

A publication of Michigan Realtors®

COMMERCIAL

real estate companion



Real Estate professionals guide to legal questions.





welcome

Michigan Realtors®:

Welcome to the inaugural publication of the *Michigan Realtors® Commercial Real Estate Companion*. In the same spirit as the extremely popular *Legal Hotline Companion*, this portable reference is intended to be a legal resource for both seasoned commercial Realtors® and Realtor® members looking to get a better understanding of some of the unique complexities that exist in commercial real estate. The differences between commercial and residential real estate are noteworthy, and it pays to develop a working knowledge and appreciation for each concentration. In fact, Article 11 of the Realtor® Code of Ethics requires that all Realtors® acquire the specialized skills and knowledge to practice in each specific real estate discipline, whether that be commercial or residential. From Purchase Agreements to Property Management, Taxation to Title Work, and many topics in between, this new legal publication is intended to benefit both you and the clients you serve.

If you're new to commercial real estate, we encourage you to explore additional resources at one or both of the primary commercial real estate associations in Michigan:

Commercial Alliance of Realtors®

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678 Front St. NW, Ste. 257
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Commercial Board of Realtors®

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Both boards have established reputations for professional development, networking, and advocacy. If your goal is to develop an expertise in the commercial real estate world, affiliating with a commercial board is an important first step.

On behalf of your Michigan Realtors® Legal Team, we sincerely hope you view this as a significant addition to the various legal resources that Michigan Realtors® develops and distributes. Over the past few years it has been a concerted effort to multiply and diversify the various ways in which we develop and distribute legal research and analysis to our membership. As we move ahead to the new year, we celebrate legal education initiatives like this publication, as well as the *Michigan Realtors® On Demand Legal Continuing Education*, the *Michigan Realtors® Law Library*, along with regular and timely video offerings like the *Letter of the Law* and *From the Mailbag*. Based on your feedback, we will continue to build upon legal education as a key value proposition for all Michigan Realtors®. We wish you much success!



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This publication provides legal resources from the Michigan Realtors® Legal Team. Opinions expressed in signed feature articles are those of the author and do not necessarily reflect the viewpoint of Michigan Realtors®. Advertising of property, services or products herein does not imply endorsement by the Michigan Realtors®.

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agency

I am a listing agent for a real estate firm that practices designated agency. My husband works at the same firm and he is the designated agent of a buyer who wants to make an offer on an office building that I have listed. Can we do this or are we required to enter into a dual agency arrangement?

While the law does not expressly prohibit a husband and wife from acting as designated agents on opposite sides of a transaction, we would strongly advise against it. If a problem later arises in connection with the transaction or the property, it may be difficult to convince the parties (or a court) that the parties received the full range of fiduciary duties from their respective designated agents.

I was involved in the sale of an old industrial building that fell through because my buyer-client was dissatisfied with the results of a roof inspection. The buyer had provided a copy of the inspection report to the seller in hopes that it would help persuade him to agree to a price adjustment. When that did not occur, the buyer terminated the contract. I no longer represent this buyer. I now represent another buyer who is looking at the same building. Can I tell my second buyer about my prior client's roof inspection?

Yes. The duty of confidentiality survives termination of an agency relationship; however, information that has been shared with the other side of a transaction is not "confidential."



I represent a buyer who has made an offer of \$1,800,000 on a small retail center listed at \$2,200,000. The listing agent called and told me that the seller was rejecting my client's offer and that it would take no less than \$2,000,000. My buyer then submitted an offer for \$2,000,000, which the seller promptly accepted. Although everyone in this transaction is happy, my broker believes that the listing agent breached a fiduciary duty owed to the seller by telling me the bottom line price the seller was willing to accept. Is my broker correct?

Potentially, yes. Michigan case law has held that a broker representing a seller may not suggest to a purchaser that the seller will accept less than the stated price. *Harvey v Lindsay*, 117 Mich 267 (1898). Under your circumstances, unless the seller gave its agent permission to disclose the minimum price that it was willing to accept, the listing agent may have breached a fiduciary duty owed to her seller.

I am the broker/owner of ABC Realty Company. I have decided that I no longer wish to be associated with the ABC Realty franchise and I have decided to go with 123 Realty franchise. Do I have to get the authorization of all my clients to transfer the listings and agency agreements to the 123 Realty franchise name?

It depends. If you are setting up a new corporation, then you will need to transfer the listings from the old corporation to the new corporation and obtain all sellers' approvals to do so. If you are simply using your existing corporation with a new assumed name referencing the new franchisor, then no transfer will be required. In the latter situation, however, a seller could argue that the new affiliation gives him the right to terminate the listing, if he chooses to do so. In other words, the seller could argue that his decision to list with your company was based upon your affiliation with the ABC Realty franchise.

I am in the third month of a 10-month listing on an office building. My relationship with my seller-client has deteriorated, and the seller has announced that she is terminating my contract, effective immediately. She has sent me an email demanding that I remove my sign from her property. Should I remove my sign?

Yes. Even if your client has no legal right to terminate the listing contract, you must nonetheless honor her wish that you no longer represent her. If she is in breach of contract, your remedy is to pursue a claim for breach of contract damages. You have no right to force your client to continue to work with you. You will want to respond to your client in a manner that makes clear that you consider her to be in breach of contract and should consult with an attorney as to how best to preserve your legal rights.



commissions/broker's liens

I represented the buyer of a small grocery store. I had a buyer's broker agreement with the buyer, the offer was presented through my office, and the listing broker acknowledged my right to a commission via email. The closing happened last week, and I was not paid the commission owed to me. Can I file a broker's lien against the grocery store property (which is now owned by my buyer-client)?

No. Under the Commercial Real Estate Broker's Lien Act, a buyer's broker has lien rights only if the buyer's agency agreement obligates the buyer to pay the commission. If a buyer's broker's right to a commission is through the listing broker's offer of cooperation and compensation, then the buyer's broker has no lien rights.

I was the listing broker in connection with the sale of a small retail building. The closing is scheduled for next week. The seller disputes the amount of the commission owed to me, and I have filed a lien under the Commercial Real Estate Broker's Lien Act. The seller is telling me that if he arranges for the commission amount to be held in escrow, then I am required to release my lien. Is that true?

Yes. The Commercial Real Estate Broker's Lien Act provides that if the parties to the transaction establish an escrow account in an amount sufficient to satisfy the broker's lien, then the broker must provide a release of the lien. Failure to do so can result in a slander of title claim in which the broker may be required to pay damages including reasonable attorneys' fees.

Can I record a commercial broker's lien on vacant land?

A commercial broker's lien may be recorded on vacant land unless the land is zoned residential.

I represented a buyer who entered into an option agreement for an old industrial building. I entered into a one-party commission agreement with the seller whereby I would receive a commission if the option was exercised. I just found out that without my knowledge, my buyer-client exercised the option 3 months ago and closed the transaction 6 weeks ago. Can I file a lien against the property? My buyer-client, now owner of the property, was very aware of my right to a commission.

No. You are too late. Under the Commercial Real Estate Broker's Lien Act, if a broker is entitled to a commission in the event an option is exercised, the broker must file a claim of lien AFTER the option to purchase is signed but BEFORE the option is exercised.

I filed a lien under the Commercial Real Estate Broker's Lien Act 18 months ago to protect my right to a commission. I just found out that the property was sold, and I was not paid. What happened to my lien?

In most instances, a lawsuit to enforce a commercial broker's lien must be filed within one year after the lien is recorded or the lien is lost. (An owner can move up this deadline by serving notice demanding that the broker file suit to enforce its lien rights within thirty days.)



disclosure

My client is selling a 50-acre parcel of vacant land. The agent for the potential buyer is insisting that my seller-client sign a vacant land disclosure form. Is my client required to complete a vacant land disclosure form?

A seller has no legal obligation to provide a vacant land disclosure form, however, a buyer can certainly require such a form as a condition of purchase. Sellers should be very careful when completing a vacant land disclosure form. The Seller Disclosure Act protects residential sellers from liability in the event of an innocent misrepresentation. There is no similar statutory protection in the event of an innocent misrepresentation made in a vacant land disclosure form.

My clients are selling an 8-unit apartment building. Are they required to provide a seller disclosure statement and/or a lead based paint disclosure form?

The sellers of the apartment building are only required to provide a lead based paint disclosure form. The Seller Disclosure Act does not apply to apartment buildings with more than 4 units; however, the Residential Lead-Based Paint Hazard Reduction Act applies to all apartment buildings.

I am a Realtor® representing a bank that is selling a duplex that it repossessed through the foreclosure process. The bank tells me that it is exempt from both the Seller Disclosure Act well as the federal lead-based paint disclosure requirements. Is this correct?

This is partially correct. The bank is exempt from the Seller Disclosure Act, but it is not exempt from the federal lead-based paint disclosure requirements.

Under the Seller Disclosure Act, both the foreclosure sale itself, and the subsequent resale by the lender to a third party, are exempt from the disclosure requirements.

As to the Residential Lead-Based Paint Hazard Reduction Act, while the original foreclosure sale is exempt, a subsequent resale from the lender is not.





environmental concerns

My client intends to buy an old gas station and convert it to a small diner. The property had a leaking underground storage tank at one time. If my client buys the gas station, will he be responsible for cleaning up any environmental contamination?

Your buyer-client should be able to protect himself from clean-up responsibility by obtaining a Baseline Environmental Assessment (“BEA”) of the property before or within 45 days after the earlier of the date of closing or the date he occupies the property. MCL 324.20126. A BEA is a written report, prepared by an environmental consulting firm, that describes the nature and extent of the environmental contamination at the time of the acquisition. The BEA must be filed with the MDEQ within six months of closing or occupancy (whichever is earlier).

My client is making an offer on a small office building and the seller is in a hurry to close. At the time the building was developed, the seller obtained a Baseline Environmental Assessment (“BEA”). The seller suggests that my client skip the time needed for an environmental review and instead rely on the seller’s reports from 3 years ago, and that my client would be protected. Is that true?

No. Michigan law allows a buyer to avoid the responsibility for contamination on property by conducting a BEA before or within 45 days after purchasing or occupying the property. MCL 324.20126. A prior owner’s BEA will not protect a new owner. The time and expense for the new BEA may be less, especially for property used as an office since the last BEA, as an office is unlikely to cause any new contamination.





land use/development

My client, the owner of a supermarket, is selling two acres of property he no longer needs to the owner of an adjoining apartment complex. The title company says we must have a land division approved before closing. Is that correct?

No. The transfer is not a division under the Land Division Act, as it is a “property transfer between 2 or more adjacent parcels.” No division approval is required. It is still a good idea to advise the local assessor, who will need to revise the property tax descriptions for the parcels.

My client divided her five-acre property, selling a two-acre parcel. The form for the deed included the statement, “the Grantor grants to the Grantee the right to make ____ division(s) under Section 108 of the Land Division Act, Act No. 288 of the Public Acts of 1967.” The buyer said to just put in “all.” That way, he would get whatever divisions go with the two acres. Is that right?

No. “All” can be used, but it will be read to say that your client is giving up all the remaining divisions he has for his entire property. The buyer and seller must reach an agreement as to how many of the available divisions for the entire property, if any, will go with the two-acre parcel that is being split off. As this answer should make clear, this decision should have been made at the time the purchase agreement was signed, not at closing.

I have a listing for an old bar/restaurant that went out of business. We have an offer from a buyer who wants to use it for a bar, but the township told my client that it is no longer zoned for commercial use, and because it has been vacant for more than a year, it would have to be rezoned by the township board. We hear it would never be approved because they think it will be a “Hooters” kind of bar. Can the township do this?

No. The new bar/restaurant is permitted so long as the new owners do not expand the use or rebuild it beyond the existing structure. The existing, legal nonconforming use as a bar/restaurant may be continued as long as the owner did not intend to abandon the old use. Listing or advertising the building for sale or lease, even while it is now vacant, is good evidence that the owner did not intend to abandon the use. (It is likely, however, that the owner’s attorney will have to get involved.)

My client made a successful offer on a medical office building. During the inspection period, a member of the city planning staff mentioned that the property is subject to a Brownfield plan. The seller is reimbursed most of the taxes on the property each year under that plan. The seller says that the Brownfield plan is not mentioned in the purchase agreement and that he intends to keep it and continue to receive the payments. Can he do that?

Yes. Once a project is completed, the original owner/developer can assign the Brownfield payments when selling property or keep them. If your buyer had known of the Brownfield payments beforehand, or can now reach an agreement with the seller, a separate assignment of these payments is required.

licensing

My buyer-client is under contract to buy a small former industrial building. He has given me a \$20,000 earnest money deposit, but the purchase contract says that I should not deposit it until after the inspection period. My broker says we cannot agree to do this, but I thought the 2 banking days deadline for depositing earnest money checks only applies to residential transactions.

The earnest money deposit rules are the same for commercial transactions as for residential transactions. If the parties want to wait to deposit the earnest money check until after the inspection, the purchase contract should call for the buyer to wait to deliver the check until after the inspection. Alternatively, the parties can agree that someone other than a real estate broker – e.g., a title company – will hold the earnest money deposit. The Occupational Code’s requirements regarding earnest money deposits only apply to real estate licensees.

I have a friend who owns and leases more than 5 separate homes. Doesn’t she need a real estate license?

No. Licensure is required if a person engages in more than 5 real estate sales during any 12-month period. MCL 339.2502b.

A potential buyer of an office building is an LLC, one of the members of which is a real estate licensee. Do I need to disclose that fact to the seller?

Yes. Disclosure is required if a real estate licensee is acquiring property “directly or indirectly.” Acquiring property through an LLC in which you are a member would likely be viewed as an “indirect” acquisition. MCL 339.2516.

An attorney I know is advertising a bowling alley for sale. I checked, and the attorney does not have a real estate license. Are attorneys exempt from the licensing requirements?

There is no catchall exemption for attorneys. However, attorneys acting in certain capacities, such as court-appointed receivers, may sell real estate without a real estate license. MCL 339.2503(2).





property management/leases

I am a property manager for a retail center. A potential tenant has approached me about leasing space for a medical marijuana distribution center. Is there any risk to my landlord-client?

Yes. While the sale of marijuana for medical purposes is legal under Michigan law (if done in conformance with state and local requirements), it is still illegal under federal law. Michigan law specifically provides that a person who leases property upon which a marijuana facility is located, who has no knowledge that the licensee has violated the law, is not subject to seizure of any real property or personal property based on a marijuana-related offense. MCL 333.27201(3). Unfortunately, this is not true under federal law. Landlords who allow marijuana facilities to operate on their property could be viewed as aiding and abetting an illegal activity – thus subjecting them to federal civil forfeiture penalties. In other words, the federal government could seize your landlord-client's building.

I am the property manager for a 20-unit condominium project. One of the units was recently foreclosed. The redemption period expired, and the lender has now listed the unit for sale. No condominium assessments have been paid on this unit for over a year. What is the lender's responsibility for these unpaid assessments?

The lender is responsible for all assessments on the unit made after the foreclosure sale. Assuming that the lender held a first mortgage on the unit, it is not responsible for assessments that were made before the foreclosure sale, unless the association recorded a lien prior to the recording of the mortgage. *Wells Fargo Bank v Country Place Condominium Ass'n*, 304 Mich App 582 (2014).

I am the property manager for a privately-owned, 8-unit apartment building. I received a request from a new tenant to have a dog. The tenant claims the dog is an assistance animal but I do not see any outward signs that the tenant is disabled. The landlord has a strict "no pets" policy. Can I simply deny the tenant's request?

No. An assistance animal is not a pet. The Fair Housing Act requires landlords to modify their "no pets" policies as a reasonable accommodation to persons with disabilities. Landlords must evaluate each request for an assistance animal by asking two basic questions: (1) does the tenant have a "disability;" and (2) does the animal work, provide assistance, perform tasks or services or provide emotional support that alleviates one or more symptoms or effects of that disability? If the answers are "yes" and "yes," then in most instances, the "no pets" policy must be modified and the animal permitted to live with the tenant. A landlord may not deny a reasonable accommodation request because he or she is uncertain whether or not the person seeking the accommodation has a disability or a disability-related need for an assistance animal. Landlords may ask individuals who have disabilities that are not readily apparent to submit reliable documentation of a disability and their disability-related need for an assistance animal.

I own and manage a duplex. Title is in the name of an LLC of which I am the sole member. I went to court to try and evict one of my tenants, and the judge said that I needed to hire an attorney. Why can't I represent myself?

The problem here is that the property is owned by an LLC. While an individual can represent himself or herself in court, an LLC or a corporation must be represented by counsel. Even though you are the sole member of the LLC, technically you would be representing someone else (i.e., the entity), and this requires a law license.

My client owned a restaurant which was located in leased space. When she sold her restaurant a few years ago, she assigned her lease to the buyer of her business, and her landlord consented to that assignment in writing. The buyer has now defaulted under the lease, and the landlord is now trying to collect the past due rent amounts from my seller-client. Doesn't the fact that the landlord consented to the lease assignment prevent him from trying to collect the past due rent from my client?

No. Ordinarily, even where a landlord consents to a lease assignment, unless the landlord expressly releases the original tenant from any future responsibility, the original tenant remains fully liable for all of the contractual obligations under the lease, including the payment of rent.

I have recently listed a small, single-unit office building for sale or lease. There is a current tenant in the building whose lease expires in 3 months and is not renewing. The tenant will not let me in the building to inspect the space and/or show the space to potential purchasers/tenants. Must the tenant cooperate with my efforts to show the property, and if not, can I use the landlord's key to show the property after ordinary business hours?

No. As a matter of law, the landlord has given up possession of the leased premises and may not enter the premises without the tenant's permission. For this reason, commercial leases typically give the landlord a right of access for specific purposes such as inspecting the property and/or showing the property to potential tenants during the last few months of the lease. Assuming the current lease does not contain such a clause, if the landlord (or you as the landlord's agent) enters the leased premises without the tenant's permission, you may be held liable for trespass damages. Trespassing is also a crime.

I am listing an office building for sale. The lease with the major tenant in the building contains an option to purchase which may be exercised at any time during that lease. I have checked with this tenant, and it is not interested in buying the property at this time. Would a buyer of the office building be obligated to honor the option to purchase if the tenant changes its mind and wants to buy the building in the future?

Yes. An option to purchase is an obligation that runs with the land and may be enforced against subsequent purchasers of the property. The only exception would be if the subsequent purchaser was a "bona fide purchaser for value," meaning a purchaser for good consideration who was not aware of the option at the time it purchased the property. For this reason, anyone holding an option should insist that a memorandum of option signed by the owner of the property be recorded with the register of deeds.

A small retail tenant has a lease with an option to renew. The provision in the lease states that the option to renew must be exercised in writing no later than 6 months prior to the expiration of the current term of the lease. The tenant provided notice orally about 2 weeks late. Is this notice sufficient?

No. Generally, as with any type of option, an option to extend a lease is considered an offer; acceptance of which must strictly comply with the terms of the option, both as to the manner of exercise and the timing. Substantial compliance is not sufficient. *Oshemo Twp v Kalamazoo*, 77 Mich App 33 (1977).



I currently represent a buyer who is looking to buy a condominium unit as an investment/rental property. The condominium documents for a particular project that he is interested in provide that the units must be owner-occupied. Can a condominium association prohibit an owner from renting his units?

Yes. A condominium restriction prohibiting the rental of units is enforceable.

I am a property manager for a small apartment complex. I heard that any residential real estate lease that is longer than one year is illegal in the State of Michigan. Is this true?

No. There is no prohibition in Michigan against residential leases that are longer than one year. However, the terms of mortgage loans on apartment complexes often prohibit the landlord from entering into leases that are longer than one year.

Can a contractor working with a commercial tenant file a construction lien on the landlord's property if he does not get paid? The landlord is aware of the improvements, but the tenant contracted directly with the contractor.

While the contractor can file a lien, it will only encumber the tenant's interest in the real estate. A construction lien that arises out of a contract with the tenant will attach to the interest of the owner/landlord only if the owner/landlord required the tenant to make the particular improvements.

purchase agreements

My client wanted to buy a multi-tenant commercial building. He met with the owner of the business, and together they wrote up a letter of intent. Both parties hired lawyers to put together a contract based upon the terms of the letter of intent, and the lawyers made a mess of things. Now, the seller won't sell. Isn't a letter of intent binding? Aren't the parties obligated to negotiate in good faith?

It depends. In order to be binding, the letter of intent must be in writing, must contain the essential terms of the deal and must be signed by both parties. In addition, it must appear from the language of the letter of intent and/or the conduct of the parties, that they intended that the letter of intent be binding and enforceable. (Many, if not most, letters of intent expressly provide that they are for discussion purposes only and are not intended to be binding.)

I represent the seller of an apartment building. We received an offer that my seller-client accepted via electronic signature and electronic transmission. The buyer's agent has indicated that her buyer does not consider this a valid acceptance of the offer and moreover that her buyer is no longer interested in the property. Isn't there a law that provides that electronic signatures/transmissions are legally binding?

The Uniform Electronic Transactions Act ("UETA") does not require parties to conduct business electronically or permit one party to impose such a requirement on the other party. The UETA simply permits both parties to a transaction to voluntarily agree to conduct business utilizing electronic transmission and electronic signatures. The question here will be whether the offer itself contained language whereby the buyer agreed to conduct business electronically, and if not, whether there was some other conduct or circumstances by which the buyer could be viewed as having agreed to conduct business electronically. Such agreement could be inferred, for example, if the buyer submitted his offer electronically.

My buyer-client entered into a contract to buy vacant land that he intended to develop as an apartment complex. He put \$20,000 in escrow and obtained all necessary approvals from the municipality. About 10 days before the scheduled closing, there was an announcement that one of the largest employers in town will be closing down. My client believes that this will significantly affect the housing market such that he no longer wants to build an apartment project in this location. He is willing to forfeit his \$20,000 and walk away. Can he do this?

Depending on the language of the purchase agreement, your client may be liable for damages in addition to the amount of his earnest money deposit. Some purchase agreements provide that in the event the purchaser defaults, the seller's sole remedy is to keep the earnest money deposit as liquidated damages. Other purchase agreements provide that if the purchaser defaults, the seller can keep the earnest money deposit and pursue its actual damages. Depending on the specific language of the purchase agreement, if the land is now worth less than what the purchaser agreed to pay, the purchaser may be liable for that difference.

My client is purchasing vacant land and intends to construct an apartment complex. We used a preprinted form for the original offer. The parties went back and forth with a series of addendums and eventually entered into a binding contract. A question has come up regarding the parties' respective obligations as it relates to land division approval and survey requirements. There appear to be several contradicting provisions within the purchase agreement.

Where there is a conflict between the preprinted form and an addendum, the addendum would control. Where there is a conflict between the various addendums, the addendum that was last in time would control.

My developer-client is building a new residential condominium project in downtown Detroit, and I am listing the units for sale. My client's lawyer says that I cannot use my standard form of purchase agreement for the sale of these units. Is that correct?

Yes. The Condominium Act regulates the initial sales of condominium units from the developer. The Condominium Act contains a list of provisions that must be included in the purchase agreement for newly-created condominium units. Your client's attorney should provide you with this form of purchase agreement. (A standard residential purchase agreement form may be used for subsequent sales of the condominium unit.)

I have listed an apartment complex. My seller received an offer and countered that offer. The counteroffer requires a response by the close of business tomorrow. We have not yet heard back from the potential buyer, and my seller has now received an offer that is higher than his counteroffer. Can my seller rescind his counteroffer?

A counteroffer can be rescinded up until the time it has been accepted. The rescission must reach the buyer or the agent for the buyer before the seller or the agent for the seller receives an acceptance.

A purchase agreement for the purchase of a warehouse facility does not mention any fixtures or personal property. Can the seller remove the shelving units?

Whether the shelving is part of the sale will depend on whether the shelving units are considered personal property or a fixture. If an item is a fixture, it will transfer with the sale of the real estate in the absence of an express agreement to the contrary. A fixture is something that was originally an item of personal property that has become part of the land by reason of its annexation. Here, the question will be whether the shelving units are physically attached to the building and, if so, whether at the time they were attached there was an intention to make the shelves a permanent accessory. Obviously, this last question is one in which buyers and sellers (and judges) can disagree. For this reason, when drafting the purchase agreement, to the extent possible, it is important to specifically describe the fixtures that are to be included in the sale.



real property taxes/transfer taxes

Several months ago, my buyer-client closed on the purchase of an office building for \$1.2 million. It was an arms-length transaction between unrelated parties that occurred after the property had been on the market for 6 months. The assessor just assessed the property at \$1.4 million. Isn't the assessor required to use the purchase price as the assessed value of the property?

No. Michigan law expressly provides that the purchase price paid for property is not necessarily the true cash value of the property transferred. "In determining true cash value of transferred property, an assessing officer shall assess the property using the same valuation method used to value all other property of the same classification in the assessing jurisdiction." MCL 211.27a(6).

I own 100% of a corporation, which in turn owns an apartment complex. The corporation has owned the property for many years and the current taxable value is significantly lower than the SEV. I am in the process of selling this property and the buyer has asked that we structure this sale as a stock sale in order to prevent the assessor from uncapping the taxable value. Will this transaction result in an uncapping?

Yes. A sale of more than 50% of the ownership interest in an entity will trigger the uncapping of the taxable value. (Such transaction will also be subject to state transfer tax.) MCL 211.27a(6)(h).

A commercial building is owned by an LLC consisting of three members owning equal shares. One member wants to buy out the interests of the other two members. Can we avoid a reassessment for property tax purposes if we structure the buyouts in two separate years?

No. The property's assessed value will be 100% uncapped at the point at which more than 50% of the ownership interest in the company has been conveyed. MCL 211.27a(6)(h).

I represent the seller of an office building. The purchase agreement calls for the seller to pay all special assessments which become a lien on the property before the date of closing. The buyer is insisting that the seller pay the entire amount of a special assessment that is payable in installments over the next 12 years. Are the future installments of this assessment already a lien on the property?

It depends on the type of assessment. There are twenty or so different statutes authorizing local governments to impose special assessments. Future installments of an assessment made under the Township Improvement Act, for example, are not a lien on the property. That would not be the case for future installments of an assessment made pursuant to the drain code. For this reason, a purchase contract should not condition responsibility for the payment of an assessment on whether or not it is a lien.

I have discovered that my seller's office building has been "forfeited" as a result of unpaid property taxes. Has my seller lost all rights in the property?

No. Property is "forfeited" in March of the second year after which the unpaid real property taxes were billed. MCL 211.78g. So, for example, if the 2016 real estate taxes were not paid, the property would have been "forfeited" in March of 2018. After "forfeiture," the property owner can still redeem by paying past due taxes, plus penalties and interest. In March of the year following the forfeiture (which in our example would be 2019), the property is "foreclosed," at which time redemption rights expire.

My client is selling a small retail building on land contract. Will this transaction trigger an uncapping of the assessed value for purposes of calculating property taxes?

Yes. A conveyance by land contract will trigger an uncapping. A subsequent sale of the buyer's interest in the land contract will trigger another uncapping; however, a subsequent sale of the seller's interest in the same land contract will not trigger an uncapping. MCL 211.27a(6)(b).

A father wishes to convey vacant, undeveloped land to his son. The register of deeds will not record the warranty deed without a tax certificate, and the father cannot get a tax certificate because there are unpaid real estate taxes. Isn't the transfer from the father to the son exempt?

No. While a warranty deed from a father to a son is exempt from the state transfer tax, it is not exempt from the requirement that the deed have a tax certificate prior to recording. Note, however, that the tax certificate requirement only applies to warranty deeds. A quit claim deed may be recorded without a tax certificate. MCL 211.135.

Is a buyer required to file a Property Transfer Affidavit (STC Form 2766) if the conveyance is exempt and will not trigger an uncapping of the assessed value of the property?

No. Under the law, a notice must be filed only when there has been a transfer of ownership that does trigger an uncapping. MCL 211.27a(10). However, a buyer may want to voluntarily file claiming the appropriate exemption so as to avoid an incorrect uncapping.

I own a commercial building 50/50 as tenants in common with a distant relative. We would like to put the property in an LLC. Will this trigger an uncapping of the assessed value?

No. You may transfer the property to an LLC without triggering an uncapping so long as the ownership interests in the entity are identical to the ownership interests that you had in the property – in your case 50/50. Once the entity is in place and the property has been transferred, you could later use the rule that permits adjustments of ownership interests of up to 50% to adjust your respective ownership interests.





title issues

I am one of three partners in a partnership that owns a large parcel of vacant land in northern Michigan. One of my partners died recently. My remaining partner and I would like to sell the land. Do we need the consent of the estate of the deceased partner?

No. After the death of a partner, partnership real property may be conveyed by the surviving partner or partners. After the death of the last surviving partner, partnership property may be conveyed by the legal representative of the last surviving partner. Michigan Land Title Standards, Sixth Edition, Standard 11.4. (Of course, the partners' relative rights in the proceeds of the sale would be governed by the partnership agreement.)

My client is selling his office building. My client had some repair work completed on the building before listing it for sale and disputed some of the charges made by the contractor. The contractor recorded a construction lien against the property. How can the lien be dealt with now that my client wants to list the property for sale?

The first inquiry is to find out how long ago the lien was recorded. The Construction Lien Act requires that an action to enforce a construction lien be filed within one year after the claim of lien is recorded. If a lawsuit is not filed within this one-year period, the lien may be administratively discharged. If the lien was recorded less than one year ago, the client could bond-over the lien, which involves replacing the property as security for the underlying debt with a bond. In either instance, the client should contact his attorney to take the necessary actions to remove or discharge the lien.

My neighbor has used my driveway to access the rear portion of his 20-acre parcel of land for 12 years. His own driveway provides access to the rear of his property, but it is not in good condition and apparently is not as convenient as using my driveway. Over the years, I have sent my neighbor 2 or 3 letters demanding that he stop using my driveway which letters have been ignored. I know that he intends to develop the property someday, and I am afraid that my neighbor will claim a prescriptive easement after 15 years. Will my letters stop an adverse possession claim?

No. In fact, your letters may help your neighbor establish that his use of your driveway was "hostile" (which is one of the requirements for an adverse possession claim). A better course of action may be to send your neighbor a letter giving him permission to use your driveway for a stated period of time. If the use becomes temporarily permissive, then the 15-year clock starts again from the beginning.

My client is trying to acquire a failed subdivision from a bank who acquired the property through foreclosure. The bank's counteroffer states that it will only provide a "covenant deed." What does this mean?

A "covenant deed," sometimes called a "Deed C," is something between a warranty deed and a quit claim deed. With a warranty deed, the seller is guaranteeing title against all prior claims, even claims that arose prior to the time that the seller acquired the property. A quit claim deed contains no warranty whatsoever – the seller is simply conveying whatever interest that it has in the property, if any. With a covenant deed, the seller's warranty is only as to claims arising from the actions of the seller, in this case the bank. It is particularly important that a buyer who will be receiving a covenant deed hire a knowledgeable attorney to make certain that he or she has appropriate title insurance coverage.

My client sold a small manufacturing facility that had been in his family for many years. As part of that transaction, he paid for the buyer's title insurance. It turns out that there is a title problem, and the buyer's title insurance company has accepted the claim but has turned around and sued my seller-client. Can it do this? I thought that the reason for title insurance is to cover problems like this.

The title insurance policy that your client purchased was for the sole benefit of the buyer. If a title problem is discovered, then the title company can step into the shoes of the buyer and, if appropriate, pursue the seller for breach of warranty of title.

I am a Realtor® who is representing a seller who is selling a large parcel of land in northern Michigan. The oil and gas rights were reserved 30 years ago by the previous owner. There has been no drilling done during this timeframe. Does the previous owner continue to retain these rights?

It depends. Under the Michigan Dormant Minerals Act, under certain circumstances, reserved oil and gas rights will terminate after 20 years.

The Dormant Minerals Act applies only to oil or gas rights, and not to other mineral rights. You should advise your seller to discuss this issue with an attorney to see what steps can be taken to clear title.

I was contacted by a prospective seller who wants to sell vacant land in an industrial park, title to which is in the name of her deceased father. She believes she should be able sell it without going through probate because she has her father's power of attorney. Is she correct?

No. The power of attorney expired upon the death of the father.

I represent the seller of a vacant parcel of land. Title is held in the name of an LLC that has only a single member. One of the title company's closing requirements is a copy of the seller's operating agreement. My seller does not have an operating agreement. Do we need to create an operating agreement in order to be able to sell this property?

No. The Limited Liability Company Act does not require LLCs to have operating agreements. Many single-member LLCs do not have an operating agreement. The title company should be willing to accept a certification statement signed by the sole member of the LLC that there is no operating agreement.





miscellaneous

I am listing an office building for a client who is in default on his mortgage. I was with my client when he met with his loan officer who agreed to delay any foreclosure action for three months to give my client time to try to sell the office building. Three weeks later, the bank initiated foreclosure proceedings. Isn't the bank obligated to honor the promise made by its loan officer?

No. There is a statute in Michigan that provides that no action may be brought against a bank to enforce any promise or commitment, unless that promise was in writing, signed on behalf of the bank by an authorized signatory. MCL 566.132(2). (You should, of course, recommend that your client consult with an attorney immediately.)

Several months ago, my buyer-client bought substantially all of the assets of a small manufacturing business. The State of Michigan is now trying to collect the prior owner's unpaid unemployment taxes from my client. Can they do this?

Yes. Under Michigan law, a buyer who acquires 75% or more of the assets of a business is liable for the seller's unpaid unemployment taxes and interest. MCL 421.15(g). The buyer may also be assigned the prior owner's unemployment tax rate. Before the purchase contract is signed, a seller of a business must complete UIA Form 1027 which discloses, among other things, all separated employees during the last 12 months, any outstanding employment taxes, and rates and benefit charges for the last five years.



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additional legal resources

legal hotline

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letter of the law

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