

# MICHIGAN REAL PROPERTY REVIEW

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Vol. 32, No. 4

Winter 2005

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**Published by the  
Real Property Law Section  
State Bar of Michigan**

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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 George J. Siedel, Editor, University of Michigan Ross School of Business, 701 Tappan Street, Ann Arbor, Michigan 48109-1234 (gsiedel@umich.edu). The publication of articles and the editing thereof are at the discretion of the Editor. A cumulative index of articles is printed annually in the Winter issue of the *Review* and is available on the Section website:

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# MICHIGAN REAL PROPERTY REVIEW

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## CHAIRPERSON'S REPORT

by David W. Charron

### Goodbye George

We said goodbye to an old friend of the Section, retiring Michigan Real Property Review editor George Siedel, at our December 14, 2005 Council meeting. George shared some reflections with the Council about the evolution of the Review and where it may be headed in the future. Notably, George encouraged the Section to continue the distribution of the written Review as tangible evidence of the value of membership in the Section, even though other groups have opted for electronic transmission of their journals. The Council bestowed upon George the Section's highest honor: The C. Robert Wartell Award for Distinguished Service, and presented him with a plaque and gift pen. Old friends, current and former committee chairpersons, and former Council members joined together for an evening reception at the Radisson Kingsley Inn in Bloomfield Hills to celebrate George Siedel's contribution to the work of the Section. It is an understatement to say we'll miss you, George.

### Hello Lynda Oswald

The Council unanimously approved the appointment of Professor Lynda S. Oswald of the University of Michigan Ross School of Business as the new editor of the Michigan Real Property Review. Lynda received her J.D. from the University of Michigan, *cum laude*, in 1986 and was senior editor of the Michigan Law Review in 1985-86. Lynda has published extensively on a range of environmental law and eminent domain subjects and I understand, she has even been cited by the United States Supreme Court in a recent opinion. (She also serves on the planning commission of Superior Charter Township in her free time). You may view Lynda's curriculum vitae at <http://www.bus.umich.edu/FacultyBios/CV/ljoswald>. Lynda's work with the Section begins with the Spring, 2006 issue. Many thanks to our editor search committee members, Pat Karbowski, Leslie Banas and Bill Acker, for a job well done. Please welcome Lynda to her new post.

### Supreme Court Requests for Amicus Briefs

The Real Property Law Section received two invitations from the Michigan Supreme Court to prepare amicus briefs on subjects of interest to our members, and significant work was undertaken to prepare briefs for

submission. Our thanks to those who volunteered their time to work on the briefs.

### *Pine Oaks v. DeVries*

The first invitation involved the case of *Pine Oaks, LLC v. DeVries*, (SC: 127656), a matter involving the question of what remedies are available to a party in District Court who seeks to challenge an eviction following a mortgage foreclosure sale by advertisement. Howard Lax led the committee to draft the brief which included Tony Viviani, Patricia Cwiek, Jeff Weisserman, Heidi Walson, Mark Makower, Dennis Hagerty, and Larry Dudek.

On the eve of the deadline for filing the brief, the Section was notified by the parties that the case had settled, following mediation in a companion case pending in Ottawa County Circuit Court. As significant amount of time and energy went into the formulation and drafting of a policy position for the Section, we have saved the work product for future use. We do not expect the work to remain unused for long, due to the recurring nature of the relevant issues involved with this case.

### *Comben v. State of Michigan*

The second invitation to the Section involves the case of *Comben v. State of Michigan* (SC: 127212), 474 Mich 893, 705 N.W. 2d 109 (2005), a matter involving fundamental principles of property taxation law with far-reaching consequences to Michigan land titles. Essentially, the case involves the issue of whether the interests of an owner or lessee of oil and gas rights can be extinguished by a tax foreclosure proceeding against the surface property estate. The Michigan Court of Appeals said they were not. At its December 14, 2005 meeting, the Council adopted the policy position that the interests of an owner or lessee of oil and gas rights can be extinguished by a tax foreclosure proceeding against the surface property estate. The Council based this conclusion, in part, on the plain language of MCL 211.78k(5)(e), which specifically states that "all existing recorded and unrecorded interest in [a foreclosed] property are extinguished." While the provision has specific exceptions for "a visible or recorded easement or right-of-way, private deed restrictions, or restrictions or other governmental interests imposed pursuant to the natural recourses and environmental

protection act,” there is no exception for oil and gas (or other mineral) interests. The Council also found that this plain language interpretation of MCL 211.78k(5)(3) was strongly supported by the fact that foreclosure proceedings involving the surface property estate are *in rem*, not in *personam*. See generally MCL 211.78h (describing procedures for filing a tax foreclosure petition). Thus, in a tax foreclosure proceeding, all property interests associated with the property (including oil and gas interests) are extinguished when that parcel of property is foreclosed, unless that interest is specifically exempt. Also contrary to the Michigan Court of Appeal’s opinion, the Council concluded the Severance Tax Act is applicable only to the production of severed (produced) oil and gas interests and is therefore not relevant to the issue of whether oil and gas interests are extinguished by foreclosure proceedings involving the surface property estate.

John Cameron, Jr. led the committee to draft the Section’s brief, which committee included John Bursch, Allison Mulder, Jennifer Remondino and Catherine Lamont. Thanks to everyone for a job well done. Oral arguments are expected this Spring.

### **Environmental Law Section**

The Section is co-sponsoring the “Environmental Boot Camp” program at Crystal Mountain Resort with the Environmental Law Section. The program is scheduled for mid-February, and notices should be emailed to all members shortly. Seminar issues include understanding the language of environmental law and how to read environmental reports (and maps), typical buyer and seller negotiating issues, and a special program about the impact of environmental issues on estate planning. Please plan to attend and bring your skis and snowboards.

### **Winter Conference – Las Vegas**

We already have a record breaking number of attendees for the Section’s Winter Conference in Las Vegas, Nevada, scheduled for March 16-18, 2005. If you have not signed up, please contact Arlene Rubinstein. Reserved rooms are limited due to the high number of attendees.

### **Summer Conference Scholarships**

The Council voted to award up to five scholarships to non-profit organizations in order to allow their members to attend the summer conference at Mackinac Island without paying a registration fee. Please let any qualified colleagues who may be interested in this program know

about the possibility of these scholarships, and direct them to Arlene Rubinstein for more information.

### **Michigan Bar Journal**

The Section has volunteered to be responsible for the submission of articles for the November, 2007 issue of the Michigan Bar Journal. Parties interested in writing an article should contact Jerry Pesick, Ron Reynolds or Gregg Nathanson.

### **Legislative Positions**

The Council took action to oppose two bills that directly impact the members of the Section.

First, the Council voted to oppose Senate Bill 574, an attempt to amend the Elliott-Larsen civil rights act to add “source of income” as a prohibited basis for discrimination in a real estate transaction. The Section’s opposition was based upon several stated factors: (a) economic and business decisions based on a party’s source of income have not historically been viewed as inviting invidious discrimination against otherwise protected classes and therefore the proposed legislation represents a substantial extension of Elliott-Larsen well beyond its traditional scope, (b) the proposed legislation would impose substantial additional administrative burdens and compliance costs on all real estate transactions that were not justified by the benefit conferred by the proposed legislation, (c) the proposed legislation would invite litigation over the “reasonableness” of various business decisions and over the “reasonableness” of the efforts undertaken to verify and evaluate economic information, and (d) discrimination against existing protected classes is already prohibited by the Elliott-Larsen Act.

The Council also voted to oppose HB 4732, an effort to allow a non-attorney to represent parties in summary proceedings litigation in District Court if such party is an “agent of the entity who has direct and personal knowledge of the facts of the dispute.” Presumably this includes any property manager or contract agent familiar with the vendor or landlord’s business records concerning payment. The Council believes the proposed legislation conflicts with the fundamental public policy reflected in MCL 600.901, which states that “[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 Council focused its analysis upon the various obligations imposed on attorneys by the Rules of Professional Conduct, and their status as officers of the court, 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.

Moreover, the proposed legislation (through its establishment of a \$3,000.00 cap) appeared to be an effort to incorporate the relaxed representation criteria of the small claims division of the district court into the summary proceedings context. The Council noted that summary proceedings involve legal interests far beyond the simple monetary interests involved in actions under MCL 600.8401 *et seq.* 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” amounts 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.

Several Council members expressed their concern that despite the importance of the summary proceedings process, the proposed legislation 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 similar restriction was imposed on summary proceedings under the proposed legislation; a part-time “agent” could 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 lay person 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 the Council strongly believes they should not be circumvented in the summary proceedings context.

### **Contract with ICLE**

The Section has entered into an historic agreement with the Institute for Continuing Legal Education (“ICLE”) of the University of Michigan to jointly produce and offer the Homeward Bound Seminars to Michigan lawyers participating in the ICLE Partnership, as of the start of the 2006-07 year. This will allow the seminars to be distributed and marketed statewide via ICLE’s online technical infrastructure, including live webcasting through ICLE’s web-site. The big news for Section members is that if one participates in the ICLE Partnership, there will be no separate fee for attending the Homeward Bound presentations. Thank you to Pat Karbowski and Bill Acker for negotiating the ICLE contract.

### **Financial Position**

Finally, the Section ended the 2004-2005 fiscal year in a strong financial situation, and with a \$10,000 addition to the reserve maintained by the State Bar of Michigan, due to record setting corporate sponsorship and attendance at the summer conference. Increased publication and mailing costs associated with the Michigan Real Property Review and the higher costs associated with the summer conference venue are anticipated to erode the surplus.

## MICHIGAN SUPREME COURT RECOGNIZES PUBLIC RIGHT TO WALK ON GREAT LAKES' BEACHES

by Kevin T. Smith\*

In its much anticipated decision in *Glass v Goeckel*,<sup>1</sup> the Michigan Supreme Court expressly declared what many members of the public had long presumed was settled law; that the public has the right to walk the dry sand beaches of Michigan's Great Lakes shores. The court held that regardless of title, the common law public trust doctrine extends to the ordinary high water mark ("OHWM") of the Great Lakes shorelands and the public trust includes the right to walk the shorelands up to the OHWM. The court denied a Motion for Rehearing.<sup>2</sup>

The court reversed the Court of Appeals decision holding that "riparian owners . . . have the exclusive right to the use and enjoyment of the land that, once submerged, has now become exposed by receding waters. [The public] has neither a statutory nor a common-law right to interfere with that use. . . . [T]he public . . . is entitled to utilize the lake bottom until it first reaches dry land, for purposes of navigating the Lake Huron shoreline."<sup>3</sup> The Court of Appeals decision was roundly criticized by members of the public as inherently at odds with the public's longstanding practice of strolling along the dry sand beaches adjacent to the Great Lakes. But the actual legal issue was much less clear than the public's perception. The public attention directed at the appellate court ruling injected significant public policy overtones into what was already a very complex legal issue. The difficult nature of the case was probably best summarized by Justice Young in the introduction to his separate opinion, wherein he stated:<sup>4</sup>

This case poses a deceptively simple question: where, if anywhere, can a member of the public walk on the private beach of one of our Great Lakes without trespassing on a lakefront (littoral) owner's property?

Although the question is simple, the answer, as amply demonstrated by the more than one hundred pages of the rival opinions filed in this case, is

muddled by an abstruse body of precedent that has been less than precise in defining critical terms and issues. This was a well-briefed and argued case that has resulted in a vigorous debate within the Court. The opinions of the majority and Justice Markman present compelling, principled, but *competing* constructions of an ambiguous body of Michigan law and that of other jurisdictions concerning Great Lakes property rights.

In holding that the public has, under Michigan's common law, the right to walk beaches up to the OHWM, the Supreme Court rejected the use of the statutory OHWM found in Part 325 of the Natural Resources and Environmental Protection Act,<sup>5</sup> formerly the Great Lakes Submerged Lands Act ("GLSLA" or "Act"),<sup>6</sup> which defines the statutory OHWM at specific elevations for each Great Lake.<sup>7</sup> Instead, the court adopted a definition of the OHWM utilized by the Wisconsin courts, defining the OHWM as

the point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic. And where the bank or shore at any particular place is of such a character that is impossible or difficult to ascertain where the point of ordinary high-water mark is, recourse may be had to other places on the bank or shore of the same stream or lake to determine whether a given stage of water is above or below ordinary high-water mark.<sup>8</sup>

The decision does not address title to lands adjacent to the Great Lakes, other than to clarify that regardless of title, adjacent lands are subject to the public trust to the OHWM. Moreover, the decision addresses public trust rights only as they exist on the Great Lakes.<sup>9</sup>

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\*Kevin T. Smith is a graduate of Northern Michigan University (BS, 1977) and the University of Michigan (JD, 1980) (MS, Natural Resources, 1982). He is a member of the Title Standards and Water Law Committees of the Real Property Law Section and a member of the Environmental Law Section. He has been employed since 1984 with the Michigan Department of Attorney General, the last eleven years in the Revenue and Collections Division. The opinions expressed in this article are those of the author and do not necessarily reflect the views of the Department of Attorney General or the State of Michigan.

As with many pronouncements regarding uncharted waters of the law, the decision raises as many questions as it answers.

### Factual Background

Since 1967 plaintiff Joan Glass owned property in Alcona County on the west side of US-23. In 1997, defendants Richard and Kathleen Goeckel acquired a parcel of riparian<sup>10</sup> property on Lake Huron across US-23 from Glass's property. In the deed to her property, Glass was granted a 15-foot easement across the Goeckel parcel "for ingress and egress to Lake Huron." According to the first amended complaint, a dispute between Glass and the Goeckels arose in August 2000, when Glass trimmed several tree branches that were impeding her use of the easement. In spring 2001, the dispute continued, with the Goeckels objecting to any pruning of trees or bushes. The Goeckels allegedly obstructed the entrance to the easement by parking a vehicle at the entrance. Additionally, Glass claimed that the Goeckels threatened or interfered with her right to walk across the beach area, between the ordinary high-water mark and Lake Huron, in front of their property. As a result, Glass filed a three-count first amended complaint, asking the trial court to enjoin the Goeckels from interfering with her rights to the express easement and the usage of the shoreline. The parties settled the easement issue, leaving the issue of walking on the beach as the only issue before the courts.

The trial court, stating that "there is no clear precedent here," granted summary disposition in favor of Glass, stating that

it appears to this Court that Plaintiff has the better argument and the Court therefore rules in Plaintiff's favor. The Great lakes Submerged Land Act, MCL § 324.32501 et seq[.], does provide for a specific definition of the high water mark of Lake Huron and does seem to support the argument that the Plaintiff's [sic] have the right to use the shore of Lake Huron lying below and lakewards of the natural ordinary high water mark for pedestrian travel.

The Supreme Court ultimately affirmed the trial court's ruling, although on alternate grounds. The conflicting Court of Appeals' decision, covering 19 pages in the Michigan Appeals Report, and Supreme Court decision, covering 91 pages in the Michigan Reports, certainly confirm the trial court's conclusion that precedent was not clear.

The appellate decisions focus primarily on the public trust doctrine, the GLSLA and *Hilt v Weber*,<sup>11</sup> the last

major pronouncement by the Supreme Court regarding Great Lakes shorelands.

### The Public Trust Doctrine

The public trust doctrine traces its history back to the Roman Emperor Justinian and was more fully developed under English common law.<sup>12</sup> As described in *Shively v Bowlby*:<sup>13</sup>

By the common law, both the title and the dominion of the sea, and of rivers and arms of the sea, where the tide ebbs and flows, and of all the lands below high water mark, within the jurisdiction of the Crown of England, are in the King. Such waters, and the lands which they cover, either at all times, or at least when the tide is in, are incapable of ordinary and private occupation, cultivation and improvement; and their natural and primary uses are public in their nature, for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing by all the King's subjects. Therefore the title, *jus privatum*, in such lands, as of waste and unoccupied lands, belongs to the King as the sovereign; and the dominion thereof, *jus publicum*, is vested in him as the representative of the nation and for the public benefit.

The United States Supreme Court described the modern public trust doctrine in *Illinois Central RR v Illinois*<sup>14</sup> as an interest held by the state over public trust waters,

a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties.

*Nedtweg v Wallace*<sup>15</sup> applied the public trust doctrine to Michigan's waters of the Great Lakes:<sup>16</sup>

The State of Michigan, upon admission to the Union, became vested with title to the beds of all the navigable waters, like unto the crown of England, or the crown and parliament at common law. . . [T]he title of the State is impressed with a perpetual trust under which rights of navigation, fishing and fowling must be saved to the public. . . .

The State may not, by grant, surrender such public rights any more than it can abdicate the police power or other essential power of government. But this does not mean that the State must, at all times,

remain the proprietor of, as well as the sovereign over, the soil underlying navigable waters. . . . The rule is that the State may grant the *jus privatum* but never alienate the *jus publicum*.

### Hilt v Weber

*Hilt v Weber* involved a parcel of property located on the shore of Lake Michigan in Oceana County. The shore line was 277 feet from the meander line, which was located on a ledge 44 feet above lake level. A stake had been driven in the shore 100 feet from the water. A dispute arose between the buyer and seller of the property as to whether the seller could convey good title to the land between the meander line and the stake in light of the decisions in *Kavanaugh v Rabior*<sup>17</sup> and *Kavanaugh v Baird*.<sup>18</sup> The *Kavanaugh* cases held that title to private lands adjacent to the Great Lakes extended only to the meander line and that the area between the meander line and the water's edge was held by the state in trust for the public. The decisions fixed the dividing line as the meander line and held that title to lands lakeward of the meander line did not change, even if the nature of the land changed due to accretion or reliction. The *Kavanaugh* cases further held that the private property landward of the meander line was riparian, notwithstanding any intervening state-owned trust lands.

In 1930, less than a decade after the *Kavanaugh* cases were decided, the *Hilt* Court chose to review the *Kavanaugh* cases in detail. After reviewing the cases decided before the *Kavanaugh* cases and upon which they relied, *Hilt* rejected both of the legal underpinnings of the *Kavanaugh* cases, holding that the meander line was not the dividing line for title purposes and that title to public trust submerged lands could transfer to private ownership if the nature of the submerged land was changed by accretion or reliction.

*Hilt* held that private title ran to the “water’s edge,” the meaning of which term was much disputed by the parties and *amici* in *Glass*. But *Hilt* did not address the public trust in the sense of defining its boundaries or expanding or restricting the lands or waters subject to the trust.

The *Hilt* court’s discussion of the public perceptions some 70 years ago remains appropriate today.<sup>19</sup>

With much vigor and some temperature, the loss to the State of financial and recreational benefit has been urged as a reason for sustaining the *Kavanaugh* doctrine. It is pointed out that public control of the lake shores is necessary to insure opportunity for

pleasure and health of the citizens in vacation time, to work out the definite program to attract tourists begun by the State and promising financial gain to its residents, and to conserve natural advantages for coming generations. The movement is most laudable and its benefits most desirable. The State should provide proper parks and playgrounds and camping sites and other instrumentalities for its citizens to enjoy the benefits of nature. But to do this, the State has authority to acquire land by gift, negotiation, or, if necessary, condemnation. There is no duty, power, or function of the State, whatever its claimed or real benefits, which will justify it in taking private property without compensation. The State must be honest.

The *Hilt* Court sought to downplay any loss to the public that might result from overruling the *Kavanaugh* cases, noting that the public’s rights in the beaches under the *Kavanaugh* decisions were quite limited, given that the adjacent private land owner retained riparian rights:<sup>20</sup>

Perhaps, also, some of the apprehension of the extent of the injury to the State and its citizens would be allayed if the scope of the *Kavanaugh* decisions were not so misunderstood and misrepresented.

The notion seems to be widespread, in official as well as in private circles, that they gave the State substantially absolute title so it can sell or lease the lake shores to strangers to the upland or use them for any public purposes. On the contrary, while declaring the legal title in fee to be in the State, they confined its ownership to the same trust which applies to the bed of the lake, i.e., that the State has title in its sovereign capacity and only for the preservation of the public rights of navigation, fishing, and hunting. The State cannot divest itself of such trust, cannot sell the land, and cannot lease it for any purpose which would injure the trust or affect riparian rights. *Nedtweg v Wallace*, *supra*.

The possibility of use of the lake shores by the State for the paramount trust purposes is so remote as to be practically negligible; so, by holding that the upland owner has riparian rights, the *Kavanaugh* decisions declared little, if any, more than a naked legal title in the State, without practical right of use. This is demonstrated by a consideration of some of the riparian rights, with special reference to the use of the relicted land by the State for park and recreational purposes . . . .

Riparian rights are property, for the taking or destruction of which by the State compensation must

be made, unless the use has a real and substantial relation to a paramount trust purpose. The State cannot impair or defeat riparian rights by a grant of land under water; nor cut off the owner's access to the water by construction of a highway; nor grant to strangers the right to erect wharves in front of his property; nor erect a bathhouse on the shore to interfere with the right of access. On the contrary, the right of the State to use the bed of the lake, except for the trust purposes, is subordinate to that of the riparian owner . . . .

*The riparian owner has the exclusive use of the bank and shore, and may erect bathing houses and structures thereon for his business or pleasure; although it also has been held that he cannot extend structures into the space between low and high-water mark, without consent of the State. And it has been held that the public has no right of passage over dry land between low and high-water mark but the exclusive use is in the riparian owner, although the title is in the State.*

The emphasized language immediately above has been the source of most subsequent analyses of *Hilt* that conclude that *Hilt* holds the public may not use the dry sand beach.

### **The Great Lakes Submerged Lands Act**

The state has long claimed title to Great Lakes bottomlands under the public trust doctrine as set forth in *Illinois Central, supra*.<sup>21</sup> With the adoption of the federal Submerged Lands Act in 1953,<sup>22</sup> the Federal Government formally confirmed title in the states to lands beneath navigable waters along coastal and Great Lakes states. Soon thereafter, the legislature adopted the GLSLA. It was entitled

An act to authorize the department of conservation of the state of Michigan to grant, convey or lease certain unpatented submerged lake bottom lands and unpatented made lands in the great lakes, including the bays and harbors thereof, or to enter into other suitable agreements in regard thereto, belonging to the state of Michigan or held in trust by it.

Section 2 of the Act described the "lands covered and affected by the act" as

all of the unpatented submerged lake bottom lands and unpatented made lands in the great lakes, including the bays and harbors thereof, belonging to

the state of Michigan or held in trust by it which have heretofore been artificially filled in and developed with valuable improvements.

The Act was intended, as indicated by the description of affected lands, to allow the state to clear title to filled lots and trespasses on Great Lakes bottomlands.

Coverage of the Act was expanded in 1958<sup>23</sup> to include

all of the unpatented lake bottom lands and unpatented made lands in the great lakes, including the bays and harbors thereof, belonging to the state of Michigan or held in trust by it, including those lands which have heretofore been artificially filled in.

In 1965 section 2 of the Act was amended to state that the Act covered and affected "all of the waters of the Great Lakes within the boundaries of the State."<sup>24</sup>

In 1958 the Department of Conservation<sup>25</sup> promulgated rules defining "lake bottom land" as "lands in the great lakes and bays and harbors thereof lying below and lakeward of the natural ordinary high water line."<sup>26</sup> The "ordinary high water line" was defined as<sup>27</sup>

that natural line between the upland and lake bottom which persists through periodic changes in water levels and below which the character of the natural soil and vegetation and the profile of the surface of the soil have been affected and worked upon by the waters of the lake at high stages as to make them distinct in character from the upland. This character of the soil, surface shape, or vegetation may be somewhat altered during exposure at low stages in the fluctuations of the water levels, but will be reestablished with the return of high stages. When the soil, vegetation, or shape of the surface have been directly or indirectly altered by man's activity, the ordinary high water line shall be located where it would have occurred had such alteration not taken place.

When these rules were repromulgated in 1967, "ordinary high water mark" was defined as<sup>28</sup>

the line between upland and bottomland which persists through successive changes in water levels, and below which the presence and action of the water is so common or recurrent as to mark upon the soil a character, distinct from that which occurs on the upland, as to the soil itself, the configuration of the surface of the soil and the vegetation. When soil,

configuration of the surface or vegetation have been altered by man's activity, the ordinary high-water mark shall be located where it would have been if this alteration had not occurred.

In 1968, the legislature amended section 2 of the Act to establish the "ordinary high water mark" at defined elevations above sea level for each of the lakes.<sup>29</sup> This reflected the experience of staff enforcing the GLSLA that the OHWM at various locations around each of the lakes as determined under the definitions set forth in the administrative rules tended to be at the same elevation for any lake.

In 1978 the Attorney General opined that "[s]ection 2 of the [GLSLA] indicates that the dividing line between the upland and the submerged land is the ordinary high water mark. Thus, the riparian ownership extends to this line."<sup>30</sup> After further discussing the GLSLA and *Hilt's* discussion of riparian rights, the Attorney General concluded that the riparian owner has exclusive use of the shore to the water's edge and may exclude the public, although the state holds title to lands below the OHWM.

### The Court of Appeals Decision

The Court of Appeals rejected the trial court's reliance on the GLSLA as authorizing the public to walk on the beach below the statutory OHWM. Relying on *Hilt*, the court held that the riparian owner could exclude the public from lands below the OHWM, but stated that the public held title to lands below the OHWM pursuant to the public trust doctrine.<sup>31</sup>

[U]nder *Hilt*, a riparian owner has the exclusive right to the use of relicted land subject to only the state's navigational servitude, and therefore "it has been held that the public has no right of passage over dry land between low and high-water mark but the exclusive use is in the riparian owner . . ." *Id.* [252 Mich] at 226. n7 Although the riparian owner has the exclusive right to utilize such land while it remains dry, because it once again may become submerged, title remains with the state pursuant to the public trust doctrine. *Id.* This is so because a riparian owner cannot interfere with the public's right to the free and unobstructed use of navigable waters for navigation purposes. *Id.*

In footnote 7, the court notes that:

This principle in *Hilt* is dicta, because the dispute in that case did not involve the public's right to access relicted land. However, the principle was endorsed

by the *Hilt* Court, and it is consistent with and germane to the actual holding in *Hilt*, i.e., that the riparian owner has exclusive use to the land running to the waters' edge. *People v Schaub*, 254 Mich App 110, 117 n 2; 656 NW2d 824 (2002).

In rejecting the trial court's reliance on the GLSLA, the Court of Appeals held that nothing in the Act authorized the public to walk on the beach above the water's edge:<sup>32</sup>

Thus, MCL 324.32502 contains no provision guaranteeing any member of the public the right to walk on a beach fronting private property along one of the Great Lakes. Moreover, it specifically preserves those riparian rights set forth in *Hilt* and its progeny.

Glass appealed to the Supreme Court.

### The Supreme Court Decision

The Supreme Court reversed with Justice Corrigan writing for a 5-2 majority, holding that the public trust doctrine extends to the OHWM of the Great Lakes and that the public trust includes the right to walk on the beach up to the OHWM. The court specifically rejected Glass's argument under the GLSLA, holding that the Act does not show legislative intent to claim title to all lands below the OHWM<sup>33</sup> and does not establish the boundaries of the public trust.<sup>34</sup> Therefore, the court turned to the common law public trust doctrine. In a critical step, the court held that the boundaries for public trust purposes need not coincide with boundaries for title purposes, citing *Collins v Gerhardt*,<sup>35</sup> an inland streams case.<sup>36</sup> This allowed the court to sidestep much of the *Hilt* analysis and the numerous cases addressing title concerns. The court was then free to address an issue on which there is very little law—the location of the public trust boundary. The court cited *Peterman v Dep't of Natural Resources*<sup>37</sup> for the proposition that the Michigan courts have accepted the OHWM as the boundary of public trust rights.<sup>38</sup>

The court recognized that the waters of the Great Lakes, while not subject to tidal influences, nonetheless fluctuate over time, resulting in the temporary exposure of land that will later be again submerged. This land, because it has been and will again be bottomlands under the Great Lakes, was held to be subject to the public trust.<sup>39</sup> This land is bounded by the OHWM, a mark that evidences the landward limit of the action of the Great Lakes' waters.

### A. Lands and Waters Subject to the Public Trust

The court adopted, from a Wisconsin decision, the following definition of the OHWM:<sup>40</sup>

the point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic. And where the bank or shore at any particular place is of such a character that is impossible or difficult to ascertain where the point of ordinary high-water mark is, recourse may be had to other places on the bank or shore of the same stream or lake to determine whether a given stage of water is above or below ordinary high-water mark.

Despite the dissent's criticism of this standard, it is not all that different from the definitions of OHWM that the Departments of Conservation and Natural Resources had adopted by rule for determining Great Lakes public trust boundaries under the GLSLA, quoted above, or the statutory definition of OHWM in the former Inland Lakes & Streams Act.<sup>41</sup> It has the benefit of being a visible mark on the ground, at least along much of the Great Lakes shores, unlike the fixed elevation set forth in the GLSLA. On the other hand, it lacks precision and provides a breeding ground for litigation. To the extent the public merely wishes to walk the beach without getting their feet wet, it is certainly adequate; to the extent the public wishes to stray from the water's edge more than is necessary to simply walk the beach with dry feet, the definition becomes more difficult.

This decision affects the shorelands of all of the Great Lakes in Michigan, which includes Lake St Clair,<sup>42</sup> but not the waters connecting the lakes, e.g., the Detroit River,<sup>43</sup> St Clair River<sup>44</sup> or St Mary's River.<sup>45</sup> Although inland navigable waters are subject to the public trust, the court made clear that its analysis of the right to walk on the beach applies only to the Great Lakes.<sup>46</sup>

The OHWM, like the water's edge, is subject to fluctuation, but over a much longer time span, perhaps months or years, not minutes. In some areas the court's definition may not be easily applied, e.g., where hard or rocky ground does not evidence the characteristics the court identified, or areas below the OHWM that quickly revegetate in low water years.

The decision provides no insight into the treatment of public trust lands that have already been leased by the state under the GLSLA or that have facilities such as

seawalls or jetties on them. Leases and permits for structures would have required a finding by the Department of Conservation or the Department of Natural Resources that the lease or the permitted activity would not impair or substantially affect the public trust.<sup>47</sup>

### B. Public Trust Rights

The court notes that, historically, the state serves "as the trustee of public rights in the Great Lakes for fishing, hunting, and boating for commerce or pleasure."<sup>48</sup> To this list the court adds walking on the beach, concluding that "[b]ecause walking along the lakeshore is inherent in the exercise of traditionally protected public rights of fishing, hunting, and navigation, our public trust doctrine permits pedestrian use of our Great Lakes, up to and including the land below the ordinary high water mark."<sup>49</sup> Whether, and to what extent, public trust rights on the beach may exceed "pedestrian rights" remains unclear, and ripe for conflict and further litigation.

The court distinguishes the language in *Hilt*, quoting *Doemel v Jantz*,<sup>50</sup> "the public has no right of passage over dry land between low and high-water mark but the exclusive use is in the riparian owner . . ." by stating that *Hilt* did not adopt this rule from Wisconsin, but merely cited this language as part of its analysis discrediting the *Kavanaugh* cases. The court indicates that *Hilt*'s recognition of the greater rights of riparian owners did not alter the public trust or preclude the public from walking within it.<sup>51</sup>

The underlying litigation raises public policy issues inherent in the public trust doctrine similar to those raised in *Collins v Gerhardt*<sup>52</sup> and *Attorney General ex rel Director of Conservation v Taggart*,<sup>53</sup> which first recognized public trust rights as including fishing on inland navigable waters, and *Bott v Natural Resources Comm*,<sup>54</sup> wherein the Supreme Court declined to recognize those waters navigable only by recreational watercraft as navigable waters to which the public trust applied.

Hunting is an area where the decision's applicability to only the Great Lakes is especially evident. While *State v Venice of America Land Co*<sup>55</sup> and *State v Lake St Clair Fishing & Shooting Club*,<sup>56</sup> both cited by the court, specifically mention "fowling" as protected public trust rights on the Great Lakes, it is equally clear that hunting rights are not part of the public trust on Michigan waters other than the Great Lakes and that hunting and trapping rights are vested in the owners of the bottomlands under other waters of the State,<sup>57</sup> as is the right to harvest ice.<sup>58</sup> Indeed, the courts have not always been entirely clear whether the public's right to hunt on the Great Lakes

derives from the public trust doctrine or the fact that the state owns the bottomlands under the Great Lakes. A discussion of the use of Great Lakes waters that may not be capable of sustaining commercial navigation in *State v Lake St Clair Fishing & Shooting Club*, one of the cases relied on by the court, suggests the right may derive from public ownership of the bottomlands: “[O]nce a body of water is navigable, its character as navigable water extends to low water mark. It certainly does as to rights of fishing, boating, hunting, and in cutting ice by any members of the public, if the state owns title to the bed.”<sup>59</sup> In *Sterling v Jackson*<sup>60</sup> the court held that where the waters of Lake Erie overflowed patented swampland, title and the right to hunt remained in the patentee, although the public had the right to use the navigable waters. This distinction becomes more relevant and the potential for conflict greater if, as *Glass* suggests, hunting is a public trust right, and the public trust extends to the OHWM.

Other potential uses also pose the potential for conflict and litigation: Does the public have the right to party, picnic, lounge, sunbathe, or build bonfires on private lands below the OHWM? Does the right to traverse private beaches include the right to traverse those lands by means other than on foot, e.g., by off-road vehicle? Does the right to navigate the waters of the Great Lakes and use the beach below the OHWM include the right to temporarily moor personal watercraft on the shore? None of these issues were before the court for consideration; the court addressed only the narrow issue of walking on the beach.

The court made clear that public trust rights are not without limits, although such limits are not defined. “By no means does our public trust doctrine permit every use of the trust lands and waters. Rather, this doctrine protects only limited public rights, and it does not create an unlimited public right to access private land below the ordinary high water mark.”<sup>61</sup>

### C. Title Issues

Although the court had indicated in an Order prior to oral argument that “the issue of title to previously submerged land will be heard by this court and should be briefed by the parties,”<sup>62</sup> the court’s decision did not address title,<sup>63</sup> holding instead, that the public trust extends to the OHWM, regardless of title to exposed lands between the OHWM and the water’s edge. The court took “as given that defendants hold title to their property according to the terms of their deed,” which defined the lakeward boundary as the “meander line of Lake Huron.”<sup>64</sup> That the court found it unnecessary to address title is not a confirmation of the Court of Appeals conclusion the state

holds title to the statutory high water mark in light of the Supreme Court’s determination that the GLSLA does not “show a legislative intent to take title to all land lakeward of the ordinary high water mark.”<sup>65</sup>

### D. The Dissent

Justice Markman’s strongly worded dissent<sup>66</sup> (joined by Justice Young) addresses several major disagreements with the majority ruling: (1) the majority adopts a “newly described ‘ordinary high water mark,’ one never before seen in Michigan,” from a Wisconsin case involving land on a river,<sup>67</sup> (2) the majority deviates from an established rule of property rights, (3) the majority’s OHWM is not easily identifiable in practice and will lead to uncertainty, conflict and additional litigation, and (4) the majority’s reliance on *Peterman*, a case involving the navigation servitude, is misplaced.

Justice Markman adopts as the line defining the landward boundary of the public trust the “wet sand” test, which defines the boundary as the “water’s edge,” the point “where wet sands give way to dry sands.”<sup>68</sup> In this sense, the court is unanimous in its holding that the landward edge of the trust land is not the point where surface water meets land. The dissent’s criticism of the language adopted by the majority because it comes from another state seems unduly harsh given the similar language used to apply public trust protections under the GLSLA. The dissent’s analysis is not helped by the fact that it clearly misunderstood technical aspects of the Wisconsin court’s analysis.<sup>69</sup>

Although Justice Markman strongly criticized the majority’s adoption of a “new” location for describing the landward boundary of the public trust, he does not cite any Michigan cases actually adopting the “wet sand” test. Under this test the boundary is the “water’s edge”— the point “where wet sands give way to dry sands.”<sup>70</sup> As he correctly notes, the parties and all of the *amici* claimed that *their* position reflected the status quo, whether they supported a line at the high water mark, the low water mark, the water’s edge or some other line.<sup>71</sup> The argument that wet sands are infused with water and therefore are within the definition of submerged lands and therefore can be used by the public, appears no stronger or weaker than other arguments. The analysis only serves to highlight the uncertainty of existing law on the issue actually before the court.

### Takings

*Hilt v Weber*’s discussion of the state’s claim to *title* to dry lands below the meander line suggested the

possibility that claiming public rights in the Great Lakes shorelands could constitute an unconstitutional taking of private property.<sup>72</sup> By deciding the present case on a public trust theory, rather than on the basis of title, it appears that the court has avoided this potential problem. The court noted this concern and dismissed it:<sup>73</sup>

Certainly, the loss of littoral property or riparian rights could result from an unconstitutional taking. Yet, here, defendants have not lost any property rights. Rather, they retain their property subject to the public trust, just as all property that abuts the Great Lakes in Michigan remains subject to the public trust, pursuant to our common law.

### Regulation of Public Trust Rights

The court makes clear that public trust rights are subject to legislative regulation: “Finally, any exercise of these traditional public rights remains subject to criminal or civil regulation by the Legislature.”<sup>74</sup> Appropriate legislation could significantly reduce the potential for conflict along the coasts.

But the uncertainty resulting from the decision results in an enforcement nightmare. Expecting law enforcement personnel to decide what activities are allowed on private property below the OHWM or to determine the location of the OHWM is asking an awful lot.

### Conclusion

The *Kavanaugh* cases held that the state held title to exposed lands lakeward of the meander line, subject to the riparian rights held by the adjacent landowner. *Hilt* overruled the *Kavanaugh* cases, holding that title moves with the water’s edge. *Glass* now holds that regardless of title, lands below the OHWM are subject to the public trust.

Although there are numerous Michigan cases discussing where private title ends and state title begins on the Great Lakes shore, dating back to at least 1843,<sup>75</sup> in most the discussion is unclear or dicta, and the dicta is very inconsistent. There are, on the other hand, essentially no cases addressing the public trust doctrine to the exclusion of the land between the OHWM and the water’s edge or adopting any other bright line demarcation of the public trust. The meander line, the statutory OHWM under the GLSLA, the OHWM as evidenced on the ground, the low water mark (however that is defined), the point where wet sand gives way to dry sand at any given point in time, and the point where surface water meets land at any given point in time are all candidates

to be a dividing line. Each reflects differing public policy choices and differing views of what the public trust protects.

The public trust doctrine traces back to concepts regarding tidal waters, where the rise and fall of the waters occurred on a regular basis. While the Great Lakes are not tidal, they rise and fall on regular basis, albeit over longer periods, perhaps decades. It is almost certain, however, that the Great Lakes will rise from their present low levels and will again submerge much of the land that is presently at issue. In rejecting the point where land meets surface water as the dividing line, a very short-term standard, the court has taken a longer-term view, one that acknowledges that the Great Lakes will return to its OHWM as evidenced on the ground and, if it fails to do so, over time, for much of the shorelands, nature will redefine the lands not reclaimed by the lakes by revegetating or otherwise physically changing them and shifting lakeward the OHWM that defines the upland boundary of the public trust.

Choosing to protect temporarily-exposed bottomlands is certainly consistent with the concept of the public trust doctrine. It is less certain whether allowing the public to walk along lands below the OHWM is appropriate. In this sense, the court’s decision likely reflects the majority’s response to public policy issues in an area where the law was simply unclear. Only time will tell whether this decision becomes accepted law like *Collins* and *Taggart* or suffers a fate similar to the *Kavanaugh* cases.

### Endnotes

1. *Glass v Goeckel*, 473 Mich 667; 703 NW2d (2005); reh denied \_\_\_ Mich \_\_\_; 703 NW2d 188 (1/14/05).
2. \_\_\_ Mich \_\_\_; 703 NW2d 188 (9/14/05).
3. *Glass v Goeckel*, 262 Mich App 29, 46; 683 NW2d 719 (2004).
4. 473 Mich at 667 (Young, concurring in part and dissenting in part, emphasis in original).
5. MCL 324.32501 *et seq.*
6. 1955 PA 247, MCL 322.701 *et seq.*, repealed by 1995 PA 59, now codified at MCL 324.32501 *et seq.*
7. MCL 324.32501.
8. 473 Mich at 691, quoting *Diana Shooting Club v Husting*, 156 Wis 261, 272; 145 NW 816 (1914).

9. 473 Mich at 678 n 6.
10. Technically, “riparian” refers to riverfront land and “littoral” refers to coastal and lakefront lands. The cases generally do not distinguish between the two, using riparian to refer to both riverfront and lakefront lands. Rights on both lakefront and riverfront lands are referred to as riparian rights. Accordingly, this article will use the term riparian to refer to the lakefront lands.
11. *Hilt v Weber*, 237 Mich 14; 208 NW 51 (1926).
12. For a detailed discussion of the development of the public trust doctrine, see Wilkinson, *The Headwaters of the Public Trust Doctrine: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 *Envtl L Rev* 425 (1989); Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 *Mich L Rev* 471 (1970); Olson, *Public Trust Doctrine: Procedural and Substantive Limitations on the Governmental Reallocation of Natural Resources in Michigan*, 1975 *Det CL Rev* 161.
13. *Shively v Bowlby*, 152 US 1, 11; 14 S Ct 548; 38 L Ed 331 (1894).
14. *Illinois Central RR v Illinois*, 146 US 387, 452; 13 S Ct 110; 36 L Ed 1018 (1892).
15. *Nedtweg v Wallace*, 237 Mich 14; 208 NW 51 (1926).
16. *Id.* at 17. The public trust doctrine applies as well to navigable waters of the state other than the Great Lakes. *Attorney General ex rel Director of Conservation v Taggart*, 306 Mich 432; 11 NW2d 193 (1943); *Collins v Gerhardt*, 237 Mich 38; 211 NW2d 115 (1926).
17. *Kavanaugh v Rabior*, 222 Mich 68; 192 NW 623 (1923).
18. *Kavanaugh v Baird*, 241 Mich 240; 217 NW 2 (1928).
19. 252 Mich at 224.
20. 252 Mich at 224-226 (citations omitted, emphasis added).
21. *People v Silberwood*, 110 Mich 103; 67 NW 1087 (1896); *People v Warner*, 116 Mich 228; 74 NW 705 (1898); *State v Lake St Clair Fishing & Shooting Club*, 127 Mich 580, 586; 87 NW 117 (1901).
22. 43 USC 1301 *et seq.*
23. 1958 PA 94.
24. 1965 PA 293.
25. Predecessor to the Department of Natural Resources and now the Department of Environmental Quality.
26. 1959 AACS, R 299.371(b).
27. 1959 AACS, R 299.371(a).
28. See, 1979 AC, R 281.901(2).
29. 1968 PA 57.
30. OAG, 1977-1978, No 5327, p 518 (July 6, 1978).
31. 262 Mich App at 30.
32. 262 Mich App at 45-46.
33. 473 Mich at 682.
34. 473 Mich at 683.
35. *Collins v Gerhardt*, 237 Mich 38; 211 NW2d 115 (1926).
36. 473 Mich at 687-690.
37. 446 Mich 177; 521 NW2d 499 (1994). *Peterman* involved the erosion of shorelands on property adjacent to a public boat launch ramp installed by the state. *Peterman* held that the OHWM was the limit of the public’s right and that the navigation servitude did not protect the state from a taking claim for the destruction of fast lands on nearby private property. 446 Mich at 198-199.
38. 473 Mich at 687.
39. 473 Mich at 691.
40. 473 Mich at 691, quoting *Diana Shooting Club v Husting*, 156 Wis 261, 272; 145 NW 816 (1914).
41. MCL 324.30101(i).
42. *State v Venice of America Land Co*, 160 Mich 680; 125 NW 770 (1910); *State v Lake St Clair Fishing & Shooting Club*, 127 Mich 580, 586; 87 NW 117 (1901) (Hooker, concurring).
43. *Lorman v Benson*, 8 Mich 18 (1860).

44. *McMorran Milling Co v C H Little Co*, 201 Mich 301; 167 NW 990 (1918).
45. *Ryan v Brown*, 18 Mich 196; 100 AD 154 (1869).
46. 473 Mich at 678 n 6.
47. MCL 322.703 (repealed) or MCL 324.32503.
48. 473 Mich at 667, citing in *Nedtweg v Wallace*, 237 Mich 14, 16; 208 NW 51 (1926); *State v Venice of America Land Co*, 160 Mich 680, 702; 125 NW 770 (1910); *State v Lake St Clair Fishing & Shooting Club*, 127 Mich 580, 586; 87 NW 117 (1901); *Lincoln v Davis*, 53 Mich 375, 388; 19 NW 103 (1884).
49. 473 Mich at 674-675; *see, also*, 473 Mich at 695.
50. *Doemel v Jantz*, 180 Wis 225; 193 NW 393 (1923).
51. 473 Mich at 697.
52. *Collins v Gerhardt*, 237 Mich 38; 211 NW2d 115 (1926).
53. *Attorney General ex rel Director of Conservation v Taggart*, 306 Mich 432; 11 NW2d 193 (1943).
54. *Bott v Natural Resources Comm*, 415 Mich 45; 327 NW2d 838 (1982).
55. *State v Venice of America Land Co*, 160 Mich 680; 125 NW 770 (1910).
56. *State v Lake St Clair Fishing & Shooting Club*, 127 Mich 580; 87 NW 117 (1901).
57. *Johnson v Burghorn*, 212 Mich 19; 179 NW 225 (1920); *St Helen Shooting Club v Mogle*, 234 Mich 60; 207 NW 915 (1926); *Sterling v Jackson*, 69 Mich 488; 37 NW 845; 13 Am St Rep 405 (1888).
58. *Grand Rapids Ice & Coal Co v South Grand Rapids Ice & Coal Co*, 102 Mich 227; 60 NW 681 (1894); *Lorman v Benson*, 8 Mich 18; 77 Am Dec 435 (1860).
59. 127 Mich at 587.
60. *Sterling v Jackson*, 69 Mich 488; 37 NW 845; 13 Am St Rep 405 (1888).
61. 473 Mich at 697 (emphasis in original).
62. \_\_\_ Mich \_\_\_; 688 NW2d 825 (2004).
63. 473 Mich at 675 n 5.
64. 473 Mich at 675 n 5.
65. 473 Mich at 682.
66. The majority mentions the “sound and fury” of Justice Markman’s dissent. 473 Mich at 667.
67. 473 Mich at 716 (Markman, dissenting).
68. 473 Mich at 744 (Markman, dissenting).
69. Although the dissent recognizes that the Wisconsin Supreme Court applied its *Diana Shooting Club* definition of OHWM to the Great Lakes in *State v Trudeau*, 139 Wis 2d 91; 408 NW2d 337 (1987), the dissent wrongly distinguishes *Trudeau* by arguing “*Trudeau* held that the ‘ordinary high water mark’ is defined by the International Great Lakes Datum (‘IGLD’) level . . . .” 473 Mich at 734 (Markman, dissenting). Justice Markman apparently misunderstood the Wisconsin Supreme Court’s analysis of the testimony in that case. He states:

[T]o the extent that the majority believes that *Trudeau* makes the *Diana Shooting Club* definition applicable to the Great Lakes, the majority fails to note that *Trudeau* adopted the IGLD definition of the ‘ordinary high water mark’ on the Great Lakes. *Trudeau, supra* at 110. In determining the location of the ‘ordinary high water mark,’ *Trudeau* specifically relied on the following evidence:

The DNR’s area water management specialist, Richard Knitter, testified that he determined the lake’s OHWM [ordinary high water mark] approximately one-half mile from the site at a protected location with a clear erosion line that was free from excessive wave action. Knitter then determined that this site’s elevation was 602 feet I.G.L.D. He transferred the elevation of the OHWM site to a number of points at the project site and concluded that approximately half of the site was below Lake Superior’s OHWM. The developers’ surveyor did not determine the OHWM of the site or Lake Superior. [*Id.* at 106-107.]’

The court concluded that “any part of the site at or below 602 feet I.G.L.D. is within the OHWM of Lake Superior and is therefore protected lake-bed upon which building is prohibited.” *Id.* at

109. [473 Mich at 734-735 (Markman, dissenting)]

Understood correctly, the witness determined the elevation of the OHWM some distance up the shore from the site at issue, at a protected location with a clear erosion line that was free from excessive wave action. He then determined where that same elevation existed on the site at issue, finding that approximately half the site was below the OHWM. IGLD does not define the OHWM. IGLD is merely a method of stating elevations by reference to a predetermined elevation monument. (Other similar scales sometimes used in Great Lakes measurements include NGVD (National Geodetic Vertical Datum) and NAVD (North American Vertical Datum). Because these measures differ by a few feet from each other, it is necessary, when giving elevation measurements on the Great Lakes, to identify which scale is being used.) The

testimony demonstrated that the witness applied the *Diana Shooting Club* definition exactly as suggested by the Wisconsin Supreme Court, and the majority correctly concluded that the *Trudeau* Court applied the *Diana Shooting Club* definition to the Great Lakes.

70. 473 Mich at 744 (Markman, dissenting).

71. 473 Mich at 711 n 3 and accompanying text.

72. 252 Mich at 224.

73. 473 Mich at 703 (citations omitted).

74. 473 Mich at 698.

75. *La Plaisance Bay Harbor Co v City of Monroe*, Walk Ch 155 (1843).

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## KELO V. CITY OF NEW LONDON: HOW WE GOT HERE AND WHERE WE'RE GOING

by Jerome P. Pesick\* and Jason C. Long\*\*

Since the United States Supreme Court's decision in *Kelo v. City of New London*,<sup>1</sup> holding that governmental agencies may use the power of eminent domain to take land from one owner and transfer it to another owner for economic development purposes, significant criticism and even anger have been directed at the court and its decision. *Kelo*, a Connecticut case in which the City of New London attempted to use its power of eminent domain to take a number of non-blighted properties for economic development, may represent the most explicit statement yet that eminent domain can be used for such purposes. But it is not the first case to approve the use of eminent domain for development-related transfers. Rather, cases from both the United States Supreme Court and state courts dating back over fifty years approved the use of eminent domain in economic development projects, even to accomplish land transfers from one private owner to another. Nevertheless, *Kelo* may have sowed the seeds of its own undoing: it recognized that states may adopt "public use" standards that prohibit such transfers, as the Michigan Supreme Court did in *Wayne County v. Hathcock*,<sup>2</sup> and *Kelo*'s emphatic statement that eminent domain can be used to transfer land has prompted a number of states, as well as Congress, to pursue new standards that would render *Kelo* obsolete.

### The Historic Narrowing of the "Public Use" Limitation

During the mid-nineteenth century, a number of courts held that the public use limitation required that any property taken through eminent domain must actually be used by the public.<sup>3</sup> But problems in enforcing that standard, including determining the portion of the public that must be permitted to actually use a property to make the use a "public use," as well as the need to accommodate growing milling and railroad industries, led to the erosion of the actual public use standard.<sup>4</sup> In fact, by the early

twentieth century, when the United States Supreme Court began applying the Fifth Amendment to the states, the Supreme Court explained that "use by the general public" had proven inadequate for determining whether an exercise of eminent domain complied with the "public use" limitation.<sup>5</sup>

These decisions led to concern that the "public use" limitation's importance was in decline,<sup>6</sup> which the Supreme Court practically confirmed with its 1954 opinion in *Berman v. Parker*.<sup>7</sup> There, a congressional act declared that an area of Washington, D.C., was "blighted," and provided that the entire area would be acquired, through eminent domain if necessary, with some properties in the area scheduled to be sold to new private owners for redevelopment.<sup>8</sup> The owner of a department store within the area challenged the attempt to condemn his property, arguing that it was not blighted and that turning his property over to new private owners for redevelopment was inconsistent with the public use limitation.<sup>9</sup> But the Supreme Court rejected this challenge, stating that the "concept of public welfare is broad and inclusive," and that it was required to defer to the legislative judgment that the entire area required redevelopment.<sup>10</sup> By holding that "nothing in the Fifth Amendment" would "stand in the way" of the taking, the court essentially equated "public use" with a "broad concept" of "public welfare."

The Supreme Court's decision in *Berman* paved the way for states to begin using eminent domain to transfer land between private owners for redevelopment.<sup>11</sup> Perhaps the most famous example of that came with the Michigan Supreme Court's 1981 decision in *Poletown Neighborhood Council v. City of Detroit*.<sup>12</sup> Pursuant to a Michigan statute allowing the use of eminent domain to provide for the general health and welfare by assisting industry and economic development,<sup>13</sup> the City of Detroit resolved to take an entire neighborhood, known as

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“Poletown” due to many of its residents’ Polish ancestry, and convey it to General Motors for the construction of a new assembly plant. While purporting to apply “heightened scrutiny” to the city’s taking, the court cited *Berman* for the principle that it was required to defer to the legislative judgment that such a taking was for a “public use.” It held that the constitutional term “public use” was synonymous with “public purpose,” and that both were efforts to “describe the protean concept of public benefit.”<sup>14</sup> Because the new assembly plant would provide jobs and alleviate unemployment, the court concluded that the plant would provide a public benefit and therefore, the city’s use of eminent domain was proper.<sup>15</sup>

*Poletown* pushed the floodgates open. After that decision, a number of state courts decided cases allowing the government to use eminent domain to take land from one private owner and convey it to another, hoping that the conveyances would lead to more jobs, tax revenue, and other economically desirable goals.<sup>16</sup> Decisions like those, together with the United States Supreme Court’s decision in *Hawaii Housing Authority v. Midkiff*,<sup>17</sup> which approved the use of eminent domain to transfer land from its owners to its lessees to reduce the concentration of land ownership, left little that the government could not accomplish through its power of eminent domain. Indeed, in 1985 one commentator noted that the function of the “public use” limitation was “an empty question,”<sup>18</sup> as the limitation had been withered such that nearly any taking would satisfy its minimal requirements.

### **Hope for New Substance in the Public Use Limitation**

After the understanding of “public use” had been expanded for a number of years, the Michigan Supreme Court decided *Wayne County v. Hathcock*, providing an indication that courts may begin to rein in the power of eminent domain. In *Hathcock*, Wayne County attempted to take a number of properties south of Detroit Metropolitan Airport, which it wanted to assemble with land that the county already owned, for a high-tech industrial park. The county planned to take properties to assemble the park, and then sell parcels in the park to private companies. A number of owners challenged the county’s power to take their properties for such purposes. The trial court and the court of appeals both relied on *Poletown* in ruling in the county’s favor, but the Supreme Court granted the owners leave to appeal, asking whether *Poletown* should be overruled.<sup>19</sup>

Unanimously, the Michigan Supreme Court held that *Poletown* misinterpreted the Michigan constitution

in permitting the use of eminent domain to take land from one owner to transfer it to another for economic development. The court held that *Poletown* erred in relying on *Berman*, as Michigan law did not require deference to a legislative decision on whether a taking was for a public use.<sup>20</sup> Rather, “public use” had to be defined based on the historical understanding of that term under the Michigan Constitution. Defining the precise contours of “public use” was unnecessary to decide *Hathcock*, however, as the court focused on whether Wayne County’s purported taking qualified under any of the three historic instances when Michigan law allowed a condemned property to be taken from one private owner and transferred to another. Those instances are (1) taking land to transfer to an owner, like a railroad, that provides services that would be unavailable absent the ability to assemble land, (2) taking land to transfer to institutions that remain accountable to the public, like heavily-regulated pipelines, and (3) taking land based on the land’s own characteristics, such as genuine blight, which results in transferring the land to new owners after the blight is eliminated.<sup>21</sup> The county’s purported taking was not analogous to any of these three permitted categories of takings, and found support only in the economic development rationale from *Poletown*. But the court held that the *Poletown* rationale had no basis in Michigan law, overruling *Poletown* and eliminating the possibility that eminent domain can be used to take property from one owner for transfer to another solely for purposes of economic development.<sup>22</sup>

When the same court that had decided *Poletown*, the case that for so long had served as the icon of the unlimited and even abusive power of eminent domain, repudiated the use of eminent domain to take land for economic development purposes, the decision created anticipation that other courts would again follow Michigan’s lead and breathe new life into the public use requirement.<sup>23</sup> Specifically, the United States Supreme Court’s grant of certiorari in *Kelo* created anticipation of a more restrictive “public use” analysis. The Connecticut courts had held that the taking in *Kelo* was lawful, but the United States Supreme Court agreed to hear the property owners’ argument that the taking violated the Fifth Amendment’s public use limitation.

### **The Kelo Decision**

In *Kelo*, however, the Supreme Court declined to alter its interpretation of the Constitution’s public use limitation. There, the City of New London had experienced several decades of economic decline, leading the state of Connecticut to declare it a “distressed municipality.”<sup>24</sup>

State and local officials therefore attempted to promote the city's economic revitalization, in part through New London's development corporation. The development corporation created a development plan focusing on 90 acres of land on a peninsula in New London. That plan called for construction of public access to the waterfront, new dining, retail, and residential components, as well as a park at the site of a former naval installation. New London's city council approved the plan and authorized the development corporation to acquire the property necessary for the plan, including authorizing the use of eminent domain.<sup>25</sup> The development corporation purchased much of the property, but filed condemnation actions to take properties from several owners that did not wish to sell. Those properties, which New London did not allege were blighted, were designated for development as offices, parking, and retail uses. The owners sought to enjoin the takings, and prevailed at trial. But the Connecticut Supreme Court, citing *Berman* and *Midkiff*, reversed and held that the takings were valid.<sup>26</sup>

Writing for the majority, Justice Stephens began the analysis of the takings' validity by acknowledging that the power of eminent domain cannot be used to take property from one person "for the sole purpose of transferring it to another private party," but that taken land can be transferred to private owners when "use by the public," as with a railroad, is the taking's purpose.<sup>27</sup> According to the court, New London's takings were not designed to benefit some private party, but resulted from a "carefully considered" development plan that was designed to create jobs and tax revenue, and create public access to the waterfront.<sup>28</sup> Thus, the court concluded that the takings were not definitively barred. On the other hand, the takings also were not designed for actual "public use," so they were not definitively permitted. The takings fell somewhere in between, leading the court to explain that their validity turned on whether New London's development plan served a "public purpose."<sup>29</sup> By so narrowing the issue, and again equating "public use" with "public purpose," the court sealed the case's outcome: deciding whether some governmental action is consistent with "public purposes" involves the court's deference to the political branches of government.

In focusing on "public purpose," the court again turned to *Berman*, *Midkiff*, and other cases in which the court deferred to legislative judgments. It noted that the court's "public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power."<sup>30</sup> Here, the

court observed that a Connecticut statute permitted New London's takings, and that New London had thoroughly deliberated in adopting its comprehensive redevelopment plan under that statute. The court believed that it was required to assess the challenges to the takings in light of the entire development plan, and because the court concluded that the overall plan served public purposes, the use of eminent domain to execute the plan was proper.<sup>31</sup>

In rejecting the property owners' argument that taking land for economic development by definition, is not a public use, the court stated that promoting "economic development is a traditional and long accepted function of government."<sup>32</sup> It explained that takings for economic development could not necessarily be distinguished from recognized public uses, as governmental pursuit of public purposes will often benefit private parties. Further, in response to an argument that the court's decision would allow a taking from one property owner to transfer land to another owner just because the other would "put the property to more productive use and thus pay more taxes," the court stated that courts could deal with such cases as they arise, but that the possibility of such a scenario did "not warrant the crafting of an artificial restriction on the concept of public use."<sup>33</sup> The court also declined to require "reasonable certainty" that public benefits will accrue from economic development takings. It stated that such a rule was an even greater departure from precedent than an "actual public use" requirement, and would digress into debates over the wisdom of takings, which are within the legislative, and not the judicial, domain. Therefore, the court affirmed the Connecticut Supreme Court's decision, permitting the takings.

Five members of the court agreed with that analysis, but Justice O'Connor offered a dissent that the Chief Justice and two other Justices joined. She argued that the deference that the majority showed to other branches in deciding whether a taking was for a public use reduced the public use clause to "little more than hortatory fluff."<sup>34</sup> For the public use clause to have any meaning, she argued, there must be an external, judicial check on the other branches' use of the power of eminent domain. She distinguished *Kelo* from cases like *Berman* and *Midkiff* as involving "extraordinary" pre-condemnation uses of property that were affirmatively harming society, while the properties in *Kelo* did no such harm. Rather, the existing uses of the properties in *Kelo* simply were not as economically productive as other uses might be.<sup>35</sup> Justice O'Connor would have held that taking a property

to “upgrade” its economic use, however, is constitutionally prohibited by the public use limitation.<sup>36</sup>

### **Kelo’s Limitations, and Downfall?**

Although it decided to allow the takings in *Kelo*, the United States Supreme Court left the door open for states to adopt “public use” standards that are more restrictive than the standard under the United States Constitution. The court explicitly stated that its decision that the Fifth Amendment permitted the takings in *Kelo* did not preclude “any state from placing further restrictions on its exercise of the takings power.”<sup>37</sup> In this respect, the court resolved the public use issue in the same manner that it has recently resolved a number of other issues: treating the federal constitution as a “floor” above which states may adopt more stringent standards.<sup>38</sup>

In fact, the *Kelo* majority specifically cited *Hathcock* as an example of the type of restriction that states may impose on the power of eminent domain.<sup>39</sup> So in states like Michigan, where the state supreme court has held that the state constitution does not allow use of the power of eminent domain to take property from one private owner and transfer it to another solely for purposes of economic development, *Kelo* has virtually no impact.

Because of the widespread sentiment that *Kelo* was wrongly decided, a number of other states have begun initiatives to join Michigan in rendering *Kelo* inapplicable under their law. For example, in response to *Kelo*, Alabama has already adopted legislation that prohibits the use of eminent domain to take “property for the purposes of private retail, office, commercial, industrial, or residential development; or primarily for enhancement of tax revenue; or for transfer to a person, nongovernmental entity, public-private partnership, corporation, or other business entity.”<sup>40</sup> Similarly, states including California, Delaware, Florida, Georgia, Louisiana, Massachusetts, Minnesota, New Jersey, Ohio, Oklahoma, Rhode Island, and Texas, as well as Connecticut, where *Kelo* originated, are considering changes to their eminent domain laws, through either legislation or amendments to the state constitutions, to limit the use of eminent domain for economic development.<sup>41</sup> Even Michigan, where *Hathcock* prohibits takings for transferring a property from one owner to another on an economic development rationale, is considering legislation and constitutional amendments designed to ensure that no future court could decide to reverse *Hathcock* and allow such takings.<sup>42</sup>

Further, while *Kelo* sets the federal standard for the use of eminent domain, Congress is also considering

measures to curb takings for economic development. The Senate recently held hearings to examine *Kelo*’s impact,<sup>43</sup> and is considering legislation that would eliminate federal funding for any construction project in which eminent domain is used to take land for transfer from one private owner to another for purposes of economic development.<sup>44</sup>

### **Conclusion**

In sum, when *Kelo* allowed the power of eminent domain to be used to take land from one private owner to transfer it to another solely for purposes of economic development, it adopted a permissive standard for the takings power. While that standard was not exactly an innovation, the decision nevertheless enflamed the passions of property owners across the country. Under *Kelo*’s express recognition that states may adopt more restrictive eminent domain standards, a wave of such standards are now sweeping the country, and may sweep *Kelo* into the dust bin.

### **Endnotes**

1. 125 S Ct 2655; 162 L. Ed. 2d 439 (2005).
2. 471 Mich 445; 684 NW2d 765 (2004).
3. See *Kelo*, *supra* at 2662.
4. See *id.* (discussing historic cases); see also Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 170-75 (1985).
5. *Strickley v. Highland Boy Gold Mining Co.*, 200 US 527, 531; 26 S. Ct. 301; 50 L. Ed. 581(1906) (upholding mining company’s use of aerial transport line crossing land that company did not own).
6. See, e.g., Note, *The “Public Use” Limitation on Eminent Domain: An Advance Requiem*, 58 Yale L.J. 599, 613-14 (1949).
7. 348 U.S. 26; 75 S Ct 98; 99 L Ed 27 (1954).
8. See *id.* at 29-31.
9. See *id.* at 31.
10. *Id.* at 33.
11. See, e.g., *State ex rel. Bruestel v. Rich*, 159 Ohio St. 13; 110 NE2d 778 (Ohio, 1953); see also Epstein, *supra* note 4, at 179 (“Once *Berman v. Parker* is on the books, the question remains whether any

- condemnation of land can be attacked for want of a public purpose”).
12. 410 Mich 616; 304 NW2d 455 (1981).
  13. *See id.* at 630.
  14. *Id.*
  15. *See id.* at 635.
  16. *See, e.g., City of Las Vegas Downtown Redevelopment Agency v. Pappas*, 76 P.3d 1 (Nev. 2003); *State ex rel. Tomasic v. Unified Gov't of Wyandotte County*, 962 P.2d 453 (Kan. 1998); *State ex rel. Washington Convention & Trade Ctr. v. Evans*, 966 P.2d 1252 (Wash. 1998); *Atlantic City v. Cynwynd Invs.*, 148 N.J. 55; 689 A.2d 712 (N.J. 1997); *City of Jamestown v. Leever's Supermarkets, Inc.*, 552 N.W.2d 365 (N.D. 1996); *Maready v. City of Winston-Salem*, 467 S.E.2d 615 (N.C. 1996); *City of Duluth v. State*, 390 N.W.2d 757 (Minn. 1986); *Common Cause v. State*, 455 A.2d 1 (Me. 1983).
  17. 467 US 229, 235; 104 S Ct 2321; 81 L Ed2d 186 (1984).
  18. *Epstein, supra* note 4, at 161.
  19. *See Hathcock*, 471 Mich at 451-455.
  20. *See id.* at 480.
  21. *See id.* at 473-75.
  22. *See id.* at 483 (“*Poletown's* conception of a public use – that of ‘alleviating unemployment and revitalizing the economic base of the community’ – has no support in the Court’s eminent domain jurisprudence”) (footnote omitted).
  23. *See, e.g., Adam Mossoff, Foreword, The Death of Poletown: The Future of Eminent Domain and Urban Development After Wayne County v. Hathcock*, 2004 MICH. ST. L. REV. 837, 844.
  24. *Kelo*, 125 S Ct at 2658.
  25. *See id.* at 2659-60.
  26. *See id.* at 2660.
  27. *Id.* at 2661.
  28. *Id.* at 2661 n. 6.
  29. *Id.* at 2663.
  30. *Id.*
  31. *See id.* at 2665.
  32. *Id.*
  33. *Id.* at 2667.
  34. *Id.* at 2673 (O’Connor, J., dissenting).
  35. *Id.* at 2674-75 (O’Connor, J., dissenting).
  36. *See id.* at 2677 (O’Connor, J., dissenting). Justice Thomas also offered a dissent from the majority’s opinion, in which he criticized *Berman* and *Midkiff*. *See id.* at 2686 (Thomas, J., dissenting).
  37. *Id.* at 2668.
  38. *See, e.g., United States v. Lopez*, 514 US 549, 552 (1995). This is ironic in that federalism principles, which generally favor setting federal minimums and allowing states to adopt their own policies, *see id.*, are usually associated with the Justices that dissented from *Kelo*. On this issue, however, those Justices favored a more restrictive federal standard. *See Kelo*, 125 S Ct at 2677 (“States play many important functions in our system of dual sovereignty, but compensating for our refusal to enforce properly the Federal Constitution (and a provision meant to curtail state action, no less) is not among them”) (O’Connor, J., dissenting).
  39. *See Kelo*, 125 S Ct at 2668.
  40. ALA. CODE § 11-47-170 (amended August 2005); *see also id.* § 11-80-1 (amended August 2005).
  41. *See Baldas, States Ride Post-Kelo Wave of Legislation*, NAT’L L.J. (Aug. 2, 2005).
  42. *See S.J. Res. E, 93d Leg., 1st Sess. (2005)* (proposing to amend Const 1963, art 10, §2); H.R.J. Res. N, 93d Leg., 1st Sess. (2005) (same); H.R.J. Res. P, 93d Leg., 1st Sess. (2005) (same); *see also S. 693, 694, 93d Leg., 1st Sess. (2005)* (proposing to amend MCL 213.23, MCL 213.54, respectively); H.R. 5060, 5078, 93d Leg., 1st Sess. (2005) (proposing to amend MCL 213.23).
  43. *See 151 CONG. REC. DIGEST D936, 109<sup>th</sup> Cong., 1<sup>st</sup> Sess. (daily ed. Sep. 20, 2005)*.
  44. *See S. 1313, 109<sup>th</sup> Cong. (2005)*.

## LEGISLATION AFFECTING REAL PROPERTY

by Lawrence Shoffner

The Section is active in the legislative process in a variety of ways, including appearing before Senate and House committees, lobbying for and against bills, and monitoring bills of interest. Additionally, the Section's Special Committees provide the Council with expertise and comment on proposed legislation. The goal of this report is to keep you advised both on the progress of various bills in the State's legislature and the Section's efforts to maintain the quality of the legislation that becomes law.

### Legislation that has become law

Several new Acts affecting real property have recently become law.

**2005 PA 23 *General Property Tax Act*:** The Act allows for correction of an incorrect uncapping of property taxes. Amends sec. 27a of 1893 PA 206 (MCL 211.27a). Immediate effect.

**2005 PA 29 *Tax Increment Finance Authority Act*:** This Act expands the definition of an eligible obligation under tax increment financing to include certain management contracts or contracts for professional services. Amends sec. 1 of 1980 PA 450 (MCL 125.1801). Immediate effect.

**2005 PA 162 *Moble Home Commission Act*:** Revises procedures for enforcement of mortgage liens against manufactured homes. Amends sec. 30i of 1987 PA 96 (MCL 125.2330i). Immediate effect.

**2005 PA 163 *Sale Disclosure Act*:** Requires seller's disclosure statement to include a statement that property inspections should take into account indoor air and water quality as well as evidence of unusually high levels of potential allergens. Amends sec. 7 of 1993 PA 92 (MCL 565.957). Immediate effect.

**2005 PA 164 & 165 *Michigan Renaissance Zone Act and General Property Tax Act*:** This Act exempts certain owners of residential rental property located in the Renaissance Zone from having to file affidavit that property is in substantial compliance with state and local zoning, building, and housing laws. Amends sec. 10 of 1996 PA 376 (MCL 125.2690) & sec. 7ff of 1893 PA 206 (MCL 211.7ff). Immediate effect.

**2005 PA 0114 *General Property Tax Act*:** This Act increases the income threshold to qualify for summer property tax deferral for certain individuals. Amends sec. 51 of 1893 PA 206 (MCL 211.51). Immediate effect.

### Legislation opposed by the Section

The following legislation has been opposed by the Section.

**SB 693 *Eminent Domain*:** Prohibits use of eminent domain to benefit private entities. Amends sec. 3, 1911 PA 149 (CL 213.23). Referred to the Senate Committee on Transportation on August 31, 2005.

**HB 4523 *Revised Judicature Act of 1961*:** Creates an absolute bar to a claim of adverse possession against a person who has paid property taxes on the parcel in dispute for the statutory period. Amends sec. 5867 of 1961 PA 236 (MCL 600.5867) & adds sec. 5867a. Referred to the House Committee on Judiciary on March 17, 2005.

**HB 5060 *Eminent Domain*:** Prohibits use of eminent domain by state or local government to take private property for the primary benefit of a private entity. Amends sec. 3 of 1911 PA 149 (MCL 213.23). Referred to the House Committee on Government Operations on July 20, 2005.

The Council opposes SB 693, HB 5060 and Senate Joint Resolution E for several reasons, including the following:

The announced intention of the proposed legislation and Senate Joint Resolution E is to "codify" and incorporate into Michigan's statutes and Constitution the taking standard embraced by the Michigan Supreme Court in the decision of *Wayne County v Hathcock*, 471 Mich. 455 (2004). As noted in *Kelo v City of New London*, 125 S.Ct. 2655 (2005), the Michigan Supreme Court's decision in *Hathcock* imposed restrictions on the use of eminent domain beyond those required by the United States Constitution. The proposed legislation and amendment are unnecessary because the *Hathcock* decision, which interprets the existing Michigan Constitution, is the law of the land in the State of Michigan.

There is no need to put *Hathcock* into the law or Constitution; it is already there.

The Council of the Section is also concerned that (a) legislation would make existing law uncertain, (b) could well have unintended consequences, and (c) could create ambiguities in interpretation. For example, the Council believes that the proposed legislation and amendment may actually resurrect the standard previously employed by the Michigan Supreme Court in *Poletown Neighborhood Council v Detroit*, 410 Mich. 616 (1981), the standard expressly rejected by *Hathcock*. Because this result is contrary to the announced intention of the legislation/amendment, it highlights the problems inherent in attempting to “codify” a Michigan Supreme Court decision.

The Council opposes HB 4523 for several reasons, including the following:

The bill does not require the person against whom a claim for adverse possession is being asserted to be the title holder of the property at issue. As such, the bill creates the potential for injustice by basing title on taxpayer status, rather than principles of title and long-standing doctrines of real estate law. The bill does not address the issues of “tacking” or other issues inherent in resolving a dispute involving a claim of adverse possession. The bill would, in certain circumstances, negate the doctrine of acquiescence, which for well over 100 years has been an effective method for resolving boundary disputes, including boundary disputes involving claims of adverse possession. The bill would work an injustice under circumstances where for tax parcel inventory purposes, land has been assigned by a local assessor to a taxpayer who did not otherwise have, or previously claim, any right of ownership to the parcel. Finally, the bill creates the potential for injustice by negating, in some circumstances, the careful analysis on a case-by-case basis that is needed to resolve claims of title involving adverse possession.

### **Legislation monitored by the Section**

Although the Section has taken no action to support or oppose the following bills, they are being monitored with interest.

SB 61 *General Property Tax Act*: Allows the formation of risk pools that offer title insurance. Amends sec. 78 (MCL 211.78), as added by 1999 PA 123.

SB 68 *General Property Tax Act*: Prohibits property tax assessment increases for new construction, mobile

homes, or structures used to house senior citizen family members under certain circumstances. Amends 1893 PA 206 by amending sec. 34d (MCL 211.34d), as amended by 1996 PA 476.

SB 106 *Property Tax Mobile Homes*: Assesses mobile homes as real property. Amends secs. 2a & 34c of 1893 PA 206 (MCL 211.2a & 211.34c) & repeals 1959 PA 243 (MCL 125.1035 - 125.1043).

SB 405 *Construction Lien Act*: Revises various provisions for construction liens on residential property including fees for membership in the homeowner construction lien recovery fund. This bill would amend various provisions of the Michigan Construction Lien Act as it relates to liens on residential property. Among other things, the proposed bill would eliminate the ability of a claimant under the homeowner construction lien recovery fund to recover a contractually-accrued time-price differential on the amount claimed. The “due diligence” aspect of the proposed legislation would require a showing that the contractor with whom the claimant contracted was “creditworthy.” Amends title & secs. 104, 106, 107, 114, 201, 202, 203 & 204 of 1980 PA 497 (MCL 570.1104 et seq.) & adds sec. 114a.

SB 459 *Construction Lien Act*: Revises various provisions regarding construction liens on residential property, including fees for membership in the homeowner construction lien recovery fund. Amends title & secs. 104, 106, 107, 114, 201, 202, 203 & 204 of 1980 PA 497 (MCL 570.1104 et seq.) & adds sec. 114a.

HB 4189 *General Property Tax Act*: Changes existing law so that the “purchase price” is the presumptive true cash value of property sold (even for certain sales at public auction), eliminates consideration of whether the sale was an “arm’s length transaction,” and eliminates the requirement that the property be assessed using the same valuation of other similar properties. Amends sec. 27 of 1893 PA 206 (MCL 211.27).

HB 4732 *Revised Judicature Act of 1961*: Allows property managers and other non-lawyers to represent businesses in certain eviction proceedings. Amends 1961 PA 236 (MCL 600.101 - 600.9947) by adding sec. 5707.

### **Recently-introduced Legislation**

The following bills have been introduced since the last issue of the *Review* and have been referred to the Section’s Special Committees for comment:

SB 459 *Construction Lien Act*: Revises various provisions regarding construction liens on residential property, including fees for membership in the homeowner construction lien recovery fund. Amends title & secs. 104, 106, 107, 114, 201, 202, 203 & 204 of 1980 PA 497 (MCL 570.1104 et seq.) & adds sec. 114a.

HB 4732 *Revised Judicature Act of 1961*: Allows property managers and other non-lawyers to represent businesses in certain eviction proceedings. Amends 1961 PA 236 (MCL 600.101 - 600.9947) by adding sec. 5707.

HB 4802 *Michigan Vehicle Code*: Allows the association of co-owners to establish the speed limit in condominium developments under certain circumstances. Amends sec. 627 of 1949 PA 300 (MCL 257.627).

HB 4839 *Construction Lien Act*: Expands construction liens on residential property, including fees for membership in the homeowner construction lien recovery fund. Amends title & secs. 104, 106, 107, 114, 201, 202, 203 & 204 of 1980 PA 497 (MCL 570.1104 et seq.) & adds sec. 114a.

HB 4939 *Housing, Condominium*: Revises procedure for assessment of condo maintenance fees. Amends secs. 8, 37 & 69 of 1978 PA 59 (MCL 559.108 et seq.). Provides requirements for master deeds.

HB 5060 *Eminent Domain*: Prohibits use of eminent domain by state or local government to take private property for the primary benefit of a private entity. Amends sec. 3 of 1911 PA 149 (MCL 213.23).

HB 5202 *Blight Condemnation*: Provides for spot blight designation and acquisition of property by local

government. Amends secs. 2 & 4 PA 27, 2002 (CL 125.2802 and 125.2804) as amended by PA 129, 2003.

HB 5203 *Nonconforming Zoning*: Allows cities and villages to require removal of nonconforming uses under local zoning after amortization. Amends sec. 3a, PA 207, 1921 (CL 125.583a).

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 this 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 actively seek member input on proposed legislation. Your active involvement and participation as a committee member is highly recommended and most welcome.

In addition, even if you are not a member of a Special Committee, your comments on any proposed legislation affecting real property are encouraged and welcome. Written comments should be forwarded to:

Lawrence Shoffner  
Buhl Building Ste 1550  
535 Griswold Street  
Detroit, MI 48226  
lshoffner@comcast.net

Current information can be obtained about pending legislation through the website of the Michigan Legislature at: [www.michiganlegislature.org](http://www.michiganlegislature.org).

## CASE COMMENTS

by *Laura Donnelly and Lawrence Shoffner*

**Editors' Note:** The editors would like to acknowledge and thank the Section's Special Committee Coordinators, Chairs and members who contributed to these Case Comments. The Special Committees are the life-blood of the Section. If you are not involved in one, please look into it – the Section needs your input and expertise. The editors would also like to acknowledge and thank the individual commentators who have contributed to this report. In addition to digesting the basic points covered in the courts' decisions, our case commentators are encouraged to share their thoughts and insights on the wisdom or effect of the decisions. Although their personal opinions do not represent the official or unofficial position of the Section, they are beliefs and insights drawn from hard-earned experience practicing within their areas of expertise. We greatly appreciate their contributions.

### **The Right of the Public to Walk Along the Beaches of the Great Lakes**

#### ***Glass v Goeckel*, \_\_\_ Mich \_\_\_ (2005)**

In *Glass v Goeckel*, \_\_\_ Mich \_\_\_ 2005, the Michigan Supreme Court addressed the issue of whether the public has the right to walk along the shores of the Great Lakes. (See article on page 152 discussing this case in depth.) The court held that the public has a right to walk along Great Lakes beaches pursuant to the public trust doctrine.

The defendants owned property on the shore of Lake Huron. The plaintiff owned property located across the highway from defendants' home. The plaintiff was provided an easement across defendants' property for "ingress and egress to Lake Huron." The parties had previously resolved a dispute concerning the plaintiff's use of that easement. The appeal concerned the plaintiff's right, as a member of the public, to walk along the shoreline of Lake Huron. The defendants argued that the plaintiff could not walk on the defendants' property between the ordinary high water mark and the shoreline of the lake without the defendants' permission. The trial court granted the plaintiff summary disposition and held that the plaintiff had a right to walk lakeward of the natural ordinary high water mark as defined in the Great Lakes Submerged Lands Act, MCL 324.2501, *et seq.* The Court of Appeals reversed the trial court, 262 Mich App 29 (2004), holding that the state holds title to

previously submerged land, subject to the exclusive use of the riparian up to the water's edge.

The Michigan Supreme Court reversed the decision of the Court of Appeals and held that plaintiff, as a member of the public, may walk along the shores of the Great Lakes below the ordinary high water mark. The court examined the public trust doctrine and determined that the public trust extends up to the ordinary high water mark and not, as the plaintiff argued, to land that is actually below the waters of the Great Lakes at any particular moment. This effectively means that the defendants' title to the land may extend to the water's edge, but the title is subject to the rights of the public pursuant to the "public trust doctrine." The court cited the case of *Hilt v Weber*, 252 Mich 198 (1930), and indicated the "concern in *Hilt* was the boundary of a littoral landowner's private title, rather than the boundary of the public trust."

The court looked to the State of Wisconsin to define "ordinary high water mark." The Wisconsin definition was not identical to the definition used in the Great Lakes Submerged Lands Act. This difference in definition and lack of a bright line for the ordinary high water mark may present a problem and allow for further litigation in the future. The court unanimously agreed that the defendants cannot prevent the plaintiff from walking along the shore of Lake Huron under the public trust doctrine. Justices Markham and Young, however, concluded that the public trust only runs to the water's edge, the point at which wet sands give way to dry sands. Therefore, the public could walk along the beaches of the Great Lakes as long as their feet were wet.

This commentator would not be surprised to see future cases determining the type of activities that are included within the public trust and further defining the specific area to be included therein.

*James Y. Stewart*

**Wetland Regulations Did Not Constitute a  
Regulatory Taking Where Remainder of  
Property Could be Developed**

***K & K Construction, Inc. v Dep't of  
Environmental Quality*, \_\_\_ Mich App \_\_\_  
(2005)**

The Michigan Court of Appeals added another chapter in the continuing saga in the *K & K Construction* case, a precedent-setting battle over wetland regulations and regulatory takings. The case was filed in the Michigan Court of Claims in 1988. The case initially involved four parcels of property, and all four parcels were included through the initial trial, the prior Court of Appeal's decision and the Michigan Supreme Court decision, *K & K Construction, Inc v Department of Natural Resources*, 217 Mich App 56 (1996), *rev'd* 456 Mich 570, cert den 525 US 819 (1998). On remand, however, the parties stipulated to removing parcel four from the litigation. Parcel one was a commercially zoned parcel of fifty-five acres of which approximately twenty-seven acres were wetlands. Parcel two, which was contiguous with parcel one, consisted of sixteen acres of which a small area was wetlands. Parcel three was 9.34 acres of land with no wetlands, and was contiguous with parcel two. Parcels two and three were zoned for multi-family residential. Although the property was the subject of "a series of often confusing real estate transactions... as well as reorganizations of various business entities," the Appellate Courts have treated the property as under common ownership.

Although part of the property had been developed or was developable, the Court of Claims originally ruled that parcel one should be looked at as a separate parcel and made its determination that the wetland regulations resulted in a taking based solely on that parcel. The Court of Claims had found that even the non-wetlands in parcel one could not be developed and that parcel one was essentially worthless. The Court of Claims awarded the plaintiff approximately \$3.25 million dollars for the property taken and approximately \$450,000 dollars for a temporary taking. This holding was affirmed by the Court of Appeals in 217 Mich App 56 (1996).

On appeal, the Michigan Supreme Court reversed, 456 Mich 570 (1998). The court stated that "One of the fundamental principles of taking jurisprudence is the single 'non-segmentation' principle. This principle holds that when evaluating the effect of a regulation on a parcel of property, the effect of the regulation must be viewed with respect to the parcel as a whole." The Michigan Supreme Court identified factors to be considered in

determining which parcel or parcels were relevant to the taking or what the court referred to as the "Denominator Parcel." Those factors include the degree of contiguity, the dates of acquisition, the extent to which the parcels have been treated as a single unit and the extent to which the regulations of the protected wetlands would enhance the value of the remaining lands. The court indicated that "the effort should be to identify the parcel as realistically and fairly as possible, given the entire factual and regulatory environment."

The Michigan Supreme Court found that there was not a categorical taking under *Lucas v South Carolina Coastal Council*, 505 US 1003 (1992), because the property owner was not deprived of all economically beneficial or productive uses of the land, even if only parcel one was considered. Because there was no categorical taking, the Michigan Supreme Court held that the trial court must apply a balancing test to determine if a taking had occurred. This requires an "ad hoc, factual inquiry" into three factors: (1) the character of the governmental action, (2) the economic effects of the regulation on the claimant, and (3) the extent to which the regulation interfered with distinct investment-backed expectations. *Penn Central* at 124. While there is no set formula for determining when a taking has occurred under this test, it is at least "clear that the question whether a regulation denies the owner economically viable use of his land requires at least a comparison of the value removed with the value that remains." *Bevan*, 438 Mich 385 at 391, citing *Keystone Bituminous Coal Ass'n v deBenedictis*, 480 US 470 at 497.

The Michigan Supreme Court found that at least parcels one, two and four should be considered as part of the "Denominator Parcel" (as noted above, after remand parcel four was removed from the case by stipulation of the parties). The Michigan Supreme Court remanded for determination whether parcel three should be part of the "Denominator Parcel," but noted that even though there were different zoning classifications, the fact that the plaintiff intended to use all of the parcels in a single development negated the fact that they were zoned differently. The Supreme Court also directed the trial court make a determination of the balancing test to determine whether the effect of the regulations on the entire "Denominator Parcel" resulted in a taking. On remand, however, the Court of Claims entered a judgment against the MDEQ in the amount of approximately \$16.5 million for the taking, interest, costs and attorney fees.

The Michigan Court of Appeals in its most recent decision, \_\_\_ Mich App \_\_\_ (2005), found that the

Court of Claims had disregarded the specific remand instructions from the Supreme Court, and reversed the Court of Claims. The Court of Appeals also found that the Court of Claims had ignored MCL 324.30323, which provides that once a court has determined that the MDEQ's actions would constitute a taking, the court must give the MDEQ certain options, including the right to modify its actions so as to minimize the detrimental effect to the property. Pursuant to that statutory authority, the MDEQ had issued a mitigation order that allowed additional development on the property. The property owner claimed that the MDEQ appeal of the judgment essentially revoked the mitigation plan, but the Court of Appeals found that the property owner had waived that claim by not seeking to enforce the mitigation plan.

In examining the issue of a regulatory taking under the three-part balancing test established by the Michigan Supreme Court, the Court of Appeals noted: "Where, as here, the regulation serves an important public interest, and is widespread and ubiquitous, we conclude that, to sustain a regulatory takings claim, a plaintiff must prove that the economic impact and the extent to which the regulation has interfered with distinct investment-backed expectations are the functional equivalent of a physical invasion by the government of the property in question."

The Court of Appeals went on to state that even the Court of Claim's erroneous determination that the property had been diminished in value by approximately 67% would not be sufficient to constitute a compensable regulatory taking, although the court subsequently recognized that the diminution in value is only one factor in the balancing test. The Court of Appeals went on to hold that although the purchase of a parcel of property after the enactment of regulations is not an absolute bar to a taking claim, notice of the regulation, nevertheless, is to be taken into consideration. The Court of Appeals held that the claimant's knowledge and experience must be taken into account when determining what the property owner's reasonable investment-backed expectations were with respect to the "Denominator Parcel," and in determining the extent of the impact of regulations on those expectations. But perhaps the most important part of the court's decision was to hold that, as they apply to the factor of the character of the government action, the wetlands regulations did not single out the property owner to bear the burden of the public good. In that regard the court specifically stated:

Michigan's wetland regulations, like zoning regulations, are comprehensive and universal throughout this state. The federal government enacted

CWA (Federal Clean Water Act), which permits the regulation of wetlands, and our Legislature enacted the WPA (Michigan Wetlands Protection Act) to protect wetlands in this state. Our Legislature made clear, within the very text of the WPA, that the regulation and protection of Michigan's wetlands is intended to benefit the people of this state in a variety of ways. All property owners in this state share these benefits relatively equally, and all property owners, and, importantly, all prospective owners, are relatively equally subject to the burdens placed on much of the property in this state by the wetland regulations.

The Court of Appeals found that the property owners were not entitled to compensation as a regulatory taking because:

- Wetland regulations like zoning, are comprehensive so that property owners are relatively equally benefited and burdened,
- The property owners had purchased with knowledge of the regulatory scheme, and
- The owners had made and could make valuable use of their lands despite the application of the regulations.

In the wake of the U.S. Supreme Court decisions on regulatory takings in the late 1980's and early 1990's, allowing for monetary damages for a taking or even temporary takings, protecting resources comes with a new potential for high-cost and substantial financial risk to governments at all levels, including the potential litigation costs. Because, as noted by the Court of Appeals, the question of what constitutes a taking "has proved to be a problem of considerable difficulty," governments, especially local governments, have to be much more cautious about making sure that the regulations stay further away from the line that constitutes going "too far" as described by the *Penn Central* case, a line that is obviously drawn quite differently by different judges. Rural townships and small villages or cities simply cannot take the risk of being found to have gone "too far," and even if the decision is favorable to the municipality, as this case clearly demonstrates, the cost of going back and forth from trial courts to the Court of Appeals, the Michigan Supreme Court, the U.S. Supreme Court, etc., simply goes "too far" for their limited budgets. No matter which side of that battle one is on, one must recognize that, even with this decision favorable to governmental protection of resources, as local municipalities become cautious, there will be less protection for natural resources, including inland lakes, approximately one-third of which are already eutrophic or hyper-eutrophic. See MDEQ's report on

*Water Quality and Pollution Control in Michigan: 2004 section 303(d) and 305(b) Integrated Report.* (Commentator's note: Eutrophication is the natural process of a body of water becoming nutrient enriched, resulting in increased plant growth, a reduction of oxygen, and a decline in the qualities that make lakes attractive to lakefront owners and users. It is often considered the process of a lake "dying".)

Roger Anderson

### **Evidentiary Issues Addressed In Condemnation Cases**

#### ***Detroit/Wayne County Stadium Authority v Drinkwater, \_\_ Mich App \_\_ (2005)***

The decision in *Detroit/Wayne County Stadium Authority v Drinkwater, \_\_ Mich App \_\_ (2005)* arises out of consolidated appeals from five separate condemnation trials involving the taking of property for the Comerica Park and Ford Field developments. The Court of Appeals rendered a number of evidentiary and damage rulings. Four of the rulings appear to be most significant.

The court addressed the proper evidentiary standard and jury instruction relating to how a prospective assemblage of property subject to taking with adjacent properties may impact on the amount of just compensation. The property owners argued that one must only show a "reasonable possibility" that a property could be assembled with other property, while the government argued, and the trial court ruled, that the standard is whether assemblage was "reasonably probable." The Court of Appeals agreed with the trial court. The court ruled that the trial court's jury instruction incorporating the "reasonably probable" standard was not erroneous. Michigan courts have previously ruled that governmental decisions impacting the potential future use of property, such as the likelihood of receiving a rezoning or variance, are subject to the lesser "reasonable possibility" standard. However, the *Drinkwater* court distinguished these governmental decisions as involving a single contingency, while stating a chain of contingencies is necessary for assemblage.

The next significant ruling involved the stadium authority's argument that motion for JNOV was improperly denied by the trial court based on evidence related to the highest and best use of the properties. The Court of Appeals disagreed with the stadium authority and upheld the trial court's denial of the motion. The property owners presented evidence and argued below that, absent the condemnation project, the property had a highest

and best use for casino development. The stadium authority presented contrary evidence, including testimony by then City of Detroit Mayor Dennis Archer that he would never have approved the development of casinos in the area of the properties. The Court of Appeals found that there was conflicting evidence relating to potential casino development and ruled that it was for the jury to weigh the evidence and determine the highest and best use of the properties.

Another important ruling by the *Drinkwater* court involved the admissibility of post-taking comparables. Under Michigan law, property subject to condemnation generally must be valued as of the date of taking. The property owners' appraiser relied on some comparable property sales that closed after the date of taking. The trial court allowed this evidence over the objection of the stadium authority. The Court of Appeals affirmed the trial court's ruling. In doing so, the court relied upon the 1964 Hawaii Supreme Court decision in *Hawaii v Heirs of Halemano Kapahi*, 48 Hawaii 101 (1964). The Hawaii court had ruled that a land sale that is not too remote in time and is reasonably comparable to the subject property should be weighed by the jury in determining just compensation. The *Drinkwater* court found this reasoning "logical and persuasive and not inconsistent with Michigan law," and upheld the trial court's admission of appraisal testimony based on post-date-of-taking comparable sales. The court also noted that, in Michigan, evidence relating to just compensation should be liberally received. In a related ruling, the court agreed with the trial court that post-date-of-taking evidence may also be received to impeach the credibility of a witness.

The *Drinkwater* court also addressed the murky distinction between business interruption damages and lost profits. Michigan courts have allowed for the recovery of business interruption damages, but have held that lost profits are not recoverable in condemnation cases. By way of background, it is interesting to note that the prohibition against lost profits dates back to a period of time when lost profits were not recoverable in any civil action because they were deemed speculative in nature. The Michigan Supreme Court has long since abandoned this general prohibition, allowing lost profits in cases where the proofs offer a reasonable degree of certainty of lost profits. Notwithstanding, the Court of Appeals has continued to assert that lost profits are not recoverable in a condemnation proceeding, without addressing the fact that the jurisprudential and historical basis for the prohibition has been abandoned with respect to other civil causes of action. Since the early 1980s, various panels of the Court of Appeals have looked at the

distinction between business interruption damages and lost profits differently. The *Drinkwater* court looked back to an earlier appellate decision in *Detroit v Larned Associates*, 199 Mich App 36 (1993), which had ruled that an increase in rent and advertising expenses were compensable business damages, but a decline in sales revenue was in the nature of lost profits and therefore not recoverable. The *Drinkwater* court ruled that although the property owners presented evidence of increased rent and advertising expenses, the bulk of the damage testimony related to increased labor costs and van operation costs as a result of relocation. The court found these latter categories “clearly relate to lost profits and not business interruption damages,” and vacated and remanded the business interruption damages award.

Ronald Reynolds

### **No Conflict Between Subsections 107(4) and 119(3) of the Construction Lien Act**

#### ***Stocker v Tri-Mount/Bay Harbor Bldg Co.*, \_\_\_ Mich App \_\_\_ (2005)**

In this case, the Michigan Court of Appeals scrutinized the language of subsection 107(3) of the Construction Lien Act, MCL 570.1101, *et seq.*, (the “CLA”) and determined that it did not conflict with subsection 119(4) of the CLA.

On February 10, 1998, Carpenters Pension Trust Fund (“Carpenters”) loaned \$9,000,000 to Tri-Mount/Bay Harbor Building Company, Inc. (“Tri-Mount”), which loan financed the purchase by Tri-Mount of a parcel of real property in Emmet County (the “Property”). The loan was secured by a mortgage in favor of Carpenters on the Property; Carpenters properly recorded that mortgage on February 11, 1998. Tri-Mount’s plans for the Property included the construction of a thirty-seven lot subdivision and a forty-five unit boat dock condominium project. To that end, Tri-Mount contracted with Flotation Docking Systems, Inc. (“FDS”) for the construction of detachable docks on the Property. FDS commenced construction on July 8, 2000. On January 2, 2001, FDS recorded a lien against the property in the amount of \$222,635.40.

Tri-Mount defaulted on its mortgage. Subsequently, the case under discussion was initiated by another subcontractor – Dave Stocker, d/b/a Dave’s Drywall Company – which had done work on the Property and sought to foreclose on its construction lien on the Property. A flurry of counter-, cross- and third-party claims ensued, including Carpenters’ action to foreclose on its mortgage.

In order to enforce its rights in the Property, Carpenters filed a motion for partial summary disposition pursuant to MCR 2.116(C)(10) before the trial court, seeking a determination that Carpenters’ mortgage had priority over any other liens on the property – including FDS’s. The trial court granted Carpenters’ motion over FDS’s objection.

A battle of semantics then ensued between FDS and Carpenters in the arena of the Michigan Court of Appeals. In its opinion, the Court of Appeals prefaced its analysis by describing FDS’s position as follows: “On appeal, FDS argues that a construction lien takes priority over a purchase money mortgage where the lien is on an improvement that can easily be removed without damaging the land.” Despite having framed the argument thusly, the issue of the improvement’s removability was never again addressed in the opinion. Rather, the court looked to the language of MCL 570.1119(4), which provides: “A mortgage, lien, encumbrance, or other interest recorded before the first actual physical improvement to real property shall have priority over a construction lien arising under this act.”

The court observed that the foregoing language should “ostensibly” end the dispute, as “this was a purchase-money mortgage recorded the day after it was made, before any improvements were made, and well before FDS became involved.” However, FDS urged the court that its analysis shouldn’t stop there, as “specific statutory provisions control general ones” (citing *Antrim Co Treasurer v Dep’t of Treasury*, 263 Mich App 474, 484 (2004)); therefore, FDS argued, the issue of its lien’s priority should be determined in accordance with the second sentence of subsection 107(3) of the CLA. That section provides, in relevant part: “...The forfeiture, surrender, or termination of any title or interest held by any owner or lessee who contracted for an improvement to the property... shall not defeat the lien of the contractor, subcontractor, supplier, or laborer upon the improvement.” MCL 570.1107(3).

Despite the fact that, on its face, the foregoing statutory provision seems irrelevant to a determination of priorities between a construction lien and mortgage, the court nevertheless patiently undertook an examination of the verbiage set forth in that section. First the court discussed the applicability of not only the first sentence of subsection 107(3), but also the first sentence of subsection 107(4). The court then concluded that neither of these sentences was germane to its decision as they “...describe how construction liens arise under two contrasting situations...” and “are therefore only background to this appeal, because

Carpenters apparently concedes that FDS had a lien under the CLA.”

The court then moved on to the crux of the matter: the meaning of the second sentence of subsection 107(3), as “FDS argues that this provision precludes subjugation of its lien to Carpenters’ mortgage.” The court held that, “The dispositive [sic] word in this sentence is ‘defeat’.” The court further noted that, because “defeat” was not defined in the CLA, the court could consult a dictionary to discover the meaning of the term as employed in the statute. *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312 (2002). The court cited the following definition:

Black’s Law Dictionary defines “defeat” as “to deprive (someone) of something expected,” “to annul or render (something) void,” “to vanquish” or “conquer,” or “to frustrate (someone or something). [sic] Black’s Law Dictionary (8th ed). It’s more common definition is similar: “to overcome in a contest; vanquish,” “to frustrate; thwart,” “to deprive of something expected,” “to annul,” and similar definitions. Random House Webster’s College Dictionary (2001).

In light of its research, the court concluded that, as “[a]ll of these definitions share the characteristic of inferring some kind of outright negation”, then, therefore, “defeat” as used in the CLA “does not refer to priority but to existence. In other words, the second sentence merely provides that the lien is not destroyed when the entity with whom the lien holder contracted loses title to the relevant property.”

In finding that no conflict exists between subsection 119(4) and subsection 107(3), the court held that they “address different issues.” The court explained that subsection 107(3) “provides for the creation of a construction lien under certain circumstances and for its continued existence in others,” while subsection 119(4) “provides for prioritization of construction liens relative to other encumbrances.” Furthermore, as the validity of FDS’ lien was not at issue, in this case subsection 107(3) “operates only to ensure that lien’s continued existence after Tri-Mount lost its interest in the property.” The court concluded:

Contrary to FDS’s discussion regarding the word “termination,” the manner in which Tri-Mount lost that interest is of no real import to this case. The significance of that section here is that, because FDS had a valid lien before Tri-Mount lost its interest, FDS continues to have a valid lien. The only remaining question is where that lien stands in priority relative to Carpenters’ mortgage. In answer, the CLA’s priority

scheme is found in MCL 570.1119(4), which unambiguously states that the mortgage is superior.

FDS was not the only party to advance a semantic argument before the court: Carpenters argued that subsection 107(3) did not apply because FDS’ loan arose under subsection 107(1), which provides for the creation of a lien in certain circumstances. The court rejected this interpretation of the second sentence of 107(3), and held that it could, and did in this case, apply to a lien created under 107(1):

The second sentence of subsection (3) does not provide such limited applicability. Its unambiguous language states that “the lien” shall not be defeated. Given that the first sentence applies to a situation in which the contracting entity lacks title, whereas the second sentence refers to losing title, the two sentences are logically placed into the same subsection because they apply to similar situations, not because the second sentence is intended to follow the first chronologically. As we have said, the second sentence of subsection (3) preserves existing construction liens when the entity that contracted for the subject improvement loses the relevant interest in the improved property.

Had the court adopted Carpenters’ reading of the statute, then the right party would have won for the wrong reason, with undoubtedly unfortunate results for many future lien holders: those whose liens arose under subsection 107(1) might otherwise face the extinguishment of those liens in a situation where the owner subsequently lost his title to the property. Similarly, had FDS’ argument prevailed, it would be impossible to reconcile subsection 107(3) with 119(4). Providently, the court rejected both parties’ proffered interpretations of the CLA and did no violence to the statute’s intended purpose, as enunciated by the Michigan Supreme Court, of protecting “the interests of contractors, workers, and suppliers through construction liens, while protecting owners from excessive costs.” *Vugterveen Sys v Olde Millpond Corp*, 454 Mich 119, 121 (1997). However, the result in this case demonstrates quite dramatically that those performing improvements to real property should not be lulled into a false sense of security by the CLA. A prudent contractor, subcontractor or supplier will not extend large amounts of credit solely in reliance on the chance of satisfying the debt through foreclosure of a lien created under the CLA.

Laura Donnelly



ownership occurred under a construction lien foreclosure absent the court's confirmation.

The federal district court rejected these arguments, noting that the differences in the various foreclosure laws were "not substantial enough to prohibit *Glenn's* application." Indeed, the court observed that "It is precisely such differences such as these which led the Sixth Circuit to fix the cut-off point for the right to cure by a bright-line rule." The need for certainty and uniformity of result was more important in the long run than other considerations. The federal district court summed it up as follows: "In deciding *Glenn*, the Sixth Circuit was deciding when a federally created right to cure under [§ 1322(b)] was cut off, not when a particular state's foreclosure sale was deemed to be final. Such a bright-line rule requires a certain amount of 'independence' from state law." Furthermore, the court agreed with the bankruptcy court that a "change of expectations" occurs with a foreclosure sale under the CLA, even if the sale has not been confirmed.

Finally, Agee argued that the bankruptcy court erred in lifting the automatic stay to allow Fenton to seek confirmation of the sale. The bankruptcy court lifted the stay because Agee failed to show either: (1) that the state court would not confirm the sale or (2) that the state court would extend the redemption period beyond the 36 months Agee had allowed for repayment under his proposed plan. The federal district court held that the bankruptcy court did not abuse its discretion by lifting the stay under these circumstances, especially because lifting the stay would allow Agee to oppose confirmation of the sale, or to seek an extension of the redemption period.

Although many of debtor Agee's arguments had merit, ultimately the desirability of a bright-line rule won out; this rule provides some measure of certainty and promotes uniformity of result, which is especially important under a federal scheme such as the Bankruptcy Code.

*Laura Donnelly*

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## CONTINUING LEGAL EDUCATION

by Brian P. Henry, Chairperson, and Arlene R. Rubinstein, Administrator

### HOMeward BOUND

**January 12, 2006**

**3:30 - 6:30 p.m.**

#### **REAL ESTATE DUE DILIGENCE PART 2: DRAFTING TRAPS IN THE PURCHASE AGREEMENT, UNDERSTANDING DUE DILIGENCE REPORTS, AND DEADLINES FOR ECONOMIC DEVELOPMENT INCENTIVES**

The January Homeward Bound seminar will be presented by Brian P. Henry of Freeman, Cotton & Norris, PC; Jason Horton, Executive Vice President of REDICO; Nicholas G. Maloof, President and General Counsel of Associated Environmental Services, LLC (AES), and Steven D. Sallen of Maddin, Hauser, Wartell, Roth & Heller, P.C.

This seminar will provide the real estate practitioner who possesses a basic understanding of the real estate transaction/land development process with: (1) drafting traps/tips in the Purchase Agreement related to due diligence issues; (2) a summary of available development incentives for contaminated and uncontaminated properties; (3) the typical timeline for completion of due diligence activities and the dovetailing of development incentive applications with environmental, zoning, site planning and other due diligence activities; and (4) an understanding of basic due diligence reports (Phase I & II ESAs, BEAs, ALTA Land Surveys, PCAs, etc.) and what the reports mean.

**February 2, 2006**

**3:30 - 6:30 p.m.**

#### **ZONING AND CONDEMNATION 21<sup>ST</sup> CENTURY UPDATE**

H. Adam Cohen & Jerome P. Pesick of Steinhardt, Pesick & Cohen, PC, Norman Hyman of Honigman, Miller, Schwartz and Cohn, LLP and David E. Pierson of McClelland and Anderson, LLP will present the February program on Zoning and Condemnation.

**Zoning** - The focus of planning, zoning, and land use regulation has shifted dramatically. With a few lines of amendments in the last session, the Legislature opened the door to broad changes in Michigan zoning. Contract zoning allows writing conditions into any rezoning. PUDs may now have dense development in one place and open space on non-contiguous parcels. Local governments have new tools for preservation of farmland and open space. Do these changes really mean that development will be different, not just more difficult?

In zoning litigation in Michigan and nationally, the pendulum appears to have swung far in giving broader scope to local government power. The U.S. Supreme Court has again adjusted the line between constitutional property rights and broad public powers.

**Condemnation** - The last ten years have seen significant changes in the practice of eminent domain/condemnation. Legislation enacted in the late 1990's created new procedures by which to preserve and assert claims for just compensation. Recent judicial decisions dramatically reshaped this State's law of public use and necessity. This seminar will address many of these developments to assist the practitioner in navigating this evolving area of law.

Walk-ins are welcome at the Troy location! We meet at the Management Education Center, 811 W. Square Lake Road in Troy. Registration is \$80 for Section members and \$90 for non-Section members. Please call Arlene Rubinstein at 248-644-7378 or e-mail at LAWAW1@aol.com for further information.

**March 2, 2006**

**“Groundbreakers” Breakfast Roundtable!**

**“Bankruptcy Issues: What You Don’t Know CAN Hurt You  
8:00 – 9:30 a.m.**

Our second Breakfast Roundtable Session will be held on March 2, 2006 at the Townsend Hotel, 100 Townsend Street, Birmingham. The Program will begin at 8:00 a.m. and end at 9:30 a.m. A full breakfast will be served. \$55 for Section members/\$65 for non-Section members. At the door the cost is \$65 for Section members/\$75 for non-Section members. **Space is limited!**

**Program Coordinators:** Rozanne M. Giunta of Lambert, Leser, Isackson, Cook & Giunta, PC and Vicki R. Harding of Pepper, Hamilton LLP

Roundtable Discussion Topics and Leaders:

**Interest Rates and Valuation: What Happens to a Mortgage in Bankruptcy** - Marc M. Bakst of Bodman LLP

**Expanding Fraudulent Transfers, Single Asset Real Estate Cases and other Bankruptcy Reform** - Brendan G. Best of Dykema, Gossett, PLLC

**Construction Contract Issues Where the Owner or Contractor Files For Bankruptcy**- Lawrence M. Dudek of Miller, Canfield, Paddock & Stone, PLC

**Commercial Leases and Bankruptcy Reform** - Lisa Sommers Gretchko of Howard & Howard Attorneys, PC

**Recording Delays and the Disappearing Mortgage** - Michael C. Hammer of Dickinson Wright, PLLC

**Chapter 13 and Lien Stripping** - Daniel S. Opperman of Braun, Kendrick, Finkbeiner, PLC

**New State Exemptions** - Steven L. Rayman of Rayman & Stone

**What is Left of Entireties Property After a Chapter 7 Trustee is Done** - Keith A. Schofner of Lambert, Leser, Isackson, Cook & Giunta, PC.

**For further information, please call  
Arlene Rubinstein at 248-644-7378.**

**2006 Winter Conference  
March 16-18, 2006**

**The Wynn  
Las Vegas, Nevada**

The program will feature Las Vegas developers and Nevada attorneys who will provide an insider’s look at cutting edge development techniques that have recently found great success in the booming Las Vegas real estate market. Michigan attorneys will examine recent trends in Michigan real estate development, including the latest in contract zoning, practical considerations in creating mixed use developments and establishing conversion condominiums. Participants will not only learn about these recent trends in Michigan, but will explore ways in which tremendously successful development techniques in Las Vegas may be applied to Michigan development opportunities. Finally, for those

cutting edge techniques and recent trends that don’t quite work out, we will also examine workout and bankruptcy options for troubled projects.

**The Wynn Las Vegas**

Opened on April 28, 2005, The Wynn Las Vegas is the newest resort/casino on the strip. The crescent shaped tower is located at the north end of Las Vegas Boulevard. This 50 story building and resort has beautifully appointed rooms, dozens of restaurants, an 18 hole golf course, pool and more to make this the perfect location for our annual winter conference.

Accommodations are limited and available on a first come first serve basis. Rates are per room per night. Final rates will include a 9% tax. The rate is \$319 a night.

To reserve your room please go to the Section website at [www.michbar.org/realproperty/](http://www.michbar.org/realproperty/) and click on 2006 Winter Conference. Register on-line for accommodations at the Wynn Las Vegas or contact USA Hosts at 877-584-6787.

To register for the conference, please send your registration fee of \$425 (\$475 for nonmembers of the Section) payable to Real Property Law Section and mail to P.O. Box 473, Birmingham, Michigan 48012. First time Winter Conference Section attendees can submit a \$375 registration fee.

A Winter Conference brochure has been enclosed in this issue.

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### **Mark your Calendars!**

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## **THIRTY-FIRST ANNUAL SUMMER CONFERENCE**

**“Real Estate 2006: Expect the Best, Plan for the Worst”**

**Grand Hotel  
Mackinac Island  
July 12 – 15, 2006**

**We would like to thank our sponsors to date!**

### **Patron Sponsor**

## **First American Title Insurance Company**

Lawrence M. Dudek of Miller, Canfield, Paddock and Stone, PLC in Detroit and Ronald E. Reynolds of Berry, Reynolds and Rogowski, PC in Farmington Hills are in the process of planning an informative program for this year's Summer Conference. Thursday morning's program will focus on Commercial Leasing Issues and an overview of Real Estate Remedies (Mortgage Foreclosure/Land Contract/ Forfeiture/Eviction) and Bankruptcy Issues.

Friday morning workshop topics will be as follows:

- Construction Contracts and Claims
- New Evidentiary Issues Dealing with Real Estate Appraisals
- Current Issues in Zoning, including Contract Zoning
- Entity Issues/Tax

**New this year! The Breakfast Roundtables will be held on Saturday morning.  
Registrants will be able to attend 3 roundtable discussions.**

**Look for further information on the Summer Conference in March.**

## COURSE CALENDAR

Set forth below is a schedule of continuing legal education courses sponsored or co-sponsored by the Real Property Law Section through April 2005.

**Key:** HB = Homeward Bound

ICLE = Courses co-sponsored by the Institute of Continuing Legal Education

<b>Date</b>	<b>Location</b>	<b>Program</b>	<b>Topic</b>
January 12	MSU Management Education Center Troy	HB	Real Estate Due Diligence Part 2
February 2	MSU Management Education Center Troy	HB	Zoning and Condemnation
February 17	Crystal Mountain Resort	Co - Sponsor Environmental Law Section	Environmental Law Boot Camp
March 2	Townsend Hotel	Breakfast Roundtable	Bankruptcy Issues
April 6	MSU Management Center, Troy	HB	Handling Higher End Residential Transactions

Further information on all Section programs can be found on the Section website at <http://www.michbar.org/realproperty/> ICLE Courses can be found at <http://www.icle.org/>.

**REAL PROPERTY LAW SECTION  
STATE BAR OF MICHIGAN  
SPECIAL COMMITTEES  
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2005-2006**

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2005-2006**

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### BANKRUPTCY

#### NEW

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### **CIVIL RIGHTS**

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### **CONDOMINIUMS, SUBDIVISIONS, COOPERATIVES AND PUDS**

**NEW**

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