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Real e-State

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An electronic newsletter for real estate professionals

From the desk of:

The Real e-ditor

Strange as it may sound, I have strong sense of accomplishment this morning. Tomorrow is April 15th, and I filed my taxes a week *early*! Of course, I did little more than gather all of my information together (that took about 90 minutes one night after work), put it into an envelope, and deliver it to my accountant. But this year, when I went to pickup my returns, I learned that they had already been filed *electronically*. That lifted the burden from me of having to sign, post and mail the returns to the IRS and Michigan Treasury. In years past I can remember traipsing around town on April 15th looking for a post office so my return would be postmarked on time. That change in procedure, and the feeling of liberation from a tedious responsibility it gave me, got me thinking about how much technology has changed our lives in just the last two or three years.

E-mail, at first a curiosity, has now transformed the way we correspond. When was the last time you received an important correspondence by mail? Even faxes seem quaint by comparison. When running out to an appointment, I type the address into my car's navigation system and – presto – a pleasant female voice guides me turn-by-turn to my destination. My cellphone is, essentially, a complete functional laptop computer in the palm of my hand. Wherever I go, I have virtually everything I need to be professionally effective: database, calendar, email, word processing and web access. And, so long as one exercises a little self-discipline, all this technological improvement really can improve quality of life. No longer is it necessary to tie oneself to the desk in order to be productive. We can stay in touch from anywhere, and no one need know whether we're sitting in a client's office, at a continuing education conference or behind home plate; it is truly amazing and empowering.

But with that power, comes responsibility. When is the workday over? How many times a day must we check our email? Is returning a telephone call the same day still timely? How about within three hours? How about within the hour? If we attend a child's school play or ball game, and spend that time in the hallway on the cellphone or text messaging from our seat, are we really being honest with ourselves about what it means to "multi-task"? Is giving 50% of our attention to two different priorities at the same time good for anybody? I suspect we'll sort this all out fairly soon, as we learn to adjust to our new technological world. Meanwhile, I recommend you keep your phone on vibrate.

**Flattery is like chewing gum.
Enjoy it but don't swallow it.**

~Hank Ketcham

LIEN ON ME

BY: STEVEN D. SALLEN

A proposed new law would give real estate brokers a right to claim a lien against commercial real estate to secure payment of their brokerage commissions. The "Commercial Real Estate Broker's Lien Act," ironically designated Senate Bill 1099, was introduced in the Michigan Senate on February 28, 2006, by State Senator Michael Bishop, of the 12th District.

The Bill, if passed, would create a process by which a broker with a written listing or other commission agreement, could claim a lien against commercial real estate to secure payment of their commission in purchase, lease and option transactions. The Bill defines commercial real estate broadly, excluding only vacant land zoned for single family use, real estate on which four or fewer residential units are located, and real estate with more than four residential units (i.e., condominiums, Townhomes, etc.) that are sold on a unit-by-unit basis. All other real estate is "commercial real estate."

Perfection of a commercial real estate broker's lien would require strict adherence to procedures and timetables enumerated in the Bill, and the lien would have priority as of its day of recording in the Register of Deeds for the county where the property is located. Notice of filing a claim of lien would have to be given to the property owner of record. Most lien foreclosure actions would have to be brought within two years after recording of the lien, and a prevailing plaintiff would also be entitled to an award of reasonable attorney fees, court and litigation costs, and prejudgment interest.

Presently, Senate Bill 1099 has been referred to the Senate Committee on Economic Development, Small Business and Regulatory Reform. No doubt it will face an uphill challenge toward passage, and will likely undergo some significant revisions before (and if) it ever becomes law. For more information, contact us at Maddin Hauser, visit www.mivotes.com, or watch for more news in future issues of Real *e*-State.

THE ETERNAL QUEST TO PREVENT UNCAPPING OF ASSESSED VALUE

BY: STEVEN D. SALLEN

Can a buyer and seller prevent an uncapping of real property's assessed value on closing by structuring the transaction as a sale of membership interests in a limited liability company that owns membership interests in a separate limited liability company that owns real estate? I have always presumed that the answer to this question was an unequivocal – "NO". Occasionally, however, someone would ask to structure a transaction in this manner for the express intention of avoiding uncapping.

In the Michigan Court of Appeals case entitled *Signature Villas, L.L.C., v. City of Ann Arbor*, the parties to a real estate transaction attempted just such a structure. After first negotiating a conventional real estate purchase agreement, the parties restructured the deal, and agreed upon a transaction where the buyer would acquire all membership interests in the limited liability company that owned the membership interest of a second limited liability company. It was the second LLC that owned the land both before and after the transaction. The Court of Appeals rejected numerous taxpayer arguments, and found that a "transfer" of the property did take place and, an uncapping of the property's assessed value was appropriate.

The court relied on the fact that Section 27a(6)(h) of the General Property Tax Act (MCL 211.27a(6)(h)) defines a transfer of ownership broadly; to include:

"[a] conveyance of an ownership interest in a corporation, partnership, sole proprietorship, limited liability company, limited liability partnership, or other legal entity if the ownership interest conveyed is more than 50% of the corporation, partnership, sole proprietorship, limited

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PROPOSED EPA REGULATIONS TO CURB LEAD POISONING MAY CAUSE HOME RENOVATION COSTS TO SKYROCKET

BY: KASTURI BAGCHI

Because of the harmful health effects of lead, the Environmental Protection Agency has promulgated a series of requirements designed to reduce the blood level of lead in children.

Current requirements

As part of this campaign, Section 406(b) of the Toxic Substance Control Act currently requires the distribution of a pamphlet disclosing lead hazard information by any persons who perform renovations for compensation of any housing, including rental property, constructed prior to 1978. The pamphlet must be delivered no later than sixty days before the activity, and the renovator must obtain written acknowledgment of receipt from the owner or a certificate of mailing. The pamphlet is also required for renovations of housing constructed after 1978 if the housing is for the elderly, persons with disabilities, or a child under the age of six "resides or is expected to reside in such housing."

Exempted from this pre-renovation notification requirement are the following categories: (i) activities which do not disturb painted surfaces of pre-1978 housing; (ii) activities which affect an area less than two square feet; or (iii) an emergency occurs which compels remediation activity within a time frame which prevents advance notification.

Proposed additional requirements

Now, in addition to the pre-renovation notice requirement, the EPA has proposed new requirements to lower the risk of lead hazards during the renovation, repair and painting activities in pre-1978 housing. While the new requirements are subject to EPA's consideration of the public comment period which closed on April 10, 2006, by and large, the substance of the proposed regulations are as follows:

• Persons that perform covered renovations must be part of a firm certified by the EPA, and must have been trained and directed by a certified renovator.

• When a certified renovator is not present at the work site, he or she must be available immediately to any uncertified worker; notably, "a walk around the job site once every shift is not enough to ensure that the uncertified workers are following lead-safe work practices at all times."

• EPA certification lasts for three years from the date of EPA approval; thereafter, a firm must apply for recertification.

• To become a certified renovator, a person must pass an EPA-recognized renovator course that focuses on methods for containing, minimizing, and cleaning up leaded dust. Renovators must take a refresher course every three years to remain certified.

The new requirements also contain specific work practice standards for certified firms such as:

• Prior to renovation activities and until the work area has been verified to be adequately cleaned, signs defining the work area must be posted to warn occupants away from the work area.

• The certified renovator must determine which containment methods would prevent leaded dust from tainting objects in the work area and from escaping beyond the work area.

• At the end of each work day, a certified firm must collect and store any lead-based paint waste in an enclosure that will eventually be transported to a municipal solid waste landfill.

• After the renovation is completed, all paint chips and debris must be cleaned up; "protective sheeting must be misted and folded dirty side inward…to trap any remaining dust…; after sheeting has been removed…, the walls, [the floors, furniture and fixtures]…would have to be vacuumed with a vacuum equipped with a HEPA filter or wiped with a damp cloth".

• In order to verify that clean up has been performed properly, a certified renovator must visually inspect the work area for dust and debris and then wipe the interior windowsills and floors with cloth, comparing such cloth to a cleaning verification card that shall be developed by the EPA,

• Firms required to comply with these new requirements must maintain and retain records for a period of three years following completion of the activity.

The applicability of the proposed regulations is similar to that of the pre-renovation pamphlet requirement. The new regulations would apply to: (i) any persons who perform renovations for compensation of any housing, including rental property, constructed prior to 1978, except housing for the elderly or persons with disabilities unless a child under the age of six resides or is expected to reside in such housing; and (ii) to any activity which would disturb painted surfaces in pre-1978 housing, unless such activity (AA) affects less than two square feet, or (BB) an emergency occurs which requires an expedited response that renders the new requirements impractical, or (CC) the activity involves components that are predetermined by a certified inspector to be free of paint.

The effective date of the new regulations would vary. The regulations would first apply only to pre-1960 rental housing and pre-1960 owner-occupied housing where a child under six resides or any target housing where a child under the age six has a blood lead level which exceeds that permitted by law. Then, a year later, the new requirements would apply to all housing built before 1978.

Effect of new regulations

According to a Wall Street Journal article published on February 2, 2006, the EPA's proposed rules coincide with the slowing of the remodeling industry. The Wall Street Journal notes that "the most recent data from the Commerce Department [indicates that] spending on home improvements was down 4.1% in November from the previous month." These numbers could spiral down even further as some members of the National Association of Home Builders predict that the new rules would increase the cost of home renovations by twenty-five percent because "the average contractor does nothing…They just go in and start replacing windows and knocking out walls."

In addition to soaring costs, contractors are also concerned whether the proposed rules are too broad and sweeping because "it is unclear how many children nationally get lead poisoning from remodeling jobs." Until the final rules are published by the EPA, we will not know if the concerns of builders have been adequately addressed by the EPA. Only time will tell the impact that the new regulations will have on the cost of a home remodeling job.

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A successful man is one who can lay a firm foundation with the bricks others have thrown at him.

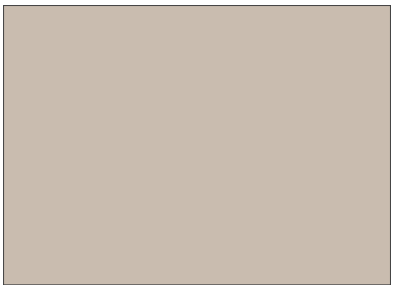
~David Brinkley

BUILDING CONDOMINIUMS ON A PLATTED LOT

BY: JAMES M. REID

Many of our readers have wondered whether it is permissible to build condominiums on a platted lot without going through the process of replatting the subdivision. This issue has now been resolved by the Michigan Court of Appeals in a published opinion, which held that it is permissible.

Generally, divisions and subdivisions of land are subject to the Land Division Act ("LDA"), which establishes the procedures for vacating, correcting and revising plats to further the orderly layout and use of land. In *Williams v. City of Troy*, the City of Troy approved a developer's plan to purchase three parcels of vacant land within a subdivision and combine them into a single condominium project consisting of six detached condominium units. However, landowners in the subdivision filed a petition in court to prevent the development. They argued that the LDA required the developer to vacate the existing plat and submit a replat before the city could approve the proposed development. However, the Court disagreed with the landowners and ruled in favor of the City. The Court relied on the Condominium Act, Mich. Comp. Laws §559.110(1), which specifically provides that the LDA "shall not control divisions made for any condominium project." In addition, the administrative rules promulgated pursuant to the Condominium Act recognize that a condominium development may overlap with a previously platted subdivision. Moreover, the court held that even if the LDA were applicable, a replat is unnecessary when the development falls within the boundaries of the existing subdivision. A different result, however, would occur if the owner intended to combine lots from two separate plotted subdivisions.



Finally, the Court believed that the proposed development was not required to be consistent with the character of the immediate subdivision. Rather, it only needed to be consistent with development in the community, including adjacent subdivisions.

Therefore, if you are considering a condominium project on previously platted parcels, you need not vacate the existing plat.

PLEASE JOIN US FOR OUR 13th ANNUAL
REAL ESTATE SYMPOSIUM
May 4, 2006
The Westin Southfield Detroit
8:00 a.m. to 10:30 a.m.
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liability company, limited liability partnership, or other legal entity . . . "

The Court also made note of the fact that the purchase agreement included an indemnification agreement addressing the risk of this transaction possibly resulting in a finding of a real estate transfer and, hence, an uncapping of the property's assessed value. It looks as though the parties will have to look to their indemnification agreement for relief.