



## CHAIRPERSON'S REPORT

by C. Leslie Banas

The professional “tool boxes” of today’s real estate attorneys are stocked with their transactional or litigation experience, drafting expertise, communication and interpersonal skills, and most importantly, their knowledge of real estate law (both substantive and technical).

Historically, real estate law grew as much through judicial decision making as statutory enactments. That is no longer the case. Real estate practitioners today need to be aware of and absorb the terms of an expanding number of statutes, many of recent vintage. These are often the work product of the Michigan legislature. Due to the expanding volume and content of state legislation, the Real Property Law Section’s attention is increasingly focused on the bills being considered in Lansing.

What role does the Section play in Michigan’s legislative process? In a nutshell, the Section looks at the new bills relating to real estate, monitors their progress as they wend their way through the legislative labyrinth, actively lobbies in favor of or against specific bills, and reports to our members on significant legislation.

The Section alerts members of new real estate-related bills by providing summaries in the *Review*. We also track how the Michigan legislature deals with them. Take a look at the list of pending legislation in this issue, and flag the ones that pique your interest. You’ll be able to watch their progress (or lack of progress) in forthcoming issues.

In certain cases, subject to the limitations imposed on the State Bar’s ability to speak out on policy matters, the Section takes a formal position in support of or opposition to a bill. The Section’s position is set forth on the State Bar’s website and published in the *Review*. Once the Section has taken the step of supporting or opposing a bill, Section members with particular knowledge or expertise regarding the bill’s subject matter, assisted by our lobbying firm, proactively promote the

Section’s viewpoint through letters, phone calls and visits to key legislators, and testimony before House and Senate committees.

The Section is mindful that its diverse membership represents many different industries and interests and that members do not hold identical views on all subjects. Hence, the Section’s positions aim to espouse the best thinking regarding a bill’s subject matter and language, rather than an outcome that favors any specific group. The Section’s goal is to serve as an “honest broker” that provides comprehensive explanations and supports the optimum result for real estate owners and other affected groups.

During the concluding days of the 2007-2008 Session, the Section actively lobbied legislators in regard to three bills. I am sharing the Section’s hits and misses as to those bills with you.

The first bill, Senate Bill 1313, colloquially referred to as the “broker’s lien bill,” was an effort to provide real estate brokers with a mechanism for collecting real estate commissions. It would have permitted a broker to file a lien on the real estate subject to a proposed sale or lease—without the property owner’s consent. Engineering a release of the lien (thus enabling the sale/lease to be consummated) would require the seller to pay the commission or use sale proceeds to set up an escrow until the commission issue was resolved. The Section opposed SB 1313. Historically, it has strongly resisted enabling any new group to file nonconsensual liens, believing that such liens unnecessarily clutter the chain of title and impede the free transferability of real estate. The Section was also concerned that giving one service provider this extraordinary remedy would cause others (like appraisers, property managers, and title companies) to seek similar rights. Despite its proponents’ strong efforts, SB 1313 “died” at the end of the 2007-2008 Session.

A second effort involved Senate Bills 927 and 1160. The purpose of these bills was to resolve the thorny problems concerning the priority of documents filed in county land records. These issues surfaced in great number during the sale/refinancing boom that ended in 2007. A creaky Michigan recording statute (circa 1846) and variations in practice among Michigan's 83 registers of deeds, coupled with the sheer volume of documents delivered for recording, led to numerous disputes regarding when various instruments in the chain of title had actually been recorded—a serious issue in a race-notice state such as Michigan. Litigation proliferated in federal and bankruptcy courts in addition to state courts.

To help resolve the outstanding issues, an ad hoc committee of the Section worked with other groups, principally the Michigan Land Title Association and the Michigan Association of Registers of Deeds, to develop solutions. Ultimately the legislative “fix” reflected in SB 927 and SB 1160 was hammered out, and supported by the Section. The final versions of the bills provided that an instrument is deemed to be recorded upon its delivery to the register of deeds so long as it otherwise satisfied recording requirements and was accompanied by the correct recording fee. The acts also gave interested parties (like lenders and title companies) the right to view instruments that were in the process of being incorporated into a county's permanent land records.

The passage of these bills, designated as 2008 PA 357 and 2008 PA 358, was a gratifying conclusion for the many Section members involved in crafting the bills and shepherding them through the legislature. Although the acts are not a comprehensive resolution of the myriad issues surrounding the recording of Michigan land documents, they provide a serviceable platform to support recording matters until an electronic recording system—which real estate practitioners know is looming on the not-too-distant horizon—supplants it.

The Section's final “campaign” involved HB 6122, the so-called “state transfer tax act amendment.” At the time of its enactment in 1995, the state transfer tax act (like the county transfer tax act on which it was modeled) required payment by the seller of a transfer tax based on a property's sales price upon recording of the conveyance deed. HB 6122 sought to expand the group of persons liable to pay the transfer tax. It also sought to broaden the transactions on which the tax would be imposed. Under HB 6122, a transfer tax would be due from sellers owning more than 80% of

the equity interests in the entity that owned property if the property comprised at least 90% of the value of the entity's assets. The tax would be payable at the time the contract dealing with the transfer of the entity interests was recorded, and the bill provided that such contracts “shall be recorded.” The Section opposed HB 6122 because the bill's descriptions of the persons and transactions subject to the transfer tax obligation were very vague, as was its seeming requirement that contracts for the sale of entity interests (which are personal rather than real property) must be recorded.

Although various groups were aligned against HB 6122, the Michigan Department of Treasury urged the legislature to pass it as a revenue raiser. It was passed in the waning moments of the 2007-2008 Session. Moreover, as a result of a change made just before passage, the bill's effective date was moved back to January 1, 2007, thereby giving it retroactive effect.

During its brief existence, 2008 PA 473 has generated much discussion, commentary and confusion among practitioners and their clients. Opinions vary as to the meaning of various provisions, and uncertainty reigns. The means of resolving the open issues is, at this point, unclear.

In conclusion, the Section tally from its lobbying efforts during the session was two solid “wins” and one “close call.” Really, not a bad result for lawyers with minimal experience in the politics of the legislative process. The Section is immensely grateful to the many dedicated members who participated in the Section's legislative efforts during lame duck and throughout the 2007-2008 legislative Session. Please accept our heartfelt thanks.

A new legislative Session began in January, 2009. New bills have been and continue to be introduced daily—many of them in response to Michigan's and our country's challenging economic circumstances. The Section intends to continue its of analyzing and informing its members of proposed legislation, supporting bills that enhance the state's jurisprudence and opposing those that do not.

We very much welcome our members' views regarding the bills we periodically identify in the *Review*. We are also most interested in hearing from you about any bills that have not come across our radar. Please share your thoughts with us.