

# MICHIGAN REAL PROPERTY REVIEW

REAL PROPERTY LAW SECTION

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He who bids the law rule may be deemed to bid God and Reason alone rule, but he who bids man rule adds an element of the beast; for desire is a wild beast, and passion perverts the minds of rulers, even when they are the best of men.

Aristotle

## CLOGGING THE EQUITY

by

**John C. Murray**

**The Prudential Insurance Company of America**

“Once a mortgage, always a mortgage.” This phrase, which became one of the “maxims of equity,” can be traced to an English case where the mortgage limited redemption to the mortgagor or his male heirs. This restriction on redemption was held to be inoperative, and an assignee of the mortgage was permitted to redeem.<sup>1</sup> Such a restriction is considered a “clog” upon the equity of redemption, and the courts will invalidate such clogs as being incompatible with all sound ideas of loan and security. This rule is applied without regard to the presence or absence of usury laws.<sup>2</sup>

A clog or restraint on the equity of redemption denotes “any provision inserted to prevent a redemption on payment or performance of the debt or obligation for which the security was given.”<sup>3</sup>

Other examples of illegal clogs on the equity are where the mortgage places a time limit on the exercise of the equity of redemption, or where the mortgagee demands and receives a “collateral advantage” to which it is not entitled, such as a requirement that, as a condition of making a loan, the mortgagor must convey to the mortgagee an interest in the mineral rights of the mortgaged property.<sup>4</sup>

Perhaps the most frequently attempted, and litigated, example of a clog on the equity is the situation where, at the time of obtaining a mortgage loan, the borrower gives the lender an option to purchase the property at any time within a certain number of years. In **Barr v. Granahan**,<sup>5</sup> decided by the Wisconsin Supreme Court, specific performance of such an option to purchase contained in a mortgage was refused by the court where the option to purchase the property was at a specified price and could be exercised by the mortgagee at any time within ten years from the date of the loan. The court held that specific performance of such an option would be inequitable where given without consideration other than the making of the loan, the principal balance of which had been reduced, and where the value of the property had greatly increased. There had been no default under the loan, and the mortgagee had drawn up, in addition to the mortgage, an option agreement which he contended was an entirely separate agreement. However, the court ruled that both the mortgage and the option were given in consideration only of the loan made by the mortgagee to the mortgagor and equity would, therefore, not enforce the option because it would prevent the mortgagor from exercising his right of redemption, which the court considered an inherent and essential characteristic of every mortgage. Although such a relinquishment of the mortgagor’s right of redemption would be valid where effected by a contract supported by good consideration and separate and distinct from the mortgage, the court held that those requirements had not been met in the instant case.

In **Humble Oil & Refining Company v. Doerr**,<sup>6</sup> the plaintiff, an oil company, brought an action for specific performance of its option to purchase premises used for a gasoline service station under a “two party” lease entered into by the plaintiff and the defendant in connection with a construction mortgage obtained by the defendant from a third-party lender. The Superior Court of New Jersey found that the lease was structured essentially as a guaranty of payment of the indebtedness to the construction lender and that the option to purchase contained in the lease was really an equitable mortgage securing that guaranty. The court held that it was never intended that the company would enter into possession, and that the terms of the option and the lease were

so manifestly unfair, unreasonable and unjust as to preclude specific performance by a court of equity. The court further determined that although the mortgagor can, after the date of the original mortgage transaction, surrender his equity of redemption to the mortgagee and enter into an option or agreement to sell, the bargain must be fair and for independent and adequate consideration. This rule applies both to mortgages of real property and pledges of personal property, with the burden imposed on the mortgagee to prove fairness.<sup>7</sup>

The general rule regarding purchase of a mortgagor's interest by the mortgagee is stated as follows:

[A]ny contract by which the mortgagor sells or conveys his interest to the mortgagee is viewed suspiciously and is carefully scrutinized in a court of equity. The sale and conveyance of the equity of redemption to the mortgagee must be fair, frank, honest, and without fraud, undue influence, oppression or unconscionable advantage of the mortgagor's property, distress, or fears of the position of the mortgagee.<sup>8</sup>

The Michigan Supreme Court, in **Gordon Grossman Building Company v. Elliot**,<sup>9</sup> has held that the right to redeem under present statutes is a legal right and can neither be enlarged nor abridged by the courts, and that absent some unusual circumstances or additional considerations not within the ambit of the statutes, the courts must follow the clear and plain meaning of the statutes. In **Rothenberg v. Follman**,<sup>10</sup> the plaintiffs, land contract vendees, were successful in persuading the Michigan Court of Appeals to set aside a forfeiture of a land contract and order specific performance of the contract, even though the plaintiffs failed to make formal tender of the delinquent payments before suit was commenced and the land contract provided that time was of the essence. The court noted:

No court will enforce a mortgagor's agreement to a clog on his equity of redemption to become effective upon the occurrence of a future default (**Batty v. Snook** (1858), 5 Mich. 231, 239, 240; **Hazeltine v. Granger** (1880), 44 Mich. 503, 505, 506, 7 N.W. 74); similarly, an agreement which seeks to eliminate equity's power to relieve against a forfeiture will not be enforced.<sup>11</sup>

In **Batty v. Snook**,<sup>12</sup> the plaintiff, being indebted under a mortgage securing his property and unable to pay the amount owing on the mortgage, agreed to deed the property to the lender and take back a contract to repurchase the property. The contract provided that, with respect to payments, time was of the essence. The lender/owner deeded the property to the defendant, who attempted to enforce the forfeiture rights under the contract when the plaintiff defaulted in making payments under the contract. The Michigan Supreme Court found that the transaction involving the deed and contract was intended to secure the amount owing to the lender and thus constituted a mortgage. The court then applied the maxim of "once a mortgage, always a mortgage," and held that the plaintiff did not forfeit his right to redeem by his failure to pay at the time specified in the contract. However, the court stated:

The mortgagor may release the equity of redemption to the mortgagee for a good and valuable consideration, when done voluntarily, and there is no fraud, and no undue influence brought to bear upon him for that purpose by the creditor.<sup>13</sup>

In **Gilliam v. Michigan Mortgage Investment Corporation**,<sup>14</sup> decided by the Michigan Supreme Court, the plaintiff, in desperate need of cash, agreed to give absolute title to a leasehold interest and an option to purchase to the defendant in return for relief from various obligations of the plaintiff in connection with the lease and option. The contract entered into between the plaintiff and the defendant provided that in the event of a sale of the lease and option by the defendant on or before a certain date, the defendant was to be reimbursed for all moneys advanced, the plaintiff was to be paid a certain amount, and the remainder of the proceeds was to be divided equally between them. Although no actual mortgage was involved, the court held that the surrender of the plaintiff's interest in the option and lease involved the release of an equity of redemption, and found that under the circumstances, as shown by the record, the contract was reasonably fair to the plaintiff, was not unconscionable, and was supported by adequate consideration. In support of this holding, the court emphasized that the plaintiff was a man of intelligence and extensive business experience, thoroughly understood the contract, and willingly entered into it. The court concluded:

In view of the fact that the legal effect of this contract was a surrender of a mortgagor's equity of redemption and because of the plaintiff's circumstances at the time it was executed, we have regarded the transaction as one which a court of equity should scrutinize closely in order to be satisfied that it was freely and fairly made, that no undue advantage was taken of his necessities; and that it was for a good and valuable consideration. We are convinced that the contract should not be avoided for any of these reasons.<sup>15</sup>

The possible usury implications of a mortgagee including an option to purchase in the mortgage documents, or in a separate document executed simultaneously with or subsequent to the mortgage documents, have not been specifically addressed by the Michigan courts. However, in **Gilliam**, the court did rely on an unconscionability test in determining whether there was sufficient consideration for the plaintiff to release his equity of redemption.<sup>16</sup> Furthermore, if the interest rate on the mortgage loan is at or near the lawful maximum rate and is at or above the market rate for equivalent loans at the time of the loan, and if the option price is set at or less than the fair market value of the property at the inception of the loan, and if the terms of the option are effective at the inception of the loan, a court would be presented with a set of circumstances which would encourage a finding either that the option to purchase made the loan usurious or that the consideration for the option was so grossly inadequate as to render the option unconscionable and unenforceable.<sup>17</sup>

From the foregoing, it is clear that, in Michigan, an option to purchase or other release of the equity of redemption may be agreed to by a mortgagor and mortgagee, but only under certain circumstances, with particular attention paid to careful drafting of the documentation and clear recital of fair and adequate consideration. An option to purchase should never be an actual part of the mortgage instrument, but should be contained in a separate agreement, with separate consideration stated. Where the option or other arrangement is transacted subsequent to the mortgage, or at least is supported by separate consideration, the courts tend to uphold such transactions. In **Massachusetts Mut. Life Ins. Co. v. Sutton**,<sup>18</sup> which involved a specific contract for possession and assignment of rents executed by the mortgagor and mortgagee subsequent to the mortgage, the Michigan Supreme Court stated:

This Court has attempted to guard the policy and protect the mortgagor against the opportunity for fraud, overreaching, or oppression by the mortgagee, but without circumscribing his right to dispose of his own property and freely contract with relation thereto subsequent to the mortgage.<sup>19</sup>

The option must not be open to the claim that it is merely additional security to the note and mortgage, and should not become automatically effective upon default by the mortgagor under the mortgage.<sup>20</sup> An option to purchase at market value, perhaps determined by independent appraisal at time of exercise, would most likely be held equitable and enforceable. Other methods could also be utilized to determine the fair market value of the property at the time of execution of the option, such as a market multiple of net cash flow or the application of a price index to the fair market value of the property at the commencement of the loan. Certainly if the option purchase price is set at an amount less than the amount of the mortgage note, the option to purchase will be held void. An option to buy the property at any fixed sum will be looked upon with suspicion by the courts and will likely be held void if taken contemporaneously by the mortgagee as part of the original loan transaction.<sup>21</sup> Since the burden of proving fairness in such situations is normally placed upon the mortgagee, great care should be taken to establish the voluntary nature of the transaction, the business sophistication of the mortgagor and representation of the mortgagor by knowledgeable and experienced legal counsel, the lack of duress, independent and adequate consideration for the option to purchase or other release of the equity of redemption, and lack of direct relation to the mortgage loan.

#### FOOTNOTES

1. **Howard v. Harris**, 1 Vern. 33 (1681), noted in 1 GLENN ON MORTGAGES, Sec. 44 at 278 n.1 (1943).
2. **Id.** Sec. 44 at 279.
3. Wyman, **The Clog on the Equity of Redemption**, 21 HARVARD L.R. 459, 462 (1908).
4. See, e.g., **Coursey v. Fairchild**, (Okla.) 436 P.2d 35 (1967); **Hopping v. Baldrige**, 130 Okla. 226, 266 P. 469 (1928). See generally: G. OSBORNE, HANDBOOK ON THE LAW OF MORTGAGES, Secs. 96-99 at 144 et seq. (2d ed. 1970).
5. 255 Wis. 192, 38 N.W.2d 705 (1949).
6. 123 N.J. Super 530, 303 A.2d 898 (1973).
7. But see **MacArthur v. North Palm Beach Utilities, Inc.**, (Fla.) 202 So.2d 181 (1967), where the court granted specific performance with respect to an option to purchase property which was contained in the original mortgage, holding that the option was incidental to the sale of the property by the mortgagee to the mortgagor and not to the mortgage. The court considered the loan to be part of a larger transaction involving a purchase money mortgage given by the mortgagee as an accommodation to the mortgagor in order to enable him to purchase the property. See also: **Harydston National Bank of Hamburg v. Tartamella**, 56 N.J. 508, 267 A.2d 495 (1970); **Smith v. Smith**, 82 N.H. 399, 135 A.2d 231 (1926); Annot. 10 ALR 2d 231; **Williams, Clogging the Equity of Redemption**, 40 W.VA. L.Q. 31 (1933).
8. 55 AM. JUR. 2d. **Mortgages**, Sec. 1220 at 1001 (1971).
9. 382 Mich. 596, 171 N.W. 2d 441 (1969).

10. 19 Mich. App. 383, 172 N.W. 2d 845 (1969).
11. **Id.** at 391 n.12, 172 N.W. 2d at 849 n.12.
12. 5 Mich. 231 (1858).
13. **Id.** at 239.
14. 224 Mich. 405, 194 N.W. 981 (1923).
15. **Id.** at 410, 194 N.W. at 982.
16. **Gilliam v. Michigan Mortgage Investment Corporation**, *supra* note 14 at 409, 194 N.W. at 982.
17. See Kane, **The Mortgagee's Option to Purchase Mortgaged Property**, FINANCING REAL ESTATE DURING THE INFLATIONARY 80's, American Bar Association, Section of Real Property, Probate and Trust Law (1981).
18. 278 Mich. 457, 270 N.W. 748 (1936).
19. **Id.** at 461, 270 N.W. at 749.
20. See **Batty v. Snook**, *supra* note 12; **Rothenberg v. Follman**, *supra* note 10.
21. See **Humble Oil & Refining Company v. Doerr**, *supra* note 6; **Barr v. Granahan**, *supra* note 5.

**REAL PROPERTY LAW 1981 (Part I)**

by

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## INTRODUCTION

Case law and legislative developments in the real property field during the past year have been significant, particularly in the areas of usury, mechanics' liens, condemnation and land use control. While this outline does not purport to include all recent cases and legislation which might conceivably relate to a real property law question, an effort has been made to include most cases and Michigan public acts which would be of interest to real estate practitioners. Except where appropriate to contrast recent cases with former holdings, this outline covers only cases decided or released for publication, and legislation enacted, after June of 1980. This outline review was completed for publication in July, 1981.

## BROKERS

A. **Diedrich v. Harten**, 103 Mich. App. 126 (January, 1981), considered the question of who should receive the portion of a commission contracted to be paid to a co-vendor/broker unlicensed as a real estate broker. The Court held the evidence established that the co-vendor engaged in the sale of real estate as a principal vocation and thus should have been licensed, rather than falling under the limited vendor exception to licensing requirements. The Court further followed the general rule that a contract in violation of the broker's licensing act is void and unenforceable. Rejecting plaintiff's claim that the entire commission should be paid to her though her agreement with the unlicensed co-vendor/broker provided for a "50-50" split of the commission between them, the Court directed that the portion of the commission not legally payable to the co-vendor/broker be distributed to the selling property owners in proportion to their interests in the property prior to the sale.

B. **Pearson-Cook Company, Inc. v. Preferred Properties, Inc.**, 102 Mich. App. 168 (December, 1980), held that a broker (member of a multiple listing service) supplying a buyer ready, willing and able to purchase at the listing price, whose offer was rejected during the period an ultimately accepted, revocable counter-offer was outstanding, was not entitled to a portion of the commission as a "selling broker." Plaintiff claimed it produced the first ready, willing and able buyer at the seller's price and terms. The Court held that, where owners sold their property in accordance with provisions of a listing agreement and paid a commission on the sale, no commission was payable to any other broker for producing a purchaser ready, willing and able to purchase. The Court held, although the counter-offer was legally revocable at the time the second offer was made, the seller was under no obligation to revoke it to accept the second offer.

C. In **United Listing Service v. Shepherd**, 96 Mich. App. 547 (April, 1980), where a wife did not sign a listing agreement for the sale of property held as tenants in the entirety but did sign an ultimately rejected counter-offer, the broker sued for its commission. The Court found the husband and wife owners not liable for payment of a commission to the listing broker who produced an acceptable buyer at a price allegedly similar to the counter-offer after they had decided not to sell. The Court did not interpret the wife's signature on the specific counter-offer which was not accepted to be a written agreement to list the property with the plaintiff, sufficient to satisfy the statute of frauds.

D. In **Weitting v. McFeeters**, 104 Mich. App. 188 (March, 1981), defendant broker had a six-month exclusive listing agreement to sell defendant seller's farm for \$80,000, possession to be given at closing. Plaintiffs signed a purchase offer at the listing price providing for possession of

the land upon signing the agreement and possession of the buildings 30 days after closing, and gave the broker a deposit. Sellers did not sign the offer, terminated the listing and sold to defendant purchaser, who allegedly knew of the offer. The Court held that the trial court correctly denied summary judgment on whether the broker was entitled to a commission, holding that the Court was entitled to hear proofs on whether the offer was more or less favorable than required by the listing contract and holding that the listing agreement was not subject to cancellation where the broker was able to show substantial performance of his duties even though he had not produced a buyer.

E. **Attorney General of the State of Michigan v. Diamond Mortgage Corporation**, 102 Mich. App. 322 (December, 1980), involved a suit to revoke the broker's license, dissolve the corporation and reform certain mortgages because of usury violation and violation of the Consumer Protection Act. The Court held that administrative remedies, though admittedly limited, must be exhausted before the courts would have jurisdiction.

## CONDEMNATION

### I. RECENT CASE LAW

A. **Jones v. East Lansing-Meridian Water and Sewer Authority**, 98 Mich. App. 104 (June, 1980), held defendant Authority's construction and use of wells which lowered water pressure and supply in neighboring plaintiffs' wells to be an "unreasonable" interference with plaintiffs' subterranean water rights and an unconstitutional taking under the federal and Michigan constitutions. The East Lansing-Meridian Water and Sewer Authority had been formed and had studied water system improvement. Engineering firms were commissioned to conduct studies but no inquiry was conducted to ascertain the extent the defendant Authority's wells would interfere with private wells in the area. Shortly after the defendant Authority's wells were placed in operation, certain of the plaintiffs experienced water problems which a study showed was caused by the defendant Authority's wells. The Court overruled the trial court which held the use reasonable considering the purposes of the Michigan act generally authorizing defendant's activities. The conclusion of unreasonable use (as the term is used in M.C.L.A. §600.2941(2)) rested primarily on the fact that defendant had made no effort to investigate the effects of its operations on adjoining land owners, though experts at trial agreed a prior study would have revealed the degree of damage before construction began. The Court remanded the case for a determination of damages.

B. **County of Muskegon v. Bakale**, 103 Mich. App. 464 (February, 1981), followed established law in holding that compensation for growing Christmas trees should be based on the increased value of the property with the trees "in place," not on the projected market value of the trees less expenses of harvesting and marketing (the "tortious destruction of crops method"). Under the facts of the case, the latter method of ascertaining damages, advanced by defendants, was held to be too speculative for use.

C. In a major decision, **Poletown Neighborhood Council v. City of Detroit**, 410 Mich. 616 (March, 1981), permitted condemnation of private property for development of a private manufacturing enterprise, a General Motors Corporation plant, on the grounds that condemnation may be used for a public purpose, in this case economic development of a community, as well as for a public use. The Court upheld the legislative determination that a public need was met, concluding that it could not do otherwise unless such determination was manifestly arbitrary and incorrect. The Court further concluded that clear benefit to a private business resulting from the

condemnation did not invalidate the action, since a public purpose was also served. (See also the discussion of this case under the heading "Land Use" herein.)

D. **State Highway Commission v. Copper Range R.R. Co.**, 105 Mich. App. 40 (April, 1981), considered the admissibility of certain types of evidence in proceedings to determine the value of real property condemned in an eminent domain action. Copper Range Railroad Company owned the condemned land and the Salos leased the land and owned the buildings. The Court held evidence of the terms of a prior settlement agreement between Copper Range and the Salos to be inadmissible, since the settlement was agreed to in anticipation of the eminent domain litigation and did not result from negotiation between a willing seller and a willing buyer.

## II. LEGISLATION

P.A. 309 of 1980, M.C.L.A. 213.51a, amends Act 87, Mich. Pub. Acts 1980 by providing for citation of Act 87 as the Uniform Condemnation Procedures Act and by clarifying commencement dates.

### CONDOMINIUMS

Condominium conversions were the subject of much activity during the 1980 Michigan legislative session, generally in response to concerns about former tenants, particularly senior citizens, possibly displaced by the high initial cost of unit ownership. Significant legislation finally enacted is as follows:

A. P.A. 283 of 1980 amends Act 59, Mich. Pub. Acts 1978 (the Michigan Condominium Act of 1978) to provide for (1) one year's notice of termination of tenancy to elderly and handicapped tenants of buildings to be converted to condominiums and (2) extended lease arrangements for certain senior citizens and handicapped persons residing in a conversion condominium. In addition, any apartment subject to an extended lease is exempted from any increase in ad valorem taxes on real property attributable to an increase in the true cash value of the restricted unit due to the conversion condominium project in which the restricted unit is located.

P.A. 283 prohibits any local unit of government (except cities with populations in excess of one million) from enacting a law, regulation, ordinance or other provision which imposes a moratorium on conversion condominiums or which establishes rights for tenants of conversion condominiums or apartment buildings proposed as condominiums.

B. P.A. 284 of 1980 amends Act 346, Mich. Pub. Acts 1966 (the State Housing Development Authority Act) to establish a conversion condominium fund, to set forth a finding of a proper public purpose in preventing the erosion of the supply of affordable housing available to elderly and handicapped persons and to add developers of conversion condominiums to the list of parties to whom grants, deferred payment loans and loans can be made under the State Housing Development Authority Act.

C. P.A. 513 of 1980 also amends the Michigan Condominium Act of 1978, as amended by the above-mentioned Act 283 of 1980, making technical corrections, clarifying and limiting definitions and expanding the powers of the administrator.

## LAND USE

### I. ZONING CASES

A. A significant decision in the area of zoning was rendered by the Michigan Supreme Court in **Robinson Township v. Knoll**, 410 Mich. 293 (February, 1981), concerning constitutionality of a zoning ordinance that prohibited location of mobile homes in residential areas. In holding the ordinance unconstitutional, the Court expressly overruled **Wyoming v. Hermeyer**, 321 Mich. 611 (1948), as applied to housing which is not a "trailer," noting that **Wyoming** was no longer valid in light of improvements in the size, quality and appearance of mobile homes. The Court rejected arguments that a reasonable basis for exclusion of mobile homes existed because the mobile homes were "movable or portable," since the same could be said for site-built homes. The Court could find no valid governmental concerns which could not be dealt with by a reasonable building and safety code, thereby in its view making per se exclusion of all mobile homes unconstitutional. Though the Court carefully pointed out that not all mobile homes need be allowed and that a municipality could continue to regulate mobile home parks, **Robinson Township** represents a notable expansion in the scope of review engaged in by the Court, going beyond established standards of judicial review in zoning cases.

The Chief Justice in dissent argued that most zoning classifications can now be attacked on the grounds that less general, less restrictive regulations should replace per se exclusions.

B. **Walker's Amusements, Inc. v. City of Lathrup Village**, 100 Mich. App 36 (September, 1980), held that plaintiff was not denied equal protection when a city ordinance restricted plaintiff's pinball operations and allowed the city to continue its pinball operations. The Court found that the city's use was so dissimilar and disparate as not to be an identical noncomplying use. In any event, a city's violation of a zoning ordinance will not keep it from enforcing the ordinance against others.

C. **People v. Yeo**, 103 Mich. App. 418 (February, 1981), held that a zoning variance cannot be acquired by prescription. Defendant homeowner had kept more than eleven dogs on her property for over eighteen years in violation of the city's kennel ordinance. In rejecting defendant's claim of a variance by prescription (as well as her claim of ordinance unconstitutionality), the Court restated the general rule that the zoning authority will not be estopped from enforcing its zoning ordinances absent exceptional circumstances.

D. **Charter Township of Delta v. Dinolfo**, \_\_\_ Mich. App. \_\_\_ (Docket No. 52162) (April, 1981), considered the constitutionality as applied of a zoning ordinance defining "family" as a group related by blood, marriage or adoption. The ordinance was challenged by unrelated adults and married couples with children living together as members of a non-profit religious organization, the Work of Christ Community. The Court determined that the application of the ordinance to exclude the plaintiffs' use was a legitimate step toward the permissible goal of enhancing family life, and thus held the statute constitutional as applied. The decision distinguished **Moore v. City of East Cleveland**, 431 U.S. 494 (1977) ("family" definition cannot exclude grandchildren living with grandparents).

E. **Silva v. Township of Ada**, 99 Mich. App. 601 (August, 1980), conformed with the established standard of review in zoning cases (see **Ed Zaagman, Inc. v. Kentwood**, 406 Mich. 137 (1979)) in upholding defendant's denial of a zoning change from agricultural to land development — natural

resources to allow the excavation of gravel. Zoning legislation, including statutes concerning natural resources, is presumed valid, and a showing of disparity of value between uses of land does not demonstrate the property has been confiscated by the government.

F. Several cases in the past year dealt with procedures involved in zoning cases and legislation. **Commodities Export Co. v. City of Detroit**, 103 Mich. App. 205 (January, 1981), held that a valid consent judgment concerning a use variance requires the consent of an intervenor by right (an area landowner), though a dissent found a lack of standing to contest the consent judgment because the intervenor was not “aggrieved” by the zoning variance. **Village of Franklin v. City of Southfield**, 101 Mich. App. 554 (November, 1980), denied standing to appeal to plaintiffs under the Zoning Enabling Act, M.C.L.A. 125.581 *et seq.*, finding them not “aggrieved” because they failed to allege and prove special damages. In a question of first impression in Michigan, **Huxtable v. Board of Trustees of the Charter Township of Meridian**, 102 Mich. App. 690 (January, 1981), a case involving a zoning ordinance amendment, held that the right of referendum set forth in the Township Rural Zoning Act applies to charter townships as well as to general law townships. The trial court’s order compelling defendant Board of Trustees to hold the referendum properly petitioned for by plaintiffs (which referendum led to the defeat of the zoning amendment) was therefore upheld by the Court.

G. **Sheffield Development Company v. City of Troy**, 99 Mich. App. 527 (August, 1980), considering whether during litigation city officials can be compelled to answer questions about the reasons underlying a denial of a request for rezoning, held that zoning decisions are legislative acts not subject to judicial interference, including judicial inquiry into legislators’ motives. The city officials therefore were not compelled to respond to the questions.

H. Other zoning cases. **Village of Mackinaw City v. Union Terminal Piers**, 103 Mich. App. 60 (January, 1981), (construed the particular ordinance before it to allow sales of ferryboat tickets to and from Mackinac Island in a district zoned for office and retail business use); **Schweihofer v. Zachary**, 103 Mich. App. 792 (February, 1981), (considered adequacy of governmental unit’s compliance with procedural requirements).

## II. MISCELLANEOUS DECISIONS

A. Public Accommodations. **Vidrich v. Vic Tanny International, Inc.**, 102 Mich. App. 230 (December, 1980), held that a blind person cannot be denied access to a health and exercise club because of possible danger to himself and other patrons resulting from his use of the facilities and equipment. Construing Michigan’s equal accommodation act, M.C.L.A. 750.146 *et seq.*, the Court of Appeals held that defendant operated a “public accommodation” as defined by the act and that no implied safety exception to the act existed, as argued by defendant. The Court reversed the trial court’s grant of summary judgment for defendant, instead granting summary judgment to plaintiff.

### B. Restrictive Covenants.

1. Interpreting a subdivision’s restrictive covenant against parking “trailers” on the premises, **Sylvan Glens Homeowners Association v. McFadden**, 103 Mich. App. 118 (January, 1981), reversed a summary judgment for plaintiff homeowners’ association, holding that a motor home is not within the ordinary meaning of “trailer.”

2. **Rofe v. Robinson**, 99 Mich. App. 404 (August, 1980), following the reasoning of the Court of Appeals in the same case (93 Mich. App. 749 (1979)) (discussed in State of the Law 1980), found a deed restriction limiting property to residential use to be inequitable, and thus unenforceable, when the only use allowed by zoning was commercial.

C. Environmental Protection. In **Poletown Neighborhood Council v. City of Detroit**, 410 Mich. 616 (March, 1981), also discussed under the heading "Condemnation" herein, the Court considered whether the exercise of the eminent domain powers of the City of Detroit were violative of the Michigan Environmental Protection Act (M.C.L. §691.1201 et seq.) because of alleged adverse effects on the social and cultural environment of the condemned area and surrounding areas. The Court held that the Environmental Protection Act does **not** protect the social and cultural environment from the actions of governmental entities, as the statutory reference to protection of "air, water and other natural resources" could not reasonably be construed to encompass such environmental factors.

D. Subdivision Control.

1. In the opinion of the Attorney General, Opinion No. 5785, September 19, 1980, governmental agencies, including county road commissions, may not condition approval of a subdivision plat on the posting of a bond except for the purpose of insuring timely completion of streets and roadways.

2. In the opinion of the Attorney General, Opinion No. 5899, May 12, 1981, summer resort associations authorized by law to subdivide lands of the association must comply with the Subdivision Control Act.

E. Open Meetings Act. **Felice v. Cheboygan City Zoning Com'n**, 103 Mich. App. 742 (February, 1981), dealt with admitted noncompliance with the Open Meetings Act in the conduct of deliberations of the defendant zoning commission regarding a special use permit for condominium construction. The Court upheld the lower court's determination that under the facts of this case the noncompliance had not impaired the rights of the public, so the action taken after private commission discussion would not be invalidated.

F. Safety Regulations. **State Fire Marshall v. Lee**, 101 Mich. App. 829 (November, 1980), held that a building used for a church day school is subject to the fire and safety regulations established for schools, rather than the less stringent standards established for churches.

### III. LEGISLATION

A. Environmental protection.

1. P.A. 316 of 1980, M.C.L.A. 319.121 - 319.125, the Pigeon River Country State Forest Hydrocarbon Development Act, attempts to provide for environmentally prudent, rapid extraction of hydrocarbon resources in Pigeon River Country State Forest, and also concerns the taxation of and the payment of royalties from the production of hydrocarbon deposits.

2. P.A. 184 of 1980, M.C.L.A. 299.51 - 299.53, amends Act 173, Mich. Pub. Acts 1929, to provide for preservation of abandoned property of historical or recreational value, regulation of salvage and designation of Great Lakes Bottomlands preserves.

3. P.A. 148 of 1980, M.C.L.A. 554.705 *et seq.*, amending Act 16, Mich. Pub. Acts 1974, concerning farmland and open space preservation, permits automatic renewal of farmland development rights agreements and open space development rights easements upon written request of a landowner who has complied with the requirements of Act 16 of 1974.

4. P.A. 197 of 1980, M.C.L.A. 399.251 - 399.257, the Conservation and Historic Preservation Easement Act, permits the granting of conservation or historic preservation easements to a governmental entity or to a charitable or educational entity, provides for enforceability of such easements and sets forth procedural requirements.

B. Subdivision Control. P.A. 111 of 1980, M.C.L.A. 565.804 and 565.805, amending sections 4 and 5 of Act 286, Mich. Pub. Acts 1972, expands the exemptions to coverage of Act 286.

C. Miscellaneous.

1. P.A. 228 of 1980, M.C.L.A. 125.330, amending Act 168, Mich. Pub. Acts 1959, establishes additional requirements for membership of certain boards of zoning appeals and provides for the appointment of alternate zoning board of appeals members.

2. P.A. 416 of 1980, M.C.L.A. 125.28 and 125.281, amending Act 184, Mich. Pub. Acts, 1943, provides for review and recommendation by the county zoning commission, if one has been appointed, of zoning ordinances proposed by township zoning boards.

3. P.A. 287 of 1980, M.C.L.A. 125.981 *et seq.*, amending Act 120, Mich. Pub. Acts 1961, allows a city with a master physical development plan to maintain and operate malls, bus stops, information centers, and other buildings as well as to construct them. Act 287 also allows the cost of the redevelopment project to be financed by the levy of special assessments.

4. P.A. 170 of 1980, M.C.L.A. 37.2505, amending Section 505 of Act 453, Mich. Pub. Acts 1976, expands the exception to the prohibition of discriminatory conditions and restrictions limiting real property use, to exclude from coverage those conditions and restrictions relating to provision of housing accommodations to senior citizens.

### MECHANICS' LIENS

I. Although the most significant development concerning mechanics' lien law in 1981 was passage of the new Construction Lien Act discussed below, several recent cases in the area deserve mention.

A. Following **Williams & Works, Inc. v. Springfield Corp.**, 408 Mich. 732 (June, 1980), **Portage Realty Corp. v. Baas**, 100 Mich. App. 260 (September, 1980), held that engineering studies and topological surveys did not constitute commencement of construction for purposes of mechanics' lien priority over a mortgage lien recorded subsequent to such work, though the mortgagee had been supplied a copy of the construction contracts, providing for the engineering studies, before making the mortgage loan.

B. **Michigan Roofing and Sheet Metal, Inc. v. Dufty Road Properties**, 100 Mich. App. 577 (October, 1980), in which the trial court had followed the Court of Appeals decision in **Williams &**

**Works, Inc. v. Springfield Corp.**, 81 Mich. App. 355 (1978), and appeal of which was held in abeyance until Supreme Court consideration of **Williams & Works**, construed the Supreme Court's decision in that case (408 Mich. 732) in holding that delivery of construction materials to the job site satisfied the Supreme Court guidelines and constituted visible, on-site construction signaling the commencement of construction. Continental Mortgage Investors (CMI) had a construction mortgage on the property and argued that its mortgage was prior to the mechanics' liens. CMI also opposed the foreclosure of the mechanics' liens on the grounds of failure to comply with the Residential Builders Act, but the Court held there had been substantial compliance with such Act sufficient to allow maintenance of an action to foreclose the lien. Because the delivery of construction materials had preceded the giving and recording of the mortgage, the mechanics' liens were held to be prior to the mortgage lien.

C. **Blackwell v. Bornstein**, 100 Mich. App. 550 (October, 1980), deals with the perennial problem of timely filing of mechanics' liens. The Court overruled the trial court by holding that substantial compliance with the 90-day filing requirement (i.e., 92 days from the day the trial court started its calculation) was not sufficient to create a valid lien. The Court affirmed the original result, however, by concluding that plaintiff's action in returning to the work site merely for picking up tools and last minute cleanup should constitute the last day of work performed by plaintiff, the Court thus starting calculation of the 90-day period later than did the trial court.

D. **H & L Heating Co. v. Bryn Mawr Apts of Ypsilanti, Ltd.**, 97 Mich. App. 496 (May, 1980), applied the generally accepted rule that a party which was named in a mechanics' lien foreclosure suit solely because of its recorded interest in the premises was not legally answerable to plaintiff in damages and was not subject to a default judgment for such damages because it did not individually defend against plaintiff's complaint. While the new Construction Lien Act modifies mechanics' lien law regarding co-owners, the result reached in this case should be unchanged.

E. In addition to upholding current mechanics' lien law regarding notice requirements, **Childers Manuf. Co. v. Altman**, 100 Mich. App. 289 (September, 1980), refused to allow a mechanics' lienee to force the lienor to accept payment of a lien claim just before commencement of a lien foreclosure trial and thereby avoid a possible assessment for attorney fees.

F. Applying established Michigan law and construing M.C.L.A. 570.9, **Hodgins v. Marquette Iron Min. Co.**, 503 F. Supp. 88 (W.D. Mich., October, 1980), held that mechanics' liens filed on October 5, 1979 but resulting from work which commenced in June, 1979 were superior to a garnishment served on October 1, 1979 resulting from a judgment obtained in September, 1979 and to United States tax liens filed on October 5, 1979. The mechanics' liens were held to relate back to the time of commencement of work. In addition, the Court pointed out that pursuant to M.C.L.A. §570.9, mechanics' liens are prior to garnishments whether the garnishment was filed before or after commencement of the mechanics' lienors' work.

## II. LEGISLATION

A. The new Construction Lien Act, Act 497, Mich. Pub. Acts 1980 (M.C.L.A. §§570.1101-570.1305) will replace former Michigan mechanics' lien statutes (M.C.L.A. §570.1 et seq.) commencing January 1, 1982, for all contracts entered into after January 1, 1982. Claims of lien after January 1, 1982, pursuant to a contract entered into prior to January 1, 1982, shall continue to be governed by M.C.L.A. §570.1 et seq.

Changes to prior mechanics' lien law are too numerous to detail here and require the close attention of all counsel working in the area. The new Construction Lien Act alters notice times and requirements, modifies remedies and expands the interests upon which a lien may be obtained. With regard to foreclosure, the new Construction Lien Act expands the powers of the receiver, changes requirements of pleading and sets forth jurisdictional provisions.

Under the new Construction Lien Act, liens on residential structures can be established only upon compliance with special criteria. If the owner or lessee of the residential structure files an affidavit with the court indicating *inter alia* that he has paid the contractor, then subcontractors, materialmen and laborers who have paid a fund fee and meet certain other criteria may recover from the Homeowner Construction Lien Recovery Fund established by the Homeowner Construction Lien Recovery Act. The Homeowner Construction Lien Recovery Act is basically a compromise between consumers groups opposed to any liens on residential properties and subcontractors, suppliers and laborers desiring full lien rights. A joint legislative review committee is to initiate review of the funds by February 1, 1985 and report by September 30, 1985.

B. P.A. 432 of 1980, P.A. 492 of 1980 and P.A. 496 of 1980 amend the respective licensing acts relating to plumbers, electricians and electrical contractors, and residential builders or maintenance and alteration contractors by providing for suspension or revocation of the license of any such party whose failure to pay a lien claimant results in a payment being made from the Homeowners Construction Lien Recovery Fund. These three acts further provide that a license so suspended or revoked shall not be renewed nor a new license issued until repayment in full of the amount paid by the Fund, plus any costs of litigation and interest.

P.A. 496 of 1980 further conditions licensing of residential builders and maintenance and alteration contractors on payment of any fee required by the Construction Lien Act.

## TAXATION OF REAL PROPERTY

### I. ASSESSMENT CASES

A. **C.A.F. Investment Co. v. Township of Saginaw**, 410 Mich. 428 (February, 1981), considering taxation of property subject to a long-term lease at lower than market rental, held that the tax commission must consider "economic" or actual rental income when capitalization of income is the method used to determine the value of the property for purposes of taxation. A dissent stated that the majority decision was not in accord with case law in most other states, which would reject actual income and rely on potential earning capacity, or consider both actual income and potential earning capacity.

B. Similarly, **Congresshills Apartments v. Township of Ypsilanti**, 102 Mich. App. 668 (January, 1981), held that the Tax Tribunal must use actual income figures and actual expenses in determining the true cash value of a rental property rather than hypothetical market rents and income projections.

C. Also considering taxation of rental property, **Northwood Apartments v. City of Royal Oak**, 98 Mich. App. 721 (July, 1980), held that any method for determining true cash value of property which is recognized as adequate and reasonably related to fair market valuation is acceptable, and the Tax Tribunal properly utilized the mortgage equity formula rather than the capitalization of

income method. Here the School District had been denied the right to intervene and appealed. The court held that the Tax Tribunal may permit intervention by any governmental unit which receives tax funds from the taxpayer making the appeal but there is no absolute right to intervene. Additionally, the School District had waited three years to intervene, which was considered an unreasonable delay.

**D. First Federal Savings and Loan Association v. Flint**, 104 Mich. App. 609 (March, 1981), cited **Northwood Apartments v. City of Royal Oak**, *supra*, for the proposition that when fraud is not alleged, appellate review of the Tax Tribunal method of determining value is limited. The Court upheld the Tax Tribunal's calculation of true cash value of the plaintiff's building based on the cost-new-minus-depreciation method. Although recognizing that this method declined in accuracy as buildings became older, the Court held that the Tax Tribunal refusal to use the capitalization of income method urged by the plaintiff was reasonable, since the capitalization of income method was inappropriate when the value of a building to its owner depends more on its owner's specialized use than on the rental income received.

**E. Wolverine Tower Associates v. City of Ann Arbor**, 96 Mich. App. 780 (April, 1980), affirmed an assessment resulting from the Tax Tribunal's use of a combination of three customary approaches in establishing true cash value of rental property. In addition, the Court held that under capitalization of income, one of the approaches used, actual income need not be the only basis for calculating true cash value, and supported the Tax Tribunal's adjustment of actual income in light of market rentals for comparable properties. (**But cf** paragraph A, above).

**F. Brittany Park v. Harrison Township**, 104 Mich. App. 81 (March, 1981), dealt with increase in assessments due to increased state equalization factors. The Court held that the taxpayer has an unequivocal right to appeal an assessment raised over 50% of true cash value by the equalization process. The Court also concluded that the language of P.A. 384, Mich. Pub. Acts 1974, §39a(3), which permitted a county to waive the collection of the additional levy for the tax year 1975 only, violated Michigan Const. 1963, Art. 9, §3, the uniformity rule. The spreading and collection of the various school districts' share of additional taxes occasioned by an increase in state equalization could not be waived by the county.

## II. EXEMPTION CASES

**A. Christian Reformed Church in No. America v. City of Grand Rapids**, 104 Mich. App. 10 (February, 1981), upheld exemption from taxation of an office building used for administration of church business, applying generally accepted law to the fact situation before it.

**B. Construing M.C.L.A. 211.7 and M.C.L.A. 211.7e, Congregation B'nai Jacob v. City of Oak Park**, 102 Mich. App. 724 (January, 1981), held that more than one "parsonage" per "religious society" may be exempted from taxation. The case involved six parcels of land on each of which a rabbi lived with his family; all six parcels were held exempt from taxation.

**C. Lessees of tax-exempt buildings must pay property tax as if they were owners of the leased property (M.C.L.A. 211.181(1)). However, construing M.C.L.A. 211.181(1) in conjunction with M.C.L.A. 500.440 which imposes a special tax on foreign insurance companies in lieu of all taxes except on the ownership of real property, American Title Insurance Co. v. City of Detroit**, 102 Mich. App. 679 (January, 1981), held the plaintiff subject only to the special tax, not the property tax imputed by M.C.L.A. 211.181(1)).

D. **Ladies Literary Club v. Grand Rapids**, 409 Mich. 748 (November, 1980), held that the Ladies Literary Club was not exempt from real property taxation, since the education exemption should be used only for institutions which fit into the general scheme of education provided by the state and supported by public taxation or for institutions which make a substantial contribution to the relief of a burden of government. **Circle Pines Center v. Orangeville Township**, 103 Mich. App. 593 (February, 1981), and **Kalamazoo Nature Center v. Cooper Township**, 104 Mich. App. 657 (March, 1981), held the respective plaintiffs not to be educational institutions, based on the test set forth in **Ladies Literary Club**.

The Circle Pines Center was denied any tax exemption, the Court holding that it also was not a charitable organization. Kalamazoo Nature Center was held to be a charitable organization, entitled to a more limited tax exemption than educational institutions, but exemption was denied for two parcels of real property used by employees as residences at reduced rentals. The parcels were not occupied **solely** for the purpose for which the Center was organized. A thirty-one acre natural preserve owned by the Center was held to be exempt, however, the Court finding that use of the parcel for observation constituted "occupancy."

### III. LEGISLATION

#### A. Credits and exemptions.

1. P.A. 322 of 1980, M.C.L.A. 207.13, amending Section 13 of Act 282, Mich. Pub. Acts 1905, concerns real property tax credit for railroad companies.

2. P.A. 152 of 1980 and P.A. 6 of 1981, each amending Act 206, Mich. Pub. Acts 1893, make technical changes and provide for exemptions from and credits against real property taxes on homesteads.

3. P.A. 348 of 1980, M.C.L.A. 211.71, amending Section 7i of Act 206, Mich. Pub. Acts 1893, concerns property tax exemption of commercial housing facilities.

4. P.A. 407 of 1980, M.C.L.A. 207.653 and 207.656, amending Act 255, Mich. Pub. Acts 1978, expands applicability of the commercial redevelopment facilities exemption.

5. P.A. 227 of 1980, M.C.L.A. 206.520a, amending Act 281, Mich. Pub. Acts 1967, expands credits to renters.

#### B. Collection procedures.

1. P.A. 403 of 1980, M.C.L.A. 211.761 **et seq.**, amending Act 225, Mich. Pub. Acts 1976, concerns deferment of special assessment payments on homestead properties. P.A. 59 of 1981, M.C.L.A. 211.768a, amending Section 8a of Act 255, Mich. Pub. Acts 1976, as added by Act 403, Mich. Pub. Acts 1980, provides for minimal interest to be charged on deferred special assessments.

2. P.A. 48 of 1980, M.C.L.A. 211.59 **et seq.**, amending Act 206, Mich. Pub. Acts 1893, concerns interest rates on unpaid taxes and establishment of a delinquent tax revolving fund.

**ATTORNEY GENERAL OPINIONS NO. 5904, 5908, 5919:  
Land Contracts, Interest, Taxation**

**LAND CONTRACTS: Late payment charges**

Late payment charges contained in a land contract for actual, unanticipated late payment, delinquency, default or other such occurrence does not constitute interest subject to the statutory interest rate ceiling for land contracts.

Opinion No. 5904 (May 15, 1981)

The Honorable Shirley Johnson  
State Representative  
State Capitol  
Lansing, MI 48909

You have requested my opinion whether a late payment charge required under the terms of a land contract constitutes interest subject to the statutory interest rate ceiling for land contracts. You advise that the late payment charge is 4 percent of the monthly payment of \$475.00, which amounts to a late payment charge of \$19.00.

You have indicated that your question concerns a land contract between two individuals.<sup>1</sup> 1966 PA 326; MCLA 438.31 et seq; MSA 19.15(1) et seq, §1c(6), authorizes individuals to enter into land contracts which

“provide for a rate of interest not to exceed 11% per annum, which interest shall be inclusive of all the amounts defined as the ‘finance charge’ in the federal truth in lending act (Public Act 90-321), and the regulations promulgated thereunder.”

Therefore, in order to determine whether a particular charge constitutes part of the interest rate, it is necessary to review the Truth in Lending Act, 82 State 146 (1968); 15 USC 1601 et seq, and the regulations promulgated thereunder.

The Truth in Lending Act, *supra*, §1605,<sup>2</sup> provides for certain charges to be inclusive in the determination of the amount of a finance charge in a consumer credit transaction:

“Except as otherwise provided in this section, the amount of the finance charge in connection with any consumer credit transaction shall be determined as the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and

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<sup>1</sup>See OAG, 1979-1980, No 5765, p \_\_\_\_ (August 28, 1980), for a discussion of permissible interest rates on land contracts when levied by regulated lenders and certain lenders who qualify for an exemption under federal law from state usury ceilings.

<sup>2</sup>This section was amended by 94 Stat 170, 185, effective March 31, 1982.

imposed directly or indirectly by the creditor **as an incident to the extension of credit**, including any of the following types of charges which are applicable:

“(1) Interest, time price differential, and any amount payable under a point, discount, or other system of additional charges.

“(2) Service or carrying charge.

“(3) Loan fee, finder’s fee, or similar charge.

“(4) Fee for an investigation or credit report.

“(5) Premium or other charge for any guarantee or insurance protecting the creditor against the obligor’s default or other credit loss.” (Emphasis added.)

Thus, whether a particular charge is considered to be a finance charge under the Truth in Lending Act, **supra**, depends on whether it is determined to be an incident to the extension of credit. 12 CFR, §226.4(c), a regulation promulgated pursuant to the Truth in Lending Act, **supra**, resolves that issue for late payment charges as follows:

“A late payment, delinquency, default, reinstatement, or other such charge is not a finance charge if imposed for actual unanticipated late payment, delinquency, default or other such occurrence.”

It follows that a late payment charge, if imposed for an “actual unanticipated late payment,” would be exempt from the purview of the Truth in Lending Act, **supra**. See **Vega v First Federal Savings & Loan Ass’n of Detroit**, 433 F Supp 624 (ED Mich, 1977). In **Continental Oil Co v Burns**, 317 F Supp 194, 198, n3 (D Del, 1970), the court gave further explanation to the term “actual unanticipated late payment”:

“Since the word ‘unanticipated’ means ‘not foreseen or expected,’ it would appear that an ‘actual unanticipated late payment’ charge would be the antithesis of a charge stemming from a course of conduct where credit is continued even though payments are repeatedly late and late payment charges are periodically imposed.”

Also see **Kroll v Cities Service Oil Co**, 352 F Supp 357 (ND Ill, 1972), and **Garland v Mobil Oil Corp**, 340 F Supp 1095 (ND Ill, 1972).

In view of the terms of the federal Truth in Lending Act, **supra**, and the rules thereunder incorporated by reference by the Legislature in 1966 PA 326, **supra**, I am constrained to conclude that a late payment charge, required under the terms of a land contract between two individuals, does not constitute interest subject to the statutory interest rate ceiling for land contracts if such charge is imposed for actual unanticipated late payment, delinquency, default or other such occurrence. It must be stressed that the amount of the late payment charge must be reasonable, reflecting the expense of the inconvenience incurred, so as not to constitute a penalty which would be unenforceable at law. **Curran v Williams**, 352 Mich 278; 89 NW2d 602 (1958).

**INTEREST: Usurious rate of interest**

A loan made by a real estate sales corporation to a homeowner to be repaid upon sale of the home with interest at the rate of 13½ percent upon such loan is usurious.

Opinion No. 5908 (May 19, 1981)

The Honorable Ed Fredricks  
State Senate  
State Capitol  
Lansing, Michigan 48909

You have requested my opinion as to whether the following described transaction involves the charging of a usurious rate of interest:

“Specifically, the issue is whether a real estate corporation is charging a usurious rate of interest in a buy-sell agreement that provides for the real estate [sales] corporation to pay homeowners \$9,000.00 in equity and assume the existing mortgage, and the parties further agree that upon resale of the property by the real estate corporation that the real estate corporation ‘will receive \$9,000.00, plus interest at 13½ percent, plus any payments made on the mortgage or other incurred expenses.’ Further, that should the resale price exceed the amount the real estate corporation is due, the excess would go to the homeowners.”

By your description, I understand that the real estate sales corporation would, in effect, loan the homeowner \$9,000.00 and agree to make the mortgage payments until the corporation can find a buyer and consummate a sale of the house. When the house is ultimately sold, the homeowner would repay that \$9,000.00 loan, plus interest at the rate of 13½ percent per annum, as well as reimburse the real estate sales corporation for all mortgage payments which it made in the interim period.

Since, under the facts stated, a first mortgage would already exist on the property, it is apparent that the loan of \$9,000.00 would not be secured by a first mortgage. Thus, it is not necessary to consider the interest rate ceilings applicable to first mortgages. Furthermore, based upon your description, the \$9,000.00 loan would not be secured by a second mortgage.<sup>1</sup> Although the form of the transaction is somewhat unusual, in substance the transaction is a loan. **Wilcox v Moore**, 354 Mich 499; 93 NW2d 288 (1958); **Abeloff v Ohio Finance Co**, 313 Mich 568; 21 NW2d 856 (1946).

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<sup>1</sup>In general, a second mortgage is subject to the civil interest rate ceiling set forth in 1966 PA 326, *infra*, absent authority elsewhere to charge a higher rate of interest. See **Beebee v Grettenberger**, 82 Mich App 416; 266 NW2d 829 (1978), and OAG, 1979-1980, No. 5765, p \_\_\_\_ (August 28, 1980).

The general civil interest rate ceiling as set forth in 1966 PA 326, as amended by 1980 PA 238; MCLA 438.31 **et seq**; MSA 19.15(1) **et seq**, §1, provides, in pertinent part:

“The interest of money shall be at the rate of \$5.00 upon \$100.00 for a year, and at the same rate for a greater or less sum, and for a longer or shorter time, except that in all cases it shall be lawful for the parties to stipulate in writing for the payment of any rate of interest, not exceeding 7% per annum. This act shall not apply to the rate of interest on any note, bond or other evidence of indebtedness issued by any corporation, association or person, the issue and rate of interest of which have been expressly authorized by the public service commission or the securities bureau of the department of commerce, or is regulated by any other law of this state, or of the United States, . . .”

Such a loan may not bear interest in excess of 5 percent, if the agreement is oral, or in excess of 7 percent, if the parties agree in writing for the payment of such a rate of interest.

A review of the various exceptions to the general civil interest rate ceiling fails to disclose any exception which would fit the circumstances in the facts supplied. See OAG, 1979-1980, No 5765, **supra**, and OAG 1979-1980, No 5740, p \_\_\_\_ (July 17, 1980), for a review of many of the exceptions to the general interest rate ceiling.

It is my opinion, therefore, that a loan made by a real estate sales corporation to a homeowner to be repaid upon sale of the home with interest at the rate of 13½ percent upon such loan is usurious.

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TAXATION: Documentary stamp tax — computation of tax on transfer of interest in real property

WORDS AND PHRASES: “Total value”

The amount of the documentary stamp tax upon the transfer of an interest in real property is computed at the rate of \$.55 for each \$500.00 or fraction thereof of the purchase price of the property, including the amount of any outstanding encumbrances assumed by the grantee.

Opinion No. 5919 (June 11, 1981)

Mr. Scott T. Beatty  
Prosecuting Attorney  
Charlevoix County  
County Building  
Charlevoix, Michigan 49720

You have requested my opinion on the following tax matter:

What is the proper method of determining the value of revenue stamps to be placed upon a written instrument transferring interest in real estate in which the grantee pays a cash consideration and assumes a mortgage?

Prior to the enactment of 1966 PA 134; MCLA 207.501 *et seq*; MSA 7.456(1) *et seq*, a tax on the conveyance of real property was assessed by the federal government pursuant to 72 Stat 1299 (1954), 26 USC 4361, which measured the transfer tax by “the consideration or value of the interest or property conveyed, exclusive of the value of any lien or encumbrance remaining thereon at the time of sale. . . .” The tax upon written instruments transferring an interest in real estate, as set forth in federal legislation, expired on December 31, 1967, 79 Stat 148 (1965), and was replaced by state legislation, 1966 PA 134, *supra*, §2, which imposes a tax upon written instruments transferring ownership of any interest in real estate located within the state at the time the instrument is recorded.

As originally enacted by the Legislature, 1966 PA 134, §4, *supra*, provided:

“The tax shall be at the rate of 1.1 mill per dollar for each \$500.00 or fraction thereof of **the consideration paid**, or if no money is involved, then upon the fair market value of the gift or value of the consideration.” (Emphasis added.)

The Legislature amended 1966 PA 134, §4, *supra*, by means of 1968 PA 327 to read:

“The tax shall be at the rate of 55 cents for each \$500.00 or fraction thereof of the **total value**. A written instrument subject to the tax imposed by this act shall state on its face the total value of the real property or there shall be attached thereto an affidavit declaring the total value of the real property. The form of the affidavit shall be prescribed by the state tax commission. In the case of the sale or transfer of a combination of real and personal property the tax shall be imposed only upon the transfer of the real property, if the values of the real and personal property are stated separately on the face of the instrument or if an affidavit is attached thereto setting forth the respective values of the real and personal property.” (Emphasis added.)

Thus, the Legislature modified 1966 PA 134, §4, *supra*, to require the tax to be imposed upon total value of the real property being transferred reflected by the market price agreed upon by the seller and purchaser, including any outstanding encumbrances assumed by the grantee under agreement with the grantor, rather than the consideration being paid by the purchaser of the property.

1968 PA 327 also amended 1966 PA 134, *supra*, §2 to add a subsection (c) to define the term “value” as used in the act to mean “the current or fair market worth in terms of legal monetary exchange at the time of the transfer.”

By adoption of amendatory 1978 PA 327, the Legislature intended to change the existing law. **Bonifas-Gorman Lumber Co v Unemployment Compensation Commission**, 313 Mich 363; 21 NW2d 163 (1946). It is impossible to read the terms “total value” as “consideration paid” by the grantee as an attempt to make plain what the Legislature had intended in its original enactment. **Detroit Edison Co v Janosz**, 350 Mich 606; 87 NW2d 126 (1957). The “total value” of the real property must be read as the purchase price agreed upon by the grantee and the grantor, including any encumbrances assumed by the grantee.

It is, therefore, my opinion that the transfer tax is computed upon the total amount of the purchase price agreed to be paid by the grantee, including any cash consideration and the amount of the mortgage assumed.

**THE LEGISLATIVE SCENE**  
**Mary P. Levine, Chairperson**  
**Legislation Committee**

There continues to be no substantive legislative action on the issue of interest rate ceilings. This past month the Governor indicated he is opposed to lifting all caps on interest rates but would consider supporting some sort of floating interest rate limit. At the same time, Rep. Jondahl, Chairman of the House Consumers Committee called for a "forceful lobby" against higher interest rates on consumer loans. Mr. Jondahl also said that legislators would probably find it politically attractive to tie interest rate limits to a floating level instead of taking off all limits on interest rates. Rep. Harrington, Chairman of the special subcommittee on interest rates, echoed Mr. Jondahl's prediction of a floating interest rate. Mr. Harrington said that the committee members will probably approve a compromise plan tying the interest rate limits to the 6 month treasury note rate. It remains to be seen how cooperative the Creditor's Coalition will be in this regard. In the past few months, leaders of this group have stood firm on their position of eliminating all caps on interest rates regardless of the type of loan transaction.

**ACTION ON PREVIOUSLY INTRODUCED LEGISLATION**

- HB 4011      Licensing of Second Mortgages; 7/14/81 presented to Governor; 7/23/81 approved by Governor, P.A. 125, I.E.
- HB 4054      Prohibit action in nuisance against Farms; 7/11/81 approved by Governor, P.A. 93, I.E.
- HB 4686      Plant rehabilitation district — includes leased personal property; 9/24/81 advanced to third reading; 9/28/81 passed.

**NEWLY INTRODUCED LEGISLATION**

- HB 4950      Provides that assessor shall not consider new residential construction in property tax assessment until 12 months following occupancy of new residential dwelling. (Introduced by Rep. Stacey on 9/15/81 and referred to the Com. on Taxation.)
- HB 4955      Provides property tax exemption for non-profit corporations supplying certain housing for elderly or handicapped. (Introduced by Rep. Brotherton on 9/15/81 and referred to the Com. on Taxation.)
- HB 4968      Permits private property held by school district and used for private purposes to be exempt from property taxes for 10 years. (Introduced by Rep. Vanek on 9/16/81 and referred to the Com. on Taxation.)
- HB 4969      Expands Job Development Authority Act to include the financing of forestry enterprises and agricultural and commercial facilities. (Introduced by Rep. Geerlings on 9/16/81 and referred to the Com. on Labor.)
- HB 4980      Provides for shared appreciation mortgages. (Introduced by Rep. Trim on 9/16/81 and referred to the Com. on Corporations and Finance.)

- HB 4994 Requires review of plats by surveyor before filing with clerk of county plat board. (Introduced by Rep. Ostling on 9/21/81 and referred to the Com. on Towns and Counties.)
- HB 5015 Decreases property tax assessments to 37.5% in 1982 and 25% in 1983. (Introduced by Rep. R. Smith on 9/21/81 and referred to the Com. on Taxation.)
- HB 5018 Provides property tax credit for renters at 20% of annual rent and provides a minimum credit for owners equal to tax on first \$13,000 on homestead's SEV. (Introduced by Rep. T. Brown on 9/22/81 and referred to the Com. on Taxation.)
- HB 5019 Requires state reassessment for property in classification with a state equalization factor of over 1.00 for 1984 levies. (Introduced by Rep. T. Brown on 9/22/81 and referred to the Com. on Taxation.)
- HB 5044 Requires cities and townships to reduce property tax rates if state equalized value exceeds assessed value. (Introduced by Rep. Emerson on 9/24/81 and referred to the Com. on Taxation.)
- HB 5045 Allows land to be designated as commercial redevelopment district if it has been zoned commercial or industrial for three years. (Introduced by Rep. Hayes on 9/24/81 and referred to the Com. on Economic Development and Energy.)
- HB 5054 Provides property tax exemption for certain housing for the elderly and handicapped. (Introduced by Rep. Brotherton on 9/24/81 and referred to the Com. on Taxation.)
- HB 5056 Requires one year notice prior to mobile home conversion. (Introduced by Rep. Knight on 9/24/81 and referred to the Com. on Towns and Counties.)
- SB 404 Exempts from usury limits loans to business entities that exceed \$500,000. (Introduced by Sen. Bishop on 9/16/81 and referred to the Com. on Corporations and Economic Development.)
- SB 444 Requires review of subdivided land plats by a surveyor before filing with clerk of county plat board. (Introduced by Sen. Irwin on 9/22/81 and referred to the Com. on Municipalities and Elections.)

**RECENT DECISIONS**  
by  
**Joseph Lloyd**  
**Lloyd, Rutzky & Dodge**

**CASE NOTES**

**LERNER v BLOOMFIELD TOWNSHIP**, \_\_\_ Mich App \_\_\_, \_\_\_ NW2d \_\_\_ (No. 49509, June 4, 1981)

Zoning — incidental uses — professional practice

The Plaintiff, a psychotherapist, owned a home in a residential neighborhood. The home was zoned "R-3" the most restrictive category provided in the ordinance. When she began occasionally seeing patients in her home, the Township cited her for a zoning violation. She commenced suit for declaratory and injunctive relief. The trial court rendered a decision in favor of the Township.

The question on appeal was whether the use by the Plaintiff of her home in her professional practice was an "accessory use" or a use "customarily incidental" to any of the permitted principal uses. The Court of Appeals held that the term "incidental" should be interpreted as meaning "dependent upon" rather than as "less predominant," and upheld the trial court's decision.

**WILLSMORE v TOWNSHIP OF OCEOLA**, \_\_\_ Mich App \_\_\_, \_\_\_ NW2d \_\_\_ (1981) (No. 44835, June 3, 1981)

Lost Goods Act — rights of land owners — Escheat

While hunting on unposted, unoccupied property, the Plaintiff found more than \$380,000 buried in a watertight suitcase. He turned the money in to the State Police. Careful examination of the money showed that it had been buried for a period of not more than a few months. Although the finder did not comply with the strict notice requirements of the Lost Goods Act, the trial court, and the Court of Appeals on review, found him in "substantial compliance" and let him proceed as though his claim was timely made.

Claim to the money was made, in turn, by the finder of the money, by the State of Michigan under the doctrine of escheats, by the Township under the Lost Goods Act, and by the owner of the property, a land contract vendee. The owner of the property claimed to be the actual owner of the money as well, but, claiming Fifth Amendment privileges, he was unwilling to testify at trial and unwilling to be cross-examined on a variety of subjects concerning the money.

The Court of Appeals held that the doctrine of Escheats did not apply, on the basis, inter alia, that there had been no period of dormancy during which the owner might be presumed to have abandoned the money. The Court then held that the owner of the property, as land contract vendee, did not, by virtue of such ownership, establish any rights in the money. The Court thereupon applied the Lost Goods Act and divided the property equally between the finder and the Township.

LELAND ACRES HOMEOWNERS ASSOCIATION, INC. v R. T. PARTNERSHIP, \_\_\_ Mich App \_\_\_, \_\_\_ NW2d \_\_\_ (No. 48213, June 3, 1981)

Deed restrictions — foster care facilities

The Plaintiff, a subdivision Homeowner's Association, brought suit to enforce building and use restrictions against the defendant, a partnership which had bought a residential home and was leasing it to a foster care facility for developmentally disabled individuals. The restriction in question limited use of the property to "residential purposes," and occupation to a "single private family."

In a careful review and analysis of prior case law the Court of Appeals singled out three common and relevant factors in deciding whether the use as an adult foster care home comported with the restrictions. The first factor was the exact language of the restriction, and whether it applied to the type of structure that was erected or the use that was to be made of the structure. The second factor was whether the operation of the home was commercial or non-profit. The third was the basis of affiliation of a resident with the home, i.e. whether the home was a "substitute family" as opposed to merely a group of unrelated adults coincidentally living under one roof. In this regard the court noted that the existence of a "parent" was not a focal question in the determination of "family" use.

Evaluating the above factors in the case at bar, the Court found that the covenant in question referred to the structure rather than to the use thereof. It found that the home was operated by a non-profit charitable corporation and it found that the home served as a substitute family for the residents. Based on these findings it was held that the deed restriction was unenforceable against the foster care facility.

PRINCE v HERITAGE OIL COMPANY, \_\_\_ Mich App \_\_\_, \_\_\_ NW2d \_\_\_ (No. 47076, September 9, 1981)

Oil and Gas Leases — Securities Act Registration

The questions before the court concerned the rights under the Uniform Securities Act of the purchasers and sellers of fractional interests in oil and gas leases where the sellers retained a substantial interest in the wells without paying in a proportionate share of the capital. The court held as follows:

- (1) The sale of fractional interests constituted the sale of "securities" under the act. The court found that the economic realities of the transaction were such that the Plaintiffs were investing in a risky venture rather than purchasing an interest in property.
- (2) Retention of an interest in the wells without contribution of capital constituted acceptance of a "commission or other remuneration" such that the sale was not exempt from registration.
- (3) Retention of a substantial interest in the wells without corresponding contribution of capital so diluted the equity of the purchasers that failure to make full disclosure of that fact constituted a material omission of fact entitling the purchasers to rescission of the purchase.

HAVENS v SCHOEN, \_\_\_ Mich App \_\_\_, \_\_\_ NW2d \_\_\_ (No. 50022, August 19, 1981)

Deeds — Delivery — effect of recording

The Plaintiff sought to set aside a deed in which she had quitclaimed to her daughter an interest in her farm. The deed had been recorded but there was no other evidence of delivery. The Plaintiff introduced evidence to show there was no delivery and no intent to presently and unconditionally convey an interest in the land.

A divided panel of the Court of Appeals held that, notwithstanding the fact that the deed had been recorded, the Defendants had the burden of proving delivery and requisite intent. On the facts of the case, the court, reviewing de novo, found that there was no intent to deliver and set aside the conveyance.

HAMMOND v MATTHES, \_\_\_ Mich App \_\_\_, \_\_\_ NW2d \_\_\_ (No. 50716, September 10, 1981)

Defects — Brokers — Misrepresentation

The Plaintiff was injured in an explosion when liquid petroleum escaped into the basement of his recently purchased home via a severed fuel line. The Plaintiff sued, inter alia, the real estate companies and their agents for failure to disclose a hidden and dangerous defect. The trial court granted summary judgment against Plaintiff in favor of the Brokers and their agents.

The Court of Appeals held that as regards the Plaintiff's theory of negligent or fraudulent non-disclosure, summary judgment was proper. The complaint did not aver knowledge of the defect in the gas lines and it was held that there is no duty to disclose what was not known.

As regards the theory of fraudulent misrepresentation, the court held that there were material issues of fact requiring trial on the merits. It was held that statements that "everything in the basement was brand new, that plaintiffs had nothing to worry about, and that everything was working fine" would be actionable if made recklessly or without knowledge of their truth and as a positive assertion. The question was one of fact and summary judgment in favor of the Broker and its agent was therefore improper.

## SECTION NEWS

### About the authors:

John C. Murray, a graduate of the University of Michigan (B.B.A., 1967; J.D., 1969), is the Associate Regional Counsel for The Prudential Insurance Company of America. Mr. Murray is a member of the Titles, Liens and Conveyancing Committee, which is chaired by Deane Malaker.

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**The 1981 Cumulative Supplement to  
Michigan Zoning and Planning, Second Edition**

The Institute of Continuing Legal Education, Ann Arbor, has recently published the 1981 Cumulative Supplement to Michigan Zoning and Planning, Second Edition, by Clan Crawford, Jr.

The Supplement incorporates all zoning developments and cases through March, 1981, and contains updated tables of Michigan and federal cases as well. It adds 15 new cases decided in Michigan courts in 1980, expands previous discussion of the Michigan Supreme Court decision in **Turkish v Warren** and subsequent related cases, and discusses the Michigan Court of Appeals decision in **Bruni v Farmington Hills** on the legality of planned unit development provisions in zoning ordinances.

Because the 1981 Supplement is cumulative, it incorporates the 1979 and 1980 Supplements. The 1979 Supplement outlines extensive revisions in the Zoning Enabling Acts of 1978 and adds 25 appellate decisions on zoning. The 1980 Supplement includes 18 new decisions made by the Court of Appeals during 1979 and more.

Author Clan Crawford, Jr. is an acknowledged authority on zoning and land use planning, a widely-published author and popular lecturer, and an environmental activist. He is a legal consultant on land use control to developers, municipalities and other parties.

For more information on the 1981 Supplement or on the Second Edition of Michigan Zoning and Planning, contact ICLE, Hutchins Hall, Ann Arbor, Michigan 48109; (313) 764-0533.



