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November 5, 2003

Mr. John T. Berry
Executive Director
State Bar of Michigan
Michael Franck Building
306 Townsend Street
Lansing, MI 48933-2083

Re: Policy Statement on HB 4608 - Council of the Real Property
Law Section

Dear Mr. Berry:

I am writing to notify you pursuant to Article IX of the Bylaws of the State Bar of Michigan that the Council of the Real Property Law Section of the State Bar of Michigan approved a policy position opposing HB 4608 on October 31, 2003. Written notice of the action was given to members prior to the adoption of the policy in the manner required by the Section Bylaws. A copy of the policy position is attached for your information.

Please contact me if you have any questions.

Sincerely,



David W. Charron
Vice Chairperson, Real Property Law Section

DWC:kjc
Encl.
cc. L. Dudek (w/encl)
A. Rubenstein (w/encl)

Council of the Real Property Law Section
of the State Bar of Michigan
Comments on House Bill 4608

THIS IS A POLICY POSITION TAKEN BY THE COUNCIL OF THE REAL PROPERTY LAW SECTION OF THE STATE BAR OF MICHIGAN. THIS POSITION DOES NOT NECESSARILY REPRESENT THE POLICY OF THE STATE BAR OF MICHIGAN.

The purpose of proposed amendment to Public Act 103 of 1937 is to allow the drain commissioner's office to provide constructive notice of unrecorded drain easements granted prior to March 28, 1956, by recording evidence of such easements in the form of an affidavit with the register of deeds.

Although the basic concept of recording notice of valid drain easements is obviously appropriate, the proposed legislation presents four significant problems in its current form. The four problems are (1) the proposed legislation does not provide adequate due process protections to the landowners, (2) the proposed legislation does not require the current landowners to be identified in the affidavit, (3) there are no standards established for description of the location of the easement, and (4) the proposed legislation will allow the drain commissioner to record evidence of easements that may be invalid as to the current landowners. The proposed legislation does not differentiate between visible and invisible (below ground) drains.

1. The proposed legislation does not provide adequate due process protections to the landowners. Generally speaking, due process requires notice and an opportunity to be heard before an action is undertaken by a governmental entity which could have a significant negative impact on established property rights. As originally drafted, HB 4608 did not require any notice to the landowner, beyond the simple constructive notice of any recorded instrument. The proposed legislation has been revised to require that "[w]ithin 30 days after recording an instrument under this section, the drain commissioner or other officer or body recording the instrument shall notify the landowner by first-class mail." Although a step in the right direction, the proposed notice is insufficient considering the affidavit's potential impact on the marketability of the property.

The significance of the concern regarding marketability is highlighted by reference to *Madhavan v. Sucher*, 105 Mich App 284 (1981), which held that the existence of a drain easement could essentially negate the related property's marketability. In light of the potential loss of marketability, the landowner should be notified before the affidavit is filed, so that issues of location or validity can be addressed and perhaps resolved before title is clouded. Guidance can be drawn from MCL 565.25, a statute that extended protection to landowners concerning the recording of encumbrances. One of the protections established by that statute is that when an instrument is presented for entry to

the register of deeds it must be accompanied by “[p]roof of service that actual notice has been given to the recorded landowner of the land to which the instrument of encumbrance applies.” Actual notice is a prerequisite to filing. However, MCL 565.25(3) exempts the statute’s application where “[t]he filing of an instrument of encumbrance [is] authorized by state statute or federal statute” and so the statute will have no impact on the proposed legislation. At a minimum, however, the proposed legislation should be modified to require the drain commissioner to provide actual notice to the landowner before the affidavit is recorded. Moreover, due to the significant impact the affidavit may have on marketability, the proposed legislation should also be modified to require the drain commissioner, upon the landowner’s request, to meet with the landowner before recording the affidavit, so errors and issues can be addressed with the landowner.

There are basic due process protections that should be provided to the landowners. Although the drain commissioners need to sort out their problem with respect to unrecorded easements, they should do so in conjunction with the affected landowners. This is a problem that has existed for nearly half a century, due in part to inaction by the drain commissioners. Unilateral action by the drain commissioners, which could destroy the marketability of the affected property without prior notice or an opportunity to be heard, is neither warranted nor appropriate.

2. The proposed legislation does not require the current landowner to be identified in the affidavit. The stated purpose of the proposed legislation is to provide constructive notice of drain easements by recording evidence of the easement with the register of deeds. Unless the current owner of the property affected by the easement is identified in the affidavit filed by the drain commissioner, the affidavit will not appear in a grantor/grantee index. Not all title companies or title examiners have access to tract indexes. Many of the affidavits will never be found and the stated purpose of the proposed legislation will not be met. The affidavits should appear in the chain of title, and that will necessarily involve identifying the current owner of property.

3. There are no standards established for description of the location of the easement. Because there currently are no standards in the proposed legislation for the description of the location of the easement, the affidavits may not adequately describe the location. If a drain easement is not clearly described or defined it will only serve to further cloud title to property. A standard should be established before the bill proceeds.

4. The proposed legislation will allow the drain commissioner to record evidence of easements that may be invalid as to the current landowner. The Supreme Court in *Peaslee v. Saginaw County Drain Commissioner*, 365 Mich 388 (1961) and the Court of Appeals in *Allen v. Bay County Drain Commissioner*, 10 Mich App 31 (1961) held that that a drain easement that was not recorded in the register of deeds office is void as against a bona fide purchaser. The recording of an affidavit against property now owned by a BFP may result in an improper cloud on title. The proposed legislation will force innocent landowners to incur expense and engage in litigation to clear title to

their property. Moreover, the proposed legislation will impose a greater burden on poor landowners who may not be able to afford to pursue their rights through litigation.

Despite *Peaslee*, there is a continuing debate over the enforceability of the unrecorded easements, which turns on interpretation of a 1968 amendment to the Drain Code. The Drain Code was amended by Public Act 208 of 1968 which added Section 6. Section 6 provides in part that “[a]ll established drains regularly located and established in pursuance of law existing at the time of location and establishment and visibly in existence, which were established as drains, and all drains visibly in existence in written drain easements or rights of way on file in the office of the commissioner, shall be deemed public drains which are valid and binding against any owners of any property interest who became or hereafter become such owners after the location and establishment of the drain or the existence of the drain became visible or the written drain easement or right of way was executed...” This amendment was apparently made in response to the *Peaslee* and *Allen* decisions. The question is whether Section 6 applies to all unrecorded easements, or only to those which are visible from a physical inspection of the property (similar to the notice by possession accorded tenants). The statute itself is poorly written and barely comprehensible.

In *Kiesel Intercounty Drainage Board v. Hooper*, 148 Mich App 381 (1986) the Court of Appeals interpreted Section 6 as extending to all drain easements, visible and invisible. The *Keisel* Court’s decision seems to hold that an easement is automatically valid against a BFP if it is filed in the drain commissioner’s office. The court stated “[t]his second provision creates a valid public easement for drains ‘visibly in existence in written drain easements or rights of way on file in the office of the commissioner’. Whether valid or not, the 1905 release of right-of-way in this case was on file in the office of the Bay County Drain Commissioner and, thus, under the statute, is deemed a valid public easement.” The language of the statute and the court’s statement are both troubling and confusing. Does the court mean that an invalid easement that is not visibly in existence, but is filed in the drain commissioner’s office, is deemed a valid easement under Section 6? If that is the case, why record affidavits evidencing drain easements with the register of deeds, particularly in a manner that will not show up in the grant/grantee index? Why exchange one form of constructive but ineffective notice for another?

It is believed that the *Kiesel* Court’s interpretation of Section 6 amounts to a taking under current interpretation of the Michigan Constitution. See, *Beulah Hoagland Appleton Qualified Personal Residence Trust v. Emmet County Road Com'n*, 236 Mich App 546 (1999). The BFP’s rights prior to 1968 were clearly established by the Michigan Supreme Court in *Peaslee*. Because the *Kiesel* Court’s decision predates November 1, 1990, its precedential impact is limited. MCR 7.215(H). If Section 6 applies only to visible drains, these issues are all avoided. The visible physical presence of the drain provides actual notice, thereby negating BFP status. Invisible drains are, however, a much different problem.

Here is a likely scenario if this proposed legislation is adopted:

I am a bona fide purchaser of property. There is no visible drain easement on my property and I have no knowledge of any drain easement or claim of drain easement. There is an old easement grant or release of right of way filed in the drain commissioner's office for an underground drain. This particular easement was granted in 1910 and was actually granted by someone other than the owner of the property at that time. The drain commissioner records an affidavit evidencing a drain easement over my property. I go to sell my property and a title company finds the affidavit in a tract index and shows it on a title commitment. I cannot sell my property because a prospective purchaser won't accept the property subject to the drain easement. I have no choice but to sue the drain commissioner to quiet title to my property and challenge the validity of the claimed drain easement. I lose the sale and I am forced to incur legal fees to clear title.

Summation:

As drafted, the Council of the Real Property Section of the State Bar of Michigan opposes the proposed legislation. The changes that need to be addressed are (1) the landowners should be extended the due process protections of prior actual notice and an opportunity to be heard, (2) the current landowner should be identified in the affidavit, (3) standards should be established for description of the location of the easement, and (4) the proposed legislation should be limited to (a) visible drain easements and (b) those invisible drain easements where there has not been an intervening BFP.

Adoption of Policy Position:

This policy position was approved by the Council of the Real Property Law Section on October 31, 2003 by a 14-0 vote of the Council, with one member abstaining. Written notice of the policy position was given to Council members in the manner required by the Section Bylaws prior to the adoption of the policy position.