October 2013 • Volume 4, Number 1

IN THIS ISSUE

DICKINSON WRIGHT'S

REALESTATE **LEGAL**NEWS

KEEP IT CLEAN : EPA ENDORSES NEW ASTM STANDARD FOR CONDUCTING ESAS

by Matthew C. Roesch

The United States Environmental Protection Agency (EPA) recently proposed a rule to recognize the updated standard of the American Society for Testing Materials (ASTM) as sufficient to satisfy the EPA's requirements for conducting an "all appropriate inquiries" investigation under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). ASTM E1527-13, issued as the environmental assessment industry's standard for Phase I Environmental Site Assessments (ESAs), changes the old ASTM E1527-05 standard with regard to the following matters:

- Implementation of a new category of Recognized Environmental Condition (REC), known as a Controlled REC (CREC). CRECs are specifically designed to identify environmental conditions which are controlled, but could still give rise to obligations for the property owner in the future. Therefore, the category of Historical RECs (HREC) now covers only those historical RECs that are completely addressed, with no future restrictions. This new category resolves the ambiguity with regard to HRECs that may give rise to future obligations, as opposed to completely remedied HRECs.

- Expansion of the obligations of an environmental professional when conducting an ESA to include (i) searches of the judicial records in a county clerk's office to locate and report environmental liens (ELs) and activity and use limitations (AULs), and (ii) a heightened reporting requirement regarding regulatory file reviews. Previously, environmental professionals and title companies routinely searched real property deed records for ELs and AULs, but not judicial records. This posed the risk that certain ELs and AULs might not be identified for the property owner. Also, environmental professionals previously were permitted to forgo reviews of regulatory files for adjacent properties. ASTM E1527-13 does not require that such reviews take place in every instance, but does require the environmental professional to explain, in detail, why such a review is not warranted in each instance where one is not conducted.

- Increased focus on vapor migration risk for properties. In recent years, vapor migration on properties has been increasingly important for lenders, among other parties. Often, it was unclear whether an ESA should include an analysis of vapor risk. ASTM E1527-13 amends the definition of "release" and "migration"

to include vapor contamination, in addition to contamination of the soil and groundwater. Going forward, environmental professionals will likely treat vapor migration risk more directly in ESAs rendered on properties, though the new standard does not include any requirement that an ASTM E2600 screen assessment for vapor be conducted in every instance.

The EPA accepted comments on the new standard, and a final rule is forthcoming. Property owners should note that the EPA is not requiring that all ESAs be conducted in accordance with the ASTM E1527-13 standard. The prior standards (including the EPA Final Rule (40 CFR part 312), ASTM E1527-05, and ASTM E2247-08) are still acceptable for purposes of satisfying EPA requirements in conducting ESAs. But, for purposes of meeting the EPA's "all appropriate inquiry" standard under CERCLA to establish the bona fide prospective purchaser, contiguous property owner, and innocent landowner liability protections, ESAs conducted in accordance with the new ASTM E1527-13 standard will entitle the property owner to CERCLA's landowner liability defenses.

The new standard should give property owners and ESA providers more clarity as to the best-practice scope of an ESA, as well as clarify some ambiguities that were present under the old standards. While the new standard may result in some additional cost to the property owner resulting from additional investigative work, owners will now have the benefit of additional information about the property, or at minimum a reasoned explanation from the ESA provider as to why such further investigation was not required. Even though the EPA does not specifically require the ASTM E1527-13 standard today, some state environmental agencies have adopted a policy of requiring the latest ASTM standards. As a practical matter, it is advisable to have all new ESAs conducted in accordance with the ASTM E1527-13 standard in order to avoid potential issues with state environmental agencies that may require the latest standards.

A NEW TAX LAW MAY HELP FAMILIES AVOID UNCAPPING ON CERTAIN INTER-FAMILY REAL PROPERTY TRANSFERS

by Judy Fertel Layne

Effective December 31, 2013, a parent can transfer residential real estate located in Michigan to his or her child without uncapping the taxable value of the property if the child continues to use the property for residential purposes. Subject to several exemptions, the Michigan General Property Tax Act provides that upon a transfer of ownership of real property, the property's taxable value is increased to the property's state equalized value, causing the new owner's property taxes to increase. Historically, this included transfers of residential real estate from parent to child. This often created a hardship for children inheriting a family residence, including a family cottage that had been owned by the family for decades, because the property's real estate taxes could increase dramatically upon the transfer. As a result, the Michigan Legislature recently created a new exemption from the definition of "transfer of ownership" to exclude "a transfer of residential real property if the transferee is related to the transferor by blood or affinity to the first degree and the use of the residential real property does not change following the transfer." MCL 211.27a(7)(s). Accordingly, a child can now receive residential real property from his parent, by gift or inheritance, without fear that the real estate taxes will increase meaningfully.

While this change to the statute will be good news for many families who wish to keep vacation or other residential property in the family for generations, the statute, as currently drafted, is not as flexible as some families may desire. The statutory language makes it clear that the property must pass from parent to child. Property held in a parent's trust is not included.[1] Because this will create planning problems for many families, the probate bar is currently pressing the Legislature to broaden the statute to include transfers from a trust. In addition, the Michigan Department of Treasury may create regulations that will establish that a transfer from a trust would fall within the exemption.

Families wishing to take advantage of this new law should be mindful of the statutory language as it currently exists and as it may be modified in the future to make sure that any proposed transfer falls within the exemption. In addition to the limitation on transfers from trust, the exemption only applies to a transfer if the transferee is related to the transferor by blood or affinity "to the first degree." As a result, a transfer to the transferor's grandchild would not fall within the exemption. Because of these traps for the unwary, families may wish to seek guidance from counsel prior to transferring residential real estate within the family.

[1] Indeed, the statutory language can even be read to imply that a transfer from a parent's estate would not qualify, though this would surely defeat the purpose of the statute.

MICHIGAN SUPREME COURT DECISION IMPOSES NEW DUTY ON LANDLORDS

by Ryan C. Mitchell

In the 2001 case of *MacDonald v PKT, Inc, 464 Mich. 322 (2001)*, the Michigan Supreme Court ruled that merchants have a limited duty to contact the police in situations where there is a risk of imminent and foreseeable harm to an identifiable invitee. In a recent split decision, *Bailey v Schaff, 494 Mich. 595 (2013)*, the Court extended this limited duty to landlords. This decision is likely to result in increased litigation against landlords and property managers, and will cause them to rethink how (and if) they choose to monitor their common areas.

Under the facts of the *Bailey* case, the plaintiff suffered two gunshot wounds, rendering him a paraplegic, while attending a barbeque in the common areas of the Evergreen Regency Townhomes, LTD ("Evergreen") apartment complex. The Evergreen complex's management company had contracted with a security firm, Hi-Tech Protection ("Hi-Tech"), to provide security services for the complex. Prior to the shooting, an Evergreen resident informed the Hi-Tech security guards on duty that a man was waving a gun and threatening to kill someone. The security

guards did not respond to this information immediately, but instead drove an intoxicated resident back to his apartment. Roughly 10 or 15 minutes later, they heard the two gunshots.

The plaintiff sued multiple parties, including Evergreen, Hi-Tech and the shooter. In its decision, the Court addressed whether it was proper to extend the limited duty of merchants to contact the police under the *MacDonald* case to landlords and other premises proprietors. In a split decision, the Court affirmed the extension of the duty under *MacDonald* to landlords, holding that "a landlord has a duty to respond by reasonably expediting police involvement where it is given notice of a specific situation occurring on the premises that would cause a reasonable person to recognize a risk of imminent harm to an identifiable invitee." In doing so, the Court recognized the consistent treatment of landlords and merchants under Michigan law with respect to physical maintenance of the areas over which they have control.

In defining the scope of this limited duty, the Court reasoned that, due to the unpredictable and irrational nature of criminal activity, this duty on a landlord is triggered only when the landlord is given notice of such a situation. Specifically, the Court stated that "without notice that alerts the landlord to a risk of imminent harm, it may continue to presume that individuals on the premises will not violate criminal law." In addition, the Court clarified that this duty upon landlords does not extend to criminal acts occurring within the tenant's premises, but only extends to acts occurring within those areas that are under the landlord's control.

The Court was further careful to note that there is no duty to anticipate and prevent the criminal acts of third parties, but rather this duty is limited to reasonably expediting police involvement when a landlord receives notice of a specific situation that poses a risk of imminent harm to an invitee. While the Court did not go on to specify what would constitute reasonably expediting police involvement, it would appear that simply calling 911 would satisfy this duty.

So what does this ruling mean for landlords and property managers? On its face, the new duty being imposed appears to be limited in scope (i.e., expediting police involvement). However, whether there is a risk of *imminent* and *foreseeable* harm to an *identifiable* invitee, and whether the landlord *reasonably* expedited police involvement are all likely to be close questions of fact that will need to be determined on a case-by-case basis. Accordingly, landlords may do well to err on the side of caution and call the police any time they become aware of any situation that could result in harm to someone on their premises, rather than having to face the prospect of defending themselves in court.

Unfortunately, as Supreme Court Justice Markman points out in his dissent to the majority's opinion, not only is the *Bailey* decision likely to result in more false alarms, but it may also have the unintended effect of encouraging landlords to avoid the common areas altogether (and forego providing security measures), so as to prevent this duty from being triggered in the first place. In any event, the failure to comply with the duty set forth in *Bailey* could result in substantial liability to landlords and property managers if a tragic event occurs in the common areas of the landlord's property.

DICKINSON WRIGHT OFFICES

Detroit
500 Woodward Avenue
Suite 4000
Detroit, MI 48226
Phone: 313.223.3500

Columbus
150 E. Gay Street
Suite 2400
Columbus, OH 43215
Phone: 614.744.2570

Las Vegas
7201 West Lake Mead Boulevard
Suite 503
Las Vegas, NV 89128
Phone: 702.541.7888

Nashville
424 Church Street
Suite 1401
Nashville, TN 37219
Phone: 615.244.6538

Phoenix
2901 N. Central Avenue
Suite 200
Phoenix, AZ 85012
Phone: 602-285-5000

Toronto
199 Bay Street, Suite 2200
Commerce Court West
Toronto ON M5L 1G4
Phone: 416.777.0101

Washington, D.C.
1875 Eye Street, NW
Suite 1200
Washington, DC 20006
Phone: 202.457.0160

Ann Arbor
350 S. Main Street
Suite 300
Ann Arbor, MI 48104
Phone: 734-623-7075

Grand Rapids
200 Ottawa Avenue, NW
Suite 1000
Grand Rapids, MI 49503
Phone: 616.458.1300

Lansing
215 S. Washington Square
Suite 200
Lansing, MI 48933
Phone: 517.371.1730

Saginaw
4800 Fashion Square Boulevard
Suite 300
Saginaw, MI 48604
Phone: 989-791-4646

Troy
2600 W. Big Beaver Road
Suite 300
Troy, MI 48084
Phone: 248.433.7200