

From the desk of:  
*The Real e-ditor*



Time for a short rewind:

- ✓ Barack Obama is nominated as the first-ever African American major party candidate for President of the United States, and he leads in the polls.
- ✓ Congress approves \$85 Billion bailout of AIG.
- ✓ 158 year old investment bank, Lehman Brothers, files for Bankruptcy falling victim to sub-prime crisis.
- ✓ Financial markets meltdown results in passage of a \$700 Billion Wall Street rescue package.
- ✓ Sarah Palin is nominated as the first-ever female Republican Vice Presidential candidate.
- ✓ General Motors in merger talks with Chrysler; CEO says bankruptcy is not an option.
- ✓ Federal government will spend \$125 Billion to partially nationalize nine of the country's largest banks, including Citigroup, JP-Morgan Chase, Bank of America and Wells Fargo.
- ✓ Kwame Kilpatrick is indicted on felony charges and resigns as Mayor of the City of Detroit.
- ✓ The Dow Jones Industrial Average suffers its worst *and* second-worst single-day point declines in history.
- ✓ Gasoline prices spike at more than \$4.25 per gallon, but now is under \$3.00 per gallon.
- ✓ O.J. Simpson convicted on 12 felony counts.

What do all of these headline grabbing events have in common? They have all occurred in just the 90 days since publication of our last e-Newsletter!

Whether you are a Republican or Democrat, black or white, male or female, there is one thing we can all agree on... Change is coming! And with change, comes uncertainty. Obviously, we are dealing with unprecedented shocks to our economy. At Maddin Hauser we are working hard to understand the Emergency Economic Stabilization Act and other recent legislation and events, their impact on the marketplace and you, and to predict how our clients will be able to survive and take advantage of the inevitable opportunities that will arise once the economy stabilizes. Already, CoStar Advisor is predicting a possible "sales frenzy" once lenders and sellers re-price assets at steep discounts and investors move in to snatch up distressed properties at bargain prices.

So, despite the inevitable changes that are coming, one thing will remain unchanged: You can continue to rely on Maddin Hauser for sound advice and wise counsel in these turbulent times.

## CITY OF DETROIT MAYORAL RACE: WHO'S WHO

BY: LINDSAY A. JERABEK

Eighteen candidates will compete to fill the remainder of Kwame Kilpatrick's abbreviated second term in office as the Mayor of the City of Detroit. The term ends on December 31, 2009. Following the February 24, 2009 primary, the two top-voted candidates will advance to the May 5, 2009 special election. On the heels of the tumultuous Kilpatrick administration, and despite a price tag of approximately \$3 million, the Detroit City Council voted unanimously to hold this special election.<sup>1</sup> No matter what the result is, these candidates might not want to hang up their campaigning hats in May, as the November 2009 election for the regular 4-year term will be right around the corner. From an NBA Hall of Famer to a private security officer, here's a look at the "Who's Who" of Detroit's mayoral race.<sup>2</sup>

### THE ANTICIPATED FRONTRUNNERS

#### Dave Bing

Age 64. President of The Bing Group auto supply company. Detroit Pistons Hall of Famer.

#### Kenneth Cockrel, Jr.

Age 42. Interim City of Detroit Mayor. Detroit City Council member since 1997. Elected President of Detroit City Council in 2005.

#### Warren Evans

Age 59. Sheriff of Wayne County since 2003 and up for re-

election November 4, 2008. Former Wayne County administrator.

#### Freman Hendrix

Age 58. Former deputy mayor. Chief of government relations at Eastern Michigan University. Received more votes than the incumbent Kilpatrick in the 2005 mayoral primary, but finished second to Kilpatrick in the runoff.

#### Nicholas Hood III

Age 56. Yale University graduate. Minister of Plymouth United Church of Christ. Two-term Detroit City Council member. Ran for mayor in 2001.

#### Sharon McPhail

Age 59. Former assistant U.S. attorney and general counsel to Kilpatrick. Detroit City

# MICHIGAN SUPREME COURT UPHOLDS EXCLUSION OF "GENERAL EFFECTS" DAMAGES FROM CONDEMNATION AWARDS

BY: KASTURI BAGCHI

Recently the Michigan Supreme Court protected our vulnerable state treasury from overwhelming damages claims asserted in condemnation cases. In *Michigan Dep't of Transportation v. Tomkins*, the Michigan Supreme Court upheld the constitutionality of MCL 213.70(2) of the Uniform Condemnation Procedures Act ("UCPA") which excludes consideration of "general effects" felt by the public at large in the calculation of "just compensation" to be awarded to property owners from whom property is taken. Case No. 132983 (Mich. June 11, 2008).

In *Tomkins*, Michigan Department of Transportation ("MDOT"), determined that it was necessary to take a strip of Tomkins' land in order to construct one of the many elevated overpasses along the M-6 road project. Tomkins rejected MDOT's initial offer of \$4,200.00 for the land and MDOT commenced condemnation proceedings under the UCPA. Experts for both parties agreed that the fair market value of the land

was \$3,800.00, but Tomkins also demanded recovery of an additional \$48,200.00 in damages suffered by the balance of his property due to "dust, dirt, noise, vibration, and smell" of the nearby M-6 project near Grand rapids. Relying on MCL 213.70(2) of the UCPA, the circuit court granted MDOT's motion to exclude any evidence of "general effects" damages and subsequently entered a judgment awarding Tomkins \$3,800.00 as full compensation for the taking and

statutory attorney fees and interest. The Court of Appeals, however, found that the statutory exclusion of "general effects" damages in MCL 213.70(2) contradicted the established meaning of "just compensation" under Article 10, Section 2 of the Constitution of Michigan of 1963 which requires con-

sideration of all factors "relevant to market value." MDOT appealed to the Michigan Supreme Court.

Applying the established rules of statutory interpretation, the Michigan Supreme Court noted that Section 213.70(2) of the UCPA clearly and unambiguously states: "The general effects of a project for which property is taken...that in varying degrees are experienced by the general public or by property owners from whom no property is taken, shall not be considered in determining just compensation." [citation omitted] The Court then focused on whether a conflict existed between the definition of "just compensation" under the Constitution versus the [UCPA] statute which would provide a basis for overcoming the presumption of constitutionality. This required an analysis as to whether the phrase "just compensation" was deemed to include damages for general effects by those "sophisticated in the law when [the Constitution]...was ratified in 1963." [citation omitted] The Court found no

case law prior to 1963 on point. While the pre-1963 cases cited by Tomkins suggest a flexible approach to damages, "none of these cases explicitly endorses the principle that 'general effects' damages are compensable in a partial taking. Instead, these cases appeared to focus on diminution or severance damages that were specific and unique to the remaining parcel, and not effects that were felt

generally by the public." [citations omitted] The Court also turned to the writings of Justice Thomas M. Cooley for guidance. 1 Cooley, *The General Principles of Constitutional Law in the United States of America* (1880), p.337. Cooley wrote that the scope of damages for a partial taking did not include dam-

ages felt generally by the public. Based on the foregoing, the Court concluded that at the time the Constitution was adopted, there was no evidence to suggest that "just compensation" included "general effects" damages and thereby held that MCL 213.70(2) of the UCPA is in fact constitutional.

If the Court had ruled the other way:

...[an] "illogical outcome...results... when neighboring property owners suffer the same "general effects" damages but only one has experienced a partial taking. Presumably, only the property owner who suffered the partial taking, of even the smallest portion of property, can be compensated... while the next door neighbor, suffering the same "general effects" damages, gets nothing. Certainly that result is an affront to principles of common sense and equity...because it leaves one property owner in a better position than his neighbor for a common harm." [citation omitted]

The Court's refusal to include "general effects" damages from condemnation awards is very reassuring to the State of Michigan. On February 27, 2008, just a few months prior to this ruling, Governor Granholm announced the acceleration of thirty-four road projects from the 2009 construction season to 2008 in an effort to create more jobs in the current year. Had the Court ruled the other way, Michigan's already depleted coffers could have been completely overwhelmed by "general effects" damage claims as a result of those road projects.

**"It's much more profitable to sell investment advice than to follow it."**  
~Author Unknown

# THE EMERGENCY ECONOMIC STABILIZATION ACT

## A BRIEF ORIENTATION

BY: BRIAN A. NETTLEINGHAM

You cannot look at a newspaper or magazine, turn on the television or tune in your radio these days without hearing about the \$700 billion bailout contained in the recently enacted Emergency Economic Stabilization Act (the "Act"). While the Act spans hundreds of pages, the following is a brief overview of some of the Act's key provisions:

- The Act creates a new department within the Department of Treasury referred to as the "Office of Financial Stability" ("OFS"), which is currently led by Interim Secretary Neel Kashkari.
- The Act provides Treasury/OFS with several tools for addressing the current economic crisis, including:

a. Creation of the "Troubled Asset Relief Program" (the "TARP") under which Treasury will buy "mortgage based assets" from "financial institutions", the definitions of which are extremely broad. The definition of "mortgage based assets" includes mortgage backed securities (including Certified Debt Obligations) and whole mortgages. The Act also allows Treasury to

purchase "troubled assets" ("Troubled Assets") that are not "mortgage related". As a result, we may see the purchase of other sorts of debt instruments (such as car loans).

- Although initial media reporting focused heavily on the purchase of mortgage based Troubled Assets, the purchase program will take time to implement. Initially, the Treasury must create a method for valuing and purchasing Troubled Assets, and valuation of these types of assets has been a fundamental problem for financial institutions. The Act requires that Treasury issue written guidelines regarding its plans for purchasing Troubled Assets within the earlier of: (a) two business days following the first purchase of troubled assets; or (b) forty-five days from enactment. The guidelines will describe the mechanisms for purchasing Troubled Assets, methods for pricing and valuing Troubled Assets, procedures for selecting asset managers and criteria for identifying troubled assets for purchase. The Act also provides, however, that establishment of these policies and procedures should not delay commencement of the TARP. Indeed, Treasury has already issued

guidelines regarding the selection of Asset Managers, applications for which were due in early October.

- The Act authorizes Treasury to purchase \$700 billion in Troubled Assets, \$250 billion of which can be outstanding at any one time. That amount can increase to \$350 billion upon the President's certification that the additional \$100 billion is needed. Upon the President's further certification, the amount allowed to be outstanding can then be increased to the full \$700 billion.

- Creation of an Equity Purchase Program, under which the Treasury will purchase equity interests in financial institutions.
- Creation of executive compensation and corporate governance requirements for participating financial institutions, including anti-Golden Parachute rules for such institutions and other limitations on executive bonuses.
- Creation of a Troubled Assets Insurance Fund, under which Treasury may guarantee the timely payment of principal and interest on certain Troubled Assets.

See **EESA** on Page 4

## P R E S S   R E L E A S E

**SOUTHFIELD, Mich. – October 10, 2008** – As a result of the recently enacted Federal Emergency Economic Stabilization Act (EESA), Maddin, Hauser, Wartell, Roth & Heller, P.C. today announced the organization of a new Distressed Real Estate Asset Group, comprised of attorneys from its Real Estate, Litigation, and Mortgage Lending Groups. Firm Shareholders Martin Frenkel, John Jacobs, and Brian Nettleingham will lead the new practice group. Attorneys in this practice group, with assistance from other attorneys in the firm's related groups such as Real Estate, Litigation, and Banking, will represent and advise local and national lending institutions, private lenders, businesses, developers and investors in a variety of areas, including the EESA's scope and application, together with the currently unfolding regulatory scheme. The group will also provide legal

counsel including litigation support for loan servicers; provide advice regarding regulations and laws governing lenders and servicers; provide due diligence with respect to mortgages and mortgage-related vehicles; provide advice regarding the purchase or sale of troubled assets under the EESA; and provide advice regarding entering into service contracts with the newly formed Office of Financial Stability or its contractors.

"The current state of the financial industry has dramatically affected our economy," said Frenkel. "Lenders, investors and businesses are in immediate need of counsel and our firm quickly reacted to the demand caused by extraordinary economic conditions."

For more than 35 years, Maddin Hauser has ad-

vised clients on real estate and banking matters, including transactions, regulatory matters, litigation and more recently, in matters regarding the impact of the EESA and other federal measures adopted to address the current economic climate. The firm represents mortgage companies in the origination, purchase, sale, and servicing of commercial and residential mortgage loans, and in the purchase and sale of mortgage companies and servicing portfolios.

Additionally, Maddin Hauser represents lenders, loan servicers and title insurance companies in finance related litigation. Maddin Hauser attorneys have played a central role in negotiating and drafting Michigan laws governing the licensing and regulation of mortgage companies and loan officers.

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***“Everyone has the  
desire to win, but  
only champions  
have the desire to  
prepare.”***

*~author unknown*

### Continued From **MAYOR** on Page 1

Council member 2002-2006.

#### **Coleman A. Young II**

Age 25. State Representative. Wayne State University student. Son of former Detroit Mayor Coleman A. Young.

#### OTHER CANDIDATES

**Donald R. Bradley**

**Angelo Brown**

**Stanley Christmas**

**James Cole, Jr.**

**Frances Culver**

**Charles Easterly, Sr.**

**Joseph Warren Holt**

**Duane Montgomery**

**Brenda K. Sanders**

**Jerrold Sanders**

**D. Etta Wilcox**

As we have all heard, but many are loathe to admit, as goes the City of Detroit, so goes the region. We all feel the impact of issues as diverse as the future of Cobo Hall and the ability to attract regional and national conventions, the safety and security of visitors, and the operation of the Detroit Water Board.

### **LET THE RACE BEGIN!**

<sup>1</sup> Crain's Detroit Business, "Special Election Set for Detroit Mayor" dated September 16, 2008, available at <http://www.crainsdetroit.com/article/20080916/FREE/809169989/1069&rssfeed=RSS01>.

<sup>2</sup> The Detroit News, "Detroit Mayoral Race Draws Crowded Field" dated October 15, 2008, available at [http://www.detnews.com/apps/pbcs.dll/article?AID=/20081015/METRO/810150388; WWJ 950 News Radio, "18 Candidates Vie for Detroit Mayor" dated October 14, 2008, available at http://www.wwj.com/18-Candidates-Vie-For-Detroit-Mayor/3136618](http://www.detnews.com/apps/pbcs.dll/article?AID=/20081015/METRO/810150388; WWJ 950 News Radio, ).

### Continued From **EESA** on Page 3

- e. Strengthening of foreclosure mitigation measures, which are intended to encourage servicers of underlying mortgages to take advantage of federal programs to minimize avoidable foreclosures.
  - f. Commissioning of a study on mark-to-market accounting requirements, and allowing the SEC to suspend Statement Number 157 of the Financial Accounting Standards Board (regarding mark-to-market accounting), as a response to concern that mark-to-market accounting requirements forced financial institutions to reduce the value of their mortgage related capital assets, thereby contributing to the institutions' current under-capitalization.
  - g. Creation of various oversight mechanisms, including a Special Inspector General for TARP and a Congressional Oversight Panel.
  - h. Temporarily increasing FDIC deposit coverage for banks, and share coverage for credit unions, from \$100,000 to \$250,000, with coverage limits scheduled to revert back to pre-Act amounts after December 31, 2009.
  - i. Changes in the treatment of gains and losses from the sale (or exchange) of certain preferred stock of Freddie Mac and Fannie Mae, under which "applicable financial institutions" may treat these gains and losses as "ordinary gains or losses" for federal income tax purposes.
- The Act encompasses a broad array of measures intended to address today's extraordinary economic conditions. As a result, Maddin Hauser has formed a new Distressed Real Estate Asset Group, comprised of attorneys from our Real Estate, Litigation, and Mortgage Lending Groups to assist our clients in navigating through the currently unfolding regulatory scheme.