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Our profession has many flaws. While the principle of stare decisis is a cornerstone of our common law system, I think we should attach more importance to what the law should be and not what it was. Life now moves quickly. Our profession should be more alert to changing times.

Donald McInnis (former President of The Canadian Bar Association)

SALE OF HUD PROJECTS — "TRANSFER OF PHYSICAL ASSETS"

by
Jefferson F. Riddell
Hyman, Gurwin, Nachman, Friedman & Winkelman

Many apartment projects, mobile home parks, nursing homes and even hospitals in Michigan are financed by mortgages insured by the Department of Housing and Urban Development.[1] As a result of the tax shelter and condominium conversion phenomena, many of these tax shelter projects — apartments especially — have been changing hands rapidly. But, unknown to many practitioners, the sale of any project financed with a HUD direct loan or a HUD insured mortgage requires the prior approval of HUD.[2]

Failure to obtain approval is a violation of paragraph 6(a) of the most common Regulatory Agreement between HUD and the mortgagor-owner,[3] which is recorded concurrently with the HUD insured mortgage for such projects. HUD refers to the approval procedure as "Transfer of Physical Assets."[4]

This article discusses the procedures for sale of non-subsidized apartment projects. It does not deal with the less frequent sales of other enterprises financed by HUD direct or insured loans. However, the procedures for other types of projects are similar.

Although failure to obtain HUD's approval of a sale could result in foreclosure of the mortgage, failure to follow the rules usually results in less drastic but equally frustrating sanctions. For example, the new owner of such a project might request HUD's approval of a rent increase within the year following the purchase. HUD's reaction to the "stranger's" request usually results in a delayed, confused procedure for approval of the sale. Traditionally it is the seller's obligation to obtain HUD's permission to sell and, so long as such approval is a condition of closing, the seller's heart will be in the right place. However the time to attempt to satisfy HUD's requirements is not after the seller has received the purchaser's money and has no particular incentive to assist the purchaser.

HUD form # 92266 is the "Application for Transfer of Physical Assets." HUD form # 92266A is the instructions for completing the application. The processing of such an application is explained in Insured Project Servicing Handbook, HM 4350.1, Supplement 1, Chapter 4, Section 11 for projects whose mortgages are current. For projects whose mortgages have been assigned upon default to HUD, the processing is explained in HUD-Held Project Servicing Handbook 4360.1, Chapter 3. There are also some General Counsel memos which are applicable to the subject.[5]

There are two stages of approval: Preliminary approval which is supposed to take place before closing and final approval which is supposed to take place after closing and after the recording of documents.

The application is processed in the Loan Management Department at the HUD field office which has jurisdiction over the project. However, the Area Counsel office reviews the documents from a legal point of view. It is therefore advisable to prepare two sets of documents or application packages. Both sets should be delivered to the Loan Management Representative in charge of the

project or, if you do not know who that is, the packages should be delivered to the Loan Management Chief. The Application must be accompanied by a check in the amount of 50 cents for each $1,000 of the original mortgage amount.

Technically the application should be signed by the seller, purchaser and the mortgagee, and its exhibits should be delivered to HUD prior to closing and the recording of documents.[6] But where a recalcitrant or uncooperative mortgagee is involved, HUD has been known to process the application without the mortgagee's signature.[7] Also, since HUD has on occasion taken as much as a year to grant preliminary approval, buyers and sellers sometimes find it necessary to close before the application is submitted. Closing first and then asking permission is not recommended. If a closing takes place prior to HUD approval it is essential that the purchase documents contain a provision for "unwinding" the sale if HUD does not approve the transfer.

For preliminary approval the application lists 12 items which must be submitted with the application. Most of these are available as HUD or FHA forms at the stock room of any HUD office.

FHA forms 2466 (Regulatory Agreement), 3311 (Assumption Agreement), 2417 (Personal Financial and Credit Statement), 2530 (Previous Participation Certificate), 2226 (Mortgagee's Title Evidence) and HUD forms 92266 (Application), 92266A (Instructions), 92458 (Rental Schedule) and 92228 (Bill of Sale and Assignment) should be obtained prior to closing and prior to attempting to compile the preliminary approval application package. These forms plus the Agreement of Sale, deed, pro forma balance sheet of purchaser, purchaser's organizational documents, statement of interested persons and a cover letter will constitute the preliminary approval application.

The agreement of sale, deed and the purchaser's organizational documents (usually a limited partnership agreement and certificate or a co-partnership agreement and certificate) are self-explanatory. However, the purchaser's organizational documents and possibly the agreement of sale must contain certain language required by HUD.

The purchaser's pro forma balance sheet should be prepared by an accountant and should reflect the projected financial condition of the purchaser immediately after closing. The statement of interested persons should be so entitled, and should certify that the persons or entities signing are the only ones who will have an ownership interest in the project after the sale.

The cover letter should summarize the sale transaction for HUD and should pinpoint any information which will probably be important for HUD to consider, such as the real estate experience of the purchaser's principals, whether a closing has already taken place (and why), and any time limitations or constraints of which HUD should be aware.

A problem in obtaining preliminary approval at some HUD offices is the tendency for communication between the HUD Loan Management Department and the HUD legal department to break down. If the applicant can identify the Loan Management Department Representative who will be handling the matter, and the attorney in the Area Counsel's office who will be reviewing documents, periodic letters to the Loan Management Representative with copies to the Area Counsel attorney will help to keep the matter from being lost between the two departments. Be aware that approvals of sales of projects often probably are not first priority items for either Loan Management or Area Counsel.

Once Area Counsel delivers its legal memo to Loan Management, the underwriting analysis has been completed and previous participation clearance has been obtained, Loan Management should either approve or disapprove the sale. If it disapproves, the application fee should be refunded. An approval letter should indicate that preliminary approval is granted and that a closing and recording of documents should take place.

The Application for Transfer of Physical Assets lists nine items required for final approval. Two final approval packages should also be prepared. A cover letter much like that which accompanied the initial approval application should also accompany the final approval application packages and should recite when preliminary approval was received, since the final approval package should be delivered to HUD within 60 days of the initial approval.

The original Regulatory Agreement and Assumption Agreement should be forwarded to HUD with the final approval packages, along with certified copies of any other documents which were recorded as part of the sale transaction. If all recordable documents in the transaction are made returnable to one person, the potential problem of gathering them together is eliminated.

A copy of all non-recorded documents used in the sale must also be supplied, with a simple certification from seller and purchaser that the documents were actually used and accurately reflect the deal. HUD requires an audited financial statement for the project from January 1 to the day of closing in the same format as year end audited statements.[8] Also required are an assumption letter from the mortgagee, showing mortgage balance, escrow balances and reserve balances as of date of closing, and a letter from the title insurance company which issued the mortgagee's policy substantially in the form of the second part of FHA form # 2226.

In addition, there must be supplied an attorney opinion, balance sheet of purchaser immediately after closing, Mortgagor's Oath (FHA form # 2478) and copies of the Rental Schedule and Information on Rental Projects (dated after closing).

The attorney opinion is a modified version of the Comprehensive Attorney Opinion (FHA form # 1725) which is the suggested HUD form for initial endorsement closings for insured projects.

It is important to realize that Transfer of Physical Assets procedures are not as concretely defined as are some other HUD-FHA procedures. The handbook explanation of the procedure is overdue for revision. As a result of the somewhat evolving nature of approval processing, some flexibility relative to the documentation and procedure is to be expected.

For example, some practitioners provide that the purchaser will assume the Regulatory Agreement obligations and mortgage obligations, while others terminate the seller's Regulatory Agreement and have the purchaser sign a new one. Some practitioners have developed a single document called Release, Modification and Assumption Agreement which incorporates the intended result of several other HUD forms described above.

Since the Transfer of Physical Assets process is evolving and sometimes appears to be a relatively low priority with HUD, the processing experience can be frustrating and slow for a seller and purchaser who want to close their sale with assurance that they will not be required to unwind the sale at some later date.

Where the seller and purchaser propose to use a land contract or second mortgage the processing experience can be doubly frustrating and tedious. Because of the complications and misunderstandings which can arise, it is strongly suggested that the application be preceded by a meeting between the principals of seller and purchaser, their attorneys, the Loan Management Representative and, if possible, the Area Counsel attorney who will be responsible for legal review. HUD stands ready to assist, but is unable to do so unless communication is sufficiently maintained at all stages of the application procedure.

Footnotes

1. The following is a partial list of the most common HUD profit and non-profit programs to which this article is applicable:

Section 221(d)(4)	Multifamily Rental Housing for Moderate Income Families
Section 223(f)	Existing Multifamily Rental Housing
Section 202	Direct Loans for the Elderly or Handicapped
Section 231	Mortgage Insurance for Housing for the Elderly
Section 232	Nursing Homes and Intermediate Care Facilities
Section 234	Insurance for Condominium Housing
Title X	Mortgage Insurance for Land Development Loans
Section 242	Mortgage Insurance for Hospitals

2. The Insured Project Servicing Handbook explains the procedure. It begins:

   The sale and conveyance by deed of title to a property covered by an insured mortgage necessitates a substitution of mortgagors. HUD approval of the substitution is required in every case where HUD exercises control over the mortgagor either as preferred stockholder, by regulatory agreement, or by certificate of beneficial interest.

3. Paragraph 6(a) of the Regulatory Agreement (FHA Form # 2466) which is applicable to profit motivated projects under Sections 207, 220, 221(d)(4), 231 and 232 says:

   6. Owners shall not without the prior written approval of the Secretary:
      a. Convey, transfer, or encumber any of the mortgaged property, or permit the conveyance, transfer or encumbrance of such property.

4. The term is historical and, in some respects, a misnomer since sales of such projects often include "good will" which certainly is not a "physical asset." The term "Transfer" may intentionally be broader than "sale" since any change of ownership is subject to HUD approval.

5. For example, on July 26, 1977, the Office of General Counsel determined that there is no legal objection to the use of a second mortgage in a Transfer of Physical Assets provided that the mortgagee on the first mortgage agrees to the subordinate lien.

6. The Insured Project Servicing Handbook says:

   Conveyance of title under a mortgage on a controlled project, without prior approval by HUD, is a default under the charter or regulatory agreement. Subsequent approval will be granted

only on a showing by the interested parties that such action was required by extreme necessity and that it was not adverse to the Secretary's interest. Since HUD's refusal to consent to a substitution in such cases requires reconveyance to the seller, both seller and purchaser would be well advised not to undertake conveyance without HUD approval.

7. The typical HUD-FHA form of mortgage has no "due on sale" clause. Therefore, where the purchaser agrees to take subject to the mortgage and the mortgagee is not being requested to sign an assumption agreement or modification agreement, the mortgagee's consent should not be required. This is especially true since mortgagees sometimes attempt to force a pay-off of the typical low interest rate mortgage by refusing to cooperate.

8. It is the practice of the Detroit area office to require an audited interim financial statement with the final approval submission; however, the Insured Project Servicing Handbook leaves Certified Public Accountant "certification" to the discretion of the loan management department. It says:

   HUD-92266A requires two interim financial statements of the seller prepared in accordance with Form No. 2230, one with the Application and one with the submission for final approval. Form No. 2230 requires a certification by a certified public accountant or a qualified public accountant. The decision as to whether either or both of these statements are to have the certification is a matter for the Housing Management Division (or Insuring Office) Director determination.

CLARIFICATION OF DOWER RIGHTS UNDER THE REVISED PROBATE CODE

by

Ralph Jossman

The enactment of 1980 PA 326, which became effective December 17, 1980, has resolved the controversy concerning the status of dower that has existed among Michigan lawyers since the adoption of the Revised Probate Code.[1] Much argument was occasioned by the Code's provisions, and lack of provisions, relating to this subject.

Since March 1, 1847, when sections 1 to 29, inclusive, of chapter 66 of the Revised Statutes of 1846[2] took effect, a wife has been entitled to "dower, or the use during her natural life of one-third part of all the lands whereof her husband was seized of an estate of inheritance, at any time during the marriage, unless she is lawfully barred thereof."[3] By an estate of inheritance is meant a fee estate.[4] This right of dower, which will be referred to herein as statutory dower, is substantially the same as dower at common law.[5]

Under the Probate Code of 1939,[6] as well as prior legislation, a widow could elect to take her dower rights in the estate of her husband, whether he died testate or intestate.[7] The incidence of such an election was, however, quite rare.

The Revised Probate Code, as enacted, contained the following language: "The surviving spouse, whether widow or widower, has dower, which insofar as it confers rights on the surviving spouse which are effective upon the death of the other spouse consists of an elective share and the rights described by sections 282 to 291."[8] Thus the surviving spouse had rights to: a statutory share instead of the provision made by the spouse's will;[9] a homestead allowance;[10] certain personal property not exceeding $3,500.00 in value;[11] a family allowance;[12] and occupancy of the dwelling house of the decedent for one year after the decedent's death, or until assignment of the surviving spouse's share of the estate, whichever occurs earlier, without being chargeable except for repairs occasioned by the survivor's acts, omissions, or negligence, public utility bills, and rent, if the decedent was a tenant.[13] None of these rights, except the last one, has any similarity to statutory dower, and that one is much more restricted as to time and property.

The Revised Probate Code did not purport to repeal the provisions of the Revised Statutes of 1846 relating to statutory dower. Neither did it contain any provisions authorizing an election of such rights in the estate of a deceased spouse. It did, however, contain several references to dower, some of them embodying language taken from previously enacted legislation, which obviously related to statutory dower.[14]

There being no express legislative declaration as to whether statutory dower was still available Michigan lawyers adopted several different procedures in connection with conveyances of real estate owned by one spouse only. Although some argument was made that a wife no longer had statutory dower rights in her husband's estate because there was no provision for electing them, the previously existing practice of obtaining the wife's signature to a conveyance of her husband's lands was usually followed. This operated to bar any rights that she might have had by way of statutory dower[15] or of homestead.[16]

With respect to the rights, if any, which a husband had in his wife's real estate while she was alive, there was a considerable difference of opinion. One view was that he had none, and that his signature was not necessary for a valid conveyance thereof. This thinking was based on the lack of provisions in the Revised Probate Code purporting to give him an inchoate interest during her lifetime.[17]

Another view was that the husband should join in a mortgage, but not in other instruments. The reason given for having him do so was to subordinate his right to remain in possession of the dwelling house after his wife's death[18] to the mortgage lien, thereby avoiding the possibility of the mortgage holder being delayed in obtaining possession of the premises after foreclosure.

A third opinion was that the husband need not sign either a deed or a mortgage, but should sign a land contract. This came from a belief that the husband should subordinate his "dower" rights, in the same manner that a wife might join in a land contract to bar her right of dower.[19]

The most cautious opinion advanced was that, in the interests of title safety, the husband should sign any form of title document.[20] It is difficult to reconcile some of these views with the constitutional provision that "The real and personal estate of every woman acquired before marriage and all real and personal estate to which she may afterwards become entitled shall be and remain the property of such woman . . . and may be dealt with and conveyed by her as if she were unmarried."[21]

By its enactment of 1980 PA 326, the legislature has now incorporated specific references to statutory dower into the Revised Probate Code. The new language furnishes answers to the questions that were being debated. The confusion, which arose from the Code's referring to dower as a collection of rights having very little or no resemblance to what formerly had been understood by that term, has been eliminated by amendment of section 281.[23] This section now reads "The surviving spouse, whether widow or widower, has, upon the death of the other spouse, the rights described by sections 282 to 291."[23] The rights described in those sections, to which reference has been made previously, are no longer to be considered as "dower."

In addition to the elections given a widow in a testate estate to take under the will or a statutory share, she may now elect to "take her dower right under sections 1 to 29 of chapter 66 of the Revised Statutes of 1846, as amended."[24] Also, by a newly added section, the widow of an intestate decedent may elect to take either her intestate share or the same dower right.[25] These changes restore to widows the right to elect to take statutory dower which they had had for many years. But there is no such right of election in favor of a widower.

The Revised Probate Code has no provisions dealing with procedures for obtaining an assignment of dower, but some material with respect to it may be found in the Probate Court Rules.[26]

Newly added section 292 provides that "Sections 281 to 291 shall not be construed as creating any inchoate or choate right to the rights described in those sections in the property of a spouse before the death of a spouse."[27] Since the right of a surviving husband to remain in his deceased wife's dwelling house is derived from section 288,[28] this right is now made junior to the lien of a previously recorded mortgage. There is no need of having the husband join in a mortgage of his wife's lands, or in any other conveyance of them. Statutory dower rights are derived, however, not from the sections mentioned in section 292, but from chapter 66 of the revised statutes of 1846,[29]

and will not be affected by this newly added language.[30] Hence, wives will continue to join in mortgages, deeds and land contracts of their husbands' lands, although purchase money mortgages can be valid without their signatures.[31]

Several other changes have been made in the Revised Probate Code to establish that references therein to dower are to statutory dower. Section 22(e)[32] has been amended so as to provide that the probate court's concurrent authority with circuit court to bar the dower of a mentally incompetent or minor wife in the estate of her living husband[33] means dower "as provided in sections 1 to 29 of the Revised Statutes of 1846."

A similar change is made in section 185,[34] which now provides that persons who, at the time of the death of their lawful spouse, are living with someone in a bigamous relation shall not inherit or take any estate, right or interest by way of statutory dower or otherwise in the property of the deceased spouse.

Also changed is section 210,[35] which provides that when, in case of partition or a sale for that purpose, it appears that a married woman has an inchoate right of dower in lands divided or sold, the court shall ascertain and settle the proportional value of the inchoate right according to principles of law applicable to annuities and survivorships, and direct the proportion to be invested, secured or paid over in the manner considered to best secure the rights of the parties. Such payment, investment or securing shall be a bar to the dower right. The amendment to this section makes clear that the dower right which is being dealt with is statutory dower.

Likewise, in section 651,[36] which provides that probate sale of real estate, or an easement or interest therein, may extend to the reversion of the dower of the widow of a deceased person, and, also, that if the reversion is not sold along with the real estate, it may be sold after the expiration of the widow's term, an amendment establishes that statutory dower is being referred to.

Section 283,[37] dealing with procedures to be followed in case of failure of a surviving spouse to make an election, has been amended so as to make it applicable to intestate estates as well as testate ones. This change was made necessary by the newly added provisions giving the widow the right to elect statutory dower in an intestate estate.[38]

Section 291,[39] dealing with waiver of rights in a spouse's estate, before or after marriage, by written contract, has been amended so as to provide expressly that statutory dower may be waived.

In closing, it might be mentioned that 1980 PA 326 does not attempt to say what the status of statutory dower has been since the Revised Probate Code took effect, or whether husbands ever had any such rights under that statute. There have been, however, extremely few instances of widows electing to take dower rights ever since they were given a distributive share in all estates of deceased husbands many years ago. Such instances can be expected to become even more scarce under the liberal provisions for surviving spouses contained in the Revised Probate Code. It was desirable to have the present status of dower clarified, and 1980 PA 326 has done this, but it is unlikely that this act will afford any substantial property benefits to the women of Michigan.

FOOTNOTES

1. 1979 PA 642, effective July 1, 1979, being MCLA 700.1 to 700.993, inc.; MSA 27.5001 to 27.5993, incl.

2. MCLA 558.1 to 558.29, incl.; MSA 26.221 to 26.245, incl.

3. MCLA 558.1; MSA 26.221.

4. MCLA 554.2; MSA 26.2.

5. Pratt v. Tefft, 14 Mich 191, 197 (1866); Cummings v. Schreuer, 239 Mich 178, 181, 214 NW 199 (1927). Dower at common law has been defined as "the third part of all the lands whereof the husband has been seized during the coverture of such an estate as the children by such wife might by possibility have inherited, and to which, by the death of her husband, the wife is entitled for her life. 3 Bac. Abr. 191." May v. Specht, 1 Mich 187, 188 (1849).

6. 1939 PA 288, mostly repealed by MCLA 700.993; MSA 27.2993.

7. MCLA 702.69, 702.70; MSA 27.3178(139), 27.3178(140), repealed by MCLA 700.993; MSA 27.5993.

8. MCLA 700.281; MSA 27.5281.

9. MCLA 700.282; MSA 27.5282.

10. MCLA 700.285; MSA 27.5285.

11. MCLA 700.286; MSA 27.5286.

12. MCLA 700.287; MSA 27.5287.

13. MCLA 700.288; MSA 27.5288.

14. MCLA 700.185; MSA 27.5185, taken from MCLA 554.321; MSA 26.1181, which was repealed by MCLA 700.993; MSA 27.5993. MCLA 700.651; MSA 27.5651, taken from MCLA 709.19; MSA 27.3178(479), also repealed by MCLA 700.993; MSA 27.5993. See also MCLA 700.22; MSA 27.5022 and MCLA 700.210; MSA 27.5210.

15. MCLA 557.1; MSA 26.161. MCLA 558.13; MSA 26.229.

16. A mortgage of homestead property that does not secure all or part of the purchase price is invalid without the wife's signature. MCLA 600.6023; MSA 27A.6023.

17. Boehm, Michigan's Probate Code-Some Questions and Answers, 1 Mich Probate Review, No 6.31.

18. MCLA 700.288; MSA 27.5288.

19. Cf. Marshall v. Reed, 237 Mich 336, 211 NW 637 (1927).

20. Dawda, Real Estate Transactions Under the Revised Probate Code, 7 Mich Real Property Review, 13, 14.

21. Mich Constitution, 1963, Article X, Sec 1.

22. MCLA 700.281; MSA 27.5281.

23. MCLA 700.282 to 700.291, incl.; MSA 27.5282 to 5291, incl.

24. MCLA 700.282; MSA 27.5282.

25. MCLA 700.282a; MSA 27.5282a.

26. PCR 707.1.

27. MCLA 700.292; MSA 27.5292.

28. MCLA 700.288; MSA 27.5288.

29. MCLA 558.1 to 558.29, incl.; MSA 26.221 to 26.245, incl.

30. Cf. Cummings v. Schreuer, 293 Mich 178, 214 NW 199 (1927).

31. MCLA 558.4; MSA 26.224.

32. MCLA 700.22(e); MSA 27.5022(e).

33. MCLA 600.2931; MSA 27A.2931.

34. MCLA 700.185; MSA 27.5185.

35. MCLA 700.210; MSA 27.5210.

36. MCLA 700.651; MSA 27.5651.

37. MCLA 700.283; MSA 27.5283.

38. MCLA 700.282a; MSA 27.528a.

39. MCLA 700.291; MSA 27.5291.

THE LEGISLATIVE SCENE

Mary Levine, Chairperson
Legislation Committee

Mary Levine was on vacation and was unable to submit a report for this newsletter. A full month report will appear in next issue!

RECENT DECISIONS

by
Joseph Lloyd
Lloyd, Rutzky & Dodge

CASE NOTES

ROBINSON TOWNSHIP v KNOLL, ____ Mich ____, ____ NW2d ____ (1981)

Zoning — prohibition against mobile homes — constitutionality

The plaintiff Township had on its books an ordinance which provided that mobile homes may be located only in mobile home parks, and further providing that a building permit must be obtained before erection of any building or structure on property in the township. The defendant challenged the application of that ordinance on the constitutional grounds that it was arbitrary, capricious and overbroad.

The Michigan Supreme Court held the ordinance unconstitutional, overruling Wyoming Twp v Herweyer, 321 Mich 611, 33 NW2d 93 (1948), holding specifically that the per se exclusion of mobile homes from all areas not designated as mobile home parks has no reasonable basis under the police power, and is therefore unconstitutional. The court added, however, that a municipality need not permit all mobile homes, regardless of size, appearance, quality of manufacture or manner of installation. The mobile home can only be excluded if it fails to satisfy reasonable standards designed to compare the mobile home with a site built home.

The decision of the court was broadly based and will be of import in communities throughout the state. The reasoning of the court, and basis for its overruling precedent of more than thirty years standing is founded in the advances in construction technology. The court was unable to identify any characteristics inherent in modern mobile homes that justify the per se rule of the ordinance. The decision of the court does not, of course, address the question of the applicability of deed restrictions dealing with mobile homes.

CAF INVESTMENT COMPANY v SAGINAW TOWNSHIP, ____ Mich ____, ____ NW2d ____ (1981)

Tax Tribunal — Assessments — Income approach to value

The question before the Supreme Court was whether commercial property subject to a pre-existing, long term lease should be assessed based on the rents provided for in the actual lease or whether they should be based on "market" rents that a new tenant would be required to pay.

The court clearly held that economic income, for the purposes of appraisal, means nothing other than actual income, and that it was improper for the assessor and the tax tribunal to base the assessment on hypothetical "market" rents. The argument raised by the taxing authority was that a landlord and tenant could, by setting an artificially low rent, maintain the tax assessment at an

artificially low level. The court dismissed such a possibility, noting that the alleged tax benefit to a landlord of an artificially low rent was more than offset by the losses inherent in an artificially low rent.

WETTING v McFEETERS, ____ Mich App ____, ____ NW2d ____ (1981)

Brokers — Listing Agreements — Right to Commissions

The question before the Court was whether a Real Estate Broker had brought in an offer substantially in conformance with an exclusive listing agreement, such that he was entitled to a commission. The listing agreement provided that the Seller would agree to surrender possession of the premises at closing. The Broker obtained an offer for the property at full price, which provided for possession of the land at the time of acceptance of the offer, and possession of the buildings thirty days after closing. The homeowner did not accept this offer. She thereupon cancelled the listing agreement some two months before its expiration date and subsequently sold the property, within the period of the "cancelled" listing agreement, through a different broker and to a different party. The first broker brought suit for his commission. The trial court denied the motion for Summary Judgment made by the Seller.

The Court of Appeals held, first, that the listing agreement did not, on its face, empower the Broker to accept the offer on behalf of the Seller. The power to receive money on behalf of the Seller is not the same as the power "to bind the sale." There was therefore no contract between the offeror and the homeowner, and no action would lie against the eventual purchasers for tortious interference with contractual advantage.

The Court then addressed the question of whether summary judgment should have been granted against the Broker in his action for commission. It was held that court was entitled to hear proofs on the question of whether an offer requiring early possession of part of the property but offering delayed possession of another part of the property was more or less favorable to the Seller than was required in the listing agreement.

A second and more compelling reason for stated by the court for denying summary judgment against the Broker is the holding that the listing agreement was not subject to cancellation by the Seller where the broker was able to show substantial performance of the duties imposed on him by the contract, even though he has not produced a buyer. The Broker was therefor entitled to present proofs in support of his claim for a commission.

STARBOARD TACK CORP v MEISTER, ____ Mich App ____, ____ NW2d ____ (1980)

Escrow Deposits — Liabilities of Escrow Agent

The purchaser of a business property paid $35,000 to an attorney-escrow agent as earnest money for the purchase of a business property. The check for the earnest money was returned for

insufficient funds and the purchaser defaulted on his agreement to purchase. The attorney-escrowee had acknowledged "that he has received" the deposit, and named the bank in which it was held. The Seller received a default judgment against the Purchaser and sought judgment against the escrow agent for the funds which were supposed to be "on deposit." The escrow agent answered alleging that, notwithstanding the written statements in the escrow agreement, the parties knew at the time it was executed, that the funds were not actually on deposit. The Circuit Court granted summary judgment against the escrow agent, whereupon he appealed.

Citing several outstate authorities on appeal, the Plaintiffs argued that the escrow agent was estopped to deny that the funds were available for payment. The Court of Appeals distinguished these cases, holding that if the parties were in fact aware that the escrow deposit was in the form of a check they could not prove reliance and the claim of estoppel must fail. The court therefor held that, on the facts of the case, the use of the term "is on deposit" in the escrow agreement was not a guarantee by the escrow agent of the deposit check.

CITY OF MUSKEGON v BAKALE, ____ Mich App ____, ____ NW2d ____ (1980)

Damages — Condemnation — Value of growing trees

The issue on appeal was the method of valuing Christmas trees growing on the property at the time of condemnation. The City argued that the value should be determined by estimating the amount by which the trees increased the fair market value of the property. The property owner argued that the value should be determined by estimating the expected proceeds upon the eventual sale of the trees and subtracting from that figure the cost of producing and marketing the trees. The first method is that used for determining the value of minerals in the land; the second is used in cases of tortious destruction of crops.

The Court of Appeals held that the proper method of valuing the trees was the increase in fair market value of the land, treating the growing trees in the same manner as minerals for valuation purposes. On balance, it was held, the sale price and profits on sale of the trees was too speculative to use the tortious destruction of crops theory of damages.

SECTION NEWS

About the authors:

Jefferson F. Riddell, who has a Bachelor's degree and Master's degree from Michigan State University, graduated from Wayne Law School in 1973. Since graduation, Mr. Riddell has been associated with the law firm of Hyman, Gurwin, Nachman, Friedman & Winkelman in Southfield, Michigan. Mr. Riddell became a partner in the law firm in 1978. Mr. Riddell specializes in commercial real estate with an emphasis on real estate transactions involving government aids to financing such as HUD-FHA, Michigan State Housing Development Authority and Farmers Home Administration. Recently Mr. Riddell has been involved with several real estate developments involving tax free bond financing under the 11(b) and Economic Development Corporation bond programs.

Ralph Jossman is well known to readers of the **Review.** Mr. Jossman, who has served as Chairman of the Section and is currently an **ex-officio** member of the Section Council, has authored several articles which have been published in the **Review.** He is currently of counsel in the Detroit firm of Rollins and Rollins.

LETTERS

February 16, 1981

Re: Volume 8, No. 1, February, 1981 issue
"Forfeiture Under Land Contracts" article by Alan M. Oravec

Dear Sir:

On page 6 of the aforesaid issue, the author stated:

> "If the defendant joins the counterclaim for equitable relief which, if granted, would defeat the plaintiff's claim for possession of the premised, the entire proceedings shall be removed to the circuit court. . . ."

If it has not already been brought to your attention, this statement is no longer correct, an amendment having been made to the court rules effective July 1, 1980, permitting the District Court to hear equitable defenses.

DCR 755.9(a) provides:

(a) A party may join
  (1) a money claim or counterclaim described by MCL 600.5739; MSA 27A.5739. A money claim must be separately stated in the complaint. A money counterclaim must be labeled and separately stated in a written answer.
  (2) **a claim or counterclaim for equitable relief.**

Respectfully,

Gerald M. Flury
Southfield