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There was a society of men among us, bred up from their youth in the art of proving, by words multiplied for the purpose, that white is black and black is white, according as they are paid.

Jonathan Swift, Gulliver's Travels: Houyhnhnms, ch. 5.

THE MICHIGAN HOMEOWNERS' ASSOCIATION AND ARCHITECTURAL CONTROL

By

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> (T)he homes association is one of those rare animals beneficial alike to producer and consumer, to private investigator and governmental official, and, in a larger sense, to the economic and social well-being of the country as a whole.[1]

I

INTRODUCTION

The Developer, as an entrepreneur, seeks to maximize his profits and protect the investment he has made in large tracts of undeveloped land. To do so, he must be sure that the subdivided lots will be attractive in the marketplace. He will also desire a showplace for any future developments which might follow. Hence, the Developer will need to assure prospective buyers that the value of their lots will not be impaired by future building patterns, nor will the common areas shared by all lot owners be allowed to deteriorate. Further, he must be able to make additional assurances that the original quality and character of the subdivision will at all times be preserved. The Developer can accomplish all these goals through utilizing an effective system of private property controls. The major components involved in such a system are found in the subdivision Homeowners' Association, in restrictive covenants which are mutual in nature and binding upon all subsequent owners of the lots, and in the reviewing committee which can approve or reject all proposed building plans according to their conformity with the development's general scheme.

The purpose of this paper is to describe the Homeowners' Association and the factors which contribute to its effectiveness as a private property control mechanism. In addition, the architectural control component will be analyzed and evaluated as a further source of control. As shall be seen, careful planning and drafting are critical to the practical utility of these methods in assuring both the Developer and his lot purchaser of ultimate satisfaction with their residential community development.

II

THE HOMEOWNERS' ASSOCIATION

The Homeowners' Association (HOA), as an entity, can generally be defined as "an organization of homeowners residing within a particular development whose major purpose is to maintain and provide community facilities for the common enjoyment of the residences."[2] As this definition suggests, the function of a HOA is twofold: (1) control and (2) government.[3] To be effective, the HOA must have the ability and wherewithal to enforce the common scheme of restrictions[4] which are so essential to

the maintenance of the quality and character of the neighborhood. This enforcement constitutes its control function. In addition, the HOA will also serve the community. As does any proper governing body, it provides an organizational structure from which the necessary facilities and services are provided, as well as a forum through which grievences are aired and decisions made.

A HOA is charged with varying responsibilities depending upon its respective documents of creation and bylaws and, more importantly, according to its Declaration of Covenants, Conditions, and Restrictions (CCR) which empower it to act. For example, HOA responsibility may run to the upkeep and maintenance of such things as private streets, sidewalks, drainage systems, trash collection, water supplies, community parks, swimming pools, club houses and golf courses.[5] It may in practice include virtually anything assigned to it by the Developer through the empowering documents. These services tend to be costly, but can be provided economically by spreading the cost over all lots through the collection of a variable annual assessment fee.

A HOA can take on a number of forms and types.[6] The most effective organization, however, is the automatic type[7] in the corporate form.[8] The automatic HOA provides for mandatory membership as a condition to purchasing a lot. That is, all lot owners consent, upon purchase, to become members of the association for as long as they own their respective lots and are thereby bound by all the duties and obligations of membership. For such a condition to be enforceable, it must be provided for in some recorded instrument, normally the CCR, which affects the title to all the property within the development.[9] The principal source of funds, and also the principal obligation of membership, in this type of association is the annual assessment. Again, such assessment is made mandatory through an express covenant in the deed or other recorded instrument and, if provided, can be rendered enforceable as a lien against the member's property.[10]

Legal Basis for HOA

Although Michigan law has little or no direct references to Homeowners' Associations *per se*,[11] the common law of deeds and covenants, the recording system, and the non-profit corporation statutes greatly facilitate their existence, structure and efficacy. With these tools at his disposal, the Developer will normally go through four very important steps in establishing an effective HOA, the first three of which should be done concurrently, but before the sale of the first lot.[12] They are: (1) the preparation and recording of the final subdivision plat; (2) the drafting and recording of the Declaration of Covenants, Conditions, and Restrictions (CCR) applicable to the platted property; (3) the incorporation of the HOA; and (4) the sale and conveyance of each lot by a deed which embodies the recorded CCR by reference or otherwise.

The subdivision plat is in the nature of a master deed which establishes the lot boundaries, streets, walkways, and common areas. In the context of the HOA, the plat should specifically provide by an express reference on its face to the CCR for the creation of an automatic association and for HOA ownership in fee of all the property in the common areas. In addition, the plat should also confirm the grant of an appurtenant easement for the use and enjoyment of all common properties to each lot owner upon purchase.[13] These provisions will, in this way, constitute the legal basis for assuring prospective buyers a voice in the affairs of the subdivision as well as an unequivocal property interest in the common areas. These rights, however, generate the corresponding duties of paying the annual assessments and abiding by the CCR referred to in their deeds.

Along with the subdivision plat, the CCR is recorded. It sets out the legal obligations which are to be mutual[14] and legally enforceable among the lot owners.[15] These obligations are contractual in nature and are normally found in the form of affirmative and negative covenants which "run with the land."[16] This means that the obligations attach to the property and bind whoever takes his title subject to the CCR for as long as they are in effect.[17] To gain this advantageous effect, the covenants must be intended to run with the land, they must touch and concern the land with which they run, and there must be established a chain of title between the property burdened and the party benefitted.[18]

Affirmative and Negative Covenants

In preparing the CCR, the Developer will require some certainty, as will his prospective purchasers, that the covenants will be continuous, enforceable and uniform. If they are not, he has failed in his attempt to guarantee the quality and character of the development. Hence, the drafting and construction of the covenants is critical, for they represent the cornerstone upon which the HOA, and its attending success or failure, is built. The best method to date for attaining the proper results is found in the judicial doctrine of negative reciprocal easements, sometimes referred to as mutual equitable servitudes.

A negative reciprocal easement is said to arise whenever "the owner of two or more lots, so situated as to bear the relation, sells one with restrictions of benefit to the land retained."[19] While the restrictions are in force, they are mutual and bind the owner of the lot sold, as well as his subsequent title-holders with notice.[20] The restrictions will "run with the land sold by virtue of an express fastening" and will continue in effect until extinguished by their own terms or otherwise.[21]

As the law has evolved in Michigan, an effective covenant must meet three requirements: (1) it must originate from a common grantor;[22] (2) it must be made pursuant to a general plan or scheme;[23] (3) it must "run with the land."[24] In the context of the modern subdivision, the CCR should find little trouble in qualifying under these requirements. The Developer will buy the entire tract of unimproved and unrestricted property to be subdivided. He will therefore always be viewed as the common grantor as to the conveyance of the individual lots in the tract. His restrictions will hence cover every purchaser in his chain of title, but will carry no effect to neighboring properties not owned by him even though those lot owners voluntarily comply with his restrictions.[25]

Normally, the general plan requirement can be met by a declaration in the plat or CCR that the restrictions are made pursuant to a uniform scheme involving the entire land platted. However, even where the language is not made express, if the Developer's purpose was to create such a common plan, and if the scheme has been maintained from its beginning and has been understood, accepted and acted upon, it will be found to exist and to be binding.[26] The strongest proof in support of an unexpressed general plan is the character, appearance, and long-continued use of the property in substantial conformity with the intended scheme.[27]

As for the "running with the land" requirement,[28] the covenants in the subdivision need only "affect and concern" the property.[29] That is, the covenants must in some respect change or alter the nature, quality or value of the property interest as opposed to affecting a purely personal or collateral engagement.[30] The usual covenants in the modern subdivision, respecting the size or style of the structure, the building height, the cost, the set back requirements and the like,

will normally qualify. By limiting what the lot owner can do with his property, that lot owner's interest is somewhat less than the full fee he would otherwise have had. Therefore, the quality and enjoyment of his property is altered. Whereas, a covenant requiring a purchaser to marry the seller's daughter or to contribute annually to the Crippled Children's fund is strictly personal in nature and leaves the quality and value of the property unaffected.

All of the foregoing principles will apply equally to "affirmative covenants," i.e., those covenants which require the property owner to do something, rather than merely restricting his conduct. The most obvious example is the covenant to pay the annual HOA fee or to pay assessments for planned improvements as they are levied. Although all jurisdictions have not recognized that this type of covenant "runs with the land,"[31] the Michigan courts have unequivocally so ruled.[32]

Judicial Construction of Covenants

Knowing how the courts are likely to construe a given covenant or restriction is an important ingredient in the proper drafting of the CCR. The Developer must be able to anticipate and obviate potential problems through the use of careful and precise language. The policy espoused by the Michigan courts has generally been to refrain from aiding the person who seeks to restrict the use of another's property unless his right to do so is clear.[33] Therefore, whenever a restriction is viewed as ambiguous, the uncertainties will usually be resolved in favor of the free use of the land.[34] Moreover, the burden of establishing the existence or applicability of a given restriction rests upon the party relying upon it.[35]

This policy seems weighted against the Developer and indicates the desirability and importance of the careful and complete drafting of the CCR to effect enforceable covenants restricting the free use of the property. In reviewing a restriction in a deed, however, the court will not necessarily construe it in strict accordance with its literal meaning. Rather, it will be viewed in light of the surrounding circumstances, the character of the property as a whole, and the purpose for which the restriction was made. The controlling factor, though, will be the intention of the parties.[36] As a general rule, the courts will uphold a clearly expressed condition whenever it remains of a substantial benefit to the existing property owners.[37] When it ceases to be of such benefit, however, the courts will no longer allow its enforcement.[38]

With these policies in mind, the Developer must avoid all semblence of ambiguity. He should spell out in detail what he wishes to accomplish and leave nothing to chance. The only way to insure enforcement of the subdivision covenants is to express them as clearly as possible, to specifically declare the intention of the Developer in making them, and to specify the purpose for which they are meant to serve. In this way, the Developer can enjoy a favorable construction along with judicial enforcement of his intentions.

Enforcement of Covenants

Subdivision covenants and restrictions are valuable property rights which can be enforced and maintained by the complying lot owners.[39] In certain situations, even adjoining property owners, not themselves subject to the CCR, may be allowed standing as third-party beneficiaries to bring suit and enforce the restrictions against non-complying parties; e.g., where the CCR specifically confers the benefit of the restrictions upon the adjoining property owners who honor the said restrictions.[40]

Although the Michigan courts have not specifically dealt with the issue of whether the HOA itself has standing to enforce the covenants, they seem to have adopted sub silentio the holdings of other jurisdictions allowing such suits to be brought by the association in its capacity as the agent of or representative for their individual members.[41] The issue here will only arise where the HOA is not a property owner. If, as suggested earlier, the HOA is given legal title to the common areas, then it will enjoy all the benefits accruing to lot owners, including the capacity to bring an enforcement action.

In addition, it should be noted that, in bringing their action to enjoin a violation of the covenants, the HOA or the lot owners need not make a showing that their property values have declined due to the violation or that they have suffered any financial loss as a consequence. The entire matter of damages is simply immaterial as a prerequisite to maintaining an enforcement suit.[42]

Even with this broad power of enforcement, though, the courts have carved out certain limitations and exceptions: (1) constitutional infringements; (2) laches; (3) a substantial change of conditions in the neighborhood; and (4) public policy considerations.

As in all areas of the law, constitutional mandates take precedence over conflicting state rulings. The Michigan courts, following the lead of the United States Supreme Court in Shelley v. Kraemer[43] and overruling earlier decisions, have held that they will not enforce, either directly or indirectly, any racially restrictive covenants. Such restrictions are viewed as repugnant to the policies of the state and violative of the Fourteenth Amendment.[44] The courts will simply refuse to lend their power to aid in these illegal enforcement schemes.

The defense of laches is often asserted against an action brought by the property owners to enforce subdivision restrictions.[45] It is a doctrine resting in equity, as is the enforceability of the covenants themselves. Hence, where the lot owners have initially allowed the restrictions to be violated and have sat on their rights to the detriment of the defendant, they will be deemed to have waived the restrictions and will be estopped from enforcing them against that party.[46]

Another common assertion to avoid enforcement of the subdivision restrictions is that circumstances have so changed the character of the community that it would be inequitable to allow their enforcement.[47] While the restrictions remain in effect perpetually unless otherwise limited,[48] a court will disallow enforcement if their purpose is no longer attainable due to a substantial change of conditions.[49] What factors are sufficient to constitute a "change of condition" will normally depend upon the individual circumstances of each case. The facts differ so widely from case to case that no general rule can be readily established.[50] The courts have, though, held that the implementation or alteration of a municipal zoning ordinance does not, of itself, indicate that conditions have materially changed.[51]

As indicated earlier, the courts will generally uphold a restriction whenever it still renders a substantial benefit to the parties objecting to its violation.[52] A claim of changed conditions must therefore be made in good faith and have some substance to it to become a successful challenge to the restrictions. As enunciated and followed by the Supreme Court of Michigan, it is their firm policy to

> protect property owners who have not themselves violated restrictions in the enjoyment of their homes and holdings, free from inroads by those who attempt to invade restricted residential districts and exploit them under some specious

claim that others have violated the restrictions or business necessities nullified them.[53]

Finally, public policy reasons will avoid the enforcement of subdivision restrictions. In some situations, equity considerations will allow a technical violation of a covenant where its purpose will not be seriously impaired but its strict enforcement will work a special hardship upon the defendant.[54] Again, the results in these cases will inevitably turn on the facts.

Incorporation of the HOA

As noted at the outset, the most effective HOA organization is the automatic type in corporate form;[55] more specifically, a non-profit, non-stock corporation is preferable.[56] This form of association will obviate problems relating to taxes and securities registration. It will also allow the association to hold legal title to the common properties and will give its membership substantial control over the management of the organization's affairs without exposing them to the risk of individual, personal, or unlimited liability.[57] With these attributes, many of which are unavailable to alternative forms of associations, the non-profit, non-stock corporate HOA can be much more efficient and responsive to the needs of its membership.

III

ARCHITECTURAL CONTROL

In setting up his subdivision, provisions for architectural control are critical to the success of the Developer's investment.[58] These provisions will normally take the form of exterior building restrictions controlling such matters as the style or type of allowable structure, the location upon which it can be built on the lot, the type of materials to be used in the construction, the type of shrubbery and landscaping, allowable fences and barriers, and the like. In addition, a covenant requiring that building plans be submitted to a committee of the HOA, or to the Developer himself, for approval prior to the commencement of construction is recommended.[59] The function of these "protective covenants"[60] is primarily to maintain property values[61] from non-conforming eyesores which may cause the area to become less desirable for residential purposes.[62] They will also assure the Developer and his prospective purchasers that any new buildings will substantially conform to the style or plan encompassing those homes already existing or scheduled to be built in the subdivision.[63]

Covenants Governing Architectural Style

Restrictions controlling the architectural style of buildings have generally been upheld by the courts.[64] In Michigan, for example, a covenant restricting allowable structures to "single bungalow residence buildings" was found to be clear, unambiguous, and therefore binding upon all those purchasers taking subject to the subdivision's CCR.[65] Other jurisdictions have likewise held similar restrictions to be valid.[66] One state court went so far as to find valid and reasonable a restriction requiring all lot owners to paint their houses in a uniform color -- white.[67] That particular court justified the color requirement as one properly used to maintain the harmonious and aesthetic character of the community. As long as the purchasers had notice of the covenant and exercised some degree of choice in

buying the subject property, the reasonableness of that court decision cannot be questioned under current legal principles.

These controls respecting the style or structure of homes to be built in a restricted subdivision may be seen as suppressive of individual expression. However, as long as they serve a legitimate protective function and are based upon a free contractual relation,[68] the courts will generally honor them, barring, of course a proper constitutional defense,[69] laches,[70] a substantial and material change of conditions,[71] or some other proper public policy consideration.[72] The judicial construction and enforcement of these covenants are governed by the same principles involving restrictive covenants as a class, as discussed in Part II of this paper.

The Architectural Review Committee

Covenants requiring construction plans to be submitted to the Developer or to an Architectural Review Committee (ARC) for approval have been received favorably in Michigan,[73] as they have been in other jurisdictions as well.[74] These covenants, under a general standard described in the subdivision CCR,[75] provide a desirable degree of flexibility regarding minor details as well as in the interpretation and practical application of the restrictions.[76] The use of the ARC device may, for example, settle potential disputes before they get out of hand[77] and may even short-circuit litigation on a particular issue before the purchaser has made a substantial investment in a half-built, non-conforming structure.[78]

Early in the subdivision's progress, the Developer may constitute a one-man ARC. Later, as more lots are sold and the lot owners as an aggregate own a greater proportion of the subdivision property, the power will be transferred to the HOA.[79] The actual membership of the ARC will normally be comprised of the lot owners but may also encompass their duly appointed delegates, e.g., outside consultants, professional architects.[80] The covenant itself may also provide for the submission of any dispute to binding arbitration by a select group of outside professionals whenever the ARC and the lot owner fail to reach an agreement as to the suitability of the proposed plans.[81]

These covenants requiring review will normally provide for the submission of blueprints and building designs to the ARC for approval before construction commences. In addition, as a built-in safeguard for the purchaser, many of the covenants provide for automatic approval, so long as the building meets a specified minimum valuation or square footage requirement, if the ARC fails to act on the application within a stated period of time.[82] Where the valuation is outdated due to inflationary factors, the court will read it in terms of its present dollar value.[83]

The ARC is purely a creature of contract and can possess only so much power and authority as is expressly delegated to it in the CCR.[84] That is, the committee is without power to add to or subtract from the existing restrictions.[85] It may not authorize a prohibited use,[86] nor may it reject plans drawn in conformity with permitted uses.[87] Moreover, in a situation where the Developer reserves a right of approval, he must likewise abid by the restrictions in the houses he builds; his approval power does not allow him to disregard or modify the restrictions at will.[88] Where, however, the CCR specifically empowers the ARC to modify the covenants,[89] such modifications, if made according to the prescribed procedure set out in the CCR, may be permissible.[90] These provisions will be upheld if exercised reasonably since all purchasers were on notice of the covenants and chose to be

bound by them. They are generally undesirable, though, because they provide the framework for constant review and change which tends to weaken or defeat the original purposes sought by the Developer of providing adequate assurances that the property values would not be adversely affected by future events.[91] In any event, a voluntary agreement by all of the affected lot owners, pursuant to general contract principles, will provide a valid modification of the CCR.[92]

Standard of Review

Whenever the ARC acts in approving or rejecting submitted applications, it "must consider the facts and be fair and reasonable" and, further, it "must not act in a high-handed, whimsical or despotic manner.[93] This rule applies whether the reviewer is the Developer alone or a full-blown ARC made up of several members and advising architects. It seems to make sense to hold the ARC to this standard of "reasonableness," but at least one commentator has suggested applying a higher duty yet.[94] Drawing upon a "powers in trust" analogy, he would impose a "fiduciary duty" upon the Developer or the ARC in favor of the lot owners subject to the CCR.[95] In this way, so goes the reasoning, the Developer need place fewer specifics in the covenants and may retain a broad power of modification, subject of course to his fiduciary duty. Hence, the system can have greater flexibility with the Developer meeting changing circumstances with modified covenants.

While this suggestion is appealing, there is no real evidence that different results would ever be reached under it as compared to the prevailing duty of "reasonableness"; in fact, the commentator suggests as much himself when he points to decisions imposing standards similar to those placed on trustees while purporting to follow the prevailing rule.[96] Moreover, any broad power of modification with a corresponding lack of specificity in the CCR invites litigation regardless of the standard of care imposed. For example, in a partially built development, the Developer will undoubtedly be looking out for his own interests in completing the sale of all the lots. Where his interests clash with those of the homeowners, as when he changes a restriction to induce another class of buyers, with different tastes, to purchase into the development, he may be exercising his discretion in such a way that a court will be called upon to review his decision. A clear-cut case of abuse of discretion will always be apparent, but it is the fine-line cases that cause serious problems and expensive litigation. It is far better, in assuring the maintenance of the common scheme, to provide clear, unambiguous, and reasonably specific covenants to guide the decision-makers and to leave very little, aside from minor details, to anyone's discretion.[97]

Aesthetics and the ARC

A concern for the aesthetics of the development seems to be the central focus of the covenants respecting architectural control and of the reviewing process of the ARC. These covenants usually charge the ARC with maintaining the residential character of the community and with providing for houses and outbuildings which conform to the specified general plan.[98] In the absence of any type of restriction on the property, the Michigan courts have held mere aesthetics to be beyond the power of the judiciary to regulate.[99] In addition, restraints upon the use or enjoyment of real property have not been favored in the law because they are seen as hindrances to its free alienability.[100] This unrestricted use of land has resulted in uncontrolled, haphazard growth with attending blighted conditions in many areas.[101] The modern subdivision, as herein described, through its restrictive controls, along with state and local zoning laws, has attempted to deal with these problems. A brief

comparison of these private and public controls will aid in seeing the relative advantages of the subdivision controls.

Restrictive covenants, as a class, constitute a form of "private zoning"[102] which differ in several respects from their counterpart in the public sphere. First, and most importantly, the private covenants are based upon a free contractual relation between the Developer and his purchasers.[103] Zoning legislation, on the other hand, is tied to the police powers of the state.[104] As such, a zoning ordinance must be reasonable[105] and must be designed in such a way as to promote the health, safety, morals, or general welfare of the community at large.[106] This is not generally true of subdivision covenants. With broad freedom of contract, the parties are presumably able to place upon their properties whatever restrictions they may agree to. The attractiveness of a development so encumbered and the relative rights and interests of the prospective lot owners may be considerations, but the general welfare of the citizenry of the whole surrounding community is seemingly irrelevent to the contract. This reasoning is consistent with the policies of this state to allow the free use of property,[107] but to uphold any clearly expressed conditions which have been adhered to, relied upon,[108] and which remain of some benefit to the covenanting parties.[109]

Secondly, while aesthetic factors may be viewed as a valid part of the public welfare under public zoning regulations,[110] they may not constitute the statute's motivating force.[111] In contrast, subdivision covenants have no such limitations and aesthetics may be the sole consideration in setting up the general plan.[112] Here, the greater flexibility of subdivision architectural controls is apparent. However, aesthetics have been increasingly utilized as effective tools in the public arena.[113]

Some public ARCs, set up under local zoning laws or building codes, have refused to approve building plans although they have appeared to meet the statutory specifications. The reasons for non-approval state that the plans failed to conform to the minimum standards of "appearance" consistent with the surrounding buildings.[114] These cases have been upheld on grounds that the general welfare would be adversely affected through lowered property values and dampened prospects for future development in the subject neighborhoods. While these decisions as well as the ordinances creating their reviewing committees have not been without constitutional attack,[115] where the guidelines are definite enough to insure sufficient objectivity on the part of the ARC, the ordinances will generally be upheld by the courts.[116] In any event, similar decisions by the private subdivision ARC, pursuant to specific covenants, will normally operate free from the constitutional analysis to which public zoning schemes are subjected.[117] This latter result can be justified so long as the purchaser in the particular market area has a real choice in his selection of housing and where the restrictions do not operate as a substitute for zoning laws on behalf of the state or local government.

Finally, private controls provide the lot owners with somewhat more stability and long-run security. Unlike zoning restrictions, they are not open to the continuous possibility of change through variances, rezoning, and non-enforcement by public officials. Rather, once properly established and sufficiently specific, the private controls may remain in effect in perpetuity; and , further, as long as they are relied upon and remain of a substantial benefit to the complying lot owners, they will be jealously guarded by the courts.[118]

IV

SUMMARY AND CONCLUSION

In this paper, the reader has been exposed to the concept of private property controls in the residential subdivision. The Homeowners' Association, its makeup, legal basis, and efficacy are central to an understanding of this concept. The major focus has been upon the Declaration of Covenants, Conditions, and Restrictions which is filed with the subdivision plat before the first lot is sold and which becomes part of every conveyance in the subdivision. The covenants therein are based upon contract and constitute reciprocal easements which run with the land. If carefully thought-out and well-drafted, these covenants become highly effective tools in regulating the building and maintenance of the subdivision. Through their proper use, the Developer can provide attractive and highly marketable lots, and prospective purchasers can be assured of the continued value and character of their property. In addition, these private controls provide substantial benefits over the traditional forms of public land control. They allow more flexibility in the type of controls utilized, and give lot owners a greater sense of security in the continued use of the area property in its existing state.

A nationwide study of residential subdivisions conducted by the Urban Land Institute found satisfaction with Homeowners' Associations to be overwhelming.[119] Their overall effect on the marketability of residential developments has been highly favorable. They are set up to help preserve neighborhood amenities and to sustain property values. Their job has apparently been well-done. They not only benefit the Developers and the purchasers, but aid as well, at least indirectly, instutional lenders, neighboring communities, and the public at large. These latter groups tend to benefit from the increased economic activity that is stimulated by the availability of marketable lots in neighborhoods assured of having a continuing level of quality and an attractive character.[120]

The consensus seems to favor the results engendered by HOAs and their underlying covenants. The usefulness and desirability of these private property controls have been proven and accepted. Query, however, whether they may be utilized in a socially undesirable fashion by monopolizing the available property in certain market areas? Should they be subject to the same kind of constitutional restraints to which zoning laws are currently subject? Can they be better controlled and administered if the governing principles are solidified in a legislative enactment? This last question suggests an appropriate response to the others.

As has been repeatedly emphasized in this paper, the private property control covenants rest in contract and are given their lasting effect through the judicial doctrine of negative reciprocal easements. By and large, judge-made law is the sole supporting basis for these controls. It sets up the standards, construes the restrictions as the equities dictate, and strikes down vague or offensive restrictions. Over the years, a fairly consistent method of dealing with real property covenants has evolved in the courts. However, no compelling reason can now be seen for not engraving these common Law principles upon the Michigan statute books with the appropriate additions to meet current needs.

A "Real Estate Covenants Act" could effect the purposes of the Developer by prescribing statutorily permissible restrictions, methods of enforcement, strict standards of architectural review, express provisions for HOAs, and a regulatory agency with fact-finding powers for submission of disputes before resort to judicial process. It could also establish guidelines as to when the available real property in a given market area is so restricted that an individual purchaser is

given no real choice but to accept the restrictions. In such a case, the private property controls can be deemed in the nature of zoning regulations imposed on behalf of the state and therefore subject to the familiar constitutional restraints.

Surely, a statutory scheme can put more certainty into the drafting of the CCR by providing that certain statutory language will be presumptive of the Developer's intent to gain a desired result. It should be broad enough to allow sufficient "freedom of contract" for a given species of restrictions which will be deemed consistent with the policies of the state, yet narrow enough to avoid unreasonable or undesirable results. The courts will still need to evaluate certain disputes on a case by case method, e.g., change of circumstances challenges, but they need only look to the statutory standards rather than to a myriad of confusing and sometimes conflicting case law.

This suggestion is only that -- a suggestion. A comprehensive statute regulating real estate in this manner is not without its problems. Citizens now days eschew state intervention into their private affairs, freedom of contract may be slightly limited, not to mention the problems in drafting such legislation. The effects will not, though, be all that far-reaching. The recommendation is only for a statutory embodiment of the existing common law principles and standards discussed above. In this way, Judges will have somewhat less leeway, thereby giving more certainty to the Developers and their purchasers. In the final analysis, the law will not have changed significantly but reliance upon it will be less of a risk.

FOOTNOTES

1. Urban Land Institute Technical Bulletin 50, The Homes Association Handbook at 4 (rev 1966), hereinafter HANDBOOK.
2. Id. at 5.
3. Vogel, Lake Community Developments with Property Owner's Associations, 8 Urb. L. Ann. 169, 177 (1974).
4. See discussion infra on affirmative and negative covenants.
5. HANDBOOK at 21.
6. E.g., automatic association, optional associations, discretionary associations, clubs, trusts, incorporated associations, unincorporated associations, and cooperatives; See also HANDBOOK 5-13.
7. HANDBOOK at 5.
8. Id. 338-341.
9. Id. at 5.
10. Id. at 6.

11. Cf., Summer Resort Owners Corporation Act, MCLA 455.201 et seq, which provides for the formation of a corporation by resort owners and allows for a dues or assessment lien against delinquent members' property; Inland Lake Improvement Act of 1966, MCLA 281.901 et seq, which provides for a "public lake" board initiated by, but not composed of, the riparian lot owners for the improvement and maintenance of the lake and allows for an assessment lien to attach to the lots; and MCLA 455.301 et seq which provides for associations to be formed for the maintenance of parks, playgrounds, drives, and boulevards.

12. HANDBOOK at 197.

13. Id. 198-200.

14. Mutuality is not a mandatory legal requirement, but is a highly desirable element in an effective system of modern subdivision controls.

15. HANDBOOK at 198.

16. See generally C. E. Clarke, Real Covenants and Other Interests which "Run with Land" (2nd ed. 1947).

17. Buckley v. Roman Catholic Archbishop, 339 Mich. 398, 63 N.W.2d 655 (1954); Saari v. Silvers, 319 Mich. 591, 30 N.W.2d 286 (1948); Nerrerter v. Little, 258 Mich. 462, 243 N.W. 25 (1932); French v. White Star Refining Co., 229 Mich. 474, 201 N.W. 444 (1924); Harley v. Zack, 217 Mich. 549, 187 N.W. 533 (1922); McQuade v. Wilcox, 215 Mich. 302, 183 N.W. 771 (1921).

18. Greenspan v. Rehberg, 56 Mich. App. 310, 224 N.W.2d 67 (1974).

19. Sanborn v. McLean, 233 Mich. 227, 229, 206 N.W. 496 (1925).

20. Id. 233 Mich. 229-230.

21. Id; See also Moore v. Kimball, 291 Mich. 455, 289 N.W. 213 (1939).

22. Golf View Improvement Ass'n v. Uznis, 342 Mich. 128, 68 N.W.2d 785 (1955); Saari v. Silvers, 319 Mich. 591, 30 N.W.2d 286 (1948); Doxtator-Nash v. Cherry Hill, Inc., 12 Mich. App. 468, 163 N.W.2d 362 (1968).

23. Indian Village Ass'n v. Barton, 312 Mich. 541, 20 N.W.2d 304 (1945); Denhardt v. DeRoo, 295 Mich. 223, 294 N.W. 163 (1940); French v. White Star Refining Co., 229 Mich. 474, 201 N.W. 444 (1924); Allen v. City of Detroit, 167 Mich. 464, 133 N.W. 317 (1911).

24. See e.g., Sanborn v. McLean, 233 Mich. 227, 206 N.W. 496 (1925); Greenspan v. Rehberg, 56 Mich. App. 310, 224 N.W.2d 67 (1974).

25. Golf View Improvement Ass'n v. Uznis, 342 Mich. 128, 68 N.W.2d 785 (1955); Hart v. Kuhlman, 298 Mich. 265, 298 N.W. 527 (1941); Compare Dorfman v. Highway Dept., 66 Mich. App. 1, 238 N.W.2d 395 (1975).

26. Stark v. Robar, 339 Mich. 145, 63 N.W.2d 606 (1954); French v. White Star Refining Co., 229 Mich. 474, 201 N.W. 444 (1924); Allen v. City of Detroit, 167 Mich. 464, 133 N.W. 317 (1911).

27. Indian Village Ass'n v. Barton, 312 Mich. 541, 20 N.W.2d 304 (1945).

28. See notes 16 and 17 supra and accompanying text.

29. See note 17 supra.

30. Mueller v. Banker's Trust Co., 262 Mich. 53, 247 N.W. 103 (1933), following Keogh v. Peck, 316 Ill. 318, 147 N.E. 266 (1925).

31. See generally Annot. 68 A.L.R.2d 1022 (1959).

32. Burton Jones Dev. Inc. v. Flake, 368 Mich. 122, 117 N.W.2d 110 (1962); Adams v. Nobel, 120 Mich. 545, 79 N.W. 810 (1899); Greenspan v. Rehberg, 56 Mich. App. 310, 224 N.W. 2d 67 (1974).

33. Ottawa Shores Ass'n v. Lechlack, 344 Mich. 366, 73 N.W.2d 840 (1955); Buckley v. Roman Catholic Archbishop, 339 Mich. 398, 63 N.W.2d 655 (1954); Woodward Hills Improvement Ass'n v. Carey Homes, Inc., 321 Mich. 163, 32 N.W.2d 428 (4948); But see Sun Oil Co. v. Trent Auto Wash, Inc., 379 Mich. 182, 150 N.W.2d 818 (1967) where the policy was side-stepped and the principles of equity were invoked to reach a more equitable result. See also Sanborn v. McLean, 233 Mich. 227, 206 N.W. 496 (1925).

34. Ottawa Shores Ass'n v. Lechlack, 344 Mich. 366, 73 N.W.2d 840 (1955); Woodward Hills Improvement Ass'n v. Carey Homes, Inc., 321 Mich. 163, 32 N.W.2d 428 (1948); Colony Park Ass'n v. Dugas, 44 Mich. App. 467, 205 N.W.2d 234 (1973).

35. Buckley v. Roman Catholic Archbishop, 339 Mich. 398, 63 N.W.2d 655 (1954).

36. Id; Library Neighborhood Ass'n v. Goosen, 229 Mich. 89, 201 N.W. 219 (1924).

37. Carey v. Lauhoff, 301 Mich. 168, 3 N.W.2d 67 (1942); Taylor Avenue Improvement Ass'n v. Detroit Trust Co., 283 Mich. 304, 278 N.W. 75 (1938).

38. DeMarco v. Palazzolo, 47 Mich. App. 444, 209 N.W.2d 504 (1973).

39. Redfern Lawns Civic Ass'n v. Currie Pontiac Co., 328 Mich. 463, 44 N.W.2d 8 (1950); Indian Village Ass'n v. Barton, 312 Mich. 145, 20 N.W.2d 304 (1945); Harley v. Zack, 217 Mich. 549, 187 N.W. 533 (1922). Cf. Bales v. State Highway Commission, 72 Mich. App. 50, 249 N.W.2d 158 (1976).

40. Dorfman v. Highway Dept., 66 Mich. App. 1, 238 N.W.2d 395 (1975) relying on MCLA 600.1405; See also Mariner v. Rhonna, 371 Pa. 615, 92 A.2d 219 (1952). See generally Annot., 51 ALR 3d 556 (1973) concerning who may enforce restrictive covenants.

41. The leading case in this area is Neoponsit Property Owners' Ass'n, Inc. v. Emigrant Industrial Savings Bank, 278 N.Y. 248, 15 N.E.2d 793 (1938).

42. Smart Farm Co. v. Promak, 257 Mich. 684, 241 N.W. 813 (1932); Austin v. Van Horn, 245 Mich. 344, 222 N.W. 721 (1929).

43. 334 U.S. 1 (1948); See also Barrows v. Jackson, 346 U.S. 249 (1953).

44. Phillips v. Naff, 332 Mich. 389, 52 N.W.2d 158 (1952); Spencer v. Flint Memorial Park Ass'n, 4 Mich. App. 157, 144 N.W.2d 622 (1966).

45. See the discussion of laches as a defense in Carey v. Lauhoff, 301 Mich. 168, 3 N.W.2d 67 (1942).

46. Id; Taylor Avenue Improvement Ass'n v. Detroit Trust Co., 283 Mich. 304, 278 N.W. 75 (1938).

47. Michigan apparently has two longstanding and current lines of authority on change of condition cases. One line holds that changes occurring outside the subdivision are not relevant, while the other line holds that such changes are relevant in determining if conditions have changed so as to render the restrictions inoperable. For a discussion of these two views and their corresponding case authority, see DeMarco v. Palazzolo, 47 Mich. App. 444, 446, 209 N.W.2d 504 (1973).

48. Moore v. Kimball, 291 Mich. 455, 289 N.W. 213 (1939).

49. Cooper v. Kovan, 349 Mich. 520, 84 N.W.2d 859 (1957).

50. Northwestern Home Owners' Ass'n v. Sheehan, 310 Mich. 188, 16 N.W.2d 712 (1944); Putnam v. Ernst, 232 Mich. 682, 206 N.W. 527 (1925).

51. Cooper v. Kovan, 349 Mich. 520, 84 N.W.2d 859 (1957); Heste v. Sanbrook, 346 Mich. 680, 78 N.W.2d 649 (1956); Phillips v. Lawler, 259 Mich. 567, 244 N.W. 165 (1932).

52. Mack Outer Drive Improvement Ass'n v. Merrill, 317 Mich. 24, 26 N.W.2d 583 (1947); Northwestern Home Owners' Ass'n v. Sheehan, 310 Mich. 188, 16 N.W.2d 712 (1944); Taylor Avenue Improvement Ass'n v. Detroit Trust Co., 283 Mich. 304, 278 N.W. 75 (1938); Boston-Edison Protective Ass'n v. Goodlove, 248 Mich. 625, 227 N.W. 772 (1929).

53. Swan v. Mitshkun, 207 Mich. 70, 76, 173 N.W. 529 (1919); See also Jones v. Schaffer, 332 Mich. 190, 50 N.W.2d 753 (1952) and Carey v. Lauhoff, 301 Mich. 168, 3 N.W.2d 67 (1942).

54. See, e.g., R.R. Improvement Ass'n v. Thomas, 374 Mich. 175, 131 N.W.2d 920 (1965) and Billiet v. Aulgur, 18 Mich. App. 391, 171 N.W.2d 463 (1969) (both allowing the grading of a needed right of way over "residential property"); See also Gamble v. Hannigan, 38 Mich. App. 500, 196 N.W.2d (1972) (technical violation caused partly by committee's error in geographical measurement).

55. See notes 7 and 8 supra and accompanying text.

56. HANDBOOK at 338; See also MCLA 450.117 et seq.

57. Id.

58. Lowell, Prahl, Alessio, Cazares, Land Use and Operational Controls in the Planned Development, 9 San Diego L. Rev. 28, 49 (1971), hereinafter LAND USE.

59. HANDBOOK at 209.

60. Architectural controls have been described as "protective covenants"; See Krasnowiecki, Townhouses with Homes Associations: A New Perspective, 123 Pa. L. Rev. 711, 716 (1975).

61. HANDBOOK at 209.

62. Cf. State ex rel Stoyanoff v. Berkeley, 458 S.W.2d 305 (Mo. 1970).

63. Ardmore Ass'n v. Bankle, 329 Mich. 573, 577, 46 N.W.2d 378 (1951).

64. Annot., 47 A.L.R.3d 1232 (1973).

65. Woodward Hills Improvement Ass'n v. Carey Homes, Inc., 321 Mich. 163, 32 N.W.2d 428 (1948).

66. See, e.g., Gaskin v. Harris, 82 N.M. 336, 481 P.2d 698 (1971) (structures must be of Old Sante Fe or Pueblo-Spanish style of architecture); Hollingsworth v. Szczesiak, 32 Del. Ch. 274, 84 A.2d 816 (1951) (garages must be of like materials and conform in appearance to the architectural design of the structure on the lot).

67. West Hill Colony, Inc. v. Sauerwein, 78 Ohio L. Abs. 340, 138 N.E.2d 403 (1956).

68. Phillips v. Lawler, 259 Mich. 567, 244 N.W. 165 (1932).

69. See notes 43 & 44 supra and accompanying text.

70. See notes 45 & 46 supra and accompanying text.

71. See notes 47-53 supra and accompanying text.

72. See note 54 supra.

73. E.g., Ardmore Ass'n v. Bankle, 329 Mich. 573, 46 N.W.2d 378 (1951); Murdock v. Babcock, 329 Mich. 127, 45 N.W.2d 1 (1950); West Bloomfield Co. v. Haddock, 326 Mich. 601, 40 N.W.2d 738 (1950).

74. See generally Annot., 40 A.L.R.3d (1971).

75. E.g., Murdock v. Babcock, 329 Mich. 127, 45 N.W.2d 1 (1950) ("same character and general construction of houses to the east"); Gaskin v. Harris, 82 N.M. 336, 481 P.2d 698 (1971) ("Old Sante Fe or Pueblo-Spanish style of architecture").

76. HANDBOOK 209-210.

77. Id.

78. Compare Donoghue v. Prynnwood Cor., 356 Mass. 703, 255 N.E.2d 326 (1970) (lot owner undertook construction after disapproval by the ARC).

79. LAND USE supra, note 58 at 49.

80. Id. at 50.

81. E.g., R.R. Improvement Ass'n v. Thomas, 374 Mich. 175, 131 N.W.2d 920 (1965).

82. E.g., Golf View Improvement Ass'n v. Uznis, 342 Mich. 128, 68 N.W.2d 785 (1955).

83. Ardmore Ass'n v. Bankle, 329 Mich. 573, 46 N.W.2d 378 (1951).

84. See, e.g., Golf View Improvement Ass'n v. Uznis, 342 Mich. 573, 46 N.W.2d 378 (1951) (ARC held to be outside the scope of its powers where it sought to enforce restrictions not included in the recorded agreement).

85. Id; See also cases cited in notes 86 & 87 infra.

86. Snashall v. Jewell, 228 Ore. 130, 363 P.2d 566 (1961); Johnson v. Dick, 281 S.W.2d 171 (Tex. Civ. App. 1955).

87. Voight v. Harbour Heights Improvement Ass'n, 218 So. 2d 803 (Fla. App. 1969); Lushing v. Riviera Estates Ass'n, 196 Cal. App. 2d 687, 16 Cal. Rptr. 763 (1961).

88. Murdock v. Babcock, 329 Mich. 127, 45 N.W.2d 1 (1950).

89. See, e.g., the covenant in Gamble v. Hannigan, 38 Mich. App. 500, 196 N.W.2d 807 (1972).

90. Pohl, Establishing and Altering the Character of Texas Subdivisions, 27 Baylor L. Rev. 639, 671-672 (1975).

91. HANDBOOK at 212.

92. See Pohl, supra, note 90 at 671-672.

93. West Bloomfield Co. v. Haddock, 326 Mich. 601, 40 N.W.2d 738 (1950); See also Ardmore Ass'n v. Bankle, 329 Mich. 573, 46 N.W.2d 378 (1951) and R.R. Improvement Ass'n v. Thomas, 374 Mich. 175, 131 N.W.2d 920 (1965).

94. Reichman, Residential Private Government: An Introductory Survey, 43 U. Chi. L. Rev. 253 (1976).

95. Id. 296-298.

96. Id. at 298.

97. HANDBOOK at 212.

98. See note 74 supra.

99. Perry Mount Park Cemetery Ass'n v. Netzel, 274 Mich. 97, 99, 264 N.W. 303 (1936); See also Gambleman v. Dept. of Conservation, 309 Mich. 416, 422, 15 N.W.2d 689 (1944); Smith v. City of Ann Arbor, 303 Mich. 476, 483, 6 N.W.2d 752 (1942)

100. LAND USE, *supra*, note 58 at 50.

101. *Id*.

102. *See* note 90 *supra*.

103. Phillips v. Lawler, 259 Mich. 567, 244 N.W. 165 (1932).

104. Hitchman v. Oakland Twp., 329 Mich. 331, 45 N.W.2d 306 (1951) citing Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

105. Frischkorn Construction Co. v. Redford Twp. Building Inspector, 315 Mich. 556, 563, 24 N.W.2d 209 (1946).

106. Hitchman v. Oakland Twp., 329 Mich. 331, 45 N.W.2d 306 (1951).

107. *See* note 33, *supra*.

108. *See* note 26, *supra*.

109. *See* note 37, *supra*.

110. Sun Oil Co. v. City of Madison Heights, 47 Mich. App. 47, 53, 199 N.W.2d 525 (1972).

111. *See* Frischkorn Construction Co. v. Redford Twp. Building Inspector, 315 Mich. 556, 563, 24 N.W.2d 209 (1946); *Compare: Comment*, 39 So. Cal. L. Rev. 409, 428 (1966) suggesting that the trend is toward sustaining zoning ordinances as constitutional upon aesthetic grounds alone; *see also* People v. Stover, 12 N.Y.2d 462, 466, 191 N.E.2d 272, 240 N.Y.S.2d 734 (1963).

112. For an excellent article on the influence of aesthetics in both the private and public sectors, *see* Leighty, *Aesthetics as a Legal Basis for Environmental Control*, 17 Wayne L. Rev. 1347 (1971).

113. *See* Henley, *"Beautiful as Well as Sanitary -- Architectural Control by Municipalities in Illinois,"* 59 Ill. B. J. 36 (1970).

114. *See, e.g.*, State *ex rel* Stoyanoff v. Berkeley, 458 S.W.2d 305 (Mo. 1970); *see also* for similar holdings: Reid v. Architectural Board of Review, 119 Ohio App. 67, 192 N.E.2d 74 (1963) and State *ex rel* Saveland Park Holding Corp. v. Wieland, 269 Wis. 262, 69 N.W.2d 217 (1955).

115. *E.g.*, Pacesetter Homes, Inc. v. Village of Olympia Fields, 104 Ill. App. 2d 218, 244 N.E.2d 369 (1968).

116. Annot., 41 A.L.R.3d 1397 (1972).

117. See, e.g., West Bloomfield Co. v. Haddock, 326 Mich. 601, 612, 40 N.W.2d 738 (1950) wherein the court rejected the contention that a lawful exercise of the ARC's right of disapproval under the covenants constituted an unlawful taking of defendant's property without due process of law; Compare: Comment, 39 So. Cal. L. Rev. 409 (1966) suggesting that private land use controls should be subjected to the same constitutional scrutiny as the public controls.

118. See note 37, supra, and accompanying text; See also LAND USE, supra, note 58 at 57.

119. HANDBOOK 15-16.

120. Id.

NOTE: REJECTION OF LAND CONTRACT AS EXECUTORY CONTRACT IN BANKRUPTCY PROCEEDINGS OF VENDOR

By

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Recently, concern has been expressed as to the status of a land contract vendee in the event of the bankruptcy of the land contract vendor. Specifically, inasmuch as Section 70(b) of the Bankruptcy Act authorizes rejection by the trustee of an "executory contract," the question is raised as to whether a vendee (who may have made substantial payments on a land contract and/or be current thereon) can have such land contract rejected as an "executory contract" by the trustee in bankruptcy of the land contract vendor. It appears that there is a likelihood that a typical Michigan land contract would be treated as an "executory contract" and could, thus, be rejected by the trustee. See Matter of New York Investors Mutual Group, Inc., 143 F Supp 51 (SD NY, 1956) In Re Philadelphia Penn Worsted Co., 278 F2d 661 (CA 3, 1960), and Gulf Petroleum, SA v Collezo, 316 F2d 257 (CA 5, 1963).

In Re Mercury Homes Development Co., _________ F. Supp. _________ (ND Calif, 1978), examined the precise problem. The Court reasoned that the purpose behind the trustee's power to reject executory contracts was to insulate the trustee from contracts which imposed burdensome liabilities upon him. However, to permit the trustee to reject executory land contracts to the detriment of a vendee who was current in payments thereon would change this power from a defensive to an offensive weapon by attempting to deprive the vendee of a preexisting equity. Thus, neither the explicit language nor the implicit policies of the Bankruptcy Act compelled the conclusion that a post-rejection land contract vendee is limited to the role of an unsecured creditor. Further, specific performance of the land contract would impose no burdensome affirmative duty on the trustee. Therefore, if the vendee's acquisition of the land contract equity is not within the trustee's avoiding powers, the Court felt that the vendee should be left to undisturbed enjoyment of such equity. Accordingly, the Court concluded that where specific performance would be an available remedy outside of bankruptcy, it should be available to the vendee against the trustee in bankruptcy. The Court, thus, directed the trustee upon receipt of the balance of the purchase price to convey title to the vendee. Thus, this decision provides a basis for defense of the vendee position in a vendor bankruptcy.

The extensive Bankruptcy Reform Act (Public Laws 95-598, 1978) takes effect in large part on October 1, 1979. Section 365(i) thereof (11 U.S.C. 365(i)) reads as follows:

> "(1) If the trustee rejects an executory contract of the debtor for the sale of real property under which the purchaser is in possession, such purchaser may treat such contract as terminated, or, in the alternative, may remain in possession of such real property.

"(2) If such purchaser remains in possession --

"(A) such purchaser shall continue to make all payments due under such contract, but may, offset against such payments any damages occurring after the date of the rejection of such contract caused by the non-performance of any obligation of the debtor after such date, but such purchaser does not have any rights against the estate on account of any damages arising after such date from such rejection, other than such offset; and

"(B) the trustee shall deliver title to such purchaser in accordance with the provisions of such contract, but is relieved of all other obligations to perform under such contract."

Thus, upon effective date of the new Act, the vendee's position will be protected thereunder as long as the vendee is a "purchaser in possession," since such a purchaser may not only remain in possession of the property, but also may continue to make the land contract payments and, ultimately, to receive title as provided for in the contract. Certainly, this is the equitable result in all of the circumstances. However, the question remains as to whether the vendee is a "purchaser in possession." Thus, if the real property which is the subject matter of the land contract should be vacant or unimproved, typical Michigan land contract language indicates that the purchaser is deemed to be "in constructive possession only, which possessory right shall cease and terminate after service of a notice of forfeiture of this contract." (Burton Abstract & Title Co. form MB-17 Rev. 10-15-78) Thus, the trustee might forward a notice of forfeiture to a vendee and claim that such vendee is not thereafter a "purchaser in possession" with the rights provided in Section 365(i) of the new Act.

Accordingly, care should be taken in drafting land contracts to either recite that the purchaser of vacant or unimproved property shall be deemed to be in actual possession thereof pursuant to the land contract, or if in constructive possession that the same will not terminate after mere notice of forfeiture, or that other provisions are inserted which will protect the rights of a purchaser in such circumstances.

NOTE: THE BUILDER'S TRUST FUND ACT - REVISITED

By

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The United States Sixth Circuit Court of Appeals recently issued decisions in two appeals that considered the relative priority of the Michigan Builder's Trust Fund Act, 1931 P.A. 259, M.C.L.A. §570.151, et seq., M.S.A. 26.331, et seq. over the Federal Bankruptcy Act. The Michigan Builder's Trust Fund Act came off the winner in both cases defeating §60 preference claims of the bankruptcy trustees. The cases were Selby, Trustee v. Ford Motor Co., et al., Case No. 76-1711, and Parker v. Klochko Rental Co., et al., Case No. 76-2395/6/7/8. (Both decided and filed January 11, 1979.)

The Selby case holding was that the Michigan Builder's Trust Fund Act creates a "statutory trust" in monies due subcontractors and materialmen on private construction jobs and that the general contractor (and his trustee in bankruptcy) have no "property" interest in such monies under §70 of the Bankruptcy Act, and thus cannot successfully assert a §60 preference claim against the subcontractor and materialmen for such of those monies as were paid within four months before bankruptcy. The Parker case reaches the same result and holding, but in the context of a public construction job. Parker thus overrules General Insurance Co. v. Lamar Corp., 482 F2d 856 (6th Cir, 1973), which had held the Michigan Builder's Trust Fund Act inapplicable to public construction jobs. In overruling General Insurance Co., the court ignored the apparent approval given that decision by the Michigan Supreme Court in National Bank of Detroit v. Eames & Brown, Inc., 396 Mich 611 (1976). (See dissenting opinion of Lively, J. in Parker.)

The Trustee in Parker has petitioned for a rehearing. However, if left standing, Parker appears to eliminate a public versus private construction job dichotomy in the applicability of the Michigan Builder's Trust Fund Act. Both Parker and Selby reemphasize and underscore the role of the Michigan Builder's Trust Fund Act as an important additional tool available to imaginative counsel in a multitude of fact situations.

THE LEGISLATIVE SCENE

Committee on Legislation
Joseph H. Hollander, Chairman

On January 10, 1979, Michigan's state representatives and senators convened in Lansing to begin the 80th Legislature's regular session of 1979. The following day, business began in earnest when Representative McCullough introduced House Bill 4001 which would promote the use of alcohol in internal combustion engines. Of the House Bills introduced through January 31st, only H.B. 4013 would appear to be of relevance to practitioners of real property law. It would amend Section 34 of 1893 PA 206, the general property tax act, by requiring that each class of real and personal property be equalized separately by the State Tax Commission. The bill was introduced on January 30th by Representative Roy Smith and referred to the Committee on Taxation.

Introduction of bills in the Senate did not begin until January 25th. Senate Bill No. 3, which would provide for the preservation, management, protection and use of wetlands was introduced by Senators Kammer, et al, and was referred to the newly created Committee on Natural Resources and Environmental Affairs.

In future issues of the Review, the "Legislative Scene," a regular feature of this publication will use the same general format as followed in the past. That is, we will report on the introduction of all legislation in the Michigan Legislature having relevance to the practice of real property law in Michigan. We will also attempt to provide the most current information available as to the progress of previously introduced bills. Finally, bills considered to be of major importance will be highlighted when significant legislative action occurs.

We would also like to cover the progress of relevant federal legislation and rule-making activity. However, this becomes infinitely more difficult due to the lack of access to current publications which detail such activities. If you become aware of legislative information which you would like to share with the other members of the Section, please communicate directly with Joseph H. Hollander, 417 Seymour Avenue, Lansing, Michigan 48933. Credit for such information will be gratefully provided.

As an added service to the members of the Section, the following is a summary of all relevant legislation signed into law during the last session of the Michigan Legislature.

PUBLIC ACTS OF 1977

PA 5 -- Property tax; commercial development and plant rehabilitation districts; exempt facilities for which a certificate is in effect. Approved 3/24/77 -- Immediate effect.

PA 20 -- Property tax, intermediate school districts; provide for collection and certification of taxes for districts in cities and townships. Approved 5/27/77 -- Immediate effect.

PA 28-30 -- Land use; zoning; cities, villages, townships and counties; provide for uniform radius for establishment of state licensed residential facilities. Approved 6/15/77 -- Immediate effect.

PA 56 -- Interest; rate on first mortgage and land contracts; extend exemption from usury statute. Approved 7/6/77 -- Immediate effect.

PA 135 -- Financial institutions; home loans; prohibit redlining. Approved 11/7/77 -- Effective 7/1/78.

PA 166 -- Property tax; permits local taxing unit to extend time for payment; permits greater expenses in making tax sales; and permits certain millage elections in December, 1977. Approved 11/16/77 -- Immediate effect.

PA 268 -- Natural resources; soil inventory; provide for inventory of soil resources of the state. Approved 12/14/77 -- Immediate effect.

PUBLIC ACTS OF 1978

PA 15 -- Interest; usury; exemption; include finance subsidiary of a manufacturing corporation. Approved 2/8/78 -- Immediate effect.

PA 25 -- Property tax; assessment; extends exclusion for certain normal repairs, replacement and maintenance. Approved 2/21/78 -- Immediate effect.

PA 27 -- Lenders; allow certain lenders approved as mortgagees to charge for certain reasonable expenses in addition to interest. Approved 2/24/78 -- Immediate effect.

PA 28-29 -- Villages; special assessments; permits prepayment of future due installments. Approved 2/24/78 -- Immediate effect.

PA 37 -- Plant rehabilitation districts; permit industrial development property to be owned or leased under certain conditions. Approved 2/24/78 -- Immediate effect.

PA 38 -- Plant rehabilitation; tax exemption certificate; limit length to 12 years. Approved 2/24/78 -- Immediate effect.

PA 54 -- Property tax; exemptions; exempt property owned and occupied by parent cooperative preschool and certain property occupied solely by elderly persons or handicapped families. Approved 3/10/78 -- Immediate effect.

PA 59 -- Condominiums; regulates sale and construction. Approved 3/14/78 -- Immediate effect.

PA 61 -- Sanitary landfills; prohibit location of landfills within 10,000 feet of certain airport runways. Approved 3/14/78 -- Immediate effect.

PA 75 -- Drains; sewers; permit deferred payment of tap-in fees. Approved 3/22/78 -- Immediate effect.

PA 96 -- Home improvement finance; permit interest determined on basis of unpaid balance. Approved 4/5/78 -- Immediate effect.

PA 108 -- Private roads; maintenance; township special assessments; allow for platted roads regardless of when constructed. Approved 4/13/78 -- Immediate effect.

PA 152 -- Trade; home solicitation sales; realtors; remove from act regulating and allow statement of buyer's right to cancel to be furnished in separate document. Approved 5/18/78 -- Immediate effect.

PA 171 -- Residential builders; licensing and regulation; permit oral examination and provide for restricted license upon successful completion under certain circumstances. Approved 5/27/78 -- Immediate effect.

PA 188 -- Land use; drains; condemnation; allow drainage districts to secure property by purchase and condemnation and prescribe procedure. Approved 6/4/78 -- Immediate effect.

PA 216 -- Revenue bond act; general amendments. Approved 6/5/78 -- Immediate effect.

PA 219 -- Insurance; property; cancellation or nonrenewal of homeowners policies; limit for 180 days. Approved 6/5/78 -- Immediate effect.

PA 242 -- Charter townships; revise procedures for annexation and incorporation. Approved 6/15/78 -- Immediate effect.

PA 255 -- Commercial redevelopment act; provides for establishment of commercial redevelopment districts in local governmental units. Approved 6/21/78 -- Immediate effect.

PA 261 -- Property tax; disabled soldiers and sailors housing exemption; extend to unremarried surviving spouse. Approved 6/28/78 -- Immediate effect.

PA 283 -- Real estate brokers and salespersons; regulate educational courses offered in compliance with licensing act. Approved 7/6/78 -- Immediate effect.

PA 315 -- Residential builders; licensing; define good moral character. Approved 7/10/78 -- Immediate effect.

PA 321 -- Income tax; property tax credit; veterans; provide for credits for disabled veteran renters equal to 17% of total annual rent paid by the property tax rate on the property. Approved 7/10/78 -- Immediate effect.

PA 324 -- Residential builders and salespersons; permit 60 day temporary license. Approved 7/11/78 -- Immediate effect.

PA 337 -- Real estate agents; licensing; define good moral character. Approved 7/11/78 -- Immediate effect.

PA 367 -- Land use; subdivision control act; changes procedure for vacating, correcting or revising a plat. Approved 7/22/78 -- Immediate effect.

PA 369 -- Secured transactions; general amendments to article 9 of uniform commercial code. Approved 7/25/78 -- Immediate effect. (Effective 1/1/79.)

PA 381 -- Property tax; assessment; prescribes and defines classifications of real and personal property for assessment purposes. Approved 7/27/78 -- Immediate effect. (See enacting section 2.)

PA 440 -- Interest; usury; exempt from usury act certain loans made by certain employee benefit plans and extend deadline for certain interest rate limitation exceptions to December 31, 1981. Approved 10/9/78 -- Immediate effect.

PA 454 -- Housing; landlord and tenants; "truth in renting act"; enact. Approved 10/16/78 -- Effective 7/1/79.

PA 467 -- Land use; prohibit project for economic development corporation where effect is to transfer employment, change ordinance requirement to resolution, and include senior citizen housing projects. Approved 10/16/78 -- Immediate effect.

PA 481 -- Uniform securities act; general amendments. Approved 10/23/78 -- Effective 4/1/79.

PA 496 -- District court; small claims division; prescribe procedure, increase jurisdiction from $300 to $600, and limit number of claims which may be filed by a person to 5 per week. Approved 12/11/78 -- Immediate effect. (Effective 1/1/79.)

PA 516 -- Traffic laws; shopping centers; make violation of parking regulations a civil infraction. Approved 12/19/78 -- Immediate effect. (See section 2 for effective date.)

PA 521 -- Downtown development authorities; governing board; allow increase in number of members and require compliance with open meetings and freedom of information acts. Approved 12/20/78 -- Immediate effect.

PA 532 -- Property tax; counties; general amendments. Approved 12/21/78 -- Immediate effect. (Effective 5/1/79, but see enacting section 2.)

PA 556 -- Plats; land dedicated to public use; regulate and provide for presumption of acceptance. Approved 12/22/78 -- Immediate effect.

PA 591 -- Charter townships; annexation and incorporation; technical amendments. Approved 1/4/79 -- Immediate effect.

PA 607 -- Commercial code; secured transactions; mobile homes; provide means of perfecting security interests and correct section number of reference. Approved 1/5/79 -- Immediate effect. (Effective 1/1/79.)

PA 624 -- Mobile homes; provide for issuance of title and procedure for perfecting security interest. Approved 1/6/79 -- Immediate effect. (Effective 1/1/79.)

PA 629 -- Land use; county zoning ordinances; eliminates requirement of submission of ordinance to governor for approval or disapproval. Approved 1/8/79 -- Immediate effect.

PA 637 -- Land use; township rural zoning act; general amendments. Approved 1/11/79 -- Immediate effect. (Effective 3/1/79.)

PA 638 -- Zoning; cities and villages; general amendments. Approved 1/11/79 -- Immediate effect.

PA 640 -- Zoning; county rural zoning enabling act; general amendments. Approved 1/11/79 -- Immediate effect.

PA 642 -- Probate code; revise and consolidate laws relative to probate of decedent's estates, guardianships, conservatorships, trusts and powers of attorney. Approved 1/11/79 -- Effective 7/1/79.

The effective dates shown for the foregoing Public Acts are those reported by the House of Representatives Analysis Section. Section members are cautioned not to rely upon these dates as they are occasionally in error.

Copies of the foregoing Acts may be obtained upon request from the House and/or Senate Document Room, State Capitol Building, Box 30014, Lansing, Michigan 48909.

CASE BRIEFS
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Case Editor: Nicholas C. Batch
Assistant Professor, Law Area
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BROKERS
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Realtors negligently misrepresented boundaries to buyers. After three years and three months of litigation with the sellers, the buyers attempted to join the realtors as defendants. Was the claim barred by the two year statute of limitations for malpractice (MCL 600.5805(3), 5838(2); MSA 27A.5805(3), 5835(2)), or the three year "injury to persons or property" statute (MCL 600.5805; MSA 27A.5805)? Neither, said the Michigan Court of Appeals. The claim falls within the six year general statute (MCL 600.5813; MSA 27A.5813). Coats v Uhlmann, No. 77-767 (MCA, Dec. 5, 1978).

CONDEMNATION
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It was error for a trial court to award $7,548.25 in attorney fees to a defendant in a vigorously contested condemnation action which was dismissed before trial over the defendant's objections. The statutory maximum of $25 in such instances, per MCL 213.37; MSA 8.27, is not abrogated by GCR 1963, 504.1(2) authorizing dismissal on terms deemed just and proper. Charter Twp of Canton v Kaufman, No. 77-4284 (Jan. 3, 1979).

DRAINS
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It is unnecessary to invoke condemnation procedures under the Drain Code (MCL 280.1 et seq.; MSA 11.1001 et seq.) when flow in an existing drain is increased, provided no additional damage is done to the affected realty. Toth v Charter Twp of Waterford, No. 77-240 (MCA, Nov. 27, 1978).

LAND CONTRACTS
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Serving notice of forfeiture on a defaulting land contract vendee does not bar the vendor from subsequently seeking money damages for breach of the contract. The common law rule that such notice irrevocably elects the forfeiture remedy will no longer be applied in Michigan owing to the new role of such notices under the Summary Proceedings Act (MCL 600.5701 et seq.; MSA 27A.5701 et seq.). The notice is now merely a prerequisite to invoking the procedures of the Act, not an irrevocable decision to seek forfeiture. Gruskin v Fisher, No. 58719 (MSC, Jan. 10, 1979).

LIENS
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An architect who contracts with a preliminary sales contract buyer has no mechanic's lien on the affected realty when the architect's plans are never implemented and the buyer repudiates the contract. Sullivan v The Thomas Organization, P.C., No. 77-2707 (MCA, Jan. 16, 1979).

SALES CONTRACTS
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A preliminary sales contract specified closing would be "when plat is recorded." The contemplated plat was not recorded by the seller and the land was sold to another purchaser. The first purchaser sued for damages for breach of contract. The seller defended by claiming failure of a condition precedent (plat recordation), and that the contract specified no time for performance and was thus void for indefiniteness. Reversing a summary judgment for the seller, the Michigan Court of Appeals held the quoted language was promissory, not conditional. "When" implies it will be done; "if" sets up a contingency. [Drafters and "flyspeckers" take note!] It was also held a "reasonable time" for performance could be implied in the contract. Soloman v Western Hills Development Company, No. 77-4932 (MCA, Jan. 17, 1979).

TAXATION
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A special road improvement assessment was challenged in Oakland County Circuit Court in 1972. The matter finally came to trial in 1977. On appeal, the Court of Appeals refused to consider the merits since neither the trial court nor the parties had realized the Tax Tribunal Act (MCL 205.701 et seq.; MSA 7.650(1) et seq.) had ousted the circuit court's jurisdiction. The dispute was remanded to the Tax Tribunal. Conduct or consent of the parties does not confer subject matter jurisdiction upon a court. Eggemont v City of Clawson, No. 77-4525 (MCA, Jan. 17, 1979).

Township treasurers have "standing" to contest an allegedly fraudulently imposed drain tax. If the fraud is proved, it will exempt the plaintiffs from the thirty day statute of limitations under MCL 280.265; MSA 11.1265. The circuit court is the proper forum for deciding equitable matters involving taxes (such as class action suits) since the Tax Tribunal lacks equitable powers. Lewkowicz v Youngblood, Nos. 31365 and 77-24, (MCA, Nov. 6, 1978). NOTE: Thanks are due to Harry S. Ellman, Esq. of Southfield for supplying information on this case. Mr. Ellman advises that an application for rehearing has been denied and that an application for leave to appeal to the Supreme Court is pending.

WATER RIGHTS
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The "recreational use" test of navigability (i.e. will it float small boats?) was held to sustain a finding that Burgess Creek in southwestern Montcalm County is navigable, even though it is the only outlet of Burgess Lake, a so-called "dead-end" lake without public access. Significant was lack of common ownership of the land surrounding the lake and traversed by the creek. Nicholas v McDaniel, No. 77-5203 (MCA, Jan. 16, 1979).

ZONING
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A trial court found multiple dwelling zoning for a 1/3 acre parcel in Birmingham unconstitutional because it precluded use of the land for any purpose to which it was reasonably adapted. The trial court then ordered the City not to interfere with office and commercial use of the realty and not to apply its off-street parking ordinance requirements. After sustaining the trial court's factual findings, reviewing the evidence of noise, traffic, economics, etc., the Court of Appeals dealt with the City's objection to the remedy as one which effectively rezoned the property judicially. Authority for such a remedy, however, was found "in the traditional power, inherent in equity, to shape the relief granted according to the circumstances of the instant case." Noting that "equitable power must be exercised with restraint," the remedy was affirmed on the grounds it "operated merely to protect the plaintiffs' (sic) from further delay, expense or harassment in what the court found to be reasonable use of the plaintiff's property." Balkin v City of Birmingham, No. 77-4478 (MCA, Dec. 28, 1978).

A township attempted to invalidate a previously granted variance because its zoning board of appeals had failed to keep minutes of the relevant meeting. The affected landowner sued, having already commenced construction in reliance on the variance. Michigan's Court of Appeals held the township could not use its own procedural error to avoid its action. Precedents were distinguished in which due process errors were claimed by litigants who were not parties in the questioned proceedings. The Court also held the board of appeals lacked inherent authority to rehear the matter without authorization by enabling statute or ordinance. Accordingly, the purported "reconsideration" of the variance was a nullity. However, the Court reversed the $110,172.25 damage award against the township, finding various theories of tort, contract and condemnation inapplicable to the facts. Kethman v Osceola Twp, No. 77-4299 (MCA, Jan. 16, 1979).

CORRECTION

Sincere apology is made for the error in the fourth paragraph of page 21 of Vol. 5, No. 6 of the Review. It was Justice Donald Holbrook, Jr. who sat on the Court of Appeals panel which held retroactive application of Michigan's Dormant Minerals Act (MCL 554.291 et seq.; MSA 26.1163 et seq.) constitutional in VanSlooten v Larsen, No. 77-1991 (MCA, Oct. 17, 1978); it was his father, Justice Donald Holbrook, Sr. who sat on the other panel which held such impact unconstitutional in Bickel v Fairchild, 83 Mich App 467 (1978). Confusion arose from a slip sheet opinion not carrying a differentiating designation. Regrets are expressed to both Justices Holbrook and thanks are conveyed to the two readers who reported the mistake. -NCB.

SECTION NEWS

Our thanks to Mr. William J. Perrone for his thoughtful, well-written lead article. Mr. Perrone, a native of Lansing, is an Assistant Attorney General for the State of Michigan. He is a *magna cum laude* graduate of Michigan State University and a *cum laude* graduate of Wayne State University Law School.

The note authors are already known to readers of the *Review*. Stephen A. Bromberg is the Chairman of the Section's Land Use and Land Sales Committee and wrote an article for the *Review* last year, *Zoning Litigation: Approaches and Preparation Techniques*, 5 MICH. R. P. REV., No. 5, at page 2 (1978). The note prepared by Mr. Andrew A. Paterson follows his earlier article, *The Builder's Trust Fund Act*, 3 MICH. R. P. REV., No. 3, at page 3 (1976).

HOMEWARD BOUND
1978 - 1979 Series

This January brings us to the second half of the Real Property Law Seminar Series entitled Homeward Bound. Below is a list of the remaining lectures to be offered through June.

"Financial Aspects of Mortgaging" - William Dwire
(National Bank of Detroit)
February 27, 1979 - Hotel St. Regis, Detroit

"Environmental Laws Affecting Real Estate Transactions" - Joseph M. Polito
March 31, 1979 - Somerset Inn, Troy

"Survey of State and Federal Housing Programs" - George J. Mager, Jr.
April 24, 1979 - Hotel St. Regis, Detroit

"Probating Real Property" - Kenneth E. Konop
May 15, 1979 - Somerset Inn, Troy

All programs will begin at 3:30 and conclude at or before 6:30 p.m., except for Saturday, January 27, 1979 and Saturday, March 31, 1979, when the program will begin at 9:00 a.m. and end at or before 12:00 p.m.

Individual programs are offered at a cost of $15.00 for Section members and $20.00 for Non-Section members. Series discounts and multiple registration discounts are also available.

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