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CONTENTS

Page

Condominium Deregulation in Michigan 157
by James P. Babcock and Jeffery R. Jones

An Introduction to Time-Sharing Condominiums 164
Under the Michigan Condominium Act
by Mark S. Keegan

First Mortgage Interest Rate on Residential 169
Real Property in Michigan
by Patrick D. Hanes

Annual Report, 1981-82 173
by David S. Snyder

The Legislative Scene 176
by Robert J. McCullen

Recent Decisions 181
by Joseph A. Lloyd

Section News 184

Litigation is a machine which you go into as a pig and come out as a sausage.

Ambrose Bierce

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CONDOMINIUM DEREGULATION IN MICHIGAN

by

James P. Babcock and Jeffery R. Jones

INTRODUCTION

Senate Bill 530 passed the state Senate June 17, 1982, and is presently awaiting action in the state House. Known as the Condominium Deregulation Act, the bill was introduced by Senator Doug Ross in the fall of 1981. Drafting condominium legislation at a time when the real estate market and the construction industry have been crushed to levels not seen since the Great Depression may seem to be time misspent. However, it was felt that now is the time to enact legislation so that when these wounded industries are ready for a turnaround, legislation will exist to encourage it.

The proposed act essentially seeks to deregulate the sales of condominiums in Michigan. Arbitration, disclosure, and escrow provisions in the act seek to provide some of the protections now afforded by the administrator. The bill amends the present Condominium Act, Public Act 59 of 1978 (MCLA 559.101), and its amendments which are Act 283 of 1980 (MCLA 559.204a) and Act 513 of 1980 (MCLA 559.171).

The Department of Commerce would no longer have its review powers prior to establishment of the condominium. A condominium would be established by simply recording the required documents. Condominiums could be sold any time after the required documents have been recorded; Permits to Take Reservations and Permits to Sell would no longer be required. The Department of Commerce would assume the role of defining terms, setting rules and regulations, accepting service for foreign developers, and processing complaints.

Escrows would be required as under the present act. A newly mandated escrow to insure substantial completion of a phase of the project and the recreational facilities would be required. If the developer failed to complete this work, the escrow agent would be empowered to do so with the escrowed funds for the benefit of all interested parties. Arbitration is mandated if requested by the co-owner, purchaser, association, or tenant of a converted unit. Disclosure requirements are expanded and criminal sanctions are attached for fraudulent representations.

ESCROW

The escrow provisions of the new bill probably propose the greatest change over the present practice. In addition to providing a third party to hold and refund deposits, it appears that the legislation seeks to assure that the recreational facilities and a particular phase of a development will be completed in a timely fashion.

Section 83 requires that deposits taken with a "preliminary reservation agreement" or a "purchase agreement" be placed with an escrow agent. If the prospective purchaser cancels the agreement within the proper time, the deposit shall be refunded within three (3) business days.

Section 84 requires the developer to retain amounts in escrow or adequate security such as an irrevocable letter of credit, lending commitment, indemnification agreement, or other resource having a value determined by the escrow agent to be adequate, to assure completion of those structures and improvements labeled "Must Be Built." Section 103A states that this escrow may

not be released to a developer until issuance of a certificate of occupancy, conveyance of legal or equitable title, and confirmation by the escrow agent that those portions of the phase of the project labeled "Must Be Built" are substantially complete. Substantial completion requires completion of all utility mains and leads, all major structural components of buildings, all building exteriors, all sidewalks and driveways, landscaping, and at least one access road for that particular phase. The developer must also substantially complete or leave escrowed security for completion of recreational facilities labeled facilities in the master deed, or amendment of the master deed for this purpose.

Not before nine (9) months after the closing of the sale of the first unit in a phase or nine (9) months after the date on which a recreational facility was promised in the condominium documents, if a developer has not substantially completed the improvements escrowed for, the escrow agent may notify the developer of a request by the association or a co-owner and if not completed in three (3) months, the escrow agent can release the security to others for completion of the improvement, for the benefit of all interested parties. Interest may be earned on the escrowed security and disposed of as the principal escrow.

One effect of this escrow provision will probably be that developers will be very conservative in determining the size of a phase and labeling what "Must Be Built." Instead of a larger phase, development may take the form of a small phase which will be expanded by the addition of other small phases. If a developer were to attempt to undertake a larger phase and fall short in that goal due to market conditions, interest, work stoppages, material shortages, or other reasons, it may be precluded from finishing because an escrow agent has contracted with a third party for completion. This may even entail constructing buildings, roads, and other improvements when the developer cannot sell what is already constructed.

The prospective purchaser might be affected by these provisions. Aside from the assurances that additional buildings, roadways, and recreational facilities will be constructed, the purchaser may find his choice of units severely curtailed. A purchaser may be faced with accepting a limited choice of units in an existing location or waiting until the project expands to include the phase encompassing his or her first choice.

Under the bill, the escrow agent will be faced with a unique task. If the time limits run and if requested by the respective party, the agent apparently, must in effect become a developer and do what the original developer did not or could not do — complete the phase and the recreational facilities.

DISCLOSURE PROVISIONS

Throughout the bill the Department of Commerce maintains its right as the administrator to promulgate rules which relate to various disclosure provisions. Much of what the bill proposes to codify is presently accepted practice or usual requirements imposed by the condominium section. There is still the requirement that the Condominium Buyers Handbook be given to both prospective buyers and contract purchasers. No mention is made of amending that document to conform with the bill. Section 32 of the bill imposes the traditional disclosures for expandable condominiums. The right of the developer to expand the project expires within six (6) years if not exercised prior to that time. Section 66(2)(j) requires the plans to show proposed improvements, their location, and that the improvement is either "Must Be Built" or "Need Not Be Built." The administrator

(Department of Commerce) also reserves the right to impose additional disclosure requirements by rule. Accordingly, pursuant to Section 81A, any promotional material using any of these plans and specifications must bear the similar notation regarding "Must Be Built" or "Need Not Be Built."

Section 73 requires, similar to present practice, that "Detailed Architectural Plans and Specifications" be filed with the local unit of government rather than with the Department of Commerce. Where such plans are not available (conversion condominium projects), the developer must file an affidavit with the local unit of government stating their non-availability. There is no specific requirement of "As-Built" drawings.

Section 84(4) requires certain information to be disclosed and certain language to be inserted in all purchase agreements for the sale of units. Among these requirements are:

A. A statement that all funds paid by the prospective buyer shall be placed in escrow and will be returned to the buyer within three (3) days after such withdrawal should he validly withdraw from the purchase agreement.

B. A statement that modifies the existing ten (10) day review period and states "nine (9) business days" for a period of review.

C. A statement that after the contract becomes valid and the developer is required to retain any funds in escrow after the closing, money held in escrow will be held for any uncompleted items listed as "Must Be Built."

D. A mandatory paragraph relating to the arbitration provisions of the bill.

E. Language allowing a knowing waiver of the review period need not be inserted in the purchase agreement. However, should a buyer wish to waive his "nine (9) business days" review period, the waiver form must include an explanation of Section 84. Although not specifically stated in the bill such a waiver form would be presumably similar to present practice.

Section 84A states the requirements of the documents necessary to be given to a prospective purchaser in order to create a binding contract upon expiration of the "nine (9) business days." The requirements are:

A. The recorded Master Deed.

B. Copy of the Purchase Agreement.

C. Condominium Buyers Handbook.

D. Disclosure Statement.

The disclosure statement must include items similar to present practice and additional items made necessary by the bill. They include:

1. An explanation of the association's possible liability pursuant to Section 58 of the bill.

2. Names, addresses, and previous experience with condominium projects of the developer, management agency, broker, builder, maintenance and alteration contractor.

3. Projected budget for the first year of operation of the association.

4. Explanation of the escrow arrangement for Section 103A.

5. Statement of any express warranties together with a statement that no warranties are provided unless specifically stated.

6. Language explaining the consequences of an expandable condominium, (if applicable) pursuant to Section 32.

7. Language explaining the consequences of a contractable condominium, (if applicable) pursuant to Section 33.

8. Identification of items labeled "Need Not Be Built" pursuant to Section 66.

9. A statement concerning the extent to which financial arrangements have been provided for the completion of items labeled "Must Be Built" pursuant to Section 66.

10. All such other information as required by the administrator by rule.

If the project is a conversion condominium, the disclosure statement shall contain language similar to present practice including the condition of the main components of the building, a list of any outstanding building code violations, the date of last inspection for compliance with building codes and the date of construction.

At the time the prospective purchaser receives the required documents, Section 84A(B) requires the developer to provide a further form that explains the provisions of the section. Apparently similar in nature to those used in present practice, the signature of the prospective purchaser on this form would be prima facie evidence that the required documents were received.

TIME TO WITHDRAW

Section 84, the provision dealing with the time granted a purchaser to withdraw from a purchase agreement, which was a reservation and subscription agreement under the existing Act, is changed from ten (10) days to nine (9) business days. A business day is defined as "a day of the year excluding a Saturday, Sunday, or legal holiday," and the day the contract is signed is counted as the first day, if it is a business day. Any amendments of the purchase agreement by the purchaser and developer does not extend this time to withdraw. This may give additional time to withdraw, depending upon when the agreement is signed, but guarantees the developer and the purchaser an unambiguous method of determining exactly when an agreement becomes binding.

TRANSITIONAL CONTROL DATE

A source of friction between many developers and co-owners has been the transitional control date, "the date on which the board of directors for an association of co-owners takes office

pursuant to an election in which the votes which may be cast by eligible co-owners unaffiliated with the developer exceed the votes which may be cast by the developer." Although the bill does not specifically state so, Section 52 of the bill indicates that an association meeting must occur within 120 days from the date when 25% of the "units that may be created" have been conveyed, or 54 months from recordation of the required documents, whichever is earlier. At that meeting, the co-owners shall elect the following percentages of directors:

> At least one director if less than 25% of the "units that may be created" have been conveyed; At least 25% of board if 25% of the "units that may be created" have been conveyed; At least 33-1/3% of the board if 50% of the "units that may be created" have been conveyed; At least 100% of the board if 75% of the "units that may be created" have been conveyed.

However, the developer has the right to one director as long as it owns and offers for sale one unit or has any units that may be created. If application of the above formula results in a right to a fractional director, in an amount greater than 0.5, the co-owners are then entitled to elect an additional director if the additional director does not deprive the developer of representation on the board.

The advisory committee must be formed within 120 days after one year from the initial conveyance or conveyance of one-third of the "units that may be created," and ceases to operate on the transitional control date.

AMENDMENTS

Under the bill, amendments to the recorded documents are regulated by restrictions or reservations made in those documents. All amendments are effective upon recordation. Consistent with the intent of the bill, Register of Deeds Offices would apparently be concerned with only the recording statutes, not sufficiency of the document or authority for such amendment.

Section 39 allows reassignment of specific common elements in a manner consistent with present practice. Section 43 specifically keeps the requirement of a consolidated master deed for expandable or contractable projects.

Section 90 allows for amendments without the consent of co-owners or mortgagees if the amendment does not materially alter or change the rights of a co-owner or mortgagee and if the documents contain the right to amend. Proposed amendments which do materially alter or change such rights require a vote of "Not less than 2/3 of the votes of owners and mortgagees." The mortgagee shall have one vote for each mortgage held. A developer may reserve the right to amend for a specific purpose. If appropriate reservation is made, an amendment for such specific purpose does not require the consent of co-owners or mortgagees. An amendment cannot be made without the consent of the co-owner if it would change: A) The formula to determine percentage of value, B) Any provision relating to the right to rent the unit, or C) Assignment of limited common elements. All parties affected must be notified of the proposed amendments ten (10) days prior to recordation. Copies are to be sent to co-owners after recordation.

ARBITRATION

Disputes will always surface between co-owners and developers or between the association and the developer. The bill makes provision for a forum to resolve these disputes by allowing for

arbitration. Section 144 provides that a purchaser, a co-owner, or a tenant in a unit being converted can require the developer to submit to binding arbitration for civil disputes involving less than $2,500.00 and an association can require arbitration of a claim up to $10,000.00. Arbitration shall be conducted by the American Arbitration Association, pursuant to their rules. Costs are to be allocated by them pursuant to their rules. The bill does not reciprocally require the co-owner, purchaser, tenant, or association to submit to arbitration if requested by the developer and presumably without that consent, the developer is left to the courts for his sole remedy.

BUSINESS CONDOMINIUM

The term "business condominium" is a new term contained in the bill. Section 3(4) defines business condominium unit as "a condominium unit within a condominium project, which unit has a sales price of more than $250,000.00 and is offered, used, or intended to be used for other than residential or recreational purposes." A business condominium unit is exempted from complying with many of the requirements of the bill such as Section 84 which delineates the requirements of a purchase agreement, Section 103A which establishes the escrow requirements for completion of a project, Section 104 which provides for notice of conversion and right to extended leases, and Section 135 which sets forth the obligations of a successor developer.

A prospective purchaser of a condominium unit selling for in excess of a quarter million dollars, for other than residential or recreational purposes, is presumed to be sophisticated enough not to require some of the protection afforded other buyers.

MISCELLANEOUS

The new condominium act proposes several other changes in the present law and will undoubtedly affect future condominium practice. Land contract vendees are now specifically included in the definition of a co-owner, Section 6(1), if the condominium documents or land contract so provides. Detailed architectural plans and specifications will be filed with the local unit of government rather than with the administrator as is the present practice. There is no mention of "As Built" drawings in the bill. The reservation and subscription agreement is replaced by the "preliminary reservation agreement" and by the "purchase agreement" as defined in Section 9(4) and (5). The developer will no longer be required to be a licensed residential builder, provided the developer contracts with a licensed residential builder for construction of the project or a residential maintenance and alteration contractor for a residential project that requires only maintenance or repairs. All rights of the developer against the builder extend to the purchaser and the association.

A maximum limit of six (6) years after the initial recording of the required documents has been put on the time during which the developer can exercise his option to expand, contract, or convert any part of a condominium. Section 54(5) eliminates the need for bi-annual financial statements and requires statements be distributed only once each year. Successor developers who acquire the lesser of ten (10) units or 75% of the units in a project shall, by Section 135, assume all written warranty obligations of their predecessor, or provide insurance coverage for these warranty obligations, or maintain an escrow for these warranty obligations of 0.5% of the sale price of the unit involved until six (6) months after the expiration of the warranty period for that unit. A tenant in a conversion condominium may terminate his or her tenancy at any time after receipt of the notice of the proposed conversion provided the tenant gives the developer not less than 60 days notice. All enforcement power of the administrator under the existing act is to terminate three (3)

years after the effective date of the proposed act. Section 112 of the bill removes the previous statutory restriction of a one year minimum term of occupancy for the rental of units by either developer or co-owner. Such a restriction **may** be imposed by the developer in the documents. Section 90(4) requires that any proposed amendment changing the term of occupancy for rental of units can only be done with the consent of the co-owner so renting.

AN INTRODUCTION TO TIME-SHARING CONDOMINIUMS UNDER THE MICHIGAN CONDOMINIUM ACT[1]

by
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History Of Time-Sharing Condominiums

In the non-time-sharing context, condominium ownership involves the individual ownership of a condominium unit with the ownership, by all condominium unit owners as tenants-in-common, of the general and limited common elements. A time-sharing condominium involves the multiple ownership of a condominium unit so that each time-share owner becomes entitled to possession of the unit for a specific period of time each year.'[2] The concept of time-sharing condominiums began in the 1960s in Europe as the "Eurotel plan" in which 'rooms would be sold to individuals who were entitled to limited use of their respective rooms.'[3] The word "time-share" was borrowed from the computer industry.[4] Beginning in the early 1970s, developers in the United States began using this concept to aid in the sale of condominium inventories, with some success.[5]

In comparison to the purchaser of a condominium unit in a non-time-sharing condominium, the time-share unit purchaser is able to limit his purchase to the time during which he desires to use the unit, thereby reducing his cash outlay significantly, both for the initial purchase price and for the ongoing maintenance expenses. The time-share owner also obtains the advantages of property ownership, e.g., interest and real estate deductions and equity appreciation.

Statutes relating to time-sharing condominiums have been enacted in at least seven states: Colorado, Florida, Maine, New Hampshire, Oregon, South Carolina and Utah.[6] The Real Estate Time-Share Act was approved as a Uniform Act by the National Conference of Commissioners on Uniform State Laws in 1979 and was officially changed to a Model Act in 1980.[7] The Model Real Estate Time-Share Act is a comprehensive, albeit complex, piece of proposed legislation which, to the author's knowledge, has not been enacted in any state.[8]

The Concept Of Time-Sharing Condominiums Under The Michigan Condominium Act.

Section 46 of the Michigan Condominium Act[9] provides as follows:

> "Sec. 46. The developer or a co-owner may impose reasonable restrictions or covenants running with the land upon a condominium unit in the condominium project, in addition to the reasonable restrictions and covenants as may be contained in the condominium documents, so long as such restrictions and covenants are not otherwise prohibited by law and as long as they are consistent with the condominium documents. The restrictions and covenants may include provisions governing the joint or common ownership of condominium units in the condominium project and the basis upon which the usage of the condominium unit or condominium units may be shared from time to time by the joint or common owners thereof."

The section authorizes the developer to execute and record a "Declaration of Restrictions and Covenants" ("Declaration") which governs the rights and responsibilities of joint or common owners of condominium units. Section 62 of the Michigan Condominium Act[10] provides that a

condominium unit may be jointly or commonly owned by more than one person and, through the operation of Section 6(1)[11] and Section 9(2),[12] all of the joint tenants or tenants in common of each condominium unit would, collectively, be the "co-owner" of that unit. The creation of joint tenancies, with the attendant rights of survivorship, would be impractical for a time-sharing regime. Therefore, time-sharing condominiums under the Michigan Condominium Act have and will be established through a traditional conveyance of undivided interests in each condominium unit to tenants in common, coupled with restrictive covenants contained in a Declaration of Restrictions and Covenants. This method of establishing a time-sharing condominium was probably first used by the Innisfree Corporation of San Francisco in its Brockway Springs of Tahoe Development at Lake Tahoe, California in 1971.

The entire concept of a tenancy in common is, in many respects, completely antagonistic to a workable system of time-sharing condominium ownership. This incongruence must be resolved and eliminated by the Declaration which governs the time-sharing condominium.

In the absence of an agreement to the contrary, each tenant in common is entitled to continuous possession of "every part of the land to occupy and enjoy the whole."[13] An essential function of the Declaration is to define, with great particularity, the time periods during which each time-share owner is entitled to exclusive use of the condominium unit and the common areas appurtenant thereto ("Use Periods"). A related concept which must also be included for the successful operation of a time-sharing condominium is the specific definition of periods during which none of the tenants in common is entitled to possession of the condominium unit ("Service Periods"). These Service Periods may range in duration from several hours between each Use Period to a week or more, one or more times per year, for major maintenance operations.

The Declaration should provide that, during his respective Use Period, each owner is also entitled to authorize others to occupy the unit. This is necessary in order that the time-share owner be able to rent his Use Period to others or to exchange one or more of his Use Periods for similar Use Period(s) at another time-sharing condominium. However, due to the fact that the success of the time-sharing condominium depends entirely on the rights of each of the time-share owners to fully enjoy the condominium unit during his Use Period, several restrictions are advisable, in addition to those commonly contained in the non-time-sharing condominium documents. Such restrictions include the following:

1. Each owner should vacate the condominium unit at or prior to the time that his Use Period expires and leave the unit in a habitable condition for the owner of the next Use Period. Failure of an owner to leave the unit or its furnishings in such a condition should render such owner liable for actual damages to other owners of the unit and/or the manager of the condominium. In the resort context, such actual damages could be substantial including, among other things, the cost of a comparable hotel room.

2. No time-share owner should be allowed to make any improvements, decorations or repairs to the condominium unit or any of the furnishings contained in the unit.

3. No time-share owner should create or permit to exist any nuisance in the condominium or permit any waste with respect to the condominium unit or permit anything to be done or kept in the unit which would increase the rate of insurance on the unit or the furnishings.

Depending on the type of resort of which the time-sharing condominium is intended to be a part, other restrictions may be appropriate.

Another right which tenants in common typically have, which is inconsistent with the idea of a time-sharing condominium, is the right to seek judicial partition of the interest held as tenants in common.[14] Michigan courts have held that tenants in common may agree to waive the right to partition.[15] If the tenants in common did not waive their right to partition the property, any co-tenant could destroy the time-sharing regime by causing the condominium unit to be sold and the proceeds distributed among all of the co-tenants.

Each time-share owner should be required to pay the expenses which he incurs while he is using the condominium unit, e.g., long distance telephone charges, services specifically requested by the owner, cost of repairs for any damage which the owner or his family, guest, invitees, tenants or lessees caused to the condominium unit. In addition, each time-share owner should share, in proportion to his pro rata interest in the condominium unit, the common expenses of the condominium unit including real property taxes and assessments, utility charges, maintenance and replacement costs for the condominium unit and the furnishings, fire and liability insurance premiums, and any other expenses provided in the Declaration to be paid by the agent managing the condominium unit.

If (and when) any time-share owner fails to pay any of the foregoing expenses or becomes liable for any damages for failure to vacate the unit or other breach of the Declaration, the Declaration should provide that each of the other owners of time-share interests in that unit should have a lien on the time-share interest of the defaulting owner, with sufficient provisions for foreclosure of that lien.

The Declaration should provide that each time-share owner may mortgage or encumber his own time-share interest but that no owner shall have the right to mortgage or encumber any other owner's time-share interest and that any attempt to do so shall be void and subordinate to the provisions of the Declaration. Similarly, provisions should be included allowing any one or more of time-share interest owners to pay or discharge any lien which may result in the sale of the condominium unit and have the right to reimbursement from the owner of the time-share interest which was subjected to the lien so discharged. In addition, such owner or owners should have a lien for such reimbursement, as described above in connection with the payment of expenses, on the interest of the owner for which the lien was discharged.

Prior to 1979, it was thought that the lien which attaches under Section 6321 of the Internal Revenue Code for nonpayment of Federal taxes might be enforced against time-share owners by ordering the sale of the condominium unit and distributing the proceeds among the co-tenants.[16] However, Revenue Ruling 79-55 provides that the lien which attaches under Section 6321 attaches only to the time-share interest of the delinquent taxpayer and not to the interest of his co-tenants.

Each time-share owner should be provided with adequate notice of and opportunity to vote with respect to the affairs of the condominium association. Time-share owners should be allowed to vote on all matters on which co-owners in a non-time-sharing condominium are allowed to vote. Since all of the time-share owners of a particular condominium unit are collectively the "co-owner" of that unit, the vote for that unit should be determined by the majority of the votes of the time-share owners for the unit. Under Section 90 of the Michigan Condominium Act,[17] an amendment to the condominium documents which materially alters or changes the rights of co-owners, mortgagees

or other interested parties requires the consent of two-thirds of the votes of all the co-owners. The existence of a time-sharing condominium may cause some inequities under the current Act. For example, when voting on such an amendment, 90% of the time-share owners for each of 65% of the units together with 40% of the time-share owners of the remaining 35% of the condominium units could vote in favor of such an amendment and the amendment would fail, although 72.5% of the total of all time-share owners would have voted in favor of such amendment.

The management required in a time-sharing condominium is totally different from that required in a non-time-sharing condominium. The services required are akin to "hotel management" aggravated by the fact that, at any point in time, most persons who own interests in the condominium are not present for purposes of immediate decision making. Therefore, in order for the time-sharing concept to succeed, the Declaration must provide for broad powers to be vested in an agent to manage the condominium including maintenance and repair of units and the furnishings included therein, the payment of all expenses necessary or helpful to the condominium and, importantly, the enforcement and collection of assessments or other amounts due from time-share owners.

In order that the Declaration be successful in resolving these inconsistencies between a tenancy in common and the time-sharing condominium scheme, it must be valid and binding upon all existing and future time-share owners as a covenant running with the land. In order for the Declaration to qualify as a covenant running with the land 1) the grantor and grantee must have intended that the covenant run with the land, 2) the covenant must affect or concern the land with which it runs and 3) there must be privity of estate between the party claiming the benefit and the party who rests under the burden.[18] A properly drafted Declaration should satisfy these requirements and would run with the land and bind time-share owners in much the same way as similar declarations have in the subdivision context.[19]

Conclusion

The purpose of this article has been to present an overview of a time-sharing condominium under the Michigan Condominium Act. Because of the fact that the Michigan Condominium Act was not intended to extensively govern the establishment of time-sharing condominiums, the real "guts" of the time-sharing concept must be contained in a Declaration of Restrictions and Covenants which is separate from the normal condominium documents.

As previously stated, the time-sharing condominium is essentially the "condominiumization of the condominium." However, sufficient guidelines for the establishment of a time-sharing condominium are not included within the Michigan Condominium Act.[20] Additional legislation providing for the unique set of problems which time-sharing condominiums involve is needed.

Footnotes

1. MCLA §559.101, **et. seq.**

2. This has been referred to as "condominiumization of a condominium." Gray, **Pioneering The Concept of Time-Sharing Ownership,** 48 St. John's L. Rev. 1196, 1201 (1974).

3. Ellsworth, **Condominiums Are Securities?,** 2 Real Est. L.J. 694, 694 (1974).

4. Gray, **supra** note 2, at 1197.

5. **See** Gunnar, **Regulation of Resort Time-Sharing,** 57 Or. L. Rev. 31, 32n.4 (1977).

6. Dubord, **Time-Share Condominiums: Property's Fourth Dimension** 32 Maine L. Rev. 181, 217 (1980).

7. Model Real Estate Time Share Act (Vol. 7a U.L.A.).

8. **See also** Burek, **Uniform Real Estate Time-Share Act,** 14 Real Prop. Prob. and Tr. J. 683 (1979).

9. MCLA §559.146.

10. MCLA §559.162.

11. MCLA §559.106(1).

12. MCLA §559.109(2).

13. **Merritt v Nickelson,** 407 Mich 544 (1980).

14. MCLA §600.3304.

15. **Avery v Payne,** 12 Mich 540 (1864); **Eberts v Fisher,** 54 Mich 294 (1884).

16. **See United States v Overman,** 424 F2d 1142 (9th Cir. 1970); **United States v Trilling,** 328 F2d 699 (7th Cir. 1964).

17. MCLA §559.190.

18. **Burton-Jones Development, Inc. v. Flake,** 368 Mich. 122 (1962).

19. **Greenspan v. Rehberg,** 56 Mich. App 310 (1974).

20. SB 530, which deregulates the establishment of condominiums under the Michigan Condominium Act, includes some references to time-sharing. This Bill which was passed by the Michigan State Senate on June 17, 1982, and which is currently in the House Committee on Towns and Counties, however, does not provide sufficient guidance for the establishment of time-sharing condominiums.

FIRST MORTGAGE INTEREST RATE ON RESIDENTIAL REAL PROPERTY IN MICHIGAN

by
Patrick D. Hanes
Bos and Hanes

Under Michigan law, specifically MCLA 438.31(c), MSA 19.15(1)(c), the conventional first lien mortgage loan and land contract interest rate as to unregulated lenders has been 11% per annum for several years. However, with the advent of the Depository Institutions Deregulation and Monetary Control Act of 1980, specifically, 12 U.S.C. 1735(f)(7) (hereinafter referred to as the Act), the federal government has attempted to preempt the Michigan usury laws as it applies to first mortgages on residential property which the sellers occupy or have occupied as their principal residence. According to Russell E. LaCoursier, Economic Analyst for the Financial Institutions Bureau of the Michigan Department of Commerce, in an article appearing in the **Michigan Real Property Review**, Volume 9, Number 1, February, 1982, the Act also applies to land contracts. Mr. LaCoursier indicates that his view on land contracts represents the informal position of the legal counsel in the Department of the Attorney General. The argument is that a land contract qualifies as a first lien under Section 501 of the Depository Institutions Deregulation and Monetary Control Act of 1980 and thus the 11% ceiling has been preempted.

That portion of the Act which is applicable to this article is cited as Act Mar. 31, 1980, P.L. 96-221, Title V, Part A, Section 501, 94 Stat. 161; Oct. 8, 1980, P.L. 96-399, Title III, Section 308(c)(6), 324(a)(e), 94 Stat. 1641, 1647, 1648 and provides in part as follows:

> (a)(1) The provisions of the Constitution or the laws of any State expressly limiting the rate or amount of interest, discount points, finance charges, or other charges, which may be charged, taken, received, or reserved, shall not apply to any loan, mortgage, credit sale, or advanced sale which is —
>
> (A) Secured by a first lien on residential real property, by a first lien on all stock allocated to a dwelling unit in a residential cooperative housing corporation or by a first lien on a residential manufactured home; . . .

During congressional hearings on the Act in the sub-committee on Financial Institutions Supervision, Regulation and Insurance of the House Committee on Banking, Finance and Urban Affairs in the Ninety-sixth Congress, witnesses were concerned with the constitutionality of the federal government preempting the state usury laws. According to many commentators on this legislation, the Act was given the support of the Congress only because the financial situation in the United States was so pressing. Congress was made aware that many states had constitutional provisions establishing the usury ceiling and that such provisions would be extremely difficult to change and thus Congress felt it had to take the initiative to raise interest rates.

In an effort to give the Act the cloak of constitutionality a compromise was finally reached by adding a provision that the states could override the Act by legislative action. To this end, the Act further provides in part as follows:

> (b)(1) Except as provided in paragraphs (2) and (3), the provisions of sub-section (a)(1) shall apply to any loan, mortgage, credit sale, or advance made in any state on or after April 1, 1980.

(2) Except as provided in paragraph (3), the provisions of said sub-section (a)(1) shall not apply to any loan, mortgage, credit sale, or advance made in any state after the date (on or after April 1, 1980, April 1, 1983) on which such state adopts a law or certifies that the voters of such state have voted in favor of the provision, constitutional or otherwise, which states explicitly, and by its terms that such state does not want the provisions of said sub-section (a)(1) to apply with respect to loans, mortgages, credit sales, and advances made in such state.

Jesse B. Heath, Jr., in his article, "New Developments in Real Estate Financing," appearing in 12 **St. Mary's Law Journal** 811, 873, discusses this provision and explains that the preemption does not apply to a loan, credit sale or advance made in any state after March 31, 1980, if after this date and before April 1, 1983, the state or its voters, adopts a law overriding this preemption as it applies in that state. The preemption, however, will continue to apply to a loan, mortgage, credit sale, or advance made pursuant to a commitment entered into after March 31, 1980, and before the state overrides the preemption.

As of this date, the Michigan legislature has not eliminated the preemption. A couple of bills have been introduced but none have reached the Governor's desk for signature.

It is important to remember that Congress has made a distinction between permanent and traditionally built homes and manufactured homes. As discussed by William M. Burke, in "The New Federal Usury Law," 36 **The Business Lawyer** 1237, creditors who wish to take advantage of Section 501 for credit extension secured by a first lien on a residential manufactured home must comply with certain consumer protection regulations promulgated by the Federal Home Loan Bank Board. The Board's regulations place limitations upon late charges, deferral fees, pre-payment penalties and balloon payments; declare use of the actuarial method in computing the rebate of unearned finance charges upon pre-payment of the indebtedness; and require creditors to provide the debtor with a 30 day notice of default and right to cure before taking enforcement actions under the credit instrument. As a result of these additional requirements, the attractiveness of selling mobile homes under the Act is greatly diminished.

The Depository Institutions Deregulation Commission, which is the body established to promulgate rules under the Act, has been challenged in federal court by the United States League of Savings Associations in the case of **United States League of Savings Associations v. Depository Institutions Deregulation Commission**, Number 80-1486 (D. D.C., filed June 16, 1980). The suit alleges that the regulations promulgated under the Act are invalid because: (1) There was no opportunity for notice and comment as required by the Administrative Procedures Act; (2) No annual report was presented regarding its effect on financial institutions; (3) The statutory scheme for an orderly phaseout was ignored; (4) Rates were set above the market rate; and, (5) The phaseout of Regulation 2 was begun before thrift institutions were given new corresponding powers contemplated by Congress, such as NOW accounts. In the alternative, this suit seeks to have a portion of the statute declared unconstitutional. The theory of this case is discussed in more detail in 14 **Akron Law Review** 377 (1980), "Savings Associations and the Depository Institutions Deregulation and Monetary Control Act," by Robert W. Bartlett.

In a recent telephone conversation with the attorney representing the plaintiff in the case, I was informed that the United States District Court found the regulations improper but found the act to be constitutional. The decision regarding constitutionality was not appealed by the plaintiff

primarily because the issue of the improper regulations was the plaintiff's primary concern. (The attorney indicated that the decision was not reported.) The thrift institutions were not particularly interested in the constitutionality of the Act and it was explained to me that the issue was only given cursory attention by both sides.

In the only reported appellate case that this author has been able to locate, the Arkansas Supreme Court has addressed the question of the constitutionality of the Act. In **McInnis v. Cooper Communities, Inc.**, 611 SW 2d 767 (1981), the plaintiff purchased a residential lot from the defendant and gave back a note and mortgage at an interest rate which violated the Arkansas constitutional usury rate of 10%. The defendant's position was that the loan was valid because it came within the preemption provisions of the Depository Institutions Deregulation and Monetary Control Act of 1980. On the trial court level, the defendant's motion for summary judgment was granted, the court holding that the note and mortgage were valid under the Act.

The Arkansas Supreme Court reversed the trial court, holding that the Act was an invalid legislative exercise of congressional power pursuant to the Commerce Clause. However, after a change in the makeup of the Arkansas Supreme Court, by a 4 to 3 ruling, the Arkansas Supreme Court reversed its initial ruling and held that the Act was a valid exercise of congressional authority pursuant to the Commerce Clause.

In the initial holding of the Arkansas Supreme Court, the majority found that there was no specific provision dealing with the usury laws in the United States Constitution and that there was nothing in the Act as it applied to the factual situation in that case which pertained to the regulation of interstate commerce. The court went on to reason that the option allowing the state to exempt itself from the Act was further proof that the federal government had never contemplated that the Act was intended to regulate interstate commerce. If the "Feds" actually wanted to regulate commerce, why would they allow the states to opt out?

On review, the new majority cited **American Power Company v. S.E.C.**, 329 U.S. 90, 67 St. Ct. 133, 91 L. Ed. 103 (1946), for the proposition that Congress has the ability under the Commerce Clause to regulate economic affairs which have an impact on several states. The majority went on to say that Congress also has the power to regulate under the Commerce Clause even those transactions which are wholly intrastate activities, citing **Frye v. United States**, 421 U.S. 542, 95 S. Ct. 179, 44 L. Ed. 2d 363 (1975). The Court also cited the record of the congressional hearings on the Act for the conclusion that state usury laws have a significant impact on the economy by diverting credit out of state, stagnating the housing industry and resulting in the inability of farmers and small businessmen to borrow, all of which distorts and adversely affects the local and national economy, thereby affecting interstate commerce. Using this as authority and coupling it with the presumption of validity given to acts of Congress, **United States v. National Dairy Products Corporation**, 372 U.S. 29, 83 S. Ct. 594, L. Ed. 2d 561 (1963), the court found that the Act was valid.

In the second holding of the Arkansas Supreme Court, Justice Purtile's dissenting opinion acknowledges that the Supremacy Clause, Article 6, Clause 2 of the Constitution of the United States, declares that the Constitution and the laws made in pursuance thereof are the supreme law of the land. However, Justice Purtile states that he can find no authority in the Constitution or the amendments thereto which authorizes the Congress to regulate interest rates between contracting parties in the various states. Any such authority must be read into some part of the Constitution

and the majority seems to look to the Commerce Clause of Article 2, Section 8, of the United States Constitution. In today's atmosphere of far-reaching federal legislation, Justice Purtile felt that it is still hard to believe that the Commerce Clause of the United States Constitution has such a broad and all encompassing power to regulate a contractual loan agreement between two private parties which in no way involves any state or federal banks or savings and loans or any flow of money between any other state and the State of Arkansas.

This author is of the opinion that the state of the economy of the United States and of the several states is in such a sad state of affairs that the federal government had to take the initiative to develop legislation to help stimulate the economy. I cannot help but feel that the old saying "hard facts makes bad law" is very appropriate.

My primary concern is the advice to give to a client that is about to become a mortgagee or vendor of a land contract providing for an interest rate in excess of 11%. There is only one appellate court decision that addresses the issue. In light of the fact that the court first found the Act to be invalid, and on rehearing to find it valid, it would be foolish to give an opinion which was not conditioned upon unknown views of our Michigan appellate courts.

Under current rulings of the Michigan Court of Appeals finding usurious interest rates to be uncollectable and that any usurious interest paid would be applied to principal, the extremely large amounts of money at issue requires great circumspection in giving an opinion as to the validity of interest rates in excess of 11% per annum.

My office has developed the following paragraphs to include in opinion letters which pertain to a transaction which comes within the purview of the Act:

> The interest rate provided for in this transaction exceeds the interest rate of 11% per annum provided for by Michigan Law. However, the federal government has enacted the Depository Institutions Deregulation and Monetary Control Act of 1980 which purports to preempt the Michigan usury ceiling. The issue of the constitutionality of this Act has been raised in the federal committee hearings preceding the passage of the Act, by several legal scholars, and in some court cases. The Michigan appellate courts have not yet addressed the issue and our office can give no assurances as to a possible favorable ruling when Michigan courts finally resolve the issue.
>
> The significance of the issue of constitutionality arises from the fact that if your mortgagor, after default on the mortgage, convinces the courts that this transaction is governed solely by Michigan law, you face a tremendous financial loss. Under Michigan law, any interest which you already received will be credited to principal and you will not collect any future interest. In other words, your loan will be interest free.

This may seem very overcautious but the stakes are very high. As long as your client understands the situation and assumes the possible risk, there is no reason not to go through with the transaction.

A possibility that should be considered is whether the court, if it finds the Act to be unconstitutional, would come up with a way to make its ruling prospective rather than to punish the person relying upon the Act. This writer would welcome any suggestions or comments from anyone concerning this idea.

ANNUAL REPORT, 1981-82
by
David S. Snyder, Chairperson
Real Property Law Section

The following is the annual report of the Real Property Law Section of the State Bar of Michigan. This report is intended as a summary of the activity and accomplishments of the Section during the 1981-82 fiscal year.

Continuing Legal Education

From its inception, the Section has devoted a significant portion of its activity to the development of seminars, conferences and programs dealing with important developments in law pertaining to real property. Beginning in September and continuing through June, the Committee on Seminars has presented a series of "Homeward Bound" programs. These sessions are scheduled late in the afternoon and, as the title suggests, they are designed to reach a broad audience and encourage maximum attendance. The Homeward Bound Programs have been videotaped so that the Homeward Bound series is no longer limited to practicing attorneys in the Detroit Metropolitan area.

The annual winter conference was held in Chicago, Illinois. The subject was residential financing. Guest speakers included specialists from our own Section, a speaker from the Illinois Bar and a guest speaker from the Department of Housing and Urban Development. The 1982 summer conference will be held July 15 through July 17 at Mackinac Island. The subject matter will be "Commercial Real Estate Projects in Distress." It will deal with foreclosures, bankruptcy and other insolvency proceedings, and default remedies under commercial leases.

This year's summer conference will include a work session with the 1982-83 Committee Chairmen of the various Section Committees as a mini-convention to define various goals and implement the procedures for Committee activities during the forthcoming 1982-83 season. To facilitate the success of this, the Council has adopted a new procedure whereby the Chairperson-Elect of the Section reviews the Committee activities with the outgoing Section Chairperson and appoints the Committee Chairman for the ensuing year. Thus, the traditional delay in establishing Committees has been avoided and the Committees are in place, ready to begin immediately following the annual meeting.

In addition to the foregoing regular conferences and seminars outlined above, the Section has participated with ICLE in several one day programs. This year those programs included a seminar on land contracts and mortgages and one on real estate taxation under ERTA.

The Section will present a program on "Syndication of Real Estate" under ERTA at the Annual Meeting of the State Bar of Michigan in September, 1982.

A Breakfast Club has been established with monthly meetings at 7:30 a.m. to hear a guest speaker discuss timely subjects.

Publications

The **Michigan Real Property Review** is published six times each year under the supervision of Professor George J. Siedel of the University of Michigan, editor of the **Review.** The **Review** has

traditionally been distributed to all members of the Section. During the past year, distribution of the **Review** has been expanded to include all law libraries and judges throughout the state. The Section has arranged for manufacturing and printing of attractive binders for storage and use of the **Review** on a library shelf. A complete set of the **Review** in binders will be distributed to each bar library and law school in the state, including the law libraries of colleges and universities, all without cost to the recipient. Back issues of the **Review** and binders are available to members of the Section at cost.

Some time ago, the Section published a book containing reprints of selected **Review** articles. Copies of that book will also be distributed to each bar library, law school and law libraries in the colleges and universities throughout the state.

Commencing with the 1982-83 season, each incoming Chairperson of the Section will prepare an article for inclusion in the October issue of the **Review** dealing with the State of the Real Property Law Section.

Legislation

During 1980-81, members of the Section, including Rick Pennings, Pat Keating, Peter Nathan, Bob Bolton, Maurice Binkow and Ralph Jossman, under the leadership of Ralph Jossman, were instrumental in the creation of the new Construction Lien Act. That Committee was actively involved during the current year in the development of technical amendments and other supplemental amendments which have been adopted by the Legislature prior to the implementation of the Act.

Section Committees

During the 1980-81 season, the Council undertook a comprehensive restructuring of its Committees through the establishment of a standing Committee on Committees. Toward the conclusion of each year, the Committee on Committees will review activities of the various Committees to determine the necessity or desirability of restructuring Committees for the forthcoming year. At the end of the last year, a questionnaire was circulated to members of the Section seeking indications of Committee preferences. The response was overwhelming. A supplement to that questionnaire will be used during the coming year. In so far as it is possible, Committees have been staffed using the preferences indicated by members of the Section through their response to the questionnaire.

Mr. Edward Barry Stulburg, a member of the Zoning and Land Use Committee was recommended to the Governor's Task Force for the study of the Subdivision Control Act of 1968. At our request, Governor Milliken appointed Mr. Stulburg to that Task Force.

The former Condemnation Committee of the State Bar has now become a regular committee of the Real Property Law Section. We feel that the Section and the Bar will benefit greatly from the efforts of Bert Burgoyne and Walt Mason, Co-Chairmen of that Committee.

The Title Standards Committee has completed its work on the fourth edition of the Standards. It will be published immediately after probate standards are completed during the summer of 1982.

The Council

The Council of the Section consists of sixteen elected members plus the Chairperson of the Title Standards Publication Committee, and all past Section Chairpersons as ex-officio members. The Council meets monthly on the second Saturday of each month for the conduct of business, review of legislation, Committee reports and other matters that may be brought before the meeting from time to time. During the past year, the average attendance at these meetings approached ninety percent. We have invited the representative of the Student Law Section as liaison to attend the Council meetings and have gained much from the participation of Karen Glorio, who has attended regularly in that capacity.

The foregoing report has been submitted with a mixture of pleasure, nostalgia and anticipation; pleasure that has been derived from leading this active and vital Section, nostalgia derived from the rewards and friendships that have been established through the years of working with the members of the Council and Committees of the Section, and anticipation derived from achievements that are sure to follow under the future leadership of our next Chairperson, Bill Dunn.

THE LEGISLATIVE SCENE

USURY STATUTE EXTENDED ANOTHER SIX MONTHS

Act 193 of the Public Acts of 1982 has extended the effective date of the existing Michigan usury statute applicable to mortgages and land contracts (MSA 19.15(1c), MCLA 438.31c) from July 1, 1982 to December 1, 1982. The statute does not state explicitly that it is intended to override the preemption of the Depository Institutions Deregulation and Monetary Control Act of 1980 as permitted by that federal statute, and thus the federal preemption continues until the Michigan legislature acts further. Under the federal statute, the legislature has until April 1, 1983 to override the federal preemption. It is expected that bills like those previously introduced to revise the Michigan usury statutes will be considered further by the legislature in the fall.

Act 193 did not change any of the existing limits on interest rates except by the addition of a new section permitting an interest rate of 11% for certain purchase money mortgages and second mortgages described in the Act.

Senate Bill 30, revising the limited partnership act, has finally passed and is now Act 213 of the Public Acts of 1982.

House Bill 5879 was introduced just prior to the Legislature's summer recess. That Bill provides for stays and for partial payments with respect to foreclosure procedures against persons receiving unemployment benefits.

ACTION ON PREVIOUSLY REPORTED LEGISLATION

HB 5327 — Provides an income tax credit for qualified residential improvements to residences located in economic growth areas — 6-10-82, 2nd reading with substitute; 6-15-82, 3rd reading with substitute; 6-16-82, passed.

HB 5611 — Provides for licensing of residential builders without examination within five years of the expiration of a previous license — 6-2-82, 2nd reading with amendment(s); 6-3-82, amended; 6-17-82, 3rd reading with amendment(s), amended, passed.

HB 5693 — Extends the expiration date on the mortgage and land contract usury statute to December 1, 1982 — 6-28-82, approved by Governor as Public Act 193.

HB 5757 — Allows home rule cities immediate and retroactive effect for millage authorization for the fiscal year during which it was adopted if that effective date is specified in the proposal, and allows for county collection of these taxes — 6-2-82, 2nd reading with amendment(s); 6-3-82, 3rd reading with amendment(s); 6-7-82, passed; 6-8-82, Committee on Finance; 6-10-82, general orders with substitute; 6-16-82, 3rd reading with substitute; 6-17-82, passed; 6-17-82, Senate substitute concurred in, ordered enrolled.

SB 30 — Revises the limited partnership act — 6-2-82, 2nd reading with substitute; 6-3-82, 3rd reading with substitute; 6-7-82, passed; 6-16-82, House substitute concurred in as amended; 6-17-82, Senate amendment(s) concurred in; 6-17-82, ordered enrolled; 7-8-82, approved by Governor as Public Act 213.

SB 530 Deregulates the condominium process — 6-2-82, general orders with substitute; 6-16-82, 3rd reading with substitute as amended; 6-17-82, passed; 6-17-82, Committee on Towns and Counties.

SB 562 Repeals the state building commission — 6-2-82, 2nd reading; 6-8-82, 3rd reading; 6-16-82, Committee on State Affairs.

SB 600 Deletes the sunset date on the toxic substance control commission act — 6-16-82, 3rd reading; 6-17-82, passed; 6-17-82, Committee on Conservation, Environment and Recreation.

SB 819 Regulates surface coal mining and reclamation operations — 6-15-82, laid on table; 6-17-82, taken from table, general orders; 6-17-82, 3rd reading with substitute; 6-17-82, amended, passed.

NEWLY INTRODUCED LEGISLATION

HB 5769 Provides for the adoption of a mobile home bill of rights act — introduced by Rep. Fitzpatrick on 5-25-82 and referred to the Committee on Towns and Counties.

HB 5770 Requires mobile home parks with 100 or more spaces to have emergency shelters — introduced by Rep. Fitzpatrick on 5-25-82 and referred to the Committee on Towns and Counties.

HB 5786 Exempts assessors 65 years of age or older who have served as assessors for 10 years or more from education requirements for property tax assessors — introduced by Rep. Dodak et al on 5-27-82 and referred to the Committee on Taxation.

HB 5793 Provides for a lien against real property when money from a social services program is used to pay for purchase — introduced by Rep. Stacey and Gnodtke on 5-27-82 and referred to the Committee on Social Services and Youth.

HB 5795 Includes commercial personal property within the tax reduction provisions of the commercial redevelopment act — introduced by Rep. DeGrow on 5-27-82 and referred to the Committee on Taxation.

HB 5797 Allows vendor or dual party payments under certain circumstances to providers of living accommodations for GA or ADC recipients — introduced by Rep. Gnodtke et al on 5-27-82 and referred to the Committee on Social Services and Youth.

HB 5801 Repeals the act creating the state boundary commission — introduced by Rep. T. Brown on 5-27-82 and referred to the Committee on Towns and Counties.

HB 5802 Exempts charter townships with 5,000 population and SEV of $50,000,000.00 from annexation — introduced by Rep. T. Brown on 5-27-82 and referred to the Committee on Towns and Counties.

HB 5803 — Exempts townships with population of 5,000 and SEV of $50,000,000.00 from annexation — introduced by Rep. T. Brown on 5-27-82 and referred to the Committee on Towns and Counties.

HB 5817 — Requires a site survey and public hearing before establishment of certain group homes — introduced by Rep. Bryant on 6-2-82 and referred to the Committee on Mental Health.

HB 5818 — Conditions establishment of zoning upon obtaining site recommendation from the township — introduced by Rep. Bryant on 6-2-82 and referred to the Committee on Mental Health.

HB 5824 — Allows property tax abatement under certain circumstances for existing facilities located in an economic growth area — introduced by Rep. Knight and Hunter on 6-3-82 and referred to the Committee on Urban Affairs.

HB 5826 — Eliminates the county treasurer's fee as agent for collection of delinquent property tax payments — introduced by Rep. Padden and Conroy on 6-3-82 and referred to the Committee on Taxation.

HB 5833 — Extends certification date for school millage certification to December 10, 1982 for 1982 millage — introduced by Rep. Mathieu et al on 6-10-82 and referred to the Committee on Taxation; 6-15-82, 2nd reading; 6-17-82, 3rd reading.

HB 5853 — Provides a property tax exemption for parsonages occupied by any minister ordained by the religious society which owns the parsonage — introduced by Rep. Fessler et al on 6-16-82 and referred to the Committee on Taxation.

HB 5854-HB 5856 — Requires an applicant for zoning for an adult residential facility or adult foster care facility to pay the cost of notifying adjacent residents — introduced by Rep. Fessler et al on 6-16-82 and referred to the Committee on Urban Affairs.

HB 5865 — Enacts a rental housing quality enforcement act — introduced by Rep. J. Young et al on 6-17-82 and referred to the Committee on Urban Affairs.

HB 5866 — Revises the method of ceding jurisdiction of state land and water to federal jurisdiction — introduced by Rep. Binsfeld et al on 6-17-82 and referred to the Committee on Conservation, Environment and Recreation.

HB 5867 — Provides certain requirements regarding the ceding of state property rights to the United States — introduced by Rep. Binsfeld et al on 6-17-82 and referred to the Committee on Conservation, Environment and Recreation.

HB 5879 — Provides for stays and for partial payments in foreclosure proceedings against persons receiving unemployment benefits — introduced by Rep. Evans et al on 6-17-82 and referred to the Committee on Urban Affairs.

HB 5880	Provides an additional property tax credit for certain senior citizens — introduced by Rep. Ryan on 6-17-82 and referred to the Committee on Taxation.
HB 5881	Facilitates purchase of existing housing, provides for rehabilitating rental housing, and establishes certain restrictions on the transfer of ownership of rental properties involving the Housing Development Authority — introduced by Rep. Ryan et al on 6-17-82 and referred to the Committee on Urban Affairs.
HB 5886	Provides a procedure for assessment of costs for operation and maintenance of retention basins and requires submission to the governing body or county drain commissioner for approval as conditions of final plat approval — introduced by Rep. Holmes on 6-17-82 and referred to the Committee on Towns and Counties.
SB 839	Increases the allowable rate of interest on second mortgages for financial institutions to 21% — introduced by Sen. VanderLaan on 5-27-82 and referred to the Committee on Corporations and Economic Development.
SB 844	The same as HB 5880, described above — introduced by Sen. Ross on 6-2-82 and referred to the Committee on Finance.
SB 857	Provides general authority for the DNR to conduct administrative searches and excuses employees conducting such searches from trespass liability — introduced by Sen. Sederburg on 6-8-82 and referred to the Committee on State and Veterans' Affairs.
SB 863	Provides property tax authorization for hiring police officers to certain local units — introduced by Sen. Kelly on 6-9-82 and referred to the Committee on Finance.
SB 875	Requires purchasers of real property to file two copies of the purchase agreement with the assessor of the city or township where the property is located — introduced by Sen. DiNello on 6-17-82 and referred to the Committee on Finance.
SB 880	Provides for the renewal of licenses of residential builders without reexamination under certain circumstances — introduced by Sen. Gast et al on 6-17-82 and referred to the Committee on State and Veterans' Affairs.
SB 881	Permits a city to allow an income tax credit for housing rehabilitation — introduced by Sen. DeMaso on 6-17-82 and referred to the Committee on Finance.
SB 882	Provides for development and regulation of mobile home parks in multiple family zoning districts — introduced by Sen. O'Brien et al on 6-17-82 and referred to the Committee on Municipalities and Elections.
SB 886	Imposes insurance and bond requirements on facility operators and haulers of hazardous waste — introduced by Sen. Faxon et al on 6-17-82 and referred to the Committee on Commerce.
SB 888	Revises the airport concessionaire exemption from real property taxation of lessees — introduced by Sen. Faust on 6-17-82 and referred to the Committee on Finance.

SB 890 Excludes amounts attributable to creative financing from property tax assessments and eliminates the requirement of filing copies of a land contract or purchase agreement with the assessor — introduced by Sen. Pierce on 6-17-82 and referred to the Committee on Finance.

SB 896 Includes villages and townships in the definition of municipalities with respect to tax increment finance authority for distressed areas — introduced by Sen. DeMaso on 6-17-82 and referred to the Committee on Corporations and Economic Development.

SB 899 Provides for an escrow exchange fund for exchange of lands by the Natural Resources Commission if private individuals or the United States do not currently have land available for exchange — introduced by Sen. Irwin on 6-17-82 and referred to the Committee on Consumer Affairs, Forestry and Tourist Industries.

SB 900 With respect to tax reverted lands, provides for surveys and declarations as eligible for exchange by the Department of Natural Resources for certain privately owned lands for economic development and enhancement of recreational opportunities — introduced by Sen. Irwin on 6-17-82 and referred to the Committee on Consumer Affairs, Forestry and Tourist Industries.

Submitted by: Robert J. McCullen
Chairman, Committee on
Legislation

RECENT DECISIONS
by
Joseph Lloyd
Lloyd, Rutzky & Dodge

CASE NOTES

ARROWHEAD DEVELOPMENT COMPANY v LIVINGSTON COUNTY ROAD COMMISSION, ____ Mich ____, ____ NW2d ____ (No. 63742, June 28, 1982)

Subdivision Control Act — Developer's duty to improve county road

The question before the Supreme Court was whether the County Road Commission had the power: (1) to require that a subdivision developer open up a cul-de-sac on a proposed plat, creating an intersection with the county road, and (2) to require that the developer undertake improvements to the county road next to the platted property. It was argued by the Commission that these changes would be necessary for the safety of the users of the highway as well as for the safety of the owners in the subdivision.

The unanimous opinion of the Court was that the Commission had no such power. The developer has a duty to create safe roads within the subdivision. The greatest restriction which the Commission could require is that the subdivision be laid out in such a way that entry could safely be made therefrom onto county roads. It would not be permissible to impose the entire cost of an off-site improvement on a single developer where other persons or property would be specifically benefited.

BOROWSKI v WELCH, ____ Mich App ____, ____ NW2d ____ (No. 58412, July 12, 1982)

Building and Use Restrictions — Motor Homes

The Building and Use Restrictions in the plaintiff Subdivision stated: "No house trailer, trailer, coach, tent or temporary shelter ... shall be parked ... on said premises." The defendant owned and parked on his property a self-propelled motor home. The motor home was 20 feet long and 7 feet wide. The defendant used it as his daily transportation to and from work as well as for family vacations. The motor home could sleep from 4 to 6 persons, and on at least one occasion, the defendant had slept in the motor home while parked in his driveway. The Plaintiff sought injunctive relief forbidding parking the motor home in the driveway. The trial court denied the injunction, stating that the restrictions failed specifically to include motor homes, and that rules of construction required that the court find in favor of free use of property. The Plaintiff subdivision appealed.

The court of appeals, reviewing the case de novo, reversed the trial court. It noted that it must give effect to the Building and Use Restrictions as a whole, when the intent of the parties is clearly ascertainable. It was found that the purpose of the restriction was to prohibit a general class of large vehicles which may be eyesores destroying the aesthetics of a neighborhood.

ARDMORE PARK SUBDIVISION v SIMON, ____ Mich App ____, ____ NW2d ____ (No. 57895, June 9, 1982)

Building and Use Restrictions — Amendment — Binding effect

The original deed restrictions in the plaintiff subdivision had been amended by a majority of the owners. The amended restrictions prohibited erection of any fence over 4 feet in height. It was provided that the restrictions might be amended by majority vote of the owners in the subdivision, but there was no provision in the restrictions that specifically bound a non-consenting property owner to the amendment. The defendant and her predecessor in title had never acceded to the amendment of the restrictions.

At issue in the case was the subdivision's request for an injunction against the erection of a 6 foot fence. The trial court granted summary judgment for the property owner, reasoning that in order for the amendment to bind a non-consenting property owner, specific language to that effect would have to be in the restrictions. The Court of Appeals reversed, holding that the right to amend, plainly and unambiguously found in the original restrictions, would be meaningless without the right to bind the non-consenting minority.

FRENCHTOWN VILLA v MEADORS, ____ Mich App ____, ____ NW2d ____ (No. 57255, July 12, 1982)

Retaliatory Eviction — Statute inapplicable to fixed term lease

The plaintiff, a mobile home park, leased space to the defendant. In 1979 the plaintiff sought to terminate the defendant's month to month tenancy. After litigation in the District Court, it was held that the plaintiff had failed to offer the defendant a lease as required in the Mobile Home Act, and that the failure to comply with the act constituted a defense to the suit. The parties thereafter executed a six month lease. Upon expiration of the lease period, the plaintiff commenced summary proceedings to recover the premises. The defendant raised the defense of retaliatory eviction. The trial judge rejected that defense, stating that it was not available as a matter of law at the expiration of a written, fixed term lease.

The Court of Appeals affirmed the trial judge. The court based its holding on a strict reading of the retaliatory eviction statute. The statute prohibits recovery of the premises where "the termination" was intended primarily as a penalty. The court distinguished "termination" from "eviction," and held that the termination in the present case was a matter of contract, occuring automatically as the lease expired, irrespective of any motive of the landlord. The court noted the loophole created for an "unscrupulous landlord" wishing to circumvent the statute, but found itself constrained to strictly construe the statute.

MILLER v VARILEK, ____ Mich App ____, ____ NW2d ____ (No. 54697, June 10, 1982)

Rescission — Mutual Mistake — limitation of caveat emptor

The plaintiff bought lakefront property and discovered shortly after closing that the septic system was inoperable. The Plaintiff thereupon sought rescission on the grounds of mutual mistake. There was no evidence that the defendants had any knowledge of the problems with the septic system. Testimony at trial showed that at least two alternative systems of waste disposal were available to the plaintiff. The trial court refused to grant rescission, reasoning that an inspection would have revealed the problem and that therefore the rule of caveat emptor should apply.

The court of appeals reversed the trial court. The court allowed rescission of the contract on the grounds of mutual mistake, failure of consideration or innocent misrepresentation, when the property purchased turned out to be wholly valueless, following the case of **Lenawee County Board of Health v Messerly**, 98 Mich App 478, 295 NW2d 903 (1980), lv granted 411 Mich 900 (1981).

The **Messerly** and **Miller** cases make further inroads in doctrine of caveat emptor in the sale of used residential and commercial property. In neither case was it contended that the subject matter of the defect was discussed by the parties or the subject of inquiry by the purchaser. In both cases it appears that the Seller was himself ignorant of the defect. The effect of these cases, then, comes quite close to the creation of an implied warranty of the condition of used property. It will be most important to note how the Supreme Court treats these issues in its review of **Messerly**.

BERNARD F. HOSTE, INC. v KORTZ, ___ Mich App ___, ___ NW2d ___ (No. 56456, June 23, 1982)

Licensing — Builders — Enforcement of contracts

The plaintiff as an individual had applied for a residential builder's license. Acting through a corporate shell, he contracted to remodel the defendant's home. After completion of the renovation, the defendant refused to pay for the work done and the plaintiff brought suit. The trial court granted summary judgment for the defendant under the Residential Builder's Act, MCLA 338.1501, et seq., MSA 18.86(101) et seq., holding that a builder unlicensed at the time of signing the contract may not maintain a suit for compensation. The defendant appealed.

The Court of Appeals affirmed the trial court, holding that: (1) a license granted to an individual does not apply to his wholly owned corporation; (2) the fact that an application for licensure was in process did not give the builder permission to operate prior to granting of the license; and (3) the builder was not in "substantial compliance" when he did not have a license at the time of signing the contract.

SECTION NEWS

About the Authors:

James P. Babcock, who is a graduate of Georgetown University and the Detroit College of Law, is currently a partner in Caputo, Babcock & Company in Warren and works in various phases of real estate law. He is a member of the Real Property Law Section of the State Bar, Vice President of the St. Clair Shores Bar Association, and a member of the Condominium Committee of the Builders Association of Southeastern Michigan. Mr. Babcock is a licensed residential builder and real estate broker and was formerly associated with C. W. Babcock & Sons, who have developed, sold, and currently manage over sixty-five co-operative and condominium complexes in the Metropolitan Detroit area.

Jeffery R. Jones is a graduate of American University in Washington D.C. and was admitted to both the Virginia and Michigan Bars in 1976 and the District of Columbia Bar in 1977. He is currently a sole practitioner in Birmingham working in the area of real estate law and specifically developer and association condominium representation. He has been the legal counsel for over 25 condominium conversion projects in over ten (10) states. He is a member of the Real Property Sections of the American Bar Association and State Bar. He is currently a member of the Condominium Committee of the Real Property Section and Chairman of its New Legislation subcommittee. He has lectured and provided seminars on condominium conversions to various real estate broker and salesperson associations.

Mark S. Keegan, an associate in the law firm of Butzel, Keidan, Simon, Myers & Graham, specializes in the practice of law related to the development and financing of real estate, both commercial and residential. He is a member of the Real Property Law and Environmental Law Sections and the Condominium, PUDS and Cooperative Committee of the State Bar of Michigan. He and Robert S. Bolton of the same firm presented a seminar on **Assignment of Rents and Appointment of Receivers** in the "Homeward Bound" Continuing Legal Education Program sponsored by the Real Property Law Section.

Patrick D. Hanes attended Michigan State University, where he received a Bachelor of Arts in 1971, and graduated with distinction from Thomas M. Cooley Law School in January of 1976. Mr. Hanes was admitted to the practice of law in the State of Michigan in May of 1976 and is a partner in the Lansing law firm of Bos and Hanes. A substantial portion of Mr. Hanes' practice concerns real estate and he has been a licensed real estate broker since 1977. He is a member of the Real Property Law Section of the State Bar of Michigan (and its Construction Lien Law Committee) and is a member of the American Bar Association. He has been a speaker at various landlord-tenant seminars throughout the State of Michigan and has acted as a Trial Advocacy Judge for Cooley Law School. In 1980 he was a commentator for the Institute of Continuing Legal Education on landlord-tenant law and has published the book "Key to the Courtroom." In May of 1980 Mr. Hanes was admitted to the United States Supreme Court Bar and is currently lecturing in Michigan on the new Mechanic's Lien Law. Mr. Hanes also wrote the book "Michigan's Mechanic's Lien Law — a Contractor's Guide" in 1981, and was co-author of an article appearing in the **Michigan Real Property Review** of the Michigan Bar Association dealing with the Construction Lien Act.

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Our special thanks to **William K. Van't Hof,** who chairs the Condominiums, PUDs and Cooperatives Committee, for arranging publication of the Babcock and Jones, and Keegan articles.

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During the annual Summer Conference on Mackinac Island, the Section Council decided to change the **Review** from a bimonthly to a quarterly publication. The **Review** will continue as a bimonthly publication until the end of this year (Volume 9, Number 6) and then, beginning in 1983, will be published on a quarterly basis. It is anticipated that the nature and number of articles appearing in the **Review** will remain unchanged.