REAL PROPERTY

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I. INTRODUCTION

This Article summarizes Michigan's most significant decisions in the area of real property during this year's *Survey* period.[1] This article is not intended to be a comprehensive study of every published decision in the area of real property over the *Survey* period, but rather a highlight and discussion of those cases which, in the view of this author, deserve particular consideration during this period.

II. ZONING, LAND USE & CONDEMNATION

In *Shepherd Montessori Center Milan v. Ann Arbor Charter Township*,[2] the plaintiff appealed the trial court's order granting summary disposition to defendants after the court of appeals remanded the case in *Shepherd Montessori Center Milan v. Ann Arbor*

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1. This *Survey* period covers cases decided, statutes enacted, or rules adopted between June 1, 2006 and May 15, 2007. Where appropriate, subsequent history has been included in case citations. Please check legislative updates as well as case law for recent changes.

2. 275 Mich. App. 597, 739 N.W.2d 664 (2007).

Charter Township, (*Shepherd I*).[3] After the court of appeals remanded the case, the trial court again ruled that plaintiff did not show a violation of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"),[4] and that "plaintiff did not demonstrate evidence of discrimination to support its equal protection claim."[5]

In this case, plaintiff held a "leasehold interest in the Domino's Farms Office Park and operated a Catholic Montessori daycare program."[6] "In April 2000, plaintiff told the township it planned to lease additional property adjacent to its daycare facility to operate a Catholic Montessori school for grades K-3."[7] Plaintiff informed the township that it anticipated approximately twenty five students would attend the school.[8] The tenant that previously occupied the space was "Rainbow Rascals," which was a non-religious, pre-school daycare program that previously received approval from the defendants to accommodate up to one hundred students."[9]

The property that the plaintiff was interested in leasing was zoned "OP" (office park district), and the township zoning ordinance expressly permitted the operation of daycare centers within this district, but only for children of office park employees.[10] The plaintiff requested in writing a zoning determination regarding its proposed use of the property and whether it would be allowed under the current ordinance to utilize the property for the Catholic Montessori school.[11] In a letter dated May 1, 2000, the township informed the plaintiff that "the zoning ordinance classified its proposed use as a 'primary school,' which use was not a permitted use in the OP district, and denied plaintiff's proposed use of the property."[12] Thereafter, "on May 30, 2000, plaintiff filed a petition with the Ann Arbor Charter Township Zoning Board of Appeals (ZBA)" appealing this decision.[13] Plaintiff's petition contained the following requests: "(1) a reversal of the zoning official's determination so as to allow the proposed use; (2) a use variance; and (3) a determination that plaintiff's proposed use as a primary school be considered a 'substituted use' of the Rainbow Rascals daycare program."[14] Plaintiff noted in its petition that "defendants had granted a use variance to the Rainbow Rascals daycare on December 3, 1991," to "permit children of non-office park

3. 259 Mich. App. 315, 321-32, 675 N.W.2d 271, 276-77 (2003).
4. 42 U.S.C. § 2000cc (2006).
5. *Shepherd Montessori Ctr.*, 275 Mich. App. at 599, 739 N.W.2d at 667.
6. *Id.*
7. *Id.* at 600, 739 N.W.2d at 667.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Shepherd Montessori Ctr.*, 275 Mich. App. at 600, 739 N.W.2d at 667.
12. *Id.*
13. *Id.* at 600, 739 N.W.2d at 668.
14. *Id.*

employees to attend" the daycare.[15] Plaintiff also noted that its proposed use as a primary school should be a substitution for Rainbow Rascals' previous use, and that its proposed use "would be low impact and would involve less density" than the previous because it would only involve twenty five students as opposed to one hundred.[16] The ZBA held a hearing with respect to plaintiff's petition on June 26, 2000[17] and rejected plaintiff's appeal holding that a primary school could not be a substitution of a non-conforming use.[18] The ZBA held that "because Rainbow Rascals had received a variance, its use of the premises became a conforming and permitted use in the OP district . . . [t]herefore, plaintiff's use would be non-conforming and a substitution was not permitted."[19] Additionally, the "ZBA determined that a primary school was not a permitted use" and denied plaintiff's request for a variance because plaintiff did not provide enough evidence that "without the variance, there could be no viable economic use of the property."[20] On September 22, 2000, plaintiff filed suit, alleging violations of RLUIPA and equal protection, and requested a preliminary injunction.[21] On January 16, 2001, the trial court granted summary disposition in favor of defendants and denied plaintiff's motion for summary disposition.[22] In *Shepherd I*, the court held that the "plaintiff had satisfied the jurisdictional requirements of RLUIPA and that plaintiff's use of the property for religious education was a religious exercise within the meaning of RLUIPA."[23] In *Shepherd I*, the court of appeals remanded plaintiff's RLUIPA claim for a "determination of whether defendants' denial of plaintiff's variance placed a substantial burden on plaintiff's religious exercise" and whether there was a violation of plaintiff's equal protection rights.[24] The court of appeals instructed the parties to address the following factors:

> [1] whether there are alternative locations in the area that would allow the school consistent with the zoning laws; [2] the actual availability of alternative property, either by sale or lease, in the area; [3] the availability of property that would be suitable for a K-3 school; [4] the proximity of the homes of parents who would

15. *Id.*
16. *Id.* at 601, 739 N.W.2d at 668.
17. *Shepherd Montessori Ctr.*, 275 Mich. App. at 601, 739 N.W.2d at 668.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Shepherd Montessori Ctr.*, 275 Mich. App. at 601, 739 N.W.2d at 668 (citations omitted).
24. *Id.* at 602, 739 N.W.2d at 668-69 (citations omitted).

> send their children to the school; [5] and the economic burdens of alternative locations.[25]

On remand, the trial court once again found in favor of defendants with respect to both the RLUIPA issues and with respect to plaintiff's equal protection claim, and again granted summary disposition in favor of defendants.[26] With respect to the equal protection claim, the court of appeals in *Shepherd I*, held that the "trial court erred when it granted defendants' motion for summary disposition because genuine issues of material fact remained," but on remand the trial court again concluded that plaintiff had failed to establish a genuine issue of material fact.[27]

As for the RLUIPA claim, "the plaintiff maintained that the trial court erroneously dismissed [its claim] after it ruled that other properties were actually available for plaintiff to operate a school for students from kindergarten through third grade."[28] The plaintiff maintained that "there were no other available locations within the area that were within plaintiff's budget" and no evidence was offered to rebut the plaintiff's evidence.[29] The vice president of the Ava Maria Foundation ("Foundation") signed an affidavit stating that he looked for property in the area and that none was suitable, and also listed twenty four other properties in the area that were either "too large, too expensive or not available for sale or lease."[30] The trial court found this evidence insufficient; however the court of appeals disagreed.[31] The court of appeals stated that the trial court essentially did not believe the vice president, but failed to set forth any reasons, and the trial court made the affirmative assertion that there were other available and suitable properties.[32] The trial court asserted that a property in Milan was available, but the evidence presented proved that the location was unavailable.[33] Additionally, the trial court ruled that the location at issue was not essential to plaintiff's religious exercise, but that plaintiff preferred this location because of convenience.[34] The court of appeals dismissed this ruling and stated that plaintiff's religious exercise was not one of the factors listed in *Shepherd I* and that the trial court erred in adding this requirement

25. *Id.* (citations omitted).
26. *Id.* at 602, 739 N.W.2d at 669.
27. *Id.*
28. *Id.* at 602-03, 739 N.W.2d at 669.
29. *Shepherd Montessori Ctr.*, 275 Mich. App. at 602-03, 739 N.W.2d at 669.
30. *Id.*
31. *Id.*
32. *Id.* at 604, 739 N.W.2d at 669.
33. *Id.* at 604, 739 N.W.2d at 670.
34. *Id.* at 605, 739 N.W.2d at 670.

into the third factor under *Shepherd I*.[35] The court of appeals cited a previous case that the trial court may have relied on in adding this requirement into RLUIPA,[36] but the court of appeals reiterated that RLUIPA does not require a finding that the disputed property must be essential to religious exercise as opposed to other property.[37]

Next, the trial court found that plaintiff could find other suitable property because it had access to abundant financial resources through the Foundation.[38] The trial court took it upon itself to weigh the Foundation's contributions as part of the plaintiff's financial resources because the principal testified that the plaintiff supported itself to the best of its ability but that the Foundation helped with funds if necessary to operate the school.[39] The court of appeals stated that the trial court cited no authority for its decision to deviate from the normal rule that "the existence of well funded corporate entities owned by the principal(s) of the plaintiff organization would not be relevant to whether the plaintiff has the financial resources to accomplish its goal."[40] Additionally, the "foundation's president testified that it sought to make plaintiff self-sufficient" and that "the foundation did not have plans to provide plaintiff with" support with respect to the lease whether the plaintiff stayed in its current location or whether plaintiff moved.[41] Taking into account that the trial court was to consider the evidence in the light most favorable to plaintiff before granting summary disposition for defendants, the court of appeals found that the trial court erred.[42]

The court then turned to the final factor, the economic burdens of alternate locations.[43] In *Shepherd I*, the trial court stated that other courts have held that "inconvenience and/or high cost of real property in a particular area should not be sufficient to establish a substantial burden."[44] The court of appeals found that the trial court failed to apply the law of the case with respect to this issue when it considered case law from other jurisdictions.[45] Because the court of appeals in *Shepherd I* specifically instructed the parties and the trial court to address whether the economic burden of alternate locations placed a substantial burden on plaintiff's religious exercise, the trial court was

35. *Shepherd Montessori Ctr.*, 275 Mich. App. at 605, 739 N.W.2d at 670.
36. Greater Bible Way Temple of Jackson v. City of Jackson, 268 Mich. App. 673, 681-82, 708 N.W.2d 756, 762 (2005).
37. *Shepherd Montessori Ctr.*, 275 Mich. App. at 605-06, 739 N.W.2d at 670-71.
38. *Id.* at 606, 739 N.W.2d at 671.
39. *Id.* at 606-07, 739 N.W.2d at 671.
40. *Id.* at 607, 739 N.W.2d at 671.
41. *Id.* at 607, 739 N.W.2d at 671-72.
42. *Id.* at 607-08, 739 N.W.2d at 671-72.
43. *Shepherd Montessori Ctr.*, 275 Mich. App. at 608, 739 N.W.2d at 672.
44. *Id.*
45. *Id.* at 609, 739 N.W.2d at 672.

bound to address this issue on remand.[46] The defendants argued that the trial court did address this factor, but the court of appeals found that it failed to follow its previous ruling.[47]

The plaintiff maintained that the trial court should have granted summary disposition to plaintiff on its RLUIPA claim and the court of appeals agreed.[48] Looking at the evidence presented, the court of appeals found that "reasonable minds could not differ that plaintiff could not afford any of the listed properties."[49] Based on the principal's testimony, the fact that defendants had no justification for looking to the Foundation's resources, and the defendants' failure to present evidence to rebut the Foundation's vice president's affidavit regarding the factual assertions regarding the availability, suitability or affordability of the listed properties, the defendants could not establish that plaintiff could afford any of the listed properties.[50] Pursuant to section 2000c of RLUIPA, "if the plaintiff establishes a substantial burden on its religious exercise, the burden then shifts to the defendants to show a compelling governmental interest."[51] The fact that the defendants presented no evidence of a compelling governmental interest led the court of appeals to hold that the trial court should have granted summary disposition to the plaintiff on its RLUIPA claim.[52]

The court then turned to plaintiff's equal protection claim. Plaintiff contended that "the trial court erred when it denied its motion for summary disposition on its equal protection claim and granted summary disposition to defendants."[53] The trial court relied on the fact that "plaintiff's evidence did not create a genuine issue of material fact" after the case was remanded and the parties had the benefit of discovery in denying plaintiff's motion, and that the court of appeals previously held only that plaintiff provided sufficient evidence to survive summary disposition before discovery.[54]

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46. *Id.* at 608-09, 739 N.W.2d at 672.

47. *Id.* The court of appeals also noted that the trial court acknowledged that the court of appeals previously held differently from courts in other jurisdictions and that the trial court then distinguished the present case from *Greater Bible Way*, 268 Mich. App. 673 (2005). *Id.* at 17-18.

48. *Shepherd Montessori Ctr.*, 275 Mich. App. at 610, 739 N.W.2d at 673.

49. *Id.* at 609, 739 N.W.2d at 673.

50. *Id.* at 609-11, 739 N.W.2d at 673. The trial court had concluded that the affidavit was too vague and conclusory, but the plaintiff had provided an extensive binder with evidence to back up the affidavit. *Id.* at 610, 739 N.W.2d at 673. Additionally, the trial court stated that the plaintiff provided an insufficient explanation of its finances, but the principal had testified at length regarding plaintiff's financial condition and tuition. *Id.* at 610-11, 739 N.W.2d at 673. The court of appeals held that the trial court erred in disregarding this evidence. *Id.* at 611, 739 N.W.2d at 673.

51. *Shepherd Montessori Ctr.*, 275 Mich. App. at 611, 739 N.W.2d at 673.

52. *Id.*

53. *Id.*

54. *Id.* at 611, 739 N.W.2d at 673-74.

However, the court of appeals stated that "nothing in *Shepherd I* even arguably suggested that the lack of discovery factored into this court's conclusion that plaintiff had presented a genuine issue of material fact on its equal protection claim."[55] The court of appeals held that a genuine issue of material fact remained because plaintiff and Rainbow Rascals could be considered similarly situated.[56] The defendants failed to provide any evidence that plaintiff's request for a variance required any more of a deviation from the zoning ordinance than the variance granted to Rainbow Rascals.[57] Therefore, "reasonable minds could have differed with regard to "whether plaintiff and Rainbow Rascals were similarly situated and the trial court should not have granted summary disposition to defendants."[58]

The court of appeals also held that the trial court failed to apply the law of the case when it held that although Rainbow Rascals received a variance, the variance had nothing to do with the number of students or level of education.[59] This argument had previously been rejected in *Shepherd I* when the court held that "plaintiff did argue that it was treated differently from the Rainbow Rascals day care center in that plaintiff wanted to use the property to educate only twenty-five children, whereas Rainbow Rascals was permitted to use the premises for up to one hundred children."[60] The court of appeals found that the trial court should have granted summary disposition to plaintiff because although "there were issues of fact that remained about whether plaintiff and Rainbow Rascals were similarly situated, the defendants had conceded on appeal that the similarity of the two entities was not in dispute."[61] The evidence presented established that even though there would be far fewer children in the school with less traffic and density problems, the defendants denied plaintiff a variance without a sufficient reason.[62]

The court of appeals held that defendants had treated a secular entity more favorably than plaintiff, a religious entity.[63] The defendant then had the burden of showing that their denial of plaintiff's variance was precisely tailored to achieve a compelling governmental interest and the defendants offered no evidence or argument to support its position in this regard.[64] Therefore, the court of appeals reversed the trial court's grant of summary disposition to

55. *Id.* at 611-12, 739 N.W.2d at 674.
56. *Id.* at 612, N.W.2d at 674.
57. *Shepherd Montessori Ctr.*, 275 Mich. App. at 612, 739 N.W.2d at 674.
58. *Id.*
59. *Id.* at 612-13, 739 N.W.2d at 674.
60. *Id.* (citations omitted).
61. *Id.* at 613, 739 N.W.2d at 674-75.
62. *Id.* at 613, 739 N.W.2d at 675.
63. *Shepherd Montessori Ctr.*, 275 Mich. App. at 613, 739 N.W.2d at 674-75.
64. *Id.*

defendants on plaintiff's RLUIPA and equal protection claims and reversed the trial court's denial of summary disposition to plaintiff on the same claims.[65] The court held that the defendants violated RLUIPA and that application of the zoning ordinance violated the equal protection guarantee of the US Constitution.[66] The court also noted that the ZBA's decision was contrary to law and the trial court erred when it affirmed the ZBA's denial of plaintiff's request for a variance.[67] The court then remanded the case to the trial court to enter judgment in favor of plaintiff and to reverse the ZBA's denial of plaintiff's variance request.[68]

In another case, *Herman v. County of Berrien*,[69] the issue centered around the location of a new law enforcement training facility. In particular an administrative building and four outdoor shooting ranges located behind the building chosen by the Berrien County Commissioners (the "County").[70] The property was owned by the County and is located within Coloma Charter Township.[71] "Plaintiffs, all neighboring residents, challenged whether the county had the ability to operate shooting ranges that are seemingly in violation of several township ordinances," including zoning and anti-noise ordinances.[72] The trial court granted defendants motion for summary disposition and held that the building as well as the shooting ranges were exempt from township ordinances, and the plaintiffs appealed.[73]

The court of appeals began its analysis by citing to *Pittsfield Charter Township v. Washtenaw County*.[74] According to the court of appeals, the Michigan Supreme Court in *Pittsfield* held that "a county was exempt from township zoning ordinances when it came to siting county buildings."[75] The Supreme Court based its decision on the language of MCL sections 46.11(b) and (d).[76] Both parties in the instant case agreed that "the siting and erecting of a county building is exempt from township zoning and anti-noise ordinances" and that the county could disregard any approved uses for the site within the township zoning ordinance, but the parties disagreed with whether other physical improvements located on the property were also

65. *Id.* at 614, 739 N.W.2d at 675.
66. *Id.*
67. *Id.*
68. *Id.*
69. 275 Mich. App. 382, 739 N.W.2d 635 (2007).
70. *Id.* at 383, 739 N.W.2d at 636.
71. *Id.* at 383-84, 739 N.W.2d at 636.
72. *Id.* at 384, 739 N.W.2d at 636.
73. *Id.*
74. 468 Mich. 702, 664 N.W.2d 193 (2003).
75. *Herman*, 275 Mich. App. at 385, 739 N.W.2d at 637 (citing *Pittsfield*, 468 Mich. at 710-11, 664 N.W.2d at 197-98).
76. *Id.* at 384, 739 N.W.2d at 636.

immune.[77] The statute in question MCL sections 46.11(a), (b) and (d) states:

> A county board of commissioners, at a lawfully held meeting, may do one or more of the following:
>
> (a) Purchase or lease for a term not to exceed 20 years, real estate necessary for the site of a courthouse, jail, clerk's office, or other county building in that county.
>
> (b) Determine the site of, remove, or designate a new site for a county building. The exercise of the authority granted by this subdivision is subject to any requirement of law that the building be located at the county seat.
>
> * * *
>
> (d) Erect the necessary buildings for jails, clerks' offices, and other county buildings, and prescribe the time and manner of erecting them.[78]

According to the court, the specific power granted to the county was to designate a site for a county building.[79] Since the word "site" is not a defined term within the statute, the court looked to *Charter Township of Northville v. Northville Public Schools*[80] in which the Supreme Court used the dictionary to help define the term. The term is defined as "the place where something was, is, or is to be located" or "the area or exact plot of ground on which anything is, has been, or is to be located."[81] Accordingly, the court in the instant case, using these same definitions, stated, "it is clear that when designating a new 'site' for county buildings, the 'site' includes the entire area of ground on which the building is to be located . . . or in real terms, the entire parcel where the buildings will be located . . . is not subject to regulation."[82] The court disregarded the dissent's argument that only the building was immune from regulation by arguing that if only the building was immune then the parking lots, sidewalks, lighting, and landscaping would be required to conform to township ordinances,

77. *Id.* at 384-85, 739 N.W.2d at 636.

78. MICH. COMP. LAWS ANN. § 46.11 (West 2006).

79. *Herman*, 275 Mich. App. at 386-87, 739 N.W.2d at 638; *see* MICH. COMP. LAWS ANN. § 46.11(b) (West 2006).

80. 469 Mich. 285, 666 N.W.2d 213 (2003).

81. *Herman*, 275 Mich. App. at 387, 739 N.W.2d at 638 (citations omitted).

82. *Id.*

which is not a limitation or restriction contained in the statute.[83] Because the shooting ranges are located on the property chosen as a site for a county building, they are not subject to the township's ordinances.[84] The court also stated that the there were no provisions in the township's zoning statute, MCL section 125.271(1), that applied more specifically to the physical improvements on the property than the cited statute.[85] Thus, the court held that the language within the statute grants to the county the authority to choose a site for county buildings, and the "site" entails the entire parcel, not just the area of land on which the building actually sits.[86]

In *Frenchtown Charter Township v. Cousino,*[87] the issue of regulatory taking was exaulted; the plaintiffs appealed the trial court's grant of summary disposition in favor of Frenchtown Township, Monroe County and the City of Monroe on the Cousinos' claim that defendants inversely condemned their property which amounted to a regulatory taking.[88]

The Cousinos own a narrow strip of land that runs parallel to the landing strip of Monroe Custer Airport in Frenchtown Township in Monroe County.[89] The City of Monroe owns the land and the airport.[90] The Cousinos property is zoned AG ("Agricultural") and they wanted to have it rezoned to a single-family residential classification in order to sell their property for $1.75 million.[91] "The Frenchtown Planning Commission recommended the approval of the rezoning request, but the Monroe County Planning Commission recommended that it be denied."[92] The County Planning Commission's reason was that the Michigan Aeronautics Commission approved an airport approach plan in 2002 which might preclude rezoning.[93] Under the plan, almost all of the Cousino property is located in an "accident safety zone 5" and residential land use is prohibited in this area.[94] After Frenchtown Township learned about

83. *Id.* at 387-88, 739 N.W.2d at 638-39. The dissent argued that the grant of power extended to the siting and erection of buildings, but other physical improvements or additional uses were only immune if they were necessary or incidental to the normal and reasonable use of a county building. *Id.* at 398-99, 739 N.W.2d at 644-45.

84. *Id.* at 387, 739 N.W.2d at 638.

85. *Id.* at 388, 739 N.W.2d at 638.

86. *Herman*, 275 Mich. App. at 388-89, 739 N.W.2d at 639.

87. 275 Mich. App. 1, 737 N.W.2d 328 (2007).

88. *Id.* at 2, 737 N.W.2d at 329.

89. *Id.*

90. *Id.*

91. *Id.* at 2-4, 737 N.W.2d at 329-30.

92. *Id.* at 3-4, 737 N.W.2d at 330.

93. *Frenchtown Charter Twp.*, 275 Mich. App. at 2, 737 N.W.2d at 329. The plan was adopted for Custer Airport pursuant to section 3 of the Airport Zoning Act and limits how land may be used or zoned around the airport. *Id.*

94. *Id.*

the approach plan, it tabled the rezoning request and filed an action for declaratory judgment in an effort to obtain a ruling from the court clarifying these issues.[95]

The Cousinos filed a cross-claim against the City, the County, MDOT and the Michigan Aeronautics Commission and also a counterclaim against Frenchtown Township alleging "that they had to cancel a purchase agreement for $1.75 million (and, later, $2 million)" due to the township's failure to rezone the property.[96] The Cousinos alleged that because of these parties their land is in an airport hazard area, which rendered the property economically worthless and amounted to an inverse condemnation.[97]

The trial court ruled that the Township "could not rezone the Cousinos' property because it was prohibited by state law from changing a zoning designation in a manner contrary to the airport approach plan" and that the defendants' action did not result in a regulatory taking or inverse condemnation.[98]

The Michigan Court of Appeals affirmed the ruling of the trial court on different grounds.[99] To make the issue clear, the court restated the basis of the Cousinos argument as, "absent rezoning to single-family residential, the sale price for the property will be a fraction of the $2 million they were offered with the condition that the property could be rezoned as single-family residential."[100] The court of appeals did, however, agree with the trial court that neither the Township, City nor the County could rezone the property because of state law.[101] Additionally, neither party disputed that the airport approach plan for Custer Airport was properly drafted by the Michigan Aeronautics Commission under the Airport Zoning Act.[102] The court of appeals set aside the Township Zoning Act, the statute that was in effect when the Cousinos applied for rezoning.[103] Under MCL section 125.273a,

> [i]f a zoning ordinance was adopted before the effective date of the amendatory act that added this section, the zoning ordinance is not required to be consistent with any airport zoning regulations . . . [h]owever, a zoning ordinance amendment

95. *Id.* at 3, 737 N.W.2d at 329-30.

96. *Id.* at 3-4, 737 N.W.2d at 330.

97. *Id.* The Cousinos later dismissed MDOT and the Michigan Aeronautics Commission from their cross-claim. *Frenchtown Charter Twp.*, 275 Mich. App. at 3-4, 737 N.W.2d at 330.

98. *Id.* at 3, 737 N.W.2d at 330.

99. *Id.*

100. *Id.* at 3-4, 737 N.W.2d at 330.

101. *Id.* at 4, 737 N.W.2d at 330.

102. *Id.* at 3-4, 737 N.W.2d at 330. The Airport Zoning Act is codified in MICH. COMP. LAWS ANN. §§ 259.442, 259.434 & 259.447 (West 2006).

103. *Frenchtown Charter Twp.*, 275 Mich. App. at 4, 737 N.W.2d at 330.

> adopted or variance granted after the effective date of the amendatory act that added this section shall not increase any inconsistency that may exist between the zoning ordinance or structures or uses and any . . . airport approach plan.[104]

Effective July 1, 2006 the Township Zoning Act was repealed, but the recently enacted Michigan Zoning Enabling Act, MCL section 125.3702(2) provides that "[t]his section shall not be construed to alter, limit, void, affect, or abate any pending litigation, administrative proceeding, or appeal that existed on the effective date of this act or any ordinance, order, permit, or decision that was based on the acts repealed by this section."[105] The new statute, MCL section 125.3203, provides a similar restriction to the old statute that requires that an amendment adopted or a variance granted pursuant to a zoning ordinance shall not increase any inconsistency.[106] According to the court, pursuant to this state law the local units of government are obligated to comply with the airport approach plan and are "bound not to alter zoning classifications designated by the airport approach plan."[107] The Cousinos were required to prove "that the economic impact and the extent to which *the regulation* has interfered with distinct investment-backed expectations are the functional equivalent of a physical invasion by the government of the property in question."[108] The court stated that the Cousinos did not satisfy this test and therefore cannot impose liability on the Township, the City or the County because the regulation did not cause the taking.[109]

As for the Cousinos' argument that the Township's failure to rezone their property was a violation of their constitutional rights, the court concluded that argument was not ripe for review.[110] The Township only "*tabled* the rezoning request in order to file the declaratory judgment action to clarify its obligations," it did not officially deny the request.[111] The Cousinos did not satisfy the rule of finality because they failed to show that "the administrative agency [had] arrived at a final, definitive position regarding how it [would] apply the regulations at issue to the particular land in question."[112] The Michigan Court of Appeals affirmed the ruling of the trial court

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104. MICH. COMP. LAWS ANN. § 125.273a (West 2006).

105. MICH. COMP. LAWS ANN. § 125.3702(2) (West 2006).

106. *Frenchtown Charter Twp.*, 275 Mich. App. at 5, 737 N.W.2d at 331.

107. *Id.*; *see* MICH. COMP. LAWS §125.3203(4) (2006).

108. *Frenchtown Charter Twp.*, 275 Mich. App. at 6, 737 N.W.2d at 331 (citing K & K Constr., Inc. v. Dep't of Envtl. Quality, 267 Mich. App. 523, 705 N.W.2d 365 (2005) (emphasis in original).

109. *Id.* at 8-9, 737 N.W.2d at 331-32.

110. *Id.* at 6, 737 N.W.2d at 331.

111. *Id.* at 3, 737 N.W.2d at 329.

112. *Id.* (citing Paragon Properties Co. v. City of Novi, 452 Mich. 568, 579, 550 N.W.2d 772 (1996) (citations omitted)).

in favor of the Township, the City and the County.[113]

In *English Gardens Condominium, LLC v. Howell Township,*[114] the plaintiff developer sued defendants, a township, a zoning administrator, and a treasurer, seeking a writ of mandamus, a declaratory judgment, and contract damages regarding funds drawn on a letter of credit.[115] The Livingston Circuit Court granted summary disposition in favor of defendants.[116] The developer appealed.[117] "In 2002, defendant, Howell Township, approved plaintiff's site plan for a condominium complex."[118] As security for the completion of the complex, the defendant required a letter of credit from the plaintiff.[119] As the complex progressed, the original letter of credit expired and new letters of credit were obtained by the plaintiff with various expiration dates and lower amounts.[120] As the developer completed the various buildings, the defendant issued certificates of zoning compliance.[121] When the certificates of zoning compliance for the last two buildings were issued, the landscaping and plantings were listed as contingencies.[122] On September 1, 2004, the zoning administrator wrote a letter to the plaintiff explaining what actions should be taken before the latest letter of credit expired one month later.[123] This letter included completion of all of the landscaping, the storm water detention/retention pond, the common areas, removal of the silt fencing, and the surfacing of the roadways and drive/parking areas.[124] The developer responded that these matters "were maintenance concerns, and thus the responsibility of the condominium association, not the developer."[125] On September 23, 2004, the defendant withdrew the full amount available from the letter of credit "on the ground that the plaintiff was refusing either to make repairs or renew the letter of credit."[126] The plaintiff filed suit for return of the funds, seeking a writ of mandamus, a declaratory judgment, and contract damages.[127]

Plaintiff's first argument was that "the trial court erred in dismissing its mandamus, declaratory judgment and contract claims

113. *Id.* at 7, 737 N.W.2d at 332.
114. 273 Mich. App. 69, 729 N.W.2d 242 (2006).
115. *Id.* at 72, 729 N.W.2d at 246.
116. *Id.* at 70, 729 N.W.2d at 245.
117. *Id.* at 70, 729 N.W.2d at 245.
118. *Id.*
119. *Id.*
120. *English Gardens*, 273 Mich. App. at 71, 729 N.W.2d at 245.
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.* at 72, 729 N.W.2d at 245.
126. *English Gardens*, 273 Mich. App. at 72, 729 N.W.2d at 245.
127. *Id.* at 72, 729 N.W.2d at 245.

because there was no question of fact that the defendants violated their own ordinance."[128] The court first addressed the issue of mandamus. The court stated that "mandamus is proper only where the petitioner has no adequate remedy at law."[129] "The trial court denied the request for mandamus on the grounds that the township was entitled to keep the money in question because of plaintiff's failure to comply with the site plan, and that the decision to draw on the letter of credit was discretionary in nature."[130] The court of appeals agreed with the result, but not with the trial court's reasoning.[131] Due to the fact that the plaintiff also sued on a contract theory, the court stated that the plaintiff had an adequate remedy at law – the contract damages – and therefore mandamus was not appropriate.[132] Next the court addressed the declaratory judgment and contract claims. The trial court rejected both of these claims based on the fact that "the plaintiff did not comply with the site plan," and "therefore the defendants were entitled to withdraw the money."[133] The court of appeals looked to the Howell Township ordinance that authorized the township to require security.[134] Section 20.15 provides, "[i]n the event that the applicant shall fail to provide improvements according to the approved final site plan, the Township Board shall have the authority to have such work completed, and to reimburse itself for costs of such work by appropriating funds from the deposited security, or may require performance by the bonding company."[135] The court looked to the exact wording of the ordinance, which did not permit the preemptive seizure of the deposited security before work was completed.[136] The ordinance clearly authorized the township to have the work completed and then reimburse itself for the costs of such work, but the court held that the township was bound to abide by the sequencing requirements of the ordinance.[137] The plaintiff also argued that the trial court erred in dismissing its claims because there was no question of fact that the plaintiff's development complied with the site plans and the applicable township ordinance.[138] Because neither the plaintiff nor the defendant appended the site plans to the court documents, the court refused to address this claim based on MCR 2.113(F)(1).[139]

128. *Id.* at 72, 729 N.W.2d at 246.
129. *Id.*
130. *Id.* at 74, 729 N.W.2d at 246.
131. *Id.*
132. *English Gardens*, 273 Mich. App. at 74, 729 N.W.2d at 246.
133. *Id.* at 74-75, 729 N.W.2d at 247.
134. *Id.* at 76, 729 N.W.2d at 248.
135. *Id.* at 76-77, 729 N.W.2d at 248.
136. *Id.* at 77, 729 N.W.2d at 248.
137. *Id.*
138. *English Gardens*, 273 Mich. App. at 80, 729 N.W.2d at 249.
139. *Id.* at 81, 729 N.W.2d at 249.

The court of appeals reversed the dismissal of the developer's declaratory judgment claim, directed the trial court on remand to declare that defendants acted contrary to the relevant ordinance in drawing the money from the letter of credit, and directed the trial court to order defendants to return the deposited security to the developer.[140]

III. FORECLOSURE

In *Sweet Air Investment, Inc. v. Kenney,*[141] the plaintiff "appealed as of right the trial court's order denying its motion for summary disposition," and also "the trial court's conversion of the July 1, 2005 hearing on plaintiff's motion into an immediate bench trial under MCR 2.116(I)."[142] The trial court set aside the foreclosure sale due to the fact that the property was sold as one parcel instead of multiple parcels.[143]

"The property at issue in this case is comprised of 66-acres located on Marr Lake."[144] There is "an 8,000 square foot main house, five outbuildings, dog kennels, and a caretaker's house."[145] The legal descriptions in the deed to the property indicate there are five different parcels and the property has three different tax parcel identification numbers.[146] On January 12, 1993, the defendant, Linda L. Kenney, bought the entire property from the Campfire Girls.[147] Later in 1993, Kenney conveyed the property to herself and another defendant, Frank DiSanto, as tenants by the entirety.[148] In 1995, both defendants conveyed the property to the Frank J. DiSanto Revocable Trust (the "Trust").[149] The main house was used as a residence for Kenney and DiSanto, and they used the property to raise show dogs while the other house was used by the caretakers.[150] The two homes were separated by a small creek and the "caretakers provided services in lieu of paying rent; however, the caretakers paid their own utilities," and there was never a written lease.[151] "On March 15, 2000, the Trust took out a loan in the amount of $475,000.00 from Eastern State Bank ("Eastern") and secured the loan by a mortgage on the

140. *Id.* at 82-83, 729 N.W.2d at 251.
141. 275 Mich. App. 492, 739 N.W.2d 656 (2007).
142. *Id.* at 494, 739 N.W.2d at 658.
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.* at 495, 739 N.W.2d at 658.
147. *Sweet Air Investment*, 275 Mich. App. at 495, 739 N.W.2d at 658.
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*

property."[152] "The legal description of the property in the mortgage consisted of the entire 66-acres."[153] The Trust failed to make its January 2001 and February 2001 payments and eventually Eastern instituted foreclosure proceedings by advertisement.[154] "On December 20, 2001, Eastern successfully bid the amount of the indebtedness, $591,601.28 . . . and received a sheriff's deed."[155] "Eastern then quitclaimed the property to plaintiff, Sweet Air Investments ("Sweet Air"), a wholly owned subsidiary of Eastern."[156] "Under MCL 600.3240, "the redemption period expired on January 24, 2003."[157] On March 11, 2004, Sweet Air filed a complaint in district court "seeking possession of the property, eviction, restitution, and an order enjoining defendants from causing any damage to the property."[158] Defendants in turn filed an answer and a counterclaim, which "asserted several claims in excess of the district court's jurisdiction" and the parties stipulated to the removal of the case to circuit court.[159] Both plaintiff and defendants filed motions for summary disposition.[160] "At the hearing on plaintiff's motion for summary disposition, the trial court converted the hearing into an immediate bench trial under MCR 2.116(I) and held, as a matter of law, that "the foreclosure sale should be set aside because the property was comprised of two distinct parcels that were occupied separately."[161]

In reaching its holding, the court first addressed the issue of parceling under MCL section 600.3224.[162] Sweet Air argued that the trial court erred in setting aside the foreclosure sale.[163] The court, citing *U.S. v. Garno*,[164] stated that "it would require a strong case of fraud or irregularity, or some peculiar exigency, to warrant setting a foreclosure sale aside."[165] Next the court set forth the applicable language of MCL section 600.3224, "[i]f the mortgaged premises consist of distinct farms, tracts, or lots not occupied as 1 parcel, they shall be sold separately, and no more farms, tracts, or lots shall be sold than shall be necessary to satisfy the amount due on such mortgage at the date of the notice of sale . . . [h]owever, if the distinct

152. *Id.*
153. *Sweet Air Investment*, 275 Mich. App. at 495, 739 N.W.2d at 658.
154. *Id.* at 495, 739 N.W.2d at 658-59. The defendants claimed that they did not receive any letters from Eastern and also made no effort to cure. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*
158. *Sweet Air Investment*, 275 Mich. App. at 495, 739 N.W.2d at 658.
159. *Id.* at 496, 739 N.W.2d at 659.
160. *Id.*
161. *Id.*
162. *Id.* at 497, 739 N.W.2d at 659.
163. *Id.*
164. 974 F.Supp. 628, 633 (E.D. Mich. 1997).
165. *Sweet Air Investment*, 275 Mich. App. at 497, 739 N.W.2d at 659.

lots are occupied as one parcel, they may in such case be sold together."[166] The court stated that this language is mandatory rather than discretionary.[167] In looking to precedent, the court stated that "[t]he proper inquiry in determining if the property consists of one parcel is whether, at the time of the foreclosure sale, the property was 'held, treated, occupied or used' as one continuous parcel" and the burden of proof is on the mortgagor in establishing that the lots were not occupied as one parcel.[168] Additionally, the statute does not require that the parcels be sold separately when doing so would be arbitrary or impractical and the court of appeals has held that "if the land is mortgaged as a single parcel it may be sold as such."[169] The court then looked to the over 100 years of Michigan case law interpreting this statute and reviewed the cases that plaintiff relied on as well as the cases that the defendants relied on.[170] The court easily distinguished the cases that the defendants relied on and stated that "[t]he case law clearly establishes that Michigan courts have interpreted [MCL 600.3224] to require the sale of individual parcels of property covered under a single mortgage only when those parcels are in fact physically separated and not interconnected or integrated in their use or occupancy."[171] "In this case, the two parcels were physically connected and accessible to each other by a bridge and the property was bought, mortgaged, and advertised for sale as one property."[172] Due to the fact that "the caretakers occupied the caretaker's home for the purpose of maintaining the dog kennels and the entire property" the caretaker parcel was an integral part of the main parcel.[173] The court stated that just because the caretaker's parcel was an irregular shape and had a unique geography did not result in the conclusion that there were two distinct parcels that were occupied separately.[174] The court held that the trial court erred in holding that plaintiff was required to sell the parcels separately.[175]

Next the court addressed the defendants' argument that they did not receive adequate notice and that the plaintiff failed to comply with

166. *Id.*; *see* MICH. COMP. LAWS ANN. § 600.3224 (West 2006).

167. *Sweet Air Investment*, 275 Mich. App. at 497-98, 739 N.W.2d at 659-60 (citing Cox v. Townsend, 90 Mich. App. 12, 15, 282 N.W.2d 223, 226 (1979)).

168. *Id.* (citing *Cox*, 90 Mich. App. at 16, 282 N.W.2d at 226).

169. *Id.* at 498, 739 N.W.2d at 660 (citing *Cox*, 90 Mich. App. at 17-18, 282 N.W.2d at 226 (citations omitted)).

170. *Id.* at 498-500, 739 N.W.2d at 660-61.

171. *Id.* at 499-500, 739 N.W.2d at 660-61.

172. *Id.* at 501, 739 N.W.2d at 661.

173. *Sweet Air Investment*, 275 Mich. App. at 501, 739 N.W.2d at 661.

174. *Id.* Additionally, the court pointed out that if the property was divided, the caretaker parcel would be isolated from the highway and would impair the value of the property as a whole. *Id.* Moreover, even though the property overlapped taxing jurisdictions, that did not result in the parcels being separated and distinct. *Id.*

175. *Id.*

the statutory requirements of MCL section 600.3220 by failing to publish notice of the adjournment of the sale from December 13, 2001 until December 20, 2001.[176] MCL section 600.3220 states:

> Such sale may be adjourned from time to time, by the sheriff or other officer or person appointed to make such sale at the request of the party in whose name the notice of sale is published by posting a notice of such adjournment before or at the time of and at the place where said sale is to be made, and *if any adjournment be for more than 1 week at one time, the notice thereof, appended to the original notice of sale, shall also be published in the newspaper in which the original notice was published*, the first publication to be within 10 days of the date from which the sale was adjourned and thereafter once in each full secular week during the time for which such sale shall be adjourned. No oral announcement of any adjournment shall be necessary.[177]

"Plaintiff published notice of the adjournment of the foreclosure sale to December 20, 2001, at the Lenawee Judicial Building in the City of Adrian," but the publication that ran in The Tecumseh Herald stated that the foreclosure would be held on December 13, 2001.[178] According to the court, "a defect in notice renders a foreclosure sale voidable, not void."[179] Additionally, in order to invalidate a foreclosure sale based on a defect in notice, the mortgagor has to show that he has been prejudiced.[180] In this case, defendants could not show any prejudice from the alleged defect in the notice, they did not timely challenge the validity of the foreclosure sale, they made no effort to redeem or take any action until well after the redemption period had expired and they waited until the plaintiff instituted eviction proceeds before they took any action to challenge the foreclosure sale.[181]

The defendants further argued that the foreclosure sale should be set aside due to the plaintiff's inclusion of a prepayment premium and for excessive attorney fees.[182] The Michigan Supreme Court has held that as long as the claim is in good faith, "a mortgage sale is not necessarily invalid because more is claimed than is in fact due," and

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176. *Id.* at 501, 739 N.W.2d at 661-62.

177. *Id.* at 502, 739 N.W.2d at 662 (emphasis in original); *see* MICH. COMP. LAWS ANN. § 600.3220 (West 2006).

178. *Sweet Air Investment*, 275 Mich. App. at 502, 739 N.W.2d at 662.

179. *Id.* at 502-03, 739 N.W.2d at 662 (citations omitted).

180. *Id.* at 502, 739 N.W.2d at 662 (citing Worthy v. World Wide Fin. Servs., Inc., 347 F.Supp.2d 502 (E.D. Mich. 2004)).

181. *Id.* at 503, 739 N.W.2d at 662.

182. *Id.* at 503, 739 N.W.2d at 662-63.

an excessive claim warrants setting aside a foreclosure only if it is significantly excessive or in bad faith and an attempt was made to redeem the property.[183] The defendants claimed that they only owed $556,667.24 and the plaintiff originally claimed that they owed $591,601.28.[184] The court found that this 6% overstatement was not significant enough to set aside the foreclosure sale and the defendants did not make an effort to redeem as required by the Michigan Supreme Court in *Flax*.[185]

Finally, the court addressed the trial court's decision in converting the July 1, 2005 hearing for summary disposition into a bench trial.[186] The court looked to *Vicencio v. Ramirez*,[187] to set forth the requirements of due process in civil cases with respect to notice of the nature of the proceedings.[188] In *Vicencio*, the Michigan Court of Appeals held that "[i]n any proceeding involving notice, due process requires that the notice given be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[189] The trial court relied on MCR 2.116(I)(3) in ordering the immediate bench trial, but MCR 2.116 (I)(3) only allows this if the motion for summary disposition is made under MCR 2.116(C)(1) through MCR 2.116(C)(7), and the plaintiff had moved for summary disposition under MCR 2.116(C)(10).[190] Therefore, the court held that "the trial court had no authority to order an immediate bench trial under MCR 2.116(I)(3)," and that plaintiff should have been afforded notice of the bench trial and an opportunity to present evidence.[191]

In *In re Petition by Treasurer of Wayne County for Foreclosure*,[192] the Perfecting Church (the "Church") "purchased two parcels for use as parking lots during its church services."[193] Both parcels were transferred to the Church by a single deed that was

183. *Id.* at 503, 739 N.W.2d at 663 (citing Flax v. Mut. Bldg. & Loan Ass'n of Bay Co., 198 Mich. 676, 691, 165 N.W. 835 (1917)).

184. *Sweet Air Investment*, 275 Mich. App. at 504, 739 N.W.2d at 663.

185. *Id.* Next the court set aside the defendants' argument that they were entitled to compensation for maintaining the property under an implied contract theory. *Id.* The court held that since the defendants were in possession of the property and had the use and enjoyment of the property during the time that they maintained it and the plaintiff had been paying the taxes, insurance, and carrying the interest during the entire time, there was nothing inequitable in not allowing defendants to recover for their maintenance of the property. *Id.*

186. *Id.* at 505, 739 N.W.2d at 663.

187. 211 Mich. App. 501, 536 N.W.2d 280 (1995).

188. *Sweet Air Investment*, 275 Mich. App. at 505, 739 N.W.2d at 663.

189. *Vicencio*, 211 Mich. App. at 504, 536 N.W.2d at 282.

190. *Sweet Air Investment*, 275 Mich. App. at 505, 739 N.W.2d at 663-64.

191. *Id.* at 505-506, 739 N.W.2d at 664.

192. 478 Mich. 1, 732 N.W.2d 458 (2007).

193. *Id.* at 4, 732 N.W.2d at 460.

properly recorded.[194] The Wayne County Treasurer (the "Treasurer") listed one parcel on the Wayne County foreclosure listing.[195] "The Church paid the outstanding taxes on that parcel and the Treasurer assured the Church that there were no further outstanding taxes on either parcel."[196] Despite assuring the Church, the Treasurer initiated foreclosure proceedings against the other parcel.[197] The crux of the case rested on the fact that the Church never received notice of the pending foreclosure because the Treasurer did not comply with the notice provisions of the General Property Tax Act ("GPTA") when the Treasurer sent the statutorily required notice to the previous owner of the property,[198] and it did not post a notice on either of the parcels.[199] "The Wayne County Circuit Court entered a judgment of foreclosure and after the redemption period passed, Wayne County sold the property to the intervening parties, Matthew Tatarian and Michael Kelly."[200] After the sale, "the Church learned of the foreclosure and sale and it filed a motion for relief . . . in the Wayne County Circuit Court."[201] "The court granted the church's motion and the Court of Appeals denied the intervening parties' delayed application for leave to appeal."[202] The Court granted the parties' application for leave and directed the parties to address two issues: "(1) whether the trial court retained jurisdiction to grant relief from the judgment of foreclosure pursuant to MCR 2.612(C), notwithstanding the provisions of MCL section 211.78[l](1) and (2); and (2) whether MCL section 22.78[l] permits a person to be deprived of property without being afforded due process."[203]

This case addressed the jurisdiction of circuit courts to modify judgments of foreclosure when the foreclosing governmental unit deprives the property owner of due process.[204] The GPTA provision at issue in this case, as well as recent amendments, "reflect a legislative effort to provide finality to foreclosure judgments and to quickly return property to the tax rolls."[205] However, what happens when the property owner is not provided with a constitutionally adequate notice of the foreclosure? According to the Court, the provision of the GPTA

194. *Id.*
195. *Id.*
196. *Id.* at 4-5, 732 N.W.2d at 460.
197. *Id.* at 5, 732 N.W.2d at 460.
198. *See* MICH. COMP. LAWS ANN. § 211.78i (West 2006).
199. In re *Petition by Treasurer of Wayne County for Foreclosure*, 478 Mich. at 5, 732 N.W.2d at 460.
200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.* (citations omitted).
204. *Id.*
205. In re *Petition by Treasurer of Wayne County for Foreclosure*, 478 Mich. at 5, 732 N.W.2d at 460.

at issue in this case insulates violations of the Due Process Clause of the United States Constitution and of the Michigan Constitution from judicial review and redress and, therefore, denies the property owner procedural due process.[206]

Certain provisions of the GPTA require a foreclosing governmental unit to follow specific procedures in order to complete the foreclosure process.[207] MCL section 211.78h(1) requires a foreclosing governmental unit to file a single petition with the clerk of the circuit court of that county listing all of the property being forfeited and not redeemed to the county treasurer under MCL section 211.78g to be foreclosed under MCL section 211.78k.[208] The foreclosing governmental unit must provide proof of service of the notices required under the GPTA and proof of the personal visit to the property and publication before the hearing on the petition can take place.[209] The circuit court then has to make a series of factual determinations to complete the process.[210] Certain provisions of the GPTA have since been revised, but at the time the county foreclosed on the Church's property, the GPTA provided:

> Except as otherwise provided in subsection (5)(c) and (e), fee simple title to property set forth in a petition for foreclosure filed under section 78h on which forfeited delinquent taxes, interest, penalties, and fees are not paid within 21 days after the entry of judgment shall vest absolutely in the foreclosing governmental unit, and the foreclosing governmental unit shall have absolute title to the property. The foreclosing governmental unit's title is not subject to any recorded or unrecorded lien and shall not be stayed or held invalid except as provided in subsection (7).[211]

Additionally, MCL section 211.78k(7) provides for an appeal to the court of appeals within 21 days of the judgment of foreclosure.[212] If a property owner claims they did not receive any notice, the GPTA provides for an action for monetary damages in the Court of Claims pursuant to MCL section 211.78l(1).[213] It is pursuant to this section and section 211.78k(6) of the GPTA that the intervening parties challenged the appropriateness of the grant of relief from judgment by

206. *Id.* at 4, 732 N.W.2d at 459.
207. *Id.*
208. *See* MICH. COMP. LAWS ANN. § 211.78h(1) (West 2006).
209. *See* MICH. COMP. LAWS ANN. § 211.78k(1) (West 2006).
210. *See* MICH. COMP. LAWS ANN. § 211.78k(5) (West 2006).
211. In re *Petition by Treasurer of Wayne County for Foreclosure*, 478 Mich. at 6-7, 732 N.W.2d at 461.
212. *Id.*; *see* MICH. COMP. LAWS ANN. § 211.78k(7) (West 2006).
213. *Id.*; *see* MICH. COMP. LAWS ANN. § 211.78l(1) (West 2006).

the Church.[214] MCL section 211.78k(6) provides:

> Except as otherwise provided in subsection (5)(c) and (e), fee simple title to property set forth in a petition for foreclosure filed under section 78h on which forfeited delinquent taxes, interest, penalties, and fees are not paid on or before the March 31 immediately succeeding the entry of a judgment foreclosing the property under this section, or in a contested case within 21 days of the entry of a judgment foreclosing the property under this section, shall vest absolutely in the foreclosing governmental unit, and the foreclosing governmental unit shall have absolute title to the property, including all interests in oil or gas in that property except the interests of a lessee or an assignee of an interest of a lessee under an oil or gas lease in effect as to that property or any part of that property if the lease was recorded in the office of the register of deeds in the county in which the property is located before the date of filing the petition for foreclosure under section 78h, and interests preserved as provided in section 1(3) of 1963 PA 42, MCL 554.291. The foreclosing governmental unit's title is not subject to any recorded or unrecorded lien and shall not be stayed or held invalid except as provided in subsection (7) or (9).[215]

The intervening parties argued that this section precluded the circuit court from staying or holding the governmental unit's title invalid and also that because the Church did not avail itself of the redemption or appeal provisions provided for in subsections (6) and (7), the Church was limited to an action for monetary damages.[216] The Court did not disagree with the intervening parties interpretation of the GPTA provisions at issue, but in this case where the governmental unit did not follow the notice procedures set forth in the GPTA, and essentially denied the Church due process, the provisions of the GPTA at issue become problematic.[217] The Church argued that it should not be constrained by the limitations of the statute because of its denial of due process.[218] The Court pointed out that the GPTA did not provide an exception for a property owner that was denied due process.[219]

The Court then turned to whether this statute was constitutional

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214. In re *Petition by Treasurer of Wayne County for Foreclosure*, 478 Mich. at 8, 732 N.W.2d at 461.

215. *Id.* at 7, 732 N.W.2d at 461; *see* MICH. COMP. LAWS § 211.78k(6) (2006).

216. In re *Petition by Treasurer of Wayne County for Foreclosure*, 478 Mich. at 8, 732 N.W.2d at 461.

217. *Id.* at 8, 732 N.W.2d at 461-62.

218. *Id.* at 8-9, 732 N.W.2d at 462.

219. *Id.* at 9, 732 N.W.2d at 462.

when it operated to deprive a property owner of its property without due process.[220] The Court stated that it "must presume a statute is constitutional and construe it as such, unless the only proper construction renders the statute unconstitutional."[221] As for due process requirements, the United States Supreme Court has held that "due process requires the government to provide 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'"[222] Additionally, "when notice is a person's due...[t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."[223] However, "due process does not require that a property owner receive *actual notice*."[224]

In summary, the Court stated "the statute permits a foreclosing governmental unit to ignore completely the mandatory notice provisions of the GPTA, seize absolute title to a taxpayer's property, and sell the property, leaving the circuit court impotent to provide a remedy for the blatant deprivation of due process."[225] The Court found that this is "patently unconstitutional" and that "the plain language of the statute simply [did] not permit a construction that render[ed] the statute constitutional because the statute's jurisdictional limitation encompass[ed] all foreclosures, including those where there [had] been a failure to satisfy minimum due process requirements, as well as those situations in which constitutional notice [was] provided, but the property owner [did] not receive actual notice."[226] The Court pointed out that if the foreclosing governmental unit complied with the notice requirements, MCL section 211.78k would not be problematic.[227] In fact the GPTA provides a damages remedy that is not constitutionally required.[228]

Justice Weaver concurred in the result only.[229] Justice Weaver disagreed with the Court's interpretation of the relevant provisions of

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220. *Id.*

221. *Id.*

222. In re *Petition by Treasurer of Wayne County for Foreclosure*, 478 Mich. at 9, 732 N.W.2d at 462 (quoting *Jones v. Flowers*, 547 U.S. 220, 226 (2006), quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)).

223. *Id.* (quoting *Jones*, 547 U.S. at 229, quoting *Mullane*, 339 U.S. at 315).

224. *Id.* (citing *Jones*, 547 U.S. at 225 (emphasis added)).

225. *Id.* at 10, 732 N.W.2d at 462.

226. *Id.* at 10, 732 N.W.2d at 463.

227. *Id.* Additionally, the GPTA notice provisions provide more notice than is required to satisfy due process, therefore if the foreclosing governmental unit only partially complied with MCL section 211.78k would not be problematic. In re *Petition by Treasurer of Wayne County for Foreclosure*, 478 Mich. at 11 n.19, 732 N.W.2d at 463 n.19.

228. *Id.* at 10, 732 N.W.2d at 463.

229. *Id.* at 11-12, 732 N.W.2d at 463-64.

the GPTA.[230] She specifically disagreed that the relevant provisions of the GPTA in effect at the time the petition for foreclosure was filed deprived the circuit court of jurisdiction to grant relief from the circuit court's foreclosure judgment.[231] Justice Weaver looked to MCR 2.612(C) to give the power to the circuit court to grant relief from a judgment.[232] MCR 2.612(C)(1) states:

> (1) On motion and on just terms, the court may relieve a party or the legal representative of a party from a final judgment, order, or proceeding on the following grounds:
>
> (a) Mistake, inadvertence, surprise, or excusable neglect.
>
> (b) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under MCR 2.611(B).
>
> (c) Fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.
>
> (d) The judgment is void.
>
> (e) The judgment has been satisfied, released, or discharged; a prior judgment on which it is based has been reversed or otherwise vacated; or it is no longer equitable that the judgment should have prospective application.
>
> (f) Any other reason justifying relief from the operation of the judgment.[233]

Justice Weaver stated, "[c]ontrary to appellants' assertion, MCLA section 211.781 does not *divest* the circuit court of its power to grant relief from a judgment as specified by MCR 2.612(C)(1). Indeed, nothing in either MCL 211.781 or MCL 211.78k removes the circuit court's power to grant relief from a judgment of foreclosure under MCR 2.612(C). MCL 211.781(1) only prohibits a displaced property owner from bringing a new *action* for possession."[234] According to Justice Weaver, "an 'action' is a proceeding in court", "[a] motion for relief from a judgment of foreclosure under MCR 2.612(C) is a

230. *Id.* at 12, 732 N.W.2d at 463-64.
231. *Id.*
232. *Id.* at 19, 732 N.W.2d at 467.
233. *In Re Petition by Treasurer of Wayne County for Foreclosure*, 478 Mich. at 19, 732 N.W.2d at 467.
234. *Id.* at 19, 732 N.W.2d at 467-468.

motion to set aside an existing judgment, and a 'motion' is an application requesting a court to make a specified ruling or order and not a separate action."[235] Accordingly, MCL section 211.781 does not apply when "a property owner files a motion for relief from a judgment under MCL 2.612(C)."[236]

IV. QUIET TITLE

In *Ameriquest Mortgage Company v. Alton,*[237] the Michigan Court of Appeals convened a special panel pursuant to MCR 7.215(J) to resolve a supposed conflict between the court of appeals ruling in the consolidated cases comprising *Ameriquest Mortgage Company v. Alton,*[238] and *Washington Mutual Bank, F.A. v. ShoreBank Corporation.*[239] The matter was decided without oral argument pursuant to MCR 7.214(E).[240]

"The consolidated cases in *Ameriquest* [arose] from competing claims to quiet title to residential property."[241] Samir Yousif ("Yousif") obtained a loan from Franklin Funding ("Franklin") in the amount of $255,000 in exchange for a mortgage on the property at issue.[242] The mortgage was recorded on March 11, 2002.[243] Later, Yousif obtained another loan from "Arkan D. Alton ("Alton") in exchange for an $86,000 mortgage on the same property [and] Alton recorded his mortgage on March 21, 2003."[244] "Alton acknowledged that he was aware of the preexisting mortgage on the property" at the time he made his loan to Yousif.[245] Then, Yousif obtained a loan from Ameriquest in the amount of $294,300 which was also secured by the property.[246] At this time, Yousif purportedly falsely represented to Ameriquest that there were no encumbrances on the property except for the Franklin mortgage.[247] Ameriquest recorded its mortgage on May 1, 2003 and although it did perform a title search, Ameriquest did not discover Alton's mortgage.[248] The funds from Ameriquest were provided to Yousif in order to pay off the Franklin mortgage and

235. *Id.* at 20, 732 N.W.2d at 468.
236. *Id.*
237. 273 Mich. App. 84, 731 N.W.2d 99 (2006).
238. 271 Mich. App. 660, 726 N.W.2d 424 (2006), *vacated in part*, 271 Mich. App. 801, 726 N.W.2d 424 (2006).
239. 267 Mich. App. 111, 703 N.W.2d 486 (2005).
240. *Ameriquest Mortgage Co.*, 273 Mich. App. at 86, 731 N.W.2d at 101.
241. *Id.*
242. *Id.* at 87, 726 N.W.2d at 101.
243. *Id.*
244. *Id.*
245. *Id.*
246. *Ameriquest Mortgage Co.*, 273 Mich. App. at 87, 726 N.W.2d at 101.
247. *Id.*
248. *Id.* at 87, 726 N.W.2d at 101-02.

a certificate of discharge of the Franklin mortgage was recorded on September 18, 2003.[249] At some point, Yousif defaulted on both the Alton and Ameriquest loans and Alton foreclosed via advertisement.[250] A sheriff's sale was conducted on September 2, 2003, Alton purchased the property for $92,863.42 and the sheriff's deed was recorded on September 9, 2003.[251] Appraisals of the property valued the property between $300,000 and $327,000.[252]

"In June 2004, Alton and Ameriquest filed separate declaratory actions in the Oakland County Circuit Court" to quiet title to the property.[253] The court consolidated the cases and both Alton and Ameriquest filed motions for summary disposition.[254] Relying on the doctrine of equitable subrogation, Ameriquest argued that it should be able to assume the priority of Franklin Funding because the funds that were loaned to Yousif were used to pay off the Franklin mortgage, which was first in priority.[255] Additionally, Ameriquest argued that Alton would receive a windfall if he received the property valued at $300,000 or more for his loan of $86,000 and Ameriquest would lose all the funds it loaned to Yousif to pay off the first priority Franklin mortgage.[256] Alton argued that Ameriquest was a volunteer when it paid off the Franklin mortgage and Ameriquest's mortgage was eliminated by the foreclosure proceedings.[257] On July 19, 2005, the circuit court granted summary disposition to Ameriquest and denied Alton's motion.[258] The circuit court found "that Ameriquest would be prejudiced if its claim were extinguished," but if it granted relief to Ameriquest then Alton would still have title that he received through the sheriff's sale.[259]

Alton appealed and the court of appeals held that it was bound to follow the ruling in *Washington Mutual* and reversed the circuit court on the grounds that Ameriquest's status as a volunteer prohibited it from benefiting from the doctrine of equitable subrogation.[260] According to *Washington Mutual*, "the doctrine of equitable subrogation does not apply to permit a new mortgage, granted as part of a generic refinancing transaction, to take the priority over the original mortgage, which is being paid off, thereby giving the new

249. *Id.* At some point, the Franklin mortgage was assigned to Popular Financial Services and serviced by Equity One. *Id.* at 87 n.1, 726 N.W.2d at 101 n.1.
250. *Id.* at 87, 726 N.W.2d at 102.
251. *Ameriquest Mortgage Co.*, 273 Mich. App. at 87; 726 N.W.2d at 102.
252. *Id.*
253. *Id.*
254. *Id.* at 88, 726 N.W.2d at 102.
255. *Id.*
256. *Id.*
257. *Ameriquest Mortgage Co.*, 273 Mich. App. at 88, 726 N.W.2d at 102.
258. *Id.*
259. *Id.*
260. *Id.*

mortgage priority over intervening liens."[261] The court of appeals stated that if it were not bound by the prior holding in *Washington Mutual* it "would affirm the [circuit] court's ruling and adopt the position of the Restatement of Property (Mortgages) 3d (the "Restatement")."[262] The Restatement view permits "the application of the doctrine of equitable subrogation in" this context "to avoid unearned windfalls and unjust enrichment.[263] Moreover, the Restatement does "not adopt a strict volunteer rule" as set forth in *Washington Mutual.*[264] The court of appeals thought that since Ameriquest was "paying off the Franklin mortgage" at the direction of Yousif, it was protecting its own interest in the property.[265] The court opined:

> Because the holding of *Washington Mutual Bank* establishes an inflexible rule precluding the application of equitable subrogation in mortgage refinancing, we find it contrary to the principles of equity the doctrine is intended to promote. Although *Washington Mutual Bank* recognizes the possibility of equitable subrogation if the replacement loan is provided by the holder of the old mortgage, or if the new lender first purchased the prior mortgage and then accepted the new mortgage, *Washington Mutual Bank* does not appear to permit an exception in this case despite the inequitable result. Existing Michigan law concerning equitable subrogation in the context of mortgage refinancing is confusing at best, and is contrary to logic, the Restatement of Property, and the view in many jurisdictions. These circumstances merit further consideration.[266] Should the volunteer rule of *Washington Mutual Bank* be found to be a proper interpretation of *Lentz*,[267] we urge the Michigan Supreme Court to review and reconsider this precedent in light of the prevailing modern view reflected in the Restatement. . . . Where the equities are in favor of the payor mortgagee, we believe this rule should prevail. Given the common practice of mortgage refinancing and the sheer volume of transactions undertaken, equitable subrogation is a proper and necessary mechanism for resolving priority disputes to avoid injustice.[268]

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261. *Id.* (citations omitted).
262. *Id.*
263. *Ameriquest Mortgage Co.*, 273 Mich. App. at 88-89, 726 N.W.2d at 102.
264. *Id.* (citations omitted).
265. *Id.*
266. *Id.*
267. Lentz v. Stoflet, 280 Mich. 446, 273 N.W. 763 (1973).
268. *Ameriquest Mortgage Co.*, 273 Mich. App. at 89-90, 726 N.W.2d at 103 (citations omitted).

In *Washington Mutual*, the debtors "received a $392,000 loan secured by a mortgage in favor of Option One Mortgage" on their property.[269] The debtors then refinanced, and satisfied and discharged the mortgage held by Option One by obtaining a loan from Washington Mutual Bank in the same amount.[270] However, there were two additional intervening mortgages that had been previously recorded against the property: "one by ShoreBank in the amount of $200,000 and one by Standard Federal Bank in the amount of $249,000."[271] Washington Mutual was unaware of these two intervening mortgages.[272] Washington Mutual was in the same situation as Ameriquest; and the trial court held that Washington Mutual had "no legal obligation to pay off the Option One mortgage" because, it was a volunteer and was not entitled to benefit from the doctrine of equitable subrogation.[273]

Washington Mutual appealed and the court of appeals reviewed Michigan case law to determine the outcome.[274] The court of appeals determined that two prior Michigan Supreme Court cases, were irreconcilable: *Lentz v. Stoflet,*[275] and *Walker v. Bates*.[276] The court found that although both cases involved the "doctrine of equitable subrogation and the status of a volunteer," their outcomes were inconsistent.[277] Being that *Lentz* was the most recent case, the court of appeals in *Washington Mutual* felt obligated to follow that case.[278] In *Lentz* the lender lost out due to its volunteer status,[279] and in *Walker* the lender won because it discharged the senior mortgage.[280] The court then ruled:

> [W]e are unaware of any authority regarding the application of the doctrine of equitable subrogation to support the general proposition that a new mortgage, granted as part of a generic refinancing transaction, can take the priority of the original mortgage, which is being paid off, giving it priority over intervening liens. . . . Such bolstering of priority may be applicable where the new mortgagee is the holder of the mortgage being paid off or where the proceeds of the new mortgage are necessary to preserve the property from foreclosure

269. *Id.* at 90, 726 N.W.2d at 103.
270. *Id.*
271. *Id.*
272. *Id.*
273. *Id.*
274. *Ameriquest Mortgage Co.*, 273 Mich. App. at 90, 726 N.W.2d at 103.
275. 280 Mich. 446, 273 N.W.2d 763 (1973).
276. 244 Mich. 582, 222 N.W. 209 (1928).
277. *Ameriquest Mortgage Co.*, 273 Mich. App. at 91, 731 N.W.2d at 104.
278. *Id.* at 91, 726 N.W.2d at 104.
279. 280 Mich. at 451, 273 N.W. at 765.
280. 244 Mich. at 586-87, 726 N.W.2d at 210.

> or another action that would cause the intervening lien holders to lose their security interests.[281]

Since the facts in *Washington Mutual* were not applicable to the exceptions, Washington Mutual was denied priority over the intervening lienholders and was not entitled to benefit from the doctrine of equitable subrogation.[282]

The special panel first described the recording system in Michigan, with Michigan being a recording priority jurisdiction and a mortgage being a conveyance covered by the recording acts.[283] MCL section 565.25 provides, in relevant part:

> (1) . . . In the entry book of mortgages the register shall enter all mortgages and other deeds intended as securities, and all assignments of any mortgages or securities.
>
> * * *
>
> (4) The instrument shall be considered as recorded at the time so noted and shall be notice to all persons except the recorded landowner subject to subsection (2), of the liens, rights, and interests acquired by or involved in the proceedings. *All subsequent owners or encumbrances shall take subject to the perfected liens, rights, or interests.*[284]

In order to satisfy the statutory requirements, "[m]ortages are subjected to the satisfaction of the obligation on the mortgage note in the order in which they are recorded."[285] Additionally, if a mortgage is recorded it provides constructive notice to all subsequent lienholders.[286] The court stated that MCL section 565.25(4) is clear and unambiguous, it "charges third parties with constructive notice and serves to determine lien priority."[287] Pursuant to MCL section 565.25(4), Alton's mortgage had priority since it was recorded first.[288] Ameriquest contended that its mortgage should have "priority over Alton's under the doctrine of equitable subrogation" and asked

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281. *Ameriquest Mortgage Co.*, 273 Mich. App. at 91-92, 726 N.W.2d at 104 (citations omitted).

282. *Id.* at 92, 726 N.W.2d at 104.

283. *Id.* at 93, 726 N.W.2d at 104-05; *see* MICH. COMP. LAWS ANN. § 565.35 (West 2006) (citations omitted).

284. *Ameriquest Mortgage Co.*, 273 Mich. App. at 93, 731 N.W.2d at 105 (citing MICH. COMP. LAWS § 565.25 (2006) (emphasis added)).

285. *Id.* (citing Mitchell v. Trustees of United States Real Estate Investment Trust, 144 Mich. App. 302, 314, 375 N.W.2d 424, 430 (1985) (citations omitted)).

286. *Id.* (citations omitted).

287. *Id.* at 94, 731 N.W.2d at 105.

288. *Id.*

the court to overlook the mandate of MCL section 565.25(4).[289] The Michigan Supreme Court previously "defined equitable subrogation as 'a legal fiction through which a person who pays a debt for which another is primarily responsible is substituted or subrogated to all the rights and remedies of the other.'"[290] Under the doctrine of equitable subrogation, "a subrogee can acquire no greater rights than those possessed by the subrogor, and the subrogee may not be a mere volunteer."[291] The subrogee must make the payment as fulfillment of a "legal or equitable duty owed to the subrogor" and cannot voluntarily make the payment in order to be entitled to subrogation.[292] The Michigan Supreme Court has also stated that courts should apply the doctrine, which should be flexible, on a case-by-case basis, should be flexible and applied when equity requires.[293] Additionally, the courts will not apply an equitable doctrine to "avoid the dictates of a statute, absent fraud, accident or mistake."[294] The court then described subrogation:

> The doctrine of subrogation rests upon the equitable principle that one who, in order to protect a security held by him, is compelled to pay a debt for which another is primarily liable, is entitled to be substituted in the place of and to be vested with the rights of the person to whom such payment is made, without agreement to that effect. This doctrine is sometimes spoken of as "legal subrogation," and has long been applied by courts of equity. There is also what is known as "conventional subrogation." It arises from an agreement between the debtor and a third person whereby the latter, in consideration that the security of the creditor and all his rights thereunder be vested in him, agrees to make payment of the debt in order to relieve the debtor from a sacrifice of his property due to an enforced sale thereof. It is wholly independent of any interest in the property which the lender may have to protect. It does not, however, inure to a mere volunteer who has no equities which appeal to the conscience of the court.[295]

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289. *Id.*

290. *Ameriquest Mortgage Co.*, 273 Mich. App. at 94, 731 N.W.2d at 105 (quoting Hartford Accident & Indem. Co. v. Used Car Factory, Inc., 461 Mich. 210, 215, 600 N.W.2d 630, 632 (1999), quoting Commercial Union Ins. Co. v. Medical Protective Co., 426 Mich. 109, 117, 393 N.W.2d 479, 482 (1986) (opinion of Williams, C.J.)).

291. *Id.* at 94-95, 726 N.W.2d at 105-106 (internal quotations and citations omitted).

292. *Id.* at 95, 726 N.W.2d at 106 (citations omitted).

293. *Id.* (quoting *Hartford Accident & Indem., Co.*, 461 Mich. at 215, 600 N.W.2d at 632-33).

294. *Id.* (quoting Burkhardt v. Bailey, 260 Mich. App. 636, 659, 680 N.W.2d 453, 465 (2004)).

295. *Id.* at 95-96, 726 N.W.2d at 106 (citations omitted).

The court in *Washington Mutual*, referring to the statutory mandate regarding lien priority, stated:

> It is only in cases where the person advancing money to pay the debt of a third party stands in the situation of a surety, or is compelled to pay it to protect his own rights, that a court of equity substitutes him in the place of the creditor as a matter of course, without any agreement to that effect. In other cases the demand of a creditor which is paid with the money of a third person, and without any agreement that the security shall be assigned to kept on foot for the benefit of such third person, is absolutely extinguished.[296]

This language supports the concept that a mere volunteer is not entitled to equitable subrogation. Thus, after reviewing precedent and the statutory mandates, the court held that there were

> no conditions or circumstances to warrant application of the equitable subrogation doctrine to permit Ameriquest to circumvent the established priority of Alton's mortgage and to assume the position of the prior recorded lien of Franklin Funding. Ameriquest [was] a mere volunteer because it had no preexisting interest in the property and did not attempt to protect its interest in the property or to revive or obtain an assignment of the original mortgage.[297]

The court stated that equitable subrogation is used to prevent fraud and it found no fraud on the part of Alton nor did Ameriquest allege any fraud by Alton.[298] Lastly, the court rejected the Restatement view that equitable subrogation should be applied to preclude an unearned windfall.[299] The court found that the mandates of MCL section 565.25(4) provided for priority based on date of recordation and that the court was not free to use its equitable powers as an "unrestricted license for the court to engage in wholesale policymaking."[300] The court of appeals held that *Washington Mutual* was correctly decided.[301]

In *Richards v Tibaldi,*[302] the trial court denied plaintiff's motion

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296. *Ameriquest Mortgage Co.*, 273 Mich. App. at 96, 726 N.W.2d at 106-07 (citations omitted).

297. *Id.* at 97-98, 726 N.W.2d at 107 (citations omitted).

298. *Id.* at 98, 726 N.W.2d at 107 (citations omitted).

299. *Id.*; *see* RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES) § 7.6 cmt. a (1998).

300. *Ameriquest Mortgage Co.*, 273 Mich. App. at 99, 726 N.W.2d at 108 (citations omitted).

301. *Id.* at 100, 726 N.W.2d at 108.

302. 272 Mich. App. 522, 726 N.W.2d 770 (2006).

for summary disposition and instead granted summary disposition in favor of defendants, awarding the property in Grand Traverse County to them.[303] The decision by the court rested on the timing of the underlying facts. The factual history of this case was not in dispute for the most part, but the parties contested the legal conclusion the court made from the facts.[304] On October 15, 2002, James T. Keyton executed a quitclaim deed conveying the property from Keyton's Development Corporation (KDC) to plaintiff, Christopher Richards.[305] Keyton signed as President of KDC.[306] Plaintiff did not record the deed with the Grand Traverse County Register of Deeds until February 5, 2004.[307] Plaintiff claimed "that he had provided real estate investment and loan monies" and renovation services to Keyton "and the deed was given to" him as security to be recorded only if Keyton failed to repay plaintiff.[308] In August 2003, Hamilton Farm Bureau obtained a judgment against KDC and Keyton in another matter, resulting "in a writ of execution being issued in August 2004 and a notice of levy being recorded against the property on October 1, 2004."[309]

On March 1, 2004, James and Diane Keyton "executed a quitclaim deed from themselves to KDC."[310] This deed was not recorded until November 3, 2004.[311] "On April 20, 2004, KDC quitclaimed the property to defendants, the Tibaldis, with James Keyton executing the deed" as the President of KDC.[312] The Tibaldis recorded their quitclaim deed on October 22, 2004.[313] "On June 18, 2004, plaintiffs filed a quiet title action against KDC and the Keytons individually."[314] Plaintiff claimed "that he held legal and equitable ownership of the property . . . pursuant to the October 2002 quitclaim deed" and due to the fact that "plaintiff provided funds and services to Keyton in exchange for the security of the deed."[315] Plaintiff filed a notice of *lis pendens* which "was recorded on the same day that he filed his complaint."[316] At the time "the suit and *lis pendens* were filed, the Keytons to KDC and KDC to Tibaldis deeds had been

303. *Id.* at 524, 527-28, 726 N.W.2d at 772-74.
304. *Id.* at 524, 726 N.W.2d at 773.
305. *Id.* at 525, 726 N.W.2d at 773.
306. *Id.*
307. *Id.*
308. *Richards*, 272 Mich. App. at 525, 726 N.W.2d at 773.
309. *Id.*
310. *Id.* at 525-26, 726 N.W.2d at 773.
311. *Id.* at 526, 726 N.W.2d at 773.
312. *Id.*
313. *Id.*
314. *Richards*, 272 Mich. App. at 526, 726 N.W.2d at 773.
315. *Id.* at 526, 726 N.W.2d at 774.
316. *Id.*

executed but not recorded."[317] "On May 23, 2005, a default judgment was entered against KDC . . . for failure to appear and the claim against Mr. Keyton was dismissed without prejudice."[318] The judgment quieted title in favor of plaintiff and "was recorded with the register of deeds on June 10, 2005."[319] The plaintiff did not name the defendants, the Tibaldis, in this litigation.[320] "By the time the default judgment was entered, the deeds" from Keyton to KDC, and KDC to the defendants, had been recorded.[321]

On August 15, 2005, plaintiff filed his complaint for this case.[322] Plaintiff requested "the trial court to quiet title to the property in his favor."[323] Plaintiff filed a motion for summary disposition, arguing that the defendants should have intervened in the earlier lawsuit and their failure to intervene precluded them from "challenging plaintiff's title in the present case."[324] Based on this argument, plaintiff contended "that there was no genuine issue of material fact" and that he was "the true owner of the property."[325] "The trial court denied plaintiff's motion and instead granted summary disposition in favor of defendants."[326] "The trial court, ruling from the bench, found that the 2002 quitclaim deed . . . did not give plaintiff any legal interest in the property because KDC" was not the legal titleholder of the property when it was quitclaimed to plaintiff.[327] Keyton owned the property individually and Keyton's wife held a dower interest.[328] The trial court further determined that the after-acquired title doctrine did not apply to plaintiff's situation because "the subsequent deed from the Keytons to KDC in March 2004 did not" revive "the 2002 deed after the fact because the 2002 deed was a quitclaim deed and not a warranty deed."[329] Based on this logic, the April 2004 deed "from KDC to defendants was valid and enforceable, and there was no effective deed conveying the property to the plaintiff."[330] As for plaintiff's argument that the defendants should have intervened in the

317. *Id.* at 527, 726 N.W.2d at 774.

318. *Id.* at 526-27, 726 N.W.2d at 774. The suit against Mrs. Keyton was dismissed on summary judgment. *Id.* at 526, 726 N.W.2d at 774. The plaintiff claimed that "he agreed to the dismissal of Mr. Keyton because [he] learned that the Keytons had conveyed the property to KDC [via] the quitclaim deed of March 1, 2004." *Richards*, 272 Mich. App. at 526-27 n.5, 726 N.W.2d at 774.

319. *Id.* at 527, 726 N.W.2d at 774.

320. *Id.*

321. *Id.*

322. *Id.*

323. *Id.*

324. *Richards*, 272 Mich. App. at 527, 726 N.W.2d at 774.

325. *Id.*

326. *Id.*

327. *Id.*

328. *Id.* at 525, 726 N.W.2d at 773.

329. *Id.* at 527, 726 N.W.2d at 774.

330. *Richards*, 272 Mich. App. at 527-28, 726 N.W.2d at 774.

earlier suit, the trial court held that "the default judgment only determined plaintiff's interest in the property as against KDC" and not the defendants because they were not named as defendants in the action.[331] The court relied on MCR 3.411(H) and held that "defendants' interest was not adjudicated or subject to divestment" and that "it could be litigated and determined in this action."[332]

The court of appeals reviewed the trial court's decision de novo because it involved the equitable nature of quiet title actions and questions of law, which included interpreting a court rule.[333] The court spelled out the plaintiff's and defendants' arguments.[334] First, the plaintiff argued that the doctrine of res judicata should apply based on the previous lawsuit and that since the defendants were privies with KDC and the Keytons, their claim regarding ownership should be barred.[335] The plaintiff argued that the defendants' interest in the property was undisclosed and unrecorded "when plaintiff filed the earlier suit" and that "while the action was pending" the defendants recorded their interest.[336] The plaintiff contended that the defendants should have intervened and the matter "could and should have been resolved in the earlier litigation and adjudication."[337] The defendants' arguments were: (1) "plaintiff never acquired the property . . . because KDC did not own the property" in 2002, when the deed was given to the plaintiff, (2) the recording of the deed was irrelevant based on the same argument in (1), (3) plaintiff could not "rely on the doctrine of after-acquired title because the 2002 deed was a quitclaim deed" and not a warranty deed, (4) the previous litigation, filed "*after* the defendants acquired their interest, only determined plaintiff's interest as compared to KDC" and "did not affect defendants' interest" because the defendants were not named as parties to the suit, pursuant to MCR 3.411(H), and (5) since the "notice of *lis pendens*" was "filed *after* the defendants acquired their property interest" the filing did not bar defendants' claim.[338]

The court of appeals set forth the requirements for the doctrine of res judicata to apply and also stated that "[a] default judgment is treated the same as a litigated judgment for" res judicata purposes.[339] The court stated that although the requirements for res judicata to apply were generally satisfied, the court felt as if MCR 3.411 was

331. *Id.* at 528, 726 N.W.2d at 774.
332. *Id.*
333. *Id.* at 528, 726 N.W.2d at 774-75 (citations omitted).
334. *Id.* at 529-30, 726 N.W.2d at 775-76.
335. *Id.* at 529, 726 N.W.2d at 775.
336. *Richards*, 272 Mich. App. at 529-30, 726 N.W.2d at 775.
337. *Id.* at 529-30, 726 N.W.2d at 775.
338. *Id.* at 530, 726 N.W.2d at 775-76.
339. *Id.* at 530-31, 726 N.W.2d at 776.

controlling.[340] MCR 3.411(H) states:

> The judgment determining a claim of title, equitable title, right to possession, or other interests in lands under this rule, determines only the rights and interests of the known and unknown persons who are parties to the action, and of persons claiming through those parties by title accruing after the commencement of the action.[341]

The court determined that since the defendants were not parties to the previous action, the judgment in the previous action was not binding upon defendants.[342] In reading the rule, the word "'parties' does not contemplate persons who *could have* been made or become parties."[343] "[T]he judgment also binds persons claiming through parties 'by title accruing *after* the commencement of the action.' . . . but the title claimed by defendants [from KDC] accrued *before* the commencement of the prior suit . . . ."[344] Next, the plaintiff argued "that he did not have a duty to include defendants in the [previous] suit because they were unknown to him and [they] did not have a recorded interest when the suit was commenced."[345] The court, putting aside the fact that there was evidence that plaintiff's counsel did obtain knowledge of the defendants' interest during the first suit, held that MCR 3.411(H) did not contemplate these types of "situations short of defendants being actual parties or defendants actually acquiring title through a party after commencement of the action . . . ."[346] "MCR section 3.411(H) does not mandate intervention."[347] The plaintiff's argument focused on the notice of *lis*

340. *Id.* at 532, 726 N.W.2d at 777.

341. *Id.* (citations omitted).

342. *Richards*, 272 Mich. App. at 533, 726 N.W.2d at 777.

343. *Id.* (emphasis in original).

344. *Id.* (citing MCR 3.411(H)) (emphasis added). KDC quitclaimed the property to the defendants on April 20, 2004 and the prior suit was filed on June 18, 2004. *Id.* Plaintiff also argued that MCL 565.401 applied to bar the defendants' claim. *Id.* The plaintiff contended that MCL 565.401 stood for the principal that a judgment "has the same effect as a deed when filed with the register of deeds." *Id.* at 533-34, 726 N.W.2d at 777. The court stated that "the default judgment reflects a determination regarding an interest in land that is controlling and that is *comparable* to the act of deeding property to a grantee, but in light of MCR 3.411(H) . . . the determination only affects the rights of the parties involved in the suit or the rights of persons claiming through those parties by title accruing after the commencement of the action. This does not include defendants . . . ." *Richards*, 272 Mich. App. at 534, 726 N.W.2d at 778. "[T]he quiet title default judgment simply announced which parties involved in the litigation held title to the property." *Id.*

345. *Id.* at 534, 726 N.W.2d at 778.

346. *Id.* at 535, 726 N.W.2d at 778.

347. *Id.*

pendens.[348] Plaintiff asserted that when the defendants recorded their deed (which was executed before the complaint) after plaintiff commenced the quiet title action and while the litigation was pending, "defendants became interested parties and were required to intervene . . . ."[349] Essentially, plaintiff argued that the defendants were guilty of unclean hands because the "defendants had at least constructive notice of the litigation."[350] "MCL 600.2701(1) provides for the filing of a notice of *lis pendens* in order '[t]o render the filing of a complaint constructive notice to a purchaser of any real estate . . . .' [and] is designed to warn persons who deal with property while it is in litigation that they are changed with notice of the right of their vendor's antagonist and take subject to the judgment rendered in the litigation."[351] The court, quoting *Provident Mutual Life Insurance Company of Philadelphia v. Vinton Company*,[352] stated "[a] purchaser who acquires property *after* the commencement of a suit and the filing of a notice of *lis pendens* is bound by the proceedings because '[o]ne may not purchase any portion of the subject matter of litigation and thereby defeat the object of the suit.'"[353] But since the defendants acquired the property *before* the suit and the notice of *lis pendens* were filed they were not barred due to their failure to intervene.[354] The court held that even though the quiet title action was equitable in nature and the doctrine of clean hands would have applied, there was a lack of evidence to suggest that defendants' failure to intervene amounted to bad faith or unfairness because they did not obtain any "benefit by not becoming a part of the previous action."[355]

Subsequently, the court focused on the trial court's determination that the defendants' title was superior to any interest claimed by plaintiff.[356] Plaintiff cited MCL section 565.29 for the proposition that title was properly vested in him rather than the defendants.[357] Plaintiff

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348. *Id.*

349. *Richards*, 272 Mich. App. at 535, 726 N.W.2d at 778.

350. *Id.* at 535-36, 726 N.W.2d at 778.

351. *Id.* at 536, 726 N.W.2d at 778-79 (citations omitted).

352. 282 Mich. 84, 87, 275 N.W. 776 (1937).

353. *Richards*, 272 Mich. App. at 536, 726 N.W.2d at 779 (citing *Provident Mutual*, 282 Mich. at 87, 275 N.W. at 777) (emphasis added).

354. *Id.* at 536-37, 726 N.W.2d at 779. Additionally, "MCR 2.209 does not mandate that a party intervene in an action under certain circumstances" and under "MCR 2.205 the defendants should have been deemed necessary parties" but the fact remained that they were not made parties." *Id.* at 536, 726 N.W.2d at 779. MCR 2.205 does not demand nonparties to intervene on their own. *Id.* at 536-37, 726 N.W.2d at 779.

355. *Id.* at 537-38, 726 N.W.2d at 779.

356. *Id.* at 538, 726 N.W.2d at 780.

357. *Richards*, 272 Mich. App. at 538, 726 N.W.2d at 780. MCL section 565.29 provides:

> Every conveyance of real estate within the state hereafter made, which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser in good faith and for a valuable consideration, of the same real estate

contended that the property was conveyed to him and he recorded his deed before the defendants' acquired their quitclaim deed.[358] Additionally, he argued that the "defendants were not bona fide purchasers."[359] Although the court appeared to avoid the issues of notice and bona fide purchasers, it decided to focus strictly on the validity of the plaintiff's 2002 quitclaim deed.[360] When property is conveyed via a quitclaim deed, the grantee acquires the "right and title which his grantor had and no other."[361] The parties did not "dispute that KDC did not have title to the property when the" plaintiff received his 2002 quitclaim deed, consequently "plaintiff acquired no rights or title relative to the property."[362] The court focused on the doctrine of after-acquired title and cited conflicting case law as to whether a quitclaim deed can operate to convey an after-acquired title.[363] Ultimately, after reviewing the case law, the court relied on *Pendill v. Marquette County [Agricultural Society]*,[364] which held that "a quitclaim deed can never operate to convey an after-acquired title, since a grantor in the quitclaim deed warrants no title and conveys only that which he or she owns at the time of the conveyance."[365] The court of appeals affirmed the trial court's determination that title to the property should be quieted in favor of defendants since the "defendants acquired sound title and plaintiff never acquired an interest in the property."[366]

In *Minerva Partners, Ltd v. First Passage, LLC*,[367] the Grand Traverse Circuit Court found in favor of plaintiff, denied defendant's motion for summary disposition, and "quieted title to the disputed property by dividing it along the centerline," and held "that each party held title to the portion of" the road adjoining that party's property because the road was abandoned.[368] The court also held that neither party retained "an easement for ingress and egress across the disputed

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> or any portion thereof, whose conveyance shall be first duly recorded. The fact that such first recorded conveyance is in the form or contains the terms of a deed of quit-claim and release shall not affect the question of good faith of such subsequent purchaser, or be of itself notice to him of any unrecorded conveyance of the same real estate or any part thereof.

MICH. COMP. LAWS ANN. § 565.29 (West 2006).

358. *Richards*, 272 Mich. App. at 538, 726 N.W.2d at 780.

359. *Id.*

360. *Id.* at 539-40, 726 N.W.2d at 780-81.

361. *Id.* at 540, 726 N.W.2d at 781 (citing Brownell Realty, Inc. v. Kelly, 103 Mich. App. 690, 695, 303 N.W.2d 871, 873 (1981) (citations omitted)).

362. *Id.*

363. *Id.* at 541-42, 726 N.W.2d at 781-82.

364. 95 Mich. 491, 55 N.W. 384 (1893).

365. *Richards*, 272 Mich. App. at 541, 726 N.W.2d at 781 (citing *Pendill*, 95 Mich. at 493, 55 N.W. at 385).

366. *Id.* at 542-43, 726 N.W.2d at 782.

367. 274 Mich. App. 207, 731 N.W.2d 472 (2007).

368. *Id.* at 209, 731 N.W.2d at 474.

property owned by the other party."[369] Plaintiff appealed the denial to "each party a private easement for ingress and egress across the disputed property owned by the other party."[370] Defendant appealed the order "denying its motion for summary disposition."[371] The parties disputed "ownership of an abandoned portion of Keystone Road."[372] Keystone Road became public between 1895 and 1908.[373] "[T]he parties stipulate[d] that the road was not created by plat or other formal dedication by statute, but" either "common-law dedication or the highway-by-user doctrine."[374] "In 1997, the Grand Traverse County Road Commission abandoned the portion of" the road in dispute.[375] The court went through the lengthy history of how the plaintiff and defendant took title to their respective properties in order to set up its analysis, which for purposes of this discussion is not relevant.[376] Defendant took title to its property adjoining the road as well as title to a certain access route which included part of the road but not all of the road, and plaintiff only took title to its property adjoining the road and no portion of the road itself.[377] Defendant argued "that it held fee title to portion of the access route" and plaintiff asserted "that under Michigan law," after "abandonment of a public road, the remaining parcel of land reverts to the abutting property owners to the centerline of the former roadway, regardless of the existence of a deed to the contrary."[378] Additionally, plaintiff argued that an "owner of land abutting a public road has a private easement across the road even after" it has been abandoned.[379]

First, the court addressed the issue of how the road was dedicated.[380] "[A] dedication is an appropriation of land to some public use, accepted for such use by or in behalf of the public."[381] The court stated that "for a road to become public property, there generally must be either a statutory dedication and an acceptance on behalf of the public, a common-law dedication and acceptance, or a finding of highway by public user."[382] The court pointed out that even

369. *Id.*
370. *Id.*
371. *Id.*
372. *Id.*
373. *Minerva Partners*, 274 Mich. App. 209, 731 N.W.2d at 474-75.
374. *Id.*
375. *Id.* at 209, 731 N.W.2d at 475.
376. *Id.* at 209-13, 731 N.W.2d at 475-77.
377. *Id.*
378. *Id.* at 212-13, 731 N.W.2d at 476.
379. *Minerva Partners*, 274 Mich. App. at 213, 731 N.W.2d at 476.
380. *Id.* at 213-18, 731 N.W.2d at 476-79.
381. *Id.* at 213, 731 N.W.2d at 477 (citations omitted).
382. *Id.* at 213-14, 731 N.W.2d at 477 (quoting Beulah Hoagland Appleton Qualified Personal Residence Trust v. Emmet Co., 236 Mich. App. 546, 554, 600 N.W.2d 698, 702 (1999)) (citations omitted).

though there is "a variety of acceptable methods . . . to dedicate a parcel of land as a public highway, not all methods have the same interest being passed on to the public authority."[383] The interest "depends on the method of dedication."[384] If the dedication is by statute, fee is vested "in the county, in trust for the municipality," but if the dedication is by common law or by the highway-by-user doctrine, "the act of dedication creates only an easement in the public."[385] If an easement is abandoned, the servient property is no longer burdened by the easement and the unencumbered fee simple interest remains in the titleholder.[386] Since the road in dispute was not created by statute or by formal plat, only an easement was granted to the public.[387] Pursuant to MCL section 224.18(3), when the county road commission abandoned the road as a public highway, the easement was terminated.[388] When the defendant received title to its property, it received a portion of the road called the access route.[389] When the easement was terminated, the unencumbered fee simple reverted back to the defendant.[390]

Second, the court addressed the issue of whether the parties "had a private easement for ingress and egress across any part of the road owned by the other party."[391] Plaintiff asserted that, "because it owns [sic] land abutting the road, it retained a private easement across the road after the road commission abandoned it."[392] The court rejected this argument.[393] The plaintiff relied on the theory "that owners of lots adjoining platted streets retain private easement rights over the streets after" they are abandoned by public authorities but since Keystone Road is not platted, plaintiff wanted the court to expand the rule to unplatted streets as well.[394] The court pointed out that when there are platted streets in subdivisions that are abandoned for public use, the lot owners retain an independent easement over the streets.[395] This is not the case for unplatted streets and there is no independent easement held by the lot owners.[396] The plaintiff did not receive title to the road nor did it receive any easements rights, nor did its

383. *Id.* at 214, 731 N.W.2d at 477.
384. *Id.*
385. *Minerva Partners*, 274 Mich. App. 214, 731 N.W.2d 477 (citations omitted).
386. *Id.*
387. *Id.* at 215, 731 N.W.2d at 477-78.
388. *Id.* at 215, 731 N.W.2d at 477.
389. *Id.* at 217, 731 N.W.2d at 478-79.
390. *Id.* at 217, 731 N.W.2d at 479.
391. *Minerva Partners*, 274 Mich. App. at 218, 731 N.W.2d at 479.
392. *Id.*
393. *Id.*
394. *Id.* at 219, 731 N.W.2d at 479-80.
395. *Id.* at 219, 731 N.W.2d at 480.
396. *Id.* at 220, 731 N.W.2d at 480.

predecessors.[397]

The court of appeals reversed the order quieting title to the disputed property and held that title should have been quieted in defendant because defendant purchased the property interest of every entity holding an interest in the access route, but affirmed the holding that neither party retained easement rights over the portion of the disputed property held by the other party.[398]

V. TAXES

In *Lake Forest Partners 2, Inc. v. Department of Treasury*,[399] the petitioner appealed as of right the judgment of the Tax Tribunal, which affirmed "respondent's assessment under the State Real Estate Transfer Tax Act (SRETTA), MCL 207.521-537."[400] "[P]etitioner agreed to sell to buyers certain unimproved lots and subsequently build homes on those lots."[401] This case involves 45 of these transactions.[402] In each of the various transactions, there was a purchase agreement, which provided the terms of the sale of the unimproved land plus the terms of the agreement to build the home on the same lot.[403] The purchase agreements provided for the petitioner to deliver to the buyers a warranty deed once the homes were constructed and a certificate of occupancy was issued.[404] Once the deed was recorded, the petitioner paid the "transfer taxes based on the value of the lot as it existed when the purchase agreement was executed."[405] The Department of Treasury determined that this was inappropriate and concluded that the petitioner should have paid transfer taxes on both "the value of the lot and the home" that was constructed on the lot.[406] The Department ordered the petitioner to pay the deficiency plus penalty and interest charges.[407] The petitioner filed its petition for reconsideration with the Tax Tribunal, but the

397. *Minerva Partners*, 274 Mich. App. at 220, 731 N.W.2d at 480.

398. *Id.* at 221, 731 N.W.2d at 480.

399. 271 Mich. App. 244, 720 N.W.2d 770 (2006), *rev'd*, 477 Mich. 1018, 726 N.W.2d 732 (2007).

400. *Id.* at 245, 720 N.W.2d at 771.

401. *Id.* at 246, 720 N.W.2d at 771.

402. *Id.*

403. *Id.*

404. *Id.* The consideration for the lot and to build the home were separately stated in the purchase agreements. *Lake Forest*, 271 Mich. App. at 246, 720 N.W.2d at 771.

405. *Id.* at 245, 720 N.W.2d at 771. As stated in footnote 1 of the opinion, the same forty-five transactions were the subject of a circuit court case. *Id.* at 246 n.1, 720 N.W.2d at 771. The county presented the same argument based on the county real estate transfer tax. *Id.* The circuit court resolved the case by a consent order, which required the petitioner to use separate contracts for the lot and the construction of the home. *Id.* If the petitioner did this, he would only be assessed on the value of the lot. *Id.*

406. *Lake Forest*, 271 Mich. App. at 246-47, 720 N.W.2d at 772.

407. *Id.* at 247, 720 N.W.2d at 772.

tribunal denied the petition.[408]

The court of appeals reviewed the decision "of the Tax Tribunal only to determine whether the tribunal committed an error of law or applied the wrong legal principals."[409] The court reviewed the interpretation of the statutes at issue *de novo* as it was a question of law.[410] The court first set forth the statute at issue.[411] MCL section 207.523 provides:

> (1) There is imposed, in addition to all other taxes, a tax upon the following written instruments executed within this state when the instrument is recorded:
>
> > (a) Contracts for the sale or exchange of property or any interest in the property or any combination of sales or exchanges or any assignment or transfer of property or any interest in the property.
> >
> > (b) Deeds or instruments of conveyance of property or any interest in property, for consideration.
>
> (2) The person who is the seller or grantor of the property is liable for the tax imposed under this act.[412]

The transfer tax is "levied at the rate of $3.75 for each $500.00 or fraction of $500.00 of the total value of the property being transferred."[413] Pursuant to MCL section 207.522(e), "'value' means the current or fair market worth in terms of legal monetary exchange *at the time of the transfer*."[414] Therefore, although the transfer tax is not paid until the time of recording, it is assessed at the time of transfer.[415] The court stated that "although purchase agreements are not recorded," transfer taxes may still "be imposed on purchase agreements" because some interest in the property is transferred albeit only an equitable interest.[416] Therefore, the transfer tax should be assessed on the basis of the value of the property when the purchase

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408. *Id.*
409. *Id.* (citations omitted).
410. *Id.* (citations omitted).
411. *Id.*
412. MICH. COMP. LAWS § 207.523 (2006).
413. *Lake Forest*, 271 Mich. App. at 248, 720 N.W.2d at 772; *see* MICH. COMP. LAWS ANN. § 207.525 (West 2006).
414. *Lake Forest*, 271 Mich. App. at 248, 720 N.W.2d at 772 (quoting MICH. COMP. LAWS ANN. § 207.522(e) (West 2006) (emphasis in original)).
415. *Id.*; *see* MICH. COMP. LAWS ANN. §§ 207.522(e), 207.523(1) (West 2006).
416. *Lake Forest*, 271 Mich. App. at 249, 720 N.W.2d at 773.

agreement was executed.[417] The court determined "that the value of the property for purposes of assessment" of the state real estate transfer tax was to be determined "at the time the parties execute[d] the purchase agreement."[418] The lower court's ruling was reversed and remanded for further proceedings.[419]

In *City of Mt. Pleasant v. State Tax Commission*,[420] the Michigan Tax Tribunal issued a decision that the plaintiff's land was not exempt from taxes because the city did not make a present use of the property as required by MCL section 211.7m.[421] The Tax Tribunal did not believe that acquiring and improving land for economic development was a present use.[422] The city of Mt. Pleasant (the "City") appealed to the court of appeals, which affirmed the judgment of the Tax Tribunal and stated that the City's use was not an "active, actual" use.[423] The court of appeals denied the City's motion for reconsideration and the Michigan Supreme Court granted the City's motion for leave to appeal.[424] In 1990, the City purchased approximately 320 acres of vacant land adjacent to the City and annexed the property.[425] The City stated that the purpose for the "land was to allow for the extension of the city streets," "widen and extend various streets," provide land for low-income housing, and "plat and prepare the land for sale to developers for residential, commercial, and industrial uses to increase the [C]ity's tax base."[426] "The property was initially treated as tax-exempt on the assessment rolls. . . . [but] the city assessor asked the State Tax Commission for guidance" and the State Tax Commission informed the city assessor that the City should treat the property as taxable.[427] The City objected to the local board of review, but the assessment was affirmed, so then the City petitioned the Michigan Tax Tribunal.[428] On October 31, 2003, the Tax Tribunal concluded "that the property was not exempt and [that] the [C]ity was required to pay two years of back taxes" due to the fact

417. *Id.* The dissent argued that the legislative intent was to "impose a tax based on the value of [the] property at the time title is legally transferred" and not when the purchaser has only an equitable interest in the property. *Id.* at 250-52, 720 N.W.2d at 774. The plain language of the statute imposes a tax on written instruments that are recorded and since the purchase agreements were not recorded the statute is not applicable to the purchase agreements. *Id.* at 251, 720 N.W.2d at 774.

418. *Id.* at 245-46, 720 N.W.2d at 771.

419. *Id.* at 246, 720 N.W.2d at 771.

420. 477 Mich. 50, 729 N.W.2d 833 (2007).

421. *Id.* at 52, 729 N.W.2d at 834.

422. *Id.*

423. *Id.* at 52-53, 729 N.W.2d at 834.

424. *Id.* at 53, 729 N.W.2d at 834.

425. *Id.* at 52, 729 N.W.2d at 834.

426. *City of Mt. Pleasant*, 477 Mich. at 52, 729 N.W.2d at 834.

427. *Id.*

428. *Id.*

that the City's use was not a present use and therefore not entitled to the exemption under MCL section 211.7m.[429]

The court initially addressed the issue of statutory interpretation.[430] In order for the court to properly give effect to the intent of the legislature, it had to review the language of the statute.[431] If the statue was and unambiguous it decided it must not interject its own judicial construction of the statute.[432] The court set forth the statute at issue in this case:

> Property owned by, or being acquired pursuant to, an installment purchase agreement by a county, township, city, village, or school district *used for public purposes* and property owned or being acquired by an agency, authority, instrumentality, nonprofit corporation, commission, or other separate legal entity comprised solely of, or which is wholly owned by, or whose members consist solely of a political subdivision, a combination of political subdivisions, or a combination of political subdivisions and the state and is used to carry out a public purpose itself or on behalf of a political subdivision or a combination is exempt from taxation under this act.[433]

The court reiterated its position "that a 'public purpose' promotes 'public health, safety, morals, general welfare, security, prosperity, and contentment of all the inhabitants or residents within the municipal corporation . . . .'"[434] In *County of Wayne v. Hathcock*,[435] the court stated that "economic development constitute[d] a public purpose" and "creating jobs for Michigan's citizens and stimulating private investment and redevelopment to ensure a healthy and growing tax based [were] examples of goals that advance a public purpose."[436] The court (in *City of Mt. Pleasant*) then went on to describe all of the purposes that the City had intended the property to serve, such as improving the property for sale to various developers to increase the City's tax base, providing a location for housing, expanding streets and public utilities to ease congestion, etc.[437] The court then had to decide "when the [C]ity 'used' the land for [those]

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429. *Id.* at 52-53, 729 N.W.2d at 834.

430. *Id.* at 53, 729 N.W.2d at 835 (citations omitted).

431. *Id.*

432. *City of Mt. Pleasant*, 477 Mich. at 53, 729 N.W.2d at 835.

433. *City of Mt. Pleasant*, 477 Mich. at 53-54, 729 N.W.2d at 835 (quoting MICH. COMP. LAWS ANN. § 211.7m (West 2006) (emphasis added)).

434. *Id.* at 54, 729 N.W.2d at 835 (quoting Gregory Marina, Inc. v. Detroit, 378 Mich. 364, 396, 144 N.W.2d 503 (1966) (citations omitted)).

435. 471 Mich. 445, 461-62, 684 N.W.2d 765 (2004).

436. *Id.* at 461-62, 684 N.W.2d at 775.

437. *City of Mt. Pleasant*, 477 Mich. at 57, 729 N.W.2d at 835-36.

public purposes" because in order to be exempt under MCL section 211.7m, "the property must be used for public purposes."[438] "[D]uring each tax year . . . the [C]ity must have made a present use of the land that qualified as a public purpose. . . ."[439] The Court had to determine "what steps the City" took to shift from simply "holding the land to actually using it for a public purpose."[440] The court proceeded to describe in detail the various activities that the City conducted that led the court to believe that the City did indeed use the land for a public purpose during the years that it held the property.[441] For example, the City expanded and installed streets and public utilities, assembled the property for resale, engaged in marketing activities to promote resale, platted subdivisions for housing, hiring a management company to market some of the property, *inter alia*, all of which actively promoted its plan for economic development.[442] The court distinguished other cases where the municipalities did not have plans for their vacant property and where the property was not part of a broader vision and stated that in this case the City's plan was not "merely aspirational."[443]

In summation, the court held that "[t]he [C]ity's efforts with regard to the land indicate its active and purposeful engagement in using the land for the public purpose of economic development" and was therefore exempt from taxation under MCL section 211.7m.[444] The court reversed "the judgment of the [c]ourt of [a]ppeals and" remanded the case to the Tax Tribunal for entry for a judgment in favor of the City.[445]

VI. RIGHT OF FIRST REFUSAL IN A DEED RESTRICTION

In *Randolph v. Reisig*,[446] the trial court granted defendant sellers' motion for summary disposition pursuant to MCR 2.116(C)(10) in a dispute arising out of the interpretation of contracts contained in a property owners' association agreement.[447] The plaintiffs, option holders, appealed.[448]

In 1948, the "property owners on Houseman Lake created a property owners' association charged with maintaining the value and

438. *Id.* at 56, 729 N.W.2d at 836.
439. *Id.*
440. *Id.*
441. *Id.* at 56-60, 729 N.W.2d at 836-38.
442. *Id.*
443. *City of Mt. Pleasant*, 477 Mich. at 57-60, 729 N.W.2d at 836-38.
444. *Id.* at 60-61, 729 N.W.2d at 838.
445. *Id.* at 61, 729 N.W.2d at 838.
446. 272 Mich. App. 331, 727 N.W.2d 388 (2006).
447. *Id.* at 332, 727 N.W.2d at 389.
448. *Id.*

resources of property surrounding the lake."[449] On October 15, 1949, they entered into an agreement that placed certain restrictions, conditions, covenants, limitations, reservations and easements on the property.[450] The restrictions, covenants, *inter alia*, were to run with the land and bind the heirs, successors, representatives and assigns of the then current property owners.[451] Incorporated into the agreement was a requirement that any property owner who wished to sell his or her property first had to notify in writing all of the then current owners of the land covered by the agreement and give those property owners the first option to buy the said property.[452] Additionally, there was a provision that restricted the property owners from selling or leasing their property to anyone not of the caucasian race.[453] The covenants were to run with the land and be binding until January 1, 1960 and were to automatically extend for successive periods of ten years each "unless by a vote of the majority of the then owners of" the affected property.[454] The defendants, Clarence and Monica Reisig, owned property on Houseman Lake and the plaintiffs, Richard and Betty Randolph, owned the property adjacent to the defendants.[455] On April 15, 2001, the defendants "executed a contract for the sale of their property" to the other defendants, William and Debra Hinkley.[456] On May 1, 2001, the Reisigs notified the property owners on Houseman Lake of their land contract.[457] "On June 7, 2001, plaintiffs attempted to exercise their right of first refusal" by complying with the requirements of the homeowners' agreement.[458] "On June 26, 2001, the Reisigs returned plaintiffs' money and refused to sell" the property to them.[459] The plaintiffs then filed suit in August 2001.[460] Initially, the circuit court ruled that the "racially restrictive covenant rendered the right of first refusal unenforceable."[461] The Michigan Court of Appeals ruled that the racially restrictive covenant could be severed from the agreement and the remainder of the agreement was still enforceable and remanded the case.[462] On January 16, 2002, the

449. *Id.* at 333-34, 727 N.W.2d at 389.
450. *Id.* at 334, 727 N.W.2d at 389-90.
451. *Id.* at 334, 727 N.W.2d at 390.
452. *Randolph*, 272 Mich. App. at 334, 727 N.W.2d at 390.
453. *Id.* at 335, 727 N.W.2d at 390.
454. *Id.* The agreement also contained a clause whereby if any covenants were declared invalid by a judgment or decree of any court the other provisions were to remain in full force and effect. *Id.*
455. *Id.*
456. *Id.*
457. *Randolph*, 272 Mich. App. at 335, 727 N.W.2d at 390.
458. *Id.*
459. *Id.*
460. *Id.* at 335, 727 N.W.2d at 391.
461. *Id.* at 336, 727 N.W.2d at 391.
462. *Id.*

Reisigs transferred title of their property to the Hinkleys.[463] Defendants then moved for summary disposition on the basis that the right of first refusal was a property interest which was subject to the rule against perpetuities.[464] Alternatively, the defendants argued that "the right of first refusal violated the general rule that first refusal agreements must be for a definite period" of time.[465] The trial court ruled that if the rule against perpetuities applied, then the right of first refusal was void.[466] Conversely, the trial court held that, and if it did not apply, then the general rule that a right of first refusal must be for a definite period of time applied and determined that time to be the original term of the covenants.[467]

The court of appeals reviewed the case de novo based on the trial court's grant of the summary disposition and the proper interpretation of contracts.[468] "A right of first refusal, or preemptive right, is a conditional option to purchase dependent on the landowner's desire to sell."[469] In *Brauer*, the Michigan Court of Appeals determined that "rights of first refusal must contain a definite time for performance."[470] However, if the agreement did not contain such a provision, it was not void.[471] Courts would construe such "agreements to be for a reasonable amount of time," making them valid only for a reasonable amount of time.[472] The court stated that there was a tendency to construe the agreements to be limited to the lives of the parties unless there was clear evidence that the parties intended a different result.[473] The terms of the agreement were clear and unambiguous.[474] It stated that the covenants shall run with the land and that it shall bind successors, assigns, and representatives until January 1, 1960, at which time they shall automatically be extended for periods of ten years.[475] Since the agreement was express and definite as to the term, the court held that the trial court erred by concluding that the agreement did not have a definite duration.[476]

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463. *Randolph*, 272 Mich. App. at 336, 727 N.W.2d at 391. The Hinkleys were then added as defendants in the action. *Id.*

464. *Id.*

465. *Id.*

466. *Id.*

467. *Id.*

468. *Randolph*, 272 Mich. App. at 333, 727 N.W.2d at 389.

469. *Id.* at 336, 727 N.W.2d at 391 (citing Brauer v. Hobbs, 151 Mich. App. 769, 775-76, 391 N.W.2d 482, 485 (1986); CzApp. v. Cox, 179 Mich. App. 216, 223, 445 N.W.2d 218, 221 (1989)).

470. *Id.*

471. *Id.*

472. *Id.* at 336-37, 727 N.W.2d at 391.

473. *Id.* 272 Mich. App. at 337, 727 N.W.2d at 391.

474. *Randolph*, 272 Mich. App. at 337, 727 N.W.2d at 391.

475. *Id.*

476. *Id.* at 337-38, 727 N.W.2d at 392.

The plaintiffs also argued "that the trial court erred by determining that the right of first refusal" was a property right subject to the rule against perpetuities.[477] The court held that since "[a]n option contract does not create an interest in land" and "[a] right of first refusal gives the promisee fewer rights than an option contract," a right of first refusal cannot be an interest in land.[478] Most (Michigan) courts have treated similar agreements as contracts and not property rights, which means that they are not confined by the rule against perpetuities.[479] Therefore, the court held that the trial court erred when it determined "that the rule against perpetuities applied to the right of first refusal in the property owners' agreement."[480] The Michigan Court of Appeals reversed and remanded the case.[481]

VII. ASSIGNMENT OF UTILITY EASEMENT

In *Heydon v. Mediaone of Southeast Michigan, Inc.*,[482] plaintiffs appealed "as of right the trial court's order granting summary disposition" to defendant and dismissing plaintiffs' claims.[483] Plaintiffs contended that the defendant did not have the right to enter upon their "land to place and maintain cable television lines on already existing utility poles" utilized by Detroit Edison ("Edison") to transmit electricity.[484] There is no dispute that Edison "acquired the right to install and maintain electrical lines and poles on plaintiffs' property."[485] Edison then entered into an agreement with "defendant to place and maintain cable television lines on the same utility poles," which would be considered "'apportioning' or partially assigning

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477. *Id.* at 338, 727 N.W.2d at 392. MCL section 554.51 is the Michigan statutory rule that governs interests created between September 23, 1949 and December 27, 1988. It states:

> The common law rule known as the rule against perpetuities now in force in this state as to personal property shall hereafter be applicable to real property and estates and other interests therein, whether freehold or non-freehold, legal or equitable, by way of trust or otherwise, thereby making uniform the rule as to perpetuities applicable to real and personal property.

MICH. COMP. LAWS ANN. § 554.51 (West 2006). As explained in *Hubscher & Son, Inc. v. Storey*, the rule "is violated if, at the time the instrument creating a future estate comes into operation, it is not certain that the estate will either vest or fail to vest within twenty-one years of the death of a person named in the instrument." 228 Mich. App. 478, 482-83, 578 N.W.2d 701, 703 (1998).

478. *Randolph*, 272 Mich. App. at 338-39, 727 N.W.2d at 392.

479. *Id.* at 339, 727 N.W.2d at 392.

480. *Id.* at 339-40, 727 N.W.2d at 393.

481. *Id.* at 340, 727 N.W.2d at 393.

482. 275 Mich. App. 267, 739 N.W.2d 373 (2007).

483. *Id.* at 268, 739 N.W.2d at 376.

484. *Id.*

485. *Id.*

Edison's right" to utilize the poles.[486] Plaintiffs "filed a complaint against defendant alleging a continuing common law trespass and seeking recovery for damage to their land under MCL 600.2919."[487]

On appeal the plaintiffs raised five arguments.[488] The plaintiffs' first argument was that the easement Edison had was prescriptive in nature, which was not assignable.[489] The court then proceeded to describe the different types of easements (appurtenant and in gross) and the ways in which an easement may be created (grant, reservation, exception, covenant or agreement).[490] Quoting *Goodall v. Whitefish Hunting Club*,[491] the court described a prescriptive easement as being "the use of the property of another that is open, notorious, adverse, and continuous for a period of 15 years,"[492] and stated that it "is generally limited in scope by the manner in which it was acquired and the previous enjoyment."[493] "One who holds a prescriptive easement is allowed to do such acts as are necessary to make effective the enjoyment of the easement unless the burden on the servient estate is unreasonably increased [and] the scope of the privilege is determined largely by what is reasonably under the circumstances."[494] In this case, the parties agreed that Edison held an easement in gross by prescription.[495] Under Michigan law, easements in gross, if express and of a commercial nature, are alienable property interests and are assignable.[496] The difference in this case was that the easement in gross was acquired by prescription and this was an issue of first impression in Michigan.[497] Since this was an issue of first impression, the court looked to other jurisdictions and cited *Zhang v.*

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486. *Id.*

487. *Id.* Plaintiffs also "filed a prior action against defendant in 1999" which was pending at the time this case was initiated. *Heydon*, 275 Mich. App. at 269, 739 N.W.2d at 376; *see* Heydon v. MediaOne of Southeast Michigan, Inc., No. 255186, 2005 Mich. App. LEXIS 3237 (2005). The prior case involved other land owned by plaintiffs, but the case was essentially the same except that in the prior case Edison had been granted an express written easement as opposed to holding a prescriptive easement. *Id.* In the prior case, the trial court granted summary disposition in favor of defendant and the court of appeals affirmed its ruling. After the prior ruling, both parties moved for summary disposition in the instant case and the trial court granted summary disposition to defendant. *Id.*

488. *Heydon*, 275 Mich. App. at 270, 739 N.W.2d 376.

489. *Id.* at 270, 739 N.W.2d at 376-77.

490. *Id.* at 270-71, 739 N.W.2d at 377.

491. 208 Mich. App. 642, 645, 528 N.W.2d 221, 223 (1995).

492. *Heydon*, 275 Mich. App. 270-71, 739 N.W.2d at 377.

493. *Id.* at 271, 739 N.W.2d at 377.

494. *Id.* (citing Mumrow v. Riddle, 67 Mich. App. 693, 699-700, 242 N.W.2d 489, 493 (1976)).

495. *Id.* (citing Johnston v. Michigan Consol. Gas Co., 337 Mich. 572, 582, 60 N.W.2d 464, 469 (1953)).

496. *Id.*

497. *Id.* at 271, 739 N.W.2d at 377.

Omnipoint Communications Enterprises, Inc.[498] In *Zhang*, the Connecticut Supreme Court held that:

> an easement in gross is capable of division when the instrument of creation so indicates or when the existence of an "exclusive" easement gives rise to an inference that the servitude is apportionable. In this context, "exclusive" means that the easement holder has the sole right to engage in the type of use authorized by the servitude.[499]

The Connecticut Supreme Court went on to describe how if the grantor does not retain an interest in exercising a similar right as the grantee then the grantor would not sustain a loss if the use was shared by the grantee with others and thus the grant of the easement would be exclusive—the grantor never attempted to engage in the distribution of electricity.[500] The court in the instant case then cited cases from other jurisdictions that held that prescriptive easements were capable of apportionment, which then led to issues of scope, use and reasonableness of the apportionment.[501] In this case, the court found that there was "no evidence that plaintiffs could or did use the easement for the purpose of erecting and maintaining power lines" and therefore Edison held the exclusive privilege.[502] The court also quoted the Restatement of Property, Servitudes, Third, section 5.9, which states that "transferable benefits in gross may be divided unless contrary to the terms of the servitude, or unless the division unreasonably increases the burden on the servient estate."[503] Therefore the court held that unless the division unreasonably increases the burden on the servient estate or unless it is contrary to the terms of the servitude, "a commercial, exclusive easement in gross acquired by prescription [could] be apportioned."[504]

Next, the plaintiffs argued that the apportionment of the easement materially burdened and imposed a new burden on the easement.[505] According to *Delaney v. Pond*,[506] the burden of the easement cannot be materially increased nor can the owner of the easement impose a new and additional burden on the servient estate.[507] The plaintiff cited

498. 272 Conn. 627, 866 A.2d 588 (2005).
499. *Heydon*, 275 Mich. App. at 271-72, 739 N.W.2d at 377-78 (citations omitted).
500. *Id.* at 272, 739 N.W.2d at 378.
501. *Id.* at 272-74, 739 N.W.2d at 378-79.
502. *Id.* at 274, 739 N.W.2d at 379.
503. *Id.*
504. *Id.*
505. *Heydon*, 275 Mich. App. at 274, 739 N.W.2d at 379.
506. 350 Mich. 685, 687, 86 N.W.2d 816, 817 (1957).
507. *Heydon*, 275 Mich. App. at 275, 739 N.W.2d at 379; *see also* Schadewald v. Brule, 225 Mich. App. 26, 36, 570 N.W.2d 788, 795 (1997).

to cases outside of Michigan "to support the position that placing cable wires in a utility easement" imposed a new burden.[508] The court pointed out that other states had reached the opposite conclusion and that Michigan had resolved a similar case in the same manner as these other states.[509] In the Michigan case, the court rejected the plaintiffs' argument that attachment of "cable television wires to the poles on a utility easement materially increased the burden on" the servient estate.[510] In the instant case, plaintiff argued that the maintenance and repair use of the property would be doubled with the additional lines, but failed to produces any evidence to support this claim.[511] Although not bound by the Michigan case, the court held that the rule in this case should be followed.[512]

Another issue that the court had to address was whether the apportionment was contrary to the terms of the servitude.[513] Because the easement in question was one of prescription, there were no express terms and the scope of the privilege had to be determined by what was reasonable under the circumstances.[514] The court indicated that there was no evidence that the additional lines were unreasonable.[515] Since the apportionment allowed for similar transmission and utilizing the original purpose of the easement the court found that it was not contrary to the terms of the servitude.[516]

The third argument that the plaintiffs raised had to deal with the Cable Communications Policy Act ("CCPA").[517] "[T]he CCPA prohibits cable companies from 'piggy-backing'" on private easements."[518] Even though "both parties raised and addressed this issue in their summary disposition briefs, the trial court [only] stated that the CCPA was constitutional and did not address" this argument.[519] For that reason, the court of appeals declined to address this issue on appeal.[520]

Plaintiffs' fourth argument was that it was a violation of the takings clause of the U.S. Constitution to interpret and apply the

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508. *Heydon*, 275 Mich. App. 275-76, 739 N.W.2d at 379-80.

509. *Id.* at 276-77, 739 N.W.2d at 380; *see also* Mumaugh v. Diamond Lake Area Cable TV Co., 183 Mich. App. 597, 456 N.W.2d 425 (1990).

510. *Heydon*, 275 Mich. App. at 277, 739 N.W.2d at 380-81.

511. *Id.* at 277, 739 N.W.2d at 380-81.

512. *Id.* at 277, 739 N.W.2d at 380.

513. *Id.* at 277, 739 N.W.2d at 381.

514. *Id.* at 277-78, 739 N.W.2d at 381; *see generally Mumrow*, 67 Mich. App. at 699, 242 N.W.2d 489.

515. *Heydon*, 275 Mich. App. at 278, 739 N.W.2d at 381.

516. *Id.*

517. *Id.*; 47 U.S.C. § 541-549 (2006).

518. *Heydon*, 275 Mich. App. at 278, 739 N.W.2d at 381.

519. *Id.*

520. *Id.* at 278-79, 739 N.W.2d at 381.

CCPA to allow this piggy-backing by cable companies.[521] Since the trial court only found that the CCPA was constitutional and that being the parties' only constitutional claim, the court of appeals found that the trial court implicitly found that the CCPA did not violate the takings clause.[522] The court of appeals reviewed this question of law involving statutory interpretation and construction de novo.[523] The court of appeals looked to the CCPA itself to determine whether there was a taking.[524] Pursuant to 47 USC § 541(a)(2)(C), a cable operator in using an easement shall ensure that the owner of the property is justly compensated for any damages.[525] The court found that since the CCPA directly addressed just compensation, Congress anticipated the plaintiffs' argument and addressed it within the act.[526]

In sum, a prescriptive easement in gross, commercial in nature, may be apportioned if the apportionment of the easement does not materially or unreasonably increase the burden on the servient estate.[527]

VIII. CONCLUSION

This year's *Survey* period again illustrates the ongoing tensions in the area of real property law. Our courts continue to explore the multiple facets involved in zoning, land use, foreclosure and other areas of real property law as well as to clarify the law and rights, which are inherent in this difficult arena.

521. *Id.* at 279, 739 N.W.2d at 381.
522. *Id.*
523. *Id.*
524. *Heydon*, 275 Mich. App. at 279, 739 N.W.2d at 382.
525. *Id.* at 280, 739 N.W.2d at 382; *see* 47 USC § 541(a)(2)(C) (2006).
526. *Heydon*, 275 Mich. App. at 280, 739 N.W.2d at 382.
527. *Id.* at 274, 739 N.W.2d at 379.