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From the desk of:

The Real e-ditor

We are all salesmen. I was reminded of that fact last weekend while reading Sunday's *New York Times*. In it, I found a supplemental flyer advertising Detroit Tigers season tickets. To some of us, the fact that the Tigers had a good (no, make that Great!) season last year is important. No doubt, season ticket sales will be up as we look forward to Opening Day with a little more optimism than last year. But what do last year's accomplishments mean for this year's team? Nothing! Oh, sure, some players will play with more confidence this year. Last year's rookies will swagger a little more; the veterans with no post-season experience will emanate the wisdom gained by achievement; and coaches, players and fans alike will wear the "D" with a bit more pride this year. But, just like us, the Tigers look at their 2007 season statistics in January and see.....nothing but zero's.

At Maddin Hauser, we understand and share the mindset of the entrepreneur, the developer, the small businessman, the broker, the salesman. We too stand at the base of the mountain that is 2007 and gaze toward the summit with trepidation. What will carry us to the top? What new innovations will we create? What new relationships will we make? What new teammates will we add? What new insights from 2006 will we put into practice this year? What will make the difference between a good year and a Great year in 2007? Will we achieve our professional and personal goals this year? Will the Tigers return to the World Series? Will they win it?

The answers to these questions are unknowable today. But one thing is for sure: at Maddin Hauser, our business is helping you achieve your goals in business. The only given for us *salesmen,* is that no one will carry us to the top, save for our own hard work and surrounding ourselves with the right teammates. Like the 2007 Tigers, we all must remember that last year means "nothing". But we can look to 2006 for inspiration and motivation to make 2007 our World Series year. To put Maddin Hauser on your "team," give us a call and see how we can help you get to your World Series year.

Steven D. Sallen
Editor-in-Chief

When is Final "Final" in the Context of Tax Foreclosure?

BY: DANIELLE M. SPEHAR

In a case potentially affecting thousands of people, the Michigan Supreme Court is considering in *Wayne County Treasurer and Matthew Tatarian and Michael Kelly vs. Perfecting Church* whether an owner who inadvertently loses his property to tax foreclosure has a right to get it back. The foreclosure at issue in *Perfecting Church* was part of a mass foreclosure filing by the Wayne County Treasurer, who sought to foreclose on thousands of properties due to unpaid taxes, including a parcel owned by the Perfecting Church, which the church used as a parking lot.

A 1999 state statute (MCL 211.78l) states that once government has seized land for back taxes and transferred title to a new owner, the prior owner can only sue for monetary damages, but not for the return of the property. The Michigan Supreme Court in *Perfecting Church* must decide whether that 1999 statute is constitutional even if a government error led to the mistaken seizure of the property.

The plaintiff in *Perfecting Church* claims in their briefs filed with the courts that they believed the parking lot would be tax exempt, as was most of the church's other property. Somehow, that exemption did not take effect, nor did the church ever get notice of a tax seizure. The church did not discover that its lot had been seized until it heard from the investors who bought the property at the tax sale.

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Public Service Improvements: Don't Tax The Developer

BY: STEVEN D. SALLEN
LINDSAY A. JERABEK

In the October 2006 case *Toll Northville, Ltd., et al. v. Township of Northville*, the Michigan Court of Appeals held that tax assessors cannot increase the taxable value of real property when public service improvements are installed by developers. Instead, they must wait until the property is sold to increase the taxable value.

"...developers can make public service improvements without having the added burden of being hit with increased taxes..."

Background

In 1994, "Proposal A" amended the Michigan Constitution by creating a limit on the amount by which the "taxable value" of a parcel of real property may increase each year, as long as the same party owns the property. Specifically, the taxable value is capped at the lesser of 5% or the increase over the immediately preceding year's general price level. An important exception was carved out to allow the value to be adjusted for "additions" without regard to the stated limit, even if the property is not transferred. When Proposal A was adopted, the General Property Tax Act ("Act") defined "additions" as "new construction or a physical addition of equipment or furnishings." After Proposal A was adopted, the Act was amended to include "public services" under the definition of "additions" ("Amendment"). "Public services" means "water service, sewer service, a primary access road, natural gas service, electrical

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Eye on the Courts

By: David M. Saperstein

The past year has been significant for Michigan real estate brokers on the judicial front. When disappointed real property buyers sue real estate agents for making alleged misrepresentations about the property, the agents commonly lament that they should not be involved in the litigation because only the sellers made representations about the property. Unfortunately, the reality is that buyers regularly make such claims against agents in their attempts to rescind a transaction. One way for real estate agents to shield themselves is to include protective language in the purchase contract that the agent did not make any representations.

A recent Michigan Court of Appeals case upheld such a clause. In *Huhtasaari v Stockemer*, 2005 WL 3481429 (Docket No. 256926) (unpublished), the buyer and seller disputed the extent of representations (and misrepresentations) concerning water leakage and mold growth. Without addressing the substance of the alleged representations, the Court ruled in the real estate broker's favor and dismissed the case.

The secret of the broker's success was in the language of the offer to purchase. First, the offer contained the following clause, which indicated that no oral representations would be part of the purchase contract:

> "This agreement supersedes any and all understandings and agreements and constitutes the entire agreement between the parties hereto *and Broker* (other than the listing/commission agreement) and no oral representations or statements shall be considered a part hereof." (emphasis added)

Next, the contract acknowledged that the Broker had not made any representations or promises:

> "Purchaser and Seller acknowledge that no representations, promises, guaranties, or warranties of any kind, including, but not limited to, representations as to the condition of the premises were made by the Broker, his/her sales persons, other cooperating sales persons or persons associated with Broker. "

Additional conditions for the sale were incorporated by two addendums. The first read:

> "We the undersigned further hold Century 21 MECK and [its] cooperating office and their salespersons, broker and employees respectively, harmless regarding the accuracy of the above representations."

A second Addendum provided the following "as is" clause:

> "We further hold Century 21 MECK and its cooperating office and their salespersons, brokers, and employees, respectively harmless and do hereby indemnify them against all claims, actions, or [suits] for damage of any nature whatsoever, arising from their actions leading to this sale and from our decision not to avail ourselves of any or all of the inspections."

From this language, it seems fairly clear that the parties intended to release the real estate broker from any liability. Nevertheless, the buyers offered a competing interpretation to suggest that the release language was ambiguous. The court rejected the buyers' interpretation and held that the language of the release foreclosed any claim by the buyers that the broker had made any misrepresentations. The court also rejected the buyers' argument that the release was invalid because there was no specific payment, or consideration, for the release.

Although this case is unpublished and thus not binding as precedent in future cases, it offers guidance on two points. First, no matter how clear the contractual language is, it will likely be susceptible to multiple interpretations. Second, despite this reality, a standard release can offer real estate brokers some protection against novel interpretations of the purchase agreement. In *Huhtasaari*, the release allowed the realtor to escape liability without any consideration of the substantive issue of whether the buyers had been fraudulently induced into buying the property.

The past year has also been significant for real estate brokers in that the Michigan Court of Appeals has addressed a number of recurring issues in litigation against brokers. One such issue is whether an aggrieved buyer may bring a claim for damages pursuant to Michigan's Seller Disclosure Act (SDA), MCL 565.951. In two recent cases,[1] the courts held that a buyer's remedy under the SDA is limited to terminating an otherwise binding purchase agreement. Once the sale is completed, the SDA provides no further remedies. The only viable option for an aggrieved purchaser is to sue for common-law fraud to the extent that there were any *fraudulent* misrepresentations.

Another recurring issue is whether Michigan's Consumer Protection Act (MCPA) applies to the sales of homes. This issue is significant because a successful claim would permit the recovery of triple damages and attorney fees. However, the court held that the MCPA does not cover transactions that are "specifically authorized" by a regulatory board.[2] Because the activities of real estate brokers and salespersons are specifically authorized by the Michigan Administrative Code, the court held that the property sale was not subject to a claim under the MCPA.

Let us hope that the courts this year will continue to enforce contractual provisions that divide the responsibilities between buyers, sellers, and brokers.

[1] *Pena v Ellis*, 2006 WL 1006444 (Docket No. 257480) (unpublished); *Vettese v Zehr*, 2005 WL 3439788 (Docket No. 255919) (unpublished).

[2] *Gleason v Nexes Realty, Inc*, 2005 WL 3304117 (Docket No. 253877) (unpublished).

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service, telephone service, sidewalks, or street lighting."

Toll Northville, Ltd., et al. v. Township of Northville

In the *Toll Northville* case, Developers made public service improvements to property, including the installation of a primary access road, streetlights, sewer service, water service, electrical service, natural gas service, telephone service, and sidewalks. Based on the Amendment's definition of "additions," Northville Township increased the taxable value of the property during the years the improvements were made. For Michigan developers who have made necessary improvements on property that remains unsold, this taxation scheme imposes on them a significant financial burden: uncapped taxes on property that is not bringing in any income.

The Michigan Court of Appeals held that the Amendment was unconstitutional because the installation of public services does not fall within the scope "additions" as that term was understood prior to Proposal A's adoption. In other words, public services do not qualify as "new construction or a physical addition of equipment or furnishings," even if the improvements are connected to the land. Rather, the court found that "additions" in this context are "improvements and added equipment that become part of the taxable land itself – that is, improvements that become part of the real property as structures or fixtures."

With regard to public improvements such as streets or roadways, the court noted that these infrastructures are expressly exempted from taxation under the Act. As for water, sewer, natural gas, electrical, and telephone services, the Act establishes that the equipment, structures, and easements that facilitate such services are to be assessed as personal property to the utility companies that own them. Even though a developer may own the land at the time the improvements are made, the municipality or a utility company holds title to such improvements and, therefore, the court reasoned they should not be included in the property's taxable value. Taxation by the municipality of both the utility companies and the real property owners would constitute impermissible double taxation.

CONSEQUENCES FOR DEVELOPERS

Under the *Toll Northville* ruling, Michigan developers can make public service improvements without having the added burden of being hit with increased taxes as a result of the improvements. To the extent that such improvements do increase the true value of the land, the increased value will be realized once the land is sold. If this ruling is given retroactive effect, it is possible that taxable values of "additions" dating back to 1994 may be impacted. Developers should stay tuned, however, as this case has been appealed to the Michigan Supreme Court.

NEW TITLE INSURANCE POLICY FORM NOW AVAILABLE

BY: LAVINIA S. BIASELL

The American Land Title Association (ALTA) recently adopted a revamped title policy form for the first time in decades. ALTA adopted these new forms in June, 2006 in an attempt to be more consumer friendly. Although a detailed exploration of these revisions are beyond the scope of this article, a few of the highlights include the following pro-consumer changes which are particularly favorable to lenders:

- The 2006 forms are more reader friendly with newly defined terms making the policy easier to understand.

- The 2006 Loan Policy form now insures fourteen categories of "Coverage Risks" instead of the previous eight. These categories include coverage for certain risks occurring after the date of policy, such as the continued priority of construction mortgage advances over construction liens or providing express coverage for matters that were previously only implied, such as loss relating to a post policy violation of a building or use restriction that was in effect on the date of policy, loss due to certain enforcement actions due to the exercise of a governmental police power, or the exercise of rights of eminent domain under certain circumstances. As a result of increasing the categories of Coverage risks, you will see fewer "Exclusions" from coverage in the 2006 loan policy.

- The new 2006 loan policy has also loosened requirements for making claims in that the title insurer may request proof of loss only if it cannot determine damages without such proof.

- The 2006 loan policy contains a new provision adding 10% to the "Amount of Insurance" if the insurer fails to establish title or the insured's mortgage lien through litigation or otherwise. In addition, the insured now has an option to value its loss under this circumstance either as of the date the insured made the claim, or the date the claim was settled and paid.

Although the 2006 policy forms are available, and are more consumer friendly, most title insurance agents have no experience in using them. Purchasers and lenders should consult with their Maddin Hauser attorney to determine if requesting a 2006 title insurance form is appropriate for their particular transaction.

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Attorneys representing the Wayne County Treasurer's office and the investors assert that the original owner already has a remedy in the form of monetary damages and that a lack of finality in tax sales would bring to a halt much of the economic redevelopment of cities like Detroit. The latter argument was supported by claims that without some finality, banks would fear lending money on a redevelopment project, title companies would not insure the deal and contractors might decline to start work since there would be no guarantee of ownership.

Countering such claims, counsel for the church argued the property already was in productive use before it was "stolen". The U.S. Supreme Court ruled, in a similar case in Arkansas in April 2006, that state officials were wrong to take away the home of a Little Rock man for nonpayment of real estate taxes without sufficient notice to him. In the Arkansas case, the court ruled that sending two certified letters to the owner and publishing a notice of the sale in a local paper was insufficient notice.

Talent wins games, but teamwork and intelligence wins championships.

-Michael Jordan

The broad public interest at issue in this case is evidenced by the fact that no fewer than seven groups filed an *Amicus Curiae* brief (a brief submitted by a non-party to the lawsuit to urge a particular result on behalf of the public or a private interest of third parties). Many parties will watch with interest to see if the Michigan Supreme Court follows suit when it rules in the *Perfecting Church* case sometime next summer. Watch future issues of Real e-state for a report of the Court's decision.

"TAKING" A STAND AGAINST *KELO*

BY: KASTURI BAGCHI

In the recent mid-term elections, Michigan voters overwhelmingly voted in favor of Proposal 4 which amends the State's constitution to impose tougher standards for condemnation actions than required by federal law. In July 2005, the United States Supreme Court upheld a condemnation action by a municipality in which private property was taken and eventually transferred to a private developer for redevelopment. *Kelo v. New London*, 2005 WL 1469529 (US). The Court justified their ruling by deferring to the municipality's conclusion that the entire "area at issue was sufficiently distressed to justify a program of economic rejuvenation…thereby… [dismissing] the homeowner's challenge that the condemnation is unconstitutional because their own properties were not blighted." Id. In order to completely derail the effects of the *Kelo* decision in Michigan, Proposal 4 has now been codified into law. Public Act No. 656 of 2006, which became law on January 9, 2007, prohibits the State of Michigan from taking private property for the purpose of transfer to a private entity for either general economic development or enhancement of tax revenue and imposes a higher standard of proof to demonstrate that a taking of property is for public use. As a result of Proposal 4, a specific statutory framework now exists for determining what is a legitimate public use.