REAL PROPERTY

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[I]t is a tale . . . full of sound and fury; signifying nothing.[1]

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I. INTRODUCTION

This article surveys developments in Michigan real property law for the *Survey* period, which began on June 1, 2007 and ended on May 31, 2008.[2] During the *Survey* period, Michigan courts decided a number of cases involving real property issues. However, unlike previous *Survey* periods, none of these decisions, frankly, announced any earth-shattering shift in legal authority. Instead, the cases during this *Survey* period, which included several decisions addressing zoning and land use issues, were incremental in nature. This article will address the cases by topic, with each topic covering any judicial decisions affecting that area of Michigan's real property law.

II. ZONING AND LAND USE

The *Survey* period encompassed three decisions addressing zoning and land use issues. The decisions included an opinion from the Michigan Supreme Court concerning the application of the Religious Land Use and Institutionalized Persons Act,[3] a short opinion from the Michigan Supreme Court regarding the application of the Right to Farm Act,[4] and an opinion from the Michigan Court of Appeals regarding the standards for a special land use permit.[5]

A. Application of the Religious Land Use and Institutionalized Persons Act

The Michigan Supreme Court clarified the application of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA)[6] in *Greater Bible Way Temple of Jackson v. Jackson.*[7] In *Greater Bible Way*, the City of Jackson denied a rezoning request made by the church for the construction of an apartment complex across a street from the church itself.[8] The City Council denied the rezoning request based upon the recommendations of a regional planning

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1. WILLIAM SHAKESPEARE, THE TRAGEDY OF MACBETH, act 5, sc. 5.

2. Only where essential to a discussion of cases decided within the *Survey* period are developments after the *Survey* period discussed.

3. Greater Bible Way Temple of Jackson v. Jackson, 478 Mich. 373, 733 N.W.2d 734 (2007).

4. Papadelis v. Troy, 478 Mich. 934, 733 N.W.2d 397 (2007).

5. Houdek v. Centerville Twp., 276 Mich. App. 568, 741 N.W.2d 587 (2007).

6. 42 U.S.C. §§ 2000cc, *et seq.* (2009).

7. 478 Mich. 373, 733 N.W.2d 734.

8. *Id.* at 377-78, 733 N.W.2d at 734.

commission and the city's planning commission.[9] The church filed a lawsuit directly challenging the city's zoning denial, and also alleging that the denial violated RLUIPA.[10] The trial court ruled that RLUIPA applied, and that the city's zoning denial violated RLUIPA, because the zoning decision was an "individualized assessment," the "refusal to rezone [Greater Bible's] property imposed a 'substantial burden' on the exercise of religion,"[11] and that the city did not have a compelling interest furthered by the denial.[12] The court of appeals affirmed the trial court.[13]

The Michigan Supreme Court reversed the court of appeals.[14] The Court commenced its analysis by noting that the burden of proving that RLUIPA was applicable lies with the plaintiff. The plaintiff could only implicate RLUIPA if:

> [T]he substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.[15]

Therefore, the plaintiff had to show that the city made an individualized assessment in implementing a land use regulation[16] that imposed a substantial burden on the religious exercise[17] of the plaintiff. The Court concluded that an "individualized assessment" was "an

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9. *Id.*

10. *Id.* at 378, 733 N.W.2d at 734.

11. *Id.*

12. *Id.*

13. *See* Greater Bible Way Temple of Jackson v. Jackson, 268 Mich. App. 673, 708 N.W.2d 756 (2005).

14. *Greater Bible Way*, 478 Mich. at 373, 733 N.W.2d at 734.

15. 42 U.S.C. § 2000cc(a)(2) (2009).

16. Land use regulation is a:

> [Z]oning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.

42 U.S.C. § 2000cc-5(5) (2009).

17. Religious exercise is "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 USC § 2000cc-5(7)(A). Further: "The use, building or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose." 42 U.S.C. § 2000cc-5(7)(B) (2009).

assessment based on one's particular circumstances."[18] Utilizing that definition, the Court ruled that a decision whether to rezone the property was not an individualized assessment, because the rezoning decision would apply to the entire community, and would continue to apply even if the property were to be sold by the church to a third party.[19]

Although the Michigan Supreme Court's opinion could have ended here, the Court continued with several additional reasons for the reversal of the Court of Appeals.[20] The Court next concluded that the plaintiff had not met the burden of proving that the proposed apartment building would be used for the religious exercise of the plaintiff. The plaintiff had provided only an affidavit signed by a religious officer of the plaintiff outlining that one of the missions of the church was to provide "an exceptional level of service to the community. This includes housing . . . . [The church] wishes to further the teachings of Jesus Christ by providing housing and living assistance to the citizens of Jackson."[21] The Michigan Supreme Court determined that the affidavit, standing alone, did not meet the plaintiff's burden.[22] Next, the Court ruled that, even if the rezoning denial were an individualized assessment, and even if the construction of an apartment building were the exercise of religion, the denial of rezoning was not a "substantial burden" on the plaintiff's exercise of religion.[23] The court determined that a "substantial burden"

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18. *Greater Bible Way*, 478 Mich. at 388-89, 733 N.W.2d at 743.

19. *Id.* at 389, 733 N.W.2d at 743-44. Whether the Court would reach the same conclusion if the church's rezoning application had been made under conditional zoning provisions in the Michigan Zoning Enabling Act is unclear. The conditional zoning provisions provide, in pertinent part: "An owner of land may voluntarily offer in writing, and the local unit of government may approve, certain use and development of the land as a condition to a rezoning of the land or an amendment to a zoning map." MICH. COMP. LAWS ANN. § 125.3405(1) (West 2009). Where the applicant contractually offers a specific type of development on the property post-rezoning, the municipality's decision may very well be an individualized assessment under the court's analysis in the instant case. The court's discussion of the distinction between a rezoning request and a variance request, which does request permission for a specific use, seems to confirm that the analysis would be different under a conditional zoning application. *See Greater Bible Way*, 478 Mich. at 390, 733 N.W.2d at 744. For further discussion of Michigan's conditional zoning authorization, *see* David Pierson, *The Background to Michigan's Conditional Zoning Authorization*, 32 MICH. REAL PROP. REV. 67 (2005); Richard D. Rattner & Richard E. Rassel III, *Legislature Opens Door for Contract Zoning in Michigan: An Overview*, 32 MICH. REAL PROP. REV. 81 (2005).

20. *Greater Bible Way*, 478 Mich. at 392, 733 N.W.2d at 746. This continued analysis was likely performed by the Court to protect the opinion from reversal by the United States Supreme Court.

21. *Id.* at 392, 733 N.W.2d at 746.

22. *Id.* at 402, 733 N.W.2d at 750.

23. *Id.* at 394, 733 N.W.2d at 746.

exists "when one is forced to choose between violating a law (or forfeiting an important benefit) and violating one's religious tenets. A mere inconvenience or irritation does not constitute a '*substantial* burden.'"[24] The Court concluded that a substantial burden was not present in this case, because "the city is not forbidding plaintiff from building an apartment complex; it is simply regulating where that apartment complex can be built. If plaintiff wants to build an apartment complex, it can do so; it just has to build it on property that is zoned for apartment complexes."[25]

The Michigan Supreme Court next concluded that even if all of the other elements of a RLUIPA claim had been met, the plaintiff would still be unsuccessful because the city has a compelling interest for imposing a substantial burden (assuming, arguendo, that a substantial burden had been imposed).[26] The city's compelling interest was "in regulating where apartment complexes can be built within the city,"[27] and "the city's general interest in zoning, and the city's specific interest in maintaining the character of [the] residential neighborhood."[28]

Finally, the Michigan Supreme Court determined that the decision on a rezoning request is an all-or-nothing proposition, so the denial of the request was the "least restrictive means" of furthering the government's compelling interest,[29] as required by RLUIPA.[30]

B. The Right to Farm Act Does Not Exempt Property from Compliance with Ordinances Unless the Ordinance Conflicts with the Right to Farm Act or a Generally Accepted Agricultural Management Practice

During the *Survey* period, the Michigan Supreme Court also issued a brief per curiam opinion in *Papadelis v. Troy*,[31] which ruled that

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24. *Id.* at 401, 733 N.W.2d at 750 (emphasis in original).

25. *Id.*

26. *Greater Bible Way*, 478 Mich. at 403, 733 N.W.2d at 751.

27. *Id.* at 404, 733 N.W.2d at 752. This argument is particularly troubling, because the very nature of a zoning ordinance is regulating land uses. Therefore, this "compelling interest" would be applicable in virtually all land use decisions made by a municipality, rendering RLUIPA virtually toothless for use by religious institutions.

28. *Id.* at 406-07, 733 N.W.2d at 753.

29. *Id.* at 407, 733 N.W.2d at 753.

30. *See* 42 U.S.C. § 2000cc(a)(1)(B) (2009).

31. 478 Mich. 934, 733 N.W.2d 397. For purposes of full disclosure, the author represented several neighbors of the plaintiff in this case as an intervening party, opposing the operations of plaintiff, in lower court and federal court litigation. However, the intervening neighbors were not a party to this appeal. The reader should also be aware that litigation between plaintiff and the City of Troy has been ongoing since the 1980s, and continues as of this writing.

Michigan's Right to Farm Act[32] and State Construction Code[33] did not exempt greenhouses and related structures from compliance with local ordinances "governing the permitting, size, height, bulk, floor area, construction, and location" of those structures.[34] The Court confirmed that the Right to Farm Act only exempts agricultural property from compliance with local ordinances if "provisions of the RTFA or any published generally accepted agricultural and management practice" conflict with the local zoning ordinance.[35] In *Papadelis*, neither the Right to Farm Act nor any generally accepted agricultural and management practice addressed the ordinance provisions at issue, and therefore the owner was required to comply with the local ordinance.[36]

C. A Zoning Ordinance Regulating Septage Disposal Not Exclusionary

In *Houdek v. Centerville Township*,[37] the court of appeals analyzed a zoning ordinance that severely restricted septage disposal within a municipality and found that the ordinance was not exclusionary in nature.[38] The plaintiff operated a company that provided septic pumping services within defendant municipality.[39] The defendant adopted a zoning regulation that prohibited application of septage to lands within the township "if an existing public wastewater treatment or septage treatment facility" within a three-county area was able to accept the waste.[40] The zoning regulation permitted current septage disposal sites to continue operating, but only until the Michigan Department of Environmental Quality permit for each site expired.[41]

After enactment of the zoning regulation, the plaintiff applied for a special use permit to apply septage to a property for which it held a MDEQ permit.[42] The defendant granted the special use permit, because it had not made available another site for the disposal of septage.[43] After granting the special use permit, the defendant township adopted a resolution making available a public septage disposal facility at a site in a

32. MICH. COMP. LAWS ANN. §§ 286.471, *et seq.* (West 2009)
33. MICH. COMP. LAWS ANN. §§ 125.1502a(f), *et seq.* (West 2009)
34. 478 Mich. 934, 733 N.W.2d 397.
35. *Id.*
36. *Id.*
37. 276 Mich. App. 568, 741 N.W.2d 587.
38. *Id.* at 570, 741 N.W.2d at 590-91.
39. *Id.* at 570-71, 741 N.W.2d at 591.
40. *Id.* at 571, 741 N.W.2d at 591.
41. *Id.*
42. *Id.*
43. *Houdek*, 276 Mich. App. at 571, 741 N.W.2d at 591.

neighboring county.[44] In the meantime, plaintiff had received additional MDEQ permits for the application of septage to other parcels plaintiff owned within the township,[45] but the defendant would not permit such disposal, because there was now a site available for the disposal of septage in a neighboring county.[46] The defendant also would not grant permits for the construction of septage storage tanks on the plaintiff's properties, because septage storage was not a permitted use in the agricultural zoning classification within which the plaintiff's properties were located.[47] Accordingly, the plaintiff filed suit, claiming, among other things, exclusionary zoning.[48] The defendant township argued that the zoning ordinance was a valid exercise of governmental zoning power.[49] The plaintiff's complaint was dismissed by the trial court, and an appeal to the court of appeals was taken.[50]

The court of appeals affirmed the dismissal of the complaint, and ruled that the septage disposal ordinance enacted by the defendant township was not exclusionary in nature.[51] First, the court determined that the ordinance did not totally exclude the proposed use in the township.[52] The Township Zoning Act provides:

> A zoning ordinance or zoning decision shall not have the effect of totally prohibiting the establishment of a land use within a township in the presence of a demonstrated need for that land use within either the township or surrounding area within the state, unless there is no location within the township where the use may be appropriately located, or the use is unlawful.[53]

Because there were two sites within the township currently approved for the disposal of septage (both of which were sites controlled by the plaintiff), the court ruled that the zoning ordinance was not exclusionary.[54] The court noted that its decision would not preclude an

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44. *Id.*
45. *Id.* at 571-72, 741 N.W.2d at 591.
46. *Id.*
47. *Id.* at 572, 741 N.W.2d at 591.
48. *Id.*
49. *Houdek*, 276 Mich. App. at 575, 741 N.W.2d at 593.
50. *Id.* at 572, 741 N.W.2d at 592.
51. *Id.* at 578-80, 741 N.W.2d at 595-96.
52. *Id.* at 577, 741 N.W.2d at 594.
53. MICH. COMP. LAWS § 125.297a (repealed 2006). The Township Zoning Act has been repealed and replaced by the Michigan Zoning Enabling Act, MICH. COMP. LAWS ANN. §§ 125.3101-.3701 (West 2009). However, the Michigan Zoning Enabling Act contains language nearly identical to the Township Zoning Enabling Act.
54. *Houdek*, 276 Mich. App. at 578-79, 741 N.W.2d at 595.

"as applied" challenge in the future, if the two sites currently approved for septage disposal were no longer approved, noting: "We need not address an issue concerning a future eventuality."[55] Because the plaintiff had failed to demonstrate that septage disposal was totally excluded by the zoning regulation, the court was not required to engage in any additional analysis. However, the court also noted that the plaintiff had failed to prove that there was a "demonstrated need" for additional septage disposal sites within the township.[56] The court noted that the factors sited by the plaintiff, which included distant locations of existing sites, the increased costs of pumping at such distant sites, and the volume of septage produced in the township, demonstrated not public need, but "self-serving needs."[57]

The plaintiff next argued that the zoning ordinance was exclusionary "as applied" regarding septage storage (as opposed to disposal) facilities.[58] Because the standards for succeeding on such a claim are similar to a "facial" challenge to a zoning ordinance, it is no surprise that the plaintiff's argument "as applied" failed as well.[59] The court of appeals first reiterated that there was no demonstrated need for additional septage storage structures within the township, for the same reasons that no demonstrated need existed for septage disposal sites.[60] Rather than store septage within the township, the plaintiff could haul the septage to the available disposal sites within neighboring counties. Most importantly, however, the township's zoning ordinance permitted the construction of septage storage sites within certain zoning classifications.[61] The plaintiff's property, of course, was not located within those zoning classifications.

The plaintiff's final two arguments were quickly disposed of by the court of appeals. The plaintiff argued that the zoning ordnance violated a provision of the Natural Resources and Environmental Protection Act, which provides:

> If a governmental unit requires that all septage waste collected in that governmental unit be disposed of in a receiving facility or prohibits, or effectively prohibits, the application of septage

55. *Id.* at 577, 741 N.W.2d at 594.

56. *Id.* at 578, 741 N.W.2d at 594-95.

57. *Id.* at 578, 741 N.W.2d at 595. Query, however, whether the court's analysis would be the same if the closest septage disposal site made available was not in a neighboring county, but a two-hour drive away from the township.

58. *Id.* at 579, 741 N.W.2d at 595.

59. *See id.* at 578-80, 741 N.W.2d at 595-96.

60. *Id.* at 580, 741 N.W.2d at 596.

61. *Id.* at 579, 741 N.W.2d at 595.

> waste to land within that governmental unit, the governmental unit shall make available a receiving facility that can lawfully accept all septage waste generated within that governmental unit that is not lawfully applied to land.[62]

However, the court of appeals noted that the above statute, in its plain language, does not require that the municipality allow construction of a setpage disposal facility within its boundaries, only that it "make available" a facility for the septage that is generated within its boundaries.[63]

Because the defendant township had made available a facility in a neighboring county, the Natural Resources and Environmental Protection Act was not violated.[64]

Finally, the plaintiff argued that the zoning regulation violated its due process and equal protection rights under the United States and Michigan Constitutions.[65] The court of appeals ruled that the plaintiff had failed to demonstrate that the septage disposal zoning regulation was not rationally related to a legitimate governmental interest, and thus it did not violate the plaintiff's due process rights.[66] Because plaintiff had not shown that the ordinance was not rationally related to a legitimate governmental interest, and because plaintiff was not treated differently than other septage haulers, the plaintiff's equal protection claim failed as well.[67]

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62. MICH. COMP. LAWS ANN. § 324.11715(2) (West 2009).

63. *Houdek*, 276 Mich. App. at 581-82, 741 N.W.2d at 596.

64. *Id.* at 582, 741 N.W.2d at 596.

65. *Id.* at 582-86, 741 N.W.2d at 596. Plaintiff implicated the Fourteenth Amendment to the United States Constitution, which provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1. Plaintiff also implicated Article I, Section 17 of the Michigan Constitution, which provides, in pertinent part: "No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law." MICH. CONST. of 1963, art. I, § 17.

66. 276 Mich. App. at 585, 741 N.W.2d at 598.

67. *Id.* at 585, 741 N.W.2d at 599.

III. STATUTE OF LIMITATIONS

A. Quiet Title Claims Have a Fifteen Year Limitation Period, Even if Fraud Is Alleged

During the *Survey* period, the Michigan Court of Appeals addressed whether the six year statute of limitations was applicable to claims of fraud[68] or the fifteen year statute of limitations for a quiet title action[69] was applicable where each party argued that different theories of recovery were implicated in the complaint.[70] In *Adams v. Adams*,[71] the court of appeals was confronted with a case where the plaintiff alleged that she was entitled to a quiet title judgment because a deed had been obtained by fraud.[72] However, the complaint had been filed eight years after the plaintiff discovered the deed that she alleged had been obtained by fraud.[73] The defendant, therefore, alleged that the complaint was barred by the six year statute of limitations applicable to fraud claims.[74] The plaintiff responded that the complaint was instead governed by the fifteen year statute of limitations applicable to quiet title actions.[75] The trial court agreed with the defendant, and dismissed the complaint.[76]

The court of appeals, on the other hand, agreed with the plaintiff, and reversed the dismissal.[77] The plaintiff argued that the "true gravamen of her complaint was to quiet title under"[78] Michigan's quiet title statute;[79]

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68. MICH. COMP. LAWS ANN. § 600.5813 (West 2009).

69. MICH. COMP. LAWS ANN. § 600.5801(4) (West 2009).

70. *See* Adams v. Adams, 276 Mich. App. 704, 742 N.W.2d 399 (2007).

71. 276 Mich. App. 704, 742 N.W.2d 399.

72. *Adams*, 276 Mich. App. at 708, 742 N.W.2d at 402.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* The author notes for the purposes of full disclosure that in his position as a member of the Council of the Real Property Section of the State Bar of Michigan, he voted in favor of the Section's filing of an *amicus curiae* brief which essentially supported the position of the plaintiff in this case. However, the author did not represent a party in this action.

78. *Adams*, 276 Mich. App. at 709, 742 N.W.2d at 402-03.

79. MICH. COMP. LAWS ANN. § 600.2932(1) (West 2009), which reads, in pertinent part:

> Any person, whether he is in possession of the land in question or not, who claims any right in, title to, equitable title to, interest in, or right to possession of land, may bring an action in the circuit courts against any other person who claims or might claim any interest inconsistent with the interest claimed by the plaintiff, whether the defendant is in possession of the land or not.

Id. See also Gorte v. Dep't of Transp., 202 Mich. App. 161, 165, 507 N.W.2d 797, 799 (1993).

therefore, the plaintiff argued that the fifteen year statute of limitations for quiet title actions[80] applied.[81] The defendant argued that the six year statute of limitations for fraud or undue influence claims,[82] or the six year statute of limitations for rescission of written instruments[83] applied.

In analyzing the "true gravamen" of the plaintiff's complaint, the court first discussed and distinguished seemingly dispositive precedent.[84] In *Lecus v. Turns*[85] and *Gragg v. Maynard*,[86] the Michigan Supreme Court had ruled that a party who had brought a claim to quiet title because a deed had been acquired by fraud or undue influence (i.e. claims similar to those brought in this case) had been cases sounding in fraud.[87] However, the court of appeals disregarded the prior rulings in *Lecus* and *Gragg*, ruling that those decisions had been made when there was a distinction between cases brought at law, and cases brought in equity.[88] The court concluded that the enactment of the quiet title statute had eviscerated the distinction between cases brought at law and cases

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80. MICH. COMP. LAWS ANN. § 600.5801 (West 2009). The statute reads in pertinent part:

> No person may bring or maintain any action for the recovery or possession of any lands or make any entry upon any lands unless, after the claim or right to make the entry first accrued to himself or to someone through whom he claims, he commences the action or makes the entry within the periods of time prescribed by this section.
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> (1) When the defendant claims title to the land in question by or through some deed made upon the sale of the premises by an executor, administrator, guardian, or testamentary trustee; or by a sheriff or other proper ministerial officer under the order, judgment, process, or decree of a court or legal tribunal of competent jurisdiction within this state, or by a sheriff upon a mortgage foreclosure sale the period of limitation is 5 years.
>
> (2) When the defendant claims title under some deed made by an officer of this state or of the United States who is authorized to make deeds upon the sale of lands for taxes assessed and levied within this state the period of limitation is 10 years.
>
> (3) When the defendant claims title through a devise in any will, the period of limitation is 15 years after the probate of the will in this state.
>
> (4) In all other cases under this section, the period of limitation is 15 years.

Id. Obviously, subsection (4) is applicable in this case.

81. *Adams*, 276 Mich. App. at 709-10, 742 N.W.2d at 402-03.

82. MICH. COMP. LAWS ANN. § 600.5813 (West 2009); *see also* Badon v. Gen. Motors Corp., 188 Mich. App. 430, 435, 470 N.W.2d 436, 439 (1991).

83. MICH. COMP. LAWS ANN. § 600.5813 (West 2009); *see also* Wall v. Zynda, 283 Mich. 260, 265-66, 278 N.W. 66, 68 (1938).

84. *Adams*, 276 Mich. App. at 712, 742 N.W.2d at 404.

85. 180 Mich. 117, 146 N.W. 649 (1914).

86. 164 Mich. 535, 129 N.W. 723 (1911).

87. *Adams*, 276 Mich. App. at 712-13, 742 N.W.2d at 404-05.

88. *Id.*

brought in equity.[89] Likewise, the enactment of the quiet title statute had eviscerated the relevance of *Lecus* and *Gragg*.[90]

The court of appeals next noted that a more recent court of appeals decision confirmed that a claim under the quiet title statute retained its character as a quiet title action even when it sought to set aside a prior deed or conveyance, unlike claims brought prior to enactment of the quiet title statute.[91] Further, the complaint in this case did not seek a recovery against the party that perpetrated the alleged fraud, but merely sought to determine the interests in the property.[92] The court also found support for its conclusion in federal court decisions that interpreted the quiet title statute in the same way the court of appeals was interpreting the quiet title statute.[93] Lastly, the court of appeals noted that cases from other states were in accord with its conclusion.[94]

After concluding that the fifteen year statute of limitations applicable to quiet title actions applied, the court then determined when the claim of the plaintiff had accrued. Notwithstanding the fact that the deed which the plaintiff sought to set aside was recorded in 1988,[95] the court of appeals determined that the plaintiff had not been aware of the deed's existence until the safe deposit box containing the deed was opened in 1997.[96] Therefore, the complaint, which was filed in 2005, was timely filed under the fifteen year quiet title statute of limitations.[97]

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89. *Id.* at 714, 742 N.W.2d at 405.

90. *Id.*

91. *Id.* at 715, 742 N.W.2d at 406 (citing Carpenter v. Mumby, 86 Mich. App. 739, 273 N.W.2d 605 (1978)).

92. *Id.* at 715, 742 N.W.2d at 406.

93. *Adams*, 275 Mich. App. at 715, 742 N.W.2d at 406; *see, e.g.*, Lorimer v. Berrelez, 331 F. Supp. 2d 585, 587 (E.D. Mich. 2004); Blachy v. Butcher, 35 F. Supp. 2d 554 (W.D. Mich. 1998), *rev'd in part on other grounds*, 221 F.3d 896 (6th Cir. 2000); Lavean v. Cowels, 835 F. Supp. 375, 377 (W.D. Mich. 1993).

94. *Adams*, 276 Mich. App. At 717-19, 742 N.W.2d at 407-08; *see, e.g.*, Wallin v. Scottsdale Plumbing Co., 557 P.2d 190 (Ariz. Ct. App. 1976); Murphy v. Crowley, 73 P. 820 (Cal. 1903); Cole v. Ames, 317 P.2d 662 (Cal. Ct. App. 1957); Moore v. Smith-Snagg 793 So. 2d 1000, 1003 (Fla. Dist. Ct. App. 2001); Detwiler v. Schultheis, 23 N.E. 709 (Ind. 1890); Cox v. Watkings, 87 P.2d 243 (Kan. 1939); Opp v. Boggs, 193 P.2d 379 (Mont. 1948); Lotspeich v. Dean, 211 P.2d 979 (N.M. 1949); Cooper v. Floyd, 177 S.E.2d 442 (N.C. Ct. App. 1970); Bradbury v. Nethercutt, 164 P. 194 (Wash. 1917); Wagner v. Law, 28 P. 1109 (Wash. 1892).

95. *Adams*, 276 Mich. App. at 708, 742 N.W.2d at 402.

96. *Id.*

97. *Id.* at 721, 742 N.W.2d at 409. This portion of the *Adams* opinion contains the following sentence, requiring the reader to decipher the meaning of a triple-negative: "[W]e conclude that reasonable minds could not disagree that plaintiff did not acquire notice of the adverse deed's existence until 1997." *Id.*

IV. EASEMENTS

A. Claiming Prescriptive Easement Due to Imperfectly Created Express Easement

The *Survey* period also presented the Michigan Court of Appeals with an opportunity to address a case involving a prescriptive easement. In *Mulcahy v. Verhines*,[98] the court of appeals discussed whether an attempted, but never executed, express easement could give rise to a claim for prescriptive easement.[99] The plaintiff and defendant owned neighboring properties.[100] At one point, the properties had been under common ownership.[101] The owner at that time had petitioned the municipality for a land division, which was granted.[102] One condition of the land division was that an easement agreement providing for reciprocal access and parking rights be created between the properties.[103] In fact, the owner sent to the municipality for approval a draft easement.[104] The municipality never responded to the draft, and the owner never executed the express easement.[105] Eventually, the two parcels were no longer under common ownership, and the owner of one of the neighboring parcels disputed the right of the other owner's tenant to use the parcel for parking and access.[106] The property line was barricaded, and a complaint was filed by the owner to regain the parking and access rights for her tenant.[107] The trial court granted summary disposition for the defendant, ruling that no easement, whether express or prescriptive, existed in favor of the plaintiff.[108]

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98. 276 Mich. App. 693, 742 N.W.2d 593 (2007).

99. *See generally id. Mulcahy* has an element often found in the most highly-litigated property disputes: the fact that the owners of the neighboring parcels are siblings. *Id.* at 695, 742 N.W.2d at 395. In the author's experience, the added element of familial relationship between parties in a property dispute often converts a seemingly simple property dispute into, essentially, a divorce proceeding.

100. *Id.*

101. *Id.* It should be noted that the prior common owner was the father of the plaintiff and the defendant who, as noted above, are siblings. *See supra* note 99. The court does not emphasize whether this fact had any bearing on its final opinion, but practitioners relying upon this case would be well suited to take note of this peculiar fact.

102. *Mulcahy*, 276 Mich. App. at 695, 742 N.W.2d at 395.

103. *Id.* at 696, 742 N.W.2d at 395.

104. *Id.*

105. *Id.*

106. *Id.* at 697, 742 N.W.2d at 396.

107. *Id.*

108. *Mulcahy*, 276 Mich. App. at 698, 742 N.W.2d at 396.

The court of appeals reversed. The court noted that a prescriptive easement can arise out of a use that is made "pursuant to the terms of an intended but imperfectly created servitude"[109] when the other elements of a prescriptive easement are met.[110] The court concluded that the original owner had "intended to create an easement but inadvertently failed to sign and record the easement agreement."[111] The court next confirmed that "use under an intended but imperfect express easement . . . satisfies the hostile—or adverse—use element of a prescriptive easement."[112] Finally, the court noted that the remaining elements for a prescriptive easement were present, without discussion of the facts satisfying those elements.[113]

V. DETERMINATION OF PROPERTY BOUNDARIES AND ADVERSE POSSESSION

A. Use of Surveys to Determine Property Boundaries and Analysis of Adverse Possession by a Municipality

In *Jonkers v. Summit Township*,[114] the court of appeals resolved conflicting legal descriptions arising out of two surveys, and also analyzed the application of the elements of adverse possession when the adverse possessor is, essentially, the public.

The disputed property was riparian property on the shore of Bass Lake, in Summit Township.[115] In 1839, a survey including the disputed property was conducted by the United States General Land Office.[116] The property was later platted.[117] In 1915, another survey was conducted near the disputed property. The 1915 survey showed that the section line actually ran through the platted subdivision, and conflicted with the 1839 survey. In 1944, relying upon the 1915 survey, an owner within the subdivision apparently conveyed the disputed property to the defendant township.[118]

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109. *Id.* at 699-700, 742 N.W.2d at 397 (quoting RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 2.16 (2000)).

110. *Id.*

111. *Id.* at 701, 742 N.W.2d at 398.

112. *Id.* at 702, 742 N.W.2d at 398 (relying on Plymouth Canton Cmty. Crier, Inc. v. Prose, 242 Mich. App. 676, 619 N.W.2d 725 (2000)).

113. *Mulcahy*, 276 Mich. App. at 702-03, 742 N.W.2d at 399.

114. 278 Mich. App. 263, 747 N.W.2d 901 (2008).

115. *Id.* at 265, 747 N.W.2d at 904.

116. *Id.*

117. *Id.* at 265-66, 747 N.W.2d at 904.

118. *Id.* at 266, 747 N.W.2d at 904.

The plaintiff owned a lot within that platted subdivision. The defendant township operated a boat launch adjacent to the plaintiff's residence.[119] The first issue addressed by the court of appeals was whether the boat launch was still included within the plaintiff's legal description. If the 1839 survey was found to be paramount, the property would be included within plaintiff's property.[120] If the 1915 survey was found to be paramount, or the township could rely upon the 1944 deed, the property would not be included within the plaintiff's property, but would instead be owned by the township.[121]

The court determined that the 1839 survey had been relied upon in platting the property, and that survey should control whether the property was included within the plaintiff's legal description.[122] The court relied upon *Adams v. Hoover*,[123] which in turn had relied upon *Diehl v. Zanger*,[124] where Justice Cooley noted:

> Nothing is better understood than that few of our early plats will stand the test of a careful and accurate survey without disclosing errors. This is as true of the government surveys as of any others, and if all the lines were now subject to correction on new surveys, the confusion of lines and titles that would follow would cause consternation in many communities. Indeed the mischiefs that must follow would be simply incalculable, and the visitation of the surveyor might well be set down as a great public calamity.
>
> But no law can sanction this course. . . . The question is not how an entirely accurate survey would locate these lots, but how the original stakes located them. No rule in real estate law is more inflexible than that monuments control course and distance,--a rule that we have frequent occasion to apply in the case of public surveys, where its propriety, justice and necessity are never questioned. But its application in other cases is quite as proper, and quite as necessary to the protection of substantial rights. The

119. *Id.* Although it appears that there was property between the end of the road and the lake in question, road end access to lakes has been a point of significant litigation in Michigan. *See* M. Carol Bamberry & Douglas S. Loomer, *Road End Access to Michigan Water*, 17 MICH. REAL PROP. REV. 11 (1990).

120. *Jonkers*, 278 Mich. App. at 266-67, 747 N.W.2d at 905.

121. *Id.*

122. *Id.* at 267-68, 747 N.W.2d at 905-06.

123. 196 Mich. App. 646, 493 N.W.2d 280 (1992).

124. Diehl v. Zanger, 39 Mich. 601 (1878) (Cooley, J., concurring) (published in Michigan Reports only).

> city surveyor should, therefore, have directed his attention to the ascertainment of the actual location of the original landmarks . . . and if those were discovered they must govern. If they are no longer discoverable, the question is where they were located; and upon that question the best possible evidence is usually to be found in the practical location of the lines, made at a time when the original monuments were presumably in existence and probably well known. . . . As between old boundary fences, and any survey made after the monuments have disappeared, the fences are by far the better evidence of what the lines of a lot actually are, and it would have been surprising if the jury in this case, if left to their own judgment, had not so regarded them.[125]

Therefore, the court of appeals determined that the disputed property was within the plaintiff's legal description.[126]

However, this did not end the court's inquiry, because the defendant township still claimed that even if it had not acquired the property through the 1944 deed, it had acquired the boat launch through adverse possession.[127] The township first argued that its possession of the boat launch under color of the 1944 deed gave it ownership of the boat launch property.[128] However, the township itself admitted that, although it was aware of the existence of the 1944 deed, it was unaware of the specific contents of the 1944 deed until 2002.[129] Based on that timing, the township could not satisfy the requisite time period for a claim of ownership under color of deed.[130]

The township next argued that it had obtained ownership of the boat launch through adverse possession, because its possession had been "actual, visible, open, notorious, exclusive, continuous, and uninterrupted."[131] The court concluded that the possession by the township was hostile, because it was done without permission granted by the plaintiff.[132] The court also noted that even though the township did

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125. *Jonkers*, 278 Mich. App. at 267-68, 747 N.W.2d at 905 (quoting *Diehl*, 39 Mich. at 605-06 (Cooley, J., concurring)) (citations omitted).

126. *Jonkers*, 278 Mich. App. at 270, 747 N.W.2d at 906-07.

127. *Id.* at 271, 747 N.W.2d at 907.

128. *Id.*

129. *Id.* at 272-73, 747 N.W.2d at 907-08.

130. The period required for adverse possession in Michigan is fifteen years, unless a claim is made under special circumstances. *See* MICH. COMP. LAWS ANN. § 500.5801 (West 2009).

131. *Jonkers*, 278 Mich. App. at 273, 747 N.W.2d at 908; *see also Gorte*, 202 Mich. App. at 170, 507 N.W.2d at 801.

132. *Jonkers*, 278 Mich. App. at 273, 747 N.W.2d at 908.

not exclude the plaintiffs from using the boat launch, the township's possession was exclusive, because the township was claiming to possess the property on behalf of the public; the plaintiff, as a member of the public, could use the boat launch in a matter consistent with the township's claim of exclusive possession.[133] The court rejected the plaintiff's argument that, essentially, a property can never be adversely possessed on behalf of the public by a municipality.[134] The plaintiff relied upon a general rule: "Occupation in common with the public is not exclusive possession, neither is possession concurrent with that of the true owner ever exclusive."[135] However, the court of appeals noted that the general rule is applicable where one is attempting to adversely possess public property as private property.[136] The rule, according to the court of appeals, is inapplicable in the converse situation, where one is attempting to adversely possess private property as public property.[137]

The court of appeals next resolved the geographic dimensions of the township's adverse possession, and affirmed the trial court's decision that was between the amount claimed by the township and the de minimis amount claimed by the plaintiff.[138]

Finally, the court rejected the plaintiff's allegation that because it had paid taxes on the disputed parcel, adverse possession by the municipality was impossible.[139] The court determined that the township had acted in good faith in reducing the assessment of the plaintiff's property in accordance with the township's claim of ownership of a portion of the plaintiff's property.[140]

VI. RESTRICTIVE COVENANTS

A. The Meaning of "Strictly Residential Purposes Only"

> Well I've been sitting here at home with the porch light on
> You've been chasing everything that runs
> Well, let me put this in your ear, make it be so clear
> Baby that dog won't hunt[141]

133. *Id.* at 274, 747 N.W.2d at 908-09.
134. *Id.* at 274, 747 N.W.2d at 909.
135. *Id.* (quoting Le Roy v. Collins, 176 Mich. 465, 475, 142 N.W. 842, 845 (1913)).
136. *Jonkers*, 278 Mich. App. at 274-75, 747 N.W.2d at 909.
137. *Id.*
138. *Id.* at 275-76, 747 N.W.2d at 909.
139. *Id.* at 276-77, 747 N.W.2d at 910.
140. *Id.* at 277, 747 N.W.2d at 910.
141. WAYLON JENNINGS, THAT DOG WON'T HUNT (MCA Records 1985).

In *Bloomfield Estates Improvement Ass'n, Inc. v. Birmingham*,[142] the Michigan Supreme Court finally resolved an issue that has been vexing real estate lawyers since the time of Blackacre: Is a dog park a "strictly residential" use?[143] In 1938, the City of Birmingham had acquired certain property that was subject to a deed restriction[144] limiting the use of the property to "strictly residential purposes only."[145] Through the years, the property had been used as a park, a use that clearly violated the deed restriction.[146] However, in 2003, the plaintiff, the association of owners for the subdivision within which the property was located, learned that the city planned to begin using the subject property as a "dog park."[147] In 2004, the city constructed the dog park, which included fencing to provide a location for dogs to run "off leash."[148] The plaintiff filed suit against the city, asking for injunctive relief to enforce the deed restriction.[149] The trial court ruled that a "dog park" constituted a residential use.[150] The court of appeals reversed the trial court, in a split decision.[151]

The Michigan Supreme Court affirmed the court of appeals,[152] ruling that a dog park was inconsistent with a deed restriction that restricted the use of the property to "strictly residential purposes only."[153] The court resorted to a dictionary to determine the meaning of the deed restriction. First, the Court noted that a residential use was one "pertaining to

142. 479 Mich. 206, 737 N.W.2d 670 (2007).

143. *See id.* at 215, 737 N.W.2d at 675. The framing of the question in this matter by the court was a good indicator of the final result. The court did not frame its first issue as whether a dog park was a more intensive violation of the deed restriction at issue. Instead, the court framed the issue as whether a dog park was consistent with a deed restriction that restricted the use of the subject property to "strictly residential purposes only." *See id.* That question virtually answers itself. It should also be noted that this matter had caused significant public discussion and controversy in the local municipalities affected, Birmingham and Bloomfield Township, Michigan. *See* Alex P. Kellogg, *Pooches May Lose a Spot in Birmingham Park*, DETROIT FREE PRESS, Mar. 16, 2006, at 3B; Emilia Askari, *Dogs to Get Day in Supreme Court*, DETROIT FREE PRESS, Jan. 17, 2007, at 1A; Emilia Askari, *Ruling Hurts City Dog Park: Some Neighbors Want It Closed*, DETROIT FREE PRESS, Jul. 20, 2007, at 1B.

144. For further discussion of deed restrictions under Michigan law, *see* William S. Hosler, *Deed Restrictions in Michigan*, 39 MICH. REAL PROP. REV. 37 (2007).

145. *Bloomfield Estates*, 479 Mich. at 208, 737 N.W.2d at 672.

146. *Id.* at 209, 737 N.W.2d at 672.

147. A "dog park" is "a fenced area within which dogs [can] roam unleashed." *Id.* at 210, 737 N.W.2d at 673.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Bloomfield Estates*, 479 Mich. at 210-11, 737 N.W.2d at 673.

152. *Id.* at 208, 737 N.W.2d at 672.

153. *Id.*

residence or to residences."[154] "Residence" means "the place, esp[ecially] the house, in which a person lives or resides; dwelling place; home."[155] Applying those dictionary definitions, the Court concluded that the use of the subject property as a park of any kind violated the deed restriction.[156] The Court dismissed the defendant city's argument that allowing dogs to roam was a residential use because homeowners allow dogs to wander in their backyards. Significantly, the Court noted, the park was not a backyard, and was not an extension of a backyard.[157]

Having ruled against the city on the city's first theory, the Court proceeded to the city's next theory: The homeowners had waived their right to contest the dog park by allowing the use of the property as a park.[158] The Court concluded that the use of the property as a dog park was a more serious violation of the deed restriction than the use of the property as a general park, and therefore the plaintiff had not waived its right to contest the expanded use of the property as a dog park.[159]

Justice Cavanagh concurred in the majority's result only.[160] Justice Kelly, joined by Justice Weaver, dissented.[161] The dissent argued that the deed restriction should be construed in favor of the free use of property, and that the majority's analysis construed the deed restriction against the free use of property.[162] The dissenters cited cases from other jurisdictions that interpreted the phrase "residential purposes"[163] and Michigan cases that analyzed residential uses,[164] and concluded that the phrase "residential purposes" meant uses "distinguishable from commercial or business use."[165] The dissenters continued by arguing that the plaintiff had waived its right to contest to the use of the property as a dog park by

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154. *Id.* at 215, 737 N.W.2d at 675 (quoting RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY (2d ed. 1997)).

155. *Id.* at 215, 737 N.W.2d at 675 (quoting RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY, *supra* note 154).

156. *Id.* at 216, 737 N.W.2d at 676

157. *Bloomfield Estates*, 479 Mich. at 217, 737 N.W.2d at 676.

158. *Id.* at 218, 737 N.W.2d at 677.

159. *Id.* at 220-21, 737 N.W.2d at 678.

160. *Id.* at 227, 737 N.W.2d at 682 (Cavanagh, J., concurring).

161. *Id.* at 227-42, 737 N.W.2d at 682-90 (Kelly, J., dissenting).

162. *Id.* at 230-31, 737 N.W.2d at 683-84 (Kelly, J., dissenting).

163. *See, e.g.*, Bagko Dev. Co. v. Damitz, 640 N.E.2d 67 (Ind. Ct. App. 1994); Baker v. Smith, 47 N.W.2d 810 (Iowa 1951); Isbrandtsen v. N. Branch Corp., 556 A.2d 81 (Vt. 1988); Shermer v. Haynes, 451 S.W.2d 445 (Ark. 1970); Voedisch v. Wolfeboro, 612 A.2d 902 (1992); Winn v. Ridgewood Dev. Co., 691 S.W.2d 832 (Tex. Ct. App. 1985).

164. *See, e.g.*, O'Connor v. Resort Custom Builders, Inc., 459 Mich. 335, 591 N.W.2d 216 (1999); Beverly Island Ass'n v. Zinger, 113 Mich. App. 322, 317 N.W.2d 611 (1982).

165. *Bloomfield Estates*, 479 Mich. at 235, 737 N.W.2d at 686 (Kelly, J., dissenting).

failing to object to the use of the property as a general park.[166] The dissent argued that a dog park was "of the same nature" as the prior use as a general park.[167] The dissent noted that no factual findings were before the court that a dog park was a more serious violation of the deed restriction at issue.[168] Therefore, the dissent argued that plaintiff should be estopped from enforcing the deed restriction.[169]

VII. PROPERTY TAXATION

A. Whether "Additions" Include Public Service Improvements

In a per curiam opinion, the Michigan Supreme Court affirmed a court of appeals opinion[170] that ruled that public service improvements were not "additions" under the General Property Tax Act[171] in *Toll Northville Ltd. v. Township of Northville.*[172] The plaintiffs in *Toll Northville,*[173] who are engaged in the development of single family residential subdivisions, had appealed to the Michigan Tax Tribunal the addition to the taxable value[174] of their property of public service

166. *Id.* at 235-36, 737 N.W.2d at 688 (Kelly, J., dissenting).

167. *Id.* at 238, 737 N.W.2d at 688 (Kelly, J., dissenting).

168. *Id.* at 239-40, 737 N.W.2d at 688-89 (Kelly, J., dissenting).

169. *Id.* at 241, 737 N.W.2d at 689 (Kelly, J., dissenting).

170. Toll Northville Ltd. v. Northville, 272 Mich. App. 352, 726, N.W.2d 57 (2006). For a complete understanding of the impact of *Toll Northville* on property taxation, it is essential to read the lengthy court of appeals opinion, together with the Michigan Supreme Court opinion.

171. MICH. COMP. LAWS ANN. §§ 211.1, *et seq.* (West 2009).

172. 480 Mich. 6, 743 N.W.2d 902 (2008). During the *Survey* period, the court of appeals also ruled in *Kinder Morgan v. Jackson* that assessments for fire and police pension obligations cannot be levied against property within an area generally exempt from real property taxes under Michigan's Renaissance Zone Act, MICH. COMP. LAWS ANN. §§ 125.2681, *et seq.* (West 2009), because such obligations are not "levied to pay 'obligations pledging the unlimited taxing power of the local governmental unit.'" Kinder Morgan Mich., L.L.C. v. Jackson, 277 Mich. App. 159, 172, 744 N.W.2d 184, 192 (2008) (quoting MICH. COMP. LAWS ANN. § 211.7ff(2)(b) (West 2009)). *See also* Toll Bros., Inc. v. Northville, No. 261804, 2006 WL 1688190 (Mich. Ct. App. June 20, 2006). For further discussion of both *Kinder Morgan* and *Toll Brothers*, *see* Lynn A. Gandhi, *Taxation, 2009 Annual Survey of Mich. Law*, 55 WAYNE L. REV. 597, 620-28 (2009).

173. For purposes of full disclosure, a limited liability company that is a member of one of the plaintiffs in this case is a client of the author's law firm. The author has represented that limited liability company in, among other matters, tax appeals against the Township of Northville. The author did not represent a party in this case.

174. For a more lengthy explanation of the mechanics of calculating taxable value after the passage of Proposal A of 1994, which amended the Michigan Constitution and introduced the concept of taxable value to Michigan taxation, *see* David E. Nykanen,

improvements.[175] Property taxes in the State of Michigan are currently calculated by multiplying the taxable value by the millage rate applicable to the property.[176] In 1994, the Michigan electorate passed Proposal A, which amended the Michigan Constitution by adding, among other items, a limitation upon the increase in the value upon which property was taxed.[177] This constitutional amendment limited the increase in the taxable value to the lesser of an inflation multiplier, or five percent.[178] After multiplying the prior year's taxable value by the inflation multiplier, any "additions" are added to the taxable value.[179] "Additions" include numerous enumerated items under the statute which purported to codify the constitutional amendment.[180] One of those enumerated items was "public services," which were defined as "water service, sewer service, a primary access road, natural gas service, electrical service, telephone service, sidewalks, or street lighting."[181] The Supreme Court concluded that such public service improvements were not within the understood definition of "additions" that existed in the General Property Tax Act when Proposal A was adopted.[182] Therefore, the statute that

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Proposal A of 1994 and Leases: Owner, Tenant and Buyer Beware, 34 MICH. REAL PROP. REV. 29 (2007).

175. *Toll Northville*, 480 Mich. at 9, 743 N.W.2d at 905.

176. *See generally* MICH. COMP. LAWS ANN. §§ 211.1, *et seq.* (West 2009).

177. The amended portion of the Michigan Constitution now reads:

> The legislature shall provide for the uniform general ad valorem taxation of real and tangible personal property not exempt by law except for taxes levied for school operating purposes. The legislature shall provide for the determination of true cash value of such property; the proportion of true cash value at which such property shall be uniformly assessed, which shall not, after January 1, 1966, exceed 50 percent; and for a system of equalization of assessments. For taxes levied in 1995 and each year thereafter, the legislature shall provide that the taxable value of each parcel of property adjusted for additions and losses, shall not increase each year by more than the increase in the immediately preceding year in the general price level, as defined in section 33 of this article, or 5 percent, whichever is less until ownership of the parcel of property is transferred. When ownership of the parcel of property is transferred as defined by law, the parcel shall be assessed at the applicable proportion of current true cash value.

MICH. CONST. of 1963, art. 9, § 3.

178. *See id.*; MICH. COMP. LAWS ANN. § 211.27a (West 2009).

179. For tax year 2009, the inflation multiplier is 4.4%. *Mich. State Tax Comm'n Bulletin No. 6* (2008), *available at* http://www.michigan.gov/documents/treasury/-Bulletin_6_of_2008_Inflation_Rate_for_2009_254420_7.pdf (last visited Apr. 14, 2009).

180. *See* MICH. COMP. LAWS ANN. § 211.27d (West 2009).

181. *Toll Northville*, 480 Mich. at 13, 743 N.W.2d at 907; *see also* MICH. COMP. LAWS ANN. § 211.34(d)(1)(b)(viii) (West 2009).

182. *Toll Northville*, 480 Mich. at 13, 743 N.W.2d at 907.

purported to require public service improvements be added to the taxable value as additions was unconstitutional.[183]

The Supreme Court therefore affirmed the court of appeals opinion that public service improvements were not additions as defined in the Michigan Constitution, and the subsection of the General Property Tax Act that purported to include public service improvements as additions was unconstitutional.[184] Justice Cavanagh wrote a concurring opinion to note his disagreement with the court's vacation of a portion of the court of appeals opinion that is irrelevant to the property taxation issues discussed herein.[185] Justice Weaver concurred in the result only, but adopted the court of appeals opinion in whole.[186]

B. Acquisition of Property Through Tax Foreclosure

In *Ligon v. Detroit*, the court of appeals examined the impact of a tax foreclosure and bankruptcy on a property held by two parties as tenants in common.[187] The court also confirmed that the demolition of a building is not a regulatory taking, but is instead a physical invasion of property.[188]

The plaintiff and his business partner purchased a piece of property within the City of Detroit by land contract.[189] In 1988, the plaintiff claimed the land contract was paid off, although a deed was never recorded.[190] In 1990, plaintiff's business partner filed for bankruptcy.[191] In 1991, the plaintiff entered into a land contract to purchase his partner's one-half interest in the property from the bankruptcy estate.[192] In November, 1995, a deed was delivered to the plaintiff for the one-half interest.[193] That deed was recorded in February 1996.[194] However, in January, 1996, the defendant city commenced tax foreclosure proceedings against the property, naming the plaintiff, his former

183. *Id.*
184. *Id.* at 16, 743 N.W.2d at 908.
185. *Id.* at 16-17, 743 N.W.2d at 908-09 (Cavanagh, J., concurring).
186. *Id.* at 18, 743 N.W.2d at 909 (Weaver, J., concurring).
187. Ligon v. Detroit, 276 Mich. App. 120, 739 N.W.2d 900 (2007).
188. *Id.* at 132, 739 N.W.2d at 907-08.
189. *Id.* at 123, 739 N.W.2d at 908.
190. *Id.*
191. *Id.* For further discussion of the impact of bankruptcy on real property taxes, see Harold E. Nelson, *Status of Real Property Taxes in Bankruptcy Case*, 18 MICH. REAL PROP. REV. 13 (1991); Harold E. Nelson & William R. VanderSluis, *Status of Real Property Taxes in Bankruptcy Case—Revisited*, 23 MICH. REAL PROP. REV. 13 (1996).
192. *Ligon*, 276 Mich. App. at 123, 739 N.W.2d at 903.
193. *Id.*
194. *Id.*

business partner, and others.[195] The plaintiff alleged he never received notice of the tax foreclosure proceedings.[196] In July 1996, a default judgment was entered in the tax foreclosure proceeding.[197] However, in August 1996, an order that vacated the judgment as to the plaintiff was entered.[198] The plaintiff was later dismissed from the tax foreclosure action altogether.[199] Notwithstanding the vacation of the judgment against the plaintiff, the state of Michigan executed a deed conveying the property to the defendant city as a result of the tax foreclosure proceedings.[200] The city took possession of the property and demolished the structure on the property in 2002.[201] Ligon then filed a complaint seeking a judgment of inverse condemnation and damages.[202] The trial court granted a partial judgment in favor of the plaintiff, determining he had a one-half interest in the property, and that one-half interest had been taken by inverse condemnation.[203] Both parties appealed.[204]

First, the court of appeals determined that the plaintiff owned *at least* a one-half interest in the property by operation of the original land contact, which had been recorded.[205] The court noted that it appeared that the plaintiff had not received notice of the tax foreclosure proceedings.[206] However, whether the plaintiff had received notice or not was essentially irrelevant, because the judgment was later vacated as to the plaintiff, and the defendant city voluntarily dismissed him as a party to the tax foreclosure proceedings.[207] Accordingly, because the plaintiff was not a

195. *Id.* The tax foreclosure process used in *Ligon* has been completely overhauled. For a discussion of the new tax foreclosure process, *see* Kevin T. Smith, *Foreclosure of Real Property Tax Liens under Michigan's New Foreclosure Process*, 29 MICH. REAL PROP. REV. 51 (2002); Kevin T. Smith, *An Update on Foreclosure of Real Property Tax Liens under Michigan's New Foreclosure Process*, MICH. REAL PROP. REV. (forthcoming 2009).

196. *Ligon*, 276 Mich. App. at 123, 739 N.W.2d at 903. Under Michigan's current tax foreclosure system, the failure to provide adequate notice would still render a foreclosure judgment ineffective. *See, e.g.*, Jones v. Flowers, 547 U.S. 220 (2006); Sidun v. Wayne County Treasurer, 481 Mich. 503, 751 N.W.2d 453 (2008).

197. *Ligon*, 276 Mich. App. at 123, 739 N.W.2d at 903.

198. *Id.*

199. *Id.*

200. *Id.* at 123-24, 739 N.W.2d at 903.

201. *Id.* at 124, 739 N.W.2d at 903.

202. *Id.* at 122-24, 739 N.W.2d at 903.

203. *Ligon*, 276 Mich. App. at 125, 739 N.W.2d at 904.

204. *Id.* at 122, 739 N.W.2d at 903.

205. *Id.* at 125, 739 N.W.2d at 904.

206. *Id.*

207. *Id.* at 126, 739 N.W.2d at 905.

party to the tax foreclosure proceedings, the foreclosure judgment had no impact on plaintiff's ownership interest in the property.[208]

Second, the court of appeals reversed the trial court, and ruled that the plaintiff was also the owner of the second one-half interest in the property.[209] The city argued that, since it had filed a lis pendens regarding the tax foreclosure proceedings in January, 1996, and the plaintiff did not record the deed he received from the bankruptcy trustee until February, 1996, the plaintiff's ownership was subject to the lis pendens.[210] The court of appeals rejected that argument, ruling that the deed from the bankruptcy trustee became effective upon delivery, not recording. As the court noted: "a lis pendens 'does not take precedence over prior transactions, even those unrecorded at the time the lis pendens notice is recorded.'"[211] Therefore, the plaintiff owned the entire property, and his dismissal from the tax foreclosure proceedings rendered the tax foreclosure ineffective as to his ownership proceeding.[212]

The defendant city next argued that, because no deed had been recorded after payoff of the land contract for the original purchase of the property by the plaintiff and his business partner, the plaintiff's claims were defeated by the statute of frauds.[213] However, because the land contract itself had been recorded, and the land contract gave the plaintiff an interest in the property, the court found this argument unpersuasive.[214]

Finally, and perhaps most curiously, the defendant city argued that the actual physical demolition of the structure on the property was not a taking in violation of the United States and Michigan Constitutions.[215] Obviously, the court of appeals found that the intentional physical destruction of the structures by the city on the subject property was a taking.[216]

VIII. CONCLUSION

The *Survey* period included numerous decisions which provided incremental advances in the clarity of understanding real property law.

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208. *Id.* at 126, 739 N.W.2d at 904-05.

209. *Ligon*, 276 Mich. App. at 127, 739 N.W.2d at 905.

210. *Id.* at 127-28, 739 N.W.2d at 905.

211. *Id.* at 128, 739 N.W.2d 906 (quoting 1A MICH. PLEADING & PRACTICE, *Lis Pendens*, § 17:1 (2d ed. 2002)); *see* Hammond v. Paxton, 58 Mich. 393, 397, 25 N.W. 321 (1885).

212. *Ligon*, 276 Mich. App. at 126-29, 739 N.W.2d at 905-06.

213. *Id.* at 130-31, 739 N.W.2d at 906-07.

214. *Id.* at 131, 739 N.W.2d at 907.

215. *Id.* at 131-32, 739 N.W.2d at 907-08.

216. *Id.*

Lacking from this *Survey* period, however, was a case of significant import. Perhaps such a situation is to be appreciated, as it leaves the practitioner with a more predictable jurisprudence. On the other hand, the courts have not provided clarity to practitioners on important legal issues that still remain unclear.[217]

217. For example, the ripeness and exhaustion of administrative remedies rules pertaining to zoning matters remain an impenetrable thicket of uncertainty for real estate practitioners after Paragon Props. Co. v. Novi, 452 Mich. 568, 550 N.W.2d 772 (1996).