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From the desk of:

The Real e-ditor

One of my favorite weekends every year is the weekend on which Daylight Savings Time ends, and we get the hour back that we lost in the Spring. That 25th hour in the day seems so precious, and I always try to put it to good use: a vigorous workout, some extra reading, or maybe a nap during the Lions game. Actually, this year I stayed awake and *watched* the Lions. That extra hour on that one day a year truly reminds me that time is a precious commodity in short supply.

At Maddin Hauser, we have always practiced with an abiding understanding that time truly is our most precious commodity. Transactions of all kinds have a short shelf-life; the longer they drag on, the less likely they are to close. We are always racing against time. That is why I have developed *The Transaction Expeditor System™* to maneuver through transactions effectively.

Over my 23 years of experience helping real estate professionals like you, I have worked and networked with real estate brokers, investors, property managers and developers from nearly every market segment, niche and specialty. To help real estate professionals like you adapt, change and grow, especially in challenging market circumstances, I have developed *The Transaction Expeditor System™*. This system can help you focus your energies to help you *close deals faster*, especially in these difficult economic times.

If you would like more information about *The Transaction Expeditor System™*, drop me an e-mail.

Steven D. Sallen
Editor-in-Chief

AMENDMENT TO MICHIGAN CONSTRUCTION LIEN ACT GRANTS REPRIEVE IN PROCESSING COMMERCIAL CONSTRUCTION LOAN DRAWS

BY: DANIELLE M. SPEHAR

Effective June 28, 2007, Public Act No. 28 of 2007 (the "Amendment") amended sections 110 and 115 of the Michigan Construction Lien Act (the "Act"). This Amendment codified what many people contemplated was the original intent of the Legislature in enacting Public Acts No. 497 and 572 (the most recent prior amendments to the Act).

Prior to the Amendment, §110(6) of the Act required the owner, upon receipt of a sworn statement, to give notice of its receipt to each subcontractor, supplier, and laborer who provided a notice of furnishing (or if a notice of furnishing was excused, to each such person named in the sworn statement) regardless of the type of project (i.e. commercial or residential).

Title companies processing draw requests required commercial borrowers to provide a sworn statement that was completed, signed, dated and notarized for each such request. In order to evidence the owner's compliance with the notice required by the Act, title companies began to require that sworn statements also include the address and telephone number of every subcontractor listed on the sworn statement. This was a very cumbersome task for an owner of a commercial project that may have any number of subcontractors working on it.

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OLD LAW IS STILL GOOD LAW: MICHIGAN CASE ALLOWS ORAL EXTENSION OF BROKER'S LISTING AGREEMENT

BY: JAMES M. REID IV

Attention Michigan real estate brokers! Is the term of your listing agreement about to expire? While a contract to pay a commission upon the sale of an interest in real estate must be in writing (MCL §566.132(1)(e)), nearly four decades ago, the Michigan Court of Appeals preserved a broker's commission by holding that the time for performance under the listing agreement may be orally waived or extended. This may remain true today.

> *"The Michigan Court of Appeals has held that the time for performance under a listing agreement may be orally waived or extended."*

In *Gardner v. Batsakes*, the broker and seller entered into a listing agreement. The listing agreement provided that the broker had a month to locate a purchaser. The listing agreement further provided that in the event a purchaser was found, the broker would be paid a commission of ten percent of the sale price.

Five days before the listing agreement expired, the seller received notice that the broker found a purchaser and invited the broker and purchaser to discuss the offer *on a date after which the listing agreement expired*. Even though the broker produced a purchaser, the seller refused to pay the broker a commission since the broker did not perform within the time-frame provided in the listing agreement. The broker filed a lawsuit

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Closing Date Alert ! (What a difference a month can make)

By Michael K. Hauser, Esq., CPA

If you are involved in a real estate purchase or sale that could potentially close in either 2007 or 2008, be advised that the State of Michigan tax ramifications for you could be substantially different between the two years.

The newly passed Michigan Business Tax becomes effective January 1, 2008, replacing the Single Business Tax. In general, sellers will fare much better by closing in 2007 instead of 2008 (although gain on the sale will need to be reported a year earlier). The reason is that, starting in 2008, there is a new 4.95% tax on business income, and also a modified gross receipts tax. For many real estate sellers, the new tax will be much higher than the current Single Business Tax. Each situation is different, however, and actual results will depend on various factors, including whether the seller qualifies for the small business credit, and whether or not the seller previously took a "capital acquisition deduction" or "investment tax credit."

Conversely, for real estate purchasers, there is at least one clear benefit of closing in 2008, rather than 2007, if the real estate includes depreciable property and is not just raw land. Either way, the purchaser will get an investment tax credit for making the purchase, but any unused credits which begin in 2007 will expire in 2009, while any unused credits which begin in 2008 will continue indefinitely until exhausted (frequently, investment tax credits are not fully used up by real estate owners within two years). In addition, the amount of the credit will be larger for many real estate owners if the property is acquired in 2008.

Commercial Property Owners beware a Municipality's Ad Valorem Tax Foreclosure May Affect Your Credit Score.

by: Courtney D. Roschek

In an economy that is less than booming, commercial property owners may be inclined to discard properties that are cutting into their bottom line by letting the municipality foreclose as a result of unpaid taxes. However, consider yourself warned, for as the American jurist Oliver Wendell Holmes once wrote "[a]ll proceedings, like all rights, are really against persons." Plainly stated, when a municipality liens or forecloses on property in your name, it may show up on your credit report.

Your credit report provides potential lenders with over a decade of your financial data. There are generally four sections to a credit report where CRAs (credit reporting agencies) regurgitate unverified information: credit history, inquiries, identifying information and public records. This last section, public records, can cause the most long term damage to your credit report .

While all negative information is detrimental to your credit rating, tax liens and foreclosures are regularly listed as two of the worst things for your credit report.

While sophisticated commercial property owners know that ad valorem taxes are levied upon the property, when unpaid taxes result in a lien or foreclosure it attaches to the person. Why? The public records section of your credit report includes all publicly available information affecting your credit report. At a price, CRAs conduct unscheduled tri-yearly reviews of all public information sources (the register of deeds and county, state and federal courts). All publicly filed legal adjudications including, but not limited to, bankruptcies, tax liens, civil judgments, foreclosures, and garnishments, filed in the property owners individual name, fall subject to a CRA's report.

While all negative information is detrimental to your credit rating, tax liens and foreclosures are regularly listed as two of the six worst things for your credit report. This is not only because lenders frown upon this data, but also, because these types of data remain on your report the longest. According to the Fair Credit Reporting Act (the "FCRA"), 15 U.S.C. § 1681c, tax liens and foreclosures will remain on your credit report for 7 years. Worse, the FCRA puts no time limit on any reported item that involves more than $150,000.00.

So what does this mean to the commercial property holder? We recognize that in Michigan's tight economy it may be financially difficult to sell or even maintain commercial property. However, while it may seem easier or even cost beneficial, to let commercial property go into foreclosure for failure to pay ad valorem taxes, remember the long term effects on your credit rating.

We recommend that you examine your property portfolio to see whether any of your properties are owned in your individual name. If so, this is yet another reason to transfer the property into a limited liability entity to avoid these negative credit implications.

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Because of the Amendment to the Act, §110(6) is now limited to residential projects. The Act, as amended, now provides "[o]n receipt of a sworn statement *regarding an improvement to a residential structure*," the above notice requirement applies. The Act defines a residential structure as "an individual residential condominium unit or a residential building containing not more than 2 residential units, the land on which it is or will be located, and all appurtenances, in which the owner or lessee contracting for the improvement is residing or will reside upon completion of the improvement."

Likewise, the Amendment also limited §115(7) of the Act to residential projects. Prior to the Amendment, §115(7) prohibited the owner from relying on a lien waiver provided by a person other than the lien claimant named in the waiver if the lien claimant filed a notice of furnishing (or was excused from doing so), unless the owner first verified with the lien claimant that the waiver was authentic, regardless of the type of project. Imagine the effort expended by an owner in personally contacting every lien claimant on a commercial project. In response to this requirement of the Act, title companies processing draw requests modified the form of waivers of lien to include a paragraph referring to verification of authenticity by the owner.

As a result of the Amendment, owners of commercial projects have been relieved of the obligation to satisfy these cumbersome requirements that many suspected all along were never intended to apply to commercial projects. This should eliminate much of the hand wringing that has been experienced by commercial project owners over the last several months.

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against seller demanding payment.

The Michigan Court of Appeals held that the seller's invitation to meet the purchaser orally waived and/or extended the time of performance under the listing agreement. Accordingly, the Court found that the broker was entitled to receive a commission despite the fact that the meeting between the parties took place *after the expiration date provided in the listing agreement had passed*.

This is a notable case for real estate brokers in Michigan. Where brokers are unable to perform during the period provided in their listing agreement, the time of performance may be orally extended or waived by the seller. Because every circumstance is different, to avoid a dispute and possible litigation, it is still best practice to memorialize extensions to listing agreements in writing. But, *Gardner v. Batsakes* illustrates that in some cases, old law is still good law.