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MEMORANDUM

TO: ELEVENTH ANNUAL REAL ESTATE SYMPOSIUM ATTENDEES

FROM:

RE: OPEN SPACE, PLANNED UNIT DEVELOPMENTS AND
LAND BANKING; 2003 PUBLIC ACTS 227, 228, and 229:

DATE: May 4, 2004

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In late 2003, the Legislature passed 2003 Public Act Nos. 227, 228 and 229. These enactments allowed for development under Planned Unit Development Agreements where the open space under the Agreement is outside of the overall project boundary. It authorizes what is essentially land banking.

As early as 1921, Michigan passed laws authorizing cities and villages to adopt zoning, planning and related ordinances to control the development of land within their jurisdiction. The State realized the importance of such regulations and in 1943 passed similar laws granting such powers to townships and counties. These laws have had and continue to have their fair share of challenges from would-be developers and potential purchasers alike, based on claims of exclusionary zoning practice, takings and everything in between.

In 1978, the basic zoning laws were again modified. The Legislature adopted a form of zoning that had become popular in several other states. The planned unit development (the "PUD"), as defined in Michigan and sometimes referred to as a Planned Urban Development or Planned Residential Development was added to the arsenal of zoning weapons the State provided to local municipalities. PUD zoning designation encourages the development of large tracts as self-contained communities.

A PUD combines complementary zoning designations within a development to create a desired community.

An example of a PUD might combine a mixture of both high and low density residential, retail, commercial, open space and business designations to create a “main street”, a town center complete with shops and restaurants might be at the heart of such a PUD. The shops and restaurants might have apartments overhead to add affordable housing options or be used for businesses like accounting and legal services. Further away from the town center, lower density residential homes might be built. The owners of such homes can take advantage of the town center, just a short walk from their homes. PUDs were created, in part, to help curb urban sprawl by providing the community environment described above.

One requirement for a PUD designation is open space. In the past, this usually required the developer of a PUD to designate open space to protect natural features in the PUD. In a PUD, municipalities often require the developer to set aside areas of land for parks, playgrounds, landscaping and buffers between certain zoning designations. The inclusion of open space requirements means that the income the developer hoped to derive from its investment might be reduced because areas it initially planned for development are required to be used as aesthetic enhancements for the PUD. The upside to the developer, in theory but not always in practice, is the availability of higher density uses within the balance of the PUD.

In December 2003, three innocuous bills were signed into law, 2003 Public Acts Nos. 227, 228 and 229. These new laws are designed to encourage innovative and unique PUDs. The laws allow municipal zoning authorities, unless expressly prohibited by applicable zoning ordinances already enacted within their jurisdiction, to approve proposed plans for PUDs without open space areas within the boundaries of the development itself. In exchange, the developer must agree to not develop land elsewhere within the municipality to satisfy the open space requirement for its PUD. The open space does not have to adjoin the PUD or create a benefit for the potential residents or users of the PUD. In theory, the developer could agree not to develop additional land miles away from its proposed development and receive the desired PUD designation. The new changes to the law could, in fact, facilitate very innovative and unique land developments. The statutes can be used to create beneficial woodlands reserves or large parks.

Our firm has extensive expertise in assisting land developers. If you would like any additional information regarding this topic or regarding any other real estate matters, please feel free to contact me, Brandy L. Mathie, at 248-827-1882 or e-mail me at blm@maddinhauser.com.

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MEMORANDUM

TO: ELEVENTH ANNUAL REAL ESTATE SYMPOSIUM ATTENDEES

FROM: CATHERINE H. FINN, ESQ.

RE: ASSOCIATION AND DEVELOPER RIGHTS TO GRANT
EASEMENTS IN CONDOMINIUMS

DATE: May 4, 2004

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In its June 18, 2002 Opinion in *Rossow v Brentwood Farms Development, Inc.*, the Michigan Court of Appeals addressed the issue of the Condominium Association's authority to grant an easement against a privately owned condominium unit. The Court held that the Condominium Master Deed and the Michigan Condominium Act permitted the Association to grant the easement.

Brentwood Farms Development, Inc. executed a Master Deed for the Brentwood Farms Condominium Project in White Lake Township, which was recorded on November 9, 1993. Glenn and Ginger Rossow purchased Unit 82 of the Project by Land Contract that was executed in December 1993. A Warranty Deed for Unit 82 was recorded in June of 1997. Some time between October 1996 and the end of 1997, James and Linda Hogan purchased a home that was located on Unit 83 of the Brentwood Farms Condominium Project. In September 1996, a survey of Unit 83 was conducted. The survey revealed that the driveway that serviced the home on Unit 83 actually encroached upon Unit 82 by approximately 9 feet. In October 1998, Brentwood Association recorded an easement over Unit 82 for the benefit of Unit 83. The Plaintiffs, Mr. and Mrs. Rossow, sued the Association for slander of title, breach of the Michigan Condominium Act, and breach of the Condominium Association By-laws. The Court ruled in favor of the Defendant Condominium Association.

The recorded Master Deed for the Brentwood Condominium Project, which was incorporated by reference into the deed by which the Plaintiffs received title to Unit 82 provided that in the event that any portion of a site or residential structure in a site or common element encroaches upon another site or common element due to, among other things, survey errors, a reciprocal easement shall exist for the maintenance of such encroachment for so long as such encroachment exists, and for maintenance thereof after rebuilding in the event of any destruction. In addition, Section 40 of the Condominium Act, as it existed at the time the easement was granted, provided "to the extent that a condominium unit or common element encroaches on any other condominium unit or common element . . . by reason of any deviation from the plans and construction . . . a valid easement for the encroachment shall exist." The Court found that the language of the by-laws and the Condominium Act gave the Association the authority to grant an easement against Unit 82 for the benefit of Unit 83.

At Maddin Hauser, we have a great deal of experience assisting clients with all types of real estate transactions and litigation issues. If you have any questions regarding the authority of a Condominium Association to grant an easement over a privately owned condominium unit, are faced with similar situations, or any other issue, please feel free to contact me at (248) 359-7521 or chf@maddinhauser.com.