REAL PROPERTY LAW SECTION
Respectfully submits the following position on:

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HB 4747

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The Real Property Law Section is not the State Bar of Michigan itself, but rather a Section which members of the State Bar choose voluntarily to join, based on common professional interest.

The position expressed is that of the Property Law Section only and is not the position of the State Bar of Michigan.

To date, the State Bar does not have a position on this matter.

The total membership of the Real Property Law Section is 3,556.

The position was adopted after an electronic discussion and vote. The number of members in the decision-making body is 18. The number who voted in favor to this position was 12. The number who voted opposed to this position was 0.

Report on Public Policy Position

Name of Section:
Real Property Law Section

Contact person:
Brian Henry

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Bill Number:
HB 4747 (Hughes) Property; other; adverse possession; prohibit against local units of government. Amends sec. 5821 of 1961 PA 236 (MCL 600.5821).

Date position was adopted:
December 9, 2015

Process used to take the ideological position:
Position adopted after an electronic discussion and vote.

Number of members in the decision-making body:
18

Number who voted in favor and opposed to the position:
12 Voted for position
0 Voted against position
0 Abstained from vote
6 Did not vote (absent)

Position:
Support Proposed Amendments Proposed Below

Explanation of the position, including any recommended amendments:

HB 4747 as introduced is opposed. The Section supports the substitute for HB 4747 (H-1), as passed the House.

Background:
HB 4747 was introduced to correct the unexpected interpretation of MCL 600.5821(2) by the Michigan Court of Appeals in *Waisanen v Superior Twp.*, 205 Mich App 719 (2014). Before *Waisanen,* it was generally understood that a municipality was not subject to the statute of limitations if it sought to recover public lands. A party who occupied municipally-owned land for over 15 years could not assert a claim for acquiescence or adverse possession based upon the expiration of the statute of limitations for recovery of land. In *Waisanen*, the Court of Appeals ruled that "actions brought by any municipal corporations…" means that the municipality must bring the action to get the

exemption. Under this interpretation, where a municipality responds to a quiet title against it and ***counterclaims*** to quiet title to its property, the protection of MCL 600.5821(2) does not apply because the action was not "brought" by the municipality. HB 4747 addresses this unexpected outcome by clarifying that in any action "involving" the recovery of or the possession of any land, including a public highway, street, alley, easement, or any other public ground, a municipal corporation or political subdivision of this state is not subject to the expiration of the statute of limitations applicable to adverse possession, acquiescence, or prescriptive easements.

Position:
The Real Property Law Section does not object to correcting the unexpected outcome of *Waisanen* to provide that MCL 600.5821(2) applies whether the claim is original or a counterclaim, as provided in the substitute for HB 4747 (H-1) (as passed by the House). RPLS objects to proposed amendments that seek to accomplish more than the "Waisanen fix."

HB 4747 as introduced went beyond this fix in ways not supported by existing Michigan law, first, by exempting all claims for acquiescence, not just those based on the statute of limitations. Scond and more significantly, the bill as introduced would have provided that a municipality is not bound by the statute of limitations in an action to recover public land, a neighboring property owner whose land is encroached upon by the municipality IS bound by the statute of limitations. That municipalities can acquire private property rights by adverse possession, acquiescence or prescriptive easement is far from a universally held principle, and for good reason. Although RPLS has generally supported the continued viability of adverse possession to resolve boundary disputes, allowing municipalities to adversely possess private land raises a number of issues. First, allowing municipalities to take private property by adverse possession may constitute an unconstitutional taking. The language of MCL 600.5821(1) (added in 1988) to protect the State of Michigan eliminates the statute of limitations from ANY action for the recovery of land where the state is a party. Thus, whether the state is defending or asserting a claim, the statute of limitations does not apply; the exception works in both directions. The substitute for HB 4747 (H-1) leaves the statute silent on a municipality's right to establish property rights in neighboring private property by expiration of the statute of limitations. Although it does not fully dispose of the issue, doing so is not necessary to accomplish the Waisanen fix and goes beyond what can fairly be called settled law in Michigan.

In the bill as introduced, the proposed subsection (3) it could be read to constitute a dramatic change in law, namely that if a municipality is merely in possession of a neighboring private land owner's land for more than 15 years, the neighbor is precluded from bringing any action against the municipality to dispossess the municipality since the statute of limitations for such action would have run. In that way, it created a super statute of limitations for municipalities by eliminating the need to prove the other elements of adverse possession (actual, visible, notorious, continuous, exclusive, hostile, under a claim of right) or the elevated burden of proof, a substantive change, well beyond existing law.

Finally, certain public entities such as county road commissions say they are excluded from the exemption because they are not "political subdivisions of the state," but are instead " public bodies corporate." To whatever extent this group was not included in the original legislation adopting MCL 600.5821(2), adding that group is not necessary to address the *Waisanen* case. Moreover, the use of "public body corporate" would expand the reach of the statute to hundreds if not thousands of other "public bodies corporate" such as the Michigan Tobacco Settlement Finance Authority and local development finance authorities that can be created by local governments, just to name two examples. There does not appear to be any reason to paint with such a broad brush. Accordingly, RPLS objects to their inclusion as part of this fix for the *Waisanen* decision.

The text of any legislation, court rule, or administrative regulation that is the subject of or referenced in this report.
http://legislature.mi.gov/doc.aspx?2015-HB-4747