MICHIGAN
REAL PROPERTY REVIEW

Published by the Real Property Law Section State Bar of Michigan

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## Contents

Chairperson's Report .....45
*by Ronald E. Reynolds*

Land Banks in the Detroit Future City Works Project .....47
*by Catharine B. LaMont*

Deed Restrictions and Covenants: An Obstacle to Urban Redevelopment .....51
*by David H. Martyn*

Subdivision Plats as a Barrier to the Repurposing of Overstocked Land Under the Detroit Strategic Framework.....55
*by Susan K. Friedlaender*

The Availability of Eminent Domain for the Detroit Works Project .....63
*by Jerome P. Pesick & Ronald E. Reynolds*

Judicial Decisions Affecting Real Property.....70
*by Brian P. Henry*

Legislation Affecting Real Property.....74
*by Brian P. Henry*

Continuing Legal Education .....76
*by Nicholas P. Scavone, Jr., Chair of CLE Committee and Karen Schwartz, Administrator*

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

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

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

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

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# Chairperson's Report

*by Ronald E. Reynolds*

This issue of the *Review* offers a unique "theme" format centering on the ambitious plan outlined by City and civic leaders in Detroit now known as the "Detroit Works Project." Recognizing the myriad of complex real property issues that could arise in pursuing the Project, David Nykanen suggested this theme format. Thank you to David, and also to David Pierson who pulled it together and, of course, to Lynda Oswald, our editor.

We are now a little more than half way through the current term for the officers of the Section. The Section has offered, as usual, some great CLE presentations, and there are more to come. Please be sure to check the CLE report by Nick Scavone and Karen Schwartz in this issue. The CLE presentations offer great opportunities to network with fellow real property lawyers while learning valuable information relevant to your practice.

If you, or someone you know, may be interested in writing an article for the *Review*, or participating in a CLE event, or you just would like to see a particular topic covered, please let me know. We are always looking and open to expanding our authors, speakers, and topics. You can reach me at *rreynolds@vmclaw.com*. If you are a newer attorney, writing an article and participating in a program are excellent ways to build your experience and credibility as a real property lawyer.

The Section's Technology Committee, under the leadership of Clay Thomas, is busy working on enhancing online offerings to Section Members. The Committee is currently working with the State Bar on rolling out changes to the Section's webpage to make CLE and publication materials more easily accessible to Members, which we hope will be available soon.

The Membership Committee, under Glen Zatz, Rick Rattner, and Brian Henry, has launched a beta mentoring program that connects new lawyers with more experienced lawyers. The Section Council is excited about this new program, and we are hopeful that it can be expanded in the future.

These are just a few of the things happening in the Section. We are one of the State Bar of Michigan's largest, and most active, Sections. The Section has benefited from excellent leadership over the years. As Chair of the Council, I am indebted to those leaders who came before me and who built the Section to what it is today.

On a personal note, there are many people who encouraged my participation in the Section and gave me opportunities that opened a path that led to becoming Chair. I would like to acknowledge a few people to whom I am indebted: Steve Bromberg for encouraging young attorneys like me (long ago) to get involved; Arlene Rubinstein for making participation easier and enjoyable; Karen Schwartz for making my job as Chair easier and enjoyable; my friend and former colleague Pat Karbowski who encouraged me to take on leadership roles in the Section; my colleagues at Vercruysse Murray & Calzone for their support of bar activities; and of course my long time mentor and partner Dave Berry, with whom I attended numerous Section events, who was a great lawyer and a better person, and who I know is missed by many.

***Editor's note:*** In 2010, Mayor Dave Bing announced a City of Detroit initiative called *The Detroit Works Project*[1] with ambitious goals for improving life for Detroiters focused on neighborhood investment, infrastructure improvements, public safety, economic growth, and public land use, later divided into "Short Term Actions" and "Long Term Planning." The Long Term Planning effort, through various teams, produced a plan, the *Detroit Future City Strategic Framework*.[2] The details of the planning effort and the Framework can be found at the Project website.

The articles in this issue of the *Review* examine some of the real property law issues that may impede, or in some cases, expedite putting the Framework into action. Thanks to David Nykanen for the idea of devoting an issue of the *Review* to the Franework and organizing the articles and authors to write them.

1 http://www.detroitmi.gov/DepartmentsandAgencies/DetroitWorksProject.aspx

2 http://dev.detroitworksproject.com/for-detroit-to-work-we-need-action-today/

# Land Banks in the Detroit Future City Works Project

*by Catharine B. LaMont**

Detroit Future City ("DFC") was created in response to the enormous challenges facing the City of Detroit. For the last four years, DFC has been assembling and analyzing data to inform and support a plan for vitality, growth, and health. It has taken on the daunting task of "uplift[ing] the people, businesses, and places of Detroit by improving quality of life and business in the city."[1] As it relates to the real property in the City, this task requires an alignment of numerous disparate agencies and interest groups. The City must achieve a collaborative approach to land management among diverse groups, each with its own defined mission and charge.

The City's goal is to achieve an effective strategy that maximizes the opportunities presented by one of the largest surplus land inventories in urban America. The ideal mechanism to achieve this goal is a land bank. The land bank concept offers a pragmatic solution to achieving the lofty ideals of the DFC Implementation Office by providing a single entity that is: (1) charged and empowered with the task of maximizing the value of public lands, and (2) given the tools to achieve it.

## DFC Implementation Office Goals

The City of Detroit offers one of the greatest opportunities for massive urban redevelopment in American memory. In its *Detroit Future City Strategic Framework ("Framework")*, Detroit has accepted this challenge as a chance to review all its systems, assets, and liabilities and, with extraordinary community engagement and feedback, to reconstruct itself in every facet:

> The Detroit Strategic Framework marks the first time in decades that Detroit has considered its future not only from a standpoint of land use or economic growth, but in the context of city systems, neighborhood vision, the critical question of vacant land and buildings, and the need for greater civic capacity to address the systemic change necessary for Detroit's success. This plan is also the first to accept and address Detroit's future as a city that will not regain its peak population of nearly 2 million people.[2]

After two years of research, collaboration and planning, DFC has created a unified vision explicitly recognizing the value of collaboration between community and technical expertise. Hopefully, the continuous dialogue with the community has resulted in a greater degree of acceptance and support for the Framework.

The broad goal of the Framework is to enhance the quality of life for Detroit citizens and business.[3] The Framework itemizes twelve imperatives that it states must be achieved to reach its goal of "improving the quality

1 Detroit Future City Implementation Office (DFC), Detroit Future City Strategic Framework(Framework), Executive Summary, p 5, www.detroitworksproject.com/the-framework

2 *Id.*

3 *Id* at p 7.

* *Catharine B. LaMont works in the Detroit office of First American Title Insurance Company and has been the owner and operator of a Detroit title company specializing in urban redevelopment and commercial operations. She is a graduate of Albion College and Wayne State Law School and is a member of the Real Property Law Section Council, and former President of Michigan Land Title Association.* *The author is grateful to Michael Brady, Vice President for Policy for Community Progress, for his comments.*

of life and business in the city."[4] All relate in one way or another to the role of real estate in the definition of Detroit's future.[5] While the role of real property has long been recognized as integral to any city's success or failure, the Framework focuses on the opportunities presented by Detroit's vast inventory of surplus land as well as challenges arising from reduced population and diminished city services.

## Challenges Confronting DFC

The challenges facing the DFC Implementation Office include: (1) the size of the vacant land inventory; (2) the large number of public entities currently charged with a piece of the inventory's management and disposition; and (3) the difficulty of unifying the disparate perspectives of all those with a vested interest in the City behind a single vision and strategy. These conditions have contributed to the City's inability to normalize the management and disposition of public lands without any apparent tools to remedy the dysfunction.

One of the most well known and challenging issues facing the City and its future is the immense amount of vacant land within its borders. The sheer volume of vacant land in Detroit is staggering—roughly equal to the size of Manhattan.[6] DFC used a now-dated (and even then conservative) 2011 estimate of 150,000 vacant parcels within Detroit's boundaries.[7] Comprised of buildings and lots dispersed across the city, this vast land mass continues to grow as the City's population continues to decline and weak property markets continue to rationalize owners abandoning their property.

There is not sufficient demand for all of this surplus property in its current state, which then encourages a new cycle of decay and blight. The issue goes beyond mere disposition and management. Solutions must be proactive, involving a strategic analysis of the potential for growth, health, and sustainability. Solutions require a systematic, coordinated, and collaborative approach to land and property management—one that draws on a shared vision based on a unified set of policies and goals and an integrated program of implementation. These substantial challenges require an integrated land strategy addressing both privately- as well as publicly-held land.

While vacant property is one of Detroit's greatest challenges, it is also one of the city's greatest opportunities. Indeed, as DFC makes plain in the Framework, the City's ability to repurpose its vacant land is critical for its own success. This must include all vacant land in the city, especially publicly owned vacant land, which comprises about 45% of all vacant land. There can be certain advantages to holding some of this vacant land in public ownership for uses such as land assembly for economic development or supporting alternative land uses (such as storm water management or community-developed urban agriculture). Arguably, because the land is in public ownership, it should lend itself to an increased level of flexibility and support for strategic planning.

Unfortunately, the amount of publicly-held land poses distinct challenges. The situation is further complicated by the number of different government departments and agencies involved. Title to Detroit's vast inventory of publicly-held, surplus vacant property (estimated at over 75,000 parcels) is currently held by a combination of eight different governmental entities. Add on those government departments involved in the use or reuse of public land and the number swells to twelve. These include three different land bank authorities (city, county, state) and three different city departments, along with the Wayne County Treasurer, Michigan State Housing Development Authority, Detroit Economic Growth Corporation, Detroit Housing Commission, Detroit Public Schools, and Detroit Water & Sewerage Department. Each has its own charge, responsibilities, priorities, and procedures for doing business.[8] These agencies are not always vested with adequate authority to implement their goals. For example, the Framework notes: "The Department of Planning and Development controls the largest number of properties, yet its ability to do strategic disposition is constrained by procedural obstacles, including the need to obtain City Council approval for all transactions, however small and insignificant from a citywide perspective."[9] Under the best of circumstances, this level of complexity is challenging. These are not the best of circumstances.

In a pragmatic effort to improve the likelihood of its plan being implemented, the City charged DFC to engage in dynamic dialogue with the various public and quasi-public entities. DFC facilitated a public land working group with representatives of each of the public land holding entities in order to open dialogue and begin to

4 *Id* at p 5.

5 *Id* at p 9.

6 *Id* at p 11.

7 DFC, Framework, *supra* note 1, Public Land, p 270.

8 *Id* at p 267.

9 *Id* at p 273.

align priorities and investment. This may have been the first time such regular meetings of public land holding entities had ever happened. The working group, operating within a context of shared decision matrices, has built a framework for strategic and coordinated action while respecting each entity's autonomy.[10] The resulting plan represents a transformative approach to land use, consolidating the missions of the various voices into a single comprehensive vision. While the plan offers a unified vision and strategy to achieve the needed goals, the question remains as to the proper mechanism to implement them.

The inventory of public land held by the various public entities continues to increase each year, primarily because of the City's inability to dispose of tax-foreclosed properties at the annual tax foreclosure auction. In 2013 alone, the list of properties up for auction was in excess of 20,000 and the auction was unable to dispose of all of them.[11] Unfortunately, until recently, buyers were hesitant to purchase tax foreclosed parcels because title insurance underwriters were reluctant to insure any parcels that had gone through the tax foreclosure process without evidence of actual notice to the interested parties of the foreclosure action. One underwriter has recently determined that the quality of title to tax foreclosed property can be underwritten and insured.[12] Until this recent development, to deliver insurable title required extensive title cleansing through efforts such as obtaining curative deeds and quiet title litigation. Absent a normalized process of obtaining title insurance for these properties, the land has been retained by the public entity until the resources were available to take the necessary steps to cure what was perceived as uninsurable title. The result of this history has been to result in the accumulation of the prodigious amount of property in the City's inventory.

## Solution

The Framework calls for a transformative change in the way the City addresses real property to enable public land to become an asset instead of a liability.[13] It calls for the multiple agencies charged with the responsibility for the management of land to subordinate their interests to a common, unified vision but it stops short of identifying the nature of the entity to be charged with the implementation of that vision.

The land bank structure offers the answers to the challenges relating to real estate and other issues:

> Land banking is the process or policy by which local governments acquire surplus properties and convert them to productive use or hold them for long term strategic public purposes. By turning vacant and abandoned properties into community assets such as affordable housing, land banking fosters greater metropolitan prosperity and strengthens broader national economic well-being.[14]

Michigan has the strongest legislation for land banking in the nation.[15] Under Michigan law, land banks are given distinct and special powers to address many of the most common issues afflicting foreclosed and vacant properties. In addition, the land bank model offers the best opportunity to implement the transformative vision of DFC in the consolidation of management of the assets presented by public land. It is the single entity that could be, and originally was designed to be, the repository of public lands acquired by a governmental body, with the ability to strategically manage and dispose of that land in accordance with public policy as articulated by the Framework.

The land bank structure under Michigan law grants broad powers to enable the acquisition, management, and disposition of property.[16] In the event that public property bears defective title or even uninsurable title due to the tax foreclosure process, the statute provides for quiet title litigation of mass parcels simultaneously on an expedited basis.[17] Furthermore, the legislation seeks to enable the land bank to be self-sustaining although the mechanisms may not be as robust as needed. Properties held by the land bank are exempt from ad valorem taxes,[18] but upon sale, the property will be subject to a separate tax that allows the land bank to capture 50% of the normal tax for the next 5 years.[19] The captured tax can be used for

10 *Id* at p 257.

11 http://www.treasurer.waynecounty.com/

12 In Fall, 2013, First American Title Insurance Company changed a long-term policy. Now tax titles can be analyzed in light of the notices provided by the Treasurers and insured where constitutional notice has been deemed to be given.

13 DFC, Framework, *supra* note 1, Public Land, p 267.

14 Frank S. Alexander, Land Banking as Metropolitan Policy, p 3, Metropolitan Policy Program at Brookings Institution (2008).

15 Michigan Land Bank Fast Track Act, 2003 PA 258, MCL 124.751.

16 MCL 124.754.

17 MCL 124.759.

18 MCL 211.7gg(1).

19 MCL 211.1025.

repayment of title clearing costs and the repayment of any loans held by the land bank. This model of revenue generation may become successful as property values increase, but currently the yield is slight.

A land bank can be the gatekeeper to all disposition of public land. While not the final nor only agency or entity charged with management and disposition of property, if the land bank is the first stop following acquisition through foreclosure, gift, or conveyance, it is in the best position to implement the unified vision contemplated by the Framework. The Framework contemplates a "shared disposition strategy," which seeks to address the multiple agencies involved in land use management and disposition. The use of the land bank structure works well within this process as the "front door" to properly receive the property, then to strategize about its best use. The land bank can then cure any title defects and prepare for disposition in accordance with the strategy. Ultimately, the land bank is able to convey the property to the proper agency for final disposition.[20] As articulated by the Framework, while the Treasurer is tasked with collection of property taxes and ultimately foreclosure and acquisition of tax delinquent property, the Treasurer is not in the best position to determine the best recipient for property through auction.[21] If a property is best served by being returned to the neighborhood in which it is located for a garden or to a neighbor for a side lot or other strategic use, the auction can deprive that neighborhood of a needed asset, and possibly begin the cycle of tax delinquency, foreclosure, and sale again to another absent investor. The land bank is also in a position to hold properties as directed by a community and prevent a sale at auction in anticipation of an assembly project contemplated by the unified plan.[22]

The Framework has established a series of decision matrices that can inform a land bank with the vision and policy direction for each given property.[23] Perhaps the most powerful benefit of the land bank structure is that it is a single entity and can respond to the multiple constituencies of the City in conformance with the unified vision of the community, hopefully as articulated by DFC.

## Conclusion

The challenges facing the City of Detroit have been captured ably by DFC. The remarkable circumstances existing in Detroit offer remarkable choices. One of the most efficient means of achieving on ongoing, sustainable implementation of the DFC Strategic Framework's vision is the use of a land bank, whether it be a local or state entity. The land bank structure was created to address the problems and indeed, the opportunities, presented in Detroit. It is an ideal time to maximize this tool to help in the realization of the bold plans established by DFC.

20 DFC, Framework, *supra* note 1, Public Land, p 276.

21 *Id*.

22 *Id* at p 277.

23 *Id* at p 278–309.

# Deed Restrictions and Covenants: An Obstacle to Urban Redevelopment

*by David H. Martyn**

The City of Detroit encompasses 138.7 square miles[1] and is larger than Boston, Manhattan, and San Francisco combined.[2] By one count, it is made up of 106 separate neighborhoods.[3] With a decline in population from more than 1.85 million in 1950[4] to 701,000 in 2012,[5] Detroit presents a unique real-world lab to explore how shrinking urban areas can reinvent themselves.

However, constraints on the use of property through deed restrictions and restrictive covenants may present a significant obstacle to the repurposing of unused land. To avoid drastic consequences, developers and their counsel must understand the restrictions that affect the use of property or limit the types of improvements that can be constructed.

## Restrictions – An Overview

Deed restrictions are private restrictions. They can be created in a number of ways, such as through retained interests in deeds and covenants created when subdivisions are formed.[6] These restrictions are contractual in nature and may exist between the buyer and the seller of the property[7]or among neighboring property owners. They may be enforced by those who have ownership interests in property that benefits from restrictive covenants or by a homeowners' association representing the interests of such owners.[8]

Restrictions and covenants are favored by the law, and are recognized as preserving monetary value and aesthetic characteristics.[9] They are often also a valuable property right[10] because they are created with the intent of enhancing the value of property. Property owners are free to attempt to enhance the value of their property in any lawful way, including by contract.[11]

1 City of Detroit <http://www.detroitmi.gov/Visitors/About-Detroit/DetroitbytheNumbers.aspx> (accessed December 10, 2013)

2 Terra Fluxus <http://www.terrafluxus.com/archives/category/landscape-urbanism> (accessed December 10, 2013)

3 Andrew Koper, Cityscape Detroit <http://www.cityscapedetroit.org/> (accessed December 10, 2013)

4 U.S. Bureau of the Census <http://www.census.gov/population/www/documentation/twps0027/tab18.txt> (accessed December 10, 2013)

5 U.S. Bureau of the Census <http://quickfacts.census.gov/qfd/states/26/2622000.html> (accessed December 10, 2013)

6 *See, eg, Terrien v Zwit*, 467 Mich 56; 648 NW 2d 602 (2002).

7 *See, eg, 35160 Jefferson Ave, LLC v Charter Township of Harrison*, unpub op of the Court of Appeals, entered Aug 7, 2012 (Docket No. 303152).

8 *Civic Assoc of Hammond Lake Estates v Hammond Lake Estates No. 3 Lots*, 271 Mich App 130; 721 NW2d 801 (2006).

9 *35160 Jefferson Ave, supra* note 7.

10 *Terrien,* 467 Mich at 70.

11 *35160 Jefferson Ave, supra* note 7.

* *David H. Martyn is a Senior Legal Counsel for Michigan for First American Title Insurance Company. He received his J.D. degree from Emory University and his B.A. degree from Cleveland State University. Mr. Martyn has practiced in the real estate and title insurance industries for more than 18 years in Michigan and Georgia, and is a member of the Real Property Law Section and a past Chair of the Oakland County Bar Association (OCBA) Real Estate Committee. He has been a speaker for the Real Property Law Section, the OCBA, Albany State University, the Cleveland-Marshall College of Law, and the Cleveland Affordable Housing Roundtable. The author wishes to thank Dawn Patterson for her editorial review and assistance.*

Restrictions of use for residential purposes only are fairly common and are particularly favored by public policy as valuable property rights.[12] Residential use only restrictions, which are generally driven by an effort to preserve aesthetics and monetary value, often include related restrictions or provisions that can directly limit or affect any aspect of land use and improvements, such as square footage, height, color, building materials, and parking. Many also include requirements to obtain permission for building plans.

In evaluating such restrictions, courts have distinguished between a restriction for residential use only and a restriction prohibiting commercial, industrial, or business use. Recognizing that an activity may be both residential in nature and commercial, industrial, or business in nature, courts have interpreted the prohibition against commercial, industrial, or business use as a broader restriction than one permitting only residential use.[13]

Because they are favored, restrictions will be enforced unless the restriction contravenes law or public policy,[14] or has been waived by acquiescence to prior violations.[15] It is difficult to evaluate whether a restriction has a limitation requiring it to be unenforceable as against public policy. The U.S. Supreme Court has said that such a public policy must not only be explicit, but that it also must be well defined and dominant.[16] The court's role in evaluating public policy arguments is not to substitute its determination of whether the restriction is reasonable. Rather, such a restriction will be struck down only if it violates a clearly articulated public policy.[17]

Waiver occurs when a party does not promptly sue to enforce a restriction.[18] However, waiver and acquiescence do not make the restriction void. Courts will look at the degree and nature of the violation as waived, and a more serious or damaging violation may be enforced even where there has been acquiescence to a prior violation.[19]

12 *Terrien*, 467 Mich at 72.

13 *Id* at 63.

14 *See, eg*, *Katz v Riverwood Subdivision Homeowners Assoc.*, unpub op of the Court of Appeals, entered July 6, 2010 (Docket No. 288624).

15 *See, eg, Bloomfield Estates Improvement Assoc, Inc. City of Birmingham,* 479 Mich 206; 737 NW 2d 670 (2007).

16 *Terrian,* 467 Mich at 68-69, citing *W R Grace & Co v Local Union759*, 461 US 757 (1983).

17 *Terrien,* 467 Mich at 67.

18 *Franklin Commons, LLC v Helman Woods Subdivision Homeowners Assoc*, unpub op of the Court of Appeals, entered Nov 4, 2010 (Docket No. 292952).

19 *Id.*

Consistent with the legal exceptions to enforcement, waiver or public policy violation, there are three primary equitable exceptions to enforcement: (1) technical violations and absence of substantial injury; (2) changed conditions (which requires that the character of a subdivision be changed in such a way as to subvert the purpose of the restriction[20]); and (3) limitations and laches.[21] There is no safe harbor in a *de minimis* violation. The courts have held that *de minimis* violations of a covenant can be enforced and the right to maintain the restriction does not require proof of damages from the violation.[22] Proving that an exception applies to preclude the enforcement of a recorded restriction is not usually an easy feat.

## Violating Restrictions – A Risky Proposition

There is no question that opportunities exist for reinventing unused urban areas, and Detroit is seeing increased investment at a level that has not happened in recent memory. Further, projects such as the Gateway[23] development at Woodward Avenue and Eight Mile Road in Detroit, anchored by a Meijer store, fills a great need for retail and grocery investment in Detroit. However, as these opportunities arise, it will be critically important to determine the nature and extent of private restrictions on the use of property, some of which were created when Detroit's subdivisions were platted a century ago.

In *Asker v WXZ Retail Group/Greenfield, LLC*,[24] the buyer took title to commercial property in Northwest Detroit subject to various restrictions and covenants, including a requirement to obtain site plan and architectural approval for improvements, and to maintain open and compatible parking between the subject property and the adjacent commercial lot. The subject property had several different uses over many years, but was vacant when purchased in 2006 for construction of a retail outlet of a national auto parts chain. The buyer did not disclose the full site and architectural plans to the adjacent parcel owner, and created a curb that encroached on the adjacent parcel despite consent for the curb being withheld. Despite the objections of the adjacent parcel owner, including a cease

20 *Kamphous v Burns,* unpub op of the Court of Appeals, entered Feb 26, 2009 (Docket No 279962).

21 *Id.*

22 *Terrien,* 467 Mich at 65.

23 In the interest of full disclosure, the author's employer provided title insurance and escrow services for the Gateway development.

24 Unpub op of the Court of Appeals, entered Jan 24, 2013 (Docket No. 303529).

and desist letter, the buyer built the auto parts retail store, garage, and dumpster enclosure.

The trial court found the buyer had not complied with the covenants and restrictions, and the remedy fashioned by the court was that the buyer was required to demolish the improvements on the property that had just been completed. The buyer had argued that demolition was a drastic remedy, and that the better remedy would be to have the parties find some sort of agreement modifying the improvement that would be acceptable to both parties. Because the buyer had forged ahead with the construction despite knowing of the adjacent parcel owner's objections and the buyer's failure to comply with the restrictions, the Court of Appeals upheld the trial court's order to demolish the improvements.

While extreme, the remedy of removing improvements that violate restrictions and covenants, such as the court imposed in *Asker,* is by no means rare. In *Webb v Smith*,[25] the Court of Appeals upheld a trial court's decision requiring the removal of a home built in violation of deed restrictions. The court rejected several arguments, including an argument that general growth in the area resulted in changed conditions sufficient to allow an equitable exception. The court found that the evidence did not support a finding that the covenants' purpose could no longer be accomplished, and that general growth alone is not sufficient to set aside residential restrictions.[26] Similarly, in 2005, the Court of Appeals upheld the removal of a garage built in violation of deed restrictions.[27] More recently, in a well-publicized case, the Court of Appeals ordered that a house violating subdivision setbacks set forth in deed restrictions must be brought into compliance with the restrictions.[28] The court held that where deed violations occur, there can be no balancing of equitable interests of the parties, despite the fact that bringing the house into compliance would result in the demolition of the entire house.

The cases cited herein requiring demolition of improvements have in common the fact that the owner of the property in each case knowingly violated the deed restrictions. Constructive knowledge is sufficient, however, and every owner takes title subject to the constructive notice of documents recorded in the chain of title.[29] Similarly-situated property owners should not expect equitable relief: as the court in *Webb* cautioned, owners who knowingly violate restrictions do so at their own peril.[30]

## Removing Restrictions

What, then, may a property owner wanting to develop restricted property do to ensure the improvements will not be at risk of court-ordered demolition? The first step is to perform a full search of the property records in the office of the Register of Deeds and a review of the recorded plat to determine what, if any, restrictions are applicable. Bear in mind that those restrictions can date back well over 100 years, so it is important to communicate the purpose of the search with whoever is doing the search. A 40-year marketable title search may not disclose all valid restrictions against the property.

If the property is subject to restrictions, then it may be possible to avoid the enforcement through one of the exceptions above: violation of public policy, waiver or acquiescence, technical violation, changed conditions, or laches. Those can be fact specific, and relying on them is not without risk. If the developer has taken title to an entire subdivision, there may be no other parties to enforce the restriction and the developer may be able to record a termination of the restrictions. If there is a provision in the restriction for plan approval, it is often accompanied by language that the approval cannot be unreasonably withheld. If the developer gets no response or has information that the approval is being unreasonably withheld, the developer can seek judicial enforcement of that provision. Finally, the developer could either get consent from all parties able to enforce the restriction or, because the restriction is a property right, sue to quiet title as to the restriction. It is essential that all parties in a position to enforce the restriction either consent or be included as a party defendant in any action. The decision in *Smiley v Grosse Pointe War Memorial Assoc*[31] can be read as an expansion of the scope of who may sue to enforce a restriction that only increases the vulnerability to exposure if restrictions are ignored or not properly terminated

Is zoning approval sufficient to allow construction of an improvement that violates a deed restriction? The answer is "no." Zoning is the "governmental regulation of

25 224 Mich App 203; 568 NW 2d 378 (1997).

26 *Id* at 213.

27 *Upper Long Lake Estates Association v Scheid*, unpub op of the Court of Appeals, entered June 28, 2005 (Docket No. 253234).

28 *Thom v Palushaj*, unpub op of the Court of Appeals, entered Feb 14, 2012 (Docket No. 301568).

29 *See, eg, 35160 Jefferson Avenue, supra* note 7.

30 *Webb*, 224 Mich App at 214.

31 Unpub op of the Court of Appeals entered Feb 26, 2008 (Docket No. 275937).

land use and is the public sector side of building and use restrictions."[32] In contrast, deed restrictions are private contractual limitations on the use of property, and the right to enforce such restrictions lies with the parties to that agreement.

Title insurers are often asked to "insure over" deed restrictions. Insurers will sometimes insure against enforcement of restrictions where there has been a long standing use that violates the restriction. However, insurers generally are not willing to insure against restrictions, especially when the insured transaction involves a new improvement that violates a recorded restriction. In addition, developers and attorneys representing them should be aware of the limitations of the title insurance. Title insurance is a contract of indemnity against actual monetary damages, not a guarantee of title.[33] As a result, the insurer may end up having to pay a claim under the title policy, but the developer may still have to remove a newly constructed improvement and be exposed to business interruption loss.

## Conclusion

Detroit, like other urban areas in Michigan, has a real opportunity to re-invent itself. Developers are already lining up to invest in Detroit, and are altering the landscape with new uses ranging from urban farming to big box retail. Real estate practitioners are cautioned that decades-old restrictions exist throughout the city and can be costly traps for the unaware.

32 Cameron, *Michigan Real Property Law* (3d ed rev 2013), § 23.1, p 1284.

33 Gosdin, *Title Insurance: A Comprehensive Overview* (3d ed 2008), § III(A), at p 83.

# Subdivision Plats as a Barrier to the Repurposing of Overstocked Land Under the Detroit Strategic Framework

*by Susan K. Friedlaender**

The land use element of the Detroit Future City Strategic Framework ("Framework") contains innovative strategies to give new life and purpose to many acres of vacant or underutilized land by adapting them to new uses and innovative forms. The realization of the Framework goals will likely require the elimination of some very old subdivision plats.

This is not the first time that the City of Detroit has been transformed. A controversial plat was at the center of an earlier rebirth that followed a devastating fire in 1805 that destroyed most of the houses and businesses in the small "old town" several weeks before Michigan officially became a territory. According to one account:

> [T]he village of Detroit was reduced to ashes. The real cause of the fire was never discovered, but it was attributed to the carelessness of someone who lighted a 'segar;' in the stable of John Harvey's bakery, near the center of the town. The fire broke out about 9 a.m. and by noon only two buildings were left standing."[1]

Congress responded to the fire by enacting the Territorial Act of April 21, 1806, which authorized the newly appointed Governor and Judges of the Michigan Territory "to lay out a town, including the whole of the old town of Detroit, and ten thousand acres adjacent" and to "finally adjust all claims to lots therein, and give deeds for the same."[2] The appointees embraced the Act as an opportunity to create a "more beautiful place."[3] The original drawing of the Governor's and Judges' Plan of Detroit apparently was lost.[4] The City suffered many years of infighting and mistrust over the Plan and settlement of titles as exemplified by an 1828 missive to Congress, which in 1830 prompted a review of the Governor's and Judges' actions. The missive states in part:

> Your memorialists cannot but be persuaded that the course which has been commenced and pursued, relative to the plan of the city of Detroit, is replete with sinister consequences, and will operate injuriously and ruinously on many of its inhabitants. Such example will also have great weight over the whole Territory, and operate as a great discouragement to men of property in vesting their money in landed property within this city or Territory; for if this corporation has power to alter the plan diametrically this year, what guarantee have the owners of property against future and frequent alterations hereafter? What man of ordinary prudence would, under such circumstances, think of holding any real estate or of erecting buildings in a place under such circumstances?

1 Burton & Burton, *Governor and Judges Journal: Proceedings of the Land Board of Detroit* (Library of Congress, 1915), p 3.

2 *See id,* quoting the Acts of the Ninth Congress of the United States, Statute I, 1806 (April 21, 1806) ("An Act to provide for the adjustment of titles of land in the town of Detroit and territory of Michigan, and for other purposes").

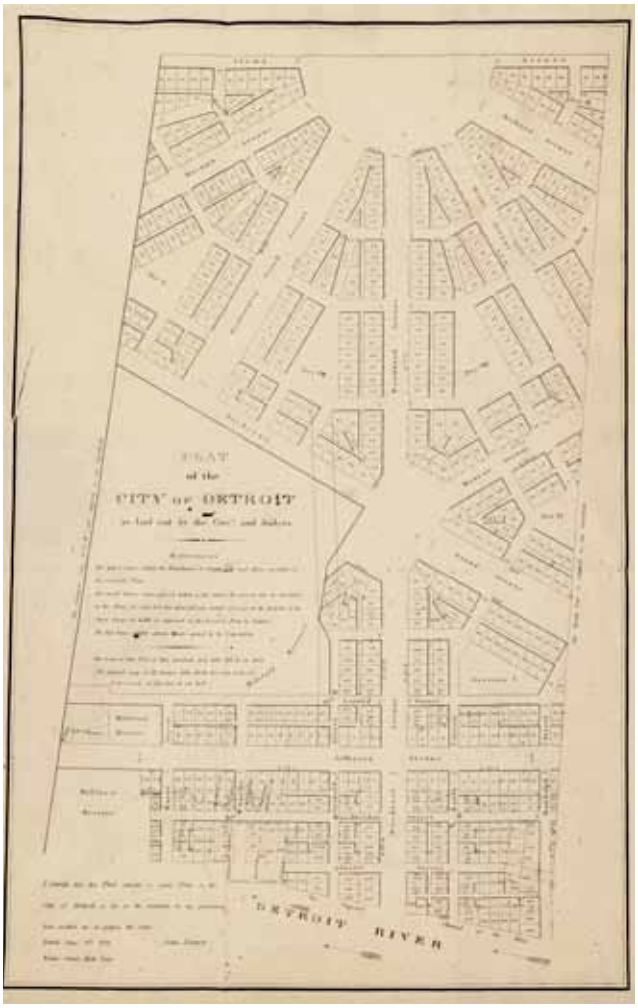
3 Burton & Burton, *supra* note 1, at p 3.

4 American State Papers, "On the Establishment of the Plan of the City of Detroit, In Michigan" 2:270-77. The plat was prepared by surveyor John Farmer, who attempted to recreate the lost plan and depict actual development that had occurred since the original 1806 plan was drafted and lost. *Id* at 271-72.

* *Susan K. Friedlaender is a managing partner of Friedlaender Rogowski LLC and a member of the Real Property Law section. Her law practice focuses on land use, zoning, historic preservation, redevelopment, and general real estate related litigation.*

Your memorialists are fully persuaded that much of the future prospects of this city must be founded on its commercial growth and importance, being the metropolis; and from its advantageous and central position there is reason to believe that it will continue to be the most important commercial entrepot for all the upper lakes and the country bordering on them. Any measure, therefore, having a tendency to unsettle the titles to lots in said city will always and lastingly be felt, and should, therefore, be deprecated as a great public as well as private misfortune.

Your memorialists, in conclusion, beg leave to observe that it is an axiom in civilized governments, as sound as it is wise and just, that much of the prosperity of all states must depend essentially upon the laws which secure and guarantee to private individuals the rights of property and the faithful administration of such protecting laws. Take away such protection and security, and what is there left to stimulate the faithful citizen to honest exertion, and industry, and economy, to acquire real estate? … Is not the secure tenure of real estate one of the greatest and most essential and prominent features in our great American bill of rights, the magna charta of American independence?[6]




John Farmer's 1831 Plat of the City of Detroit as Laid out by the Governor and Judges[5]

As ordered by Congress, the then Governor and Judges sent to Washington a plan entitled "Plat of the city of Detroit, as laid out by the governor and judges," which Congress approved.[7] The plat established the physical development of the City with its network of avenues, streets, lots and public squares, parks, and other public spaces. The plat was the City's first planning document and an ancestor to the Framework Plan. Ironically, the Framework Plan might need to remove many of the connecting plats that followed the City Plat as the City grew and prospered (as the memorialists predicted it could if the approved Plat addressed land title concerns).

The Framework Plan identifies some of the oldest platted areas in the City as ripe for rebirth, but this time out of the ashes of a long smoldering urban decline. The plats likely contain land such as streets, alleys, and parks that the proprietor dedicated to public or private uses. Any redevelopment or repurposing of the land that changes plat boundaries or affects dedications in the underlying plats will likely require a statutory vacation action. While some redevelopment will require eliminating plat dedications for streets and other public places, the City might want to maintain rights in other dedicated land that might benefit from the transformation. This article will provide a summary of the rules for maintaining or eliminating interests in publicly or privately dedicated land located within subdivision plats.

5 *http://cdm16317.contentdm.oclc.org/cdm/ref/collection/p129401coll3/id/38*

6 American State Papers, "Relative to a change in the original plan of the City of Detroit, in Michigan" 1:452-53 (No. 643).

7 American State Papers, "On the Establishment of the Plan of the City of Detroit, In Michigan" 2:270-72 (No. 900).

## I. Short Summary of Statutory Dedication Law

### A. Offer and Acceptance

By definition, a "dedication" is the "appropriation of land to some public use, accepted for such use by or in behalf of the public."[8] Although the term "dedication" contemplates "public use," Michigan recognizes the enforceability of private dedications made to lot owners alone.[9]

The Land Division Act[10] ("LDA") authorizes dedications, gifts, and grants of land to "the public, or any person, society or corporation" that when properly "certified, signed, acknowledged and recorded" "shall be deemed sufficient conveyance to vest the fee simple of all parcels of land so marked and noted, and shall be considered a general warranty against the donors, their heirs and assigns to the donees for their use for the purposes therein expressed and no other."[11] The dedication is an offer that must be accepted to become effective.

When the offer is made to the public, it must be accepted by an authorized public entity.[12] Before acceptance, a plattor can withdraw an offer to dedicate land to the public.[13] If the proprietor does not withdraw the offer within the statutory period, however, the public has a reasonable time to accept the dedication.[14] While the Michigan Supreme Court has not set an outer limit for what would be regarded as a reasonable time within which to accept a public dedication, it has held that waiting 87 years to accept is too long.[15]

In contrast to acceptance on behalf of the public, a lot owner accepts the offer of a plat dedication when it purchases a lot.[16] The lot owner's right to use the dedicated land, therefore, vests upon the sale of a lot.[17] The plattor is estopped from revoking or withdrawing a public dedication against the vested lot owner even if the public does not accept the dedication.[18]

### B. Nature of Fee Interest Conveyed in a Dedication

The State's plat acts dating back to 1821 have consistently described the property rights conveyed in a dedication as a fee interest but only for the dedicated purposes.[19] The Michigan Supreme Court consequently has characterized the interest as a "base" fee that did not convey any beneficial ownership or title in the dedicated land.[20] The dedicator only parts with possession and possibly could regain title to the land. The effect of the dedication "is not to deprive a party of title to his land, but to estop him, while the dedication continues in force, from asserting that right of exclusive possession and enjoyment which the owner of property ordinarily has."[21] The government as trustee of the dedicated land can only use it for the purposes offered or risk losing it.[22]

8 *Clark v Grand Rapids*, 334 Mich 646, 656–57 (1952).

9 *See Little v Hirschman*, 469 Mich 553 (2004); *Martin v Beldean*, 469 Mich 541 (2004). According to the Court, private dedications on plats recorded before the enactment of and not under the Subdivision Control Act of 1967, MCL 560.101 et seq, as amended by the Land Division Act, 1996 PA 591, effective March 31, 1997 (the "LDA") conveyed an irrevocable easement to the lot owners. Dedications after 1967 conveyed a fee simple interest in privately dedicated areas of a plat consistent with the language in MCL 560.253.

10 MCL 560.101 et seq.

11 MCL 560.253(1).

12 *Kraus v Dept of Commerce*, 451 Mich 420, 424 (1996).

13 *See* MCL 560.255b(1)-(2)(b). Upon the passage of 10 years from the date of recording of the plat, a rebuttable presumption exists that the public accepted the dedication. *Id* at 560.255b(1). The plattor can rebut the presumption with proof that it withdrew the offer before acceptance and the effective date of the 1967 Subdivision Act. *Id* at 560.255b(2)(a). Alternatively, the plattor can rebut the presumption with proof that it filed a notice of withdrawal with the appropriate register of deeds offices, with copies to the appropriate agencies and within 10 years after recording the plat. *Id* at 560.255b(2)(b).

14 *Krause*, 451 Mich at 427.

15 *Id*.

16 *Martin*, 469 Mich at 548 n17.

17 *Schurtz v Wescott*, 286 Mich 691, 695, 696 (1938) (the lot owner's private interest in dedicated land is irrevocable).

18 *Westveer v Ainsworth*, 279 Mich 580, 583 (1937).

19 *See Kirchen v Remenga*, 291 Mich 94, 111-12 (1939) (canvassing the dedicatory language in the plat acts from 1821 to 1929). The Subdivision Act of 1967, MCL 560.101 et seq, which repealed the 1929 Act, in relevant part, enlarged the class of possible dedicatees and inserted the word "simple" after "fee" in Section 253 of the Act.

20 *2000 Baum Family Trust v Babel*, 488 Mich 136, 139 (2010), citing *Bay County v Bradley*, 39 Mich 163, 166 (1878); *Wayne Cty v Miller*, 31 Mich 447, 448-49 (1875); *Backus v Detroit*, 49 Mich 110, 115 (1882).

21 *2000 Baum Family Trust*, 488 Mich at 145, quoting *Patrick v Young Men's Christian Ass'n of Kalamazoo*, 120 Mich 185, 190 (1899).

22 488 Mich at 139, 141, 154, 159-60. The Court held that the dedication and acceptance of a public road that bordered a lake did not give the government an estate in land that could cut off the riparian rights of the first tier lots that bordered on the road or their reversionary rights in the road itself. The nature of the right in the dedicated land, even when described as a fee

The LDA expresses the same estoppel and reversion principles by stating that the dedication "shall be considered a general warranty against the donors, their heirs and assigns to the donees for their use for the purposes therein expressed and no other."[23] The dedication estops the plattor or its heirs from reclaiming the land so long as the property is used for the expressed purposes and no other. The dedicatee, therefore, can lose possession of the land through misuse or non-use.[24]

Even if the dedicatee continues to use the property for the dedicated purposes, the dedication still can be lost through the statutory vacation procedure. The plattor, although generally estopped from vacating a dedication, can vacate a dedicated street or other dedicated land if doing so would not harm private rights in the plat.[25]

### C. The Need To Vacate Plats

To the extent that the reuse or repurposing of the City's land will change platted boundaries, discontinue, add, or extend streets and alleys or introduce uses inconsistent with recorded dedications, the proponent of the change likely will need to vacate, alter, or amend the existing plat through a court action.[26] Sections 222 to 229 of the LDA contain the exclusive means to vacate, correct, or revise a plat absent any exception to or exclusion from the rule as discussed in Part II of this article. A vacation action is required to ensure that the underlying property interests are accurately described and identifiable.[27] The ability to vacate plats and dedications helps preserve the productivity and adaptability of land to new forms and uses when conditions change.[28] To be approved, the vacation must serve the public welfare, and the public benefit supporting it "must arise from the vacation itself rather than any private use to which the petitioning party proposes to put the land."[29]

Either a lot owner, "a person of record claiming under the owner, or the governing body of the municipality in which the subdivision covered by the plat is located" has standing to file a vacation complaint.[30] The complaint must describe the plat areas that the plaintiff wants to vacate, correct, or revise, and provide the reasons for the change.[31] The plaintiff must join as defendants all persons and entities with an interest in the platted areas. These defendants include: (1) the record owners of land, and persons of record who claim under them, located within 300 feet of the affected subdivision property; (2) utilities; and (3) affected governmental entities.[32] As discussed more fully, *infra*, the defendants can object to the vacation.

Under Section 226 of the LDA, the court may order the vacation or other plat change after a trial and hearing subject to detailed exceptions.[33] The exceptions limit the court's jurisdiction to vacate state, county, and federal aid roads. They also concern the vacation of roads located near or adjoining lakes and streams that can affect public access to waterways. As a general rule, a city can vacate or

interest, is limited to uses or purposes for which the dedication was made. *Id* at 159-60. The government does not gain any beneficial interest in the dedicated land or possess "'the usual rights of a proprietor.'" *Id* at 166 (internal citations omitted).

23 MCL 560.253(1).

24 "It is generally agreed that a fee simple interest in real property may not be abandoned … . However, there may be an abandonment of an inchoate or lesser interest in realty, such as an easement, railroad right of way, interest under a contract for the purchase of realty, homestead, highway, mining lease, or land dedicated to a public use." *Michigan State Hwy Comm v St Joseph Tp*, 48 Mich App 230, 237 (1973).

25 *Westveer,* 279 Mich at 583.

26 *Beach v Lima Twp*, 489 Mich 99, 108-09 (2011).

27 *Id* at 108, 109, 111.

28 *See, eg*, *Detroit v Judge of Recorder's Court*, 253 Mich 6, 9, 12-13 (1931) (dedication of strip of land for ornamental parkway purposes lost any utility and became an obstruction to the free flow of traffic).

29 *Horton v Williams*, 99 Mich 423, 430 (1894). The *Horton* Court enjoined the defendant from building in a vacated portion of an alley that the city allowed based on the defendant's offer to give the city council a 99 year lease to use part of the proposed building. *Id* at 426. Putting land to a private use that provides new jobs would benefit the public as well and should not be reason to deny a vacation. *Horton* really seems to caution against using the procedure in a collusive way that would allow a city to "barter away [its] streets and alleys." *Id* at 430.

30 MCL 560.222.

31 MCL 560.223.

32 MCL 560.224a (joinder rules). A public utility easement can be relinquished without a vacation subject to the conditions specified under 560.222a. A judgment vacating or otherwise changing a plat used by a public utility "shall reserve an easement therein for the use of public utilities [under the specified examples], and may reserve an easement in other cases." MCL 560.226(c)(3).

33 MCL 560.226. The plaintiff must record the judgment within 30 days after entry of the judgment of vacation, correction, or revision of the plat. MCL 560.228. If the court orders the vacation, it must also direct the plaintiff to prepare a new plat of the part of the subdivision affected by the judgment or a new plat of the entire subdivision if the court's judgment affects a major part of the subdivision. MCL 560.229.

discontinue streets and alleys over which it has jurisdiction, without a court order. A court order, however, is required to vacate a part of a platted city street or alley within 25 meters of a lake or stream, or "any public walkway, park, or public square, or any other land dedicated to the public *for purposes other than pedestrian or vehicular travel.*"[34]

### D. Title to Vacated Land

When a street or alley is vacated, title to the vacated land vests in the "rightful proprietors of lots within the plat that abut the streets or alleys."[35] The same lot owner can claim ownership of the entire vacated street or alley when it owns all the land on opposite sides of the vacated street or alley. Otherwise, the street or alley is divided along its centerline and the land added to those abutting lots on either side of the street or alley.[36] If only part of the street or alley is vacated without extending to the centerline, then only the nearest abutting lot can claim ownership up to the vacated line.[37] Title to land not described as streets or alleys vests "in the rightful proprietor of that part."[38] In other words, the land would revert to the original proprietor, its grantees, heirs, or any person who can establish a claim as the "rightful proprietor." It is not uncommon, however, for abutting lot owners to make adverse claims against outlots or other common areas.

### E. Exceptions and Exclusions to the Need for Vacation

MCL 560.104 contains a limited statutory exception to filing a court action to vacate a plat if the proprietor plans to replat some or all of the land.[39] No court action is required if all the lot owners who will be part of the revised plat agree to it in writing, proper notice is given, and the municipality adopts the appropriate resolution or legislation to vacate the publicly dedicated areas within the proposed replat.[40]

If a person claims title to some part of a plat, the necessity to vacate rather than bring a quiet title action depends on the nature of claimant's interest in the plat. If a lot owner or other person with an interest in the plat attempts to defeat or set aside a dedication, he or she must bring an action to vacate following the statutory procedures. A quiet title action cannot substitute for a vacation action to establish exclusive rights in dedicated land by attacking the dedication.[41] A quiet title action is proper, however, to establish title to land within a plat based upon adverse possession or other similar theory.[42]

There is also authority for the proposition that vacation of an underlying plat is not required to establish a site condominium on lots within a platted subdivision.[43] Even if vacation would not be required to obtain approval of a condominium development within the boundaries of an existing plat, that does not mean that the condominium owners are not subject to any property interests in the underlying plat, including dedications.[44]

34 Emphasis added. MCL 560.256 and MCL 560.257 describe the conditions under which the local legislative authority can vacate, widen, open, name, or discontinue streets and alleys without court action.

35 MCL 560.227a.

36 MCL 560.227a (2).

37 MCL 560.227a (3). Title to a public highway that borders on, is adjacent to, or terminates at a lake or general course of a stream may vest in the State under 560.226.

38 MCL 560.227 a (1).

39 *Martin*, 469 Mich at 550-52.

40 *See In Brookshire-Big Tree Ass'n v Oneida*, 255 Mich App 196 (1997), for a case in which the Court held that the developers were not entitled to proceed under § 104 because they failed to obtain consent from all the owners affected by the replat, which meant all the owners in the proposed revised plat, and not only the lot which the replat would revise and which the developer owned.

41 *Martin*, 469 Mich at 550 (the plaintiff was required to proceed under LDA to obtain declaration that dedication was void).

42 *Beach,* 489 Mich at 109, 111. The *Beach* plaintiff filed a quiet title action to establish adverse rights in platted property. The Court held that "an action that seeks to establish a substantive property right arises independently of an LDA action to vacate, correct, or revise a recorded plat. It is only after such a property right has been recognized that the need arises under the LDA to revise a plat that does not reflect the newly recognized property right. Until that property right is legally recognized the LDA is inapplicable." *Id* at 102.

43 In *Williams v Troy*, 269 Mich App 670 (2005), the court held that the developer did not need to file a vacation action to develop a site condominium over an existing plat because the definition of "Record" in § 110(1), of the Condominium Act, MCL 559.101 et seq, provides that the provisions of the LDA "do not control divisions made for any condominium project." *Id* at 675. Additionally, 1999 AC, R 559.401(4)(h) contemplates that a condominium development may overlap with a platted subdivision. *Williams* seems to conflict with *Beach's* observation that one of the purposes of a vacation action is to ensure that "plats on file remain accurate." *Beach*, 489 Mich at 109.

44 Of course, the condominium owners could eventually establish adverse rights in the platted land.

## II. The Vacation or Condemnation of Private Rights in Dedicated Land

### A. Parties to Vacation Actions

The Michigan Supreme Court held in *Schurtz v Wescott*[45] that neither the plat proprietor nor its grantees may unilaterally "vacate" dedications and claim ownership of the underlying land.[46] In *Westveer v Ainsworth*,[47] on which *Schurtz* relied, the Court held that although the proprietor was estopped from denying the dedication as to a lot owner, the proprietor's grantees could file an action to vacate the dedication.[48] The resolution of the Court's apparently conflicting holdings is found in the differing rights that a lot owner and the public have in dedicated lands. Regardless of the ability to revoke the public's right in dedicated property, the private lot owner's right to use dedicated property arises independently and does not depend on the public's acceptance of or its continued interest in the dedicated land.[49] Even if some limitation exists on the proprietor as the proponent, other lot owners and the municipality can still move for the removal of the restrictions and interests in the dedicated ground. As discussed immediately below, different rules apply when the municipality is the moving party.

### B. Standing to Object to a Proposed Vacation

The Plat Act of 1929[50] provided in relevant part that if there were "reasonable objection to making the alteration or vacation, correction or revision, . . . the court shall not proceed to alter or vacate, correct or revise the plat, or part thereof unless it is deemed necessary for the health, welfare, comfort or safety of the public."[51] The Legislature entirely eliminated the "reasonable objection" language and accompanying judicial standards from the 1967 Subdivision Act. The Act now provides only that "[u]pon trial and hearing of the action, the court may order a recorded plat or any part of it to be vacated, corrected, or revised,"[52] subject to the narrow exceptions previously discussed in Part I.C related to roads and access to waterways. In *Petition of Gondek*,[53] the Court of Appeals presumed that the deletion was unintentional. *Gondek* held therefore that the same judicial standards, burdens of proof, and case precedents regarding the "reasonable objection" standard are still applicable under the 1967 Act.[54] The Legislature has remained silent on the issue.

The *Westveer* Court acknowledged the apparent inconsistency between the estoppel to revoke a dedication against a lot owner and the statutory vacation procedure that accomplished the same end.[55] *Westveer* rationalized that the lot owner's ability to object to the vacation had some estoppel force to prevent the plaintiff from taking unfair advantage of the lot owners.[56] All lot owners within a plat have standing to object to the vacation of a park even if the particular owner's lot does not abut the park.[57] Similarly, all lot owners have standing to object to a proposed street or alley vacation even if their lot does not abut the street proposed for vacation.[58] The lot, however, must be in the same plat as the land proposed for vacation.[59]

In determining whether the lot owners' objections to a vacation were reasonable, the *Westveer* Court assessed the totality of the facts in light of existing and traditional uses, the character of the plat and surrounding areas, the

45 286 Mich 691 (1938).

46 *Id* at 69, citing *Westveer v Ainsworth*, 279 Mich 580 (1937). The proprietor's daughter filed an injunctive action to restrain lot owners from using a park in a subdivision that the proprietor had not explicitly dedicated to public or private use but depicted on the plat and labeled "park."

47 279 Mich 580 (1937).

48 *Id* at 584-85, citing *Oakes v Behm*, 249 Mich 494, 497 (1930), in which the Court held that although the proprietor was a party to the vacation, it did not sign the petition. The 1929 Plat Act, MCL 560.1 et seq, which was effective when *Westveer* was decided, authorized any proprietor of any part of the plat to bring an action to vacate the plat or any part of it. In contrast, the 1967 Act authorizes the owner of a lot or any person claiming under the owner to bring the action.

49 279 Mich at 583 (the lot owner has a private right to use dedicated parks that the public never accepted). A lot owner also acquires a private right of ingress and egress to its lot from the platted streets that cannot be lost through vacation without the payment of just compensation. *Horton v Williams*, 99 Mich 423, 428-29 (1894).

50 MCL 560.1 et seq (1929 PA 172).

51 MCL 560.62.

52 MCL 560.226(1).

53 69 Mich App 73, 77 (1976) (It is better to perpetuate prior law than make new law based on unexpressed legislative intent; " if we are in error… let the Legislature correct us.").

54 *Id* at 74-75.

55 *Westveer*, 279 Mich at 583-84.

56 *Kirby Terminal Co v Detroit*, 339 Mich 155, 161 (1954).

57 *Petition of Engelhardt*, 368 Mich at 399, 401-02(1962).

58 *In re Petition of Carson*, 362 Mich 409, 413-14 (1961) (lot owners had reasonable objection to vacation of unimproved street used as scenic footpath and which could be improved for convenient vehicular travel).

59 *Kirby Terminal v Detroit*, 339 Mich 155, 160 (1954).

probability that the lot owners would continue indefinitely to use the dedicated areas consistent with the dedication, and the injury to the lot owners' expectations if the court granted the vacation. *Westveer* held that the lot owners' objection to the vacation was reasonable because it would deprive the lot owners of the amenities and conditions that induced them to purchase the lots and would interfere with their enjoyment of their property by destroying those amenities.[60] If the vacation of roads merely makes travel more inconvenient, the lot owner does not have standing to object because any injury would not be any different from that suffered by the general public.[61] In *Vander Meer v Ottawa County*,[62] the court held that the objection to the vacation of a private drive was reasonable because it would impair reasonable access to the property, as it existed under the original plat.

### C. The Municipality as Vacation Proponent

A municipality also can overcome even reasonable objections to a vacation through its power of eminent domain.[63] The Michigan Constitution generally reserves to municipalities "the reasonable control of their highways, streets, alleys and public places."[64] Once a city accepts the dedication of land for street or park purposes, it has the authority to vacate or discontinue the public use under its police and legislative powers if the municipality determines that the public is better served without the land as restricted.[65] If it takes a substantial right, including the rights of lot owners in a platted park or right-of-way, those rights might be included in the condemnation action.

In *Detroit v Judge of Recorder Court*,[66] the city wanted to widen Brush Street by using 60 feet of land dedicated for ornamental purposes. The dedication carried a reversion to the grantors if the land was used for other purposes. The City attempted to vacate the dedication but was enjoined and directed to acquire the land through condemnation. After the City commenced condemnation proceedings, the court again enjoined the City from proceeding under the theory that the City had no power to take public property. The Supreme Court reversed and found first that the City did not waive its right to discontinue public uses for the public good when it accepted the dedication. Second, while the City could not take public property from a different public entity without legislative authority, it could condemn land dedicated to the City for public uses by paying for the private interests, which included the grantor's reversion and the abutting lot owners' protected interests in the parkway.[67]

Applying those same principles, the Court restrained the City of Birmingham from building a road through a dedicated park because the City attempted to use the park for prohibited purposes without acquiring the necessary private and ownership rights.[68] In road vacation cases, the government must use its eminent domain powers to vacate a road if the vacation causes the abutting owner to lose a substantial right, including access. Otherwise, a municipality can vacate streets as a matter of right.[69]

## III. Loss of Dedicated Land Through Abandonment Based on Non-use or Misuse

Even if some limitation exists on the grantor's revocation of a dedication, the grantor would be entitled to recover possession if the grantee abandons the land through its non-use or misuse.[70] Abandonment can be difficult to prove because of the policy against forfeitures.[71] The person asserting abandonment must prove it.[72] In order for

60 *Westveer*, 279 Mich at 585.

61 *Tomaszewski v Palmer Bee Co*, 223 Mich. 565, 569-70 (1923).

62 12 Mich App 494, 496 (1969).

63 *Baldwin Manor, Inc v City of Birmingham*, 341 Mich 423, 425 (1954).

64 1963 Const, Article VII, § 29.

65 *Detroit v Judge of Recorder Court*, 253 Mich 6, 14-15 (1931).

66 253 Mich 6 (1931). This case concerned the same property at issue in *Ford v City of Detroit*, 273 Mich 449 (1935).The City abandoned the condemnation because the years of litigation made it too costly to acquire.

67 *Id* at 9, 11-13. "In the present case, the city is attempting to condemn the private interests of the reversioners and abutting property owners so that it will put itself in the same position as if it had owned the property free from all claims of others, and thus be able to use the property for such greater demands as have been occasioned by the growth of the city, the change in the neighborhood, and the necessities in the case." *Id* at 13-14. The City's 2012 Charter, Sec. 9-501 provides in relevant part that the City "to the extent permitted by law … may condemn private or public property."

68 *Id*.

69 *Burton v Freund*, 243 Mich 679, 684-85; 220 NW 672, 674 (1928). *See also Roberts v City of Detroit*, 241 Mich 71, 77-78 (1927).

70 *Meyer v Meldrum*, 237 Mich 318, 321-322 (1927).

71 *See eg*, *Central Land Co v City of Grand Rapids*, 302 Mich 105 (1942) (city did not abandon dedication by leasing park land to an oil company because land could still be used for compatible park purposes).

72 *Kirchen*, 291 Mich at 113.

misuse to amount to abandonment, the grantee's conduct must be inconsistent with the dedicated use or substantially and materially interfere with its purpose.[73] In *Ford v City of Detroit*,[74] the Court held that the City's attempt to use an ornamental parkway to widen a road may have been a misuse of the dedicated property but did not amount to abandonment because after digging up the trees and terminating condemnation proceedings, the City restored the property to its conforming and dedicated use.[75]

The Court has also defined abandonment as the complete failure of the use for which the property is dedicated.[76] In *Kirchen v Remenga,* the defendants contended that the plaintiff lot owners abandoned dedicated parks by allowing third parties to construct buildings in open space areas. The Court disagreed because it found that the owner's acquiescence in the construction of the buildings was for the lot owners' convenience and the use was consistent with the park dedication.[77] In *Patrick v Young Men's Christian Association of Kalamazoo*,[78] however, the Court held that the grantee abandoned land dedicated for religious uses when it sold the property to the YMCA, which demolished the conforming church and replaced it with a nonconforming use.

## IV. Conclusion

There are many platted parcels of land in the City dedicated to public use. These parcels could carry private rights that need to be determined, not completely unlike the need to settle titles that arose after the 1806 fire. The challenge with dedicated land is that many people can have colorable claims, whether as a lot owner, reversion owner, or adverse possessor. Implementation of the DFS land use strategies could require removing use restrictions and lingering property rights in that dedicated land. The government as a trustee of publicly dedicated land cannot use that land for other purposes that interfere with compensable private interests and expectations without exercising its eminent domain powers.

Based on the substantially changed conditions in many of the City's platted neighborhoods, however, a court could likely find under *Westveer* or *Kirchen* that the dedication has wholly failed. In that case, the City could gain proprietary control over the land without paying for it. Alternatively, the City might also want to retain land dedicated for roads, parks, or other open space uses. It could then be in the position of defending the dedication as still viable against a lot owner who wants the dedication vacated.

The uncertainty, time, and expense involved in vacating plats and dedications could discourage investors from purchasing and redeveloping platted land. It is unlikely as a practical matter that many original proprietors or heirs would emerge as claimants of vacated parcels since many City plats date back to the early and mid-1800s, but there could be lot owners and persons claiming under them who might emerge as objectors if an investor shows an interest in vacating a plat or dedicated land. The chances seem good, however, that the changed landscape, times, and conditions in many of these platted neighborhoods should not pose a barrier to starting over with a blank and unlined canvas.

73 *Ford v City of Detroit*, 273 Mich 449, 453 (1935).

74 *Id.*

75 *Id* at 452.

76 *Kirchen v Remenga*, 291 Mich 94, 113 (1939). *Accord*, *Richey v Shepherd*, 333 Mich 365(1952) (no proof existed that owners had abandoned use of dedicated street which still could be used for passage).

77 291 Mich at 113.

78 120 Mich 185, 197-98 (1899).

# The Availability of Eminent Domain for the Detroit Works Project

*by Jerome P. Pesick* & Ronald E. Reynolds***

The Detroit Works Project represents an ambitious effort to harmonize the City's historically declined population numbers, the City's expansive boundaries, and its ability to effectively and efficiently deliver basic services to its residents. To what extent does the power of eminent domain, or condemnation, offer a tool for the City in pursuing the Detroit Works Project? Recent judicial, legislative, and constitutional changes have curtailed the general availability of eminent domain, and likely limit the usefulness of condemnation for projects like the Detroit Works Project.

## The Public Use Limitation

The Michigan Constitution, like the United States Constitution, prohibits the government from taking private property for public use without just compensation.[1] These provisions, each referred to as the "Takings Clause," prevent the government from taking property if there is no public use, whether or not just compensation is paid. What constitutes a valid public use authorizing an exercise of eminent domain, however, has generated controversy both in Michigan and throughout the United States. The Michigan Supreme Court has generated national attention in interpreting the meaning of the public use limitation on the exercise of the power in its decisions in *Poletown Neighborhood Council v Detroit*[2] and *Wayne County v Hathcock*.[3]

## Poletown

Prior to the 1981 decision in *Poletown*, the Michigan Supreme Court had narrowly construed the public use limitation to prohibit the use of eminent domain for private, not public, uses.[4] In 1980, however, the City of Detroit embarked on an ambitious plan seeking to condemn 465 acres located in Detroit and Hamtramck (an area known as "Poletown"), consisting of homes, neighboring industrial and retail businesses, and other land uses, and to transfer the property to General Motors for use as an automobile plant. The City was acting under the Michigan Economic Development Corporations Act,[5] which authorized condemnation of private property to further economic development to alleviate and prevent economic decline. The City's ability to withstand a public use challenge was considered bleak under existing caselaw interpreting the public use limitation. Yet, in a 5-2 decision,

1 Mich Const 1963, art 10, § 2; US Constitution, am V.

2 410 Mich 616; 304 NW2d 455 (1981).

3 471 Mich 445; 684 NW2d 765 (2004).

4 *See, eg*, *Shizaz v Detroit*, 333 Mich 44; 52 NW2d 589 (1952) (private property may not be condemned for partly public and partly private purposes).

5 MCL 125.1601 et seq.

* *Jerome P. Pesick is the managing shareholder of Steinhardt Pesick & Cohen, Professional Corporation, in Birmingham. He is a former Chair of the Real Property Law Section Council and the Eminent Domain Committee. A graduate of the University of Michigan and the University of Detroit School of Law, Mr. Pesick has been representing clients in condemnation, real property tax appeals, and land use litigation for 35 years.*

** *Ronald E. Reynolds is a shareholder of Vercruysse Murray & Calzone, Professional Corporation, in Bingham Farms. He is Chair of the Real Property Law Section Council and a former chair of the Eminent Domain Committee. Mr. Reynolds is a graduate of Hillsdale College and the Northwestern University School of Law and has been representing clients in condemnation, zoning, land use, real estate and real property litigation for over 20 years.*

the Michigan Supreme Court approved the City's plan. The Court framed the constitutional issue as whether the taking would primarily benefit the private or the public:

> There is no dispute about the law. All agree that condemnation for a public use or purpose is permitted. All agree that condemnation for a private use or purpose is forbidden. Similarly, condemnation for a private use cannot be authorized whatever its incidental public benefit and condemnation for a public purpose cannot be forbidden whatever the incidental private gain. The heart of this dispute is whether the proposed condemnation is for the primary benefit of the public or the private user.[6]

The Court held that General Motors' use of the property was only *incidental* to the public benefits underlying the proposed condemnation project.

The dissenting opinion of Justice Ryan has captured nearly as much attention as the majority opinion. Justice Ryan saw the majority decision as a radical departure from prior Michigan cases interpreting the Takings Clause. Justice Ryan articulated the long-standing precedents limiting the exercise of eminent domain to traditional public uses. Justice Ryan also warned of potential dire consequences from the majority's decision:

> The reverberating clang of [this case's] economic, sociological, political, and jurisprudential impact is likely to be heard and felt for generations. By its decision, the Court has altered the law of eminent domain in this state in a most significant way and, in my view, seriously jeopardized the security of all private property ownership.
>
> This case will stand, above all else, despite the sound intentions of the majority, for judicial approval of municipal condemnation of private property for private use. This is more than an example of a hard case making bad law—it is, in the last analysis, good-faith but unwarranted judicial imprimatur upon government action taken under the policy of the end justifying the means.[7]

Notwithstanding Justice Ryan's concerns, *Poletown* became the law of the land in Michigan for over 20 years, and also inspired similar decisions by state supreme courts throughout the country. If left in place by the Court, *Poletown* would likely have extended broad condemnation authority to the City of Detroit to advance its Detroit Works Proposal. However, an economic development plan initiated by Wayne County 20 years after the decision in *Poletown* led to the reversal of the famous decision.

## Return to a Narrow Public Use

In 2001, Wayne County sought to rely on *Poletown* in pursuing an economic development project south of the Detroit Metropolitan Airport, known as the Pinnacle Project. In *Wayne County v Hathcock*, the Wayne County Circuit Court upheld the use of eminent domain for the Pinnacle Project, ruling that there was a valid public use at issue, despite the fact that the condemned property would ultimately be transferred to private interests. The Court of Appeals likewise upheld the project, noting *Poletown*'s broad precedential scope.

In an opinion released the very last day of its term in July 2004, the Michigan Supreme Court reversed the *Hathcock* Court of Appeals' decision on the public use issue, overturned *Poletown*, and garnered national media attention on the controversial issue involving the proper scope of the public use limitation on takings of property for economic development. One remarkable aspect of the decision is that all seven justices voted to reverse the *Poletown* decision handed down by the Court 23 years earlier.

In its majority opinion, written by Justice Young, the Court agreed with the Court of Appeals that the Legislature's general grant of the power of eminent domain in the Acquisition of Property by State Agencies and Public Corporations Act ("Acquisition of Property Act")[8] provided a sufficient basis for Wayne County's exercise of the power, without the need for more specific legislation such as the Michigan Economic Development Corporation Act. The Court found that the Legislature intended to provide broad authority to municipalities for the exercise of eminent domain under Section 3 of the Act.[9] The Court ruled that the Acquisition of Property Act broadly allowed for the use of eminent domain where it was necessary for a public purpose (not use), and was "for the use or benefit of the public."[10] Under this broad legislative standard, the use of eminent domain for the Pinnacle Project was valid.

6 *Poletown,* 410 Mich at 632.

7 *Id* at 645-46 (Ryan, J., dissenting).

8 MCL 213.21 et seq.

9 MCL 213.23

10 *Hathcock*, 471 Mich at 466.

### The New Standard

The Court ruled, however, that despite the broad grant of authority contained in MCL 213.23, Wayne County's proposed taking was also subject to the narrower limitations contained in the Michigan Constitution's Takings Clause:

> On the basis of the foregoing analysis, we conclude that the condemnations sought by Wayne County are consistent with MCL 213.23 and that this statute is a separate and independent grant of eminent domain authority to public corporations such as Wayne County. If the authority to condemn private property conferred by the Legislature lacked any constitutional limits, this Court would be compelled to affirm the decisions of the circuit court and the Court of Appeals. But our state Constitution does, in fact, limit the state's power of eminent domain. Therefore, it must be determined whether the proposed condemnations passed constitutional muster.[11]

The Court's focus then turned to the Takings Clause enacted in the Michigan Constitution of 1963. The Court relied upon Justice Ryan's dissent in the original *Poletown* decision in describing the state of eminent domain jurisprudence as of the passage of the 1963 Constitution. Justice Ryan identified three categories where the Constitution authorized condemnations in which private land was transferred by the condemning authority to a private entity. The first involved "public necessity of the extreme sort otherwise impracticable."[12] The building of railroads, highways, and other "vital instrumentalities of commerce" are examples that fall under this category.[13]

The second category of constitutionally authorized condemnations is where the private entity remains accountable to the public in its use of the property. The Court cited to its prior decision in *Lakehead Pipeline Co v Denn*[14] wherein it approved the transfer of property to a pipeline company regulated by the Michigan Public Service Commission.[15]

The third and final category of constitutionally authorized transfers of property to private entities is where the "selection of the land to be condemned is itself based on a public concern."[16] The most common type of condemnation in this category involves the taking of property to eliminate blight. The elimination of blight forms the basis of the "public use" underlying the condemnation, even though that property, once condemned and the blight eliminated, is ultimately transferred to a private entity for redevelopment. The Court explained:

> Thus, as Justice Ryan observed, the condemnation was a "public use" because the land was selected on the basis of "facts of independent public significance—namely the need to remedy urban blight for the sake of public health and safety."[17]

Importantly, the Michigan Supreme Court in *Hathcock* sanctioned the historic use of condemnation for the elimination of blight.

In a somewhat ironic twist of fate, approximately one year after the decision in *Hathcock*, the Court upheld a taking that had been stricken under the *Poletown* test for public use in *City of Novi v Adell Trust*.[18] *Adell Trust* involved whether the requirements of the public use test were met with respect to the construction of a road "available for use by the public but . . . primarily used by a private entity that has contributed funds to the project."[19] The Court of Appeals, in a ruling which predated the *Hathcock* reversal of *Poletown,* held that the taking could not survive the public use test even as broadly defined under *Poletown*:

> Here, the City has not demonstrated that the public is primarily to be benefited from the construction of A.E. Wisne Drive. Rather, the spur benefits specific and identifiable private interests, those of Wisne/PICO. The trial court correctly applied heightened scrutiny and we agree with its analysis. The public benefit here is not clear and significant; rather, it is speculative and marginal. The fact that A.E. Wisne Drive is to be a public road does not, standing alone, automatically mean that the public purpose/public use would be advanced by its construction.[20]

11 *Id* at 467.

12 *Id* at 473.

13 *Id* at 473-74.

14 340 Mich 25; 64 NW2d 903 (1954).

15 *Hathcock*, 471 Mich at 474-75.

16 *Id* at 475.

17 *Id* at 476.

18 473 Mich 242; 701 NW2d 144 (2005).

19 *Id* at 244.

20 253 Mich App 330, 356; 659 NW2d 615 (2003).

In re-examining the case under its new standard enunciated in *Hathcock*, the Michigan Supreme Court reversed the Court of Appeals and ruled that there was a valid public use supporting the construction of the road. The Court focused on the fact that the public would own the road and that the public had access to the road, despite the fact that there was no dispute that a private entity would make primary use of the road. Moreover, the fact that the private entity was paying for all or part of the road did not change the Court's analysis: "In sum, when the public body that establishes a road retains ownership and control of it, and the public is free to use and occupy it, that proposed use is a public use."[21]

### The Blighted Area Rehabilitation Act

Historically, urban renewal projects in major Michigan cities were commonly undertaken pursuant to the Blighted Area Rehabilitation Act.[22] This Act authorized municipalities to remedy conditions found in a blighted *area*:

> "Blighted area" means a portion of a municipality, developed or undeveloped, improved or unimproved, with business or residential uses, marked by a demonstrated pattern of deterioration in physical, economic, or social conditions, and characterized by such conditions as functional or economic obsolescence of buildings or the area as a whole, physical deterioration of structures, substandard building or facility conditions, improper or inefficient division or arrangement of lots and ownerships and streets and other open spaces, inappropriate mixed character and uses of the structures, deterioration in the condition of public facilities or services, or any other similar characteristics which endanger the health, safety, morals, or general welfare of the municipality, and which may include any buildings or improvements not in themselves obsolescent, and any real property, residential or nonresidential, whether improved or unimproved, the acquisition of which is considered necessary for rehabilitation of the area. It is expressly recognized that blight is observable at different stages of severity, and that moderate blight unremedied creates a strong probability that severe blight will follow. Therefore, the conditions that constitute blight are to be broadly construed to permit a municipality to make an early identification of problems and to take early remedial action to correct a demonstrated pattern of deterioration and to prevent worsening of blight conditions.[23]

The Legislature made clear that it intended a broad interpretation of what amounted to a blighted area, first by identifying broad categories of conditions giving rise to blight, and then following up by directly expressing that "the conditions that constitute blight are to be broadly construed… ."[24] The Legislature also liberally empowered municipalities to use condemnation, among other powers, in eliminating blighted areas:

> A municipality may bring about the rehabilitation of blighted areas and the prevention, reduction, or elimination of blight, blighting factors, or causes of blight, and for that purpose may acquire real property by purchase, gift, exchange, or condemnation, and may lease, sell, renovate, improve, or exchange such real property in accordance with the provisions of this act.[25]

The Michigan Supreme Court has likewise given a liberal interpretation of the scope of public purpose in takings for blight. In *Sinas v Lansing*, decided in 1951, the Court approved of the transfer of the condemned property by the municipality to a private person or entity under the Act:

> The underlying public purpose of that act is to eliminate urban blight. The elimination of urban blight is an adequate justification for the exercise of the power of eminent domain, even where the acquisition is followed by sale to private individuals.[26]

The Michigan Supreme Court focused on the public use of eliminating blight, rather than the fact that there were third-party private beneficiaries to the blight elimination process. Thus, the Michigan Supreme Court historically allowed for broad use of the power of eminent domain in eliminating blighted areas, notwithstanding the fact that the property would ultimately be transferred to private uses. Prior to *Sinas*, the Court had ruled in

21 *Adell Trust*, 473 Mich at 252.

22 MCL 125.71 et seq.

23 MCL 125.72.

24 *Id.*

25 *See* MCL 125.73 (former section).

26 382 Mich 407, 412 (1969) (citing *In re Slum Clearance* 331 Mich 714 (1951)).

*In re Edward J. Jeffries Homes Housing Project* that even non-blighted property could be taken within an otherwise blighted area:

> The fact that some desirable homes will be destroyed by the project does not affect the public character of the proceedings. Since slums can be eradicated only by the replanning of entire neighborhoods, the few exceptions cannot be held to change the general condition.[27]

Since this broad interpretation of public use for the elimination of blighted areas, including condemnation of non-blighted property in the area, predated the 1963 Michigan Constitution, the Michigan Supreme Court's decision in *Hathcock* would likely not restrict the City of Detroit's use of eminent domain in clearing and repurposing for other private use blighted areas in the city. The City of Detroit likely could make a strong argument that one of the purposes of the Detroit Works Project is the elimination of blight, thus arguably making the use of the power of eminent domain available even under the Court's restrictive decision in *Hathcock*, based upon the pre-1963 precedents broadly interpreting the Blighted Areas Act. However, a later decision by the United States Supreme Court put into motion legislative and constitutional changes in Michigan that restricted the use of eminent domain in blighted areas.

### The Impact of the U.S. Supreme Court's Decision in *Kelo v City of New London*

As *Poletown* had been, *Hathcock* was anticipated to be the harbinger of a new national standard for public use: when *Hathcock* was decided, the United States Supreme Court was considering *Kelo v City of New London*.[28] There, a Connecticut city argued that taking non-blighted property to convey it to a real estate developer for a new development intended to create jobs and boost the city's tax base qualified as a "public use" of the taken property. To the surprise of many, and in accord with precedents like *Berman v Parker*[29] and *Hawaii Housing Authority v Midkiff*,[30] the United States Supreme Court held that although the federal constitution's "public use" limitation prohibits takings for private purposes, it permits takings to promote economic development, even if property is taken for transfer between private owners. The Court seemed to view the federal constitution as setting the "minimum" requirements for public use, noting that each state is free to adopt standards that require greater public uses to authorize taking property through eminent domain. Indeed, *Kelo* cited *Hathcock* as an example for states to follow should they desire a more restrictive interpretation of "public use."[31]

As a result of the heightened national attention given to the public use issue after the Supreme Court's decision in *Kelo*, and notwithstanding the protections advanced by *Hathcock*, the Michigan Legislature took on the public use issue, as well as other eminent domain issues, in its 2005-2006 Legislative Session.

The Michigan Senate adopted Senate Joint Resolution E with the goal of presenting a ballot initiative in November, 2006 that would incorporate *Hathcock* into the Takings Clause of the Michigan Constitution. Historically, that clause simply provided in one sentence that "Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law." The resolution substantially enlarged the Takings Clause well beyond one sentence:

> Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law. If private property consisting of an individual's principal residence is taken for public use, the amount of compensation made and determined for that taking shall be not less than 125% of that property's fair market value, in addition to any other reimbursement allowed by law. Compensation shall be determined in proceedings in a court of record.
>
> "Public use" does not include the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenues. Private property otherwise may be taken for reasons of public use as that term is understood on the effective date of the amendment to this constitution that added this paragraph.
>
> In a condemnation action, the burden of proof is on the condemning authority to demonstrate, by

27 *In re Edward J. Jeffries Homes Housing Project*, 306 Mich 638, 647 (1943).

28 545 US 469 (2005).

29 348 US 26 (1953).

30 467 US 229 (1984).

31 *Id* at 489, n22.

> the preponderance of the evidence, that the taking of a private property is for a public use, unless the condemnation action involves a taking for the eradication of blight, in which case the burden of proof is on the condemning authority to demonstrate, by clear and convincing evidence, that the taking of that property is for a public use.
>
> Any existing right, grant, or benefit afforded to property owners as of November 1, 2005, whether provided by this section, by statute, or otherwise, shall be preserved and shall not be abrogated or impaired by the constitutional amendment that added this paragraph.

Both the Michigan House and Senate adopted this Resolution with broad bipartisan support. The voters in the 2006 general election similarly supported the Resolution, electing to adopt it as an amendment to the Michigan Constitution by an overwhelming margin.[32]

As the language makes plain, this constitutional amendment went well beyond simply codifying *Hathcock*. Not only does the amendment preclude takings for economic development or tax enhancement, but it also allocates the burden of proof in a public use challenge, requires payment of 125% of fair market value as just compensation for the taking of property consisting of an individual's principal residence, and preserves all rights and benefits afforded to property owners under the law as of November 1, 2005. Further, beyond simply allocating the burden of proof generally for determining public use challenges, the amendment adopts a heightened burden for takings involving blighted properties:

> unless the condemnation action involves a taking for the eradication of blight, in which case the burden of proof is on the condemning authority to demonstrate, by clear and convincing evidence, that the taking of that property is for a public use.

In addition to presenting the ballot initiative that resulted in amendments to the Michigan Constitution, the Michigan Legislature also amended a number of eminent domain-related statutes. For example, the Legislature amended the Acquisition of Properties Act, which grants state agencies and municipalities the power of eminent domain.[33] The apparent purpose of the statutory amendments was to render the Act consistent with the amendments to the Michigan Constitution. In fact, the amendments replicated in statutory form the constitutional amendments: the statutory amendments prohibit state agencies and public corporations from exercising eminent domain for economic development purposes or to enhance the municipal tax base; they allocate the burden of proof in public use challenges; they require the condemning agency to pay 125% of the taken property's fair market value when the taken property is a principal residence; and they preserve property owners' existing rights as of November, 2005.

In some instances, however, the amendments to the Act went further than the constitutional amendments. For example, the amendments expressly incorporate the standard for "public use" articulated by Justice Ryan in his *Poletown* dissent, which the Michigan Supreme Court adopted in *Hathcock*.[34] This legislation also limited the 125% multiplier's applicability to those residential takings in which the residential structure is actually taken or the taking renders the remaining property nonconforming under the applicable zoning ordinance. The Legislature added a new protection against pretextual takings for private benefit, but excepted drain projects from its scope.

The amendments also added a new definition for "blighted" property:

> As used in this section, "blighted" means property that meets any of the following criteria:
>
> (a) Has been declared a public nuisance in accordance with a local housing, building, plumbing, fire, or other related code or ordinance.
>
> (b) Is an attractive nuisance because of physical condition or use.
>
> (c) Is a fire hazard or is otherwise dangerous to the safety of persons or property.
>
> (d) Has had the utilities, plumbing, heating, or sewerage disconnected, destroyed, removed, or rendered ineffective for a period of 1 year or more so that the property is unfit for its intended use.

32 *See* Mich Const 1963, art 10, § 2.

33 *See* MCL 213.21.

34 *See id*.

(e) Is tax reverted property owned by a municipality, by a county, or by this state. The sale, lease, or transfer of tax reverted property by a municipality, a county, or this state shall not result in the loss to the property of the status as blighted for purposes of this act.

(f) Is property owned or under the control of a land bank fast track authority under the land bank fast track act, 2003 PA 258, MCL 124.751 to 124.774. The sale, lease, or transfer of the property by a land bank fast track authority shall not result in the loss to the property of the status as blighted for purposes of this act.

(g) Is improved real property that has remained vacant for 5 consecutive years and that is not maintained in accordance with applicable local housing or property maintenance codes or ordinances.

(h) Any property that has code violations posing a severe and immediate health or safety threat and that has not been substantially rehabilitated within 1 year after the receipt of notice to rehabilitate from the appropriate code enforcement agency or final determination of any appeal, whichever is later.[35]

This detailed definition was taken from the definition of blight found in the Brownfield Redevelopment Financing Act.[36] The Legislature also added this same definition for blighted property to the Blighted Areas Rehabilitation Act.[37] The Legislature further expressly restricted the Acts' broad authorization of the use of condemnation for the rehabilitation of *blighted areas* to the acquisition of *blighted property* as that term is defined in the Act.[38]

## Eminent Domain and the Detroit Works Project

Had the Detroit Works Project been undertaken prior to overruling of *Poletown*, the City would have had a strong argument supporting its use of eminent domain to further the project. Even under the more restrictive *Hathcock* decision, however, the Court appeared not to restrict the historic broad authority allowing for the use of condemnation in eradicating blighted areas, including the taking of non-blighted property for the transfer to other private use. Yet the U.S. Supreme Court's subsequent decision in *Kelo* was a game changer. It triggered action by the Legislature that resulted in not only the codification of the *Hathcock* ruling into the Michigan Constitution, but went further to eliminate the ability of municipalities to condemn properties in blighted areas, whether or not the property itself is blighted, and repurpose the entire area by transferring the property to private interests. Blight eradication may still give the City of Detroit the opportunity to utilize condemnation for the acquisition and transfer to new private use, but only for those specific properties that meet the new Brownfield definition of blight.

The use of eminent domain for traditional public uses (e.g., roads, bridges, parks, municipal facilities, etc.) remains a tool available to the City, but likely has limited use in the Detroit Works Project. It remains to be seen whether the decision in *Adell Trust* offers any ability for the City to condemn and retain ownership of property while repurposing it to a use that remains open to both public and private use, and even so, whether it can effectively aid in furthering the Detroit Works Project.

The availability of eminent domain in pursuing a large public works project has not been tested since the Court's decision in *Hathcock* and the Legislature's broad re-writing of the Takings Clause and related legislation. Nevertheless, these judicial, legislative and constitutional changes unquestionably limit the power for undertakings such as the Detroit Works Project.

35 MCL 213.23(8).

36 *See* MCL 125.2652.

37 MCL 125.72(b).

38 MCL 125.73.

# Judicial Decisions Affecting Real Property

*by Brian P. Henry*

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

*Special Thanks*. The Section extends its sincere appreciation to the SBM and the e-Journal staff. The original drafts to these case summaries were prepared for and published in the e-Journal. The e-Journal is a daily publication that provides case summaries organized by areas of practice, legal news and updates, public policy information, a calendar of events, and classified and fields of practice listings. The e-Journal is an invaluable tool for keeping current on Michigan law. Subscriptions to the e-Journal are free. You can subscribe by visiting the State Bar of Michigan website at www.michbar.org, and selecting the publications and advertising tab. The summaries below include some editorial matter added by the author and may not represent the views of the SBM or the e-Journal.

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

*Citizens Bank v Boggs*
299 Mich App 517; 831 NW2d 876 (2013)

In this action to recover a purported deficiency consisting of amounts not included in a "full credit bid" at a foreclosure sale, the Court of Appeals affirmed the trial court's determination that the defendants ("Boggs") were not liable for the unpaid taxes paid by plaintiff Citizens Bank ("Bank") after the foreclosure sale. The court reversed the trial court's determination that defendants were not liable for any insurance premium payments made by the Bank before the foreclosure sale, and remanded for further proceedings as to this question.

The alleged deficiency was comprised of unpaid taxes and insurance premiums that the mortgagor-Houghton Lake Lodging Investments Limited Partnership ("HLL") failed to pay into escrow as required by the note. After HLL defaulted, the Bank foreclosed on the property by advertisement and made a successful bid to fully satisfy HLL's outstanding principal and interest, plus the foreclosure costs. The Bank then sued the Boggs, the guarantor of HLL's loan obligations, for unpaid taxes and insurance premiums. The Bank admitted that it did not actually pay the taxes on the property until well after the foreclosure sale when it resold the property to a third party, but did present evidence to show that it paid at least some of the premiums before the sale.

On appeal, the Bank argued, *inter alia*, that the defendants remained liable under the note and mortgage for HLL's liabilities because its final bid was not a "full credit bid" since it did not include the unpaid taxes, insurance premiums, and the escrow amounts. It was undisputed that Bank's bid included all of the outstanding principal balance, as well as all accrued interest and foreclosure costs. In its opinion, the Court stated that this situation was the "quintessential definition of a full credit bid." The Court noted additionally that "our courts have recognized that a mortgagor may remain liable for taxes and insurance premiums paid by the mortgagee before the foreclosure sale."

The Bank argued that defendants were liable for the unpaid taxes that became due before the foreclosure sale, in spite of the fact that the Bank did not actually pay these taxes until it sold the property to a third party. While HLL's property taxes were to be paid regularly and held in escrow, the Bank conceded that it did not actually incur these costs until it sold the property well after the foreclosure sale. The Court of Appeals referred to the decision of the Supreme Court in *New York Life Ins. Co. v Erb*, 276 Mich 610; 268 NW 754 (1936). In *Erb*, the Supreme Court reasoned that "where taxes are paid by the mort-

gagee or purchaser after the foreclosure sale, a bill in equity will not lie to re-foreclose the mortgage for the taxes nor to impress and enforce a lien for them against the property." Because the Bank did not pay the taxes before the date of the sale, this liability was extinguished by the foreclosure. The Court of Appeals found that the trial court, *inter alia*, properly granted defendants summary disposition as to the unpaid taxes. The case was remanded for further proceedings consistent with the Court of Appeal's opinion.

*People v Johnson-El*
299 Mich App 648; 831 NW2d 478 (2013)

The trial court convicted the defendant of forgery, uttering and publishing, and encumbering real property without a lawful cause based on an "Affidavit of Allodial Title" that he authored, signed, and recorded with the Wayne County Register of Deeds against a parcel of real property for which he had no ownership or other interest. The trial court held that the prosecution presented sufficient evidence to establish that the affidavit was false and forged and that defendant was aware of its falsity when he authored and recorded it.

On July 21, 2010, defendant recorded the affidavit with the Wayne County Register of Deeds claiming an interest in real property. The affidavit stated that defendant owned the property, that its value was secured by a $100 billion bond, and that defendant was a secured party. Defendant claimed allodial title because he was a "Washitaw Moor" as indicated in his tribe-endorsed birth certificate provided to the trial court. (The Washitaw Moors claim a mixture of Native American and African heritage and assert that they are a sovereign nation within the U.S.)

While the Sixth Circuit has called the Nation of Washitaw fictional, the Washitaw Moors apparently believe that all land in this country outside the 13 colonies and Texas belong to their members. Allodial title denotes "absolute ownership" of property over which no one can bring a superior claim. "Defendant's actions clouded the property's title." The property's true owner, Jesus Martin-Roman ("MR"), was unable to redeem the property, which was the subject of a bank foreclosure, by trying to sell it to an interested buyer to secure the funds necessary to satisfy the secured debt. When MR's real estate agent contacted defendant, he asserted his "property rights" and warned the agent not to close the sale or "I got their ass."

On appeal, defendant contended that the prosecutor failed to prove beyond a reasonable doubt that the affidavit was false or forged or that he filed the affidavit to harass or intimidate anyone. The court held, *inter alia*, that the prosecutor presented sufficient evidence that defendant uttered and published and unlawfully encumbered when he recorded the affidavit with the Wayne County Register of Deeds. Defendant swore to the truth of the statements in the affidavit before a notary public, knowing that his statements were not true. As a result of the recorded false document, others were led to believe that MR's title to the property was clouded. The Court of Appeals noted that one "need not know the victim of his harassment, fraud, or forgery" and affirmed the circuit court finding that prosecution presented sufficient evidence to establish the Affidavit was false and forged.

*Cheryl Knight v Northpointe Bank and NPB Mortgage*
300 Mich App109; _____ NW2d _____ (2013)
(No. 310206, decided January 24, 2013
and published March 26, 2013)

In this dispute, plaintiff Cheryl Knight appealed the trial court's order dismissing her complaint for title to the disputed property free of any claim by defendants Northpointe Bank and NPB mortgage (collectively "Bank"). The Court of Appeals affirmed the decision of the trial court applying the doctrine of laches to bar plaintiff's claim.

At trial, the defendant Bank demonstrated that plaintiff-Knight delayed suing for years after the point at which she knew or should have known of her claim. The trial court held that the defendant Bank's ability to defend against her suit was severely prejudiced by the delay. The Court of Appeals affirmed the trial court's order dismissing Knight's complaint for title to the disputed property free of any claim by the Bank.

Plaintiff Cheryl Knight challenged whether her sister Charlene Cutro, pursuant to a power of attorney, validly transferred to herself, 200 acres owned by their mother. Plaintiff Knight also asked the trial court to determine, on that basis, that she owned the 200 acres free of any claim by the Bank. Thus, although she did not refer to her claim as one to quiet title, it was evident that Knight invoked the trial court's equitable power to quiet title. Plaintiff Knight sued to quiet title to the parcel more than 10 years after the transfer from her mother to her sister that she claimed was invalid.

During that 10-year period, the 200 acre property was transferred twice. First, after Cutro died in 2006, the property passed to her daughter. Cutro's and Knight's mother passed away in 2007. Subsequently, the property passed to the Bank in 2010 after it foreclosed on a mortgage given by Cutro. Each of these transfers was recorded and thus, a matter of public record. Each transfer also

contained a right of first refusal that named Knight and required notice to her before the property could be sold.

The Court noted that Knight lived on property adjacent to the 200 acre parcel so that Cutro and Knight were in effect neighbors, for more than eight years prior to Knight's decision to sue. "Knight's apparent knowledge of the facts and circumstances surrounding the transfers suggests that she deliberately chose to sleep on her rights while her sister, and later her niece, had possession of the property at issue." Her decision to delay suing until after the Bank acquired the property at the sheriff's sale "plainly prejudiced the Bank's ability to defend itself against Knight's lawsuit." During the delay, the two most important witnesses to the underlying facts died. "Knight's delay also prejudiced the Bank's position by increasing its financial exposure." The court concluded that, "under the circumstances, the fact that the Bank knew, or at the least should have known, that Cutro transferred the property from her mother to herself using a power of attorney did not preclude the Bank from asserting laches as a defense."

*Rudy Silich v John Rongers*
_____ Mich App ____; 840 NW2d 1 (2013)
(No. 305680, August 8, 2013)

The Court of Appeals held that the trial court erred by granting 75% of the partition sale proceeds to defendant. Because plaintiff did not show that equity required the trial court to unequally divide the proceeds, each party was entitled to 50% of the proceeds. The trial court correctly determined the scope of attorney fees to be awarded to plaintiff under MCR 3.403(C), and did not clearly err in its calculation of the specific amount allowed in the case. The Court of Appeals also affirmed the trial court's refusal to grant attorney fees to defendant.

This case involved the partition of a cottage on a river jointly owned by the parties. The trial court ordered that the property be sold, after deciding that it could not be partitioned. Plaintiff purchased the property at an auction sale. The trial court awarded 75% of the proceeds from the auction to defendant after deducting the partition commissioner's expenses and $8,359.20 for plaintiff's attorney fees and costs "incurred obtaining the partition of the premises." The trial court denied plaintiff's request for additional attorney fees arising from the litigation of the partition, and also rejected defendant's claim that some of plaintiff's claims were frivolous. Plaintiff appealed seeking to divide the partition proceeds equally, and also seeking his remaining attorney fees. The trial court held that it was undisputed that plaintiff paid his share of all expenses after he became the co-owner. Defendant did not provide any law allowing the trial court to hold a subsequent owner liable for a prior owner's debts.

The Court of Appeals affirmed the trial court's rulings as to the attorney fees based on the American rule which provides that "fees are not generally recoverable unless a statute, court rule or common law exception provides otherwise." The Court of Appeals also held that "MCR 3.403(C) authorizes the award of fees only to cover the plaintiff's expense in filing the suit and arranging the partition sale, which theoretically benefits all parties to the proceeding."

*Charles A. Murray Trust v Futrell*
_____ Mich App ____; _____ NW2d _____ (2013)
(No. 304093, October 24, 2013)

This appeal involved two consolidated cases in which two groups of plaintiff lot owners ("Murray" and "Bearce") claimed rights to easements by necessity in the plat of Waubun Beach pursuant to an order of the Cheboygan Circuit Court in 1934. In rendering its decision, the Court of Appeals held that the decision in *Chapdelaine v Sochocki,* 247 Mich App 172; 632 NW2d 339 (2001) erroneously applied the "reasonable-necessity" standard to easements by necessity where the "strict-necessity" standard should have been applied. The Court of Appeals concluded that there was no strict necessity demonstrated and therefore, neither plaintiff group (Murray or Bearce) in the consolidated cases was entitled to an easement by necessity. The Court of Appeals ruled that the trial court properly extinguished the easement by necessity requested by plaintiff group Bearce, but erred by granting a winter emergency-vehicle easement to plaintiff group Murray when no strict necessity existed.

In 1934, the Cheboygan Circuit Court granted the lot owners of the plat of Waubun Beach, a reciprocal easement by necessity to traverse each other's lots for purposes of ingress and egress to and from public highways. Over 70 years later, defendants Edward and Rosemary Futrell refused to allow access through their property to the other lot owners.

The issue before the Court of Appeals was whether the reciprocal easement by necessity still existed in light of: (i) an appeal of the 1934 decree to the Michigan Supreme Court in *Waubun Beach Ass'n v Wilson* 274 Mich 598; 265 NW 474 (1936); and (ii) the necessity for its existence, if any, given the factual circumstances existing when the consolidated cases were filed.

The Court of Appeals first concluded that "the 1934 decree awarded an easement by necessity and not three

easements implied from a quasi-easement." The parties also disputed the degree of necessity required to establish an easement in this case: strict necessity or reasonable necessity. The court held that "strict necessity is required to establish an easement by necessity." It noted that since the decision in *Waubun Beach*, the Supreme Court continued to apply the principles of strict necessity in the context of easements by necessity, and the court has both recognized and applied those principles, although it has not done so consistently. The origin of the court's inconsistency appeared to be the *Chapdelaine* decision. However, the Court of Appeals noted that any citation to authority from the Supreme Court for the use of the reasonable-necessity standard was "markedly absent from *Chapdelaine*" decision. The Court of Appeals concluded that the strict-necessity standard remains the law in Michigan absent contrary authority from the Supreme Court. Under this standard, neither the Murray plaintiff group nor the Bearce plaintiff group was entitled to an easement by necessity.

# Legislation Affecting Real Property

*by Brian P. Henry*

The Section is active in the legislative process in a variety of ways, such as appearing before House and Senate committees, lobbying for and against bills, and monitoring legislation of interest to real estate lawyers. Before taking a formal public position for or against a bill, the Section follows procedures specified in its bylaws, and members with an interest in particular legislation should bring it to the attention of members of the *Section Council* or the chairs of the *Special Committees* listed on the Section's website. *Policy Positions* of the Section can also be found there. (More information is provided at the end of this article.)

This article provides a quarterly report designed to inform Section members about new legislation affecting real property, the Section's efforts regarding legislation that may become law and bills that may have an impact on real estate practice.

The links in the article for each public act take you to the original bills and public acts on the Michigan Legislative Website. In most cases, the most useful version to read is the last one *before* the public act version. Unless a bill creates an entirely new act (and there are very few of those every year), the version before the public act shows the existing statute with the amendments that the bill makes to it. Language that is repealed is shown by strikethrough text; new language is shown in all CAPITALS. Changes made on the floor of either house may be shown by red or blue text. The public act version simply shows the statute with all the changes already made.

The following are the bills of interest that became law since the last issue of the *Review*.

## Bills of Interest That Have Become Law Since The Last Issue of The *Review*

HB 4355 is now PA 134 of 2013.

The Governor signed this legislation on October 15, 2013 with an effective date of January 14, 2014.

HB 4355 was a revised version of HB 5197 from the last session. Previously, the Section opposed HB 4355 on the grounds that it would remove an existing requirement for a review by an independent accountant of the condominium financial records. Subsequently, the Council voted to support the bill by suggesting certain amendments aimed at protecting directors of non-functioning associations as well as those where the costs of an audit would be prohibitive under the budget.

As enacted, PA 134 of 2013 requires a condominium association with revenues greater than $100,000 to obtain an annual audit or review by a CPA. However, the legislation also creates an exception that allows an association to opt out of this required review if a majority of the members consent.

SB 257 (Kowall) is now PA 126 of 2013.

This legislation was effective on October 9, 2013.

PA 126 of 2013 amends the provisions for creation, operation, governance, and dissolution of principal shopping districts and business improvement zones and expand the activities that may be conducted in them.

HB 4613 (O'Brien) is now PA 127 of 2013.
The Section opposed this legislation.

This legislation was effective on October 9, 2013.

PA 127 of 2013 amends the forcible entry and detainer (sometimes called the "anti-lockout statute") provisions of the RJA to allow a landlord to recover premises after the death of a tenant and be protected from claims by the tenant's estate or others claiming through the tenant. Under the legislation, an owner does not unlawfully interfere with a tenant's possessory interest if: (i) the owner believes in good faith that the tenant has been deceased for at least 18 days; (ii) there is not a surviving tenant; (iii) current rent is not paid; (iv) the owner has previously informed the tenant in writing of the option to provide contact information for an authorized person that the owner could contact in the event of tenant's death; and (v) a probate estate has not been opened, by a public administrator or anyone else, for the decease tenant.

As enacted, the legislation addresses a limited situa-

tion where the rent is not paid and there is no estate (at least as yet) to take possession of the property of the deceased tenant. This legislation creates an exception to the requirement that summary proceedings must be followed in order terminate a tenant's interest.

Senate Bills 35 through 39 is now PA 188 of 2013.
(sponsored by Steven Bieda and Virgil Smith)

The Governor signed these bills on December 17 which will be effective on March 14, 2014.

The legislation increases the penalties that may be imposed by local officials on property owners when blighted property violations are ignored and fines are not paid. These penalties do not apply to a government sponsored enterprise, MSHDA, a financial institution, a mortgage servicer or a credit union.

## Bills That the Section Has Opposed or is Monitoring

### The Section opposed and suggested changes to House Bills 5069 through 5071 (Haverman)

These bills provide an exception to the unlawful ejectment statute for squatters without any possessory interest. The bills would: (i) allow the use of force to remove squatters; (ii) make squatting a misdemeanor for the first offense and a felony thereafter; and (iii) make the felony punishable by a fine of up to $10,000. These bills have passed the House and have been referred to the Senate Judiciary Committee. Currently, there is an effort to more clearly define the concept of "forcible entry."

The Real Property Law Section opposed these bills because the use of the term "tenant" in the proposed amendment to MCL 600.2918(3) undermined the intent of the legislation and could have instead encouraged lockouts against legitimate leaseholders. The Section proposed modifications to the legislation which may be reviewed at the Section website.

### The Section opposed House Bill 4626 (Yonker)

This bill amends the Land Bank Fast Track Act to establish protocols that address situations where a land bank authority purchases or acquires a tax reverted property in violation of the Land Bank Fast Track Act. The Land Bank will not automatically be provided with first opportunity to acquire blighted property. This bill has been referred to the Committee on Local Government.

The Section opposed 4626 for the reasons that: (i) the bill creates an undefined, burdensome, and unnecessary appeal process within the Department of Treasury; (ii) there is no evidence of a land bank acquiring tax foreclosed property in violation of the Land Bank Fast Track Act; (iii) the bill does not address the actual concern that lead to its introduction: local units of government acquiring tax foreclosed property for blight remediation; and (iv) the language of the amendment is inconsistent with the language of the current statute.

### The Section suggested changes to House Bill 5083 (Rutledge)

This bill amends the General Property Tax Act to allow some tax foreclosed public properties to be transferred to a city, county or the state land bank under certain circumstances. The property must satisfy the definition of blighted property set forth in the proposed legislation. This bill has been referred to the Committee on Local Government.

The Section suggested that "public use" should be substituted for "public purpose" in subsections 78m(l) and 78m(15)€, the new definitional section, for the reason that both are terms of art and the definition in 78m(15)€ much more closely approximate the concept of public use.

### The Section is Monitoring HB 5057 (Johnson)

This provides an exception to the 15 year statute of limitation for recovery of possession of real estate if "an adverse party is asserting a claim to the property based upon adverse possession or acquiescence." This bill has been referred to the Judiciary Committee.

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

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

Brian P. Henry
Orlans Associates, PC
1650 W. Big Beaver,
Troy, MI 48084
*bhenry@orlans.com*

Consult the *Michigan Legislature's* website for current information regarding pending legislation.

# Continuing Legal Education

*by Nicholas P. Scavone, Jr., Chair of CLE Committee,*
*and Karen Schwartz, Administrator*

# RPLS Goes to Las Vegas

**2014 Winter Conference**

**"Making The Smart Gamble: Understanding the Current Legal Landscape of Commercial Real Estate Development in Michigan"**

The Real Property Law Section is pleased to announce that the 2014 Winter Conference will be held at The Palazzo Resort Hotel Casino in Las Vegas on March 13-15, 2014. This is a great opportunity to learn and network with other Section members. To register, go to: *www.michbar.org/realproperty/winterconf.cfm*

The Section would like to thank Program Chair Thomas A. Kabel, Butzel Long PC, Bloomfield Hills for planning the Winter Conference.

The Section would also like to thank the Winter Conference Sponsors:

**Presenting Sponsor**
First American Title Insurance Company
National Commercial Services

**Platinum Sponsors**
eTitle Agency
Michigan State Housing Development Authority (MSHDA)

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Giffels Webster
Michigan Land Title Association

## Real Property Law Section
## State Bar of Michigan
## "Groundbreaker" Breakfast Roundtable Program

**Thursday, April 17, 2014**
**"Leasing Boot Camp - Part II"**

**Breakfast: 7:30 a.m. Program: 8-9:30 a.m.**

**Detroit Athletic Club, Detroit**

**Program Chair:** Glen M. Zatz, Bodman PLC

To register, go to: *www.michbar.org/realproperty/roundtables.cfm*

## HOMEWARD BOUND

**May 1, 2014**

### Use of Appraisals in Real Estate Transactions and Litigation

**2:00 - 5:00 p.m.**

**The Inn at St. John's, Plymouth**

Assess the merits of an appraisal with insight from practitioners and valuation experts. Understand factors that contribute to value such as type of property, applicable marketing time and exposure time, and physical inspection of the property.

**Moderator:** Jerome P. Pesick, Steinhardt Pesick & Cohen PC

**Speakers:** James N. Candler, Jr., Dickinson Wright PLLC
Kevin A. Kernen, Stout Risius Ross, Inc.
Ronald E. Reynolds, Vercruysse Murray & Calzone PC

Attend live or by webcast. Walk-ins are welcome.

**Program Chair:** Margaret Van Meter, Trinity Health

Further information can be found on the Section website at *www.michbar.org/realproperty/* or *www.icle.org/hb*

## MARK YOUR CALENDARS!

### Summer Conference 2014
### July 16 – 19, 2014

### Rebuilding the Dream: Michigan Real Estate Revitalized

Grand Traverse Resort & Spa

Traverse City, Michigan

Please join your colleagues this July at the RPLS Summer Conference being held at Grand Traverse Resort. Leslee M. Lewis of Dickinson Wright, PLLC in Grand Rapids and Michael A. Luberto, Chirco Title Co. are putting together an exciting three-day conference. Accommodation information can be found on our website at: *http://www.michbar.org/realproperty/summerconf.cfm*

Registration and program information to come.

If you are interested in participating as a Summer Conference sponsor, please contact Karen Schwartz: *rplsks@gmail.com*

# Course Calendar

Set forth below is a schedule of continuing legal education courses sponsored or co-sponsored by the Real Property Law Section through May 2014.

| Date | Location | Program | Topic |
|---|---|---|---|
| March 13-15 | The Palazzo Resort Hotel Casino, Las Vegas | Winter Conference | Making a Smart Gamble: Understanding the Current Legal Landscape of Commercial Real Estate Development in Michigan |
| April 17 | Detroit Athletic Club, Detroit, Michigan | Breakfast Roundtable | Leasing Boot Camp - Part II |
| May 1 | Inn at St. John's Plymouth, Michigan | Homeward Bound | Use of Appraisals in Real Estate Transactions and Litigation |

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/.