August 1981

TITLE NEWS

State Legislative Communication

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TITLE NEWS

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Features

Departments

Front Cover

Growing interest in the land title industry on the part of state legislators—and regulators—has emphasized the need for more effective communication between title people and these important groups. In this issue, C. Wesley Ashcroft, first vice president, Missouri Land Title Association, tells how MLTA developed a successful state legislative contact event that has greatly improved understanding of the title business.

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"A Title Man for Title People"

A Message From The President. . .

This is the eleventh and last officer's message I have written for *Title News* in four years of movement through the ALTA chairs. It is tempting to make the last of any series a summary or a review. Such a look back can have value only if it serves to provide perspective and momentum for an active future.

There are a number of lessons for title people to learn—or to have reinforced—from the experiences of the last four years. None is more important than that of involvement.

For many years, the members of our industry led very pleasant, generally low-key business existences. We went about doing our jobs well on a day-to-day basis. We fulfilled our obligations to our communities. We met in conventions to enjoy friends and discuss the latest improvements in equipment and techniques available to us.

We accepted as unavoidable the general lack of understanding on the part of private citizens, public officials, and members of the media regarding what we do and the value of the way we do it. We sought to avoid or minimize confrontations with those who criticized us or promoted alternatives to our products and services.

Criticism and attacks upon us increased in number and severity. Our ignoring them did not lessen the problem. Finally we realized that we must answer our critics and defend ourselves against the thrusts of our opponents. More important, we learned to look ahead, to be prepared, to take the initiative. Positive effort on our part followed and has reached a historic peak during the past four years.

This turnabout in the attitude and the actions of our industry occurred because title people became involved in successful efforts to make effective, resourceful organizations of the American Land Title Association and its affiliated state and regional associations. Many title men and women have devoted amazing amounts of time and energy in carrying out their responsibilities as officers and committee members of both national and local land title associations—often sacrificing their personal interests and the short-term interests of their companies. They have been involved.

But those of us who have been involved are not enough. There are tough battles ahead for this industry. You and I hold no doubt on how these fights will have to turn out if the national economic system and those who need workable land transfer methods are to be winners.

As we move on to the battlefield, the outcome is by no means certain. But the closer members of our industry come to total involvement, the clearer it is that we are making the maximum possible effort to preserve land title evidencing as a private, efficient, competitive, fiscally sound enterprise.

My point in this last officer's message is the primary one I have sought to convey at state and regional title conventions over these past four years. If you are personally involved in the effort to meet the many challenges facing our industry, stay involved. If you are not, get involved. The future of your industry depends on it.

Sincerely,

J. L. Boren, Jr.

J. L. Boren, Jr.

Government Affairs Committee

Flood

The Government Affairs Committee (GAC) is charged with analyzing and monitoring federal and state government activities that would have a substantial impact on the title insurance business. The committee develops and implements strategy and tactics to facilitate ALTA federal and state legislative and regulatory objectives.

In 1981, GAC has focused its attention on the controlled business problem, the RESPA Section 14 study, Indian land claims, the insurability of new mortgage instruments, the so-called "All Savers Certificate" proposal, and arrangements for the fourth annual ALTA federal reception. GAC is also involved with a number of other proposals, including RESPA Section 13, federal savings and loan service corporation activities, and the formation of an ALTA state legislative and regulatory network.

Controlled Business

GAC, in conjunction with and under the auspices of ALTA, has devoted considerable time, effort, and resources to the problem of controlled business. Controlled business materials have been circulated to a majority of the members of Congress, including those who sit on the House and Senate Banking Committees—the committees that would process legislation relating to the controlled business problem. In addition to the written materials, ALTA members and staff have held meetings with nearly 60 members of Congress to discuss and encourage the enactment of a legislative solution to the growing controlled business phenomenon.

Due to the association's lobbying efforts, congressional hearings have been scheduled for September before the House Housing Subcommittee. Subcommittee Chairman Henry B. Gonzalez (D-Tex.) has called these hearings in an effort to respond to two focal questions: How does the controlled business problem affect the nature of competition for consumers' business? How does this problem ultimately affect consumers of real estate settlement services?

ALTA has argued that the two questions are intimately related—for any problem that inhibits competition on the merits or that inhibits the entry of new competitors must directly affect consumers. Indeed, the direct relationship between the objective of competition on the merits and the interest of consumers underlies many of the provisions of RESPA.

ALTA's position on the controlled business problem is to ensure that all providers of title insurance services have a fair and equal opportunity to compete on the merits for consumers' business. The association believes that the achievement of this goal is not only consonant with the objectives sought by Congress in enacting RESPA but represents the most efficient and effective way for the federal government to ensure that prices and services of real estate settlement providers will be reasonable.

Department of Housing and Urban Development (HUD) policymakers have indicated that the congressional hearings on controlled business will be most helpful in the department's efforts to determine what course of action it should recommend in its RESPA Section 14 study. HUD, at one time or another, has discussed at least four alternatives:

- Specifically exempt controlled business arrangements from the RESPA Section 8 proscription.
- Let the July 24, 1980, Interpretive Rule stand, and do nothing more.
- Expand the scope of RESPA Section 8 to specifically include controlled business arrangements.
- Recommend an antitrust-type statute that would allow private rights of action by competitors. The new statute would cover controlled business as well as kickbacks and referral fees.

In a related development, the Federal Trade Commission (FTC), at HUD's request, submitted comments on the subject of price competition among settlement service providers. The FTC letter states that the "possibility of prohibiting ownership of underwritten title companies by referrers is a means of advancing competition and should be considered by HUD in its RESPA Section 14 report."

The scheduled September congressional hearings are critical to the success of the association's efforts to prohibit controlled business arrangements. Even though an increasing number of members of Congress are concerned about the problem of controlled business, GAC encourages ALTA members to continue their educational efforts with their respective congressional delegations. Controlled business explanatory materials are available through the ALTA Washington office; contact Mark E. Winter.

RESPA Section 14

A draft of the RESPA Section 14 report is under active review at HUD. HUD is considering a recommendation to substantially eliminate the existing set of RESPA regulations involving services required in making mortgage loans. These regulations would be replaced with a re-

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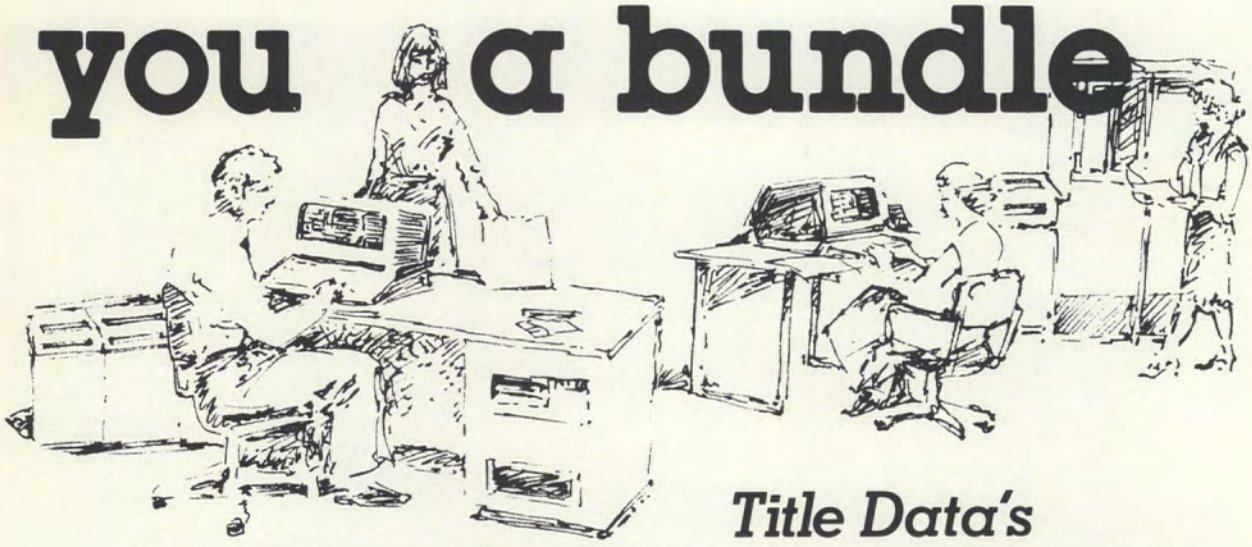
Winter

Sharing can save you a bundle



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Committees—
from page 6

quirement that lenders package certain settlement services—a concept known as "lender-packaging." The lender would be required to select a provider for each settlement service required for loan approval. The bundle of ancillary settlement services associated with making the mortgage loan—such as title search, lender's title insurance, appraisal, survey, credit checks, and lending charges—would then be marketed to the consumer as a package with one stated cost. According to the lender-packaging scheme, the lender would quote the consumer two prices, the up-front "bundling" charge and the mortgage contract rate. The lender would have the option of recouping part or all of the settlement costs in the contract rate or of recouping all the costs in the front-end fee.

In addition to the mandatory lender-packaging recommendation, the RESPA Section 14 draft also considers a repeal of RESPA Section 8. Certain HUD economists are of the opinion that the market situation created by lender-packaging could result in price reductions through the use of rebates and kickbacks, and, therefore, the lender-packaging proposal eliminates the need for RESPA Section 8.

If a mandatory lender-packaging system is not agreed to, however, HUD would then consider expanding the scope of RESPA Section 8 to incorporate controlled business arrangements along with kickbacks and unearned fees.

At this writing it is not known if a mandatory lender-packaging scheme will be part of the final RESPA Section 14 report. The final report is expected to be forwarded to Congress this fall.

Indian Land Claims

GAC worked very closely with the Committee on Indian Land Claims in developing legislation that would clear title in affected Indian land claims areas. Settlements have been reached with Indian tribes that had land claims in Maine and Rhode Island, and the necessary legislation implementing these settlements has been enacted by Congress.

Presently, GAC is monitoring a report being developed by the Department of the Interior identifying Indian land claims subject to a December 31, 1982, statute of limitations that would be appropriate to resolve by legislation. This report, which was to be submitted to Congress by June 30, is expected to be forwarded later this year. A representative of the Interior Department stated that the number of individual Indian claims may be significantly smaller than originally believed since the department has been able to locate documents—such as applications for the fee simple patents by Indians who had held trust patents—that previously had been thought not to exist.

Also on the Indian front, Congressman Gary Lee (R-N.Y.) plans to introduce a bill that would settle the Non-Intercourse Act and related claims of Indian tribes in New York, Connecticut, South Carolina, and Louisiana. The proposed legislation would resolve the claims of affected Indian tribes against current landowners and provide some reasonable measure of compensation to the tribes affected. It is hopeful that ALTA will be successful in incorporating language that will effectively clear titles similar to the title-clearing provision contained in the Maine and Rhode Island claims legislation.

All Savers Certificate Proposal

At GAC's request, the association submitted written testimony in support of a measure contained in the tax cut legislation that would exclude from federal taxation a certain amount of interest earned from a savings certificate. The proposal, referred to as the All Savers Certificate, would allow individuals to exclude the federal taxation of up to $1,000—$2,000 on a joint return—of interest earned on a one-year savings certificate that would be available from all depository institutions. The rate of return on the certificate could not exceed 70 percent of the average yield on one-year Treasury bills. Seventy-five percent of the net savings generated from the issuance of the certificate would have to be invested in residential financing or agricultural loans.

ALTA stated in its testimony that the tax incentive certificate would attract capital back into depository institutions and away from unproductive tax shelters. The All Savers Certificate would have the advantage of not only increasing savings but stabilizing the savings inflows that would provide strong underpinnings for the development of significant capital formation—a goal of both the administration and Congress. ALTA's support for the All Savers Certificate is based on the association's position that one of the most important segments of the country's economic restoration is the need to stimulate capital formation.

GAC's principal legislative and regulatory efforts at the federal and state levels will be directed at initiatives to curb controlled business arrangements.

At the federal level, Congress will hold hearings next month to determine the competitive and consumer implications of controlled business arrangements. At the state level—in particular, Utah, Colorado, Michigan, Missouri, and Oregon—insurance departments and legislatures are becoming increasingly aware and concerned with the development of controlled business in their respective jurisdictions. 1981 could prove to be a decisive year in determining what restraints legislators and regulators are willing to place on controlled business arrangements.

John E. Flood Jr., Chairman

and

Mark E. Winter
Vice President—Government Relations
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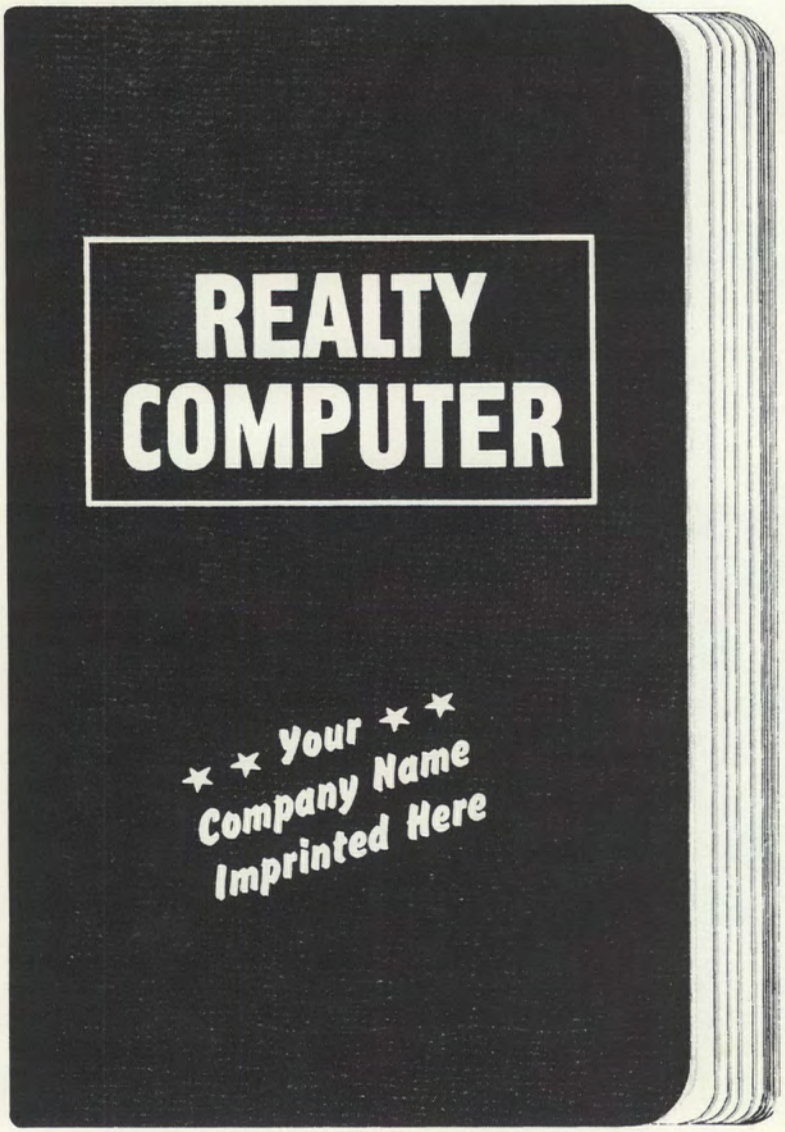

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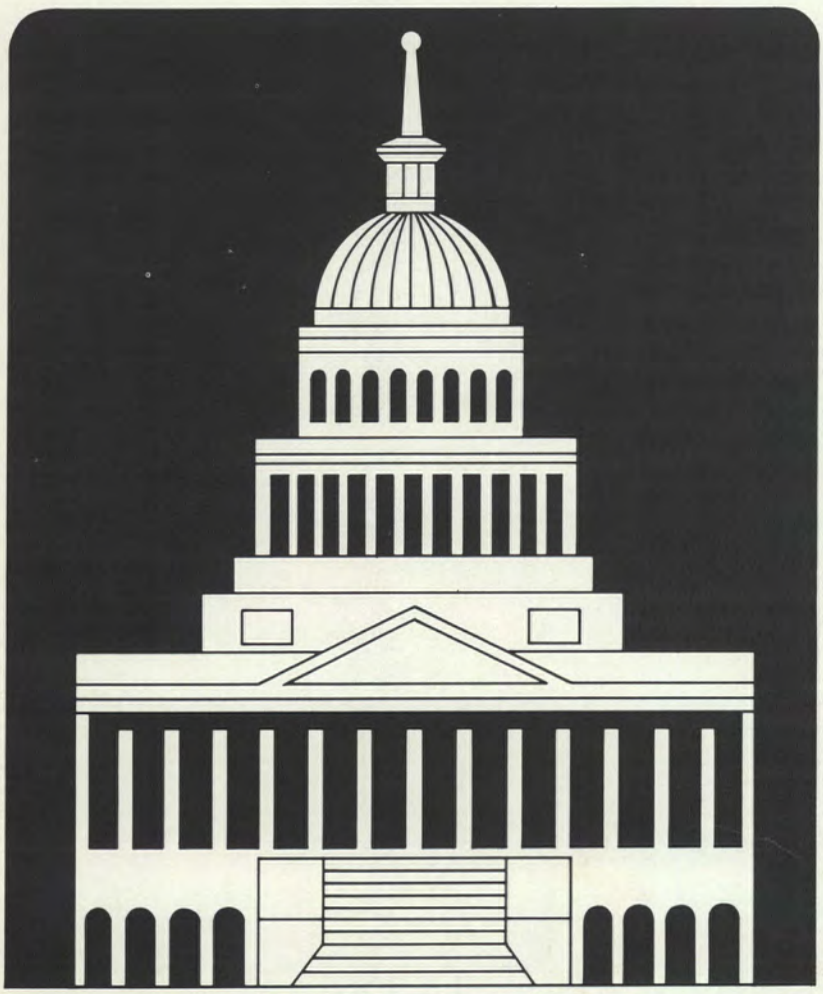
C. Wesley Ashcroft

Barbeque and Better Understanding



Work on developing better understanding between members of the Missouri Land Title Association and their constituent state legislators began when 1980-81 MLTA President Betty Quisenberry appointed me as chairman of the association public relations committee.

My committee had been virtually dormant for the past several years and I suppose our members looked for more of the same. It came as somewhat of a surprise, therefore, when I recommended at our December, 1980, MLTA board meeting that the association hold a get-acquainted dinner for state legislators.

Although one person at the meeting suggested we would be "throwing money away," the decision there was to proceed as recommended. It then was decided to schedule the dinner during the spring, 1981, legislative session—which didn't allow much time for organizing. Also, there is only one facility in Jefferson City, our state capital, that can handle an event of this size and that certainly limited our alternatives.

In view of the uncertainties and my lack of prior experience with state legislative dinners, we were especially fortunate to have the advice and assistance of a distinguished MLTA member—State Senator Harold Caskey who, along with his wife, Kay, owns the Bates Countywide Abstract & Title Co. in Butler, Mo. As we progressed, it proved invaluable to have this help from a member of the legislature who also is in the title business.

Our first step was to select a date that wouldn't conflict with a function of some other group, since this was our first effort and our attendance might suffer in direct competition with a more well established event. In seeking a date, I consulted a number of sources including the clerks of the Senate and House. The prevailing advice was to pick a date in the middle of the week so legislators would be in town, and to send invitations out early.

Next, I visited with the staff at the hotel facility where the dinner would be held and they were very helpful because of past experience with events of this type. It was our feeling that the dinner would be more successful if tied in with a theme idea and the hotel people informed me

The author is first vice president of the Missouri Land Title Association and is vice president of Hogan Land Title Co., Springfield, MO.

that the only approach not already taken by another group was a barbeque. This proved to be a blessing because the barbeque approach we selected was more economical than others and provided the casual atmosphere that we wanted to establish.

After the date was known, it was time to print and mail the invitations. A quality appearance was stressed in the printing, and the invitations emphasized that (1) abstracters and title insurance agents from the legislator's area would be present, (2) press releases and photographs from the event would be sent to local papers, (3) there would be no formal program, and (4) legislative aides were welcome to attend with their senators and representatives. There was a R.S.V.P. telephone number at the bottom of each invitation.

As a follow-up to the invitations, suggested form letters were sent to MLTA members for use in drafting personal communications in which they advised constituent legislators that they planned to attend the dinner and would like to sit with them and have their photographs taken with them. MLTA members also were asked to telephone their constituent legislators to confirm their plans regarding attendance. This form of follow-up was an integral part of the success that we realized.

Another bit of advice obtained in the planning stage was even more important than we realized at first and that was to have title people from all over the state in attendance at the dinner. Initially, we didn't look upon this as crucial because we expected a relatively small turnout from the legislative ranks. This supposition vanished abruptly when I checked with the people manning the R.S.V.P. telephone number about a week before the dinner—when I had heard from about 20 MLTA members who said they would or might be attending—and learned that 135 legislators and aides were planning to be on hand.

Recognizing that disaster was just around the corner, I spent the next three days on the telephone. I called each of our MLTA zone chairmen and requested that they contact everyone in their respective districts and report back to me as to which of our members had agreed to attend. Then I called every MLTA member that I know well and urged them to be present for the dinner.

With this activity in motion, I reasoned that a final turnout of 125 legislators and 50 MLTA members would be outstanding, and I contacted the hotel to see if they would raise the number of dinners served from the previous 100 to a new figure of 175. The hotel agreed.

Missouri Land Title Association President Betty Quisenberry and First Vice President Wesley Ashcroft, right, visit with State Director of Insurance C. Donald Ainsworth during the association's state legislative contact dinner. Ms. Quisenberry is president of Central Missouri Abstract & Title Co. and Ashcroft is vice president of Hogan Land Title Co.

Two days before the dinner, I was advised by the people handling the R.S.V.P. number that some 220 legislators and aides had agreed to attend and that this probably would be all. Attendance from the title industry was picking up at the same time so I called the hotel once again to see if they would raise our guarantee from 175 to 275 dinners with a 10 per cent margin. Fortunately, the hotel again was able to accommodate our request.

Insurance Director Invited

On the day of the dinner, a group of MLTA members arranged to meet in Jefferson City with the state director of insurance to discuss a regulation he had proposed, which was of considerable interest to the association. This meeting afforded an opportunity to help him become better acquainted with MLTA, and to personally invite him and key members of his staff to the legislative dinner. He accepted the invitation and this proved to be an extremely positive step in improving communication with his office.

A number of MLTA members arranged to meet with their constituent legislators in their offices while in Jefferson City on the day of the dinner and this increased the effectiveness of our event.

Legislators and aides attending the dinner were presented with an information package containing a short summary of the history and activity of MLTA, a copy of *ALTA White Papers: Volume I*, and a copy of the ALTA Research Committee financial report on the title insurance industry.

The dinner was preceded by a 30-minute open bar before serving of the meal buffet style. Guests were seated at round tables to encourage small group conversations and MLTA members were asked to not sit all together but rather look for unaccompanied legislators and join them.

During the open bar and dinner, those present were encouraged to have their pictures taken and this proved to be popular. There were 42 photographs of MLTA members and legislators sent to local newspapers and reports are that pickup was good.

Our primary objective during the dinner was rather basic: introduce legislators and their aides to MLTA as the leading source of expertise on land title matters in our state. During the dinner, many of our members were asked what we wanted and were quite comfortable in responding that we "just want to better acquaint legis-

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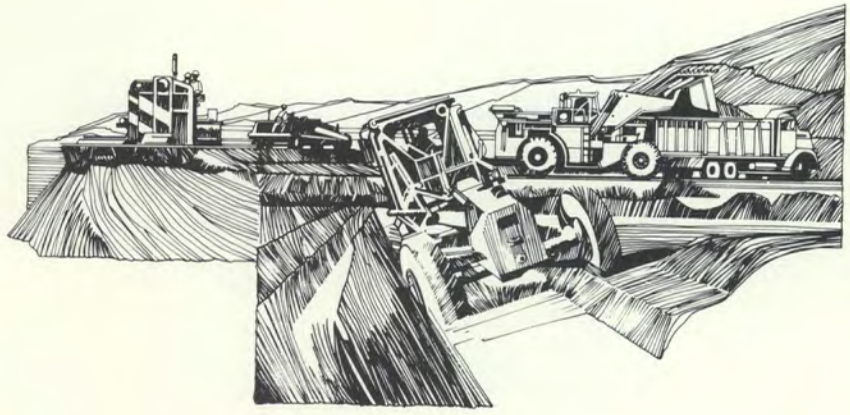
"Our primary objective during the dinner was rather basic: introduce legislators and their aides to MLTA as the leading source of expertise on land title matters in our state."

Barbara J. Grady

TDR Use Expands



As municipalities face dilemmas caused by the need for fiscal restraint juxtaposed with increased demands on land resources, transfer of development rights (TDR) is receiving greater use as a new land use management tool.

As landowners in rural areas and architecturally prized city neighborhoods are pressured by escalating real estate taxes and tempting land sale bids from developers, they too are turning to TDR.

The transfer concept recognizes the severability of individual rights from the bundle of rights in title and allows the zoned development potential of one tract of land to be realized on another. These rights are transferred in the same way as any other interest in real property. When development rights are used on a parcel of land other than the parcel to which they were originally attached, open space or buildings may be preserved while landowners are compensated for non-development from other than government coffers.

Opposing sides in the classic land use confrontation of preservation versus development can each be satisfied by transferring development rights. Growth and tax revenues are generated while open space is left intact.

"The basic cause of the land use conflict is the destruction of the development potential and hence market value of affected sites or areas," writes John J. Costinis, an advocate of TDR techniques from the University of Illinois (Urbana) Law School. Costinis says the traditional choices in land use planning of allowing development or imposing restrictive zoning "make an either/or choice inevitable: the landmark or the office tower; the nature preserve or the industrial plant." He explains the benefits of TDR: "In freeing up the bottled up development rights for use elsewhere, the technique avoids the either/or dilemma because it both protects the threatened resource and enables the owner of the restricted site to recoup the economic value represented by the site's frozen potential."

TDR has been used in the heart of New York's Manhattan (see accompanying article), in the brushy, backwoods Pinelands of New Jersey, in small, picturesque towns along the ski belt of Vermont, in beach-front resort locations in Florida and in expanding suburbs rubbing up against mountain land preserves in California and Arizona. Proposals for TDR have been introduced before the Maryland state legislature and the Chicago city government.

Title insurance companies nationwide have been asked to provide coverage for TDRs. To date, title companies generally have recognized the transfers as negative easements or appurtenant easements and have insured them as such.

Aside from basic common denominators, procedures for implementing TDR have varied considerably from program to program. These differences are due in part to the newness, and consequently yet experimental nature, of TDR. The differences also result because of the range of purposes to which TDR techniques are addressed and because of the varieties in zoning practices and real property law among municipalities and states.

All TDR projects start with approval by the municipal or county government through the passage of a zoning ordinance or ordinance amendment allowing transfer of development rights to take place in certain districts or creating development rights credits which are transferable.

Next, transferable development rights are bought and sold, similar to the manner in which mineral rights or any other interest in real property are negotiated.

Most ordinances require that applications be filed with the municipal or county government for particular TDR transactions to be approved.

In some locations, development rights are bought and sold directly between landowners and developers. In other locations, the municipalities control

development rights credit banks to which development rights can be transferred and held prior to a specific demand for them.

In all situations, the transferable development rights represent the density of building allowed for through zoning but not constructed on a parcel of land. This potential density is often referred to as the floor area ratio of a parcel. The implementing ordinance designates the locations to which development rights are transferable and the act of transfer allows construction on the receiving parcels in densities otherwise exceeding the zoning limitation for the area.

Transferable development rights ordinances have been implemented generally either to preserve the status quo of land areas or to direct the type and location of growth within a community.

Jerome Rose of the Urban Policy Research Center of Rutgers University in New Jersey, who is a recognized authority on TDR, identifies six main purposes for which transfer of development rights programs have been proposed.

- To plan community growth by regulating the location and timing of growth
- To preserve architectural landmarks
- To preserve open space or agricultural land within a community
- To encourage construction of moderate or low income housing
- To protect ecologically sensitive areas
- To balance the large increases or decreases in property values that result from public investment in neighborhoods making them less or more desirable locations

Metropolitan Areas

In large cities, TDR programs have been instituted to preserve architectural landmarks and to control the location of growth so that existing transportation corridors and sewage and water lines can accommodate the growth.

New York City, having adopted a transferable development rights ordinance in 1968 and, prior to that, allowing zoning lot mergers as of right, probably has had more transfer of development rights transactions within its city limits than any other city.

The purpose of New York City's original TDR ordinance was to preserve architectural landmarks—specifically the Grand Central Terminal. The ordinance allowed transfer of development rights

between contiguous lots with the receiving lot allowed to increase in density up to 20 percent of its zoning limitation.

With the train station representing one of the city's main points of entry and exit, the area surrounding the station—particularly Park Avenue—became a business and commercial center. The land under the terminal itself increased in value as a result of the neighborhood's commercial development, but the owners of the terminal could not realize an income commensurate with the value of the real estate unless it was developed to its zoning density limitations. When the owners were on the brink of selling the terminal building, the city proclaimed it an architectural landmark and, shortly afterward, amended the city's zoning ordinance to allow transfer of development rights.

In 1969, the city planning commission passed another ordinance amendment which broadened the definition of contiguous lots to include lots across the street or across intersections from the transferee lot—or even up the street from it if all the lots in between were connected through common ownership. The amendment also eliminated the 20 percent limitation for most commercial districts.

The city planning commission later recognized the value of transferable development rights to protect architecturally valued brownstone town houses in the city's residential neighborhoods. In 1970, the planning commission adopted a TDR ordinance for the upper east side of Manhattan, the neighborhood east of Central Park.

This amendment allowed developers to purchase unused development rights from town house owners. The development rights could then be used for high-rise apartment buildings on the main avenues found at either end of these blocks of town houses, but not on lots outside the same city block.

Since 1970, development rights have been transferred in many locations in New York City. However, the demand for their use has vacillated with the inconsistent demand for office space and residential units.

As David A. Richards, a New York City attorney, wrote in the Yale Law School *Journal* in 1972, "Development rights transfers in any city must depend on the metropolitan market for new office building space or high density residential development."

A detailed proposal for a transfer of development rights ordinance was brought to the attention of Mayor Daley of Chicago and the Chicago City Council in 1972 by John J. Costinis. The proposal was never formally introduced in the city council, however, apparently because of strong interest in developing the locations the ordinance aimed to preserve.

The Chicago Plan, as it is known in the lexicon of TDR advocates, would have allowed the transfer of development rights between separate, non-adjacent lots if both were included in the development rights transfer districts. These districts were to be designated by the city council as those containing many architectural landmark buildings the city wished to preserve. The landmark owner could transfer the unused development potential of his lot and receive a real estate tax reduction because of the reduced value of the property. The development rights were to be transferable to one or several other locations but the receiving lot's new construction area was not to exceed 15 percent of that zoned for construction.

The Chicago Plan was incorporated in a larger Urban Landmark Preservation Proposal for consideration by the Chicago City Council and the city administration. The proposal, with the Plan included, apparently did not move further than the mayor's desk. Reportedly, the Chicago housing industry lobbied heavily against

"In some locations, development rights are bought and sold directly between landowners and developers. In other locations, the municipalities control development rights credit banks to which development rights can be transferred and held prior to a specific demand for them."

the Urban Landmark Preservation Proposal before it ever reached the agenda of the city council.

The Country and Suburbia

In rapidly expanding suburban and rural towns, TDR projects have been implemented to regulate the location and speed of growth to preserve open space. Three growing towns in Pennsylvania—Birmingham, Buckingham and Upper Makefield—each adopted zoning ordinances allowing TDR in order to preserve agricultural land and open space without imposing economic loss on the owners of farmland or necessitating payments by the town as compensation for condemnation. Birmingham's and Upper Makefield's ordinances were enabling measures allowing transfers of development rights between property owners and designating areas between which these transfers could take place. Buckingham's ordinance created certificates of development rights which are available to all owners of agricultural land of over 10 acres and which could be sold to landowners in certain districts.

Upper Makefield is along the Delaware River and one purpose of its ordinance was to restrict development on the flood plains of the river.

In addition to preserving agricultural land, Birmingham township intended through its TDR program to provide incentive for the construction of a variety of housing types—including low and moderate income housing—in the town's central, developable area.

Sunderland, Mass., passed a zoning bylaw in order to preserve agricultural land for agricultural use only. In Sunderland's Overall Development Plan, areas were preserved as Agricultural Protection Lands which were restricted from any development and from which development rights could be transferred to other sections of the town.

The town of St. George, Vt., experiencing a rapid growth due to the state's expanding ski and recreation industry and urban sprawl in nearby Burlington, passed an ordinance allowing TDR in order to channel economic development. The demand for new commercial and residential construction was welcomed by the town. But a wish to regulate it induced citizens in 1970 to purchase 48 acres of land in the middle of town to become a center of commercial, residential and public facility development.

Prior to 1970, the town had no school, town hall, post office, gas station or store. But the population had quadrupled over the previous decade, requiring certain steps to accommodate this growth.

With the aim of encouraging development in the 48-acre town center, and preserving the rural character of the rest of the town, the plan was for developers to buy development rights from landowners throughout the town in order to build within the 48-acre town center. It was only through purchase of development rights from areas outside the designated center that developers could build in the town center.

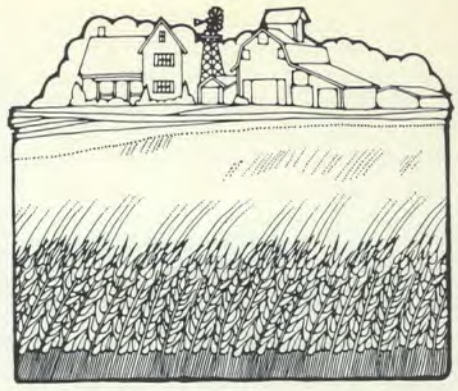
The St. George scheme was designed by Armand Beliveau, a land use planner and resident of St. George.

The town of Eden, N.Y., adopted a zoning ordinance allowing TDR also for the purpose of controlling the location of growth. The town council's concern was to balance the interests of the community as a whole by economic and efficient use of municipal services and utilities with the interest of the individual landowners. The ordinance enabled TDR through allowing the creation of open space easements. These easements are transferable to the town, and the town, in turn, grants optional density permits to the landowner. The permits are usable in specified areas. Development rights can be transferred between parcels held in the same ownership.

In Connecticut, Windsor township's Transfer of Residential Density zoning ordinance regulation was adopted to assure efficient use of the town's existing transportation and water facilities. The purpose stated in the text of the ordinance is "to provide the flexibility to promote the most appropriate relationship of residential development to transportation, community facilities and public and private services, while not increasing the overall residential density established in the plan of development." The ordinance allows transfer of residential density between all residential zones in the town, subject to requirements.

In Southampton, N.Y., the town board adopted a policy through public notice of passing zoning ordinances each time a transfer of development rights takes place. The town implemented a TDR program in order to control growth, protect open space—particularly wetlands and tidelands—and to encourage construction of low and moderate income housing in the town.

Individual transfer of development rights transactions in Southampton have been insured by Title Guarantee Company of New York City. According to Bernard Rifkin, first vice president and chief counsel of Title Guarantee, transfers of



development rights in Southampton have been insured as negative easements.

Montgomery County, Md., a suburb of Washington, D.C., has a TDR program designed to generate moderate to low income housing while not increasing the overall population density of the town. Holding the zoning density limit constant, TDR is used to allow greater density in particular areas provided an area of equal size is left as open space. An almost identical program designed for the same purpose was proposed in Fairfax County, Va., also a suburb of Washington.

Audrey Moore, a supervisor in Fairfax County, proposed to the Fairfax County Board of Supervisors in 1973 that the county adopt a TDR program to work as follows: "Fairfax County would limit all residential construction to a maximum of 10 units an acre in all multi-family zoning districts. Each zoning district would allow, however, a particular higher density on one site, requiring open space equal to the difference, such open space to be located either adjacent to the site or elsewhere in Fairfax County." The plan did not receive sufficient support among board members to be passed, although the plan has enjoyed considerable attention in literature on the subject.

New Jersey Differences

With somewhat unique transfer procedures, two towns in New Jersey, Chesterfield and Hillsborough, have passed TDR ordinances which meet a number of purposes. The ordinances were passed in order to preserve agricultural land, set aside lands for public and recreational use, prevent development on environmentally sensitive areas and reduce township costs in providing streets, utilities and services to residents by efficient planning of growth.

The ordinances of both towns created TDR systems by which landowners in certain districts can build in densities beyond the zoned limitation in exchange for dedi-

The ALTA Judiciary Committee Supplement

This installment of the annual Judiciary Committee Supplement presents 55 of the 128 cases submitted this year by Committee Chairman Ray E. Sweat. The balance will be included as supplements in future issues of *Title News.*

Abstracter Negligence—Release of Judgment

Wichita Great Empire Broadcasting, Inc., v. *Gingrich et al.*, 4 Kan. App. 2d 223, 604 P.2d 281

This case involved an abstracter who was sued for negligence in not showing a judgment on an abstract. In extending the abstract, the abstracter relied on the judgment docket that showed the judgment released. He did not search the appearance docket or the file. The facts showed that the judgment had been on two properties, and a partial release had been filed, releasing the judgment only on the property not being abstracted. The district court clerk, however, had shown the entire judgment released on the judgment docket.

The district court awarded summary judgment against the abstracter, finding the abstracter negligent as a matter of law. The abstracter appealed, raising three issues.

The first issue was whether the abstracter was negligent as a matter of law in relying only on the judgment pertaining to release of a lien on real estate (a question of first impression in Kansas). The court cited a Minnesota case and a Nebraska case and also 1 Am. Jur. 2d, Abstracts of Title #13, p. 239, all holding the abstracter in such cases to be negligent as a matter of law, concluding with the following: "Since the standard of care has been established by case law that the abstracter has a duty to examine the original records, and cannot reasonably rely on the index, and the stipulated facts indicate that the abstracter did not go to the original release but relied upon an index, summary judgment was appropriate."

The second issue was whether evidence as to the customary reliance by abstracters on the judgment docket should have been allowed in determining whether the abstracter was reasonably diligent in performing his duties. The court ruled against the abstracter's position, stating the following: "Common usage of a business or occupation may be relevant to prove what constitutes due care or reasonable diligence in the performance of the abstracter's duties. The standard of care has been established by case law. Even if the abstracter could show that only checking the judgment docket was the common practice, this would not change the conclusion that such action was not negligent. 'Negligence may exist notwithstanding the conduct pursued or the methods adopted were in accordance with those customarily pursued or adopted.' *Morrison* v. *Kansas City Coca-Cola Bottling Co.*, 175 Kan. 212, 221, 263 P.2d 217 (1953), citing 65 C.J.S., Negligence Section 16, p. 406 (1950). . . . Further it was stated in *Walker* v. *Colgate-Palmolive-Peet Co.*, 157 Kan. 170, 195, 139 P.2d 157 (1943), that while customary usage was sometimes sufficient to relieve liability, it is not the test. 'The test is, did defendant use due care? The test is reasonable care, not customary usage.' "

The third issue advanced by the abstracter was that the deputy clerk in the office of clerk of the district court should have borne responsibility for the negligence, since she had been negligent in posting the release. The court agreed that the deputy clerk had been negligent, but the attorney examining the abstract was relying on the abstracter's skill and the abstracter's bond. Since the abstracter was negligent, it was immaterial whether the abstracter could have brought an action against the deputy clerk or whether the deputy clerk should have been sued as a joint tort-feasor.

Author's conclusion: Abstracters must not rely on the index but must look at the file itself.

Attorney and Client—Authority of Attorney to Settle Case

Miotk v. *Rudy*, 227 Kan. 296, 605 P.2d 587 (1980)

This case demonstrated again to Kansas abstracters and title insurance agents the importance of carefully examining the release of judgments. *Wichita Great Empire Broadcasting, Inc.*, v. *Gingrich et al.*, 4 Kan. App. 2d 223, 604 P.2d 281, and *Carnation Company* v. *Midstate Marketeers, Inc.*, 2 Kan. App. 236, 577 P.2d, both held abstracters to be negligent who relied only on the judgment dockets. The *Miotk* case showed that even payment of $10,000 by the judgment debtor and a release signed by the judgment creditor's attorney do not release the judgment without authority from the judgment creditor.

In this case, the judgment debtor paid the $10,000 settlement to the judgment creditor's attorney by two checks made payable to both the judgment creditor and the judgment creditor's attorney. The attorney cashed the checks, forging the judgment creditor's signature on each.

The court recited the rule as to an attorney's authority to settle a case as set forth in *Reimer* v. *Davis*, 224 Kan. 225, 580 P.2d 81, as follows: "We have previously considered the nature and extent of an attorney's authority in handling a client's case. It has been recognized generally that a client is bound by the appearance, admissions, and actions of counsel acting on behalf of his client. *Meyer* v. *Meyer*, 209 Kan. 31, 39, 495 P.2d 942. The rule is limited, however, to control over procedural matters incident to litigation. The client has control over the subject matter of litigation. *Giles* v. *Russell*, 222 Kan. 629, 635, 567 P.2d 845. An attorney has no authority to compromise or settle his client's claim without his client's approval. *Jones* v. *Inness*, 32 Kan. 177, 4 Pac. 95, *Rickert* v. *Craddock*, 98 Kan. 143, 157 Pac. 401. See also *Sette* v. *Sette*, 132 Kan. 375, 295 Pac. 1096, and 7 Am. Jur. 2d, Attorneys at Law, Par. 128, pp. 128-129."

The judgment debtor argued that an attorney should be held to have apparent authority to settle an action. The court stated that the law recognizes two distinct types of agency (the relation of attorney and client is one of agency and the general rules of law that apply to agency apply to that relation), namely, actual and ostensible or apparent. There was no actual authority given in this case, and the question was whether the judgment creditor's attorney had ostensible or apparent authority to settle the case. An apparent agent is one who, with or without authority, reasonably appears to third persons to be authorized to act as the agent of another.

The court then held that there was no evidence of apparent authority in this case, citing 7 C.J.S. Attorney and Client, Par. 105, p. 931, as follows: "If there has been nothing beyond a mere employment or retainer of the attorney to represent the client in a case the attorney . . . thereby acquires no apparent authority to make a compromise or settlement, *and if the attorney seeks to do so it is incumbent upon the opposing party to ascertain at his peril whether actual authority to take such action has been conferred upon the attorney* [emphasis added]. In other words, if the client has not held his attorney out to the opposing party as having any other or greater power than an attorney authorized to take charge of litigation for a client commonly has, such other party is charged with knowledge that agreements of compromise or settlement do not come within the implied authority of the attorney; and it is open to the client to show any restrictions or limitations that may have been placed on the attorney's authority to compromise."

Bankruptcy Order Confirming Trustee's Sale of Real Property

In re Royal Properties, Inc., 621 F.2d 984 (9th Cir. 1980)

This case was a consolidation of appeals from three orders of the district court dismissing as moot the plaintiffs' appeals from orders of the bankruptcy court. The appellate court affirmed.

The plaintiff-appellants were the shareholders of two-thirds of the outstanding stock of the debtor corporation in a Chapter X proceeding. The debtor's principal asset was a subdivision, divided into three units, which the trustee put up for sale at public auction. One purchaser was the high bidder on unit one, and another purchaser was the high bidder on unit three. After the bidding, the trustee entered an agreement with the purchasers to facilitate sale of all the units in bulk. The sale of unit two was contingent on the trustee's obtaining fee title to the unit, since the debtor had only a leasehold interest in the property. The plaintiffs contested the trustee's application to sell the three units. After a hearing, the bankruptcy court overruled their objections and entered an order confirming the sale. The plaintiffs filed two notices of appeal from this order but did not seek a stay of the order pending appeal pursuant to Bankruptcy Rule 805. Thereafter, the sale was completed as to units one and three and the trustee distributed the cash consideration for the property to the creditors, including the plaintiffs. The trustee never obtained fee title to unit two, and so no transfer of that unit took place.

One of the plaintiffs also appealed from an ex parte order of the bankruptcy court. Before the bankruptcy proceedings were initiated, the debtor had conveyed unit one to him, which the bankruptcy court found was intended as a security agreement. The plaintiff was ordered to deed the property back to the debtor and the debtor and the trustee to execute a note and deed of trust to the plaintiff. Documents were placed in escrow. The order was not appealed. Subsequently, after approving the trustee's application to sell the subdivision, the bankruptcy court entered an ex parte order requiring delivery of the documents in escrow to the trustee. The trustee was to record the quitclaim deed and deliver the note and deed of trust to the plaintiff. The plaintiff appealed from the order but did not seek a stay. The deed was recorded, and the note and trust deed delivered concurrently with the sale of the units.

The appeals were dismissed as moot. The two orders confirming the sale had been carried out pending the appeal since the plaintiffs had failed to obtain a stay of the orders. The quitclaim deed had been recorded, the note and deed of trust had been delivered, and the property had been sold, and, thus, once the orders had been performed, an appeal attacking the order was moot. Plaintiffs may not attack the validity of the sale or the deed in this appeal since the purchasers of the property have not been made parties to the appeal, and the appellate court cannot grant effective relief in their absence. This result was not changed by the fact that unit two had not yet been transferred. The purchasers agreed to buy the units in bulk. A reversal of part of the order authorizing the sale was not possible without affecting the entire agreement.

Bankruptcy

Good Hope Refineries, Inc., v. *Benavides*, 602 F.2d 998 (1st Cir. 1979)

In this case, the court of appeals upheld the lower court's determination that the provision of the Bankruptcy Act establishing a special 60-day period for the trustee or debtor in possession to perfect certain rights of the debtor does not authorize automatic extension of an option contract. The option contract here was an "unless" oil and gas lease under which the lessee must drill or pay delay rental; otherwise the lease automatically expires.

The court held that the time period for tender of the delay rental was not extended for a period of up to 60 days from the date of adjudication. Under Texas law, the lease terminated upon failure to tender the rental.

American Grain Association v. *Lee-Vac., Ltd.*, 630 F.2d 245 (5th Cir. 1980)

The debtor in a Chapter XI proceeding held a sublease of a site on which it owned a grain elevator. It proposed to lease both for one year, granting to its tenant the option to purchase the elevator. If such option was exercised, the debtor agreed to assign its remaining interest in its sublease on the site. The sublease provided that the debtor could not assign or sublease without the written approval of the owner of the fee and the debtor's lessor. The owner of the fee consented, but the debtor's lessor did not respond to its request although the debtor indicated that time was of the essence.

The debtor filed a petition in the bankruptcy court requiring its lessor to show cause why it should not consent to the proposed transaction. The court ordered such consent, and the district court affirmed the bankruptcy judgment, at which time the lessor of the debtor filed notice of appeal to the circuit court but did not seek a stay of the bankruptcy court order requiring its consent ot the proposed transaction. The debtor's lessor thereafter consented to the proposed option-sublease in accordance with the bankruptcy court order, although it attached a certificate to a consent that noted that it was appealing the bankruptcy court order. Thereafter, the sublease and option were executed and the transaction was closed.

The Fifth Circuit holds that the appeal by the lessor of the debtor is moot since its failure to seek a stay of the lower court order entitled the other parties to treat such order as final notwithstanding the pending appeal and since those parties took irreversible action in reliance on the order. The general rule of appellate procedure is exemplified by Rule 805 of the bankruptcy rules, which provides that a sale to a good faith purchaser is not affected by an appeal unless an order of sale is stayed pending appeal, even if the purchaser knows of such appeal. The rule is not to be limited strictly to sales, however. The policy of affording finality to orders and judgments on which third parties can rely is applicable not only to such sales but also to leases and options entered or agreed to pursuant to court order.

Bankruptcy—Foreclosure on Real Property Security After Discharge of Debtor

In re Cornist, 7 B.R. 118 (Cal. 1980)

A secured creditor filed a complaint for relief from the automatic stay in order to foreclose on exempt real property in the hands of the debtor. The court held that the stays issued under the Bankruptcy Code, Section

362, upon the debtor's filing of a voluntary Chapter 7 petition, were terminated when the debtor received his discharge; thus the complaint was moot.

Bankruptcy—Running of Reinstatement Period Is Not Stayed as an Act to Enforce a Lien

McCarthy v. *Lewis*, 615 P.2d 1256 (Utah 1980)

The plaintiff was a contract purchaser of the real property in question from Robert C. Anderton and Shauna L. Anderton and made monthly payments thereon. The Andertons failed to make certain loan payments owing upon the property, and on December 1, 1978, defendant Commerce First Thrift recorded a "Notice of Default" pursuant to its trust deed that secured its note reflecting the loan encumbrance against the property. According to Utah statute, three months had to elapse after the recording of said notice of default before a notice of sale could be given and a subsequent trustee's sale held. Defendant Kay Lewis was the trustee under the deed of trust.

On December 18, 1978, the Andertons filed petitions in bankruptcy. On March 26, 1979, however, the bankruptcy court issued its order authorizing its trustee to abandon any interest in the property. On May 8, 1979, defendant Kay Lewis, as trustee under the deed of trust, sold the property to defendant Larry Dimick, the successful bidder. The plaintiff was present at the sale but made no objection thereto.

Sometime thereafter, the plaintiff tendered the full amount owing to defendant Commerce First Thrift, and the same was rejected. This prompted the plaintiff to initiate proceedings seeking to invalidate the trust deed sale on the theory that Rule 601 of the Bankruptcy Act had tolled the three-month notice requirement and proper notice had therefore not preceded the sale.

Rule 601 of the Bankruptcy Act reads, in pertinent part, as follows: "The filing of a petition shall operate as a stay of any act of the commencement or continuation of any court proceeding to enforce a lien against property in the custody of the bankruptcy court, or a lien against the property of the bankrupt obtained within four months before bankruptcy by attachment, judgment, levy, or other legal or equitable process or proceedings."

At issue was whether the running of the three-month reinstatement period constituted an "act to enforce a lien against property in the custody of the bankruptcy court" within the meaning of Rule 601.

The court held that the mere passage of time for reinstatement of the trust obligation did not constitute an "act" and that Rule 601, by its own terms, did not toll or suspend the three-month reinstatement provision of the Utah statute.

Reporter's note: This is a state court's construction of a federal statute.

Contract—Specific Performance and Substantial Completion of Conditions

First National State Bank of New Jersey v. *Commonwealth Federal Savings and Loan Association of Norristown*, 610 F.2d 164, (3d Cir. 1979)

In this diversity action, a real estate developer sought and obtained a standby commitment from Commonwealth Federal Savings and Loan Association of Norristown. This commitment was conditioned upon the shopping mall being constructed in accordance with plans submitted to Commonwealth. The developer then contracted with First National for short-term construction financing. Commonwealth consented to the commitment being assigned from developer to First National. Prior to expiration of Commonwealth's standby commitment, First National requested that a closing be arranged on the permanent loan.

Claiming that the completed work lacked congruity with the plans, Commonwealth refused to close the loan. In turn, the developer, unable to secure that permanent financing, became delinquent in its loan payments to First National, which proceeded to foreclose on the property and then instituted this action for specific performance of the loan.

The United States District Court for the District of New Jersey, applying the law of New Jersey, entered judgment in favor of First National. Commonwealth was ordered to perform its obligation under the commitment, to pay interest at eight percent on the amount of the loan from the time the loan should have been made until such time as the money was actually forwarded, and to reimburse with interest First National's financial losses in operating the mall.

On appeal, the court rejected Commonwealth's four contentions. In responding to the appellant's first argument that the mall was not completed in accordance with the plans, Judge Adams iterated the findings of the district court, wherein it was found that any incongruities were slight and that the project was substantially completed when Commonwealth refused to close the loan. In the absence of a provision to the contrary, substantial completion dictates performance by the other party to the contract.

The court also rejected the appellant's claim that it was a third-party beneficiary of the developer-First National loan agreement. Judge Adams propounded that, requisite to the creation of a third-party beneficiary contract, the contracting parties must intend to make another a third-party beneficiary.

The court addressed the issue of specific performance. The court asserted that under New Jersey law the equitable remedy of specific performance will be ordered only where legal remedies prove inadequate.

Moreover, two situations are primarily responsible for the resultant inadequacy of legal remedies. In the first instance, legal remedies may prove inadequate because of the unique character of the subject matter in question. More specifically, the unique nature of certain subject matter may frustrate its translation into quantitative terms. The second instance occurs where legal damages cannot be accurately calculated.

Finding these criteria satisfied, the court affirmed the ruling of the district court. Judge Adams adduced that as between the construction lender and the permanent lender, the latter's expertise allows him to assess more fully the risk of failure. Indeed, insofar as the construction lender relies in part on the permanent financing of the venture, he shifts the risk of nonviability to the permanent lender.

Commonwealth contested the granting of incidental damages in addition to specific performance. Citing the proposition that the object of a remedy for breach of contract is to make the aggrieved party whole, the circuit court concluded that the damages were properly awarded as reimbursement for interest lost and losses sustained in operating the mall.

Pitchfork Ranch Co. v. *Bar T L*, 615 P.2d 541 (Wyo. 1980)

The bidder at a "no-reserves" auction of a ranch appealed from a judgment quieting title in the seller and denying the bidder's counterclaim for specific performance. The Supreme Court of Wyoming held that where the sale was advertised as a "no-reserve" auction, the seller was obliged to sell the property only to the highest bidder, and when the highest bid was not communicated to the auctioneer because of the auctioneer's unauthorized minimum-increment policy, no obligation arose on the part of the seller to sell to the next highest bidder.

Covenants

Philips v. *Iglehart*, 626 F.2d 393 (5th Cir. 1980)

One of the plaintiffs conveyed to the defendant's deceased father a tract of land that was subject to a repurchase option that ran with the land as a covenant and that was exercisable if the grantee desired to sell the property. At such time, the grantor would have 60 days in which to exercise the repurchase option in the land for the amount originally paid by the grantee to the aforesaid plaintiff, plus the cost of improvements.

The Florida Supreme Court concluded that the option was void as an unreasonable restraint on alienation, following the uniformly recognized rule that a fixed-price option of unlimited duration is an unreasonable restraint and concluding in the present situation that such an option at the original purchase price plus the costs of improvements

was unreasonable. The issue of the rule of perpetuities was therefore not touched by the Florida Supreme Court.

The court also stated that it would be inappropriate to rescind or cancel the deed that contains such option, the remedy of recision or cancellation having the same effect as enforcement of the option. The determination of other equitable relief would be left to the trial court, however, but it could include impressment of an equitable lien on the property for the fair market value of the property at the time of the original conveyance, increased by dollar inflation.

Jayno Heights Landowners Association v. *Preston*, S4 Mich. App. 443.271 N.W. 2d 268 (1978): leave to appeal denied

The defendant's property was subject to a deed restriction that provided that any dwelling located thereon should not be occupied by more than a single family. The defendant leased the property to others to be used as a home for elderly women under the Michigan Adult Foster Care Facility Licensing Act. A statute provides that such facilities may not be excluded from residential neighborhoods by zoning provisions (Mich. Comp. Laws 125.286a: Mich. Stat. Ann. 5.2963 (16a)). This action was brought to enjoin the use of a dwelling as an adult-care facility as being in violation of the building restriction.

The court held for the plaintiff. The court thought that the cited statute applied to zoning only and was applicable to the contract rights created by the deed restrictions that are favored by public policy.

A dissenting judge contended that public policy with respect to adult care should outweigh the deed restrictions, calling attention to a contrary decision by another panel of the court of appeals in a case involving application of a single-family restriction to a licensed home for mentally retarded children (*Bellarmine Hills Association* v. *The Residential Systems Co.*, S4 Mich. App. 554.269 N.W. 2d 673 (1978)).

Fahmie v. *Wulster*, 81 N.J. 391, 408 A.2d 789 (1979)

This was an action for breach of covenant against encumbrances. The prior owner had constructed a culvert on the property that did not conform to government specifications. The plaintiff acquired title by a warranty deed that included a covenant against encumbrances and then was notified by the state that the culvert was inadequate in size and would have to be replaced.

The court held that while a breach of covenant against encumbrances can involve physical conditions concerning the property, such as a building encroachment, this concept will not be extended to the condition of a structure on the property that violates some law or government regulation.

Somerset County v. *Durling*, 174 N.J. Super. 52, 415 A.2d 371 (Chan. Div. 1980)

Pursuant to the contract of sale, property was conveyed by a bargain and sale deed with covenants against the grantor's acts and was accompanied by an affidavit of title. The affidavit of title contained unqualified statements that were unintentionally inaccurate when made.

The court held that an affidavit of title may be sufficient to support liability for damages sustained by one who had relied thereon, as a result of unintentional inaccuracies in the representations therein contained.

Bailey Development Corp. v. *MacKinnon-Parker, Inc.*, 60 Ohio App. 2d 307, 397 N.E. 2d 405 (1977)

A uniform plan of development is sufficient to validate a covenant, shown on the recorded plat, to submit all building plans for approval of the developer. The law requires that good faith, reasonable standards be applied by the developer.

Damages—Negligent Construction

Moore v. *Heritage, Inc.*, 62 Ohio App. 2d 89, 404 N.E. 2d 167 (1978)

The proper measure of damages for negligent construction of a new house is cost to repair, not diminution in market value, even if cost to repair is the greater of the two. Violation of building code requirements is not negligence per se.

Dedication of Real Property

Beechler v. *Winkel*, 59 Ohio App. 2d 65, 392 N.E. 2d 889 (1978)

When a developer records a plat showing roads, he has a duty to all purchasers, enforceable in equity, to build the roads. Laches are not a defense when no date for performance has been set.

Deeds

Fetzer v. *Bodcaw Co.*, 601 F.2d 356 (8th Cir. 1979)

In 1895, Bodcaw Lumber Co. acquired land in Arkansas and operated its own railroad on a strip thereof. In 1898, the owners of the Bodcaw formed a railroad company and deeded "all its right, title, property and interest in and to the main line of the railroad" to this newly formed company. This deed was not acknowledged by a notary public until 1902, and it was recorded in this year. Meanwhile, in 1899, Bodcaw granted a "right of way" in the same strip to this newly formed railroad company. This strip of land has remained part of the existing main line of the Louisiana and Arkansas Railway Co., which presently operates a railroad in south Arkansas and north Louisiana.

From time to time this railway company has executed oil and gas mining leases on the land covered by its right of way, and the plaintiffs in this action own a working interest in an oil and gas lease that was executed by the railroad company some years ago. Bodcaw Co., successor of Bodcaw Lumber Co., prior to 1973 did not question the railroad company's ownership of the minerals underlying its right of way in this strip of land, nor did it question the railroad's right to execute leases involving the underlying oil and gas. In 1973, however, Bodcaw took the position that it owned the minerals underlying the right of way and that leases executed by the railroad company were invalid.

In the original opinion written in the case, the district judge referred to the 1898 deed as the 1902 deed and held that the 1899 deed granting the "right of way" merely granted an easement but that this easement merged in the fee title granted in the 1902 deed. This decision was appealed, and the circuit court remanded the case with the instructions that the district court recognize that the deed that it had assumed had become valid in 1902 was in fact effective between the parties as of 1898. The district court, bearing this in mind, held that the deed of 1898 conveyed a fee title to the railroad company and not simply an easement. This decision was appealed, asking that the circuit court construe the 1898 deed and the 1899 deed together, find that the railroad merely had a right of way in the strip of land in question, and declare the present leases to be void.

At issue was whether the deed that purports to "sell, transfer, and deliver . . . all right, title, property and interest" can be construed to convey fee title in a strip of land where there is a subsequent deed between the same parties that grants a right of way to the same strip. The court ruled yes. Although the deed of 1898 does not by its terms grant fee title to the railroad company and is therefore ambiguous, under Arkansas law where a deed does not manifest a contrary intent, an intent to convey a fee simple estate of inheritance is at least presumed. Where possible, a trial court should construe a deed from a consideration of the instrument itself. Where this is impossible, however, the court may resort to extrinsic aids to the extent that they are shown by admissible evidence as having legitimate probative value. The court may consider the relationships between the parties, the relation between the grantor and the property, the facts and circumstances surrounding the transaction, and the contemporaneous construction placed by the parties on their own conveyances. The ruling of the district court was not based on a misconception of the Arkansas law, nor was it arbitrary and capricious, nor did it lack substantial evidence support, and therefore the district court's opinion is affirmed.

Roper v. *Elkhorn at Sun Valley*, 100 Idaho 790, 605 P.2d 968 (1980)

Plaintiffs brought this action against their immediate predecessors in title under a breach of warranty theory seeking to recover expenses incurred in compromising a controversy wherein a third party had claimed an easement across their property.

Plaintiffs argued that regardless of the existence or nonexistence of a valid easement, the defendants should be liable for any expenses reasonably incurred, but the Supreme Court held that their failure to prove that there was an easement at the time they purchased the property was fatal to their claim.

In reaching this conclusion, the court noted the following language contained in 20 Am. Jur. 2d, Covenants, Conditions and Restrictions, 056: "The mere showing of a cloud on the grantee's title is insufficient to establish a breach, for the warrantor is not bound to protect his grantor against a mere trespasser or against an unlawful claim of title. In other words, a covenant to warranty of title does not extend to apparent or unfounded titles in land, but only to hostile titles superior in fact to those of the grantor."

Camp v. *Camp*, 260 S.E. 2d 243 (Va. 1979)

Residential property was conveyed by general warranty deed to a mother and son as "tenants in common with the right of survivorship as at common law." Some 20 years later, after the son had predeceased the mother, the son's widow sued the mother to determine whether the mother acquired the son's interest by operation of law under the survivorship clause or whether the widow (and six children) inherited the husband's interest in the property by reason of the tenancy in common. The trial court held in favor of the mother, based on testimony adduced as to the intent of the parties. The widow and children appealed.

The court held that in cases in which intention of parties cannot be ascertained by language of deed and there exist irreconcilable repugnant clauses in deed, circumstances of "rigorous necessity" require application of harsh common law rule whereby the portion of repugnant clauses first appearing in the deed controls; therefore, the widow and children inherit a one-half undivided interest as tenants in common.

Deeds—Quitclaim Deed

Walliker v. *Escott*, 608 P.2d 1272 (Wyo. 1980)

Plaintiffs in a quiet title action conveyed a partial interest in mineral rights by quitclaim deed to defendants' assignors. Plaintiffs thereafter acquired a patent. Plaintiffs claimed that the quitclaim deed did not transfer the after acquired title.

The court held that under Wyoming law, a quitclaim deed is not a quitclaim deed but a conveyance when it purports to convey less than "all interest in," and in this case it conveyed an "undivided one-third interest" and therefore applied it to the after acquired title.

The court also held that "a patent from the United States operates to transfer title not merely from date of patent, but from inception of equitable right upon which it is based." The inception of "equitable right" in this case was substantiated by the patentee entry on the land and the starting of the process of converting the land to agricultural uses with the installation of irrigation systems.

Due-On-Sale Clause

First Federal Savings and Loan Association of Englewood v. *Lockwood* 385 So. 2d 156 (Fla. 1980)

This is an important case on the due-on-sale clause contained in the instrument of federal savings and loan associations. Amicus curiae briefs were filed by the Federal Home Loan Bank Board, Florida Association of Realtors, Florida Savings and Loan League, and two other savings and loan associations. The Federal Home Loan Bank Board argued that the federal regulations preempted state law.

The court found that the federal regulation in question revealed no procedural provisions for a distinct cause of action in federal court for enforcement purposes. The court held, therefore, that a federal savings and loan seeking foreclosure against a Florida resident must file its action in a Florida state court.

The court stated that when a foreclosure complaint is filed in the Florida court seeking an equitable remedy, it follows that traditional equitable defenses and considerations are available to all the litigants. The court held that although the due-on-sale clause is not invalid, the savings and loan could not obtain foreclosure in a Florida court of equity without showing that violation of the clause had impaired the security of the mortgage, despite the rules and regulations of the Federal Home Loan Bank Board authorizing the clause.

Easements—No Need for Words of Inheritance for Finding of Easement Appurtenant

Burcky v. *Knowles*, 413 A.2d 285 (N.H. 1980)

This was a petition for declaratory judgment. In 1934, Garland sold the defendants' predecessor part of his land, "reserving to the grantor the right to pass and repass over a strip of land 15 feet in width, lying adjacent to and northerly of said homestead lot of the grantee and extending from said Post Road to the rear of the lot hereby conveyed."

In 1953, he sold the same grantee an additional lot contiguous to the first, "reserving to the grantor the right to pass and repass by foot, horse, and/or vehicle, over a strip of land 15 feet in width, lying adjacent to and northerly of said homestead lot of the grantee, and continuing the right of way reserved to the grantor (in the grantor's deed above referred to) between said Post Road and the rear of the land surveyed to the grantee by said deed, on to the rear of the within granted parcel, so as to assure the grantor, his heirs and assigns of all necessary rights of ingress and egress for all purposes between said Post Road and his reserved pasture land which lies westerly and northwesterly of the within granted parcel." The plaintiffs succeeded to title to Garland's remaining land under deeds that did not mention the easement.

The trial court found an easement in gross, denied the plaintiffs' right to cross the defendants' land, and reserved and transferred the plaintiffs' exceptions.

The supreme court held: First, the easement in the 1934 deed was clearly appurtenant despite lack of words "heirs and assigns." Previous case *Glines* v. *Auger* (93 N.H. 340, 341, 42, A.2d 219, 220) overruled. The supreme court said, "To the extent that any vestige of words of inheritance still underlie our caselaw to beguile and taunt the followers of William the Conqueror, we hereby declare them a legal nullity."

Second, the 1953 reservation of easement was valid even though it extended the one reserved in 1934.

Third, both easements being appurtenant ran with the land and were effective despite omission from deeds in the plaintiffs' chain of title.

Reversed.

Easements by Necessity

Ghen v. *Piasecki,* 172 N.J. Super. 35, 410 A.2d 708 (1980)

The plaintiff sued a neighbor for an easement of necessity.

The court held that the owner of the servient estate was not entitled to be compensated for an easement by way of necessity. The dimensions of the easement and the rights to be exercised within the easement are determined by the court after an evidentiary hearing has been held as to the needs of the parties.

Easements—Unrecorded; Inquiry Notice Due to Possession

Xar Corp. v. *DiDonato,* 429 N.Y.S. 2d 59 (1980)

The Appellate Division, Third Department, held that where an agreement constituting an easement in gross to permit maintenance of an advertising sign on premises had not been recorded, a purchaser of the premises who had knowledge of the existence of the sign was not excused from making inquiries from the owners of the sign concerning their rights or interests in the premises.

The agreement permitting the sign to be erected had been entered into some four years before the purchase of the premises by Xar Corp. but had never been recorded.

The deed to Xar contained no reference to the agreement. The court, however, held that this did not relieve the grantee of the duty to inquire from the owners of the sign, since the terms of the deed only established that the purchaser may have been deceived by the grantor. The terms of the deed could not be relied on when there was constructive notice by possession.

Easements by Prescription

Potts v. *Burnette,* 46 N.C. App. 626 265 S.E. 2d 504 (1980)

This was a suit to enjoin the defendants from denying the plaintiffs use of a road and to have a permanent easement declared in favor of the plaintiffs. The plaintiffs alleged that for more than 50 years, they and their predecessors in title made open, notorious, hostile, adverse, and continuous use of a road over the defendants' land to and from a public road.

The court said that North Carolina "presumes that the use of a way over another's land is permissive unless evidence appears to the contrary."

The court found that the evidence was insufficient to show that the plaintiffs' use of the road was hostile to the defendants' interest. The use must be of such a nature that it would give the owner of the land notice that the use was being made under a claim of right.

Easements

State ex rel. Goldsberry v. *Weir,* 60 Ohio App. 2d 149, 395 N.E. 2d 901 (1978)

An easement granted to excavate a channel adjacent to a river includes the right to take the soil removed. Parol evidence is not admissible to vary the terms of the deed, which are clear. The grantor's right to use the land for all purposes that do not interfere with the easement does not include a right to the excavated soil.

Ovard v. *Cannon,* 600 P.2d 1246 (Utah 1979)

The plaintiffs Ovard sued to compel the defendant Cannon to remove obstructions he had placed in an irrigation ditch that ran across his land to the plaintiffs' property. The defendant denied the plaintiffs' right to a ditch easement. The plaintiffs' property fronted on an east-to-west street and was 96 feet wide and 225 feet deep (southward). Properties acquired by the defendant bordered the plaintiffs' tract on the west and the south. Both parties derived their ownership from a common source, William E. Parker and his successors.

The plaintiffs' tract had been fenced, used, and occupied in the same manner since 1952. In the conveyance to the defendant's predecessor, there was reserved an easement for an irrigation ditch that was from the southwest corner of the plaintiffs' land westward 96.5 feet over the defendant's land, where it connected with a ditch running southward 600 feet over the defendant's property. Through these ditches, the plaintiffs (and their predecessors) obtained water to irrigate their land. The controversy arose because of the defendant's dispute of the plaintiffs' claim of an easement and the right to so use that ditch.

In support of the trial court's determination that the plaintiffs had an easement in the above-mentioned ditch for the purpose of conveying water to their property, reliance was placed on the doctrine of *easement acquirement by implication or necessity.*

The question at issue was, What is necessary to establish an easement by implication or necessity?

The court held that . . . the following elements (all necessary to find such an easement) were present: a previous unity of title followed by severance; at the time of the severance, the servitude was so plainly apparent that any prudent observer should have been aware of it; the easement was reasonably necessary to the use and enjoyment of the dominant estate; it had been continuous at least in the sense that it had been used by the possessor whenever he desired.

Easements—Railroads

Veach v. *Culp,* 92 Wash. 2d 570, 599 P.2d 526 (1979)

A 1901 quitclaim deed to a railroad described: "A right of way, being fifty feet on each side of the center line. . . ." At the time of trial, the railroad had made little use of the "right of way." The plaintiff sought removal of a chain link fence preventing his crossing to a lake.

The court held the conveyance was that of an easement, not a fee; while in most instances the nature of a railroad requires it to enjoy substantial rights, where the railroad's use is light, the owner may use the right of way in such manner as not to interfere materially with the railroad's use thereof.

Eminent Domain—Valuation

United States v. *Certain Lands in Truro, Barnstable County,* 476 F.Supp. 1031 (Mass. 1979)

In these condemnation actions, tract owners filed motions to have a town zoning law set aside for the limited purpose of determining the fair market value of the land pursuant to what the zoning provision would have been in absence of federal intervention. The court said that although the more restrictive zoning provision was in effect in the town during the period before condemnation, the federal government would not be allowed to benefit from the lower value resulting therefrom since, in creating the Cape Cod National Seashore, it had caused this more stringent zoning provision to be enacted.

Thus, the general rule that the taker of the property is required to pay only fair market value on date of taking subject to applicable zoning regulations would not be applied; rather, fair market value of the land would be determined pursuant to what the zoning provision would have been in absence of such intervention. The prior zoning provision required half-acre lots instead of three-acre ones.

United States v. *45.28 Acres of Land, etc.,* 483 F.Supp. 1099 (Mass. 1979)

This is an action similar to the one reported in 476 F.Supp. 1031, in which the court also held that the three-acre zoning provision that the federal government required the town to enact did not apply and that the land taken should be valued based on the three-quarter acre zoning requirement previously in effect.

The court, however, held that the land could not be appraised on the basis of a 17-lot subdivision plan that had expired because not perfected within seven years of approval. The court rejected the landowner's argument that he had not developed the land because of an inaccurate representation by an employee of the National Park Service that the subdivision could not be developed. The court held that the federal government could not be held accountable for the representations of its employees.

Eminent Domain—Inverse Condemnation by Corps of Engineers

American Dredging Co v. *Dutchyshyn,* 480 F.Supp 957 (Pa. 1979)

American Dredging Co. filed suit seeking injunction of a modification of a dredging permit by the Corps of Engineers. The modification sought to preclude the plaintiff from using approximately 300 acres of land that the plaintiff had purchased solely as a repository for dredged spoil. The plaintiff alleged that the modification constituted a taking of private property without just compensation in violation of the Fifth Amendment.

Although the court declined to determine whether the modification constituted a taking without just compensation, it did note that the Tucker Act, 28 U.S.C. §1491, substantially detracted from the plaintiff's argument. The court concluded that the Tucker Act, which inter alia gives the court of claims jurisdiction to render judgment on any claim against the United States founded upon the Constitution, affords the plaintiff a statutory procedure for receiving just compensation. Therefore, the injunction was denied.

Reporter's note: I found the court to be contradictory. The issue in the case is one of just compensation. The judge states that the Tucker Act, which gives jurisdiction to

the court of claims, vitiates the plaintiff's argument; however, the jurisdiction of court of claims does not "vitiate" plaintiff's argument, which concerns just compensation and *not* jurisdictional powers.

Eminent Domain—Powers of Ohio Township

Board of Trustees v. *Lambrix*, 60 Ohio App. 2d 295, 396 N.E. 2d 1056 (1978)

A township may not appropriate land located within a municipality.

Escrow—Interest-Free Tax Escrow Accounts

Bass v. *Boston Five Cent Savings Bank*, 478 F.Supp. 741 (D. Mass. 1979)

In this case, commenced in 1972, borrowers brought action against banks to recover for alleged violation of antitrust laws with respect to requirement that they make payments into interest-free tax escrow accounts as a condition of receiving a real estate mortgage. The district court held that the allegations of the complaint were insufficient to warrant class certification, there was no showing of conspiracy on the part of banks, the complaint did state a cause of action for illegal tying arrangements, there was no violation of the Truth-in-Lending Act, there was no showing of illegal reciprocal dealing arrangement, and there was no basis under Massachusetts law to impose constructive trust on the funds requiring the payment of interest. It should be noted that since this action was commenced, both the federal government and the Comonwealth of Massachusetts have enacted laws requiring the payment of interest on tax escrow accounts, and these laws and regulations were discussed in *First Federal Savings and Loan Association of Boston et al.* v. *Carol S. Greenwald*, 591 F.2d 417 (1 Cir. 1979).

Evidence—Opinion of Value

Starman v. *Associated Estates Corp.*, 401 N.E. 2d 952 (Ohio C.P., 1980)

When the purchaser of a new condominium unit sues for failure to receive what he contracted for (based on improper construction), he does not have to present evidence of the value of what he did not receive. An opinion of value may be formed from common knowledge and so may be determined by the court.

Federal Courts—Title Questions

Antonio Santasucci et al. v. *Hugh Gallen et al.*, 607 F.2d 527 (1 Cir. 1979)

The suit was brought based on the plaintiffs' assertion that they had a constitutional right to march and demonstrate on certain lands and byways that form part of a construction site of a nuclear power facility being built by a private New Hampshire corporation. The plaintiffs sought a declaration that the property in question had never validly been conveyed from the town to the corporation. The New Hampshire Federal District Court dismissed the action under the doctrine of abstention, and the court of appeals sustained the decision.

The court held that where the plaintiffs' claim that title to the land never properly passed rested on a number of unsettled questions of state law such as whether a prospective way can be discontinued by a vote of the town without court approval, whether a vote of special town meeting is adequate to approve the sale of tax title property and whether a sale of town land can occur without a transfer of cash, the plaintiffs had a ready forum for the resolution of their claims in the New Hampshire Superior Court, and the district court did not abuse its discretion by abstaining in this action.

Homestead

Wyoming County Bank and Trust Co. v. *Kiley*, 431 N.Y.S. 2d 900 (N.Y. 1978)

The homestead exemption rule in New York was significantly updated in 1977 to exempt the principal residence, or a family burial ground, from application to the satisfaction of a money judgment, without requiring the prior recording of a designation of the property as a homestead. A significant aspect of the rule is that the exemption is of up to $10,000 above liens and encumbrances, unless the judgment was recovered for the purchase price of the property.

Lenders were not entirely clear on what the rule meant in making the exemption above liens and encumbrances, except for a judgment on the purchase price. Did this mean that only purchase money mortgage liens, and encumbrances that were charges on the property prior to its acquisition, could have priority over the exemption?

In *Wyoming*, the borrowers had granted the bank a collateral security mortgage on their dwelling. In the foreclosure, the court held the homestead exemption to have priority over the mortgage. The appellate division reversed, noting that a mortgagee may elect to proceed either by foreclosing his lien in equity, which results not in a "money judgment" but in a sale under the supervision and control of the court with a right of redemption in the borrower, or by proceeding at law to obtain a judgment on the loan, in which case he cannot levy execution on the mortgaged property, N.Y. CPLR, 5230 (a), 5236 (b) (since there is no right of redemption in execution sales). The two types of remedy, the court said, ". . . are legislative enactments and relate to distinct concerns without inherent incompatibility . . . when a mortgage-secured creditor . . . foreclose(s) its mortgage, the action does not result in a 'money judgment'; and therefore the homestead exemption of CPLR 5206 (subd. [a]) does not exempt the debtor's homestead from a mortgage foreclosure sale."

In arriving at this conclusion, which now clearly informs potential lenders of the circumstances in which the exemption can and cannot be successfully pleaded, the court relied on the court of appeal's decision in the matter of the *State of New York* v. *Avco Financial Service of New York*, 50 N.Y., 2d 383, 429 N.Y.S. 2d 181, 406 N.E. 2d 1075 (decided in June 1980). The court of appeals had stated: ". . . because the law exempts such property from . . . execution by a judgment creditor does not mean the exemption statute was intended to . . . (restrict) the freedom of debtors to dispose of these possessions as they wish. . . . No statute precludes exempt property from being sold."

Relying on this language, the appellate division stated that "[n]othing in the law forbids a debtor from executing a nonpurchase money mortgage or his residence to secure repayment . . . and thus create a lien which may be foreclosed despite the property's exempt status under the homestead statute."

HUD-Acquired Projects—Disposal

Russell v. *Landrieu*, 621 F.2d 1037 (9th Cir. 1980)

In this case, the Department of Housing and Urban Development (HUD) insured a mortgage encumbering a low-income housing project under section 236 of the National Housing Act. The lender assigned the mortgage to HUD, which foreclosed and acquired the project. Subsequently, HUD sold the project to defendant city and took back a purchase money mortgage. Pursuant to agreement with HUD, the city raised rents. The tenants of the project brought this action, naming as defendants the secretary of HUD, the director of the Los Angeles area office of HUD, and the city, and asked that the sale and the proposed rent increases be enjoined.

The plaintiffs asserted that their due process rights were violated when HUD sold the project to the city and permitted the city to raise rents without giving tenants prior notice and an opportunity to be heard. The court held that the plaintiffs were not entitled to maintain a statutory entitlement to operation of a project for low-income renters after HUD had foreclosed on the property and conveyed it to a later purchaser. The court reasoned that section 236 of the National Housing Act authorizes the secretary to make mortgage assistance payments to a mortgagor only while the contract of insurance is in effect or while the secretary holds the mortgage as the assignee of the mortgage lender; if the project is acquired by HUD, these payments must be suspended.

The court, however, rejected the secretary's claims that he was under no obligation to consider any other alternatives or to attempt to implement the policies and objectives of the National Housing Act in disposing of HUD-acquired projects. The court stated that the secretary must act, whenever possible, in a manner consistent with the objectives and priorities of the National Housing Act. The secretary, however, has no statutory obligation to dispose of the property he acquires as low-income housing, nor do tenants have a legitimate expectation, protected by the Fifth Amendment, that rents will not be raised and the character of the project will not be altered. The secretary must consider alternative means of disposing of HUD-acquired property that are consistent with the act, but there is no warranty, and no reasonable expectation, that such objectives will be obtained. If disposition of the property as low-income housing is not feasible, then HUD has no obligation to dispose of the property in this manner.

The court also stated that if the allegations in the complaint—that the secretary acted only to obtain maximum financial return for HUD and that he failed to consider and implement alternatives that would have enabled him to effect the policies and objectives of the National Housing Act—were true, these actions and omissions would constitute an abuse of the secretary's discretion.

Indian Lands—Accretion and Avulsion

Omaha Indian Tribe v. *Wilson*, 614 F.2d 1153 (8th Cir. 1980)

This is an action to quiet title in 2,900 acres of land lying adjacent to the Missouri River, which had been set aside by treaty in 1854 as a reservation for the Omaha Indian tribe. The dispute between the plaintiff Indian tribe and the defendant, the state of Iowa, arose because of movements in the course of the Missouri River. Although the river course change occurred relatively rapidly, the land that had been within an oxbow was completely submerged during this movement of the river. The state of Iowa argued that since the land was submerged the change was an accretion and therefore the soil that had been within the oxbow was now Iowa riparian land. The Omaha Indian tribe argued that the change was an avulsion, and therefore the land at issue remained a part of their reservation.

The federal district court, applying federal common law, held in favor of the state of Iowa. The Eighth Circuit Court reversed, and certiorari was granted by the United States Supreme Court. For the present opinion, the Supreme Court mandated that the legal standard in determining whether accretion or avulsion has occurred, absent any boundary dispute or need for a uniform federal rule, should be borrowed from applicable state property law.

At issue was whether the legal concept of accretion, under Nebraska law, included all river movements, other than those in which intervening land above the high water mark was identifiably in place.

Another question at issue was, in actions between Indians and white persons, who has the burden of proof?

The court's ruling on the first issue was no. On the second issue the court ruled that the white persons have the burden of proof.

The court reasoned that Nebraska case law makes clear that accretion has two elements: first, boundary changes in which the change in the river's channel is caused by erosion or excavation of earth from one bank and deposition of unidentifiable silt and sediment on the other—the land between the old and the new channels being completely disintegrated; second, this process must be gradual and imperceptible. Avulsion, on the other hand, occurs when there is a sudden and rapid change of the channel within the bed of a stream, whether or not intervening land is submerged during a sudden flood.

Applying the principle of 25 U.S.C. sec. 194, that "the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself," the circuit court quieted title in favor of the Omaha tribe, since the defendants had not made out more than a speculative case that accretion had occurred.

Indian Lands

United States v. *Morgan*, 614 F.2d 166 (8th Cir. 1980)

This was an appeal by three non-Indian individuals who had been enjoined from selling intoxicating beverages until they secured a license from the Standing Sioux tribe. The appellant operated a business known as the Dew Drop Inn, in an area known as "Mahto." Mahto is 10 miles east of McLaughlin, South Dakota. All government services and at least 70 percent of the appellant's business in Mahto were from non-Indian customers from McLaughlin.

Federal statutes prohibit sale of alcoholic beverages in "Indian country" unless the transaction conforms with state and Indian laws. But "Indian country" is defined to exclude fee-patented lands in "non-Indian communities."

The appellants argued that as operators on fee-patented lands, even though within the exterior boundaries of the Standing Rock Sioux Indian Reservation, they were within a non-Indian community and therefore exempt from the licensing requirements imposed by the Indians.

At issue was whether the term *non-Indian community* could include fee-patented land outside any incorporated non-Indian municipality and situated within the boundaries of an Indian reservation.

The court's opinion was yes. The federal statute focuses on "community" and not "town," "city," or other incorporated entity. The test for finding a "community" is the existence of an element of cohesiveness. The factors to be considered are the economic pursuits in the area, the common interests, and the needs of the inhabitants as supplied by the locality.

Because a large proportion of the inhabitants in Mahto are non-Indian and the history and background of the area is non-Indian, a man of average intelligence could find Mahto to be a non-Indian community. Therefore, the appellant needs no liquor license from the tribe.

Insurance

Robinson v. *MFA Mutual Insurance Co.*, 629 F.2d 497 (8th Cir. 1980)

In 1974, a vehicle operated by Juanita Robinson was struck by a hit-and-run driver. There was a maximum limit of $10,000, but to recover there must have been "physical contact" between the hit-and-run driver's vehicle and the insured's vehicle. Robinson made a claim against her insurance company under the uninsured motorist coverage, but the insurer denied liability, stating that both she and the state police had said that there had been no physical contact between the insured vehicle and the allegedly unknown vehicle.

The insured brought action, alleging that the insurance company knew all along that neither she nor the state police officer had made such statements. She argued as a theory of recovery deceit, willful and outrageous conduct causing her emotional distress, and the tort of "bad faith." The insurer moved for dismissal of the action on the grounds that the complaint did not state a cause of action under Arkansas law. The district court granted the insurer's motion to dismiss.

At issue was whether a complaint alleging deceit, willful and outrageous conduct causing emotional distress, and a tort of "bad faith" against an insurer, under Arkansas law, states a cause of action on which relief can be granted.

The court ruled yes. Since the Arkansas case of *Sturgeon* v. *American Life Assurance Co. of Georgia*, 589 S.W. 2d 207 (Ark. App. 1979), it is clear that a complaint containing allegations such as those made in the present case makes out at least a cause of action for deceit, a well-recognized common law tort. Robinson's complaint does not explicitly argue that it seeks recovery under the tort of deceit, but it does contain numerous references to the insurance company's allegedly deceitful conduct. A reading most favorable to the insured states a tort claim in deceit if nothing else. The circuit court reversed the district court's dismissal of the Robinson's action. The insurer's defense theory that because the insured had brought a previous action

on the contract this present action was barred by res judicata was rejected, since in the first suit, the contract suit, the insured had no reason to believe that the insurer was advancing anything other than bona fide defenses. Now, however, the cause of action was deceit, which requires proof substantially different from that presented in the suit for the policy proceeds.

Insurance—Estoppel as to Defenses Not Asserted When Claim Is Denied

Taylor v. *Commercial Union Insurance Co.*, 614 F.2d 160 (8th Cir. 1980)

The appellant in this case was a marine insurance company, which was appealing a judgment by the district court holding the insurer liable for certain losses, a statutory penalty, and attorney's fees based on vexatious refusal to pay the insured's claim.

An insurance policy had been issued to the insured as an individual doing business as Taylor Towing Service. After the policy had been issued, the towing service was incorporated, but the named insured in the policy was not changed.

In January 1973, Taylor Towing Service, Inc., took into tow two barges to bring them to dock. Since the dock was full, the barges, per agreement, were moored to a tree. Three days later, the mooring cables broke, and the barges drifted downstream and crashed into some docks. The dock owners brought suit against the insured, who submitted a claim to the insurer. In a letter to the insured, the insurer denied liability on the basis that this claim was outside policy coverage but did not mention any other defenses. Specifically, the insurer did not mention that the policy covered Taylor as an individual, whereas the action for damages had been brought against the corporation, Taylor Towing Service, Inc.

The issue was whether an insurer may be estopped from asserting a defense, even if the effect is that the insured may recover a benefit not provided by the terms of the policy.

The opinion was yes.

In the case at hand, the insurer, in the exchange of letters, conducted itself as if the policy applying to Paul S. Taylor's corporate successor in ownership of the towing service. Under Missouri law, when an insurer declines liability it waives all defenses not asserted at the time. Although waiver of a defense cannot create coverage in circumstances in which coverage is specifically excluded or never included under the terms of the policy, the insurer may be estopped from asserting a defense where appropriate, even if the effect is that the insured may recover a benefit not provided by the terms of the policy. Coverage is based on Taylor Towing Services, Inc.'s reasonable reliance that it was covered by the policy, and because of its actions the insurer is estopped from denying said coverage.

The insurer is not liable for vexatious refusal to pay the claim. Serious grounds for contesting liability have existed since this insurance claim was filed. Where there are open questions of fact or law, the insurer, acting in good faith, may insist on judicial determination of such questions without subjecting itself to penalties for vexatious refusal to pay.

Joint Tenants—Termination by Conveyance to Oneself as a Tenant in Common

Riddle v. *Harmon*, 102 Cal. App. 3d 524, 162 Cal. Rptr. 530 (1980)

In this case, a wife who held a parcel of real property in joint tenancy with her husband attempted to terminate unilaterally the joint tenancy by conveying her interest from herself as joint tenant to herself as tenant in common. After doing so, she disposed of her interest in the property by will. The appellate court rejected the archaic rule that one cannot enfeoff oneself, which, if applied, would defeat the clear intention of the grantor. Stating that there was no question but that the decedent could have accomplished her objective, termination of the joint tenancy, by one of a variety of circuitous processes, the court held that one joint tenant may unilaterally sever the joint tenancy without the use of an intermediary device.

Insurance—Punitive Damages

Linscott v. *Rainier National Life Insurance Co.*, 100 Idaho 854, 606 P.2d 958 (1980)

The plaintiffs had purchased three insurance policies insuring their daughter. Each policy included among its benefits $25 per day for hospital room expenses. Subsequently, their daughter spent 57 days in a hospital for a "seizure disorder," probably caused by the removal of her pituitary gland. The fact of the pituitary gland removal had been disclosed on the insurance application, but the seizure disorder had not. Rainier Life initially denied liability on the bases that the condition was epilepsy, which the insurance policies did not cover, and the condition had not been disclosed. On this latter basis, Rainier Life asked the plaintiffs to return the policies in exchange for a refund of all premiums paid. Shortly after the plaintiffs had brought this action in an effort to establish Rainier Life's liability and to seek punitive damages, Rainier Life admitted liability under the terms of the policies. The trial court awarded the plaintiffs $20,000 in punitive damages. Rainier Life argued on appeal that the award was excessive. The Idaho Supreme Court found that since the policies did not specifically except epilepsy from the coverage they did in fact cover it and even if Rainier Life had proved that the condition was epilepsy and the condition was not adequately disclosed in the application they did not have the right to rescind, since under the terms of the policies the company had only the right to refuse to make payment for any claims that arose therefrom. Noting that activity supporting an award of punitive damages involves an intersection of two facts—a bad act and a bad state of mind—the court stated that such damages may be awarded, even in contract actions, so long as the evidence shows that there has been an injury resulting from an act that is an extreme deviation from reasonable standards of conduct and that the act was performed with an understanding of or a disregard for its likely consequences. In the instant case, the court found that Rainier Life's refusal to make payments under the policies was totally unjustified and that its attempt to rescind the policies suggested that it was acting in bad faith—all to the end that the trial court was justified in awarding punitive damages.

With regard to whether the award was excessive, the court noted that punitive damage cases generally fit into three categories: those involving deceptive business schemes operated for profit and often victimizing numerous members of the public, those in which physical harm is threatened or actually inflicted, and those involving nonviolent but nevertheless serious disputes between two parties. Cases that fit the first two categories support a substantial and generous award of punitive damages. The court, however, found that this case fit the third category, and therefore the punitive damages should be limited to the plaintiffs' reasonable and necessary attorney fees in bringing the action; other related expenses not ordinarily recoverable, such as expert witness fees; and reasonable reimbursement for the time and effort required to bring the action.

Insurance

495 Corp. v. *N.J. Insurance Underwriting Association*, 173 N.J. Super. 114, 413 A.2d 630 (1980)

A fire insurance policy issued to the owner of improved realty contained the standard mortgage clause providing that the loss, if any, under the policy would be payable to the named mortgagee as his interest may appear. During the term of the policy and prior to a loss caused by fire, the owner had made a conveyance in lieu of foreclosure to the mortgagee. The insurance company rejected the mortgagee's proof of loss and refused payment on the ground that when the mortgagee accepted the deed in full satisfaction of the debt, he no longer had any insurable interest.

The court held that if a mortgagee acquires title to the mortgaged premises by a conveyance from the defaulting mortgagor in lieu of foreclosure, and a fire occurs thereafter, the mortgagee-owner is entitled to be compensated for his loss, to the extent of available insurance monies.

Insurance—No Fiduciary Relationship Between Insurer and Insured

Tyson v. *Aetna Life & Casualty Co.*, 429 N.Y.S. 2d 120 (1980)

Breach of a contract of insurance, in the absence of special, additional allegations of wrongdoing, does not give rise to a tort action. The fourth department of the appellate division upheld the insurer's motion to dismiss a tort action by an insured, who sought punitive damages in tort because of the insurer's failure to fulfill a contractual obligation to pay a claim under the policy. No special relation of trust or confidence arose out of the insurance contract. The court's decision complemented the prevailing rule in New York that for punitive damages to be awarded, the insurer must be shown to have engaged in a general course of conduct in denying claims that was fraudulent to its policyholders.

Judgments—Effect of Stipulated Vacation on Prior Execution Sale

Roosevelt Hardware v. *Green*, 72 A.D. 2d 261, 424 N.Y.S. 2d 276 (1980)

The long-established principle that a sheriff's deed is a nullity when the underlying judgment is voided does not apply in the case of a judgment that has been vacated by stipulation.

Green failed to pay installments for goods purchased from Roosevelt Hardware, which then obtained a default judgment. Execution was issued, and Green's real estate was sold by the sheriff. Green initiated a motion to vacate the judgment based on defective service of process. Without going to trial, the parties stipulated vacation of the judgment and provided for repayment of the debt by installments. The trial court thereafter granted Green's motion to show cause why her title should not be reestablished as against the execution sale purchaser.

In reversing the trial court on the last point, the appellate division noted that although the legislature had created, in CPLR 5240, a broad supervisory power in the court to deny, limit, condition, regulate, extend, or modify the use of enforcement procedures, such power has its limitations and had been applied only prior to the execution. Moreover, since a judgment may be vacated by stipulation without the merits being determined by the court by simply filing with the clerk, such a stipulation does not reflect a finding that the underlying judgment has been improperly obtained and hence voided.

Landlord and Tenant

Kesselman v. *Gulf Oil Corp.*, 479 F.Supp. 800 (Pa. 1979)

The plaintiff, a service station operator, instituted an action against Gulf Oil Corp., claiming that the latter violated the Petroleum Marketing Practices Act (15 USCA §2801, et seq.) when the defendant failed to renew the plaintiff's lease agreement. Specifically, the plaintiff alleged the following: the defendant's proposed rent increases were not made in good faith and in the normal course of business (15 USCA §2802 (b) (3) (A)), and the oil company did not give the proper 90-day notification of its intention to terminate the lease (15 USCA §2804).

The case came before the bench on the plaintiff's motion for a preliminary injunction, whereby the defendant would be ordered to maintain relations with the plaintiff until after a trial on the merits. Attempting to mitigate the disparity of bargaining power between franchisor and franchisee, Congress had codified provisions in the act whereby preliminary injunctions might be more easily granted. 15 USCA §2805 (b) (2), however, states in part that requisite to the granting of a preliminary injunction the franchisee must show that "there exists sufficiently serious questions going to the merits to make such questions a fair ground for litigation."

On both issues, the court found that the plaintiff failed to sustain his burden. More particularly, the defendant countered the first allegation by introducing testimony that indicated that the proposed rental costs were calculated by taking the higher of either the occupancy cost to Gulf, which was a lessee of the property, or 10 percent of the appraised value. Concluding that the formula produced an unrealistic rental figure, the defendant reduced its rent offer to less than one-half the occupancy costs.

In ruling on the issue of proper notification, the court found that such notice need not have been given 90 days before the original lease expired. To the contrary, proper notice could be given at any point during the month-to-month tenancy, which was created by a holdover clause contained in the original lease.

Accordingly, the injunction was denied.

Ewert v. *Basinger*, 59 Ohio Misc. 43, 392 N.E. 2d 911 (1978)

Evicting a tenant who is depositing rent in court because of housing code violations is not retaliatory when necessary alterations require vacating the premises. The 30-day notice of termination does not satisfy the 3-day notice requirement of Ohio Rev. Code §1923.04, however.

Colquett v. *Byrd*, 59 Ohio Misc. 45, 392 N.E. 2d 1328 (1979)

Injunction is a proper remedy for violation of a landlord's duty under the landlord-tenant act (here terminating utilities and excluding the tenant). It may be issued without bond.

Benlehr v. *Shell Oil Co.*, 62 Ohio App. 2d 1, 402 N.E. 2d 1203 (1978)

A lessor who leases premises for a dangerous purpose (here a service station) may be liable for injury to third persons if he selects an incompetent lessee (here one totally inexperienced in dealing with cars).

State ex rel. Carpenter v. *Warren Municipal Court*, 61 Ohio St. 2d 208, 400 N.E. 2d 391 (1980)

A forcible entry and detainer action does not try title and should not be stayed pending a common pleas action to set aside a deed.

Land Use Regulation—Historic District

Aertsen et al. v. *Landrieu*, 488 F.Supp. (Mass. 1980)

In this case, the court entered a preliminary injunction to enjoin demolition of certain existing structures on the proposed site of a federally subsidized housing project in Boston. On the defendant's motion to vacate the injunction, the court held that the Department of Housing and Urban Development's (HUD) determination that seven buildings situated outside, but close to, a historic district were ineligible for inclusion in the National Register of Historic Places was made in accordance with regulatory procedures and was not arbitrary or capricious; that HUD's determination that federally subsidized housing projects would have no adverse effect on adjacent properties included within a historic district was not erroneous; and that HUD's determination not to prepare an environmental impact statement of the housing project was reasonable because the project had already been substantially completed and an environmental impact statement is essential only when future expansion is contemplated.

Land Use Regulation—Wetlands, Limits of Police Power

Spears v. *Berle*, 48 N.Y. 2d 254, 422 N.Y.S. 2d 636 (1979)

The same practical standards used to "differentiate permissible police power from overly vigorous and hence unconstitutional impositions" in land use regulation, whether by zoning ordinances or more circumscribed measures, are applicable to the regulation of the use of wetlands under the New York Freshwater Wetlands Act. Under this test, the New York Court of Appeals said that the regulation is too onerous when it renders the property unsuitable for any reasonable private use and thereby destroys all but a residue of its value. Thus, a challenger must demonstrate that under no permissible use would the parcel produce a reasonable return.

The plaintiffs had proposed mining their

wetlands property, an activity that would lead to all but its complete destruction but that they asserted was the only use that would produce a reasonable economic return. This use was not expressly permitted by the act but could be carried out only if a permit was granted by the wetlands commissioner. Such a permit was refused.

To carry the burden of his challenge, the court stated, "the landowner should produce 'dollars and cents' evidence as to the economic return that could be realized under each permitted use"; only if the evidence shows almost complete destruction of this value can a "taking" be established.

Land Use Regulation

Jackson v. *Claxton*, 61 Ohio St. 2d 283, 400 N.E. 2d 1356 (1980)

Ohio Rev. Code § 1721.03, which prohibits a cemetery association or a benevolent or religious society from locating a cemetery within a hundred feet of a building, does not apply to an individual cemetery owner.

Limited Partnership—"Substantial Compliance" with Georgia Limited Partnership Act

Hirsch et al. v. *Equilateral Associates et al.* 245 Ga. 373, S.E. 2d (1980)

This was an action by the limited partners of a limited partnership in which they alleged that limited partnership interests were issued to them in 1975. The certificate of limited partnership and an amendment thereto were executed by the limited partners but were not witnessed, notarized, or recorded. The general partners, who held title, conveyed it to the partnership entity.

The limited partners also alleged that subsequently a limited partnership certificate was filed but it was substantially altered from the one that the limited partners had signed.

In 1977, the property was sold by the general partners without the consent of the limited partners. Among other things, the plaintiff alleged fraud on the part of the general partners and deprivation of the plaintiff's property, which was the sole asset of partnership, and that the sale of the property was void.

The court ruled that the limited partners had only a personal property interest in the property of the partnership and that under the partnership agreement the limited partners had contractually agreed that the general partners had the power to sell the assets of the partnership. The court went on to hold that the failure to have the signatures of the limited partners notarized on the certificate was inconsequential since the Limited Partnership Act (Ga. Code Ann. § 75-403) states that "substantial compliance" is all that is required. This decision would seem to have far-reaching effects on the creation of limited partnerships. The act requires that the certificate must be "sworn to" by all the partners. This suggests a signing and swearing before a notary. In the past, the position was taken that a limited partnership certificate could not be signed by an attorney-in-fact for the signing partners because he could not "swear" on behalf of his principal.

Under this decision, it would appear that a failure to have the certificate "sworn to" is still in "substantial compliance" with the act, and it thus seems to permit the signing of the certificate by an attorney-in-fact.

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cating to the town other lots for open space, public use, school sites or agricultural use. Both the transferring lot and the transferee lot must be owned by the same party. The fact that transfers are negotiable only with the town made the programs unique.

Chesterfield's ordinance allows landowners to use a cluster design technique to increase density of development on transferee lots.

Another popular reason why state and local governments have adopted TDR ordinances is protecting ecologically vulnerable areas from excessive development.

The largest project of this kind is in the Pine Barrens region of New Jersey—a million-acre, sandy-soil area stretching through much of the south and central regions of the state. The New Jersey Pinelands Planning Commission, which has jurisdiction over the area, created a Pinelands Development Credit Program allowing TDR between underdeveloped ecologically sensitive areas and regions in which development exists and which can accommodate further growth. Legislation creating this program was passed by the New Jersey state assembly and senate in November, 1980, and was signed by New Jersey's Governor Brendan Byrne in January, 1981.

Pressures for increased home building in the vast Pinelands region have escalated during the past decade—to the point where decisions about the Pinelands are a major controversy in New Jersey politics. The Pinelands controversy also has drawn the involvement of the federal government, represented in the creation of the Pinelands National Preserve, an umbrella designation given to the whole one-million-acre region.

In February, 1979, Governor Byrne imposed a moratorium on construction in the Pinelands until a further decision by the New Jersey legislature. At the same time, Governor Byrne issued an executive order creating the Pinelands Planning Commission to decide use and regulation matters in the area.

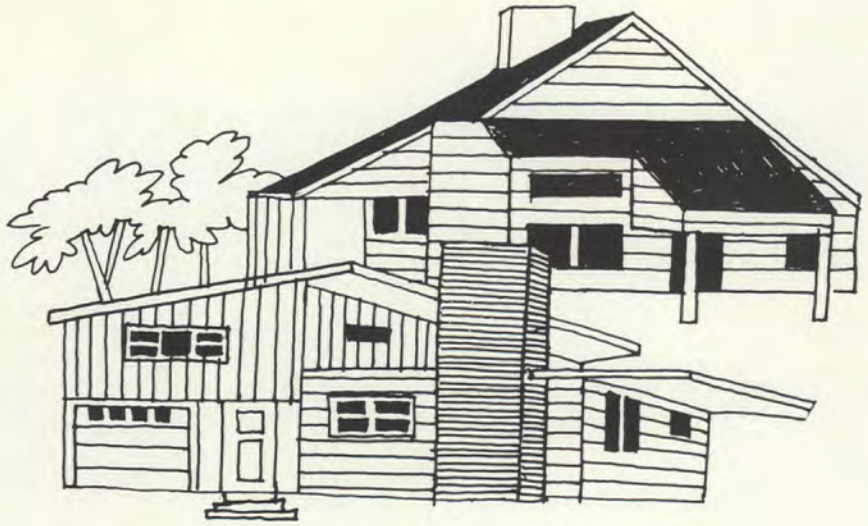
The moratorium on Pinelands development has upset many in New Jersey's powerful home building industry, as well as others who are concerned about the state's flagging economy. Constituting roughly 20 percent of the state's land mass, the Pinelands Preserve is regarded by some as merely lost economic opportunity. Many of those disappointed with the moratorium are the restricted landowners.

The pressures for development of the Pinelands are aggravated by the influx of population accompanying nearby Atlantic City's exploding resort and casino industry.

Assailed by complaints over restrictions on Pinelands development, one of the Pinelands Planning Commission's earliest moves was to create the Pinelands Development Credit Program. This program was instituted with passage of the Pinelands Preservation Act by the New Jersey state assembly and senate. The act also created a comprehensive management plan for the Pinelands.

Through TDR, the Pinelands Development Credit Program takes the burden off landowners in heavily restricted areas by allowing them to benefit from any increase in development values which are realized in growth areas. And, the program accommodates the need for residential growth in the area.

The restricted areas within the Pinelands have been labeled as preservation area districts, special agricultural production areas and agricultural production areas in the comprehensive management plan. The three designations represent varying levels of restrictions on land use.



The Development Credit Program allocates to landowners in these areas credits, which can then be purchased by landowners in designated regional growth areas, and used to build increased residential densities.

The regional growth areas are found in 30 townships located mostly on the periphery of the Pinelands preservation areas and agricultural production areas. The plan describes criteria for regional growth areas "developable lands are those privately held, non-wetlands lands with a depth to seasonal high water table of greater than five feet," or "where sewer systems are available, soils with a depth to seasonal high water table exceeding 1.5 feet may also be considered developable."

To transfer development credits, a landowner in the preservation district or one of the agricultural areas sells his credits and records a deed establishing a restriction limiting the future uses of his plot of land to those allowed under the plan for the area. The credits can be bought by land owners in the regional growth areas.

The Development Credit Program plan assigns different values to lands, depending on which district. The credit values are determined through a ratio based on the comparative values of uplands to wetlands, and, in turn, to agricultural land. For example, agricultural land has a higher credit value than wetlands because of its inherently greater development potential.

Agricultural areas are assigned two development credits per 39 acres; lands in the preservation areas are allocated one credit per 39 acres; and lands that are wetlands are allocated only .2 credits per 39 acres.

One Pinelands development credit translates to four additional potential housing units, usable only in the regional growth areas.

The Pinelands Comprehensive Management Plan, which is state government created and mandated, requires that townships encompassing regional growth areas adopt land use regulations which make use of the development credit transfer system.

The plan describes how this should be done, with townships issuing a zoning rule of a base residential density which is the density allowed under the particular town's regular zoning, and a high density

Continued on page 22

Bernard M. Rifkin

Utilizing TDR in New York City

Photo by Walter Smalling Jr. for the National Register of Historic Place

Transferrable development rights (TDR) is a growth industry in the arena of land use regulation. The ability of an owner to utilize the full development rights of a parcel of property has its origins in the earliest common law attempts to regulate the type of construction by the rejection of the concept of "stopping another's lights" to the recognition of private covenants and restrictions and the adoption of zoning codes.[1]

In 1916, the City of New York adopted its first zoning code which was based on five categories of height and tied to street widths. The enormous construction boom of the late twenties, particularly on Manhattan Island (New York County), was succeeded by an equally startling development after World War II.[2] It was seen that density could not be controlled only by height restrictions, but could be better accomplished through regulation of Floor Area Ration (FAR).[3] By 1961, FAR controls had been extended to business areas. The 1961 Zoning Lot Resolution not only regulated the FAR, but created a zoning lot within the city block.

Until August 18, 1977, when Zoning Lot Resolution 12-10 was amended to its present form, a zoning lot was required to be in one ownership, which could consist of more than one tax lot in a city block, if the lots were contiguous for at least 10 linear feet. Furthermore, ownership was deemed to include a lease of not less than 50 years duration, with an option to renew such lease of not less than a total of 75 years duration.[4]

In 1972, the Court of Appeals of the State of New York decided *Newport Associates v. Solow*.[5] In that case the defendant held a vacant parcel in fee and a leasehold estate on an adjoining parcel. The highest court of the state held that the holder of the leasehold estate (the defendant) was entitled to the full utilization of the development rights of the leasehold estate. The court also held that the owner of the reversionary interest in the leasehold estate (the plaintiff) was not ownership for the purpose of floor area ratio of air space rights. This holding was made despite a provision in the lease that prohibited the lessee from making additions, alterations or changes to the demised premises which would change its character.[6]

The concept of a zoning lot as an amalgam of more than one tax lot was indeed a new concept but it was, as Newport Associates indicated, not yet fully or adequately articulated. What happens to the zoning lot development rights which are based on a 75-year lease after expiration

[1] **David Alan Richards, "Development Rights Transfer in New York City," 82 *Yale Law Journal*, Vol. 82 p. 338, pp. 340 and 343. (1972)**

[2] **See *Yale Law Journal* supra, p. 344**

[3] **See *Yale Law Journal* supra, p. 346. Floor Area Ratio (FAR) is an index figure which expresses the total allowable floor area of a building as a multiple of the area of its lot. (fn omitted). A 10,000 square foot lot in a district where the FAR was twelve, would this be limited to a maximum of 120,000 square feet of floor space." To the extent that a property has underutilized its FAR it has "excess" development rights, which can be transferred from one or more tax lots to the benefit of another.**

[4] **Zoning Lot Resolution Article 1, ch. 2 12-10 (Board of Estimate, City of New York) (1961)**

[5] **332 N.Y.S. 2d 617 (1972) Court of Appeals. The Court here confused the concept of air rights and development rights. This has had some mischievous consequences in other areas such as an asserted right of the City of New York to tax the transfer of development rights as an interest in real property.**

[6] **A clause which might be considered in New York City leases to protect the reversionary interest in the lease might be as follows:**

> **"The lessee should have no right to make structural changes to the building. The lessor reserves to itself the air rights above, below and around the building, including any space below the present basements or vaults. The lessor further reserves the right to join in any zoning lot declaration for its benefit, or for the benefit of any adjoining lot within the block where the premises are located, pursuant to Zoning Lot Resolution 12-10 of the city planning commission and any legislation or regulation which is substitution or in expansion or in amendment thereof."**

The author is first vice president and chief counsel of The Title Guarantee Company, New York City.

Grand Central Terminal

of the lease? Can the holder of the reversionary estate now utilize these rights again? Is a 75-year-old building worthless? Furthermore, would the reversionary fee owner (plaintiff) in the Solow case have been able to utilize the development rights first if he sought to develop another parcel that was adjacent to the demised premises, but also owned by the plaintiff?

Frankly, the Solow case was a shock to the real estate community and was undoubtedly the motivation behind the substantial revision of Zoning Lot Resolution 12-10 which was adopted on August 18, 1977. What effect would prior encumbrances have on the development rights where such interests were clearly superior to the utilizer of the development rights? The law did not cover these and other contingencies.

Zoning Lot Resolution 12-10 (After August 18, 1977)

The new law radically changed the basis for the Department of Buildings of the City of New York to issue a building permit to allow the utilization of "excess" development rights.[7]

Certification is required by a licensed New York state title company to an "applicant" for a building permit of certificate of occupancy, that each "party in interest" has, with respect to a single ownership zoning lot, joined in the declaration or in the case of a multiple ownership zoning lot, has either joined or waived their rights to join in the declaration. (Subdivision "c" and "d" of the Resolution 12-10.) The involvement of the title company in the process of certification has opened new vistas and challenges for the industry which are as yet not fully realized.[8]

The resolution defines "parties in interest" with respect to single ownership tax lots as follows:

"(Subdivision "c")

"(w) the fee owner thereof

"(x) the holder of any enforceable recorded interest superior to that of the fee owner and which could result in such holder obtaining possession of all or substantially all of such tract of land

"(y) the holder of any enforceable recorded interest in all or substantially all of such tract of land which would be adversely affected by the development thereof

"(z) the holder of any unrecorded interest in all or substantially all of such tract of land which would be superior to and adversely affected by the development thereof and which would be disclosed by a physical inspection of the tract of land"

With respect to multiple tax lots or parts thereof the resolution defines "parties in interest" as follows:

"(Subdivision "d")

"(w) the fee owner or owners thereof

"(x) the holder of any enforceable recorded interest in all or a part thereof which would be superior to the declaration and which could result in such holder obtaining possession of any portion of such tract of land

"(y) the holder of any enforceable recorded interest in all or a part thereof which would be adversely affected by the declaration

"(z) the holder of any unrecorded interest in all or part thereof which would be superior to and adversely affected by the declaration and which be disclosed by a physical inspection of the portion of the tract of land covered by declaration"

It must be observed that *Newport Associates* has been repealed since fee owners must join in the declaration. The 75-year lease is no longer permitted except for a grandfather clause with respect to leases recorded prior to August 1, 1978.[9] Further-

[7] **Board of Estimate Calendar No. 52 of 1977.**

[8] **In New York State the New York Board of Title Underwriters has not yet filed an application for offering zoning coverage in connection with the development rights. It is therefore limited to making certifications and insuring the benefits of negative easements for light and air or against further development of the servient parcel which frequently accompany the transfer of the development rights.**

[9] **"Where ownership of a zoning lot or a portion thereof was effected prior to the effective date of this amendment, as evidenced by an attorney's affidavit, any development, enlargement or alteration on such zoning lot may be based upon such prior effected ownership as then defined in the zoning lot definition of Section 12-10. Such prior leasehold agreements shall be duly recorded prior to August 1, 1978."**

more, it is important to note that many other interests come into play whose consents must be obtained in order to obtain Building Department approval.

The composition of the "zoning lot" is defined with greater precision than in the earlier version of Zoning Lot Resolution 12-10:

- A zoning lot may or may not coincide with a lot as shown on the official tax map of the City of New York, or on any recorded subdivision plot or deed.
- A zoning lot may be subdivided into two or more zoning lots provided all the resulting zoning lots and all the buildings thereon shall comply with the applicable provisions of the zoning lot resolution.
- The zoning lot must consist of parcels that are contiguous for at least 10 linear feet.

Problems Outlined

Some problems of the parties in interest include:

Is a ground lessee or the lessee of a building a party in interest under the Zoning Lot Resolution? Subparagraph "x" of both subdivision "c" and "d" in paragraph 2 above would seem to express a clear intent that such a lessee is a party in interest. The closer question is whether a space tenant of less than the entire premises would be a party in interest. The answer to this question may turn on whether the tenant would have rights to the same kind of space in the event of fire or demolition. The rights of such a tenant may be covered by subparagraph "y" of subdivision "c" and "d," particularly if such rights are set forth in a recorded lease.

Suppose there is a lessee of all or part of the premises who has an option to purchase or a right of first refusal. Such a lessee would clearly be a party in interest under subsections "x" of "y" of subdivision "c" and "d".[10] One would also suppose that a mortgagee on a lease where the fee owner has subjected the fee interest to the leasehold mortgage, or has agreed to recognize the mortgagee or its assignee as a tenant, would also be a party in interest.

Is a mortgagee of the fee who would otherwise clearly be a party in interest still be such a party, if the mortgage were clearly prepayable and sufficient funds or an irrevocable letter of credit were held by a title company to satisfy the mortgage at any time? There is neither statutory nor case authority for such a proposition, but it would seem a reasonable position for an insurer to take. After all, if the funds are available and the mortgage is prepayable, what interest does such a mortgagee have in the development rights?

The obvious parties who may be parties in interest are the state for franchise taxes and estate taxes, the City of New York for corporation taxes and real estate taxes and other municipal liens, the federal government for estate taxes, and other federal liens. Obtaining waivers from these authorities may be difficult if not impossible. Therefore, most companies insist on disposition prior to final certification or that sufficient deposits (escrows) be placed with them in order to enable their removal as parties in interest from the certification.

Subsections "z" of subdivision "c" and "d" refer to the holder of an *unrecorded* interest which would be superior to and adversely affected by the declaration, but which would be revealed by a physical inspection. Conceivably the holder of a visible prescriptive easement on the parcel to be improved would be such an interest that would be required to join in or waive its rights to join in the declaration.

Where a religious corporation is in-

[10] See Section 290 (2) and 294 (7) of New York Real Property Law for the protection afforded lessees under the Recording Acts.

N.B.# _____
or
ALT.# _____

EXHIBIT "I"

CERTIFICATION PURSUANT TO ZONING LOT SUBDIVISION C OF SECTION 12-10 OF THE ZONING RESOLUTION OF DECEMBER 15, 1961 OF THE CITY OF NEW YORK - AS AMENDED EFFECTIVE AUGUST 18, 1977

THE TITLE GUARANTEE COMPANY, a title insurance company licensed to do business in the State of New York and having its principal office at 120 Broadway, New York, New York hereby certifies that as to the land hereafter described being a tract of land, either unsubdivided or consisting of two or more lots of record, contiguous for a minimum of ten linear feet, located within a single block in the single ownership of _____ that all the parties in interest constituting a "party in interest" as defined in Section 12-10, subdivision (c) of the Zoning Resolution of the City of New York, effective December 15, 1961, as amended, are the following:

NAME	ADDRESS	NATURE OF INTEREST

The subject tract of land with respect to which the foregoing parties are the parties in interest as aforesaid, is known as Tax Lot Number(s) _____ in Block _____ on the Tax Map of the City of New York, _____ County and more particularly described as follows: (Full Metes and Bounds Description)

BEGINNING at a point on the side of distant feet from the corner formed by the intersection of and running thence (direction) feet; thence feet; thence feet; thence feet; to the point or place of beginning.

That the said premises are known as and by street address(es) _____ and _____ as shown on the following DIAGRAM:

) Show Distance from corner.

BLOCK NO.

N.

) Show Block & Lot numbers and dimensions of each lot.

The north point of the diagram *must* agree with the arrow.

Delete if not applicable

That the Zoning Lot Description and Ownership Statement containing the above description was recorded on the _____ day of _____, 19____ in Record Book at Page _____. CERTIFIED this _____ day of _____ to _____, the applicant for this certification.

N.B.# _____
or
ALT.# _____

EXHIBIT II

CERTIFICATION PURSUANT TO ZONING LOT
SUBDIVISION D OF SECTION 12-10
OF THE ZONING RESOLUTION OF DECEMBER 15, 1961
OF THE CITY OF NEW YORK - AS AMENDED
EFFECTIVE AUGUST 18, 1977

THE TITLE GUARANTEE COMPANY, a title insurance company licensed to do business in the State of New York and having its principal office at 120 Broadway, New York, New York, hereby certifies that as to the land hereafter described being a tract of land, either unsubdivided or consisting of two or more lots or record, contiguous for a minimum of ten linear feet, located within a single block, that all the parties in interest constituting a party as defined in Section 12-10, subdivision (d) of the Zoning Resolution of the City of New York, effective December 15, 1961, as amended are the following:

NAME	ADDRESS	INTEREST (IDENTIFY THE LOT OR LOTS AFFECTED)	DECLARATION OR WAIVER (INDICATE WHICH)	RECORDING DATE	RECORD BOOK	PAGE

The subject tract of land with respect to which the foregoing parties are the parties in interest as aforesaid is known as Tax Lot Number(s) _____ in Block No. _____, as shown on the Tax Map of the City of New York _____ County and more particularly described as follows: (Full Metes and Bounds Description).

BEGINNING at a point on the side of distant feet from the corner formed by the intersection of and running thence feet; thence feet; thence feet; thence feet; to a point or place of beginning.

That the said premises are known as and by the street address(es) _____ _____ and _____

That the said premises are known as and by street address(es) _____

_____, as shown on the following DIAGRAM:

) Show Distance from corner.

BLOCK No.

N.

) Show Block & Lot numbers and dimensions of each lot.

The north point of the diagram *must* agree with the arrow.

NOTE: A Zoning Lot may or may not coincide with a lot as shown on the Official Tax Map of the City of New York, or on any recorded subdivision plot or deed. A Zoning Lot may be subdivided into two or more zoning lots provided all the resulting zoning lots and all the buildings thereon shall comply with the applicable provisions of the zoning lot resolution.

THIS CERTIFICATE IS MADE FOR AND ACCEPTED BY THE APPLICANT UPON THE EXPRESS UNDERSTANDING THAT LIABILITY HEREUNDER IS LIMITED TO ONE THOUSAND (1,000.00) DOLLARS.

THE TITLE GUARANTEE COMPANY

BY: _____

volved as a party in interest, court approval will be required to permit its joinder in the declaration or execution of a waiver.[11]

[11] **Section 12. Religious Corporation Law**

The Documentation

The basic forms of documentation are appended. Exhibit I shows the sample of the title company certification where the zoning lot is in a single ownership and

". . . if you look at the number of major developments that have been affected by Zoning Lot Development Rights in a rather restricted area of New York City, the effect may be termed profound."

Exhibit II shows the title company certification where the zoning lot consists of multiple ownership; Exhibit III shows the zoning lot description; Exhibit IV shows the declaration of zoning lot restrictions; Exhibit V shows a sample form of waiver of declaration by a party in interest.

The parties to the transaction usually expand the declaration of zoning lot with a comprehensive agreement between the dominant (or user of the development rights) estate and the servient estate. Such agreements can provide for utilization of less than all the available development rights. Provision can also be made for the future expansion of the zoning lot. In such cases the agreement may provide that the parties who joined in or waived their rights to join in the original declaration will agree to join in an expanded declaration. Frequently this agreement gives the original declarant the power to execute the expanded declaration on behalf of such parties in interest which ought to be construed as a power coupled with an interest which would survive even the infirmity on death of the party in interest.[12]

The agreement between the declarant and the other parties in interest will often create a negative easement.[13] The intention of this agreement is to provide for an easement for light and air for the benefit of the dominant estate. It also usually will provide that an existing low lying structure not be expanded in any direction and retain its present "foot print" so as not to affect the utilization of the FAR in favor of the dominant estate.

Are development rights an interest in real property and therefore subject to the real property transfer taxes of both the City and State of New York? The finance administrator of the City of New York has taken this position that the filing of the declaration of zoning lot even without creating the negative easement is a taxable event. Although one court has called

[12] **Warren's Weed, *New York Real Property*, 4th Ed., Vol. 1, Attorney in Fact, Par. 6.01**

[13] **Warren's Weed, *New York Real Property*, 4th Ed., Vol. 4A, Easements, Par. 3.07**

N.B.# _____
OR
ALT.# _____

EXHIBIT III

ZONING LOT DESCRIPTION AND OWNERSHIP STATEMENT BY BUILDING DEPARTMENT PERMIT APPLICANT AND TO BE RECORDED IN THE COUNTY CLERK'S OR REGISTER'S OFFICE

_____, a New York Corporation having its principal office at _____, an applicant for present or future permits pursuant to the Zoning Resolution of the City of New York, effective as of December 15, 1961, and as subsequently amended states that the zoning lot to which the aforementioned permit or permits pertain are shown on the Tax Map of the City of New York, County of New York, as Lots _____ in Block _____ as shown on the Tax Map of the City of New York _____ County, and is more particularly described as:

BEGINNING at a point on side of distant feet from the corner formed by the intersection of and running thence feet, thence feet; thence feet; thence feet, to the point or place of beginning.

That the said premises are known as and by the street address(es) _____ and _____, as shown on the following DIAGRAM:

) Show Distance from corner.

N.

) Show Block & Lot numbers and dimensions of each lot.

The north point of the diagram *must* agree with the arrow.

The above described zoning lot is presently owned by:

BLOCK	TAX LOT	NAME	ADDRESS

IN WITNESS WHEREOF the applicant for permit has executed this instrument this _____ day of _____, 19____.

BY _____

EXHIBIT IV

DECLARATION OF ZONING LOT RESTRICTIONS

_____, residing at _____:
_____, residing at _____:
_____ a _____ corporation having its principal office at _____ constituting the "parties in interest" (excepting those parties waiving their respective rights to join therein) as defined in Section 12-10(d) of the Zoning Resolution of the City of New York effective December 15, 1961, as amended with respect to the land known as Tax Lot(s) _____, in Block _____ on the Tax Map of the City of New York, County of _____, do hereby declare that the tract of land known as and by street address(es) _____ and _____ is to be treated as one zoning lot for the purposes of and in accordance with the provisions of the aforementioned Zoning Resolution effective December 15, 1961, as amended August 18, 1977.

IN WITNESS WHEREOF the declarants have executed this instrument this _____ day of _____, 19____.

_____

Acknowledgment

these development rights "valuable and transferrable,"[14] there is considerable doubt as to the justification for the city's position.[15]

Miscellaneous problems include the following:

- Such matters as catastrophe, fire or condemnation should be considered in connection with zoning lot development rights transfers. Down zoning in connection with these future events may require some considerable thought since the acquired development rights may then be inadequate at the time of rebuilding. Even future alterations to the building using the development rights may require some similar consideration.

- Title Insurance ought to be available to insure the real value of the development rights. The negative easement device is a present alternative, but not the best one. Development rights transfer is a device that is here to stay. Our challenge is to make it work, and I believe our New York title industry is doing just that.

I have been informed by the Building Department of the City of New York that, since the effective date of Zoning Lot Resolution 12-10 as amended August 18, 1977, approximately 100 applications have been made for the creation of zoning lots; these have been predominantly made in New York County. This figure may seem to be relatively insignificant when taken as an absolute number. However, if you look at the number of major developments that have been affected by Zoning Lot Development Rights in a rather re-

[14] *Fred F. French Investing Company, Inc.* v. *City of New York* 385 N.Y.S. 2d 5 (1976).

[15] See Ch. 9 of Laws of 1965 and Title II, Ch. 46 Administrative Code of The City of New York adopting a real property transfer tax. Article 2 of the regulations states as follows:

> "Any document, instrument or writing (other than a will), regardless of where made, executed or delivered, whereby any real property or interest therein is created, vested, granted, bargained, sold, transferred, assigned or otherwise conveyed," is subject to the real property transfer tax.

It is less than clear that development rights are conveyed or are an interest in real property and is therefore subject to the tax.

EXHIBIT V

WAIVER OF DECLARATION OF ZONING RESTRICTIONS

_____ residing at
_____
_____ residing at
_____;
_____ a
_____ corporation having its principal office at _____, being a "party in interest" as defined in Section 12-10 of the Zoning Resolution of the City of New York effective December 15, 1961, as amended with respect to the land known as Tax Lot(s) _____, _____, _____ in Block _____ of the Tax Map of the City of New York, County of _____, hereby waives (its) (his) (her) (their) respective right(s) to execute a declaration that the above described lands which are known by street address(es) _____ _____ and _____ _____ is to be treated as one zone lot for the purpose of and in accordance with the provisions of the aforementioned zoning resolution and shall have the effect therein set forth.

IN WITNESS WHEREOF the undersigned has executed this waiver this _____ day of _____, 19____.

_____

Acknowledgment

_____

Delete if not applicable — That the Zoning Lot Description and Ownership Statement containing the above description was recorded on the _____ day of _____, 19____ in Record Book at Page _____. CERTIFIED this _____ day of _____ to _____, the applicant for this certification.

NOTE: A Zoning Lot may or may not coincide with a lot as shown on the Official Tax Map of the City of New York, or on any recorded subdivision plot or deed. A Zoning Lot may be subdivided into two or more zoning lots provided all the resulting zoning lots and all the buildings thereon shall comply with the applicable provisions of the zoning lot resolution.

THIS CERTIFICATE IS MADE FOR AND ACCEPTED BY THE APPLICANT UPON THE EXPRESS UNDERSTANDING THAT LIABILITY HEREUNDER IS LIMITED TO ONE THOUSAND (1,000.00) DOLLARS.

THE TITLE GUARANTEE COMPANY

BY: _____

ACKNOWLEDGEMENT

NOTE: Section C26-110.2 Subdivision (a) Paragraph (1) of the Administrative Code requires submission of an accurate lot diagram in accordance with an attached boundary survey made by a licensed surveyor, which need not be recorded but which must be submitted with the application for the permit.

stricted area of New York City, the effect may be termed profound.[16]

The transferrable development rights occasioned by the use of underutilized development rights accruing to landmarks designation is beyond the purview of this article. See the following articles for discussion of that subject:

- "From Zoning to Landmark Preservation: The Grand Central Terminal Decision Signals a Shift in Land Use Regulation," New York Law School *Law Review*, Vol. 25 p. 39, 1979.
- Marc A. Chamlin, "Landmarks Preservation Laws," Property, *1979 Annual Survey of American Law* New York University.
- Marcus, Norman "Air Rights Transfer in New York City" 36 *Law and Contemporary Problems* 372 (Summer, 1971)
- Richards, David Alan, "Note: Development Rights Transfer in New York City," 82 *Yale Law Journal* 338 (December, 1972)

[16] **The building department of the City of New York deals with the practical implementation of Zoning Lot Resolution 12-10. This department has various specialists who deal with these matters; they have been uniformly helpful and cooperative in advancing the legal and procedural elements involved in the transfer of development rights.**

"Title Insurance ought to be available to insure the real value of the development rights. The negative easement device is a present alternative, but not the best one. Development rights transfer is a device that is here to stay. Our challenge is to make it work, and I believe that our New York title industry is doing just that."

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All of the cases published in *The National Property Law Digests* over the past five years and a comprehensive index are now available from the publishers in a single bound volume.

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Mitchell S. Cutler and Milton Quint, nationally prominent real estate lawyers with offices in Washington, D.C., are the principal editors of the publication. In preparing each issue of the *Digests*, the entire West Reporter system is searched monthly and cases having national significance are selected.

Copies of the bound volume are available on a 10-day approval basis at $120 each including postage. Orders may be addressed to The National Property Law Digests, Inc., 8401 Connecticut Avenue, N.W., Washington, D.C. 20015.

TDR—
from page 15

"Title insurance companies nationwide have been asked to insure or provide coverage for TDR. To date, title companies generally have recognized the transfers as negative easements or appurtenant easements and have insured them as such."

which is the maximum density achievable through use of the transferred development credits. The plan asks that the municipalities allow for an additional housing capacity of roughly 50 percent above the base density for developable lands within the growth areas.

The Pinelands Development Credit Program is still new—perhaps too new to assess its accomplishments in answering the debate over preservation versus development that continues to rage in New Jersey. However, a good deal of optimism has accompanied the implementation of the program.

The creators of the Pinelands Development Credit Program recognize, however, that a proper supply and demand relationship for the credits must exist for the program to work. The program plan reads: "The creation of a viable market for credits depends on the existence of an adequate number of sites within the growth areas to realistically accommodate the credits that are allocated under the plan." They estimate that, at maximum, 33,260 housing units could be created out of what they estimate will be 8,315 development credits generated from the program.

Environmental Safeguard

TDR programs have been enacted for environmental protection reasons in California, Florida, Arizona and Alaska as well.

In California, a successful program was adopted in San Bernardino County to protect the Santa Monica Mountains and the cliffs along the Pacific Coast in Santa Monica.

An ordinance to San Bernardino County's development code permits the landowners in specified districts to apply for acquisition of development rights from other property owners in order to increase permitted residential density. Conditions for such transfers are that a property owner from within the city acquires development rights from a landowner in designated restricted areas and then both owners execute an agreement approved by the San Bernardino County counsel and filed with the county recorder. Also, the ordinance requires that the resulting transfer in potential density is in such amount and so located as to not strongly affect the surrounding neighborhood.

Bordering the vast Everglades in Florida are cities struggling with the accommodation of pressures for growth and for protecting the fragile wetlands, mangrove swamps and estuaries of the Everglades. Several municipalities and counties have developed TDR programs to answer this quandary.

St. Petersburg, a still burgeoning city on Florida's Gulf Coast, passed an ordinance providing for TDR for the express purpose of "encouraging preservation (of certain lands) in a natural or near natural state" because of these lands' "unique environmental and ecological significance and importance."

The ordinance establishes development rights certificates, available to landowners within preservation land districts who wish to transfer the development rights of their land. The certificates and approval of an applicant's plan for a development rights transfer are granted by the city's environmental development commission.

The main criterion in granting certificates is the applicant's guarantee of preservation as open space the land to which the development rights originally belonged.

This guarantee can occur, according to the ordinance, through conveyance of fee simple to the city, subject to appropriate deed restrictions and covenants; execution and recordation of a deed restriction and covenants running with the land to provide for preservation of the land; or an execution and recordation of a 99-year lease to the city.

The transfer of development certificates between separate property owners requires an application by the receiver of the certificates and the execution of a deed. The ordinance stipulates that such transfers should take place "by the same procedure as deed transfers."

Down the coast from St. Petersburg lies Collier County, much of which contains the Everglades National Park.

Collier County adopted a TDR ordinance for the stated purpose of protecting areas of environmental sensitivity. The ordinance established districts called Special Treatment Overlay (ST) districts, which need special protection not already provided by the basic zoning regulations of the areas.

The ordinance allows owners of land designated as ST districts to transfer some or all of the residential development rights of their land to parcels not designated ST districts but found in other specified districts within the county.

A landowner in an ST district wishing to transfer development rights applies to the board of county commissioners with an application for a building permit for use on the non-ST designated land. The application must tell who are the new owners of the transferred development rights and provide survey descriptions of both the transferring and receiving parcels of land. Collier County's ordinance says transferred development rights should be considered as interests in real property.

Scottsdale, Ariz., an expanding suburb sandwiched between Phoenix and the mountains in Tonto National Forest, passed an ordinance to preserve the McDowell Mountains and protect surrounding hillsides.

Scottsdale's ordinance established a Hillside district which was divided into the Hillside conservation area and the Hillside development area. The ordinance allowed density credits to be transferred from the Hillside conservation area to the adjacent Hillside development area. The Hillside conservation area was to be "set aside for conservation of permanent natural open space," according to the ordinance, while the Hillside development area was established to "protect hillsides while accommodating development," subject to the standards of the zoning district.

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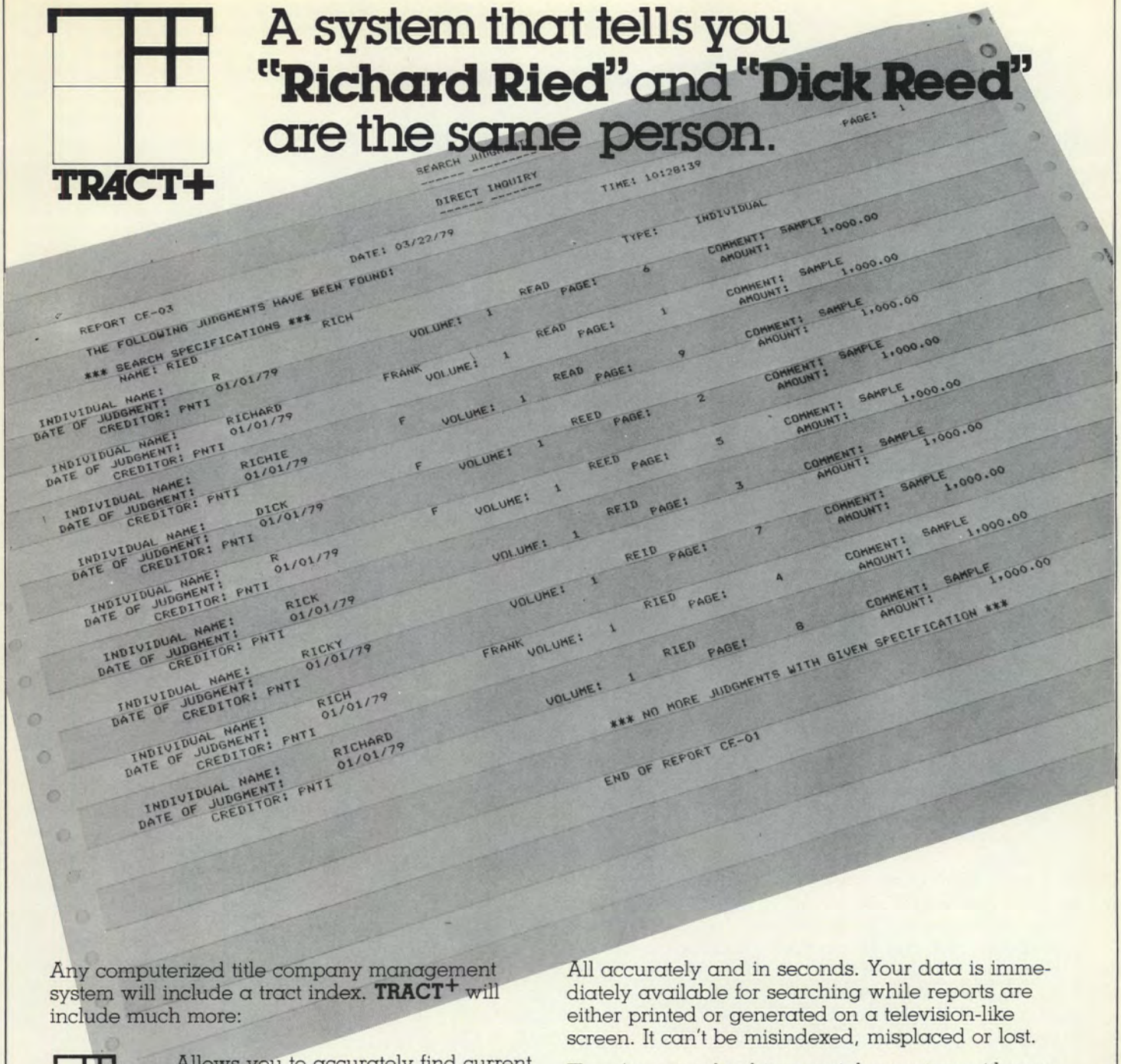

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Committees—
from page 8

Abstracter-Agent Section Educational Committee

The Educational Committee of the Abstracters and Title Insurance Agents Section has been established to provide information to the membership of ALTA concerning opportunities for educational advancement. In the last two years, the purpose of the committee has been broadened by an investigation into the possibilities of ALTA conducting regionally organized educational seminars for our industry members.

While a great deal of enthusiasm for such seminars has been observed, not only among the members of the Educational Committee, but also among the ALTA membership at large, the practical side of such an undertaking has slowed implementation. The committee hopes that an initial seminar will be staged in 1982.

Another very important aspect of the committee's function is to undertake to catalogue the educational activities by various state and local title associations, and expose these efforts to all members of ALTA. The committee feels that some of the most effective educational efforts can be made on a local level and that the experience of our members in one locale may be very useful to other members who wish to initiate a local program.

Another important function of this committee is to support and publicize an educational vehicle which is now maintained and administered with ALTA assistance—The Land Title Institute, Inc.

The main thrust of the committee's current efforts is directed toward the regional seminar concept and the implementation of at least one such seminar as a "test case." With regard to the prospect of such a seminar, as well as information concerning other activities with our industry as a whole, the committee would welcome and appreciate comments and suggestions from any interested ALTA member.

Charles H. Newman III, Chairman

Committee on Indian Land Claims

It is pretty well understood by most title insurance people and their customers that title policies cover unrecorded claims, but it was quite unexpected that the industry would be protecting insureds against Indian tribal claims dating back over 200 years!

If the claims and suits that were filed five years ago were successful, losses would be massive. So ALTA appointed a "temporary" special committee to help member companies in defending their insureds. The Committee on Indian Land is composed of six general counsel from title insurance companies.

The form of assistance provided by the committee has generally been to keep member companies abreast of developments in Indian claims as they are asserted by tribes, advise of commencement of suits and their progress, and furnish legal research on points which might be used in defense of the suits.

Shortly after its appointment, the committee retained independent counsel and authorized him to prepare legal opinions on what might be considered points of defense against Indian claims. More than a dozen such research papers were prepared and have been furnished to counsel for any member of the industry who is providing a defense against an Indian claim on behalf of its insureds.

The committee has also retained legislative counsel and has been active in recommending language for use in federal statutes enacted for the purpose of settling Indian claims. This language has been used in at least two federal statutes which were adopted by Congress to settle claims in Maine and Rhode Island.

The committee meets on call of its chairman and considers the status of claims previously filed and determines what assistance, if any, it may give member companies in connection with new claims. It has become a depository and source of information on Indian claims generally and has been of assistance to entities other than its own member companies, especially institutions and state governments whose land ownership has been threatened by Indian claims.

While the Indian claims committee denies that it dons blue coats and rides to the sound of bugles and rattling sabers, it does feel that it must diligently pursue any avenues of legal defense which might be of help to members of the Association in a situation in which serious loss could occur unless the claims are properly defended and hopefully settled through mutual agreements and legislation.

Marvin C. Bowling Jr., Chairman

Judiciary Committee

The Judiciary Committee is a low-profile, hardworking committee whose duties are outlined in Section 9 in the bylaws of the American Land Title Association.

This section provides: "The Judiciary Committee shall investigate and report at each Annual Convention important decisions rendered in Federal and State Courts relating to the duties, liabilities and responsibilities of the abstracters and insurers of title to real property or liens and obligations thereon and other decisions relative to land titles."

The Committee consists of the chairman and reporters in each of the 50 states, the 10 federal circuits, and the Federal Court for the District of Columbia. The

members' names, addresses, and affiliations are listed in the ALTA Manual of Organization.

The Committee serves to identify and report all court cases of interest to our members of the industry. The cases are analyzed, classified as to subject matter, and published in *Title News* on an installment basis. The Committee hopes to report, as soon as possible, unusual cases that may affect the industry.

The Committee would appreciate members calling attention to any unusual or interesting cases that have been noticed, and, in return, the Committee has been and is willing to respond to inquiries by individual members of any particular problems they may have.

Ray E. Sweat, Chairman

"The true effectiveness of this legislative contact event will be measured in the future when it becomes necessary for MLTA members to visit with their elected senators and representatives on an important issue."

Barbeque—
from page 11

lators, their aides, and regulators with our state association."

Legislators Are Impressed

After all the anxious moments during the preparatory stages, the dinner was an unqualified success. Many legislators personally complimented me during the event and others expressed similar feelings to their MLTA member constituents. At the close of the dinner, we served an ice cream cone buffet which preserved the atmosphere of informality and extended the opportunity for MLTA members to walk around and become better acquainted with our guests.

As for expenses, the cost of the dinner breaks down like this:

Dinners (275) and bar	$3,395.98
Printing	137.15
Photography	271.44
ALTA literature	540.74
Telephone	117.26
Miscellaneous supplies	41.06
TOTAL	$4,503.63

This total of course does not reflect all of the time and expense contributed by a number of people that contributed materially to the success of the event. Special appreciation is extended to President Quisenberry for her support, and for the help of her people from Central Missouri Abstract & Title Co., Columbia, where she is president, in preparing name tags and serving as hosts; to Don Dailey from Stewart Title Guaranty Company for handling the photography; and to my employer, Jack Hogan of Hogan Land Title Company, Springfield, for allowing me to spend time working on this assignment. Also, much credit should go to our MLTA board members who—along with President Quisenberry—authorized this activity in an expeditious manner even in its early phases when we were uncertain of the cost.

The true effectiveness of this legislative contact event will be measured in the future when it becomes necessary for MLTA members to visit with their elected senators and representatives on an important issue. Based on their reaction during our dinner gathering, it seems certain that our legislators will listen to the views of MLTA members with a positive attitude—and a much better understanding of the title industry than many of them had previously.

Brochures Available

Chicago Title has recently released two brochures designed as aids for homebuyers. The first, "WHY BUY rather than rent?" explains the benefits of home ownership compared to renting and is sensitive to today's tight economy.

The second brochure introduces the potential homebuyer to the contract sale method of financing a home purchase. Titled "Q. Is financing frustrating your plans to buy (or sell) a home? A. Consider a contract sale," the brochure explains how a contract sale works, what the advantages are to both buyers and sellers, and why title insurance is important on a contract sale.

Prospective homebuyers who are shying away from the real estate market because of high interest rates or financing problems can contact Chicago Title Insurance Company for free copies of the brochures.

State Senator David Doctorian, center, learns more about the Missouri Land Title Association from two of its members, Robert Williams, left, president of Chariton County Abstract & Title Co. and William Cohrs, president of Lafayette County Abstract Co.

Names In The News . . .

Anya Weisnewski was appointed associate title counsel for Title Insurance and Trust Co., Rosemead, Calif. She formerly was assistant title counsel in the company's claims and litigation department.

Transamerica Title Insurance Co., San Francisco, announced new county branch manager appointments in Transamerica offices in a number of western states.

In Houston, Tex., **Carl E. Ehler** was appointed manager of the company's operations in Harris and Montgomery counties.

John H. Liles Jr. was named manager of Transamerica's Travis County, Texas, operations, and is based in Austin.

In Colorado, **Jill Lynn Childress** was promoted to manager of the Eagle County operations and is headquartered in Vail.

Kerry Eldon Grimes was appointed manager of Larimer County, Colo., operations, headquartered in Fort Collins.

In Washington state, **Thomas M. Erickson** was promoted to manager of Cowlitz County operations, based in Longview.

In Oregon, **Craig Naylor** was named manager of Multnomah County operations.

In Michigan, **Bradley E. Borgeson** was promoted to manager of Transamerica's Macomb County operations, headquartered in Warren.

And in California, **Larry C. Lowe** was appointed manager of Los Angeles County operations, based in Los Angeles.

Dorris L. Gressot was named assistant county manager for Transamerica's Solano County, Calif., operations and is headquartered in Fairfield.

Title Insurance and Trust Co. (TI) announced the appointment of **Charles S. Axen** as associate title counsel and his election as vice president. Axen supervises all underwriting, claims and litigation matters in Imperial, Kern, Riverside, San Luis Obispo and Santa Barbara counties in California and in the state of Nevada. He works from the Santa Ana, Calif., office.

TI also announced the promotion of **Carolynn A. Lester** to major account manager in the San Francisco area.

Also in San Francisco, **Robert C. Hash** was promoted to national title service representative.

Janet Van Cise-Yoshitake was promoted to national title service representative in Los Angeles. TI's national title service representatives are responsible for handling interstate and inter-county title services and business development.

TI promoted **Gary J. Peters,** vice president, to manager of TI's Riverside County, Calif., operations. He is responsible for coordinating TI title insurance and marketing activities in Riverside County. He formerly was assistant manager in the Phoenix, Ariz., office.

M. James Jacobson was appointed manager for San Mateo County, Calif., operations for TI. He coordinates escrow and title insurance marketing and service activities in seven branch offices.

Diane Ganiats was promoted to branch escrow manager for TI's Rancho Cordova, Calif., office.

American Realty Title Assurance Co., Columbus, Ohio, announced the election of **Sally J. Treherne** as vice president—administration and **Georgia A. West** as assistant vice president—accounting.

Chicago Title Insurance Co. announced that **Grant Berning** was appointed resident vice president and transferred as a national marketing officer to Arlington, Va., from Miami, Fla.

Douglas Brown was appointed administrative services officer for Chicago Title's Dallas, Texas, office. Formerly he was manager of administrative services.

Sharon Wynn was appointed title officer in Philadelphia, Pa., where she formerly was examining attorney.

Morris Harper, vice president of Pioneer National Title Insurance Co. and area manager for National Title Services in Houston, Tex., has been elected president of the Associate Council of the National Association of Corporate Real Estate Executives (NACORE).

The Associate Council arm of NACORE consists of representatives from the financial services fields who work with NACORE members.

Frank A. Melchoir was appointed vice president and associate eastern regional counsel for First American Title Insurance Co. He is headquartered in First American's New York City office.

Robert L. Henn was appointed state counsel in charge of underwriting practices for First American's Pennsylvania operations, and is located in the Valley Forge office.

Rattikin Title Co., Fort Worth, Tex., announced the appointment of **Mike Corder** to manager of branch office operations. He formerly was southwest area manager for the company.

Rattikin Title also announced that **Betty Carlisle** has been appointed manager of the company's Keller office, in addition to her existing duties as manager of the Riverside office.

Brad Mitchell has been named director of agency sales for the American Realty Title Assurance Co., Columbus, Ohio.

Commonwealth Land Title Insurance Co. announced that **Edward P. Locher** has been named vice president and treasurer of the company.

Richard A. Cecchettini has joined Title Insurance Company of Minnesota as senior vice president for operations, and is responsible for the company's agent and branch operations. **Cecchettini** is a member of the ALTA Board of Governors.

Richard A. Angelo has been appointed eastern regional counsel for American Title Insurance Co., Philadelphia.

J. Earle Norris has been elected vice president of Title Insurance and Trust Co. and Pioneer National Title Insurance Co. He is an associate title counsel for both companies and is headquartered in Los Angeles.

Patrick R. Crews has been appointed manager of the Ventura County (Calif.) office of Title Insurance and Trust Co., located in Oxnard.

Jesse D. Worley, vice president, has been appointed national title service representative for Pioneer National Title Insurance Co. in Chicago.

Lawyers Title Insurance Corp. has announced that **Edward A. Blaty** is promoted to senior vice president—operations, headquartered in Troy, Mich.

Frank Melchoir

R. Cecchettini

Edward Blaty

Edward Locher

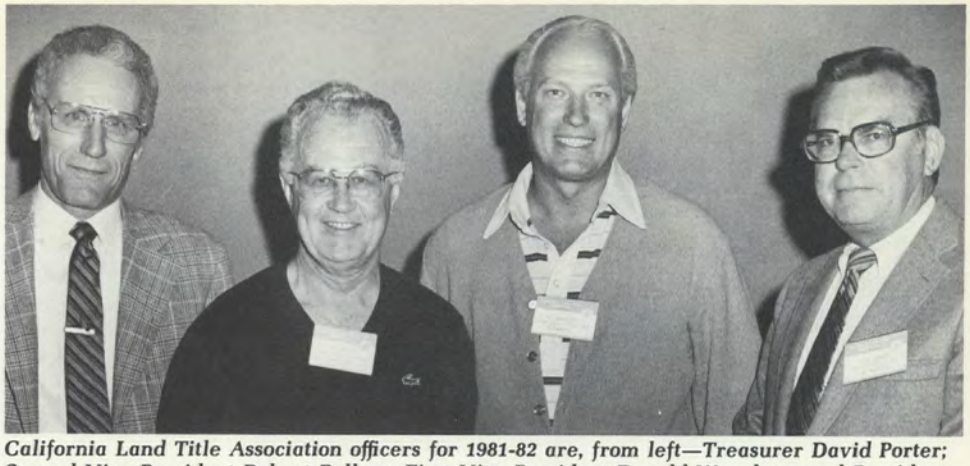
Harriet Burns Feller, corporate counsel, has been elected vice president of Title Insurance and Trust Co. in Los Angeles.

Kenneth Astheimer has been elected manager of Lawyers Title's national division office in Richmond, Va.

Lawyers Title also has announced the appointment of two branch managers and an assistant branch manager. **Poulson C. Reed** has been elected branch manager of the Richmond, Va., office and **Peter R. Coyle** has been elected branch manager of the Atlantic City, N.J. office. **Robert G. Wagner** has been named assistant branch manager of the Ft. Pierce, Fla. office.

Transamerica Title Insurance Company announced that **Mervyn Louis Morris** has been promoted to manager of the company's San Diego County operations. Morris was formerly area manager in Los Angeles and also branch and area manager in San Diego.

Correction: We regret that in our June issue **John A. Mueller Jr.** was listed as chief executive officer of American Title. Actually, he was appointed chief administrative officer.



California Land Title Association officers for 1981-82 are, from left—Treasurer David Porter; Second Vice President Robert Bollum; First Vice President Donald Wangberg and President Richard Shramm.

California Association Elects Shramm

The California Land Title Association held its 74th annual convention and elected 1981-82 officers.

Richard J. Shramm was elected president. He is senior vice president and regional manager for Chicago Title Insurance Co. in Los Angeles.

Elected first vice president is Donald R. Wangberg, president and general manager of the First American Title Insurance Co., Sacramento division. Robert H. Bollum is elected second vice president; he is chief executive officer of Land Title Insurance Company of San Diego. Elected treasurer is David R. Porter, senior vice president of Title Insurance and Trust Co. and western region manager of Pioneer National Title Insurance Co., Los Angeles.

Calendar of Meetings

August 30-September 1
Ohio Land Title Association
Hyatt Regency
Columbus, Ohio

September 1-4
New York State Land Title Association
The Otesga
Cooperstown, New York

September 9-11
Nebraska Land Title Association
Holiday Inn
Kearney, Nebraska

September 9-12
Washington Land Title Association
Thunderbird Motor Inn
Wenatchee, Washington

September 11-13
Missouri Land Title Association
Lodge of the Four Seasons
Lake Ozark, Missouri

September 13-15
Indiana Land Title Association
Merrillville Holiday Inn
Merrillville, Indiana

September 16-19
Dixie Land Title Association
Broadwater Beach Hotel
Biloxi, Mississippi

September 17-19
North Dakota Land Title Association
Kirkwood Motor Inn
Bismarck, North Dakota

September 20-23
American Land Title Association
The Broadmoor
Colorado Springs, Colorado

October 2-4
South Carolina Land Title Association
Hilton Head Island, South Carolina

October 15-16
Wisconsin Land Title Association
Pioneer Inn of Lake Winnebago
Oshkosh, Wisconsin

November 11-14
Florida Land Title Association
Hotel Royal Plaza
Lake Buena Vista, Florida

American Land Title Association
1828 L Street, N.W.
Washington, D.C. 20036

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