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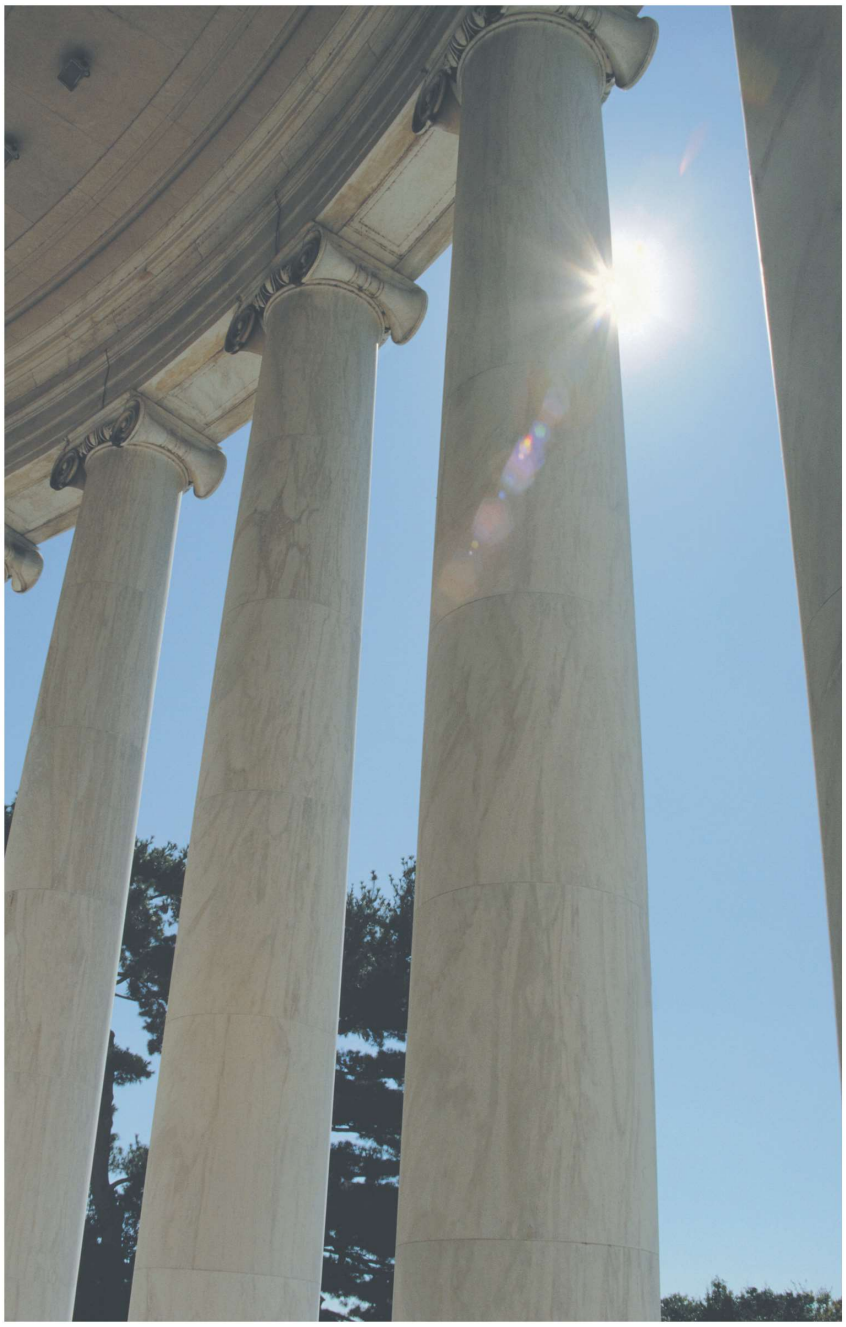

Real Estate Continuing Education Course

2020 CE

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The Occupational Code states: In completing the appropriate number of hours of eligible continuing education courses, a licensee must complete **at least** 2 hours of eligible continuing education courses in each year of a license cycle that involve law, rules, and court cases regarding real estate. The licensee may select any continuing education courses in his or her area of expertise to complete the remaining hours of eligible continuing education courses required under subsection (1) and may complete those hours at any time during the license cycle.

Completion of 2020 Michigan Comprehensive Legal Update satisfies six(6) clock hours of the 18 clock hours necessary to renew your license for the three (3)-year license period beginning November 1, 2021 and ending on October 31, 2024. This course also satisfies the mandatory, annual, minimum two (2) clock hours of "laws, rules and court cases regarding real estate."

If you have specific questions regarding license renewal, please contact:

State of Michigan
Department of Licensing and Regulatory Affairs
Bureau of professional licensing
Real Estate Brokers and Salespersons
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Lansing, Michigan 48909
(517) 373-8068

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CHAPTER 1 MICHIGAN LAWS AND RULES UPDATE

On February 4, Michigan Governor Gretchen Whitmer signed two executive orders and an executive directive to protect the Great Lakes, clean up drinking water, and combat the impacts of climate change.

Executive Order 2019-2 restructures the Department of Environmental Quality (DEQ) as the Department of Environment, Great Lakes, and Energy (EGLE). The executive order also creates new offices within the department, including the Office of the Clean Water Public Advocate, Office of the Environmental Justice Public Advocate, and Interagency Environmental Justice Response Team. It also creates a new Office of Climate and Energy that will work with the Governor to mitigate the impacts of climate change, reduce greenhouse gas emissions, and embrace more sustainable energy solutions.

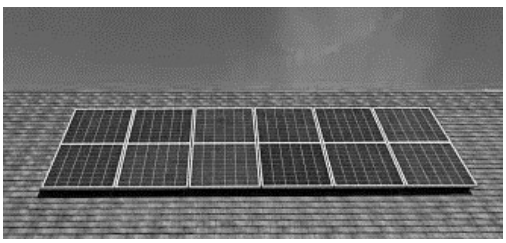
Executive Order 2019-3 strengthens the Michigan PFAS Action Response Team (MPART) as an effort to inform the public about per- and polyfluoroalkyl substances, locate contamination, and take action to protect sources of drinking water from these dangerous chemicals.

Executive Directive 2019-12 enters Michigan into the U.S. Climate Alliance, a bipartisan coalition of Governors from 19 other states that have committed to reducing greenhouse gas emissions consistent with the goals of the Paris Agreement.

Public Act 23 of 2019 amends the Land Division Act. A property tax payment certification is required before any parcel of land is divided. This change ensures that taxes are paid before splits happen. It also creates clarity regarding delinquent tax payments when land is split up, ensuring the new owners will not get an unpleasant surprise upon learning they are responsible for unpaid tax bills of previous owners.

As a protection to the seller, the new law provides for the approval of a division and apportionment of taxes according to the specific division. This provision prevents the local government from requiring payment of all the taxes for approval and sale of just a part of parent parcel.

PA 115 and 116 of 2019 The classification and associated taxation of solar panels have been subject to different interpretations, guidelines, and assessment practices over time. From 2003 to 2013, solar panels could be exempt from property taxes under a specific provision that classified the property as "alternative energy personal property." That exemption, however, has ended. In June 2013, the State Tax Commission (STC) provided a memorandum classifying solar panels as industrial personal property.



With that determination, the panels would be exempt from the 6-mill state education tax and the 18-mill non-homestead levy earmarked for local schools. Shortly afterward, in 2014, the property could be exempt from taxation under the small taxpayer exemption, as long as the true cash value of the panels was

less than $80,000. Most recently, in February 2018, the STC issued another memorandum classifying residential solar panels as residential real property to be assessed as a component of the real property.

With this determination, the value of a residential solar panel installation would be included in assessed and taxable values. Essentially, installing solar panels on a home would likely lead to increased property taxes beyond the taxable value cap. Regardless of the classification of solar panels—whether personal, industrial, or real property—some believe that state tax policy should encourage the adoption of these environmentally beneficial energy systems, and that previously enjoyed tax benefits should be preserved for those with existing systems. These two laws provide property tax benefits for alternative energy systems.

In most instances, prior to the February 13, 2018, State Tax Commission guidance that classified solar panels as a component of residential real property if they are located on a parcel of residential real property, solar panels were classified as industrial personal property and considered exempt from the 6-mill state education tax and the 18-mill non-homestead levy earmarked for local schools. Despite the State Tax Commission's reclassification of residential solar panels as residential real property, this law will continue to exempt solar panels from these two tax levies by excluding solar panels from the calculation of the true cash value of residential real property.

The personal property tax exemption would apply to the type of alternative energy personal property that is described as an alternative energy system, for taxes levied after the effective date of the bill, regardless of the ownership of the alternative energy personal property. Alternative energy system would have the same definition as in HB 4069. The exemption would apply if both of the following conditions were met:
• The alternative energy personal property had a generating capacity of not more than 150 kilowatts and was used solely to offset all or a portion of the commercial or industrial energy usage of the person upon whose real property the alternative energy personal property is located. • If installed after the effective date of the bill, the alternative energy personal property had a true cash value that, when combined with the true cash value exempt under section 9o as eligible personal property of the person claiming the alternative energy personal property exemption or a related entity, equaled less than $80,000.

These combined laws add to the list of what constitutes repairs and maintenance. Previously the list had the examples of i n s i d e or outside painting; repairs; adding gutters or downspouts; and replacing plumbing, furnaces, or hot water heaters. The following to the list of normal maintenance activities under the act: installing, replacing, or repairing an alternative energy system with a generating capacity of not more than 150 kilowatts, the annual energy output of which does not exceed the annual energy consumption measured by the electrical meter on the system to which it is connected. This would apply regardless of the ownership of the system. Alternative energy system is defined in the Michigan Next Energy Authority Act and means the small-scale generation or release of energy from one of thirteen energy systems, alone or in combination, including photovoltaic and wind energy systems.

Public Act 602 of 2018 bans state agencies from creating new regulations stricter than federal unless an agency shows a clear and convincing need due to exceptional circumstances.

Public Act 581 of 2018 overhauls state standards for cleaning up toxic sites.

Public Act 132 of 2018 Amends survey law. Any boundary survey where a permanent corner is monumented the surveyor shall record a survey. The second paragraph lists the exceptions to the rule being that no drawing is required to be recorded if one is already recorded and there is no change to the description or if the property is part of a subdivision.

Effective, March 29, 2019, the Michigan Marketable Record Title Act was amended to define what is required for a document to transfer or preserve certain title interests in land, and set a deadline of March 28, 2021, to record a document complying with the new requirements.

Public Act 631 of 2018 Slightly changed the definition of which wetlands come under the jurisdiction of EGLE. The five acres still is the minimum, but now to be considered a wetland, there must be hydric soils and a predominance of wetland vegetation or aquatic life. The amendments also removed the provision allowing EGLE to protect a wetland that is not otherwise regulated by simply declaring it is "essential to preserving the natural resources of the", as that had been criticized as too subjective. Also, although any property within 500 feet of a lake or stream or with 1,000 feet of one of the Great Lakes are presumed to be "contiguous" and therefore regulated, a provision has been added to permit a landowner to submit proof that a wetland within those limits is, in fact, not connected and therefore not regulated. If a wetland permit is denied, EGLE must specify the sections of the law that justify the denial and make suggestions for changes to the project that would allow the permit to be approved. Also, a process also now exists for challenging EGLE's classification of property as a wetland. It the decision is overturned the landowner is entitled to reimbursement for expert witness fees.

Public Act 367 or 2018 Amends the Construction Lien Act. Pryor to this change, a lien could only be recorded if actual physical change to the property occurred, and not preparation for change. Now, design professional defined as architects, professional engineers, surveyors and the subcontractors, may now record a lien for design services performed prior to the first physical improvement to the property.

To accomplish this, the design professional or its subcontractor must first record a "Notice of Contract" with the Register of Deeds in the county where the project is located. The Notice of Contract must be recorded ***after*** executing a contract for their services, but ***before*** the first physical improvement to the property and not later than 90 days after the design professional last provided services. Moreover, the Notice of Contract must substantially comport with the form set out in MCL 570.107a and include: (1) a statement which indicates the design professional is performing design services for the improvement of the property; (2) a description of the services provided; and (3) a legal description of the property to be improved. In order to have the right to record a Notice of Contract, the design services performed by a design professional or its subcontractor must have been authorized in writing by the Owner. The Notice of Contract is valid for one year after it is recorded. And, even if no physical improvement is made to the property, the lien is still valid. This is limited to those trades people listed herein and not to construction managers, trade contractors and suppliers even if they are performing the same services.

Public Act 572 of 2018 The change has the greatest impact on interests in land created more than 40 years in the past, such as:

- Building and use restrictions created in deeds, plats, condominium master deeds and other recorded documents
- Easements that haven't been improved or visibly used
- Conservation easements
- Rights to mine sand, gravel or limestone
- Other interests in land owned by persons other than the surface landowner

For example, if someone moved into a residential neighborhood or condominium project first developed more than 40 years and was pleased with the plat or condominium master deed and bylaws creating the

development which set down rules limiting how the land could be used and improved. Those rules ensured that the property could only be used in certain ways and granted important rights that protect the land value. Examples of some restrictive covenants may be that the residence may be used for dwelling places, only or that no fences shall be built, or no separate storage sheds may be placed on the property. Another example would be if someone sold a portion of their land to another and recorded a negative easement such that nothing could be built that would block the grantor's view.

As another example, a business operates in a retail center first developed more than 40 years ago. The building and use restrictions recorded at that time may prohibit industrial, adult entertainment or other uses that produce unwanted noise, odors or traffic that would disrupt the business. It could limit parking in areas that would block access to another business's loading dock. Or include other limits on use that you were counting on when you purchased or leased your parcel in the center.

Under the new amendment, if one want their rights to continue in effect, they must prepare and record at the Register of Deeds a notice that you intend to preserve your rights, and identifying the recording information for the original document creating those rights, no later than March 28, 2021. If you fail to do so, your rights will lapse.

How can Michigan Community Associations avoid the risks posed by 2018 PA 572?

MCL 565.103, as amended by 2018 PA 572, states as follows:

Sec. 3 (1) Marketable title is held by a person and is taken by his or her successors in interest free and clear of any and all interests, claims, and charges the existence of which depends in whole or in part on any act, transaction, event or omission that occurred before the 20-year period for mineral interests, and the 40-year period for other interests, and all such interests, claims, and charges are void and of no effect at law or in equity. However, an interest, claim, or charge may be preserved and kept effective by filing for record within two years after the effective date of the amendatory act that added section 2 or during the 20-year period for mineral interests and the 40-year period for other interests, a notice in writing, verified by oath, setting forth the nature of the claim in the manner required by section 5.

Sec. 5 (1) To be effective and to be entitled to record, a notice of claim under section 3 must contain an accurate and full description of all land affected by the notice, which description must be set forth in particular terms and not by general inclusions. However, except as to mineral interests, if the claim is founded on a recorded instrument, the notice must also state the liber and page or other county-assigned unique identifying number of the recorded instrument the claim is founded on. The failure to included liber and page or other county-assigned unique identifying number renders the recording ineffective and claim unpreserved. The notice must contain all of the following:

(a) The claimant's name

(b) The claimant's mailing address

(c) The interest claimed to be preserved.

(d) Except as to mineral interests, the liber and page or other unique identification number of the instrument creating the interest to be preserved

(e) The legal description of the real property affected by the claimed interest.

(f) The claimant's signature

(g) An acknowledgement in the form require by the uniform recognition of acknowledgments act.

(h) The drafter's name and address.

(i) The address to which the document can be returned.

(2) A notice of claim under section 3 must be filed in the register of deeds office of the county or counties where the land described in the notice is located. The register of deeds of each county shall accept all notices of claim under section 3 that are presented to the register of deeds that describe land located in the in which the register of deeds serves and shall enter and record full copies of the notices in the same way that deeds and other instruments are recorded.

In Michigan, "Marketable title is one of such character which should assure the vendee the quiet and peaceful enjoyment of the property, which must be free from encumbrance." *Stover v Whiting*, 157 Mich App 462, 468; 403 NW2d 575, 578 (1987). Accordingly, restrictive covenants can be preserved either by specific reference in a deed, i.e. by maintaining the restrictions in the chain of title, or by recording a notice that satisfies the specific requirements the specific requirements of MCL 565.105.

In the context of condominiums, a deed for a condominium unit should contain a specific reference, by liber and page number, to the originally recorded master deed and condominium bylaws. The Michigan Condominium Act, specifically, MCL 559.164 states as follows with respect to deeds in condominium units: Conveyances and other instruments affecting title to any condominium unit in a condominium project shall describe the same by reference to the condominium unit number of the condominium subdivision plan and the caption thereof, together with a reference to the liber and page of the county records in which the master deed is recorded. The conveyances and other instruments are recordable.

At the very least, the original master deed and condominium bylaws will be specifically identified in the chain of title for a condominium unit, and it is unlikely that a claim of interest would need to be recorded. Similarly, while condominiums existed under the Michigan Horizontal Real Property Act, most condominiums are less than 40 years, as the Michigan Condominium Act, MCL 559.101, et seq., was not enacted until 1978. However, it could be possible for issues to arise if there is an error in the deed, the recorded condominium documents or an amendment to the condominium documents is somehow omitted from the chain of title, so a condominium association may want to consider recording a claim of interest as a precautionary measure to avoid potential risks posed by 2018 PA 572.

In the context of platted subdivisions, many of which are governed by homeowners' associations, there is no statutory equivalent to the condo law and many of these documents are more than 40 years old. Many deeds do not specifically reference the recorded deed restrictions or covenants that may apply to a property and contain language such as "subject to anything of record" or "subject to existing use restrictions, if any" will no longer be sufficient. While arguments can be made that such language includes any recorded deed restrictions in the "chain of title", 2018 PA 572 has created an uncertain landscape. Accordingly, homeowners' associations may be forced to review the current deed, and chain of title for every owner, to ensure that any recorded restrictive covenants are appropriately referenced, or simply just file a claim of interest based on the existing deed restrictions to ensure that their interests are preserved.

MICHIGAN'S MARIJUANA REGULATORY AGENCY RELEASES EMERGENCY RULES

July 3, 2019 – The Marijuana Regulatory Agency (MRA) has issued emergency administrative rules for the purpose of implementing the Michigan Regulation and Taxation of Marijuana Act (MRTMA). Signed by Gov. Gretchen Whitmer, [illegible] to fully implement the marijuana proposal that Michigan voters approved in 2018.

"The release of the rules today provides local municipalities and prospective licensees with the information they need to decide how they want to participate in this new industry," said MRA Executive Director Andrew Brisbo. "Since we plan to start taking business applications November 1st, stakeholders will have four months to evaluate these rules and make their decisions. These rules set Michigan's marijuana industry on a path for success while ensuring safety for marijuana consumers."

Designed to allow prospective licensees to operate under clear requirements, the emergency rules are effective today and will remain in effect for six months. The emergency rules may be extended once for not more than six months. The rules ensure a fair and efficient regulatory structure for Michigan businesses as well as access to safety-tested marijuana for Michigan's citizens and visitors.

NEW LICENSE TYPES

In addition to the license types required in MRTMA, these emergency rules create the following additional license types:

- **Marijuana Event Organizer** – allows the license holder to apply for Temporary Marijuana Event licenses from the MRA.
- **Temporary Marijuana Event** – this license allows a Marijuana Event Organizer to run an event, which has been approved by the local municipality, where the onsite sale or consumption of marijuana products, or both, are authorized at a specific location for a limited time. Licensed Retailers and Microbusinesses may participate. The Marijuana Event Organizer is required to hire security and ensure that all rules and requirements for onsite consumption of marijuana products are followed.
- **Designated Consumption Establishment** – allows the license holder, with local approval, to operate a commercial space that is licensed by the MRA and authorized to permit adults 21 years of age and older to consume marijuana and marijuana products on premises. A Designated Consumption Establishment license does not allow for sales or distribution of marijuana or marijuana product, unless the license holder also possesses a Retailer or Microbusiness license.
- **Excess Marijuana Grower** – allows a licensee who already holds five adult-use Class C Grower licenses to expand their allowable marijuana plant count.

EQUIVALENT LICENSES

The Medical Marijuana Facilities Licensing Act (MMFLA) provides the structure for medical marijuana facilities. The Michigan Regulation and Taxation of Marijuana Act (MRTMA) provides the structure for adult-use ("recreational") marijuana establishments.

The Emergency Rules define Equivalent Licenses between the MMFLA (medical) and MRTMA (adult- use) as follows:

	Equivalent Licenses				
MMFLA (medical)	Any Class Grower (A, B, C)	Processor	Provisioning Center	Secure Transporter	Safety Compliance Facility
MRTMA (adult-use)	Any Class Grower (A, B, C)	Processor	Retailer	Secure Transporter	Safety Compliance Facility

Equivalent Licenses with common ownership will be allowed to operate at the same location, without separation, if the operation is not in violation of any local ordinances, regulations, or limits. Separate entrances, exits, point of sale areas, and operations will not be required.

Adult-use Retailer and medical Provisioning Center licensees who are operating equivalent licenses at the same location must physically separate the entire inventories and the items on display for sale so that individuals may clearly identify medical marijuana products from adult-use marijuana products. Products subject to the adult-use excise tax may not be bundled in a single transaction with a product or service that is not subject to the excise tax.

To ensure marijuana product is available for individuals 21 years of age or older, the MRA may authorize Grower, Processor, and Retailer equivalent licenses to transfer marijuana product from their medical marijuana inventory to their adult-use inventory. The MRA will publish a specific start date, end date, and other requirements for the transfer of marijuana product between equivalent licenses.

SIMILARITIES/DIFFERENCES BETWEEN ADULT-USE RULES AND MEDICAL RULES

The adult-use marijuana Emergency Rules share a large overlap with the medical marijuana Administrative Rules but also contain some significant differences. In the overlap between adult-use and medical, there are similar rules with important distinctions. These distinctions include:

- There are no capitalization requirements for adult-use licenses and fewer financial documents are requested from applicants.
- Adult-use home delivery includes Designated Consumption Establishments and any residence. Medical home delivery is to registered marijuana cardholders only.
- Adult-use license renewal fees are divided into three tiers in which larger volume licensees will pay more on renewal and smaller volume licensees will pay less.
- Growers and Microbusinesses may accept the transfer of marijuana seeds, tissue cultures, and clones from another Grower licensed under the adult-use law or the medical marijuana law.
- Class A Growers and Microbusinesses may accept the transfer of marijuana plants one time from (a) registered primary caregiver(s) so long as the caregiver(s) was an applicant for that license.
- Current medical marijuana licensees who apply for adult-use licenses will be expedited through the application process if there are no changes in ownership.
- All adult-use applicants are required to submit a social equity plan. The social equity plan must detail a strategy to promote and encourage participation in the marijuana industry by people from communities that have been disproportionately impacted by marijuana prohibition and enforcement and to positively impact those communities.
- Adult-use Safety Compliance Facilities are required to hire a laboratory manager.

ADULT-USE LICENSING TWO-STEP APPLICATION PROCESS

The application process for adult-use marijuana establishment licenses will continue to follow the two-step process that the MRA has been using for the processing of medical marijuana facility operator licenses. The two-step process will allow applicants to begin the application process while still seeking a location for the adult-use marijuana establishment, if they choose to do so.

The first step, pre-qualification, allows applicants to determine if they have state approval before they invest in property, buildings, or equipment. Some municipalities may require this approval before local support is given.

The second step, license application, will allow applicants to indicate which type of adult-use marijuana establishment license is being sought and must include plans for a marijuana establishment located in a municipality that does not have an ordinance in place which would preclude the business.

Since the adult-use marijuana law requires the MRA to make a licensing decision within 90 days of receiving a complete application, applicants are encouraged to utilize the two-step process to help avoid a default denial occurring at the 90-day mark.

Applicants will have the option of submitting step one and step two materials at the same time and may submit an online or a paper form application to the MRA; both the paper and online application will require the same documentation and information.

OTHER HIGHLIGHTS

- Growers and Processors may engage in research and development.
- Growers, Processors, Retailers, and Microbusinesses may offer tested internal product samples for their employees to consume, off-site, to ensure the quality and/or potency of the products.
- Growers and Processors may provide trade samples of marijuana and marijuana products to other Processors or Retailers to help determine whether they want to purchase the product.
- A licensee – who holds two or more Processor licenses or two or more Retailer licenses – with common ownership at different establishments may transfer marijuana product inventory between the Processor or Retailer establishments.
- Microbusinesses may not operate at multiple locations and must operate the corresponding areas of their Microbusiness in compliance with the operation requirements of a Retailer, a Grower, and a Processor.
- The MRA's Social Equity Plan will (1) promote and encourage participation in the marijuana industry by people from communities that have been disproportionately impacted by marijuana prohibition and enforcement and (2) positively impact those communities.
- A Retailer is not required to retain information from customers other than the following: method and amount of payment, date/time of sale, product quantity, and other product descriptors.

In September of 2019, the U.S. House of Representatives voted by a vote of 321-103 to advance legislation that would allow banks to provide services to cannabis companies in states where it is legal. At the time of the writing of this text the Senate still had the legislation in committee. At present much of the marijuana industry is a cash business.

Thirty-three states allow for some form of legal cannabis use, but banks have by and large been unwilling to do business with companies that sell marijuana or related enterprises, out of concern they could run afoul of federal laws.

The other issue to consider when assisting a client or customer who is wishing to buy or sell a property which has been or will be used for some aspect of the marijuana industry is title insurance.

Note, hemp is not marijuana. Due to the recent federal decriminalization of hemp (The Agriculture Improvement Act of 2018. P.L 115-334) a property that will be used for production, sale or distribution of hemp is eligible for title insurance and can bank anywhere. Hemp plants contain no more than 0.3 percent (by dry weight) of THC (tetrahydrocannabinol), the psychoactive substance found in marijuana. By comparison, marijuana typically contains 5 to 20 percent THC,

In December of 2019, some members of the Michigan Marijuana Regulatory Agency went to Colorado to see how they are handling their laws and rules.

SANDBAGS AND TEMPORARY MEASURES

The Michigan Department of Environment, Great Lakes, and Energy announced a new Minor Project category that will make it easier for lakeshore property owners to get a permit for the temporary use of sandbags as immediate stabilization measures to protect homes and other critical infrastructure.

The Minor Project category will provide for faster permit processing for homeowners and a reduced permit fee of $100. Under the new category, a public notice will not be necessary for stabilization projects meeting review requirements.

EGLE emphasizes that sandbags are not a permanent solution to erosion problems and the bags eventually must be removed. Property owners should work with a contractor to design a more permanent solution, such as boulders, riprap, or even moving homes and other infrastructure farther inland.

Property owners who seek to take measures to protect their property from record high water levels still need to file a permit application through EGLE's MiWaters portal. EGLE is expediting permits where there is a risk to structures, human health, and safety. In many cases, the U.S. Army Corps of Engineers also needs to review the permit application, which is filed jointly through Mi Waters.

Since Oct. 1, EGLE has issued more than 100 shoreline protection permits across the state. Of these, 60 percent were issued within three days of receiving a completed application. Between Oct. 1, 2018, and Sept. 30, EGLE issued 730 permits for Great Lakes projects, some of which were non-emergencies. Fifty percent of the 730 permits were issued within 30 days of receiving an application and 21 percent were issued within 10 days.

In October of 2019 EGLE announced it would expedite permit applications to protect homes or structures that are in danger due to record high water levels. Permits can be approved within days of a completed application being filed, when under normal circumstances the process takes 60-90 days. The shoreline permitting process ensures a balance between protecting property and freshwater dunes and shorelines.

SURVEILLANCE

Surveillance laws vary from state to state. Generally, video monitoring is prohibited in places where someone has a "reasonable expectation of privacy." With audio surveillance, most states require the consent of all participants.

In Michigan, the law prohibits the installation, placement or use in any "private" place any device for recording, transmitting or eavesdropping upon the sounds or events in that place unless consented to by all persons entitled to privacy in that place. The law goes on to state the homeowner is not prohibited from security monitoring unless conducted for lewd or lascivious purposes.

The law does however prohibit using a devise to eavesdrop on a private conversation unless the parties' consent. Note, that this statutory provision requires consent and not just disclosure.

If a seller is monitoring their home for security purposes, while not legally required, it may in fact be a good idea disclose with a sign. Buyers should obtain permission from the seller before photographing the interior of the home. It is fine to take photos of that which can be seen from the street. Advise your seller to remove valuables. There have been occasions that a potential "buyer" was merely casing the place to spot the guns, jewelry and other valuables.

Advise your buyer to not say anything positive or negative about the property until you have left. There was an agent in Michigan who when presented with an offer from the buyer's agent told her she knew the offer was coming in because the seller had seen the buyers dancing in the kitchen.

If the seller is leaving a surveillance camera on the house, advise your client, whether buyer or seller to return it to the default factory settings. There was an instant that a year after the buyer bought the property and installed landscaping and a pool in the back yard, the seller spoke over the security camera and advised the buyer they liked the new look of the back yard.

CHANGES TO CORPORATE, LLC AND PARTNERSHIP FILING (www.michigan.gov/corporations)

Effective 2019, one may choose to either create an entity by mail, or in Person by visiting the Corporations Division located at 2501 Woodlake Circle, Okemos, Michigan, or 24 hours a day seven days a week one may utilize the COFS (Corporate Online Filing System). Access the online filing system by going to www.michigan.gov/corpfileonline

CONTRACT LAW

In the real estate business, there are many contracts that must be handled. A real estate licensee is allowed to fill in the blanks on a prepared contract so long as they refrain from offering legal advice. People agree to do things all the time. A contract can be implied and casual. One goes into a restaurant and order a meal. There is an implied oral (parole) contract that they will pay the bill before you leave.

A contract is an agreement between two or more legally competent parties to do or not to do something. For a contract to be valid, certain requirements must be met.

º Legally competent parties: For a contract to be valid, the people making the agreement must be of legal age in the state in which the contract is executed. They must be sober, sane and mentally competent to agree to do what the contract proposes. Although not strictly speaking a competence issue, parties to a contract need to be acting freely and voluntarily and be under no undue influence or duress.

º Mutual agreement: This is sometimes referred to as mutual assent, mutual consent or meeting of the minds. This requires an offer and acceptance. The offer must be clear and definite in all material facts and the acceptance must be exactly as offered.

º Lawful object: This is sometimes referred to as legality of object or lawful objective. If the object of the offer is not legal the contract would be void.

º Consideration: The consideration could be money or something else of value, such as love and affection among family members or a promise to perform.

Johnson v. McLoyd, No. 341547 March 21, 2019, unpublished

Facts: The McLoyds owned the condo immediately above Johnson and installed hardwood flooring in their unit. Ms. Johnson complained to them that the hardwood flooring they installed was noisy in her unit. The McLoyds filed a counterclaim regarding tortious interference between them and their tenant. In 2017 the participated in mediation which resulted in an agreement that the McLoyds would install carpeting with standard padding in the bedrooms and take up the hardwood floor in the kitchen, living room and hallway and put an underlayment down which was satisfactory to Ms. Johnson. The costs were to be shared and to not exceed $15,000. She further required they allow her or her agent to supervise the work which was to be completed by August 20, 2017. At a hearing that month the agreement was somewhat modified. Ms. Johnson wanted the cork underlayment glued in place rather than nailed. The McLoyds agreed to have their contractor take photographs of the work and provide them to Ms. Johnson within three days of completion. Defense counsel informed Ms. Johnson of an increased cost to have the underlayment glued. Ms. Johnson did not object. Trial court awarded the McLoyds 50% of the cost which totaled $8,580.50.

Question before the courts: Did the agreement at the hearing materially alter the contract? The modification did not include the additional cost in writing, however the parties were in court and under oath at the time of the information about the increased cost.

Result: A contract may be deemed abandoned by the acts and conduct of the parties and an abandoned term is not subject to specific enforcement. Plaintiffs request for specific materials with the knowledge of the increased amount abandoned the $15,000 limit. The appellate court upheld the verdict and awarded costs.

John L. Roseman v Gwen Weiger, Keller Williams, Patricia A. Adams and Patrick Burgess, **No. 344677, June 27, 2019**

Facts: John L. Roseman purchased a personal residence from Patricia Adams and her husband Patrick Burgess in 2016. The sellers had completed a Sellers' Disclosure State (SDS) August 8, 2015. The SDS stated the home had a geothermal heating system which was in working order. It also indicated there were features of the property deemed in common with other property owners. In addition, it referred to an attached property maintenance agreement concerning the private easement road. There were some important paragraphs in the purchase agreement.

AS IS CONDITION: Purchaser acknowledges that Seller has provided Purchaser a required Seller's Disclosure Statement. Purchaser has been afforded an independent inspection of the property and the Purchaser affirms that Purchaser has examined the above described property and is satisfied with the physical condition of the structure thereon and purchases said property in an "AS IS CONDITION," subject only to the rights of a property inspection. It is further agreed that Keller Williams Realty and its agents have made no representations or warranties of any kind nor assume any responsibility for representations made by Seller or any cooperating broker pertaining to the condition of the property. It is further understood that no promises have been made other than those that are in writing and signed by all parties involved (NO VERBAL AGREEMENTS WILL BE BINDING).

The purchase agreement also contained a release, providing:
RELEASE: Purchaser recognizes that Seller has provided Purchaser a required Seller's Disclosure Statement. Purchaser has been afforded the right to independent inspections of the property and Purchaser affirms that property is being purchased "AS IS" and hereby knowingly waives, releases and relinquishes any and all claims or causes of action against Keller Williams, its officers, directors, employees and independent sales associates. Purchaser and Seller recognize and agree that brokers and sales associates involved in this transaction are not parties to this Agreement. Broker and sales associates specifically disclaim any responsibility for the condition of the property or for the performance of the Agreement by the parties. Keller Williams assumes no liability for performance of any inspection or statements on Seller's disclosure form.

Plaintiff, in addition to signing the purchase agreement, specifically initialed both the release and "as is" clauses. The purchase agreement also contained the following arbitration clause:
ARBITRATION: Any claim of Seller or Buyer arising out of this agreement relating to the disposition of the earnest money deposit or the physical condition of the property covered by this agreement shall be

arbitrated in accordance with the rules, then in effect, adopted by the American Arbitration Association. This is a voluntary agreement between the Buyer and Seller and the failure to agree to arbitrate does not affect the validity of this agreement. This agreement is made subject to and incorporates the provisions of Michigan law governing arbitration. This provision shall survive closing.

In December 2016, the geothermal furnace allegedly failed. The buyer was told it was necessary to replace the unit. He sought to void the purchase agreement on this basis and be refunded his money. He claimed the purchase agreement was void as the sellers had committed fraud, negligent misrepresentation by failing to tell him about the condition of the heating system and the nature of the private road. In addition he sought $5,000,000 in damages.

Rather than responding to his claims Keller Williams and all of the defendants moved for a summary disposition within 21 days of the plaintiffs filing. Following the hearing, the trial court granted the motion and set aside the default based the defendants timely filing.

Question before the court: Did the trial court err in granting the defendants a summary disposition?

Result: The appellate court affirmed the lower court's rulings and stated the plaintiffs claim should have been resolved in arbitration.

STATUTE OF FRAUDS

***Ralph Roberts v Mike Green*, No. 342829**

Facts: In January of 2012 Mike Green verbally agreed to participate in Ralph Robert's Investor Program. Green was given a copy of the proposed Acquisition Agreement. On January 24 Roberts purchased a foreclosure property and titled it in the name of an LLC named after the address. On June 12, 2012 another property was purchased at foreclosure auction and titled in the name of an LLC formed by Roberts containing the address of the property. Pursuant to the contract, Roberts is due fifty percent of the net equity in all properties at the expiration of the five-year term of the agreement. The agreement was neither filled in, signed or dated. The trial court granted Green a summary disposition and stated: Moreover, taking all plaintiffs' allegations as true for purposes of this motion, the claimed fees were to be paid after five years from the date of purchase; however, under MCL 566.132(1)(a), any such agreement must be in writing. Since there is no signed writing, plaintiff is unable to overcome the requirements mandated by the statute of frauds. Accordingly, defendant's motion for summary disposition as to plaintiff's claim for breach of contract is granted and that claim is dismissed.

Question before the court: Does the fact that this is just an oral contract to develop real estate and divide the profits make this NOT a real estate transaction? At the time of the appeal the properties had not been sold, hence there were no profits.

Result: In this case, the plaintiff's claim is premised on an interest in land, which comes within the statute of frauds contained in MCL 566.106. Because plaintiff's claim is premised on an alleged interest in the respective defendants' equity in each property, rather than on an interest in the proceeds of a sale of land, plaintiff's claim does not fall within the exception to the statute of frauds relied on by plaintiff. The trial court did not err by granting defendants' motion for summary disposition on the ground that the statute of frauds barred enforcing the alleged oral agreement regarding an interest in land

BREACH OF CONTRACT

Loren K. Hicks v Jack Healy, Erika Healy, Healy Homes, LLC and Lyon Ridge Development 2, LLC.
No 343015, October 17, 2019

Facts: Only plaintiff and Healy Homes were parties to the agreement; defendants Jack Healy, Erika Healy, and Lyon Ridge Development 2, LLC were not parties to the agreement.1 The agreement granted Healy Homes the option to terminate the agreement and render it null and void in the event that plaintiff failed to obtain a firm commitment for mortgage financing within 30 calendar days of Healy Home's acceptance of the agreement. An addendum to the purchase agreement set the closing date at "May 26, 2017 or later if lender needs more time to process loan. Plaintiff failed to obtain the commitment in thirty days so Healy refunded the earnest money deposit.

Question before the courts: Were the terms of the purchase agreement ambiguous and as such subject to interpretation?

Result: The terms were quite clear additional time which may be allocated were not for obtaining a firm commitment, but for giving the lender additional time to process the loan.

SELLERS' DISCLOSURE

Michigan is one of the few states in which it is not the job of the agent to disclose the condition of the property. If, however, the agent is aware the seller is committing fraud in the sellers disclosure, the agent should not be representing that client. The state has said no action may be brought against an agent for disclosing material facts to the buyer. They did not, however state that the seller could not sue you for lack of fiduciary.

There is no case in Michigan in which the agent has been held liable for failing to disclose patent defects.

There is no case in Michigan whereby the agent has been held liable for failing to disclose latent defects of which he had no knowledge.

Edward Scott kondrat v Arnold and Ann Marie Servitto, **No 341990, 3/26/2019, Unpublished**

Facts: The Servittos filled out the seller disclosure indicating there was never any water intrusion in the basement or roof and there was no infestation. In remodeling the basement Kondrat discovered fifty mouse carcasses, thirty mouse poison boxes, mouse traps and peanut baits. Servutto did admit he had a couple of mice when his wife was working on craft project involving acorns. The seller disclosure stated the roof was five or six years old and it was actually nine. In February of 2015 there was an insurance claim due to water entering through the roof. Servitto stated it was actually entering through the second floor wall due to an ice jam.

Question before the court: Could the sellers misrepresentation constitute fraud?

Result: To establish a claim of fraudulent misrepresentation, or common law fraud, plaintiff must establish the following: (1) the defendant made a material representation; (2) the representation was false; (3) when the representation was made, the defendant knew that it was false, or made it recklessly, without knowledge of its truth, and as a positive assertion; (4) the defendant made it with the intention that the plaintiff should act upon it; (5) the plaintiff acted in reliance upon the representation; and (6) the plaintiff thereby suffered injury. While the trial court granted the seller a summary disposition, the appellate court reversed and ruled the plaintiff, being the prevailing party, may tax costs.

GOVERNMENT RIGHTS, TAXES AND POLICE POWERS

Michigan Association of Home Builders v City of Troy, **Michigan Supreme Court, No. 156737, July 11,2019**

Facts: Section 22 of Michigan's Construction Code Act states that municipalities can only charge fees for building department services that are reasonably related to the cost of the service and that those fees may only be used for Building Department services and a Construction Board of appeals. Similarly, the Headlee Amendment at Section 32 requires that the amount of any "fee" charged by a municipality for a service bear a reasonable relationship to the cost of providing the service. The contract at the center of this longstanding dispute outsourced the operation of the City's Building Department to SafeBuilt. The City compensated SafeBuilt by paying 75-80% of the fees it collected for Building Department services. The City then retained the 20-25% surplus of those fees. The surplus fees were deposited into the City's general fund and used for the purpose of paying back alleged historical deficits incurred by the City in the operation of its Building Department in the years preceding its contract with SafeBuilt.

Questions before the court: Does the use of surplus funds to pay the Building Department's budgetary shrtfalls in previous years violate MCL 125.1522(1)? Is this a violation of the Headlee Amendment?

Result: Yes, Section 22 of the Michigan Construction Code Act was violated. However, the City has presented evidence to justify retention of a portion of the fees. The case was remanded back to trial court to determine to what portion the Building Department was entitled. The portion of the complaint concerning violation of the Headlee Amendment was also remanded to allow plaintiffs to establish representational standing to maintain such a claim.

PROPERTY TAXES

One may fill out paperwork to claim a residential property is their principal residence and be exempted from paying the school operating tax which in most taxing districts comes with the summer bill.

Who can claim the principal residence exemption (PRE)?

1 Someone with legal title who resides in the home.
2 Someone with equitable title who resides in the home. (the purchaser on a land contract)
3 An individual who is in an assisted living community and leaves the home vacant. (The paperwork must be filled out annually.)
4 Someone who is marketing their home and has purchased another and leaves the home vacant. (This is referred to as a conditional recession and must be filled out annually and applies for up to three years.)
5 A person who is a partial owner who resides in the home.
6 An individual who conveys the home to their revocable living trust and resides there.
7. A person with a beneficial interest who resides in the property, such as a life estate.

***Frank and Virginia Kovalic v Department of Treasury*, No. 345171, September 12, 2019, Unpublished**

Facts: In 1968 the Kovalics sand the Bergishagans were granted a four-acre parcel, called parcel AB. Parcel B is a two acre parcel. Parcel A is a 34 acre parcel which the Kovalics and the Bergishagans each own an undivided one-half interest. The Kovalic's home is on parcel B. In 1971 the Begishagens conveyed their ownership of Parcel B to the Kovilacs by quitclaim deed. It was recorded and Parcel B was assigned a parcel identification number. Parcel A never received a parcel identification number. In January of 1978 the Kovalics conveyed Parcel A to the Bergishagens by quitclaim deed. The intent was to convey A and retain B. The Bergishagens did not record Parcel A until August of 2011. They conveyed the parcel to the Bergishagans Living trust. Their attorney attempted to record the deed. The clerk could not find the parcel number and presumed the legal description was incorrect. She instructed the attorney to change the legal. This ended up accidently conveying Parcel B to the Bergishagans Living Trust. Even though each had a one-half undivided interest, the deed recorded in 2011 conveyed the entire parcel. The Kovalics tried to claim a PRE but it was denied as they did not own the 34 acres. Both A and B had been conveyed into the Begishagen Living trust. In 2017, the Bergishagens conveyed all of Parcel B and an undivided one-half interest in Parcel A to the Kovalics.

Question before the trust: Can a deed of correction make the ability to claim Principal Residence Exception retroactive?

Result: Overall, the Tax Tribunal did not err by denying plaintiffs' request for a PRE

***Brian S. Slagter v Department of Treasury.* No. 343763, July 23, 2019, Unpublished**

Facts: Slagter filled out the affidavit that the property in question was his principal resident, but he did not live there. His wife did, however, she did not sign the affidavit. They did share title. He claimed that as a husband and wife they were a "person" and as such he could sign. His next claim was that he is not liable for additional taxes because he conveyed ownership of the property to Parkland via a warrantee deed in lieu of foreclosure. The General Property Tax Act provides, in relevant part, that "if the property has been transferred to a bona fide purchaser before additional taxes were billed to the seller as a result of the denial of a claim for exemption, the taxes, interest, and penalties shall not be a lien on the property and shall not be billed to the bona fide purchaser," but rather assessed to the owner who improperly claimed the exemption.

Questions before the court: Is a married couple a person? Is a deed in lieu of foreclosure a bona fide purchaser or not?

Result: Michigan law provides, "Person", for purposes of defining owner means an individual and for purposes of defining owner means an individual, partnership, corporation, limited liability company, association, or other legal entity.
"Black's Law Dictionary defines "purchase" as
1. The act or an instance of buying. 2. The acquisition of an interest in real or personal property by sale, discount, negotiation, mortgage, pledge, lien, issue, reissue, gift, or any other voluntary transaction. 3. The acquisition of real property by one's own or another's act (as by will or gift) rather than by descent or inheritance. Both the lay and legal dictionaries' definition of "purchase" is broad, and we conclude that they include the conveyance at issue here: an acquisition of real property by warranty deed as part of a voluntary transaction in lieu of mortgage foreclosure.

The only remaining issue is whether Parkland was a bona fide purchaser, which is a legal term of art. Black's Law Dictionary defines bona fide purchaser as someone who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.
[*Black's Law Dictionary* (10th ed).]

Uncapping of Taxable Value

Rico Zenti v. City of Marquette, July 25, 2019 (Docket No. 344615) Published

Facts: April 25, 1996 Rose Mary Zenti executed a quitclaim deed conveying title to herself and her children as joint tenants with full rights of survivorship. Rose Mary passed away December 7, 2015 and on January 13, 2016, the children executed a quitclaim deed conveying the property to themselves as tenants in common. In February of 2017, they received a notice of assessment.

	2016	2017	Change From Prior Year
Taxable Value	$126,450	$246,000	$119,550
Assessed Value	$226,700	$246,000	$19,300
State Equalized Value	$226,700	$246,000	$19,300

They went before the Tax Tribunal in May of 2017 who ruled the conveyance was not an exempt transfer.

Question before the court: Did the Tax Tribunal err in concluding the January 13, 2016 was a "transfer of ownership?"

Result: In this case, however, the grantors and grantees of the January 2016 deed were identical, so there was no transfer to another. Additionally, each grantor held an undivided one-fifth interest in the property both before and after the execution of the deed, so not only were no new parties involved, but the extent of each party's interest remained the same. Because the threshold of MCL 211.27a(6) was not met, there was no basis for uncapping the valuation.

CONDEMNATION: The government's right to take private property for public purpose is called Eminent Domain. The process is condemnation. Property may also be condemned if it is blighted. "Blighted" means property that meets any of the following criteria:

(a) Has been declared a public nuisance in accordance with a local housing, building, plumbing, fire, or other related code or ordinance.

(b) Is an attractive nuisance because of physical condition or use.

(c) Is a fire hazard or is otherwise dangerous to the safety of persons or property.

(d) Has had the utilities, plumbing, heating, or sewerage disconnected, destroyed, removed, or rendered ineffective for a period of 1 year or more so that the property is unfit for its intended use.

Bailey & Biddle, LLC v City of St. Joseph, **No. 340989, Unpublished.**

Facts: The home was constructed around 1900 and purchased by the appellant in 2000. In 2013, the city notified the appellant of the damaged roof and gave him a year to discuss the repair plan. They notified him again in 2015. He pulled a permit and covered the roof with a blue tarp. The tarp tended to blow off and the hole was large enough to provide ready access to birds. In 2017, the city revoked the roof permit and the city's chief building inspector took several pictures as he inspected the home. The ceiling had caved in, there was major mold and water damage through. Some of the structural supports could not reliably hold their loads. There had been no utilities in the home since the mid-2000s. Because of the extensive damage to the home, the city concluded it was beyond reasonable repair and ordered the appellant to demolish and remove the structure. He appealed this decision to the Property Maintenance Board of Appeals (PMBOA) which affirmed the demolition order. The city presented evidence that it would cost $122,000 to make the property habitable at which time it would have a true cash value of $40,000 to $50,000. Appellant presented the report of an engineer who opined the cost would be 50% to 75% of that which was the city's estimate. The attorney said the appellant could do a lot of the work himself which would save considerably. The PMBOA questioned the appellant's skill and expertise as he had a history of failing to maintain the property. The appellant argued that the city failed to provide a reasonable time to make the repairs.
As adopted by the City, the IPMC provides for demolition of property as follows:
The code official shall order the owner of any premises upon which is located any structure, which in the code official's judgment is so old, dilapidated or has become so out of repair as to be dangerous, unsafe, insanitary or otherwise unfit for human habitation or occupancy, and such that it is unreasonable to repair the structure, to demolish and remove such structure; *or* if such structure is capable of being made safe by repairs, to repair and make safe and sanitary or to demolish and remove at the owner's option; *or* where there has been a cessation of normal construction of any structure for a period of more than two years, to demolish and remove such structure.

Question before the courts: Did the PMBOA have to allow him a reasonable amount of time to make the repairs.

Result: If it is deemed unreasonable to make the repairs, the PMBOS must take into account the home's sentimental or historic value when making this decision. Appellant has failed to show any such value. The appellate court upheld the circuit courts decision.

Board of County Road Commissioners for the County of Washtenaw v Mildred Shankle, Kevin C. Nevaux, Janet L Nevaux, Christina L Lirones and Stephen W. Berger, **No. 340612, March 19, 2019, Published**

Facts: The County wanted to reconstruct a portion of Textile Road. Four parcels owned by three sets of owners are at issue. The steps to take a condemnation action to acquire property for public use are quite specific. **Before initiating negotiations for the purchase of property,** the agency shall establish an amount that it believes to be just compensation for the property and for the full amount established. **If there is more than 1 owner of a parcel, the agency may make a single, unitary good faith written offer.** The good faith offer shall state whether the agency reserves or waives its rights to bring federal or state cost recovery actions against the present owner of the property arising out of a release of hazardous substances at the property and the agency's appraisal of just compensation for the property shall reflect such reservation or waiver. .

. . If an agency is unable to agree with the owner for the purchase of the property, after making a good faith written offer to purchase the property, the agency may file a complaint for the acquisition of the property in the circuit court in the county in which the property is located. The county created a Compensation Estimate Market Study and did not present it to other parties of interest, such as Pittsfield Charter Township, Michigan Department of Agriculture, Michigan Bell Telephone Company and MERS. Also the document lacked specific language require by law: "whether the agency reserves its rights to bring federal or state cost recovery actions against the present owner of the property arising out of a release of hazardous substances at the property and the agency's appraisal of just compensation for the property shall reflect such reservation or waiver."

Question before the court: Does a document lacking the mandatory words and has not been given to all parties of interest constitute a written good faith offer and therefore allow the county the right to move forward to Circuit Court?

Result: The appellate court reversed and remanded with instructions to enter an order granting summary disposition in favor of defendants for lack of subject-matter jurisdiction, without prejudice to plaintiff's refiling the action in compliance with the statutory requirements.

ZONING

When an pre-existing use does not conform to a new zoning law, the nickname for what happens is that it's "Grandfathered" in. The legal term for this is that it is called non-conforming and permitted to continue. When zoning is creating a hardship, one may seek a variance.

Southfield Lodge, Inc. v City of Southfield Zoning Board of Appeals, **No. 343783, June 25, 2019, Unpublished**

Facts: Southfield Lodge operates as a hotel in Southfield, Michigan. February of 2015 the city amended a zoning ordinance to state the lighting on the exterior cannot exceed One linear foot of neon or fiber-optic tube for each linear foot of building façade. After the ordinance was passed, but before the effective date, appellant removed the neon lighting and installed LED lighting. The new LED lights measured 1,028 lineal feet which is 690 feet more than allowable. The hotel installed the LED lighting in the same pattern as the neon had been for fifteen years. The hotel then sought a variance which was denied. The zoning ordinance stated, "Any lighting which was unlawfully installed and maintained prior to the effective date of this Section and which fails to conform to all applicable regulations and restrictions of this Section must be removed or a variance sought from the Zoning Board of Appeals."

Question before the court: Would replacing the neon lighting with LED create an end to the non-conforming status? Was the Zoning Board of Appeals denial of granting a variance creating a hardship?

Result: "Expansion of a nonconforming use is severely restricted. One of the goals of zoning is the eventual elimination of nonconforming uses, so that growth and development sought by ordinances can be achieved." However, "not every change in a nonconforming use constitutes an extension of a prior nonconforming use." The appellate court was not convinced of the hardship status.

SHORT-TERM SEASONAL RENTALS

Susan Reaume v Township of Spring Lake, **No. 341654. May 21, 2019, Published**

Facts: In 2003, Susan Reaume purchased a home to use as her residence and did until 2014. The next year, she retained a property management company who made a telephone call to the Township inquiring if short term rentals were legal. She was told that Spring Lake Township had no restrictions on either short- or long-term rentals. The neighbors complained to the Township. In December of 2016, the Township adopted Ordinance No. 255 which prohibited short-term rentals in the R-11 zone.

She applied for a permit and was denied. She went before the Zoning Board of Appeals and was denied. She then went to Circuit Court which affirmed the ZBA's decision.

Equitable estoppel may preclude the enforcement of a zoning ordinance. Plaintiff contends that her property was legally used as a short-term rental prior to the new law, hence it should be "grandfathered" in.

Question before the court: Was it legal for the plaintiff to use the house for short-term seasonal when it is zoned for single family.

Result: A single individual or individuals, domiciled together whose relationship is of a continuing, non-transient, domestic character and who are cooking and living together as a single, nonprofit housekeeping unit, but not including any society, club, fraternity, sorority, association, lodge, coterie, organization, or group of students, or other individuals whose relationship is of a transitory or seasonal nature, or for anticipated limited duration of school terms, or other similar determinable period of time. Read as a whole, the definition of "Dwelling, Single-Family" unambiguously excludes transient or temporary rental occupation. As, it was not legal for her to have short-term rental before the ordinance, it is not considered nonconforming and permitted to continue.

Nestle Waters North America, Inc v Township of Osceola**, No 341881, December 3, 2019, Unpublished**

Facts: Nestle requested zoning approval to build a 12' x 22' building which would house a booster pump along the existing pipeline. On November 22, 2016, the Planning Commission adopted two resolutions finding that the booster-pump building complies with all standards applicable to special land uses as stated in . . . the zoning ordinance; however, it denied the zoning-request finding that the request fell . . . under the classification of "essential service" and, therefore, applied a "public convenience and necessity" standard. Neither the meeting minutes nor a resolution of the Planning Commission contains any reason or explanation why this project was classified as an essential service. The Planning Commission found that this "public convenience and necessity" standard was not met. The Zoning Board of Appeals ended in a 1:1 tie vote; and pursuant to the zoning ordinance, a tie vote results in the Planning Commission's decision being upheld. Nestle also advanced the argument that extracting water from the ground could come under the category of agriculture and as such the proposed booster-pump facility constitute an accessory building.

Question before the court: Does selling bottled water for profit constitute a public service and necessity? Does withdrawing water from the ground come under the category of agriculture?

Result The appellate court concluded that the trial court erred in reversing the decision of the ZBA to refuse plaintiff's requested permit, and that the ZBA properly denied the request. The circuit court is therefore reversed. We direct that the parties shall bear their own costs on appeal, an important question of public interest being involved.

MARIJUANA

***Zachary Alan Varela v Brad and Catherine Spanski*, No. 34137, July 11, 2019, Published**

Facts: The Spanskis agreed to purchase a two story warehouse in Detroit and install cultivation equipment therein. The purpose of the lease was to convert cash from the grow operation into bankable money. Varela carried a Medical Marijuana Card and was caregiver to five individuals. He estimated each of his 70 plants would produce 2.2 pounds every fifteen weeks at a market value of $2,500 per pound. He asked the Spanskis to install a security system and in December 2016, a street gang allegedly robbed the building of its first harvest. The rent was projected to be $16,700 per month. The partnership agreement indicated he would be transferring the marijuana to his business partner, Powers, for Powers to manage the sale and distribution. Such a transfer is not permitted under MMMA. The Spanskis informed Varela they had sold the building to a new investor and barred Varela from entering to retrieve his things.

Question before the courts: Could the wrongful conduct rule bar the claim for the plaintiff?

Result: Plaintiff's conduct—manufacturing, possessing, and delivering marijuana—is prohibited under the Public Health Code, MCL 333.7401(d). These are serious illegal acts that are punishable as felonies. And, contrary to plaintiff's argument on appeal, plaintiff has failed to plead facts showing that his conduct was lawfully protected medical marijuana activity that warrants immunity under the MMMA. Therefore, the MMMA will not supersede the wrongful conduct rule where plaintiff has not acted consistently with the MMMA. Plaintiff's claim that his conduct was lawful lacks merit.

***City of Warren v Clayton Jamers Bezy*, No 341639, May16, 2019**

Facts: The city had zoning regulations which were stricter than state law regarding medical marijuana. Mr. Bezy grows marijuana in his home for himself and his patients. The local ordinance prohibits growing without first registering the dwelling and having a safety inspection of all of the mechanicals in the dwelling, installing a filtration system to prevent emission of odors on neighboring properties. Only one person per household may grow.

Question before the court: There is no question that the defendant is compliant with the Michigan Medical Marijuana Act. May a municipality be more restrictive than the MMMA?

Result: The plain language of the MMMA lacks any ambiguity that would necessitate judicial construction to decipher its meaning. When the statute is read as a whole, no irreconcilable conflict results that makes the statutory provisions susceptible to more than one meaning. We conclude that the MMMA permits medical use of marijuana, particularly the cultivation of marijuana by registered so long as it is in a statutorily specified enclosed, locked facility. No provision in the MMMA authorizes municipalities to restrict the location of MMMA-compliant medical use of marijuana by caregivers. Nor does the MMMA authorize municipalities to adopt ordinances restricting MMMA-compliant conduct to home occupations in residential locations. So long as caregivers conduct their medical marijuana activities in compliance with the MMMA—including that caregivers cultivate medical marijuana in an "enclosed, locked facility", and do not violate the prohibitions the law—such conduct cannot be restricted or penalized.

MARITAL ASSETS

While Michigan is not a community property state, in a divorce situation, the c o u r t makes every effort to make the property settlement fair and equitable. Generally, marital assets are subject to division between the parties but the parties' separate assets may not be invaded. Generally, assets earned by a spouse during the marriage, whether they are received during the existence of the marriage or after the judgment of divorce, are properly considered part of the marital estate. The parties' manifestation of intent to lead separate lives, such as by filing a complaint for divorce or maintaining separate homes, can be of crucial significance when apportioning the marital estate. However, property earned after such a manifestation of intent should still be considered a marital asset, although the presumption of congruence that exists with respect to the distribution of marital assets becomes attenuated and may result in the nonacquiring spouse being entitled to no share or a lesser share of the property in light of all the apportionment factors. Separate assets may be invaded if one party demonstrates additional need or had significantly contributed to the acquisition or growth of the separate asset.

Animesh Agarwal v Seema Agarwal, **Nos. 340133; 340435; 340591 February 12, 2019, Unpublished**

Facts: The couple married in India in 1990. They resided in their marital home until Seema left, in February of 2013, with their sixteen year old daughter and acquired rental housing and then due to a gift for a down payment was able to buy a condo. They both contributed to paying off the mortgage on the marital home. Hence, Animesh was able to live there rent-free. He did not contribute to his daughter's support during this time. The trial court ruled the marital home was a marital asset and Animesh should give Seema 50% of the value at the time of the filing rather than at the time of the separation, thereby awarding Seema $40,000 more than he felt was fair. The trial court ruled the condo to be separate property as it was partially financed by a gift to her. Animesh did not contribute to its maintenance and Seema paid the payments from her own earnings. He did not dispute the trial court awarding each of the parties their own vehicle, however he wanted the court to take into account the outstanding debt on his vehicle. He also wanted to have his student loan address. He paid it off the $39,000 prior to the divorce with monies that would have been subject to distribution. Hence, she did contribute. Animesh also wanted his retirement account which he opened after their separation to be separate property. The insurance and property taxes were paid in advance. This combined with the fact that he did not provide for his daughter afforded him to an increase in discretionary funds.

Question before the court: Was the property settlement fair and equitable?

Result: Given the history of the marriage, the trial court's finding on credibility and the general factual circumstances, the trial courts election to split the investments cannot be construed as inequitable.

Estate of Ronald J. Sons by David William Sons, Personal Representative v Mary Beth Sons, **No. 346979, November 14, 2019, Unpublished.**

Facts: Ronald and Mary Beth Sons married on June 22, 2012. Ronald was suffering from stage IV cancer. Mary Beth had assets consisting of an investment portfolio of $650,000 and a retirement plan that paid $64 a month and monthly maintenance payments of approximately $1,330 for three years. She also had approximately $100,000 in other assets. She deposited monies into their joint account and into his personal account. She withdrew $200,000 from her retirement account to purchase property from Ronald's nephew. That withdrawal cost $60,000 in taxes and penalty. In April of 2018, the property appraised for $135,000. Ronald was unable to get a mortgage due to a 2010 foreclosure, so he asked Mary Beth to borrow $138,000 on the Michigan house and purchase a Florida house. The trial court awarded Mary Beth both homes.

Question before the court: Given the fact that Mary Beth is solely responsible for the mortgage and is in essence paying in excess of $400,000 for a $135,000 home, is the settlement fair and equitable?

Result: The circumstances surrounding the purchase of the Michigan and Florida homes, the relative contributions of the parties to the marriage enterprise support the trial court's award of the real estate to the defendant.

ADVERSE POSESSION

If someone uses the property of another for a statutory period of time which is fifteen years, in Michigan, one may actually acquire ownership.
The use must be each of the following:

- Open
- Continuous
- Notorious
- Hostile
- Exclusive

In Michigan, tacking on may be permitted. For example, the property owner of lot A built a storage shed on Lot B. The property owner of A sells lot A to another and the shed remains. A total of 15 years go by with the shed in place. The current owner may now start a court action called a "quiet title" suit to obtain legal title.

One may not adversely possess property which is owned by the government.

Fouad Bou-Melhem and Ibrahim Bou-melhem v Trumbull-Commonwealth, LLC, **No 340581, February 12, 2019, Unpublished.**

Facts: The Bou-Melhems own the southern half of the parking lot, known as 5265 Trumbull. It is adjacent to their auto repair shop. Trumbull-Commonwealth, LLC owns the north half known as 5275 Commonwealth's convenience store. The repair shop has been in the building to the south for over twenty years. They have always used the entire parking lot and never paid taxes on 5275. 5275 has had several owners. The DNR conveyed it to the City of Detroit, October 3, 1994. The city sold it to Trumbull-Commonwealth, LLC August 27, 2007. Fouad testified that the city knew he was using it, and never granted permission. He wrote letters to the city asking them to sell it to him. Fouad was in prison for six months during which time his brother ran the business. They communicated daily. Years ago, Fouad paid $20,000 to pave 5275 in concrete and installed the fence to stop people from putting trash on the lots. In 2009 he gave a key to the manager of the convenience store. Trumbull-Commonwealth, LLC put forth the argument that the tacking on of time could not include when it was owned by the government. They also pointed out the six months Fouad was in jail broke the chain of continuity. Trumbull-Commonwealth, LLC stated they give the Bou-Melhems permission to use the lot in 2009.

Question before the courts: Did the Bou-Melhems use of 5275 meet the tests of open, continuous, notorious, hostile and exclusive?

Result: One may not adversely possess property while it is government owned. A fence around a property makes it exclusive. The Bou-Melhems gave permission to use the property. Nobody gave them permission. Tacking on is permitted in Michigan. The appellate court reversed the trial courts findings and remanded back to circuit court to quiet the title. Plaintiffs, being the prevailing party, may tax costs.

CONDOMINIUM

Michigan adopted the Michigan Condominium act in 1978. It was once referred to as the Horizontal Housing Act, because with fee simple ownership, one typically owns a wedge-shaped section to the center of the planet. With condominium, this area is more likely a common element. The act provides detailed regulations for most aspects of condominium living, including selling, voting, financing, assessing and terminating a condominium association and its units. A condo owner may not withhold assessment payments even if he is not satisfied with the condo association.

The act requires each condo unit owner to pay fees to cover the common expenses of the condo. The Act also specifically provides that an owner is not exempt from paying his share of common expenses even if that owner claims nonuse, waiver of the use or abandons his unit.

The association may foreclose if the condo association fees are not paid. Exercise caution when buying mortgage foreclosure condo. The person missing mortgage payments probably didn't get sued for non-payment of assessments. Once the bank owns the property, this does not extinguish the association fees.

First time offering of a condo, the buyer must be given the condominium documents and a nine-business day opportunity to review. Second time offering, there is no law, but the Bylaws may require it. It is always a good idea to give the Bylaws and condo docs to a purchaser.

In Michigan a condominium is simply a unit in a multi-unit complex consisting of that unit and a share of the common elements.

Donna Stadler v Fontainebleau Condominiums Association, **No 2017-161653-CZ, Unpublished**

Facts: Ms. Stadler owns Unit 233 at Fontainebleau Condominium in Waterford township. In June of 2016, she proposed to lease the unit. She submitted a copy of the lease to the defendant for its approval. The Association failed to respond for 22 days. The tenant chose not to rent. In June of 2016, she filed a complaint in small claims court seeking $371 plus costs and fees to compensate for loosing at least 12 days of rent. They agreed to drop the case. The Association then filed a lien on unit 233 for attorney fees. Ms. Sadler brought action in court to enjoin the Association from foreclosing on the lien. She lost.

Question before the court: Are attorney fees prohibited by the Condominium Act?

Result: "Generally, attorney fees are not recoverable as an element of costs or damages unless expressly allowed by statute, court rule, common-law exception, or contract." The Condominium Bylaws represent a contract between the Association and the condo owner. Affirmed. As the prevailing party, defendant may tax costs.

Fox Pointe Association v Mary Elizabeth Ryal. **No 344232, Unpublished**

Facts. Mary Elizabeth bought a condominium in 2013. She stated the pewter door handles, square lock and house numbers were already there. The Bylaws state that no alterations may be made to the exterior without approval of the Association. The Association noticed the front door in 2015 and sent her notice that the alterations had been made without permission. FPA sent letters to Ryal regarding the alleged violations and assessing increasing fins after she refused to make the changes.

Question before the court: Were the violations waived because most of them had existed when she purchased her unit, yet FPA had not acted on them.

Result: The bylaws contained this paragraph, "The failure of the Association to enforce any right, provision, covenant or condition which is granted by the Condominium Documents shall not constitute a waiver of the right of the Association to enforce such right, provision, covenant or condition in the future." The appellate court affirmed the trial courts verdict. Having prevailed in full, FPA is awarded taxable costs.

EASEMENT. An easement is the right of a person or entity to use the land of another for his or her benefit. The property receiving the benefit of the easement is called the dominant estate or dominant tenement. The property over which the easement runs is the servient estate or tenement. There are two basic types of easement:

> ***Easement Appurtenant.*** *An easement appurtenant is what happens when there are two pieces of property side by side in which one property owner has use of a portion of the other property usually for the purpose of ingress and egress. An easement appurtenant will run with the land. Examples of easement appurtenant are a driveway over the neighbor's property, an underground easement bringing the waterline across a neighbor's property to get to the subject property.*

> ***Easement in Gross.*** *With an easement in gross there is no dominant estate, simply the servient. An example of an easement in gross is a road or a railroad track or the power line. There are different ways to create and reasons for creating easements.*
>
> - *Easements may be created by express grant or reservation. An easement may be negative or affirmative.*
> - *Easements may be created by agreement or may be an implied easement.*
> - *An easement may be created by prescription. This is similar to adverse possession, however rather than actually possessing the property, the possessor simply uses it.*
> - *An encroachment is the unauthorized use of the subject property by the adjacent property owner. It may be a tree branch or a building or a fence that is across the line. If it is allowed to continue, it could ripen into either an easement by prescription or actual adverse possession.*

There are ways to terminate an easement.

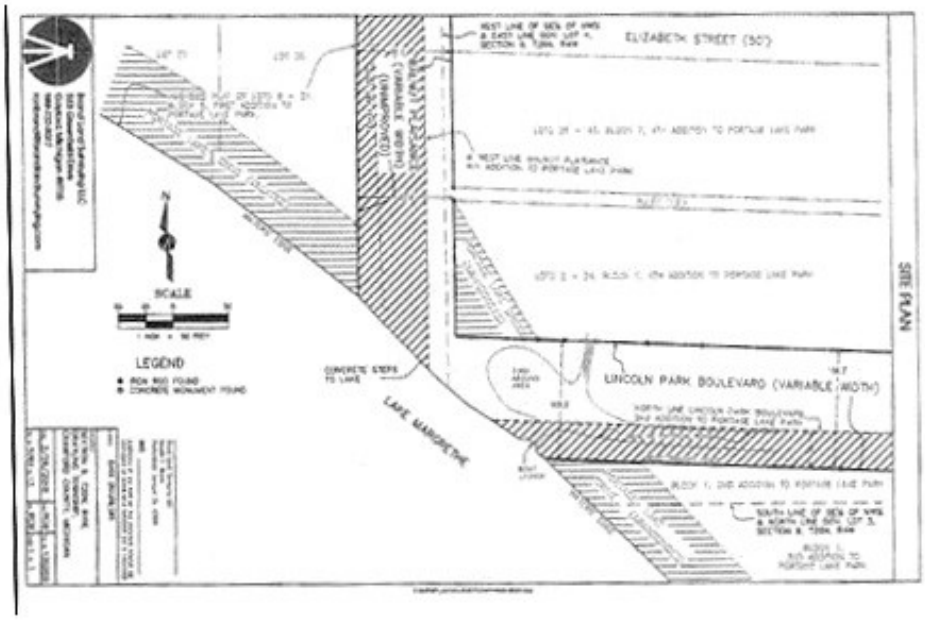
- *Merger* – Dominant estate buys the servient or vice versa.

- *Abandonment accompanied by end of purpose* – If the easement was for a particular purpose such as ingress and egress and it was no longer needed for that purpose, this would constitute abandonment accompanied by end of purpose.
- *Agreement* – The two property holders agree to end the easement

Township of Grayling v Alan Berry, Louis Scarpino, et al. **No 344297, July 23, 2019, Published**

Facts: Three roads in the subdivision were recorded in 1901. They were part of Portage Lake Park. They were dedicated to and for public use. The Road Commission formally accepted Walnut Plaisance and Lincoln Park Boulevard in 1937.

A survey performed in February 2018 depicts the improved portion of Lincoln Park Boulevard.



Portage Lake Drive, much of which has since been vacated by the Road Commission, runs parallel with and along the shoreline of what is now known as Lake Margrethe—originally named Portage Lake. Walnut Plaisance runs north and south, intersecting Portage Lake Drive at the shoreline. Lincoln Park Boulevard runs east and west, intersecting where Portage Lake Drive and Walnut Plaisance meet. The area where the three roads converge is the area in dispute in this case.

Although there are large portions of the three roads that were intended to be developed as indicated in the 1901 plat, areas of Walnut Plaisance, Portage Lake Drive, and Lincoln Park Boulevard have remained undeveloped since being platted, and therefore, large portions of the roads that were intended to be developed do not actually exist. For instance, much of Walnut Plaisance is actually forested area, including the area that was intended to reach the shoreline. In response to a 1956 petition signed by 30 owners of real estate located in two of the additions, the Road Commission passed a resolution abandoning a portion of Portage Lake Drive for residential development. Although the original plat indicated that the two roads would meet at the shoreline—Walnut Plaisance was to extend to the shoreline, and Portage Lake Drive was to extend along the shoreline—the two were never developed and

do not actually meet. However, a portion of Lincoln Park Boulevard was opened in the 1960s and is the only road in dispute that was developed and reaches the shoreline of the lake. The end of Lincoln Park Boulevard—the area the three roads as platted intersect—is now a dirt turnaround near the lake's edge and makes up the disputed area at issue.

Owners of backlots in Portage Lake Park have historically used the disputed area for recreational purposes including swimming and picnicking, and they have also placed a dock for the mooring of their boats. Grayling sought declaratory and injunctive relief regarding the scope of the dedications of the roads, streets, alleys, and boulevards at issue. Grayling maintained that the recreational activities of the residents exceeded the scope of the dedications.

The residents have continually maintained that Grayling does not have an actual property interest or right in the disputed area because Walnut Plaisance and Lincoln Park Boulevard are not public roads, the roads do not terminate at the water's edge, and the residents' activities do not occur at the end of a public road.

Under the McNitt Resolution, for a road to become public property there must be (a) a statutory dedication and an acceptance on behalf of the public, (b) a common-law dedication and acceptance, or (c) a finding of highway by public user. The roads at issue here were dedicated by statute. To create a public road by statutory dedication, two elements are required: (a) "a recorded plat designating the areas for public use, evidencing a clear intent by the plat proprietor to dedicate those areas to public use," and (b) "acceptance by the proper public authority". Public acceptance must be timely and must be disclosed through a manifest act by the proper public authority either formally confirming or accepting the dedication and ordering the opening of the street, or informally by exercising authority over it, in some of the ordinary ways of improvement or regulation.

Questions before the court: The subdivision was platted in 1901. Did the acceptance of the dedication via the McNitt Resolution constitute timely acceptance of the dedication? The law regarding mooring at road ends states a person may bring action in court against individuals improperly using the road end. Is a township a person?

Result: There are many cases sited where the time period between the offer of dedication and the acceptance are even more than the 36 years in this case. And, yes, the township may bring action in court to enjoin the use at the road ends.

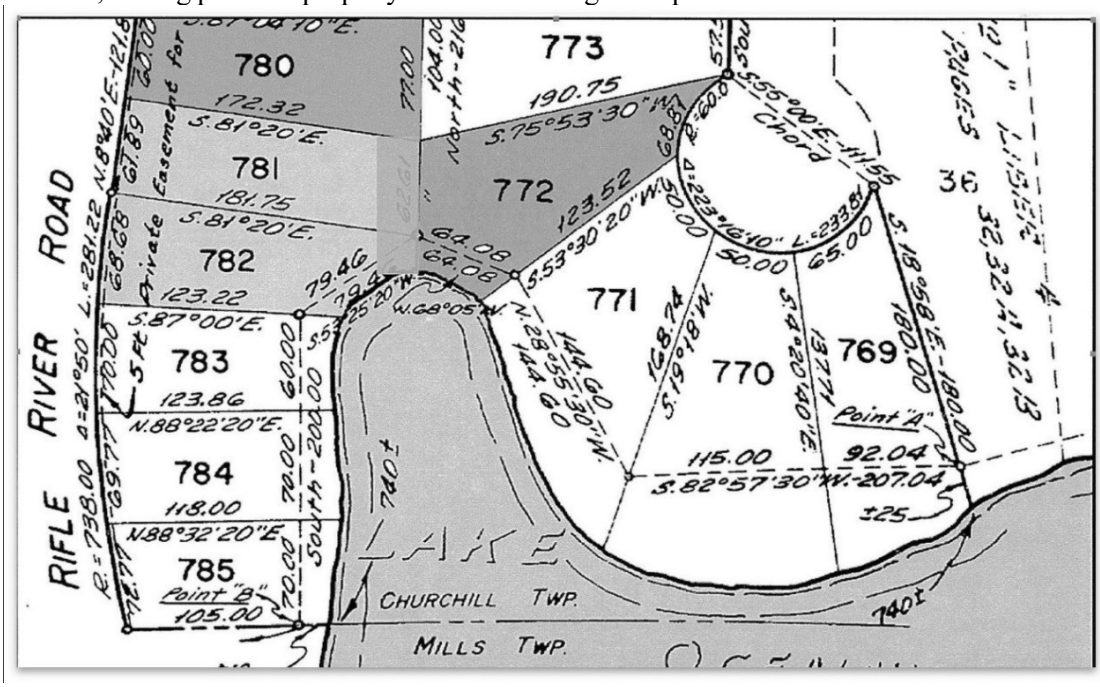
Jon and Anna Steenland and Paul Fessler v Ann S. Tousciuk. **No 341084, May 16, 2019 unpublished**

Facts: Ms. Tousciuk previously owned all four parcels at issue: lots 772, 780, 781 and 782 of Lake Ogemaw No. 7 Subdivision.

In 2002, defendant sold lots 781 and 782 to Michael and Janis Altomare. The deed reserved an easement for lots 772 and 780:
"The Grantors reserve an easement over the East 20 feet of Lots 781 and 782 of Lake Ogemaw No. 7 Subdivision for ingress and egress to Lake Ogemaw and for the personal use and occupation by the owners of Lots 772 and 780 of Lake
Ogemaw No. 7 Subdivision."

Defendant continued living on lot 772 until 2005 when she sold it to Jon and Anna Steenland. Before that transaction, defendant extinguished the easement benefitting lot 772. Defendant built a home on lot 780 and began living there in 2006. In 2007, plaintiff purchased lots 781 and 782 from the Altomares. In 2015, the Steenlands brought suit arguing that defendant's use of the easement went beyond its scope.

The Steenlands sold lot 772 to Paul Fessler and were dismissed from the lawsuit. Ms. Tousciuk built a home on lot 780 and continued to use the easement for recreational and storage purposes, such as mooring her boat, storing personal property and constructing a fire pit on the easement.



Question before the court: What activities are permitted in an easement?

Result: The appellate court affirmed the trial court verdict concerning use of the easement. Ultimately, the trial court concluded that the easement's scope (1) permitted seasonal mooring of one watercraft (e.g., a boat, a jet ski, a kayak, or a canoe); (2) prohibited a dock, permanent structures, and storage of personal property; and (3) permitted sunbathing and picnicking so long as tables, lawn chairs, and other personal property were removed after the activity was concluded for the day. The appellate court did look into the activities of the past. When the Steenlands purchased 772 in 2006, there was no firepit or picnic table.

Larry Clingman v Robert and Delores Harris. **No 343090, Unpublished**

Facts: Mr Clingman has a sixty-six foot easement over the Harris property for the purpose of ingress and egress to his home. The Harris family placed obstructions in the easement. Plaintiff regularly exercises his right to use the easement, frequently traveling over a small, approximately 15-foot-wide trail road that exists on the easement. In November 2015, plaintiff sought an injunction against defendants, complaining that the Harrises were impeding his use of the easement and his ability to make improvements on the trail road. Clingman contended that the Harrises had placed feeding bowls, chicken coops, and other large objects on the easement that inhibited plaintiff's ability to access his property. The feeding bowls in particular caused masses of chickens to congregate on the road, blocking his ingress and egress. The trial court ordered the Harris family to remove all manufactured objects from the easement. Mr. Clingman returned to court three times to force the Harrises to comply.

Question before the court? As Mr. Clingman does not use the entire sixty-six feet, does that give the Harrises the right to store horse fencing and other material on the easement?

Result: The appellate court upheld the trial court verdict and stated that Clingman may tax costs.

RESTRICTIVE COVENANTS

Restrictive covenants limit what an owner can do with real property. As such, they are disfavored by the legal system. Thus, when a court interprets restrictive covenants, it will do so narrowly. If a restrictive covenant is not written clearly, a court may not enforce it.

Mazzola, et al v Deeplands Development Company, LLC, **No. 343878, July 25, 2019, Published**

Facts: The plaintiffs were residents of two Grosse Pointe subdivisions. When the original parcel of land was divided into the subdivisions in the 1950s, restrictive covenants were placed on the land. The restrictions also applied to the parcel of land retained by the original owner.

A developer purchased the land retained by the original owner. The developer planned to build a street with a cul-de-sac and divide the land into 18 parcels for residential development. The residents of the neighboring subdivisions sued to prevent the development. The neighbors claimed the proposed development was in violation of the restrictive covenants.
Specifically, the neighbors claimed the covenants prevented the building of a new road on the property and they constrained the size and location of future lots. The Wayne County Circuit Court granted the developer's motion for summary disposition. The circuit court agreed with the developer that the covenants did not apply in the manner argued by the neighbors. The neighbors appealed the ruling.

Question before the court: Was there anything in the restrictive covenants that would prevent the developer from building a new road.

Result: On appeal, the Court of Appeals emphasized that "restrictive covenants are construed strictly against those claiming the right to enforce them, and all doubts are resolved in favor of the free use of property." The court referred to this principle as "fundamental."

Turning to the specific covenants in this case, the court agreed with the circuit court. It found that the neighbors had read more into the covenants than what was actually written. The neighbors' arguments rested on "necessary implications" rather than the plain language of the covenants. In light of the principle to resolve doubts in favor of the free use of property, the court affirmed the circuit court's ruling in favor of the developer and dismissed the case.

100% DISABLED VETERANS EXEMPT FROM PROPERTY TAXES

Folard B. Williams v City of Eastpointe**, No 344942, July 11, 2019, Unpublished**

Facts: Mrs. Williams husband passed away while they were awaiting his certificate indicating his 100% disability. She went to the city to request the forgiveness of property taxes. They denied her as she did not have the certificate. She appealed to the Michigan Tax Tribunal. They asked how much he was getting as a pension. She informed them that he received $3,139.67. The MTT researched and discovered that was the amount a 100% disabled veteran receives and as such granted her the exception.

Question before the court: Did the MTT improperly assist the petitioner by conducting research on her behalf?

Result: The Michigan Tax Tribunal did not err in verifying the information on the Veterans Administration website. The appellate court affirmed the tax tribunal's grant of exception from property taxes.

NEW FHA LIMITS

On December 3, HUD announced the maximum FHA loan limits for 2020, issuing Mortgagee Letter 19-19 for FHA-insured forward mortgage case numbers and Mortgagee letter 19-20 for FHA-insured Home Equity Conversion Mortgage (HECM) case numbers. The general one-unit property limits "floor" increased to $331,760, and the "ceiling" increased to $765,600, while the HECM claim amount also increased to $765,600, effective January 1, 2020.

HEMP V MARIJUANA

On December 3, 2019, four federal agencies, in consultation with state banking regulators, clarified the legal status of hemp growth and production under the Bank Secrecy Act (BSA) for banks[1] providing financial services to hemp-related businesses.

More specifically, the US Treasury Department's Financial Crimes Enforcement Network (FinCEN), the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Comptroller of the Currency, and the Conference of State Bank Supervisors issued a joint statement (the Joint Statement) clarifying that banks are not required to file Suspicious Activity Reports (SARs) on customers solely because they are engaged in the growth or cultivation of hemp in accordance with applicable laws and regulations.[2]

Background

In February 2014, FinCEN issued guidance clarifying BSA expectations for financial institutions seeking to provide financial services to marijuana-related businesses (the 2014 Guidance).[3] The 2014 Guidance sought to clarify how financial institutions can provide financial services to marijuana-related businesses, consistent with their BSA obligations, in light of state legislative efforts to legalize certain marijuana-related activities and the resulting conflict between U.S. state and federal regulation of marijuana.

Because federal law prohibits the distribution and sale of marijuana, the 2014 Guidance clarified that financial transactions involving marijuana-related businesses (even those properly licensed under state law) would generally involve funds derived from illegal activity, which would typically trigger a SAR filing. Given this, the 2014 Guidance established three separate categories for marijuana-related SARs, namely, Marijuana Limited SARs, Marijuana Priority SARs, and Marijuana Termination SARs, one of which would generally need to be filed anytime a financial institution provided services to a marijuana-related business.

In addition, on December 20, 2018, the Agriculture Improvement Act of 2018 (the 2018 Farm Bill) was signed into law.[4] Among other things, the 2018 Farm Bill removed hemp from the Controlled Substances Act's definition of "marijuana." The 2018 Farm Bill defined "hemp" as any part of the cannabis plant "with a [THC] concentration of not more than 0.3 percent on a dry weight basis." As a result of this change, hemp and products derived from hemp, such as cannabidiol (CBD), are no longer Schedule 1 drugs under the Controlled Substances Act.

Finally, on October 31, 2019, the US Department of Agriculture issued an interim final rule establishing a domestic hemp production regulatory program to facilitate the legal production of hemp, as required by the 2018 Farm Bill. The interim final rule will apply to the 2020 growing season and does not affect hemp that was or is being cultivated under the 2014 Farm Bill programs. That hemp remains subject to the requirements of the 2014 Farm Bill.

The Joint Statement

Given this background, the Joint Statement offers banking institutions relief from the practice of filing SARs whenever they engage in financial transactions with hemp-related businesses, as was required under the 2014 Guidance. In accordance with the 2014 Guidance, which was released when hemp was still considered part of the definition of "marijuana" under the Controlled Substances Act, financial institutions were generally required to file SARs whenever they engaged in any financial transaction with a hemp-related business.

However, the Joint Statement updated the 2014 Guidance and clarified that banks are not required to file SARs on customers solely because they are engaged in the growth or cultivation of hemp. As the Joint Statement noted, this clarification was needed because hemp was no longer considered a controlled substance under the Controlled Substance Act as a result of the 2018 Farm Bill and therefore would not automatically trigger one of the special marijuana SARs required by the 2014 Guidance.

The Joint Statement emphasized that banks are expected to follow standard SAR filing requirements for its hemp-related customers in accordance with the BSA requirements, including the filing of SARs when the bank has reason to suspect the financial transaction involves funds derived from illegal activity or is attempted to disguise funds derived from illegal activity. The Joint Statement also clarified that banks should continue following the 2014 Guidance for transactions involving marijuana-related businesses, with the understanding that banks should exclude hemp from their definition of a marijuana-related business in accordance with the 2018 Farm Bill.

Key takeaways

The Joint Statement represents a major shift in FinCEN's prior guidance of requiring banks to file SARs for providing services to hemp-related businesses. Importantly, the Joint Statement only applies to banks and does not apply to all financial institutions covered by the BSA, such as broker-dealers, investment advisers, investment companies, and insurance companies. Consequently, these non-bank financial institutions (including broker-dealers and investment advisers that may be affiliated with banks) would still need to file SARs for transactions involving hemp-related businesses in accordance with the 2014 Guidance. For instance, broker-dealers opening a customer account for a hemp-related business, such as a company producing hemp or CBD, would still need to file SARs pursuant to the 2014 Guidance.

In addition, even though banks are no longer required to file SARs for providing services to hemp-related businesses solely because they are engaged in the growth or cultivation of hemp, the Joint Statement requires banks to follow the standard SAR filing requirements for its hemp-related customers. Among other things, this means that banks may need to file SARs if the hemp-related customers derive any of their revenue from illegal activity, including any marijuana-related business.

Legal and compliance professionals for banks and other financial institutions such as broker-dealers should consider how the Joint Statement impacts their SAR reporting requirements, as well as their overall BSA anti-money laundering compliance programs.

CLEAN WATER ACT – WATERS OF THE UNITED STATES

Definition of "Waters of the United States" - Recodification of Pre-Existing Rules

On October 22, 2019, the Environmental Protection Agency (EPA) and the Department of the Army ("the agencies") published a final rule to repeal the 2015 Clean Water Rule: Definition of "Waters of the United States" ("2015 Rule"), which amended portions of the Code of Federal Regulations (CFR), and to restore the regulatory text that existed prior to the 2015 Rule. The final rule will become effective on December 23, 2019. The agencies will implement the pre-2015 Rule regulations informed by applicable agency guidance documents and consistent with Supreme Court decisions and longstanding agency practice.

The agencies are repealing the 2015 Rule for four primary reasons. First, the agencies conclude that the 2015 Rule did not implement the legal limits on the scope of the agencies' authority under the Clean Water Act (CWA) as intended by Congress and reflected in Supreme Court cases, including Justice Kennedy's articulation of the significant nexus test in *Rapanos*. Second, the agencies conclude that in promulgating the 2015 Rule the agencies failed to adequately consider and accord due weight to the policy of the Congress in CWA section 101(b) to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" and "to plan the development and use . . . of land and water resources." 33 U.S.C. 1251(b). Third, the agencies repeal the 2015 Rule to avoid interpretations of the CWA that push the envelope of their constitutional and statutory authority absent a clear statement from Congress authorizing the encroachments of federal jurisdiction over traditional State land-use planning authority. Lastly, the agencies conclude that the 2015 Rule's distance-based limitations suffered from certain procedural errors and a lack of adequate record support. The agencies find that these reasons, collectively and individually, warrant repealing the 2015 Rule.

In summary, the final rule outlines waters that would be considered "waters of the United States": traditional navigable waters; tributaries to those waters; certain ditches; certain lakes and ponds; impoundments of jurisdictional waters; and wetland adjacent to jurisdictional waters. The proposal also establishes what would not be "waters of the United States," among them: waters not meeting one of the preceding jurisdictional categories; ephemeral features, including ephemeral streams; groundwater; many ditches; prior converted cropland; stormwater control systems and wastewater recycling structures; wastewater recycling structures; and waste treatment systems.

QUALIFIED OPPORTUNITY ZONES

In December 2017, as part of the Tax Cuts and Jobs Act ("TCJA"), Congress established a new tax incentive program to promote investment in certain low-income communities designated by the IRS as qualified opportunity zones. Section 1400Z-2 of the Internal Revenue Code provides three compelling tax incentives to encourage investment in qualified opportunity funds ("QOFs").

Taxpayers can defer paying taxes on capital gain from the sale or exchange of appreciated assets by investing such gain in a QOF within 180 days following such sale or exchange. Such gain may be deferred until the earlier of (i) when the investment is sold or exchanged or (ii) December 31, 2026.

Investors receive a step-up in the basis equal to 10% of the original deferred gain if the investment in the QOF is held for at least five years, with an additional 5% basis step-up if the investment is held for seven years. These basis step-ups can result in permanent exclusion from taxation of up to 15% of the originally deferred gain.

If the investor holds the investment in the QOF for at least 10 years, an elective basis adjustment made upon sale of the interest in the QOF provides a permanent exclusion from taxation for any appreciation in excess of the deferred gain.

On April 17, 2019, the Treasury Department released its second round of guidance on opportunity zone investment in the form of proposed regulations (the "New Proposed Regulations"). These newly proposed regulations supplement and in some cases revise the proposed regulations issued in October 2018 (The "October Proposed Regulations").

In particular, the New Proposed Regulations provide:

- Guidance related to investments in QOFs including rules for the transfer of property other than cash to a qualified opportunity fund, guidance on the purchase of eligible investments, rules for investment rollovers, guidance on what triggers a taxable inclusion, rules for mixed investments in funds, and guidance on investments by partnerships, S-corporations and consolidated groups.
- Guidance related to qualified opportunity zone businesses including workable rules for businesses that straddle opportunity zone and non-opportunity zones, guidance on the use of intangible property and favorable safe harbors for the 50 percent gross income location test.
- Guidance on opportunity zone business property including rules that will permit investors to lease rather than purchase opportunity zone property, and a clarification that for purposes of the holding period requirement "substantially all" means 90 percent.
- Guidance on QOFs including a reinvestment rule for funds, relief from the 90 percent asset test for new capital, and anti-abuse rules.

The New Proposed Regulations do provide further clarity, but still leave many questions unanswered. In light of the length and complexity of the New Proposed Regulations we will release a multi-part series of blog posts that will each address key issues relating to a specific component of the opportunity zone rules. Key issues relating to qualified investments in QOFs are highlighted in this Part I. We will unpack and explain additional aspects of the New Proposed Regulations in future blog posts.

What types of gain can be deferred through investment in a QOF?

The Tax Cuts and Jobs Act left open the question of what types of "gain" are eligible for deferral by simply stating "gain from the sale to, or exchange with, an unrelated person of any property held by the taxpayer." The October Proposed Regulations clarified that only capital gain is eligible for deferral. The New Proposed Regulations make clear that in the case of Section 1231 gain, only capital gain net income for a taxable year is eligible for deferral.

Can gain from the sale or other transfer of property to a QOF in exchange for an equity interest in the QOF be deferred?

No. Under the New Proposed Regulations, gain from the sale or other transfer of property to a QOF in exchange for an equity interest in the QOF is not eligible for deferral.

Can gain from the sale or other transfer of property to a person other than a QOF in exchange for an equity interest in a QOF be deferred?

No. Capital gain recognized for federal income tax purposes in connection with transfer of property to a person other than a QOF in exchange for an equity interest in the QOF is not eligible for deferral under the New Proposed Regulations.

Can a taxpayer defer eligible gain by acquiring an equity interest in a QOF from a person other than a QOF?

Yes. The New Proposed Regulations provide that if a taxpayer acquires an equity interest in a QOF from a person other than the QOF, then the amount of gain eligible for the taxpayer's deferred election is the amount of the cash, or the fair market value of the other property, that the taxpayer exchanged for the eligible interest in the QOF, as determined immediately before the exchange.

Do carried interests qualify for opportunity zone tax benefits?

No. Services rendered to a QOF are not considered a Section 1400Z-2(a)(1)(A) investment. Thus, if a taxpayer receives an equity interest in a QOF for services rendered to the QOF or to a person in which the QOF holds any direct or indirect equity interest, then the interest in the QOF that the taxpayer receives is treated as a separate investment which does not qualify for opportunity zone tax benefits.

Can a taxpayer make an equity investment in a QOF by contributing property in a nonrecognition transaction?

Yes. For property contributions, the deferral election is limited to the lesser of the taxpayer's adjusted basis in the equity interest received in the transaction without regard to section 1400Z-2(b)(2)(B) (generally, the taxpayer's basis in the property contributed), or the fair market value of the equity interest received in the transaction, both as determined immediately after the contribution. This rule applies separately to each item of property contributed to a QOF. If the fair market value of the equity interest in the QOF received is in excess of the taxpayer's adjusted basis in the equity interest received, without regard to section 1400Z-2(b)(2)(B), then the taxpayer's investment is a mixed funds investment to which Section 1400Z-2(e)(1) applies.

For more information go to https://miopportunityzones.com/

HIGHER GIFT AND ESTATE TAX EXCEPTIONS

The Internal Revenue Service ("IRS") recently announced the 2020 Federal estate and gift tax exclusion amount.

In calendar year 2020, the exclusion amount for a single individual has increased to $11.58 million from the 2019 exclusion amount of $11.4 million. With proper planning or the use of portability, a married couple has a combined exclusion of $23.16 million. The Federal estate and gift tax rate will remain unchanged at 40%, and the annual exclusion amount, which allows taxpayers to make annual gifts of a present interest, remains at $15,000 per taxpayer per beneficiary.

Additionally, the IRS issued proposed regulations clarifying that taxpayers who take advantage of the current exclusion rates will not be adversely impacted when the higher exclusion amounts are scheduled to sunset in 2026. At that time, the exclusion is scheduled to revert back to $5 million, as indexed for inflation. In other words, the IRS has indicated there will be no "clawback" of exclusion.

The IRS proposed regulations make clear that individuals should consider taking advantage now of lifetime gifting strategies to lessen, or even eliminate, their future Federal estate tax liability.

FREQUENTLY ASKED QUESTIONS ABOUT FLOOD INSURANCE:

Why should I talk to my clients about flood insurance? Flooding can happen anywhere at any time. You should encourage your clients to purchase flood insurance to protect their properties from flood damage and the economic devastation it can bring.

A property does not have to be near water to flood. In fact, more than 20 percent of all National Flood Insurance Program (NFIP) flood claims come from outside of the areas at the highest risk for flood (Special Flood Hazard Areas). Floods can result from storms, melting snow, hurricanes, drainage system backups, broken water mains, and changes to land from new construction, among other things.

It is important to let your client know that homeowner's insurance policies typically do not cover floods. If a property is in a Special Flood Hazard Area or designated high-risk flood area, then federally regulated or insured lenders must require the buyer to purchase flood insurance as a condition of their mortgage loan. Flood insurance can help with recovery regardless of whether there is a Presidential Disaster Declaration. In the event of flood, federal disaster assistance, such as individual assistance from FEMA, including federally funded grants, or loans from the U.S. Small Business Administration, offers very limited help following a flood loss. Such assistance is only available when there is an official Presidential Disaster Declaration for federal disaster assistance. Most federal disaster assistance comes in the form of low-interest disaster loans that recipients must repay with interest in addition to their existing mortgages, other loans, and debts. Your client will never have to repay money received from a verified claim on their NFIP flood insurance policy.

Who can purchase flood insurance? Anyone in a community that participates in the NFIP can purchase building and/ or contents coverage, with few exceptions. Licensed insurance agents can tell you if a specific community participates in the NFIP. Coastal Barrier Resources System Areas (CBRS), undeveloped coastal areas established for wildlife refuge, sanctuary, recreational, or natural resource conservation purposes (Otherwise Protected Areas), and buildings principally below ground or entirely over water may not be eligible for NFIP flood insurance coverage.

How do clients obtain a flood insurance policy? The NFIP also has resources to help your client find an agent. Your client can visit fema.gov/nfip or call their local insurance agent for more information on purchasing a policy. Your client can purchase NFIP flood insurance from the many companies writing and servicing flood insurance on behalf of FEMA or from NFIP Direct. Only a licensed property and casualty insurance agent can sell NFIP flood insurance. Regardless of who writes the policy, NFIP flood insurance is the same. The premium and amount of coverage for an individual risk policy is the same regardless of who the agent is. There are other legal requirements to ensure that your client has flood insurance when they need it the most. If the mortgage company requires flood insurance as a condition of the loan, and the mortgage company escrows for other insurance premiums, the mortgage company must also escrow flood insurance premium

How much will flood insurance cost? Flood insurance premiums will vary depending on the construction date and flooding risk for the building, among other things. A licensed insurance agent can provide a price quote and you should encourage a prospective buyer to get a quote for both building and contents coverage. In most cases, they are separate coverages with separate deductibles. Costs vary depending on whether the property falls within a flood risk designation. As an example, if your client's property is outside the high-risk area, they may qualify for a Preferred Risk Policy that starts as low as $395 a year. If

FEMA maps your client's property into a high-risk flood area, your client may need to obtain an Elevation Certificate (EC) to receive a flood insurance quote. To find out if a property already has an EC, contact the local building permit office, the local planning and zoning office, or the current owner or a flood insurance agent. If your client is unable to identify an existing EC for their property, the client may have to hire a licensed land surveyor, engineer, or architect to provide one. Should you or your client need more information about ECs, how the NFIP uses them, and why they may need one, visit fema.gov/media-library/assets/ documents/32330.

When is the best time to buy flood insurance coverage? Now! A flood can happen anywhere, at any time—even outside of high-risk flood areas. Additionally, there is typically a 30-day waiting period between submitting the policy application and premium and the policy effective date. However, there are exceptions to this rule. For example, if a buyer purchases an NFIP policy in connection with a loan closing, there is no waiting period. If a seller transfers his/her policy to the new property owner, regardless of whether or not there is a mortgage involved, the policy will not lapse and coverage continues uninterrupted upon sale. Personal property coverage and building coverage for a property under construction do not transfer.

What are Special Flood Hazard Areas (SFHAs)? These are the areas with the highest risk for floods or zones beginning with the letters A or V on Flood Insurance Rate Maps.

How will I know if a building is in an SFHA? Your clients can check with their local community or visit fema.gov/nfip to learn more about their flood risk. Anyone can view and download flood maps from msc.fema.gov. Lenders will notify borrowers if they must purchase flood insurance as a condition of a mortgage loan.

Am I legally liable if I do not disclose the fact that a property is in a high-risk flood area? Many states have disclosure laws for real estate professionals that address all-natural hazards, including floods. You can better help your client understand flood risk by learning more about it yourself. Visit fema.gov/nfip to learn more about flood risk and NFIP flood insurance.

What if a property owner believes the property has been incorrectly named to be in a flood zone? They may get a specially licensed surveyor to conduct a LOMA (Letter of Map Amendment). A Letter of Map Amendment (LOMA) is an official amendment, by letter, to an effective National Flood Insurance Program (NFIP) map. A LOMA establishes a property's location in relation to the Special Flood Hazard Area (SFHA). LOMAs are usually issued because a property has been inadvertently mapped as being in the floodplain but is actually on natural high ground above the base flood elevation.

Because a LOMA officially amends the effective NFIP map, it is a public record that the community must maintain. Any LOMA should be noted on the community's master flood map and filed by panel number in an accessible location.

CHAPTER 4 CASES FROM AROUND THE COUNTRY

***KNICK v. TOWNSHIP OF SCOTT, PENNSYLVANIA*, No. 17–647. Argued October 3, 2018— Reargued January 16, 2019— Decided June 21, 2019**

Facts: In 2013, government agents forced Rose Knick to allow public access to a suspected gravesite on her farmland. Rose sued over the unconstitutional property taking. But a federal court refused to hear her federal claim citing the 1985 Supreme Court decision *Williamson County*. Rose asked the Court to overturn this precedent, so property rights are on equal footing with other rights such as due process and free speech. In a major ruling announced on June 21, 2019, the Supreme Court agreed with Rose that federal courts cannot turn away takings cases like hers, because property rights are just as important as all other rights protected by the Constitution.

Hundreds of years of property records find no gravesites on Rose Mary Knick's 90-acre farm in Scott Township, Pennsylvania—a rural area on the eastern side of the state. Rose lives alone on the property, which has been in her family since 1970. Other than farming activity she allows in her fields, Rose treasures the peace and quiet she finds nowhere else.
Lack of evidence notwithstanding, Scott Township officials enacted a so-called graveyard law in 2013 and forced Rose to allow unrestricted public access across her private property to visit a suspected gravesite.

Rose sued over the unconstitutional property taking. But a federal court refused to hear her federal claim, citing *Williamson County Regional Planning Commission v. Hamilton Bank*. This 1985 decision by the U.S. Supreme Court said property owners must take their federal property rights claims to state courts before bothering with federal courts.

Williamson County gave property rights second-class status, that is, the only rights guaranteed by the Constitution not directly enforceable by federal courts.

Rose asked the Supreme Court to review and overturn this precedent and put property rights on equal footing with other rights such as due process and free speech.

Question before the courts: Are property rights less important than our other rights?

Result: Pacific Legal Foundation argued *Knick* before the Supreme Court on October 3, 2018, and again on January 16, 2019, after the High Court ordered a reargument. On June 21, 2019, the Supreme Court agreed with Rose in a 5 to 4 decision that property rights protected under the Fifth Amendment have just as much clout as the rights protected in the rest of the Constitution. Writing for the majority, Chief Justice John Roberts said, *"Fidelity to the Takings Clause and our cases construing it requires overruling Williamson County and restoring takings claims to the full-fledged constitutional status the Framers envisioned when they included the Clause among the other protections in the Bill of Rights."*
In November of 2019, the Township agreed to rescind the ordinance authorizing public access to Rose Knick's property. Rose's fight came to an end, which allows her to enjoy the peace and quiet she loves about her farm.

AGENCY

Real estate licensees are subject to a broad range of legal and ethical requirements that are designed to protect buyers, sellers and the community at large. Buyers and sellers will typically delegate authority to a real estate broker to act as their agent when conducting real estate business. When this happens, an agency relationship has been created. *This relationship falls within the domain of that body of law called* ***"law of***

agency". The agent owes a fiduciary duty to the client. Fiduciary refers to a relationship based on loyalty and trust.

Agency. There are three levels of intensity of agency.

Special Agent. *A special agent is authorized to do a specific act or conduct specific business transactions. Real estate sales agents are special agents. They are authorized to either find a property for a buyer or a buyer for a property.*

General Agent. *An agent who represents someone in a range or group of activities is a general agent. Property managers formulate management plans, collect rent, pay bills, authorize repairs, and negotiate leases, and are considered to be general agents.*

Universal Agent. *An agent who acts on a client's behalf in all matters and situations is considered a universal agent. A power-of-attorney is usually the document that creates this relationship.*

Agents have certain responsibilities to their clients (also referred to as principals).

- *Loyalty:* The agent owes undivided loyalty to the client and must put the client's interest above his own.
- *To account for all monies:* The agent may not commingle funds.
- *To obey all lawful instructions.*
- *Confidentiality:* The agent must keep confidential any information given by the client.
- *Disclosure:* The agent must disclose any information that may benefit the client.
- *Care:* The agent must use all skill to the best of ability to benefit the client.

A customer is the party with whom the real estate licensee does not have a contract. While the agent may not lie to them, they do not owe anything to them. Because of the fact that a lot of consumers were confused concerning who was representing whom in real estate, Michigan and most other states have come to require agency disclosure when one is dealing with one to four family residential properties. *The broker determines the type of agency that is practiced in the real estate company, not the salesperson.*

Single Agency. Some companies prefer to only represent one client in a transaction. They will represent buyers or sellers, but never in the same transaction. ***Multiple Agency.*** Most brokers allow for all types of agency, sellers, buyers and fully disclosed, consensual dual agency.

1. **Seller's agency.** A seller's agent is the agent who has listed the property and acts solely on behalf of the seller. Anything the agent learns that can benefit the seller, they must share with the seller. A Subagent is one from another office who has agreed to work with the listing agent on the seller's behalf. They pledge the same standard of loyalty to the seller as a seller's agent. A seller's agent will present all offers and counter offers and suggest of outside services of experts when such are warranted. A good seller's agent should know how to best market the property to the advantage of their client.
2. **Buyer's agency.** A buyer's agent should have a written contract in place with the buyer. A licensee may accidentally create an implied buyer's agency agreement by his or her acts. This is definitely not advised. The buyer's agent shall disclose all information that would benefit the buyer/client. These items include the availability of home warranties and the need for insurance for fire, hazard and liability. A good buyer's agent can save their client money by advising the of outside services that would reveal problems that should be addressed such as recommend inspections for pests, well, septic, soil and environmental concerns.
3. **Dual agency.** In Michigan it is permissible for agents to represent both buyer and seller in the same transaction, with each party's written consent. The agent acts with somewhat of a lessened fiduciary duty.

Rather than advising the clients, the agent provides information so the client can make an informed decision. A dual agent never shares confidential information from one client to the other.
4. **Transaction Coordinator.** A transaction coordinator is acting as neither agent for the seller or the buyer.
5. **Designated Agency.** Real estate brokerage firms may elect to adopt a style of agency in which two salespersons within a company may represent individual clients in the same transaction without becoming dual agents.

Michigan has created a form within the occupational code which agents must use in *one to four* family residential real property transactions. Agency disclosure is required before confidential information is obtained from buyer or seller. Note, the agency disclosure form is not a contract. There is a paragraph in that form which reads:

AFFILIATED LICENSEE DISCLOSURE
Only the licensee's broker and a named supervisory broker have the same agency relationship as the licensee named below. If the other party in a transaction is represented by an affiliated licensee, then the licensee's broker and all named supervisory brokers shall be considered disclosed consensual dual agents. All affiliated licensees have the same agency relationship as the licensee named below. Designated agency offices must check the sentence which begins with the word "Only". Other offices (some refer to as traditional agency model offices) must check the sentence which begins with the word, "All". ***NOTE:*** *This agency disclosure form is not a contract. It is still important to get a signed buyer agency contract in place with the buyer/client.*

PLL, LLC v. Carlton Group, Ltd., No. B280854, 2019 WL 1325037 (Cal. Ct. App. Mar. 25, 2019)

FACTS: A real estate advisory firm agreed to assist a buyer in obtaining investors for a purchase of property. A potential investor was found, but a deal was not concluded. The potential investor then purchased the property without the participation of the buyer and paid a commission to the real estate representative. The buyer alleged breach of fiduciary duty and unjust enrichment and moved for summary judgment.

The trial court found no triable issues of fact remained as to the nature of the agreement and fiduciary relationship between the buyer and real estate advisory firm. Additionally, the trial court determined that a payment made by the investor to the advisory firm was made in exchange for settlement and release of claims against the investor and was therefore not a secret profit or payment at buyer's expense. The court granted the advisory firm's motion for summary judgement for the breach of fiduciary duty and unjust enrichment claims. The buyer appealed.

QUESTION BEFORE THE COURT: Did the real estate advisor breach his duty to the original buyer?

RESULT: Real estate representative did not breach fiduciary duties by accepting payment from investor for settlement of a claim.

Edwards v. Wash, **169 A.D.3d 865, (N.Y. App. Div. 2019)**

Facts: A real estate agent and the company for which she worked had a contract representing a buyer. She showed a property to the buyer and then wrote two offers to the seller, one on behalf of the buyer and one of her own. Both were the same price, however the buyer offered a down payment of $40.000 and hers was $80,000. She informed the buyer the seller had accepted a different offer, neglecting to mention it was hers.

Question before the court: Did the real estate agent breach her fiduciary duty to the buyer and as such should the court force the agent to allow the buyer to purchase the property?

Result: While the court did rule the agent breached her fiduciary duty. The buyer was seeking specific performance. The buyer failed to establish the real estate agent was motivated solely by disinterested malevolence

***Ryan v. Real Estate of the Pacific, Inc.*, No. D072724, 2019 WL 926101 (Cal. Ct. App., Feb. 26, 2019)**

Facts: The sellers listed their property with the real estate company. The company provided professional guidance and advice throughout the entire process. At an open house, the seller's next-door neighbor informed an agent of the company of plans to remodel his home in such a way it would have a significant impact on the sellers' property. The agent did not inform the sellers of their neighbor's plans. The buyer learned of this and attempted to rescind the contract. Based on the company's advice the seller refused to rescind.

Question before the appellate court: Was it really necessary for the seller to bring in an expert witness to prove or disprove the real estate company performed in accordance with prevailing standard of care?

Result: The appellate court held that under the common-knowledge rule, an expert witness was not necessary. The company chose to remain silent and withheld a material fact from the seller.

PROPERTY DISCLOSURE

Most states have some form of residential property disclosure form. Michigan's property disclosure form is required when a seller is selling one to four family properties. There are some exceptions.
(a) Transfers pursuant to court order, including, but not limited to, transfers ordered by a probate court in administration of an estate, transfers pursuant to a writ of execution, transfers by any foreclosure sale, transfers by a trustee in bankruptcy, transfers by eminent domain, and transfers resulting from a decree for specific performance.
(b) Transfers to a mortgagee by a mortgagor or successor in interest who is in default, or transfers to a beneficiary of a deed of trust by a trustor or successor in interest who is in default.
(c) Transfers by a sale under a power of sale or any foreclosure sale under a decree of foreclosure after default in an obligation secured by a mortgage or deed of trust or secured by any other instrument containing a power of sale, or transfers by a mortgagee or a beneficiary under a deed of trust who has acquired the real property at a sale conducted pursuant to a power of sale under a mortgage or deed of trust or a sale pursuant to a decree of foreclosure or has acquired the real property by a deed in lieu of foreclosure.
(d) Transfers by a nonoccupant fiduciary in the course of the administration of a decedent's estate, guardianship, conservatorship, or trust.
(e) Transfers from 1 co-tenant to 1 or more other co-tenants.
(f) Transfers made to a spouse, parent, grandparent, child, or grandchild.
(g) Transfers between spouses resulting from a judgment of divorce or a judgment of separate maintenance or from a property settlement agreement incidental to such a judgment.
(h) Transfers or exchanges to or from any governmental entity.
(i) Transfers made by a person licensed under article 24 of Act No. 299 of the Public Acts of 1980, of newly constructed residential property that has not been inhabited.

CHAPTER 4 CASES FROM AROUND THE COUNTRY

***Calhoun v. I-20 Team Real Estate*, No. 12-18-00224-CV, 2019 WL 456892, (Tex. App., Feb. 6, 2019)**

Facts: Texas has a TREC promulgated Sellers' Disclosure Notice, but the Texas Association of Realtors has one the is more thorough. Where it asks if there has been any form of water intrusion, it says, "Attach Addendum". No such addendum was attached.

Question before the court? Could the seller be held liable for failing to attach the addendum? Could the agent be held liable for failing to advise the seller to do so?

Results: The appellate court reversed the trial court's judgement and remanded the case for further proceedings, stating the real estate firm was not entitled to be dismissed. Further the lower court was to determine the amount of attorney fees that should be awarded to the buyer. As of December, 2019, nothing more has been published regarding this case.

***Bow Grove v Marion Gine Franke and Brenda Kay Lynch.* No. 09-18-0019-CV**

Facts: Bow Grove purchased a log home from Henric Ekehed and Marion Gine Franke. Brenda Kay Lynch was Henric's real estate agent. Henric completed the Texas Association of Realtors Seller's Disclosure Notice January 2013. A first buyer retained an inspection which revealed rotting wood. Henric had some repairs done.
Grove wrote an offer to purchase with an inspection contingency. Again,the inspector noticed some wood rot. He also hired a termite inspection which did not identify any active wood destroying infestation. Based on the inspection Grove asked Henric to lower the price by $13,000. While not filling out a new Seller's Disclosure Notice, Henric did inform Grove via email about the first inspection and the repairs that had been done.
Closing was held May 23, 2014. At one point in the trial, Grove could not recall reviewing the Seller's Disclosure Notice. At another point he testified he made his purchase decision d on the fact that the Notice revealed no major issues.

Question before the court: Could the as-is clause in the purchase agreement prevent the lawsuit? Is the seller and the seller's agent guilty of fraud? Could the clause in the purchase agreement that stated "in the event of a lawsuit the non-prevailing party is obligated to pay fees" survive after the deed is executed?

Result: The closing documents did indeed have the box checked that Grove was taking the property in its present condition. The fact that he knew there had been damage and corrected it, did not infer he knew of present damage. He did not interfere with the buyer's ability to get an independent inspection, which the buyer did. The agents made no representation as to the condition of the home. Yes, the obligation for Grove to pay fees did survive the deed.

PASSIVE LOSS LIMITATION

One is limited to being able to deduct $25,000 single or married filing jointly of passive loss against active income. There is a phase out when the total AGI exceeds $100,000. There is no limit for deducting active loss against active income. If real estate is ones profession, that is considered to be active loss or income.

To qualify as a real estate professional, as would permit income tax deduction of otherwise passive activity losses for real estate, taxpayer may substantiate the required 750 hours of participation in real estate activity by any reasonable means, but a ballpark guesstimate will not suffice

Ronnie HAIRSTON and Gloria Cruz Hairston, Petitioners v. COMMISSIONER of Internal Revenue.
Docket No. 20372-17, Filed August 20, 2019

Facts: The parties filed a stipulation of facts with accompanying exhibits that is incorporated by this reference. Petitioners resided in Maryland when they petitioned this Court.

At some time before 2013 petitioners purchased two contiguous rental properties in Glenn Dale, Maryland: 6330 Bell Station Road (6330 Bell) and 6340 Bell Station Road (6340 Bell) (collectively, rental properties). Petitioners resided in a home immediately adjacent to the rental properties.

Each rental property consists of a single-family home located in the middle of a 1.5-acre lot. Each lot has a few large trees, a surrounding fence, and a gravel driveway about 50 feet long. Each property has a shed, and 6340 Bell has an un-attached six-car garage. Neither property has any sidewalks apart from a short path connecting the driveway to the house.

A long-term tenant occupied 6340 Bell throughout 2014. Another long-term tenant occupied 6330 Bell until October 2014, when petitioners evicted her for failure to pay rent. The latter property remained vacant until December 19, 2014, when petitioners executed a lease with a new tenant. During the time 6330 Bell was vacant, petitioners performed maintenance on the property, advertised it, fielded questions from prospective tenants, showed the property to applicants, and screened applicants with credit reports and background checks.

The tenants also agreed to maintain the yard and surrounding area by removing yard waste and keeping the paths to the driveways free of snow and debris.

During 2014 Mr. Hairston supervised contractors who replaced carpet and painted the interior of 6330 Bell while it was vacant. In each case he met the contractors at the house and (according to his testimony) remained onsite until they finished their work. But he did not participate in any of this work himself.

Petitioners jointly filed for 2014 a timely Form 1040, U.S. Individual Income Tax Return. They reported total adjusted gross income (AGI) of $202,409, of which $9,648 represented taxable Social Security benefits. They included with their return a Schedule E, Supplemental Income and Loss, which reported the following amounts:

	6330 Bell	6340 Bell	Total
Rent	$12,000	$18,000	$30,000
Expenses	30,029	27,459	57,488
Loss	(18029)	(9,459)	(27,488)

The IRS selected petitioners' 2014 return for examination and determined that neither of them qualified as a "real estate professional." This disallowed the $27,488 loss deduction and determined an accuracy-related penalty. Petitioners timely petitioned this Court, c o n t e n d i n g that at least one of them qualified as a "real estate professional."

Petitioners produced a calendar for each rental property that purports to show the number of hours worked each day. Together the calendars include 360 separate entries. Each entry describes a task and the hours allegedly consumed in performing that task, without indicating which petitioner did the work. The handwriting on all entries seems identical. Some of these entries were recorded on the day of performance, but most were made at the end of the week or later. Every task recorded on the calendars, no matter how trivial, is listed as having taken at least one hour to complete. Of the 360 recorded entries, 121 (or roughly one-third) record tasks that allegedly consumed exactly one hour. These [*10] include 36 entries for doing nothing more than receiving a rent payment, issuing a receipt for a payment, or depositing a check at the bank. There are 13 distinct one-hour entries for "paying mortgage." There are 11 distinct one-hour entries--all of which petitioners attribute to Mr. Hairston--for "hunting down" or "remind[ing]" the tenant to pay rent. Three of these entries appear in the same week, including two on the same day. There are nine distinct one-hour entries for "inspecting vacant property," i.e., walking next door to 6330 Bell to make sure it had not been broken into. This pattern of inflating recorded hours undermines the credibility of petitioners' calendars overall.

Question before the court: Could Mr. Hairston claim the passive loss as a "real estate professional?"

Result: The tax court ruled the 781 hours that taxpayers attributed to husband were inflated by at least 150 hours, but most likely more. With respect to petitioners' Federal income tax for 2014, the Internal Revenue Service determined a deficiency of $7,341 and an accuracy-related penalty of $1,468." The 7th Circuit Court of Appeals affirmed.

***Matter of Estate of Ethridge*, No. 11-17-00291-CV, 2019 WL 5617630 (Tex. App. Oct. 31, 2019)**

Facts: In 1990, Mildred L. Ethridge executed a one-page typewritten will without consulting an attorney. It read as follows, "I, Mildred L. Ethridge (femme sole) of Midland County, Texas, for the purpose of the distribution of my entire estate, real, personal and mixed, which I wish to take effect at my death, do make, publish and declare this to be my Last Will and Testament, and I do hereby revoke all former wills and testamentaries heretofore made by me at any time.

FIRST

I hereby appoint and name Fred D. Davis, Jr. as Independent Executor and trustee of my **estate**, to serve without bond. I give Fred D. Davis, Jr. all my personal effects to clear my **estate** after my death.

SECOND

I give and bequeath my one half (1/2) ownership in my residence and homestead situated on the East 53 feet of Lot 5, West 16.9 feet of Lot 4, Block 1, Oxford Heights to Patricia Petosky.

Appellant was Mildred's nephew-in-law. Mildred died on January 9, 1994, and her will was admitted to probate on April 7, 1994. Prior to her death, Mildred gifted the Oxford Heights residence to someone else, leaving Appellant as the only other person possibly named as beneficiary under the will.2 The county court at law authorized Appellant to receive "Letters Testamentary" as the independent executor of Mildred's **estate**. Appellant filed an inventory of the **estate**. In the inventory, Part A described the money in Mildred's checking account, and Part B listed miscellaneous property that Mildred owned at the time of her death, including furniture and a television.

At her death, Mildred also owned mineral royalties that were not specifically devised in her will or included in the inventory. After the will was probated, Enterprise Crude Oil LLC began paying royalties to Mildred's estate. Appellant opened a bank account for the estate to receive the funds. Believing he was entitled to the entire estate, Appellant transferred the funds into his personal account. Appellant and his wife, June Ethridge Davis, spent the funds on items unrelated to the estate.

In 2010, Mildred's heirs discovered they were possibly entitled to the royalty payments from Mildred's **estate**. On July 8, 2014, Mildred's great-nephew, John Wright Ethridge Jr., sent a letter to Appellant requesting an accounting of the **estate.**

Question before the court: Was she intestate a far as the mineral royalties were concerned?

Result: The appellate court affirmed the trial court's verdict that it did pass to her heirs as opposed to the only named beneficiary in the will.

RESPA (REAL ESTATE SETTLEMENT PROCEDURES ACT)

Saccameno v. Ocwen Loan Servicing, LLC, No. 15 CV 1164, 2019 WL 1098930 (N.D. Ill. Mar. 1, 2019)

Facts: Borrower filed a Chapter 13 bankruptcy, the plan for which required that she repay the arrearages on her mortgage. The borrower made the arrearage payments, and the bankruptcy was discharged. The mortgage servicer mistakenly continued to attempt to collect the arrearages and refused the scheduled payments the borrower attempted to make. The borrower filed suit asserting claims for breach of contract and for violations of the Fair Debt Collection Practices Act, Illinois Consumer Fraud and Deceptive Business Practices Act and the Real Estate Settlement Procedures Act.

Question before the court: Does the lender have an obligation to correct erroneous information

Result: A jury returned a verdict for the borrower on all counts. The loan servicer filed motions for judgment as a matter of law, a new trial, and to amend the judgment. The court held that the evidence supported a verdict based on a violation of RESPA when the loan servicer failed to conduct a sufficient investigation and appropriately correct the borrower's record to reflect that the borrower had made all of her payments. The existence of a disclaimer in a form letter noting that communications were not intended to collect a debt that had been discharged in bankruptcy would not prevent the loan servicer from being liable for false statements when the communications were in fact being used to attempt to collect a discharged debt. The appellate court upheld the jury's verdict and determined the borrower did suffer compensable RESPA damages.

In 1978, the IRS issued a "Safe Harbor Provision" rule. They stated that the broker could call the salesperson or associate broker an independent contractor as long as five conditions were met: Licensed, at risk, has no minimum job requirements, has an annually negotiated independent contract and not less than 90% of the money from the broker was commission due to real estate sales

Under the Fair Credit Reporting Act, if an employer takes an adverse action against an employee due to information that turns up during a credit check, the employee must be informed.

Walker v. REALHome Servs. and Solutions, Inc., No. 1:18-CV-03044-WMR-WEJ, 2019 WL 1225211, (N.D. Ga. Jan. 28, 2019)

Facts: A real estate professional was offered a position with a real estate company as an independent contractor. The real estate professional returned the required documents allowing the real estate company to conduct a background check. The real estate professional was subsequently informed that he did not pass the review and would not be brought on as an independent contractor. The real estate professional argued that the company violated the Fair Credit Reporting Act's (FCRA) stand-alone disclosure requirement by asking him to sign a standardized background check authorization form that included a liability waiver. Additionally, he alleged he did not receive a copy of the consumer report and notice of his dispute rights as required by FCRA's mandatory pre-adverse action notification requirement.

Question before the court: Do the rules in the Fair Credit Reporting Act apply to a potential independent contractor?

Result: The appellate court upheld the lower court's verdict, that FCRA does not apply to independent contractors

NON-COMPETE AGREEMENT

***Saxe v Raveis Real Estate, Inc.*, No. FSTCV176033070S, 2018, WI 4199004 (Conn. Super. Ct. Aug 24, 2018)**

A real estate professional and a real estate company executed a transition agreement and an independent contractor agreement when the professional started working for the company in 2014. The transition agreement contained a covenant not to compete and a confidentiality.

A real estate professional and a real estate company executed a transition agreement and an independent contractor agreement when the professional started working for the company in 2014. The transition agreement contained a covenant not to compete and a confidentiality clause; the independent contractor agreement included a confidentiality clause, an indemnity clause, and a merger clause. In 2017, the real estate professional terminated the relationship and resumed working with a different real estate company. The real estate company sent her a cease and desist notice, indicating that her actions were in violation of her contractual duties under the covenant not to compete and the confidentiality clause. The real estate professional filed a motion for summary judgment claiming the covenant not to compete was unenforceable. The real estate company also filed a motion for summary judgment alleging breach of the covenant not to compete and the confidentiality agreement.

Question before the court: Is the non-compete clause enforceable?

Result: The court concluded the ten-mile operation restriction set forth in the covenant not to compete was unreasonable because it prevented the real estate professional from seeking employment within ten miles of any of the 46 defendant real estate company offices located throughout Connecticut (and any of the over 70 defendant real estate offices located in eight other states). Thus, the ten-mile restriction as written essentially prevented the real estate professional from working in her field anywhere in the state of Connecticut. The court granted the real estate professional's motion for summary judgment and denied the real estate company's motion.