

**SUPPLEMENT NO. 1**

**MICHIGAN LAND TITLE STANDARDS**

**SIXTH EDITION**

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of the State Bar of Michigan

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# **PREFACE TO MICHIGAN LAND TITLE STANDARDS**

## **SIXTH EDITION**

The Sixth Edition of Michigan Land Title Standards has been prepared by the Land Title Standards Committee of the Real Property Law Section of the State Bar of Michigan and published by the Real Property Law Section.

First published in the 1950s, the Michigan Land Title Standards is a series of selected statements of the law of land titles, as supported by applicable statutes and case law. Each Standard is a concise statement of a principle of law, accompanied by problems which illustrate the proper application of the principle. Each Standard includes specific references to the statutes and cases which provide the legal authority for the principle addressed. Some of the Standards include explanatory comments by the Committee.

The Committee has taken care to include only those principles of land title law which are clearly supported by the law of Michigan or, where applicable, by the law of the United States, and for which there are supporting statutes or published cases which are definitive in their effect or holding. Points of law that are subject to dispute or uncertainty, or as to which there are conflicting opinions, have not been included in the Standards, even if a particular interpretation may be commonly accepted in practice. The Standards are not intended as a treatise on land title law, but rather consist of selected statements of legal principles to guide lawyers on the legal effect of land title instruments.

The Standards have played a significant role in promoting the certainty and continuity of Michigan's principles of real property law, the importance of which was noted in a recent decision of our Supreme Court:<sup>1</sup>

[I]f there is any realm within which the values served by stare decisis -- stability, predictability, and continuity -- must be most certainly maintained, it must be within the realm of property law. For this reason, "[t]his Court has previously declared that stare decisis is to be strictly observed where past decisions establish 'rules of property' that induce extensive reliance."

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The justification for this rule is not to be found in rigid fidelity to precedent, but conscience. . . . Judicial "rules of property" create value, and the passage of time induces a belief in their stability that generates commitments of human energy and capital.

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<sup>1</sup> 2000 *Baum Family Trust v Babel*, 488 Mich 136, 172; 793 NW2d 633, (2010), citing *Bott v Natural Resources Comm*, 415 Mich 45, 77-78; 327 NW2d 838 (1982).

During the more than 60 years since their initial publication, the Standards have come to be regarded as an authoritative reference on the law of land titles and other aspects of real property law as developed and interpreted in Michigan. Trial and appellate courts have frequently cited the Standards in support of the legal principles relied upon in decisions in real property cases. Indeed, the Michigan Land Title Standards are generally regarded as among the most complete and authoritative of all the state land title standards in the United States.

The Committee has been ably guided by the following Chairpersons: Ralph W. Aigler (1953-54), James H. Hudnut (1954-55), Ralph Jossman (1955-59), Cyrus M. Poppen (1959-61), Ray L. Potter (1961-63), Clarence W. Videan (1963-64), Reuben M. Waterman (1964-65), F. Norman Higgs (1965-66), T. Gerald McShane (1966-69), Frank L. Charbonneau (1969-71), James W. Draper (1971-74), Myron Winegarden (1974-76), Andrew Cooke (1976-78), Paul A. Ward (1978-80), John R. Baker (1980-83), Carl A. Hasselwander (1983-85), Janet L. Kinzinger (1985-88), Thomas C. Simpson (1988-90), Gerard K. Knorr (1990-91), Russell A. McNair, Jr. (1991-92), Anne H. Hiemstra (1992-93), C. Robert Wartell (1993-95), James R. Brown (1995-98), Dennis W. Hagerty (1998-2001), James E. Reed (2001-04), Robert D. Mollhagen (2004-07), Russell E. Prins (2007-10), and James M. Marquardt (2010-13).

The Committee continuously reviews and revises the Standards and prepares new Standards to include new subject matter and authorities and to reflect changes in the law. New and revised Standards are published in periodic supplements. The Committee welcomes comments and suggestions from all interested members of the Bar.

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Lansing, Michigan  
May, 2013

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## SIXTH EDITION

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## **STANDARD 1.1**

### **EFFECT OF THE MARKETABLE RECORD TITLE ACT**

#### **STANDARD: THE MARKETABLE RECORD TITLE ACT REMEDIES TITLE DEFECTS WITHIN ITS SCOPE.**

**Authorities:** MCL 565.101 through 565.109. *Rush v Sterner*, 143 Mich App 672, 373 NW2d 183 (1985); *Strong v Detroit & Mackinac Ry Co*, 167 Mich App 562, 423 NW2d 266 (1988).

**Comment:** The stated legislative purpose of the Marketable Record Title Act is to simplify and facilitate land title transactions by providing a statutory basis for establishing record title with reference to a period of at least 40 years (at least 20 years for certain mineral interests). The effect of the Act is to extinguish by operation of law certain interests and claims which arise out of any act, transaction, event or omission preceding the 40-year period (or the 20-year period for certain mineral interests), subject to specified exceptions and limitations. The 20-year period applies only to a mineral interest other than an interest in oil, gas, sand, gravel, limestone, clay or marl, owned by a person other than the surface owner.

An interest in land is preserved under the Act by the recording during the 40-year period (or during 20-year period for certain mineral interests) of a notice, verified by oath, setting forth the nature of the interest claimed. A mineral interest other than an interest in oil, gas, sand, gravel, limestone, clay or marl, owned by a person other than the surface owner, is also preserved by the recording within three years after December 22, 1997, of a notice setting forth the nature of the interest claimed. See also Standard 15.4 with respect to certain severed oil and gas interests. The title resulting from application of the Act's remedial provisions is marketable record title. MCL 565.103. Marketable record title under the Act may not be equivalent, however, to a marketable title at common law or to a commercially marketable or merchantable title, as those terms are generally used. One may have a marketable record title under the Act which is still properly subject to objection.



## STANDARD 5.2

### DEED OR ASSIGNMENT OF HOMESTEAD LAND ON OR AFTER JANUARY 1, 1964

**STANDARD:** A DEED OR ASSIGNMENT OF ANY INTEREST IN HOMESTEAD LAND (EXCEPT ENTIRETIES PROPERTY), EXECUTED BY A MARRIED MAN ON OR AFTER JANUARY 1, 1964 (THE EFFECTIVE DATE OF THE MICHIGAN CONSTITUTION OF 1963), IS NOT RENDERED INVALID BY THE ABSENCE OF THE SIGNATURE OF HIS WIFE. THE TITLE OF THE GRANTEE OR ASSIGNEE MAY, HOWEVER, BE SUBJECT TO THE DOWER OF THE WIFE.

**Problem A:** Richard Roe purchased Blackacre on land contract, and occupied it with his wife as a homestead. In 1973 Roe, as a married man, assigned his vendee's interest to Simon Grant. Roe's wife did not sign the instrument of assignment. Did Grant acquire Roe's interest in Blackacre?

**Answer:** Yes.

**Problem B:** Richard Roe owned Blackacre and occupied it with his wife as a homestead. In 1973 Roe, as a married man, conveyed Blackacre to Simon Grant by deed. Roe's wife did not sign the deed. Did Grant acquire marketable title to Blackacre?

**Answer:** No. Although the deed was valid to convey Roe's interest to Grant, Grant's interest was subject to the dower of Roe's wife.

**Authority:** Since January 1, 1964, the effective date of the Michigan Constitution of 1963, there is no requirement that the wife sign an alienation of land constituting a homestead, title to which is vested in the husband.

**Comment:** Although after 1963 a married man holding title to homestead land in his name alone may validly convey his interest in the land without the signature of his wife, the conveyance does not extinguish the dower of the wife. See, Standard 4.1.



## STANDARD 5.3

### MORTGAGE OF HOMESTEAD LAND

**STANDARD:** A MARRIED MAN AND, SINCE APRIL 17, 1984, A MARRIED WOMAN, CANNOT, WITHOUT THE SIGNATURE OF THE OTHER SPOUSE, CREATE A VALID MORTGAGE UPON ANY INTEREST IN THE LAND WHICH CONSTITUTES THEIR HOMESTEAD, EXCEPT BY A MORTGAGE GIVEN TO SECURE ALL OR PART OF THE PURCHASE PRICE.

**Problem A:** Richard Roe acquired title to Blackacre in 1960, and occupied it with his wife as a homestead. Roe, as a married man, executed a mortgage describing Blackacre in 1961. Roe's wife did not sign the mortgage. Was the mortgage valid?

**Answer:** No. However, the mortgage will be valid 25 years after it is recorded unless before the expiration of the 25 years a notice of invalidity is recorded in the office of the register of deeds in the county in which the homestead land is located.

**Problem B:** Same facts as in Problem A, except that the mortgage was given in 1965. Was the mortgage valid?

**Answer:** No. Although the limitation on a mortgage of a homestead provided in the Michigan Constitution of 1908 was not included in the 1963 Michigan Constitution, the limitation on a homestead mortgage given without the signature of the wife, provided in the Revised Judicature Act, applies to mortgages not given to secure all or a portion of the purchase price.

**Problem C:** Mary Doe acquired title to Blackacre in 1979, and occupied it as a homestead with her husband. On August 10, 1984, Doe executed a mortgage describing Blackacre. Doe's husband did not sign the mortgage. Was the mortgage valid?

**Answer:** No.

**Problem D:** In connection with his purchase of Blackacre as an intended homestead, Richard Roe, a married man, executed a purchase

money mortgage to the former owner. Roe's wife did not sign the mortgage. Was the mortgage valid?

**Answer:** Yes. A mortgage is a purchase money mortgage if the proceeds are applied to the purchase price, irrespective of whether the vendor of the land is the mortgagee.

**Authorities:** Problem A: Michigan Constitution of 1908, Article XIV, Sec 2; Michigan Constitution of 1850, Article XVI, Sec 2; CL 1948, 623.74 (repealed by 1961 P.A. 236, being MCL 600.9901); MCL 600.6023(1)(h). *Watertown Fire Insurance Co v Grover & Baker Sewing Machine Co*, 41 Mich 181, 1 NW 961 (1879); *Shoemaker v Collins*, 49 Mich 595, 14 NW 559 (1883); *Girzi v Carey*, 58 Mich 447, 19 NW 139 (1884).

Problem B: MCL 600.6023(1)(h).

Problem C: MCL 600.6023(1)(h).

Problem D: MCL 600.6023(1)(h). CL 1948, 623.74 (repealed by 1961 P.A. 236, being MCL 600.9901). *Amphlett v Hibbard*, 29 Mich 298 (1874); *Fournier v Chisholm*, 45 Mich 417, 8 NW 100 (1881); *Converse v Barhard*, 114 Mich 622, 72 NW 611 (1987).

**Comment:** The Committee expresses no opinion as to whether MCL 600.6023(1)(h) conflicts with Article 10, Sec 1 of the Michigan Constitution of 1963.

**Note:** See Standard 5.4 regarding validation of a mortgage of home-  
stead land in which a spouse did not join.

## **STANDARD 6.9**

### **CONVEYANCE OF ENTIRETIES PROPERTY BY ONE SPOUSE TO THIRD PERSON**

**STANDARD: NEITHER SPOUSE, ACTING ALONE, CAN ALIENATE OR ENCUMBER TO A THIRD PERSON AN INTEREST IN THE FEE OF REAL PROPERTY HELD AS TENANTS BY THE ENTIRETIES.**

**Problem A:** Blackacre was owned by Edgar A. Poe and Mary Poe, husband and wife, as tenants by the entireties. Mary Poe, acting alone, deeded Blackacre to Simon L. Grant. Subsequently Mary Poe died and Edgar A. Poe, as an unmarried man, deeded Blackacre to Paul Ingram. Did Ingram acquire marketable title to Blackacre free of any interest in Grant?

**Answer:** Yes. The same result would occur if the instrument executed by Mary Poe alone had been a mortgage.

**Problem B:** Blackacre was owned by James E. Deer and Mary Deer, husband and wife, as tenants by the entireties. Mary Deer executed a quit claim deed of Blackacre to Simon L. Grant. James E. Deer did not join. Subsequently, James E. Deer predeceased Mary Deer. Did Grant acquire marketable title to Blackacre?

**Answer:** No. The quit claim deed was not effective to convey any interest. If the deed to Grant had been a warranty deed, it is possible that Mary Deer would be estopped to assert her title as survivor. The Michigan Supreme Court has held that, if one purports to convey by warranty deed real property which he or she does not own, any after-acquired interest inures to the benefit of his or her grantee, but the Court has not yet determined whether this principle applies to a warranty deed executed by only one tenant by the entireties who later becomes the survivor. The Committee therefore expresses no opinion as to the effect of a warranty deed under the facts stated.

**Problem C:** Blackacre was owned by J. Ray Brown and Sarah Brown, husband and wife, as tenants by the entireties. In 1973, J. Ray Brown, acting alone, leased Blackacre to Les Freebie for a term

of five years. The lease was recorded promptly. Was the lease valid?

**Answer:** Yes, but it was subject to being terminated if J. Ray Brown predeceased Sarah Brown before the expiration of the five-year term. Before the enactment of MCL 557.71, which became effective December 10, 1975, it had been held that the husband had the exclusive right to the management and control of entireties property and the exclusive right to income derived from the property and any crops grown there. The husband, acting alone, could enter into a valid lease of entireties property, subject only to the limitation that the lease would cease to be valid should the wife become the sole owner through the death of the husband.

**Problem D:** Same facts as in Problem C, except that the lease was executed on January 2, 1999. Was the lease valid?

**Answer:** No. A lease of entireties property executed on or after December 10, 1975 must be signed by both husband and wife. MCL 557.71 provides that “A husband and wife shall be equally entitled to the rents, products, income, or profits, and to the control and management of real or personal property held by them as tenants by the entirety.” The Committee has not considered the constitutionality or the effect of MCL 557.71 with respect to a tenancy by the entireties created before that statute’s effective date.

**Authorities:** Problem A: *Vinton v Beamer*, 55 Mich 559, 22 NW 40 (1885); *Speier v Opfer*, 73 Mich 35, 40 NW 909 (1888); *Ernst v Ernst*, 178 Mich 100, 144 NW 513 (1913); *Truitt v Battle Creek*, 205 Mich 180, 171 NW 338 (1919); *Bailey v Grover*, 237 Mich 548, 213 NW 137 (1927); *Elson v Elson*, 245 Mich 205, 222 NW 176 (1928); *Robinson v Commissioner of Internal Revenue*, 63 F2d 652 (CA 6, 1933); *Nurmi v Beardsley*, 275 Mich 328, 266 NW 368 (1936); *Arrand v Graham*, 297 Mich 559, 298 NW 281 (1941); *French v Foster*, 307 Mich 361, 11 NW2d 920 (1943); *Berman v State Land Office Board*, 308 Mich 143, 13 NW2d 238 (1944); *Schultz v Silver*, 323 Mich 454, 35 NW 2d 383 (1949); *Hearns v Hearns*, 333 Mich 423, 53 NW2d 315 (1952). See also *Williams v De Man*, 7 Mich App 71, 151 NW2d 247 (1967).

Problem B: *Naylor v Minock*, 96 Mich 182, 55 NW 664 (1893); *Duffy v White*, 115 Mich 264, 73 NW 363 (1897); *Dye v Thomp-*

*son*, 126 Mich 597, 85 NW 1113 (1901); *Ernst v Ernst*, 178 Mich 100, 144 NW 513 (1913); *Agar v Streeter*, 183 Mich 600, 150 NW 160 (1914).

Problems C and D: MCL 557.71. *Morrill v Morrill*, 138 Mich 112, 101 NW 209 (1904); *American State Trust Co of Detroit v Rosenthal*, 255 Mich 157, 237 NW 534 (1931); *Marks v Corliss' Estate*, 256 Mich 460, 240 NW 71 (1932); *Wuerth v Wuerth*, 270 Mich 628, 259 NW 346 (1935); *Dombrowski v Gorecki*, 291 Mich 678, 289 NW 293 (1939); *Arrand v Graham*, 297 Mich 559, 298 NW 281 (1941).



## STANDARD 6.14

### EFFECT OF FAILURE OF DIVORCE JUDGMENT TO DISPOSE OF REAL PROPERTY

**STANDARD:** TITLE TO REAL PROPERTY HELD BY HUSBAND AND WIFE AS TENANTS BY THE ENTIRETIES OR AS JOINT TENANTS VESTS IN THEM AS TENANTS IN COMMON IF THEIR JUDGMENT OF DIVORCE FAILS TO DISPOSE OF THE REAL PROPERTY, EVEN IF THE JUDGMENT IS ENTERED IN ANOTHER JURISDICTION.

**Problem A:** Blackacre was owned by John Doe and Mary Doe, husband and wife, as tenants by the entireties (or as joint tenants). Later, they were divorced in Michigan. The judgment made no disposition of Blackacre but did contain the provision required by statute with respect to the dower of Mary Doe. Mary Doe died. Later, John Doe, a single man, deeded Blackacre to Simon Grant. Did Grant acquire marketable title to Blackacre?

**Answer:** No. Grant acquired an undivided one-half interest as a tenant in common with Mary Doe's heirs or devisees. The divorce destroyed the right of survivorship. The provision with respect to the dower of Mary Doe had no application to the interest formerly held as tenants by the entireties or as joint tenants.

**Problem B:** Blackacre was owned by John Doe and Mary Doe, husband and wife, as tenants by the entireties (or as joint tenants). Later, they were divorced in Iowa. The judgment made no disposition of Blackacre. Mary Doe died. Later, John Doe, a single man, deeded Blackacre to Simon Grant. Did Grant acquire marketable title to Blackacre?

**Answer:** No.

**Authorities:** Problem A: MCL 552.101 and 552.102. *Montgomery v Montgomery*, 221 Mich 31, 190 NW 687 (1922); *Angeloff v Smith*, 254 Mich 99, 235 NW 823 (1931); *Sullivan v Sullivan*, 300 Mich 640, 2 NW2d 799 (1942); *Flynn v Flynn*, 367 Mich 625, 116 NW2d 907 (1962).

Problem B: MCL 552.102. *Brown v Prisel*, 97 Mich App 188, 292 NW2d 799 (1980).

**Comment:** MCL 552.102 provides that unless the divorce judgment provides otherwise, a husband and wife owning real property “as joint tenants or tenants by the entireties,” become tenants in common upon being divorced. This statute does not expressly address the status, upon divorce, of title to real property held by a husband and wife as joint tenants with right of survivorship.

## **STANDARD 16.38**

### **ASSIGNMENT OF RENTS SECURING MORTGAGE WHICH IS NOT TRUST MORTGAGE**

**STANDARD:** AN ASSIGNMENT OF RENTS CONTAINED IN, OR GIVEN IN CONNECTION WITH, A MORTGAGE WHICH IS NOT A TRUST MORTGAGE, COVERING INDUSTRIAL OR COMMERCIAL REAL PROPERTY OTHER THAN AN APARTMENT BUILDING CONTAINING LESS THAN SIX UNITS, IS ENFORCEABLE UPON DEFAULT, AFTER RECORDING OF A NOTICE OF DEFAULT IN THE OFFICE OF THE REGISTER OF DEEDS FOR THE COUNTY IN WHICH THE MORTGAGED PROPERTY IS SITUATED AND SERVICE OF A COPY OF THE NOTICE, TOGETHER WITH A COPY OF THE INSTRUMENT UNDER WHICH THE ASSIGNMENT IS MADE, UPON THE OCCUPANTS OF THE PROPERTY.

**Problem A:** A mortgage given by Roberta Brown, covering Blackacre, on which a 100 unit apartment building was located, was executed and recorded on May 26, 1991. The mortgage was not a trust mortgage and contained an assignment of rents of the mortgaged real property. On March 20, 1994, Roberta Brown deeded Blackacre to Samuel Peck. On June 1, 1998, upon default under the mortgage, the mortgagee recorded a notice of default in the office of the register of deeds for the county in which Blackacre was situated, and served a copy of the notice and of the mortgage containing the assignment upon the occupants of the apartment building. Is Peck bound by the assignment of rents?

**Answer:** Yes.

**Problem B:** Same facts as in Problem A, except that the apartment building contained five units. Is Peck bound by the assignment of rents?

**Answer:** No, but Peck would have been bound if the mortgage had been a trust mortgage. See, Standard 16.37.

**Authorities:** Problem A: MCL 554.231, 554.232 and 554.283. *Smith v Mutual Benefit Life Insurance Co*, 362 Mich 114, 106 NW2d 515 (1960).

Problem B: MCL 554.231 and 600.2932. *Hazeltine v Granger*, 44 Mich 503, 7 NW 74 (1880); *Nusbaum v Shapero*, 249 Mich 252, 228 NW 785 (1930); *American Trust Co v Mich Trust Co*, 263 Mich 337, 248 NW 829 (1933).

**Comment A:** Even if no assignment of rents was contained in, or given in connection with, a mortgage, an assignment of rents subsequently entered into for a separate consideration may be enforceable. *Central Trust Co v Wolf*, 262 Mich 209, 247 NW 159 (1933); *Mass Mutual Life Insurance Co v Reutter*, 268 Mich 175, 255 NW 754 (1934); *Mass Mutual Life Insurance Co v Sutton*, 278 Mich 457, 270 NW 748 (1936).

**Comment B:** Discharge of a mortgage operates as a release of an assignment of rents contained in or given in connection with the mortgage.

**Comment C:** Before June 24, 1966, an assignment of rents given in connection with a mortgage that was not a trust mortgage was effective only as to those leases in effect when the mortgage was given. 1966 P.A. 151, effective June 24, 1966, amended MCL 554.232 to make such an assignment also effective as to leases entered into after execution of the mortgage.

## CHAPTER XVII

### CONSTRUCTION LIENS



#### STANDARD 17.1

#### DURATION OF ENFORCEABILITY OF CONSTRUCTION LIEN

**STANDARD:** A CONSTRUCTION LIEN CEASES TO BE ENFORCEABLE ONE YEAR AFTER THE DATE OF RECORDING OF THE CLAIM OF LIEN, UNLESS A FORECLOSURE PROCEEDING HAS BEEN COMMENCED; PROVIDED, HOWEVER, THAT IF A NOTICE OF LIS PENDENS WITH RESPECT TO THE PROCEEDING HAS NOT BEEN RECORDED, THE LIEN MAY NOT BE FORECLOSED AGAINST THE INTEREST OF A PARTY NOT TIMELY SERVED IN THE PROCEEDING.

**Problem A:** On March 20, 2005, Jones Construction Company recorded a claim of lien against Blackacre. As of May 3, 2006, there was no suit to enforce the lien. May Jones enforce the lien against Blackacre?

**Answer:** No.

**Problem B:** On March 20, 2005, Jones Construction Company recorded a claim of lien against Blackacre. Jones filed a complaint to foreclose the lien on March 1, 2006, but did not record a notice of lis pendens. Jones timely served the complaint on John Doe, owner of Blackacre, on March 30, 2006. May Jones enforce the lien against Blackacre?

**Answer:** Yes.

**Problem C:** On March 20, 2004, Jones Construction Company recorded a claim of lien against Blackacre. On March 28, 2005, a certificate of the county clerk dated March 21, 2005 was recorded, stating that no suit to foreclose the lien was then pending in the circuit court. May Jones enforce the lien against Blackacre?

**Answer:** No.

**Authorities:** Problem A: MCL 570.1117. *Fox v Martin*, 287 Mich 147, 283 NW 9 (1938); *Yerrington v Miller*, 325 Mich 193, 38 NW2d 84 (1949).

Problem B: MCL 570.1117 and 600.2701. *Wallich Lumber Co v Golds*, 375 Mich 323, 134 NW2d 722 (1965); *Troy W Maschmeyer Co v Haas*, 376 Mich 289, 136 NW2d 902 (1965).

Problem C: MCL 570.1128.

**Comment A:** The Construction Lien Act, MCL 570.1101 *et seq.*, repealed the former mechanic's lien statute. The sections of the Construction Lien Act addressed in this Standard are substantially unchanged from the applicable sections of the former mechanic's lien statute.

**Comment B:** Timely commencement of a suit to enforce a construction lien and the recording of a notice of lis pendens operate to continue the lien (but see Comment C). MCL 570.1117, 600.2701. *Washtenaw Lumber Co v Belding*, 233 Mich 608, 208 NW 152 (1926); *Whitehead & Kales Co v Taan*, 233 Mich 597, 208 NW 148 (1926).

A construction lien may also be continued by the timely filing of a cross-claim or counter-claim. Compare, *Guerra v Bar-Har Investments, Inc*, 112 Mich App 302, 315 NW2d 921 (1982).

**Comment C:** *Troy W Maschmeyer Co v Haas*, 376 Mich 289, 136 NW2d 902 (1965) addressed the question of how long a mechanic's lien is continued by the commencement of a foreclosure suit. In that case, the claim of lien had been recorded on March 19, 1962, and the complaint was filed on February 28, 1963. The defendants were served on July 9, 1963. Four justices were of the opinion that under the provisions of MCL 600.5856, the statute of limitations was tolled for a period not exceeding 90 days by the filing of the complaint, and that the cause of action was therefore barred before the defendants were served. The other four justices, while agreeing that service on the defendants occurred after the termination of the lien, held that because then-applicable MCL 570.10 (repealed by 1980 P.A. 497, being MCL 570.1303; cf. MCL 570.117) provided for the filing of a notice of lis

pendens in a mechanic's lien case, the lis pendens provisions of the Revised Judicature Act, being MCL 600.2701, applied, instead of MCL 600.5856. Under the lis pendens statute, service of process is to be made within 60 days after the filing of the notice of lis pendens, a shorter period than that allowed by MCL 600.5856. There has been no later reported decision determining which of the two periods is controlling in actions to foreclose a mechanic's lien or a construction lien.

**Comment D:** The Committee expresses no opinion on the issue of whether the interest of a bona fide purchaser of real property who acquired the interest after the commencement of a construction lien foreclosure proceeding with respect to which no notice of lis pendens was recorded and who has no actual notice of the proceeding would be subject to the construction lien foreclosure case.



## **STANDARD 17.2**

### **RIGHT TO CONSTRUCTION LIEN FOR IMPROVEMENT OTHER THAN TO RESIDENTIAL STRUCTURE OR PUBLIC BUILDING**

**STANDARD: A CONTRACTOR, SUBCONTRACTOR, SUPPLIER OR LABORER WHO PROVIDES AN IMPROVEMENT THAT IS INCORPORATED INTO REAL PROPERTY (OTHER THAN A RESIDENTIAL STRUCTURE OR PUBLIC BUILDING) HAS A RIGHT TO A CONSTRUCTION LIEN ON THE INTEREST OF THE OWNER OR LESSEE WHO CONTRACTED FOR THE IMPROVEMENT.**

**Problem A:** Smith Contracting Company entered into a contract with Spartan Corporation, the owner of Blackacre, to construct a commercial building on Blackacre. Smith provided labor and materials for the construction of the building. Does Smith have a right to a construction lien on Blackacre?

**Answer:** Yes.

**Problem B:** Same facts as in Problem A, except that Smith entered into a contract with Star Corporation, which was leasing Blackacre from Spartan. Does Smith have a right to a construction lien on Spartan's interest in Blackacre?

**Answer:** No, but Smith has a right to a construction lien on Star's leasehold interest.

**Problem C:** Same facts as in Problem B, except that the lease required Star to construct the building. Does Smith have a right to a construction lien on Spartan's interest in Blackacre?

**Answer:** Yes.

**Problem D:** Same facts as in Problem B, except that during construction Spartan terminated Star's leasehold interest because of a default by Star. Does Smith have a right to a construction lien on either Spartan's or Star's interest in Blackacre?

**Answer:** No, but Smith has a right to a construction lien on the building. In addition, Smith's interest will be subrogated to the pre-termination rights of Star under the lease if Smith cures the lease default within 30 days of actual notice of the termination.

**Problem E:** Star Corporation was purchasing Blackacre on land contract from Spartan Corporation. Star entered into a contract with Smith Contracting Company to construct a commercial building on Blackacre. The land contract did not require Star to construct the building. Does Smith have a right to a construction lien on Spartan's vendor's interest in Blackacre?

**Answer:** No, but Smith has a construction lien on Star's vendee's interest.

**Problem F:** Smith Contracting Company entered into a contract with Spartan Corporation, the owner of Blackacre, to construct a commercial building on Blackacre. Smith contracted with Superior Door Company to supply door hardware for the building. Superior supplied door hardware for the building. Does Superior have a right to a construction lien on Blackacre?

**Answer:** Yes.

**Problem G:** Same facts as in Problem F, except that Superior delivered the door hardware to Smith's warehouse where it was placed in Smith's general inventory. Later, Smith installed door hardware from its general inventory in the building. Does Superior have a right to a construction lien on Blackacre?

**Answer:** Yes, if the door hardware installed by Smith was the door hardware supplied by Superior.

**Problem H:** Brown Engineering Company entered into a contract with Spartan Corporation, the owner of Blackacre, to perform architectural and engineering services for a commercial building to be constructed on Blackacre. Brown prepared plans for a building that was constructed on Blackacre. Does Brown have a right to a construction lien on Blackacre?

**Answer:** Yes.

**Problem I:** Smith Contracting Company entered into a contract with the City of East Lansing, the owner of Blackacre, to construct a public

building on Blackacre. Smith commenced construction of the building. Does Smith have a right to a construction lien on Blackacre?

**Answer:** No.

**Authorities:** Problems A and B: MCL 570.1107(1).

Problem C: MCL 570.1107(1). *Sewell v Nu Markets*, 353 Mich 553, 91 NW2d 861 (1958).

Problem D: MCL 570.1107(3) and (4). *Lazenby v Wright*, 250 Mich 203, 229 NW 437 (1930).

Problem E: MCL 570.1107(2).

Problems F: MCL 570.1107(1).

Problem G: *People for Use of Belson Mfg Co v Wayne Electric Motor Co.*, 269 Mich 537, 257 NW 877 (1934).

Problem H: MCL 570.1104(7).

Problem I: *Ford v State Board of Education*, 166 Mich 658, 132 NW 467 (1911); *Kammer Asphalt v East China Twp*, 443 Mich 176, 504 NW2d 635 (1993).

**Comment:** A supplier providing materials to a supplier does not have a right to a construction lien. MCL 570.1106(6).

**Note:** See Standard 17.3 regarding the right to a construction lien on a residential structure and Standard 17.4 regarding the right to a construction lien on a condominium.



## STANDARD 17.3

### RIGHT TO CONSTRUCTION LIEN FOR IMPROVEMENT TO RESIDENTIAL STRUCTURE

**STANDARD:** A CONTRACTOR, SUBCONTRACTOR, SUPPLIER OR LABORER WHO PROVIDES AN IMPROVEMENT THAT IS INCORPORATED INTO A RESIDENTIAL STRUCTURE HAS A RIGHT TO A CONSTRUCTION LIEN ON THE INTEREST OF THE OWNER OR LESSEE WHO CONTRACTED IN WRITING FOR THE IMPROVEMENT.

**Problem A:** James Mann, the owner of Blackacre, entered into a written contract with Star Contracting Company to construct a house on Blackacre in which Mann intended to reside. Star provided labor and materials for the construction of the house. Does Star have a right to a construction lien on Blackacre?

**Answer:** Yes.

**Problem B:** Same facts as in Problem A, except that the contract was not in writing. Does Star have a right to a construction lien on Blackacre?

**Answer:** No.

**Authorities:** MCL 570.1106(4) and 570.1114.

**Comment A:** A residential structure is “an individual residential condominium unit or a residential building containing not more than 2 residential units, the land on which it is or will be located, and all appurtenances, in which the owner or lessee contracting for the improvement is residing or will reside upon completion of the improvement.” MCL 570.1106(4).

**Comment B:** A prospective owner under a purchase agreement for real property is a “lessee” for purposes of MCL 570.1106(4) and 570.1114. *Kitchen Suppliers v Erb Lumber*, 176 Mich App 602, 440 NW2d 50 (1989).

**Comment C:** A written contract with a contractor must comply with MCL 570.1114, which includes the following: (i) the contract, includ-

ing all amendments or additions, must be in writing; (ii) the contract must contain a statement that a residential builder, a residential maintenance and alteration contractor, an electrician, a plumbing contractor and a mechanical contractor are required to be licensed, and (iii) if the contractor is required to be licensed, a statement that contractor is licensed and the contractor's license number.

**Note:** See Standard 17.2 regarding the right to a construction lien for an improvement to a non-residential structure and Standard 17.4 regarding the right to a construction lien for an improvement to a condominium.

**Caveat:** The construction lien rights of an unlicensed contractor providing an improvement to a structure that is not a residential structure under the Michigan Construction Lien Act may be adversely affected by Chapter 24 of the Michigan Occupational Code (MCL 339.2401 *et seq.*). The Michigan Occupational Code applies to contractors who meet the definition of a residential builder contained in MCL 339.2401(a) and prohibits an action by an unlicensed residential builder to collect “compensation for the performance of an act or contract for which a license is required ...”. The Michigan Occupational Code and the Michigan Construction Lien Act each define “residential structure” differently. MCL 339.2401(c) and 570.1106(4). Thus, a contractor who is an unlicensed residential builder may be precluded from enforcing a construction lien against a structure that meets the definition of a “residential structure” under the Michigan Occupational Code but does not meet the definition of a “residential structure” under the Michigan Construction Lien Act. See, *84 Lumber Company, LP v Pagel & Frey, LLC*, 2007 WL 1228629 (Mich App), unpublished.

## **STANDARD 17.4**

### **RIGHT TO CONSTRUCTION LIEN FOR IMPROVEMENT TO CONDOMINIUM**

**STANDARD: A CONTRACTOR, SUBCONTRACTOR, SUPPLIER OR LABORER WHO PROVIDES AN IMPROVEMENT TO A CONDOMINIUM HAS A RIGHT TO A CONSTRUCTION LIEN AS FOLLOWS:**

- (A) EXCEPT AS PROVIDED IN SUBPARAGRAPH (B), (C) OR (D), THE CONSTRUCTION LIEN FOR AN IMPROVEMENT FURNISHED TO A CONDOMINIUM UNIT OR ITS LIMITED COMMON ELEMENTS ATTACHES ONLY TO THE CONDOMINIUM UNIT AND ITS LIMITED COMMON ELEMENTS.**
- (B) THE CONSTRUCTION LIEN FOR AN IMPROVEMENT FURNISHED TO A COMMON ELEMENT AND AUTHORIZED BY THE CONDOMINIUM DEVELOPER ATTACHES ONLY TO THE CONDOMINIUM UNITS OWNED BY THE DEVELOPER AT THE TIME OF RECORDING OF THE CLAIM OF LIEN.**
- (C) THE CONSTRUCTION LIEN FOR AN IMPROVEMENT AUTHORIZED BY THE ASSOCIATION OF CO-OWNERS OF CONDOMINIUM UNITS ATTACHES TO EACH CONDOMINIUM UNIT ONLY TO THE PROPORTIONAL EXTENT THE CO-OWNER OF THE UNIT IS REQUIRED TO CONTRIBUTE TO THE EXPENSES OF ADMINISTRATION AS PROVIDED BY THE CONDOMINIUM DOCUMENTS.**
- (D) THE CONSTRUCTION LIEN FOR AN IMPROVEMENT FURNISHED TO A COMMON ELEMENT DOES NOT ATTACH TO A CONDOMINIUM UNIT IF THE DEVELOPER OR THE ASSOCIATION OF CO-OWNERS OF CONDOMINIUM UNITS DID NOT CONTRACT FOR THE IMPROVEMENT.**

**Problem A:** Whiteacre Development, LLC, the developer of Blackacre Condominium, owns Units 3, 6, 7 and 8 of the Condominium.

Whiteacre contracted with Acme Cabinet Company to install cabinets in Unit 7. Does Acme have a right to a construction lien on any units in the Condominium?

**Answer:** Yes, but only on Unit 7.

**Problem B:** Same facts as in Problem A, except that the cabinets were installed in a community room, a common element of the Condominium. Does Acme have a right to a construction lien on any units in the Condominium?

**Answer:** Yes, but only on Units 3, 6, 7 and 8.

**Problem C:** The association of co-owners of condominium units in Sunny Dale Condominium contracted with Tiptop Roofing to re-roof some of the condominium units. The roofs are common elements. Does Tiptop have a right to a construction lien against all the units in the Condominium?

**Answer:** Yes. However, the lien amount on each unit in the Condominium is limited to the proportional extent that the unit owner is required to contribute to the expenses of administering the Condominium as provided by the condominium documents.

**Problem D:** Jack Jones, the owner of Unit 6 of Rush Ridge Condominium, contracted with Elegant Fence Co. to construct a privacy fence in a general common element of the Condominium. The condominium association did not authorize Jones to enter into the contract. Does Elegant have a right to a construction lien on any units in the Condominium?

**Answer:** No.

**Authority:** MCL 570.1126.

**Note:** A construction lien attaching to a condominium unit also attaches to the limited common elements appurtenant to the unit.

## STANDARD 17.5

### TIME TO RECORD CLAIM OF LIEN

**STANDARD:** THE RIGHT TO A CONSTRUCTION LIEN CEASES TO EXIST UNLESS A CLAIM OF LIEN IS RECORDED WITH THE REGISTER OF DEEDS FOR THE COUNTY IN WHICH THE REAL PROPERTY IS LOCATED WITHIN 90 DAYS AFTER THE LAST DAY ON WHICH THE LIEN CLAIMANT FURNISHED LABOR OR MATERIAL FOR AN IMPROVEMENT TO THE REAL PROPERTY.

**Problem A:** Smyth Drywall contracted to provide drywall for the construction of a building on Whiteacre. On May 29, 2007, Smyth Drywall completed its work at the building. On August 28, 2007, Smyth Drywall recorded a claim of lien against Whiteacre. Was the lien timely recorded?

**Answer:** No. The last day for recording the lien was August 27, 2007.

**Problem B:** Same facts as in Problem A, except that on July 1, 2007, Smyth Drywall performed warranty work on the drywall at the building. Was the lien timely recorded?

**Answer:** No. The performance of warranty work does not extend the time for recording a lien.

**Problem C:** Same facts as in Problem A, except that when Smyth Drywall presented its lien for recording on August 2, 2007, the register of deeds accepted the lien for recording and date-stamped the lien, but did not assign a liber and page number to the lien until August 28, 2007. Was the lien timely recorded?

**Answer:** Yes.

**Authorities:** Problem A: MCL 570.1111(1).

Problem B: *Woodman v Walter*, 204 Mich App 68, 514 NW2d 190 (1994); *Stock Building Supply v Parsley Homes*, 291 Mich App 403, 804 NW2d 898 (2011).

Problem C: MCL 570.1111(1). *Central Ceiling & Partition v Department of Commerce*, 470 Mich 877, 683 NW2d 142 (2004).

**Comment A:** A lien claimant must strictly comply with the 90-day requirement of MCL 570.1111(1). *Northern Concrete Pipe v Sinacola Companies-Midwest*, 461 Mich 316, 603 NW2d 257 (1999). If the 90th day falls on a Saturday, Sunday or legal holiday, a lien recorded on the next day that is not a Saturday, Sunday or legal holiday is timely. *Superior Products Co v Merucci Bros*, 107 Mich App 153, 309 NW2d 188 (1981).

**Comment B:** Last minute clean-up or the picking up of tools after the completion of actual work may be considered part of the work for the purpose of determining the last day of furnishing labor or material for an improvement. See, *Blackwell v Bornstein*, 100 Mich App 550, 299 NW2d 397 (1980). Compare, *Superior Steel Systems v Nature's Nuggets*, 174 Mich App 368, 435 NW2d 492 (1989).

## STANDARD 17.6

### RELATIVE PRIORITY OF CONSTRUCTION LIENS

**STANDARD: CONSTRUCTION LIENS ON AN IMPROVEMENT GENERALLY HAVE EQUAL PRIORITY BASED ON THE DATE OF THE FIRST ACTUAL PHYSICAL IMPROVEMENT.**

**Problem:** Nick Paige, the owner of Whiteacre, contracted with Vivian Construction Co. to construct a building on Whiteacre. On May 5, 2006, Myers Landscape Co. commenced grubbing and clearing work on Whiteacre, which constituted the first actual physical improvement. In June, 2007, Allen Excavating, Inc. excavated the basement of the building. Allen recorded a claim of lien against Whiteacre in August, 2007. In April, 2008, Hagen Carpentry performed finish carpentry work in the building. Hagen recorded a claim of lien against Whiteacre in June, 2008. Does the Allen lien have priority over the Hagen lien?

**Answer:** No. The Allen and Hagen liens have equal priority based on the May 5, 2006 date of the first actual physical improvement.

**Authority:** MCL 570.1119(1). *Michigan Pipe & Valve-Lansing v Hebler Enterprises*, 292 Mich App 479, 808 NW2d 323 (2011), *lv den* 490 Mich 874, 803 NW2d 688 (2011).

**Comment A:** The term “actual physical improvement” means an “actual physical change in, or alteration of, real property as a result of labor provided, pursuant to a contract, by a contractor, subcontractor, or laborer which is readily visible and of a kind that would alert a person upon reasonable inspection of the existence of an improvement.” MCL 570.1103(1).

**Comment B:** “A construction lien under this act shall take priority over all garnishments for the contract debt made after commencement of the first actual physical improvement, without regard to the date of recording of the claim of lien.” MCL 570.1119(2).

**Note:** See Standard 17.8 regarding circumstances under which lien claimants may not have equal priority.



## **STANDARD 17.7**

### **PRIORITY OF CONSTRUCTION LIEN OVER LIENS, ENCUMBRANCES AND OTHER INTERESTS**

**STANDARD: A CONSTRUCTION LIEN HAS PRIORITY OVER ALL LIENS, ENCUMBRANCES AND OTHER INTERESTS IN REAL PROPERTY THAT ARE RECORDED AFTER THE FIRST ACTUAL PHYSICAL IMPROVEMENT TO THE REAL PROPERTY.**

**Problem A:** Hogan Construction Company provided labor and materials for the construction of a building on Whiteacre. The first actual physical improvement for the building construction occurred on October 24, 2007. First Bank recorded a mortgage against the building on December 1, 2007. Hogan recorded a claim of lien against Whiteacre on January 15, 2008. Does the Hogan lien have priority over the mortgage?

**Answer:** Yes.

**Problem B:** Same facts as in Problem A, except that a judgment lien was recorded against the owner of Whiteacre on October 25, 2007. Does the Hogan lien have priority over the judgment lien?

**Answer:** Yes.

**Problem C:** Same facts as in Problem A, except that Taylor Land Development Company recorded an easement for access across Whiteacre on October 31, 2007. Does the Hogan lien have priority over the easement?

**Answer:** Yes.

**Authority:** MCL 570.1119(3).



## **STANDARD 17.8**

### **PRIORITY OF MORTGAGE, LIEN, ENCUMBRANCE OR OTHER INTEREST OVER CONSTRUCTION LIEN**

**STANDARD: A MORTGAGE, LIEN, ENCUMBRANCE OR OTHER INTEREST IN REAL PROPERTY RECORDED BEFORE THE FIRST ACTUAL PHYSICAL IMPROVEMENT HAS PRIORITY OVER A CONSTRUCTION LIEN, EXCEPT THAT A MORTGAGE ADVANCE AFTER THE FIRST ACTUAL PHYSICAL IMPROVEMENT DOES NOT HAVE PRIORITY OVER:**

**(A) A CONSTRUCTION LIEN UNLESS THE MORTGAGEE HAS FOR SUCH ADVANCE:**

- (1) RECEIVED A CONTRACTOR'S SWORN STATEMENT PURSUANT TO MCL 570.1110;**
- (2) MADE THE ADVANCE PURSUANT TO THE SWORN STATEMENT; AND**
- (3) RECEIVED A WAIVER OF LIEN FROM THE CONTRACTOR AND EACH SUBCONTRACTOR, LABORER AND SUPPLIER WHO PROVIDED A NOTICE OF FURNISHING; OR**

**(B) THE CONSTRUCTION LIEN OF A LIEN CLAIMANT NOT SET FORTH ON A CONTRACTOR'S SWORN STATEMENT IF THE LIEN CLAIMANT HAS:**

- (1) PROVIDED A NOTICE OF FURNISHING BEFORE THE ADVANCE OR IS EXCUSED FROM PROVIDING A NOTICE OF FURNISHING PURSUANT TO MCL 570.1108, 570.1108a OR 570.1109; OR**
- (2) RECORDED A CLAIM OF LIEN BEFORE THE ADVANCE,**

**UNLESS THE MORTGAGEE HAS RECEIVED FROM THE LIEN CLAIMANT EITHER:**

**(1) A FULL CONDITIONAL WAIVER OF LIEN; OR**

**(2) A PARTIAL UNCONDITIONAL WAIVER OF LIEN FOR THE FULL AMOUNT DUE THE LIEN CLAIMANT AS OF THE DATE THROUGH WHICH THE LIEN IS WAIVED AS SHOWN ON THE WAIVER OF LIEN, WHICH DATE IS WITHIN 30 DAYS BEFORE THE DATE OF THE ADVANCE.**

**Problem A:** Charland Enterprises, Inc., the owner of Whiteacre, entered into a contract with Morris Construction, Inc. to build an office building on Whiteacre. On October 15, 2006, Main Bank recorded a mortgage given by Charland to secure a loan for construction of the building. On October 16, 2006, Charland recorded a notice of commencement against Whiteacre. The first actual physical improvement for the building construction occurred on October 24, 2006. Weadon Concrete Co., a subcontractor of Morris, provided materials for the building on November 1, 2006. On November 15, 2006, Main Bank made an advance under the mortgage for costs of construction of the building pursuant to a contractor's sworn statement. Main Bank did not obtain a waiver of lien from Weadon, which was listed on the sworn statement. On December 18, 2006, Weadon recorded a claim of lien against Whiteacre. Does the Weadon lien have priority over the advance?

**Answer:** Yes, because Main Bank did not obtain a waiver of lien from Weadon.

**Problem B:** Same facts as in Problem A, except that Weadon was not listed on the sworn statement but provided a notice of furnishing on November 1, 2006. Does the Weadon lien have priority over the advance?

**Answer:** Yes, because Main Bank did not obtain a waiver of lien from Weadon.

**Problem C:** Same facts as in Problem A, except that Weadon was not listed on the sworn statement, did not provide a notice of furnishing and was not excused from providing a notice of furnishing. Does the Weadon lien have priority over the advance?

**Answer:** No.

**Problem D:** Same facts as in Problem C, except that Weadon recorded a claim of lien before the date of the advance. Does the Weadon lien have priority over the advance?

**Answer:** Yes.

**Problem E:** Same facts as in Problem B, except that Charland did not record a notice of commencement and Weadon did not provide a notice of furnishing. Does the Weadon lien have priority over the advance?

**Answer:** Yes, because the failure to record the notice of commencement extends the time to provide the notice of furnishing.

**Problem F:** Same facts as in Problem E, except that Charland recorded a notice of commencement and Weadon contracted directly with Charland. Does the Weadon lien have priority over the advance?

**Answer:** Yes.

**Authorities:** Generally: MCL 570.1119(2), (3) and (4).

Problem E: MCL 570.1108(10).

Problem F: MCL 570.1109(1).

**Comment A:** The Committee expresses no opinion concerning whether “disbursement pursuant to a contractor’s sworn statement” in the third sentence of MCL 570.1119(4) requires the mortgagee (1) to obtain a waiver of lien from each contractor, subcontractor, laborer and supplier listed on the sworn statement which has not provided a notice of furnishing or is excused from providing a notice of furnishing, or (2) to make direct payments to each contractor, subcontractor, laborer and supplier pursuant to MCL 570.1110(7).

**Comment B:** The requirement that a notice of furnishing be provided may be excused under MCL 570.1108(10)-(13) (the failure of an owner, lessee or designee to record or, upon the request of the lien claimant, to provide a notice of commencement with a blank notice of furnishing attached with respect to an improvement to real property operates to extend the time within which the contractor, supplier or laborer may provide the notice of furnishing), MCL

570.1108a(9) and (10) (the failure of an owner, lessee or designee, upon request of the lien claimant, to provide a notice of commencement with blank notice of furnishing attached with respect to an improvement to a residential structure operates to extend the time within which a contractor, supplier or laborer may provide a notice of furnishing) and MCL 570.1109(1) (if the contractor contracts directly with an owner or lessee).

**Comment C:** Generally, the construction liens of all lien claimants have equal priority based upon the date of first actual physical improvement. However, the amount of a construction lien entitled to priority vis-à-vis one or more advances under a mortgage is based upon separate determinations as to whether the construction lien has priority over or is subordinate to each advance under MCL 570.1119(4). These separate determinations can result in differing priorities among construction liens as to one or more mortgage advances.

**Note:** See Comment A to Standard 17.6 regarding the definition of “first actual physical improvement” and the priority of construction liens generally. See Standard 17.7 regarding the priority of construction liens if the first actual physical improvement occurs before a mortgage is recorded.

## STANDARD 22.5

### DEED OF REAL PROPERTY REVERTED BEFORE APRIL 1, 1976 PURSUANT TO GENERAL PROPERTY TAX ACT

**STANDARD:** A DEED BY THE DEPARTMENT OF NATURAL RESOURCES OR THE DEPARTMENT OF CONSERVATION OF REAL PROPERTY ACQUIRED BY THE STATE FOR DELINQUENT TAXES BEFORE APRIL 1, 1976, UNDER AUTHORITY OF THE GENERAL PROPERTY TAX ACT, VESTS MARKETABLE TITLE IN THE GRANTEE.

**Problem:** In 1972, by proceedings under the General Property Tax Act for the sale of lands for delinquent taxes, title to Blackacre was acquired by the State. Blackacre was deeded by the Department of Natural Resources to Harold Fowler in 1974. The deed contained a recital that it was executed pursuant to Section 131 of the General Property Tax Act. The deed was recorded. Is Fowler's title marketable?

**Answer:** Yes.

**Authorities:** MCL 211.131 (repealed by 2005 P.A. 183, effective December 31, 2006). MCL 211.67b (repealed by 1999 P.A. 123, effective December 31, 2003).

**Comment A:** A deed executed pursuant to the General Property Tax Act may reserve mineral, coal, oil and gas rights. MCL 322.212 (now MCL 324.503). *Matthews v Dep't of Conservation*, 355 Mich 589, 96 NW2d 160 (1959), held that a reservation of mineral rights included sand, gravel, clay and other non-metallic minerals. 1964 PA 125 amended MCL 322.212 (now MCL 324.503) to provide that the term "mineral rights" does not include sand, gravel, clay or other non-metallic minerals for deeds executed after May 15, 1964. A deed of tax reverted land may reserve to the State aboriginal antiquities and the right to explore and excavate for them. MCL 299.52 (now MCL 324.76104). It may also reserve a right of ingress to and egress from a watercourse. MCL 322.212 (now MCL 324.503).

**Comment B:** The title to land conveyed by the State pursuant to the General Property Tax Act may be subject to certain visible or recorded easements that were not extinguished when the land reverted to the State. See, Standards 22.7 and 22.8.

**Comment C:** The General Property Tax Act provides that, after six months from the recording of a deed to the State pursuant to MCL 211.67(a), the State's title is deemed to be absolute, and no suit or proceeding "shall thereafter be instituted by any person claiming through the original or government title to set aside, vacate or annul the said deed or the title derived thereunder." MCL 211.431.

In *Dow v State of Michigan*, 396 Mich 192, 240 NW2d 450 (1976), an action brought by owners against the State challenging the tax sale proceedings for lack of due process, it was held that the State as titleholder could not rely on the statute "to insulate itself from redress if the statutory procedure does not meet constitutional requirements." The court stated, however, that a different question would be presented if rights of a third party had intervened. The Court of Appeals held in *Buckley Land Corp v Dep't of Natural Resources*, 178 Mich App 249, 443 NW2d 390, *lv den*, 433 Mich 876 (1989), that *Dow* does not apply retroactively. See, Standard 22.6.

**Comment D:** With respect to the adequacy of notice under 1976 PA 292, MCL 211.131e, see *Smith v Cliffs of the Bay Condominium Ass'n* 465 Mich 876, 634 NW2d 362 (2001) and *Jones v Flowers* 547 US 220, 126 S Ct 1708, 164 L Ed2d 415 (2006). In *Jones*, the U.S. Supreme Court held that when a certified-mail notice of a tax sale is returned unclaimed, the foreclosing entity must take additional reasonable measures to attempt to provide notice to the property owner before selling the property, if it is practicable to do so. In such event, the Court suggested that notice by first class mail, sent to the owner at the property address or sent to "occupant" at the property address, or notice by posting the property, would be reasonable notice.

**Comment E:** The name of the Department of Conservation was changed to the Department of Natural Resources by 1968 PA 353, which amended MCL 16.104, effective November 15, 1968. The Department of Natural Resources was replaced by the Department of Natural Resources and Environment by Executive Order No.

2009-45, effective as of January 17, 2010. The Department of Natural Resources and Environment was abolished and its powers and duties for the management of the natural resources of the State, including authority to convey real property pursuant to the General Property Tax Act, were transferred to the re-created Department of Natural Resources, by Executive Order No. 2011-1, effective as of March 13, 2011.



## STANDARD 22.5A

### DEED OF REAL PROPERTY REVERTED AFTER MARCH 31, 1976 PURSUANT TO MCL 211.60 – 211.70

**STANDARD:** A DEED BY THE DEPARTMENT OF NATURAL RESOURCES OF REAL PROPERTY ACQUIRED BY THE STATE FOR DELINQUENT TAXES AFTER MARCH 31, 1976 PURSUANT TO MCL 211.60 – 211.70, VESTS MARKETABLE TITLE IN THE GRANTEE IF THE STATE COMPLIED WITH THE NOTICE PROVISIONS OF THE GENERAL PROPERTY TAX ACT.

**Problem:** In 1995, by proceedings under MCL 211.60 – 211.70 for the sale of lands for delinquent taxes, title to Blackacre was acquired by the State. Blackacre was deeded by the Department of Natural Resources to Harold Fowler in 2010. The deed contained a recital that it was executed pursuant to Section 131 of the General Property Tax Act. The deed was recorded. Is Fowler’s title marketable?

**Answer:** Yes, provided that notice was given in accordance with the notice provisions of the General Property Tax Act, but in certain circumstances additional reasonable measures may be required to satisfy due process requirements. See, Caveat.

**Authorities:** MCL 211.67, 211.67b (both repealed by 1999 P.A. 123, effective December 31, 2003); MCL 211.131 (repealed by 2005 P.A. 183, effective December 31, 2006; MCL 211.131e (repealed by 2006 P.A. 611, effective December 31, 2014).

**Comment A:** A deed executed pursuant to the General Property Tax Act may reserve mineral, coal, oil and gas rights. MCL 322.212 (now MCL 324.503). *Matthews v Dep’t of Conservation*, 355 Mich 589, 96 NW2d 160 (1959) held that a reservation of mineral rights included sand, gravel, clay and other non-metallic minerals. 1964 PA 125 amended MCL 322.212 (now MCL 324.503) to provide that the term “mineral rights” does not include sand, gravel, clay or other non-metallic minerals for deeds executed after May 15, 1964. A deed of tax reverted land may reserve to the State aboriginal antiquities and the right to explore and excavate for them. MCL 299.52 (now MCL 324.76104). It may also re-

serve a right of ingress to and egress from a watercourse. MCL 322.212 (now MCL 324.503).

**Comment B:** The title to land conveyed by the State pursuant to the General Property Tax Act may be subject to certain visible or recorded easements that were not extinguished when the land reverted to the State. See, Standards 22.8 and 22.9-1.

**Comment C:** As to lands reverted to the State after March 31, 1976, MCL 211.131e provides that “[f]or all property the title to which vested in this state under this section after October 25, 1976, the redemption period on property deeded to the state under former section 67a shall be extended until the owners of a recorded property interest in the property have been notified of a hearing before the department of treasury, a local unit of government, or a land bank fast track authority” and that “[p]roof of the notice of a hearing under this section shall be recorded with the register of deeds in the county in which the property is located in a form prescribed by the department of treasury.”

**Comment D:** The Department of Natural Resources was replaced by the Department of Natural Resources and Environment, by Executive Order No. 2009-45, effective as of January 17, 2010. The Department of Natural Resources and Environment was abolished and its powers and duties for the management of the natural resources of the State, including authority to convey real property pursuant to the General Property Tax Act, were transferred to the re-created Department of Natural Resources, by Executive Order No. 2011-1, effective as of March 13, 2011.

**Caveat:** With respect to the adequacy of notice under 1976 PA 292, MCL 211.131e, see *Smith v Cliffs of the Bay Condominium Ass’n*, 463 Mich 420, 617 NW2d 536 (2000). See also, *Jones v Flowers*, 547 US 220, 126 S Ct 1708, 164 L Ed2d 415 (2006). In *Jones*, the U.S. Supreme Court held that when a certified-mail notice of a tax sale is returned unclaimed, the foreclosing entity must take additional reasonable measures to attempt to provide notice to the property owner before selling the property, if it is practicable to do so. In such event, the Court suggested that notice by first class mail, sent to the owner at the property address or sent to “occupant” at the property address, or notice by posting the property, would be reasonable notice.

## STANDARD 22.5B

### DEED OF REAL PROPERTY FORECLOSED PURSU- ANT TO MCL 211.78 – 211.78o

**STANDARD:** A DEED BY A FORECLOSING GOVERNMENTAL UNIT OF REAL PROPERTY ACQUIRED FOR DELINQUENT TAXES PURSUANT TO MCL 211.78 - 211.78o VESTS FEE SIMPLE TITLE IN THE GRANTEE IF THE FORECLOSING GOVERNMENTAL UNIT COMPLIED WITH THE NOTICE PROVISIONS OF THE GENERAL PROPERTY TAX ACT.

**Problem:** In 2004, Oakland County acquired title to Blackacre as the foreclosing governmental unit by judgment dated March 1, 2004, in proceedings under MCL 211.78-211.78o for the sale of lands for delinquent taxes. Oakland County deeded Blackacre to John Doe in November, 2004. The deed contained a recital that it was executed pursuant to Section 78m(2) of the General Property Tax Act. The deed was recorded. Did Doe acquire fee simple title to Blackacre?

**Answer:** Yes, provided that Oakland County complied with the notice provisions of the General Property Tax Act, but in certain circumstances, additional reasonable measures may be required to satisfy due process. See, Caveat 2.

**Authorities:** MCL 211.78k(6). *Republic Bank v Genesee County Treasurer*, 471 Mich 732, 690 NW2d 917 (2005); *In re Petition by Treasurer of Wayne County for Foreclosure (Wayne County Treasurer v Perfecting Church)*, 478 Mich 1, 732 NW2d 458 (2007).

**Comment A:** If the State is the foreclosing governmental unit, mineral, coal, oil and gas rights may be reserved in deeds executed pursuant to the General Property Tax Act. MCL 324.503. The term “mineral rights” as used in MCL 324.503 does not include sand, gravel, clay and other non-metallic minerals. MCL 324.503. A deed of tax reverted land may also reserve to the State (1) aboriginal antiquities and the right to explore and excavate for them, MCL 324.76104, and (2) the right of ingress to and egress from a watercourse, MCL 324.503.

**Comment B:** The title to land conveyed by a foreclosing governmental unit pursuant to the General Property Tax Act may be subject to certain interests therein, including, among others, future installments of special assessments, certain visible or recorded easements and private deed restrictions. See, Standard 22.9-2.

**Caveat 1:** The General Property Tax Act provides that, if forfeited delinquent taxes, interest, penalties and fees are not paid on or before the March 31 immediately following entry of a judgment of foreclosure or, in a contested case, within 21 days after entry of the judgment, fee simple title will vest absolutely in the foreclosing governmental unit except for interests described in Standard 22.9-2. MCL 211.78k(5) and (6). The Act further provides that the owner of an extinguished interest who claims that he or she did not receive notice as required by the Act, may not bring an action for possession but is limited to an action for damages. MCL 211.78l. The Michigan Supreme Court in *In re Petition by Treasurer of Wayne County for Foreclosure (Wayne County Treasurer v Perfecting Church)*, 478 Mich 1, 732 NW2d 458 (2007) held this provision to be unconstitutional as to property owners who had not been accorded due process.

**Caveat 2:** In *Jones v Flowers*, 547 US 220, 126 S Ct 1708, 164 L Ed2d 415 (2006), the U.S. Supreme Court held that when a certified-mail notice of a tax sale is returned unclaimed, the foreclosing entity must take additional reasonable measures to attempt to provide notice to the property owner before selling the property, if it is practicable to do. In such event, the Court suggested that notice by first class mail, sent to the owner at the property address or sent to “occupant” at the property address, or notice by posting the property, would be reasonable notice.

## **STANDARD 22.9-2**

### **EFFECT OF TAX FORECLOSURE PROCEEDING ON LIENS AND ENCUMBRANCES ON REAL PROPERTY ACQUIRED BY A FORECLOSING GOVERNMENTAL UNIT THROUGH A JUDGMENT OF FORECLOSURE PURSUANT TO MCL 211.78k ENTERED BEFORE JANUARY 3, 2007**

**STANDARD: TITLE TO REAL PROPERTY ACQUIRED BY A FORECLOSING GOVERNMENTAL UNIT THROUGH A JUDGMENT OF FORECLOSURE PURSUANT TO MCL 211.78k ENTERED BEFORE JANUARY 3, 2007, IS FREE OF LIENS AND ENCUMBRANCES THAT EXISTED AT THE DATE THE JUDGMENT WAS ENTERED, EXCEPT:**

**(A) FUTURE INSTALLMENTS OF SPECIAL ASSESSMENTS;**

**(B) RECORDED LIENS, RESTRICTIONS OR OTHER GOVERNMENTAL INTERESTS IMPOSED PURSUANT TO THE NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION ACT, 1994 PA 451, MCL 324.101 ET SEQ.;**

**(C) VISIBLE OR RECORDED EASEMENTS OR RIGHTS OF WAY; AND**

**(D) PRIVATE DEED RESTRICTIONS.**

**Problem A:** Jane Doe, the owner of Blackacre, conveyed the east half of Blackacre to Mary Smith in 1995. Smith later conveyed to Doe an easement over the north 10 feet of the east half of Blackacre. The easement was not visible or recorded. In 2003, the State, as the foreclosing governmental unit, acquired title to the east half of Blackacre through a judgment of foreclosure pursuant to MCL 211.78k and expiration of the redemption period. Later, the State conveyed the east half of Blackacre to Robert Jones. Is Jones's title to the east half of Blackacre subject to the easement?

**Answer:** No.

**Problem B:** Same facts as in Problem A, except that the easement was recorded. Is Jones's title to the east half of Blackacre subject to the easement?

**Answer:** Yes.

**Problem C:** Same facts as in Problem A, except that Doe used the easement as a visible access road to the west half of Blackacre. Is Jones's title to the east half of Blackacre subject to the easement?

**Answer:** Yes.

**Problem D:** Beginning in 1997, Blackacre was subject to a special assessment for road improvements payable in installments over 20 years. In 2005, the county treasurer, as the foreclosing governmental unit, acquired title to Blackacre through a judgment of foreclosure pursuant to MCL 211.78k and expiration of the redemption period. Later, the county treasurer conveyed Blackacre to Robert Jones. Is Jones's title to Blackacre subject to the special assessment?

**Answer:** Jones's title to Blackacre is free of all installments of the special assessment that were due and payable before entry of the judgment of foreclosure, but is subject to all installments due and payable after entry of the judgment.

**Authority:** MCL 211.78k(5).

**Comment A:** MCL 211.78(7)(a) defines "foreclosing governmental unit" as used in sections 78 through 157 of the General Property Tax Act, MCL 211.78 – 211.157, as (a) the county treasurer or (b) the State, if a county has opted out of the tax foreclosure process pursuant to MCL 211.78(3).

**Comment B:** Before 2002, delinquent real property tax liens were offered at annual sales held in each county pursuant to MCL 211.60 – 211.70. Liens not purchased at sale were automatically bid to the State for foreclosure. Following enactment of 1999 PA 123, beginning in 2001, liens for delinquent taxes for 1999 and later may be forfeited to the county treasurer on March 1 of the first year of delinquency and may then be subject to foreclosure at a

circuit court hearing held at the end of the second year of delinquency, under MCL 211.78 – 211.78o. Delinquent tax liens for 1997 and earlier were sold under the former process. A phase-in period was created for delinquent 1998 and 1999 taxes, which were permitted to be sold under the former process or forfeited and foreclosed under the new process, at the county treasurer's discretion.



## **STANDARD 22.9-3**

### **EFFECT OF TAX FORECLOSURE PROCEEDING ON LIEN AND ENCUMBRANCE ON REAL PROPERTY ACQUIRED BY A FORECLOSING GOVERNMENTAL UNIT THROUGH A JUDGMENT OF FORECLOSURE PURSUANT TO MCL 211.78k ENTERED AFTER JANUARY 2, 2007**

**STANDARD: TITLE TO REAL PROPERTY ACQUIRED BY A FORECLOSING GOVERNMENTAL UNIT THROUGH A JUDGMENT OF FORECLOSURE PURSUANT TO MCL 211.78k ENTERED AFTER JANUARY 2, 2007, IS FREE OF LIENS AND ENCUMBRANCES THAT EXISTED AT THE DATE THE JUDGMENT WAS ENTERED, EXCEPT:**

- (A) FUTURE INSTALLMENTS OF SPECIAL ASSESSMENTS;**
- (B) RECORDED LIENS, RESTRICTIONS OR OTHER GOVERNMENTAL INTERESTS IMPOSED PURSUANT TO THE NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION ACT, 1994 PA 451, MCL 324.101 ET SEQ.;**
- (C) VISIBLE OR RECORDED EASEMENTS OR RIGHTS OF WAY;**
- (D) PRIVATE DEED RESTRICTIONS;**
- (E) INTERESTS OF A LESSEE OR AN ASSIGNEE OF AN INTEREST OF A LESSEE UNDER A RECORDED OIL OR GAS LEASE; AND**
- (F) INTERESTS IN OIL OR GAS THAT WERE OWNED BY A PERSON OTHER THAN THE SURFACE OWNER IF, DURING THE PERIOD OF 20 YEARS IMMEDIATELY BEFORE THE FILING OF THE PETITION FOR FORECLOSURE UNDER MCL 211.78h:**
  - (1) THE INTEREST WAS SOLD, LEASED, MORTGAGED, TRANSFERRED, OR RESERVED BY**

**INSTRUMENT RECORDED IN THE COUNTY  
WHERE THE INTEREST IS LOCATED; OR**

**(2) THE OWNER OF THE INTEREST RECORDED A  
NOTICE OF INTENT TO PRESERVE THE IN-  
TEREST.**

**Problem A:** Jane Doe, the owner of Blackacre, conveyed the east half of Blackacre to Mary Smith in 1995. Smith later conveyed to Doe an easement over the north 10 feet of the east half of Blackacre. The easement was not visible or recorded. In 2003, the State, as the foreclosing governmental unit, acquired title to the east half of Blackacre through a judgment of foreclosure pursuant to MCL 211.78k(5) and expiration of the redemption period. Later, the State conveyed the east half of Blackacre to Robert Jones. Is Jones's title to the east half of Blackacre subject to the easement?

**Answer:** No.

**Problem B:** Same facts as in Problem A, except that the easement was recorded. Is Jones's title to the east half of Blackacre subject to the easement?

**Answer:** Yes.

**Problem C:** Same facts as in Problem A, except that Doe used the easement as a visible access road to the west half of Blackacre. Is Jones's title to the east half of Blackacre subject to the easement?

**Answer:** Yes.

**Problem D:** Beginning in 1997, Blackacre was subject to a special assessment for road improvements, payable in installments over 20 years. Later, the county treasurer, as the foreclosing governmental unit, acquired title to Blackacre through a judgment of foreclosure pursuant to MCL 211.78k and expiration of the redemption period. Later, the county treasurer conveyed Blackacre to Robert Jones. Is Jones's title to Blackacre subject to the installments of the special assessment due and payable before entry of the judgment of foreclosure?

**Answer:** No, but Jones's title is subject to all installments of the special assessment due and payable after entry of the judgment.

**Problem E:** In 1980 Jane Doe conveyed Blackacre, reserving a fee interest in all oil and gas. The deed was recorded in 1980. No further activity occurred affecting the oil and gas. In 2008, the State, as the foreclosing governmental unit, acquired title to Blackacre through a judgment of foreclosure pursuant to MCL 211.78(k) and expiration of the redemption period. Later, the State conveyed Blackacre to Robert Jones. Did Jones acquire the oil and gas?

**Answer:** Yes.

**Problem F:** Same facts as in Problem E, except that the conveyance and recording occurred in 1990. Did Jones acquire the oil and gas?

**Answer:** No.

**Problem G:** Same facts as in Problem E, except that in 1999 Doe recorded a notice of intent to preserve her interest in the oil and gas. Did Jones acquire the oil and gas?

**Answer:** No.

**Problem H:** Same facts as in Problem E, except that in 1990 Doe leased the oil and gas to Gusher Oil, LLC. The lease was recorded in 1990. Did Jones acquire Doe's interest in the oil and gas?

**Answer:** No. Neither Doe's fee interest nor Gusher's leasehold interest was affected by the tax foreclosure.

**Problem I:** Same facts as in Problem H, except that the lease was not recorded. Did Jones acquire the oil and gas?

**Answer:** Yes, Jones acquired both Doe's fee interest and Gusher's leasehold interest.

**Problem J:** Same facts as in Problem E, except that in 1980 Doe leased the oil and gas rights to Deep Driller, LLC. The lease was recorded in 1980. Oil and gas production began in 1982 and continued in-

to 2008, but no instrument affecting the oil and gas was recorded after 1980. Did Jones acquire all the interest in the oil and gas?

**Answer:** No. Jones acquired Doe's interest in the oil and gas subject to Deep Drillers' lease, which was not extinguished by the tax foreclosure. Although production is sufficient under MCL 554.291 *et seq.* to prevent Doe's interest from being deemed abandoned and vesting in the surface owner, production alone is insufficient to prevent the severed oil and gas interest from being foreclosed for delinquent real property taxes.

**Authority:** MCL 211.78k(5).

## STANDARD 22.10

### EFFECT OF TAX SALE OR TAX FORECLOSURE PROCEEDING ON REAL PROPERTY INTEREST EX- EMPT FROM TAXATION UNDER THE GENERAL PROPERTY TAX ACT

**STANDARD:** TITLE TO A PROPERTY INTEREST EXEMPT FROM TAXATION UNDER THE GENERAL PROPERTY TAX ACT IS NOT AFFECTED BY TAX SALE OR TAX FORECLOSURE PROCEEDINGS.

**Problem A:** The State owned the mineral interests in Blackacre. Blackacre was sold at tax sale to Fred Warner. Warner served notices under MCL 211.140 of the right to redeem from the tax lien sale to all interest holders in Blackacre, including the State. There was no redemption during the statutory period. Did Warner acquire the mineral interests?

**Answer:** No, because the State-owned mineral interests were exempt from taxation, the foreclosure did not affect the interests.

**Problem B:** Blackacre, subject to a railroad right-of-way, was foreclosed for delinquent taxes and title vested in the foreclosing governmental unit. After the redemption period expired, the foreclosing governmental unit deeded Blackacre to Cy Luce. The tax description by which Blackacre was foreclosed and deeded to Luce did not exclude the railroad right-of-way. Is Luce's title subject to the right-of-way?

**Answer:** Yes, because the railroad was exempt from taxation under the General Property Tax Act, the foreclosure did not affect the right-of-way.

**Authorities:** Problem A: *Porter v Auditor Gen*, 255 Mich 526, 238 NW 185 (1931); *Hammond v Auditor Gen*, 70 Mich App 149, 245 NW2d 544 (1976).

Problem B: MCL 211.7v. *Smith v Auditor Gen*, 138 Mich 582, 101 NW 807 (1904).

**Comment A:** Michigan's current and former constitutions provide for specific taxation of certain real and personal property interests in lieu of general ad valorem taxation. Const 1963, art 9, § 3. These interests are therefore exempt from foreclosure under the General Property Tax Act. They include railroad, telegraph, and telephone operating property subject to specific taxation under MCL 207.1 *et seq.*, and oil or gas pipelines and electric utility lines and their rights of way or easements assessed as personal property under MCL 211.8.

**Comment B:** The result is the same whether delinquent taxes are foreclosed through tax sale proceedings under MCL 211.60 *et seq.* (repealed by 1999 PA 123) or tax foreclosure proceedings under MCL 211.78 *et seq.*

**Comment C:** Real property exempt from taxation under the General Property Tax Act may be foreclosed for unpaid special assessments imposed or for delinquent property taxes levied in years in which the property was not tax-exempt. *In re Petition of Auditor Gen*, 300 Mich 80, 1 NW2d 461 (1942) (special assessments); *Triangle Land Co v Detroit*, 204 Mich 442 (1918) (prior years' property taxes).

**Comment D:** An interest in real property owned by the State, even if subject to delinquent taxes, is not subject to foreclosure. *In re Petition of Wayne County Treasurer for Foreclosure (Wayne County Treasurer v Watson)*, 480 Mich 981, 742 NW2d 109 (2007), *mod*, 480 Mich 1139, 745 NW2d 781 (2008); *State Highway Comm'r v Simmons*, 353 Mich 432, 91 NW2d 819 (1958). Real property owned by a public school district is considered State-owned and not subject to tax foreclosure. *King v School Dist No 5*, 261 Mich 605, 247 NW 66 (1933).

The Committee expresses no opinion as to whether real property owned by a municipality is affected by a foreclosure under the tax sale proceedings set forth at MCL 211.60 *et seq.* (repealed by 1999 PA 123). *See, King v School Dist No 5, supra*. However, real property owned by a municipality is not subject to foreclosure under the tax foreclosure proceedings set forth at MCL 211.78 *et seq.* *Detroit Building Auth v Wayne County Treasurer*, 480 Mich 897; 738 NW2d 765 (2008).

## STANDARD 22.11

### EFFECT OF RECORDING OF CERTIFICATE OF FORFEITURE

**STANDARD:** THE RECORDING OF A CERTIFICATE OF FORFEITURE OF REAL PROPERTY PURSUANT TO MCL 211.78g(2) DOES NOT DIVEST AN OWNER OF AN INTEREST IN THE REAL PROPERTY. THE OWNER IS DIVESTED OF THE INTEREST ONLY BY A JUDGMENT OF FORECLOSURE AND EXPIRATION OF THE REDEMPTION PERIOD.

**Problem:** On April 5, 2005, the county treasurer recorded a certificate of forfeiture pursuant to MCL 211.78g(2), stating that Blackacre was forfeited to the county treasurer on March 1, 2005, for delinquent 2003 taxes pursuant to MCL 211.78g(1). On May 27, 2005, Steve Mason, the owner of Blackacre, conveyed Blackacre to Russ Alger. Did Alger acquire marketable title to Blackacre?

**Answer:** Yes, subject to the lien for 2003 taxes and potential loss of title through the tax foreclosure process if the 2003 taxes are not paid.

**Authority:** MCL 211.78(g).

**Comment:** The General Property Tax Act requires a foreclosure hearing to be held within 30 days before March 1 in the year after the forfeiture, and the entry of a judgment of foreclosure, followed by the applicable redemption period. MCL 211.78h(5) and 211.78k(5) and (6).

**Caveat:** Under MCL 211.78i(6), the recording of an instrument conveying an interest in real property after the recording of a certificate of forfeiture does not entitle the interest holder to additional notice of the foreclosure proceedings. *First Nat'l Bank of Chicago v Dep't of Treasury*, 485 Mich 980; 774 NW2d 912 (2009).



## STANDARD 23.2

### AMBIGUOUS DESCRIPTION: DETERMINING INTENT OF PARTIES

**STANDARD:** IF A DESCRIPTION CONTAINS EITHER A PATENT OR A LATENT AMBIGUITY, THE AMBIGUITY IS RESOLVED BY DETERMINING THE ACTUAL INTENT OF THE PARTIES OR, IF NECESSARY, BY APPLYING SETTLED RULES OF CONSTRUCTION TO DETERMINE THE PROBABLE INTENT OF THE PARTIES.

**Problem:** Molly Hagen intended to sell, and Martin Elli intended to purchase, Blackacre. The call for the southern boundary of the true description of Blackacre was “thence due east 100 feet to the east line of Section 1.” In the deed executed by Hagen, the description of Blackacre was accurate, except that the call for the southern boundary was erroneously given as “thence due east 100 feet to the west line of Lake Huron.” Does the rule of construction that monuments, such as shore lines, prevail over courses and distances apply to defeat the intent of the parties to the deed?

**Answer:** No. The intent of the parties controls over the rules of construction.

**Authorities:** Generally: *Moran v Lezotte*, 54 Mich 83, 19 NW 757 (1884); *Smith v Smith*, 71 Mich 633, 40 NW 21 (1888); *Plummer v Gould*, 92 Mich 1, 52 NW 146 (1892); *Negaunee Iron Co v Iron Cliffs Co*, 134 Mich 264, 96 NW 468 (1903); *Glidden v Beaverton Power Co*, 223 Mich 383, 193 NW 862 (1923); *Farabaugh v Rhode*, 305 Mich 234, 9 NW2d 562 (1943); *Curran v Maple Island Resort Association*, 308 Mich 672, 14 NW2d 655 (1944); *Purlo Corp v 3925 Woodward Avenue, Inc*, 341 Mich 483, 67 NW2d 684 (1954); *Gawrylak v Cowie*, 350 Mich 679, 86 NW2d 809 (1957); *McHenry v Ford Motor Co*, 146 F Supp 896 (ED Mich 1956), *rev'd on other grounds*, 269 F2d 18 (1959); *Weimer v Gilbert*, 7 Mich App 207, 151 NW2d 348 (1967); *Michaels v Chamberlain*, 26 Mich App 317, 182 NW2d 360 (1970).

**Comment A:** The intent of the parties controls over all rules of construction. *Holmes v Trout*, 32 US 171, 8 L Ed 647 (1833); *Paddock v Pardee*, 1 Mich 421 (1850); *Purlo Corp v 3925 Woodward Avenue, Inc, supra*; *Dep't of Natural Resources v Carmody-Lahti Real Estate, Inc*, 472 Mich 359, 699 NW2d 272 (2005).

If the actual intent of the parties cannot be determined, courts apply the following rules of construction to determine the probable intent of the parties in resolving an ambiguous description:

1. If an instrument contains a general description of the real property followed by a more particular description, the latter controls. *Jones v Pashby*, 62 Mich 614, 29 NW 374 (1886); *Nichols v New England Furniture Co*, 100 Mich 230, 59 NW 155 (1894).
2. Fixed lines and monuments generally control over contradictory or conflicting statements of courses, distances or quantity. *County of St Clair v Lovington*, 90 US 46, 23 L Ed 59 (1874); *Keyser v Sutherland*, 59 Mich 455, 26 NW 865 (1886); *Nordberg v Todd*, 254 Mich 440, 236 NW 826 (1931); *Farabaugh v Rhode, supra*; *Curran v Maple Island Resort Ass'n, supra*; *People, ex rel MacMullan v Babcock*, 38 Mich App 336, 196 NW2d 489 (1972).
3. A point in a description is a monument only if it indicates a permanent object which is either natural or artificial, *Murray v Buikema*, 54 Mich App 382, 221 NW2d 193 (1974), such as a river or spring, *Stolte v Krentlel*, 271 Mich 98, 260 NW 127 (1935), or a lake, pipe or post, *Keyser v Sutherland, supra*. If a monument cannot be located, or is lost or obliterated, evidence may be admitted to prove its location. *Hess v Meyer*, 73 Mich 259, 41 NW 422 (1889).
4. If monuments identified in a description are inconsistent with fixed lines in the description, such as section lines or quarter lines, the monuments control. *Murray v Buikema, supra*.
5. If courses and distances conflict, courses control. *Bird v Stimson*, 197 Mich 582, 164 NW 438 (1917), *reh den*, 166 NW 1043 (1918).

6. A line designated as running along one of the four primary compass points, such as “west,” is presumed to run “due west” according to the true meridian. *Gutha v Roscommon County Road Comm’n*, 296 Mich 600, 296 NW 694 (1941).

7. The word “half” in a description means half in quantity. *Au Gres Boom Co v Whitney*, 26 Mich 42 (1872); *Dart v Barbour*, 32 Mich 267 (1875); *Heyer v Lee*, 40 Mich 353 (1879); *Hartford Iron Mining Co v Cambria Mining Co*, 80 Mich 491, 45 NW 351 (1890). The word “half” as used in a government survey means that part of the section or other parcel being subdivided that is determined with reference to a line which is equidistant from the boundary lines of the parcel. *Edinger v Woodke*, 127 Mich 41, 86 NW 397 (1901).

8. If one part of a description is false or impossible and the omission of that part leaves an adequate and identifiable description, the false or impossible part is rejected and the remaining part of the description is given effect. *Anderson v Baughman*, 7 Mich 69 (1859); *Gilman v Riopelle*, 18 Mich 145 (1869); *Wilt v Cutler*, 38 Mich 189 (1878); *Taber v Shattuck*, 55 Mich 370, 21 NW 371 (1884); *Tuthill v Katz*, 163 Mich 618, 128 NW 757 (1910).

9. A description which contains a customary or generally accepted abbreviation or a numerical figure is not ambiguous. *Harrington v Fish*, 10 Mich 415 (1862).

10. A description which identifies a lot in a recorded plat must identify the plat with particularity. *Warner v Noble*, 286 Mich 654, 282 NW 855 (1938).

11. If a description contains conflicting particulars, the particular as to which there is the least probability of error controls. *Moran v Lezotte*, *supra*; *Curran v Maple Island Resort Ass’n*, *supra*.

12. If, but only if, other rules of construction fail to resolve an ambiguity, a description will be construed strongly against the grantor. *Bolio v Marvin*, 130 Mich 82, 89 NW 563 (1902); *Negaunee Iron Co v Iron Cliffs Co*, *supra*; *Heethuis v Kerr*, 194 Mich 689, 161 NW 910 (1917); *Old Mission Peninsula School District v French*, 362 Mich 546, 107 NW2d 758 (1961).

13. A conveyance is void only if the description is so vague, uncertain or impossible that the real property cannot be identified. *Dwight v Tyler*, 49 Mich 614, 14 NW 567 (1883); *Persinge v Jubb*, 52 Mich 304, 17 NW 851 (1883); *Stampe v Steele*, 209 Mich 205, 176 NW 464 (1920).

**Comment B:** A patent ambiguity is apparent on the face of the instrument; a latent ambiguity arises from the application of the words of the instrument to the subject described. *Zilwaukee Twp v Saginaw-Bay City Ry Co*, 213 Mich 61, 181 NW 37 (1921).

## STANDARD 24.2

### TITLE TO LAND SUBMERGED BY WATERS OF NATURAL WATERCOURSES OTHER THAN GREAT LAKES

**STANDARD:** TITLE TO LAND SUBMERGED BY WATERS OF NATURAL WATERCOURSES OTHER THAN THE GREAT LAKES IS VESTED IN THE ABUTTING LANDOWNERS.

**Problem:** Brown owned Blackacre, which abutted Muskegon Lake. White took sand and gravel from the submerged land abutting Blackacre without Brown's consent. Is White liable to Brown for damages?

**Answer:** Yes.

**Authorities:** *Lorman v Benson*, 8 Mich 18, 77 AD 435 (1860); *McMorran Milling Co v C H Little Co*, 201 Mich 301, 167 NW 990 (1918); *Hall v Wantz*, 336 Mich 112, 57 NW2d 462 (1953).

**Comment A:** This Standard concerns title to land submerged by waters of naturally-occurring inland watercourses, i.e., inland lakes, rivers, streams and ponds, although the courts have applied the same analysis to land submerged by artificial impoundments on natural streams. *Hartz v Detroit, P & N Ry*, 153 Mich 337, 116 NW 1084 (1908); *Moore v Provost*, 205 Mich 687, 172 NW 410 (1919). Note, however, that Part 301 of the Natural Resources and Environmental Protection Act, MCL 324.30101 *et seq.*, includes both natural and artificial watercourses in the definition of a regulated "inland lake or stream."

**Comment B:** Watercourses which empty into or connect the Great Lakes are considered inland waters. *Lorman v Benson*, 8 Mich 18 (1860) (Detroit River); *Rice v Ruddiman*, 10 Mich 125 (1862) (Muskegon Lake); *Ryan v Brown*, 18 Mich 196, 100 AD 154 (1869) (St. Mary's River); *Pere Marquette Boom Co v Adams*, 44 Mich 403, 6 NW 857 (1880) (Pere Marquette Lake); *Webber v The Pere Marquette Boom Co*, 62 Mich 626, 30 NW 210 (1886) (Pere Marquette Lake); *Jones v Lee*, 77 Mich 35, 43 NW 855 (1889) (Muskegon Lake); *Hall v Wantz*, 336 Mich 112, 57

NW2d 462 (1953) (White Lake). See Standard 24.1 for the rule regarding Lake St. Clair.

**Comment C:** Title to land submerged by natural watercourses other than the Great Lakes is subject to the riparian rights of owners of other riparian or littoral property. *Hilt v Weber*, 252 Mich 198, 233 NW 159 (1930); *Thompson v Enz*, 379 Mich 667, 154 NW2d 473 (1967).

In addition, title to land submerged by waters of navigable watercourses is subject to a navigational servitude in favor of the public.

**Comment D:** For cases addressing the division of submerged land, see *Clark v Campau*, 19 Mich 325 (1869); *Grand Rapids Ice & Coal Co v South Grand Rapids Ice & Coal Co*, 102 Mich 227, 60 NW 681 (1894); *Hanson v Way Estate*, 25 Mich App 469, 181 NW2d 537 (1970). For cases addressing the division of accreted or relicted land, see *Cutliff v Densmore*, 354 Mich 586, 93 NW2d 307 (1958); *Weisenburger v Kirkwood*, 7 Mich App 283, 151 NW2d 889 (1967); *Booker v Wever*, 42 Mich App 368, 202 NW2d 439 (1972); and *Gregory v LaFaive*, 172 Mich App 354, 431 NW2d 511 (1988).