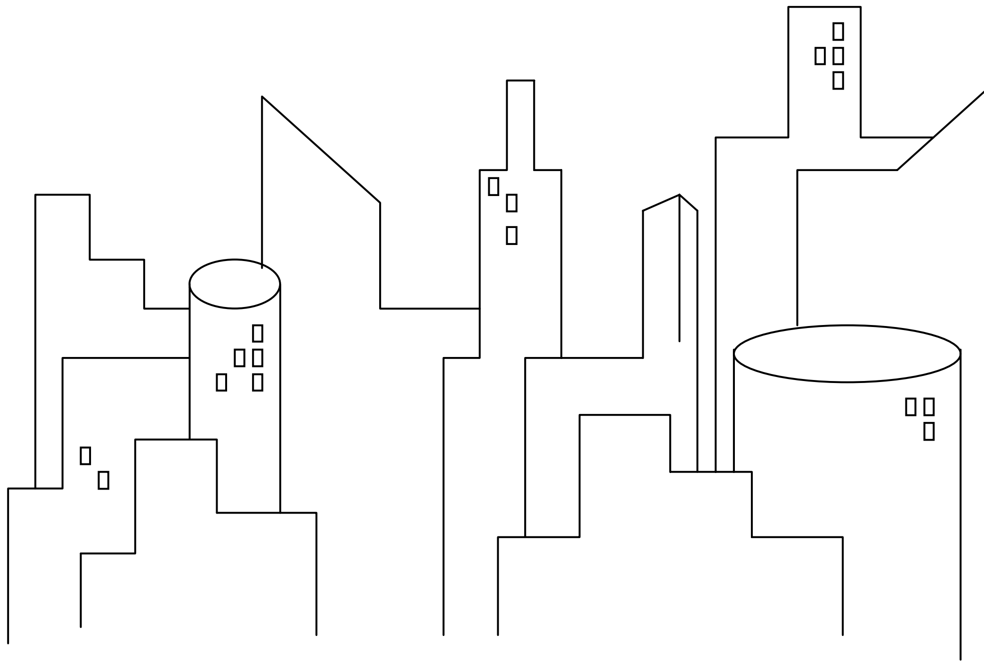
NINTH ANNUAL
REAL ESTATE SYMPOSIUM



A DISCUSSION OF PURCHASE AGREEMENTS, LEASES AND LOAN COMMITMENTS WITH SUPPLEMENTAL MATERIALS

presented by the
Law Offices of

Maddin, Hauser, Wartell, Roth & Heller, P.C.

NINTH ANNUAL REAL ESTATE SYMPOSIUM

April 12, 2002
NOVI HILTON
NOVI, MICHIGAN

PRESENTED BY THE LAW OFFICES OF
MADDIN, HAUSER, WARTELL, ROTH & HELLER, P.C.

____
Copyright 2002.
Maddin, Hauser, Wartell, Roth & Heller, P.C.
All rights reserved. This material may not be reproduced in whole or in part without prior written approval.

TABLE OF CONTENTS

Invitation 1

Evaluation 2

Agenda 3

Property Under Discussion 4

Mark R. Hauser and Gregory J. Gamalski:
Discussion of Important "Boilerplate" Clauses 5

Michael W. Maddin and Steven D. Sallen:
Select Issues in Negotiating Leases with Onerous Tenants 25

Lowell D. Salesin and George A. Contis:
Borrower and Lender Perspectives on Negotiating a Loan Commitment 53

Appendix: Supplemental Memoranda

Franchisors and Leasing 102
I've Earned My Commission! Haven't I? 105
New Regulations Facilitate Like-Kind Exchanges 108
Updates to Michigan Land Title Standards 110
Revised Article 9 of The Uniform Commercial Code 113
A Real Estate Broker Accepting An Earnest Money
Deposit Check From A Buyer Made Payable To A
Title Insurance Company Is Violating The Occupational Code 121
Navigating The Waters Of Real Estate Arbitration 124
Builder Obligations Under The Revised Michigan Condominium Act 132
Mold…Could It Be The Next Asbestos (Or Radon Or EMF)? 136
Recent Revisions To The Occupational Code Relating
To Workmanship Complaints Against Residential Builders 141
Your Builder's License – An Easy Target 145
Recent Amendments To Statutes Pertaining To
Recording Of Real Estate Documents.. 147
Public Acts Nos. 177, 178 and 179; Open Space Preservation Act 148

Attorney Biographies 150

LAW OFFICES
MADDIN, HAUSER, WARTELL,
ROTH & HELLER, P.C.
THIRD FLOOR ESSEX CENTRE
28400 NORTHWESTERN HIGHWAY
SOUTHFIELD, MICHIGAN 48034-8004

(248) 354-4030
(248) 355-5200
TELEFAX (248) 354-1422

MAILING ADDRESS
POST OFFICE BOX 215
SOUTHFIELD, MI 48037-0215

MICHAEL W. MADDIN
MARK R. HAUSER
RICHARD J. MADDIN
RICHARD F. ROTH
HARVEY R. HELLER
MICHAEL S. LEIB
ROBERT D. KAPLOW
WILLIAM E. SIGLER
STEWART C.W. WEINER
CHARLES M. LAX
STUART M. BORDMAN
STEVEN D. SALLEN
GREGORY J. GAMALSKI
JULIE CHENOT MAYER
NATHANIEL H. SIMPSON
RONALD A. SOLLISH
LOWELL D. SALESIN
MARK H. FINK
STEVEN M. WOLOCK
DAVID E. HART
GEORGE A. CONTIS

LORI E. TALSKY
MARTIN S. FRENKEL
GARY M. REMER
GEORGE V. CASSAR, JR.
SHERYL K. SILBERSTEIN
PAUL V. McCORD
E. DALE WILSON
KASTURI BAGCHI
CATHERINE H. FINN
DAVID M. SAPERSTEIN
DANIELLE M. SPEHAR
CHRISTOPHER A. McMICAN
RICHARD M. MITCHELL
BRANDY L. MATHIE
NICOLE E. WILINSKI

MILTON M. MADDIN
(1902-1984)
C. ROBERT WARTELL
(1936-2001)

April 12, 2002

Re: **NINTH ANNUAL REAL PROPERTY SYMPOSIUM**

Dear Real Estate Symposium Participant:

Welcome to our **Ninth Annual Real Property Symposium**. We are extremely pleased that you have joined us this morning. This morning's program is a series of three panel discussions focusing on issues directly related to the purchase, lease and financing of commercial real estate. We hope the presentations will provide you with useful information for your commercial transactions in 2002.

You can appreciate that time constraints mean we are only able to provide you with a short overview of each topic. Therefore, we have included additional information about recent changes in the law and other topics of interest in supplemental materials found in the Appendix toward the end of the volume.

If you have questions about any of the materials please write them on the cards provided. Attorneys from the firm will be circulating during the program and will collect them from you. Questions will be answered at the end of the panel discussions.

This Symposium highlights only one aspect of our practice. As a full service business law firm, we encourage you to contact any member of our firm for assistance with any legal matters which may concern you.

Finally, we would appreciate it if you would complete the evaluation form on the following page and leave it with us. It will assist us as we plan our program for next year. We hope you enjoy the program.

Sincerely,

MADDIN, HAUSER, WARTELL,

MADDIN, HAUSER, WARTELL, ROTH & HELLER, P.C.
NINTH REAL ESTATE SYMPOSIUM EVALUATION FORM

Please rate the speaker and topic:	Excellent	Good	Fair	Poor
MARK R. HAUSER and GREGORY J. GAMALSKI				
➧ Presentation	4	3	2	1
➧ Technical Content	4	3	2	1
MICHAEL W. MADDIN and STEVEN D. SALLEN				
➧ Presentation	4	3	2	1
➧ Technical Content	4	3	2	1
LOWELL D. SALESIN and GEORGE A. CONTIS				
➧ Presentation	4	3	2	1
➧ Technical Content	4	3	2	1
APPENDIX - SUPPLEMENTAL MEMORANDA				
➧ Materials	4	3	2	1
Overall Evaluation of Real Estate Symposium	4	3	2	1

Suggestions for topics for the 2003 Real Estate Symposium:

____

Any additional comments or suggestions you may have concerning the Symposium:

____

In the Fall of 2003, the firm will hold its 11th Annual Tax Symposium, if you would like to be included in the mailing list for this event, please complete the portion set forth below:

Please send me information about the upcoming Annual Tax Symposium: ☐

Name: ____

Address: ____

Phone: ____

MADDIN, HAUSER, WARTELL, ROTH & HELLER, P.C.
NINTH ANNUAL REAL ESTATE SYMPOSIUM
APRIL 12, 2002
8:00 A.M. – 10:30 A.M.

PROGRAM AGENDA

Our program this year will consist of three panel discussions on important provisions in: (1) purchase agreements for commercial properties, (2) leases with key tenants, and (3) loan commitments for construction and end financing.

The Symposium materials also include information on several topics our speakers will not have time to cover such as: (a) the amendment to Michigan's Recording Act, effective in March, 2002, (b) pending Condominium Act amendments, (c) new Michigan Land Title Standards, (d) the recently adopted Open Space Preservation Act, and (e) the new arbitration provisions now required in residential building agreements by amendments to the Occupational Code.

8:00 **Continental Breakfast**

8:30 **Michael W. Maddin**:

- Welcome

➢ **Mark R. Hauser and Gregory J. Gamalski:**
Discussion of Important "Boilerplate" Clauses

- Permitting and Approval Contingencies
- General Versus Specific Inspection Clauses and Walk Away Rights
- Casualty Loss Considerations and Why They Do Really Matter
- Utility, or Not, of Extensive Representations and Warranties
- Anticipating Lender Requirements for Tenant Estoppels and Subordination, Non-Disturbance and Attornment Agreements.

➢ **Michael W. Maddin and Steven D. Sallen:**
Select Issues in Negotiating Leases with Onerous Tenants

- Construction and Build Out Issues
- Delivery of the Premises and Lease Commencement
- Exclusives, Restrictions and Permissive Uses
- Issues Derived from Lender Concerns

➢ **Lowell D. Salesin and George A. Contis:**
Borrower and Lender Perspectives on Negotiating a Loan Commitment

- Cross Collateralization and Cross Default Issues
- Guaranties and Credit Enhancements
- Prepayment Clauses, Defeasance Options and Yield Maintenance
- Mezzanine and Junior Financing
- First Shovel Rule and the 30 Day Lag

Questions and Answers

THE PROPERTY UNDER DISCUSSION

I. FACTUAL BACK GROUND

A. The speakers will all be discussing a common factual background in the panel presentations.

B. The common facts are that a not too large neighborhood shopping center is being sold and will be renovated by the buyer who will also bring in new tenants.

C. The center will be sold, leases will be modified or new leases will be signed and financing will be placed to acquire and renovate the center.

D. The subject property contains a substantial strip center anchor, such as a major grocer or drug store.

E. There are some other tenants existing in the center and some vacant spaces to fill.

II. PARTIES NAMES, PLACES

A. Buyer/Borrower: Palmer, Hogan & Jones Redevelopment, LLC

B. Seller: Magnolia Drive, LLC

C. Anchor Tenant: Palmer Woods Market

D. Property: The Links Shopping Center

E. Lender: Masters National Bank

DISCUSSION OF IMPORTANT "BOILERPLATE" CLAUSES

By: Mark R. Hauser
and
Gregory J. Gamalski

I. IDENTITY OF PARTIES

A. Purchaser: Is the Agreement signed by the actual buyer, by an actual entity on behalf of an entity to be formed or by an entity without assets set up to sign purchase agreements for assignment to the resulting buyer?

B. Seller: Important to have the correct entity identified. If the Seller is a married man, his spouse must join in the execution. If a Partnership or LLC, is the signatory authorized to bind the entity or are the partners or members required to sign?

II. DESCRIPTION OF PROPERTY.

A. Legal Description and Tax Parcel Numbers

B. Easements, mineral rights, riparian rights

C. Personalty included

III PURCHASE PRICE

A. Amount

B. Earnest Money Deposit

C. Manner of Payment

1. Cash

2. Cash to Existing Mortgage

3. Cash down with Seller Financing

(a) Assumption with second mortgage

(b) Wrap around mortgage

(c) Land contract

D. Type of conveyance, i.e., Warranty Deed, Covenant Deed, Quit Claim Deed.

E. Allocation of Purchase Price; Goodwill; Noncompetition Covenants: Consultation Agreements

IV <u>EVIDENCE OF TITLE</u>

A. Title Commitment

B. Survey

C. Objections to title

D. Possession

V <u>CONDITIONS PRECEDENT OR CONTINGENCIES</u> (Examples)

A. Due Diligence Inspection (Physical and Financial)

1. Length of Inspection Period

2. Buyer's right of access and indemnity for damages sustained.

3. Buyer's right to terminate. Notice of termination vs. automatic termination if no notice is given. Delivery of Buyer's work product as condition of termination.

4. Buyer's right to extend for Phase II Environmental

B. Financing. Note this may be included in Due Diligence Inspection.

C. Governmental Approvals such as rezoning, site plan approval, certificate of occupancy.

D. No material changes in condition of Property

E. Seller's representations and warranties continue to be correct

F. Lender approval of assumption (for benefit of buyer and seller if transfers are restricted by loan documents to be assumed)

VI. SELLER'S REPRESENTATIONS AND WARRANTIES

A. Survival (will they terminate at closing or survive for a limited or unlimited period).

B. Indemnities; Limitations of Buyer's remedy for breach.

C. Examples

1. Condition of property, violations, mechanical and utility systems, latent defects, AS-IS condition

2. Certification of rent roll

3. Pending or threatened litigation or condemnation

4. Environmental

5. Disclosure statement

6. Ownership of adjacent or contiguous property.

7. Authority of Seller

VII. CLOSING ADJUSTMENTS

A. Property taxes and special assessments.

B. Rents, security deposits and tenant contributions

C. Responsibility for transfer taxes, documentary stamps, lender approvals.

D. Utilities, service contracts and operating expenses.

VIII. TIME AND PLACE OF CLOSING; DEFAULTS

A. "X" days after expiration of Inspection Period; Drop Dead Date; Time of the Essence.

B. Round table closing, escrow or combination

C. Buyer's default: retention of deposit as Seller's sole remedy.

D. Seller's default: right to specific performance.

IX. CASUALTY LOSS OR CONDEMNATION

A. Risk of loss with Seller.

B. These clauses often ignored but when a loss is experienced pending closing, particularly where an interest rate is locked with the acquisition lender for a date certain closing, many problems can arise.

X. REAL ESTATE BROKERS

A. Responsibility for commission

B. Indemnities for claims of other brokers

XI. NOTICES

A. Parties entitled to notice and their addresses

B. Method, e.g., fax, e-mail, overnight delivery, certified mail

XII MISCELLANEOUS CLAUSES

A. Buyer's right to assign

B. Parties' duty to cooperate with IRC §1031 exchange requirements

C. Duration of offer

DAMAGE CLAUSES

Pro Seller Destruction or Damage. In the event of destruction to the Subject Property prior to the date of closing, Purchaser shall, at his option, have the right to (a) cause the Seller to repair the property to the state existing prior to the damage; (b) take the proceeds of the insurance, including any loss of rents insurance, requiring Seller to contribute any deductible amounts and to proceed and go forward with the transaction or (c) declare the transaction to be void and of no further force or effect. In the event that Purchaser selects option (a), the closing date shall be delayed until said work is completed unless Seller escrows a sufficient portion of closing proceeds to cover 115% of the cost of such repairs plus an amount sufficient to cover the loss of rents to be sustained by Purchaser until such work is completed. In the event that Purchaser selects Option (b), if necessary the closing date shall be delayed until the loss is adjusted and the amount of insurance proceeds is determined.

Pro Buyer Destruction or Damage. Until the day of closing and actual exchange of legal title for the consideration to be paid hereunder, all risk of loss with respect to the Subject Premises shall be borne by Seller. In the event of destruction or damage to the Subject Premises prior to the date of closing, Purchaser shall, at its option, have the right to (a) cause the Seller to repair same to the state existing prior to the damage, if such damage can be repaired prior to the date set for closing; (b) take the proceeds of the insurance, including any loss of rents insurance, or a present assignment of Seller's rights therein, requiring Seller to pay the deductible amounts and proceed and go forward with the transaction; or (c) declare the transaction to be void and of no further force or effect and Purchaser shall thereupon receive a refund of the Deposit and be relieved of any and all liability hereunder. In the event that Purchaser selects option (a), Purchaser may either elect to delay the closing until all restoration work is completed or cause Seller to escrow with the Title Company at closing an amount of the closing proceeds equal to 115% of the cost of such repairs plus an amount sufficient to cover the loss of rents to be sustained by Purchaser until such work is completed. In the event that Purchaser selects option

(b), if necessary the closing date shall be delayed until the loss is adjusted, the insurance company acknowledges Purchaser's rights therein by virtue of this Agreement, and the amount of insurance proceeds is determined.

AS-IS CONDITION

A. Buyer acknowledges and agrees that, except as specified in this Agreement, neither Seller nor any agent, employee, attorney or representative of Seller has made any statements, agreements, promises, assurances, representations or warranties, whether expressed, implied, or otherwise regarding the condition of the Premises, the suitability of the Premises for any uses or purposes contemplated by Buyer, the zoning of the Premises, the right to occupy the Premises, the environmental condition of the Premises and/or any other aspect of or matter pertaining to the Premises or any other fact or matter whatsoever, whether pertaining to Seller, the Premises or otherwise. Buyer acknowledges that (i) it is acquiring the Premises in an "as is, where is" condition as of the Closing Date; (ii) Seller shall not be responsible for making (or contributing in any way to the cost of making) changes or improvements to the Premises, or any other aspect of or matter pertaining to the Premises; and (iii) in executing, delivering and performing its obligations under this Agreement, Buyer has not relied upon any statement, promise, representation or warranty to whomsoever made or given, directly or indirectly, orally or in writing, by any person or entity, except as specified herein. Buyer further releases and discharges Seller from any and all claims or causes of action which Buyer may now have or hereafter have against Seller, and Buyer shall indemnify and hold Seller harmless from and against all costs, claims, expenses and causes of action, in connection with, or arising out of the condition of, the Premises, including, without limitation, the conditions disclosed (but not limited to the extent disclosed) by the environmental site assessment report described in subsection (b) below, as of the Closing Date.

B. Buyer acknowledges that it has received and reviewed a certain Environmental Site Assessment Report (the "Report"), dated May, 2000, prepared by Conestoga-Rovers & Associates for Seller with respect to the Premises. Seller hereby disclaims any responsibility for the contents, accuracy or inaccuracy of the Report. Buyer understands and acknowledges that Seller is not warranting, guaranteeing, affirming, or assuring in any manner whatsoever any of the information

contained or referenced in the Report. Buyer acknowledges that the Report has been prepared for Seller and that Buyer has no right to rely on the Report. Buyer is conducting its own investigation as to the environmental and other condition of the Premises.

SELLER'S REPRESENTATIONS AND WARRANTIES

Seller hereby represents and warrants the following to Purchaser, which representations and warranties shall survive the Closing Date:

A. Seller owns fee simple title to the Purchased Assets, including the Shopping Center, free and clear of all liens, claims, encumbrances and matters except the Permitted Exceptions, the Land Contract and the Store Leases;

B. Seller has requisite power and authority to enter into this Agreement and convey the Purchased Assets and perform its obligations as set forth herein and after execution by Seller, this Agreement shall be valid, binding and enforceable against Seller in accordance with its terms. Seller will execute and deliver to Purchaser, or cause to be executed and delivered to Purchaser, all documents and instruments necessary to consummate this transaction in accordance with the terms hereof;

C. There are no utility or roadway payback agreements affecting the Shopping Center created by or known to Seller, no notices of intention to claim any lien (or similar documents) have been received by Seller or any possessory rights created by or known to Seller other than the Store Leases.

D. Except for the Planned Unit Development Agreement, dated on various dates in March, 1998 (“PUD”), by and among Seller’s predecessor, the County of ____________, Michigan and the Township, the Shopping Center is not subject (i) to any deed restrictions, easements, use restrictions, encroachments, statutes, ordinances, rules, regulations, restrictions or codes (including building and use codes and zoning ordinances) which would prevent or restrict the intended use or resale of the Shopping Center by Purchaser, or (ii) to any unrecorded deed, restrictions, easements or use restrictions.

E. The Purchased Assets are not subject to any claim of lien or special assessment, either recorded or unrecorded, and no improvements to or upon the

Shopping Center have been made within one hundred twenty (120) days prior to the Effective Date which could give rise to a claim of lien or special assessment.

F. There are no reservations of minerals, mineral rights, oil, gas and other hydrocarbon substances, timber rights or leases, profits or licenses of such rights pertaining to the Shopping Center.

G. There are no condemnation proceedings pending or contemplated against any part of the Shopping Center.

H. Subject to the PUD, the Shopping Center may be used as proposed by Purchaser and no part thereof will, within the knowledge of Seller, be required to be dedicated for any public or quasi-public use.

I. There are no public improvements which have been ordered, threatened, announced or contemplated which have not been completed, assessed and paid for.

J. There are no actions or proceedings, pending or, to Seller's knowledge, threatened, against Seller or the Purchased Assets, including liability claims in which the amount involved or other relief sought would (i) materially affect Seller's ability to perform its obligations under this Agreement, (ii) attach to or involve Seller's interest in the Purchased Assets, or (iii) result in the joinder of Purchaser in such actions or proceedings.

K. The Shopping Center is free of and does not contain and Seller has not discharged, released, generated, treated, stored, disposed of or deposited in, on or under the Shopping Center any hazardous or toxic wastes, substances or materials (as defined or regulated by any Environmental Laws) or violated any Environmental Laws. Seller has not received any notices, regulatory orders or claims of any violation of any environmental laws by any governmental agency having jurisdiction thereof or any third party. The term "Environmental Laws" means any applicable federal, state, county or local statutes, laws, regulations, rules, ordinances, or codes relating to environmental matters, including by way of illustration and not by way of limitation,

the Clean Air Act, the Federal Water Pollution Control Act of 1972, the Resource, Conservation and Recovery Act of 1976, the Comprehensive Environmental, Response, Compensation and Liability Act of 1980, the Superfund Amendment and Reauthorization Act of 1986, the Federal Hazardous Materials Transportation Act, the Toxic Substance Control Act and any rules, regulations, standards or guidelines issued pursuant to any of the aforesaid and all other applicable environmental standards or requirements.

L. There are no leases, tenancies or rights of possession (pursuant to either oral or written agreements) with respect to the Shopping Center other than the Store Leases.

M. There are no taxes or assessments which are past due or which have become a lien upon the Purchased Assets except for current taxes which are being prorated and adjusted in connection with the closing.

N. Seller has, as of the Effective Date, received no notices of violation of any law, rule, regulation or ordinance issued in connection with the Purchased Assets by any agency or department having jurisdiction thereof, and Seller hereby agrees to provide Purchaser with copies of any such notices received after the Effective Date.

O. Seller has obtained a Certificate of Occupancy for the Shopping Center, including all of the stores, and all licenses and permits from all governmental authorities necessary for the construction, development, operation and use of the Shopping Center; the zoning classification of the Shopping Center is not violated by the uses and/or improvements thereon as of the date hereof, and there is presently adequate parking on the Shopping Center to comply with the requirements of the applicable zoning laws. Seller shall assign to Purchaser at Closing all such licenses and permits which are necessary to enable Purchaser to use and operate the Shopping Center.

P. The improvements (including parking areas and landscaping) on or about the Shopping Center and all systems are in a good condition, are adequate to

own, operate and use the Shopping Center, are structurally safe and sound without defects (latent or patent) and are fit for the purpose designed and intended, subject to ordinary wear and tear. All operating systems of the Shopping Center, including without limitation the HVAC system, plumbing system, electrical system, fire alarm system, water and sewer systems and other systems are in good operating condition. All water hydrants, fire prevention and safety equipment required by law are in operation and are of sufficient size and capacity for the proper safety of the Shopping Center and meet all applicable fire, life, safety and similar codes and all site plan approvals. In the event Purchaser incurs any costs and expenses for repairs or rebuilding or any other costs and expenses as a result of Sellers' breach with the warranty and representation, Purchaser shall have the right to set off such amount against the Purchase Price or recover such amount from Seller as damages for the breach of this Agreement.

Q. The Shopping Center has adequate access to and from public roads or rights-of-way. The owner of the Shopping Center and its agents, employees, tenants, occupants, customers, invitees and licensees, have the right to use any adjacent commercial property for pedestrian and vehicular ingress and egress to and from the Shopping Center and for the parking of motor vehicles thereon.

R. Usable public sanitary and storm sewers, public water, telephone, gas and electrical utilities ("Public Utilities") have adequate capacity for the operation of the Shopping Center, are installed and are duly connected to the Shopping Center and can be used without any charge except the normal and usual metered charges imposed for such Public Utilities. All such Public Utilities required for the operation of the Shopping Center enter the Shopping Center either through public right-of-ways or adjoining private lands pursuant to private easement benefiting the Shopping Center.

S. Public water, gas and electrical utilities are separately metered for the Shopping Center.

T. Seller has not and will not from and after the date hereof enter into any leases or otherwise encumber the Purchased Assets, enter into any agreements

which would be binding upon the Purchaser after its acquisition of the Purchased Assets or which would effect the Purchaser's title to or right to possession of the Purchased Assets or perform any act or alteration which would change the current condition of the Shopping Center or in any manner impair or diminish the value of the Shopping Center.

U. Seller has obtained all consents required to permit all of the transactions contemplated by this Agreement and the sale of the Shopping Center (i) does not require the consent or approval of any public or private authority or any other entity which has not already been obtained by Seller, and (ii) is in compliance with the Michigan Land Division Act (“Act”);

V. The execution of this Agreement and the consummation of the transactions provided for herein, and the fulfillment of the terms hereof, will not result in a breach of any of the terms or provisions of, or constitute a default under, any instruments to which Seller is a party or by which Seller is bound, or any judgment, decree or order of any court or governmental body, or any applicable law, rule or regulation;

W. No property other than the Shopping Center is included in the tax assessment of the Shopping Center which constitutes its own separate tax parcel and there are no unpaid real estate taxes or assessments;

X. The Shopping Center has adequate drainage systems and easements in place so that water freely runs off it and does pool or collect on any portion of the Shopping Center; and such runoff does not violate the rights of any owners of adjacent property;

Y. There are no encroachments on the Shopping Center from adjacent properties, no encroachments of any improvements on the Shopping Center on to adjacent properties and no survey matters which may be a defect in title to the Shopping Center; and

Z. All Documents , Records and any other information, data, statements, drawings and other matters relating to the Shopping Center and delivered or communicated to Purchaser by or on behalf of Seller, are true, complete and accurate, and Seller has not failed to disclose in writing to Purchaser any material fact or matter affecting or pertaining to the Shopping Center.

AA. The Purchased Assets, including the Shopping Center, and Seller are adequately insured, in accordance with sound shopping center management practices, for fire and other casualty and against claims for liability due to injury to person or property at the Shopping Center. All insurance policies providing such coverage are presently in full force and effect and fully paid and Seller shall maintain all such policies in full force and effect through the Closing Date.

BB. The Land Contracts are in full force and effect and there is no default thereunder by either Seller or the vendors.

CC. Landlord and the Shopping Center are in full compliance with all statutes, laws, ordinances, rules, regulations, restrictions and codes, including the PUD, relating to or affecting the use and operation of the Shopping Center.

DD. With respect to each of the tenants of the Shopping Center, Seller further represents and warrants to Purchaser as follows, the truth and accuracy of which shall be a condition precedent to Purchaser's obligation to close:

1. All the obligations of the Landlord under the Store Leases that accrue as to the Closing Date have been performed including, but not limited to, all required tenant improvements, cash or other inducements, rent abatements or tenant concessions, installations and constructions and each tenant has unconditionally accepted Lessor's performance of such obligations. No tenant has asserted any offsets, defenses or claims available against rent payable by it for other performance or obligations otherwise due from it under any Store Lease;

2. No tenant is in default under any term or provision of its Lease and Seller has no reason to believe that any tenant is, or may become, unable or unwilling to perform any or all of its obligations under its Lease, whether for financial or legal reasons or otherwise;

3. Seller has provided Purchaser with true, accurate and complete copies of all Store Leases, including all amendments and modifications;

4. The rent roll attached hereto as **Exhibit G** accurately identifies all tenants and the following with respect to each tenant: square footage of leased premises, rent, tenant percentage or proportionate share of common area maintenance charges, rental concessions, tenant improvement allowances, security deposits, options, rights of first refusal and purchase rights. No tenant has prepaid rent in excess of one month in advance and all security deposits held by Seller identified on attached **Exhibit G** are true and accurate;

5. No tenant has been given any rights of first refusal, options or similar agreement to purchase the Shopping Center;

6. There are no brokers' commissions, finders' fees, or other charges payable or to become payable to any third party on behalf of Seller as a result of or in connection with any Store Lease or any transaction related thereto, including, but not limited to, any exercised or unexercised option(s) to expand or renew;

7. Seller shall pay and Seller retains sole and exclusive responsibility for, all expenses connected with or arising out of the negotiation, execution and delivery of the Store Leases,

including, without limitation, brokers' commissions (including those applicable to future expansions or renewals by any tenant) leasing fees and recording fees (as well as the cost of all tenant improvements not paid for by tenants) and Seller shall be deemed to have certified and warranted payment thereof to Purchaser at the Closing; and

8. Neither Seller, nor any entity in which Seller (or any shareholder or owner of Seller) has any interest or right for a period of two (2) years following the termination of any Store Lease, to lease or contract to lease real estate to any such tenant.

Seller shall promptly disclose in writing to Purchaser any change in any facts or circumstances which would make any of the representations and warranties set forth in this Paragraph 6, inaccurate, incomplete or misleading in any respect. If prior to the Closing, Purchaser shall discover that any of Seller's representations and warranties are incorrect, then Purchaser, at its option, shall have the right to terminate this Agreement with no liability on its part and recover from Seller all damages, costs and expenses as a result of Seller's breach of such representations and warranties. At the Closing, Seller shall execute an affidavit, in form and substance acceptable to Purchaser ("Affidavit"), which shall make the foregoing representations and warranties effective as of the Closing Date and provide that such representations and warranties shall survive the Closing.

CONDITIONS PRECEDENT

The following are additional conditions precedent to Purchaser's obligation to complete the transaction and unless all of the conditions are satisfied or waived in writing by the Purchaser, this Agreement shall be null and void:

A. Seller shall have performed and complied with all agreements, covenants and obligations of Seller under this Agreement. Each representation and warranty of Seller set forth herein shall be accurate, complete and true on the Closing Date.

B. The Shopping Center shall be in good operating condition and repair, properly maintained and water tight, as solely determined by Purchaser, including the roof, structural walls and components, HVAC system, electrical, plumbing, water, sewer and utility systems, interior and exterior buildings and improvements and parking areas.

C. The Shopping Center shall be adequately served by gas, electricity, water, sanitary sewer, storm sewer, telephone and all other utilities in sufficient capacity and in full operational condition.

D. The Shopping Center shall be properly zoned for its office and warehouse use and shall not need or be subject to any variances or other zoning modifications and the Shopping Center shall be in compliance with all zoning laws, building and use laws, codes and restrictions, including the Americans With Disabilities Act and all other restructuring affecting the Shopping Center.

E. The Shopping Center shall be in compliance with all laws, statutes, orders, ordinances, codes, rules or regulations of any federal, state or municipal body or other governmental agency or authority having jurisdiction thereof, including, without limitation, occupational safety and health requirements, lead-based paint regulations, asbestos abatement rules, regulations and requirements, occupancy permits, and Environmental Laws.

F. Purchaser shall have received a satisfactory environmental report performed by an environmental consultant acceptable to Purchaser and its lender, and certified to Purchaser and its lender, at the sole cost and expense of Seller, showing that the Shopping Center does not contain any asbestos, urea-formaldehyde foam insulation, underground gas storage tanks, or any other hazardous or toxic substances, materials or waste as defined in or regulated by any Environmental Laws.

G. There shall be no defaults under any of the Store Leases, the Land Contract, the Contracts or any other encumbrance on the Shopping Center. The Licenses shall be in full force and effect and in compliance with all applicable law.

H. Purchaser shall have received from counsel for Seller, a written opinion dated as of the Closing Date, in form and substance reasonably satisfactory to Purchaser and its counsel, to the effect that the transactions contemplated hereby are within the power of Seller and have been duly authorized and approved by Seller and that this Agreement and all documents and instruments executed pursuant to or in connection with this Agreement constitute valid and binding obligations of the Seller enforceable in accordance with their terms.

I. Purchaser shall have received from Seller true and complete copies of all Records, Licenses, Documents, Store Leases, Warranties, Contracts and Intangible Shopping Center.

J. The physical condition of the Shopping Center on the Closing Date shall be as required under this Agreement and the Seller shall have performed all operations, maintenance and repairs through the date of Closing as required by Paragraph 9.

K. Purchaser shall have obtained, within sixty (60) days following the Effective Date, a binding mortgage loan commitment for financing of its acquisition of the Purchased Assets from a mortgage lender acceptable to Purchaser and on terms and conditions satisfactory to Purchaser, provided any such mortgage loan covering

the Shopping Center shall be without recourse to the Purchaser or any of its members or Shareholders.

L. The Shopping Center shall constitute a separate tax parcel.

SELECT ISSUES IN NEGOTIATING LEASES WITH ONEROUS TENANTS

By: Michael W. Maddin
and
Steven D. Sallen

I. PREMISES DESCRIPTION

A. The floor area and methods of measurement of leased premises

B. Parking field area, lighting, maintenance, etc.

C. Sight lines to major roads

D. Common areas

1. Definition of permitted CAM expenses

2. Reductions in CAM charges for income derived from rental generated from common area ventures (kiosks; ATM's, etc.)

3. Management and administrative fees

E. Roof

1. Communications equipment (Landlord's vs. Tenant's)

2. Signage (Landlord's vs. Tenant's)

II. CONSTRUCTION

A. Timing of plan reviews and approvals

B. Building permits

C. Time to build

1. Force mejeure

D. Delivery

1. Completion vs. substantial completion

2. Certificate of occupancy (temporary vs. permanent)

3. Parking areas; curb cuts and other amenities

III. TERM/COMMENCEMENT

A. Opening Co-tenancy

B. Blackout periods

C. Lease commencement acknowledgement letter

D. Continuing Co-tenancy

E. Termination rights

IV. USE

A. Tenant's specific permitted uses

1. Exclusivity and remedies for violation

2. Radius restrictions

3. Any other use permitted by law

B. Prohibited uses (vices)

C. Coordination with other tenant exclusives

D. Go dark and recapture

E. Self-help and rent abatements

F. Hold harmless and indemnity

G. Percentage rent: gross sales exclusions

V. <u>GUARANTY</u>

A. Bait and switch

B. Payment vs. performance

C. The foreign corporation guarantor

VI <u>MORTGAGEE ISSUES</u>

A. Insurance

B. Tenant rights of abatement and setoff

C. Subordination, Non-disturbance and Attornment Agreement

D. Default notices and mortgagee right to cure

1. Landlord defaults

2. Tenant defaults

E. Approval of Lease modifications

F. Approval of Lease assignment and subletting

SAMPLE LEASE PARAGRAPHS

PERMITTED USES

TENANT'S VERSION:

Sale of women's, men's and children's apparel, accessories of all kinds, shoes and sneakers, jewelry, cosmetics, toiletries, bath and body products, gift and boutique items, or for any other lawful purpose.

LANDLORD'S VERSION:

Sale at retail of women's, junior, missy, petite and pre-teen sizes, ~~men's and children's~~ apparel, accessories of all kinds, ~~shoes and sneakers, jewelry, cosmetics, toiletries,~~ ~~bath and body products, gift and boutique items, or for any other lawful purpose.~~

EXCLUSIVE USE

TENANT'S VERSION:

Upon the commencement of operation in the Shopping Center (as same may be expanded) of any retail store selling women's, men's and children's apparel, accessories of all kinds, shoes and sneakers, jewelry, cosmetics, toiletries, bath and body products, gift and boutique items (i) Rent and all Additional Rent due hereunder shall abate and Tenant shall pay, in lieu thereof, a sum equal to One ($1.00) Dollar per square foot per year, payable one-twelfth (1/12th) per calendar month, and (ii) Tenant shall have the right at any time thereafter to terminate this Lease upon thirty (30) days' prior written notice to Landlord. Tenant's rights set forth herein shall be effective the date of the commencement of operation in the Shopping Center of the store or stores described above and shall continue until the earlier of the termination of this Lease or such time as the store or stores described above shall cease to operate at the Shopping Center. Upon such termination neither party hereto shall have any further obligations hereunder. The foregoing rights shall also apply to the remerchandising of any existing store in the Shopping Center.

LANDLORD'S VERSION:

Provided that and for so long as Tenant is conducting business as a fully stocked and staffed Skinny Minnie's Dress Store in the entire Leased Premises, ~~Upon the commencement of operation in the~~ Landlord shall not permit in the Shopping Center (as same may be expanded) ~~of~~ any retail store substantially (i.e., more than 25% of retail sales floor area) devoted to selling women's, junior, missy, petite and pre-teen size ~~men's and children's~~ apparel and accessories ("Tenant's Exclusive Items"), ~~of all kinds, shoes and sneakers, jewelry, cosmetics, toiletries, bath and body products, gift and boutique items~~ Upon opening up of a store in violation of the preceding clause, (i) base Rent ~~and all Additional Rent~~ due hereunder shall abate and Tenant shall pay, in lieu thereof, a sum equal to One ($1.00) Dollar per square foot per year, payable one-twelfth (1/12th) per calendar month, and (ii) Tenant shall have the right at any time thereafter to terminate this Lease upon thirty

(30) days' prior written notice to Landlord, unless, in the event of a violation of this section, such tenant ceases to sell Tenant's Exclusive Items, within sixty (60) days after Landlord's receipt of written notice of a violation of this Section from Tenant, in which case this Lease shall be reinstated in good standing. Provided that, and for so long as Tenant is conducting business as a fully stocked and staffed Skinny Minnie's Dress Store in the entire Leased Premises. Tenant's rights set forth herein shall be effective the date of the commencement of operation in the Shopping Center of the store or stores described above and shall continue until the earlier of the termination of this Lease or such time as the store or stores described above shall cease to operate at the Shopping Center. Upon such termination neither party hereto shall have any further obligations hereunder. The foregoing rights shall also apply to the re-merchandising of any existing store in the Shopping Center.

CONDITIONS ON COMMENCEMENT OF TERM

TENANT'S VERSION:

A. Permits and Approvals. Landlord represents that it shall deliver possession of the Leased Premises in accordance with the provisions hereof to Tenant, in the condition required hereunder, on or before August 1, 2002, however Tenant shall in no event be required to accept possession of the Leased Premises prior to such date. Notwithstanding anything herein to the contrary, in no event shall the date of possession be deemed earlier than the date a fully executed Lease is delivered to Tenant. In the event Tenant is unable to obtain all the necessary permits and approvals to build its store by the date of delivery of possession of the Leased Premises to Tenant, then notwithstanding anything contained in this Lease to the contrary, the Commencement Date shall be delayed commensurately with the delay in obtaining possession and said permits and approvals. In the event Tenant is unable to obtain a permanent Certificate of Occupancy as a result of any failure by Landlord to complete Landlord's Work or any work required to be performed by Landlord outside of the Leased Premises, the Commencement Date shall be delayed commensurately with the delay in obtaining the permanent Certificate of Occupancy. Tenant shall receive a credit in the amount of $500.00 per day against the first accruing Rent and Additional Rent due under the Lease (a) for each day that delivery to Tenant of the Leased Premises, with all of Landlord's Work completed in accordance with the requirements of this Lease, is delayed beyond August 1, 2002, and (b) for each day the Commencement Date is delayed because of Landlord's failure to satisfy all of Landlord's obligations set forth herein. It is agreed that, with respect to this Section, time is of the essence, and the provisions of Section FORCE MEJEURE shall not apply to Landlord's obligations.

B. Opening Co-Tenancy. Until (1) Grocery Store is open for business containing 50,000 square feet and is located as shown on Exhibit "A"; and (2) at least 60% of the gross leaseable area (exclusive of the Leased Premises, the Grocery Store, any theater, health club, post office, bank, office space of any kind, bowling

alley, hair salon, or restaurant), is occupied by retail tenants which are open for business, Tenant shall have the option of (a) delaying its opening and the Term of the Lease shall not commence until both (i) such requirements are met, and (ii) the provisions of Subsection C, below, are satisfied, or (b) opening for business, in which event, the Initial Lease Term shall commence and Tenant shall pay, in lieu of all Rents and Additional Rent payable under this Lease, the lesser of (x) the Minimum Rent, or (y) two (2%) percent of Gross Sales, as defined herein, on a Sales Base of Zero ($0.00) Dollars.

C. Blackout Dates. Notwithstanding any other provisions of this Lease to the contrary, the Commencement Date shall not occur and payment of Rent and Additional Rent due under the Lease shall not commence prior to October 1, 2002 or during the periods November 1 through February 28 and June 1 through August 1 of any year, the same being slack periods in Tenant's business, unless Tenant elects to open for business during such periods in which event the Initial Lease Term shall commence on the date Tenant opens for business and Tenant shall pay Rent and Additional Rent in accordance with all of the provisions of this Lease.

LANDLORD'S VERSION:

A. Permits and Approvals. Landlord represents that it shall deliver possession of the Leased Premises in accordance with the provisions hereof to Tenant, in the condition required hereunder, on or before August 1, 2002, however Tenant shall in no event be required to accept possession of the Leased Premises prior to such date. Notwithstanding anything herein to the contrary, in no event shall the date of possession be deemed earlier than the date a fully executed Lease is delivered to Tenant. ~~In the event Tenant is unable to obtain all the necessary permits and approvals to build its store by the date of delivery of possession of the Leased Premises to Tenant, then notwithstanding anything contained in this Lease to the contrary, the Commencement Date shall be delayed commensurately with the delay in obtaining possession and said permits and approvals.~~ In the event Tenant is unable to obtain a permanent Certificate of Occupancy as a result of any failure by

Landlord to complete Landlord's Work or any work required to be performed by Landlord outside of the Leased Premises, the Commencement Date shall be delayed commensurately with the delay in obtaining the temporary or permanent Certificate of Occupancy. Tenant shall receive a credit in the amount of $500.00 per day against the first accruing Rent and Additional Rent due under the Lease ~~(a)~~ for each day that delivery to Tenant of the Leased Premises, with all of Landlord's Work completed in accordance with the requirements of this Lease, is delayed beyond August 1, 2002~~, and (b) for each day the Commencement Date is delayed because of Landlord's failure to satisfy all of Landlord's obligations set forth herein~~. It is agreed that, with respect to this Section 2.4.A, time is of the essence~~ and the provisions of Section FORCE MEJEURE shall not apply to Landlord's obligations~~.

B. Opening Co-Tenancy. Until (1) Grocery Store is open for business containing 50,000 square feet and is located as shown on Exhibit "A"; and (2) at least 60% of the gross Leaseable area (exclusive of ~~the Leased Premises,~~ the Grocery Store, any theater, health club, ~~post office, bank, office space of any kind,~~ bowling alley~~, hair salon, or restaurant~~), is occupied by retail tenants which are open for business, Tenant shall have the option of (a) delaying its opening and the Term of the Lease shall not commence until both (i) such requirements are met, and (ii) the provisions of Subsection C, below are satisfied, or (b) opening for business, in which event, the Initial Lease Term shall commence and Tenant shall pay, in lieu of all Rents ~~and Additional Rent~~ payable under this Lease, the lesser of (x) the Minimum Rent, or (y) two (2%) percent of Gross Sales, as defined herein, on a Sales Base of Zero ($0.00) Dollars, in either event, plus all Additional Rent.

C. Blackout Dates. Notwithstanding any other provisions of this Lease to the contrary, the Commencement Date shall not occur and payment of Rent and Additional Rent due under the Lease shall not commence prior to October 1, 2002 ~~or during the periods November 1 through February 28 and June 1 through August 1 of any year, the same being slack periods in Tenant's business~~, unless Tenant elects to open for business ~~during such periods~~ prior to such date, in which event the Initial Lease Term shall commence on the date Tenant opens for business and Tenant

shall pay Rent and Additional Rent in accordance with all of the provisions of this Lease.

LANDLORD'S WORK

TENANT'S VERSION:

Landlord shall cause to be performed its work required by Exhibit "C" ("Landlord's Work"). All such work shall be done in a good and workmanlike manner employing appropriate materials so as to conform to all governmental requirements and the specifications set forth in Exhibit "C". Landlord must give Tenant at least ninety (90) days' prior written notice of the anticipated date of delivery of possession of the Leased Premises ("Notice of Anticipated Completion"). Landlord shall notify Tenant in writing when Landlord's Work is complete and the Leased Premises are ready for delivery to Tenant ("Notice of Completion"). The effective date of such Notice of Completion for purposes of Section TERM of this Lease shall be the date which is five (5) days after Tenant's receipt of such Notice of Completion. Landlord warrants that Landlord's Work shall be delivered free and clear of liens, encumbrances, violations or conditions which may constitute violations of any laws, ordinances, or regulations relating to the use, occupancy and construction of the Leased Premises or the building containing the same. Landlord's Work shall be deemed approved by Tenant when Tenant is open for business in the Leased Premises except for any items of Landlord's Work which are incomplete or do not conform to Exhibit "C" and except for any latent defects. Tenant shall notify Landlord of any incomplete or non-conforming work. In the event Landlord shall fail to remedy any such incomplete or non-conforming work within (i) forty-eight (48) hours after notice from Tenant if such incomplete or non-conforming work shall prevent Tenant from performing or completing Tenant's Work (as defined herein), or (ii) ten (10) days after notice from Tenant if such incomplete or non-conforming work consists only of punchlist items which do not prevent Tenant from performing or completing Tenant's Work, Tenant may undertake such work without further notice to Landlord, and at the expense of Landlord. If Tenant has not received reimbursement from Landlord for performance of such work on behalf of Landlord within ten (10) days after the date of a bill therefor, Tenant may deduct such sum from the first accruing Rents and Additional Rent due under the Lease. If Landlord shall for any reason, have failed to

complete Landlord's Work and deliver possession of the Leased Premises to Tenant on or before August 1, 2002, Tenant shall have the right to cancel this Lease by giving written notice of such cancellation to Landlord. It is agreed that, with respect to this date, time is of the essence, and the provisions of Section FORCE MEJEURE shall not apply thereto.

LANDLORD'S VERSION:

Landlord shall cause to be performed its work required by Exhibit "C" ("Landlord's Work"). All such work shall be done in a good and workmanlike manner employing appropriate materials so as to conform to all governmental requirements and the specifications set forth in Exhibit "C". ~~Landlord must give Tenant at least ninety (90) days' prior written notice of the anticipated date of delivery of possession of the Leased Premises ("Notice of Anticipated Completion").~~ Landlord shall notify Tenant in writing when Landlord's Work is complete and the Leased Premises are ready for delivery to Tenant ("Notice of Completion"). The effective date of such Notice of Completion for purposes of Section TERM of this Lease shall be the date ~~which is five (5) days after~~ of Tenant's receipt of such Notice of Completion. Landlord warrants that Landlord's Work shall be delivered free and clear of liens, encumbrances, violations or conditions which may constitute violations of any laws, ordinances, or regulations relating to the use, occupancy and construction of the Leased Premises or the building containing the same. Landlord's Work shall be deemed approved by Tenant when Tenant is open for business in the Leased Premises except for any items of Landlord's Work which are incomplete or do not conform to Exhibit "C" and except for any latent defects. Tenant shall notify Landlord, in writing, of any incomplete or non-conforming work. In the event Landlord shall fail to remedy any such incomplete or non-conforming work within (i) ~~forty-eight (48) hours~~ ten (10) days after notice from Tenant if such incomplete or non-conforming work shall prevent Tenant from performing or completing Tenant's Work (as defined herein), or (ii) ~~ten (10)~~ thirty (30) days after notice from Tenant if such incomplete or non-conforming work consists only of punchlist items which do not prevent Tenant from performing or completing Tenant's Work, Tenant may undertake such work

without further notice to Landlord, and at the expense of Landlord. If Tenant has not received reimbursement from Landlord for performance of such work on behalf of Landlord within ten (10) days after the date of a bill therefor, Tenant may deduct such sum from the first accruing Rents ~~and Additional Rent~~ due under the Lease; provided, however, in no event shall Tenant deduct in any single month, an amount greater than 25% of the base Rent due in such month. If Landlord shall for any reason, other than delays caused by Tenant or its agents, have failed to complete Landlord's Work and delivered possession of the Leased Premises to Tenant on or before ~~October 1, 2002~~ April 1, 2003, Tenant shall have the right to cancel this Lease by giving written notice of such cancellation to Landlord. It is agreed that, with respect to this date, time is of the essence~~, and the provisions of Section FORCE MEJEURE shall not apply thereto~~.

REAL ESTATE TAXES

TENANT'S VERSION:

Landlord shall in the first instance pay, or cause to be paid, all real estate taxes assessed against the Shopping Center and the Leased Premises on the date due. The real estate taxes upon the Shopping Center for any Tax Year shall mean such amounts as shall be finally determined after deducting abatements, refunds, or rebates, if any, to be the real estate taxes payable with respect to the Shopping Center for said Tax Year, but excluding any penalties or assessments for late payment of such taxes. Except as provided hereafter, Tenant shall pay to Landlord, with respect to each Tax Year or portion thereof included in the Lease Term, Tenant's pro-rata share (as hereinafter defined) of the amount of real estate taxes upon the Shopping Center (exclusive of betterments or special assessments). A "Tax Year" shall mean that twelve calendar month period commencing with the date as of which real estate tax assessments are made. Tenant's pro-rata share of such real estate taxes shall be an amount equal to that proportion of such taxes, which the gross Leaseable area of the Leased Premises bears to the gross leaseable area of the Shopping Center. It is specifically agreed that under no circumstances shall Tenant be liable for direct or indirect assessments, impositions, taxes, levies or other charges imposed by any Taxing Authority which pertain to any bonds or extraordinary assessments including, but not limited to, General or Limited Obligation Improvement Bonds or any other "municipal" type bonds. In addition, in no event shall Tenant be liable for any so-called "impact" fees or charges of any kind required to be paid due to the construction or renovation of the Shopping Center, the Leased Premises or the opening for business of the Leased Premises. Any increase in real estate taxes resulting from a re-assessment of the Shopping Center due to the sale thereof shall not be included in the definition of real estate taxes for purposes of this Lease.

LANDLORD'S VERSION:

Landlord shall in the first instance pay, or cause to be paid, all real estate taxes assessed against the Shopping Center and the Leased Premises before the same become delinquent~~on the date due~~. ~~The real estate taxes upon the Shopping Center for any Tax Year shall mean such amounts as shall be finally determined after deducting abatements, refunds, or rebates, if any, to be the real estate taxes payable with respect to the Shopping Center for said Tax Year, but excluding any penalties or assessments for late payment of such taxes.~~ For purposes of this Lease, real estate taxes shall include any tax and/or assessment of any kind or nature presently or hereafter imposed by the state of Michigan or any political subdivision thereof or any governmental authority having jurisdiction thereof, upon, against or with respect to the land and buildings constituting the Shopping Center. Except as provided hereafter, Tenant shall pay to Landlord, with respect to each Tax Year or portion thereof included in the Lease Term, Tenant's pro-rata share (as hereinafter defined) of the amount of real estate taxes upon the Shopping Center~~ (exclusive of betterments or special assessments)~~. A "Tax Year" shall mean that twelve calendar month period commencing with the date as of which real estate tax assessments are made. Tenant's pro-rata share of such real estate taxes shall be an amount equal to that proportion of such taxes, which the gross leaseable area of the Leased Premises bears to the gross leaseable area of the Shopping Center. ~~It is specifically agreed that under no circumstances shall Tenant be liable for direct or indirect assessments, impositions, taxes, levies or other charges imposed by any Taxing Authority which pertain to any bonds or extraordinary assessments including, but not limited to, General or Limited Obligation Improvement Bonds or any other "municipal" type bonds~~ In no event shall Tenant be liable for any so-called "impact" fees or charges of any kind required to be paid due to the construction of the Shopping Center~~, the Leased Premises or the opening for business of the Leased Premises. Any increase in real estate taxes resulting from a re-assessment of the Shopping Center due to the sale thereof shall not be included in the definition of real estate taxes for purposes of this Lease.~~

COMMUNICATIONS DEVICE

TENANT'S VERSION:

Tenant shall have the right, at Tenant's sole option, to install an antenna or satellite "dish", or similar device for the reception and transmission of signals ("Device"), on the roof or exterior of the Leased Premises. The Device shall be installed at Tenant's expense and Tenant shall comply with all laws, ordinances and regulations relating to the installation, use and maintenance of the Device.

LANDLORD'S VERSION:

Tenant shall have the right, at Tenant's sole option, to install an antenna or satellite "dish", or similar device for the reception and transmission of signals to and from the business of Tenant only ("Device"), on the roof or exterior of the Leased Premises; provided that the Device is located in such position as is approved in advance by Landlord, and is not visible from any street, and is screened in a manner architecturally compatible with the remainder of the Shopping Center. The Device shall be installed at Tenant's expense, without roof penetration of any kind, and Tenant shall comply with all laws, ordinances and regulations and the instructions and requirements of Landlord (including coordinating with Landlord's roofing contractor, so as to avoid violating any roofing warranties) relating to the installation, use and maintenance of the Device. Tenant shall not enter upon the roof to maintain or repair the Device without the prior written consent of Landlord in each such instance (excepting cases of emergency or where damage to the building is possible) and Tenant shall be responsible for any maintenance and repairs to the Shopping Center necessitated by Tenant's installation, maintenance, repair and removal of the Device.

TENANT'S OPERATIONS COVENANT

TENANT'S VERSION:

Tenant agrees initially to open the Leased Premises for business to the general public for at least one day. Notwithstanding anything to the contrary contained in the immediately preceding sentence or elsewhere in this Lease, after such initial opening Tenant shall not be obligated to conduct or to remain open for the conduct of any business in the Leased Premises.

LANDLORD'S VERSION:

Tenant agrees initially, and in good faith, to open the entire Leased Premises for business to the general public as a fully fixtured, inventoried, operational and staffed Skinny Minnie's Dress Store for at least one ~~day~~ full calendar month. Notwithstanding anything to the contrary contained in the immediately preceding sentence or elsewhere in this Lease, after such initial opening Tenant shall not be obligated to conduct or to remain open for the conduct of any business in the Leased Premises.

RECAPTURE

If, for any reason other than a Permitted Closing (as herein defined), Tenant shall close its store, and if such closing continues for a period of time in excess of ___________ consecutive months, then, at any time thereafter, Landlord shall have the right upon written notice ("Landlord's Termination Notice") to Tenant to terminate this Lease upon a date (the "Proposed Termination Date") which is not less than sixty (60) days and not more than ninety (90) days following Landlord's Termination Notice, provided that such notice is accompanied by (i) a release duly executed by Landlord in form reasonably satisfactory to Tenant, wherein Landlord releases Tenant from all obligations and liabilities under this Lease accruing after the effective date of such termination (other than any liabilities which expressly survive termination of this Lease or accrued prior to such termination date, which liabilities shall survive said termination)., (ii) a release executed by the holder of any mortgage to which this Lease may be subordinate, in form reasonably satisfactory to Tenant, and (iii) Landlord's payment to Tenant of the Termination Payment Amount described below and required as consideration for such termination right.

SUBORDINATION, NON-DISTURBANCE AND ATTORNMENT

TENANT'S VERSION:

This Lease shall become subject and subordinate to the lien of any mortgage of the entire fee interest of the Shopping Center made to a bank, trust company, or savings and loan association, and any renewals, modifications or extensions thereof, provided that a Subordination, and Non-Disturbance Agreement in recordable form and in the form annexed hereto as Exhibit "F" is executed, acknowledged and delivered by such mortgagee to Tenant. If the holder of any first mortgage of the entire fee interest of the Shopping Center requires that this Lease have priority over such mortgage, Tenant shall, upon request of such holder, execute, acknowledge and deliver to such holder any agreement acknowledging such priority.

LANDLORD'S VERSION:

This Lease shall become subject and subordinate to the lien of any mortgage of the entire fee interest of the Shopping Center made to a bank, trust company, or savings and loan association, insurance company or federal or state pension or retirement fund, or other institutional lender that customarily makes commercial loans secured by mortgages against real property, and any renewals, modifications or extensions thereof, provided that a Subordination, Recognition and Non-Disturbance Agreement in recordable form and in the form annexed hereto as Exhibit "F" is executed, acknowledged and delivered by such mortgagee to Tenant. In lieu of the document attached as Exhibit F, Tenant agrees to accept a lender's form of such an agreement, provided that such an agreement; (a) does not amend the terms of this Lease; (b) does not require that any amendment of this Lease (other than a shortening of the term or a reduction of the fixed annual rent or Charges payable under this Lease) must have the lender's approval; (c) consents to and recognizes this Lease and the term thereof; (d) agrees that Tenant shall not be disturbed in its possession of the Leased Premises for any reason other than one which would entitle Landlord to terminate this Lease pursuant to the terms of this Lease; (e) waives any right to lien Tenant's trade fixtures and equipment; (f) agrees that

insurance proceeds and condemnation awards shall be available for restoration of the Leased Premises to the extent provided and/or required by this Lease; and (g) does not otherwise diminish the rights of Tenant under this Lease or impose additional requirements or burdens upon Tenant. However, such agreement may require that Tenant agree not to pay more than one (1) month's rent in advance to Landlord, and may extend to the lender the additional time to cure a Landlord's default as provided in Section LANDLORD'S DEFAULT of this Lease. If the holder of any first mortgage of the entire fee interest of the Shopping Center requires that this Lease have priority over such mortgage, Tenant shall, upon request of such holder, execute, acknowledge and deliver to such holder any agreement acknowledging such priority.

LANDLORD'S TITLE

TENANT'S VERSION:

Landlord warrants and represents to Tenant that Landlord has the right and lawful authority to enter into this Lease for the term hereof (including any Renewal Periods), and that Landlord has enforceable purchase agreements to acquire fee simple title to the Land and all existing improvements thereon. In the event that Landlord has not acquired fee simple title to the Shopping Center on or before ______________, 2002, Landlord and Tenant shall each have the option to terminate this Lease by giving notice to the other at any time prior to completion of such acquisition, and upon the giving of such notice this Lease shall immediately cease and expire and any fixed annual rent and/or Charges paid hereunder shall be refunded to Tenant. If this Lease shall be terminated pursuant to the provisions of this paragraph, then for a period of three (3) years thereafter Landlord shall not use, or permit or suffer others to use, any portion of the Land for any Retail Use (as herein defined), and this restriction shall run with and be binding upon the Land for said three (3) year period. If Landlord desires to develop any portion of the Land for any Retail Use during such three (3) year period, Landlord shall give written notice thereof to Tenant and Tenant shall have the right to reinstate this Lease by written notice given to Landlord within ninety (90) days following receipt of such notice from Landlord, and upon the giving of such notice this Lease shall be reinstated and in full force and effect.

LANDLORD'S VERSION:

Landlord warrants and represents to Tenant that Landlord has the right and lawful authority to enter into this Lease for the term hereof (including any Renewal Periods), and that Landlord has enforceable purchase agreements to acquire fee simple title to the Land and all existing improvements thereon. In the event that Landlord has not acquired fee simple title to the Shopping Center on or before ______________, 2002, Landlord and Tenant shall each have the option to terminate this Lease by giving notice to the other at any time prior to completion of such

acquisition, and upon the giving of such notice this Lease shall immediately cease and expire and any fixed annual rent and/or Charges paid hereunder shall be refunded to Tenant. If this Lease shall be terminated pursuant to the provisions of this paragraph, then for a period of three (3) years thereafter Landlord shall not use, ~~or permit or suffer others to use,~~ any portion of the Land for sale at retail of women's, junior, missy, petite and pre-teen size apparel and accessories ~~any Retail Use (as herein defined)~~, and this restriction shall ~~run with and~~ be binding upon ~~the Land~~ Landlord for said three (3) year period. If Landlord desires to develop any portion of the Land for sale at retail of women's, junior, missy, petite and pre-teen size apparel and accessories ~~any Retail Use~~ during such three (3) year period, Landlord shall give written notice thereof to Tenant and Tenant shall have the right to reinstate this Lease by written notice given to Landlord within ninety (90) days following receipt of such notice from Landlord, and upon the giving of such notice this Lease shall be reinstated and in full force and effect.

LANDLORD'S DEFAULT

TENANT'S VERSION:

A. If Landlord shall be in default hereunder, Tenant may (i) after thirty (30) days notice that Landlord is in default in the payment of any moneys which Landlord is obligated to pay pursuant to the terms of this Lease, deduct the amount thereof plus interest thereon at the Lease Interest Rate from fixed annual rent and/or Additional Rent; or (ii) after thirty (30) days notice that Tenant intends to cure such default or, without notice, if in Tenant's judgment an emergency shall exist, cure such default and Landlord shall pay to Tenant upon demand the reasonable cost thereof plus interest at the Lease Interest Rate, failing which Tenant may deduct same from any payments of fixed annual rent and/or Additional Rent. Any such deduction from fixed annual rent and/or Additional Rent shall not constitute a default by Tenant unless Tenant shall fail to pay the amount of such deduction to landlord within thirty (30) days after final adjudication by a court of competent jurisdiction that such amount is owing to Landlord. Nothing in this Section shall limit any remedies which would otherwise be available to Tenant including, but without limitation, damages and specific performance or other equitable relief.

LANDLORD'S VERSION:

A. If Landlord shall be in default hereunder, Tenant may (i) after thirty (30) days notice to Landlord and Landlord's mortgagees that Landlord is in default in the payment of any moneys which Landlord is obligated to pay pursuant to the terms of this Lease, deduct the amount thereof plus interest thereon at the Lease Interest Rate from fixed annual rent ~~and/or Additional Rent~~; or (ii) after thirty (30) days notice that Tenant intends to cure such default or, without notice, if in Tenant's judgment an emergency shall exist, cure such default and Landlord shall pay to Tenant upon demand the reasonable cost thereof plus interest at the Lease Interest Rate, failing which Tenant may deduct same from any payments of fixed annual rent ~~and/or Additional Rent~~. Any such deduction from fixed annual rent and/or Additional Rent shall not constitute a default by Tenant unless Tenant shall fail to pay the amount of

such deduction to landlord within ~~thirty (30)~~ ten (10) days after ~~final adjudication by a court of competent jurisdiction~~ a decision is rendered by an arbitrator that such amount is owing to Landlord, and the parties agree that such disputes shall be submitted for decision to binding arbitration. Nothing in this Section shall limit any remedies which would otherwise be available to Tenant including, but without limitation, damages and specific performance or other equitable relief.

B. Tenant shall not terminate this Lease or, except in an emergency, commence to cure any default of such a nature that said default could not reasonably be cured within such period as is provided above, if Landlord promptly commences and thereafter proceeds with due diligence and in good faith to cure such default.

GUARANTY OF CONSTRUCTION.

<u>TENANT'S VERSION</u>.

By execution of this Lease in their individual capacity, Oscar Owner and Peter Partner (herein called "Guarantors"), who are the principal owners of Landlord, irrevocably and unconditionally guarantee full and punctual performance of Landlord's obligations to complete initial renovation of the Shopping Center, and the Tenant's interior space buildout, and payment in full therefor, in accordance with the terms and conditions of this Lese (collectively, the "Obligations"). Guarantors shall, upon demand, pay and perform the Obligations in the same place and stead as Landlord. Guarantors further agree that this guaranty and Guarantors' liability hereunder shall not be impaired or affected by, and shall apply and continue in full force and effect with respect to, any modification, supplement, extension or amendment of any of the guaranteed Obligations. This Guaranty is an absolute, unconditional, present and continuing guaranty of payment and performance, and not of collectability, is in no way conditioned or contingent upon any attempt to collect payment from or enforce performance by the Landlord and is in no way affected by any releases, waivers or delays in enforcement of any of the Obligations. Guarantors shall not have any right of subrogation, reimbursement or indemnity whatsoever unless and until all of the Obligations have been paid and performed in full. This Guaranty is a continuing guaranty which shall remain in full force and effect notwithstanding any termination of the lease. Neither the discharge of Landlord from the Obligations in bankruptcy or in any similar proceeding nor any other event shall discharge or satisfy the liability of Guarantors hereunder except the full payment and performance of all of the Obligations.

<u>LANDLORD'S VERSION</u>:

~~By execution of this Lease in their individual capacity, Oscar Owner and Peter Partner (herein called "Guarantors"), who are the principal owners of Landlord, irrevocably and unconditionally guarantee full and punctual performance of Landlord's obligations to complete initial renovation of the Shopping Center, and the~~

~~Tenant's interior space buildout, and payment in full therefor, in accordance with the terms and conditions of this Lese (collectively, the "Obligations"). Guarantors shall, upon demand, pay and perform the Obligations in the same place and stead as Landlord. Guarantors further agree that this guaranty and Guarantors' liability hereunder shall not be impaired or affected by, and shall apply and continue in full force and effect with respect to, any modification, supplement, extension or amendment of any of the guaranteed Obligations. This Guaranty is an absolute, unconditional, present and continuing guaranty of payment and performance, and not of collectability, is in no way conditioned or contingent upon any attempt to collect payment from or enforce performance by the Landlord and is in no way affected by any releases, waivers or delays in enforcement of any of the Obligations. Guarantors shall not have any right of subrogation, reimbursement or indemnity whatsoever unless and until all of the Obligations have been paid and performed in full. This Guaranty is a continuing guaranty which shall remain in full force and effect notwithstanding any termination of the lease. Neither the discharge of Landlord from the Obligations in bankruptcy or in any similar proceeding nor any other event shall discharge or satisfy the liability of Guarantors hereunder except the full payment and performance of all of the Obligations.~~

LANDLORD'S ENVIRONMENTAL COVENANT

TENANT'S VERSION:

Landlord represents and warrants to Tenant that there are no Hazardous Materials (as hereinafter defined) contained within, upon or under the Leased Premises and/or Land and that the Leased Premises and Land are in compliance with all applicable Environmental Laws (as hereinafter defined). Landlord represents and warrants that neither Landlord, or to the best of Landlord's knowledge and belief, after thorough investigation, any former owner or occupant of the Leased Premises and/or Land has used Hazardous Materials on, from, or affecting the Leased Premises and/or Land (or any part thereof) in any manner which violates any Environmental Laws. Landlord agrees not to maintain or install or allow to be installed or maintained Hazardous Materials in the Leased Premises in violation of any Environmental Laws.

LANDLORD'S VERSION:

Environmental Law.

Notwithstanding anything herein to the contrary, and pursuant to MCL 324.20116(1), Landlord discloses to Tenant, and Tenant acknowledges that Landlord has disclosed to Tenant, that parts of the Land, which may include the Leased Premises, is a "facility", within the meaning of MCL 324.20101(1). Tenant further acknowledges that prior to entering into this Lease, Tenant has been provided with written documentation disclosing the general nature and extent of the release, and that Tenant has had ample opportunity to read and understand the disclosed information and to seek the advice of competent legal and environmental professionals concerning its rights and obligations under applicable environmental laws. Except as herein disclosed by Landlord to Tenant, Landlord represents and warrants that ~~neither~~ Landlord~~, or to the best of Landlord's knowledge and belief, after thorough investigation, any former owner or occupant of the Leased Premises and/or Land has used Hazardous Materials on, from, or affecting the Leased~~

~~Premises and/or Land (or any part thereof) in any manner which violates any Environmental Laws.~~ has no actual knowledge of the existence of any Hazardous Materials (as hereinafter defined) contained within, upon or under the Leased Premises and/or Land and that the Leased Premises and Land are in compliance with all applicable Environmental Laws (as hereinafter defined). Landlord agrees not to maintain or install or allow to be installed or maintained Hazardous Materials in the Leased Premises in violation of any Environmental Laws; provided, however, nothing herein shall prevent Landlord from leasing any portion of the Shopping Center to a dry cleaning operation; fast oil change facility or other use, provided that the operation of such other use is, in all respects, compliant with applicable Environmental Laws.

PERSPECTIVES OF THE BORROWER AND LENDER IN THE NEGOTIATION OF A COMMITMENT LETTER IN CONNECTION WITH THE FINANCING OF THE LINKS SHOPPING CENTER

By: Lowell D. Salesin
and
George A. Contis

I. INTRODUCTION

The ability of Palmer, Hogan & Jones, LLC to redevelop The Links Shopping Center in order to attract viable tenants not only depends upon the success achieved by Palmer, Hogan & Jones in attracting a new anchor tenant but also its ability to secure an acceptable funding source to: (a) finance the construction of the proposed expansion and redevelopment of The Links Shopping Center; and (b) obtain a satisfactory non-recourse permanent loan.

Masters National Bank is in receipt of a loan application from Palmer, Hogan & Jones. Based upon the information contained in the application, Masters National Bank's credit analysts reviewed the proposed project and weighed the economic and financial risks associated with financing The Links Shopping Center project, including the financial strength and creditworthiness of the anchor tenants, and the financial strength of Palmer, Hogan & Jones and its members. Based upon its review, Masters National Bank issued its loan approval. The loan approval is the basis upon which the Commitment Letter is created. The Commitment Letter operates as the agreement under which Masters National agrees to advance the funds sought by Palmer, Hogan & Jones.[1]

[1] In the case of a first time borrowing by a Borrower, most Lenders will require the Borrower to agree to the terms and conditions of a Commitment Letter. There are some exceptions to this standard practice and, in fact, some Lenders no longer issue Commitment Letters and proceed directly to the preparation of loan documents.

In certain circumstances a Commitment Letter is generated by the loan officer responsible for generating the loan. In most circumstances, however, when the amount of the proposed loan exceeds a certain threshold amount, the Commitment Letter is drafted by counsel retained by the lender.[2]

II. THE COMMITMENT LETTER PROCESS

Some borrowers do not retain counsel in connection with a loan transaction until after they have signed the Commitment Letter. These borrowers rationalize their non-use of an attorney in the negotiation process as a factor of cost containment. What these borrowers fail to realize is that a borrower's ability to negotiate more favorable terms in the loan transaction may be lost if not raised at the Commitment Letter stage. At the Commitment Letter stage, the borrower is in a position to exert some leverage vis-á-vis its relationship with the lender. The lender desires to "book" the loan and to make the deal and therefore, the borrower is in the best position to "negotiate" the finer points of the deal. In fact, borrower's counsel can often streamline the document review and negotiation process by raising and negotiating revisions to the "Standard Loan Documentation" long before the documents are even drafted.[3]

[2] Each Lender has different standards on when counsel is retained to prepare a Commitment Letter and document a loan transaction. Some Lenders require counsel's involvement for any real estate loan in excess of $500,000.00, whereas others require attorney involvement when the loan exceeds $1,000,000.00. Counsel is typically not used in real estate loans of less than $500,000.00. In our example, Masters National Bank requires attorney involvement in the drafting of the Commitment Letter and all of the associated loan documents when the amount of the loan exceeds $750,000.00.

[3] A Lender typically requires a Borrower to submit a loan application which is used to collect relevant information for the Lender to evaluate the proposed loan and includes representations and warranties made by the Borrower, who will be required to certify information upon which the Lender will rely. The application also incorporates certain provisions which protect the Lender against claims that it may have committed to make financing available and the application typically addresses the disposition of any application fees required to be paid to the Lender. The application is also often accompanied by other requests for certifications including, environmental certifications and questionnaires, which become part of the application. Any misstatement of facts, any material change in the Borrower's financial condition or the condition of the collateral to be used as security for the loan, may negate the lender's obligations to close a loan once the Commitment Letter is issued. Some Lenders combine the application form, loan commitment and standard terms and conditions into a single document to minimize the forms required to be executed by the Borrower and to simplify the loan financing process.

The Commitment Letter is an offer of financing and must be accepted by the borrower and supported by consideration. Generally, a Commitment Letter must be accepted by a specified date and a loan commitment fee, or a negotiated portion thereof, must be tendered in connection with the acceptance of the Commitment Letter. [4] Once the Commitment Letter is accepted by the borrower, a contract exists obligating the lender to loan the funds in accordance with the terms of the loan commitment.

Loan commitments typically contain both specific and general conditions precedent to the obligation of the lender to make the loan in order to protect the lender's legitimate concerns over issues both known and unknown at the time of issuing the loan commitment. Most Commitment Letters will contain general conditions or other provisions so that the lender is protected against any possible issues or contingencies not contemplated at the time the Commitment Letter is issued. The Commitment Letter will contain, in summary form, the material terms and conditions to be included within the loan documents and the general framework under which the loan will close.

One of the principal goals of a borrower as it reviews a Commitment Letter is to analyze and evaluate the terms the lender imposed as conditions of the lender's obligations to advance monies. To the fullest extent possible, the Commitment Letter should be negotiated so as to limit and/or otherwise waive terms and conditions which do not apply to the project.

The trend of many lenders is to utilize the "everything but the kitchen sink" approach in the preparation of a Commitment Letter and include all essential loan provisions in the loan commitment in order to address as many issues at the commencement of the project as possible and to ensure that such provisions will be incorporated into the first draft of the loan documents. If the material terms and conditions of the loan are successfully negotiated in the Commitment Letter, this

[4] For an analysis of the negotiation of commitment fees and the perspectives of lender and borrower, refer to the Memorandum attached hereto as Exhibit "A".

process will reduce the time period necessary to negotiate the loan documents and will reduce the cost associated with negotiating the loan documents. It is imperative that borrowers provide the Commitment Letter to their counsel for review and negotiation because the commitment provisions may foreclose a negotiating opportunity when the loan documents are produced or, at best, borrowers will be without leverage in such negotiations.

III. COMMITMENT LETTERS

What follows is an outline of the items contained in a standard commitment letter issued by Masters National Bank. Some of these items may require negotiation.

A. Credit Facilities

1. Amounts
    a. Loan to Value Ratio
    b. Loan to Cost Ratio
    c. Minimum Equity Requirements[5]
2. Use of Loan Proceeds
3. Term
4. Interest Rate
5. Repayment
6. Prepayment
    a. Construction Loan
    b. End Loan[6]
7. Loan Facility Fees
8. Security
    a. Mortgage
    b. Assignment of Leases and Rents
    c. Security Agreement
    d. General Assignments

---

[5] For a discussion of minimum equity requirements, refer to the Memorandum attached hereto as Exhibit "B".

[6] For a discussion of prepayment penalties and yield maintenance requirements, refer to the Memorandum attached hereto as Exhibit "C".

e. Cross-Collateralization and Cross Default[7]

9. Guarantys

a. Personal Guaranties and Carve-Outs[8]

b. Completion Guaranties[9]

c. Consequences of the death of a Guarantor[10]

B. Funding Requirements

a. Construction Loan

b. End Loan

C. Financial Covenants

D. Conditions of Closing

1. Appraisal

a. Construction Loan

b. End Loan

2. Environmental Assessment

3. Purchase Agreement

4. Plans and Specifications

5. Budget

6. Construction/Design Agreements

7. Permits and Approvals

8. Title/Survey[11]

9. Zoning

10. Utilities

11. Parking and Access to Public Streets

12. Building Permits

13. Leases

---

[7] For a discussion of cross collateralization and cross default, refer to the Memorandum attached hereto as Exhibit “D”.

[8] For a discussion of personal guarantys and carve-outs, refer to the Memorandum attached hereto as Exhibit “F”.

[9] For a discussion of a lender’s growing insistence to require a completion guaranty in a development or construction context, refer to the Memorandum attached hereto as Exhibit “G”.

[10] For a discussion of the enforceability of a guaranty against the estate of a guarantor, refer to the Memorandum attached hereto as Exhibit “E”.

[11] For a discussion of the Lender’s concern under the “First Shovel Rule” and its desire to have the Notice of Commencement recorded after its mortgage is recorded, refer to the Memorandum attached hereto as Exhibit “H”.

14. Estoppels/Subordination, Non-Disturbance and Attornment Agreements
15. Insurance Coverage
16. Legal Opinions
17. Approval of Third Party Agreements

E. 1. Completion of Construction
   a. Outside Completion Date
   b. Permanent vs. Temporary Certificates of Occupancy
2. Reporting Requirements

F. <u>LOAN COMMITMENTS - END LOAN PROVISIONS</u>

1. Loan Amount
2. Conditions to Conversion from Construction Loan to End Loan
3. Ongoing Loan Covenants
4. Defeasance[12]
5. Junior and Mezzanine Financing[13]

G. <u>CONCLUSION</u>

Through the process of negotiating the Commitment Letter, a borrower can significantly reduce the uncertainties involved in arranging financing for a real estate project while allowing the lender to include broad enough provisions within the loan commitment to address unanticipated or unknown conditions with respect to the real estate project.

By spending a few hours and some time at this stage negotiating the loan Commitment Letter, the parties will streamline the documentation process and ultimately reduce the time necessary to complete the transaction and decrease the legal expenses to be incurred in connection with the transaction.

[12] For a discussion of defeasance, refer to the Memorandum attached hereto as Exhibit “J”.
[13] For a discussion of junior or mezzanine financing and the competitive interests of lender and borrower, refer to the Memorandum attached hereto as Exhibit “J”.

[Form of Commitment Letter]

MASTERS NATIONAL BANK, N.A.
28400 Peachtree Lane
Augusta, MI 49999

April 12, 2002

Palmer, Hogan and Jones Redevelopment, LLC
123 Fairway Drive
Augusta, MI 49999
Attention: Mr. Robert Palmer, Manager

Re: $7,000,000.00 Construction/End Loan for Redevelopment of The Links Shopping Center, Augusta, Michigan

Dear Mr. Palmer:

We are pleased to inform you that Masters National Bank, N.A. ("Bank") hereby offers to extend the Credit Facilities (herein defined) to Palmer, Hogan and Jones Redevelopment, LLC ("Borrower"). The Credit Facilities shall be provided to Borrower for the purpose of providing financing for the redevelopment and construction of improvements to The Links Shopping Center located at the corner of Butler Cabin Road and Augusta National Drive in Augusta, Michigan in accordance with and subject to the terms and conditions set forth herein. The commitment of the Bank to extend the Credit Facilities shall be contingent upon: (i) the execution on or prior to the closing date of the Loan Documents (as hereinafter defined) as are hereinafter required and satisfactory in form and substance to the Bank and its special counsel, Haven Ice Day; (ii) no adverse material change in the financial condition and affairs of the Borrower and the guarantors of the Credit Facilities from those that were presented to Bank at the time of application; and (iii) compliance with such other conditions, requirements and actions as are herein set forth.

CREDIT FACILITIES:

1. Amounts:

   A. Construction Loan. Not to exceed the lesser of: (i) Seven Million and 00/100 ($7,000,000.00) Dollars; (ii) eighty (80%) percent of the appraised value of the Property (as defined herein) on an "as built" basis/ or (iii) seventy-five (75%) percent of the cost of the Improvements (as defined herein) based upon the budget approved by Bank.

   B. End Loan. Not to exceed the lesser of: (i) Seven Million and 00/100 ($7,000,000.00) Dollars; (ii) eighty (80%) percent of the appraised value of the Property on an "as built" basis; or (iii) the final amount advanced by Bank under the Construction Loan.

2. <u>Use of Loan Proceeds</u>:

A. <u>Construction Loan</u>. To provide funds to Borrower to develop and construct additions and improvements to The Links Shopping Center (the "Improvements") in the City of Augusta, Masters County, Michigan ("Property"). An interest reserve in the amount of Five Hundred Sixty Thousand and 00/100 ($560,000.00) Dollars will be required under the Construction Loan from which interest shall be paid under the Construction Loan until such time as such reserve is exhausted. Advances under the Construction Loan will be limited by the advance formulas referenced herein and shall be subject to the disbursement requirements and limitations set forth in the Loan Documents.

B. <u>End Loan</u>. Proceeds of the End Loan will be used to pay off the Construction Loan in full.

3. <u>Term</u>:

A. <u>Construction Loan</u>. The maturity date of the Construction Loan shall be twenty-four (24) months from the date of closing.

B. <u>End Loan</u>. Provided that the Borrower is not in default of its obligations under both this Commitment Letter and the loan documents required hereunder (the "Loan Documents"), the maturity date of the End Loan shall be sixty (60) months from the earlier of (i) the maturity date of the Construction Loan, or (ii) the date the Construction Loan is paid in full.

4. <u>Interest Rate</u>:

A. <u>Construction Loan</u>. Interest shall be computed on the unpaid principal balance of the Construction Loan on a basis of a year of three hundred sixty (360) days for the actual number of days elapsed in a month, at a variable rate of interest per annum (the "Construction Loan Interest Rate") which shall change in the manner set forth below, equal to the Masters National Bank Prime Rate. If the Loan is not paid at maturity, whether maturity occurs by lapse of time, demand, acceleration or otherwise, the unpaid principal balance and any unpaid interest thereon shall, thereafter until paid, bear interest at a rate equal to three (3) percentage points in excess of the Construction Loan Interest Rate.

In addition to the foregoing, Bank may impose a late charge of ten ($.10) cents of each dollar of an overdue installment more than five (5) days overdue to cover the extra expense of handling delinquent payments.

B. <u>End Loan</u>. Interest shall be computed on the unpaid principal balance of the End Loan on a basis of a year of Three Hundred Sixty (360) days for the actual number of days elapsed in a month, at the available rate of interest per annum (the "End Loan Interest Rate") which shall change

in the manner set forth below, equal to three hundred (300) basis points per annum in excess of the weekly average yield on five (5) year U.S. Treasury securities adjusted to a constant maturity, as reported by the Federal Reserve Board for the last week that is at least forty-five (45) days before the date of closing for the end loan, but in no event shall the interest rate be less than seven (7%) percent. If the Loan is not paid at maturity, whether maturity occurs by lapse of time, demand, acceleration or otherwise, the unpaid principal balance and all unpaid interest thereon shall, thereafter until paid, bear interest at a rate equal to three (3%) percentage points in excess of the End Loan Interest Rate.

5. Repayment:

A. Construction Loan. Interest only on amounts disbursed under the Construction Loan shall be due and payable on the first (1st) day of each month following the closing and on the first (1st) day of each month thereafter until maturity of Construction Loan (whether by acceleration or otherwise), at which time the entire unpaid principal balance and all accrued interest thereon shall be due and payable in full.

B. End Loan. Consecutive monthly payments of principal and accrued interest, as determined by Bank, based upon a five (5) year term and a ten (10) year amortization period, shall be paid on the first (1st) day of the first (1st) month following the funding of the End Loan and on the first (1st) day of each month thereafter, until maturity (whether by acceleration or otherwise), at which time the entire unpaid principal balance and all accrued interest thereon shall be due and payable in full. Borrower acknowledges the payments under the End Loan will not pay the outstanding indebtedness in full by maturity and that a balloon payment will be required on the maturity date.

6. Prepayment: The Construction Loan may all be prepaid in whole or in part, without the payment of any prepayment premium or penalty. Under the End Loan, a prepayment premium will be due at any time Borrower desires, to prepay, in full or in part, the principal under the promissory note. Prepayment Premiums, as defined below, for full or partial prepayments at any time that the interest rate in effect hereunder is a fixed rate, shall be due and payable by Borrower to Bank at the time of each prepayment. "Prepayment Premium" means the greater of (i) two percent (2%) of the amount of the prepayment or (ii) the "Formula Amount", which shall be an amount calculated by Bank, as of the third Business Day preceding the date of prepayment ("Calculation Date"), as follows:

Bank shall calculate the interest for each month during the remaining term of the End Mortgage Loan that would be earned by Bank by reinvesting the outstanding principal amount of the Loan at the Reinvestment Rate, and Bank shall subtract that amount from the interest for that month that would have been earned by Bank if the

prepayment had not been made. The result for each month is the “Monthly Payment Differential” for that month.

Bank shall calculate the present value of each Monthly Payment Differential by discounting the Monthly Payment Differential to the Calculation Date at the Reinvestment Rate. The total of all of those present values shall be the “Formula Amount”.

“Reinvestment Rate means 2.0% plus the yield for the most recent week under the heading *“Week Ending”* published in the Statistical Release under the caption “*Treasury Constant Maturities”* for the maturity (rounded to the nearest month) corresponding to the Weighted Average Life to Maturity of the outstanding principal of the Loan on the Calculation Date. If no maturity exactly corresponds to that Weighted Average Life to Maturity, then the Reinvestment Rate shall be calculated by interpolating or extrapolating using the yields for the two published maturities most closely corresponding to that Weighted Average Life to Maturity. Such interpolation or extrapolation shall be on a straight-line basis. For the purpose of calculating the “Reinvestment Rate”, the most recent Statistical Release published before the Calculation Date shall be used.

“Statistical Release” means the then most recent published statistical release designated H.15.(519) or any successor publication that is published weekly by the Federal Reserve Board and that establishes yields on actively traded United States Government Securities adjusted to constant maturities or, if that statistical release is not published at the time of any determination of the Formula Amount, then any other reasonably comparable index that Bank shall designate.

“Weighted Average Life to Maturity” of the outstanding principal amount of this Note means, as of the Calculation Date, the number of years obtained by dividing the then Remaining Dollar-Years of that principal amount by that principal amount. “Remaining Dollar-Years” of that principal amount means the amount determined by (a) multiplying (i) the remainder of the amount of principal that would have become due under the Loan on each scheduled payment date if the prepayment had not been made by (ii) the number of years (calculated to the nearest one-twelfth) that will elapse between the Calculation Date and that scheduled payment date and (b) totaling the products obtained in (a).

“Business Day” means a weekday on which Bank is open to the public for carrying on substantially all of its banking functions.

Bank’s calculation of the Formula Amount shall, absent manifest error, be binding and conclusive on Borrower and Bank; provided, however, that notwithstanding the foregoing, no Prepayment Premium shall be payable during the three (3) month period immediately prior to the scheduled maturity of the permanent phase. The Prepayment Premium shall be payable regardless of the whether the prepayment shall be made voluntarily by Borrower or shall occur due to the acceleration of the Indebtedness based upon Borrower’s default.

7. Loan Facility Fees: As an inducement to enter into this Loan Commitment, Borrower hereby agrees to pay Bank:

A. Construction Loan. A non-refundable loan facility fee equal to three quarters of one percent (.75%) of the loan amount of the Construction Loan which shall be paid upon execution of this Commitment Letter.

B. End Loan. A non-refundable loan facility fee equal to three quarters of one percent (.75%) of the loan amount of the End Loan, which shall be paid to and deemed earned by Bank, upon Borrower's notice to Bank of its intent to convert from the Construction Loan to the End Loan.

The loan facility fee for the Construction Loan is deemed fully earned by Bank upon acceptance of this Commitment Letter by Borrower. The loan facility fee for the End Loan shall be deemed fully earned by Bank upon conversion of the Construction Loan to the End Loan. Further, Borrower shall be required to pay all costs and expenses of Bank in connection with the closing of the Credit Facilities including, without limitation, Bank's attorneys' fees incurred in connection with the preparation and execution of the Loan Documents. If the Credit Facilities do not close for any reason whatsoever, Bank may retain the loan facility fees theretofore paid and in all events Borrower shall also pay all other fees and expenses incurred by Bank in connection with the preparation for closing of the Credit Facilities, including Bank's attorneys' fees incurred in connection with the preparation and execution of the Loan Documents.

8. Taxes and Assessment Escrow: During the term of the End Loan, Bank shall have the right to require monthly escrow payments for the payment of taxes and assessments, subject to periodic review and adjustment.

9. Security:

A. Construction Loan/End Loan. The following shall be security for the Construction Loan and the End Loan and shall be in form and substance satisfactory to Bank:

(i) A first prior, valid, enforceable and perfected mortgage on the Property, and upon all improvements, appurtenances, Borrower owned fixtures and construction materials located thereon, subject only to recorded easements and restrictions acceptable to Bank in all respects, in Bank's sole discretion.

(ii) A first and prior Assignment of Leases and Rents derived from the Property.

(iii) A first and prior Security Agreement (which may be included within the Mortgage) covering all personal property owned by Borrower and used in the construction and/or operation of the Property.

(iv) General Assignment of Rights Regarding Real Estate Re: Contracts, Permits, etc.

(v) Financing Statements as necessary to perfect the security interests and liens of Bank with respect to the security described above.

With respect to the Construction Loan only, the collateral shall also include the following:

(i) An Assignment of the Plans and Specifications, if any, and an Assignment of the Architect's Contract with respect to the Improvements, if any, and written confirmation of the engineer's consent and the architect's consent to such assignments and agreement to continue working for Bank during the Construction of the Improvements (at Bank's option but upon payment to the architect and/or engineer.)

(ii) An Assignment of the Guaranteed Maximum Price Construction Contract (and subcontracts as required by Bank), if any, and written confirmation of the consent of the contractor to such assignment and agreement of the contractor (and subcontractors) to continue working for Bank during the Construction of Improvements (at Bank's option but upon payment of the sums due under the Construction Contract and subcontracts which Bank elects to continue, if any).

B. Cross Collateralization/Cross Default. The Credit Facilities will be cross collateralized and cross defaulted with all other debt of Borrower (and its principals, affiliates and Guarantors, as defined below) with Bank.

10. Guaranty:

A. The full principal amount of the Construction Loan, End Loan and all accrued interest and all indebtedness arising out of the loan documents and performance thereunder shall be personally guaranteed by the following, all of whom are principals of the Borrower: Robert Palmer, Arnold Hogan and Ben Jones (each a "Guarantor" and collectively, the "Guarantors").

B. A Completion Guaranty, from each Guarantor, which guarantees the completion of the Improvements, or in lieu thereof, the cost of completing the Improvements.

FUNDING REQUIREMENTS:

1. Construction Loan: Advances under the Construction Loan shall be subject to the advance formulas set forth below and the disbursement requirements and limitations set forth in the Construction Loan Agreement, including, without limitation, the following:

   A. There shall always be sufficient funds remaining to be disbursed from the Construction Loan to pay in full the construction costs of the Improvements on the Property and to fund the interest reserve in accordance with the Loan Documents.

   B. Receipt of a certificate from Borrower prior to each advance under the Construction Loan, and, if required by Bank, by Bank's inspector, certifying the amount of the Construction Loan expended to date; the percentage of completion; and the amount required to fully complete the same.

   C. There shall be submitted to Bank at the time of each request for an advance, a sworn statement prepared by the contractor and waivers of lien, showing payment of all construction costs, including labor, material and other expenditures, all in accordance with the Construction Lien Act of Michigan. Bank will approve a thirty-day lag period for lien waivers if approved by the title company; provided, that, in any event, all waivers which are to be submitted on the basis of a thirty-day lag period shall be submitted prior to the next draw.

   D. Inspection of the construction of the Improvements by Bank and, if required by Bank, by Bank's inspecting architect; all costs incurred in connection therewith shall be borne by Borrower and charged as an additional disbursement of the Construction Loan.

   E. The Bank shall retain (from each advance) the retainage amount required as to each contract and/or subcontract entered into by Borrower in connection with the Improvements; retainage shall not be held for soft costs. Final disbursement and release of such retainage shall be made upon completion of the Improvements subject to final inspection by Bank, receipt by Bank of evidence that all work and improvements to be constructed by Borrower with respect to the Improvements requiring inspection by governmental authorities having jurisdiction have been so inspected and approved, all required certificates, permits and approvals have been duly issued and receipt by Bank of a final "as built" survey and a final mortgage title insurance policy issued in the full amount of the Construction Loan.

   F. All construction advances or draws, and all other advances, shall otherwise be in accordance with the requirements of this Commitment Letter and all other terms and conditions to be included in the

Construction Loan Agreement and shall be insured by the title company.

G. Borrower shall construct the Improvements substantially in accordance with the plans and specifications and in accordance with the site plan approval. The construction of the Improvements shall be diligently pursued and shall continue, without interruption to completion. The construction of the Improvements shall be completed within twenty-four (24) months after the closing of the Construction Loan. Anything contained herein to the contrary notwithstanding, if Borrower shall fail to complete construction of the Improvements, as hereinbefore provided, or if Borrower shall default in any other obligation, undertaking or agreement which it may have to Bank, Bank shall have no further obligation to disburse monies to Borrower and Bank may accelerate the payment of all indebtedness of Borrower to Bank, as more specifically provided in the Loan Documents.

2. End Loan: Prior to closing on the End Loan, Borrower shall have satisfied the following requirements:

A. Borrower shall be in compliance with all terms and conditions of the Loan Documents of the Construction Loan.

B. The loan facility fee for the End Loan shall have been paid in full on the date required.

C. All Improvements shall have been completed and Borrower shall have received all necessary consents, permits and approvals, including, without limitation, a Final and Unconditional Certificate of Occupancy for the Improvements.

D. Bank shall have received a final “as built” survey of the Improvements and a final mortgage title insurance policy as required under the Commitment Letter and the Loan Documents, in the full amount of the End Loan.

E. Borrower shall provide evidence satisfactory to Bank in its sole discretion, that the Debt Service Coverage Ratio of Borrower meets or exceeds 1.5 to 1.

F. Bank shall have received an update of the appraisal of the Property evidencing a loan to value ratio with respect to the End Loan not to exceed eighty (80%) percent.

FINANCIAL COVENANTS:

1. End Loan: During the term of the End Loan, Borrower shall be required to maintain a minimum Debt Service Coverage Ratio of one and one-half to one (1.5:1) to be monitored on a quarterly basis, as determined by Bank. For any period of determination "Debt Service Coverage Ratio" shall mean the ratio of "Net Rental Income" (as herein defined) to "Debt Service" (as herein defined). "Debt Service" shall mean the sum of all principal and interest payments that would be payable over a twelve (12) month period with respect to the End Loan, assuming an imputed fixed interest rate equal to three hundred (300) basis points in excess of the weekly average yield on five (5) year U.S. Treasury obligations, adjusted for constant maturity, as reported by the Federal Reserve Board for the most recent week available, and assuming an amortization of twenty five (25) years and "Net Rental Income" shall mean the gross rent received by Borrower from tenants at the Property during any twelve (12) month period less (i) actual monthly operating expenses; (ii) a pro-rated portion of actual expenses not paid on a monthly basis; and (iii) a management fee equal to three (3%) percent of gross rents.

CONDITIONS OF APPROVAL: The obligation of Bank to close on any and all of the Credit Facilities is subject to satisfaction of the following conditions, all of which are to be satisfied by Borrower at least ten (10) business days prior to Closing on the Construction Loan and/or the End Loan, as the case may be:

1. Appraisal:

   A. Construction Loan. The Bank must receive a satisfactory appraisal establishing an appraised value of the Property on an "AS IS" basis so that loan-to-value ratio is not more than eighty (80%) percent.

   B. End Loan. The Bank shall have the right to require a satisfactory appraisal establishing an appraised value of the Property on an "as built" basis so that loan-to-value ratio is not more than eighty (80%) percent.

2. Environmental Assessment: The Bank must receive an Environmental Phase I Site Assessment, in a form acceptable to Bank and its legal counsel, prepared by an environmental engineer acceptable to Bank, stating that the Property is free of any environmental conditions unacceptable to Bank and its legal counsel, and evidencing the condition of the Property and its compliance with applicable law to Bank's satisfaction. In the event Bank is not satisfied with the Environmental Phase I Site Assessment for any reason or for no reason whatsoever, Bank reserves the right to require additional environmental studies of the Property, including, but not limited to, a Baseline Environmental Assessment and/or a Phase II Environmental Site Assessment, all at Borrower's sole cost and expense.

3. Purchase Agreement: Bank must receive and approve Borrower's Real Estate Purchase and Sale Agreement to acquire the Property.

4. Trust Agreements: Receipt and approval of all trust documents of the Trust Guarantors, if any.

5. Leases: Review and approval of all current, contemplated and future leases between Borrower and its tenants, as well as the prior written approval of Borrower to all amendments or modifications of such leases.

6. Management Agreement: Execution of a Collateral Assignment of Management Agreement for the Property if a Management Agreement exists, between the manager of the Property and the Bank, on such terms and conditions as are satisfactory to Bank and its counsel.

7. Architect's Agreement: The Bank must receive and approve an architect's agreement between Borrower and its architect in a form acceptable to Bank.

8. Engineer's Agreement: The Bank must receive an engineer's agreement between Borrower and its engineer in a form acceptable to Bank and its legal counsel with an engineer acceptable to Bank if any work remains to be completed by the engineer in connection with the Improvements.

9. Construction Contract: The Bank must receive a Guaranteed Maximum Price Construction Contract between Borrower and its general contractor in a form acceptable to the Bank and its legal counsel with a contractor acceptable to Bank. The Construction Contract shall include a detailed cost breakdown of the Improvements to be completed on the Property, which must be satisfactory to Bank. In addition, Bank may require copies from Subcontractors, from time to time.

10. Plans and Specifications: The Bank must receive and approve a complete set of final plans and specifications for the Improvements.

11. Notice of Commencement: The Bank must receive a duly executed Notice of Commencement showing a designee satisfactory to Bank, which Notice shall be recorded subsequent to the recording of Lender's mortgage, together with a sworn statement certifying that there have been no improvements made to the Property in the one hundred twenty (120) days preceding the closing has been duly recorded and posted on the Property.

12. Land Use: The Bank must receive evidence satisfactory to the Bank and its legal counsel that the Property may be developed and operated as a retail shopping center project with sufficient parking to meet all applicable parking requirements.

13. Utilities: The Bank must receive evidence of the availability of adequate storm sewer, sanitary sewer and water facilities, gas, cable, electricity and all other utilities, and if applicable, evidence of recorded beneficial easements necessary to locate said utilities to the perimeter of the Property.

14. Approvals: The Bank must receive satisfactory evidence that (a) the Improvements have received final site plan approval and the Improvements have been approved by all necessary zoning and planning commissions and any other land use regulatory bodies and governmental authorities; (b) the Improvements will be constructed is in compliance with all applicable zoning, environmental and land use laws, including, without limitation, the Michigan Soil Erosion and Sedimentation Control Act of 1972, as amended, and all laws governing wetlands; and (c) the Improvements and all conditions precedent to the commencement of construction of the Improvements established by any such approvals or permits have been satisfied and that no further authorization, license, approval or consent of any governmental authority is necessary therefor.

15. Ingress/Egress: The Bank must receive satisfactory evidence of adequate means of ingress and egress to the Property by means of dedicated roadways, recorded easements or right-of-ways.

16. Soil Conditions: A written opinion issued by a soil engineer acceptable to Bank to the effect that the soil conditions of the Property are adequate and acceptable for construction of the Improvements, attaching the soil borings, test reports and any other applicable reports thereto.

17. Project Cost Breakdown: A final Budget, acceptable to Bank and its inspector in all respects and certified as fair and reasonable by Bank's inspecting architect or engineer.

18. Document Execution: Real Estate Mortgages, Promissory Notes, Loan Agreements, an Opinion of Borrower's Counsel, in form and substance satisfactory to Bank and its legal counsel, an Environmental Indemnification Agreement, and any other documents deemed necessary by Bank (the "Loan Documents"), all in a form and detail satisfactory to Bank and its legal counsel, and all of which are to be executed by all parties and delivered to Bank at the closing of the Construction Loan and the End Loan. By acceptance of this Commitment Letter, Borrower acknowledges that this Commitment Letter does not contain or set forth all of the terms, conditions, covenants, representations and warranties that Bank may require of Borrower in the Loan Documents. The Loan Agreement will provide, among other things, but without limitation of the generality of the foregoing, that:

    A. Borrower shall not sell, transfer, assign or lease all or any portion of the Property or any interest therein, except for residential leases to tenants of the Property on terms and conditions satisfactory to Bank.

    B. Borrower shall not further encumber, mortgage or permit any security interest or lien to attach to the Property;

    C. Borrower shall comply with all governmental requirements and all covenants, restrictions and easements affecting the Property, including building and use restrictions;

D. There shall be no change in the composition of Borrower or of the members of Borrower without Bank's prior written consent and the death of a Guarantor shall be a default under the Credit Facilities.

E. Borrower shall waive its right to a jury trial.

19. Insurance Requirements: The Bank shall be furnished with (a) a builder's risk policy (during construction of the Improvements), and adequate hazard insurance policies, in amounts not less than the indebtedness under the Credit Facilities, with loss payable endorsements specifically relating to Bank's interest in the Property and all standard mortgage endorsements; (b) a public liability insurance policy in an amount satisfactory to Bank, naming Bank as an additional insured; and (c) a policy of flood hazard insurance, if necessary, with the aforementioned policies to be placed with insurance company's satisfactory to Bank. Borrower shall also provide evidence of worker's compensation insurance for all contractors and engineers. All insurance policies shall provide that the insurance company will deliver at least thirty (30) days notice to Bank prior to cancellation, material alteration or amendment of such policies. Moreover, proof that all initial insurance premiums have been paid by Borrower shall be required to be provided to Bank no later than at or before closing.

20. Acceptability of Title: Title to the Property to be used as security for the Construction Loan and End Loan shall be satisfactory to Bank and Bank shall be furnished with an A.L.T.A. mortgagee's title insurance policy in the full amount of the Construction Loan and/or the End Loan, as the case may be, issued without standard exceptions by a Title Insurance Company satisfactory to Bank (the "Title Company"), including a zoning endorsement, access endorsement, comprehensive endorsement, condominium endorsement and any other endorsements required by Bank and/or its legal counsel after a review of the Title Commitment and insuring all beneficial easements to the Property, if any, all in such form and content as is satisfactory to Bank. Said policy shall insure, in all respects, the fact that the Bank's mortgage is the first lien against the Property. Each advance under the Construction Loan shall be subject to the receipt of a pending disbursement endorsement to such policy insuring the first priority of Bank's lien as required by this Paragraph.

21. Survey: An A.L.T.A. boundary survey, satisfactory to and certified to Bank and the Title Company, shall be prepared by a certified surveyor acceptable to Bank showing no encroachments or adverse rights, other than those acceptable to Bank, the exact location of the Property and depicting all easements, utilities and flood designations affecting the Property, and including such other information as Bank and/or Title Company requests. The surveyor's certification shall be in form and substance satisfactory to Bank.

22. Real Property Taxes: The Bank must receive evidence of annual payments of all current real property taxes and assessments relating to the Property prior to the closing on the Construction Loan and the End Loan and during the terms thereof.

23. Costs and Expenses: The Borrower will be responsible for the payment of all costs, fees and expenses incident to the Construction Loan and/or the End Loan, whether or not the Credit Facilities close, including, but not limited to, mortgage title insurance premiums, the A.L.T.A. boundary survey, environmental site investigations, flood designation fees, inspection reports, UCC and tax lien search fees, recording and filing fees and Bank's attorneys' fees.

24. Certified Copies of the Organizational Documents: The Bank must receive executed copies of all organizational documents of Borrower and its constituent entity members, if any, all in form and content satisfactory to Bank including, without limitation, Borrower's resolutions authorizing the subject transaction and designating appropriate persons to execute and deliver the Loan Documents contemplated by this Commitment Letter.

25. Other Approvals: Borrower shall furnish Bank with a certified letter from its engineer identifying all of the permits/approvals/licenses/consents which will be required for the construction of the Improvements to be constructed and operated in the City of Augusta including, without limitation, all necessary approvals, site plan approvals or permits pursuant to the City of Augusta's Zoning Ordinance or otherwise required under the provisions of all applicable state and federal regulations, statutes and other local, county or state regulations and ordinances.

26. Opinion of Counsel: The Bank must receive an Opinion of Counsel for the Borrower and the Guarantor dated as of the date of closing, satisfactory in substance and form to Bank and its legal counsel, to the effect that:

27. Borrower is a limited liability company duly organized and validly existing under the laws of the State of Michigan;

28. All Loan Documents have been duly authorized, executed and delivered by Borrower and the Guarantor and constitute legal, valid and binding obligations of Borrower and the Guarantor, respectively, enforceable in accordance with their terms and do not violate any usury or other applicable laws or ordinances (except that such counsel need not express any opinion as to the extent relating to bankruptcy, insolvency or other similar laws affecting creditor rights generally); and

29. To the best of counsel's knowledge, there is no litigation pending or threatened against Borrower or the Guarantor or any other parties involved in the subject loan transaction, which would impair their ability to perform their respective obligations under any of the Loan Documents, or to repay the Credit Facilities (as applicable) according to their terms, nor is any litigation pending or threatened with respect to the Property; and further, to the knowledge of Borrower's counsel, based only upon a reasonable inquiry of Borrower and the Guarantor, none of the parties to the subject loan transactions are a parties to any contract or agreement, the terms of which would be violated by the consummation of the Credit Facilities (as applicable)

or the execution of any of the Loan Documents required in connection therewith.

30. Depository Account. Borrower shall establish Depository Accounts and the operating account for the Improvements with Bank and shall, at all times, maintain a minimum balance of One Hundred Thousand and 00/100 ($100,000.00) Dollars.

31. Real Property Analysis. The Bank must receive an approved Real Property Analysis, containing such information as Bank may request.

32. Financial Statements. The Bank must receive and approve the Federal tax return of each Guarantor, as well as real estate cash flow statement and personal financial statement from each Guarantor on a Bank form.

33. Other Conditions. Such other conditions as the Bank and/or its legal counsel may require.

34. Acceptance of Offer. This Offer will terminate unless Borrower signs and returns this Commitment Letter to Bank together with the required loan facility fees prior to April 30, 2002. If the closing of the Construction Loan fails to occur on or before June 30, 2002, the approval of the loan application for the Credit Facilities and the Bank's obligation under this Commitment Letter will terminate and be of no further force or effect. The Bank may, in its sole discretion, extend the closing dates referenced herein.

REPORTING REQUIREMENTS: The Borrower shall furnish (or cause to be furnished) to Bank, by a certified public accountant and/or Borrowers, if applicable, and in form and detail satisfactory to Bank and its legal counsel, the following:

1. Annual federal personal tax returns, including all supporting schedules and K-1's and annual financial statements, including a list of contingent liabilities and annual real estate cash flow schedule, of each Guarantor. Financial statements and cash flow schedules shall be submitted to Bank on or before March 1st of each year. Copies of federal tax returns shall be submitted to Bank on or before June 15 of each year.

2. Annual federal tax returns and management prepared financial statements of Borrower, which shall be submitted to Bank on or before July 1st of each year.

3. During the term of the End Loan, the annual certified rent roll with respect to the Property, dated as of December 15th of each year, which shall be submitted to Bank on or before February 1st of the following year.

4. Monthly lease summary reports and operating statements, which shall be submitted to Bank on or before the fifteenth (15th) of each month.

If the foregoing meets with your approval, please acknowledge your acceptance of this Commitment Letter by signing below, initialing each page of the

Commitment Letter and returning this Commitment Letter, together with the required loan facility fees, on or before April 30, 2002, otherwise, this Commitment Letter will terminate and be of no further force or effect. This Commitment Letter sets forth the entire agreement between Borrower and Bank and cannot be modified in any way except for further amendments in writing, signed by Borrower and Bank. This Commitment Letter takes the place of any preliminary discussions and negotiations between Borrowers and Bank and supersedes any previous written letters, proposed letters, agreements or understandings between Borrowers and Bank.

Sincerely,

MASTERS NATIONAL BANK

By: ______________________________
Horton Smith
Its: Vice President

ACKNOWLEDGMENT

The above terms and conditions are hereby acknowledged and accepted this ____ day of ___________________, 2002.

BORROWER:

PALMER, HOGAN AND JONES REDEVELOPMENT, LLC

By: ______________________________
Robert Palmer
Its: Manager

Employer Identification Number: 99-9999999

GUARANTORS:

____
Robert Palmer

____
Arnold Hogan

____
Ben Jones

EXHIBIT "A"

LAW OFFICES
MADDIN, HAUSER, WARTELL,
ROTH & HELLER, P.C.
THIRD FLOOR ESSEX CENTRE
28400 NORTHWESTERN HIGHWAY
SOUTHFIELD, MICHIGAN 48034-8004

(248) 354-4030
(248) 355-5200
TELEFAX (248) 354-1422

MAILING ADDRESS
POST OFFICE BOX 215
SOUTHFIELD, MI 48037-0215

MICHAEL W. MADDIN
MARK R. HAUSER
RICHARD J. MADDIN
RICHARD F. ROTH
HARVEY R. HELLER
MICHAEL S. LEIB
ROBERT D. KAPLOW
WILLIAM E. SIGLER
STEWART C.W. WEINER
CHARLES M. LAX
STUART M. BORDMAN
STEVEN D. SALLEN
GREGORY J. GAMALSKI
JULIE CHENOT MAYER
NATHANIEL H. SIMPSON
RONALD A. SOLLISH
LOWELL D. SALESIN
MARK H. FINK
STEVEN M. WOLOCK
DAVID E. HART
GEORGE A. CONTIS

LORI E. TALSKY
MARTIN S. FRENKEL
GARY M. REMER
GEORGE V. CASSAR, JR.
SHERYL K. SILBERSTEIN
PAUL V. McCORD
E. DALE WILSON
KASTURI BAGCHI
CATHERINE H. FINN
DAVID M. SAPERSTEIN
DANIELLE M. SPEHAR
CHRISTOPHER A. McMICAN
RICHARD M. MITCHELL
BRANDY L. MATHIE
NICOLE E. WILINSKI

MILTON M. MADDIN
(1902-1984)
C. ROBERT WARTELL
(1936-2001)

MEMORANDUM

TO: NINTH ANNUAL REAL ESTATE SYMPOSIUM ATTENDEES

FROM: GEORGE A. CONTIS, ESQ.

RE: COMMITMENT FEES

DATE: APRIL 12, 2002

==

Generally, a standard Commitment Letter received from a lender provides that the commitment fees are earned at the time that the loan commitment is executed. Commitment Letters also generally provide that the transaction must be documented to the lender's satisfaction and that the loan documents must be satisfactory to the lender and lender's counsel as a condition precedent to closing. As a result of this condition, many borrowers are placed in a quagmire when unable to agree on loan documents with the risk of losing commitment fees. A standard commitment fee provision in a Commitment Letter generally provides as follows:

> "The commitment fee will be paid upon acceptance of the terms of this Commitment Letter and shall be deemed a fully earned, non-refundable commitment fee."

If a Commitment Letter is executed with such a provision, and the loan does not close because the parties are unable to agree upon the material terms of the loan documents, the commitment fee would be deemed to be earned by the lender and non-refundable by the borrower.

Through the process of negotiation, many lenders will agree to provide for the return of the commitment fees less lender's out-of-pocket costs and expenses in the event the borrower and lender are unable to agree on the material terms of the loan documents or if other conditions of the commitment cannot be met through no fault of the borrower.

Furthermore, while in many instances the commitment fee may be deemed to be "earned" at the time the Commitment Letter is accepted by the borrower, the timing of the payment of the commitment fee is something that may also be negotiated. Through the process of negotiation, one-half of the commitment fee could be paid at the time the Commitment Letter is accepted by the borrower or, through negotiation, the commitment fee could be paid at the time of closing.

In most circumstances, most conventional lenders will, at the request of borrower or its counsel, provide for a return of the commitment fee less the lender's out-of-pocket costs and expenses in the event the loan transaction does not close through no fault of the borrower.

EXHIBIT "B"

LAW OFFICES
MADDIN, HAUSER, WARTELL,
ROTH & HELLER, P.C.
THIRD FLOOR ESSEX CENTRE
28400 NORTHWESTERN HIGHWAY
SOUTHFIELD, MICHIGAN 48034-8004

(248) 354-4030
(248) 355-5200
TELEFAX (248) 354-1422

MAILING ADDRESS
POST OFFICE BOX 215
SOUTHFIELD, MI 48037-0215

MICHAEL W. MADDIN
MARK R. HAUSER
RICHARD J. MADDIN
RICHARD F. ROTH
HARVEY R. HELLER
MICHAEL S. LEIB
ROBERT D. KAPLOW
WILLIAM E. SIGLER
STEWART C.W. WEINER
CHARLES M. LAX
STUART M. BORDMAN
STEVEN D. SALLEN
GREGORY J. GAMALSKI
JULIE CHENOT MAYER
NATHANIEL H. SIMPSON
RONALD A. SOLLISH
LOWELL D. SALESIN
MARK H. FINK
STEVEN M. WOLOCK
DAVID E. HART
GEORGE A. CONTIS

LORI E. TALSKY
MARTIN S. FRENKEL
GARY M. REMER
GEORGE V. CASSAR, JR.
SHERYL K. SILBERSTEIN
PAUL V. McCORD
E. DALE WILSON
KASTURI BAGCHI
CATHERINE H. FINN
DAVID M. SAPERSTEIN
DANIELLE M. SPEHAR
CHRISTOPHER A. McMICAN
RICHARD M. MITCHELL
BRANDY L. MATHIE
NICOLE E. WILINSKI

MILTON M. MADDIN
(1902-1984)
C. ROBERT WARTELL
(1936-2001)

MEMORANDUM

TO: NINTH ANNUAL REAL ESTATE SYMPOSIUM ATTENDEES

FROM: LOWELL D. SALESIN, ESQ.

RE: MINIMUM EQUITY REQUIREMENTS

DATE: APRIL 12, 2002

==

A fundamental concept in construction loan financing is that there must always be sufficient funds available under the construction loan facility to complete construction of the project. Accordingly, implicit in a construction loan is a minimum cash equity requirement which will be determined based upon the loan-to-value and the loan-to-cost ratios applicable to the loan. Lenders will generally not make any advances until they have received satisfactory evidence of the investment of the Borrower's minimum cash equity in the transaction. The Lender will verify that the minimum equity requirements have been met and that the loan is "in balance" by completing an analysis of the budget and the construction work completed to date. In all events, the undisbursed amount of the loan must be equal to the cost to complete the project based upon the plans approved by the Lender, the budget approved by the Lender, and the construction contracts for the project. Borrowers should anticipate that they will not be able to advance funds under the loan until their equity is invested in the project.

Often, Borrowers seek to obtain initial draws to pay for or be reimbursed for acquisition costs and/or soft costs incurred in connection with a project. It is recommended that the specific equity requirements be addressed in the Commitment

Letter and in the event that the first advance must be for a sum certain, the first advance amount should be pre-negotiated in the Commitment Letter.

In order to meet a minimum equity requirement, many Borrowers request that the Lender utilize a fair market valuation of the project's real estate in lieu of the actual purchase price for the project's real estate. If this is the case, it must be pre-approved by the Lender who will otherwise typically provide a Borrower with credit for land acquisition costs at its actual purchase price.

Lenders will not disburse funds which may reduce the total undisbursed amount of the loan below the amount necessary to complete the project. Accordingly, if the Lender believes at any time during the construction process that the loan is "out of balance", then the Lender may require the Borrower to deposit additional funds in escrow which will then be disbursed to Borrower as construction proceeds to pay for construction costs. Lenders may also require minimum contingency reserves to be included within the budget and will typically require retention on each construction advance. Borrowers should request that Lenders release retention upon completion of particular line items in the budget and allocate savings to the contingency reserve so that Borrowers get the benefit of savings to offset overruns on other construction items in connection with the project.

EXHIBIT "C"

LAW OFFICES
MADDIN, HAUSER, WARTELL,
ROTH & HELLER, P.C.
THIRD FLOOR ESSEX CENTRE
28400 NORTHWESTERN HIGHWAY
SOUTHFIELD, MICHIGAN 48034-8004

(248) 354-4030
(248) 355-5200
TELEFAX (248) 354-1422

MAILING ADDRESS
POST OFFICE BOX 215
SOUTHFIELD, MI 48037-0215

MICHAEL W. MADDIN
MARK R. HAUSER
RICHARD J. MADDIN
RICHARD F. ROTH
HARVEY R. HELLER
MICHAEL S. LEIB
ROBERT D. KAPLOW
WILLIAM E. SIGLER
STEWART C.W. WEINER
CHARLES M. LAX
STUART M. BORDMAN
STEVEN D. SALLEN
GREGORY J. GAMALSKI
JULIE CHENOT MAYER
NATHANIEL H. SIMPSON
RONALD A. SOLLISH
LOWELL D. SALESIN
MARK H. FINK
STEVEN M. WOLOCK
DAVID E. HART
GEORGE A. CONTIS

LORI E. TALSKY
MARTIN S. FRENKEL
GARY M. REMER
GEORGE V. CASSAR, JR.
SHERYL K. SILBERSTEIN
PAUL V. McCORD
E. DALE WILSON
KASTURI BAGCHI
CATHERINE H. FINN
DAVID M. SAPERSTEIN
DANIELLE M. SPEHAR
CHRISTOPHER A. McMICAN
RICHARD M. MITCHELL
BRANDY L. MATHIE
NICOLE E. WILINSKI

MILTON M. MADDIN
(1902-1984)
C. ROBERT WARTELL
(1936-2001)

MEMORANDUM

TO: NINTH ANNUAL REAL ESTATE SYMPOSIUM ATTENDEES

FROM: BRANDY L. MATHIE, ESQ.

RE: YIELD MAINTENANCE - WHAT EVERY COMMERCIAL BORROWER SHOULD KNOW

DATE: APRIL 12, 2002

==

Perhaps one of the most important and least understood provision in a fixed rate commercial real estate mortgage loan is the yield maintenance "prepayment premium" provision. The terms "prepayment premium", "prepayment penalty" and "yield maintenance" will be used interchangeably for purposes of our analysis. The prepayment premium provision forces the borrower to pay the lender a penalty if the borrower decides to pay a loan off prior to its maturity date. As a matter of fact, most lenders will require payment of the prepayment premium if the loan is prepaid as a result of condemnation, casualty or default.

The theory behind yield maintenance is not difficult. In fact, the term itself explains the concept quite well. When a lender decides to make a loan, it does so on the basis that a certain amount of profit (yield) will be made, i.e. the interest charged over the duration of the loan will yield a particular profit to the lender. If the borrower pays back the principal of the loan before the maturity date of the note, the lender will not receive all of the profit it anticipated when originating the loan. If the borrower is forced to pay a penalty along with the principal, the lender's yield is

maintained. To the lender, the prepayment premium insures that the lender will receive most, if not all, of the profit it contemplated when the loan was originated.

The actual formula used to calculate yield maintenance is a little more complicated. The formulas vary slightly from lender to lender. For the purposes of this memorandum, we will focus on the standard prepayment premium provision of a Fannie Mae loan. The standard Fannie Mae note provides the prepayment premium shall be the greater of:

“(i) 1% of the amount of principal being prepaid”; or

“(ii) The product obtained by multiplying:

(A) the amount of principal being prepaid,

by

(B) the difference obtained by subtracting from the interest rate on this Note the yield rate (the "**Yield Rate**") on the __________% U.S. Treasury Security due _________________________ (the "**Specified U.S. Treasury Security**"), as the Yield Rate is reported in *The Wall Street Journal* on the twenty-fifth Business Day preceding (x) the date Borrower stated to be the intended prepayment date in its notice of prepayment given to Lender where prepayment is voluntary, or (y) the date Lender accelerates the Loan or otherwise accepts a prepayment pursuant to Paragraph 10(a)(3) of this Note,

by

(C) the present value factor calculated using the following formula:

$$\frac{1 - (1 + r)^{-n}}{r}$$

[r = Yield Rate

n = the number of 365-day years (or 366-day years, if applicable), and any fraction thereof, remaining between the Prepayment Date and the expiration of the Yield Maintenance Period]

In the event that no Yield Rate is published for the Specified U.S. Treasury Security, then the nearest equivalent U.S. Treasury Security shall be selected at Lender's discretion. If the publication of such Yield Rates in *The Wall Street Journal* is discontinued, Lender shall determine such Yield Rates from another source selected by Lender.

For purposes of subparagraph (ii)(C), the "**Prepayment Date**" shall be (x) in the case of a voluntary prepayment, the date on which the prepayment is made, and (y) in any other case, the date on which Lender accelerates the unpaid principal balance of this Note.

The second prong of the formula is obviously much more difficult to calculate. As a result, many borrowers are unsure about what they will be paying in the event they repay the loan before the maturity date.

While the formula above is rather daunting to some, we will attempt a step-by-step analysis that will try and simplify the calculation.

There are several numbers and facts which must be known before the yield maintenance can be calculated. For purposes of our calculations, let's assume the following to be true:

1. The outstanding principal balance on the loan being prepaid is $1,000,000.00.

2. The interest rate under the terms of the note is 9%.

3. The loan is being prepaid five years earlier than the date of maturity.

4. The Five Year Security Treasury Yield Rate is 4%.

The first number used in calculating the prepayment premium is the amount of principal being prepaid. The amount of outstanding principal is multiplied by an interest rate (the "Applicable Interest Rate") which is derived by subtracting two interest rates. The First Interest Rate (the "First Interest Rate") is the rate of the note. The Second Interest Rate (the "Second Interest Rate") is the yield rate on the U.S. Treasury Security that will be repaid on the date closest to the original maturity date on the note. For example, if the note is repaid 3 years early, the Second Interest Rate would be the 3 Year Treasury Security interest rate; if the note is repaid 5 years early, the Second Interest Rate would be the 5 Year Treasury Security interest rate.

To calculate the Applicable Interest Rate, subtract the First Interest Rate from the Second Interest Rate.

On the facts assumed in our example, the First Interest Rate is 9% and the Second Interest Rate would be the yield rate paid on the 5 Year Treasury Security, which is 4%. The Applicable Interest Rate is the First Interest Rate less the Second Interest Rate, or 9% - 4%, which is 5%. To finish the calculation, the outstanding principal is multiplied by the Applicable Interest Rate or $1,000,000.00 x 5% = $50,000.

The calculation does not stop here, however. The next segment of the formula used by Fannie Mae is $1 - (1 + r)^{-n}/r$, where r is the yield rate for the Treasury Security (the same as used above) and n represents the number of years being prepaid. In our example, $1 – (1 + 4\%)^{-5} /4\% = 4.45$. We then multiply $50,000.00 x 4.45 = $222,591.12. The prepayment penalty on the $1,000,000.00 outstanding principal is $222,591.12 based on our assumed numbers.

It is important to remember that the formula used to calculate yield maintenance will vary from lender to lender. When a borrower, who has a promissory note with a fixed interest rate, is considering refinancing the obligation with new funds, the borrower should carefully analyze the prepayment provisions contained within the note to determine the amount of the prepayment penalty. It would be prudent for the borrower to conduct a cost benefit analysis to determine whether the cost savings thought to be realized as a result of the refinance will actually be met after taking into account the amount of the prepayment penalty.

EXHIBIT "D"

LAW OFFICES
MADDIN, HAUSER, WARTELL,
ROTH & HELLER, P.C.
THIRD FLOOR ESSEX CENTRE
28400 NORTHWESTERN HIGHWAY
SOUTHFIELD, MICHIGAN 48034-8004

(248) 354-4030
(248) 355-5200
TELEFAX (248) 354-1422

MAILING ADDRESS
POST OFFICE BOX 215
SOUTHFIELD, MI 48037-0215

MICHAEL W. MADDIN
MARK R. HAUSER
RICHARD J. MADDIN
RICHARD F. ROTH
HARVEY R. HELLER
MICHAEL S. LEIB
ROBERT D. KAPLOW
WILLIAM E. SIGLER
STEWART C.W. WEINER
CHARLES M. LAX
STUART M. BORDMAN
STEVEN D. SALLEN
GREGORY J. GAMALSKI
JULIE CHENOT MAYER
NATHANIEL H. SIMPSON
RONALD A. SOLLISH
LOWELL D. SALESIN
MARK H. FINK
STEVEN M. WOLOCK
DAVID E. HART
GEORGE A. CONTIS

LORI E. TALSKY
MARTIN S. FRENKEL
GARY M. REMER
GEORGE V. CASSAR, JR.
SHERYL K. SILBERSTEIN
PAUL V. McCORD
E. DALE WILSON
KASTURI BAGCHI
CATHERINE H. FINN
DAVID M. SAPERSTEIN
DANIELLE M. SPEHAR
CHRISTOPHER A. McMICAN
RICHARD M. MITCHELL
BRANDY L. MATHIE
NICOLE E. WILINSKI

MILTON M. MADDIN
(1902-1984)
C. ROBERT WARTELL
(1936-2001)

MEMORANDUM

TO: NINTH ANNUAL REAL ESTATE SYMPOSIUM ATTENDEES

FROM: GEORGE A. CONTIS, ESQ.

RE: CROSS COLLATERALIZATION AND CROSS DEFAULT

DATE: APRIL 12, 2002

==

The "standard loan documents" used by most lenders in commercial loans contain cross collateralization and cross default provisions such as the following:

> Cross Collateralization/Cross Default. The Credit Facilities will be cross collateralized and cross defaulted with all other indebtedness of Borrower (and its principals, affiliates and guarantors) with Lender.

This provision provides that: (a) the security given in the current loan serves as collateral security for all loans between the lender and the borrower, its principals, their affiliates and the guarantors; and (b) any default that occurs in any other loan between the lender and the borrower, its principals their affiliates and the guarantors will be deemed a default under the current loan and vice versa. In short, in the standard loan documents used by the lender, the collateral serves as security for indebtedness beyond the specific loan transaction and the collateral and loan are prone to being defaulted as a result of a default in a loan unrelated to the specific loan transaction.

The cross default would apply to:

- All other loans between the lender and the borrower;
- All other loans between the lender and the borrower's guarantors;
- All other loans between the lender and any member of the borrower; and
- All other loans between the lender and affiliates of the borrower and or guarantors

Based on the standard loan documentation utilized by the lender, if a minority member of the borrower defaulted on his home equity loan to lender, then this default would also cause an event of default to occur under the specific loan.

Counsel for the borrower through the course of negotiating the commitment letter will attempt to have the lender limit or eliminate, in its entirety, the cross collateralization and cross default provisions. Counsel will argue that the specific loan should "stand alone" and should not be subjected to a potential default under a loan unrelated to the current loan.

A borrower can attempt to minimize the cross collateralization and cross default provision by utilizing single purpose entities to own real property for the purpose of limiting the scope of the obligation secured by the collateral. Borrower's counsel should request that the definition of "Indebtedness" be narrowly drafted to include only the loan intended to be secured by the collateral.

EXHIBIT "E"

LAW OFFICES
MADDIN, HAUSER, WARTELL,
ROTH & HELLER, P.C.
THIRD FLOOR ESSEX CENTRE
28400 NORTHWESTERN HIGHWAY
SOUTHFIELD, MICHIGAN 48034-8004

(248) 354-4030
(248) 355-5200
TELEFAX (248) 354-1422

MAILING ADDRESS
POST OFFICE BOX 215
SOUTHFIELD, MI 48037-0215

MICHAEL W. MADDIN
MARK R. HAUSER
RICHARD J. MADDIN
RICHARD F. ROTH
HARVEY R. HELLER
MICHAEL S. LEIB
ROBERT D. KAPLOW
WILLIAM E. SIGLER
STEWART C.W. WEINER
CHARLES M. LAX
STUART M. BORDMAN
STEVEN D. SALLEN
GREGORY J. GAMALSKI
JULIE CHENOT MAYER
NATHANIEL H. SIMPSON
RONALD A. SOLLISH
LOWELL D. SALESIN
MARK H. FINK
STEVEN M. WOLOCK
DAVID E. HART
GEORGE A. CONTIS

LORI E. TALSKY
MARTIN S. FRENKEL
GARY M. REMER
GEORGE V. CASSAR, JR.
SHERYL K. SILBERSTEIN
PAUL V. McCORD
E. DALE WILSON
KASTURI BAGCHI
CATHERINE H. FINN
DAVID M. SAPERSTEIN
DANIELLE M. SPEHAR
CHRISTOPHER A. McMICAN
RICHARD M. MITCHELL
BRANDY L. MATHIE
NICOLE E. WILINSKI

MILTON M. MADDIN
(1902-1984)
C. ROBERT WARTELL
(1936-2001)

MEMORANDUM

TO: NINTH ANNUAL REAL ESTATE SYMPOSIUM ATTENDEES

FROM: GEORGE V. CASSAR, ESQ.

RE: DEATH OF A GUARANTOR CLAIMED BY THE LENDER AGAINST THE PROBATE ESTATE OF THE GUARANTOR

DATE: APRIL 12, 2002

==

As part of its "standard real estate loan" transaction, most lenders will insist a default of the loan will occur in the event of the death of a guarantor. There are circumstances where a lender has failed to include the death of the guarantor as an event of default under a loan. There are circumstances, albeit rare, where the death of the only guarantor of a real estate loan does not result in an event of default under the loan. The reason that death is often considered to be an event of default is demonstrated here. This memorandum describes the procedure that a lender must follow in order to file a claim against the estate of a guarantor in an otherwise performing loan.

In our example, the obligations of the borrower are being fully performed, notwithstanding the death of the sole guarantors. Accordingly, the lender's claim against the guarantor's estate is contingent. The claim will not accrue in the event the borrower fully performs its obligations. Under Section 700.3810 of the Michigan Estates and Protected Individual's Code (EPIC), claims that do not become due or certain before distribution of the estate (the lender's contingent claim on an otherwise

performing loan) and if the claim has not been allowed or established by a proceeding, the personal representative of the estate, or upon the petition of either the personal representative or the claimant (lender) in a proceeding for such purposes, the court may provide an arrangement for future payment, or possible payment, on the happening of a contingency. In the alternative, upon liquidation of the estate, the claim may be disposed of by creating a trust, giving a mortgage, obtaining a bond or security from a distributee, or otherwise.

The lender, as a claimant, would be required to bring the claim against the deceased guarantor's estate within the prescribed time periods permitted by EPIC Section 700.3803, and petition the court for the creation of a trust, or giving a mortgage or some other type of acceptable security such as a bond from the estate prior to the distribution of the estate assets. The lender, would have four months from the date of publication of the notice to creditors in a decedent's estate or one month after receiving personal notice from the personal representative of the estate, whichever is later, in which to file a claim against the estate.

Based upon the above scenario, if the lender fails to timely assert a claim against the estate of a deceased guarantor, there is a possibility that the lender's claim against the guarantor will be forever barred. Accordingly, it is evident why a lender is generally reluctant to acquiesce to a request that the death of a guarantor does not constitute an event of default.

There are, however, always exceptions to this rule. If a lender has multiple guarantors on a loan, only one of whom is the "key person" (e.g. essential to the operation of the borrower and/or the success of the project and the loan), a lender may be willing to waive the event of default of a non-key person guarantor (passive investor guarantor).

In many circumstances, lenders have been willing to provide borrowers with the opportunity, in the event of a guarantor's death, to obtain, within a period of time specified within the loan documents, an opportunity to present the lender a replacement guarantor otherwise satisfactory to the lender.

In conclusion, the death of a guarantor is a significant event which requires, at a minimum, a review of the loan relationship with the borrower and an evaluation of whether there remains adequate security for the performance of the loan.

EXHIBIT "F"

LAW OFFICES
MADDIN, HAUSER, WARTELL,
ROTH & HELLER, P.C.
THIRD FLOOR ESSEX CENTRE
28400 NORTHWESTERN HIGHWAY
SOUTHFIELD, MICHIGAN 48034-8004

(248) 354-4030
(248) 355-5200
TELEFAX (248) 354-1422

MAILING ADDRESS
POST OFFICE BOX 215
SOUTHFIELD, MI 48037-0215

MICHAEL W. MADDIN
MARK R. HAUSER
RICHARD J. MADDIN
RICHARD F. ROTH
HARVEY R. HELLER
MICHAEL S. LEIB
ROBERT D. KAPLOW
WILLIAM E. SIGLER
STEWART C.W. WEINER
CHARLES M. LAX
STUART M. BORDMAN
STEVEN D. SALLEN
GREGORY J. GAMALSKI
JULIE CHENOT MAYER
NATHANIEL H. SIMPSON
RONALD A. SOLLISH
LOWELL D. SALESIN
MARK H. FINK
STEVEN M. WOLOCK
DAVID E. HART
GEORGE A. CONTIS

LORI E. TALSKY
MARTIN S. FRENKEL
GARY M. REMER
GEORGE V. CASSAR, JR.
SHERYL K. SILBERSTEIN
PAUL V. McCORD
E. DALE WILSON
KASTURI BAGCHI
CATHERINE H. FINN
DAVID M. SAPERSTEIN
DANIELLE M. SPEHAR
CHRISTOPHER A. McMICAN
RICHARD M. MITCHELL
BRANDY L. MATHIE
NICOLE E. WILINSKI

MILTON M. MADDIN
(1902-1984)
C. ROBERT WARTELL
(1936-2001)

MEMORANDUM

TO: NINTH ANNUAL REAL ESTATE SYMPOSIUM ATTENDEES

FROM: GEORGE A. CONTIS, ESQ.

RE: PERSONAL GUARANTIES, RECOURSE AND CARVE-OUTS

DATE: APRIL 12, 2002

==

Generally, and as an enhancement to the creditworthiness of a loan transaction, a lender requires the principals of the borrower to guaranty the performance of the borrower's repayment obligations under the loan. The traditional type of guaranty is known as the personal guaranty. It is known as a guaranty of payment and not only a guaranty of collection. Under the typical personal guaranty, a lender is not required to exhaust the remedies afforded it under the loan documents before requiring a guarantor to perform.

In most instances a lender requires the principals of a borrowing entity to fully guaranty the obligations of the borrower. This is known as a full recourse loan. A guaranty signed by a guarantor in such a circumstance is noted as being "unlimited". This notation does not mean that the principal amount of the guaranty is an unlimited amount. Rather, the notation in a guaranty that it is "unlimited" means that the obligation of the guarantor is not limited to the principal amount of the loan (in our outline example, $7,000,000). The guarantor is also obligated to reimburse the lender for the collection of interest, fees and related expenses of collection, which include, but may not be limited to, the collection of attorney fees incurred by the

lender in collecting the amounts guaranteed by the guarantor even if the aggregate amount of indebtedness exceeds the principal balance of $7,000,000.

In many circumstances, as in the outline, there is more than one guarantor. It is in the lender's interest to have each guarantor execute an unlimited guaranty, which creates a joint and several obligation among the guarantors. The lender would not be required to pursue its remedies against all of the guarantors. It may proceed against one or all.

While each guarantor has a common law right of contribution against the other guarantors, most lenders are reluctant to permit a guarantor to assert his or her right of contribution while the lender is exercising its right to a guaranty of payment against a particular guarantor. In most circumstances, the lender takes the position that the guarantor's ability to pursue a right of contribution from his or her fellow guarantors accrues after and independent of the lender's exercise of its collection rights.

Most counsel for borrowers and guarantors will attempt to negotiate a limitation on the amount of each guarantor's exposure on a guaranty, based upon the ownership interest that each guarantor may have in the borrowing entity. The ability of counsel to successfully negotiate this limitation is largely dependent upon the relative creditworthiness of each guarantor, as well as the strength of the project.

Borrowers often desire to limit their possible losses to the collateral and not to prejudice other projects or their personal assets. Lenders may be unwilling to rely on the collateral as security provided the borrower has not acted in such a manner as to diminish the value of the collateral. Construction lenders almost always require full personal guaranties. In an end-loan, lenders generally require exceptions ("carve-outs") to the non-recourse provisions to protect against actions taken by the borrower which reduce the value of the collateral. If the business terms of the loan transaction contemplate that neither the borrowing entity nor its principals will be personally liable based upon a non-recourse provision in the loan documents, either primarily or for any deficiencies, or if the parties have agreed upon a dollar limitation on personal liability, lenders will generally still require certain "carve-outs" under which the borrower and its principals will remain personally liable. Generally, these carve-outs are intended to discourage certain affirmative acts by the borrower or its principals, as well as to provide additional collateral in the event that waste or other acts are taken with respect to the property.

1. General carve-outs may include the following:

   A. Fraud or misrepresentation in making the loan.

      i. Material;

ii. Intentional;

iii. Written misrepresentations only.

B. Diversion of rents. The Lender is interested in avoiding diversions of rental income which might otherwise be applied to pay taxes, operating expenses and debt service, particularly following an event of default.

C. Diversion of loan, insurance or condemnation proceeds.

D. Environmental liability.

E. Violations of due on sale clauses.

F. Commencement of bankruptcy proceedings.

G. Creation of liens on collateral.

H. Interference by borrower with lender’s collection of assigned rents.

I. Misapplication of tenant’s security deposits.

J. Misapplication of prepaid rent or rent credits.

K. Failure to pay taxes, assessments or insurance.

L. Waste.

M. Costs incurred in order to cause improvements to comply with statutory requirements (e.g. the Americans With Disabilities Act).

N. Court costs and attorneys fees.

2. Liability under carve-out provisions.

A. Liability limited to lender’s damages resulting from specific action.

B. Liability for total outstanding loan balance.

C. Court costs and attorneys fees.

3. Lenders have been adding significant exceptions to non-recourse carve-outs in order to discourage certain practices by borrowers.

EXHIBIT "G"

LAW OFFICES
MADDIN, HAUSER, WARTELL,
ROTH & HELLER, P.C.
THIRD FLOOR ESSEX CENTRE
28400 NORTHWESTERN HIGHWAY
SOUTHFIELD, MICHIGAN 48034-8004

(248) 354-4030
(248) 355-5200
TELEFAX (248) 354-1422

MAILING ADDRESS
POST OFFICE BOX 215
SOUTHFIELD, MI 48037-0215

MICHAEL W. MADDIN
MARK R. HAUSER
RICHARD J. MADDIN
RICHARD F. ROTH
HARVEY R. HELLER
MICHAEL S. LEIB
ROBERT D. KAPLOW
WILLIAM E. SIGLER
STEWART C.W. WEINER
CHARLES M. LAX
STUART M. BORDMAN
STEVEN D. SALLEN
GREGORY J. GAMALSKI
JULIE CHENOT MAYER
NATHANIEL H. SIMPSON
RONALD A. SOLLISH
LOWELL D. SALESIN
MARK H. FINK
STEVEN M. WOLOCK
DAVID E. HART
GEORGE A. CONTIS

LORI E. TALSKY
MARTIN S. FRENKEL
GARY M. REMER
GEORGE V. CASSAR, JR.
SHERYL K. SILBERSTEIN
PAUL V. McCORD
E. DALE WILSON
KASTURI BAGCHI
CATHERINE H. FINN
DAVID M. SAPERSTEIN
DANIELLE M. SPEHAR
CHRISTOPHER A. McMICAN
RICHARD M. MITCHELL
BRANDY L. MATHIE
NICOLE E. WILINSKI

MILTON M. MADDIN
(1902-1984)
C. ROBERT WARTELL
(1936-2001)

MEMORANDUM

TO: NINTH ANNUAL REAL ESTATE SYMPOSIUM ATTENDEES

FROM: KASTURI BAGCHI, ESQ.

RE: COMPLETION GUARANTIES

DATE: APRIL 12, 2002

==

Black's Law Dictionary defines "guaranty" as "an agreement in which the guarantor agrees to satisfy the debt of another (the debtor), only if and when the debtor fails to repay (secondarily liable)" or "an undertaking or promise that is collateral to primary or principal obligation and that binds guarantor to performance in event of nonperformance by the principal obligor."[14] The scope of a guarantor's obligations under a particular guaranty is governed by the language of the contract together with the intent of the parties as determined by the circumstances.[15]

The most common guaranty is that of a guaranty of payment in which the guarantor unconditionally agrees to repay the debt, including accrued interest, prepayment premiums, and any and all fees, costs, and expenses incurred by the lender in connection with the enforcement of the guaranty or the debtor's obligations (the "Indebtedness"). However, a guaranty of payment may not be adequate security for a construction loan where the repayment of the debt depends largely on the

[14] Black's Law Dictionary 6th Edition, page 705
[15] *See* In re Landwehr's Estate, 286 Mich. 698 (1938); and Miller Industries, Inc. v. Cadillac State Bank, 40 Mich.App. 52 (Mich.App. 1972).

ability of the borrower to complete the project in a timely fashion and in accordance with the construction budget and plans approved by the lender.

The typical construction loan revolves around the following set of facts: the loan amount is limited by underwriting to a percentage of the value of the project on a projected "as-completed" basis; the borrower has sufficient cash flow on hand to cover only monthly interest payments on the construction loan and to satisfy the lender's equity requirements; the guarantor is the principal of the borrower and may or may not have liquidity to repay the Indebtedness; and the ultimate repayment of the principal portion of the Indebtedness will be derived from selling lots and/or units in the completed project or collecting rent from tenants in the completed project. If the loan is accelerated prior to project completion in such a context, a payment guaranty will not protect the lender from the risk of foreclosing on an incomplete project with cost overruns. To minimize such a risk[16], a lender should strongly consider requiring a guaranty of completion in addition to a guaranty of payment.

A completion guaranty requires the guarantor to complete the project for which advances have been made in a lien free manner and in accordance with the plans and specifications approved by the lender by the completion date set forth in the loan documents and to the extent that the project is over-budget by any amount, to advance those sums necessary to complete the project. In addition, a completion guaranty requires the guarantor to pay the costs of completing the project which can include all expenses, charges, costs, and fees of or relating to the construction of the project including without limitation, all permitting fees, licensing fees, amounts payable under construction contracts and all subcontracts, and all amounts payable to any architects, engineers, contractors, subcontractors, and other consultants engaged by the borrower, its employees, agents or contractors in connection with the construction of the project. With a completion guaranty in place, the lender creates an additional layer of protection around the projected value of the collateral on which the loan amount is based by requiring the guarantor or another third party to complete the project in accordance with the approved plans and specifications while the guarantor remains liable for all costs even in excess of the original budget.

The use by Michigan based lenders of completion guaranties in the standard real estate construction project is new. Completion guaranties have, however, been

[16] The reader should be cautioned in that a guaranty of completion will not eliminate the risk of foreclosing on an incomplete project and cost overruns because a guarantor may file for bankruptcy.

routinely used by lenders in other parts of the country. It should come as no surprise that a lender's insistence that guarantors also be bound by a completion guaranty will be a hotly negotiated item in the Commitment Letter review and loan document review process.

EXHIBIT "H"

LAW OFFICES
MADDIN, HAUSER, WARTELL,
ROTH & HELLER, P.C.
THIRD FLOOR ESSEX CENTRE
28400 NORTHWESTERN HIGHWAY
SOUTHFIELD, MICHIGAN 48034-8004

(248) 354-4030
(248) 355-5200
TELEFAX (248) 354-1422

MAILING ADDRESS
POST OFFICE BOX 215
SOUTHFIELD, MI 48037-0215

MICHAEL W. MADDIN
MARK R. HAUSER
RICHARD J. MADDIN
RICHARD F. ROTH
HARVEY R. HELLER
MICHAEL S. LEIB
ROBERT D. KAPLOW
WILLIAM E. SIGLER
STEWART C.W. WEINER
CHARLES M. LAX
STUART M. BORDMAN
STEVEN D. SALLEN
GREGORY J. GAMALSKI
JULIE CHENOT MAYER
NATHANIEL H. SIMPSON
RONALD A. SOLLISH
LOWELL D. SALESIN
MARK H. FINK
STEVEN M. WOLOCK
DAVID E. HART
GEORGE A. CONTIS

LORI E. TALSKY
MARTIN S. FRENKEL
GARY M. REMER
GEORGE V. CASSAR, JR.
SHERYL K. SILBERSTEIN
PAUL V. McCORD
E. DALE WILSON
KASTURI BAGCHI
CATHERINE H. FINN
DAVID M. SAPERSTEIN
DANIELLE M. SPEHAR
CHRISTOPHER A. McMICAN
RICHARD M. MITCHELL
BRANDY L. MATHIE
NICOLE E. WILINSKI

MILTON M. MADDIN
(1902-1984)
C. ROBERT WARTELL
(1936-2001)

MEMORANDUM

TO: NINTH ANNUAL REAL ESTATE SYMPOSIUM ATTENDEES

FROM: E. DALE WILSON, ESQ.

RE: THE FIRST SHOVEL RULE

DATE: APRIL 12, 2002

==

Michigan's construction lien law, like many states, has a "first shovel priority rule." The first shovel rule is often misunderstood by lenders, borrowers and their respective counsel. Under the first shovel rule, a lender can be surprised to learn that it can either suffer delays in the enforcement of its rights in the event of a future default or will incur losses not adequately covered by title insurance. The delay in recording a mortgage, after closing, even if physical improvements to the property have not begun as of the date of closing, can create a priority windfall for construction lien claimants because in many circumstances, this "gap" may not be covered by title insurance. An example of this priority is set forth in the following example:

1. Palmer, Hogan & Jones has obtained a Commitment Letter from Masters National Bank for the expansion of The Links Shopping Center. At the loan closing, Palmer, Hogan & Jones execute all of the standard loan documents, including a construction mortgage. Masters National Bank also obtains a marked-up title insurance commitment from a title insurer which insures the mortgage as a first priority mortgage lien on

The Links property as of the date it is recorded by the title company. Palmer, Hogan & Jones also signs the standard owners affidavit,

2. stating that no labor or materials were provided to The Links within the last 90 days prior to closing. Based upon this representation, the title insurer deletes one of the standard exceptions (Schedule B, Exception No. 4), thereby giving Masters National Bank insurance coverage over all filed, or later filed, construction liens for labor or materials provided to The Links up through the policy date. Even though there is a gap between the date of the affidavit provided by Palmer, Hogan & Jones and the policy date, a title insurer routinely assumes this risk.

3. The day after closing, Palmer, Hogan & Jones' general contractor begins work at The Links; however, the title insurer does not record the mortgage until ten days after the closing.

4. The construction work is completed on the first phase of the construction on schedule. The construction draw requests, accompanied by proper sworn statements and personal lien waivers, conditional only on payment, are submitted to Masters National Bank and to the title insurer in the normal course. The title insurer issues pending disbursement endorsements to the title insurance policy in the normal course, insuring each construction loan draw.

5. The second phase of the construction development of The Links begins shortly thereafter. Palmer, Hogan & Jones starts running into financial difficulties on several other projects and divert the latest draws to pay delinquencies on some other projects. Construction work at The Links continues for a period of time until all subcontractors stop working and file numerous construction liens against The Links property over the next 90 days. Masters National Bank begins foreclosure proceedings. Based upon Masters' commencement of foreclosure proceedings, the subcontractors file construction lien foreclosure actions and assert that their construction liens have priority over Masters National Bank's mortgage. The Bank tenders defense of the foreclosure claims to its title insurer.

6. During the foreclosure case, Masters National Bank discovers that the majority of the amounts claimed by the subcontractors on their construction liens are for labor and materials provided to The Links after the date of the last endorsement to the title policy and, therefore, will not be paid by the title company.

7. Under the first shovel rule, all construction liens have priority over the mortgage because the first actual physical improvement to the property began prior to the date of recording of the mortgage. All Michigan

8. construction liens have priority based on the date of the first actual physical improvement (the first shovel) to the real property, regardless of when contracted for or when work was commenced or completed or materials provided. Masters National Bank's construction mortgage would be subordinate in priority to all valid construction lien claims when the "first shovel in the ground" predated the recording of the construction mortgage.

9. Mortgage title insurance does not insure Masters National Bank's mortgage against the first shovel rule. At closing, the mortgage title insurance policy only insures Masters National Bank's mortgage against potential construction lien claims for labor or materials provided to The Links up to the closing date. After closing, the same coverage is obtained for each construction draw -- coverage against potential construction lien claims for labor or materials provided to the real property up to the date of each endorsement to the Lender's mortgage title insurance policy. In other words, Masters National Bank's title insurance policy does not provide it with coverage against potential construction lien claims for labor or materials provided to the Property after the date of the last endorsement. Therefore, since the "first shovel" occurred prior to recording of Masters National Bank's mortgage, the construction lien claims arguably have priority over the mortgage and are uninsured. The longer work continues after the last endorsement, the larger the aggregate amount of the construction lien claims having priority over Masters National Bank's mortgage.

10. A construction lender can reduce the risk of the loss under the first shovel rule by:

    A. Determining if actual physical improvements have started on the property;

    B. If the borrower already owns the property and improvements have not commenced, pre-record the mortgage; if the construction loan fails to close, simply discharge the mortgage;

C. Arrange with the title company to record the construction mortgage within a specific time period after closing;

D. Engage in vigilant administration of the construction loan by performing inspections prior to each draw and monitoring the timely issuance of the title insurance endorsement for each draw;

E. Under the first shovel rule, construction lenders may suffer losses due to the lack of priority of their construction mortgage liens and lack of complete title insurance coverage. While the risk of loss due to the first shovel priority for construction liens cannot, except in limited circumstances, be eliminated, effective antidotes can be incorporated into the documentation and administration of the construction loan to significantly reduce this risk.

EXHIBIT "I"

LAW OFFICES
MADDIN, HAUSER, WARTELL,
ROTH & HELLER, P.C.
THIRD FLOOR ESSEX CENTRE
28400 NORTHWESTERN HIGHWAY
SOUTHFIELD, MICHIGAN 48034-8004

(248) 354-4030
(248) 355-5200
TELEFAX (248) 354-1422

MICHAEL W. MADDIN
MARK R. HAUSER
RICHARD J. MADDIN
RICHARD F. ROTH
HARVEY R. HELLER
MICHAEL S. LEIB
ROBERT D. KAPLOW
WILLIAM E. SIGLER
STEWART C.W. WEINER
CHARLES M. LAX
STUART M. BORDMAN
STEVEN D. SALLEN
GREGORY J. GAMALSKI
JULIE CHENOT MAYER
NATHANIEL H. SIMPSON
RONALD A. SOLLISH
LOWELL D. SALESIN
MARK H. FINK
STEVEN M. WOLOCK
DAVID E. HART
GEORGE A. CONTIS

MAILING ADDRESS
POST OFFICE BOX 215
SOUTHFIELD, MI 48037-0215

LORI E. TALSKY
MARTIN S. FRENKEL
GARY M. REMER
GEORGE V. CASSAR, JR.
SHERYL K. SILBERSTEIN
PAUL V. McCORD
E. DALE WILSON
KASTURI BAGCHI
CATHERINE H. FINN
DAVID M. SAPERSTEIN
DANIELLE M. SPEHAR
CHRISTOPHER A. McMICAN
RICHARD M. MITCHELL
BRANDY L. MATHIE
NICOLE E. WILINSKI

MILTON M. MADDIN
(1902-1984)
C. ROBERT WARTELL
(1936-2001)

MEMORANDUM

TO: NINTH ANNUAL REAL ESTATE SYMPOSIUM ATTENDEES

FROM: BRANDY L. MATHIE, ESQ.

RE: DEFEASANCE

DATE: APRIL 12, 2002

==

Defeasance represents an alternative to yield maintenance. Defeasance is a method of collateral substitution. Instead of holding a mortgage interest in real property or some other collateral, the borrower buys and substitutes qualified U.S. Governmental Securities in its place. The redemption of principal and interest from the securities pays the scheduled monthly debt service and, ultimately, the balloon payment. Technically the note is still in place, but is paid by the securities purchased by the borrower instead of the cash flow generated from the property.

When the borrower uses defeasance, it avoids the prepayment penalty under a fixed rate note. However, there are two costs associated with the defeasance option. First, there are the costs associated with purchasing the securities. These costs are not surprising; obviously, the substitute collateral will cost some amount. The second set of costs are those associated with the transaction or defeasance itself. These costs include rating agency fees, servicer's processing fees, custodian fees, legal fees, accountant fees and special New York Counsel fees, among others. Typically these fees can range from $55,000 to $120,000, according to experts in the

field. The average fees are closer to $75,000.00. This is all in addition to the cost of purchasing the substitute securities.

Defeasance would only be a beneficial alternative to yield maintenance if the total costs of the substitute collateral and transaction fees are lower than the yield maintenance payment.

The defeasance process itself is as complicated as the calculation of the yield maintenance and takes a much longer time to facilitate. If the borrower is battling time constraints, defeasance will serve as a poor choice. This is true because of the numerous parties necessary for each and every defeasance. Every defeasance requires a securities dealer, securities intermediary, a successor borrower, rating agencies, an escrow agent, New York Special Counsel, servicer's counsel, successor borrower's counsel and borrower's counsel.

Basically, the securities dealer purchasers the substitute collateral (the securities) and delivers them to the securities intermediary. The successor borrower agrees to assume the borrower's obligations under the note. The rating agency provides an opinion that the securities are sufficient to pay down the note obligation. An accounting agency must also opine that the securities are sufficient to pay down the note obligation. The New York Counsel must provide a New York Perfection and Enforceability Opinion. The successor borrower's counsel must provide an organization opinion and non-consolidation opinion. The borrower's counsel must provide a legal opinion. It should not come as a surprise, therefore, that the costs incurred in a defeasance can be substantial. Once all of these people and their various takes are in place, the borrower can defease the loan.

There are services which claim to save money by organizing the whole defeasance process for the borrower. They also claim to charge fees as low as only $5,000.00. Given the complex nature of the defeasance process and the organization required to keep each party apprised of their duties, the fee seems quite small. However, it is not unusual that the borrower will pay a much higher price, as much as an additional $25,000.00 in some instances, for the securities they purchased. The borrower must make the decision whether the additional $30,000.00 in fees is worthwhile given the circumstances, particularly when the borrower will be required to pay for their own counsel, but also the counsel of every other party involved.

EXHIBIT "J"

LAW OFFICES
MADDIN, HAUSER, WARTELL,
ROTH & HELLER, P.C.
THIRD FLOOR ESSEX CENTRE
28400 NORTHWESTERN HIGHWAY
SOUTHFIELD, MICHIGAN 48034-8004

(248) 354-4030
(248) 355-5200
TELEFAX (248) 354-1422

MAILING ADDRESS
POST OFFICE BOX 215
SOUTHFIELD, MI 48037-0215

MICHAEL W. MADDIN
MARK R. HAUSER
RICHARD J. MADDIN
RICHARD F. ROTH
HARVEY R. HELLER
MICHAEL S. LEIB
ROBERT D. KAPLOW
WILLIAM E. SIGLER
STEWART C.W. WEINER
CHARLES M. LAX
STUART M. BORDMAN
STEVEN D. SALLEN
GREGORY J. GAMALSKI
JULIE CHENOT MAYER
NATHANIEL H. SIMPSON
RONALD A. SOLLISH
LOWELL D. SALESIN
MARK H. FINK
STEVEN M. WOLOCK
DAVID E. HART
GEORGE A. CONTIS

LORI E. TALSKY
MARTIN S. FRENKEL
GARY M. REMER
GEORGE V. CASSAR, JR.
SHERYL K. SILBERSTEIN
PAUL V. McCORD
E. DALE WILSON
KASTURI BAGCHI
CATHERINE H. FINN
DAVID M. SAPERSTEIN
DANIELLE M. SPEHAR
CHRISTOPHER A. McMICAN
RICHARD M. MITCHELL
BRANDY L. MATHIE
NICOLE E. WILINSKI

MILTON M. MADDIN
(1902-1984)
C. ROBERT WARTELL
(1936-2001)

MEMORANDUM

TO: NINTH ANNUAL REAL ESTATE SYMPOSIUM ATTENDEES

FROM: LOWELL D. SALESIN, ESQ.

RE: MEZZANINE AND SECONDARY FINANCING

DATE: APRIL 12, 2002

===

The objective of mezzanine and secondary financing is to obtain additional funds out of the lending market on a real estate project to be secured by a junior lien on the real estate project. However, most first mortgage lenders prohibit junior financing in their loan documents.

Issues arise when a borrower desires to have two lenders whose loans are to be secured by the same real estate project. Typically, one lender has provided mortgage financing and now the borrower is in search of new money. In order to obtain the additional money, potential lenders request a junior lien against the real estate project. Secondary financing may be needed by the borrower to make major improvements to the real estate project, to fund tenant improvements to attract new tenants to the real estate project, to address environmental issues, to address unforeseen expenses or to pull additional money out of the real estate project.

It has become commonplace for lenders to restrict or prohibit junior financing as a condition to making a loan. These restrictions are typically found in loan commitments and loan documents which contain *due-on-encumbrance* clauses

causing loans to be accelerated in the event junior liens are granted against the mortgaged collateral.

In the context of a senior "securitized loan", additional indebtedness of the borrower violates rating agency investment criteria and therefore, prohibitions against junior liens are a condition of securitization of a "securitized" loan. Outside of "securitized" loans, commercial and institutional lenders generally limit or prohibit secondary secured financing because it increases the risks of monetary defaults by increasing the borrower's debt service requirements and may impair the lender's right to exercise remedies against its mortgaged collateral.

As a result of the favorable interest rate market for the past few years, many developers and property owners have entered into fixed rate loans for 5, 10 and 15 years, which loans prohibit secondary financing and have prepayment prohibitions or penalties. In the future, these developers and property owners who find themselves in need of additional cash may not be able to place a second lien against the mortgaged collateral even if loan-to value ratios on the senior loans are very low. Therefore, borrowers should be aware of the limitations on secondary financing in their loan transactions and should request the right to put junior liens on mortgaged collateral if certain conditions are met. If possible, this should be addressed at the loan commitment stage; but in all events should be memorialized in the borrower's loan documents.

Although most often found only in a "securitized" loan, some lenders restrict both secured and unsecured financing by the borrowers. Borrowers are unpleasantly surprised to find out that their senior loan documents restrict against obtaining unsecured lines of credit and even making personal loans to the borrowing entity. Borrowers will need to carefully consider the consequences of these types of restrictions and should attempt to carve-out exceptions to these restrictions if at all possible.

In the event secondary financing is prohibited and not available, alternative types of mezzanine financing may still be available. Mezzanine financing secured by granting mezzanine lenders equity interests in the borrowing entity or pledging partnership or membership interests to secure the mezzanine debt are becoming increasingly popular alternatives. In addition, mezzanine financing may be the only means of obtaining secondary type financing in conjunction with a "securitized" loan.

APPENDIX

SUPPLEMENTAL MEMORANDA

LAW OFFICES
**MADDIN, HAUSER, WARTELL
ROTH & HELLER, P.C.**
THIRD FLOOR ESSEX CENTRE
28400 NORTHWESTERN HIGHWAY
SOUTHFIELD, MICHIGAN 48034-8004

(248) 354-4030
(248) 355-5200
TELEFAX (248) 354-1422

MAILING ADDRESS
POST OFFICE BOX 215
SOUTHFIELD, MI 48037-0215

MICHAEL W. MADDIN
MARK R. HAUSER
C. ROBERT WARTELL
RICHARD J. MADDIN
RICHARD F. ROTH
HARVEY R. HELLER
IAN D. PESSES
MICHAEL S. LEIB
ROBERT D. KAPLOW
WILLIAM E. SIGLER
STEWART C.W. WEINER
CHARLES M. LAX
STUART M. BORDMAN
STEVEN D. SALLEN
GREGORY J. GAMALSKI
JULIE CHENOT MAYER
NATHANIEL H. SIMPSON
RONALD A. SOLLISH
LOWELL D. SALESIN
MARK H. FINK
STEVEN M. WOLOCK
DAVID E. HART

GEORGE A. CONTIS
LORI E. TALSKY
MARTIN S. FRENKEL
GARY M. REMER
GEORGE V. CASSAR, JR.
SHERYL K. SILBERSTEIN
PAUL V McCORD
E. DALE WILSON
KASTURI BAGCHI
CATHERINE H. FINN
DAVID M. SAPERSTEIN
DANIELLE M. SPEHAR
CHRISTOPHER A. MCMICAN
RICHARD M. MITCHELL
GEOFFREY N. TAYLOR
BRANDY L. MATHIE
NICOLE E. WILINSKI

MILTON M. MADDIN
(1902-1984)
C.ROBERT WARTELL
(1936-2001)

MEMORANDUM

TO: NINTH ANNUAL REAL ESTATE SYMPOSIUM ATTENDEES

FROM: STUART M. BORDMAN

RE: FRANCHISORS AND LEASING

DATE: APRIL 12, 2002

==

In retail and restaurant franchises the location of a franchised unit is an essential ingredient of success. If the franchisor does not have control of the real estate in which the franchisee is located the franchisee has the power "to pull down the sign" and continue in business outside of the franchise system. Some of the techniques frachisors use and the problems these approaches create are set forth below:

1. **Franchisor Lease of the Premises and Sublease to the Franchisee**. This approach gives the franchisor the most control over the franchise location. There are ordinarily cross default provisions in the lease and in the franchise agreement. Accordingly, if the franchisee defaults under the franchise agreement the franchisor can declare a default under the lease and remove the franchisee from the premises. However, the franchisor is liable under the lease. If the franchisee discontinues business and the franchisor cannot locate another franchisee or sublet the premises the franchisor is liable to the landlord. Generally the franchisor has the franchisee or its principals guaranty the lease. If the franchisee is not financially able the franchisor must deal with the landlord either by making the monthly payments or by buying itself out of the lease.

Many franchisees do not have the financial strength to lease locations in regional or major malls. Part of the appeal of becoming a franchisee is access to locations not otherwise available. In these situations the franchisor must lease and sublet or the franchisor will not be able to have franchisees in these prime locations.

2. **Franchisor's Shell Corporation Leases the Premises and Subleases to the Franchisee**. At least one national franchisor has established a corporation for leasing which has only nominal assets. The shell corporation enters into leases; sublets the premises to the franchisee, and the franchisee guarantees the underlying lease. If a franchisee defaults under its franchise agreement the franchisor has the option of curing the default and retaining control of the location, or walking away from the location. The landlord can obtain no assets from the shell corporation and the landlord's only remedy is to pursue the franchisee who has guaranteed the lease.

3. **Use of a Lease Rider**. In order to control the premises and not be exposed to liability the franchisor will require the franchisee to enter into a lease, which requires the **landlord** to notify the franchisor of:

a. Any cancellation or termination of the lease;
b. Any assignment or attempted assignment;
c. Any sublease or attempted sublease;
d. Any modification of the lease.
e. The exercise of any option to extend the lease
f. The renewal or new lease with the franchisee; or
g. Any action against the franchisee for eviction or otherwise.

The landlord agrees to the assignment of the lease to the franchisor at any time during the lease term without further action (consent) by the landlord. The franchisor is deemed a third-party beneficiary of the lease. The difficulty with this approach is that it requires a great deal of monitoring by the franchisor. Generally, the lease is signed after the franchise agreement. Accordingly, franchisor personnel must be certain that the signed lease contains the lease provisions that are desired. Changes in the relationship between the landlord and the franchisee must be continually monitored. If the franchisee sells its unit and a new lease is entered into by the purchaser the new lease must be obtained and monitored for compliance with the franchise agreement.

The franchise agreement gives the franchisor the power to take over the lease if there is a default under the franchise agreement. Since the landlord's consent is

not required the franchisor may only be required to cure any defaults under the lease to retain control of the location.

In at least one state (California) a post-termination not to compete is unenforceable. Accordingly, the only way to control the franchise location is through control of the premises.

LAW OFFICES

MADDIN, HAUSER, WARTELL ROTH & HELLER, P.C.

THIRD FLOOR ESSEX CENTRE
28400 NORTHWESTERN HIGHWAY
SOUTHFIELD, MICHIGAN 48034-8004

(248) 354-4030
(248) 355-5200
TELEFAX (248) 354-1422

MAILING ADDRESS
POST OFFICE BOX 215
SOUTHFIELD, MI 48037-0215

MICHAEL W. MADDIN
MARK R. HAUSER
C. ROBERT WARTELL
RICHARD J. MADDIN
RICHARD F. ROTH
HARVEY R. HELLER
IAN D. PESSES
MICHAEL S. LEIB
ROBERT D. KAPLOW
WILLIAM E. SIGLER
STEWART C.W. WEINER
CHARLES M. LAX
STUART M. BORDMAN
STEVEN D. SALLEN
GREGORY J. GAMALSKI
JULIE CHENOT MAYER
NATHANIEL H. SIMPSON
RONALD A. SOLLISH
LOWELL D. SALESIN
MARK H. FINK
STEVEN M. WOLOCK
DAVID E. HART

GEORGE A. CONTIS
LORI E. TALSKY
MARTIN S. FRENKEL
GARY M. REMER
GEORGE V. CASSAR, JR.
SHERYL K. SILBERSTEIN
PAUL V McCORD
E. DALE WILSON
KASTURI BAGCHI
CATHERINE H. FINN
DAVID M. SAPERSTEIN
DANIELLE M. SPEHAR
CHRISTOPHER A. MCMICAN
RICHARD M. MITCHELL
GEOFFREY N. TAYLOR
BRANDY L. MATHIE
NICOLE E. WILINSKI

MILTON M. MADDIN
(1902-1984)
C.ROBERT WARTELL
(1936-2001)

MEMORANDUM

TO: NINTH ANNUAL REAL ESTATE SYMPOSIUM ATTENDEES

FROM: DANIELLE M. SPEHAR

RE: I'VE EARNED MY COMMISSION! HAVEN'T I?

DATE: APRIL 12, 2002

==

In a recent unpublished opinion, the Michigan Court of Appeals held That the general rule that a real estate broker is entitled to the agreed commission when the broker produces a ready, willing, and able buyer does not always apply. Re/Max Advisors, Inc. v. Bakun, No. 224814 (Mich. Ct. App. Jan. 29, 2001).

The facts in the case were not in dispute. The homeowners, Mr. and Mrs. Bakun (the "Sellers"), entered into two consecutive listing agreements of sixty and thirty days, respectively, with Re/Max Advisors, Inc. ("Re/Max" or the "Broker"). The Bakun's home had not sold at the time of the expiration of the second listing agreement. Shortly thereafter, Re/Max had located potential purchasers, Mr. & Mrs. Licatovich (the "Buyers"), for the Bakun's home. Re/Max then entered into a one-party listing agreement that contained specific language that if "a sale is consummated to the above prospective purchaser [the Licatoviches] within one year" then, Re/Max would be entitled to a six (6%) percent commission.

Within days of the execution of the one-party listing agreement, the Buyers and the Sellers entered into a purchase agreement for the purchase of the Sellers' home on land contract. The parties to the purchase agreement acknowledged in an addendum to the purchase agreement, signed on the same date, that the Sellers'

mortgage contained a due-on-sale clause. The parties also agreed in the addendum that the mortgagor would not be advised of the sale of the Sellers' home on land

contract. A land contract sale addendum signed on the same date set forth the terms of the land contract and the Buyers paid $5,000 in deposit money to Re/Max.

Within a short period of time, concerns arose about the due-on-sale clause and the Buyers and Sellers agreed to modify the land contract sale to a lease with an option to purchase agreement. The Sellers asked Re/Max to revise the proposed land contract to be a lease with an option to purchase agreement. Re/Max advised against do so. Re/Max prepared and circulated to the parties a lease with an option to purchase agreement. However, the Buyers had concerns with the language of the agreement. Ultimately, the Buyers and Sellers entered into a lease with an option to purchase agreement prepared by the Sellers with essentially identical terms to the terms of the land contract sale addendum.

Re/Max requested that the Sellers grant a lien on the house for the commission and the Sellers refused. Re/Max filed a lawsuit alleging breach of contract and fraud. The Sellers eventually obtained a judgment of possession against the Buyers for failure to pay rent under the lease with an option to purchase agreement.

At trial, Re/Max demanded its full six (6%) percent commission. The Defendants, the Bakuns and the Licatoviches, argued that no commission was due because no sale was ever consummated as specifically stated in the one-party listing agreement. The trial court held that Re/Max was entitled to a commission as a result of bringing the parties together and those parties having reached an agreement regarding the property. However, the trial court ruled that Re/Max was only entitled to six (6%) percent of the amount of the Defendants' enrichment due to its willingness to participate in the effort to skirt around the due-on-sale clause in the Sellers' mortgage. The court noted that the Buyers had paid a $40,000 deposit plus $18,000 in rent before they defaulted, for a total of $58,000. The trial court awarded Re/Max a commission of $3,480 or six (6%) percent of the total amount received by the Sellers.

Re/Max appealed the trial court's judgment. The Michigan Court of Appeals held that the trial court erred in its ruling that Re/Max was entitled to a commission because it did not apply the clear and unambiguous language in the one-party listing agreement to the facts of the case. The appeals court noted that generally a broker earns a commission when the seller and the purchaser enter into a binding agreement. However, the court acknowledged that the parties may contract to

provide that the commission is contingent on "completion of the deal" or "consummation of the sale." Referring to the specific language of the one-party agreement, the appeals court concluded that Re/Max and the Sellers had clearly agreed that Re/Max was not entitled to a commission until a sale was consummated.

Further, the court stated a lease with an option to purchase agreement is not a binding contract of sale because the option does not bind the prospective buyer to purchase the property. Because the specific language of the one-party listing agreement required that a sale be consummated between the Buyers and the Sellers in order for the Broker to be entitled to its six (6%) percent commission, and as no sale was ever consummated, the appeals court reversed the trial court and held that the Broker was not entitled to any commission.

Clearly, in light of this opinion, Brokers would be advised to make certain that the terms of any listing agreement or commission agreement clearly state the specific terms under which the Broker will be entitled to a commission.

If you would like any additional information about the subject covered in this memo, please contact Danielle M. Spehar at (248) 827-1892 or at dxs@maddinhauser.com.

LAW OFFICES

MADDIN, HAUSER, WARTELL ROTH & HELLER, P.C.

THIRD FLOOR ESSEX CENTRE
28400 NORTHWESTERN HIGHWAY
SOUTHFIELD, MICHIGAN 48034-8004

(248) 354-4030
(248) 355-5200
TELEFAX (248) 354-1422

MAILING ADDRESS
POST OFFICE BOX 215
SOUTHFIELD, MI 48037-0215

MICHAEL W. MADDIN
MARK R. HAUSER
C. ROBERT WARTELL
RICHARD J. MADDIN
RICHARD F. ROTH
HARVEY R. HELLER
IAN D. PESSES
MICHAEL S. LEIB
ROBERT D. KAPLOW
WILLIAM E. SIGLER
STEWART C.W. WEINER
CHARLES M. LAX
STUART M. BORDMAN
STEVEN D. SALLEN
GREGORY J. GAMALSKI
JULIE CHENOT MAYER
NATHANIEL H. SIMPSON
RONALD A. SOLLISH
LOWELL D. SALESIN
MARK H. FINK
STEVEN M. WOLOCK
DAVID E. HART

GEORGE A. CONTIS
LORI E. TALSKY
MARTIN S. FRENKEL
GARY M. REMER
GEORGE V. CASSAR, JR.
SHERYL K. SILBERSTEIN
PAUL V McCORD
E. DALE WILSON
KASTURI BAGCHI
CATHERINE H. FINN
DAVID M. SAPERSTEIN
DANIELLE M. SPEHAR
CHRISTOPHER A. MCMICAN
RICHARD M. MITCHELL
GEOFFREY N. TAYLOR
BRANDY L. MATHIE
NICOLE E. WILINSKI

MILTON M. MADDIN
(1902-1984)
C.ROBERT WARTELL
(1936-2001)

MEMORANDUM

TO: NINTH ANNUAL REAL ESTATE SYMPOSIUM ATTENDEES

FROM: PAUL V. MCCORD, ESQ.

RE: NEW REGULATIONS FACILITATE LIKE-KIND EXCHANGES

DATE: APRIL 12, 2002

==

The Internal Revenue Service has released new regulations that will facilitate structuring like-kind exchanges. Specifically, Treasury Regulation Section 1.1031(k)-1(k) makes it possible for a bank to serve as a qualified intermediary even though a bank holding company or subsidiary provided services that would have made the bank a "disqualified person."

Property owners may accomplish a deferred like-kind exchange through the use of qualified escrow accounts, qualified trusts, or a qualified intermediary as long as the escrow holder, trustee, or intermediary is not a disqualified person. Under current rules, a disqualified person includes any person who has acted as the taxpayer's employee, attorney, accountant, investment banker or broker, or real estate agent or broker within two (2) years of the exchange.

However, due to recent changes in banking laws, banks and bank holding companies are now permitted to become members of control groups that include investment banks and brokerage firms. Since banks frequently act as qualified intermediaries, escrow holders or trustees for like-kind exchanges, the new regulations provide that a bank member of a control group containing an investment bank or brokerage firm won't be a disqualified person merely because the investment

bank or brokerage firm has provided services to the taxpayer within two (2) years of the exchange.

Similarly, bank affiliates whose principal activity is to render services as like-kind exchange facilitators are also excluded from being a disqualified person based solely on affiliation with an investment bank or brokerage firm that provided services to the taxpayer.

These rules apply retroactively to like-kind exchange transfers occurring after January 17, 2001, which is when these rules were first proposed.

Should you have any questions regarding IRC Section 1031 exchange and reverse exchanges, or the treatment of condemnation proceeds under IRC Section 1033, please contact me at (248) 359-7539 or e-mail at pvm@maddinhauser.com.

LAW OFFICES
MADDIN, HAUSER, WARTELL ROTH & HELLER, P.C.
THIRD FLOOR ESSEX CENTRE
28400 NORTHWESTERN HIGHWAY
SOUTHFIELD, MICHIGAN 48034-8004

(248) 354-4030
(248) 355-5200
TELEFAX (248) 354-1422

MAILING ADDRESS
POST OFFICE BOX 215
SOUTHFIELD, MI 48037-0215

MICHAEL W. MADDIN
MARK R. HAUSER
C. ROBERT WARTELL
RICHARD J. MADDIN
RICHARD F. ROTH
HARVEY R. HELLER
IAN D. PESSES
MICHAEL S. LEIB
ROBERT D. KAPLOW
WILLIAM E. SIGLER
STEWART C.W. WEINER
CHARLES M. LAX
STUART M. BORDMAN
STEVEN D. SALLEN
GREGORY J. GAMALSKI
JULIE CHENOT MAYER
NATHANIEL H. SIMPSON
RONALD A. SOLLISH
LOWELL D. SALESIN
MARK H. FINK
STEVEN M. WOLOCK
DAVID E. HART

GEORGE A. CONTIS
LORI E. TALSKY
MARTIN S. FRENKEL
GARY M. REMER
GEORGE V. CASSAR, JR.
SHERYL K. SILBERSTEIN
PAUL V McCORD
E. DALE WILSON
KASTURI BAGCHI
CATHERINE H. FINN
DAVID M. SAPERSTEIN
DANIELLE M. SPEHAR
CHRISTOPHER A. MCMICAN
RICHARD M. MITCHELL
GEOFFREY N. TAYLOR
BRANDY L. MATHIE
NICOLE E. WILINSKI

MILTON M. MADDIN
(1902-1984)
C.ROBERT WARTELL
(1936-2001)

MEMORANDUM

TO: NINTH ANNUAL REAL ESTATE SYMPOSIUM ATTENDEES

FROM: CATHERINE H. FINN

RE: UPDATES TO MICHIGAN LAND TITLE STANDARDS

DATE: APRIL 12, 2002

===

The Land Title Standards Committee of the Real Property Law Section of the State Bar of Michigan publishes a volume called the “Michigan Land Title Standards,” which is of considerable assistance to parties who have title questions with regard to the conveyance of real estate. The Title Standards cover a number of topics and are continually subject to review and revision by a Standing Committee of the State Bar, appropriately called the “Land Title Standards Committee.” As stated in the preface to Michigan Land Title Standards, “[t]he Title Standards are not intended as a treatise on land title law, but rather comprise the Committee’s carefully considered statements on the particular legal principle that can guide lawyers as they evaluate the legal effect of land title instruments.”

The Committee has recently published the Seventh Supplement (2001) to the 5th Edition of the Michigan Land Title Standards, that consists of the following new or revised Michigan Land Title Standards:

Standard 1.6 – Effect of the Marketable Record Title Act on Prior Interests

Standard 1.7 – Conflicting Marketable Record Titles

Standard 3.18 – Unrecorded Conveyance Void Against Subsequent Purchaser for Value and Without Knowledge

Standard 11.7 – Effect of Dissolution Upon Partners' Authority to Convey Co-Partnership Real Property

Standard 11.8 – Effect of Statutory Conversion of Co-Partnership or Limited Partnership to Limited Liability Company on Title to Real Property

Standard 16.1 – Lien of Mortgage on After-Acquired Title

Standard 16.2 – Effect of Mortgage Purporting to Correct or Modify Land Description in Prior Mortgage

Standard 16.3 – Reference to Mortgage in Chain of Title

Standard 16.5 – Effectiveness of Discharge of Mortgage

Standard 16.6 – Mortgage Held by Husband and Wife

Standard 16.9 – Recorded Mortgage Over Thirty Tears Old

Standard 16.11 – Attempted Foreclosure by Advertisement of Mortgage Not Containing Proper Power of Sale

Standard 28.1 – Condominium Units as Real Property

Standard 28.2 – Relocation of Boundaries Between Adjoining Units

Standard 28.3 – Reassignment of Limited Common Elements

Standard 28.4 – Subdivision of Units in a Condominium

LAND TITLE STANDARDS AND CONDOMINIUM LAW

Of particular interest are the new Standards 28.1 through 28.4 pertaining to condominiums.

Standard 28.1 defines a condominium unit, together with and inseparable from its appurtenant share of common elements, as real property independent of the other condominium units. As the illustrations to Standard 28.1 demonstrate, a deed conveying title to a condominium unit necessarily conveys title to the unit's appurtenant share of common elements, even if the share of common elements is not specified in the deed. A limited common element (such as a carport or a boat slip) may not be conveyed separately from the unit to which it is assigned. Rather, a

limited common element may be reassigned only by a recorded amendment to the condominium Master Deed, and then only if the Master Deed does not expressly prohibit such reassignments. Standard 28.3; MCL 559.139; MSA 26.50(139).

Standard 28.2 addresses the relocation of boundaries between adjoining condominium units, relying on MCL 559.148; MSA 26.50(148) as authority. The boundaries between adjoining units may be relocated only if expressly *permitted* by the condominium documents, and only with the approval of the unit owners and any affected mortgagees. The relocation of boundaries is effected by the recording of an amendment to the Master Deed that identifies the units involved in the relocation, contains the legal description of the units whose boundaries are being relocated, and has attached thereto a replat of the Condominium Subdivision Plan showing the new relocated boundaries. The parties may agree on a reasonable reallocation of the aggregate undivided interest in appurtenant common elements, if applicable.

Standard 28.4 addresses the subdivision of units in a condominium, relying on MCL 550.149; MSA 26.40(149) as authority. A condominium unit may be subdivided only if expressly permitted by the recorded Master Deed, and is effective upon recording an amendment to the Master Deed that assigns new identifying numbers to the units created by the subdivision and allocates to those units all of the undivided interest in common elements appurtenant to the subdivided unit. The Committee notes in its comment to Standard 28.4:

> If the amendment subdividing a condominium unit does not specifically allocate among the resulting units the limited common elements previously assigned to the subdivided unit, then the resulting units jointly share all rights, and are equally liable, jointly and severally, for all obligations, with regard to the limited common elements previously assigned to the subdivided unit.

The recent revisions to the Michigan Land Title Standards will likely prove to be of great assistance to practitioners and courts alike. If you would like additional information, or have questions concerning the Michigan Land Title Standards, please contact me at (248) 359-7521 or chf@maddinhauser.com.

LAW OFFICES
MADDIN, HAUSER, WARTELL ROTH & HELLER, P.C.
THIRD FLOOR ESSEX CENTRE
28400 NORTHWESTERN HIGHWAY
SOUTHFIELD, MICHIGAN 48034-8004

(248) 354-4030
(248) 355-5200
TELEFAX (248) 354-1422

MAILING ADDRESS
POST OFFICE BOX 215
SOUTHFIELD, MI 48037-0215

MICHAEL W. MADDIN
MARK R. HAUSER
C. ROBERT WARTELL
RICHARD J. MADDIN
RICHARD F. ROTH
HARVEY R. HELLER
IAN D. PESSES
MICHAEL S. LEIB
ROBERT D. KAPLOW
WILLIAM E. SIGLER
STEWART C.W. WEINER
CHARLES M. LAX
STUART M. BORDMAN
STEVEN D. SALLEN
GREGORY J. GAMALSKI
JULIE CHENOT MAYER
NATHANIEL H. SIMPSON
RONALD A. SOLLISH
LOWELL D. SALESIN
MARK H. FINK
STEVEN M. WOLOCK
DAVID E. HART

GEORGE A. CONTIS
LORI E. TALSKY
MARTIN S. FRENKEL
GARY M. REMER
GEORGE V. CASSAR, JR.
SHERYL K. SILBERSTEIN
PAUL V McCORD
E. DALE WILSON
KASTURI BAGCHI
CATHERINE H. FINN
DAVID M. SAPERSTEIN
DANIELLE M. SPEHAR
CHRISTOPHER A. MCMICAN
RICHARD M. MITCHELL
GEOFFREY N. TAYLOR
BRANDY L. MATHIE
NICOLE E. WILINSKI

MILTON M. MADDIN
(1902-1984)
C.ROBERT WARTELL
(1936-2001)

MEMORANDUM

TO: NINTH ANNUAL REAL ESTATE SYMPOSIUM ATTENDEES

FROM: E. DALE WILSON

RE: REVISED ARTICLE 9 OF THE UNIFORM COMMERCIAL CODE

DATE: APRIL 12, 2002

==

BACKGROUND

Article 9, the Secured Transactions Article of the Uniform Commercial Code ("UCC"), has been the law governing secured transactions since about 1972. In Michigan it is codified as MCL §440.9101, et seq. Article 9 governs the means by which security interest in goods, chattels and securities are created, perfected and enforced. Article 9 does not apply to real estate interests; it does apply to goods such as inventory, equipment, production machinery and fixtures (a peculiar legal term of art which purports to describe an item that is neither equipment nor real estate).

Article 9 of the Uniform Commercial Code dealing with secured transactions was signed into law in Michigan in 1962, effective January 1, 1964. Article 9 has not been substantially revised since it was first adopted. However, the Commission on Uniform Laws ("Commission") began working on revising parts of the UCC in the late 1990s. The Commission is a private body that proposes and comments on uniform laws, one of which is the UCC. After the Commission proposes a new uniform law, the law is frequently adopted by the individual States. In the instance of Revised

Article 9, Michigan adopted the proposal when Public Act 348 of 2000 became law, effective July 1, 2001. Revised Article 9 represents the first major revision to Article 9

since 1972. The revisions are intended to bring greater certainty to financing transactions and this will reduce both transaction costs and the costs of credit. Revised Article 9 provides greater certainty by expanding the scope of property and transactions covered by Article 9 and simplifying and clarifying the rules for creation, perfection, priority and enforcement of a security interest.

FINANCING STATEMENTS

In perhaps the most dramatic change, Revised Article 9 has done away with the requirement that the debtor sign the Financing Statements (§9-502, official comment number 3). This facilitates electronic filing of Financing Statements, and as a result, electronic searches. A secured party can file a Financing Statement (without the debtor's signature) only if authorized by the debtor to make the filing. Revised Article 9 provides for automatic authorization to file a Financing Statement consistent with a security interest granted by the debtor in the security agreement. Therefore, it is critical that financing documents contain a clear expression of the secured party's rights to file a Financing Statement. A secured party would need express authorization (or subsequent ratification) to pre-file a Financing Statement if the debtor has not yet authenticated a security agreement.

However, a very important item to note, is that while the ability for a secured party to file a Financing Statement without the debtor's signature enables secured transactions to proceed more smoothly. Revised Article 9 also allows debtors to file termination statements, terminating the secured party's interest in the individual debtor's collateral. There is a section of the termination statement that must be marked if a debtor is filing a termination statement without the secured party's signature. However, when one does a UCC search in the future, and receives various termination statements that have not been signed by a secured party, it would be very prudent for the potential creditor or secured party to independently verify the proper termination of that Financing Statement and/or security interest of the secured party. Revised Article 9 provides penalties for a Financing Statement that is improperly terminated but it will be much easier to verify the proper termination of a security interest before a secured party either provides goods or funds a transaction, rather than argue with another creditor about priorities.

FILING LOCATION

Revised Article 9 also changes the rules about the location of the filing of a Financing Statement. A Financing Statement is a recorded notice to the public that collateral is pledged to secure repayment of a debt. It is somewhat like a mortgage on real estate in one sense. Generally, the former law provided for filing a Financing

Statement in the State where the goods and equipment are located for goods, and the State of the debtor's chief executive office for intangible collateral, such as accounts and general intangibles. Revised Article 9 provides for only one (1) filing location for goods, equipment, assessments and general intangibles: the place of the debtor's "location." For example, for a debtor incorporated in Maryland, with its chief executive office in New Jersey, a secured party would file a Financing Statement in Maryland, the State of the debtor's formation, for all kinds of collateral. For an entity not created by a filing, the entity's location is the place of its chief executive office. For an individual, the person's location is his or her principal residence.

FINANCING STATEMENTS AND SECURITY INTERESTS

Revised Article 9 expands the kinds of collateral that a secured party can use when filing a Financing Statement to protect its security interest. These now include instruments and investment property (including stock certificates) where a secured party formerly could perfect only by possession. The availability of perfection by filing does not preclude perfection by other available means, such as possession or control (where appropriate).

ACCOUNTS

Article 9 has always applied to the sale of "Accounts." Revised Article 9 continues this rule in §9-109(a)(3). However, former Article 9 defined accounts to include payment obligations arising only out of the sale or lease of goods or the provision of services. Under the former law, this left many kinds of payment rights within the definition of general intangibles. The sale of these types of payment rights (such as account receivables) often serve as a financing tool, but former Article 9 did not apply to these transactions. Revised Article 9 broadens the definition of "Accounts" to include: (i) payment obligations arising out of the sale, lease or license of all kinds of tangible and intangible property (for example, "Accounts" will include license fees payable for the use of software); and (ii)credit card receivables. §9-102(a)(2). The broader definition expands the scope of Article 9 by bringing into Article 9 more transactions through the continued application of Article 9 to the sale of accounts. Revised Article 9 also clarifies that a seller of accounts (and other property where the sale is an Article 9 transaction) retains no interest in the property sold.

SOFTWARE AND GOODS

Article 9 draws a line between "goods" and "software." Where software is embedded in goods so that the software becomes part of the goods, Revised Article 9 now treats the software as goods for all purposes under Article 9, such as how to

perfect a security interest and buyer in ordinary course rules (the oft mentioned BFP or bona fide purchaser for value). Otherwise, when software maintains its independent status, it will constitute a general intangible.

TORT CLAIMS

Former Article 9 excluded tort claims from the coverage of Article 9 (except to the extent they constitute "proceeds"). Revised Article 9 continues this rule, except for "commercial tort claims." Revised Article 9 defines "commercial tort claims" as those tort claims: (i) where the claimant is an organization, or (ii) if the claimant is an individual, the claim (a) arose in the course of the claimant's business and (b) does not involve personal injury. A secured party may not obtain a security interest in an after-acquired commercial tort claim. The security agreement must describe the commercial tort claim with some specificity.

ATTACHMENT

Attachment generally continues to require (i) a security agreement, (ii) value, and (iii) that the debtor have rights in the collateral (§9-203). The security agreement may be an authenticated record, i.e. signed by the Borrower. Revised Article 9 confirms the exception to the requirement of a signature where the secured party has possession pursuant to an "Agreement." "Agreement" means that the Agreement for possession has to be an agreement that the person (secured party) will have possession for purposes of security specifically. The classic agreement is a pledge where something of value is delivered to the lender to secure repayment for a debt. Imagine, for instance, a lender taking possession of a machine to assure repayment.

COLLATERAL DESCRIPTION

Revised Article 9 clarifies that a description of collateral by Article 9 "type" (e.g. "equipment") suffices to "describe" the collateral. If the collateral is a commercial tort claim, however, the description requires some specificity beyond the category of "commercial tort claims" (e.g. "all claims arising out of the explosion occurring at the Debtor Chicago Fireworks Factory on July 4, 2001"). However, for the purposes of security agreements as opposed to Financing Statements, a description of collateral in the security agreement may not use a generic statement such as "all my personal property."

ATTACHMENT TO PROCEEDS

As with former Article 9, a security interest automatically attaches to "proceeds" of the collateral. Revised Article 9 expands the definition of "proceeds" to

include (a) rights arising out of the licensing property, and (b) distributions on stock and other investments. Revised Article 9 also permits the use of a Financing Statement to perfect a security interest in some kinds of collateral that under former Article 9 could be perfected only by other means, such as possession by a bailee. Revised Article 9 modifies the method of perfecting a security interest by possession where a third party has possession of the collateral. Most court decisions under former §9-305 held that the secured party can perfect its security interest by possession through giving notice of the security interest to the bailee in possession of the collateral. Now Revised Article 9 requires that the bailee (a) receive notice, and (b) acknowledge in an authenticated record that it is holding the collateral "for the secured party's benefit."

NEW DEBTOR

A person who is a "new debtor" (i.e., when a company or individual purchases assets from a third party that are covered by the security interest of a secured party), under the terminology of Revised Article 9, will become bound by a security interest that another person entered into if under other law (a) the other person's security agreement becomes effective to create a security interest in the property of the second person, or (b) the second person becomes generally obligated for the obligations of the other person and the second person acquires all or substantially all of the assets of the other person. A licensee under a non-exclusive license in an ordinary course will also "take free" of a security interest created by its immediate licensor (in this circumstance "take free" means that the non-exclusive licensee can continue to enjoy its rights under the license following the foreclosure by the licensors' secured party against the licensors so long as the licensee performs its obligations under the license). It is important to note that the non-exclusive licensee will not "take free" of a security interest created by a remote licensor. For example, if a licensor grants a security interest in its intellectual property and then grants an exclusive license to a licensee, the exclusive licensee would not "take free" of the security interest. A person who obtains a non-exclusive sublicense from the original licensee in the circumstance, would not "take free" of the security interest created by the original licensor.

CONTINUED PERFECTION – OR NOT – UNDER REVISED ARTICLE 9

A security interest perfected under former Article 9, or outside of Article 9, remains perfected if: (a) the secured party perfected the security interest under prior law (under Article 9 or outside of Article 9); and (b) the acts of perfection (under former Article 9 or outside of Article 9) would also perfect the security interest under new Article 9. Except for a security interest perfected by filing under former Article 9, a security interest perfected under former Article 9 or outside of former Article 9

maintains perfected status for only one (1) year after Revised Article 9 comes into effect (i.e., through July 1, 2002), if: (a) the secured party perfected the security interest under prior Article 9 or outside of prior Article 9; and (b) the steps of perfection taken do not suffice to perfect the security interest under the Revised Article 9. Such a security interest will remain continuously perfected under new Article 9 if: (a) if the secured party has perfected the security interest under prior Article 9 or outside of former Article 9; and (b) the secured party satisfies the creation and perfection requirements under Revised Article 9 within one (1) year of the effective date of the new Revised Article 9. **Note: Secured Parties should confirm that these requirements are being satisfied.** This requires, among other things: (a) a description of collateral that suffices under the Revised Article 9; and (b) a filing in the correct State under the Revised Article 9. The filing of an effective Financing Statement under the prior Article 9 remains effective under the Revised Article 9 (including to perfect a security interest in collateral arising after the effective date of the Revised Article 9) until the earlier of: (a) the normal lapsed date of the Financing Statement (generally five (5) years after filing a Financing Statement); and (b) five (5) years after the effective date of the Revised Article 9. A secured party may file a "real" continuation statement under the Revised Article 9 to continue a Financing Statement filed under the prior Article 9 only if: (a) the continuation statement is filed in the State where the Financing Statement was filed under prior law; (b) that State is the correct State for the filing of a new Financing Statement under the Revised Article 9; and (c) the continuation statement "updates" the old Financing Statement to comply with the requirements of Revised Article 9. Unless a "real" "continuation" statement is filed under §9-705, a Financing Statement filed under the prior Article 9 is "continued" by: (a) the filing of a compliant initial Financing Statement under Revised Article 9; (b) the initial Financing Statement is filed in the correct State under the Revised Article 9 and contains certain required information concerning the continued Financing Statement in the other State; and (c) the continuation statement "updates" the old Financing Statement to comply with the requirements of Revised Article 9.

TAX LIEN FILINGS

As discussed above, Revised Article 9 has modified many aspects of filing and searching UCC records on a daily basis. However, the statutes covering State and Federal tax liens were not amended and therefore the location for the filing of State and Federal tax liens has not changed. As such, personal property liens against corporations and partnerships must still be filed at the Michigan Secretary of State's office, personal property liens against all others are to be filed at the County Register of Deeds' office, and tax liens upon real property continue to be filed at the Register of Deeds office in the county in which the real property is located. Along the same

vein, Jeopardy Tax Assessment documents filed pursuant to MCL 211.693 continue to be filed at the County Register of Deeds' office.

CONCLUSION

The effectiveness of Revised Article 9 will facilitate financing, reduce the cost of financing, bring greater certainty to financing transactions and provide greater protection to debtors in the foreclosure process. A form National UCC Financing Statement to be utilized for a transaction under the new law is attached for your information.

If you have any questions or would like further information, please contact the members of our Banking Group:

Lowell D. Salesin at (248) 827-1889 or lds@maddinhauser.com;
George A. Contis at (248) 827-1886 or gac@maddinhauser.com;
E. Dale Wilson at (248) 359-6326 or edw@maddinhauser.com; or
Kas Bagchi at (248) 359-7501 or kxb@maddinhauser.com.

UCC FINANCING STATEMENT

FOLLOW INSTRUCTIONS (front and back) CAREFULLY

A. NAME & PHONE OF CONTACT AT FILER [optional]

B. SEND ACKNOWLEDGMENT TO: (Name and Address)

Gregory J. Gamalski
Maddin, Hauser, Wartell, et al
28400 Northwestern Highway, 3rd Fl.
Southfield, Michigan 48034

THE ABOVE SPACE IS FOR FILING OFFICER USE ONLY

1. DEBTOR'S EXACT FULL LEGAL NAME – insert only one debtor name (1a or 1b) – do not abbreviate or combine names

1a. ORGANIZATION'SNAME					
OR 1b. INDIVIDUAL'S LAST NAME		FIRST NAME	MIDDLE NAME		SUFFIX
1c. MAILING ADDRESS		CITY	STATE	POSTAL CODE	COUNTRY
1d. S.S. OR TAX I.D.#	ADD'NL. INFO RE ORGANIZATION DEBTOR	1e. TYPE OF ORGANIZATION	1f. JURISDICTION OF ORGANIZATION	1g. ORGANIZATIONAL I.D.#, IF ANY	☐ NONE

2. ADDITIONAL DEBTOR'S EXACT FULL LEGAL NAME– insert only one debtor name (2a or 2b) – do not abbreviate or combine names

2a. ORGANIZATION'S NAME					
OR 2b. INDIVIDUAL'S LAST NAME		FIRST NAME	MIDDLE NAME		SUFFIC
2c. MAILING ADDRESS		CITY	STATE	POSTAL CODE	COUNTRY
2d. S.S. OR TAX I.D.#	ADD'NL. INFO RE ORGANIZATION DEBTOR	2e. TYPE OF ORGANIZATION	2f. JURISDICTION OF ORGANIZATION	2g. ORGANIZATIONAL I.D.#, IF ANY	☐ NONE

3. SECURED PARTY'S NAME (or NAME of TOTAL ASSIGNEE of ASSIGNOR S/P) – insert only one secured party name (3a or 3b)

3a. ORGANIZATION'S NAME				
OR 3b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME		SUFFIC
3c. MAILING ADDRESS	CITY	STATE	POSTAL CODE	COUNTRY

4.. This FINANCING STATEMENT covers the following collateral:

5. ALTERNATIVE DESIGNATION [if applicable]: ☐ LESSEE/LESSOR ☐ CONSIGNEE/CONSIGNOR ☐ BAILEE/BAILOR ☐ AG. LIEN ☐ NON-UCC FILING

6. ☐ This FINANCING STATEMENT is to be filed [for record] (or recorded) in the REAL ESTATE RECORDS Attach Addendum [if applicable]

7. Check to REQUEST SEARCH REPORT(S) on Debtor(s) [ADDITIONAL FEE] (optional) ☐ All Debtors ☐ Debtor 1 ☐ Debtor 2

8. OPTIONAL FILER REFERENCE DATA

FILING OFFICER COPY– NATIONAL FINANCING STATEMENT (FORM UCC1) (REV. 07/29/98)

LAW OFFICES
MADDIN, HAUSER, WARTELL ROTH & HELLER, P.C.
THIRD FLOOR ESSEX CENTRE
28400 NORTHWESTERN HIGHWAY
SOUTHFIELD, MICHIGAN 48034-8004
(248) 354-4030
(248) 355-5200
TELEFAX (248) 354-1422
MAILING ADDRESS
POST OFFICE BOX 215
SOUTHFIELD, MI 48037-0215

MICHAEL W. MADDIN
MARK R. HAUSER
C. ROBERT WARTELL
RICHARD J. MADDIN
RICHARD F. ROTH
HARVEY R. HELLER
IAN D. PESSES
MICHAEL S. LEIB
ROBERT D. KAPLOW
WILLIAM E. SIGLER
STEWART C.W. WEINER
CHARLES M. LAX
STUART M. BORDMAN
STEVEN D. SALLEN
GREGORY J. GAMALSKI
JULIE CHENOT MAYER
NATHANIEL H. SIMPSON
RONALD A. SOLLISH
LOWELL D. SALESIN
MARK H. FINK
STEVEN M. WOLOCK
DAVID E. HART

GEORGE A. CONTIS
LORI E. TALSKY
MARTIN S. FRENKEL
GARY M. REMER
GEORGE V. CASSAR, JR.
SHERYL K. SILBERSTEIN
PAUL V McCORD
E. DALE WILSON
KASTURI BAGCHI
CATHERINE H. FINN
DAVID M. SAPERSTEIN
DANIELLE M. SPEHAR
CHRISTOPHER A. MCMICAN
RICHARD M. MITCHELL
GEOFFREY N. TAYLOR
BRANDY L. MATHIE
NICOLE E. WILINSKI

MILTON M. MADDIN
(1902-1984)
C.ROBERT WARTELL
(1936-2001)

MEMORANDUM

TO: NINTH ANNUAL REAL ESTATE SYMPOSIUM ATTENDEES

FROM: DANIELLE M. SPEHAR

RE: A REAL ESTATE BROKER ACCEPTING AN EARNEST MONEY DEPOSIT CHECK FROM A BUYER MADE PAYABLE TO A TITLE INSURANCE COMPANY IS VIOLATING THE OCCUPATIONAL CODE.

DATE: APRIL 12, 2002

In what appears to be a strict construction of Article 25 of the Occupational Code, the Attorney General opined in October, 2000 that under the Occupational Code, 1980 PA 299, MCL 339.101 *et seq*, a real estate broker may not accept from a buyer an earnest money deposit check made payable to a title insurance company. 2000 OAG No. 7064. Section 2512 of Article 25 of the Occupational Code which governs a broker's handling of deposit monies requires licensed real estate brokers to deposit money "belonging to others coming into the hands of the licensee" in a separate "custodial, trust or escrow account maintained by the broker" until the transaction is "consummated or terminated." MCL 339.2512(j).

The supposition on which the Attorney General's opinion is based is the fairly common scenario where a prospective buyer and seller of real property agree that the buyer will deliver an earnest money deposit check to the real estate broker in the form of a check made payable to a title insurance company. In turn, the broker shall

deliver the check to the title company to hold in trust until the transaction is consummated or terminated in accordance with the parties' further agreement that

the title insurance company, as opposed to the broker, shall act as the escrow agent for the earnest money deposit.

The Attorney General began her analysis with a review of the legislative history of provisions of the Occupational Code which require a real estate broker to deposit earnest money in a separate custodial or escrow account maintained by the broker. In determining the legislative intent of the statute, the Attorney General analyzed the specific language of the statute and concluded that the Legislature's intent was to safeguard the buyer's funds and to make them accessible in the event the funds needed to be returned to the buyer.

In rendering her decision, the Attorney General noted that where an activity is created and regulated by statute and where the statute prescribes the mode for the exercise of its authority, no deviation from that mode should be permitted. The licensure of brokers to sell real estate is a privilege granted by the state. The continuation of the privilege of licensure is conditioned upon the licensee's proper observance of the law and rules related to such business.

The Attorney General opined that in a situation where a broker accepts an earnest money deposit in the form of a check made payable to a title insurance company:

> Since the broker cannot negotiate the check, he likewise cannot obey his legal obligation to deposit the check in a separate custodial or escrow account maintained by the broker in the broker's name. The broker should, therefore, decline to accept such a deposit, and instead direct the buyer to provide a deposit check made payable to the broker, who in turn can process it in accordance with section 2512 of the [Occupational] Code.

To conclude otherwise, according to the Attorney General, would prevent the broker from complying with the requirements of the Occupational Code and would consequently deprive the buyer and the seller the protection contemplated in Section 2512.

In her opinion, the Attorney General acknowledges that the Occupation Code does not prevent a buyer and seller from agreeing that an earnest money deposit be held in an escrow account maintained with a title insurance company, ". . . provided that a real estate broker is not involved in facilitating or handling the deposit." While the Attorney General's opinion does not make it clear what activities would constitute "facilitating" by a real estate broker, it seems apparent that unless the broker can literally comply with the procedural requirements of negotiating the check and

depositing it in an account maintained by the broker that the broker should decline to accept physical possession of the deposit check. Therefore, buyers and sellers electing to use a title insurance company as the escrow agent should make arrangements, not involving the broker, for delivery of the earnest money deposit.

It should be noted that the analysis in the Attorney General's opinion is not limited to residential transactions or to situations where a title company is acting as escrow agent. By natural extension of her opinion, a real estate broker should not accept an earnest money deposit check made payable to any third party. The simple act of physically delivering the check or "facilitating" the delivery of the deposit check to any third party would constitute a violation of the Occupational Code under the Attorney General's analysis.

Although the Attorney General's opinion does not specifically address the sale of condominium units, it should be pointed out that there is a subtle distinction to be made in the context of condominium projects. With regard to the initial sale of condominium units, the Condominium Act, MCL 559.101 *et seq*, absolutely precludes real estate brokers from acting as escrow agents. In the case of the initial sale of condominium units, the Condominium Act requires that earnest money must be held by a title insurance company, bank or savings and loan association pursuant to a written escrow agreement. MCL 559.184(5). Consequently, real estate brokers must continue to ensure that earnest money deposits for new condominium units are deposited with the designated escrow agent pursuant to a written escrow agreement in order to comply with the requirements of the Condominium Act. The Attorney General's opinion would apply, however, in the context of earnest money deposits for condominium units which are being re-sold.

If you would like additional information about the subject covered in this memo, please contact Danielle M. Spehar at (248) 827-1892 or at dxs@maddinhauser.com.

LAW OFFICES
**MADDIN, HAUSER, WARTELL
ROTH & HELLER, P.C.**
THIRD FLOOR ESSEX CENTRE
28400 NORTHWESTERN HIGHWAY
SOUTHFIELD, MICHIGAN 48034-8004

(248) 354-4030
(248) 355-5200
TELEFAX (248) 354-1422

MAILING ADDRESS
POST OFFICE BOX 215
SOUTHFIELD, MI 48037-0215

MICHAEL W. MADDIN
MARK R. HAUSER
C. ROBERT WARTELL
RICHARD J. MADDIN
RICHARD F. ROTH
HARVEY R. HELLER
IAN D. PESSES
MICHAEL S. LEIB
ROBERT D. KAPLOW
WILLIAM E. SIGLER
STEWART C.W. WEINER
CHARLES M. LAX
STUART M. BORDMAN
STEVEN D. SALLEN
GREGORY J. GAMALSKI
JULIE CHENOT MAYER
NATHANIEL H. SIMPSON
RONALD A. SOLLISH
LOWELL D. SALESIN
MARK H. FINK
STEVEN M. WOLOCK
DAVID E. HART

GEORGE A. CONTIS
LORI E. TALSKY
MARTIN S. FRENKEL
GARY M. REMER
GEORGE V. CASSAR, JR.
SHERYL K. SILBERSTEIN
PAUL V McCORD
E. DALE WILSON
KASTURI BAGCHI
CATHERINE H. FINN
DAVID M. SAPERSTEIN
DANIELLE M. SPEHAR
CHRISTOPHER A. MCMICAN
RICHARD M. MITCHELL
GEOFFREY N. TAYLOR
BRANDY L. MATHIE
NICOLE E. WILINSKI

MILTON M. MADDIN
(1902-1984)
C.ROBERT WARTELL
(1936-2001)

MEMORANDUM

TO: NINTH ANNUAL REAL ESTATE SYMPOSIUM ATTENDEES

FROM: MARTIN S. FRENKEL

RE: NAVIGATING THE WATERS OF REAL ESTATE ARBITRATION

DATE: APRIL 12, 2002

==

Anyone whose livelihood is tied to real estate – whether a real estate broker, contractor or real estate investor – has probably asked the question "what if?" What if this deal goes bad? The answer frequently is "arbitration." But what exactly is "arbitration?" Simply put, arbitration is a *private* dispute resolution procedure which is intended to be faster, less expensive, and more informal than normal civil litigation which takes place in the courts. The outcome of an arbitration proceeding is typically decided by an attorney or attorneys that act as the judge(s) during the Arbitration. The procedure was developed as a reaction to overloaded court dockets that required parties to litigate cases for years prior to obtaining a conclusion to the dispute and only after incurring tens of thousands of dollars in attorney fees. Arbitration is particularly well-suited for resolving real estate disputes because real estate transactions tend to be time sensitive. If a dispute is not quickly resolved, property may significantly decline in value or the condition of the property may deteriorate while the parties wait for a resolution of their case.

Arbitration does not just happen. In order for the parties to be required to arbitrate their disputes, there must be a written contract between the parties and the contract must have a provision mandating that all disputes arising between the

parties under the contract will be arbitrated (rather than litigated in court), that the arbitration will be conducted as a statutory arbitration under Michigan law, that an award may be rendered by the arbitrator, and that a judgment may be entered on the award by a court.

Arbitration clauses are most commonly found in (1) purchase agreements, and (2) construction contracts. The following is an example of a typical arbitration provision found in pre-printed real estate form contracts:

> Buyer and seller agree that should any controversy or claim arise out of or relating to this agreement, or breach thereof, that the dispute shall be settled by arbitration which arbitration shall be conducted as a statutory arbitration under Michigan law according to the [variation: Home Buyer/Home Seller] rules of the American Arbitration Association and judgment upon an award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

A common arbitration provision in the construction setting is as follows:[17]

> The parties shall endeavor to resolve their disputes by mediation which, unless the parties mutually agree otherwise, shall be in accordance with the Construction Industry Mediation Rules of the American Arbitration Association currently in effect. Request for mediation shall be filed in writing with the other party to this Agreement and with the American Arbitration Association. The request may be made concurrently with the filing of a demand for arbitration but, in such event, mediation shall proceed in advance of arbitration or legal or equitable proceedings, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or court order.
>
> Claims, disputes and other matters in question arising out of or relating to the Contract that are not resolved by mediation . . . shall be decided by arbitration which, unless the parties mutually agree otherwise, shall be in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect. The demand for arbitration shall be filed in writing with the other party to this Agreement and with the American Arbitration Association and shall be made within a reasonable time after the dispute has

[17] This arbitration clause was taken from a form A107-1997 published by the American Institute of Architects.

> arisen. The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof. . ..

Although parties may use anyone on which they are able to agree to act as an arbitrator, and may follow any rules they wish in conducting the arbitration, generally, agreements provide (for convenience sake, i.e. why reinvent the wheel) that the arbitration shall be conducted according to the rules of the American Arbitration Association ("AAA"). AAA is a private arbitration company that has developed well-accepted procedures for selecting and training professional arbitrators, as well as rules for conducting the arbitration itself.[18]

It must be noted that the type of dispute which you have (breach of purchase agreement vs. breach of construction contract) will dictate which set of rules maintained by AAA will be applicable. For purchase agreements relating to the sale of residential property, the AAA Home Buyer/Home Seller Rules will apply if specified in the agreement between the parties, or will generally be applied in house sales under $500,000.00. For house sales exceeding $500,000.00, and in the absence of a specification in the agreement that the Home Buyer/Home Seller Rules shall be used, then AAA's Commercial Rules will apply. In construction disputes, AAA's Construction Industry Rules will be applied. For the purposes of this memorandum, AAA's Construction and Commercial Rules are similar in nature and will be referred to generally as the Construction Rules.

So, once you have a dispute, you are secure in the knowledge that you have an arbitration clause in your agreement and you know which rules will apply to the arbitration, how do you get to arbitration and what happens once you get there? In order to begin arbitration, you must (1) file a demand form (samples are attached to this memorandum) with the American Arbitration Association and with the other party to the contract; and (2) pay initial filing fees and case administration fees. The initial filing and case administration fees under the Home Buyer/Home Seller Rules range from $500.00 to $1,100.00, depending on the amount of money which is at issue in the case. The initial fees for a matter proceeding under the Construction Rules range from $500.00 for claims under $10,000.00 to $5,500.00 for claims up to $500,000.00. (These fees will be apportioned evenly between the parties by AAA after initial payment by the filing party.) Greater fees are charged for claims over $500,000.00.[19]

---

[18] For more information on AAA, you may log on to AAA's web site at www.adr.org.

[19] It should be noted that these fees do not include compensation for the arbitrator(s) that may range from $150.00 per hour to $300.00 per hour for conducting the arbitration.

After these basic requirements have been met, you can expect the following in a case proceeding under the Home Buyer/Home Seller Rules: (1) Upon filing of the arbitration demand, AAA sends the non-filing party notice of the demand; (2) Within ten (10) days of receipt of the arbitration demand, the non-filing party may file a response addressing the issues raised by the demand and may file a counterclaim asserting any claims that the non-filing party has against the party which filed for arbitration; (3) If a counterclaim is filed, the party against whom the counterclaim is asserted has ten (10) days from mailing of the counterclaim to file an response thereto; (4) Upon filing of the arbitration demand, AAA will forward to the parties a list of three (3) arbitrators who are real estate agents, attorneys, architects, builders or engineers. The parties may strike one arbitrator and must number the remaining arbitrators in order of preference. The list of acceptable arbitrators must be returned to AAA within ten (10) days or all arbitrators will be deemed acceptable. If the parties cannot agree on an arbitrator, AAA will select one. (5) Upon appointment of an arbitrator, the arbitrator will set the date, time, and place of the hearing and AAA will notify the parties of the hearing at least ten (10) days prior to thereto. The hearing will generally be held at the house/property that is at the center of the dispute.

At the hearing, the parties may be represented by an attorney. The hearing begins with the filing party presenting evidence to support its claim in the form of documents, affidavits and witness testimony. The witnesses may be questioned by both parties. This procedure is duplicated for the non-filing party in proving its claims or defenses. After the parties present their evidence, the arbitrator will declare the hearing closed. The arbitrator will issue his/her award no later than ten (10) days following the close of the hearing and upon payment of any fees owing the arbitrator.

The procedures for cases proceeding under the Construction Rules are slightly different. As noted above in the standard provision for construction contracts, the parties to the agreement are required to attempt *mediation* prior to arbitration. Because mediation is in itself a complex procedure requiring a lengthy explanation, it will not be discussed in detail in this memorandum. By way of background, mediation is a procedure in which a neutral person (generally an attorney) acts as a go-between or facilitator. The mediator attempts to work with the parties in an informal setting to narrow their differences in the hopes of reaching a settlement of the matter. Presuming that mediation fails and a settlement cannot be reached, the procedures for arbitrating construction cases are as follows:[20] (1) A demand for arbitration is filed

[20] The procedures discussed are for “Fast Track” cases which are disputes where the aggregate amount of all claims and counterclaims is less than $75,000.00. Cases with dollar figures exceeding this amount will be administered through the use of a lengthier and more extensive set of rules and procedures.

on the appropriate AAA form and the non-filing party is informed of the demand by AAA; (2) The non-filing party has fifteen (15) days from the date of notice of filing of the arbitration demand to file an answering statement; (3) After the filing of the answering statement, or within fifteen (15) days of service of the demand (whichever is earlier), AAA will forward a list of arbitrators to the parties for approval. In the event no agreement is reached on an arbitrator, AAA will appoint one; (4) Immediately after confirmation of the appointment of an arbitrator, the arbitrator will schedule a telephone conference with the parties and their attorneys to discuss the case and select a hearing date.

The hearing must be scheduled by the arbitrator for a date not exceeding 30 days after the confirmation of his/her appointment as arbitrator. The hearing generally will not exceed one (1) day. In cases where the claims do not exceed $10,000.00, no hearing will be conducted and the dispute will be decided on written submissions and documents filed by the parties. No discovery is generally permitted between the parties and the only exchange of information regarding the parties' cases will come in the form of an exchange of exhibits that will be used at the hearing. The exchange will occur at least two (2) days before the hearing. At some point after conclusion of the hearing, the arbitrator will declare the hearing closed. An award must be rendered by the arbitrator within fourteen (14) days after the hearing is closed, and no longer than 60 days after his/her initial appointment.

Finally, it may be disconcerting, but once you have navigated your way through the arbitration process, your journey may not yet be over. However, what follows is generally *perfunctory*. In the event the party against whom an award is rendered fails or refuses to honor the award, it will be necessary for the prevailing party to file a perfunctory complaint in state court to have the arbitration award "transformed" into a court judgment. This may add an additional 30 to 50 days after the award is rendered before you may enforce it. The reason for this requirement is that although arbitration was agreed to by the parties and is authorized by state law, there is no power to enforce the arbitration award absent the authority of a court.

If you would like additional information concerning real estate arbitration, or any other form of arbitration, please contact me at (248) 827-1891 or msf@maddinhauser.com.

American Arbitration Association
COMMERCIAL ARBITRATION RULES
DEMAND FOR ARBITRATION

MEDIATION *is a nonbinding process. The mediator assists the parties in working out a solution that is acceptable to them. If you wish for the AAA to contact the other parties to ascertain whether they wish to mediate this matter, please check this box (there is no additional administrative fee for this service).*	☐

TO: Name			Name of Representative (if known)		Name of Firm (if applicable)
Address			Representative's Address		
City	State	Zip Code	City	State	Zip Code
Phone No.	Fax No.		Phone No.	Fax No.	

The named claimant, a party to an arbitration agreement contained in a written contract, dated ____________________ and providing for arbitration under the Commercial Arbitration Rules of the American Arbitration Association, hereby demands arbitration thereunder.

THE NATURE OF THE DISPUTE

THE CLAIM OR RELIEF SOUGHT (the Amount, if Any)

DOES THIS DISPUTE ARISE OUT OF AN EMPLOYMENT RELATIONSHIP? ☐ Yes ☐ No

TYPES OF BUSINESS

Claimant ___________________________________ Respondent ___________________________________

HEARING LOCALE REQUESTED

You are hereby notified that copies of our arbitration agreement and this demand are being filed with the American Arbitration Association at its office, with a request that it commence administration of the arbitration. Under the rules, you may file an answering statement within fifteen days after notice from the AAA.

Signature (may be signed by a representative)	Title

TO: Name			Name of Representative (if known)		Name of Firm (if applicable)
Address			Representative's Address		
City	State	Zip Code	City	State	Zip Code
Phone No.	Fax No.		Phone No.	Fax No.	

TO INSTITUTE PROCEEDINGS PLEASE SEND TWO COPIES OF THIS DEMAND AND **THE ARBITRATION AGREEMENT** WITH THE FILING FEE AS PROVIDED FOR IN THE RULES TO THE AAA. SEND THE ORIGINAL DEMAND TO THE RESPONDENT.

Form C2-11/99

American Arbitration Association
CONSTRUCTION INDUSTRY ARBITRATION RULES
DEMAND FOR ARBITRATION

MEDIATION *If you want the AAA to contact the other party and attempt to arrange a mediation please check this box.* ☐

TO: Name			Name of Representative (if known)		
Address			Address		
City	State	Zip Code	City	State	Zip Code
Phone No.	Fax No.		Phone No.	Fax No.	

THE NAMED CLAIMANT, A PARTY TO A WRITTEN AGREEMENT PROVIDING FOR ARBITRATION UNDER THE CONSTRUCTION INDUSTRY ARBITRATION RULES, HEREBY DEMANDS ARBITRATION THEREUNDER. (ATTACH THE ARBITRATION CLAUSE).

THE NATURE OF THE DISPUTE (Please give enough details to enable the AAA to select arbitrators with appropriate experience)

DOLLAR AMOUNT OF CLAIM $	OTHER RELIEF SOUGHT

PLEASE DESCRIBE APPROPRIATE QUALIFICATIONS FOR ARBITRATOR(S) TO BE APPOINTED TO HEAR THIS DISPUTE

CLAIMANT IS

☐ Owner ☐ Design Professional (specify ___________________________) ☐ Contractor

☐ Subcontractor (specify ___________________________________) ☐ Other (specify ___________________________________)

RESPONDENT IS

☐ Owner ☐ Design Professional (specify ___________________________) ☐ Contractor

☐ Subcontractor (specify ___________________________________) ☐ Other (specify ___________________________________)

ESTIMATED TIME NEEDED FOR HEARINGS OVERALL _____________hours _____________ days

Copies of this demand are being filed with the American Arbitration Association at its ___________________________ office. Claimant requests that the AAA commence the administration of the arbitration. Under the rules, you may file an answering statement within fifteen days after notice from the AAA.

CLAIMANT REQUESTS THAT ARBITRATION HEARINGS BE HELD AT THE FOLLOWING LOCALE

Signature (may be signed by a representative)	Title	Date

TO: Name			Name of Representative (if known)		
Address			Address		
City	State	Zip Code	City	State	Zip Code
Phone No.	Fax No.		Phone No.	Fax No.	

TO INSTITUTE PROCEEDINGS PLEASE SEND TWO COPIES OF THIS DEMAND AND **THE ARBITRATION AGREEMENT** WITH THE FILING FEE AS PROVIDED FOR IN THE RULES TO THE AAA. SEND THE ORIGINAL DEMAND TO THE RESPONDENT.

Form C12-07/01

American Arbitration Association
CONSTRUCTION INDUSTRY ARBITRATION RULES
ANSWERING STATEMENT

MEDIATION *If you want the AAA to contact the other party and attempt to arrange a mediation please check this box.*	☐

TO: Name			Name of Representative (if known)		
Address			Address		
City	State	Zip Code	City	State	Zip Code
Phone No.	Fax No.		Phone No.	Fax No.	

RESPONDENT ANSWERS CLAIMANT'S DEMAND FOR ARBITRATION AS FOLLOWS:
Please describe the dispute and any counterclaim in sufficient detail so the AAA may select an arbitrator with appropriate qualifications and experience.
AAA Case # (if known)

DOLLAR AMOUNT OF CLAIM $	OTHER RELIEF SOUGHT

PLEASE DESCRIBE APPROPRIATE QUALIFICATIONS FOR ARBITRATOR(S) TO BE APPOINTED TO HEAR THIS DISPUTE

ESTIMATED TIME NEEDED FOR HEARINGS OVERALL _____________hours _____________ days

RESPONDENT REQUESTS THAT ARBITRATION HEARINGS BE HELD AT THE FOLLOWING LOCALE

Signature (may be signed by a representative)	Title	Date

TO: Name			Name of Representative (if known)		
Address			Address		
City	State	Zip Code	City	State	Zip Code
Phone No.	Fax No.		Phone No.	Fax No.	

TO INSTITUTE PROCEEDINGS PLEASE SEND TWO COPIES OF THIS DEMAND AND **THE ARBITRATION AGREEMENT** WITH THE FILING FEE AS PROVIDED FOR IN THE RULES TO THE AAA. SEND THE ORIGINAL DEMAND TO THE RESPONDENT.

Form **C14-11/99**

LAW OFFICES
MADDIN, HAUSER, WARTELL
ROTH & HELLER, P.C.
THIRD FLOOR ESSEX CENTRE
28400 NORTHWESTERN HIGHWAY
SOUTHFIELD, MICHIGAN 48034-8004

(248) 354-4030
(248) 355-5200
TELEFAX (248) 354-1422

MAILING ADDRESS
POST OFFICE BOX 215
SOUTHFIELD, MI 48037-0215

MICHAEL W. MADDIN
MARK R. HAUSER
C. ROBERT WARTELL
RICHARD J. MADDIN
RICHARD F. ROTH
HARVEY R. HELLER
IAN D. PESSES
MICHAEL S. LEIB
ROBERT D. KAPLOW
WILLIAM E. SIGLER
STEWART C.W. WEINER
CHARLES M. LAX
STUART M. BORDMAN
STEVEN D. SALLEN
GREGORY J. GAMALSKI
JULIE CHENOT MAYER
NATHANIEL H. SIMPSON
RONALD A. SOLLISH
LOWELL D. SALESIN
MARK H. FINK
STEVEN M. WOLOCK
DAVID E. HART

GEORGE A. CONTIS
LORI E. TALSKY
MARTIN S. FRENKEL
GARY M. REMER
GEORGE V. CASSAR, JR.
SHERYL K. SILBERSTEIN
PAUL V McCORD
E. DALE WILSON
KASTURI BAGCHI
CATHERINE H. FINN
DAVID M. SAPERSTEIN
DANIELLE M. SPEHAR
CHRISTOPHER A. MCMICAN
RICHARD M. MITCHELL
GEOFFREY N. TAYLOR
BRANDY L. MATHIE
NICOLE E. WILINSKI

MILTON M. MADDIN
(1902-1984)
C.ROBERT WARTELL
(1936-2001)

MEMORANDUM

TO: NINTH ANNUAL REAL ESTATE SYMPOSIUM ATTENDEES

FROM: BRANDY L. MATHIE

RE: BUILDER OBLIGATIONS UNDER THE REVISED MICHIGAN CONDOMINIUM ACT

DATE: APRIL 12, 2002

==

On January 3, 2001, Senate Bill 612 was signed by Governor Engler as Public Act No. 379 of 2000. The new Act made significant changes to the existing Michigan Condominium Act, MCL 559.101, which was last significantly revised in 1983. The original Act contained several provisions that were designed to protect residential condominium purchasers. While the provisions may have provided some benefit to the purchasers, they made sales of site condominium units by builders an awkward and paper-intensive task. The recent changes to the Act ease the burdens on a builder (though not the Developer), decreasing the amount of information the builder must provide a purchaser and the complexity of the documents needed to sell site condominium units as part of a building contract. The changes reduce the amount of documentation provided to the purchaser and makes the transaction almost identical to sales of lots in traditional subdivisions.

Perhaps the most important changes to the Act under Public Act 379 deal with the definition of a condominium "Developer." The original definition of a "Developer" under the Act was very broad and included "anyone who engaged in the business of

developing a condominium project." This meant that an independent builder who purchased units in a condominium project and then resold the units to purchasers

were treated as condominium Developers with the same duties and responsibilities that the original Developer had to the prospective purchasers of a unit. Under the prior provisions, a residential builder was forced to comply with the many notice and protective provisions of the Act. By way of example, a builder might purchase all of the site condominium units in a 20-unit site condominium project in which all infrastructure was complete. Prior to Public Act 379, the builder would have been obligated to supply a purchaser with a Purchaser Information Booklet containing, at a minimum, a copy of the recorded Master Deed, Bylaws, Condominium Subdivision Plan, Purchase Escrow Agreement and Articles of Incorporation for the condominium association.

From the builder's point of view, the most problematic provisions of the Act were MCL 559.184 and 184a. Both of these provisions contain specific information that the Developer of a condominium project must provide to a potential purchaser. Specifically, MCL 559.184 requires that the purchase agreement for a condominium unit include a nine (9) day grace period during which the prospective purchaser may withdraw from the purchase agreement without cause and without penalty. Nine (9) business days is almost two (2) complete weeks. Furthermore, the same provision, along with MCL 559.209(b), requires the Developer to deposit all funds received in connection with the purchase of the unit into an escrow account. After the nine (9) day grace period, the Developer can generally obtain the funds at closing if all the "must be built" items in the Condominium Subdivision Plan have actually been completed.

MCL 559.184a(1) requires that the developer provide the prospective purchaser of a condominium unit with (a) a copy of the recorded master deed, (b) a copy of the purchase agreement that conforms with the provisions of MCL 559.184, together with the escrow agreement, (c) The Condominium Buyers Handbook, published by the State of Michigan, which contains the name, telephone number and address of the person designated by the administrator to respond to complaints and provides a list of available remedies provided under the Act and (d) a Disclosure Statement containing, among other things, the names, addresses and previous experience with condominium projects of each Developer, identification of any affiliates of Developer involved in the project, description of any management agency contracted to manage the project, if any, and the real estate broker for the project.

While these two statutory provisions were created as consumer protection tools meant to assist prospective purchasers when purchasing condominiums, the paper-intensive nature of the disclosures that the Developer is required to provide have become particularly burdensome to residential builders who purchase units within the condominium project with the intention of building a residence on the unit and selling the unit and completed residence to an end consumer.

The plight of the residential builder was recognized by Public Act 379. MCL 559.106(2), as revised by the Public Act 379, specifically excludes "a residential builder who acquires title to 1 or more condominium units for the purpose of residential construction on those condominium units and subsequent resale" from the definition of a Developer. By virtue of the change in definition of a "Developer," the residential builder is no longer burdened with fulfilling the various protective provisions of the Act. The residential builder is free to buy units and build residences on them in the same fashion as a builder would when buying lots and building a residence in a subdivision. The residential builder does not have to deposit all funds received in connection with the purchase of a site condominium unit in a special escrow account, nor does the residential builder have to provide the potential purchaser with a nine (9) day grace period. The residential builder has also been relieved from providing the potential purchaser with all the documentation required by MCL 559.184a, i.e., the recorded Master Deed, Disclosure Statement and The Condominium Buyers Handbook.

As a result, the residential builder will be in a better position when selling units than the original condominium Developer, because the builder's documentation burden is less. Furthermore, the costs of assembling and maintaining the Purchaser's Information Booklet and Disclosure Statement are eliminated. Most builders purchasing site condominium units for the purpose of building residences on them can now market their site condominium units in the same fashion as they would market and sell units in a typical subdivision.

There is also a subtle window of opportunity that could allow the condominium Developer to avoid the documentation burdens of the Act. If the Developer of the condominium project records the Master Deed, creates the units, builds the common elements and then "sells" the units to an affiliated residential builder, this residential builder falls into the exception to the definition of the "Developer" pursuant to Public Act 379. The affiliate could have the exact same principal parties as the Developer. This residential builder would then be relieved from the duties imposed on the Developer by the Act. While this would seem to undermine the intention of the Act, this approach is currently not prohibited by the Act.

However, of course, some things can prove too good to be true. On February 14, 2002, a revision to the Act was presented to the Michigan House of Representatives as Substitute for House Bill Number 5486 which would eliminate the possibility that a Developer could side step the consumer protection provisions of the Act. Substitute for House Bill Number 5486, if passed, would require a residential builder "who is an Affiliate of the Developer" to assume and be liable for any

contractual obligations of the Developer and shall be considered a Successor Developer. MCL 599.103(2) currently defines "affiliate" as follows:

> ... any person who controls, is controlled by, or is under common control with a developer. A person is controlled by another if the person is a general partner, officer, member, director or employee of the person, directly or indirectly, individually, or with 1 or more persons or subsidiaries, owns, controls, or holds power to vote more than 20% of the person, controls in any manner the election of a majority of the directors of the person, or has contributed more than 20% of the capital of the person.

Effectively, the revision would prevent the transfer of the units in a condominium project to a residential builder who was controlled by the same parties as the Developer as a way of circumventing the consumer protection aspects of the Act.

The proposed bill would not, however, be retroactively applied if passed in its current form. Therefore, current Developers of condominium projects could, before the revision bill takes effect, take advantage of the wide hole created by the most recent amendment to the bill and transfer the units to a related residential builder without running amok of the law.

If you need additional information about the subject covered in this memo, please contact me at (248) 827-1882; blm@maddinhauser.com.

LAW OFFICES
MADDIN, HAUSER, WARTELL ROTH & HELLER, P.C.
THIRD FLOOR ESSEX CENTRE
28400 NORTHWESTERN HIGHWAY
SOUTHFIELD, MICHIGAN 48034-8004

(248) 354-4030
(248) 355-5200
TELEFAX (248) 354-1422

MAILING ADDRESS
POST OFFICE BOX 215
SOUTHFIELD, MI 48037-0215

MICHAEL W. MADDIN
MARK R. HAUSER
C. ROBERT WARTELL
RICHARD J. MADDIN
RICHARD F. ROTH
HARVEY R. HELLER
IAN D. PESSES
MICHAEL S. LEIB
ROBERT D. KAPLOW
WILLIAM E. SIGLER
STEWART C.W. WEINER
CHARLES M. LAX
STUART M. BORDMAN
STEVEN D. SALLEN
GREGORY J. GAMALSKI
JULIE CHENOT MAYER
NATHANIEL H. SIMPSON
RONALD A. SOLLISH
LOWELL D. SALESIN
MARK H. FINK
STEVEN M. WOLOCK
DAVID E. HART

GEORGE A. CONTIS
LORI E. TALSKY
MARTIN S. FRENKEL
GARY M. REMER
GEORGE V. CASSAR, JR.
SHERYL K. SILBERSTEIN
PAUL V McCORD
E. DALE WILSON
KASTURI BAGCHI
CATHERINE H. FINN
DAVID M. SAPERSTEIN
DANIELLE M. SPEHAR
CHRISTOPHER A. MCMICAN
RICHARD M. MITCHELL
GEOFFREY N. TAYLOR
BRANDY L. MATHIE
NICOLE E. WILINSKI

MILTON M. MADDIN
(1902-1984)
C.ROBERT WARTELL
(1936-2001)

MEMORANDUM

TO: NINTH ANNUAL REAL ESTATE SYMPOSIUM ATTENDEES

FROM: SHERYL K. SILBERSTEIN

RE: MOLD…COULD IT BE THE NEXT ASBESTOS (OR RADON OR EMF)?

DATE: APRIL 12, 2002

==

A. What is mold?

Mold is a type of fungus. It is common, abundant and an essential part of the ecological system. Fungi are found almost everywhere and are necessary for the natural decomposition of plant and other organic material. Mold spreads by airborne microscopic spores and travels as air is exchanged with the movement of people and things. It grows on wet or damp surfaces and may eventually release spores into the air. Where moisture and a food source exist, mold most likely can be found. Most people are familiar with mold growth in the form of bread mold. Unfortunately, new buildings, including new residential home construction, offer a perfect environment for mold growth. Where poor construction results in roof leaks or window leaks, moisture will enter the building or home. If growing conditions are favorable, mold is likely to grow.

Sustained mold growth requires three (3) elements: a food source, suitable temperatures and moisture. A food source can be supplied by common items found in the home, such as cloth, carpet, leather, wallpaper, or by building materials such

as drywall, wood and insulation. Suitable temperatures are generally between 40ºF and 100ºF. Moisture in homes is the result of many causes. Spills, leaks,

condensation and high humidity are common sources of moisture. Moisture is the key requirement for mold growth.

B. **<u>What are the consequences of mold?</u>**

Exposure to mold is through inhalation of mold spores or contact with mold contaminants. Some individuals experience no reaction after exposure to mold, while others feel ill. Some common effects are allergic reactions that include watery eyes, runny nose, sneezing, nasal congestion, skin irritation, coughing, wheezing, sore throat and/or headache. Those with compromised immune systems may risk infections and life threatening disease. Some people complain about more subjective symptoms such as chronic fatigue and memory loss. While there are no standards concerning “safe” or “unsafe” levels of exposure, experts disagree about the level of mold exposure that may cause health problems. In addition, the Center for Disease Control contends that a causal link between the presence of mold and serious health conditions has not been proven. Nonetheless, litigation over the presence of mold is on the rise.

C. **<u>What can you do to minimize your liability for mold claims?</u>**

(i) <u>Proper construction of the building or residence</u>. Common sources of moisture include water leaks through roofs and windows, leaks through basement foundations, water associated with poor ventilation, water associated with condensation and water associated with wet building products. To prevent these types of problems, builders should use quality building products, especially with respect to siding, shingles, windows and pipes. Roofs and windows should be carefully installed and properly flashed. Proper insulation should be included to reduce the possibility of condensation on cold surfaces. Rainwater should drain away from the building or residence through proper landscaping and downspouts. Building materials, like wallboard, must be dry at the time of installation. The HVAC systems should be properly designed and working. Moisture-generating activities like showers, dryers and cooking appliances should be vented to the outside.

(ii) <u>Education of the homeowner and apartment dweller to understand that proper maintenance is key to mold control and prevention</u>. Positive steps can reduce or eliminate the occurrence of mold growth in the residence and minimize adverse effects that may be caused by mold. These steps include:

- When bringing items into the home or residence, check for signs of mold. Potted plants, furnishings, stored clothing and bedding material, as well as other household goods could already contain mold growth.

- Regular vacuuming and cleaning will help reduce mold levels. Mild bleach solutions and most tile cleaners are effective in eliminating or preventing mold growth.

- Keep the humidity level in the residence low. Vent clothes dryers to the outdoors. Ventilate kitchens and bathrooms by opening windows, using exhaust fans, or by running the air conditioner to remove excess moisture in the air and to facilitate evaporation of water from damp surfaces.

- Promptly clean up spills, condensation and other sources of moisture (mold will begin to grow in 24-48 hours). Thoroughly dry any wet surfaces or material. Do not let water pool within the residence. Promptly replace any materials that cannot be thoroughly dried such as drywall or insulation.

- Inspect for leaks on a regular basis. Look for discolorations or wet spots. Repair any leaks promptly. Inspect condensation pans from refrigerators and air conditioners for mold growth. Take note of musty odors and any visible signs of mold.

- If mold should develop, thoroughly clean the area with a mild solution of bleach. If mold develops on porous materials, such as fabric, upholstery or carpet, they should be discarded. If mold growth is severe, call on the services of a qualified professional cleaner.

  There are several useful Web sites that address these issues and concerns, one of which is www.epa.gov/iaq/pubs/moldresources.html

(iii) Information Disclosure Statement. Mold problems can occur where homeowners fail to maintain their premises. In order to avoid responsibility for homeowner neglect, builders should provide homeowners with an information disclosure statement. The Statement should provide the homeowner with information about the relationship between proper maintenance and mold growth, and provide the homeowner with a better understanding of his/her own obligations. The

Information Disclosure Statement should be given to the homeowner before the sale and should be incorporated by reference into the sales contract or purchase agreement. The Information Disclosure Statement should contain a waiver of liability for mold growth caused by the homeowner's failure to follow the builder's recommendations and a disclaimer stating that the Builder will not be responsible for any damages caused by mold.

Similarly, mold problems can occur within the rental premises where the tenant fails to maintain the premises. The difference here is that the landlord cannot waive liability, even if the mold situation is cause by the tenant's own negligence. While the tenant may be responsible financially for remedying the mold problem caused by the tenant's negligence, under the implied warranty of habitability, the landlord remains responsible for seeing that the work gets done and that the premises is returned to a habitable state. In the landlord/tenant situation, the Information Disclosure Statement can educate the tenant as to his/her responsibilities with respect to the proper maintenance of the leased premises to eliminate mold problems and occurrence; however, the landlord remains ultimately responsible to assure that any mold problem is alleviated. Landlords cannot use agreements that include exculpatory clauses or hold harmless clauses to contract away its responsibility for a mold problem.

(iv) Indemnity Agreements. Builders should obtain an indemnity agreement from each of their subcontractors wherein the subcontractors agree to defend and indemnify the builder for mold problems arising out of the subcontractors' work.

D. **Will your insurance protect you?**

Commercial general liability policies generally provide coverage for "all sums which the insured shall become legally obligated to pay as damages because of bodily injury and property damage" subject to many exclusions. These exclusions can include "pollution exclusion" and the "business risk exclusion." Currently, several courts have held that the pollution exclusion does not apply in situations involving non-traditional, naturally occurring pollutants released into the environment like mold. The business risk exclusion applies to property damage claims, not necessarily to coverage for the defense of bodily injury claims. However, with the increase of mold claims, it is certain that insurance companies will begin to eliminate mold coverage from their policies. It would behoove you to work with your insurance broker to define

"mold" as an exception to the "pollution" and "business risk" exclusions, and to obtain affirmative coverage for mold claims involving personal injury and property damage.

E. **Disclaimer and disclosure documents.**

We have used the information in this memo and from other sources, such as the *National Association of Home Builders* and the *Building Industry Association of Southeastern Michigan*, to develop limited warranty text and disclaimers for builders and disclosure documents for apartment owners. We would be happy to work with you to design similar documents to help you manage this issue. If you need additional information about this subject, please contact Sheryl K. Silberstein at (248) 827-1887; sks@maddinhauser.com.

LAW OFFICES

MADDIN, HAUSER, WARTELL ROTH & HELLER, P.C.

THIRD FLOOR ESSEX CENTRE
28400 NORTHWESTERN HIGHWAY
SOUTHFIELD, MICHIGAN 48034-8004

(248) 354-4030
(248) 355-5200
TELEFAX (248) 354-1422

MAILING ADDRESS
POST OFFICE BOX 215
SOUTHFIELD, MI 48037-0215

MICHAEL W. MADDIN
MARK R. HAUSER
C. ROBERT WARTELL
RICHARD J. MADDIN
RICHARD F. ROTH
HARVEY R. HELLER
IAN D. PESSES
MICHAEL S. LEIB
ROBERT D. KAPLOW
WILLIAM E. SIGLER
STEWART C.W. WEINER
CHARLES M. LAX
STUART M. BORDMAN
STEVEN D. SALLEN
GREGORY J. GAMALSKI
JULIE CHENOT MAYER
NATHANIEL H. SIMPSON
RONALD A. SOLLISH
LOWELL D. SALESIN
MARK H. FINK
STEVEN M. WOLOCK
DAVID E. HART

GEORGE A. CONTIS
LORI E. TALSKY
MARTIN S. FRENKEL
GARY M. REMER
GEORGE V. CASSAR, JR.
SHERYL K. SILBERSTEIN
PAUL V McCORD
E. DALE WILSON
KASTURI BAGCHI
CATHERINE H. FINN
DAVID M. SAPERSTEIN
DANIELLE M. SPEHAR
CHRISTOPHER A. MCMICAN
RICHARD M. MITCHELL
GEOFFREY N. TAYLOR
BRANDY L. MATHIE
NICOLE E. WILINSKI

MILTON M. MADDIN
(1902-1984)
C.ROBERT WARTELL
(1936-2001)

MEMORANDUM

TO: NINTH ANNUAL REAL ESTATE SYMPOSIUM ATTENDEES

FROM: LORI E. TALSKY

RE: RECENT REVISIONS TO THE OCCUPATIONAL CODE RELATING TO WORKMANSHIP COMPLAINTS AGAINST RESIDENTIAL BUILDERS

DATE: APRIL 12, 2002

On July 31, 2000, Act No. 113 of Public Acts of 2001 (the “Act”) became effective. The Act amended certain subsections of *M.C.L. 339.2411* and *M.C.L. 339.2412* that pertain to workmanship complaints filed against state licensed residential builders. The Act prohibits the Department of Consumer and Industry Services (“CIS”) from initiating administrative proceedings against builders with respect to workmanship unless (a) the complainant files a complaint which specifies what workmanship does not meet the standards of the industry; (b) a state or local building code enforcement official verifies or confirms the substance of the complaint in writing; and (c) the complainant demonstrates that a notice describing reasonable times and dates that the residence was accessible for any needed repairs to be accomplished by the builder and the builder did not make the repairs within 60 days from the date such notice was sent.

Most importantly, the Act provides for the utilization of alternate dispute resolution procedures for workmanship complaints in lieu of an administrative proceeding if the builder has contractually provided for an alternate dispute resolution procedure that:

(a) is conducted by a neutral third party;

(b) is initiated by the builder;

(c) requires the builder to give the complainant at least 30 days advance notice of the commencement of the procedure by certified mail;

(d) is conducted at a location mutually agreed upon by the parties; and

(e) is completed within 90 days of the date the complaint is filed.

Under the Act, the failure of a complainant to utilize such a contractually agreed upon alternate dispute resolution procedure is an affirmative defense to any action brought in a State of Michigan court against the builder. A sample alternate dispute resolution procedure provision that may be included in residential construction contracts is attached.

The Act also provides residential builders with the opportunity to select the performance guidelines relating to workmanship which the CIS will utilize when it evaluates a particular complaint. This may be accomplished by inserting a provision in the construction and/or sales contract stating what guidelines will be utilized. The selected guidelines must, however, be consistent with the Stille-DeRossett-Hale Single State Construction Code, *M.C.L. 125.1501* to *125.1531*, as amended ("State Construction Code").

Under Michigan common law, every residential builder impliedly warrants that its houses will be erected in a reasonably workmanlike manner and will be reasonably fit for habitation. *Weeks v. Slavick Builders, Inc.*, 24 Mich. App. 621 (1970). This implied warranty may, to some extent, be modified and/or limited by written agreement. However, because the implied warranty relates to workmanship, in light of the Act, it is important that any intended contractual warranty limitations be consistent with the State Construction Code and with the guidelines that are selected to be utilized in evaluating workmanship complaints. If, for example, a builder specifies in its contract what workmanship performance guidelines will apply, and provides a written warranty that conflicts with such guidelines, the CIS could take the position that no single set of guidelines was properly selected and will proceed to evaluate a complaint using any guidelines it selects.

Maddin, Hauser, Wartell,
Roth & Heller, P.C.

We regularly assist builders and contractors in preparing contract forms and limited warranties. We would be pleased to review forms that you may be using and recommend any revisions we believe might be useful. We have also represented builders and contractors before the CIS and in arbitration proceedings with the American Arbitration Association. If you would like additional information about any of these topics, please contact me at (248) 827-1864 or let@maddinhauser.com (email).

PROPOSED ALTERNATIVE DISPUTE RESOLUTION PROVISION

Pursuant to *M.C.L. 339.2411(5)(d)*, Purchaser agrees that any complaint filed against Builder regarding Builder's workmanship ("Workmanship Claims") shall be resolved by binding arbitration through the American Arbitration Association employing the American Arbitration Association Construction Industry Rules. Purchaser also agrees to arbitrate any and all other claims Purchaser has or may have against Builder in connection with the construction of the Residence, including, without limitation, warranty related claims, and such arbitration shall be binding and shall also be conducted through the American Arbitration Association in accordance with Construction Industry Rules. The arbitration hearing shall be conducted at a location mutually agreed to by the parties. Builder shall file a demand for arbitration regarding Workmanship Claims within fifteen (15) days from the date Builder receives notice that Purchaser has filed a complaint with the Michigan Department of Consumer and Industry Services. The arbitration hearing regarding Workmanship Claims shall be conducted not less than thirty (30) days after the date Builder sends Purchaser a copy of the demand for arbitration by certified mail as required under Public Act No. 113 of 2001, unless Purchaser consents in writing to a delay and waives any right(s) to complain that the arbitration was not completed in ninety (90) days. Purchaser agrees to allow Builder and Builder's attorneys to conduct an inspection of the Residence at least ten (10) days prior to the arbitration hearing and to photograph and/or videotape the Residence and/or any internal or external portions of the Residence during said inspection. The parties agree that the arbitrator shall be knowledgeable by education, training and/or experience in the standards of the residential construction industry in the jurisdiction where the Residence is located and need not be an attorney. The performance guidelines relating to workmanship shall be the NAHB Performance Guidelines to the extent such guidelines are consistent with any applicable uniform state construction code standard under *M.C.L. 125.1501, et seq*. Pursuant to Section 2412 of Public Act 113 of 2001, Purchaser's failure to comply with these alternative dispute resolution procedures shall be an affirmative defense to an action brought in a State of Michigan court against a licensee under the Michigan Occupational Code. Judgment upon an award rendered by the arbitrator may be entered in any court having jurisdiction. The parties may be represented by counsel in connection with the arbitration.

BUILDER

By:______________________________

Its:______________________________

PURCHASERS

____

____

LAW OFFICES

**MADDIN, HAUSER, WARTELL
ROTH & HELLER, P.C.**

THIRD FLOOR ESSEX CENTRE
28400 NORTHWESTERN HIGHWAY
SOUTHFIELD, MICHIGAN 48034-8004

(248) 354-4030
(248) 355-5200
TELEFAX (248) 354-1422

MAILING ADDRESS
POST OFFICE BOX 215
SOUTHFIELD, MI 48037-0215

MICHAEL W. MADDIN
MARK R. HAUSER
C. ROBERT WARTELL
RICHARD J. MADDIN
RICHARD F. ROTH
HARVEY R. HELLER
IAN D. PESSES
MICHAEL S. LEIB
ROBERT D. KAPLOW
WILLIAM E. SIGLER
STEWART C.W. WEINER
CHARLES M. LAX
STUART M. BORDMAN
STEVEN D. SALLEN
GREGORY J. GAMALSKI
JULIE CHENOT MAYER
NATHANIEL H. SIMPSON
RONALD A. SOLLISH
LOWELL D. SALESIN
MARK H. FINK
STEVEN M. WOLOCK
DAVID E. HART

GEORGE A. CONTIS
LORI E. TALSKY
MARTIN S. FRENKEL
GARY M. REMER
GEORGE V. CASSAR, JR.
SHERYL K. SILBERSTEIN
PAUL V McCORD
E. DALE WILSON
KASTURI BAGCHI
CATHERINE H. FINN
DAVID M. SAPERSTEIN
DANIELLE M. SPEHAR
CHRISTOPHER A. MCMICAN
RICHARD M. MITCHELL
GEOFFREY N. TAYLOR
BRANDY L. MATHIE
NICOLE E. WILINSKI

MILTON M. MADDIN
(1902-1984)
C.ROBERT WARTELL
(1936-2001)

MEMORANDUM

TO: NINTH ANNUAL REAL ESTATE SYMPOSIUM ATTENDEES

FROM: MARTIN S. FRENKEL

RE: YOUR BUILDER'S LICENSE – AN EASY TARGET

DATE: APRIL 12, 2002

==

MCL 339.2401 et. seq. is the Michigan statute (the "Act") which regulates persons and companies which are engaged in residential construction (including salespersons employed by builders) or home remodeling and repair (collectively referred to as "contractors" or "builders"). The Act (with certain limited exceptions) requires that all contractors and builders be licensed by the State of Michigan in order to practice their trade. The Act is administered by the Michigan Department of Consumer and Industry Services ("CIS").[21]

Although the procedure described in this article may appear to be straightforward, contractors should be warned. The administrative procedures applied by the CIS, as in many administrative agencies, are a black hole. The procedures used and the standards applied are often loosely applied or are poorly defined. Moreover, the powers of the CIS are also not well enunciated for suspending or revoking a license. This uncertainty, when dealing with one's livelihood (your license), can be a source of great consternation. The best advice is to resolve minor complaints quickly in accordance with local building ordinances and in a common sense manner. If this fails, get help.

[21] For more information on the CIS, log on to the CIS web site at www.cis.state.mi.us.

Under the Act, homeowners have the ability to file a complaint seeking the suspension or revocation of a contractor's license within 18 months from the date on which the work was completed, the home was purchased, or the homeowner began occupancy of the house – whichever is later. In the license complaint (a copy of which is attached to this article), the homeowner must specify which workmanship provided by the contractor fails to meet industry standards.

Once the complaint is filed, an administrative procedure for dealing with the complaint is set in motion. The complaint will be forwarded by the CIS to the contractor. The contractor will have 15 days from receipt of the complaint to confirm or deny the assertions in the complaint. If the contractor agrees with the complaint, he must correct the complaint within a reasonable time. If the contractor disagrees with the complaint or any portion thereof, then the CIS will notify the homeowner. At this point, the CIS will not take further action until the local building inspector has inspected the home regarding the alleged construction defects and has issued a report concerning his findings. The contractor will be notified of the local building inspector's report. If the local building inspector determines that the homeowner's complaint is justified, the contractor must correct the problem(s) within a reasonable time. However, the failure of a contractor to correct a structural matter that is materially deficient, dangerous, or hazardous to the homeowner will be presumed by the CIS to be dishonest or unfair dealing.

The CIS may also elect to schedule an investigation conference requiring the contractor to appear before the CIS in order to determine whether there is cause for the homeowner's complaint. The contractor will receive notice of the conference by mail at the address appearing on the license at least ten (10) days prior to the conference. The contractor may be represented by an attorney at the conference, but failure of the contractor to appear may be the basis for suspension or revocation of the contractor's license. If the homeowner and contractor settle their dispute before the investigative conference, the contractor must immediately notify the CIS of the settlement and the CIS will contact the homeowner to verify the terms of the settlement. If the dispute is not settled prior to the investigative conference, or the homeowner disputes the contractor's version of a settlement that has been reached between the parties, the CIS may issue an order requiring the contractor to appear before the CIS to "show cause" – provide justification – as to why the problems of which the homeowner has complained have not been remedied. If good cause is not shown, the CIS may suspend or revoke the contractor's license.

If you would like additional information concerning the handling of administrative complaints filed by homeowners (our firm has represented clients in such proceedings), please contact me at (248) 827-1891; msf@maddinhauser.com.

LAW OFFICES

MADDIN, HAUSER, WARTELL ROTH & HELLER, P.C.

THIRD FLOOR ESSEX CENTRE
28400 NORTHWESTERN HIGHWAY
SOUTHFIELD, MICHIGAN 48034-8004

(248) 354-4030
(248) 355-5200
TELEFAX (248) 354-1422

MAILING ADDRESS
POST OFFICE BOX 215
SOUTHFIELD, MI 48037-0215

MICHAEL W. MADDIN
MARK R. HAUSER
C. ROBERT WARTELL
RICHARD J. MADDIN
RICHARD F. ROTH
HARVEY R. HELLER
IAN D. PESSES
MICHAEL S. LEIB
ROBERT D. KAPLOW
WILLIAM E. SIGLER
STEWART C.W. WEINER
CHARLES M. LAX
STUART M. BORDMAN
STEVEN D. SALLEN
GREGORY J. GAMALSKI
JULIE CHENOT MAYER
NATHANIEL H. SIMPSON
RONALD A. SOLLISH
LOWELL D. SALESIN
MARK H. FINK
STEVEN M. WOLOCK
DAVID E. HART

GEORGE A. CONTIS
LORI E. TALSKY
MARTIN S. FRENKEL
GARY M. REMER
GEORGE V. CASSAR, JR.
SHERYL K. SILBERSTEIN
PAUL V McCORD
E. DALE WILSON
KASTURI BAGCHI
CATHERINE H. FINN
DAVID M. SAPERSTEIN
DANIELLE M. SPEHAR
CHRISTOPHER A. MCMICAN
RICHARD M. MITCHELL
GEOFFREY N. TAYLOR
BRANDY L. MATHIE
NICOLE E. WILINSKI

MILTON M. MADDIN
(1902-1984)
C.ROBERT WARTELL
(1936-2001)

MEMORANDUM

TO: NINTH ANNUAL REAL ESTATE SYMPOSIUM ATTENDEES

FROM: CATHERINE H. FINN

RE: RECENT AMENDMENTS TO STATUTES PERTAINING TO RECORDING OF REAL ESTATE DOCUMENTS

DATE: APRIL 12, 2002

==

The Michigan State Legislature has recently amended the statutes pertaining to the recording of instruments in the Office of the Register of Deeds. Effective March 4, 2002, instruments entitled to be recorded in the Office of the Register of Deeds no longer requires the signature of witnesses. Rather, the act only requires the signature of a notary public and the persons executing the agreement. House Bill No. 5023, State of Michigan 91st Legislature, amending MCL 565.201. Similarly, MCL 565.351 has been amended by House Bill No. 5024 to no longer require the signature of two witnesses on a contract for the sale of land or any interest in land. Rather, it requires only that the contract be acknowledged before a judge or notary public. MCL 565.8 and 565.47 have been similarly amended by House Bill No. 5022 to no longer require the signature of two witnesses on deeds and mortgages.

LAW OFFICES
**MADDIN, HAUSER, WARTELL
ROTH & HELLER, P.C.**
THIRD FLOOR ESSEX CENTRE
28400 NORTHWESTERN HIGHWAY
SOUTHFIELD, MICHIGAN 48034-8004

(248) 354-4030
(248) 355-5200
TELEFAX (248) 354-1422

MAILING ADDRESS
POST OFFICE BOX 215
SOUTHFIELD, MI 48037-0215

MICHAEL W. MADDIN
MARK R. HAUSER
C. ROBERT WARTELL
RICHARD J. MADDIN
RICHARD F. ROTH
HARVEY R. HELLER
IAN D. PESSES
MICHAEL S. LEIB
ROBERT D. KAPLOW
WILLIAM E. SIGLER
STEWART C.W. WEINER
CHARLES M. LAX
STUART M. BORDMAN
STEVEN D. SALLEN
GREGORY J. GAMALSKI
JULIE CHENOT MAYER
NATHANIEL H. SIMPSON
RONALD A. SOLLISH
LOWELL D. SALESIN
MARK H. FINK
STEVEN M. WOLOCK
DAVID E. HART

GEORGE A. CONTIS
LORI E. TALSKY
MARTIN S. FRENKEL
GARY M. REMER
GEORGE V. CASSAR, JR.
SHERYL K. SILBERSTEIN
PAUL V McCORD
E. DALE WILSON
KASTURI BAGCHI
CATHERINE H. FINN
DAVID M. SAPERSTEIN
DANIELLE M. SPEHAR
CHRISTOPHER A. MCMICAN
RICHARD M. MITCHELL
GEOFFREY N. TAYLOR
BRANDY L. MATHIE
NICOLE E. WILINSKI

MILTON M. MADDIN
(1902-1984)
C.ROBERT WARTELL
(1936-2001)

MEMORANDUM

TO: NINTH ANNUAL REAL ESTATE SYMPOSIUM ATTENDEES

FROM: GREGORY J. GAMALSKI

RE: 2001 PUBLIC ACTS NOS. 177, 178 AND 179;
OPEN SPACE PRESERVATION ACT

DATE: APRIL 12, 2002

==

In late 2001 the Legislature passed 2001 Public Acts Nos. 177, 178 and 179, all of which deal with Open Space Preservation. The Acts respectively amend the Township Zoning Act, the County Zoning Act, and the City and Village Zoning Act. The legislation provides a means by which a tract of land can be developed so that all residences are clustered on only part of the parcel to assure that at least 50% of the parcel remains undeveloped ("Open Space"). That Open Space can then be subjected to a conservation easement or restrictive covenant so that the Open Space will remain undeveloped in perpetuity. The Acts are now in effect and present significant land use and planning opportunities for any future projects.

One interesting side note is that the statutes provide a legal definition for a "site condominium" which had not previously been readily apparent in other legislation, such as the Michigan Condominium Act, even as most recently amended.

In order to benefit from the provisions of the three (3) Public Acts, local townships, villages and cities must enact an ordinance implementing the Acts. It is mandatory that an ordinance be adopted. One would expect that in the ordinary

course such ordinances will eventually come on local municipal government books. A developer anxious to proceed with a project might consider proposing an ordinance

to a municipality that has yet to adopt one. Therefore, it is somewhat easing the way toward use of the Open Space Preservation provisions. Builders, developers, planning consultants and engineering firms involved in such projects may wish to discuss that notion with us further.

If you need additional information about the subject covered in this memo, please contact me at (248) 827-1893; gjg@maddinhauser.com.

MADDIN, HAUSER, WARTELL, ROTH & HELLER, P.C.

ATTORNEY BIOGRAPHIES

Michael W. Maddin is the President and one of the Managing Directors of the firm. Mr. Maddin has been practicing law for over 35 years, primarily in the areas of real estate, corporate and business law, and probate and estate planning. He is a member of the Southfield, Oakland, Michigan and American Bar Associations and the America Judicature Society. He is also a member of the Real Property Law Section Council of the State Bar of Michigan and for years acted as Chairman of the Commercial Leasing and Management Committee of the Real Property Law Section of the State Bar of Michigan. Mr. Maddin has been a speaker at numerous ICSC, ICLE, National Business Institute and State Bar of Michigan Real Property Law Section Seminars and has authored a number of articles.

Mark R. Hauser is a Managing Director of the firm who specializes in the areas of real estate, partnerships, finance, corporate and business law, taxation and estate planning. A 1964 graduate of the University of Michigan, he obtained his Juris Doctor magna cum laude from Wayne State University in 1967 where he served as an Editor of the Wayne Law Review. A member of the Real Estate, Business Law & Taxation Sections of the State Bar of Michigan, Mr. Hauser has lectured at numerous professional seminars for attorneys and accountants on real estate and tax-related issues. Mark was selected by his peers to be listed in the "Best Lawyers in America" and is currently President of the United Jewish Foundation of Metropolitan Detroit.

C. Robert Wartell (1936-2001)

Richard J. Maddin is a firm shareholder who has practiced law for over 30 years. He is a graduate of Michigan State University and University of Detroit Law School. His areas of practice include general business, commercial and residential real estate, construction, corporate, land use planning, zoning and probate law. Mr. Maddin is an active litigator, representing both plaintiffs and defendants in the above described areas of practice, including the areas of real estate, construction, zoning and real estate tax appeals. He is a member of the real estate and litigation sections of the State Bar of Michigan, the Southfield, Oakland and American Bar Associations, and the American Judicature Society.

Richard F. Roth is a shareholder in the firm who attended the Wharton School at the University of Pennsylvania where he received a Bachelor of Science in Economics. He graduated from the University of Michigan Law School, cum laude, in 1972. Mr. Roth has a business practice with a concentration on corporate law, real estate, estate planning, and taxation. On the corporate side, he has facilitated mergers, acquisitions and financing for his corporate clients. He has handled many corporate

and individual tax matters and Michigan sales, use and single business tax issues. He co-authored the statute which exempts from Michigan sales tax the purchase of hi-tech computers used in computer integrated manufacturing and CAD-CAM. Mr. Roth has lectured at numerous professional seminars. He is presently on the Board Of Trustees of The Jewish Fund and I am past president of the Michigan Jewish Sports Hall of Fame and a past president of the Sinai Healthcare Foundation and a former member of the Board of Trustees of Sinai Hospital and Huron Valley -Sinai Hospital.

Harvey R. Heller is a shareholder of the firm who has over the past 20 years specialized in the area of litigation, primarily professional liability defense. He is an honors graduate of Michigan State University, as well as a cum laude graduate of Detroit College of Law. In addition to being an active litigator, Mr. Heller is also a long-standing member of the State Bar of Michigan Committee on Insurance Law, the Michigan Defense Trial Council and the Defense Research Institute. On a national level, Mr. Heller is a member of the American Bar Association Standing Committee on Lawyers Professional Responsibility. He has authored articles on the subject of professional responsibility and has been a featured speaker at professional responsibility seminars.

Michael S. Leib is a shareholder in the firm. He is a trial lawyer practicing in the areas of business disputes, real estate litigation, creditor's rights law including bankruptcy law, employment law and professional malpractice defense. Mr. Leib is the Chairperson of the State Bar of Michigan Character and Fitness Committee and has lectured on behalf of the Institute for Continuing Legal Education. He is a graduate of Kalamazoo College, the University of Montana and Wayne State University Law School.

Robert D. Kaplow is a shareholder in the firm. His practice is concentrated in estate planning and personal and corporate income tax planning. He is a graduate of Cornell University, receiving his law degree from the University of Michigan. He received a Masters in Tax Law from Wayne State University. He is a member of the State Bar of Michigan (Taxation and Probate and Estate Planning sections), Oakland County Bar Association (Taxation Committee), American Bar Association (Taxation, Real Property, Probate and Trust Law Sections) and the Financial and Estate Planning Council of Metropolitan Detroit, Inc. Mr. Kaplow is a frequent lecturer before professional groups pertaining to tax and corporate matters. He is listed in Who's Who in American Law and Who's Who in America. Mr. Kaplow is active in various charitable and bar related activities.

William E. Sigler is a shareholder in the firm whose practice involves financial and estate planning, corporate law, taxation, pension and employee benefits, emphasizing business organization and planning, pension, profit sharing and employee benefit plans, federal income taxation, partnership law, executive compensation, and business succession and estate planning. He graduated from Michigan State University and the University of Detroit School of Law where he was

an editor of the Law Review. He has lectured frequently on the topics of estate planning and employee benefits and taught federal income taxation at Lawrence Technological University. He has authored several articles, including "Supreme Court Declares Qualified Plan Benefits to be Exempt from Bankruptcy," Michigan Bar Journal, Volume 71, No. 10 (October 1992), "New Revenue Ruling Encourages Gifts of Stock in the Family Business, But Beware!", Michigan Bar Journal, Volume 72, No. 10 (October 1993) and "Qualifying for the Annual GST Tax Exclusion," Latches, No. 387 (April 1998). Mr. Sigler is a member of the Financial and Estate Planning Council of Metropolitan Detroit, Inc. and is active in charitable and bar related activities.

Stewart C. W. Weiner is a shareholder of the firm who has concentrated his practice over the past 17 years in business transactions, acquisitions, real estate and has a particular focus on the resolution of business, construction, partnership and shareholder disputes. He regularly counsels clients on employment and computer related matters. He serves as an arbitrator for the National Association of Securities Dealers, as a private arbitrator and is a member of the American Bar Association (Business Law, Computer Law, Construction Law Forum and Employment Law Sections), State Bar of Michigan, Real Property Section (Construction Lien Committee), and Oakland County Bar Association.

Charles M. Lax is a shareholder of the firm who has practiced primarily in the areas of employee benefits, tax and corporate law. He has authored numerous articles appearing in legal and public accounting journals. He has lectured extensively on qualified retirement plans and other tax topics before the Michigan Institute of Continuing Legal Education, the Michigan Association of Certified Public Accountants and other professional groups. Mr. Lax presently serves as a member of the State Bar of Michigan Tax Section Council, the IRS Great Lakes Area Customer Satisfaction Survey Protection Committee and the IRS/ASPA Great Lakes Area Benefits Conference Steering Committee. Mr. Lax has previously served as a member of the IRS Employee Plans, Ad Hoc Advisory Group for the Assistant Commissioner of Internal Revenue Service, EP, the IRS Regional Council Bar Advisory Group, Central Region, the Advisory Group to IRS, Northeast Region's Chief of EP/EO Division and the Chairman of the State Bar of Michigan - Section of Taxation Employee Benefits Committee. He has extensive experience in representing clients in tax controversy matters before the Internal Revenue Service and Tax Court of the United States.

Stuart M. Bordman is a shareholder of the firm who, in addition to being an attorney, is a certified public accountant. His practice is devoted to general corporate work with extensive experience in health care, franchise work and representation before the Internal Revenue Service. Mr. Bordman is the 1997-98 Chairman of the Oakland Bar Association Tax Committee. Mr. Bordman is a frequent lecturer before the Michigan Association of Certified Public Accountants and a regular contributor to LACHES, the Oakland County Bar Association Publication. He has written on use

tax, corporate finance under the Michigan Business Corporation Act and single business tax. He is a graduate of the Northwestern University School of Law.

Steven D. Sallen is a shareholder in the firm and member of the firm's Executive Management Committee. Mr. Sallen received his undergraduate degree from the University of Michigan and his law degree, *cum laude*, from the University of Detroit School of Law where he served as Case and Comment Editor of the University of Detroit Law Review. Mr. Sallen concentrates his practice in the areas of real estate law, environmental law and corporate law, and his clients include real estate developers, general contractors, commercial real estate brokers and environmental consulting firms. Mr. Sallen's publications include "The Leaking Underground Storage Tank Act: A Trap For the Unwary?" 72:9 Michigan Bar Journal, September, 1993, and an article on lead battery recycling in Recycling Today, June, 1994.

Gregory J. Gamalski is a shareholder in the firm who received his undergraduate degree from Kalamazoo College and his law degree from University of Detroit. After graduation he worked at the Michigan Court of Appeals and was law clerk for Judge Walter P. Cynar. His practice is concentrated in the areas of real estate and corporate matters. Mr. Gamalski specializes in condominium law and related areas such as planned unit developments and cooperatives. He is a former Chairman of the Oakland County Bar Association Real Estate Committee and past President of the University of Detroit-Mercy Law Alumni Association.

Julie Chenot Mayer is a shareholder of the firm who received her undergraduate degree from the University of Michigan. She obtained her Juris Doctor cum laude from the Detroit College of Law in 1986 where she was a senior member of the Law Review. Ms. Mayer concentrates her practice in the area of litigation with an emphasis on professional liability defense and insurance coverage disputes. Ms. Mayer is a member of the State Bar of Michigan and the American Bar Association.

Nathaniel H. Simpson is a shareholder of the firm. He graduated from Wayne State University Law School in 1988 with honors and was awarded the Order of the Coif. His practice focuses primarily on litigation matters with an emphasis on commercial, employment and property disputes. He is a 1985 graduate of Michigan State University, majoring in Financial Administration, where he was awarded high honors. Nate is involved in a number of local community and charitable organizations.

Ronald A. Sollish is a shareholder of the firm. He graduated from Wayne State University Law School in 1988 with honors and was awarded the Order of the Coif. His practice focuses primarily on litigation matters with an emphasis on creditor's rights, collections, creditor representation in bankruptcy matters, commercial, employment and real property disputes. He is a 1985 graduate of Michigan State University, majoring in Financial Administration, where he was awarded high honors. Nate is involved in a number of local community and charitable organizations.

Lowell D. Salesin is a shareholder in the firm and member of the firm's Executive Management Committee. Mr. Salesin received his undergraduate degree from

Indiana University and his law degree from George Washington University National Law Center in 1993, where he graduated with high honors and served as an Associate Editor of the George Washington Law Review and an Intern at the Small Business Clinic. Mr. Salesin is a member of the American and Oakland County Bar Associations as well as the State Bar of Michigan and concentrates his practice in the areas of real estate, lending, finance, partnership and corporate law.

Mark H. Fink is a Shareholder who graduated from Wayne State University, College of Business Administration and the Detroit College of Law with highest honors and is admitted to the practice of law in the states of Michigan and Arizona. Mr. Fink's practice areas include litigation, with concentration on commercial and real estate matters, and civil appeals. Mr. Fink is the author of several articles which have appeared in publications such as the Michigan Bar Journal and the Detroit College of Law Review. He is a professional affiliate with the American Bar Association and Oakland County Bar Association, and a member of the Appellate Section of the State Bar of Michigan.

Steven M. Wolock received his law degree from University of Michigan Law School in 1985 and obtained a Bachelor's of Science in Economics from the University of California at Santa Cruz in 1977. Mr. Wolock specializes in general commercial litigation and legal malpractice defense litigation and has extensive experience in labor and employment law. Mr. Wolock serves as a council member of the Litigation Section of the State Bar of Michigan and is a member of the Labor and Employment and Negligence Sections of the State Bar of Michigan, the American Bar Association and the Oakland County Bar Association. He also serves as a panelist on the State Bar of Michigan Attorney Discipline Board and is Litigation Master in the Oakland County Bar Association Inn of Court. Mr. Wolock is author of The Michigan Sales Representative Act Revisited, Michigan State Bar Journal, Rev. Nov. 2000.

David E. Hart is a shareholder who joined the firm in 1999. He earned his Bachelor Degree in Philosophy and Political Science from the University of Michigan in 1988 and received his Juris Doctor Degree, cum laude, from the Detroit College of Law in 1991. While at the Detroit College of Law, Mr. Hart was a senior member of the Detroit College of Law Review and he participated in several national Moot Court competitions. He concentrates his practice in the areas of business disputes, real estate litigation, title insurance and in general civil litigation. Mr. Hart is a member of the State Bar of Michigan and the Oakland County and Federal Bar Associations and the Michigan Land Title Association.

George A. Contis is a shareholder in the firm who concentrates his practice in the areas of real estate, lending, finance, transactional and corporate law.. He earned his Bachelor of Arts Degree in Economics from the University of Pittsburgh in 1982 and received his Juris Doctor Degree from the University of Detroit in 1985. While at the University of Detroit, Mr. Contis participated in several local and national Moot Court competitions and was selected a National Member of the Order of Barristers. Mr. Contis' publications include: *Tax Aspects of Divorce in Michigan* Michigan Tax

Law Journal, 1984; *Bring a Weapon to School, Get Expelled* 370 Laches 8, Nov. 1996; and *Year End Planning Considerations for 1031 Exchanges*, Bar Briefs, December 2000.

Lori E. Talsky joined the firm as an associate after graduating summa cum laude from the Detroit College of Law at Michigan State University in January, 1996. Ms. Talsky has an extensive working knowledge of the Canadian legal system. She is a member of the State Bar of Michigan and the American Bar Association.

Martin S. Frenkel graduated from the University of Michigan in 1991 and Wayne State University Law School in 1994. He was admitted to practice by the State Bar of Michigan and the Federal District Court, Eastern District of Michigan in 1994. Mr. Frenkel worked for the Michigan Department of Attorney General from 1994 to 1997 with practice in the areas of tax fraud, debt collection, and. employment litigation. Mr. Frenkel joined the firm in 1997 and practices in the areas of commercial and title related litigation. Mr. Frenkel is also a member of the Real Property Section of the State Bar of Michigan.

Gary M. Remer received his law degree from the Detroit College of Law at Michigan State University where he graduated summa cum laude in May 1997 and obtained a Bachelor of Arts in Accounting from Michigan State University in 1990. Mr. Remer was a Revenue Agent with Internal Revenue Service, Employee Plans Division, from 1992 through 1996. Mr. Remer concentrates his practice in the areas of employee benefits, corporate law, taxation and estate planning. He has lectured extensively on qualified retirement plans and other tax topics. Mr. Remer is the co-author of The Insider's Guide to IRS Plan Audits. He is a Certified Public Accountant and Chair of the MACPA Employee Benefits Committee.

George V. Cassar, Jr. graduated with honors from Drake University Law School in 1996 and received a Masters in Tax Law from Wayne State University Law School in 1997. He obtained a Bachelor of Arts in Psychology from the University of Michigan in 1993. George concentrates his practice in the areas of estate planning, probate and tax law. He is a member of the State Bar of Michigan, the State Bar of Iowa, the American Bar Association, the Federal Bar Association and the Detroit Bar Association. George has also been accepted as Life Member of the National Registry of *Who's Who in America Law* and is an active supporter of various charity and bar related activities. He is also an active member of the National Association of Insurance and Financial Advisors (NAIFA).

Sheryl K. Silberstein is a 1986 *cum laude* graduate of the Detroit College of Law and a 1978 graduate of the University of Michigan. Her concentration of law is in the area of real estate, corporate, and related business matters. Ms. Silberstein has thirteen years experience in the real estate industry in the corporate sector.

Paul V. McCord concentrates his practice in the areas of federal and state tax planning. Paul graduated from Marquette University in 1988. Prior to beginning his

legal career, he served as an officer in the U.S. Navy, including service in the Gulf War. He earned his law degree from the University of Illinois in 1995 and a master's of law with a specialty in taxation in 1997 with distinction from the Georgetown University Law Center. Paul clerked for the Honorable David Laro and the Honorable Juan F. Vasques of the United States Tax Court from 1995 to 1996 and also served as in-house tax counsel for a Fortune 15 company. Paul is admitted to the practice of law in Michigan, Illinois, and before the United States Tax Court. He is a member of the State Bar of Michigan Taxation Section, Illinois State Bar Association Federal and State Tax Sections and the American Bar Association (Taxation Section). Paul is also a licensed pilot.

E. Dale Wilson attended Yale University and earned his B.A. in Environmental History in 1992. He acquired his J.D. cum laude from the University of Detroit School of Law in 1999. Dale practices primarily in the areas of banking, corporate and business law, and real estate. He is a member of the Oakland, Michigan and American Bar Associations. He is also a member of the Business Law and Uniform Commercial Code sections of the American Bar Association.

Kasturi Bagchi received a Bachelor of Arts in Political Science with honors from UCLA in 1992 and subsequently was awarded her Juris Doctor degree with honors from Tulane University School of Law in 1995. While at law school, Ms. Bagchi was a managing editor of the Tulane University School of Law Environmental Journal where she published an article entitled "Application of the Rule of Lenity: the Specter of the Midnight Dumper Returns." 8 TUL.ENVTL. L.J. 265 (1995). Upon her graduation from Tulane, she clerked for the Honorable William Albrecht and the Honorable Harry K. Seybolt of the Superior Court of New Jersey, Warren county. She concentrates her practice in the firm's commercial lending and real estate groups. Ms. Bagchi is admitted to the Bars of New Jersey, and Michigan.

Catherine H. Finn is a 1996 Cum Laude graduate of the Wayne State University Law School and a Member of the Order of the Coif Honor Society. After law school, Ms. Finn served as a judicial clerk to the Honorable Martin M. Doctoroff of the Michigan Court of Appeals. She joined the firm in 2001, and concentrates her practice in commercial litigation.

David Saperstein earned a B.A. in Political Science with High Honors in 1989 from the University of California, Berkeley, and a J.D. from the University of Michigan Law School in 1993. He subsequently clerked for the late Michigan Court of Appeals Chief Judge Pro Tem Myron H. Wahls. Mr. Saperstein's publications include, *Why There are No Common-Law Exceptions to a Municipality's Governmental Immunity: A Municipal Perspective*, Public Corporation Law Quarterly, Spring 2001, No. 9, p.1, and *The Abominable Snowman, the Easter Bunny, and "The Intentional Tort Exception" to Governmental Immunity: Why Sudul v Hamtramack was Wrongly Decided*, 16 Michigan Defense Quarterly, No. 2, p. 7 (2000). Mr. Saperstein is licensed to practice law in Michigan, Ohio, and California (inactive). He concentrates his practice in the areas of insurance defense and appellate law.

Danielle M. Spehar attended Central Michigan University and earned a Bachelor of Science in Business Administration. She also earned a Master's Degree in Business Administration from Wayne State University. She acquired her Juris Doctor, magna cum laude, from University of Detroit Mercy School of Law in 1998. Danielle concentrates her practice in the areas of real estate transactions and probate administration law. She is a member of the State Bar of Michigan, the American Bar Association, and the Detroit Metropolitan Bar Association.

Brandy L. Mathie earned a Bachelor of Arts in English and Political Science from the University of Michigan. She obtained her Juris Doctor, cum laude, from Wayne State University Law School in 2000. Prior to attending law school, Brandy worked as a paralegal in real estate transactions. She concentrates her practice in the areas of real estate and transactions and corporate law.

Nicole E. Wilinski received a Bachelors of Arts degree from the University of Michigan in 1997 and received her Juris Doctor, cum laude, from Wayne State University Law School in 2000. She was admitted to practice by the State Bar of Michigan in 2000 and, the Federal District Court, Eastern District of Michigan and Federal District Court, Western District of Michigan in 2001. She concentrates her practice in the area of insurance defense.

Christopher A. McMican joined the firm in 2001. He earned his Bachelor of Science Degree in Accounting (*summa cum laude*) from the University of Detroit in 1991, his Juris Doctor (*cum laude*) and Masters in Business Administration from the University of Detroit in 1994, and his LL.M. in Taxation from the University of Florida in 1995. Mr. McMican's practice areas include employee benefits, taxation, and estate planning. In addition to providing tax and corporate advice relating to individuals, corporations and L.L.C.s, he regularly counsels clients regarding executive compensation and retirement plan design issues. Mr. McMican has lectured on employee benefits and taxation topics and authored several articles published in tax periodicals. Prior to joining the firm, Mr. McMican practiced for 6 years in law firms in the Detroit and Chicago areas. He is licensed by the State Bars of Michigan and Illinois, the U.S. District Court for the Northern District of Illinois, and the United States Tax Court.

Richard M. Mitchell earned his Juris Doctor Degree from Indiana University Law School, Bloomington, in 1991, where he served on the Indiana University Law Review. He earned his Bachelor of Arts Degree from the University of Michigan in 1988. Mr. Mitchell focuses his practice on the defense of insurers, complex insurance coverage disputes and general civil litigation. He has authored publications and spoken in these areas. He is also a member of the Society of Chartered Property Casualty Underwriters (CPCU), a designation granted by the American Institute for CPCU in Malvern, PA, upon the successful completion of ten examinations relating to insurance and business related topics.

Geoffrey N. Taylor graduated magna cum laude from the University of Pittsburgh Law School in 1997. He obtained a Bachelor of Business Administration with distinction from the University of Michigan in 1992. He concentrates his practice in the areas of estate planning, probate, and tax law.