



M I C H I G A N REAL PROPERTY REVIEW

Published by the Real Property Law Section State Bar of Michigan

Fall 2010, Vol. 37, No. 3

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The Michigan Real Property Review is the official journal of the Real Property Law Section of the State Bar of Michigan. The Review is published quarterly and is a significant part of the Section's program of publications, seminars, conferences, legislative liaison and other undertakings for the professional education and development of its members and the Bar.

The Section encourages interested members of the Bar to contribute articles and other publishable material relating to real property law and of interest to the profession. Manuscripts are reviewed by attorneys experienced in the subject matter covered by each article.

Readers are invited to submit articles, comments and correspondence to Lynda J. Oswald, Editor, University of Michigan Ross School of Business, 701 Tappan Street, Ann Arbor, Michigan 48109-1234 (ljowald@umich.edu). The publication of articles and the editing thereof are at the discretion of the Publications Committee. A cumulative index of articles is compiled annually and is available on the Section website: www.michbar.org/realproperty/realproperty.cfm in January of each year.

Articles in the *Review* may be cited by reference to the volume number, abbreviated title of the publication, the appropriate page number and the year of publication as, for example, 14 Mich Real Prop Rev 35 (1987).

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The *Michigan Real Property Review* is published by the Real Property Law Section of the State Bar of Michigan. An annual subscription to the Review commences in September of each year and ends in August of the following year. Four issues are published each year. The subscription price is \$45 annually, payable in advance. Orders for subscriptions should be sent, with the above-stated payment, to *Michigan Real Property Review*, Real Property Law Section, State Bar of Michigan, Michael Franck Building, 306 Townsend Street, Lansing, Michigan 48933-2012.

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Chairperson's Report

by Mark P. Krynski

Jerry Pesick's term as Chairperson of the Real Property Law Section came to a successful conclusion at the Summer Conference in July at Crystal Mountain Resort and Spa. Jerry did an outstanding job as Chairperson. He is hard working, thoughtful, resourceful, courteous and efficient. He ran great meetings and did a wonderful job speaking on behalf of the Section, meeting with legislators and dealing with the day-to-day issues of running a Section with a few thousand members. Jerry is a great advocate, a fine technician and more importantly, a good person. He is one of the nicest and most considerate people I have had the pleasure of working with, without being a pushover. I think I also managed to successfully embarrass him in front of a couple of hundred people when I expressed my sincere love and devotion to him at the handing over of gavel ceremony at the Summer Conference.

Jerry started a number of initiatives last year that will be continued in the upcoming year. Jerry noted that our leadership and general membership were aging and that we needed to make a concerted effort to bring in new faces and ideas. We have had a number of events with the Young Lawyers Section and have made significant outreach efforts to individual lawyers we know at law firms throughout the state to get newer members of their firms involved in the Section. We have put new people in the position of leadership where they have performed enthusiastically and well. We hope the influx of new faces and new ideas will continue to expand the Section's primary goal of providing relevant continuing legal education for its membership.

The programs we have put on in the recent past and the ones we will be putting on for the foreseeable future reflect the times in which we live. As I mentioned in the E-newsletter, it seems that we cannot have too many foreclosure or workout programs: this is the knowledge and skills that our membership seems to need most in these difficult times where most of the work is bad news work. There seem to be some brighter spots on the horizon (some new healthcare development work, some movement in the multi-family housing sector and some new private and public partnership developments). However, development work seems sparse and most of us today are still spending our time dealing with litigation, loan workouts, landlord-tenant workouts and disputes and other matters that reflect the dismal state of the economy and the real estate industry in general.

One of the more active tables of the Summer Conference was the one concerning urban farming. We are looking at putting together a program that addresses this interesting topic and, as time goes on, seemingly more realistic area of practice. Alternative energy sources and alternative financing will also be popular topics for upcoming programs. If you have an idea for a seminar topic or if there is a particular speaker you would like to hear from, please give us a call at (248) 644-7378 or email us at sbmrpls@gmail.com. We look forward to hearing from you, seeing you at this year's programs and to your helping to bring us new ideas and new faces so that we can continue to serve the members and our varied geographical locations and practice areas.

The End of Trespass-Nuisance in Michigan? *Blue Harvest, Inc v Department of Transportation*

by Jason C. Long*

I. Introduction

It can be a daunting task for a private property owner to attempt to recover for damages to its property from a governmental agency. The standards governing claims for inverse condemnation and regulatory takings, common claims for relief against governmental bodies, often result in courts denying property owners any relief, even when the courts recognize the damage.¹ In Michigan, however, “trespass-nuisance” provided an alternative means for private property owners to recover when governmental activity resulted in damage to their properties. The Michigan Supreme Court has explained that trespass-nuisance is “trespass or interference with the use or enjoyment of land caused by physical intrusion that is set in motion by the government or its agents and resulting in personal or property damage.”² To prevail on a trespass-nuisance claim, a property owner must demonstrate “condition (nuisance or trespass); cause (physical intrusion); and causation or control (by government).”³

Trespass-nuisance has been considered a tort. As such, claims for trespass-nuisance generally beget a governmental immunity defense, with governmental bodies arguing that the damage resulted from an immune governmental function.⁴ For many years, Michigan courts recognized an exception to immunity for trespass-nuisance claims, but applied the exception only to claims against local governmental bodies, including cities, townships, and road commissions. During the early 2000s, the Michigan Supreme Court reconsidered the trespass-nuisance exception, deciding that by allowing an exception for local governmental bodies, Michigan courts had been misconstruing the Governmental Tort Liability Act (“GTLA”), which granted those bodies immunity. In *Pohutski v City of Allen Park*, the Supreme Court therefore held that local governmental bodies are immune from trespass-nuisance claims.⁵ But *Pohutski* did not require the Court to decide whether the State of Michigan is also immune.

The Michigan Court of Appeals made that decision in *Blue Harvest, Inc v Dep’t of Transp.*⁶ Following *Pohutski*, the court of appeals analyzed the State’s historical common-law immunity to determine whether it supported a trespass-nuisance exception. Concluding that it did not, the court held that the State is immune

1 See, e.g., *Spiek v Dep’t of Transp.*, 456 Mich 331, 348-51; 572 NW2d 201 (1998) (recognizing harm to the plaintiffs’ properties but denying any relief in an inverse condemnation setting); see also *Bevan v Brandon Twp.*, 438 Mich 385, 391; 475 NW2d 37 (1991) (denying relief in a regulatory taking setting).

2 *Hadfield v Oakland County Drain Comm’r*, 430 Mich 139, 169; 422 NW2d 205 (1988).

3 *Id.*

4 See MCL 691.1407(1) (“a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function”).

5 465 Mich 675, 688; 641 NW2d 219 (2002).

6 ___ Mich App __; ___ NW2d __ (2010).

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from trespass-nuisance claims. Absent the Michigan Supreme Court intervening, the decision in *Blue Harvest* leaves no governmental body, State or local, subject to liability for trespass-nuisance. Thus, *Blue Harvest* may have yielded the end of trespass-nuisance in Michigan.

II. Trespass-Nuisance: Origin and Evolution

For over 140 years, trespass-nuisance claims provided a means for property owners to recover for certain types of damages resulting from governmental activity. Throughout the history of trespass-nuisance, however, governmental immunity's applicability to the claim has been controversial. During the early 2000s, the Michigan Supreme Court made clear that political subdivisions of the State are immune from trespass-nuisance claims. But the Court did not address the State's immunity.

A. The Beginning

One of the earliest examples of a trespass-nuisance claim arose in *Pennoyer v City of Saginaw*, where a property owner successfully sued the city for damage to his property resulting from runoff from the city's drainage ditches.⁷ Another early instance arose in *Ashley v City of Port Huron*, where a city sewer flooded the plaintiff's property. The Michigan Supreme Court analogized the flooding to the city constructing a road through a property without first acquiring right-of-way:

The right of an individual to the occupation and enjoyment of his premises is exclusive, and the public authorities have no more liberty to trespass upon it than has a private individual. If the corporation send people with picks and spades to cut a street through it without first acquiring the right of way, it is liable for tort; but it is no more liable under such circumstances than it is when it pours upon his land a flood of water by public sewer so constructed that the flooding must be a necessary result. The one is no more unjustifiable, and no more an actionable wrong, than the other. Each is a trespass, and in each instance the city exceeds its lawful jurisdiction.⁸

7 8 Mich 534 (1860).

8 35 Mich 296, 300 (1877).

Notably, the Court in *Ashley* rejected the trial court's reasoning that the city was immune from claims for injuries resulting from the sewer's construction.⁹ In fact, Michigan courts would go on to hold that cities, townships,¹⁰ boards of education,¹¹ and other political subdivisions of the State¹² could be liable for trespass-nuisance, notwithstanding governmental immunity, well into the 20th century.

B. The Middle

In response to the Michigan Supreme Court abolishing common law immunity for cities in *Williams v City of Detroit*,¹³ the Michigan Legislature adopted the GTLA, now known as the Governmental Immunity Act.¹⁴ As a reaction to the Court ending cities' immunity, as well as "in anticipation of a similar demise of immunity for counties, townships, and villages," the Legislature adopted the GTLA "to not only restore governmental immunity to non-sovereign governmental agencies, but to provide uniform treatment for state and local agencies."¹⁵ The Legislature implemented this in GTLA § 7, which grants immunity to governmental agencies and affirms the State's immunity:

Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function. Except as otherwise provided in this act, this act does not modify or restrict the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed.¹⁶

9 See *id.* at 297.

10 See, e.g., *Robinson v Wyoming Twp*, 312 Mich 14; 19 NW2d 469 (1945).

11 See, e.g., *Ferris v Bd of Ed*, 122 Mich 315; 81 NW 98 (1899).

12 See, e.g., *Rogers v Kent Co Rd Comm'rs*, 319 Mich 661; 30 NW2d 358 (1948).

13 364 Mich 231; 111 NW2d 1 (1961).

14 MCL 691.1401 *et seq.*

15 *Ross v Consumers Power Co*, 420 Mich 567, 605; 363 NW2d 641 (1984).

16 MCL 691.1407.

During the 1980s, the Michigan Supreme Court issued an important decision concerning the breadth of governmental immunity in *Ross v Consumers Power Co (On Rehearing)*.¹⁷ Writing for the Court, Justice Brickley summarized the decision in *Ross* by explaining that the GTLA's grant of immunity "is broad and encompasses most of the activities undertaken by governmental agencies," and that broad immunity "is the result envisioned by the enactors of the governmental immunity act."¹⁸

In the wake of the Supreme Court emphasizing the breadth of governmental immunity in *Ross*, it again addressed the interaction between immunity and trespass- nuisance in *Hadfield v Oakland Co Drain Comm'r*. There, several property owners respectively sued governmental agencies, including a drain commission, several cities, and the State, asserting a variety of nuisance-based claims, including trespass- nuisance. The governmental defendants argued that the GTLA granted them immunity.

Justice Brickley again delivered the Court's opinion, rejecting the immunity argument based on an interpretation of the GTLA's language. He explained that, taken alone, the first sentence of GTLA § 7 supported the governmental bodies' assertion of immunity:

Taken alone, the first sentence of § 7 does support a narrow interpretation of the act, to preclude recognition of any nuisance exception. The Legislature's use of the word "tort" to describe the liability from which governmental agencies are to be held immune exemplifies the breadth of the intended immunity. There is no doubt that nuisance is a tort and that liability for nuisance would be within the scope of statutory governmental immunity as expressed in the first sentence of § 7.¹⁹

But Justice Brickley went on to explain that granting the governmental bodies immunity under the first sentence would be contrary to GTLA § 7's second sentence, which required analysis of the common law of immunity predating the GTLA's adoption:

¹⁷ 420 Mich 567; 363 NW2d 641 (1984).

¹⁸ *Id.* at 620-21.

¹⁹ *Hadfield*, 430 Mich at 147 (footnote omitted)

[T]he second sentence of §7 retains preexisting governmental immunity law except where provided otherwise in the act. In *Thomas v Dep't of State Hwys*, we interpreted the second sentence, noting, "[obviously] this language must be construed as an 'affirmation' of case-law precedent on the subject of the state's immunity."²⁰

Accordingly, *Hadfield* concluded that the GTLA "requires a continuation of the nuisance exception as formulated prior to the enactment of the" GTLA.²¹ The Court then analyzed the nuisance claims against each of the governmental defendants in light of historic nuisance law, holding several of the cities and townships liable.²²

Two years after the Supreme Court's decision in *Hadfield*, the Court reiterated the "historical approach" to the GTLA's exceptions to immunity in *Li v Feldt*.²³ The Court's decision in *Li* seemingly settled the immunity issue. In fact, during the 1990s, the trespass- nuisance debate shifted away from immunity and into the finer points of the claim, such as whether trespass- nuisance claims based on sewage backflows required the property owner to demonstrate governmental negligence.²⁴

C. The Beginning of the End

The Supreme Court waded into the dispute over whether negligence is an element of a trespass- nuisance claim arising out of a sewage backflow when the Court granted leave to appeal in *CS&P, Inc v City of Midland* in October, 1999.²⁵ But by that time, most of the Justices that had decided *Hadfield* and *Li* were gone; six of the

²⁰ *Id.* at 147 (citation omitted) (second brackets in original)

²¹ *Id.* at 149. It is noteworthy, however, that in the case in which the State was the defendant, the court concluded that there were no facts that would have supported a trespass- nuisance claim in any event. *See id.* at 194-95. Thus, even in *Hadfield*, the State was not held liable for trespass- nuisance.

²² *See id.* at 194-95.

²³ 434 Mich 584, 590-91; 456 NW2d 55 (1990).

²⁴ *See, e.g., CS&P, Inc v City of Midland*, 229 Mich App 141; 580 NW2d 468 (1998) (holding that negligence is not an element of a trespass- nuisance claim based on a sewage backflow flooding a property).

²⁵ 461 Mich 880; 603 NW2d 269 (1999).

Court's Justices had not been involved in *Hadfield*, and a majority of them had demonstrated their willingness to reconsider issues that they believed had been wrongly decided.²⁶ Perhaps on that basis, when the parties briefed the negligence issue in *CS&P*, the Michigan Municipal League submitted an amicus curiae brief suggesting that the Court should reconsider the trespass-nuisance exception to governmental immunity altogether.²⁷

Instead of considering negligence or reconsidering immunity in *CS&P*, the Court vacated leave to appeal. Justice Corrigan issued a concurrence to the Order vacating leave to appeal in which she explained her reasoning that the Court should not consider the finer points of trespass-nuisance until it first reconsidered the more fundamental immunity issue:

Although this Court granted leave to address the question whether negligence is an element of the trespass-nuisance exception to governmental immunity, I cannot overlook a more fundamental question brought to this Court's attention by amicus curiae, the Michigan Municipal League. Amicus argued that the second sentence of MCL 691.1407(1) . . . "compels the conclusion that there is no trespass nuisance exception to a city's governmental immunity . . ." On its face, this argument seems to have considerable merit. Accordingly, I am persuaded that we should not address the finer points of the trespass-nuisance exception without first reconsidering the question whether there is statutory authority for the trespass-nuisance exception in the plain language of the [GTLA].²⁸

As Justice Corrigan stated, however, "Because the parties ha[d] not briefed the question," *CS&P* did "not present such an opportunity."²⁹

The opportunity to reconsider the immunity issue presented itself soon afterward in *Pohutski v City of*

Allen Park.³⁰ That case was a class action in which a number of property owners asserted trespass-nuisance claims against several municipalities based again on sewage backflow.³¹ With Justice Corrigan delivering the opinion, the Court held that *Hadfield* was wrongly decided and that the GTLA granted the municipalities immunity from trespass-nuisance claims. To reach that decision, the Court relied on precisely the same language in the GTLA that *Hadfield* had relied on to support its conclusion that there is a trespass-nuisance exception. But *Pohutski* emphasized that the first sentence in § 7 applied only to "governmental agencies," which the GTLA defines to include both the State and local governmental bodies, while the second sentence applies only to the State itself. *Pohutski* therefore adopted Justice Griffin's dissenting opinion in *Li*, which reasoned that *Hadfield* had erred in applying the historical analysis called for in GTLA § 7 to local governmental bodies:

A literal reading of the second sentence of § 7 seems, at most, to require an historical analysis of the *state's* common-law immunity. The significance of the Legislature's use of "governmental agencies" in the first sentence and the "state" in the second sentence is underscored by the definitions expressly given those terms in the act. "Governmental agency" is defined as "the state, political subdivisions, and municipal corporations." The "state," on the other hand, is defined as "the state of Michigan and its agencies, departments, [and] commissions . . ." . . . Thus, assuming arguendo that the second sentence of § 7 requires an historical analysis, it should be applied to the "state" and not other "governmental agencies."³²

The *Pohutski* Court agreed with Justice Griffin that the "second sentence of § 7 was merely intended to prevent further erosion of the *state's* common-law immunity, rather than preserve any common-law exceptions to *governmental* immunity."³³

26 See, e.g., *McDougall v Schanz*, 461 Mich 15, 32; 597 NW2d 148 (1999) (overruling *Perin v Peuler (On Rehearing)*, 373 Mich 531; 130 NW2d 4 (1964)).

27 See *CS&P*, ___ Mich __; 614 NW2d 585 (2000) (Corrigan, J., concurring).

28 614 NW2d at 585 (Corrigan, J., concurring).

29 *Id.* (Corrigan, J., concurring)

30 465 Mich 675; 641 NW2d 219 (2002).

31 See *id.* at 678.

32 *Id.* at 688, quoting *Li v Feldt*, 434 Mich at 598-600 (Griffin, J., concurring in part and dissenting in part).

33 *Id.*, quoting *Li v Feldt*, 434 Mich at 605 (Griffin, J., concurring in part and dissenting in part).

Having rejected the historical analysis that *Hadfield* adopted, the question left for the Court was whether the GTLA's language contained an exception for trespass-nuisance claims against "governmental agencies" such as cities and townships. After reviewing the GTLA's exceptions, which are limited to the highway exception, the motor vehicle exception, the public building exception, the proprietary function exception, and the governmental hospital exceptions, the Court held that "trespass-nuisance simply is not one of the five exceptions to immunity set forth in the governmental tort liability act."³⁴ Thus, the Court overruled *Hadfield*, emphasizing the need to "honor the intent of the Legislature as reflected in the plain and unambiguous language of the statute."³⁵

Importantly, the Court made explicit in *Pohutski* that its decision provided no conclusions about the State's liability. The Court explained that because the State was not a party in *Pohutski*, its decision was based on the first sentence in GTLA § 7, and did not need to "explicate fully the meaning of the second sentence of § 7."³⁶ The Court did state its agreement with Justice Griffin's dissent in *Li* "that, at most, the language of the second sentence requires an historical analysis of the state's sovereign immunity," but made "no determinations regarding common-law exceptions to the state's" immunity.³⁷ *Pohutski* therefore brought an end to local governmental bodies' liability for trespass-nuisance claims, but left the issue of the State's liability to be decided in another case.

III. *Blue Harvest*: The End of Trespass-Nuisance?

Blue Harvest, Inc v Dep't of Transp proved to be that case. There, the Michigan Court of Appeals held

³⁴ *Id.* at 690.

³⁵ *Id.* at 695. Notably, however, the Court applied its decision that there is no trespass-nuisance exception in the GTLA prospectively only, meaning that it did not apply the decision to the property owners in *Pohutski*. One factor in the Court's decision in favor of prospective application was that the Legislature had amended the GTLA to "provide a remedy for damages or physical injuries caused by a sewage disposal system event." *Id.* at 697; see also MCL 691.1416-.1419.

³⁶ *Pohutski*, 465 Mich at 688 n1.

³⁷ *Id.*

that nothing in Michigan common law predating the GTLA supports a trespass-nuisance exception to the State's immunity, leaving neither the State nor local governmental bodies liable for trespass-nuisance. Absent a change of course from the Michigan Supreme Court, *Blue Harvest* signals the end of trespass-nuisance under Michigan law.

A. The Court of Appeals Decision

In *Blue Harvest*, several commercial blueberry farmers sued the Michigan Department of Transportation ("MDOT") and Ottawa County based on the effect of road salt on their properties. The farmers alleged that over a 15-year period, the amount of salt spread on roads to prevent ice formation had been increasing. They claimed that after the salt was spread, drops of salty water were thrown into the air by vehicles traveling on the roads and then blown onto their properties. The salt spray damaged the farmers' properties and resulted in lost blueberry production. Thus, the farmers asserted a claim for inverse condemnation against MDOT and Ottawa County, and for trespass-nuisance against MDOT. The trial court granted both defendants summary disposition on the inverse condemnation claim, but relied on *Hadfield* to grant the farmers summary disposition against MDOT on the trespass-nuisance claim.³⁸

1. The Farmers' Trespass-Nuisance Claim

MDOT appealed, challenging the trial court's decision that the State is subject to a common law exception to immunity for trespass-nuisance. The court of appeals reviewed *Hadfield* and *Pohutski*, noting that *Pohutski* left the open question whether MDOT, an arm of the State, "is protected by governmental immunity."³⁹ But the court quickly concluded that MDOT is protected, stating that "there is simply no indication that the common-law trespass-nuisance exception to sovereign immunity was in effect at the time of the enactment of § 7."⁴⁰

³⁸ *Blue Harvest, Inc v Department of Transportation*, __ Mich App at __; slip op at 2.

³⁹ *Id.*, slip op at 4.

⁴⁰ *Id.*, slip op at 5.

To bolster that conclusion, the court cited the Michigan Supreme Court's decision in *Ross v Consumers Power Co (On Rehearing)*, which the *Blue Harvest* court found to provide a clear indication "that exceptions to sovereign immunity must be granted by the Legislature."⁴¹ Absent that legislative grant, the court saw no basis to allow the farmers' trespass-nuisance claim to proceed.

Judge Beckering issued a concurring opinion that elaborated on the court's reasoning, providing the historical analysis that Justice Griffin had discussed in his dissent in *Li v Feldt*. She observed that the farmers relied on *Hadfield*, which itself had "conducted an extensive historical analysis," but explained that "the 13 cases referenced in that opinion do not shed any light on" the State's immunity.⁴² Rather, the cases discussed in *Hadfield*, and the cases that Judge Beckering herself could identify, beginning with *Pennoyer* in 1860 and proceeding through *Herro v Chippewa Co Rd Comm'rs* in 1962,⁴³ all involved local governmental bodies rather than the State. Therefore, Judge Beckering concluded that Michigan common law predating the GTLA did not establish a trespass-nuisance exception to the State's immunity.

2. The Farmers' Inverse Condemnation Claim

As for the farmers' inverse condemnation claim, the court of appeals majority pointed out that the harm to the farmers' properties was "caused not by the act of administering salt to the highways and roads, but as a result of traffic causing salt spray to ultimately invade plaintiffs' property, thereby harming their blueberry crops."⁴⁴ The majority explained that this "harm is akin to that resulting from the amount of traffic traveling a particular highway at a particular time,"⁴⁵ and therefore the farmers' damages represented only a difference in degree of the salt sprays' effect on their properties rather than an injury that was different in kind from that experienced by other persons that own property along salted roads. Without an injury that was "different in kind," the farmers could not

support the claim for inverse condemnation under the standards set forth in cases like *Spiek v Dep't of Transp.*⁴⁶

Judge Beckering also addressed the inverse condemnation claim in her concurrence, "noting that while trespass-nuisance and unconstitutional taking claims are similar, they remain distinct actions."⁴⁷ She observed that the Supreme Court "has not yet addressed whether facts that might establish liability for trespass-nuisance could establish an unconstitutional taking claim," but ultimately agreed with majority of the court of appeals that the farmers' damages were different only in degree from the damages suffered by other property owners, and not different in kind.⁴⁸ With Judge Beckering's agreement with the majority opinion, the Michigan Court of Appeals unanimously rejected both of the farmers' bases for relief.

B. Is This the End of Trespass-Nuisance in Michigan?

Absent intervention by the Michigan Supreme Court, the court of appeals decision in *Blue Harvest* will mark the end of trespass-nuisance as a tort claim in Michigan.⁴⁹ The farmers have declared their intent to seek leave to appeal,⁵⁰ but given the thorough historical analysis provided in Judge Beckering's concurring opinion in *Blue Harvest*, the odds do not seem in favor of the farmers identifying a common law basis for a trespass-nuisance exception to the State's immunity that was in place before the Legislature adopted the GTLA. This, coupled with the fact that a majority of the Justices who decided in *Pobutski* that the GTLA "at most" requires "an historical analysis of the state's common-law immunity" still sit on the Michigan Supreme Court, trespass-nuisance as a tort appears to be finished.⁵¹

46 456 Mich 331; 572 NW2d 201 (1998).

47 *Blue Harvest*, __ Mich App at __, slip op at 3 (Beckering, J., concurring).

48 *See id.* at __, slip op at 5.

49 This Article was drafted and submitted to publication before Justice Weaver resigned and was replaced by Justice Davis.

50 *See Road Salt Spray Causes Jam for Blueberry Farmers*, Mich Lawyers Wkly, p 1, May 10, 2010.

51 *Pobutski*, 465 Mich at 688 (internal quotation omitted). The *Pobutski* majority consisted of then-Chief Justice Weaver, as well as Justices Taylor, Corrigan, Young, and Markman. *See id.* Only Justice Taylor is no longer on the Court, with Justice Hathaway now occupying his former seat.

41 *Id.*, slip op at 5.

42 *Id.*, slip op at 2 (Beckering, J., concurring).

43 368 Mich 263; 118 NW2d 271 (1962).

44 *Blue Harvest*, __ Mich App at __, slip op at 8.

45 *Id.*, slip op at 9 (internal quotation omitted).



More interesting, however, is whether the Supreme Court will consider whether facts that might have supported a trespass-nuisance claim will support a claim for inverse condemnation, or whether trespass-nuisance itself is not a tort but an unconstitutional taking. In the Supreme Court's Order vacating leave to appeal in *CS&P, Inc v City of Midland*, for example, then-Chief Justice Weaver issued a concurrence suggesting that the Court should consider "whether trespass nuisance is not a tort within the meaning of the governmental immunity statutes, but rather an unconstitutional taking of property that requires just compensation even if the taking is temporary."⁵² Because then-Chief Justice Weaver joined the *Pohutski* majority, it seems reasonable to presume that she decided that trespass-nuisance is not based in the Michigan Constitution. In contrast, Justice Kelly's dissent in *Pohutski* argued that "the common law cause of action of trespass-nuisance is based on the Taking Clause of the Michigan Constitution and, as a consequence, statutory governmental immunity is not a defense."⁵³ Justice Cavanagh joined Justice Kelly's *Pohutski* dissent,⁵⁴ and Justice Hathaway has not taken a position on this issue in a published opinion. Thus, if Justice Weaver should be willing to continue considering whether trespass-nuisance may be based in the Michigan Constitution, and depending on Justice Hathaway's conclusions, trespass-nuisance may find new life as a constitutional claim rather than a tort. Otherwise, when governmental activity results in dam-

age to property, if the damage does not satisfy the high standards for inverse condemnation actions set forth in cases like *Spiek*, then *Pohutski* and *Blue Harvest* combine to provide that the GTLA leaves property owners without a remedy.

IV. Conclusion

Trespass-nuisance long provided a means for property owners to seek a remedy when governmental activity resulted in damage to their properties. But in *Pohutski v City of Allen Park*, the Michigan Supreme Court explained that the GTLA granted local governmental agencies, such as cities, townships, and counties, immunity to protect them against trespass-nuisance claims. The Michigan Court of Appeals decision in *Blue Harvest, Inc v Dep't of Transp* took the next step, holding that the GTLA also shields the State against claims for trespass-nuisance. Absent the Michigan Supreme Court dramatically changing course to hold that Michigan common law did establish a trespass-nuisance exception to the State's immunity before 1965, or that trespass-nuisance is based in the Michigan Constitution, *Blue Harvest* marks the end of trespass-nuisance in Michigan.

52 *CS&P*, 614 NW2d at 587 (Weaver, C.J., concurring).

53 *Pulaski*, 465 Mich at 709 (Kelly, J., dissenting).

54 *See id.* at 712 (Kelly, J., dissenting).



Creation of Condominium Projects: The Master Deed Recording Process in the State of Michigan and Comparison to Plat Recording Under the Land Division Act

by Gregory J. Gamalski*

Condominiums in Michigan are created by recording a master deed in the register of deeds for the county in which the project is located.¹ Curiously, a master deed can also include land in more than one county.² However, this article's primary focus is the process of creating a condominium in one county under the Michigan Condominium Act³ (or amending a previously recorded master deed). The article also provides some comparative comments on the platting process under the Land Division Act by which a so-called "subdivision" is created.⁴ These two regulatory schemes by and large control the creation of legal saleable parcels of real estate out of larger tracts

in Michigan, although a third mechanism allows for another approach by combining Land Division Act division rights with some requirements and processes for recording so-called "Act 132"⁵ surveys.

I. Recorded Surveys Under Act 132

Act 132 allows the recording of surveys depicting four parcels or less, or a greater number if the parcels are more than ten acres,⁶ and actually mandates the recording of surveys made for the purposes of conveying real estate.⁷ In this regard, Act 132 no longer synchronizes with the former Subdivision Control Act, which limited divisions under ten acres to four in any ten-year period, but did not limit divisions of over ten acres in meaningful fashion.

1 MCL 559.108; MCL 559.153.

2 AAC R559.415. This suggests a curious exercise for the party seeking to record such a master deed. Oddly, the Condominium Act does not appear to contemplate the possibility that a replat adding land could extend into an adjoining county.

3 MCL 559.101 et seq.

4 MCL 560.102(f). The term "subdivision" is really a misnomer when used as a noun, though the common usage is usually to call a real estate project created under the Land Division Act through the platting process a subdivision. "Subdivision" in the Land Division Act can more correctly be considered a verb since the actions that are controlled by the Land Division Act are the acts of division and subdivision, with the typical end result under the Land Division Act being creation of platted lots.

5 MCL 54.211. This Act, 1970 PA 132, authorizes so-called "staked surveys" and further provides that such surveys may be recorded and actually mandates surveys be recorded if a conveyance is involved. That mandate is likely most often honored by real estate owners in breach. An Act 132 survey establishes minimum survey requirements but those requirements are not as detailed as a so-called ALTA/ASCM survey.

6 MCL 54.211(1).

7 MCL 54.211(2).

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The new, more complicated division rights under the now-renamed Land Division Act⁸ provide a different array of division and split rights, leaving one to wish perhaps that Act 132 and the Land Division Act might in some sense be re-synchronized. In any case, the recorded Act 132 survey then becomes the means by which land being conveyed can be described by reference to the recorded survey or map in the same way that one might refer to a lot⁹ in a recorded plat under the Land Division Act or unit¹⁰ in a Condominium Subdivision Plan¹¹ under the Condominium Act.¹² Of course, the Act 132 approach offers none of the modest consumer protections provided by the platting process under the Land Division Act and condominium process under the Condominium Act. Thus, while the Land Division Act forbids platting of subaqueous land,¹³ making sales of the proverbial swampland theoretically impossible, the Act 132 survey process is not so proscriptive. *Caveat emptor* in that instance.

II. Condominium Act

In stark contrast, the Condominium Act does not preclude creating a condominium over the waters, and actually contemplates and facilitates such schemes in the form of marina condominium projects.¹⁴ This difference is one of numerous hints the discerning practitioner will notice as she reads and applies the respective acts to a particular situation and notes that

the two acts are, in fact, very different in philosophy and application. The Land Division Act and Condominium Act offer two contrasting approaches for small parcel sales of real estate. The Land Division Act provides a detailed regulation scheme with considerable public agency approval and involvement and a strictly two-dimensional mapping scheme for lots. The Condominium Act provides a more *laissez-faire* approach, with typically no real government involvement once the site plan has been approved by the local unit of government as part of local site plan approval ordinance and with generally (though not exclusively) a three-dimensional depiction of the Units to be sold.¹⁵

Recent times have shown some failings in the Condominium Act approach, but a discussion of those failings is best left for another time. However, as one illustration, note that the Land Division Act, with its detailed and, at times, onerous bonding requirements for infrastructure improvements, has likely left in its recent wake far fewer residential projects in which roads and other infrastructure are incomplete, especially the problematic final wearing course or “lift” of asphalt.¹⁶ The Condominium Act and condominium project creation by comparison were largely deregulated by the 1982 amendments to the Condominium Act,¹⁷ as the State of Michigan moved out of the business of approving and issuing permits

8 MCL 560.101 et seq.

9 MCL 560.102(m) defines “lot” as a legal term being essentially the resulting subdivision of land as depicted on the plat.

10 MCL 559.104 (3) defines a condominium unit as a similar end result of recording the plat’s analog, the master deed. Common parlance also uses the terms “site condominium unit” and the Michigan Administrative Code recognizes certain types of condominium projects, such as marina condominiums, campsite condominiums and mobile home park condominiums. *See* AAC R559.403-405. However, all subsets of ownership in a condominium, regardless of form or format, are legally called only “units.”

11 MCL 559.104 (2); MCL 559.166; AAC R559.401-415.

12 The only correct and legally acceptable way to refer to a condominium unit is by reference to unit number as set forth in the recorded master deed. MCL 559.164.

13 MCL 560.136(e); AAC R560.105(2)(e).

14 MCL 559.166; AAC R559.405.

15 MCL 559.166(i); AAC R559.401-402. A fourth dimension, time, can also be involved when a timeshare or fractional interest arrangement is used. *See* MCL 559.110(5)-(6), which allows for a leasehold condominium using an estate limited by time; and MCL 559.110(4)-(6) and MCL 559.172(a), which allow timeshare and fractional interests.

16 Under the Condominium Act, the apparent expectation was that the escrow requirements imposed under MCL 559.184 and MCL 559.203(b) would assure all improvements would be built. Practical experience, however, has shown that assumption to have been largely false in many instances. The Land Division Act imposes more stringent requirements for infrastructure completion, such as MCL 560.182(1)(e), which requires cash, letter of credit or surety bond for such improvements.

17 MCL 559.273 made 1982 PA 538 effective January 17, 1983. Further amendments under 1983 PA 113 implemented the current arrangement, which provides no significant public agency oversight.

for condominium projects that it had first entered under the now-repealed Horizontal Real Property Act.¹⁸ One result of the deregulation has been the regrettable discovery that the contemplated “other adequate security” for completion of improvements, sadly, was not.¹⁹

III. Plat Recording Under The Land Division Act

A brief discussion of the platting process under the Land Division Act will help set the table for some of the explanations of the recording process for a condominium under the Condominium Act. The two processes in the end are intended to yield smaller saleable units out of the division processes, be they lots under the Land Division Act or units under the Condominium Act.

The Land Division Act is best thought of as a three-lap marathon. The first lap is tentative plat approval, where the general layout of the proposed plat or “sub-division” is tentatively approved;²⁰ the second lap is preliminary plat approval, where the engineering and other details are reviewed and approved by all agencies;²¹ and the final or gun lap is recording the plat.²² In this regard, the Land Division Act also takes on an aspect of a planning process by which various agencies provide

input, desired or not, about how the development will be configured and take place.²³ The final end game on the gun lap is the execution of the actual plat map by all approving agencies, the proprietor (usually the owner of the land) and any mortgagee, all done with a special pen with apparently magical specifications.²⁴

The execution of a plat happens in an ordered sequence. Since the engineers and surveyors have pre-empted most of the platting process, it is likely very few lawyers have actually witnessed the alchemy that turns vacant land into lots. The final sequence is as follows:

- the surveyor prepares and signs the plat;
- proprietors and mortgagees sign;
- the county treasurer certifies the taxes are paid;²⁵
- the county plat board signs;
- the county drain commissioner signs;
- the Michigan Department of Transportation signs if the project abuts a state controlled road;

18 MCL 559.1 et seq.; 1963 PA 229 (repealed effective July 1978, see MCL 559.271).

19 See *Hills of Lone Pine v Texel*, 226 Mich App 120; 572 NW 2d 256 (1997) (summarizing the implications and inadequacy of the escrow schemes). Consider how many of the Section 84 escrow agreements were actually signed by title companies as required under the Condominium Act and how many were probably illegally signed by title agents as ultra vires acts unauthorized by the agents’ principals and underwriters. Those concluding chapters of the current real estate debacle are now being considered by the courts.

20 MCL 560.112(4) allows a tentative approval, which generally gives the plat proprietor one year to complete and obtain approval for the preliminary plat. The tentative approval sets the general form of the plat and project.

21 MCL 560.111-120 lists the approvals that must be obtained for the preliminary plat. At this stage, most comments and approvals are made and incorporated in the document, leading to what is expected to be the final draft of the plat.

22 MCL 560.131-173 detail the requirements for drafting, submitting, executing and recording the final plat.

23 This theme is also evident in the other aspect of the Land Division Act, which is to limit and control the manner and frequency of divisions so that de facto subdivisions or plats do not occur over time, or at least limit the occurrence of the divisions to a near glacial pace. The prior name, “Subdivision Control Act,” captured the essence of that concern.

24 AAC R560.104(4).

25 Tax certification is an important conceptual and fiscal step for both plat recording and master deed recording. One aspect of the creation of plats and condominiums is that new tax parcels are created and the old tax parcel number essentially becomes ineffective (except perhaps if less than the whole of a large tract is being platted or turned into a condominium); thus, the taxes in the year of recording must be paid in full. Otherwise, if those taxes were unpaid, there is the possibility of confusion as to what tax parcels might be foreclosed for the year of recording. One other quirk also needs to be noted. Since “tax day” is actually December 31 of the preceding year, a plat or condominium recorded any time during the course of the year will not yield new tax parcel numbers and bills until the following tax year. A plat or master deed recorded on February 1, 2011, for example, likely will not have individual tax bills for lots or units until the so-called Summer tax bills issue in July, 2012. This thus complicates real property tax allocations and pro-rations in the first year after creation. Prudent parties would estimate and escrow for 2011 Summer and Winter tax bills since the taxes will still be billed under the original, larger tract’s tax parcel number and failure to pay could generate a tax foreclosure for the 2011 taxes.

- the State of Michigan Department of Energy, Labor and Economic Growth, Office of Land Survey and Remonumentation approves; and
- the plat is then finally recorded in the register of deeds for the county in which it is located.

This process has been re-codified to some extent and the latest rules were adopted effective June 16, 2008.²⁶

The involvement of several county agencies suggests at least one reason why a plat is not likely to extend across a county line. While one faction might suggest this is an illustration of the unwieldiness of the platting process under the Land Division Act, there is an arguable reason for this complicated procedure. In most plats, all roads, sewer and water lines are within publicly dedicated easement or road rights-of-way, while in most condominium projects they are not. Thus, the public agencies need both to approve the facilities and to accept the dedication, which is really in the nature of a conveyance of the road and utility easements depicted on the plat. It is the fact of that dedication that further suggests why plat alteration and vacation is so complicated, accomplished generally only by court actions,²⁷ as public ownership of easements and roads will be affected by a plat amendment and the public might be fairly considered entitled to have input on such changes to public property. In contrast, private roads and utility easements in a condominium project can be generally realigned or vacated by consent of the agency holding the rights and the co-owners or condominium associations, and are accomplished without court action by amendment to the master deed and condominium subdivision plan.

IV. Condominium Creation Under The Condominium Act

Contrast the plat recording process with the process for recording a master deed:

- signature by owner or developer;
- consent by mortgagee;

²⁶ See generally AAC R560.101-428 and the Office of Land Survey and Remonumentaion website: http://www.michigan.gov/dleg/0,1607,7-154-10575_17394_17565---,00.html

²⁷ MCL 560.221-229; *Brookshire v Oneida*, 225 Mich App 196; 670 NW 2d 294 (1997).

- tax certification; and
- recording using an ordinary black ballpoint pen in each case.

In many cases, the process is completed in an hour or less and, in all cases, in less than a week. Amendment of a master deed is no more complicated, requiring no circuit court actions, no signing of re-plats (except by the surveyor or engineer who prepared them), no approval by each agency having jurisdiction over the re-plat, and no magic pen either. Master deeds are recorded in the county in which the land is located, and have three parts: (1) Master Deed; (2) Exhibit A, Condominium Bylaws; and (3) Exhibit B, Condominium Subdivision Plan,²⁸ reduced in size to 8-1/2" x 14". These reduced plans must be signed and sealed by the surveyor or engineer who prepared the plans. Curiously, while a surveyor is the only professional who can prepare and sign a plat,²⁹ civil engineers and architects appear to be entitled to certify the survey for a condominium subdivision plan.³⁰ But, in practice, the surveyor will almost always undertake preparation of the complete set of Exhibit B drawings.

The Michigan Recording Act imposes certain requirements upon the recording of any document, including a master deed: (1) the first page must have a top margin of unprinted space of at least 2-1/2 inches; (2) the first line of print on the first page must contain a statement identifying what the recordable event is ("master deed"); (3) the type must be 10-point or larger; (4) all blanks must be completed in black ink; and (5) the paper must be white and of not less than 20-lb weight.³¹

The recording fees in all counties of the state, *with the exception of Wayne County*, are \$14.00 for the first page of the document and \$3.00 for each additional page. In Wayne County, the fees are \$15.00 for the first page and \$3.00 for each additional page. A typical mas-

²⁸ The content of the condominium subdivision plan is prescribed in detail by MCL 559.166 and further detailed in the Condominium Rules and Regulations, ACC R559.401-415.

²⁹ MCL 560.126.

³⁰ MCL 559.166; AAC R559.401(1).

³¹ MCL 565.201-203.

ter deed is fifty pages, or more. Therefore, a 50-page document being recorded in Oakland County would require a check made payable to the Oakland County Register of Deeds in the amount of \$161.00: \$14.00 for its first page and \$3.00 each for the additional 49 pages.

In addition, every county requires an original, 24" x 36" set of the Condominium Subdivision Plans, signed in black ink and sealed by the surveyor.³² This full-size set of plans is retained permanently by the county.³³ Some county register of deeds offices will sign a receipt for these plans to document a client file; others will not. Check with the individual register of deeds.

The Condominium Act requires the master deed receive tax certification that there are no unpaid property taxes.³⁴ The tax certification fees vary slightly but are always \$1.00 minimum with a fee of \$0.20 per unit if there are more than five units. In Wayne County, the tax certification fees are \$4.00 minimum. In addition, the Cities of Detroit and Flint also assess tax certification fees, in the amounts of \$8.00 and \$3.00, respectively, in addition to Wayne and Genesee Counties' tax certification charges. In the case of multiple tax parcel numbers for one condominium project, Oakland County charges \$0.20 per tax parcel number, with a minimum charge of \$1.00. If the recording involves an amendment and no land is being removed or added and no units are being removed or added, no tax certification is required. A similar procedure exists for tax certification of plats under the Land Division Act.³⁵

A summary of the step-by-step process in several of Michigan's more populous counties follows. However, be forewarned: idiosyncrasies abound. For instance, it has been the peculiar practice in the City of Southfield to have its planning or building department review and "approve" master deeds before tax parcel numbers are assigned. The City of Southfield

uses Oakland County's Equalization Department for that service. The Oakland County Equalization Department assigns the numbers on a preliminary basis after it receives the recorded master deed via the county treasurer and register of deeds, submitting the proposed tax parcel number assignments to the City of Southfield. This means review by the City of Southfield only occurs after the Master Deed is recorded, a rather inconvenient approach. It is likely in a new construction project where site plan approval was obtained and the planning and building departments are directly engaged in the approval of the project, this review will not be an issue. However, in the case of a conversion, one might not become aware of the City of Southfield's review process until months after recording. There has been at least one occasion where the review of an office condominium conversion lingered for over a year and, as a result, no new tax parcel numbers were assigned for a period that covered nearly three tax cycles (year of recording, year of "review" and, finally, year of approval). This sort of "local court rule" does not appear to be authorized under any City of Southfield ordinances and is, in fact, very unusual.

Thus, practitioners should be forewarned that peculiarities abound even though on the surface the process would appear to be uniform statewide, since there is one statute and one set of regulations that supposedly implement the statute. Also keep in mind that many cities and townships have condominium ordinances that require prior notice of proposed condominium projects beyond the notice required under Condominium Act Section 71³⁶ and may issue approval of the master deed under zoning or other land use regulations. The registers of deeds will not inquire about such approvals, however, and the recording can be accomplished without proof that local unit approval has been obtained. To avoid embarrassment and amendment, any needed local municipal review and approval should be obtained and confirmed before submission for recording.

One other quirk also presents a trap for the unwary. Section 71a³⁷ of the Condominium Act requires

32 AAC R559.401(4)(l).

33 AAC R559.415.

34 MCL.559.173(2).

35 See MCL 560.145.

36 MCL 559.171.

37 MCL 559.171a.



that the health department approve the master deed for any condominium project in which public water or public sanitary sewers are not available. The same is true for plats.³⁸ However, the plat engineers or other parties reviewing the proposed master deed, bylaws and condominium subdivision plan submitted for recording will not generally require proof of such approval, their task being generally limited to confirming the master deed is legally executed and that condominium subdivision plans meet the minimum requirements of Condominium Act Section 66 and the rules. This is, of course, another stark contrast to the rigorous review and control of plats under the Land Division Act.

The processes for recording a master deed in Wayne, Oakland, Macomb, Washtenaw, Livingston and Genesee counties are summarized below and a separate appendix providing a capsule summary of procedures about the process in a number of Michigan's more populous counties is appended to the end of this article, with apologies to practitioners in any of Michigan's other counties. Time and energy did not permit the information to be gathered for each of Michigan's eighty-three counties.

A. Oakland County

Oakland County is one of the few counties that claim a three-day review period for a master deed but the current workload has made review faster since there is little backlog. To record the master deed, it must be taken, along with the 24" x 36" condominium subdivision plan, to the register of deeds' office. The clerk will submit the master deed and plans to the plat engineer for review and will contact the submitter when review is complete. Once approved by the plat engineer, the original master deed must be delivered to the Oakland County Treasurer's office in the West Wing of 1200 North Telegraph for tax certification. The Treasurer's office will photocopy portions of the master deed document and will compute the tax certification charge. After tax certification, one returns to the register of deeds for the final step of recording. If a photocopy of the master deed is submitted along with the original, the register of deeds' clerk will stamp the liber and page on the photocopy and will return the photocopy im-

38 MCL 560.105(g); AAC R560.401-428.

mediately upon recording. If a photocopy is not provided, the liber and page information can be found on the payment receipt. The original document will be scanned by the register of deeds' office and returned by mail, usually within a few weeks or less.

B. Macomb County

Macomb County register of deeds does not require a pre-recording review of the master deed document; thus, same-day submission and recording is standard. Prior to delivery to the register of deeds' office, the Land Planning Department, which is located next to the Treasurer's office on the 2nd floor of 1 South Main Street, does a quick review of the plans so that the Land Planning Department is made aware of the condominium project being recorded. After Land Planning review, tax certification is required from the Macomb County Treasurer. The cost is \$1.00 minimum for the first five parcel numbers or units and then \$0.20 per unit after the first five. Finally, submit the certified document and the condominium subdivision plan to the clerk at the register of deeds' office. In order to obtain the liber and page information immediately, there is a \$1.00 charge for a copy of the first page of the newly recorded master deed.

C. Wayne County

Like Oakland County, Wayne County's plat engineer's office also carefully reviews the condominium subdivision plans, so the first step is to submit the *proposed* master deed and 24" x 36" condominium plans to the plat engineer's office for review. Revisions to the document or the plans may be necessary after the review process. The Wayne County Plat Engineer's Condominium Subdivision Plan Review form, available upon request, is a useful tool for use in reviewing all condominium subdivision plans and master deed packages before they are submitted for recording. Once the plans and documents have been given final approval by the plat engineer's office, the fully executed set of master deed and plans are delivered to the plat engineer for a final 15-20 minute review prior to tax certification and recording. The plat engineer's office will "walk you through" these processes. The tax certification fee for a property in Wayne County is a minimum of \$4.00 (instead of the \$1.00 in all other counties), but if your project is comprised of numerous

parcel numbers, check with the Wayne County Treasurer's office for possible additional fees. If the project is located in the City of Detroit, the tax certification fee is \$8.00 minimum in addition to the charge by the Wayne County Treasurer. The recorded master deed document is returned immediately upon recording with the liber and page information provided.

D. Washtenaw County

The Washtenaw County register of deeds no longer requires a review of the master deed prior to recording. However, tax certification is to be completed prior to visiting the register of deeds office. Therefore, the first step is visiting the Washtenaw County Treasurer's office for tax certification. The Washtenaw County Treasurer requires the local property assessor's office for the municipality in which the project is located to approve the master deed and plans, so it is necessary to work with the local assessor when submitting the master deed for recording. Once the local assessor has approved the master deed, the Washtenaw County Treasurer will certify the master deed. The tax certification fee is \$1.00 for each group of parcel numbers or \$0.20 per unit with a \$1.00 minimum.

After tax certification, submit the master deed and 24" x 36" condominium subdivision plans to the clerk at the Washtenaw register of deeds for recording prior to 4:00 p.m., Monday through Friday. The Washtenaw register of deeds also requires that all parcel identification numbers for the project be listed in the master deed document. The clerks advise that the numbers be clearly reflected near the legal description of the property (probably the second or third page of the document) at the bottom of the page. Upon recording the master deed, the clerk will provide you with a receipt, which will contain the liber and page information for the recording. You may also want to request a photocopy of the first page so that you can obtain the condominium subdivision plan number for your records.

E. Genesee County

In Genesee County, the register of deeds should be your last stop. First, obtain tax certification at the Genesee County Treasurer's office. If the property is lo-

cated in the City of Flint or some Genesee townships, it could also be necessary to obtain tax certification at that local treasurer's office. No review is required in Genesee County. As long as you have all the required signatures and acknowledgements (in black ink) on your plans and the master deed document, same-day recording can occur. Genesee County register of deeds requires that the 24" x 36" condominium subdivision plans be on polyester film or plastic sheet, such as *Mylar*®.

F. Livingston County

Livingston County adds one other flourish to the requirements. Along with the 24" x 36" condominium subdivision plan and the master deed with 8½" x 14" plans attached, one must also deliver a set of 18" x 24" plans. (Note: this is the same size plan as must be delivered for a plat being recorded under the Land Division Act.) The 24" x 36" and 18" x 24" plans must also be polyester film reproductions. Otherwise, the process will take a familiar course: tax certification (which may take up to three days or more), review for recording, review formalities and then recording after paying the customary fees for recording. Livingston County provides an "instrument number" instead of the more typical liber and pages number indication that the document is recorded.

V. Closing Chaos

Closing a transaction might depend upon recording the master deed and creating the condominium as a condition of closing, perhaps if a resulting unit is to be conveyed at the closing. Typically, title companies will not be willing to be involved in the process of recording a master deed because of the number of steps involved and the possibility that corrections might be required. In those instances, every effort must be made to accomplish recording before the date of closing since, as illustrated above, the process may not be readily accomplished in one day and thus one cannot reasonably expect to record a master deed on the date of closing by tendering it to the title company along with a warranty deed and mortgage and detailed instructions about the sequence in which instruments are to be recorded (master deed, warranty deed to units and finally mortgage for a unit for instance).



The process for creating a condominium project is initiated by lawyers generally by drafting the master deed and bylaws, reviewing the condominium subdivision plan for compliance with the Condominium Act and regulations, obtaining health department approval for any required sanitary system and well water approvals under Condominium Act Section 71a, and shepherding the package through the recording process.

Because the creation of a condominium is not generally controlled by public review agencies, the task of recording and thus creation of the condominium remains the lawyer's task. While the statute contemplates uniform procedures, local custom and practice vary. The prudent buyer will review local recording procedures in advance to assure recording is not frustrated by a minor missing detail.

COUNTY	DOCUMENTS NEEDED						FEES			
	Orig. Mast. Deed	Tax Cert.	Reduced Plans	24x36 Plans	Other Size Plans	Bylaws	Recording	Time Stamped	Storage	Tax Cert.6
Antrim	Y	Y	Y	Y	N	N	14/3	\$1	\$10	\$1
Benzie	Y	Y	Y	Y ¹	N	N	14/3	\$1	\$0	\$1
Calhoun	N	Y	Y	Y	N	N	14/3	\$0	\$10	\$1
Charlevoix	Y	Y	Y	Y	N	N	14/3	\$0	\$0	\$1
Cheboygan	Y	Y	Y	Y ⁷	N	N	14/3	\$1/pg	\$0	\$1
Emmet	Y	Y	Y	Y	N	N	14/3	\$0	\$0	\$1
Genesee	Y	Y	Y	Y ¹	N	N	14/3	\$08	\$0	\$1
Grand Traverse	Y	Y	Y	Y	N	N	14/3	\$0	\$0	\$1
Huron	Y	Y	Y	Y ¹	N	N	14/3	\$1	\$10	\$1
Ingham	Y	Y	Y	Y	N	N	14/3	\$0.50/pg	\$10	\$1
Jackson	Y	Y	Y	Y ¹	N	N	14/3	\$19	\$10	\$1
Kalamazoo	Y	Y	Y	Y ¹	N	N	14/3	\$0	\$0	\$1
Kent	Y	Y	Y	Y	N	N	14/3	\$1/pg	\$0	\$1
Lapeer	Y	Y	Y	Y	Y ²	N	14/3	\$1/pg	\$0	\$1
Leelanau	Y	Y	Y	Y	N	N	14/3	\$1/pg	\$10	\$1
Livingston	Y	Y	Y	Y	Y ³	N	14/3	N/A	\$0	\$1
Mackinac	Y	Y	Y	Y	N	N	14/3	\$1/pg	\$0	\$1
Macomb	Y	Y	Y ⁴	Y	N	N	14/3	\$0	\$0	\$1
Manistee	Y	Y	Y	Y	N	Y	14/3	\$1/pg	\$105	\$1
Monroe	Y	Y	Y	Y	N	N	14/3	\$0	\$0	\$1
Oakland	Y	Y	Y	Y	N	N	14/3	\$1/pg	\$0	\$15
Ottawa	Y	Y	Y	Y	N	N	14/3	N/A	\$10	\$1
Sanilac	Y	Y	Y	Y	N	N	14/3	\$0	\$0	\$1
Shiawassee	Y	Y	Y	Y ¹	N	Y	14/3	\$1/pg	\$0	\$1
St. Clair	Y	Y	Y	Y	N	N	14/3	\$0	\$0	\$1
Washtenaw	Y	Y	Y	Y ¹	N	N	14/3	N/A	\$0	\$1

Key:

- | | | |
|--------------|---|---|
| 1. On Mylar® | 4. Original Signatures Required on Reduced Set of Plans | 7. Prefer Plain Paper |
| 2. 11x17 | 5. "Probaby Won't Charge" | 8. Bring Additional Copy |
| 3. 18x24 | 6. Generally \$0.20 Per Unit with \$1.00 Minimum | 9. No Charge If You Bring An Extra Copy |



After 2000 *Baum Family Trust v Babel*: The Impact of Public Roads on the Riparian Rights of Michigan Real Estate Owners

by Brett N. Liefbroer*

Introduction

The June 23, 2009 Michigan Court of Appeals decision in *2000 Baum Family Trust v Babel* stripped the riparian rights of property owners living adjacent to public roads that trace the shoreline of Lake Charlevoix in Northern Michigan.¹ Some Michigan legal practitioners have claimed that the decision in *Baum* flies in the face of about seventy-five years of precedent first established by the Michigan Supreme Court in *Croucher v Wooster*.² In *Croucher*, the Court held that a lot sepa-

rated from a lake by a public road has riparian rights when no intervening land exists between the lake and the public road and the plat contains no express limitation of the lot's riparian rights.³

In reality, the holding of *Baum* is consistent with the holding of *Croucher*. *Baum* held that, under the circumstances of the case, a dedication of a public road to the use of the public amounted to an unambiguous dedication of riparian rights to the public,⁴ thereby expressly limiting the riparian rights of the front lot property owners. The *Baum* court thus appropriately focused on interpreting the plat's language to determine who should have riparian rights.

1 284 Mich App 544, 545-46, 562-63; 773 NW2d 44 (2009). As a technical distinction, land abutting a river is defined as "riparian," while land abutting a lake, sea, or ocean is defined as "littoral." 78 Am Jur 2d *Waters* § 30 (2002). This Article will use the phrase "riparian rights" when referring to rights in lakes, seas, and oceans because the term "riparian" is often used to refer to multiple types of land, including land abutting a lake. *Id.*

2 One interpretation of the rule in *Baum* was that lots or properties located along plat-dedicated public roads that parallel the lakeshore in Michigan are not riparian properties. Clifford H. Bloom, *The 2000 Baum Case Decision Disaster*, <http://mlswa.org/Legal/Cliff%20Bloom%20Baum%20Article%202009.pdf> (accessed August 27, 2010). Other practitioners point out that the court of appeals "did not explain how its decision will correlate with a number of prior inconsistent appellate court decisions." Nyal Deems & Eric Guerin, *Surprising Court Decision: Public Road Cuts Off Riparian Rights*, <http://www.varnumlaw.com/Publications/Surprising-Court-Decision-Public-Road-Cuts-Off-Riparian-Rights> (accessed August 27, 2010).

3 *Croucher v Wooster*, 271 Mich 337, 342-43; 260 NW 739 (1935). The Court in *Croucher* wrote:

[The lot at issue] fronted upon the highway at a place where there was no land intervening between the lake and the opposite side of the highway, [so] the conveyance of the lot . . . carried with it, subject to express limitations appearing [in the conveyance], the same riparian rights on the opposite side of the highway as it would had the lot itself been contiguous to the shore line.

Id. A plat is a "map describing a piece of land and its features, such as boundaries, lots, roads, and easements." Black's Law Dictionary (8th ed) pp 1188-89.

4 *2000 Baum Family Trust v Babel*, 284 Mich App 544, 560-61; 773 NW2d 44 (2009).

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Courts faced with the issue of determining who has riparian rights when a public road separates a property from a body of water should look to the express language of the plat.⁵ If the plat's language is ambiguous, then courts should interpret the language by considering objective evidence of the language's meaning, much like a court interpreting a contract.⁶

Part I of this Article explains *Croucher* and the cases interpreting it and introduces legal precedent from other jurisdictions. Part II provides an in-depth discussion of *Baum*. Part III explains the significance of *Baum* and compares it to precedent from Michigan and other jurisdictions, and Part IV introduces important policy considerations.

I. *Croucher v Wooster* and the Cases Interpreting It

The issue of how platted parallel and perpendicular roads impact the riparian rights of waterfront property owners and the general public was one of first impression in Michigan in 1935. The landmark Michigan Supreme Court case of *Croucher v Wooster* put forth a new rule of law to resolve the issue of who has riparian rights—front lot property owners or the general public—when a platted parallel or perpendicular road separates front lot owners from a watercourse.⁷

A. *Croucher v Wooster*

In 1900, two joint landowners, Mr. and Mrs. Freer, subdivided a parcel that they owned located to the south of Gull Lake in Western Michigan.⁸ Sixty-four lots resulted.⁹ About half of the lots abutted a public road that ran parallel to the southern shore of Gull Lake, and about half of the lots were located further south.¹⁰ The defendants, Wooster and Klose, owned lots abutting the parallel public road, and the plain-

tiffs owned lots located further south.¹¹ The plaintiffs filed suit seeking to restrain alleged trespasses by the defendants and to clear cloud on the title of a portion of property running along Gull Lake's southern shoreline across from the defendants' property.¹² The dispute between the plaintiffs and the defendants was resolved, but the defendants joined two parties, the Nielsons and Deere & Co., as cross-defendants because they asserted a competing property interest in the disputed portion of the southern shoreline.¹³

The Court set forth to determine whether the defendants or the cross-defendants had superior title.¹⁴ Starting the analysis with the defendants and their riparian rights, the Court found that the defendants received fee title from a third party to the suit, McBeth, who received fee title from the creators of the subdivision, Mr. and Mrs. Freer.¹⁵ The Court also found that the deed to McBeth and the deeds to the defendants contained language stating that use of the lake's shoreline was to be "in common with others, for landing boats used for pleasure."¹⁶

Resolving the issue of whether the defendants had riparian rights in the shoreline, the Court ruled that the conveyance in the deeds to the defendants carried riparian rights subject only to the "express limitations" appearing in the deeds so long as no "substantial and valuable" land separated the public road from the watercourse.¹⁷ Since no substantial land separated the defendants' lots from the water, the Court held that the defendants had riparian rights in the lake limited only by their use in common with the general public for landing boats.¹⁸

5 *Croucher*, 271 Mich at 342.

6 See Part III *infra*.

7 See 271 Mich 337, 342-43; 260 NW 739 (1935).

8 *Id.* at 339.

9 *Id.*

10 *Id.*

11 *Id.* at 339-40.

12 *Id.* at 339.

13 *Id.* at 341. The defendants claimed to have fee title and riparian rights in the disputed portion of the southern shore of Gull Lake, while the cross-defendants claimed to have a mortgage lien on the disputed portion of the southern shore of Gull Lake. *Id.* at 340.

14 *Id.* at 341.

15 *Id.*

16 *Id.* at 342.

17 *Id.* at 342-46.

18 *Id.* at 345-46.

After deciding that the defendants had riparian rights in the shoreline, the Court considered whether the cross-defendants' asserted property interest in the shoreline was valid.¹⁹ The Court held that the cross-defendants had no valid property rights in the shoreline.²⁰ The defendants received good title on May 6, 1904, and the cross-defendants received invalid title on September 22, 1910.²¹ The cross-defendants thus received no property rights in the shoreline because all of the valid rights to the disputed portion of land had already been transferred to the defendants in 1904.²² As a consequence, the cross-defendants had no riparian rights.²³

B. After *Croucher*

Cases interpreting *Croucher* did not appear for about twenty-five years. An opinion in the 1960 case of *Park Trustees for Cass Co v Wendt* became the first Michigan opinion to cite *Croucher*.²⁴ The concurrence in *Wendt* stated that “[i]t seemingly [was] agreed” in Michigan that after *Croucher*, a waterfront property owner “holds legal title . . . subject to the public right” in a public road separating the owner’s lot from the water.²⁵ Six years later, a Michigan court cited *Croucher* for the proposition that front lot owners have riparian rights in the shoreline across a parallel public road with the “only exception” being when “land in private ownership” lies between the road and waterfront.²⁶

Michigan cases continued to cite *Croucher* as granting fee title and riparian rights to front lot owners. In 1970, a Michigan court stated that the law of Michigan

seemed to be settled that the owner of land separated from a lake by a public road has riparian rights.²⁷ *Kempf v Ellixson* extended *Croucher* to property owners whose land abuts perpendicular roads that run into a lake with no intervening land between the perpendicular road and the water.²⁸ In *Kempf*, the public argued that it may exercise recreation rights at the end of the perpendicular road because the road touched the water.²⁹ The court refused to grant riparian rights to the public without an “express mention” of riparian rights in the plats at issue.³⁰ *Kempf* acknowledged, however, that an express limitation in a plat could sever the riparian rights of front lot owners living along public roads.³¹

Another Michigan case to at least mention that an express limitation may limit the riparian rights of front lot owners was *Thies v Howland*.³² *Thies* broadly restated the holding of *Croucher* as follows: “Unless a contrary intention appears, owners of land abutting any right of way which is contiguous to the water are presumed to own the fee in the entire way, subject to the easement. Since the owner’s property is deemed to run to the water, it is riparian property.”³³

The issue before the *Thies* Court was whether a dedication of a walk “to the joint use of all the owners of the plat” conveyed fee title or an easement in the walk to the subdivision owners.³⁴ “The intent of the platters,” the Court wrote, “must be determined from the language they used and the surrounding circumstances.”³⁵ The Court held that the trial court’s finding that the phrase “joint use” does not ordinarily pass fee title was not “clearly erroneous,” especially in light of the fact that there was “no evidence in the re-

19 *Id.* at 346.

20 *Id.*

21 *Id.*

22 *Id.*

23 *Id.*

24 See 361 Mich 247, 248; 105 NW2d 138 (1960) (Black, J., concurring). An Oregon court was the first to cite *Croucher*. See *McAdam v Smith*, 221 Or 48, 54-55; 350 P2d 689 (1960) (citing *Croucher* for the proposition that “where the grantor owns the entire underlying area and no land on the opposite side of the street, [a title transfer causes] all of the underlying area [to] pass[] to the grantee”).

25 361 Mich at 248 (Black, J., concurring).

26 *Mich Cent Park Ass’n of Higgins Lake v Roscommon Co Rd Comm’n*, 2 Mich App 192, 197-98; 139 NW2d 333 (1966).

27 *Sheridan Drive Ass’n v Woodlawn Backproperty Owners Ass’n*, 29 Mich App 64, 69; 185 NW2d 107 (1970).

28 69 Mich App 339, 341-44; 244 NW2d 476 (1976).

29 *Id.* at 342.

30 *Id.*

31 *Id.*

32 424 Mich 282; 380 NW2d 463 (1985).

33 *Id.* at 293.

34 *Id.*

35 *Id.* (citing *Bang v Forman*, 244 Mich 571, 576; 222 NW 96 (1928)).



cord” suggesting otherwise.³⁶ The front lot owners used the public walk like it was their own property, and no evidence was presented that the back lot owners paid additional consideration for lots with riparian rights.³⁷ The back lot owners had an easement, and the plat restricted the use of the easement to “limited vehicular traffic, the hand carrying or dragging of small boats to and from the lake, and walking.”³⁸ The back lot owners’ easement transferred only the riparian rights mentioned in the plat.³⁹

In 2008, another Michigan court interpreted the rule in *Croucher* as requiring a “clearly expressed” contrary intention in a plat to defeat a front lot owner’s riparian rights.⁴⁰ More specifically, the court required nothing short of an “explicit statement” to strip the riparian rights of front lot owners.⁴¹ Not until 2009 did a court find a contrary intention in a plat without any explicit mention of riparian rights, boats, swimming, water access, or other similar language. The plat in *2000 Baum Family Trust v Babel* dedicated public roads to the use of the public.⁴² In determining the meaning of the word “use,” the court considered extrinsic evidence.⁴³

36 *Id.* at 293-94.

37 *Id.* at 294 n 8.

38 *Id.* at 296.

39 *Id.* at 297.

40 *Jonkers v Summit Twp*, 278 Mich App 263, 269; 747 NW2d 901 (2008).

41 *Id.*

42 284 Mich App 544, 559; 773 NW2d 44 (2009).

43 *Id.* at 561-62. The court stated:

The northern boundaries of [the front] lots abut[] Beach Drive, not Lake Charlevoix. Further, Beach Drive runs all the way to the water’s edge, indicating that the plattors intended the public, including all lot owners, to have access to Lake Charlevoix. This depiction does not support the position that plaintiffs have riparian rights, but rather is entirely consistent with the stated purpose of the dedication. In addition, plaintiffs’ properties are not taxed as riparian properties, but as properties with a view of the lake.

Id.

C. How Other Jurisdictions Have Handled the Public Road Issue

In Maryland, courts have looked to the basic principles of contract interpretation to interpret language in plats and resolve riparian rights issues.⁴⁴ In *White v Pines Community Improvement Ass’n*, the Maryland Supreme Court described the applicable process in detail.⁴⁵ The general rule of contract interpretation is that a court should effectuate the intention of the parties at the time the parties entered into the contract.⁴⁶ As applied to interpreting a plat, the court should effectuate the plattor’s intent at the time the plattor drafted the plat.⁴⁷ In contract law, when the language in a contract is “plain” and “unambiguous,” then the court must assume that the parties to the contract meant what they expressed and give effect to what appears in the contract.⁴⁸ If the language is ambiguous, then the language must be examined from the perspective of a “reasonable person” in the same position and circumstances as the parties to the contract.⁴⁹ The subjective intent of the parties is subordinated to how a reasonable person in like circumstances would perceive the parties’ intent so as to discourage fraud.⁵⁰

In the Maryland case, the Pines Community Improvement Association owned fee title to a section of land immediately adjacent to a lake, and eventually decided to convey some of the real property to prospective buyers.⁵¹ The conveyances granted to buyers a right to use in common with other subdivision landowners the roads, paths, piers, and riparian rights in the subdivision.⁵² The Court held that the language plainly and unambiguously granted a right to the buyers to exercise riparian rights, and that any piers constructed by the buyers would become property of the Association because the Association only

44 *See White v Pines Cmty Improvement Ass’n*, 403 Md 13, 31-32; 939 A2d 165 (2008).

45 *Id.*

46 *Id.* at 31.

47 *See id.*

48 *Id.* at 32.

49 *Id.*

50 *Id.*

51 *Id.* at 22.

52 *Id.*

conveyed easements, not ownership rights, over community property in the subdivision.⁵³

Maryland's theory of contract interpretation serves to effectuate a platlor's intent. In *Olde Severna Park Improvement Ass'n v Gunby*, the Maryland Supreme Court wrestled with what to do when a notation appears in a subdivision plat that reserves riparian rights in a subdivision developer rather than granting riparian rights to the subdivision landowners or the public.⁵⁴ The notation in the plat stated that the platlor did not intend to dedicate to the general public the roads in the subdivision except for their use in common by all lot owners in the plat.⁵⁵ The Court, seeking to effectuate the platlor's intent, read the statements in the notation as meaning that the developer did not intend for the public to have riparian rights.⁵⁶ The Court further held that riparian rights were transferred to private lot owners as soon as the developer sold individual parcels in the subdivision.⁵⁷

Wisconsin adheres to a rather distinctive view of riparian rights, having broadly declared that land separated from water by a public road is not riparian.⁵⁸ An early example is an 1899 decision in which the Wisconsin Supreme Court reasoned that parallel and perpendicular roads are designed to provide the public with access to watercourses.⁵⁹ Furthermore, any private right's

interference with the public right is "unreasonable" and "against law."⁶⁰ As a more recent example of the Wisconsin approach, the Wisconsin Supreme Court ruled in *Heise v Village of Pewaukee* that riparian rights belong to the public when public road boundaries meet the boundary of a watercourse.⁶¹

Some jurisdictions have found a middle ground between flatly granting riparian rights to front lot owners or to the public. The rule is perhaps best laid forth in *American Jurisprudence*, which states that parallel and perpendicular public roads grant riparian rights to the public if the public has fee title to the public road and grant riparian rights to front lot owners if they have fee title in the land underlying the public road.⁶² The Michigan Supreme Court expressed approval of the same rule in *Thies*,⁶³ and interpreted *Croucher* as a presumption that front lot owners have fee title in the land beneath a public road all the way to the shoreline.⁶⁴

II. 2000 Baum Family Trust v Babel

On July 15, 1911, the North Charlevoix Company subdivided land near Lake Charlevoix in Northern Michigan.⁶⁵ The plat included forty-nine lots and six named streets.⁶⁶ No lots abutted the lake, but eleven extended to the edge of Beach Drive, which runs parallel and immediately adjacent to the lake.⁶⁷ The lots abutting Beach Drive were taxed as lake view properties, as opposed to riparian properties, and the deeds to the properties contained no grants of riparian rights.⁶⁸

53 *Id.* at 33.

54 402 Md 317; 936 A2d 365 (2007). The plat's notation stated:

IT IS THE INTENTION OF THE SEVERNA COMPANY NOT TO DEDICATE TO THE PUBLIC, THE STREETS, ALLEYS, ROADS, DRIVES, AND OTHER PASSAGE WAYS AND PARKS SHOWN ON THIS PLAT, EXCEPT THAT THE SAME MAYBE USED IN COMMON BY LOT OWNERS AND RESIDENTS OF SEVERNA PARK PLAT 2. ALL RIPARIAN RIGHTS BEING RETAINED BY . . . THE SEVERNA COMPANY.

Id. at 323.

55 *Id.*

56 *Id.* at 331-32.

57 *Id.* at 332.

58 *Heise v Village of Pewaukee*, 92 Wis2d 333, 344; 285 NW2d 859 (1979).

59 *Village of Pewaukee v Savoy*, 103 Wis 271, 278-79; 79 NW

436 (1899).

60 *Id.* at 279.

61 92 Wis2d at 344.

62 78 Am Jur 2d *Waters* § 40 (2002).

63 *Thies v Howland*, 424 Mich 282, 290-91; 380 NW2d 463 (1985).

64 *Id.* at 293.

65 *2000 Baum Family Trust v Babel*, 284 Mich App 544, 546; 773 N.W.2d 44 (2009).

66 *Id.* The six named streets were "Western Avenue, Central Avenue, Park Avenue, Cottage Avenue, Lake Avenue, and Beach Drive." *Id.*

67 *Id.*

68 *Id.* at 547.

The subdivision's plat included language that reads "the streets and alleys as shown on said plat are hereby dedicated to the use of the public."⁶⁹ The Charlevoix County Board of Supervisors accepted the plat and the dedication of streets on August 7, 1911,⁷⁰ and the Charlevoix County Road Commission currently maintains Beach Drive.⁷¹ A small strip of land and some trees separate Beach Drive from the lake.⁷² Front lot and back lot property owners in the subdivision have built permanent docks on the lake's shoreline.⁷³

The eight plaintiffs, who own lots abutting Beach Drive, brought suit against the back lot property owners in the subdivision, the Charlevoix County Road Commission, and Charlevoix Township, alleging trespass and nuisance.⁷⁴ The named back lot owners in the suit counterclaimed, asserting adverse possession or seeking a declaration that they had easements over the shoreline property.⁷⁵ A group of back lot owners not named in the suit intervened and filed a counterclaim, asserting adverse possession or seeking a declaration that they had easements.⁷⁶ Finally, the Charlevoix County Road Commission counterclaimed, asserting trespass due to the plaintiffs' construction of docks and other intrusions on the shoreline.⁷⁷

Prior to trial, the plaintiffs moved for partial summary disposition against the Charlevoix County Road Commission, arguing that "their lots were separated from the water by a roadway contiguous to the water,

[so] their lots were riparian."⁷⁸ The Charlevoix County Road Commission argued that it held fee title to the parallel public road pursuant to the statutory dedication in the plat, so the plaintiffs' lands were not riparian.⁷⁹ The back lot owners argued that the plaintiffs' lots did not abut the lake, so the plaintiffs had no riparian rights.⁸⁰ Charlevoix Township adopted the arguments of the Road Commission and back lot owners.⁸¹

The trial court denied the plaintiffs' motion for partial summary disposition against the Charlevoix County Road Commission, reasoning that the plaintiffs held no fee title to the waterfront land in front of their lots, so the plaintiffs had no riparian rights.⁸² The trial court relied on a rule from *American Jurisprudence* cited by the Michigan Supreme Court in *Thies v Howland*.⁸³ *American Jurisprudence* states that a majority of courts have adopted a rule regarding riparian rights that land separated from a watercourse by a public road, the fee of which is owned by the public, is not riparian land.⁸⁴ The rule also states that where a landowner has fee title to the land beneath a public road, riparian rights remain in the landowner.⁸⁵

The plaintiffs appealed the decision stripping them of their riparian rights, and the court of appeals granted interlocutory leave to appeal on September 10, 2008.⁸⁶ The plaintiffs argued on appeal that the trial court erred in finding that the dedication of the parallel public road around Lake Charlevoix conveyed fee title to the public.⁸⁷ The dedication, the plaintiffs argued, only transferred a limited fee to the public for the "sole purpose

69 *Id.* at 546.

70 *Id.* at 547.

71 *Id.*

72 *Id.*

73 *Id.* at 547-48.

74 *Id.* at 548. Plaintiffs' complaint was filed on March 20, 2007. *Id.*

75 *Id.*

76 *Id.* The additional back lot owners motioned to intervene on October 4, 2007. *Id.* The motion was granted October 25, 2007, and the counterclaim was filed on November 1, 2007. *Id.*

77 *Id.* The Charlevoix County Road Commission counterclaimed on September 9, 2007. *Id.* Among the various intrusions alleged were "docks, fencing, landscaping, rocks and rock walls, septic drain fields, and a flagpole." *Id.*

78 *Id.* at 548-49.

79 *Id.* at 549.

80 *Id.*

81 *Id.*

82 *Id.*

83 *Id.*; *Thies v Howland*, 424 Mich 282, 290-91; 380 NW2d 463 (1985).

84 78 Am Jur 2d *Waters* § 40 (2002).

85 *Id.*

86 *2000 Baum Family Trust v Babel*, 284 Mich App 544, 549; 773 NW2d 44 (2009). Plaintiffs moved for reconsideration in the trial court, but the motion was denied. *Id.*

87 *Id.* at 550.

of maintaining the road.”⁸⁸ As such, the plaintiffs, by reason of owning the land underlying the public road, should have riparian rights in the lake’s shoreline across the public road.⁸⁹

The court of appeals framed the issue on appeal as whether the plaintiffs, i.e., the front lot owners, have riparian rights where their lots abut a roadway that runs parallel to the lakeshore when the roadway was created by a dedication in an approved plat.⁹⁰ The court rejected the plaintiffs’ contention that the trial court characterized the defendants’ property interest as a full fee title, refocusing the initial inquiry on the plat act that gave rise to the defendants’ property interest.⁹¹ The Plat Act of 1887, which was still in effect in 1911 when the plat at issue was recorded, controlled regarding the distribution of rights within the subdivision.⁹²

The Plat Act of 1887 reads, in pertinent part, that properly executed plats dedicating property to the public “shall vest the fee of such parcels of land as may be therein dedicated for public uses” in the city, village, or township where the plat is located “in trust to and for the uses and purposes therein designated, and for no other use or purpose whatsoever.”⁹³ The court interpreted this provision of the Plat Act of 1887 as giving fee title to the public “for a use and purpose as designated in the plat by the plattors,” which happened to be a limited fee title.⁹⁴

The court, then, must interpret the particular plat at issue to determine whether the dedication in the plat assigned riparian rights to the public along with the fee title. The dedication in the plat in *Baum* included language stating “the streets and alleys as shown on said plat are hereby dedicated to the use of the public.”⁹⁵ The court ultimately held that the plat’s dedication to the use of the public granted riparian rights to the public because

the dedicatory language in “no way limit[ed] what type of use may occur on the depicted streets or alleys or who may use them.”⁹⁶ The plattors intended, in other words, to transfer full use, including use of riparian rights, to the general public.⁹⁷ The court also noted that the plaintiffs’ lots, as drawn on the plat, abutted Beach Drive and not Lake Charlevoix, the plaintiffs’ lots were not taxed as riparian properties, and the deeds to the plaintiffs’ lots contained no grants of riparian rights.⁹⁸

The court of appeals mentioned that the trial court’s analysis ended prematurely when the trial court ruled in favor of the defendants merely because the public had fee title in the public road.⁹⁹ The rule espoused by the court of appeals requires considering whether fee title passes to the public under the applicable plat act and whether language in the applicable plat and dedication limits the fee title.¹⁰⁰ The trial court’s failure to continue the analysis was “harmless error” because the “right result was reached, even if for the wrong reason.”¹⁰¹ The court of appeals affirmed the trial court’s decision, denying the plaintiffs’ riparian rights.¹⁰²

On January 27, 2010, the Michigan Supreme Court granted leave for the front lot owners to appeal.¹⁰³ On appeal, the decision of the court of appeals should be upheld and a rule of law adopted that favors interpreting plats to identify who the plattor or plattors intended to have riparian rights.

III. The Significance of *Baum*

The rule in *Baum* is consistent with the rule set forth in *Croucher*. *Croucher* stated that a lot located along a plat-dedicated public road has riparian rights so long as no express limitations of the lot’s riparian rights appear

88 *Id.*

89 *See id.*

90 *Id.*

91 *Id.* at 555-56.

92 *Id.* at 556.

93 1887 PA 309.

94 *2000 Baum Family Trust v Babel*, 284 Mich App 544, 558; 773 NW2d 44 (2009).

95 *Id.* at 546.

96 *Id.* at 561.

97 *Id.*

98 *Id.*

99 *Id.* at 563.

100 *Id.*

101 *Id.* (citing *Coates v Bastian Bros, Inc*, 276 Mich App 498, 508-09; 741 NW2d 539 (2007)).

102 *Id.*

103 *2000 Baum Family Trust v Babel*, 485 Mich 1051; 777 NW2d 137 (2010).

in the plat and no valuable land intervenes between the public road and the water.¹⁰⁴ *Baum* adds substance to what *Croucher* referred to as express limitations. While a number of the courts interpreting *Croucher* sought a narrow sequence of words to effectively limit a lot's riparian rights,¹⁰⁵ *Baum* interpreted the language used in a particular plat to give riparian rights to those the plattors intended to have riparian rights.¹⁰⁶

The courts interpreting *Croucher* before *Baum* typically looked only to the four corners of a plat to find an express limitation of the front lot owners' riparian rights.¹⁰⁷ In *Jonkers v Summit Twp*, for example, the court insisted that the public must demonstrate a "clearly expressed contrary intention" to defeat a front lot owner's riparian rights in the shoreline across the road from the owner's lot.¹⁰⁸ The court's requirement of an explicit statement to strip a front lot owner's riparian rights makes the finding of a contrary intention in a plat that doesn't mention riparian rights unlikely.¹⁰⁹ Nonetheless, the court in *Baum* found a contrary intention in a plat with no mention of riparian rights or related terms.¹¹⁰ The plattors did not use the words riparian rights in the plat at issue in the case, yet the court found that the plattors intended to transfer riparian rights to the public because: (1) the front lots, as drawn in the plat, did not abut the waterfront,¹¹¹ (2) the front lots were not taxed as riparian properties,¹¹² (3) the front lots' deeds contained no grants of riparian rights,¹¹³ and (4) the public's

use of the road was in no way restricted¹¹⁴ (unlike the public's use of the easement in *Thies v Howland*, which was restricted to "limited vehicular traffic, the hand carrying or dragging of small boats to and from the lake, and walking").¹¹⁵

Evidence of a plattor's intent may be found outside a plat. The *Thies* Court directly acknowledged this point, writing that the "intent of the plattors must be determined from the language they used and the surrounding circumstances."¹¹⁶ For example, perpendicular public roads drawn to touch the water's edge grant riparian rights to the public because the obvious purpose "of platting the [public] street in that fashion [was] to provide access . . . into the water."¹¹⁷ Regardless of whether the plattor intended to allocate fee title to the public, the public has riparian rights "material" to accessing the water,¹¹⁸ suggesting that the distinction drawn in *Kempf* between a right to travel to the water and riparian rights may be artificial because the public has riparian rights.¹¹⁹ Other relevant surrounding circumstances may include how subdivision owners, both past and present, have exercised riparian rights. The *Baum* court mentioned, however, that although the front lot owners set up and maintained docks on the shoreline, that fact alone, considered in light of the dedication's language and other surrounding circumstances, did not vest riparian rights in the front lot owners.¹²⁰

Whoever has fee title to the public road has, as a general rule, the riparian rights in the shoreline abutting the road.¹²¹ The analysis, however, does not stop upon discovery of who holds fee title, as the court in *Baum*

104 *Croucher v Wooster*, 271 Mich 337, 342-43; 260 NW 739 (1935).

105 See *Mich Cent Park Ass'n of Higgins Lake v Roscommon Co Rd Comm'n*, 2 Mich App 192, 197-98; 139 NW2d 333 (1966); *Sheridan Drive Ass'n v Woodlawn Backproperty Owners Ass'n*, 29 Mich App 64, 69-71; 185 NW2d 107 (1970).

106 See *2000 Baum Family Trust v Babel*, 284 Mich App 544, 560-62; 773 NW2d 44 (2009).

107 See *Jonkers v Summit Twp*, 278 Mich App 263, 269; 747 NW2d 901 (2008); *Kempf v Ellixson*, 69 Mich App 339, 342; 244 NW2d 476 (1976).

108 *Jonkers*, 278 Mich App at 269.

109 See *id.*

110 *Baum*, 284 Mich App at 560-62.

111 *Id.* at 561.

112 *Id.*

113 *Id.*

114 *Id.*

115 424 Mich 282, 296; 380 NW2d 463 (1985).

116 *Id.* at 293 (citing *Bang v Forman*, 244 Mich 571, 576; 222 NW 96 (1928)).

117 Sheldon J. Plager & Frank E. Maloney, *Multiple Interests in Riparian Land, Subdivision Platting, and the Allocation of Riparian Rights*, 46 J Urb L 41, 51 (1968).

118 *Id.*

119 *Kempf v Ellixson*, 69 Mich App 339, 342; 244 NW2d 476 (1976).

120 *2000 Baum Family Trust v Babel*, 284 Mich App 544, 561; 773 NW2d 44 (2009).

121 Plager & Maloney, *supra* note 117, at 50.

noted,¹²² because a fee title may be limited by language in the plat or by other surrounding circumstances.¹²³ In Michigan, the Land Division Act and the Plat Act of 1887 state that dedications transfer fee title to the public, but the fee title may be limited by the purposes described in a dedication or plat.¹²⁴ While the fee title transferred to the public by these statutes is not equivalent to an unrestricted fee title, the existence of the language in the Acts suggests that several courts' interpretation of the *Croucher* rule as vesting fee title in front lot owners may be wrong. *Thies*, for example, restates the rule in *Croucher* as creating a presumption of fee title in front lot owners.¹²⁵ *Croucher* merely says that riparian rights are in front lot owners unless an express limitation appears in the plat or conveyance.¹²⁶

122 *Baum*, 284 Mich App at 559-60.

123 *Id.* at 560.

124 See MCL 560.253; 1887 PA 309. The Land Division Act states:

- (1) When a plat is certified, signed, acknowledged and recorded as prescribed in this act, every dedication, gift or grant to the public or any person, society or corporation marked or noted as such on the plat shall be deemed sufficient conveyance to vest the fee simple of all parcels of land so marked and noted, and shall be considered a general warranty against the donors, their heirs and assigns to the donees for their use for the purposes therein expressed and no other.
- (2) The land intended for the streets, alleys, commons, parks or other public uses as designated on the plat shall be held by the municipality in which the plat is situated in trust to and for such uses and purposes.

MCL 560.253. The Plat Act of 1887 states:

The map so made and recorded in compliance with the provisions of this act shall be deemed a sufficient conveyance to vest the fee of such parcels of land as may be therein designated for public uses in the city or village within the incorporate limits of which the land platted is included, or if not included within the limits of any incorporate city or village, then in the township within the limits of which it is included in trust to and for the uses and purposes therein designated, and for no other use or purpose whatsoever.

1887 PA 309.

125 See *Thies v Howland*, 424 Mich 282, 293; 380 NW2d 463 (1985).

126 See *Croucher v Wooster*, 271 Mich 337, 342-43; 260 NW 739 (1935).

Determining whether an express limitation appears in a plat requires interpreting the language in a plat. Interpreting the language in a plat may require consideration of the surrounding circumstances in a subdivision¹²⁷ or an application of the principles of contract interpretation.¹²⁸ The principles of contract interpretation, as mentioned in the *White* opinion,¹²⁹ provide a valuable guideline for interpreting dedicatory language. In *White*, the Court highlighted the importance of effectuating drafters' intent so as to minimize fraud.¹³⁰ The Court stressed that plain and unambiguous language should be given effect whenever possible, while mentioning that ambiguous language should be analyzed from an objective perspective.¹³¹

The *Baum* court applied contract interpretation principles by beginning with the words in the subdivision's plat and determining what the words meant by considering the plat's language as a whole.¹³² Specifically, the court noticed that the dedicatory language in the plat granted public roads to the use of the public without any additional language, while clauses in other plats contained qualifying language that narrowed the scope of the public's use of public roads to such activities as walking or limited vehicular traffic.¹³³ Unlike the restricted language in *Thies*, which only transferred limited riparian rights to the public,¹³⁴ the unrestricted "use of the public" language in *Baum* transferred full riparian rights to the public.¹³⁵

Even if the court in *Baum* had found the plat's language to be ambiguous, the court likely would have

127 See *Thies*, 424 Mich at 293 (citing *Bang v Forman*, 244 Mich 571, 576; 222 NW 96 (1928)).

128 See *White v. Pines Cmty Improvement Ass'n*, 403 Md 13, 31-32; 939 A2d 165 (2008).

129 *Id.*

130 See *id.*

131 *Id.* at 32. Ambiguous language should be analyzed from the perspective of a reasonable person in the same position and the same circumstances as the parties at the time of contract formation. *Id.*

132 See *2000 Baum Family Trust v Babel*, 284 Mich App 544, 561; 773 NW2d 44 (2009).

133 See *Thies v Howland*, 424 Mich 282, 296; 380 NW2d 463 (1985).

134 *Id.*

135 *Baum*, 284 Mich App at 563.

reached the same conclusion had the court applied the principles of contract interpretation. The front lots, as drawn in the plat, did not abut the waterfront,¹³⁶ the front lots were not taxed as riparian properties,¹³⁷ and the front lots' deeds contained no grants of riparian rights,¹³⁸ providing objective evidence that the plat-tors' intent in *Baum* was to limit the riparian rights of the front lot owners. Even though a plat-tor may not be available to discuss or present evidence about his or her intentions with regard to riparian rights at the time a plat was drafted, objective evidence, such as how a property has been characterized by a taxing authority,¹³⁹ may indicate who in the subdivision a plat-tor intended to have riparian rights.

IV. Policy Implications

Critics of *Baum* oppose the case's rule due to the allegedly disastrous effects that the rule could have on property owners who were riparian one day, but not the next.¹⁴⁰ Attorney Clifford H. Bloom has suggested that the value of a property that was classified as riparian may plummet by as much as thirty percent if the property loses its riparian status.¹⁴¹ In addition, previously riparian property owners may incur costs from the forced removal of their docks and boat hoists from the water, in addition to the discomfort caused by watching the government replace the owners' private docks with public docks to be used by everyone.¹⁴²

Mr. Bloom's concerns may be overstated because a few key points in *Baum* reduce some of the risks associated with transferring front lot owners' riparian rights to the public. First, the front lot properties in *Baum* that were stripped of riparian rights were not taxed as riparian properties,¹⁴³ so a shift in riparian rights would not have tax consequences. The tax burden on front lot own-

ers would not increase or decrease because, in the eyes of the taxing authority, the value of the front lot properties would remain the same. Second, while the fair market value of a home may be tied to the home's access to a watercourse, *Baum's* transfer of riparian rights to the public does not strip the front lot property owners of all access to the lake because the front lot owners are members of the public. The front lot owners may exercise riparian rights in the watercourse to the same extent that the public may.

Because private property owners would lose exclusive access to their property, however, the relevant local authority should reimburse the front lot owners for any costs associated with removal of docks and other shoreline property unless the court finds the property to have been placed on the shoreline illegally.¹⁴⁴ Alternatively, a settlement could be reached whereby the local authority would compensate front lot owners for public use of their docks. The settlement option would save the local authority the cost of constructing new public docks and would provide the private property owners with an economic benefit to offset the psychological effect of losing exclusive access to what was once their private property.

An interesting point brought up by Mr. Bloom is whether *Baum* can be said to apply to plat-created public roads that have never been opened, improved, or utilized.¹⁴⁵ Could a properly accepted and dormant public road strip a front lot owner's riparian rights? Under *Baum*, the answer would be yes only if an unambiguous grant of riparian rights to the public existed in the plat or the surrounding circumstances indicated that the plat was drafted to grant riparian rights to the public.¹⁴⁶ The possibility that circumstances would indicate that riparian rights belong to the public is unlikely in the event of a dormant public road because the public has ceased using

136 *Id.* at 561.

137 *Id.*

138 *Id.*

139 *See id.*

140 *See* Bloom, *supra* note 2; Adam Rule, *Carry a Big (Pile of) Stick(s)*, <http://tryingliberty.com/2009/07/20/carry-a-big-pile-of-sticks> (accessed August 27, 2010).

141 Bloom, *supra* note 2.

142 *Id.*

143 *2000 Baum Family Trust v Babel*, 284 Mich App 544, 561; 773 NW2d 44 (2009).

144 *See* Patrick J. Wright, *Eroding Rights?*, <http://www.mackinac.org/12015> (accessed August 27, 2010). Mr. Wright argued that as the public's demand for access to watercourses increase, courts have become more willing to erode property rights that traditionally belonged to private property owners. *Id.* Mr. Wright also expressed a desire that private property owners be compensated for the erosion of their rights by the courts. *Id.*

145 Bloom, *supra* note 2. Mr. Bloom claims that there are "hundreds, if not thousands," of unused platted public roads that run parallel or perpendicular to the shorelines of Michigan watercourses. *Id.*

146 *Baum*, 284 Mich App at 560-63.

the road for any purpose. Nonetheless, an unambiguous grant of riparian rights to the public would strip a front lot owner of riparian rights. One must ask, then, how many dormant roads exist in platted developments with unambiguous grants of riparian rights to the public. The number is difficult to estimate because of varying interpretations of “unambiguous,” but the number should be compared with the number of actively used public roads that were intended to provide the public with riparian rights but have not because of *Croucher’s* interpretation.

Whether dormant public roads could strip a front lot owner’s riparian rights depends in part on whether the court’s holding in *Baum* that a dedication to the use of the public amounts to an unambiguous grant of riparian rights is read narrowly as applying only to the case at bar or read expansively as applying to any plat with similar language. Since the *Baum* court considered extrinsic evidence in finding that the particular dedication was unambiguous,¹⁴⁷ the court’s decision should be read narrowly to mean that the phrase was unambiguous only in regard to the Lake Charlevoix plat. A narrow reading would minimize the dormant public roads problem because a narrow reading would mandate consideration of a subdivision’s unique circumstances. An expansive reading, on the other hand, stating that any dedication to the use of the public is sufficient to grant riparian rights to the public may be too broad, wrongly encompassing cases where evidence suggests that front lot property owners should have riparian rights.

The benefit of reading *Baum* narrowly is fairness. Since the purpose of platting requirements is to balance important interests in land development,¹⁴⁸ plats that are approved can be said to contain fair and enforceable provisions. Failing to honor the specific language in a plat would be to ignore the enforceability of a plat in general and ignore the inherent fairness that comes with letting a plattee decide who should exercise particular rights in the plattee’s subdivision. Applying a blanket rule from *Croucher* that all front lot owners are riparian landowners would be a harsh result for the public if a plattee intended for a watercourse to be publicly accessible.

147 The court considered that the plaintiffs’ lots were not taxed as riparian properties and that the deeds to the plaintiffs’ lots contained no grants of riparian rights. *Id.* at 561.

148 MCL 560.101.

Whether or not *Baum* correctly interpreted the plat at issue in the case, the court rightly sought to interpret the language in the plat because interpreting the plat is fair and consistent with *Croucher*. Courts other than *Baum*, *Thies*, and *Kempf* seem to have ignored, or downplayed the significance, of the express limitation statement in *Croucher*.

Conclusion

In 1935, the Michigan Supreme Court set forth a rule of law stating that a lot separated from a watercourse by a public road with no land intervening between the public road and the shoreline has riparian rights absent an express limitation in the plat or property’s conveyance.¹⁴⁹ About seventy-five years later in *2000 Baum Family Trust v Babel*, a Michigan appellate court found an express limitation in the language of a plat dedicating a public road to the use of the public without any explicit mention of riparian rights or similar language.¹⁵⁰ The court held that the dedicatory language was unambiguous in granting riparian rights to the public because the plat did not limit the type of use that the public could make of the public road.¹⁵¹ Perhaps more importantly, the court supported its decision with objective evidence of the plattee’s intent.¹⁵²

In determining who has riparian rights when a public road separates a property from a body of water, courts should look to the express language of the plat at issue. If the plat’s language is ambiguous, then courts should interpret the plat by considering objective evidence of the plattee’s intent, as the court in *Baum* did, as is consistent with the rule from *Croucher*, and as is fair to individuals living near and visiting Michigan’s watercourses.

149 *Croucher v Wooster*, 271 Mich 337, 342-43; 260 NW 739 (1935).

150 *2000 Baum Family Trust v Babel*, 284 Mich App 544, 562-63; 773 NW2d 44 (2009).

151 *Id.* at 561.

152 *Id.* The front lots were not drawn to abut the watercourse and were not taxed as riparian properties. *Id.* The deeds to the front lots contained no grants of riparian rights. *Id.*



Judicial Decisions Affecting Real Property

by Ronn S. Nadis and Sarah Heisler Gidley

The Section is active in the judicial process in a variety of ways, such as preparing *amicus curiae* briefs and monitoring cases of interest to real estate lawyers. This Article provides a quarterly report designed to inform Section members about the Section's efforts to maintain the integrity of the law and to advise Section members about published decisions that may impact real estate practice.

The Following Cases Involving Real Property Issues Have Been Published Since The Last Issue Of The Review

Special Thanks. The Section extends its sincere appreciation to the SBM and the e-Journal staff. The original drafts to these case summaries were prepared for and published in the e-Journal. The e-Journal is a daily publication that provides case summaries organized by areas of practice, legal news and updates, public policy information, a calendar of events, and classified and fields of practice listings. The e-Journal is an invaluable tool for keeping current on Michigan law. Subscriptions to the e-Journal are free. You can subscribe by visiting the State Bar of Michigan website at www.michbar.org, and selecting the publications and advertising tab.

Wedgewood Ltd. Partnership v. Township of Liberty, Ohio
610 F.3d 340 (C.A.6, 2010)
June 28, 2010 (No. 08-446)

Issues: Whether the district court properly enjoined the defendant-Liberty Township from applying a set of zoning instructions against a parcel owned by

plaintiff-Wedgewood; Planned Unit Development; 42 USC § 1983 procedural due process violation; Scope of the injunction.

Judge(s): Griffin and Kethledge; Dissent – Carr

The court held the defendant-Liberty Township violated plaintiff-Wedgewood's procedural due process rights when it adopted zoning instructions which, in effect, amended the Wedgewood Commerce PUD without providing Wedgewood with notice and an opportunity to be heard. Thus, the court affirmed the order of the district court granting a permanent injunction. In 1991, the township trustees legislatively approved the WCC, a PUD. The development standards for each subdivision within the PUD were contained in a written document (the WCC Development Plan or "WCCDP") filed with the township's zoning commission. According to the WCCDP, only subareas 3, 8, and 9 were zoned for commercial development; however, between 1992 and 2003, owners of other subareas sought approval for and obtained permits to build commercial structures. Plaintiff-Wedgewood owns a lot in subarea 3. In October 2003, Wedgewood applied for certain zoning variances (related primarily to permitted square footage) to develop a Wal-Mart and gas station on subarea 3. A public hearing addressing the request was held with many residents voicing their objections to the proposal. The commission denied Wedgewood's application. Public opposition intensified and the trustees held two public meetings. A petition drive was also coordinated and gathered signatures from anti-Wal-Mart residents. As a result, in January 2004, the trustees issued a "Public Statement and Instructions to Zoning Department Regarding Future Administration

of Wedgewood Commerce Center Development Plan” (Instructions), which formed the crux of Wedgewood’s constitutional claims. The Instructions imposed a “floating” square foot maximum of commercial development in the WCC, determined that most of the square footage was already consumed by completed commercial development, and instructed the zoning department to “refrain from issuing zoning certificates for any additional commercial development” unless the applicant has completed a two-step “major” administrative process review. Six months later, Wedgewood submitted an application for a zoning permit to build a smaller Wal-Mart fueling station in subarea 3. It was denied as it was not in conformance with the newly adopted Instructions. Wedgewood sued the township under 42 US § 1983, alleging that the adoption of the Instructions constituted an unauthorized amendment to the WCCDP. To establish a procedural due process violation, Wedgewood had to demonstrate three elements - it had a life, liberty, or property interest protected by the Due Process Clause of the Fourteenth Amendment, it was deprived of the protected interest within the meaning of the Due Process Clause, and the state did not afford it adequate procedural rights before depriving it of its protected interest. The court held the district court did not err in ruling the Instructions constituted an amendment to the WCCDP triggering a state requirement of advance notice and a public hearing and properly granted summary judgment to Wedgewood on its procedural due process claim and the scope of the district court’s injunction did not constitute an abuse of discretion.

Hurley v. Deutsche Bank Trust Co. Ams.
610 F.3d 334 (C.A.6 2010)
July 01, 2010 (NO. 09-1964)

Issues: Plaintiffs’ claim under the Servicemembers’ Civil Relief Act (SCRA) (50 USC § 501); Defendants-Lohr and Orleans Associates’ appeal from the district court’s order denying defendants’ motion to compel arbitration because they waived their rights to enforce the arbitration clause against the plaintiffs.

Judges: Clay, Gilman, and Zatkoff

The court affirmed the district court’s order denying defendant-Orleans Associates’ motion to compel

arbitration pursuant to an arbitration agreement in a mortgage rider, holding that the defendants had waived the right to arbitration because they actively litigated the case in court for more than two years, and did not attempt to enforce their arbitration rights until after the district court entered an unfavorable decision. The plaintiffs-Hurley filed suit alleging violations of the SCRA and state law claims of infliction of emotional distress, fraud, and conversion after defendants foreclosed on their home. James Hurley has been a member of the Michigan Army National Guard since 1984 and was a sergeant. In 2003, he obtained a \$95,200 loan, and executed a mortgage on his residence in Hartford, Michigan, as security for the loan. Included in the paperwork for the mortgage was a rider as to arbitration of disputes related to the loan. In July 2004, he was ordered to active duty. While training in California to be ready to deploy for active duty he fell behind on the mortgage payments. On October 14, 2004, following notice by publication, defendants held a sheriff’s sale of the home. Deutsche Bank placed the highest bid of \$70,000 and obtained a sheriff’s deed, which was to become operative in 6 months. In connection with the foreclosure sale, defendant-Lohr signed an affidavit swearing none of the persons named in the notice of foreclosure (including James Hurley) were in the U.S. military at the time of the sheriff’s sale. In May 2005, while James Hurley was still deployed in Iraq, defendants began eviction proceedings requiring him to appear in a state court, and the state court entered a default judgment against James Hurley on June 14, 2005. Plaintiffs vacated the property and Deutsche Bank sold it to a bona fide purchaser for \$76,000. On May 2, 2007, Plaintiffs filed suit in federal district court. On May 21, 2009, after the district court granted in part and denied in part summary judgment motions, defendant-Orleans Associates filed the motion to compel arbitration, which the district court denied, holding that defendants had waived their right to compel arbitration. The court agreed that both factors indicating waiver were present. By actively litigating the case in court for more than two years, the defendants had taken actions inconsistent with any reliance on an arbitration agreement, and had delayed in asserting a right to arbitration to such an extent as to actually prejudice the plaintiffs. Thus, the court affirmed.

United States v. Barr
— F.3d — (CA 6, 2010)
2010 WL 3023985
August 04, 2010 (No. 09-1710)

Issues: Foreclosure for a federal income tax debt; Property owned by the tax debtor and his wife as tenants by the entirety; Whether the wife was only entitled to 50% of the proceeds of a foreclosure sale; 26 USC § 7403; Reliance by analogy on Takings Clause precedent; Whether the fact the wife was deprived of her right to prevent a sale undermined the conclusion that Michigan law implicitly supports an equal assignment of interests; Whether the district court properly conducted the “balancing test” described in *United States v. Rodgers*.

Judge(s): Rogers and Greer; Concurring in part, Dissenting in part - Batchelder

Since spouses owning property as tenants by the entirety are entitled to equal distribution of proceeds under all circumstances contemplated by Michigan law, the district court correctly determined that foreclosure was appropriate in this case where the plaintiff-government sought to foreclose a federal income tax debt owed by the defendant-husband against the home he and the defendant-wife owned as tenants by the entirety. The husband owed the government over \$300,000 in unpaid income taxes, interest, etc. The government sued to foreclose the federal tax lien created by those debts against the marital home. After a default judgment was entered against the husband, the government moved for summary judgment on its foreclosure claim. The wife opposed the motion and asked the district court to exercise its limited equitable discretion to decline to order the sale. She argued that because she was likely to outlive her husband, her interest in the home was more than 50% of its value. Thus, she asserted that foreclosure was inappropriate due to her larger interest and because only her husband had unpaid federal tax liabilities. The district court held that an equal division of any proceeds was appropriate and refused to exercise its equitable discretion to prevent the foreclosure sale. On appeal, the wife argued that the district court erred in determining that she was only entitled to half the proceeds of any foreclosure sale. The court held that under Michigan law, the spouses had identical rights to

their marital home. Because they had equal interests in their home, “division according to their interests results in an equal distribution of the proceeds of the sale of that home.” While the wife contended that her right of survivorship and her right to prevent the encumbrance or sale of the property were worth more than her husband’s survivorship and sale-prevention rights, the court concluded that both of these rights generated equal spousal interests. “Michigan law dictates the result that survivorship rights are equal between spouses.” This conclusion was consistent with *United States v. Rodgers*, 461 US 677, 683 (1983), and the court held that the wife did not present any compelling reason why it should not apply the presumption of equal spousal life expectancy implicit in Michigan law. Her right to prevent sale also did not support her claim that her interest in the home was greater than her husband’s. “Because these rights are precisely reciprocal between spouses, they have no net effect on the relative interests of spouses who own property as tenants by the entirety.” While the wife also contended that she had an interest in the home greater than half its value based on various theories that would result in the total of her and her husband’s interests exceeding 100%, this result was not possible under 26 USC § 7403. The court also held that the *Rodgers* court did not mandate application of its four-factor balancing test before a district court could order a sale under § 7403, and even if it had, the district court properly applied the factors. Affirmed.

Hendee v. Putnam Twp.
— Mich —; — NW2d — (2010)
2010 WL 2787923, Mich.
July 15, 2010 (NO. 137447, 137446)

Issues: Zoning; Whether the trial court had jurisdiction to entertain an exclusionary zoning claim and grant relief allowing the plaintiffs to use the property for a 498-unit manufactured housing community (MHC); Applicability of the “futility” doctrine; Applicability of the “ripeness” and “finality” rules stated in *Paragon Props Co v City of Novi*, 206 Mich App 74, 76 (1994), to a “facial” attack on a zoning ordinance.

Judges: Weaver and Hathaway; Concurrence - Cavanagh and Kelly; Separate Concurrence – Corrigan, Young, Jr., and Markman

The lead opinion held that the trial court and the Court of Appeals erred by reaching the question of whether the defendant-township's zoning ordinance was unconstitutional and thus, also erred by holding that the plaintiffs were entitled to an order enjoining the township from interfering with plaintiffs' development of a 498-unit MHC. Because plaintiffs never submitted an application for rezoning or a variance to construct an MHC, their claim was not ripe for judicial review. Thus, the trial court had no basis to enjoin the township from enforcing its zoning ordinance, nor should the trial court have awarded plaintiffs their costs and expert witness fees. The plaintiffs-Hendee own a 144-acre tract of land, formerly used as a dairy farm, in the township. They filed an application with the township Planning Commission to rezone their land from A-O to R-1-B. They later unsuccessfully applied for approval of a 95-unit PUD and rezoning to R-1-B. At some point during the application process concerning the 95-unit PUD, the Hendees filed a new application to rezone the property to permit MHC development. However, they withdrew this application after the township informed them it would not process a new application for an MHC while the PUD application was still pending. The Hendees, and the proposed buyer/developer, plaintiff-Village Pointe, sued the township, alleging the refusal to rezone the property from A-O zoning to allow MHC development deprived them of equal protection and substantive due process, constituted an unconstitutional taking, and the township's zoning was exclusionary, in violation of former MCL 125.297a, because it excluded MHC zoning. Plaintiffs' exclusionary zoning claim was based on the notion that because the township's zoning map classified no appropriate land for MHC use and the township's master plan designated only unsuitable property for this use, the township's ordinance was facially invalid. Citing the U.S. Supreme Court's opinion in *Williamson Co Regional Planning Comm v Hamilton Bank of Johnson City*, 473 US 172, 186 (1985), as well as the court's express adoption of *Williamson* in *Electro-Tech, Inc v HF Campbell Co*, 433 Mich 57, 81-91 (1989), the court observed in *Paragon* the importance of requiring finality in land-use-regulation disputes. Consistent with *Williamson*, the court held in *Paragon* that judicial review in zoning cases is not available until the zoning authority has rendered a final decision. Here, the

trial court and the Court of Appeals majority erred (1) to the extent they held the township zoning ordinance was facially invalid because it unconstitutionally excluded a lawful use (MHC) and (2) by holding the futility exception excused compliance with the finality rule and the appropriate remedy was to enjoin the township from interfering with plaintiffs' development of a 498-unit MHC. "An ordinance is not facially invalid merely because it does not authorize every conceivable lawful use, nor does a zoning authority's denial of an application for residential rezoning at a proposed lower-density level automatically establish that it would be futile for the property owner to apply for a higher-density use, such as MHC rezoning or a variance allowing MHC use." Because plaintiffs never submitted an application to the township for MHC rezoning or for a use variance permitting construction of an MHC, their claim was not ripe for judicial review. The Court of Appeals judgment was reversed and remanded for entry of a dismissal order. Justices Cavanagh and Kelly disagreed with the lead opinion's analysis, which would extend and exacerbate the errors in *Electro-Tech* and *Paragon*, but ultimately agreed with its conclusion that plaintiffs had not presented any exclusionary zoning claims ripe for review. Thus, they concurred with the decision to reverse the Court of Appeals judgment and remand the case for entry of a dismissal order consistent with the court's decision. Justices Corrigan, Young, Jr., and Markman concluded that plaintiffs' exclusionary zoning claim was not ripe for adjudication because plaintiffs neither sought nor obtained a decision concerning their contemplated development of a 498-unit MHC before filing suit. They would hold plaintiffs' as-applied challenge to the validity of defendant's zoning ordinance was subject to the threshold doctrine of ripeness and the interrelated rule of finality. Because plaintiffs could not cross this threshold and because the futility exception to the rule of finality was inapplicable in this case, the justices concurred in the result of the lead opinion reversing the Court of Appeals judgment.

Tkachik v. Mandeville

— Mich ___; ___ NW2d ___ (2010)
2010 WL 2925086, Mich.
July 27, 2010 (NO. 138460)

Issues: Whether the equitable "doctrine of contribution" can be applied between co-tenants in a tenancy



by the entirety where one spouse has willfully abandoned the other before that spouse's death and thus is not a "surviving spouse"; Whether defendant was unjustly enriched; Whether there was an adequate legal remedy precluding the court from providing equitable relief.

Judges: Markman, Kelly, Cavanagh, and Corrigan; Dissent - Weaver and Hathaway; Separate Dissent – Young, Jr.

The court was presented with an issue of first impression: whether the equitable "doctrine of contribution" can be applied between co-tenants in a tenancy by the entirety where one spouse has willfully abandoned the other before that spouse's death, and thus is not a "surviving spouse." The court held that since there was no adequate remedy at law for the harm that plaintiff-Tkachik (the personal representative of the estate of Janet Mandeville) alleged, because no other governing legal or equitable principle precluded this remedy, and because the relief plaintiff sought—when properly understood—will not upset the common law of this state, the equitable doctrine of contribution can be appropriately applied in this context. Thus, on the facts of this case defendant was liable for the payments his spouse made in excess of her "aliquot share of the common burden or obligation . . ." The judgment of the Court of Appeals was reversed and the case was remanded to the probate court. Janet and defendant-Frank Mandeville were married in 1975 and remained so until Janet died on July 13, 2002, after a battle with breast cancer. The Mandevilles acquired two properties during their marriage, which they owned as tenants by the entirety. Accordingly, by the right of survivorship inherent in a tenancy by the entirety, the marital real properties passed to Frank upon Janet's death. In the last decade of their marriage, Frank was often out of the country for extended periods. Specifically, he was absent for the 18 months preceding Janet's death. During this period, Frank did not attempt to call Janet or otherwise communicate with her, even though, as he acknowledged, he knew that she was seriously ill. He did not attend her funeral. In Frank's absence, Janet maintained the properties and was responsible for paying the taxes, insurance, and mortgage. In Frank's absence, Janet was cared for by her sister, the plaintiff. In the months

before she died, Janet executed a living trust and final will disinheriting defendant and left everything to her mother. Plaintiff sought contribution from defendant for the monetary expenses Janet incurred in maintaining the properties before her death. Defendant argued he had not been unjustly enriched because he "has only received that which was given to him by operation of law, without any obligation . . ." On the facts of the case, the court held that equity, and the principles of natural justice called on Frank to contribute his share of the property maintenance costs incurred by his wife Janet. But for her payments, there would be no property to pass to defendant by operation of law. Considering this reality, the court was unable to conclude he received the properties "without any obligation on his part to make restitution." Considering his willful abandonment of Janet, by which she alone became responsible for the properties, for defendant to retain the monies that preserved these properties and made his ownership possible would be unjust. The court held there was no adequate legal remedy precluding it from providing equitable relief. Additionally, the remedy of divorce, which would have both dissolved the Mandevilles' bonds of marriage and necessitated a division of real property, was not an adequate remedy at law for the actual, and relatively narrow, relief sought by plaintiff. Justice Young vigorously dissented believing the majority created a rule rendering Michigan the one place in the common law world where a tenant by the entirety can now be liable for contribution to his deceased spouse's estate. The justice believed the majority's opinion was contrary to and undermined settled principles of law and equity.

Whitman v. Galien Township
— Mich App __; __ NW2d __ (2010)
2010 WL 2330378, Mich. App.
June 10, 2010 (No. 287991)

Issues: Zoning; "Special use permit" to allow the operation of a snowmobile, dirt bike, and ATV race-track during the summer months in defendant-township's agricultural zoning district; Whether the zoning ordinance complied with MCL 125.3502(1)(a) of the Michigan Zoning Enabling Act (MZEA)(MCL 125.3101 *et seq.*).

Judges: O'Connell, Owens, and Talbot

Because the zoning ordinance at issue did not comply with the MZEA, the defendant-Board of Appeals' decision to grant a special use permit did not comport with the law, and the court held the trial court erred in affirming the Board's decision. Thus, the trial court's order affirming the Board was reversed and the special use permit was vacated. The Board granted the applicants' application for a special use permit to allow the operation of a snowmobile, dirt bike, and an ATV racetrack during the summer months in the defendant-township's agricultural zoning district. The appellants (Whitman and the Piccolis-neighboring land owners) claimed the Board's decision did not comport with the law because the zoning ordinance did not comply with the MZEA. Appellants contended the zoning ordinance failed to "specify" the land uses and activities eligible for special use permits because the ordinance generalized any establishment for commercial or industrial activities was eligible for special use status. Applying the interpretation of the language in the MZEA to the zoning ordinance at issue, the court held the zoning ordinance did not comply with the enabling legislation. Here, the zoning ordinance provided "establishments for the conducting of commercial or industrial activities" were eligible for special use status within the agricultural zoning district. Considering the definitions of "commercial" and "industrial," the court held the language in the zoning ordinance swept too broadly and made all actions or functions (activities) pertaining to commerce, business, trade, manufacture, or industry in general, eligible for special use status within the agricultural zoning district. The zoning ordinance did not comply with MCL 125.3502(1) because it did not specify the special land uses and activities eligible for approval, but rather identified general categories of uses or activities. Also, defendants' reliance on *Reilly v Marion Township*, 113 Mich App 584 (1982) was unpersuasive. The central issue in *Reilly* involved the interpretation of a zoning ordinance, while the central issue in this case concerned whether the zoning ordinance complied with the MZEA.

Brown v. Martin

— Mich App —; — NW2d — (2010)
2010 WL 2390210, Mich. App.
June 15, 2010 (NO. 289030)

Issues: Action to enforce a restrictive covenant written into an original subdivision deed and contin-

ued through automatic 10-year extensions of the covenant; Whether the amendment to the covenant passed by the majority of then lot owners took effect immediately upon its recording or upon the commencement of the next 10-year automatic extension period; Restriction on the frequency of amendment and the type of vote required.

Judges: Fitzgerald, Servitto, and Beckering

The court held that because the amendment to the restrictive covenant was by less than unanimous vote of the then-existing lot owners, the amendment will not take effect until the end of the current 10-year extension period in 2017. Thus, defendants-Martins' home-based hair salon violated the subdivision's existing restrictive covenant, and the trial court erred by granting summary disposition to defendants. The parties own lots in the same subdivision and all lots in the subdivision were originally subject to a restrictive covenant providing that each lot be used for single-family residential purposes only. The subdivision covenants provided that the covenants were binding for 25 years after recording "after which time said covenants shall be automatically extended for successive periods of ten years unless an instrument signed by a majority of the then owners of the lots has been recorded, agreeing to change said covenants in whole or in part." The covenants were recorded on 6/28/72, so the initial 25-year period ran until 6/27/97. Defendants remodeled their home and began operating a hair salon in 11/07. Plaintiffs-Brown complained to defendants about the business, asserting it was operating in violation of the subdivision's land use restrictions. On 3/9/08, the required number of then lot owners passed an amendment to the covenant allowing for certain home-based businesses, including hair salons. Plaintiffs filed suit seeking declaratory and injunctive relief to enforce the original restrictive covenant, and to enjoin defendants from operating the hair salon in their home. Plaintiffs claimed the covenant could be changed only at the expiration of any automatic 10-year extension period. Defendants contended the changes could occur at any time after the first 25-year period when a majority of the then-owners of the lots agreed. The court disagreed and concluded the trial court erred in finding the amendment took immediate effect. The plain language of the covenant clearly provided automatic 10-year renewals "unless an

instrument signed by a majority of the then owners of the lots has been recorded.” The covenant prescribed a definite time period of 10 years for modification by a majority of the then lot owners. The 10-year automatic extension language would be rendered meaningless if the covenant could be amended by a majority vote (less than unanimous) at any time on or after 6/27/97. Thus, the plain language of the covenant caused the reference to “periods of ten years” to be a restriction on the frequency of the amendment by a less than unanimous vote. However, if every then lot owner voted to amend or change the covenant, then the restriction as to frequency of amendment by majority vote would not apply, and a change by unanimous vote could be made at any time. The court reversed and remanded for entry of an order granting plaintiffs summary disposition and enjoining defendants from operating a beauty salon in their home until after 6/28/17 or a unanimous vote of the then-existing lot owners permits the use.

D’Andrea v. AT&T

___ Mich App ___; ___ NW2d ___ (2010)
2010 WL 2595015, Mich. App.
June 29, 2010 (NO. 288483)

Issues: Whether defendant-AT&T’s installation of new and additional utility equipment on an easement on the plaintiffs’ property (a private residence) constituted a continuing trespass.

Judges: Saad, Hoekstra, and Servitto

Plaintiffs alleged that AT&T’s installation of new equipment on a utility easement on their property is a continuing trespass because it materially increased the burden on the property because the new equipment was much larger and further reduced plaintiffs’ useable backyard area by almost half, diminishing the value of their property. The trial court granted summary disposition in favor of AT&T. However, the court (Court of Appeals) noted that the easement language provided little guidance as to whether AT&T could place additional equipment within the easement. AT&T contended plaintiffs failed to establish a trespass because AT&T was authorized by the Land Division Act (LDA), MCL 560.101 *et seq.*, to place the equipment within the utility easement. The court disagreed that the LDA addresses the rights and limitations of AT&T’s development

of the utility easement in this case where none of the provisions of the LDA discuss to what extent a utility may develop or build on a public utility easement on a subdivision lot, and there is a complete absence of any legislative intent in the LDA to give a public utility free reign to build on an easement as it pleases. Therefore, the trial court erred in granting AT&T summary disposition based on the LDA. Further, the trial court erred in granting AT&T summary disposition on the ground that it had obtained building permits from the local city and county before it placed the additional equipment on the easement because AT&T provided no legal authority or documentary evidence to establish the city or county had the legal authority to decide on the nature, size, or scope of equipment a utility may install on the utility easement or whether the city or county actually considers these issues when issuing a building permit. The court reversed, remanded, and stated the trial court should address discovery on remand.

Michigan Dep’t of Transp. v. Gilling

___ Mich App ___; ___ NW2d ___ (2010)
2010 WL 2788161, Mich. App.,
July 15, 2010 (NO. 285369, 287552)

Issues: Condemnation; Whether a business owner may receive business interruption damages, including moving and relocation expenses, as constitutional just compensation; Whether state and federal statutes exclusively govern recovery for moving and relocation expenses; Whether the trial court properly excluded MDOT’s evidence showing the permanent site to which the defendants ultimately moved was available at the time they first moved to the allegedly unnecessary interim site.

Judges: Saad, Whitbeck, and Zahra

The court agreed in part with the trial court’s ruling that business interruption damages include actual moving and relocation expenses, but further held that the cost of moving inventory is not included. These consolidated appeals arose out of a condemnation proceeding brought by plaintiff-MDOT to acquire a multi-acre parcel located on a highway as part of a road-widening project. The parcel was owned by the defendants and was used to operate a retail nursery and landscaping business. MDOT contended that the trial court erred

in allowing the jury to award over \$500,000 in moving and relocation expenses as just compensation. MDOT argued that “business interruption damages” do not include incidental expenses for moving personal property and other relocation expenses, and that recovery of moving and relocation expenses is statutorily provided as an administrative remedy, separate from just compensation. The court held that claims for business interruption damages do not allow for lost profits, but permit recovery of moving and relocation expenses. However, although moving and relocation expenses can include expenses for moving trade fixtures, the court held that the trial court erred in classifying defendants’ nursery stock as trade fixtures. The defendants might successfully argue that items such as water pumps, chemical fertilizers, fertilizing equipment, flower display racks and free-standing counters designed for the space are trade fixtures. Those items, while not necessarily attached to the land or building, could be considered “constructively annexed” to the property because they are intended to be permanent, they would lose value if removed from the building, and they enable and are

essential to the business of keeping and selling plant material. In contrast, the inventory of trees and bushes were the products of the business, they were specifically intended to be sold and removed from the property, and their removal did not impair their value or the value of the property. This moveable inventory did not fall within the definition of a “trade fixture” under any of the relevant cases and, because it was more akin to personal property, Gilling was not entitled to recover for the expense of moving inventory. The trial court should not have ruled Gilling had the right to recover for the cost of moving inventory in the form of trees, shrubbery, etc. These plants were not trade fixtures. Any losses arising from the movement of the nursery products fell within the category of non-compensable lost profits. The court further held the trial court abused its discretion in excluding key expert testimony supporting MDOT’s position Gilling was unreasonable in moving to an interim location before moving to its final destination, and MDOT was entitled to a new trial on this basis. Affirmed in part, reversed in part, and remanded for a new trial.



Legislation Affecting Real Property

by Ronn S. Nadis and Michael K. Dorocak



The Section is active in the legislative process in a variety of ways, such as appearing before House and Senate committees, lobbying for and against bills, and monitoring legislation of interest to real estate lawyers. This Article provides a quarterly report designed to inform Section members about new legislation affecting real property, the Section's efforts regarding legislation that may become law, and bills that may have an impact on real estate practice.

The Section has taken a Formal Position on the following Pending Legislation

Positions adopted by the Section: The Real Property Law Section is not the State Bar of Michigan, but rather a Section that members of the State Bar choose voluntarily to join based on common professional interest. The positions expressed are those of the Real Property Law Section. The Real Property Law Section's total membership is 3,152. The positions were adopted by vote of the Section Council which has a total of 18 voting members.

SB 610: The Section opposes SB 610, which would create a statutory commercial real estate brokers lien. The reasons for opposition are as follows:

1. The proposed legislation provides for a non-consensual lien, which interferes with basic property rights.
2. The proposed legislation makes brokers a special preferred class of persons and pro-

vides a very extraordinary remedy of a lien against real property.

3. Brokers deal directly with owners, purchasers, landlords and tenants and have adequate remedies at law for the collection of their commissions.
4. Providing lien rights to brokers will encourage other parties dealing with real estate such as appraisers, property managers, property inspectors, lawyers, title companies, escrow agents and accountants to request similar rights.
5. Once broker's liens are granted for commercial property there will be a substantial risk that lien rights will be subsequently extended to include residential property.
6. The proposed legislation is patterned after the Construction Lien Act, but the justification for protecting artisans who create physical improvements to the property does not apply to brokers.
7. The proposed legislation seeks to force parties to a transaction to close the transaction and escrow funds sufficient to satisfy a lien, even though the validity of a lien is in dispute.
8. The proposed legislation is complex and will add substantial costs, expenses, litigation, delays and disruptions to closing real estate transactions.
9. The proposed legislation will result in the filing of more documents affecting property,

problems of timely discovering such documents, and will create additional underwriting risks for title insurance companies.

SB 960: This bill would require a notary public, before performing a notarial act, to determine whether the signer objectively understands the substance of the transaction. Such a conclusion would also necessarily require a determination of competency. The reasons for opposing this bill are as follows:

1. The statutory change expands a notary's duties far beyond that which exists today. Currently, a notary is only required to confirm that the person signing is in fact the person named in the instrument.
2. The statutory change would require a notary to determine matters which are not easily determinable (i.e., competency and understanding of the substance of the transaction).
3. The statutory change would make it more difficult to find notaries willing to notarize documents, and may lead to notary shopping.
4. The statutory change would lead to inadvertent disclosure of confidential information to a person who is not a party to the transaction.
5. Disabled persons could be subjected to discrimination by a notary who believes that, because of the person's disability (i.e., blindness or physical limitations), the person is unable to understand the transaction.

HB 4503 and SB 332: These bills would provide for the recording of affidavits to correct errors in previously recorded documents by persons with knowledge of relevant facts. The Section opposes these bills for the reasons as follows:

1. The bills would permit anyone with knowledge of relevant facts of "errors or omissions" in a recorded document, to file an affidavit to correct such errors and omissions. This expands the scope of permissible affidavits far beyond the limited scope contemplated

by MCL 565.451a, and opens the door to fraud and abuse. Note, however, that a person who knowingly makes a false statement is guilty of perjury. MCL 565.451b.

2. The bills raise questions about what effect such an affidavit has with respect to the recorded documents. MCL 565.453 allows such an affidavit to be used as evidence in court and is prima facie evidence of the facts therein contained. Yet, such an affidavit may not be approved by the parties to the document.
3. The bills state that the register of deeds "may" record such affidavits. It later states that affidavits are not "necessary" if a new document indicating corrective changes is recorded. This seems to imply that re-recording of documents is not permitted (which is the position now taken by some registers of deeds). It has been a longstanding practice to re-record documents as a means to correct scrivener's errors and there is no reason that practice should not continue.

Finally, the Council of the Real Property Law Section further noted that it has been a longstanding practice to record scrivener's error affidavits, and it would be helpful to have express statutory authority for doing so.

HB 4869: It appears that HB 4869 intends, within the context of the summary proceedings act, to extend to any property manager the right to represent parties (in other words, to act as their lawyers) before the court. The Council of the Real Property Law Section opposes HB 4869 because the proposed legislation conflicts with the fundamental public policy reflected in MCL 600.901, which states, "[n]o person is authorized to practice law in this state unless he complies with the requirements of the supreme court with regard thereto." The Section believes that the various obligations imposed upon attorneys by the Rules of Professional Conduct, and their status as officers of the court, bring an important level of professionalism to these proceedings, as well as some basic assurance that the fundamental due process requirements of the Michigan Court Rules and the summary



proceedings act are being honored. Unrestricted and typically unlicensed management “agents” are not bound by the Rules of Professional Conduct and are not likely to share an attorney’s training, experience or concern regarding legal procedure. Eviction actions impact fundamental interests (for example, basic shelter), which in the residential context are subject to extensive statutory regulation. Forfeiture actions may determine legal and equitable title to real estate under land contract. In neither case does the “past due” amount upon which these cases are commenced reflect the total economic or social value of the interests. These are not simply collection actions; the summary proceedings act and the Michigan Court Rules impose extensive due process requirements on summary proceedings (requirements that do not exist in small claim actions) because the right to possession is so important.

Despite the importance of the summary proceedings process, HB 4869 actually imposes far less restriction on representation than currently exists in the small claims division. For example, a claim by a corporate plaintiff in the small claims division can only be filed by a “full time, salaried employee having knowledge of the facts surrounding the complaint.” MCL 600.8407; MCR 4.302(B)(2). No such restriction is imposed on summary proceedings under the proposed legislation; a part-time “agent” can apparently act in the full capacity of a lawyer (but with none of the corresponding restrictions imposed by the Rules of Professional Conduct). Additionally, MCL 600.8408 expressly precludes the use of collection agencies or agents in small claims actions. Since management companies will effectively be acting as “collection agents” within the eviction and forfeiture context, the legislation significantly expands the scope of layperson representation beyond that allowed in the small claims division. The proposed legislation goes well beyond any prior model and is not justified by any existing problem with the summary proceeding process. The Rules of Professional Conduct provide important restrictions on advocacy and representation, and they should not be circumvented in the summary proceedings context.

HB 5267 and SB 350: These bills will allow the register of deeds in Kent, Oakland and Macomb Counties to calculate the amount required to redeem fore-

closed property. The reasons for opposing these bills are as follows:

1. Amendments to MCL 600.3204(4) are inequitable, because in certain circumstances, a purchaser might be required to make insurance, tax or other applicable payments during the last 30 days before the redemption period expires, and in such cases, the property can be redeemed without repayment of such amounts. In addition, the 30-day requirement could discourage purchasers from making such payments because of the increased risk that the payment might not be added to the redemption amount.
2. HB 5267 requires a purchaser to “accept” a redemption amount erroneously calculated by the register of deeds, and the register of deeds has no liability for such erroneous calculations. SB 350 does not expressly require a purchaser to “accept” a redemption amount erroneously calculated by the register of deeds, but because it authorizes the register of deeds to calculate the redemption amount, it creates a statutory reliance argument by the redeeming party. Under either proposed legislation, this would likely result in litigation over title and the appropriateness of redemptions.

HB 5753: This bill would impose certain requirements on contracts for the sale of land. In particular, if the real property subject to a land contract is a single-family residence, the land contract vendee would not be able to rent or lease the residence to a third party unless the land contract expressly permits the residence to be rented or leased. The Council for the Real Property Law Section voted to oppose this bill because it is inconsistent with the freedom to contract. In most situations, a land contract vendor and vendee can bargain for and agree to a provision prohibiting rental of the property. Thus, there is no policy reason to be shifting the balance of power on this issue in favor of the vendor.

HB 5804: An adverse possession claim cannot be made against someone who has been paying real property taxes during the period of time covered by the ad-

verse claim if this bill passes. The Section opposes HB 5804 for the reasons as follows:

1. Adverse possession is already a difficult claim on which to prevail, and this revision would make it almost impossible for anyone to prevail on such a claim, because the claimant will not often have paid the property taxes on the disputed land for 15 years.
2. The proposed revision would be subject to many difficulties in a boundary line dispute, which likely comprises the majority of adverse possession claims. It is often difficult to determine which party paid the taxes on the disputed strip of land because the tax record legal descriptions are often imprecise, and not intended to establish legal boundaries. The assessor may base his assessment upon the location of improvements, such as a fence, as opposed to the actual acreage in the legal description. A few other states that have required that the claimant pay property taxes either exempt boundary line disputes by statute, or by judicial carve-out.
3. This language would arguably allow a defendant who is delinquent in the payment of property taxes to pay those taxes after the claim is filed, thereby defeating the adverse possession claim. This problem could be remedied by replacing “maintained” with “commenced.”
4. The existing requirements to prove an adverse possession claim (open, continuous, exclusive, adverse, notorious, hostile, etc.) provide a difficult burden of proof for the claimant, and already ensure that adverse possession will be found only in clear situations to protect the integrity of the adverse possession doctrine.
5. The elements of a prescriptive easement claim are almost identical to an adverse possession claim. The prescriptive easement holder will not have paid taxes on the property. Therefore, it is inconsistent for the legislature to impose this additional requirement

on an adverse possession claim, when it does not apply to a prescriptive easement claim.

SB 1256: This bill would permit a majority of the co-owners to modify restrictions or covenants imposed under Sections 46 and 53 of the Michigan Condominium Act, if the restrictions or covenants were imposed by a developer who is no longer operative or who no longer maintains a financial interest in the association.

The Condominium, PUDs and Cooperatives Committee opposed the legislation because the Michigan Condominium Act, in Section 90, already requires a super-majority (2/3rds) of the owners and, under certain circumstances, the first mortgagees of units, to modify the restrictions and covenants. SB 1256 appears to conflict with Section 90 of the Act.

SB 549: This bill, among other things, would permit co-owners of a condominium association to attend all meetings of the board of directors. The only exceptions to this open-meetings requirement, as provided in the proposed bill, are as follows:

1. To consider the dismissal, suspension, or disciplining of; to hear complaints or charges brought against; or to consider a periodic personnel evaluation of an officer, employee, staff member, or individual agent, if the named person requests a closed hearing. A person requesting a closed hearing may rescind the request at any time, in which case the matter at issue is considered only in open sessions.
2. For strategy and negotiation sessions connected with the negotiation of a collective bargaining agreement if either negotiating party requests a closed hearing.
3. To consult with its attorney regarding trial or settlement strategy in connection with specific pending litigation, only if an open meeting would have a detrimental financial effect on the litigating or settlement position of the association of co-owners.
4. To review the specific contents of an application for employment if the candidate requests that the application remain



confidential. However, all interviews for employment shall be held in open sessions.

The Section opposes this bill for the following reasons:

1. Directors of condominium association boards are not public officials making public policy decisions, which is the main reason for requiring governmental bodies to have open meetings.
2. There is concern that having open meetings will deter owners from volunteering to serve on boards because of the increased possibility of the board members having to deal with belligerent co-owners.
3. The action items often considered by condominium association boards are personal in nature, such as collection of delinquent assessments or enforcement of restrictions, and the co-owners involved often want their personal information protected.
4. Material changes to the condominium documents already require a super-majority of the co-owners to approve; thus the board will not be able to effect material changes without participation of the co-owners. In short, nothing is gained by requiring open meetings.
5. Directors are subject to certain duties and responsibilities whether the meeting is open or closed; thus, there is nothing gained by having open meetings.
6. The relationship between co-owners and the board of directors is by way of a private contract and the legislators should not be interfering with that contractual relationship.

Bills Of Interest That Have Become Law Since The Last Issue Of The Review

SB 791: 2010 PA 123 – creates the Uniform Real Property Electronic Recording Act.

The Act allows registers of deeds to record legal documents via electronic filings (but does not require

registers of deeds to do so) and provides for the creation of an electronic recording commission effective January 1, 2011, which will adopt standards to implement the Act.

HB 5830: 2010 PA 147 - eliminates the Homeowner Construction Lien Recovery Fund.

The Act eliminates the Homeowner Construction Lien Recovery Fund, which is insolvent, reduces contractor license fees and retains a mechanism for a homeowner to prevent a construction lien from attaching by filing an affidavit with evidence of payment.

Bills Of Interest That Have Been Introduced Since The Last Issue Of The Review

HB 6284: This bill would amend MCL 211.27a by changing the date for uncapping properties sold by land contract after December 31, 2010 to the date of recording of the deed conveying title (instead of the date of the land contract sale).

HB 6167: This bill would create a new act to require certain property owners to provide security measures for abandoned commercial properties.

HB 6276: This bill would impose certain new minimum standards on title insurers and agencies issuing title policies, and who are acting as an escrow agent, including a requirement to offer closing or settlement protection to the lender, borrower and seller.

HB 6056: This bill would require real estate brokers to convey offers to purchase foreclosed properties to the owner and mortgagee.

HB 6123: This bill would permit copies of documents that are verified by affidavit to be recorded at the register of deeds.

HB 6306: This bill would amend the general property tax act (MCL 211.78k) by adding a requirement that a foreclosing governmental unit send a notice of a judgment of foreclosure to each person with a legal interest in an improved property and to the occupant, if any, stating the last date the property may be redeemed.

HB 6308: This bill would amend the income tax act (MCL 206.30) by providing for a deduction for a loss associated with a sale of a taxpayer's principal residence located in Michigan.

As a member of the Real Property Law Section, you can have a voice in commenting on proposed legislation that impacts real property law issues. Each of the Special Committees of the Section covers a substantive area of real estate law. Membership in a Special Committee offers the opportunity to network with your fellow practitioners and learn about your areas of practice. Special Committee chairs are encouraged to seek member input on proposed legislation. Your active involvement and participation as a committee member is highly recommended and most welcome.

Non-members of a Special Committee are also welcome to comment on any proposed legislation affecting real property. Written comments should be forwarded to:

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Consult the Michigan Legislature web site for current information regarding pending legislation: www.michiganlegislature.org.

Continuing Legal Education



*by Gregory J. Gamalski and Melissa N. Collar, Co-Chairs, CLE Committee
and
Arlene R. Rubinstein, Administrator*

2010 Summer Conference *The New Normal—Working with Today’s Realities*

The 2010 Summer Conference was a huge success! “Engaging speakers,” “great interactive discussions,” “excellent materials” were all words used to describe the 2010 Summer Conference held at Crystal Mountain Resort & Spa in Thompsonville. The section would like to thank our co-chairs, Lorri B. King of the Law offices of King and King PLLC in Cadillac, and Clay Thomas of Jaffe Raitt Heuer & Weiss PC in Southfield for planning the 35th Annual Summer Conference. We had 150 registrants plus families and guests attend this timely and informative program. A special thanks to our sponsors for their generous commitment to our programming. Please view our pictures elsewhere in this issue.

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36th Annual Summer Conference
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Homeward Bound

The Continuing Legal Education Committee is pleased to announce its 36th season of “Homeward Bound” seminars. This season’s series is under the direction of Melissa N. Collar of Warner Norcross & Judd LLP in Grand Rapids. The section will be working with ICLE in producing the 2010-2011 Homeward Bound series. This year’s topics include “The ABCs of Real Estate Appraisals for Lawyers,” “Economics of Property Deals,” and “Total Redevelopment in the World of the Land Division Act—Platted and Unplatted Property” and “Leasing Fundamentals.”

If you belong to the ICLE partnership, there will be no separate charge for attending the seminar series. (Section members who are not ICLE partners will still be able to sign up for any or all Homeward Bound programs at the low section price of \$80 per seminar). The seminars will run from 2 to 5 p.m. and will be held at The Inn at St. John’s in Plymouth. All seminars will be webcast.

November 4, 2010
2:00–5:00 p.m.

The Inn at St. John’s • 44045 Five Mile Road, Plymouth

“The ABCs of Real Estate Appraisals for Lawyers”

Jerome P. Pesick of Steinhardt Pesick & Cohen PC in Birmingham will moderate the November 4, 2010 Homeward Bound seminar. Faculty includes Bruce M. Closser, MAI, SRA, Closser Associates Inc., Marquette; Michael E. Ellis, MAI, Value Trends Inc., Shelby Township; and David E. Nykanen, Steinhardt Pesick & Cohen, PC in Birmingham.

Learn to analyze appraisals effectively to better represent your client!

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A brochure with topics, speakers, and registration information is elsewhere in this issue of the Review.

Real Property Law Section State Bar of Michigan “Groundbreaker” Breakfast Roundtable Programs

The first “Groundbreakers” Breakfast Roundtable program of 2010-2011 was held on October 7, 2010 at the Townsend Hotel in Birmingham. Entitled “**How to Teach an Old Dog New Tricks: The Bank Asset Recovery Checklist (BARC) for Buying and Selling Bank Owned Real Estate,**” this program provided a checklist of steps to be followed when purchasing bank owned real property. The program provided information for practitioners to navigate the different motivations of lenders when buying and selling repossessed property. The Section would like to thank Brian P. Henry of Orleans Associates PC for planning this program.

Our next program, “**Energy is Here to Stay,**” will be held on Thursday, January 13, 2011, at the Townsend Hotel in Birmingham. The program chair is Shaun M. Johnson of Dykema Gossett PLLC in Lansing. Discussion topics will include alternative energy, windmills, wind zones, solar energy, LEED certification, clean code, zoning issues (local and federal), oil and gas issues, environmental issues, new statutes, and Brownfields.

Save the date! The third Groundbreaker program, entitled “**How to Get a Loan/Financing If You are Not Going to the Bank,**” will be held on Thursday, April 14, 2011, at the Detroit Athletic Club in Detroit. The program chair is Kevin S. Macadino. He is with Williams Williams Rattner & Plunkett PC in Birmingham. This presentation will cover general financing, public and private financing, private bonds, TIFs, creative financing, SBA loans, movie tax, state grants, and non-conventional funding.

The section would like to thank Steve Estey of Dykema Gossett PLLC in Bloomfield Hills for chairing and planning the 2010-2011 “Groundbreakers” Breakfast Roundtable series.

Further information on the January and April program will be available late fall.

RPLS Goes To Washington, DC

2011 Winter Conference

The Willard Intercontinental

March 10–12, 2011

The Real Property Law Section is pleased to announce that the 2011 Winter Conference will be held at The Willard Intercontinental Washington. This landmark hotel is located in the heart of the nation's capitol, just one block from the White House and walking distance to the Smithsonian Museums, the National Theater, and other major DC attractions and monuments. Attendees and their families can stroll along the Mall or gaze over DC from atop the Washington Monument!

We are in the process of planning our program. The section would like to thank Laura McMahon Lynch, of Law Office of Laura McMahon Lynch PLC in Grosse Pointe, and Melissa B. Papke of Varnum Law in Grand Rapids.

Accommodations:

All registrants are responsible for making their own room reservations and flight arrangements. All rooms reserved at the hotel are Superior rooms. You can specify if you would like two double beds or a king-size bed. We also have options to upgrade.

Superior Room.....\$239

Deluxe Room.....\$299

Premier Room.....\$339

Willard Room.....\$499

Executive Suite.....\$839

Room rates do not include the state and local taxes (currently 14.5 percent). All pre- and post-reservation requests are subject to availability and may not be available at the group rate. Rate is based on single and double occupancy. Charge for additional persons in the room will be \$30 per person per night.

Reservations can be made by calling the Reservations Department at (800) 424-6835 or (202) 628-9100. Please identify yourselves as participants in the Real Property Law Section meeting in order to receive our special group rate. If arrival and departure dates are within the conference dates, you may reserve online by going to the website www.washington.intercontinental.com. The code is VA2.

Registration for the conference will be available later this fall.

Course Calendar

Following is a schedule of continuing legal education courses sponsored or co-sponsored by the Real Property Law Section through January 2011.

Key:

RPLS—Real Property Law Section

ICSC—International Council of Shopping Centers

ICLE—Institute of Continuing Legal Education

HB—Homeward Bound

SC—Summer Conference

Date	Location	Program	Topic
November 4, 2010	The Inn at St. Johns Plymouth	ICLE/RPLS	The ABC's of Real Estate Appraisals for Lawyers
November 10-11, 2010	University of Michigan Flint	UM/ULI Real Estate Forum	Sparking a Reinvention: The Evolution of a Factory Town
December 2, 2010	The Inn at St. Johns Plymouth	Homeward Bound/ ICLE	Economics of Property Deals
January 13, 2011	The Townsend Hotel	Groundbreaker Breakfast Roundtable	Energy is Here to Stay
January 27, 2011	ICSC Rock Financial	ICSC/RPLS	ICSC 2011 Michigan Continuing Education Program for Real Estate Professionals

Further information on all Breakfast Roundtable Sessions and the Homeward Bound series can be found on the section's website at: <http://www.michbar.org/realproperty/>.

2010 Summer Conference

July 14-17, 2010 • Crystal Mountain • Thompsonville, MI



Real Property Law Section
State Bar of Michigan
Michael Franck Building
306 Townsend Street
Lansing, Michigan 48933-2012

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