECTION 600.3201 et seq.) RELATIVE TO PROVIDING NOTICE

AND OPPORTUNITY FOR HEARING PRIOR TO FORECLOSURE BY ADVERTISEMENT

by

William B. Dunn, Chairman  
Subcommittee on Revision to Michigan Statutory  
Foreclosure of Mortgages Law, Committee on Liens,  
Encumbrances and Property Taxes

Upon receipt of the report of the Subcommittee to this Council relating to the proposal of the Law Revision Commission for the repeal of Chapter 32, Revised Judicature Act (Foreclosure by Advertisement) and proposal to amend the summary proceedings section of the Revised Judicature Act, MCL Section 600.5726-5750, the Council, at its meeting of May 17, 1975, requested the Subcommittee to develop a legislative proposal which could be considered in the alternative to that of the Law Revision Commission. In developing such an alternate proposal, the Subcommittee was asked to assume that notice and opportunity for hearing would be required in the conduct of mortgage foreclosures.

The proposal of the Law Revision Commission was introduced in the Michigan House of Representatives on June 26, 1975, as House Bill No. 5423, and has been referred to the Committee on Judiciary. It has also been published in the last issue of the Newsletter as a proposal of the Law Revision Committee.

After a number of meetings and considerations of several types of proposals, the Subcommittee has concluded that the best approach for providing notice and opportunity for prior hearing exists in the amendment to the existing foreclosure by advertisement law. Accordingly, an amendment to Chapter 32 of the Revised Judicature Act is proposed, adding three additional sections to that law: one dealing with notice and hearing opportunity prior to acceleration and commencement of foreclosure by advertisement, one dealing with notice of public sale, and one providing that no deficiency can be asserted based upon the bidding at public sale.

The proposal provides a form and, partially, the content of notice to the owner of mortgaged property prior to acceleration or institution of foreclosure proceedings. The necessity of court action in all foreclosure cases is avoided, but is confined to those cases in which the mortgagor desires to contest foreclosure.

The proposal permits the mortgagor to take issue with the mortgagee's proposed reasons for foreclosure. This right of contest applies not only to the claimed defaults in the mortgage performance, but also permits the mortgagor to raise any other reason as to why the mortgage should not be foreclosed. The Subcommittee is aware that numerous defenses may be raised by a mortgagor, such as usury, non-compliance with federal mortgage guidelines, defect in the property, poverty, and so forth. Careful consideration was given to limiting the scope of hearing afforded by the proposal to those matters relating strictly to the existence of default. It was felt, however, that to so limit would simply engender additional litigation at the Circuit Court level, and it was decided to open up the entire "Pandora's Box" initially. Thus prolonging foreclosure and lack of certainty to mortgagees relying upon the hearing. The approach adopted is similar to the claim and delivery court rule, at which an initial hearing is provided to determine whether or not defenses raised are meritorious, and an additional hearing is held to determine the final rights of the parties.

The proposal also would permit the mortgagor to reinstate the mortgage at any time prior to the public sale. This is a right not available under older conventional mortgages, and perhaps is broader than the right under the prevailing FHLMC mortgage form, which provides for reinstatement at any time up to five days prior to the sheriff's sale. However, in view of the fact that the terms of various insured mortgage instruments provide for reinstatement at some time prior to a sheriff's sale, it was felt that the foreclosure law may as well provide a similar right of reinstatement.

The proposal eliminates the right of a mortgagor to create and collect a deficiency when proceeding by foreclosure by advertisement. If the mortgagee desires to create a deficiency, that can be accomplished through foreclosure by judicial action where the interests of the respective parties are fully litigated. It was also concluded that deficiencies occur rarely in foreclosure by advertisement cases, and even if created, are rarely pursued or collected. (The elimination of the deficiency may also be a palliative to the consumer groups and Legislature.)

#### Proposed Amendment

I.

- Sec. 3205 (a) Prior to the acceleration of the mortgage debt or the institution of foreclosure proceedings as otherwise provided in this Chapter, the holder of any mortgage seeking to exercise a power of sale therein contained shall serve upon the persons hereinafter specified a written notice containing the information hereinafter provided.
- (b) Such notice shall be served upon the following: Any person to whom the mortgage instrument itself directs notice to be sent in the case of default; and the record owner or owners (including all persons owning in tenancy by the entirety) of the property subject to such mortgage, as evidenced by the records of the Register of Deeds in the county where the property is situated not more than 10 days before the date of notice.

- (c) Such notice shall specify and, where the provisions hereof are within quotation marks, shall so state:
- (1) The date of the notice.
  - (2) The names of the persons upon whom served and the name of the original mortgagor, if different; and the name and address of the mortgagee and assignee of the mortgage, if any.
  - (3) The date and original amount of the mortgage.
  - (4) The amount of the remaining unpaid balance of the principal of the mortgage debt.
  - (5) A description of the mortgaged premises, conforming substantially with that contained in the mortgage instrument.
  - (6) "THE HOLDER OF THE MORTGAGE INTENDS" [if the mortgage instrument provides for acceleration of the indebtedness on default: "(a) TO DECLARE THE REMAINING UNPAID PRINCIPAL BALANCE OF THE MORTGAGE DEBT IMMEDIATELY DUE AND PAYABLE AND (b)"] "TO INSTITUTE PROCEEDINGS TO FORECLOSE THE MORTGAGE BY ADVERTISEMENT PURSUANT TO CHAPTER 32 OF THE REVISED JUDICATURE ACT IN THE EVENT THAT THE DEFAULT SPECIFIED IN THIS NOTICE IS NOT CURED WITHIN TWENTY ONE (21) DAYS FROM THE DATE OF THIS NOTICE."
  - (7) "[a] The mortgage is claimed to be in default by reason of the following: "(insert information as to the nature of the default(s) claimed with reasonable specificity.)"  
  
"[b] In order to cure such default, it is necessary to do the following within twenty one (21) days from the date of this notice: "(insert information as to payment of amounts necessary to cure default by reason of non-payment of obligations secured by the mortgage as of the date of the notice, and any performance required for the curing of default in the event of non-performance of other obligations secured by the mortgage. The amount necessary to cure may include any filing fee paid or to be paid by the holder of the mortgage under this Section.)"  
  
"[c] You may contact" (insert name, address and telephone number of the holder of the mortgage or its agent or representative)" in regard to this matter."
  - (8) "You have a right to file within twenty one (21) days from the date of this notice with the" (insert the title and address of either the District Court, the Municipal Court, or the Common Pleas Court of the City of Detroit, as the case may be, where the mortgaged property is located) "a statement in writing on the form attached hereto and signed by you (subject to the penalties of perjury) denying the existence of the default claimed or otherwise stating why

the mortgage should not be foreclosed by reason of the default claimed. If you file such a statement, the Court will set a hearing and notify you of the time and place. At such a hearing the Court will determine whether the reasons contained in such statement are meritorious, and whether the mortgage may be foreclosed without further hearing. You are entitled to seek counsel and be represented by an attorney. You are entitled to appear at such hearing with or without an attorney."

- (9) "You are not required to file such a statement or appear in Court, if you do not choose to do so. In the event you do not file such a statement within twenty one (21) days from the date of this notice, or do not appear at a hearing set by the Court, or if the Court, after a hearing, decides against you (subject, in such event, to your right to appeal as provided by law),
- (a) The mortgage may be foreclosed by advertisement and a public sale will be conducted in not less than thirty (30) days following the entry of an Order of the Court permitting foreclosure.
  - (b) The default(s) may be cured at any time prior to the public sale by paying the installments of principal, interest and other sums due and owing the mortgagee as of the date of payment; plus the costs of publication of notice of foreclosure; filing fees and court costs with respect to the proceedings hereunder, including reasonable attorneys fees and reasonable attorneys fees in connection with the foreclosure proceedings; and in addition thereto, by performing all other requirements set forth above.
  - (c) No deficiency judgment can be obtained against you based upon the sale price of the property at the time of public sale pursuant to foreclosure by advertisement.
  - (d) You have a right to redeem from the public sale within "(insert length of redemption period)", the redemption period as provided by law, after such sale.
  - (e) In the event you do not redeem, the purchaser at the public sale will be entitled to possession of the property at the end of the redemption period, and if you are in possession of the property at that time, you may be then evicted without further hearing.
  - (f) You may be liable for damage or destruction of the property occurring at any time prior to your delivery of possession of the premises to the purchaser at the public sale.
  - (g) You may execute and deliver to the holder of the mortgage a voluntary conveyance of the mortgaged premises at any

time prior to the expiration of the redemption period in order to terminate any interest you may have in the property and any liability for damages or destruction which may occur to the property following the day of delivery of your voluntary conveyance.

Such notice may provide additional information desired to be given by the holder of the mortgage, provided the same is not inconsistent with any of the foregoing provisions. Such notice shall have attached to it a duplicate thereof providing space either on the front or reverse side, or both, for the person notified to write a statement as provided in subpart (8) above of this paragraph (c). If such space is on the reverse side, a statement must be made to that effect on the front side.

- (d)
  - (1) Service of this notice may be made upon the persons required to receive notice hereunder by personal service, or by certified mail, return receipt requested.
  - (2) In the event that personal service of the notice may not have been made or in the event that delivery receipt of certified mail notice has not been received by the sender within 10 days from the date of the notice, service may be made both by securely attaching a copy of the notice and statement of reply form in a conspicuous place on the mortgaged property, and by mailing a copy of said notice and statement of reply form to the person upon whom service is sought to his last known address, by first class mail, not less than 7 days before expiration of the period specified in said notice.
  - (3) Within five (5) days after the issuance of the notice herein provided, the holder of the mortgage shall cause to be filed in said Court, a copy of the notice so issued, and pay such filing fee therefor as may be prescribed by rule of the Court. The holder of said mortgage shall cause to be filed in said Court prior to or upon the last date for filing of the statement of reply as specified in said notice, a proof of service of the notice made in accordance with the provisions of subpart (1) or (2) above.
- (e) If the statement of reply is filed with the Court, the Court shall promptly notify the holder of the mortgage and the replying person(s) of the place, date and time of hearing, which shall not be less than seven (7) nor more than ten (10) days from the receipt of such statement of reply by the Court.
- (f) If such person(s) who has filed a statement of reply as provided in this Section appear at such a hearing, the Court shall thereupon hear the same as a Motion. If the Court determines that such person(s) has no meritorious defenses to the foreclosure action, the Court shall enter an Order authorizing acceleration of the mortgage debt (if the mortgage so provides) and foreclosure of the mortgage in conformity with the provisions of this Chapter. If the Court determines that there may be a meritorious defense to foreclosure, the case shall thereupon be set for trial in conformity with the rules of the Court in which the action is pending.

- (g) If the person upon whom the notice is served fails to respond as provided in this Section, or fails to appear at the hearing scheduled by the Court, the Court, upon written request of the holder of the mortgage, shall issue to the holder an Order authorizing acceleration of the mortgage debt (if the mortgage so provides) and foreclosure of said mortgage pursuant to the provisions of this Chapter.
- (h) A true copy of any Order of the Court authorizing acceleration and foreclosure shall be attached to and recorded with the sheriff's deed on foreclosure. The entry of any Order of the Court pursuant to the provisions hereof is final, and shall not be open to collateral attack. Any party may appeal the Order of the Court to the Circuit Court of the county wherein the property is situated, in accordance with Rule 705, GCR 1963, as amended from time to time.
- (i) Any final Order authorizing acceleration and foreclosure shall also serve as an Order authorizing the issuance of a Writ of Restitution following the expiration of the period of redemption upon mortgage foreclosure, in accordance with RJA Section 5701, et seq. without further hearing thereon as to the person(s) notified under this Section; provided, however, that the purchaser at public sale, or its assignee shall send notice to such person(s) not less than thirty (30) days prior to the end of the redemption period advising that possession of the premises is demanded as of the end of the redemption period, specifying the date thereof. Such notice shall be sent by certified mail, and shall be deemed to be served as of the date of mailing. Failure to provide such notice shall not affect the validity of foreclosure proceedings, but only the right to obtain a Writ of Restitution for recovery of possession without further hearing.

## II.

Sec. 3213 Not less than ten (10) days prior to the date of public sale, the holder of the mortgage to be foreclosed shall cause to be sent by first-class mail to those persons entitled to notice under Section 3205 of this Chapter, a copy of the published notice and a statement specifying the following:

- (a) That foreclosure by advertisement proceedings have been commenced;
- (b) That the sale will be held at a specified place, date and time;
- (c) The date or time period at which the period of redemption will expire; and
- (d) That possession of the mortgaged premises is demanded as of the expiration of such redemption period.

## III.

Sec. 3279 In the case of foreclosure of mortgages pursuant to this Chapter, for which proceedings therefor are commenced subsequent to (the effective date of this act), no purchaser at public sale shall be entitled to

sue for or undertake to recover a deficiency judgment against the mortgagor, trustor or other maker of any such obligation, or any other person liable thereon by reason of the bid price at public sale being less than the total of the remaining principal balance of the mortgage debt, plus accrued interest, taxes, interest, and other lawful charges includable in such bid, to and including the date of such sale.

Legal Rates of Interest

Dear Editor:

I was chagrined to read that my opinion letters with respect to legal rates of interest on second mortgages were wrong according to Mr. Philleo. After reading his article I immediately reread § 9 of the statute.

The crucial wording of that section reads:

"The bona fide primary security for which is a lien against real property." (Emphasis supplied.)

Most assuredly the second (third, fourth, and even fifth) mortgages which our lenders take for their larger loans definitely are the primary security upon which they rely; and those mortgages definitely are "a" lien against real property. Therefore, I think Mr. Philleo ought to reconsider his position with respect to mortgages and land contracts in excess of \$100,000 to include all mortgages and land contracts in excess of \$100,000, not simply first mortgages. The language of subsection 9 is clearly distinct from that of subsection 2, which speaks to a "primary security for which...is a first lien against real property." (Emphasis supplied.)

One other minor point. The criminal usury ceiling is really a bit circular since its 25% limit only applies when the interest charged is not otherwise authorized or permitted by law. Therefore, if one may charge "any" rate of interest, one may charge in excess of 25% and not violate the criminal usury statute.

Lastly, thank you for providing a topical and interesting newsletter. It definitely ranks among the best of all the State Bar sections.

Very truly yours,

Andrew A. Paterson  
Cross, Wrock, Miller & Vieson

Michigan Land Title Standards

by

Myron Winegarden

Early in 1952, a legal institute dealing with real property law was held at Ann Arbor. Among the speakers was Perry W. Morton of Nebraska who told of what had been accomplished in that state through the adoption of standards of title examination. Insubstantial exceptions had been eliminated from title opinions, with considerable resultant savings in time, expense and vexation.

Shortly after this institute was held, the Muskegon County Bar Association set up a committee of its members to draft a set of title standards for use in that county. This committee had about completed its work when, in response to requests from various practitioners, the State Bar Commissioners established the Committee on Title Standards.

The Committee was originally composed of eighteen members, with Prof. Ralph W. Aigler, the principal draftsman of the Forty Year Marketable Title Act, as its chairman. Six of the original members are still serving on the Committee: F. Norman Higgs, Ralph Jossman, T. Gerald McShane, Daniel Petermann, Ray L. Potter and Henry L. Schram.

The first Committee meeting was held at Lansing, November 13, 1953. It was decided to use the material prepared by the Muskegon County Bar Association as a framework for a set of statewide standards. The Muskegon standards thus played a large part in determining the content of the original Michigan Land Title Standards, although a number of additional ones were included therein.

Two editions of the Michigan Land Title Standards have so far been published. In addition, numerous revisions of individual standards have been made, as for example, in 1969, when passage of the Federal Tax Lien Act made it necessary to re-draft the entire chapter dealing with federal tax liens.

There has been a difference in approach to the preparation of standards among members of the committee. Some of them have believed that the Standards should be primarily statements of the minimum evidence required to establish merchantability of title satisfactory to a majority of the attorneys dealing with the subject. It was the opinion of these members that through printing and dissemination of such materials, acceptance of such minimum requirements would become customary throughout the State. Other members, while recognizing the need to bring about general acceptance of real estate titles that are free from substantial defects, have favored doing so through more extended treatment of specific problems, producing something like a restatement of Michigan title law. With the passage of time, the differences between these approaches have become rather blurred, and it is believed that the present end product is not only a valuable tool for daily use by attorneys interested in title work, but also a good starting place for more intensive research into particular problems.

With the establishment of the Real Property Law Section, the Committee on Title Standards ceased to be a State Bar Committee, and became an autonomous group in the Section. Over the years, the Committee's chairmen have been in order of service, Prof. Ralph W. Aigler, James H. Hudnut, Ralph Jossman, Cyrus M. Poppen, Ray L. Potter, Clarence W. Videan, Reuben M. Waterman, F. Norman Higgs, T. Gerald McShane, Frank L. Charbonneau, James W. Draper, and Myron Winegarden. About a hundred members have served on the Committee, with almost all of them having made some contribution to its work.

Exhaustion of the last published edition of the Michigan Land Title Standards has made it necessary for the Committee to be concerned during the last few years with a complete revision of the title standards. Instead of being a so-called "cosmetic job", this revision has involved a thorough redrafting. A new arrangement of chapters and problems has been adopted. Numerous new standards and problems have been added, while some of the present ones have been consolidated or, if considered no longer pertinent, eliminated. Authorities have been rechecked and supplemented. The format of the new edition has been approved by the full Committee, and the final material is in the hands of the printers. It is anticipated that the

new edition of Michigan Land Title Standards will be available for distribution during the fall. The Standards will be printed in a loose leaf form, which permits them to be utilized with binders used for the previous edition. Announcement of their availability will be made in the State Bar Journal. While a final decision as to their price has not yet been made, it is hoped that it will be about \$8.50 without a binder.

### Code Enforcement

Building codes do not ordinarily constitute the daily working subject matter of practitioners. Yet, they constitute a significant branch of property law affecting all Americans. I have decided to reprint the following articles and the accompanying letter in the hopes that you, the membership, may find them stimulative and thought provocative.

### WHY NEW HOUSES COST TOO MUCH

by

Arthur M. Watkins

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The United States housing industry is a \$23 billion annual business which has a potent influence on the whole economy. It provides jobs for five million workers and a vast market for dozens of other industries; when it falters, business everywhere feels the effects.

And housing has been faltering, largely because of the industry's incredible inefficiency. Most of the nation's 125,000 home builders are forced to use wasteful and obsolete techniques and materials, do little or no research, and are largely cut off from new technology which could sharply reduce the cost of housing. The industry is hobbled by a maze of outdated local building codes which rule out the benefits of mass-production methods. The effects on the cost and quality of housing can be gauged by imagining what automobiles would be like if local laws decreed that they had to be assembled in local garages rather than built in factory production lines.

The system--if it can be called that-- is perpetuated by a combination of powerful national pressure groups, including local craft unions (particularly the plumbers, electricians and masons), and certain manufacturers of old-line building products like iron and steel, masonry and plumbing fixtures. Some home builders, real-estate dealers and mortgage bankers oppose reform for fear it would cut into their local domination of the housing business or reduce commissions. Organizations like the United States Chamber of Commerce oppose it for fear that reform would involve government "meddling."

The situation is exacerbated by corrupt building inspectors, builders whose ethics are no stronger than their foundations, and local "craftsmen" who couldn't care less about craftsmanship. While the proportion of honest men in home building is probably as high as in any other industry, corner-cutters account for a disproportionate share of the business. The muddle in housing encourages cheats, and even gives them competitive advantage.

The end result is evident in spiraling construction costs, which have risen 192.6 percent since 1930, or two and a half times the increase in the overall cost

of living. "Twenty years ago I could build a good small house for \$7,000," says a Cleveland builder. "Today approximately the same house must sell for \$17,000."

. . . . Harvard economist Douglas Dacy thinks that the slowdown in housing sales and construction since 1956 may account for most of the lately lamented decline in the national growth rate, with its legacy of widespread unemployment.

And cost is the root of the trouble. Each \$1,000 reduction in the price of the average new house would make an additional 75,000 American families eligible to buy, according to estimates by the National Association of Home Builders. That many more houses a year would call for an additional 150,000 tons of steel, 350 million bricks, 1.5 million gallons of paint, 895 million board feet of lumber, 90,000 bathtubs, and proportionately greater sales of other products. And each \$15,000 house sold generates some \$15,000 of related economic activity, such as furniture sales, electricity installations, and new stores and streets to serve the homes. The \$23 billion worth of houses which will be put up this year will have a total impact of more than \$50 billion on the economy. There would be a lot more housing and a lot more stimulus if houses were cheaper.

One basic medicine needed can be expressed in a word: prefabrication. The widespread introduction of efficiently made, mass-produced structural assemblies would produce better houses, because each part would be designed by a factory staff of architects and engineers, instead of--as is too often the case--by local stumblebumps. Each part would be produced under factory controlled conditions which would sharply reduce the possibility of flaws. If there was a serious flaw, an established factory would not be likely to try to duck responsibility by changing its corporate name. . . .

But the hodgepodge of wildly differing building codes in most cases prevents builders from standardizing components or achieving the mass markets necessary for mass production. . . .

Nearly all impartial building experts agree that specification codes should be junked and replaced by performance codes. A performance code merely spells out the desired goal--a floor that will hold a 40-pounds-per-square-foot load; a pipe that will withstand, say 50 pounds of water pressure; a wall that will not quaver in hurricane winds, whether it is built of wood, brick or synthetic palm fronds.

Performance codes are easier and less expensive to administer, enforce and keep up to date. They would open the door for new products now waiting in the wings, including rugged new lightweight aluminum-, and steel- and plastic-skin wallpanels, rigid new corrosion-free plastic pipe--used to handle corrosive sulphuric acid in chemical plants but barred for house water pipe by obsolete codes. Experts hold that new lightweight structural assemblies are our best hope for sharply cutting construction costs. But many manufacturers will not even earmark research money to develop new products, because the present code curtain would bar whatever they developed.

Also needed is code uniformity--a national performance code--the same flexible but nonetheless uncompromising rules for voluntary adoption by any city or town. It could easily embody regional modifications to allow for geographical differences in building requirements.

. . . . Between now and the year 2000 the United States will need 40 million new housing units just to keep abreast of population growth, plus tens of millions of new units to replace old houses that wear out. There is, too, an incalculably vast

worldwide demand for low-cost housing which could provide more business and jobs in the United States if housing could be mass-produced here for those markets.

"Private industry will be unable to do this job unless we sweep away the 19th-century restrictions that now hold it back," says Nathaniel Keith, head of the National Housing Conference. "Some may object to federal 'meddling' in local and private affairs. Yet the ultimate effect would be to impose less, not more, government upon the industry, to get rid of the tangle of regulations that breeds inefficiency in housing and slows the progress of the whole economy."

### THE FOLLIES OF MODERN ARCHITECTURE

by

Peter Blake

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There exists a great temptation, in the life of an artist or scientist or modern architect like myself, to commit oneself to a dogma in one's youth and then to build one's entire work on that foundation. Unhappily for me and for some of my friends, the premises upon which we have almost literally built our world are crumbling. We have begun to discover that almost nothing that we were taught by our betters in or out of the architecture schools of the mid-century has stood the test of time. Nothing--or almost nothing--turns out to have been entirely true.

Let me re-examine some notions that have been drilled into every modern architect over the past half-century:

The best way to bring life and happiness into a city is to construct it of tall towers, raised off the ground on columns so as to permit pedestrians to circulate freely through wide-open spaces, parks and playgrounds.

What the ground floors of cities need is not wide-open spaces, but tightly structured spaces full of shops, restaurants, theaters and markets. The one sure way to kill cities is to turn their ground floors into great, spacious expanses of nothing. Jane Jacobs pointed this out, almost 15 years ago, in her book The Death and Life of Great American Cities. But cities are still being built of glassy towers on columns, with nothing at ground-floor level except windswept plazas, and sometimes a fountain, or a bank that closes at 3 p.m.

Such diagrams for modern cities are sure death for their inhabitants--and that is not a rhetorical statement: Sixth Avenue, in New York, whose upper reaches consist almost entirely of glass towers, with lots of empty space at ground level, is one of Manhattan's most dangerous modern avenues. I know--I live around the corner from it. The avenue used to be full of little shops and restaurants and bars and movie houses that stayed open most of the night--and nobody was stabbed. Now the place is an architectural gem--and a human disaster area.

Glass skins draped over steel or concrete frames are the most rational visions of the 20th century.

Every modern architect loves the many inimitable qualities of glass. But every modern architect has also been in trouble because of this particular love affair: a

lot of glass has problems of expansion and contraction; it cracks under unpredictable wind loads; it lets in too much heat or too much cold; it creates so much glare that it takes a great deal of expensive backlighting to balance the natural light admitted from the great outdoors.

In the real world, rather than the world of architectural theory, all-glass buildings leave something to be desired. And not only by those who live and work inside the glass skins, but also by those who live across the street. Some of our recent glass buildings have been so effectively reflective that they have broiled their immediate neighbors, whose air-conditioning requirements substantially increased when the new arrival started reflecting heat.

We need large housing developments in our cities to solve our desperate housing shortage.

Experience with urban housing in the United States over the past 40 years has shown that high-rise apartments for families with children, however well-conceived, tend to be a disaster. Pruitt-Igoe, in St. Louis, is the most dramatic case in point: there, a low-income housing project consisting of three dozen high-rise apartment buildings has been completely abandoned, several buildings have been dynamited, and there are plans to raze the rest.

Housing projects have got to be the very worst way of solving our housing problems. Just think what it means to live in one: the social stigma that is attached to it; the fact that everybody knows that your family earnings fall below a certain limit; the rigid immobility for people whose most desperate need is being able to live near better job and educational opportunities. In fact, the well-meaning people who design and build subsidized housing are the perpetrators of a status quo in which the poor are segregated and effectively kept from better jobs and better schools. It is quite clear now that rent and home-purchase supplements to people entitled to them are a much more enlightened way of subsidizing housing.

More sophisticated transportation systems will make our cities work.

The solution for large, sprawling cities such as Los Angeles is not to design and build better mass-transit systems; it is, really, to design and build more vital concentrations of people that will make transportation systems unnecessary. Transportation hardware (cars, buses, monorails, subways) is not the technology that will fix all our urban problems.

The ideal city needs no transportation system at all, other than the built-in transportation system that every citizen carries in his or her feet. The ideal city is a place of crowds, not of highways that are symbols of alienation. The ideal city is a place so jammed with people and events that the only successful criminals are pickpockets, and the only transportation problem is the width of the city's sidewalks.

Prefabrication will solve most of today's building problems.

The trouble with most of our prefabrication theories is that they were developed in areas like Europe or Japan, where densities are high, the climate and building codes are relatively uniform, markets are just around the corner and labor is relatively cheap.

The most obvious fact about this country is its enormous size, which means that prefabricated units of anything need to be shipped huge distances to reach a market large enough to make mass production economical. Shipping is inherently so costly that whatever on-site savings in labor may result are often dissipated. Moreover, prefabrication, for a market that may contain areas ranging from the subartic to the semitropical, that may be governed by hundreds of conflicting building codes, is impossible because economical prefabrication implies standardization.

That isn't all: when you talk about prefabrication of residential units, you are talking about something that may never be worth prefabricating in the first place. The shell of a dwelling costs less than 20 percent of the total--and utilities, interior finishes, on-site services, foundations, land and land-preparation, and mortgage money cost all the rest. And land, foundations, access roads and trees don't lend themselves to prefabrication.

So, when you get right down to it, the prefabrication of a housing shell, shipped over x miles from plant to site, may save ten percent of the cost of that shell, or two percent of the total cost of the dwelling itself. Or it may not, if only one little thing goes wrong in that intricate process.

A few years ago, a building in upstate New York, where the climate is awful for six months of the year and terrible for the remainder, was completed. It was a very conventional, site-built structure. The builders rented a great big air-support bubble, pumped it up over their site, heated the air, and constructed their building inside this cocoon. Not a minute of labor was lost to bad weather, not an ounce of material lost to frost or snow or rain, not a drop of paint lost because the surfaces were damp and soggy. After the building had been completed in record time, they just deflated the bubble and sent it back to the supplier, to be rented out to the next intelligent customer.

Now, what this event signifies to anyone who has ever built anything is that an idea such as constructing a building inside a giant incubator may be a much more important innovation in U. S. building technology than any kind of universal, modular standard.

Cities are essential if civilization is to survive.

It is quite true that the kind of face-to-face confrontation that has been possible only in densely crowded cities in the past is what generated ideas, and without such "interface" it is possible that there might have been no arts, no science, no philosophy, no literature, no political democracy. But is it still true, and will it be true tomorrow?

Obviously, the kinds of electronic communications systems in universal use throughout the developed countries have begun to make many face-to-face communications unnecessary. Any day now, our banks and insurance companies will see that they are wasting an awful lot of money by building huge corporate headquarters on expensive downtown real estate--when all they really need, downtown, is a small suite of offices for some of their decision-making personnel, and a telephone wire connecting that office to a data bank buried somewhere in the Mojave Desert.

It is becoming simpler every day to engage in confrontations without being within physical reach of the other party. It is much more comfortable to shop by TV than to shop by fighting your way through a supermarket; it is much more interesting to study by some well-conceived educational TV programs than to sit in an uncomfortable classroom or lecture hall. Even diagnosis in medical care is now handled very effectively in some areas by means of closed-circuit TV.

What all this means, of course, is that decentralization is taking place here and now. Only those who are very rich or very poor are trapped in cities nowadays--the very rich because they want penthouse status, which is difficult to come by in a one-story ranch house; and the very poor because they've been locked into slums of despair. Pretty soon the majority of people in industrialized nations will be living in vast suburban tracts, linked to one another and to educational, cultural and job opportunities by electronic means. Our old downtown areas will probably become tourist attractions like Siena and Carcassonne and the mad castles of Ludwig of Bavaria, visited by suburbanites on package tours conducted by tape-recorded tourist guides.

I don't know whether you and I want to live in that sort of land, but I doubt if we really have much of a choice. Everything happening in the real world--as opposed to the ideal, anachronistic world designed in schools of architecture-- is moving us in the direction of that sort of society. And since the votes are almost exclusively in the suburbs, it is highly unlikely that state and federal legislatures will appropriate any significant sums of money to the preservation of our abandoned downtown areas. Manhattan will have to be sold to the tourist industry-- or (not inconceivably) back to the Indians.

May 29, 1975

Professor Frank Sengstock  
The University of Detroit  
651 East Jefferson  
Detroit, Michigan 48226

Dear Professor Sengstock:

In response to your telephone request yesterday, I am sending you copies of the two latest Department of Labor Annual Reports which give some information regarding this agency's progress. The report of our Electrical Division was inadvertently omitted from the 1973-74 report.

Act 230, PA 1972 as amended, has had a big impact on code uniformity in Michigan. Reportedly, there were up to 1,200 different building codes being enforced in the state prior to the new law. Today all governmental units are either enforcing the state building code (which is the BOCA Basic Building Code with amendments) or have "opted out" for the BOCA or ICBO codes. Any amendments to these nationally recognized model codes must have Construction Code Commission approval. To date we have reviewed and rendered decisions on some 50 such ordinances, always keeping in mind the premise of uniformity.

The commission has also adopted rules regarding premanufactured units, mobile homes and plumbing. Barrier free design provisions are included in the rules which accompanied the building code.

The commission will soon be considering provisions for fire safety and building security. It will also adopt the latest edition of the National Electrical Code, as well as the BOCA Basic Mechanical Code which is an area heretofore neglected in Michigan.

All of these accomplishments and plans are promoting uniformity of codes throughout the state. We are enthusiastic about our mission and trust this information will be helpful to you. We would be pleased to have you come to our office if you would like to make a more in-depth study of our activities.

Sincerely,

/S/ Robert C. Hilprecht, P. E.  
Executive Director

RCH/dev

STATE OF MICHIGAN

COURT OF APPEALS DIGEST

(MICHIGAN SUPREME COURT CASES INCLUDED)

BETTER VALU HOMES, INC v PREFERRED MUTUAL INSURANCE CO (Rev'd & Rem'd)  
April 8, 1975 20439

INSURANCE - STATUTE OF LIMITATIONS - INSURER - WAIVER - DILATORY TACTICS If an insurer, through negotiations or dilatory tactics, induces an insured to forego bringing suit under an insurance policy until after its limitations period has expired, the insurer will be held to have waived the limitations defense.

INSURANCE - FIRE - REAL PARTY IN INTEREST - MORTGAGOR - MORTGAGEE While there is only one insurance commitment here, there are two separate contracts governing to whom the proceeds of the insurance policy are to be given and for what purposes. The standard mortgage loss payable clause gives the proceeds to the mortgagee to the extent that they are equal or are less than the mortgage indebtedness of the property, and it gives the mortgagee's claims to the proceeds priority to insuring the mortgage debt. The mortgagor's interest in the proceeds is for the damage to the insured building, and it arises from the underlying insurance contract. The claims of either are legally valid and based on contractual obligations owed them; as a result, either claimant would clearly be a real party in interest regardless of whether the claims of both could be completely satisfied if competing claims were filed.

MOTIONS - FINDINGS OF FACT - LEGAL CONCLUSIONS - BETTER PRACTICE While the court rule does not require trial judges to make findings of fact and conclusions of law on decisions of motions, in cases like the present one, where the motion for accelerated judgment is based on multiple theories, the better practice would be for the trial judge to clearly state such findings and conclusions rather than to grant the motion without further elaboration. Since the trial court opinion does not disclose its underlying rationale and since there is at least a possibility that it rests upon an insubstantial theory, this Court is obligated to set aside the judgment and remand this case for further proceedings.

STATUTE: GCR 1963, 517; GCR 1963, 116.1

PANEL: R. B. BURNS, T. M. Burns, Brennan

POOLE-DICKIE LUMBER COMPANY v STROTHER (Aff'd)  
April 9, 1975 20622

LIENS - MECHANICS - WAIVER - REVIVAL Once waived, a mechanic's lien may not be revived in the absence of an express agreement binding upon those whose interests are adversely affected.

LIENS - MECHANIC'S - WAIVER - CONSIDERATION - NOTES - WORTHLESS The fact that instruments relied upon for full payment at the time of execution of a waiver of lien proved to be worthless is unfortunate, but should not and does not affect the validity of the waiver of lien.

PROPERTY - LIEN - WAIVER - ASSERTION - PROPER PARTY The fact that the waiver of lien ran to a third-party builder is of no consequence, since the lien waived was asserted on the premises in question.

PROPERTY - LIEN - REVIVAL - ESTOPPEL - BANK - HOMEOWNERS Since the only agency established on the record between the bank and the home owners was for disbursing mortgage funds, even if the bank made certain statements which could work an estoppel, it could have no application to the owners.

ESTOPPEL - BANK - PROPERTY - LIEN - REVIVAL Since the bank is neither the owner nor lessee and has no lien claims on the property, and since the lien was waived in favor of the owners of this property, an estoppel argument as to the bank is irrelevant.

PROPERTY - LIEN - FORECLOSURE - NECESSARY PARTIES Mortgagee bank is a required defendant in the foreclosure of lien action because if the lien is valid, the lien takes priority over the mortgage.

STATUTE: MCLA 570.9

PANEL: QUINN, Bashara, Kaufman

IN THE MATTER OF THE ACQUISITION OF LAND FOR URBAN RENEWAL DEVELOPMENT AND OTHER MUNICIPAL PURPOSES v COLEMAN (Rev'd)  
April 24, 1975 19282

CONDEMNATION - PUBLIC IMPROVEMENT - NECESSITY - DECLARATION - TIMELINESS A condemning authority is required to declare a public improvement and the necessity for taking private property prior to the commencement of condemnation proceedings.

STATUTE: MCLA 213.24

CONDEMNATION - PROCEDURAL RULES - STRICT COMPLIANCE The law of eminent domain permitting the taking of private property for public use is a harsh remedy and, therefore, the courts have required strict compliance with the particular provisions of the law upon which the action was based.

PANEL: Gillis, QUINN, Maher

PALMER v TOWNSHIP OF SUPERIOR (Aff'd)  
April 25, 1975 20033

APPEAL AND ERROR - ZONING - REVIEW - DE NOVO In zoning cases this Court reviews de novo the record on appeal but gives considerable weight to the findings of the trial court.

ZONING - ORDINANCE - REASONABLENESS - REVIEW - STANDARD The standard of review in cases where requests for rezoning have been granted is not clear. If the action of the local governmental body is deemed "legislative," the test is whether the action is "reasonable." If the action is deemed "administrative," the test is whether the decision is supported by competent and material evidence on the record. A reading of the two most recent Supreme Court cases indicates that while there is a significant split in the Court, the test is the traditional one, that of "reasonableness."

ZONING - ORDINANCE - REASONABLENESS - PROBLEMS - CERTAINTY Reasons given by municipalities in deciding zoning cases will not be deemed speculative if they deal with problems that are "imminent and factually certain to occur."

ZONING - ORDINANCE - REASONABLENESS Defendant provided sufficient jurisdiction for its refusal to rezone plaintiff's property. The request was inconsistent with the master plan; the proposed mobile home park would overtax sewage, road and school facilities.

ZONING - MOBILE HOMES - ORDINANCE - STATUTE - CONFLICT Defendant's zoning ordinance is not invalid as conflicting with the State Mobile Home Park Act. The State Act provides minimum standards and there is room for more rigid local standards.

STATUTE: 1959 PA 243; MCLA 125.1001 et seq

ZONING - MOBILE HOMES - MUNICIPALITIES - REGULATION - SCOPE Allowing localities to set reasonable stricter standards is consistent with the legislative intent to assure safe and aesthetically pleasing trailer parks throughout the state while also guaranteeing to municipalities the power to regulate the types of structures erected on their land as it has done in the Township Rural Zoning Act.

STATUTE: 1943 PA 184; MCLA 125.271 et seq

PANEL: Quinn, Bashara, KAUFMAN

DICKENS v GORDON (Rev'd)  
May 29, 1975 19954

PROPERTY - ADVERSE POSSESSION The elements necessary to gain title to property through adverse possession are well settled: possession must be for the statutory period of 15 years, and it must be actual, hostile, open and notorious, continuous and exclusive. Where a plaintiff's claim to adverse possession requires a tacking-on of his grantor's possession, and the grantor admits that his possession was not hostile but through permission, the plaintiff's claim to ownership through adverse possession is untenable; he did not possess the property for the statutory period.

PROPERTY - CONVEYANCE - STREET The rule that a conveyance of land abutting a street carries with it a fee to the center of the street (if the grantor owned to the center thereof and there are no words in the deed showing a contrary intention) applies only if the property actually abuts the street. Where the deeds are not ambiguous, there is no misunderstanding, and the placing of the street leaves a gap between the property boundaries and the street, the transfer does not carry with it the fee to the center of the street.

PROPERTY - TITLE - ESTOPPEL - FRAUD Title to real property cannot pass on an estoppel theory in the absence of fraud.

STATUTE: Quinn, BASHARA, Kaufman

EARLY v BAUGHN (Rem'd)

May 28, 1975 19529

RIPARIAN RIGHTS - LITIGATION - STAY Where there is litigation over the question of whether a riparian owner's acts in subdividing his property so as to give his grantees access to a lake or bay is reasonable, and resolution of the question of reasonableness may depend on the frame of reference, it is appropriate to hold the equitable action in abeyance pending a finding of fact and decision by the Department of Natural Resources.

STATUTE: MCLA 281.951 et seq

PANEL: Holbrook, Sr., Bronson, KELLY

GEORGIA PACIFIC CORP v CENTRAL PARK NORTH CO

April 29, 1975 No. 54615-6

MECHANIC'S LIEN - STATEMENT OF ACCOUNT - ERROR While a mechanic's lien may be voided because the statement of account was made in bad faith, a lienholder's failure to reduce the lien to reflect amounts paid after proper filing of the lien--while error--is not sufficient evidence to support a finding of bad faith so as to void the liens.

MECHANIC'S LIEN - SEPARATE CONTRACTS - SINGLE PROJECT - NOTICE The Supreme Court is not convinced that the Michigan mechanic's lien statute and case precedent precludes the filing of separate liens upon single buildings when a claimant has furnished labor or materials pursuant to a single contract. However, the Supreme Court does not decide the point; finding instead that the Court of Appeals' holding that a single contract existed for the furnishing of materials to a single project consisting of six separate buildings was erroneous. The case was tried and the record supported the finding of separate contracts to supply materials to separate buildings within the project. Since the lienholder filed notices of intent to claim liens against two of the buildings within 90 days of first delivering materials to those buildings, the notices were timely served and the liens are upheld.

STATUTE: MCLA 570.1

PANEL: Entire Bench, T. G. Kavanagh

HESSEE REALTY, INC. v CITY OF ANN ARBOR (Rev'd)

May 29, 1975 19849

MANDAMUS - REQUIREMENTS To present a proper request for mandamus, plaintiffs must have a clear legal right to the specific duty sought; defendants must have the clear legal duty to perform such act; and it must be a ministerial act, one where the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment.

ZONING - COMPLIANCE - ABUSE OF DISCRETION The Ann Arbor City Council possesses narrow administrative powers to review and examine recommendations made by the Planning Commission concerning proposed site plans. The Planning Commission is

empowered to establish standards pertaining to streets, open spaces, drainage and utilities among other things and to determine that site plans meet such standards. If such standards are met, the Commission must approve the site plan. The same limitations apply to the City Council. The Council can only review the site plan to see if the Planning Commission has correctly applied the relevant standards. Where the Planning Commission first approved the site plan, then rejected it without giving any reasons for changing its mind, and the City Council voted to reject the plan, alluding to possible traffic problems, the denial of the site plan represented an abuse of discretion. Neither the Planning Commission nor the City Council gave reasons for their rejection of the site plan in writing, no reason for a denial exists in the record.

PROPERTY - USE - REGULATION - VALIDITY - FACTORS Laws regulating land use must be considered in the context of what is often a conflict between two significant rights: (1) the right of a landowner to utilize his land as he desires and (2) the right of the state, through its political subdivisions, to guarantee that an individual's land use is consistent with the public good.

ZONING - ORDINANCE - REASONABLENESS - PRESUMED Municipalities are given great breadth in establishing general land use patterns through their power to zone. The overall zoning map and individual zoning decisions are clothed with a presumption of validity and will be upheld if at all reasonable.

PANEL: Quinn, Bashara, KAUFMAN

MICHIGAN STATE HIGHWAY COMMISSION v CANVASSER BROTHERS BUILDING CO  
May 27, 1975 19261

PROPERTY - LEASE AGREEMENT - INTERPRETATION - INTENT A lease agreement must be read as a whole with a view toward ascertaining the intention of the parties.

PROPERTY - EASEMENT - CREATION - METHODS An easement may be created by express grant, by reservation or exception, or by covenant or agreement. An easement may also be created by implication.

PROPERTY - EASEMENT - IMPLIED - REQUIREMENTS While an easement may be created by implication, where there has been no showing that the easement contended for is necessary for the use of the land, no easement by implication arises. An easement by implication must rest upon necessity and not mere convenience.

PROPERTY - EASEMENT - CREATION - INEFFECTIVE Where a lessor creates no easement for parking on property leased to a lessee; and lessor then conveys adjacent property without conveying an easement for parking on the leased property, the grantee cannot create a mutual and reciprocal right on the part of each party and each party's tenants and their customers, agents, and invitees to use parking areas on that property. Grantee, having no easement could not convey one to its tenants.

WITNESS - EXPERT - ASSUMPTION - INCORRECT Where testimony by an appraiser regarding the value of property condemned for highway construction is erroneously based on an incorrect assumption, such testimony may properly be struck, and the jury instructed to disregard it.

PANEL: Brennan, GILLIS, Walsh

TURKISH v CITY OF WARREN (Aff'd)  
May 29, 1975 20409

ZONING - ORDINANCE - REASONABLENESS - REVIEW - STANDARD Where a trial court finds that due to the size and shape of a landowner's property and due to zoning requirements for lot development, a zoning ordinance as applied to landowners property is unreasonable and confiscatory, and the record fully supports the trial court's finding, affirmance of the trial court's finding is required by case precedent. If this Court were not bound by existing precedent, however, we would prefer to bring stability to the review of zoning decision by adopting the reasoning of Justice Levin in Kropf v Sterling Heights.

PANEL: Gillis, QUINN, Maher

WERKHOVEN v CITY OF GRANDVILLE (Rev'd)  
May 28, 1975 19353

ZONING - ORDINANCE - REASONABLENESS - PRESUMED Zoning ordinances are presumptively valid; the burden of proof is on the plaintiff to show that a particular ordinance is unreasonable.

ZONING - EXCLUSIONARY - DE FACTO - BURDEN OF PROOF Where a zoning ordinance does not specifically exclude mobile home parks; where a mobile home park is currently in operation and areas are provided in a master plan for the establishment of other mobile home parks; and where plaintiff is alleging that "de-facto" exclusionary zoning exists; plaintiff must meet a heavy burden of proof, showing that all available areas cannot be used for a mobile home park.

PANEL: T. M. Burns, McGREGOR, Walsh

DEAN v MICHIGAN DEPARTMENT OF NATURAL RESOURCES (Aff'd)  
June 9, 1975 19355

ACCELERATED JUDGMENT - PROPERTY - TAX SALE - DEED TO STATE It is proper to treat a motion to dismiss as a motion for accelerated judgment where its purpose is clear. The trial court did not err in granting defendants' motion in a suit to set aside a deed by the State of Michigan following a tax sale, where plaintiff failed to allege that she had paid all taxes owed and no redemption was made within the statutory period of limitations.

STATUTES OF LIMITATIONS - PROPERTY - TAX SALE - DEED TO STATE - REDEMPTION  
Redemption statutes should be liberally construed in favor of persons seeking to redeem property. But, where plaintiff made no appeal from the circuit court judgment of tax delinquency, did not commence an action within the required time to set aside a State Treasurer's deed to the State of Michigan, and commenced the instant action over four years after the conveyance of the deed, plaintiff is precluded from challenging the State's divestiture of her real estate interest.

STATUTE: MCLA 211.431

TAXATION - PROPERTY - SALE - EXCESS - UNJUST ENRICHMENT It is well settled in Michigan that, where land is sold at a tax sale and bid in by the State, the failure of the owner to redeem within the prescribed time limits result in vesting an absolute fee title in the State. No matter how great the difference between the expenditure made by the tax sale purchaser and the actual value of the land, a court cannot he

expenditure made by the tax sale purchaser and the actual value of the land, a court cannot help out the original owner. Where there is no evidence that plaintiff was misled by anything the City Treasurer said, the trial court was correct in dismissing plaintiff's claim that the defendant state was unjustly enriched because it received an amount greater than the amount of delinquent taxes, interest and expenses owed.

TAXATION - PROPERTY - SALE - EQUAL PROTECTION Where plaintiff made no allegation that the State failed to give sufficient notice of the amount owed and the opportunity for redemption, the trial court acted correctly in granting defendant's motion for accelerated judgment against plaintiff's allegation that the sale of her property to satisfy tax delinquencies denied her equal protection of the laws.

STATUTE: MCLA 211.47

PANEL: Danhof, McGREGOR, Walsh

BOARD OF GOVERNORS OF WAYNE STATE UNIVERSITY v BUILDING SYSTEMS HOUSING CORPORATION  
(Aff'd)

June 10, 1975 20196

APPEAL AND ERROR - SUMMARY JUDGMENT - STANDARD It is axiomatic that appellate courts reviewing the grant of a summary judgment for the defendant assume that every well-pleaded allegation in the plaintiff's complaint is true and consider these allegations in a light most favorable to the plaintiff.

CONTRACTS - CONSTRUCTION - BID - ACCEPTANCE - CONDITIONAL Nothing in the information plaintiff furnished to bidders on a construction project indicated that the award of the contract would be subject to the qualification that plaintiff's acceptance would be conditional until bonds necessary to finance the construction were sold and delivered. Thus, plaintiff's letter notifying defendant that its bid was accepted subject to the sale of necessary financing bonds was not a genuine acceptance based on the mutual assent of the parties.

CONTRACT - OFFER - COUNTER-OFFER - REJECTION In order to establish a valid contract, the offeree's acceptance must in every respect correspond substantially with the identical offer made. The acceptance must be absolute and unconditional, and if conditions are attached or it differs from the offer, the transaction amounts only to a proposal and a counter-proposal. A proposal to accept an offer which contains terms varying from that of the offer is a rejection of the offer.

SURETIES - LIABILITY - CONTRACT - COMPLIANCE - STRICT - SUMMARY JUDGMENT The liability of a surety is limited by the scope of the liability of its principal and the precise terms of the surety agreement. The suretor may insist upon compliance with unambiguous terms of the surety contract which place conditions and limitations on the suretor's liability. Where the surety contract provided for termination of the suretor's responsibility if the bid contract was rejected, and the plaintiff's conditional acceptance amounted to a rejection of the bid, neither the bidder nor the suretor were liable to the plaintiff under the bid contract. Thus, a summary judgment in favor of defendant suretor is affirmed.

PANEL: T. M. Burns, CAVANAGH, O'Hara

ED ZAAGMAN, INC v CITY OF KENTWOOD (Rev'd)

June 10, 1975 19381

ZONING - ORDINANCE - REASONABLENESS - BURDEN OF PROOF The trial court erred in ruling that the burden was upon the city to establish a reasonable relationship between the zoning ordinance and valid governmental interests in a suit to invalidate municipal ordinances which acted to prohibit mobile home parks. The burden should be on the plaintiff to show the lack of such a relationship.

ZONING - ORDINANCE - REASONABLENESS - PRESUMPTION - PLAINTIFF - BURDEN OF PROOF The quality and quantity of proof required to permit Michigan courts to invalidate zoning ordinances is explicitly set forth in Kropf. First, a zoning ordinance is always presumed to be valid; this presumption is equally valid with respect to cases involving mobile homes, multiples, or other "preferred uses." Secondly, for a plaintiff to prevail, he must prove that the ordinance in question denied him a specific constitutional right and thus acted unreasonably. He must show that the ordinance denied him substantive or procedural due process, equal protection of the laws, or deprived him of his property without just compensation.

ZONING - ORDINANCE - REASONABLENESS - DUE PROCESS - SUBSTANTIVE Two questions are raised by a substantive due process argument; first, whether a reasonable governmental interest is being advanced by the present zoning classification and, second, whether the present classification arbitrarily and capriciously excludes certain types of land uses from the area in question.

ZONING - ORDINANCE - REASONABLENESS Where the evidence shows that the mobile home park would create problems of population density and traffic congestion, a reasonable governmental interest is being advanced by the present zoning classification which excludes mobile home parks from the area but allows 1- and 2-family homes and garden apartments. Thus, defendant's zoning ordinance does not violate plaintiff's right to substantive due process.

ZONING - ORDINANCE - REASONABLENESS - CONFISCATORY The standard to be met by a plaintiff contending that a zoning argument is confiscatory is clearly set out in Kropf. An aggrieved property owner must show that if the ordinance is enforced the consequent restrictions on his property preclude its use for any purposes to which it is reasonably adapted.

ZONING - ORDINANCE - REASONABLENESS A zoning classification which excludes mobile home parks but allows 1- and 2-family homes and garden apartments does not constitute a deprivation of plaintiff of his property without just compensation where an area is suited for development of the latter housing units despite the fact that such would be less profitable.

PANEL: T. M. Burns, McGREGOR, Walsh

EMMONS v EASTER (Aff'd in part; Rev'd in part; Rem'd)  
June 23, 1975 19481

PROPERTY - LAND CONTRACT - DEFAULT - FORFEITURE The general rule with respect to the interpretation and construction of contracts is that, if unambiguous, they are not subject to interpretation and must be enforced as written. Where the land contract contained provisions stating that time was of the essence and that, in case of default, defendant could sua sponte declare the contract void and plaintiff's interests in the realty forfeited without providing any notice to plaintiff; where plaintiff had failed to make three scheduled payments; and where the plaintiff had absented himself from the premises, the trial court could reasonably

find that the plaintiff had defaulted on and forfeited his interest to the realty and trade chattels under the terms of the contract.

APPEAL AND ERROR - TRIAL COURT - FINDINGS OF FACT - CLEARLY ERRONEOUS The findings of fact made by a trial court will not be overturned unless clearly erroneous.

STATUTE: GCR 1963, 517.1

PROPERTY - LAND CONTRACT - FORECLOSURE - SELF-HELP - NOTICE The estate of a land contract purchaser does not (in contrast with a mortgage) include as one of its incidents an equity of redemption. A land contract seller need not invoke a judicial or statutorily created remedy to foreclose the rights of the purchaser as must a mortgagee if he wishes to foreclose the mortgagor's equity of redemption. Where the purchaser is not in physical possession of the land or possession can be recovered peaceably, the purchaser's rights may be declared forfeited by the seller without proceedings in court if notice of forfeiture is duly given. Notice of forfeiture need not always precede repossession to be properly given.

EQUITY - SPECIFIC PERFORMANCE - FORFEITURE - LAND CONTRACT - RELIEF While a court of equity may relieve plaintiff of the forfeiture and compel specific performance from defendants, such equity power could not be properly exercised where plaintiff is delinquent on many payments; there is a balance of more than \$27,000; plaintiff admits that he does not intend to resume operation of the store on the premises; and plaintiff does not claim to be able to tender payment immediately for all amounts due.

STATUTES - CONSTITUTIONALITY - REPOSSESSION - SELF-HELP Plaintiff's claim that the statute which permits self-help repossession of chattels is violative of his federal due process rights is not supported by any theory disclosing the presence of state action. State action will not be presumed to exist where the statute in question merely permits the private use of a common-law remedy without further state interference.

STATUTE: MCLA 440.9503

PROPERTY - LAND CONTRACT - SECURITY INTEREST - IMPROVEMENTS - AFFIXED Where a land contract provision provided that improvements to the realty subsequently made by the plaintiff were part of the security for the land contract, it was correct for the trial court to hold that insofar as the items that were at the premises when defendant repossessed the property had become affixed to the realty in such a manner as to constitute improvements, they were considered forfeited by plaintiff along with the remainder of the security for the land contract.

PROPERTY - LAND CONTRACT - DEFAULT - FORECLOSURE - PERSONALTY - ACCOUNTING Where contracting parties make one agreement pertaining to realty and a separate agreement pertaining to trade fixtures and chattels, the parties intended the two categories to be treated differently. In other words, the trade fixtures and chattels were never to be considered improvements of, attachments to, or inseparable from the realty controlled by the land contract. Since the trial court failed to maintain this distinction; trade fixtures and other personalty could have been improperly classified as improvements to the realty, or as items either valueless or abandoned. But where the uncontested facts show that some items that plaintiff had on the premises were used as gifts, or for business purposes, or for personal use, or were sold, plaintiff's property was valuable, not valueless.

Further, the record does not demonstrate that plaintiff's personal property was abandoned. Since plaintiff's trade fixtures and chattels could not be improvements to the realty, were not valueless, and were not abandoned, further proceedings must be held in which defendants must account for plaintiff's personal property they came to possess through foreclosure. Plaintiff is entitled to possess it; to just compensation for its use by defendants, for whatever damage it suffered while in defendant's possession, for its loss caused by defendant's actions; and to the proceeds from its sale.

PROPERTY - ABANDONMENT - NONUSER - INTENT TO RELINQUISH The abandonment of property is composed of two elements, an intention to relinquish the property and an external act putting that intention into effect. Nonuser by itself is insufficient to show abandonment, it must be accompanied with some act that shows the intent to relinquish the property. Where plaintiff was never informed of any intention to dispose of his personal property or to convey it, and plaintiff was asserting his possessory rights in court within four months of the conveyance, no disinterest in the property was displayed. Nor does the mere fact that plaintiff was unavailable to the defendants indicate a desire to abandon his personal property; he was under no obligation to remain available and he did have a local agent who was available.

SECURED TRANSACTIONS - COLLATERAL - REPOSSESSION - DISPOSITION - ACCOUNTING Where defendant after foreclosure on chattels controlled by a security agreement, resold the chattels for many thousands of dollars in excess of the amount of plaintiff's indebtedness to defendant; and defendant did not attempt to define his claim for the amount that exceeded plaintiff's indebtedness, a remand is necessary regarding the proceeds from the resale of these secured chattels over the amount of plaintiff's indebtedness and the expenses of sale. The law is well settled that the secured party must account to the debtor for any surplus over the amount of the indebtedness to the debtor.

STATUTE: MCLA 440.9540(2)

PANEL: R. B. BURNS, Bashara, Kelly

REPORT OF THE NOMINATING COMMITTEE

OF THE

REAL PROPERTY LAW SECTION

STATE BAR OF MICHIGAN

August 12, 1975

Pursuant to Article IV, Section 6 of the Bylaws, as amended, Nomination of Council Members, the Nominating Committee respectfully submits the following for renomination as members of the Council for a three-year term ending with the Annual Meeting to be held in 1978:

Maurice S. Binkow  
James W. Draper  
Edward D. Gold  
David S. Snyder  
Maurice V. Victor

In making these nominations, it is the opinion of this committee that the named persons are worthy of re-election in view of their record on the Council since its organization.

Other nominations for the Council may be made from the floor, as provided by Article IV, Section 6 of the Bylaws.

Respectfully submitted,

Richard J. Sullivan, Chairman

John R. Mann

Wendell Brown