



ICSC+CONTINUING EDUCATION MICHIGAN

**Suburban Collection Showplace
Novi, MI**

Wednesday, April 13, 2022

Session Materials

Table of Contents

Page 4 – Speaker and Program Planning Committee Bios
Page 34 – Roundtable 1: ALTA Surveys, the Land Surveyor and You Roundtable
64 – Roundtable 3: Evolving Consumer Behaviors & Impact on Retail CRE
Page 94 – Roundtable 4: PACE Financing: A Swiss Army Knife for Your Capital Stack
Page 111 – Roundtable 5: Use Restrictions: Overcoming Use Restrictions and Related Obstacles Regarding Non-Traditional Uses
Page 116 – Roundtable 6: Closing Transactions Using Electronic Signatures and Remote Notarization Tools
Page 157 – Roundtable 7: COVID Crisis Communications: Who Did It Well? Who Didn't—and Why?
Page 181 – Roundtable 8: SNDA – Why Should Tenants Care?
Page 185 – Roundtable 9: Attorneys & Brokers – Same Client: We ARE on the Same Team, Right?
Page 187 – Roundtable 10: 1031 Trends: Where We Were and Where Are We Heading?

Page 189 – Roundtable 11: Build Back Better: Eminent Domain Takings from Commercial Properties for Roads, Utilities and Other Infrastructure Projects

Page 196 – Roundtable 12: Property Tax Considerations for Shopping Centers, Even in a Good Market

Page 206 – Roundtable 13: Urban and Industrial Properties: Environmental Liabilities or Real Estate Opportunities?

Page 227 – Roundtable 14: The Pressure for Vapor Mitigation: Does It Really Have to Be a Drain?

Page 246 – Roundtable 15: Keys to a Successful Absolute Net Lease Transaction

Page 256 – Roundtable 16: The Impact of Zoom on Commercial Eviction Hearings

Page 261 – Roundtable 17: Evictions and Collections in the Age of COVID and Force Majeure Defenses

Page 263 – Roundtable 18: Liquor Licensing: From Beers to Cheers! R

Page 295 – Roundtable 19: EAD THE FINE PRINT: How the Language in Purchase Agreements Can Affect the Bottom Line on Your Closing Statement – and Why

Page 300 – Roundtable 20: A View from the Hill: 1031 Exchanges and the Proposed Biden Tax Plan

Page 365 – Roundtable 21: What You Should Know: The Complexity of Cannabis Real Estate Transactions

Page 367 – Roundtable 22: Detroit Regional Partnership's Verified Industrial Properties (VIP) Program

Page 419 – Roundtable 23: Why Are Special Land Uses So "Special" When You Need to Get Your Drive-Through Restaurant Approved?

Page 427 – Roundtable 24: Unwritten Rules of Broker-to-Broker Contact (Ethics) – Best Practices

Page 442 – Roundtable 25: SHOW ME THE MONEY! Asserting, Preparing and Protecting Landlord Claims in Bankruptcy

Page 445 – 11:00 am: Detroit's Neighborhoods, Their Relationship to the Suburbs and Current Retail Opportunities

Page 448 – 11:00 am: Let's (Curbside) Pick Up Where We Left Off! Moving Ahead Post COVID: The New Normal of Retail Leasing

Page 456 - 1:30 pm: Financing in Today's Retail Market: Lessees, Lessors and Lenders, Oh My!

Page 463 - 2:35 pm: Emerging Issues and Recent Developments in Real Estate Law Affecting the Marketplaces Industry: 2022



Biographies of Speakers & Program Planning Committee

MIJO ALANIS Mijo Alanis opened the first Beyond Juicery + Eatery in 2005 alongside his wife, Pam Vivio, after working in the restaurant industry for many years. The couple founded the fast-casual concept in response to seeing how customers' needs were changing. They noticed that people began to trade fries for salads and knew they could create a business to fill the void of healthy food options in Michigan. With more than 35 restaurants open across the Midwest, Mijo is committed to growing the Beyond Juicery + Eatery brand while maintaining the brand's commitment to "be the best part of someone's day."

THOMAS J. BARRETT is the Market Manager of commercial lending for the Brighton, Michigan branch of The State Bank. The State Bank, founded in 1898, is a full-service, 5-Star Bauer Financial rated commercial, retail and trust bank headquartered in Fenton, Michigan. It currently operates 17 full-service branches in Genesee, Livingston, Oakland, Saginaw, and Shiawassee Counties. It has assets of approximately \$1.3 billion. Tom provides construction, development and long-term permanent financing options for both owner occupied and investment real estate in Michigan and throughout the Midwest. In a career spanning almost 35 years, Tom has directly made loans totaling nearly half a billion dollars secured by all product type including retail, office, industrial, hospitality, multi-family, manufactured housing communities, self-storage and senior housing. Prior to his current role at TSB, Tom held positions in real estate capital markets and community development finance for First Place Bank, Republic Bank and Huntington Bank. Tom attended John Carroll University and has spent his entire banking career in Metro Detroit.

WILLIAM "BILL" P. BEARDSLEY is the President of Michigan Business Connection, LC, a Credit Union Service Organization. After nearly a 20-year banking career in Michigan, Mr. Beardsley led the launch of Michigan Business Connection, LC in March 2004 and serves as its president and chief lending officer. MBC is a collaborative effort by credit unions throughout the State of Michigan to provide small business and commercial real estate financing. The MBC business model enhances sustainable lending capacity by

allowing credit union lenders to share the risks and costs of commercial loan program management while collaboratively providing capital critical to Michigan's economic prosperity. Since inception, MBC has helped the credit unions originate and manage more than a half billion in financing for Michigan business owners and real estate investors. The company is headquartered in Ann Arbor and has a professional staff of 23. Mr. Beardsley has been in commercial banking since 1985, most recently serving as community president of the Citizens Bank Ann Arbor market with previous leadership positions at regional banks with business lending and credit administration management responsibilities. Mr. Beardsley is a frequent industry event speaker and presenter, an active member of the National Association of CUSOs and founding member of the Regional CUSO Alliance, a collaborative network of regional commercial lending CUSOs dedicated to promoting safety and soundness in credit union business lending. A life-long Michigan resident, and Michigan State University graduate, Mr. Beardsley lives in Saline, Michigan, with his wife and four children. Mr. Beardsley currently serves as Chairman of the City of Saline Planning Commission, is a personal advocate for the Cystic Fibrosis Foundation and American Foundation for Suicide Prevention and has previously served as the local Chairman of the American Red Cross, Chairman of the Washtenaw Economic Club, President of the New Enterprise Forum (a venture capital support organization) and other community and economic development organizations. billb@mbcloans.biz

CHRIS BELAND Chris Beland has over 25 years of experience in the land surveying field and currently serves as PEA Group's Survey Department Manager. Previously, he has served as the Director of the Office of Land Survey and Redocumentation for the State of Michigan and has also held the positions of Office Director, Department Manager, Senior Project Manager, Project Surveyor and worked in business development. His education and experience have taught him that the most important part of any project is the people on the project team and how they work cohesively together toward a shared vision. Whether the client or the end-user, understanding their needs, expectations, and perceptions is paramount to the project's success. In his current role, Mr. Beland is responsible for providing leadership and communication to the project surveying teams between PEA Group's Michigan and Texas offices. cbeland@peagroup.com

MATTHEW BERKE is a Principal of Keystone Commercial Real Estate. Matt began his real estate career in 1993 as a licensed sales associate while still attending Wayne State University. From 1999 when he was promoted to Vice President at Beale Group through 2011 Matt held a primary leadership role as part of the management team, overseeing daily operations as well as staff training and development. In 2012 Matt formed Keystone Commercial Real Estate with his partners to better serve his clients. Matt received his broker's license in 2001 and is active with the International Council of Shopping Centers currently serving as the State Director. Matt also serves as the President Elect of the

broker network Site Source. Matt has received the Costar Power Broker award for numerous years in a row. Matt continues to work on tenant representation, investment sales and handling selected leasing accounts. mberke@keystonecres.com

ALEX BIERI began his real estate career in 2004. He has worked with many local, regional and national retailers throughout the state of Michigan and Midwest with their site selection strategy and execution and has been a leasing representative for many notable Metro Detroit projects most recently completing the leasing at The Village at Bloomfield. Mr. Bieri graduated from Purdue University in 2000 with a Bachelor of Science in Industrial Management. Upon graduation from Purdue, he worked at RR Donnelley, covering over 200 catalog/retail customers. Mr. Bieri is a licensed Real Estate Associate Broker in Michigan. He is a member of the International Council of Shopping Center (ICSC), a past co-chair of the ICSC Michigan Idea Exchange and a past Michigan State Next Generation Chair. Alex is a member of the Detroit Athletic Club and enjoys running, golf and handball. alex@sbrel.com

JAMES C. BIERI, founded Bieri Company in 1976 in order to help both retail landlords and tenants successfully reach their real estate goals and is now a principal of Stokas Bieri Real Estate. Mr. Bieri earned a bachelor's degree in business administration from Western Michigan University and a law degree from the Detroit College of Law. Mr. Bieri has provided a variety of services from business expansion planning to project leasing for some of the world's most renowned retailers. Mr. Bieri holds the designation of International Council of Shopping Centers Senior Certified Leasing Specialist, and is a member of various professional, educational and civic organizations including the Urban Land Institute. Mr. Bieri has served as Co-Chair of the Detroit Land Institute District Council and has served on the Board of Directors of the Detroit Athletic Club. Mr. Bieri also has served as Detroit Athletic Club Secretary and is a member of the Country Club of Detroit. Mr. Bieri is a frequent speaker at retail real estate events and is often quoted in various retail and business publications. JBieri@sbrel.com

DAVID BLASZKIEWICZ serves as president and chief executive officer of Invest Detroit, a certified Community Development Financial Institution (CDFI) that uses strategic lending and investment to catalyze economic growth in the city of Detroit. With more than 25 year of business leadership experience, Mr. Blaszkiewicz manages the development and implementation of collaborative economic growth strategies and leads the organization's efforts to strengthen relationships with the public, private and philanthropic sectors to promote economic renewal and sustainability. Under his leadership, Invest Detroit administers more than \$300 million in financing assets and tax credit allocations to support Detroit's revitalization, as well as to support Michigan's growing startup

ecosystem. Mr. Blaszkiewicz coordinates lending, development, government, and community partners to accelerate residential, commercial, retail, entertainment and placemaking activity throughout Detroit. His work at Invest Detroit strives to address the city's changing needs and expanding collaborative development opportunities, such as the launch of the M-1 Rail transit and the Strategic Neighborhood Fund. A longtime leader in the Detroit development community, Mr. Blaszkiewicz served as president and CEO of both Invest Detroit and the Downtown Detroit Partnership (DDP) between 2013 and 2016. In this time, he expanded DDP's capacity to accelerate economic growth, develop initiatives to promote Safety and Security, and create density and sustainability in Greater Downtown Detroit. Prior to his current role, he was president of the Detroit Investment Fund, now managed by Invest Detroit, and the director of finance for Detroit Renaissance, now known as Business Leaders for Michigan. Mr. Blaszkiewicz is an active member of numerous boards, including M-1 RAIL, Detroit RiverFront Conservancy, Detroit Economic Growth Corporation and Detroit Future City. He also serves as vice chair of the Downtown Development Authority and is on the board of directors of Universal Technical Institute, a NYSE listed company.

IAN S. BOLTON My first goal is to learn as much as I can about my clients to make sure I am in the best position possible to help them achieve their goals. Once I fully understand their legal needs, I can focus on helping my clients achieve desired results as quickly and efficiently as possible. I focus my practice on the following areas of law: Real Estate: represents businesses and individuals in simple and complex real estate matters, including acquisitions, dispositions, leasing, judicial foreclosures, quiet title actions, foreclosures of construction liens and receiverships. Landlord/Tenant Litigation: represents commercial landlords and tenants in a wide array of litigation, from summary proceedings to recover possession of property, to enforcing and defending monetary breaches through bankruptcy filings. General Commercial Litigation: represents small and mid-sized businesses to large corporations in multi-faceted litigation matters in state and federal court. Bankruptcy: represents creditors, such as; secured lenders, landlords and trade creditors in complex bankruptcy cases, including objections to plans of reorganization, nondischargeability actions, relief from stay, and defense of preference or fraudulent transfer actions. Real and Personal Property Tax Appeals: assists individuals and businesses in reducing tax liability through real and personal property tax appeals from the Board of Review to/through the Michigan Tax Tribunal. ianboltonlaw@gmail.com

WILLIAM BUTLER is a Senior Business Development Manager for the Detroit Regional Partnership. In this role, Butler assists domestic and global businesses as they explore, locate, and grow in the Detroit region, and has helped attract hundreds of new jobs and millions of dollars in corporate investment. As an economic development professional, he is passionate about showcasing the unique assets and competitive advantages that make

the Detroit region a premier destination for new investment. In addition, he volunteers for organizations focused on foreign direct investment and international trade, including serving on the Board for the Swedish American Chamber of Commerce-Detroit, and Automation Alley's International Business Services Advisory Council. Prior to joining the Detroit Regional Partnership, Butler worked for the Detroit Regional Chamber as well as several municipal and state-level political campaigns. Butler is a graduate of the University of Michigan where he earned a bachelor's degree in political science, and is currently enrolled in the University of Oklahoma's Economic Development Institute.

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JASON R. CANVASSER is a member at Clark Hill PLC. He advises clients on best practices for managing and avoiding potential risks and liabilities. He represents a variety of clients in the liquor, cannabis, and gaming industries on licensing, land use, and regulatory compliance matters in addition to representing clients in complex commercial matters, real estate disputes, and collection litigation. Jason has broad experience representing clients in general litigation matters that include complex commercial cases, contractual disputes, defense of premise liability and auto negligence claims, landlord-tenant matters, and issues relating to creditor's rights. He represents clients in state, federal, and bankruptcy courts and has been admitted pro hac vice in multiple out-of-state matters. Jason also routinely represents national clients on a number of issues relating to the licensing and regulatory compliance involved in the sale of alcohol, both on-site and off-site. These clients include restaurants, bars, pharmacies, grocery stores, manufactures, distributors, hotels, and convenience stores. His clients regularly call on him to advise on issues relating to alcohol promotions, tasting events, sampling promotions, charity events, regulatory compliance, and zoning issues in addition to his extensive experience in the acquisition and sales of liquor licenses. Jason is in frequent contact with the Michigan Liquor Control Commission (MLCC) and works closely with the MLCC commissioners to achieve his client's desired goals. jcanvasser@clarkhill.com

ALFREDO CASAB is a Member of Dawda, Mann, Mulcahy & Sadler, PLC. Alfredo's practice focuses on real estate, corporate and commercial litigation. As part of his practice, Alfredo advises his clients, including brokers, real estate developers, retailers, small to medium sized companies, banks, and court-appointed receivers, on acquisitions, leasing, dispositions, financing, management, succession planning, day-to-day issues, and major crises. Alfredo is a member of various professional organizations, including the International Council of Shopping Centers and the Hispanic Bar Association of Michigan (past President). Alfredo has been a regular speaker at local International Council of Shopping Centers and Institute of Continuing Legal Education programs. Alfredo has been named to the list of Michigan Super Lawyers and recognized in dBusiness Top

Lawyers. He received his B.S. from Oakland University and his J.D. from Wayne State University. acasab@dmms.com

SARA CHAIKEN With 20 years of retail experience, Sara Chaiken recently joined the Real Estate Department for Dollar Tree/Family Dollar where she will be focused on Midwest expansion goals for both banners. She has spent the past 5 years working to grow two great national brands; Subway and Great Clips, across the United States. Dollar Tree and Family Dollar is currently the largest discount tenant in the country with over 16,000 locations. Additionally, Sara has years of working for retail Landlords including Schostak Brothers and Next Realty. Sara attended University of Illinois and is active in CREW Detroit as well as ICSC. Shutch55@dollartree.com

JEREMY CRANE is a Director of Customer Success who partners with commercial real estate professionals, retailers and civic organizations to help them understand how offline location data impacts their businesses. After spending over a decade in sales and customer success in the commercial real estate data industry with a leading research and analytics firm, Jeremy came to Placer.ai as a Senior Account Executive in April 2021. In December 2021 he became Director of Customer Success. Jeremy holds a degree in Organizational Studies from the University of Michigan and has spent the past 21 years working in the commercial and investment real estate industry. jeremy.crane@placer.io

BRADLEY S. DEFOE is a partner and member of Varnum LLP's Litigation and Trial Practice Team, concentrating in commercial litigation in state and federal courts. He focuses his practice on commercial contract disputes, creditor's rights and collection, landlord/tenant matters, construction lien litigation and other real estate disputes.

TRACY DURON, eTitle Agency Closing Manager has over 29 years' experience in the title industry and is one of the first individuals in Michigan certified to use the Pavaso Remote Online Notary technology. Tracy has remotely notarized over 10,000 documents in the last two years. She is also adept at creating DocuSign templates for both commercial and residential closings. Tracy manages the post-closing team for eTitle Agency and is responsible for disbursing and recording instruments for over 180 closings each month. tduron@etitleagency.com

NICK A. EGELANIAN considered a leading expert on retail and the shopping center industry, Nick A. Egelanian pioneered the segmentation of retail into Commodity & Specialty genres and first wrote on the pending failure of the U.S. regional mall industry as the author of the retail chapter of the Urban Land Institute's Professional Real Estate Development: The ULI Guide to the Business, 3rd Edition (ULI/Richard Peiser, Michael D. Spear Professor of Real Estate Development at the Harvard Graduate School for School

of Design) in 2012. He was recently retained by the Urban Land Institute to further update the retail chapter of its Professional Real Estate Development: The ULI Guide to the Business, 4th Edition, scheduled for release in 2022. Mr. Egelanian has spent over 30 years in the shopping center industry where he first served as VP of Real Estate & New Store Development for Crown Books and FAO Inc/Zany Brainy before forming SiteWorks Retail Real Estate Services in 1992. As President of SiteWorks, he has advised a wide array of retail clients including Stuart Weitzman, Balducci's, Jos. A. Bank, Starbucks, Justice, Lane Bryant, & Zoey's Kitchen, Kitchens Etc among others. He also advises a wide array shopping center owners & developers throughout North America. Mr. Egelanian is currently in his seventh-year teaching retail theory and development as an Adjunct Professor in the Colvin Real Estate Development graduate program within the UMD's School of Architecture, Planning & Preservation in College Park, MD. He also serves as a faculty member at the ICSC's John T Riordon School. He earned a Doctor of Law (J.D.) degree at the George Washington University National Law Center in 1982 and his Bachelor of Science degree in Finance from the Smith School of Business at the University of Maryland in 1979.

GREGORY J. ERNE in his 25 years in the real estate and hospitality industry, has developed, acquired and managed over 18 million square feet of real estate assets and played a key role in over \$1 billion in transactions including retail centers, hotels, medical centers, seniors housing and office developments throughout the Midwest and Hawaii. Greg has held key management positions in organization sizes ranging from small entrepreneurial enterprises to large corporations. With Versa, Greg leads the multi-tenant, development and re-development platforms. Active projects are in mixed-use infill in Ferndale and Royal Oak, retail redevelopment in Holland and healthcare properties, both acquisition and development. Outside of his professional duties, Greg remains active locally in non-profit organizations such as HAVEN and Cystic Fibrosis, giving his time and energy to specific causes. Part of Greg's philosophy of giving back with his skill set is taking on a major project for non-profit organizations pro-bono. In 2014, he was the project manager of HAVEN's state of the art Family Justice domestic abuse shelter, which was constructed ground up in Pontiac, Michigan. Greg's current pursuit is creating affordable housing projects in Michigan to help create housing communities for people of lesser means to live with dignity and comfort, and within good design.

JOHN D. GABER is a partner at Williams, Williams, Rattner & Plunkett, P.C., in Birmingham, Michigan. Mr. Gaber practices real estate, land use and zoning law, corporate and general business law, specializing in commercial real estate acquisitions, dispositions, land use, developments, construction, financing and leasing. He represents developers, national retailers, landlords, tenants, operators, franchisees and municipalities. He has represented

clients in the development and redevelopment of numerous commercial and mixed use projects. Previously, Mr. Gaber was a senior real estate attorney for Kmart Corporation. Mr. Gaber is an active member of the Real Property Law Section of the State Bar of Michigan (RPLS), where he serves on the RPLS governing Council, co-chaired the Commercial Real Estate Development, Ownership and Finance Committee, co-chaired the 2012 and 2013 Summer Law Conferences and is a member of the Continuing Legal Education Committee. He is also a member of the American Bar Association, International Council of Shopping Centers and the Oakland County Bar Association. Mr. Gaber serves on the Rochester Hills Planning Commission and the Board of Directors for the Rochester Regional Chamber of Commerce and chairs its Foundation Board. He has served on the Rochester DDA, and is an active member in the Rochester Rotary Club. He is also a former Rochester Hills City Councilman. Mr. Gaber often lectures to various real estate groups, including the Commercial Board of Realtors (CBOR), ICSC and RPLS. He graduated *summa cum laude* from Wayne State University Law School, and earned his BBA degree with high distinction in finance from the University of Michigan. Mr. Gaber has been recognized by *The Best Lawyers in America*, *Dbusiness Magazine's Top Lawyers*, and *The Fellows of the American Bar Foundation*. JDGaber@wwrplaw.com

PAUL A. GLANTZ is the Co-Founder and Chairman of Troy, Michigan based theatre chain Emagine Entertainment, Inc. Glantz has raised over \$180 million in capital to develop 16 world-class entertainment venues and in doing so has brought his concept of an exemplary entertainment experience to reality. Glantz is regarded as an expert in the cinematic exhibition industry. He has been at the forefront of technological change in the theatre industry by leading the transition to high-definition digital presentation, being among the first to deploy "4K" digital projectors, opening Michigan's first all-laser projection theatre, by introducing Dolby's revolutionary Atmos® sound systems to the Michigan marketplace, and by building some of the nation's largest premium large format movie screens: Emagine's Super EMAX auditoriums. Glantz holds a Bachelor of Science Degree in Business Administration with high distinction from Wayne State University and a Master of Science degree in taxation from Walsh College. He has been recognized by Wayne State's Business School which awarded him its Distinguished Alumnus Award, by Wayne State's Irvin D. Reid Honors College which named him its first ever "Pillar Award" recipient, by Ernst & Young as a Michigan and Northwest Ohio Entrepreneur of the Year, and by Walsh College with its Distinguished Alumnus Award. pag@emagine-entertainment.com

IVY GREANER is the Chief Operating Officer and Executive Vice President at Bedrock, where she leads the company's day-to-day administrative and operational functions, ensuring a seamless experience for our visitors, residents and tenants. Since its founding, Bedrock and its affiliates have invested and committed more than \$5.6 billion to acquiring and developing

more than 100 properties, including some of the most significant new developments that Detroit and Cleveland have seen in decades. Bedrock's portfolio totals more than 18 million square feet of office, retail and residential space within new construction and adaptive reuse projects. Ivy's career as a real estate executive and investment leader spans more than 35 years, including broad experience in the retail, commercial and multifamily industries across the geography of the United States. She has been responsible for operating and growing large portfolios of real estate investments in multiple capital stacks, as well as ground up development for single and mixed-use product types and all company operations. Prior to joining Bedrock, Ivy served as the Executive Vice President and Chief Operating Officer of Chicago-based InvenTrust Properties, a premier retail Real Estate Investment Trust (REIT) that owns, leases, redevelops, acquires and manages open-air centers totaling 11 million square feet. She has also held the title of Partner and COO of Ram Realty Services in Detroit and was on the leadership team that developed the city's first Whole Foods Market in Midtown. Previously, Ivy also held the position of Regional Vice President of FivePoint (previously Lennar Urban) from 2016 to 2018 and served as the Executive Vice President and COO of Lennar Commercial. She merged her 7-year-old company, Gadinsky and Greaner, principals, developers and real estate management services, with Ram in 1999. Ivy attended Boston University before starting her career in real estate. She is an active member of the International Council of Shopping Centers (ICSC), where serves on the National Economic Committee and its Infrastructure Task Force. She served for many years as the Government Chair for ICSC's Florida Government Relations Committee and was briefly member of ICSC California. Ivy serves on Florida State University's Real Estate Advisory Board, is a founding member of 100+ Women Who Care's South Florida chapter, and supports a variety of other charitable causes.

JAMES GUDENAU is the Michigan market Business Development Manager for First American Exchange Company. Jim joined First American Exchange in early 2021 to focus on expanding the company's Qualified Intermediary (QI) services in Michigan. He is responsible for marketing the company's QI business to CPAs, attorneys, real estate brokers, and real estate investors. He has lectured nationally on the subject of tax-deferred exchanges since 2003. Prior to joining First American Exchange, Jim provided similar services for almost 20 years at two regional financial institutions. He is a graduate of Wayne State University in Detroit (MBA 1998, Master of Science in Taxation 2005). jgudenau@firstam.com

JEFFERY S. GUNSBURG Co-Founder of Title Connect, LLC Jeff began his career in the Real Estate Industry in 1998, as a Mortgage Banker, which ultimately paved the way for His fulfilling career path. He has worked in the Title Insurance Industry since January 2000, and has been fortunate to have found a true Partner in Walter Quillico. They began Title Connect in 2004, and together, they have created a thriving brand in the Commercial

Title Insurance Industry. In 2020, Title Connect **surpassed a landmark \$1.0 Billion in Commercial Transactions and is on pace to close \$1.5 Billion in 2021.** Jeff's role is Business Development and management of the Company's sales force. During His time in the Title Insurance Industry, Jeff has created a reputation for himself and Title Connect of being simply, trusted. Creating long lasting relationships with clients has enabled Him, and the Company to continue to achieve growth year over year. jgunsberg@title-connect.com

VICKI GUTOWSKI graduated from University of Michigan with a BA in Economics in 2012 and from Eastern Michigan University with an MBA in 2017. Since joining Gerdome Realty in 2012, Vicki has gained experience working on both landlord and tenant representation. As director of marketing and administration, Vicki oversees the advertising regiment for the company's listings as well as the creation of presentation material for tenant and buyer representation clientele on top of property management and day-to-day administrative operations. vgutowski@gerdome Realty.com

BRIAN P. HENRY is the Senior Executive Counsel for eTitle Agency and is responsible for the strategic direction and profitability of the agency which is licensed to provide title in sixteen states and staffed with 60 title professionals. Brian has supervised commercial and residential closings ranging in value from \$500,000 to \$20,000,000. Previously Brian served as the Chief Legal Officer for Orlans P.C., the largest women owned multi-jurisdictional law firm in the country comprised of over 50 attorneys licensed in ten jurisdictions. Mr. Henry has over 40 years' experience in real estate law, title and related litigation. Mr. Henry is a past Chair of the Real Property Law Section of the State Bar of Michigan and its CLE Committee. He has served as the Chairman of the Birmingham Bloomfield Chamber of Commerce, as a member of the Zoning Board of Appeals for Bloomfield Township and as the President of Leadership Oakland. He currently serves on the Michigan Electronic Recording Commission and on the Michigan Land Title Standards Committee. BHenry@orlans.com

SETH HERKOWITZ is a partner and Chief Operating Officer at Hunter Pasteur, a premier residential developer. Hunter Pasteur has nearly \$700M in the development pipeline, throughout Southeast Michigan. Equally principled and committed, Hunter Pasteur is an advocate for the critical role housing plays in economic and community development. The Company was previously named Multifamily Construction Builder of the Year by the Home Builders Association of Michigan. In his role, Herkowitz is responsible for strategic oversight, working closely with the Company's consultant network and joint venture partners. Furthermore, Herkowitz is responsible for procuring governmental approvals for its portfolio of developments. He recently led the Company's entitlement efforts for its \$200M mixed use development, located in the Corktown Neighborhood of Detroit. Herkowitz earned his Bachelor of Arts degree from the University of Michigan and

his joint JD/MBA from Chicago-Kent College of Law, where he currently serves on the Alumni Board of Directors. He is a cofounding member of the Woodward Society and member of the ULI Housing and Community Development Local Product Council. In addition, Seth was a past recipient of Crain's Detroit Business '40 under 40' award. Finally, Herkowitz serves as a Beaumont Health Trustee and past Co-Chair of the Harry N. Herkowitz Distinguished Chair in Orthopedics Campaign at Beaumont Health.

ERIN A. JOHNSON As a member at Dickinson Wright PLLC, Erin provides strategic counsel to entities and individuals in the acquisition, disposition, leasing, development, and financing of office, retail, multi-family, and mixed-use projects throughout the United States. Erin's expertise has been recognized by several prominent publications, including Michigan Super Lawyers (2019 "Rising Star"), Best Lawyers in America ("Ones to Watch," Real Estate Law, 2021 and 2022), and The Legal 500 United States (2021 "Recommended Lawyer"). Erin earned a Bachelor of Fine Arts in Musical Theatre from the University of Michigan, where she graduated magna cum laude. After college, she moved to New York City, performing in Broadway musicals such as "42nd Street," "Thoroughly Modern Millie," and "West Side Story." In 2011, Erin earned her Juris Doctor magna cum laude from the University of Illinois College of Law, where she served as the Managing Editor of the Elder Law Journal.

MATTHEW JONNA, Plum Market CEO & Co-Founder, has over twenty-five years of experience in the food and beverage industry. After leaving the Whole Foods National Operations Team, Matthew opened the first Plum Market in 2018 with a focus on Natural, Organic, and Locally crafted items. Today, Plum Market is an independently owned company with a service-forward approach to food, beverage, and wellness essentials. The company operates nationwide with more than 20 multiple-format locations across Michigan, Illinois, Indiana, Ohio, and Texas, with new locations announced in Washington DC, Florida, and California. matt.jonna@plummarket.com

JOSEPH JUDGE is a partner at Dawda, Mann, Mulcahy & Sadler, PLC, where he has spent 20+ years practicing in the area of commercial real estate law. Over those years, he has guided some of the largest retailers in the world through the acquisition and development of stores in the Midwest and his current focus includes working with developers to successfully acquire, develop and lease property for single-tenant users. jjudge@dmms.com

MARYAM H. KARNIB is a real estate attorney in Honigman's Detroit office. Maryam's practice focuses on matters related to commercial real estate transactions, including retail and industrial and office real estate. Maryam has worked on a number of acquisitions ranging in value from \$50 million to \$100 million nationwide.

KEVIN A. KERNEN is a Managing Director in the Real Estate practice within the Valuation Advisory group at Stout. Mr. Kernen's concentration is in commercial real estate valuation and advisory services, where he has 21 years of national and international appraisal, review, and consulting experience. Mr. Kernen's experience encompasses a wide range of commercial real estate engagements covering numerous property types from core properties to special purpose properties, and a variety of matter types such as litigation, estate & gift tax reporting, financial reporting, and consulting. Mr. Kernen's experience includes many public speaking engagements and he has been qualified as an expert witness and has testified in a variety of state and local jurisdictions. Mr. Kernen co-leads the firm's real estate practice, with responsibilities including practice management, business development, senior level recruiting, and internal systems and group operations. kkernen@stout.com

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CASEY KOPPELMAN is a partner in Varnum LLP, and is currently based in the firm's Birmingham office. Mr. Koppelman has a national real estate practice with a concentration on acquisitions and dispositions as well extensive experience negotiating and drafting retail, office and industrial leases on behalf of both landlords and tenants. In addition, Mr. Koppelman represents lenders, investors, operators, developers and borrowers in all aspects of real estate financing including construction loans and structuring joint ventures. Mr. Koppelman is a regular speaker for the Real Property Section of the State Bar of Michigan on topics including leasing and construction lending. Mr. Koppelman is active in the Oakland County Bar Association, Urban Land Institute and ICSC and was recognized as a Rising Star by Michigan Super Lawyers for several years. As a licensed real estate broker, Casey leverages the latest market trends and data to bolster his clients' interests in deals. Within the community, Mr. Koppelman serves on the Board of Directors for Community Care Properties and is a member of Temple Israel. Prior to joining Varnum, Mr. Koppelman was a partner in the real estate group at Dykema Gossett. He is a graduate of Wayne State University Law School and received his undergraduate degree from the University of Michigan. ckoppelman@varnumlaw.com

KEVIN KOVACHEVICH founded District Capital in 2018 with a specific goal, to create a mortgage banking platform which provides clients with the best possible execution in the

marketplace. The client first mentality comes from Kevin's nearly 20 years of mortgage banking experience and by being a commercial real estate owner himself. Kevin thinks like an owner, treating each client deal as if he was financing something from his own portfolio. This provides the client with thoughtful, creative solutions to all their financing needs. Kevin started his career as a credit analyst with JP Morgan and quickly learned he wasn't built to be a banker. After a quick cup of coffee with JPM, Kevin moved into the real estate world as a commercial real estate analyst and quickly moved into the role of a mortgage banker. As a mortgage banker, Kevin rose to become the top producer within the firm where he financed every type of cash flowing real estate from an outdoor water park in the Midwest (not kidding!) to retail malls, office towers to apartment complexes and everything in between. Over his career, Kevin has financed, acquired, managed and serviced well over \$10 Billion dollars of transactions. Outside of the office, Kevin spends most of his free time with his family of 6. Kevin married his junior high sweetheart, Danielle and together they have four kids, Jake, Ben, Luke and Lana. If you want to track down Kevin outside of the office just head to the nearest ball field where he is probably coaching one of his kid's sports teams. Kevin also enjoys traveling, spending time with his family in northern Michigan, golfing, beer league hockey and staying active. kevin@dcapdetroit.com

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ROBERT LABELLE graduated with honors with an A.B. in Economics from the University of Chicago in 1982, and received his J.D. from the University of Michigan Law School in 1985. Mr. LaBelle practiced for 19 years as a partner and associate at Dickinson Wright PLLC, was later a founding partner member of Myers Shierk & LaBelle, which merged with Williams Williams Rattner & Plunkett, P.C. in 2014. Mr. LaBelle's practice has focused on real estate and environmental law, with a substantial emphasis on the acquisition, sale, development, leasing and subleasing of commercial real estate, surplus asset disposition, zoning and entitlement issues, and environmental regulation and investigation. In these practice areas, he has represented national companies, retailers and restaurants, such as Verizon Wireless, Borders Group, Kmart Corporation, Ruby Tuesdays, and Long John Silvers. Mr. LaBelle has also represented national developers and landlords, including American Star Properties, Liberty Property Trust and Chuck Miller Development Group. He has negotiated and drafted hundreds of leases and subleases. He managed the project team of lawyers which specialized in the disposition of excess property holdings for several Fortune 500 companies, which projects transferred over 32,000,000 square feet of space. He has appeared before many dozens of municipal planning commissions, zoning boards of appeals, boards and councils in obtaining rezonings, variances and special use permits. Mr. LaBelle has presented seminars and authored papers on many commercial real estate and leasing topics for the Law Conference of the International Council of Shopping Centers, the Real Property Law Section of the Michigan Bar Association, the Oakland County Bar Association, and other trade journals. ral@wwrplaw.com

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JENNIFER MACKAY, a dynamic Real Estate leader, with a strategic-leadership style delivering results working on Shopping Centers and Real Estate Developments throughout the country. Experience includes Retail Power Centers, Lifestyle Developments, Office/Mixed Use, and Residential/Historical preservation projects. As a Portfolio Manager, Leasing Director, and Senior Sales professional for a publicly and privately traded REITs, her responsibilities included the managing of Assets valued at more than \$128 million dollars. Jennifer's charitable contributions include previous President of the Northville Optimist Club (501C Non-profit) and being a regular volunteer at local charities such as Forgotten Harvest, Gleaners Community Food Bank, The Baldwin Soup Kitchen, and the Clothes Closet of Pontiac. She has also chaired numerous ICSC committees and has extensive training on the "Post-Department Store Era" involving the evolution of the retail industry and segmentation of retail into Commodity and Specialty sub-groups. Jennifer has been a member of ICSC since 2008, and a licensed Realtor 1997. jennifer.mackay@shopone.com

PAUL S. MAGY is a member of the law firm of Clark Hill PLC's Real Estate Practice Group. Mr. Magy's extensive commercial real estate experience includes acquisition, development, finance, zoning, leasing and sale of commercial real estate, in addition to litigation related to those areas, including receiverships, distressed assets and retailer bankruptcy. Mr. Magy has substantial experience representing owners of all manner of commercial real estate as well as developers, property managers and brokers. Mr. Magy is actively involved in a number of real estate trade associations. Mr. Magy is a long-time member of the International Council of Shopping Centers (ICSC), serving as ICSC's

Michigan State Director from 2001-2004 and has held numerous other state and regional ICSC offices. In 2012, Mr. Magy was awarded ICSC's highest honor, the Trustees Distinguished Service Award, at a special ceremony at RECon in Las Vegas. Mr. Magy is currently chair of the Michigan ICSC's Continuing Education Program for Real Estate Professionals and frequently presents at seminars and programs on a variety of real estate related topics. Mr. Magy's work in the area of shopping center related law and involvement with ICSC earned him a seat on ICSC's National Legal Advisory Council beginning in 2002. He was named to become its Chairman effective at the 2013 RECon. Mr. Magy is Past President of the Building Owners and Managers Association (BOMA) of Metropolitan Detroit. Prior to joining Clark Hill, Mr. Magy was a founding member of Kupelian Ormond & Magy (KOM) - a Southfield, Michigan based law firm that joined with Clark Hill PLC in 2012. He graduated from Wayne State University Law School in 1982. Mr. Magy has been designated a Michigan Super Lawyer and a DBusiness Top Lawyer for many years. Mr. Magy is a Fellow of the Michigan State Bar Foundation and a Life Member of the Judicial Conference of the U.S. Court of Appeals for the Sixth Circuit. He is also actively involved with a number of educational, religious and charitable institutions, and has presented or facilitated at seminars and programs on topics related to leadership development, programming and fundraising. Mr. Magy served as President of Adat Shalom Synagogue, a 1,000-member family congregation in Farmington Hills, Michigan, between 2004-2006 and was Chair of the Board of Advisors of the Rabbinical School of Jewish Theological Seminary of America, located in New York, N.Y., from 2006-2009.

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has obtained tens of millions of dollars of Tax Increment Financing (TIF), Brownfield Tax Credits (SBT/MBT), Grants and Loans, Tax Abatements, Site Assessment Funds (SAF) and other economic incentives throughout Michigan for Brownfield Redevelopment, Commercial and Industrial projects. His tenure includes being a Past President (2007) of the Commercial Board of Realtors (CBOR) in Michigan, the statewide commercial board which owns the Commercial Property Information Exchange (CPIX), member of the ICSC Alliance and founding member of the Continuing Education Program committee of the International Council of Shopping Centers (ICSC), the Board of Directors for NAIOP and the UM/ULI Real Estate Forum. Mr. Maloof is also past Chair (2017-2018) of the Energy Sustainability and Environmental Law (ESEL) Committee of the Oakland County Bar Association (OCBA) and is Co-chair of the Hazardous Substances and Brownfield Committee for the State Bar of Michigan Environmental Law Section (ELS). As an active member and frequent speaker for the State Bar of Michigan Real Property Law Section, including as a founding faculty member of the Real Property Law Academy educational program for attorneys, Mr. Maloof is also an approved Continuing Education Instructor with the State of Michigan and has presented numerous accredited educational programs for the State Bar of Michigan, ICLE, ICSC, Lorman Education and CBOR.

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MATTHEW MASON spearheads Conway MacKenzie's Real Estate industry vertical. He is accomplished in assisting institutional clients, lenders, and private investors with distressed real estate and has served as a court-appointed Receiver for more than 200 retail, office, multi-family, and mixed-use projects. He has significant expertise with large retail and office assets, including enclosed regional malls, multi-state portfolios, and open-air lifestyle centers throughout the country. Mr. Mason has extensive experience with acquisitions, dispositions, and lease negotiations, having completed 14,000,000 square feet of leases with a value in excess of \$885,000,000. Matthew routinely assists major retailers in the site selection, negotiation and optimization of retail portfolios. Prior to joining Conway MacKenzie, Mr. Mason was Senior Vice President of Commercial Real Estate and Special Advisor to the CEO at McKinley, Inc., where he managed a 21 million square foot, \$1 billion portfolio of retail, office, industrial, and mixed-use properties throughout the United States. He previously served as Real Estate Counsel for the Kmart Corporation/Sears Holdings Corporation, where he oversaw real estate and legal matters pertaining to the retailer's 3,000+ stores. During his tenure at Kmart/Sears, Mr. Mason completed real estate transactions in excess of \$1.2 billion. Mr. Mason began his career in retail real estate as the Director of Acquisitions for a preferred developer for CVS/pharmacy, where he was responsible for the site selection and acquisition of retail properties throughout the Midwest. In addition, he led a team of site acquisition specialists in the identification of retail locations, analyzed market conditions and tailored development strategies to maximize returns. Mr. Mason earned his Bachelor of Arts

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ROBERT MATTTLER of Green Portfolio Solutions, LLC is the Michigan market leader for Counterpointe Sustainable Real Estate, a leading PACE financing company. Mr. Mattler brings more than 30 years of combined experience in real estate law, commercial brokerage and green building consulting through his efforts and past experience as a Board Member of the Detroit Chapter, United States Green Building Council (USGBC). Presently, Mr. Mattler is involved with the American Institute of Architects (AIA) 2030 national initiative in the cities of Grand Rapids, Ann Arbor and is a Detroit 2030 Ambassador. The AIA 2030 initiative has 23 city members across the country, whose goal is to reduce energy, water consumption and provide stormwater mitigation of at least 50% by 2030. greenps14@gmail.com

PATRICIA A. MEADOWS-SMITH is a Senior Account Executive at First American Title (formerly Metropolitan Title Company) since 1992. Prior to First American Title, she had a 10-year career at NBD (Chase Bank) in their Commercial & Consumer Lending Groups along with a family owned residential brokerage firm. Each of these career paths have given her an advantage to understand a real-estate transaction from different perspectives (real-estate broker; closer; analyst; lender; title). Ms. Meadow-Smith is involved in every facet of commercial real estate organizations, participates on several committees, and presents various continuing education topics (ICSC; CCIM; ULI; SIOR). Her dedication, perseverance, and exceptional customer service has been recognized at First American Title with the highest honor - The DPK Circle of Excellence Award for the past seven years (2015, 2016, 2017, 2018, 2019, 2020, and 2021). Outside of her career, she tries to manage her charitable heart between several charities and Church(s). She lives in Birmingham, MI with her husband. Together they have six children and 11 grandchildren (all within 5 years). She loves to travel, hike, water & snow ski, boat, paddle board, cycle, tennis and spend time with the grandchildren of course! pattymeadows@firstam.com

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JUSTINE O'BRIEN is an industry leader in retail shopping center leasing. As the Senior Leasing Representative for Schostak Brothers & Company she is responsible for the company's Retail Shopping Center Portfolio. Justine is an expert in creating retail synergy at the shopping centers by combining national and regional retailers with local flare. Major projects include the ground up development of Northville Park Place at 7 Mile and Haggerty Rd. and the re-development of 13 Mile and Woodward Avenue in Royal Oak for Beaumont Hospital. Justine's achievements in retail leasing are the collective experience of working with national developer, Brixmor Property Group, as a Senior Leasing Representative and with the former brokerage firm of Ludwig & Seeley Inc. as a Tenant Rep Broker. For the past 15 years Justine has been dedicated to the retail real estate

business, building relationships in the real estate community through networking, mentoring and volunteering. obrien@schostak.com

MARCEL PEARL, Associate Advisor, Encore Real Estate Investment Services. Marcel is a Commercial Retail Estate Broker in the City of Detroit. His focus has been on the retail side of Commercial Real Estate with a focus and specialty that includes, single tenant net lease, shopping centers, mixed use developments and retail strip centers. Other experience in real estate has included, apartments, industrial, and vacant land. His experience working with buyers, sellers, tenants, and landlords has made him keenly aware of the needs and wants of the retail-centered client. With the help of his brokerage Marcel has been able to establish a client base throughout the country. He has listed and sold properties from California to Maine. Working with small private entities to large publicly traded REITs. Marcel has developed the ability to understand what makes a deal work for all parties involved in a deal. Marcel has also carved out a niche within the neighborhoods of Detroit. His unprecedented understanding of the unique needs that come with doing business within the city, is a huge asset to Encore Real Estate. As a life-long Detroiter, Marcel has been able to build relationships like very few can. Recognizing the importance of interacting with various business entities, helps him facilitate transactions with many important financial and developing organizations like the Detroit Economic Growth Corporation, Community Development Financial Institutes (CDFI), and other non-profit neighborhood-based development organizations (Motor City Match and Grandmont-Rosedale Development Corporation.) After studying finance at the University of Michigan-Dearborn, Marcel started a career in sales and now has more than 15 years of sales experience. The knowledge learned from his experience has augmented Marcel's abilities to facilitate all types of commercial real estate transactions. Marcel is a member of ICSC and ULI, both which support industry-specific growth and networking in commercial real estate. mpearl@encorereis.com

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100 Michigan Lawyers,” and was named one of the “Top 50 Michigan Business Lawyers” in 2013. Mr. Pesick’s memberships include: **State Bar of Michigan**, where he is a Member of the Sections on Litigation and Real Property Law. He is a past Chair of the Real Property Law Section, served as Chair of the Real Property Law Section’s Eminent Domain Committee for seven consecutive years; **American Bar Association**, where he is a Member of the Section on Litigation; and Committee on Real Estate, Condemnation and Trust Litigation; and the **Oakland County Bar Association**. Mr. Pesick is also the author of several articles on eminent domain, and is a frequent speaker, instructor, and lecturer at state and national eminent domain conferences. jpesick@spclaw.com

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MARK SCHOSTAK is partner in a fourth generation family business, Schostak Family Enterprises (SFE). Made up of multiple family entities, SFE celebrated 100 years of real estate and banking expertise in 2020. Mark is involved in all aspects of the family business. He is a Partner in Schostak Family Investments Company, which invests in a diverse group of businesses, Schostak-Fisher Group, a residential real estate developer Officer and is Director of Schostak Brothers and Company, Inc. (SBCI), a diversified commercial real estate company operating in 24 states in the United States. Mark is also Executive Chairman of TEAM Schostak Family Restaurants. TEAM Schostak Family Restaurants (TSFR) was started in 1981 when Mark was a freshman at the University of Michigan. Today, TSFR has a portfolio of over 160 casual dining, family dining, fast casual, and quick service restaurants. As Executive Chairman of TSFR, Mark oversees the high level strategic decisions of the restaurant group including Applebee's (TSFR opened the world's only co-branded Applebee's/IHOP in Detroit), Wendy's, Olga's Kitchen, MOD Pizza and Del Taco. In 2019, TSFR launched a fast casual concept of Olga's Kitchen called Olga's Fresh Grille and in 2021, TSFR entered into the ghost kitchen space with its first ghost kitchen, Olga's Express. One of TSFR's operating divisions King Venture, Inc. (KVI) sold its 60 Burger King restaurants to GPS Hospitality in 2015. Mark is a passionate leader and particularly enjoys the planning, analysis, and the establishment of strong organizational culture. TSFR is a Top Workplace which Mark attributes to TSFR's ongoing commitment to engaging our people, leadership development and corporate citizenship. Mark takes great

pride that as a restaurant company employing thousands of people, TSFR has been honored as a Top Work Place in Michigan by the Detroit Free Press four consecutive years since 2018. Mark is on the Board of Advisors of VoicePlug, a provider of custom voice AI solutions; a member of the Board of Directors of Apple Supply Chain Co-Op, the purchasing agent for the Applebee's and IHOP systems; and Burns and Wilcox, a national insurance company. He also serves on the Applebee's Franchise Marketing Council (FMC). Mark is a past board member of the Michigan Restaurant and Lodging Association (MRLA). He is on the Schostak Family Advisory Board which acts as the family board of directors and he participates in the family's significant philanthropic activities.

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ELIZABETH A. SPADAFORE joined Community Choice Credit Union in 2009 as a Business Development Officer, initially charged with expanding the Business Lending portfolio. This position continues to expand including assisting in providing a full suite of business offerings to our business members. Beth has been in the financial arena for over 45 years, 43 of which have been in the commercial lending department, starting as a credit analyst, AVP and VP at local commercial banks. Beth has a Bachelors Degree in Business Communications with a minor in Accounting from Oakland University. Beth has also attended numerous RMA classes and various college courses.

ALAN J. TAYLOR is a Shareholder with Segal McCambridge Singer & Mahoney in its Michigan office. Mr. Taylor's practice primarily focuses on real estate law, commercial litigation and the defense of professional liability claims. Mr. Taylor's subspecialty expertise lies in landlord/tenant relationships. Mr. Taylor currently represents several commercial, industrial and residential property owners and many local and national property management companies. Mr. Taylor attended the London School of Economics and received a B.A. in Economics, with distinction, from the University of Michigan in 1991. In 1994, Mr. Taylor graduated from the Wayne State University Law School. He has been very active in the Metropolitan Detroit legal community for the last 22 years. Mr. Taylor is a Martindale-Hubbell AV Preeminent® Peer Review Rated attorney who was recognized as

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ELIE TORGOW is the Chief Executive Officer of Sterling Group, a privately held investment and real estate firm that acquires and manages high potential and high performance properties. In this capacity, he has employed his leadership ability and team building skills to help shape the direction of the company. Mr. Torgow has been with Sterling Group since 2008 and has been involved in acquisitions, leasing, property management, development and management of company operations. Since becoming CEO in 2013, Mr. Torgow has applied innovative strategies that has allowed Sterling Group to anticipate market transitions and continued growth. Mr. Torgow has worked with business leaders and community activists to contribute towards the ongoing growth and betterment of Detroit. He maintains active involvement in several community organizations and currently serves on the board of the Judson Center, the Downtown Detroit Partnership and City Year Detroit. Mr. Torgow is married with four children.

SEAN VALENTINO has over 24 years of experience in the retail industry. He currently leads the Retail Operations Division at REDICO. Joining the company in 2006, Sean has worked his way through the ranks, at all levels of property management and leasing, and currently directs the operations and management of REDICO's entire retail portfolio, where he oversees three million square feet of retail and mixed-use properties. Prior to joining REDICO, Sean was the specialty leasing manager for Thor Equities. While there, he oversaw the specialty leasing efforts at Macomb Mall in Roseville, Michigan, a one million square foot super-regional shopping center. Sean has also work for NAMCO Real Estate Group at the Summit Place Mall, a 1.4 Million square foot super regional shopping center in Waterford, Michigan. Sean held multiple positions during his time at Summit Place, including assistant general manager, specialty leasing manager and marketing director. Sean holds a Bachelor's degree in Business Administration from Baker College. He is an Administrative Committee member for The 8 Mile Boulevard Association and he has been a member of the International Council of Shopping Centers (ICSC) for over 15 years. His credentials include a Certified Shopping Center Manager (CSM) designation and a Certified Retail Real Estate Professional (CRRP) designation with ICSC.

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JULIE VAN DEVENDER is Ford Land's Director of Leasing for the Michigan Central Innovation District including the Michigan Central Station, the Book Depository Building and related properties located in the Corktown neighborhood in Detroit, Michigan. She is responsible for managing the activities related to the marketing and leasing of retail and office spaces within Ford's 30-acre mobility innovation campus. Julie has been active in the real estate arena since 1989 and has a broad spectrum of commercial real

estate experience having worked with national firms Transwestern and Trammell Crow Companies in Washington, DC and Edward J. Lewis, Inc. and MegaJoule Ventures in Youngstown, Ohio and CBRE here in Detroit, Michigan. She oversaw a portfolio of approximately 4 million SF with Trammell Crow Company and co-founded the Association and Non-Profit group practice in DC during her tenure with Transwestern. With Edward J. Lewis she provided commercial and industrial advisory services to commercial and industrial clients in the Mahoning Valley, Ohio and as Director of Real Estate for MegaJoule Ventures Julie was responsible for effecting the strategic real estate plan for its ambitious industrial redevelopment projects in Trumbull County, Ohio. Her role involved the business integration of MegaJoule's technology interests as well as its green energy and circular economy goals. Julie is a graduate of the University of Notre Dame and a monogram award recipient of the Notre Dame Women's soccer team. As a part of the Michigan Central team, she is excited to be part of bringing this iconic property to life and working with the Ford team towards its goals of creating a truly unique place for innovation, technology, community and sustainability.

MATTHEW VAN DYK is a Member at Miller Johnson in the Kalamazoo, MI office. His real estate practice includes multi-faceted, complex transactional and development work. Mr. Van Dyk represents clients in commercial, industrial, residential, and mixed-use projects and matters. He has significant experience in development, condominiums, zoning and entitlement, acquisitions, leasing, affordable housing, 1031 exchange, and tax incentive projects. Mr. Van Dyk serves on the Michigan steering committee for the International Council of Shopping Centers (ICSC), is a former co-chair of the State Bar of Michigan Real Property Law Section – Commercial Leasing group and has served as the chair of the Kalamazoo County Economic Development Corporation. He is a graduate of Wayne State University Law School and is admitted to practice in Michigan. vandykm@millerjohnson.com

THOMAS WACKERMAN is President and Co-Founder of ASTI Environmental (ASTI) a national environmental and restoration company with headquarters located in Brighton, Michigan. ASTI has been providing assistance to business and government since 1985, offering investigation, compliance, remediation, and restoration services. ASTI has completed over 11,000 projects throughout the United States and in Canada, Mexico and East Europe. ASTI works with groups ranging from industry to developers to municipalities to non-profits, in order to provide solutions to environmental and site redevelopment challenges. Mr. Wackerman has over 40 years of experience in environmental consulting, and has authored over 1,000 papers and reports on environmental issues. He is a graduate of the University of Michigan, and is a Certified Hazardous Materials Manager, Masters Level, a Certified Environmental Trainer, and an Environmental Professional. He is

a graduate of the 2003 Leadership Michigan class, and the Chair of the University of Michigan/Urban Land Institute Real Estate Forum. He was recently a part-time faculty member at Wayne State University, Department of Chemical Engineering, where he taught graduate engineering courses related to environmental investigation and compliance from 1991 to 2012. He is a frequent guest lecturer for professional associations and universities on subjects ranging from Brownfield redevelopment, to environmental assessment, to regulatory compliance. He has been a speaker at the 2003, 2004, 2008, and 2015 National Brownfield Conferences, as well as the 2013 ULI National Fall Conference, and an instructor for Brownfield Redevelopment at the International Council of Shopping Centers (ICSC) University of Shopping Centers at the Wharton School of the University of Pennsylvania. As Director of Brownfield Redevelopment, he has been responsible for assessment and remediation of site impacts, evaluation of redevelopment scenarios, negotiation of exit strategies for sellers, obtaining financial incentives to support redevelopment, obtaining and managing federal and state grants for investigation and remediation, and coordinating a wide range of gap financing tools. Mr. Wackerman has conducted environmental programs ranging from the assessments to RCRA corrective action facilities, to assessment of an anthrax vaccine production facility, to redevelopment of a 206 acre campus-wide Brownfield site, to evaluations of community exposure from industrial and hazardous waste emissions, to industrial compliance surveys for all media. He also has directed numerous projects to assist industry with regulatory compliance, to investigate the migration and fate of chemicals in the environment, to assess human exposure, and to provide information for product design and development. twacker@asti-env.com

DEBORAH WEINSWIG is the founder and CEO of Coresight Research. Between 2014 to early 2018, Deborah served as Managing Director of Fung Global Retail and Technology (FGRT), the think tank of Fung Group. Previously, she was Managing Director and Head of the Global Staples & Consumer Discretionary team at Citi Research. Deborah was ranked the #1 analyst by *Institutional Investor* for 10 years in a row. She was named one of the Top 50 Retail Influencers by Vend in both 2016 and 2017, and received the Asia Retail Congress's Retail Leadership Award in 2016. She was also recognized by LinkedIn as a top Voice in Retail in 2017 and 2018. She serves on the board of directors for Goodwill Industries New York/New Jersey, GUESS?, Inc., Kiabi, Street Soccer USA and Xcel Brands, Inc. Deborah is on the advisory board of the World Retail Congress as well as several accelerators. Deborah is a Certified Public Accountant and holds an MBA from the University of Chicago.

RICK WELSH Mr. Welsh is the Director of Environmental Due Diligence and ASTI's Phase I & II Environmental Site Assessment (ESA) practices. He has over 30 years of environmental consulting experience. Mr. Welsh is an Environmental Chemist and Board-

Certified Toxicologist (i.e., Diplomate of the America Board of Toxicology or DABT). He specializes in the clean-up and re-development of contaminated urban industrial properties. The business sectors he has supported include land developers, manufacturing, transport (rail / shipping), hazardous waste (treatment, storage and disposal), electronics, energy, oil & gas, mining, and petro-chemical. His team focuses on the Part 201 (environmental contamination of properties) and Part 213 (underground storage tank contamination) regulatory programs. rwelsh@asti-env.com

GLENN A. WILSON is Co-Founder and President/CEO of Communities First, Inc. and leads one of the largest minority real estate organizations as it responds to the great need that distressed communities face related to economic development and affordable housing. The award-winning organization has secured more than \$50 million in funding, primarily for real estate development projects and provided jobs to more than 400 people due to Mr. Wilson's leadership. Glenn has expansive knowledge of real estate and community development, serving as the primary lead for these activities since the organization's inception in 2010. He is a sought-after speaker and considered a national thought leader and practitioner in the community development and wealth building space. He currently advises and sits on boards with collective assets over \$160 billion. He is known as a trusted convener of national leaders who has a unique skill to translate between community, government, philanthropy and corporate fluently. His approach ensures equitable outcomes meet objectives. He has a proven and consistent track record of producing results. His background in healthcare, compliance and regulatory, construction, governance, policy, real estate, energy, finance, business development, capital markets, M&A, transportation, diversity, equity and inclusion, crisis management, sales, marketing and entrepreneurship has translated well to into his board and community development work. Glenn is highly skilled at creating organizational vision and translating those visions into community results. Glenn currently serves on the Michigan Housing Council Board of Directors, Michigan Housing Council Finance and Development Committee, Mott Children's Health Center Facilities and Grounds Committee, Mass Transportation Authority board, Genesee/Lapeer Valley Area Agency on Aging board, Hurley Foundation board, Michigan Historic Preservation Network board and is a member of the Federal Home Loan Bank of Indianapolis Advisory Board, Flagstar Bank Advisory Board, sits on the HUD Preservation Task Force, Consumers Energy Advisory committee, ELGA Credit Union Supervisory and Audit committee and Michigan Economic Development Corporation committee. He is also a member of the Private Director's Association. Glenn holds a Diploma in Theology from Christian Life School of Theology, Certificate of Excellence in Nonprofit Leadership and Management from Michigan State University Extension and Society of Nonprofits, BA in Business from Northwood University and is pursuing a MS in Leadership from Central Michigan University. Glenn is currently a fellow in the American Express Social Justice Leadership Academy and previously traveled to

Australia as a Next City Vanguard fellow, convening on best practices in urban leadership, land use and policy. He has won many awards, including Partner in Progress Award - Genesee District Library, 40 Under 40 - Michigan Chronicle, American Express Aspire Award - The National Trust for Historic Preservation, Young Professional Award - Flint & Genesee Chamber of Commerce, Paul Harris Fellow - Rotary International. Glenn participates in committees at the Flint Institute of Arts and Flint Institute of Music and has a passion for promoting social equity. He is married to Essence Wilson and has a lovely daughter.

MARK WINTER As Identity's president and founding partner, Mark Winter is not just the face of the agency—he is its visionary, leader, heart and soul. The firm's experiential approach to the Modern PR Mix is reflective of his vision to continually feed his entrepreneurial energy with purpose, and create a better, more impactful way. As the firm has grown and evolved from a two-person startup in 1998 into one of the most recognized and respected firms in the nation, Mark's leadership, passion and commitment have served as the engine driving the firm's success. As a past president and eight-year board member of the Detroit Chapter of Entrepreneurs Organization (EO), Mark's leadership skills and style are deeply rooted in his unique ability to bring leaders and stakeholders together, simplify the complex, navigate challenges, optimize opportunities and deliver results. Mark's inherent gift of cultivating and maintaining meaningful professional relationships—and his commitment to teaching those skills to others—has driven Identity's long-standing client loyalty, as well as its ongoing invitations to work with some of the best leaders and companies in the country. He currently serves on the board of Holtzman Wildlife Foundation, The Heat and Warmth Fund (THAW) and the Association of Corporate Growth (ACG). mwinter@identitypr.com

BROOKE WOLF For over 18 years, Brooke has been exclusively focused on retail real estate throughout the State of Michigan. Brooke's expertise is in retail tenant representation, specialty leasing, ground up developments, freestanding buildings and QSR restaurants. Brooke began her real estate career in 2003 with LaKritz-Weber & Company where she was quickly promoted to Vice President. Throughout her tenure, Brooke helped various national and local retailers with their initial retail roll out in the Metro Detroit area and throughout the State of Michigan. Additionally, she has assisted several local developers such as RPT Realty, and Grand Sakwa Realty in exclusively master leasing high profile, ground-up developments in Metro Detroit. Working with many landlords, Brooke has also been instrumental in the design of many small pad developments from purchase, design, and full lease-up. Brooke graduated from the University of Michigan with a degree in Business Administration. Brooke is an active member of the International Council of Shopping Centers (ICSC) where she sits on the education board and currently lives in Franklin, Michigan with her two children Marley and Dylan. Throughout her career in

the industry, Brooke was involved in helping a variety of top retailers in their plans to roll out and expand. Brooke exclusively represented and executed market entrance plans for the following retailers: Starbucks, Panera Bread, Oberweis Dairy and Noodles & Company. Regionally, Brooke was involved in creating expansion plans for GNC and Famous Footwear. Another notable tenant that Brooke represented was Leo's Coney Island, on the local level.

CORBIN YALDOO specializes in landlord and tenant representation. His area of expertise also includes high profile listings, leasing of new developments and seller/buyer representation through land/asset acquisition and disposition. Additionally, he has created a niche being at the forefront of cannabis real estate on a national basis. In 2011, Corbin joined CMP Real Estate Group and quickly became an asset to the company by helping grow and sustain the company's relationships within the Metro Detroit market. His attention to detail, combined with his strong work ethic, garnered recognition from his peers in the business becoming a true value to his clients. During his career, Corbin gained widespread knowledge of landlord representation including: neighborhood strip centers, new development/re-development projects, power centers, and big box disposition. In addition, Corbin has developed site selection skills and market knowledge through various tenant representation assignments, ranging from local to regional and national retailers. In 2017, Corbin joined Mid-America Real Estate-Michigan, Inc., where he is actively working throughout Michigan and select US market. His clients range from local private companies to institutional Landlords, REITS and publicly traded companies. Some of his current and past clients include Beztak Properties, Gatlin Development Company, Lormax Stern Development Company, Time Equities Inc., AT&T, Domino's Pizza and The UPS Store. Corbin attended Oakland University majoring in Business General Management and minoring in Human Resources Management. Corbin is an active member of the International Council of Shopping Centers (ICSC) and currently serves as ICSC's Michigan Next Generation State Chair. He also is a member of ChainLinks Retail Advisors and on the board of several local organizations. Additionally, Corbin helps coordinate the Mid-America Next Generation Group monthly calls, in which all five Mid-America offices discuss market news based on research and market analysis.

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ICSC+CONTINUING EDUCATION MICHIGAN

Suburban Collection Showplace

Novi, MI

Wednesday, April 13, 2022

Session Materials

Roundtable 1: ALTA Surveys, the Land Surveyor and You

Led by: Chris Beland, PPEA Group

**Frequently Asked Questions
and
other guidance for
ALTA/NSPS Land Title Surveys
(06/30/21 vers.)**

What about the transition period leading up to and immediately after February 23, 2021?

If a contract to perform a Land Title Survey is executed on or after February 23, 2021, the survey must be performed pursuant to the 2021 Standards with a couple of possible exceptions explained below.

During the transition period, surveyors may encounter situations whereby they have entered into a contract to perform an ALTA/NSPS Land Title Survey prior to the effective date of the 2021 Standards (February 23, 2021), but the survey is not anticipated to be completed until after February 23, 2021. In such cases, the surveyor may discuss this with the client, title company and lender and include an appropriate clause in the contract, viz., *“This survey will be prepared using the 2016 Minimum Standard Detail Requirements for Land Title Surveys as established by ALTA and NSPS since said standards are still currently in effect at the time of this contract. It is understood and accepted by all parties involved that said standards may no longer be current upon completion of the survey, but will still be used for the purpose of this survey.”*

How about HUD survey requirements?

On March 25, 2021, HUD’s *Office of Multifamily Production Technical Support Division* issued “Interim Instructions for Surveyors for Form 91073M Pending HUD Revision of the Form” which recognize, explain the application of, and allow use of the 2021 ALTA/NSPS Survey Standards.

Based on discussions with HUD, it is expected that the final instructions may differ somewhat from the interim instructions. When those instructions are issued, this FAQ will be updated.

What about the transition period as related to “updates” of previous surveys?

As an aside, notwithstanding the innocuous-sounding word “update,” there is actually no such thing as an “update.” An “update” is a new survey – the surveyor is certifying that the survey reflects the current conditions on the property and that it was performed pursuant to all of the requirements in the current standards. The only difference is that the surveyor happens to have surveyed the property previously, so the client *might* realize a reduced fee or quicker turnaround depending on a number of factors (e.g., how long has it been since the initial survey? How many changes have affected the property since?).

In any event, if the contract to conduct the “update” is executed after February 23, 2021, it must be performed pursuant to the 2021 Standards. However, if the “update” is simply a follow-up on a survey *related to a conveyance that had been anticipated to close before February 23rd, but was perhaps unexpectedly delayed for a fairly short time until after February 23rd*, the surveyor could arguably conduct the “update” pursuant to the 2016 Standards. This does not extend to

“updates” unrelated to the initial conveyance or “updates” that take place substantially after February 23rd. By the date of this version of the FAQs, that “fairly short” time period is now arguably past.

Providing professional guidance to the client

When deemed appropriate, surveyors might want to consider suggesting to their clients that the advice of a wetlands, flood plain, environmental, archeological or other appropriate expert might be beneficial.

Section 4 - What if the required research information is not provided to the surveyor?

Surveyors may encounter situations whereby the title company is unable or unwilling to provide the research otherwise required pursuant to Section 4. In that case, surveyors must perform their research pursuant to their state’s requirements, and if their state has no standards in that regard, it is advised that they be familiar with the normal standard of care in their area regarding research. Notwithstanding that, some form of title work is required to perform a Land Title Survey (see below).

Section 4 - What constitutes satisfactory title evidence?

Starting in 2016, the ALTA/NSPS Standards state that the surveyor needs to be provided with the most recent title commitment “or other title evidence satisfactory to the title insurer.” Why not simply require a title commitment?

Title companies have other products that are sometimes requested by clients that fall short of commitments and policies, but that - for a variety of reasons - are acceptable to clients in some circumstances. In addition, in some cases, abstracts are still used. Since the ALTA/NSPS Standards were developed expressly to address title company needs, the Standards – starting in 2011 – required that title evidence be provided to the surveyor. But sometimes, the title company may accept or produce something less than a title commitment, so the Standards need to reflect that fact.

Section 5.B.ii. - How do we treat sidewalks and trails along the street/road

It is not unusual that streets and roads are found to have sidewalks or trails running adjacent to them or with a grass strip between the two. Likewise, walking/biking trails are sometimes found adjacent to the street/road - even as part of the paved way in some cases. Section 5.B.ii. calls for locating the “travelled way” to be located and, of course, shown on the survey. The question of whether such sidewalks/trails should also be located and shown is answered by Section 5.B.iv. which requires that *“The location and character of vehicular, pedestrian, or other forms of access by other than the apparent occupants of the surveyed property to or across the surveyed property observed in the process of conducting the fieldwork (e.g., driveways, alleys, private roads, railroads, railroad sidings and spurs, sidewalks, footpaths)”* be located and shown.

Section 5.E. - Easements and Utilities

The 2021 ALTA/NSPS Standards now require that utility locate markings (typically paint or wire flags) be located and shown as evidence of easements and utilities. For those surveyors concerned about locating and showing what may or may not be actual utility locate markings because they do not have any information regarding the locate request or source of the markings, they might consider developing an appropriate note such as *“Paint markings found on the ground and shown hereon as evidence of possible (or probable) underground utilities are consistent with typical utility markings. However, no utility report was provided to authenticate these markings - their source is unknown. The user of this plat/map should rely upon such markings at their own risk.”*

Section 5.E.iv. - Why did locating and showing ‘observed evidence of utilities’ become mandatory in 2016, rather than optional as it was in Table A item 11(a) of the 2011 Standards?

This change was made to address a conundrum. Prior to the 2016 Standards, if a client did not request Table A item 11(a) or 11(b), the surveyor had no responsibility to locate and show evidence of utilities. But if that utility evidence could be considered evidence of an easement, the surveyor *did* need to locate and show it pursuant to Sections 5.E.i. through iv.

The committees felt that most evidence of utilities could also be considered evidence of easements, so to eliminate future problems and questions in that regard, locating and showing observed evidence of utilities was made mandatory starting in 2016.

Section 5.E.iv. - Why the changes in 2021 regarding this item?

The committee felt that utility locate markings should be treated as evidence of utilities just like vales, manholes, etc. NOTE that this item *does not* require a utility locate request.

NOTE - The wording of the second sentence in Section 5.E.iv. needs to be clarified. The intent of this - even though it is not clearly expressed - is this... *“Examples of such evidence include pipeline markers, utility locate markings (including the source of the markings, with a note if unknown), manholes, valves, meters, transformers, pedestals, clean-outs, overhead lines, and guy wires on and within five feet of the surveyed property, and utility poles on and within ten feet of the surveyed property.”*

Section 6.B.i.a. - What if the record description does not match the Schedule A description?

This section requires that on a survey of an existing parcel, the record description of the parcel being surveyed shall appear on the face of the plat/map.

The description of the real property being insured (contained in Schedule A of the title commitment) is typically (and ideally) identical to the record description. In cases where the two descriptions differ, the surveyor may wish to inquire of the title company as to the origin of the Schedule A description. In cases where the title company insists that it will be insuring the description in Schedule A even though it does not match the record, the surveyor may need to show both descriptions on the face of the plat/map.

It is certain that the parties will require that the description being insured appear on the face of the plat/map, and 6.B.i.(a) requires that the record description be shown. The surveyor might consider providing a note explaining how the two descriptions differ.

Section 6.B.vi. - Water boundaries and caveat

This section calls for a caveat to be noted regarding the nature of water boundaries. Surveyors might consider developing their own such note, but it could be formulated on the order of, *"Where the property being surveyed includes a water boundary, the parties relying on the survey should be aware that, (1) laws regarding the delineation between the ownership of the bed of navigable waters and the upland owner differ from state to state, (2) water boundaries are typically subject to change due to natural causes, and (3) as a result, the boundary shown hereon may or may not represent the actual location of the limit of title. The [e.g., bank, edge of water, high-water mark, ordinary high-water mark, low-water mark, ordinary low-water mark, center of stream] shown hereon [was/were] located on [Date]."*

Section 6.B.vii. - contiguity, gaps and overlaps

This section requires that the surveyor disclose any gaps or overlaps with adjoiners or between interior parcels where the property being surveyed is comprised of multiple parcels. This can be done not only with notes on the graphic portion of the plat/map, but also with textual notes drawing attention to the condition(s). Such information is critically important to the title company so that such issues can be disclosed to the parties and appropriate exceptions to coverage can be written.

Where no gaps or overlaps exist, surveyors should consider assuring that the parties understand that fact by providing an affirmative statement to that effect.

Section 6.C.i. - Dealing with easements that burden vs. easements that benefit the property

Offsite easements that benefit the surveyed property (i.e., appurtenant easements) are typically identified as insured parcels in Schedule A of the title commitment. Such easements may be included as part of the survey - treating them as a fee parcel rather than simply graphically showing them - pursuant to optional Table A item 18. But be wary of, for example, cross-parking and access easements that may cover large areas.

Easements that burden the surveyed property are identified as exceptions to title insurance coverage in Schedule BII of the title commitment.

It is possible that an easement could *both* benefit *and* burden a property in which case, it might be listed both in Schedule A and Schedule BII.

In addition, sometimes a title company may inadvertently list a beneficial easement in Schedule BII as an *exception* to coverage, rather than identifying it in Schedule A as one that *benefits* the surveyed property - or vice versa.

Surveyors should communicate with the title company when they believe there is a discrepancy between their opinion as to the effect of an easement and how the title commitment reports it.

Section 6.C.ii. - How do I deal with revisions to the title commitment?

Often in the course of the surveyor preparing the survey and often even after the plat/map has been completed and delivered, there will be revisions made to the title commitment that the surveyor will need to address. Surveyors should assure that they are appropriately compensated for

any work that they believe represents additional services. This could be accomplished by carefully spelling out in the contract how many lender/client/title company comment letters will be addressed, how many client/lender/title company-driven revisions will be made to the survey, and over what period of time.

Section 6.C.iii. - Does the surveyor need to now identify if streets are public or private?

Oftentimes people read more into the standards than what they actually say.

This particular item was modified slightly because in the 2016 standards, as it was written the surveyor needed to note lack of access only if it was a public street.

There were two problems with that:

1. The surveyor needed to determine if a street was public, and, more importantly,
2. Title companies and others need to know about access whether it is a public or private street.

Thus the item was modified accordingly. If you read it carefully, however, it does not say anything about the surveyor determining if the street is public or private, only that there needs to be a note if there is lack of access to either a public or private street.

Having written that, let's answer this question more specifically.

The standards never required surveyors to identify streets as public or private other than perhaps as may have been reported on, for example, a subdivision plat or in a grant of easement listed in Schedule BII.

These types of requests routinely come from lenders as part of the litany of things they want surveyors to tell them. Those requests *very frequently* have the surveyor providing more information than the standards require. Surveyors should strive to be helpful and cooperative, but not to their detriment (i.e., additional liability), so each request should be carefully weighed.

Most of the time, surveyors can probably determine, with some confidence, if a street is public or private - assuming the documentation was provided or is readily available.

But - aside from the items of Schedule BII and other research that surveyors need to do based on their state laws or the normal standard of care - under the ALTA/NSPS Standards they do not need to independently make such a determination. If it's not obvious from the documentation, they may wish to decline to opine on the issue pending someone providing definitive documentation.

Section 6.C.viii. - How does the surveyor address easements found, but not listed in title commitment?

This will most commonly happen when the surveyor, (a) by some means or other, becomes aware of an easement not listed in the title commitment or (b) an easement that appeared in an earlier version of the commitment has been removed from a subsequent version.

In this events, typically one of three things has occurred. (1) the title company simply inadvertently missed an easement, (2) the title company is aware - but the surveyor is not - that the easement has been released, vacated or abandoned, or (3) the title company has decided to insure over the easement.

New Section 6.C.viii. in the 2021 Standards states *“If in the process of preparing the survey the surveyor becomes aware of a recorded easement not otherwise listed in the title evidence provided, the surveyor must advise the insurer prior to delivery of the plat or map and, unless the insurer provides evidence of a release of that easement, show or otherwise explain it on the face of the plat or map, with a note that the insurer has been advised.”*

Such a note might be formatted similar to:

The 20 foot gas-line easement recorded as Instrument number 64-12345 and shown hereon is not listed in the title commitment; however, no evidence of a release, vacation or abandonment has been provided. The title company has been advised.

Section 7 - Certified parties?

Surveyors are often told they need to certify to multiple parties above and beyond the client, lender and insurer as identified in Section 7 and they need to recognize that more certified parties may equate to more liability. They may wish to consider specifically listing in the contract those parties that they will certify to and that *“additional parties may be certified to for an additional fee.”* If the specific parties are not yet known, they could specify that they will certify to the lender, client and insurer.

Often a request is made or direction given to certify to “ATIMA” and/or “ISAOA.” These are acronyms that mean *“as their interests may appear”* and *“its successors and/or assigns.”* The loan policy defines “insured” in a way that should remove the need for such wording, but if the lender demands that the title company put those in the policy, the title company will likely want to surveyor to certify to the same. Surveyors should seek guidance from their attorneys on the desirability of certifying in this matter; however, in any event, they may want to avoid certifying to successors and assigns of the client/buyer.

Section 7 - The date of the fieldwork is obvious, but what is the date of the Plat or Map?

That is the date by which the survey will be identified. Many surveyors date the plat or map as of the date they signed it. Others backdate it to the date of the fieldwork. The committees feel this decision is best left to the surveyor. In some states, the date of the plat/map may need to be the same as the date of the fieldwork.

Table A - What can I modify in Table A?

The introductory paragraph to Table A has been revised to make it clear - as was always intended - that not only is the very selection of a Table A item negotiable, but *the exact wording of the item is also negotiable*, as is - of course - the fee. It is permissible for the surveyor and client/lender to negotiate a modification to the wording of any item. Any such modification, however, must be explained in a note placed on the face of the plat/map pursuant to Section 6.D.ii.(g). Of course, surveyors need to decide for themselves what fee to attach to any given Table A item.

Table A, item 11 - What about underground utilities?

Item 11 has been re-written for 2021 in order to better address the realities of underground utility locations. The best thing surveyors can do to help manage expectations in this regard is to reiterate the “Note” following this item in Table A, viz.,

Note to the client, insurer, and lender – With regard to Table A, item 11, information from the sources checked above will be combined with observed evidence of utilities pursuant to Section 5.E.iv. to develop a view of the underground utilities. However, lacking excavation, the exact location of underground features cannot be accurately, completely, and reliably depicted. In addition, in some jurisdictions, 811 or other similar utility locate requests from surveyors may be ignored or result in an incomplete response, in which case the surveyor shall note on the plat or map how this affected the surveyor’s assessment of the location of the utilities. Where additional or more detailed information is required, the client is advised that excavation may be necessary.

Table A, item 11(b) - Does this item require an 811 locate request or a Level B SUE investigation?

No, neither! Because in many, if not most, parts of the country an 811 locate request from a surveyor is an exercise in frustration and futility, the Joint ALTA/NSPS Committee dropped reference to 811 locate requests and added the “private locate request” as 11(b).

The intent of 11(b) is to hire a private locator, rather than making an 811 locate request or hiring someone to do a Level B SUE investigation.

If item 11(b) is checked, the surveyor needs to discuss with the client who will make the locate request and who will paying for it. Obviously, if the surveyor is paying, the associated fee would be added to the survey costs.

Keep in mind, however, that the wording of Table A items is always negotiable, so if in your area, an 811 locate request is actually fruitful - or if the client insists on a Level B SUE investigation - the wording of 11(b) can be negotiated, modified and the word “private” replaced with “811” or “Level B SUE investigation.”

Table A item 19 - “What does ‘This item shall not be addressed on the face of the plat or map’ refer to? The minimum amount of insurance to be in effect throughout the contract term and/or the certificate of insurance?”

In that phrase, “This item” refers to the totality of Item 19 and that, by implication, means everything associated with the item.

The intent of the requirement is that nothing related to Item 19 should be reflected on the plat/map. The item does not even need to be mentioned in the certificate as a Table A item. If proof of insurance has been provided (typically a certificate of insurance), there is no reason for anything regarding insurance to appear on the plat/map.

2021 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys Adopted

by Gary R. Kent, PS

After two years of concentrated effort and the input of many interested persons including several hundred surveyors, the American Land Title Association and the National Society of Professional Surveyors adopted the new 2021 version of the ALTA/NSPS Land Title Survey Minimum Standards in October 2020 effective February 23, 2021.

The most significant changes will be explained in this column, although those who perform Land Title Surveys should carefully review the red-lined version, the final “clean” version, and the Frequently-Asked Questions all of which are available on the NSPS website by going to [NSPS.us.com](https://www.nspus.com), selecting the “Resources” tab across the top, then picking “Standards” followed by “ALTA/NSPS” from the pull-downs.

Initially, the red-lined version may be most helpful since it shows the 2016 Standards with red-lined strikeouts and underlined additions indicating the deletions and additions that resulted in the 2021 version.

False Imperatives

One of the first changes the reviewer may come across is a number of occurrences of the word “shall” that have been changed to “must” in the 2021 Standards. This does not indicate some fundamental change in the thinking of the joint ALTA/NSPS Committee, but rather simply reflects the United States Supreme Court’s decision in *Gutierrez de Martinez v. Lamagno* 515 U.S. 417 (1995) in which it ruled that “shall” really means “may,” and that “must” is the word that imposes an obligation or command that something is mandatory.

The use of “shall” in earlier versions of the standards was consistent with its common usage at the time; various authoritative references agreed that “must” and “shall” were basically synonyms - both were imperatives. Since “shall” has been ruled to essentially be a false imperative, each such use in the ALTA/NSPS Standards was reviewed and if it was intended as a command, it was replaced with “must.”

Section 2 - The Request for Survey

A number of suggestions were received expressing an interest in the 2021 Standards addressing mineral rights. After considerable discussion, and definitive input from the ALTA members of the committee, it was decided that mineral rights can be so problematic the best way to deal with them was to simply add them to the list of atypical and non-fee interests that a Land Title Survey may involve.

Section 2 gives a number of examples of such properties and directs the surveyor to consult with the interested parties to determine the scope of the related Land Title Survey.

Section 3.D. - The Boundary

There was some concern expressed that the title of this subsection (“Boundary Resolution”) might lead the uninitiated to conclude that the professional surveyor is the final authority as to the location of boundary lines and corners. Of course, surveyors and title professionals know that

a boundary survey is merely a surveyor's professional opinion, and given that, the decision was to drop the word "Resolution" from the title of this subsection.

In addition, previous versions of the Standards had used a number of different terms to describe the property that was the subject of the Land Title Survey. With the 2021 Standards, that property is now referred to as either "*the surveyed property*" or "*the property to be surveyed.*" This change is reflected in several places throughout the 2021 Standards.

Section 3.E. - The Measurement Standards

A long-standing concern over the Relative Positional Precision (RPP) measurement standard and exactly how it was defined has been addressed in the 2021 Standards. The concern had to do essentially with the question of "with respect to what?" This has been addressed in 2021 by referencing the term "local accuracy" and by expressing another manner in which RPP could be calculated (viz., "*using the full covariance matrix of the coordinate inverse between any given pair of points*").

This is not to suggest that a minimally-constrained least squares adjustment is inadequate in estimating the RPP, but to simply shore up the definition with a more solid, statistically-based definition.

In another change to the measurement standard, the application of RPP - which previously included the relationship of the monument or witness marking any corner of the property to the monuments or witnesses marking any other corner of the property - has been limited to only the relationships between adjacent monuments or witnesses.

Section 4 - Records Research

Although this section appears on the red-lined version to have undergone a major rewrite, the order of the included items was merely rearranged for clarity; the actual content changed *very* little. This becomes obvious if the "clean" version of the 2021 Standards is reviewed.

Section 5 - Fieldwork

Section 5 underwent very few changes except for subsections C and E where several notable modifications were made. That being said, however, there is an addition to the introductory comments that clarifies that the precision with which the features in Section 5 are to be located does not apply to the precision of the boundary, which is addressed separately in Section 3.E.

In a major change, subsections 5.E.ii. and iii. now include utility locate markings as evidence of easements. Related to that, subsection 5.E.iv. likewise includes them as evidence of utilities. The requirement also says to identify the source of the markings and include a note if the course is unknown. It must be emphasized that nothing in Section 5 requires an 811 locate request.

Section 5.C.ii. has always called for the locations of features within 5 feet of the perimeter boundary to be located. And Table A item 11 has called for utility poles within ten feet of the perimeter boundary to be located and shown. But when locating and showing utility features on the property became mandatory with the 2016 Standards, the ten foot requirement on utility poles was inadvertently not included in Section 5.E.iv. This has been corrected in 2021.

The result is that all utility features on the surveyed property or within five feet of the perimeter boundary of the surveyed property are to be located and shown, except in the case of

utility poles which must be located and shown if they are on or within ten feet of the perimeter boundary off the surveyed property.

As an aside, attention is drawn here to the almost universally overlooked requirement to show the extent of any potentially encroaching utility pole cross-members.

Section 6 - Plat or Map

Two of the most significant changes to Section 6 occur in subsection C.ii. where two problematic issues have been addressed.

First, some surveyors have encountered lenders who demand that they list *all* of the items shown in Schedule BII of the title commitment on the face of their surveys, whether those items are survey-related or not. Such requests are, in this writer's opinion, ridiculous (this is a *survey* after all and it addresses *survey-related* issues). To tamp down on such requests, Section 6.C.ii. now calls for a "summary of all rights of way, easements and *other survey-related matters...*" (emphasis added).

Second, the ALTA/NSPS Standards have always strived to make certain that the requirements placed on the professional surveyor while undertaking an ALTA/NSPS Land Title Survey are rooted in factual, objective observations. That has been the reason for the avoidance of the word "affects" in the Standards when discussing the impact that an easement may have on the surveyed property.

Whether an easement "affects" a property is dependent not only on *where* the easement plots, but also on the *legal* effect of the easement. For example, if the person who granted the easement in 1920 was not the owner of the property encumbered at the time, that grant is not even valid. Surveyors do not routinely confirm the chain of title related to an easement and neither do title companies. An easement could *plot* on a property, but have no legal or title effect because it was not a valid grant in the first place.

However, lenders and others often focus on the word "affects," so Section 6.C.ii. now suggests that surveyors may want to note whether an easement "affects" the surveyed property *based on the description contained in the record document*. In this way, the word "affects" is qualified as being based only on an objective assessment of *where* the easement plots pursuant to the granting instrument.

In addition to several other revisions, a new subsection viii. has been added to Section 6.C. to outline the surveyor's responsibility when he or she discovers an easement that is not listed in Schedule BII of the title commitment. After a lengthy discussion of the issue in one of the Joint ALTA/NSPS Committee meetings, it was decided that in the event of such a conundrum, the surveyor must notify the title company of the discovery and, unless the insurer can provide evidence that the easement has been terminated, the surveyor must show or explain its existence on the face of the plat or map with a note that the title company has been notified.

Table A

Before outlining the specific and consequential revisions to Table A, two important changes are noted. First, two Table A items have been deleted, so there are now only 19 items.

Second, it has always been the intent - since its inception in 1988 - that the exact wording of each Table A item may be negotiated. It turns out that this is not universally understood, so the introductory paragraph to Table A now makes that fact patently clear.

With regard to the specific and more significant changes to Table A, what had been Item 10.b. (*a determination of whether certain walls are plumb*) has been eliminated. It had been a Table A item for years, but it is not rooted in any title issue (other than the possibility of an encroachment, which is addressed in Section 5.C.). Additionally, clients and lenders often request this item without giving any consideration to what walls - if any - they are actually concerned about. With the 2021 Standards, if there is truly concern about plumbness, it may be negotiated as an additional Table A item.

Table A item 18 - the wetlands item - has also been eliminated. This item has caused confusion since it was introduced in 2011 and is also not rooted in a title-related concern, so rather than trying to tweak it yet again in 2021, the Joint Committee decided to simply strike it. Of course, if the surveyor's firm has a wetlands biologist or otherwise wants to offer a wetlands-related service, for example, through a subcontracting arrangement, that may be negotiated as a Table A item 20.

The call in Item 5 to provide the originating benchmark has been modified to say "*when appropriate*." This addresses when a topographic survey was not actually performed (e.g., contours from some other source were utilized) or when elevations were, for example, established based purely on GPS observations.

Table A items 6(a) and 6(b) have been modified to specify that the zoning report or letter provided to the surveyor must be *specific to the surveyed property*. This is addressed to clients who simply want to dump the entire zoning ordinance on the surveyor, leaving it to him or her to sort out how the ordinance applies to the surveyed property.

One of the most significant changes in the 2021 Standards is to Table A item 11. This utility-related item has been problematic since 1988 primarily because it is very difficult to manage clients' expectations with respect to underground utilities. As a result, the item has been altered a number of times over the years. For 2021, two choices have been introduced.

The possible choices are to show "[e]vidence of underground utilities existing on or serving the surveyed property as determined by (a) plans and/or reports provided by client and/or (b) markings coordinated by the surveyor pursuant to a private utility locate request.

Surveyors will note several important points. First, the plans/reports are now to be *provided by the client*. Second, in most states, 811 locate requests from surveyors are routinely ignored or - at best - given a low priority. So mention of 811 requests has been deleted from the choices.

It is important to note; however, that - as mentioned above - the exact wording of a Table A item is negotiable. So, if the surveyor has ready access to utility plans, then item 11(a) can be modified accordingly. Likewise, if 811 locate requests from surveyors are actually properly attended to in your area, item 11(b) can easily be modified by changing the word "private" to "811."

In order to help control clients' expectations regarding what is actually achievable when it comes to underground utilities, surveyors might want to consider including the qualifying paragraph following Table A item 11 in their scope of work and/or on the face of their plat/map.

HUD Surveys

We were pleased to report that on March 25, 2021, HUD's Office of Multifamily Production Technical Support Division issued *Interim Instructions for Surveyors for Form 91073M Pending HUD Revision of the Form*. Those instructions state, in part:

Multifamily Production will accept the new 2021 ALTA/NSPS survey requirements. A revised HUD-91073M (Survey Instructions and Surveyor's Report) in redline format showing necessary changes to the HUD form to accommodate the underlying changes to the new ALTA/NSPS form is attached. HUD will allow surveyors for Multifamily transactions who use the 2021 ALTA/NSPS requirements to make the redlined edits to the 91073M without HQ review. Please note that these interim instructions are applicable to multifamily applications only, not Office of Health Care.

HUD recommends to participants the following transition and implementation guidance provided by ALTA:

- If you (surveyor) were/are under contract prior to Feb. 23, 2021 you could use the 2016 Standards - even if the survey is not completed until after the 23rd.
- If you (surveyor) were/are under contract prior to Feb. 23, 2021 and you know the survey will not be completed until after the 23rd, it would be logical, but not required to contract to use the 2021 Standards.
- "Updates" must be to the 2021 Standards if they are contracted after Feb. 23, 2021. The only exception to that might be if you (surveyor) contracted to do a 2016 survey before Feb. 23 and, for some reason, the closing was delayed so long that participants (owner, lender, HUD) wanted the survey "updated" before closing. In that case, you might be able to do that update to the 2016 Standards: not for a new conveyance but for the delayed conveyance.

If a new construction or sub-rehab project has a 2016 survey performed for initial closing, but Final Endorsement will occur after March 18, 2021 the final survey should meet the 2021 Standards. The surveyor should be alert to the changes to Table A between 2016 and 2021.

A revised Form 91073M is now in process to update the form to the ALTA 2021 Standard and likely will conclude later in 2021.

Summary

As has been the case with the last few versions of the ALTA/NSPS Standards, virtually every change for 2021 is to the advantage of surveyors by further limiting their liability and/or providing better clarity as to the requirements.

There are a number of changes to the 2021 ALTA/NSPS Standards that are not outlined above; an attempt has been made here to provide some background on only the primary changes. Surveyors should review the redlined version of the Standards in order to be well-informed about *all* of the changes that resulted in the 2021 Standards.

Surveyors should also consider reviewing the FAQs on the NSPS website ([NSPS.us.com](https://www.nsp.us.com) - click on the Resources tab across the top, then select “Standards” followed by “ALTA/NSPS”). Those FAQs will be revised periodically, so if anyone has a question about the standards, they might check that document first.

Finally, the 2021 Standards will be my last as chair of the Joint ALTA/NSPS Committee. It has been a pleasure serving the professions in this capacity over the years and I thank everyone for the opportunity and for their confidence in my work. But 25 years is more than enough and, while I will continue to be involved, I have decided to step down to allow ALTA and NSPS to designate a new chair for the committee.

**MINIMUM STANDARD DETAIL REQUIREMENTS FOR
ALTA/NSPS LAND TITLE SURVEYS**
(Effective February 23, 2021)

1. **Purpose** - Members of the American Land Title Association® (ALTA®) have specific needs, unique to title insurance matters, when asked to insure title to land without exception as to the many matters which might be discoverable from survey and inspection, and which are not evidenced by the public records.

For a survey of real property, and the plat, map or record of such survey, to be acceptable to a title insurance company for the purpose of insuring title to said real property free and clear of survey matters (except those matters disclosed by the survey and indicated on the plat or map), certain specific and pertinent information must be presented for the distinct and clear understanding between the insured, the client (if different from the insured), the title insurance company (insurer), the lender, and the surveyor professionally responsible for the survey.

In order to meet such needs, clients, insurers, insureds, and lenders are entitled to rely on surveyors to conduct surveys and prepare associated plats or maps that are of a professional quality and appropriately uniform, complete, and accurate. To that end, and in the interests of the general public, the surveying profession, title insurers, and abstracters, the ALTA and the NSPS jointly promulgate the within details and criteria setting forth a minimum standard of performance for ALTA/NSPS Land Title Surveys. A complete 2021 ALTA/NSPS Land Title Survey includes:

- (i) the on-site fieldwork required pursuant to Section 5,
- (ii) the preparation of a plat or map pursuant to Section 6 showing the results of the fieldwork and its relationship to documents provided to or obtained by the surveyor pursuant to Section 4,
- (iii) any information from Table A items requested by the client, and
- (iv) the certification outlined in Section 7.

2. **Request for Survey** - The client shall request the survey, or arrange for the survey to be requested, and shall provide a written authorization to proceed from the person or entity responsible for paying for the survey. Unless specifically authorized in writing by the insurer, the insurer shall not be responsible for any costs associated with the preparation of the survey. The request must specify that an **"ALTA/NSPS LAND TITLE SURVEY"** is required and which of the optional items listed in Table A, if any, are to be incorporated. Certain properties or interests in real properties may present issues outside those normally encountered on an ALTA/NSPS Land Title Survey (e.g., marinas, campgrounds, mobile home parks; easements, leases, mineral interests, other non-fee simple interests). The scope of work related to surveys of such properties or interests in real properties should be discussed with the client, lender, and insurer, and agreed upon in writing prior to commencing work on the survey. When required, the client shall secure permission for the surveyor to enter upon the property to be surveyed, adjoining properties, or offsite easements.

3. **Surveying Standards and Standards of Care**

- A. **Effective Date** - The 2021 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys are effective February 23, 2021. As of that date, all previous versions of the Minimum Standard Detail Requirements for ALTA/ACSM or ALTA/NSPS Land Title Surveys are superseded by these standards.
- B. **Other Requirements and Standards of Practice** - Many states and some local jurisdictions have adopted statutes, administrative rules, and/or ordinances that set out standards regulating the practice of surveying within their jurisdictions. In addition to the standards set forth herein, surveyors must also conduct their surveys in accordance with applicable jurisdictional survey requirements and standards of practice. Where conflicts between the standards set forth herein

and any such jurisdictional requirements and standards of practice occur, the more stringent must apply.

- C. **The Normal Standard of Care** - Surveyors should recognize that there may be unwritten local, state, and/or regional standards of care defined by the practice of the “prudent surveyor” in those locales.
- D. **Boundary** - The boundary lines and corners of any property or interest in real property being surveyed (hereafter, the “surveyed property” or “property to be surveyed”) as part of an ALTA/NSPS Land Title Survey must be established and/or retraced in accordance with appropriate boundary law principles governed by the set of facts and evidence found in the course of performing the research and fieldwork.
- E. **Measurement Standards** - The following measurement standards address Relative Positional Precision for the monuments or witnesses marking the corners of the surveyed property.
 - i. “Relative Positional Precision” means the length of the semi-major axis, expressed in meters or feet, of the error ellipse representing the uncertainty in the position of the monument or witness marking any boundary corner of the surveyed property relative to the position of the monument or witness marking an immediately adjacent boundary corner of the surveyed property resulting from random errors in the measurements made in determining those positions at the 95 percent confidence level. Relative Positional Precision can be estimated by the results of a correctly weighted least squares adjustment of the survey. Alternatively, Relative Positional Precision can be estimated by the standard deviation of the distance between the monument or witness marking any boundary corner of the surveyed property and the monument or witness marking an immediately adjacent boundary corner of the surveyed property (called local accuracy) that can be computed using the full covariance matrix of the coordinate inverse between any given pair of points, understanding that Relative Positional Precision is based on the 95 percent confidence level, or approximately 2 standard deviations.
 - ii. Any boundary lines and corners established or retraced may have uncertainties in location resulting from (1) the availability, condition, history and integrity of reference or controlling monuments, (2) ambiguities in the record descriptions or plats of the surveyed property or its adjoiners, (3) occupation or possession lines as they may differ from the written title lines, or (4) Relative Positional Precision. Of these four sources of uncertainty, only Relative Positional Precision is controllable, although, due to the inherent errors in any measurement, it cannot be eliminated. The magnitude of the first three uncertainties can be projected based on evidence; Relative Positional Precision is estimated using statistical means (see Section 3.E.i. above and Section 3.E.v. below).
 - iii. The first three of these sources of uncertainty must be weighed as part of the evidence in the determination of where, in the surveyor’s opinion, the boundary lines and corners of the surveyed property should be located (see Section 3.D. above). Relative Positional Precision is a measure of how precisely the surveyor is able to monument and report those positions; it is not a substitute for the application of proper boundary law principles. A boundary corner or line may have a small Relative Positional Precision because the survey measurements were precise, yet still be in the wrong position (i.e., inaccurate) if it was established or retraced using faulty or improper application of boundary law principles.
 - iv. For any measurement technology or procedure used on an ALTA/NSPS Land Title Survey, the surveyor must (1) use appropriately trained personnel, (2) compensate for systematic errors, including those associated with instrument calibration, and (3) use appropriate error propagation and measurement design theory (selecting the proper instruments, geometric layouts, and field and computational procedures) to control random errors such that the maximum allowable Relative Positional Precision outlined in Section 3.E.v. below is not exceeded.
 - v. The maximum allowable Relative Positional Precision for an ALTA/NSPS Land Title Survey is 2 cm (0.07 feet) plus 50 parts per million (based on the direct distance between the two

corners being tested). It is recognized that in certain circumstances, the size or configuration of the surveyed property, or the relief, vegetation, or improvements on the surveyed property, will result in survey measurements for which the maximum allowable Relative Positional Precision may be exceeded in which case the reason shall be noted pursuant to Section 6.B.x. below.

4. **Records Research** - It is recognized that for the performance of an ALTA/NSPS Land Title Survey, the surveyor will be provided with appropriate and, when possible, legible data that can be relied upon in the preparation of the survey. In order to complete an ALTA/NSPS Land Title Survey, the surveyor must be provided with the following:
- A. The current record description of the real property to be surveyed or, in the case of an original survey prepared for purposes of locating and describing real property that has not been previously separately described in documents conveying an interest in the real property, the current record description of the parent parcel that contains the property to be surveyed;
 - B. Complete copies of the most recent title commitment or, if a title commitment is not available, other title evidence satisfactory to the title insurer;
 - C. The following documents from records established under state statutes for the purpose of imparting constructive notice of matters relating to real property (public records):
 - i. The current record descriptions of any adjoining to the property to be surveyed, except where such adjoining are lots in platted, recorded subdivisions;
 - ii. Any recorded easements benefitting the property to be surveyed; and
 - iii. Any recorded easements, servitudes, or covenants burdening the property to be surveyed; and
 - D. If desired by the client, any unrecorded documents affecting the property to be surveyed and containing information to which the survey shall make reference.

Except, however, if the documents outlined in this section are not provided to the surveyor or if non-public or quasi-public documents are otherwise required to complete the survey, the surveyor must conduct that research which is required pursuant to the statutory or administrative requirements of the jurisdiction where the surveyed property is located and that research (if any) which is negotiated and outlined in the terms of the contract between the surveyor and the client.

5. **Fieldwork** - The survey must be performed on the ground (except as may be otherwise negotiated pursuant to Table A, Item 15 below). Except as related to the precision of the boundary, which is addressed in Section 3.E. above, features located during the fieldwork shall be located to what is, in the surveyor's professional opinion, the appropriate degree of precision based on (a) the planned use of the surveyed property, if reported in writing to the surveyor by the client, lender, or insurer, or (b) the existing use, if the planned use is not so reported. The fieldwork shall include the following:

A. Monuments

- i. The location, size, character, and type of any monuments found during the fieldwork.
- ii. The location, size, character, and type of any monuments set during the fieldwork, if item 1 of Table A was selected or if otherwise required by applicable jurisdictional requirements and/or standards of practice.
- iii. The location, description, and character of any lines that control the boundaries of the surveyed property.

B. Rights of Way and Access

- i. The distance from the appropriate corner or corners of the surveyed property to the nearest right of way line, if the surveyed property does not abut a right of way.
- ii. The name of any street, highway, or other public or private way abutting the surveyed property, together with the width of the travelled way and the location of each edge of the travelled way including on divided streets and highways. If the documents provided to or obtained by the surveyor pursuant to Section 4 indicate no access from the surveyed property to the abutting street or highway, the width and location of the travelled way need not

- be located.
- iii. Visible evidence of physical access (e.g., curb cuts, driveways) to any abutting streets, highways, or other public or private ways.
 - iv. The location and character of vehicular, pedestrian, or other forms of access by other than the apparent occupants of the surveyed property to or across the surveyed property observed in the process of conducting the fieldwork (e.g., driveways, alleys, private roads, railroads, railroad sidings and spurs, sidewalks, footpaths).
 - v. Without expressing a legal opinion as to ownership or nature, the location and extent of any potentially encroaching driveways, alleys, and other ways of access from adjoining properties onto the surveyed property observed in the process of conducting the fieldwork.
 - vi. Where documentation of the location of any street, road, or highway right of way abutting, on, or crossing the surveyed property was not disclosed in documents provided to or obtained by the surveyor, or was not otherwise available from the controlling jurisdiction (see Section 6.C.iv. below), the evidence and location of parcel corners on the same side of the street as the surveyed property recovered in the process of conducting the fieldwork which may indicate the location of such right of way lines (e.g., lines of occupation, survey monuments).
 - vii. Evidence of access to and from waters adjoining the surveyed property observed in the process of conducting the fieldwork (e.g., paths, boat slips, launches, piers, docks).
- C. Lines of Possession and Improvements along the Boundaries**
- i. The character and location of evidence of possession or occupation along the perimeter of the surveyed property, both by the occupants of the surveyed property and by adjoining, observed in the process of conducting the fieldwork.
 - ii. Unless physical access is restricted, the character and location of all walls, buildings, fences, and other improvements within five feet of each side of the boundary lines observed in the process of conducting the fieldwork (see Section 5.E.iv. regarding utility poles). Trees, bushes, shrubs, and other vegetation need not be located other than as specified in the contract, unless they are deemed by the surveyor to be evidence of possession or occupation pursuant to Section 5.C.i.
 - iii. Without expressing a legal opinion as to the ownership or nature of the potential encroachment, the evidence, location, and extent of potentially encroaching structural appurtenances and projections observed in the process of conducting the fieldwork (e.g., fire escapes, bay windows, windows and doors that open out, flue pipes, stoops, eaves, cornices, areaways, steps, trim) by or onto adjoining property, or onto rights of way, easements, or setback lines disclosed in documents provided to or obtained by the surveyor.
- D. Buildings**
- The location of buildings on the surveyed property observed in the process of conducting the fieldwork.
- E. Easements and Servitudes**
- i. Evidence of any easements or servitudes burdening the surveyed property as disclosed in the documents provided to or obtained by the surveyor pursuant to Section 4 and observed in the process of conducting the fieldwork.
 - ii. Evidence of easements, servitudes, or other uses by other than the apparent occupants of the surveyed property not disclosed in the documents provided to or obtained by the surveyor pursuant to Section 4, but observed in the process of conducting the fieldwork if they are on or across the surveyed property (e.g., roads, drives, sidewalks, paths and other ways of access, utility service lines, utility locate markings (including the source of the markings, with a note if unknown), water courses, ditches, drains, telephone lines, fiber optic lines, electric lines, water lines, sewer lines, oil pipelines, gas pipelines).
 - iii. Surface indications of underground easements or servitudes on or across the surveyed property observed in the process of conducting the fieldwork (e.g., utility cuts, vent pipes, filler pipes, utility locate markings (including the source of the markings, with a note if unknown)).

- iv. Evidence on or above the surface of the surveyed property observed in the process of conducting the fieldwork, which evidence may indicate utilities located on, over or beneath the surveyed property. Examples of such evidence include pipeline markers, utility locate markings (including the source of the markings, with a note if unknown), manholes, valves, meters, transformers, pedestals, clean-outs, overhead lines, guy wires, and utility poles on or within ten feet of the surveyed property. Without expressing a legal opinion as to the ownership or nature of the potential encroachment, the extent of all encroaching utility pole crossmembers or overhangs.

F. Cemeteries

As accurately as the evidence permits, the perimeter of cemeteries and burial grounds, and the location of isolated gravesites not within a cemetery or burial ground, (i) disclosed in the documents provided to or obtained by the surveyor, or (ii) observed in the process of conducting the fieldwork.

G. Water Features

- i. The location of springs, ponds, lakes, streams, rivers, canals, ditches, marshes, and swamps on, running through, or outside, but within five feet of, the perimeter boundary of the surveyed property and observed during the process of conducting the fieldwork.
- ii. The location of any water feature forming a boundary of the surveyed property. The attribute(s) of the water feature located (e.g., top of bank, edge of water, high water mark) should be congruent with the boundary as described in the record description or, in the case of an original survey, in the new description (see Section 6.B.vi. below).

6. Plat or Map - A plat or map of an ALTA/NSPS Land Title Survey shall show the following information. Where dimensioning is appropriate, dimensions shall be annotated to what is, in the surveyor's professional opinion, the appropriate degree of precision based on (a) the planned use of the surveyed property, if reported in writing to the surveyor by the client, lender, or insurer, or (b) existing use, if the planned use is not so reported.

A. Field Locations. The evidence and locations gathered, and the monuments and lines located during the fieldwork pursuant to Section 5 above, with accompanying notes if deemed necessary by the surveyor or as otherwise required as specified below.

B. Boundary, Descriptions, Dimensions, and Closures

- i. (a) The current record description of the surveyed property, or
(b) In the case of an original survey, the current record document number of the parent tract that contains the surveyed property.
- ii. Any new description of the surveyed property that was prepared in conjunction with the survey, including a statement explaining why the new description was prepared. Except in the case of an original survey, preparation of a new description should be avoided unless deemed necessary or appropriate by the surveyor and insurer. Preparation of a new description should also generally be avoided when the record description is a lot or block in a platted, recorded subdivision. Except in the case of an original survey, if a new description is prepared, a note must be provided stating (a) that the new description describes the same real estate as the record description or, (b) if it does not, how the new description differs from the record description.
- iii. The point of beginning, the remote point of beginning or point of commencement (if applicable) and all distances and directions identified in the record description of the surveyed property (and in the new description, if one was prepared). Where a measured or calculated dimension differs from the record by an amount deemed significant by the surveyor, such dimension must be shown in addition to, and differentiated from, the corresponding record dimension. All dimensions shown on the survey and contained in any new description must be horizontal ground dimensions unless otherwise noted.
- iv. The direction, distance and curve data necessary to compute a mathematical closure of the surveyed boundary. A note if the record description does not mathematically close. The basis

- of bearings and, where it differs from the record basis, the difference.
- v. The remainder of any recorded lot or existing parcel, when the surveyed property is composed of only a portion of such lot or parcel, shall be graphically depicted. Such remainder need not be included as part of the actual survey, except to the extent necessary to locate the lines and corners of the surveyed property, and it need not be fully dimensioned or drawn at the same scale as the surveyed property.
 - vi. When the surveyed property includes a title line defined by a water boundary, a note on the face of the plat or map noting the date the boundary was measured, which attribute(s) of the water feature was/were located, and the caveat that the boundary is subject to change due to natural causes and that it may or may not represent the actual location of the limit of title. When the surveyor is aware of natural or artificial realignments or changes in such boundaries, the extent of those changes and facts shall be shown or explained.
 - vii. The relationship of the boundaries of the surveyed property to its adjoiners (e.g., contiguity, gaps, overlaps) where ascertainable from documents provided to or obtained by the surveyor pursuant to Section 4 and/or from field evidence gathered during the process of conducting the fieldwork. If the surveyed property is composed of multiple parcels, the extent of any gaps or overlaps between those parcels must be identified. Where gaps or overlaps are identified, the surveyor must, prior to or upon delivery of the final plat or map, disclose this to the insurer and client.
 - viii. When, in the opinion of the surveyor, the results of the survey differ significantly from the record, or if a fundamental decision related to the boundary resolution is not clearly reflected on the plat or map, the surveyor must explain this information with notes on the face of the plat or map.
 - ix. The location of buildings on the surveyed property dimensioned perpendicular to those perimeter boundary lines that the surveyor deems appropriate (i.e., where potentially impacted by a setback line) and/or as requested by the client, lender or insurer.
 - x. A note on the face of the plat or map explaining the site conditions that resulted in a Relative Positional Precision that exceeds the maximum allowed pursuant to Section 3.E.v.
 - xi. A note on the face of the plat or map identifying areas, if any, on the boundaries of the surveyed property, to which physical access within five feet was restricted (see Section 5.C.ii.).
 - xii. A note on the face of the plat or map identifying the source of the title commitment or other title evidence provided pursuant to Section 4, and the effective date and the name of the insurer of same.
- C. Easements, Servitudes, Rights of Way, Access, and Documents**
- i. The location, width, and recording information of all plottable rights of way, easements, and servitudes burdening and benefitting the surveyed property, as evidenced by documents provided to or obtained by the surveyor pursuant to Section 4.
 - ii. A summary of all rights of way, easements, and other survey-related matters burdening the surveyed property and identified in the title evidence provided to or obtained by the surveyor pursuant to Section 4. Such summary must include the record information of each such right of way, easement or other survey-related matter, a statement indicating whether it lies within or crosses the surveyed property, and a related note if:
 - (a) its location is shown;
 - (b) its location cannot be determined from the record document;
 - (c) there was no observed evidence at the time of the fieldwork;
 - (d) it is a blanket easement;
 - (e) it is not on, does not touch, and/or - based on the description contained in the record document – does not affect, the surveyed property;
 - (f) it limits access to an otherwise abutting right of way;
 - (g) the documents are illegible; or
 - (h) the surveyor has information indicating that it may have been released or otherwise

terminated.

In cases where the surveyed property is composed of multiple parcels, indicate which of such parcels the various rights of way, easements, and other survey-related matters cross or touch.

- iii. A note if no physical access to an abutting street, highway, or other public or private way was observed in the process of conducting the fieldwork.
- iv. The locations and widths of rights of way abutting or crossing the surveyed property and the source of such information, (a) where available from the controlling jurisdiction, or (b) where disclosed in documents provided to or obtained by the surveyor pursuant to Section 4.
- v. The identifying titles of all recorded plats, filed maps, right of way maps, or similar documents that the survey represents, wholly or in part, with their recording or filing data.
- vi. For non-platted adjoining land, recording data and, where available, tax parcel number, identifying adjoining tracts according to current public records. For platted adjoining land, the recording data of the subdivision plat.
- vii. Platted setback or building restriction lines that appear on recorded subdivision plats or that were disclosed in documents provided to, or obtained by, the surveyor.
- viii. If in the process of preparing the survey the surveyor becomes aware of a recorded easement not otherwise listed in the title evidence provided, the surveyor must advise the insurer prior to delivery of the plat or map and, unless the insurer provides evidence of a release of that easement, show or otherwise explain it on the face of the plat or map, with a note that the insurer has been advised.

D. Presentation

- i. The plat or map must be drawn on a sheet of not less than 8 ½ by 11 inches in size at a legible, standard engineering scale, with that scale clearly indicated in words or numbers and with a graphic scale.
- ii. The plat or map must include:
 - (a) The boundary of the surveyed property drawn in a manner that distinguishes it from other lines on the plat or map.
 - (b) If no buildings were observed on the surveyed property in the process of conducting the fieldwork, a note stating “*No buildings observed.*”
 - (c) A north arrow (with north to the top of the drawing when practicable).
 - (d) A legend of symbols and abbreviations.
 - (e) A vicinity map showing the surveyed property in reference to nearby highway(s) or major street intersection(s).
 - (f) Supplementary or detail diagrams when necessary.
 - (g) Notes explaining any modifications to Table A items and the nature of any additional Table A items (e.g., 20(a), 20(b), 20(c)) that were negotiated between the surveyor and client.
 - (h) The surveyor’s project number (if any), and the name, registration or license number, signature, seal, street address, telephone number, company website, and email address (if any) of the surveyor who performed the survey.
 - (i) The date(s) of any revisions made by the surveyor who performed the survey.
 - (j) Sheet numbers where the plat or map is composed of more than one sheet.
 - (k) The caption “ALTA/NSPS Land Title Survey.”
- iii. When recordation or filing of a plat or map is required by state statutes or local ordinances, such plat or map shall be produced in the required form.

7. **Certification** - The plat or map of an ALTA/NSPS Land Title Survey must bear only the following unaltered certification except as may be required pursuant to Section 3.B. above:

To (name of insured, if known), (name of lender, if known), (name of insurer, if known), (names of others as negotiated with the client):

This is to certify that this map or plat and the survey on which it is based were made in accordance with the 2021 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys, jointly established and adopted by ALTA and NSPS, and includes Items _____ of Table A thereof. The fieldwork was completed on _____ [date].

Date of Plat or Map: _____ (Surveyor's signature, printed name and seal with Registration/License Number)

8. **Deliverables** - The surveyor shall furnish copies of the plat or map of survey to the insurer and client and as otherwise negotiated with the client. Hard copies shall be on durable and dimensionally stable material of a quality standard acceptable to the insurer. A digital image of the plat or map may be provided in addition to, or in lieu of, hard copies pursuant to the terms of the contract. If the surveyor is required to record or file a plat or map pursuant to state statute or local ordinance it shall be so recorded or filed.

TABLE A

OPTIONAL SURVEY RESPONSIBILITIES AND SPECIFICATIONS

NOTE: Whether any of the nineteen (19) items of Table A are to be selected, and the exact wording of and fee for any selected item, may be negotiated between the surveyor and client. Any additional items negotiated between the surveyor and client must be identified as 20(a), 20(b), etc. Any additional items negotiated between the surveyor and client, and any negotiated changes to the wording of a Table A item, must be explained pursuant to Section 6.D.ii.(g). Notwithstanding Table A Items 5 and 11, if an engineering design survey is desired as part of an ALTA/NSPS Land Title Survey, such services should be negotiated under Table A, Item 20.

If checked, the following optional items are to be included in the ALTA/NSPS LAND TITLE SURVEY, except as otherwise qualified (see note above):

1. _____ Monuments placed (or a reference monument or witness to the corner) at all major corners of the boundary of the surveyed property, unless already marked or referenced by existing monuments or witnesses in close proximity to the corner.
2. _____ Address(es) of the surveyed property if disclosed in documents provided to or obtained by the surveyor, or observed while conducting the fieldwork.
3. _____ Flood zone classification (with proper annotation based on federal Flood Insurance Rate Maps or the state or local equivalent) depicted by scaled map location and graphic plotting only.
4. _____ Gross land area (and other areas if specified by the client).
5. _____ Vertical relief with the source of information (e.g., ground survey, aerial map), contour interval, datum, with originating benchmark, when appropriate.
6. _____ (a) If the current zoning classification, setback requirements, the height and floor space area restrictions, and parking requirements specific to the surveyed property are set forth in a zoning report or letter provided to the surveyor by the client or the client's designated representative, list the above items on the plat or map and identify the date and source of the report or letter.
_____. (b) If the zoning setback requirements specific to the surveyed property are set forth in a zoning report or letter provided to the surveyor by the client or the client's designated representative, and if those requirements do not require an interpretation by the surveyor, graphically depict those requirements on the plat or map and identify the date and source of the report or letter.
7. _____ (a) Exterior dimensions of all buildings at ground level.
_____. (b) Square footage of:
_____ (1) exterior footprint of all buildings at ground level.
_____ (2) other areas as specified by the client.
_____. (c) Measured height of all buildings above grade at a location specified by the client. If no location is specified, the point of measurement shall be identified.
8. _____ Substantial features observed in the process of conducting the fieldwork (in addition to the improvements and features required pursuant to Section 5 above) (e.g., parking lots, billboards, signs, swimming pools, landscaped areas, substantial areas of refuse).
9. _____ Number and type (e.g., disabled, motorcycle, regular and other marked specialized types) of clearly identifiable parking spaces on surface parking areas, lots and in parking structures.

Striping of clearly identifiable parking spaces on surface parking areas and lots.

10. _____ As designated by the client, a determination of the relationship and location of certain division or party walls with respect to adjoining properties.

11. Evidence of underground utilities existing on or serving the surveyed property (in addition to the observed evidence of utilities required pursuant to Section 5.E.iv.) as determined by:

_____ (a) plans and/or reports provided by client (with reference as to the sources of information)

_____ (b) markings coordinated by the surveyor pursuant to a private utility locate request

Note to the client, insurer, and lender - With regard to Table A, item 11, information from the sources checked above will be combined with observed evidence of utilities pursuant to Section 5.E.iv. to develop a view of the underground utilities. However, lacking excavation, the exact location of underground features cannot be accurately, completely, and reliably depicted. In addition, in some jurisdictions, 811 or other similar utility locate requests from surveyors may be ignored or result in an incomplete response, in which case the surveyor shall note on the plat or map how this affected the surveyor's assessment of the location of the utilities. Where additional or more detailed information is required, the client is advised that excavation may be necessary.

12. _____ As specified by the client, Governmental Agency survey-related requirements (e.g., HUD surveys, surveys for leases on Bureau of Land Management managed lands). The relevant survey requirements are to be provided by the client or client's designated representative.

13. _____ Names of adjoining owners according to current tax records. If more than one owner, identify the first owner's name listed in the tax records followed by "et al."

14. _____ As specified by the client, distance to the nearest intersecting street.

15. _____ Rectified orthophotography, photogrammetric mapping, remote sensing, airborne/mobile laser scanning and other similar products, tools or technologies as the basis for showing the location of certain features (excluding boundaries) where ground measurements are not otherwise necessary to locate those features to an appropriate and acceptable accuracy relative to a nearby boundary. The surveyor must (a) discuss the ramifications of such methodologies (e.g., the potential precision and completeness of the data gathered thereby) with the insurer, lender, and client prior to the performance of the survey, and (b) place a note on the face of the survey explaining the source, date, precision, and other relevant qualifications of any such data.

16. _____ Evidence of recent earth moving work, building construction, or building additions observed in the process of conducting the fieldwork.

17. _____ Proposed changes in street right of way lines, if such information is made available to the surveyor by the controlling jurisdiction. Evidence of recent street or sidewalk construction or repairs observed in the process of conducting the fieldwork.

18. _____ Pursuant to Sections 5 and 6 (and applicable selected Table A items, excluding Table A item 1), include as part of the survey any plottable offsite (i.e., appurtenant) easements disclosed in documents provided to or obtained by the surveyor.

19. _____ Professional liability insurance policy obtained by the surveyor in the minimum amount of \$_____ to be in effect throughout the contract term. Certificate of insurance to be furnished upon request, but this item shall not be addressed on the face of the plat or map.

20. _____

Adopted by the Board of Governors, American Land Title Association, on October 1, 2020.

*American Land Title Association, 1800 M St., N.W., Suite 300S, Washington, D.C. 20036-5828.
www.alta.org*

Adopted by the Board of Directors, National Society of Professional Surveyors, on October 30, 2020.

*National Society of Professional Surveyors, Inc., 5119 Pegasus Court, Suite Q, Frederick, MD 21704.
<http://www.nsps.us.com/>*



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-8000

OFFICE OF HOUSING

Interim Instructions for Surveyors for Form 91073M Pending HUD Revision of the Form

March 25, 2021
Office of Multifamily Production
Technical Support Division

Multifamily Production will accept the new 2021 ALTA/NSPS survey requirements. A revised HUD-91073M (Survey Instructions and Surveyor's Report) in redline format showing necessary changes to the HUD form to accommodate the underlying changes to the new ALTA/NSPS form is attached. HUD will allow surveyors for Multifamily transactions who use the 2021 ALTA/NSPS requirements to make the redlined edits to the 91073M without HQ review. Please note that these interim instructions are applicable to multifamily applications only, not Office of Health Care.

HUD recommends to participants the following transition and implementation guidance provided by ALTA:

- If you (surveyor) were/are under contract prior to Feb. 23, 2021 you could use the 2016 Standards - even if the survey is not completed until after the 23rd.
- If you (surveyor) were/are under contract prior to Feb. 23, 2021 and you know the survey will not be completed until after the 23rd, it would be logical, but not required to contract to use the 2021 Standards.
- "Updates" must be to the 2021 Standards if they are contracted after Feb. 23, 2021. The only exception to that might be if you (surveyor) contracted to do a 2016 survey before Feb. 23 and, for some reason, the closing was delayed so long that participants (owner, lender, HUD) wanted the survey "updated" before closing. In that case, you might be able to do that update to the 2016 Standards: not for a new conveyance but for the delayed conveyance.

If a new construction or sub-rehab project has a 2016 survey performed for initial closing, but Final Endorsement will occur after March 18, 2021 the final survey should meet the 2021 Standards. The surveyor should be alert to the changes to Table A between 2016 and 2021.

A revised Form 91073M is now in process to update the form to the ALTA 2021 Standard and likely will conclude later in 2021.

For questions use MAP Guide AAQ at <https://www.hudexchange.info/hudexchange-portal/> Select "Ask a Question." You will need to register as a HUD Exchange user if you have not already done so.

HUD Survey Instructions and Surveyor's Report

U.S. Department of Housing
and Urban Development
Office of Housing

OMB Approval No. 2502-0598
(Exp. 9/30/2021)

Public Reporting Burden for this collection of information is estimated to average 0.5 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Reports Management Officer, Office of Information Policies and Systems, U.S. Department of Housing and Urban Development, Washington, DC 20410-3600 and to the Office of Management and Budget, Paperwork Reduction Project (2502-0468), Washington, DC 20503. Do not send this completed form to either of the above addresses.

Warning: Federal law provides that anyone who knowingly or willfully submits (or causes to submit) a document containing any false, fictitious, misleading, or fraudulent statement/certification or entry may be criminally prosecuted and may incur civil administrative liability. Penalties upon conviction can include a fine and imprisonment, as provided pursuant to applicable law, which includes, but is not limited to, 18 U.S.C. 1001, 1010, 1012; 31 U.S.C. 3729, 3802, 24 C.F.R. Parts 25, 28 and 30, and 2 C.F.R. Parts 180 and 2424.

Standards of Performance: for all surveys contracted for or updated after February 23, 2021: In every instance the survey and survey plat(s) and/or map(s) must be made in accordance with the requirements for an "ALTA/NSPS Land Title Survey" and in compliance with the:

A. 2021 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys, jointly established and adapted by the American Land Title Association and the National Society of Professional Surveyors;

B. Table A, Optional Survey Responsibilities and Specifications, thereof, items 1, 2, 3, 4, 6a, 6b, 7a, 8, 9, 10, 11a, 11b, 12, 13, 16, 17, and 18.

C. And the following requirements as applicable:

1. **Wetland Delineation Involved:** Optional Item 20 of Table A must be amended as follows: "If there has been a field delineation of wetlands conducted by a qualified specialist hired by the client, the surveyor must locate any delineation markers observed in the process of conducting the fieldwork and show them on the face of the plat or map. If no markers were observed, the surveyor must so state."
2. **Site Grading Involved:** Comply with table A, item 5. Contours may not exceed 1-foot vertical intervals, except that 2-foot and 5-foot vertical intervals may be used where the mean site gradient exceeds 5 percent and 10 percent respectively. Where curbs and/or gutters exist, show top of curb and flow line elevations.
3. **Plot Plan Design/Redesign Involved:** Comply with Table A, Item 6.

4. **Condominium/Air-rights Involved:** The surveyor must provide a survey made in accordance with any Property Jurisdiction requirements or, in the absence of such requirements, professionally recognized standards.
5. **Flood Hazard Involved:** Where any portion of the site is subject to flood hazard, show the 100-year return frequency flood hazard elevation and flood zone for all projects plus the 500 year return frequency flood hazard elevation and flood zone for Section 811 housing program. For existing projects show the site elevation at the building entrances, lowest habitable finished floor, and basement for each primary building, and the vehicular parking area that serves each primary building. Take return frequency flood hazard elevations from the applicable Federal Flood Insurance Rate Map. Where such is not available, take the elevations from available state or local equivalent data, or when not available, work in conjunction with owner's engineer.
6. **Blanket Easement Involved:** Show on the map/plat the location of any facility that is located within or traverses the property under provisions of a blanket easement.

Additional Owner Requirements: The following requirements are not intended to void any other part of this instruction.

Certification: The survey map/plat must bear the ALTA/NSPS Certification:

"To (name of insured, if known), (name of lender, if known), (name of title insurer, if known), Department of Housing and Urban Development ("HUD"), (names of others as negotiated with the client):

This is to certify that this map or plat and the survey on which it is based were made in accordance with the 2021 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys, jointly established and adopted by ALTA and NSPS, and includes Items _____ of Table A thereof. The fieldwork was completed on _____[date].

HUD Surveyor's Report

Date of Plat or Map: _____ (Surveyor's signature, printed name and seal with Registration/License Number)"

Surveyor's Report Instructions: A current Surveyor's Report (not more than 120 days old) must be included with the survey map(s)/plat(s) submitted to HUD for: project design review, construction contract document sets, as required during construction, upon project completion; and with the map(s)/plat(s) used at initial and final closing. Identify pertinent observed and otherwise known conditions on the Surveyor's Report.

HUD Surveyor's Report

The included survey plat and/or map is to be used in a multifamily housing loan transaction submitted to HUD.

Its uses will include:

☒
☐
☐

- Land title recordation (all cases).
Site grading plan preparation (item 1 above).
Plot plan design/redesign (item 2 above).

Special Project Features:

- ☐ Condominium/Air-rights, and/or
☐ Other: (e.g. accessibility features) _____

Owner's Representative/Contact:

Name & Phone No: _____

Address: _____

I certify that, on [Insert date of survey] _____, I made a survey of the premises standing in the name of [Insert name of owner at time of survey] _____ situated in [Insert city, county, state] _____ known as street numbers _____ and shown on the accompanying survey plat and/or map entitled _____; and made a careful inspection of said premises and of the building(s) located thereon.

I certify that on [Insert date of last site inspection or N/A] _____, I again made a careful inspection of said premises and of the building(s) located thereon, and found said premises to be standing in the name of:

_____.

In my professional opinion, the following information reflects the conditions observed on the date of the last site inspection, or disclosed in the process of researching title to the premises, and I further certify that such conditions(s) are shown on the survey map/plat dated: [Insert date of latest revision] _____.

For Items 1 through 10, please provide a detailed answer or state "none," if inapplicable.

1. Rights of way, old highways or abandoned roads, lanes or driveways, drains, sewer or water pipes over and across said premises:

2. Springs, streams, rivers, ponds or lakes located, bordering on or running through said premises:

3. Cemeteries or family burying grounds located on said premises:

4. Electricity, or electromagnetic/communications signal, towers, antenna, lines, or line supports located on, overhanging or crossing said premises:

5. Disputed boundaries or encroachments. (If the buildings, projections or cornices thereof or signs affixed thereto, fences or other indications of occupancy encroach upon adjoining properties or the like encroach upon surveyed premises, specify all such):

HUD Surveyor's Report

6. Earth moving work, building construction, or building additions within recent months:

7. Building or possession lines. (In case of city or town property specify definitely as to whether or not walls are independent walls or party walls and as to all easements of support or "Beam Rights." In case of country property report specifically how boundary lines are evidenced, that is, whether by fences or otherwise):

8. Recent street or sidewalk construction and/or any change in street lines either completed or proposed by and available from the controlling jurisdiction:

9. Flood hazard:

10. Site used as a solid waste dump, sump, or sanitary landfill:

Further, I hereby certify to HUD, (Borrower), (Sponsor), (Lender), (Title Insurance Underwriter), (Other), and to their successors and assigns, that:

I made an on the ground survey per record description of the land shown on the Survey No. _____,

last revised [Insert date] _____ ("Survey"), located in [Insert city or town, county, township, etc.], and that it was made in accordance with this HUD Survey Instructions and Surveyor's Report, and the requirements for an ALTA/NSPS Land Title Survey, as defined in the 2021 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys.

To the best of my knowledge, belief and information, except as shown on the Survey, there are no encroachments across any property lines, title lines and lines of actual possession are the same, and the premises are [Insert *not subject to a* OR *subject to a*] 100/500 year return frequency flood hazard, and such condition is shown on the Federal Flood Insurance Rate Map, Community Panel No. _____ [Insert "*none*," if inapplicable].

Surveyor's Name:

License Number:

Seal

Date:



ICSC+CONTINUING EDUCATION MICHIGAN

Suburban Collection Showplace

Novi, MI

Wednesday, April 13, 2022

Session Materials

Roundtable 3: Evolving Consumer Behaviors & Impact on Retail CRE

Led by: Jeremy Crane, Placer.ai and Laura Criswell, Placer.ai



Placer.ai

Evolving Consumer Behaviors and Impact on Retail CRE

April 2022

Roundtable Agenda



Introduction



Who is Placer.ai and how do we get our data?

Q1 Analysis



Where are we at this stage of the recovery?

Michigan Trends



What is trending up and down locally? Who is winning so far?

Q&A



We take your questions

Our Participants



Jeremy Crane

Director of Customer Success



Laura Criswell

Senior Customer Success Manager



Introduction



How Placer.ai Works

Observe. Analyze. Present.

For any location in the U.S., Placer.ai observes a portion of the visiting customers. Akin to a statistical survey, this observed data is aggregated and used to generate insights into any venue. Placer.ai then extrapolates a range of metrics that provide visibility into consumer behavior.



01 - Observe

Anonymized location data from tens of millions of mobile devices used as a core panel.

- 30M Active Devices
- 1.5B Monthly Retail Visits
- 500 Mobile Apps w/ SDK



02 - Analyze

Accurate and reliable estimations on activity across the entire U.S. population.

- Extrapolated Panel Data
- Normalized & Debiased
- "Ground Truth" Validated



03 - Present

A wealth of detailed reports containing critical insights into what is truly happening offline.

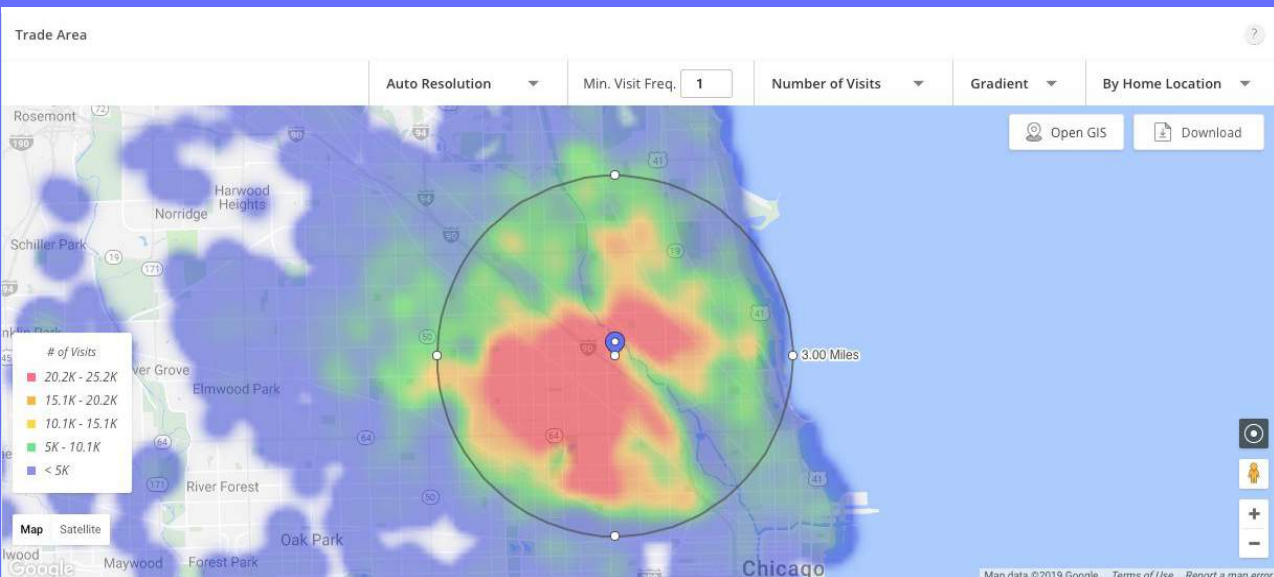
- Visitation Trends
- Trade Area Analysis
- Customer Demographics

Telling The Full Story of Any Location

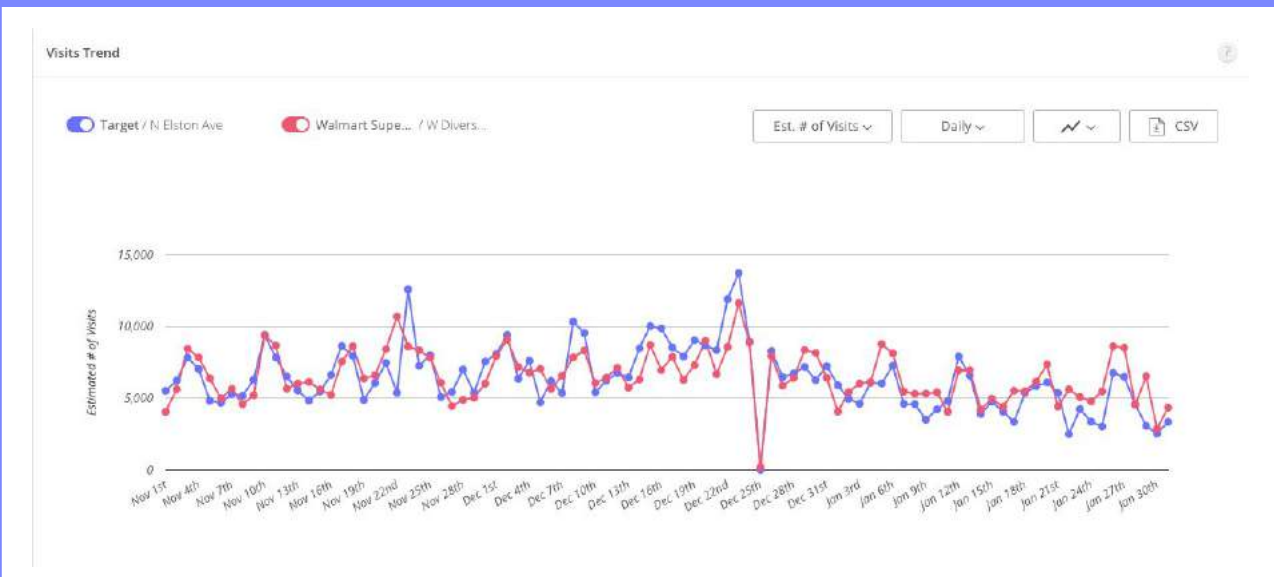


Observe. Analyze. Present.

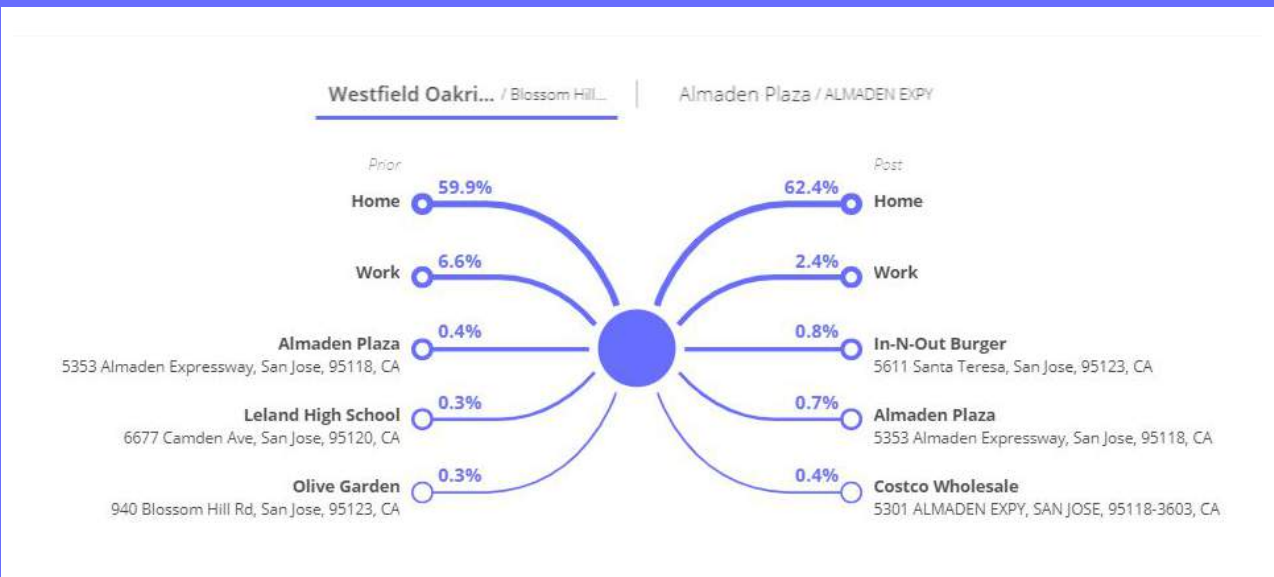
Trade Area Analysis



Visitor Counts



Customer Journey



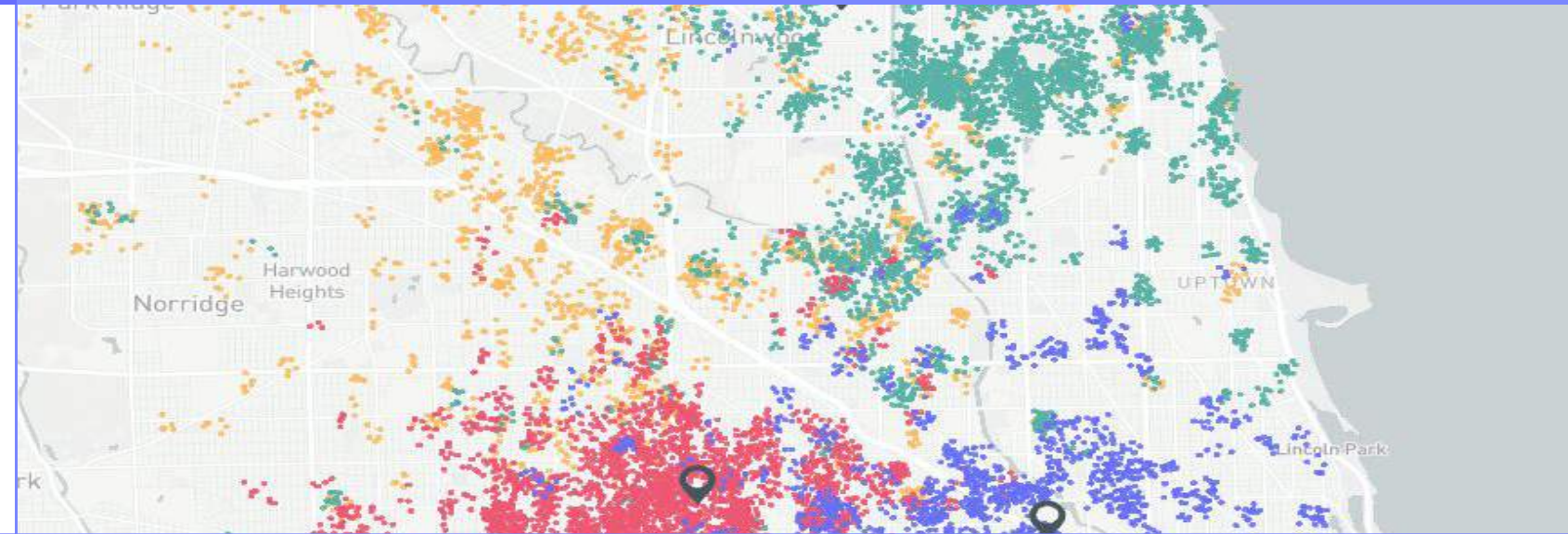
Customer Demographics



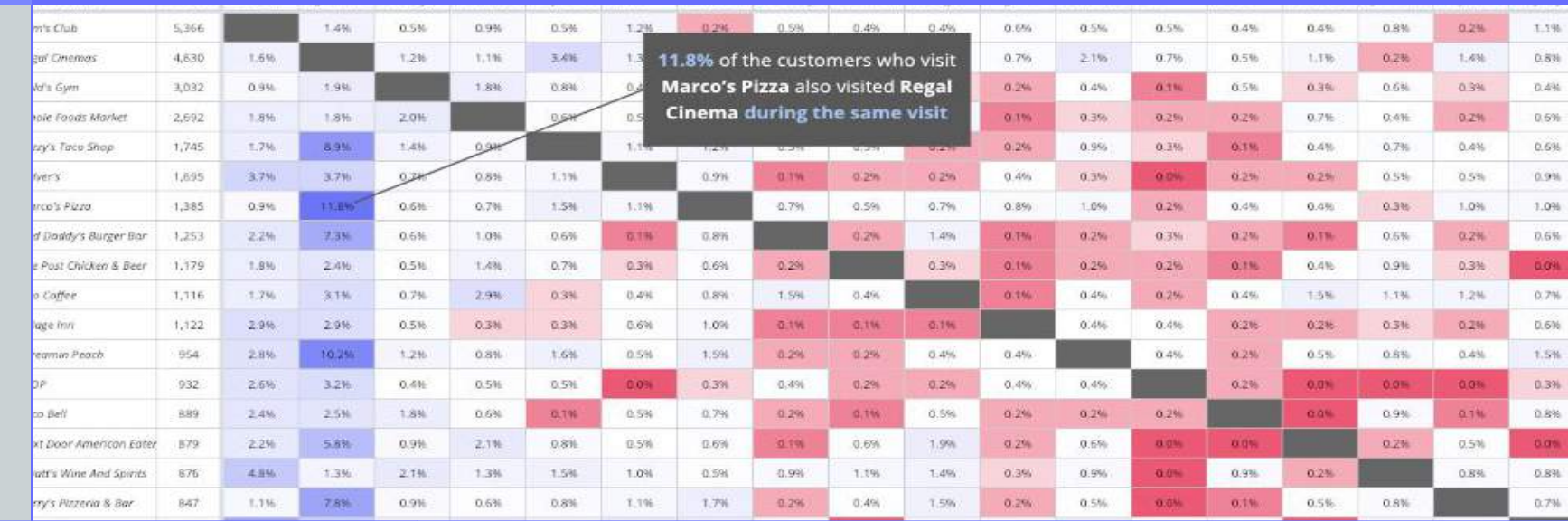
Competitive Benchmarking



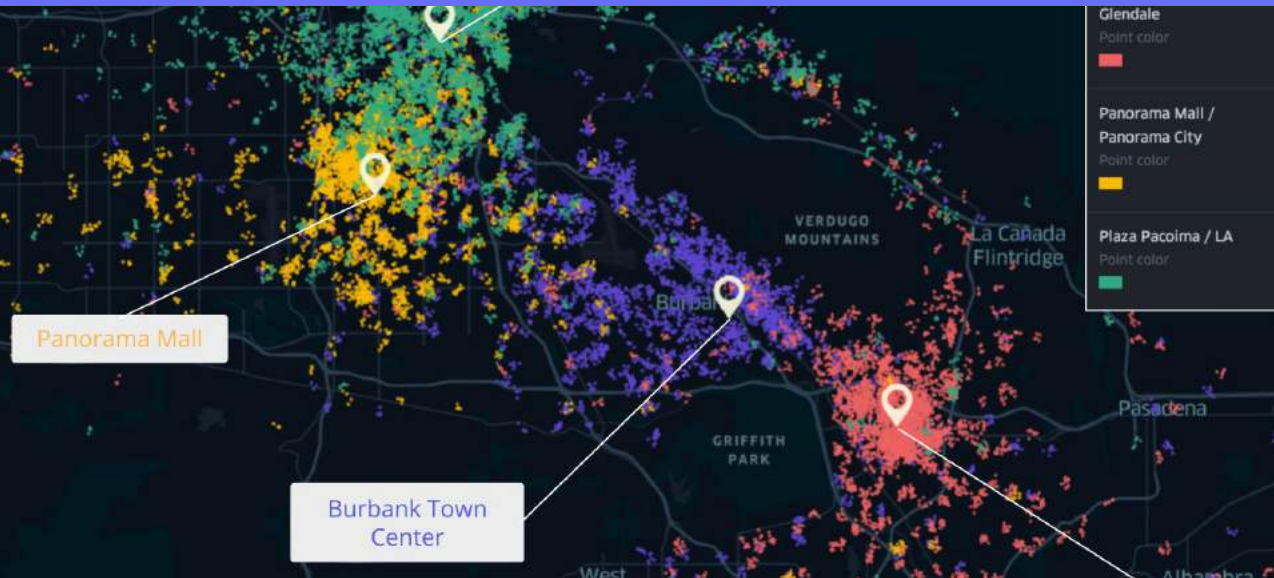
Void Analysis



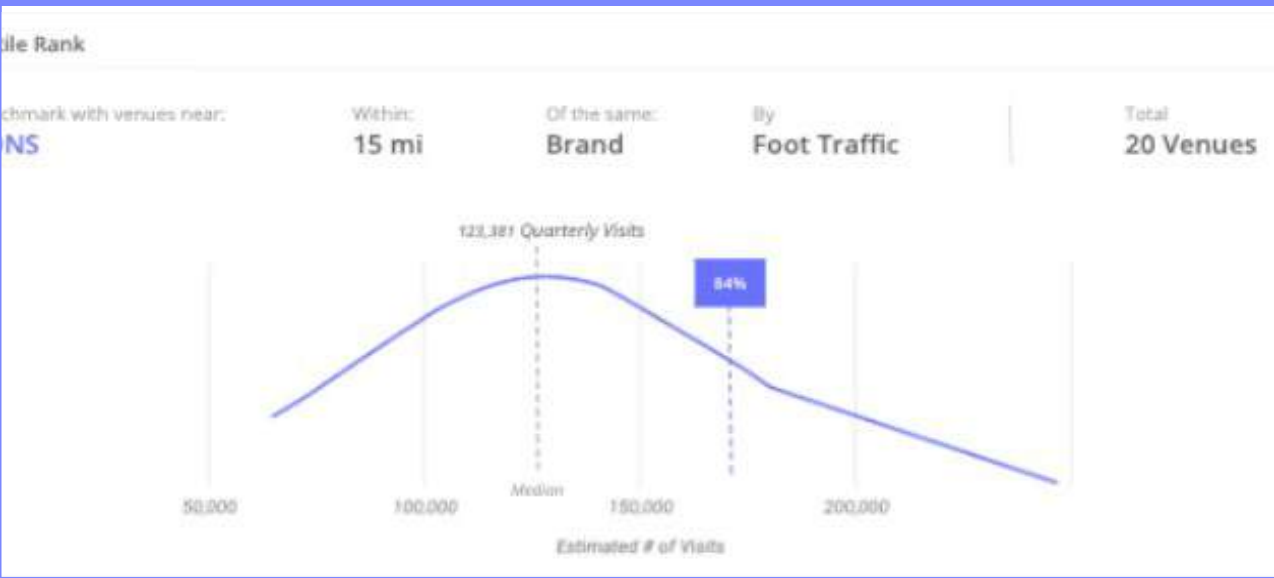
Cross Shopping



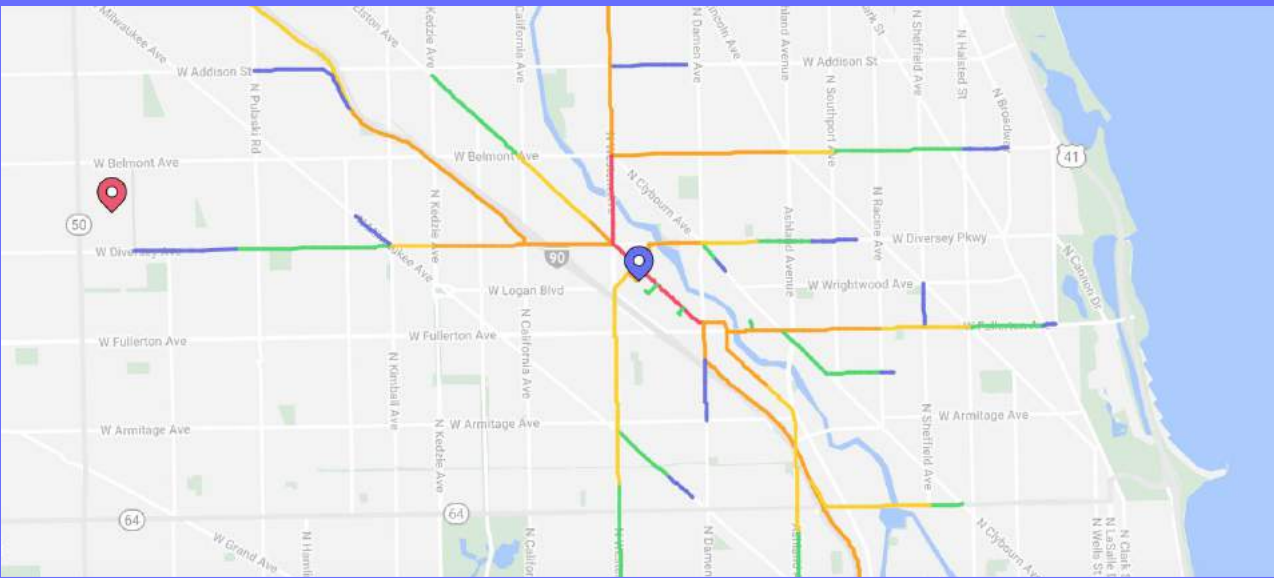
Cannibalization



Store Benchmarking



Traffic Routes



Market Share

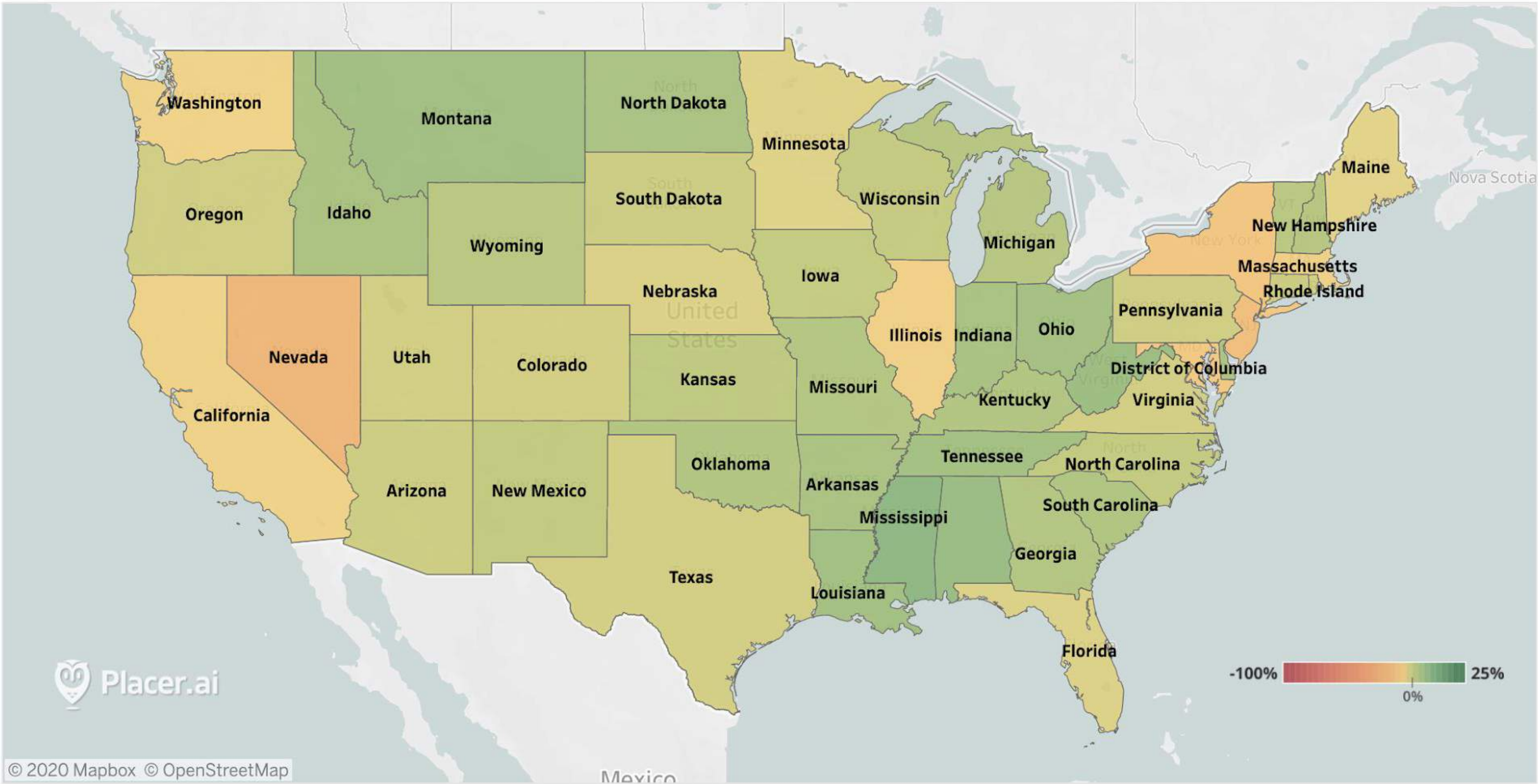


The Square - Free Tools Available

www.placer.ai/the-square/

Industry Trends Brand Tracker Brand Dominance Map Insights Weekly Digest

Recovery Trend - YoY Foot-traffic % Change



Iowa Overall Change

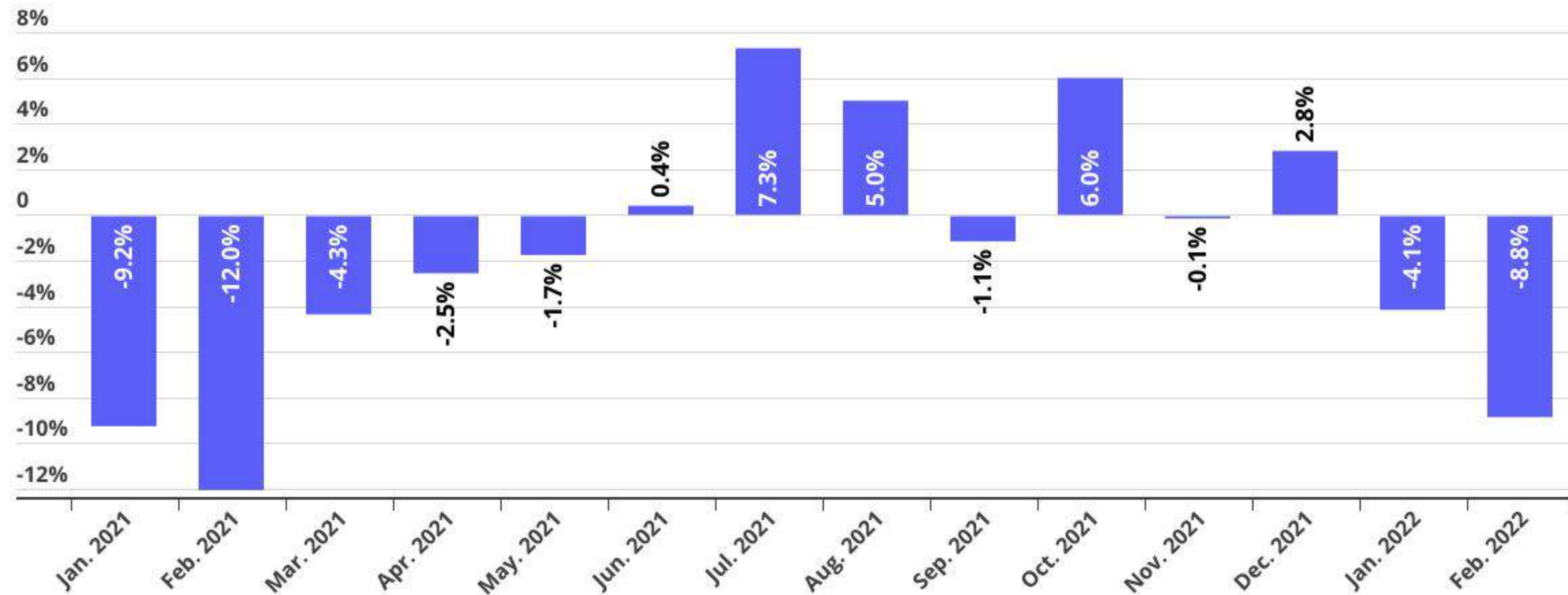
All Categories	-7.89%
Apparel	-3.89%
Dining	-26.55%
Electronics	-24.02%
Fitness	-28.30%
Groceries	-6.43%
Home Improvement	24.29%
Hotel/Casinos	-54.10%
Medical & Health	0.57%
Shop & Service	8.55%
Shopping Centers	-20.53%
Superstores	0.73%

Retail Overall

How have recent challenges been met?



Year-over-Two-Year Changes in Monthly Visits - Overall Retail



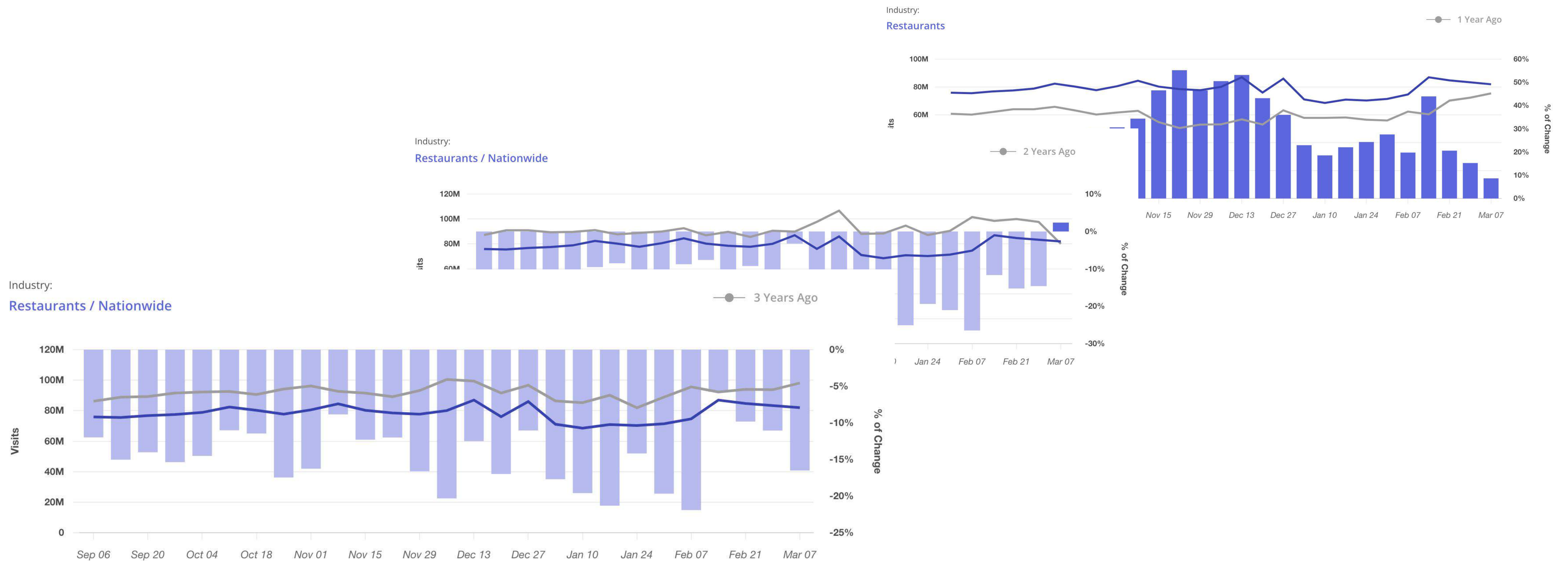
Where do we stand?

Comparison Problem

How can we understand current performance?



9



What do we benchmark against?



Q1 Analysis



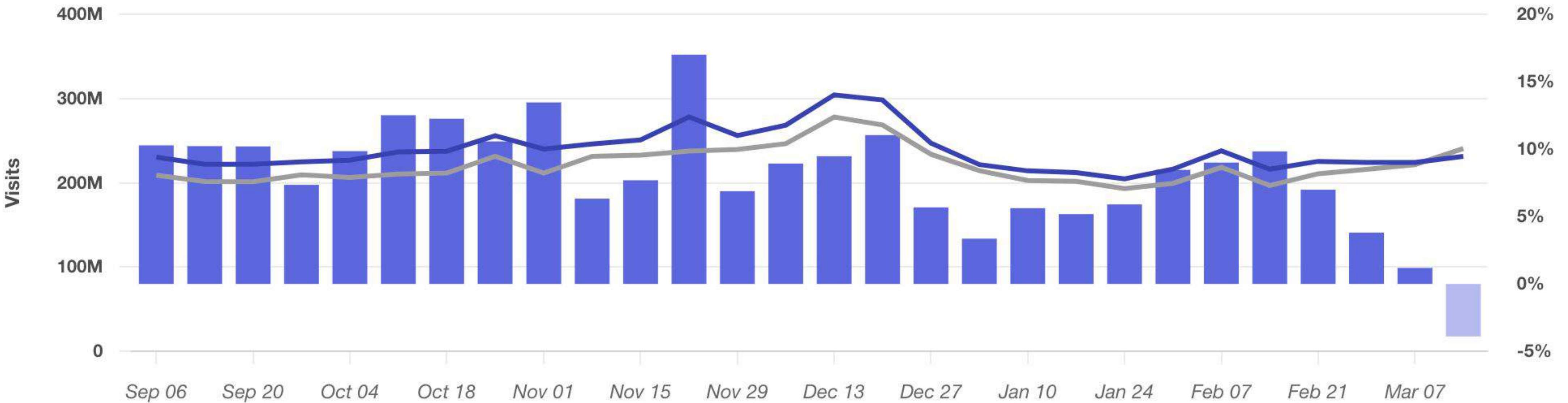
Handling the Unique Challenges of 2022

Will these obstacles continue to affect retail?

Industry:

Superstores

● 1 Year Ago



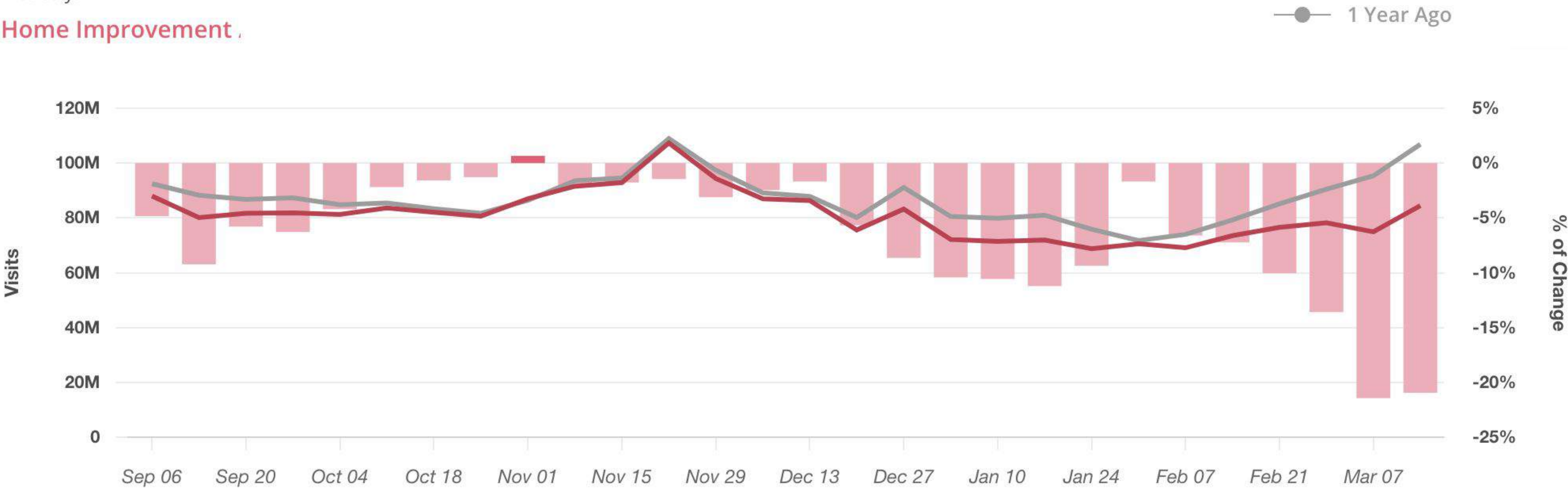
What is the long term impact?

Home Improvement's Q1

Will the strength continue?



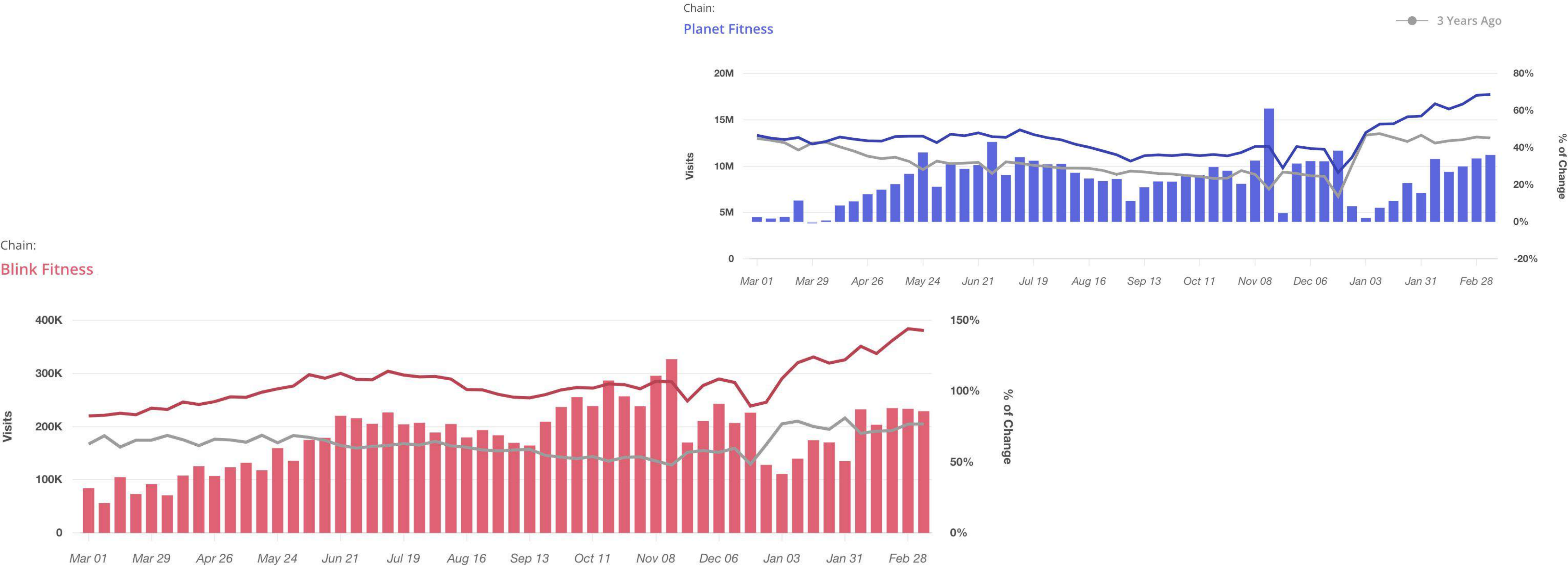
Industry:
Home Improvement



Can the segment continue to thrive?

The Fitness Rebound

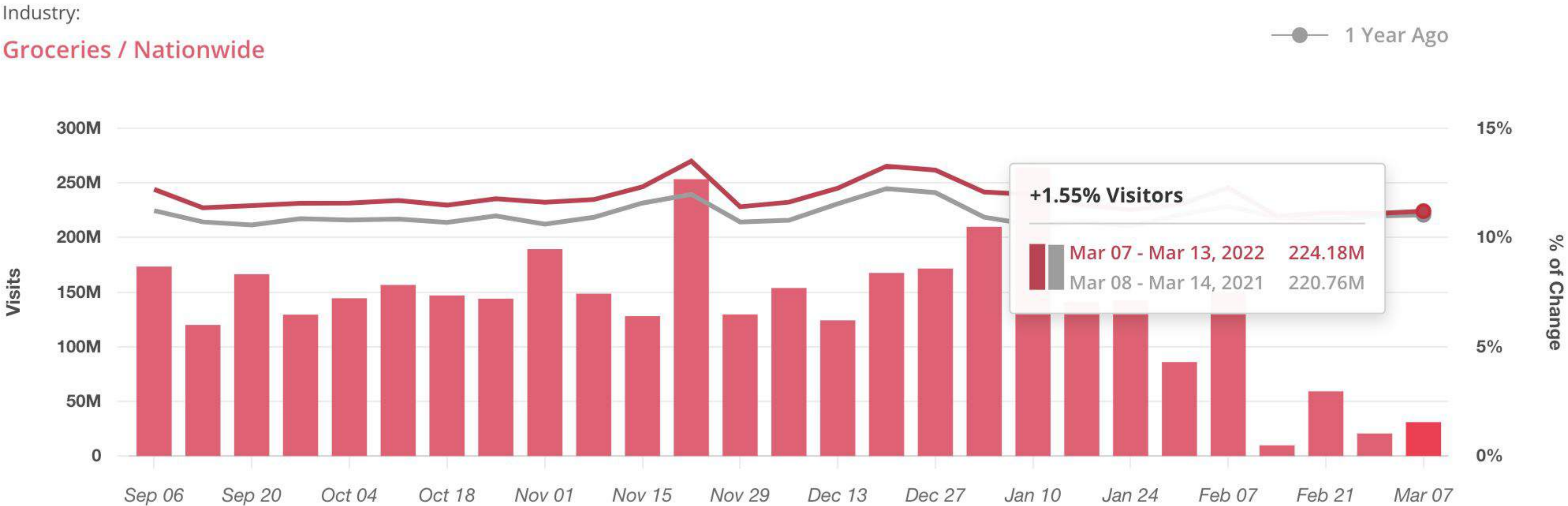
Have the doubts been put to bed?



What are the key takeaways from this surprising recovery?

Grocery's Golden Age?

Will it end?



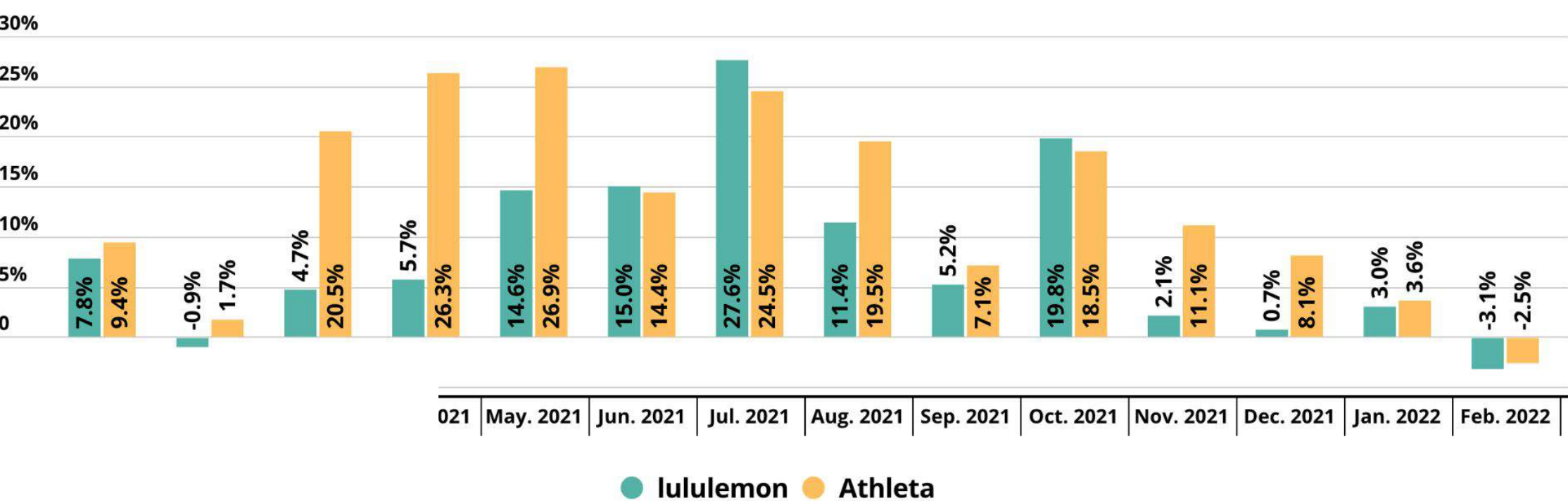
What is driving this segment's continued success?

Apparel's Regression to the Norm?

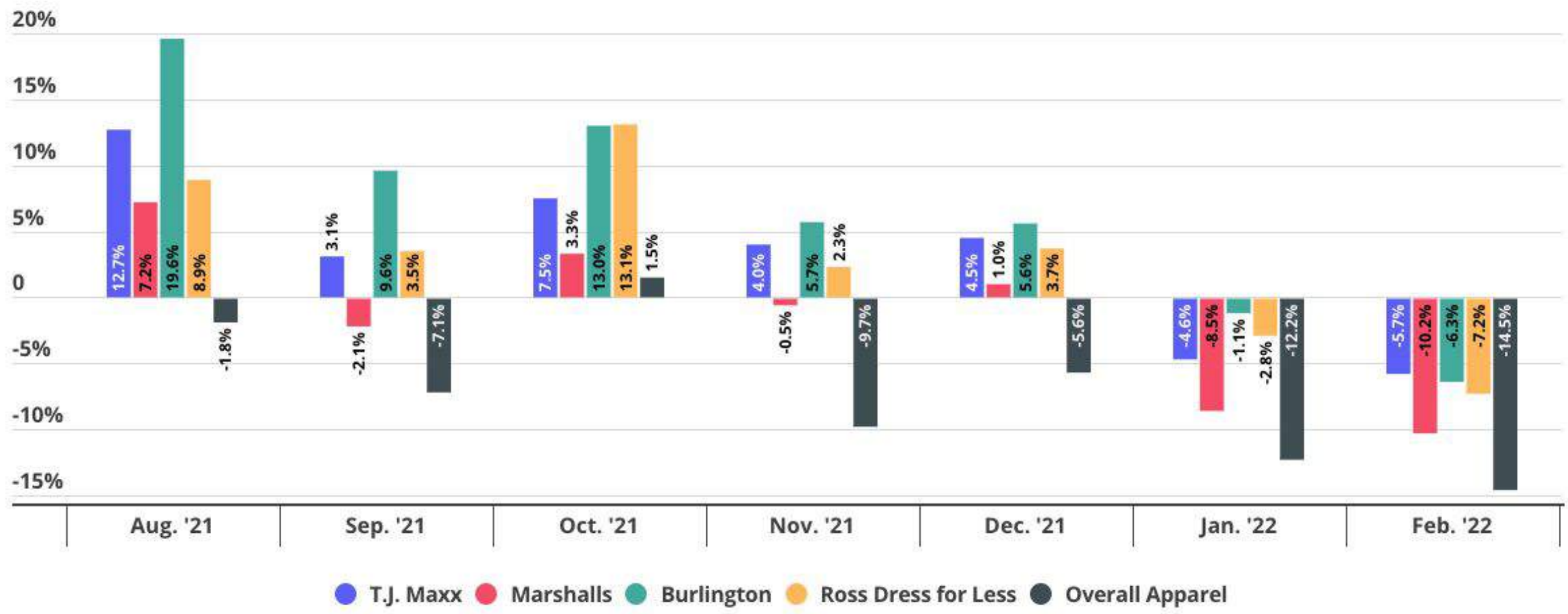


Will a traditional balance return?

lululemon, and Athleta Monthly Visits - Year-over-Two-Year Comparison



Off-Price Monthly Visits - Year-over-Two-Years



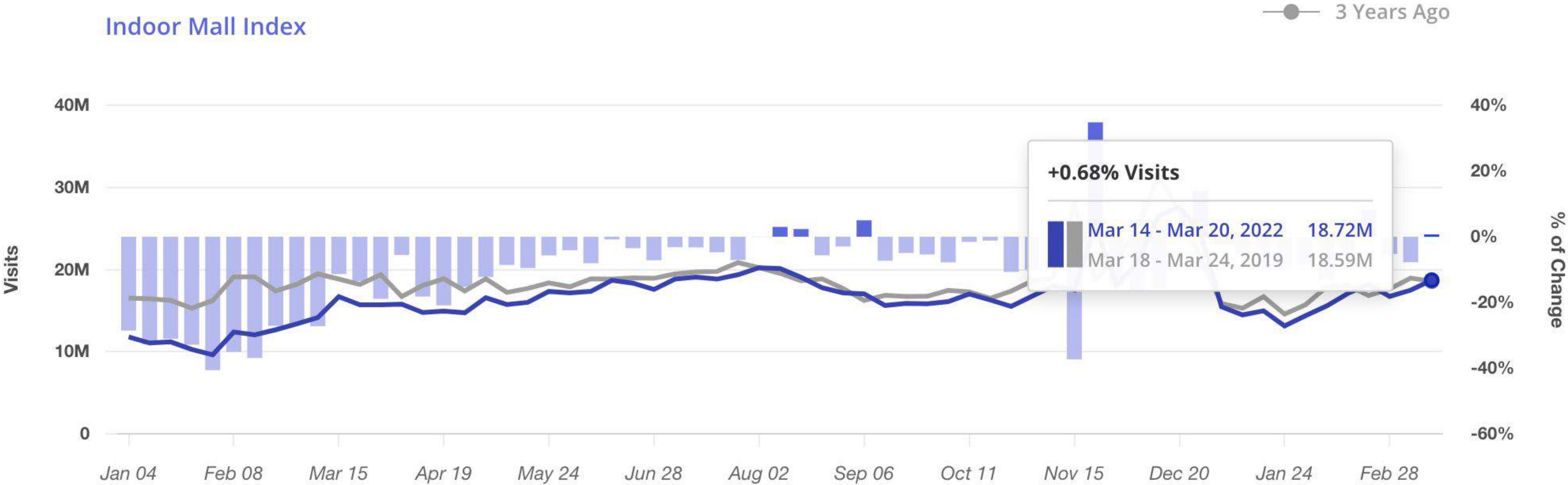
Will shifting times drive a return to normalcy?

The Mall Waterfall

Can the sector as a whole improve?



Chain:



Are there wider implications to the success of top tier indoor malls?

Restaurant Surprise?

Who benefits most from the strength?



Industry:
Restaurants



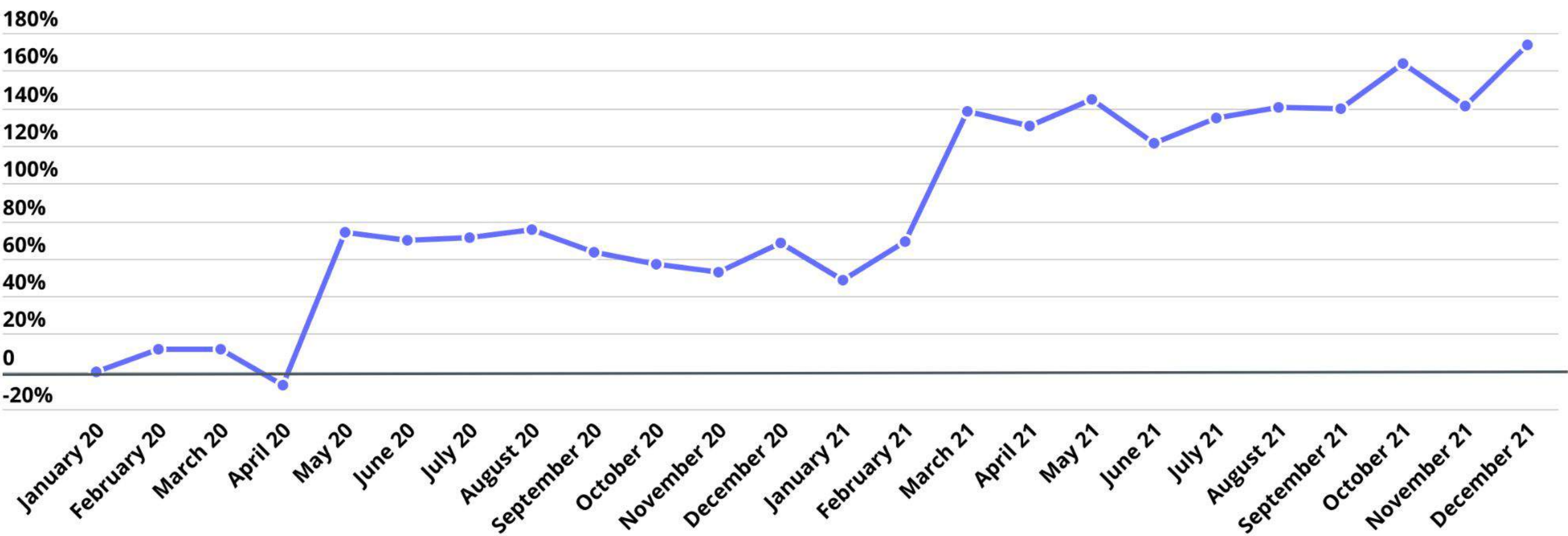
How have they managed to be so resilient?

Rising Brands to Watch

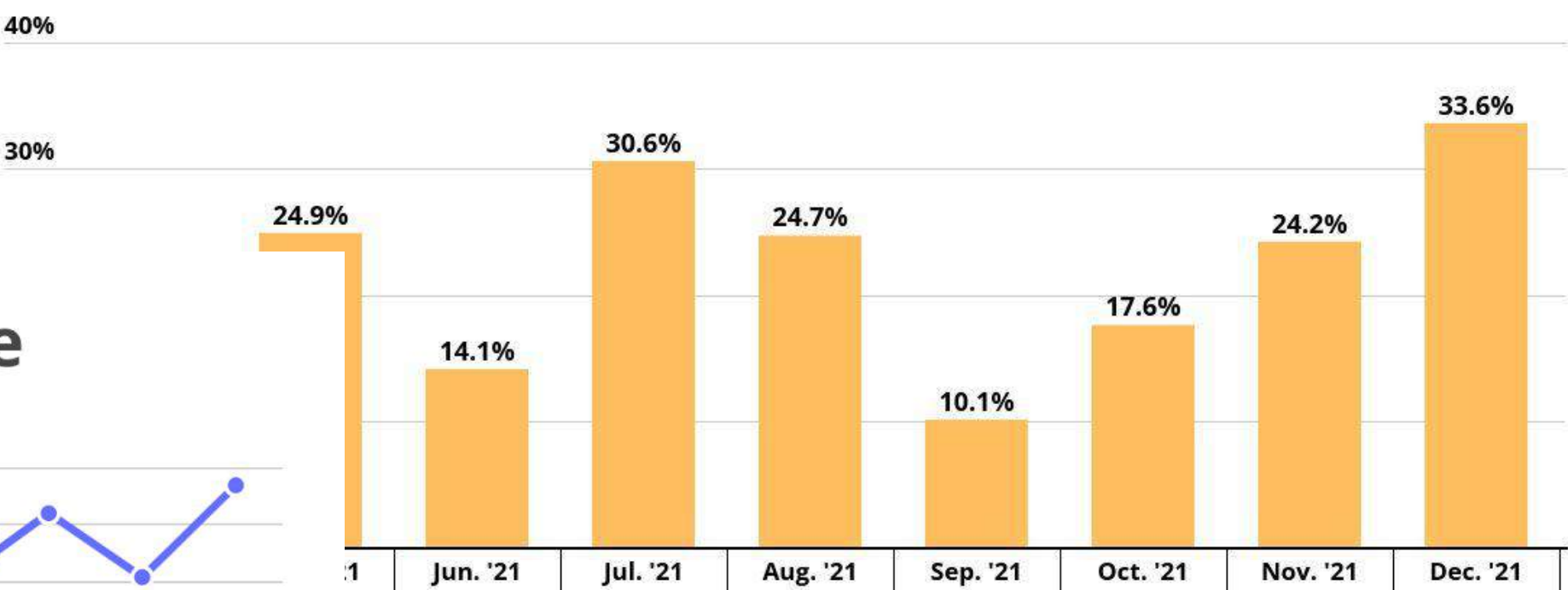
Who should we keep an eye on?



Dutch Bros. Monthly Visits - Compared to January '20 Baseline



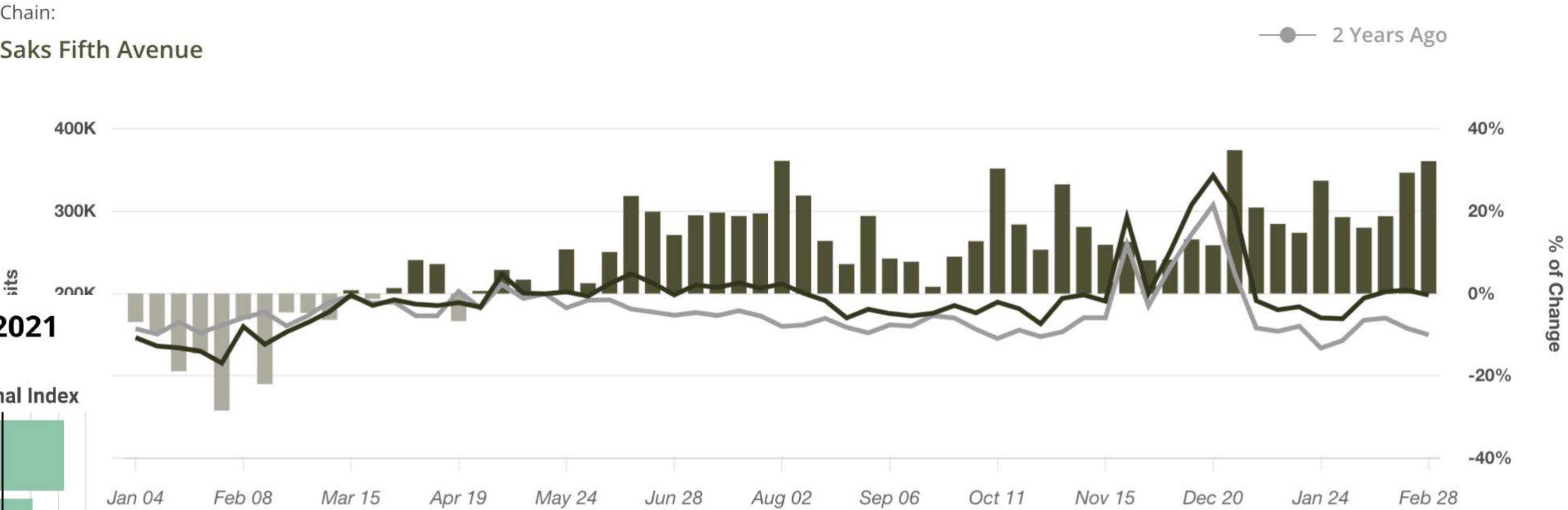
Arhaus Monthly Visits - Comparing to 2019



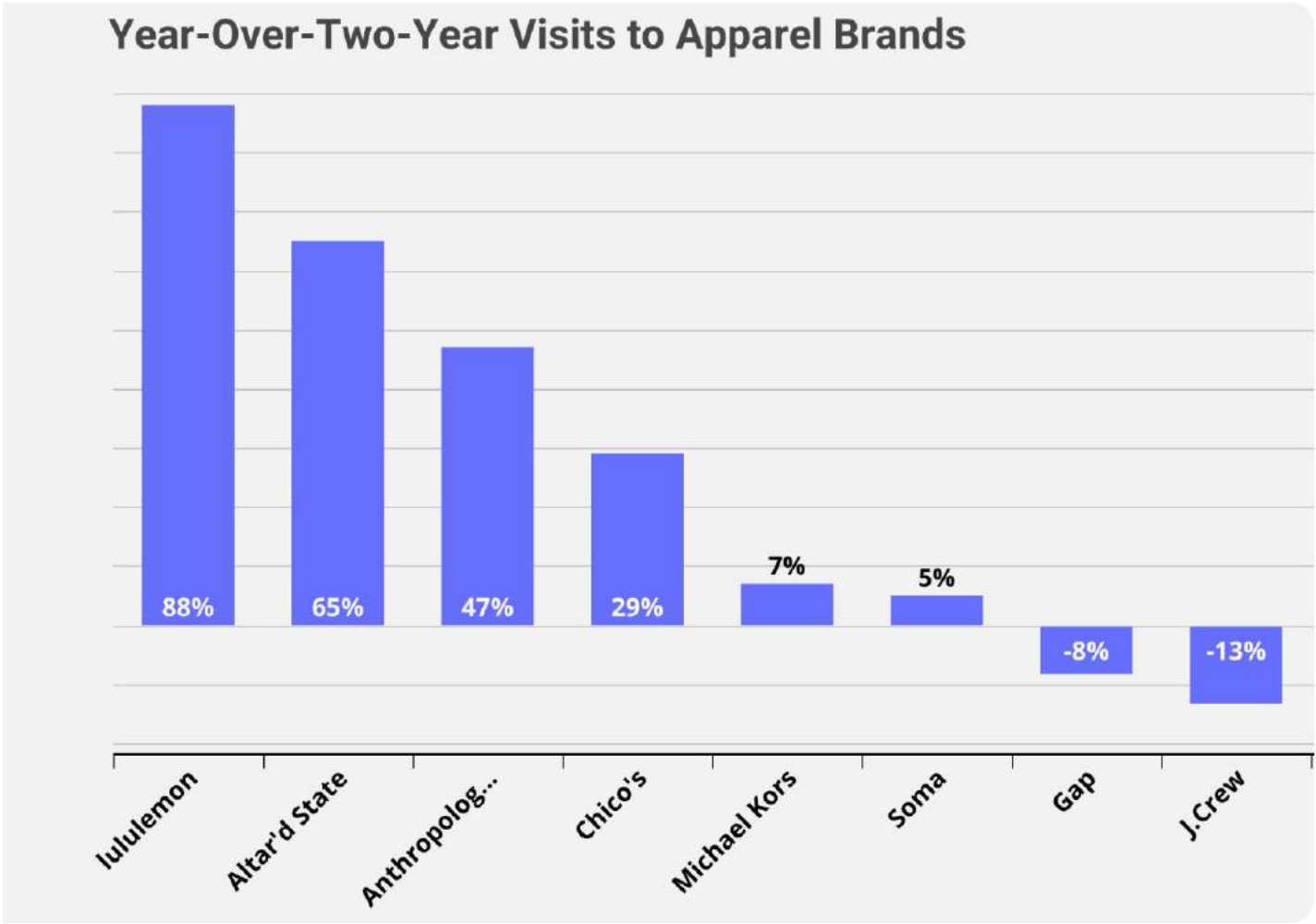
Which expanding footprint is the most exciting?

The Omni Question

How does it redefine the space?



ABQ Uptown Shopping Mall Visitors - Visits VS. Web Searches - Q4 2021



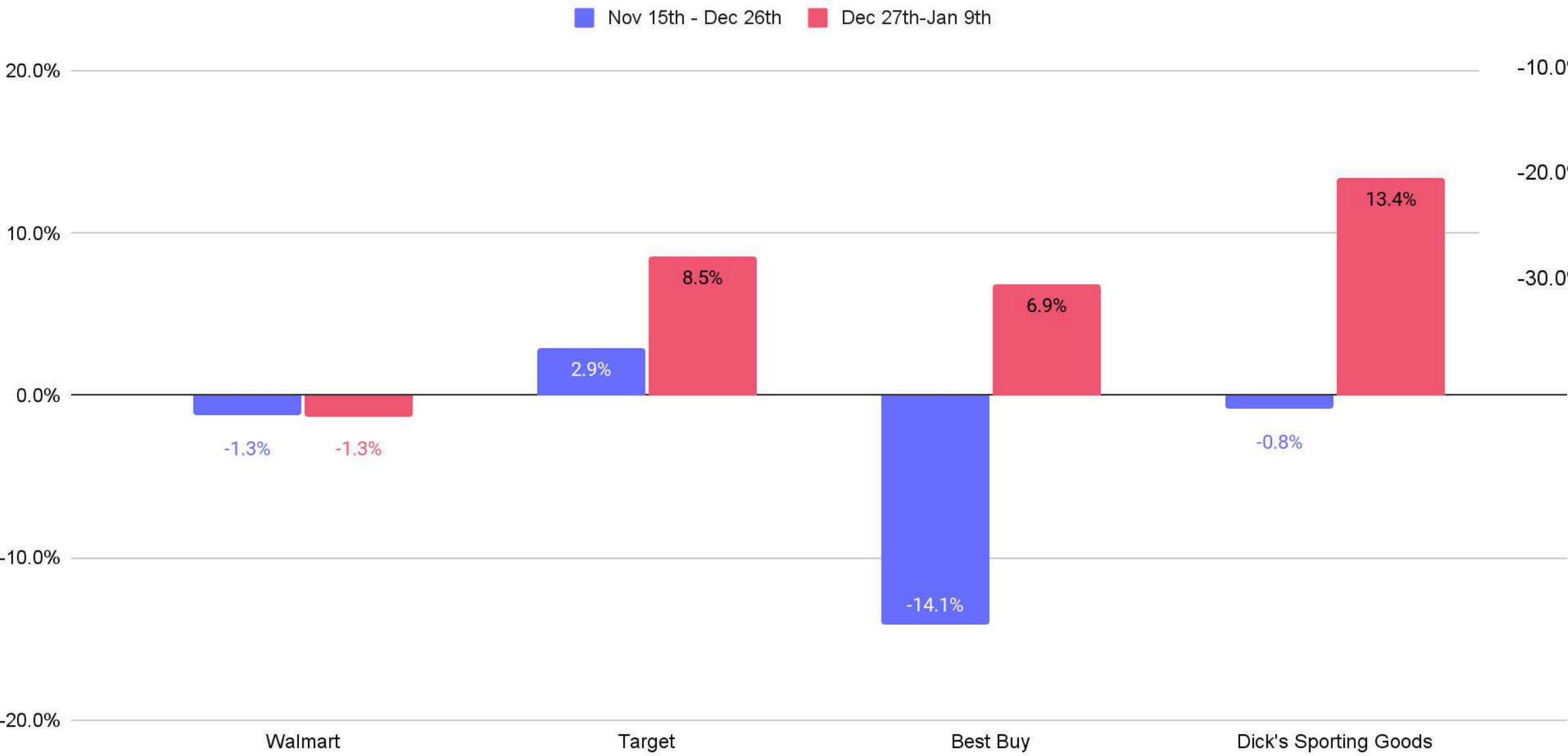
Should online and offline be split?

2022 Early Winners

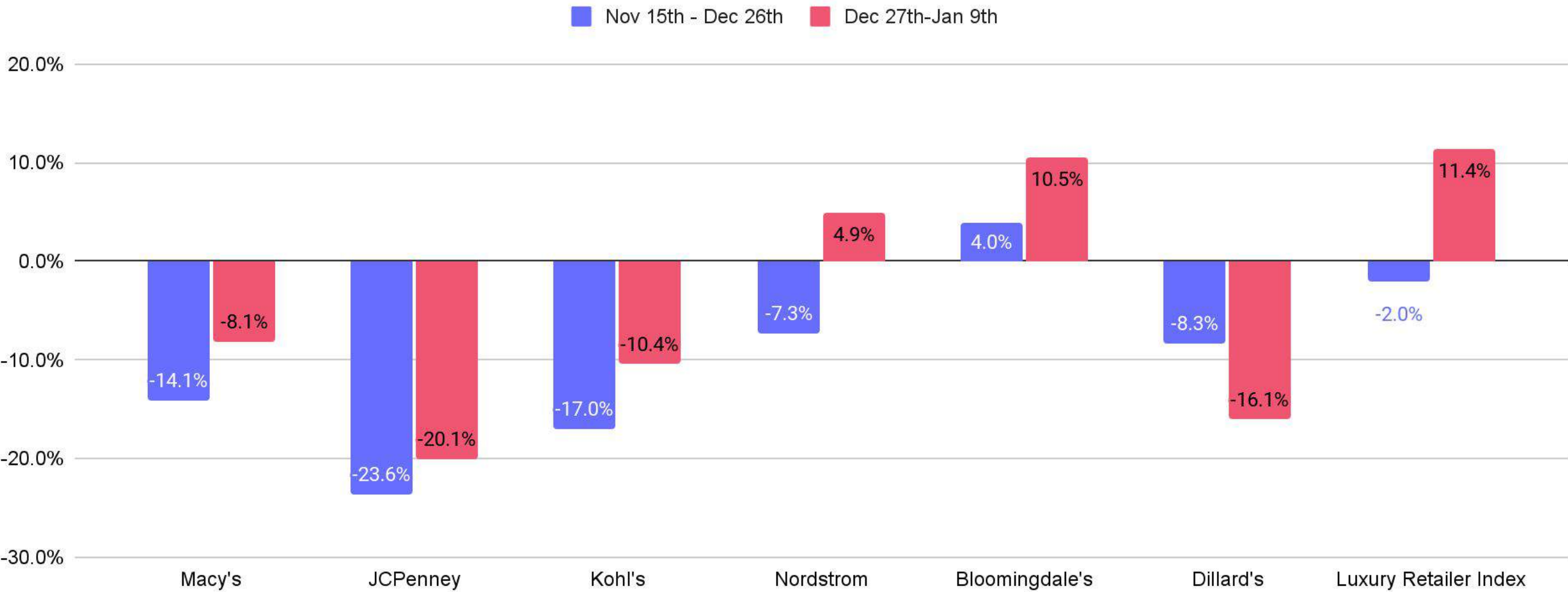
Which brands impressed?



The Return Window Comparing to 2019



The Return Window - Comparing to 2019



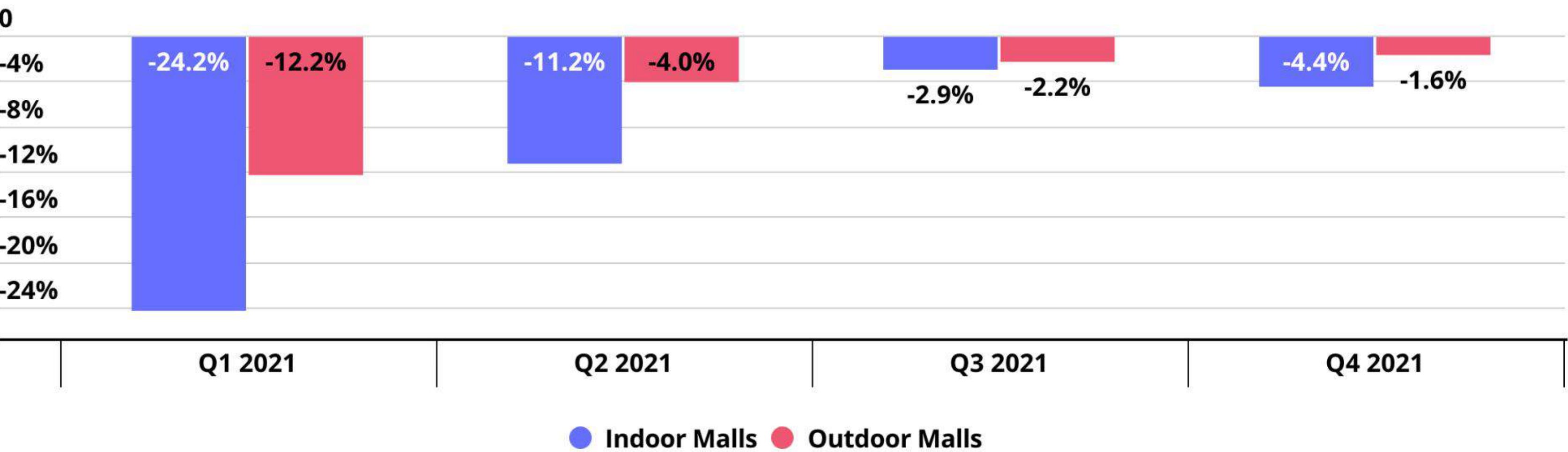
What can we learn from the visits?

Shopping Center Expectations

Which formats will thrive?



Placer.ai Mall Index - Quarterly Visits Compared to 2019



A tide lifting all boats or some formats better positioned?



Michigan - Looking Forward

Retail Recovery Trends

What will be strong in 2022 in Michigan?

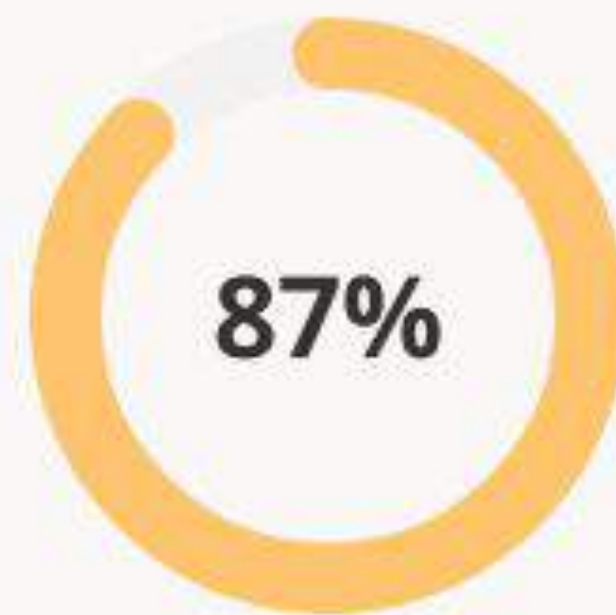


23

Retail Chains Foot Traffic Recovery: Michigan

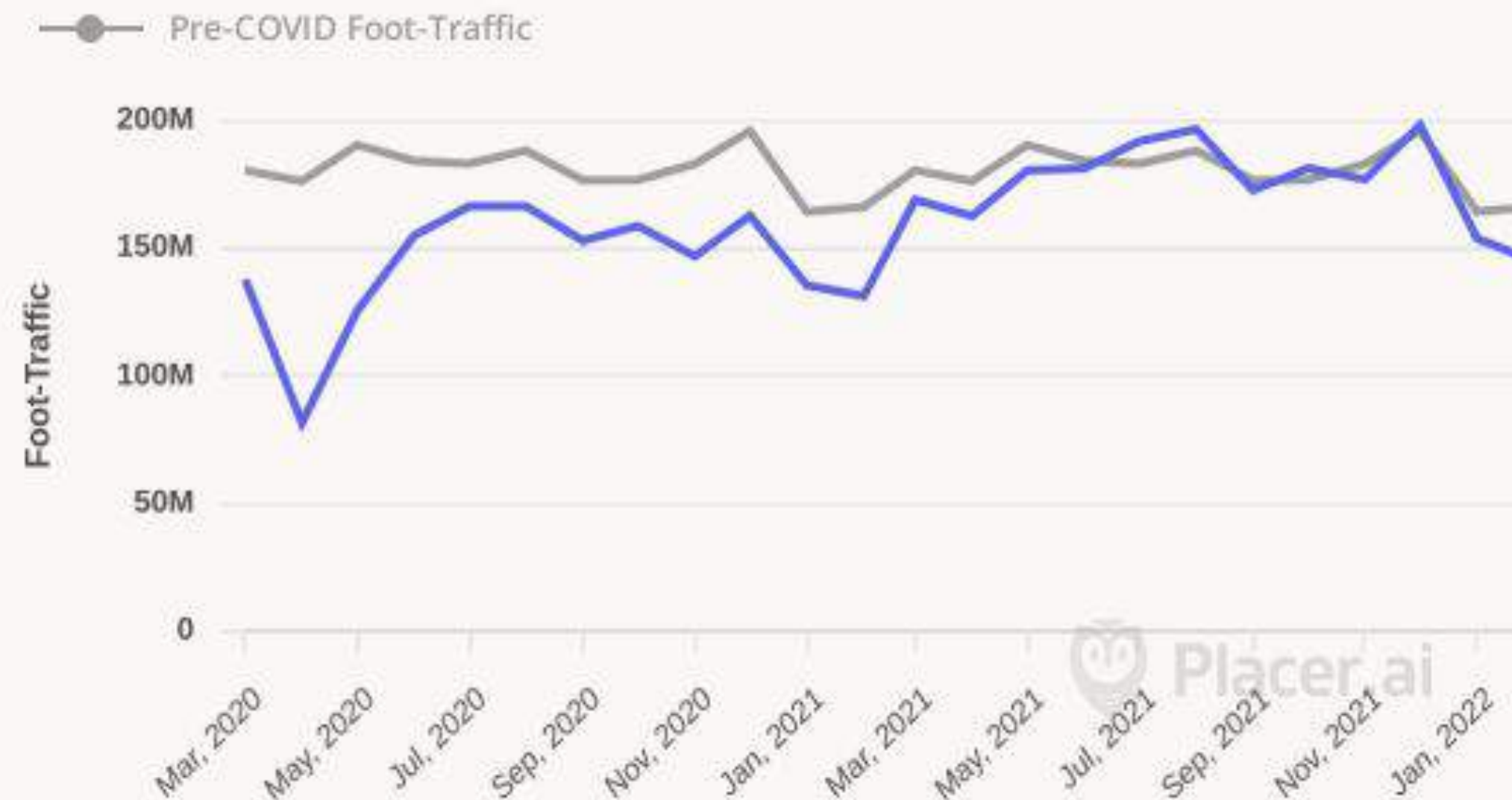
Feb, 2022 Compared To Feb, 2020

Retail Chains Recovery



-13% compared to Feb, 2020

Retail Chains Foot Traffic Recovery Over Time



Will it return? How do we adapt?

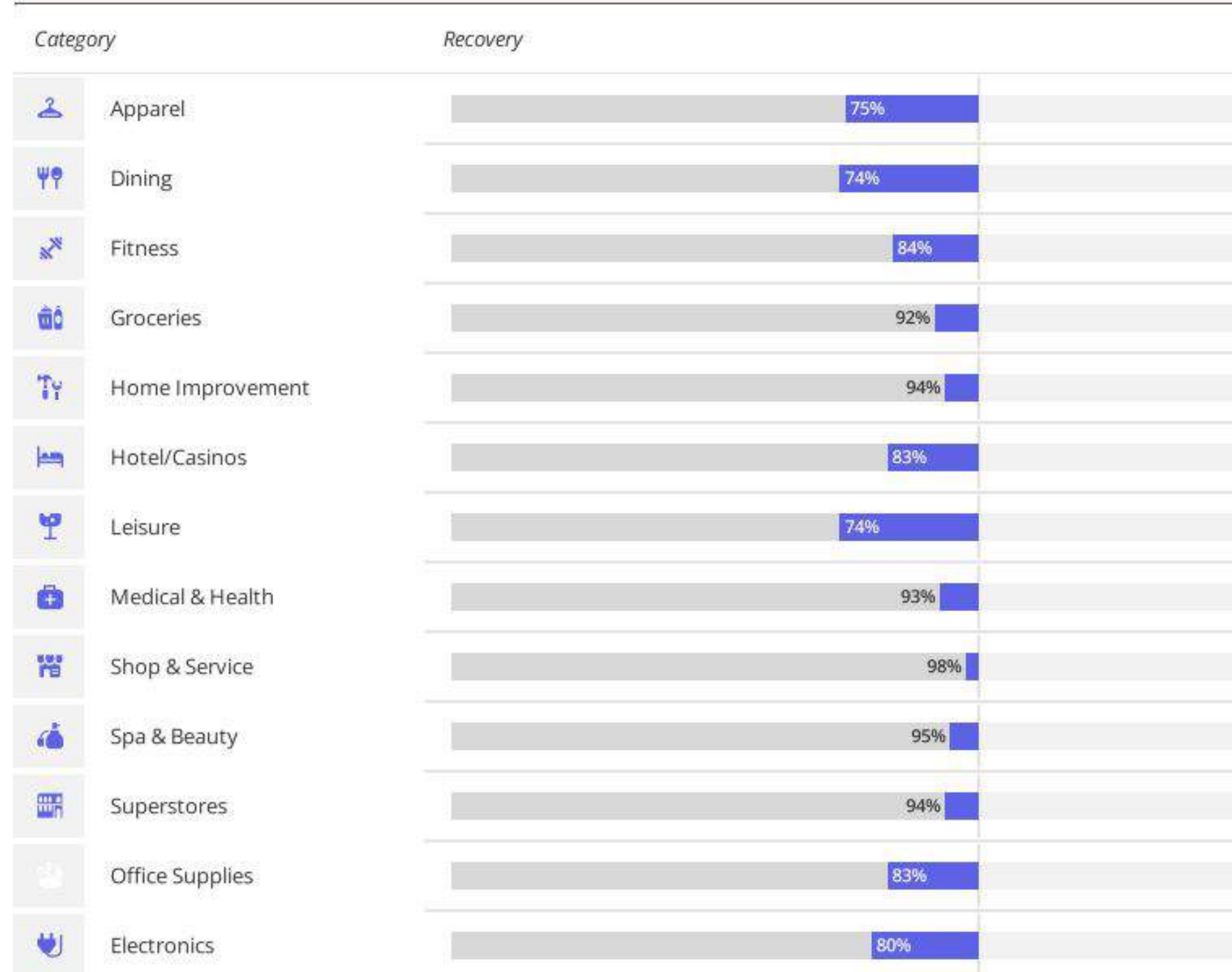
Retail Recovery Trends

What sectors will be strong in 2022?



24

Retail Chains Foot Traffic Recovery By Category



Who's Growing?



Is the growth sustainable? (Monthly Visits compared to 2 Years Ago)



What do we learn from the expansions?



Which Retailers will Win 2022?

Which retailers will take the year?

Monthly Visits Compared to 2 Years Ago



Who and Why?



Which Retailers will Win 2022?

Which retailers will take the year?

Monthly Visits Compared to 2 Years Ago



Who and Why?



Questions?



Thank you for joining us!
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ICSC+CONTINUING EDUCATION MICHIGAN

Suburban Collection Showplace

Novi, MI

Wednesday, April 13, 2022

Session Materials

Roundtable 4: PACE Financing: A Swiss Army Knife for Your Capital Stack

**Led by: Robert (Bob) Mattler, Green Portfolio Solutions and Bali Kumar,
PACE Loan Group**



Hotel Saint Regis

Detroit luxury boutique hotel finances phase two retrofit with PACE

Project Quick Stats:

PACE district: Wayne County

Property owner: St. Regis Real Estate Holdings

PACE lender: PACE Loan Group

PACE contractors: Ebee Management, Catalyst Partners

Amount financed: \$3,500,000

Project term: 25 years

Net 25 year savings: \$801,825

Total 25 year savings: \$2,698,175

Energy conservation measures:

- Domestic hot water
- Elevator upgrade
- HVAC
- LED lighting
- Window glazing

Impact: The PACE project at the Hotel Saint Regis is projected to save over 15,118 metric tons of CO₂. That's the equivalent of eliminating the energy use of 1,745 homes for each of the 25 years of the project.

Overview

As the Hotel Saint Regis undergoes phase two of a long term redevelopment project that began in 2018, the owners of the Hotel Saint Regis are utilizing upfront financing through PACE to serve as a component of their capital stack to upgrade the Hotel Saint Regis with new energy efficient appliances.

Connecting Detroit's historic Cadillac Place and Fisher Building landmarks, the completion of this 125-room hotel modernization project will make the Hotel Saint Regis a focal point of the ongoing redevelopment efforts in Detroit's New Center area.

"When looking at all of the financing choices for our Hotel Saint Regis renovation, PACE was the best all-around solution for completing our capital stack," said Christos Moisides with St. Regis Real Estate Holdings. "A key factor to accessing this solution was the outstanding support of Stephen Guy at Bank of Ann Arbor and their forward vision in accepting the PACE financing as an integral component of the overall project financing. PACE's long-term fixed-rate financing was cheaper than mezzanine debt and the non-recourse feature made it an attractive option for our vested partners."

Partners



catalystpartners

PACE Financing

Commercial building owners spend \$200 billion per year on utilities, yet 30% of this is waste. The energy projects that could make these properties efficient often require significant up-front capital and take years to achieve profitability. Commercial loans typically have a tenor of 3-5 years, making the annual repayment greater than the energy savings. PACE changes all this by allowing property owners to finance energy efficiency and renewable energy projects via a property tax special assessment.

Wayne County's elected leaders created a countywide PACE district in December 2013 by joining the statewide Lean & Green Michigan PACE program. Since the County will enforce the PACE assessment just like any other property tax obligation, lenders feel secure in providing fixed-interest loans with terms of up to 25 years. The result is 100% financing to facilitate energy-saving projects. In addition, these projects create good jobs, and communities upgrade their building stock, increasing the local tax base over time.

Lean & Green Michigan

Lean & Green Michigan™ helps commercial, industrial and multi-family property owners take advantage of PACE to finance energy projects, eliminate waste and save money through long-term financing solutions that make energy projects profitable. Lean & Green Michigan™ is a public-private partnership that works with local governments, contractors, property owners, and lenders to invigorate Michigan's PACE statute with a market-based approach to energy finance and economic development.

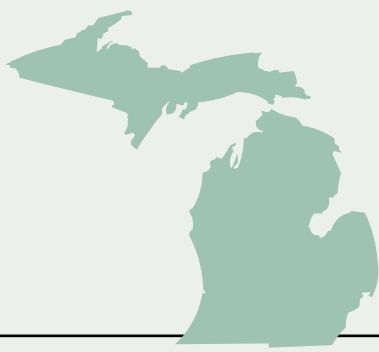
Contact Lean & Green Michigan

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Detroit, MI 48207





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Contents

Chairperson's Report	1
<i>By Lorri B. King</i>	
Applying the Doctrine of Reciprocal Negative Easements to the 2018 Amendment to the Marketable Record Title Act	3
<i>By Matthew W. Heron and Kayleigh B. Long</i>	
The ABCs of CBD and Hemp: A Primer.....	8
<i>By Gregory J. Gamalski</i>	
A Michigan House Seller's Legal Duty to Disclose Coronavirus.....	13
<i>By R. Bradley Lambert</i>	
Ten Years of Michigan Property Assessed Clean Energy (PACE) Financing: Progress or Passing Fad?	17
<i>By Robert Mattler</i>	
Judicial Decisions Affecting Real Property.....	22
<i>By Thomas A. Kabel</i>	
Legislation Affecting Real Property.....	25
<i>By Thomas A. Kabel</i>	
Continuing Legal Education	28
<i>By Jason Long</i>	



Ten Years of Michigan Property Assessed Clean Energy (PACE) Financing: Progress or Passing Fad?

By Robert Mattler*

The Michigan Property Assessed Clean Energy Act was passed by Governor Granholm in 2010.¹ This public-private economic development law endeavors to: (1) mitigate the barriers to improving building performance; (2) lower carbon emissions from buildings; and (3) improve the building stock of new and existing buildings in an uncertain and unpredictable future climate. Its adoption by Michigan property owners and local jurisdictions has been slow but growing over the decade since it was first enacted. This mirrors national trends and begs the question of whether property assessed clean energy (PACE) will be a passing fad or a valuable financing tool for Michigan property owners.

Through PACE, property owners are able to finance energy efficiency and water efficiency upgrades and implement renewable energy and, in some states, building sustainability and resiliency. The PACE loan is secured against the property in the form of a tax assessment, providing a unique and strong incentive for lenders to invest.

Thirty-seven states and the District of Columbia have enacted PACE laws. While all have enacted commercial property assessed clean energy, or C-PACE, only five currently have residential property assessed clean energy, or R-PACE. Of those, California, Florida, and Missouri

have the active R-PACE programs, with Ohio and New York currently considering expanding R-PACE programs. This article will focus solely on Michigan's experience with C-PACE, as the current Michigan PACE statute does not allow for R-PACE.

Before discussing the history and growth of PACE in Michigan, it's important to understand the flexibility and versatility of the financing. PACE has many applications. Developers of new construction projects are using PACE financing to round out their capital stacks, as it's less costly than private equity or mezzanine finance. PACE financing can be used to retrofit existing properties with improved energy or water infrastructure upgrades, as well as installation of renewable energy systems. More recently, PACE has been used by some building owners as a form of "rescue capital," helping struggling owners pull equity from buildings for recently completed energy or water upgrades.

PACE financing may be used by commercial and industrial property owners in Michigan, and across all asset classes. PACE has been used in the capital stack for ground-up mixed use and multi-family construction projects, non-profit houses of worship and recreational facilities, senior living facilities, office buildings, and hotels. Not only do the property owners benefit from a more efficient property, but the buildings offer improved experi-

¹ 2010 PA 270.

* Robert Mattler, JD, LLM, LEED AP BD&C, Michigan's first recipient of the national PACENATION PACESetter award for diversity, equity and inclusion (DEI), is the Michigan market leader for Green Portfolio Solutions, LLC, a leading PACE origination and project management firm headquartered in Detroit. Bob brings more than 30 years of combined experience in real estate law, commercial brokerage and green building consulting through his efforts and experiences as a Board Member of the Detroit Chapter, United States Green Building Council (USGBC), the City of Detroit Green Task Force, and other sustainable organizations. Currently, Bob is involved with the Detroit 2030 District (D2D) and serves as a business development consultant helping to grow the movement through professional stakeholder and building/developer support. The D2D initiative's goal is to reduce energy and water consumption by at least 50% in City of Detroit buildings by 2030.

ences for the occupants' health, comfort, and convenience. As building owners, businesses, and developers begin to recover from the Covid-19 pandemic, there appears to be greater focus on paying closer attention to occupants' health, safety, and welfare in indoor environments. No longer can landlords assume that more discerning tenants will tolerate low air quality standards, inefficient/outdated building systems, or poor performing buildings.

From Fortune 500 corporations to tier 3 automotive suppliers, environmental, social, and corporate governance (ESG) issues are focal points for C-suite executives, investors, and the consuming public alike. PACE financing has also been used as a business and talent attraction tool for developers and building owners with net zero energy goals or other sustainable building objectives.

I. History of PACE in Michigan

PACE was originally known as a Special Energy Financing District or on-tax bill solar and efficiency financing. The first PACE financing program was implemented by the City of Berkeley, California, led by Cisco DeVries.² This program was focused initially on residential PACE, but the applicability of the financing tool to commercial property was not far behind. The concept was designed to overcome one of the most significant barriers to solar and costly energy efficiency retrofits: up-front costs.

Realizing the potential of this public-private financing law to provide a solution for upgrading many of Michigan's outdated buildings, worn out downtown shopping districts, and historic buildings in disrepair, interested stakeholders and legislators set out to introduce commercial PACE to Michiganders. The Legislature, interested in economic stimulus and pulling Michigan out of a deep recession, united to pass this legislation without much controversy or fanfare. Towards the end of her second term, Governor Jennifer Granholm signed Michigan Public Act 270, creating the Property Assessed Clean Energy Act (the PACE Act) for commercial and industrial property owners.³

Little attention was initially paid to the PACE Act after it became law in 2010, and there were a few natural hurdles that needed to be overcome to really launch PACE. First, the statute requires local jurisdictions to

adopt a PACE program report and enable PACE. The infrastructure of PACE was slow to develop. Second, there was a general lack of interest to provide the financing of projects by local jurisdictions and lack of a developed private financing market for private capital.

The launch of PACE in Michigan took advantage of the two potential funding tracks, governmental and private. The City of Ann Arbor, an early supporter of the passage of the PACE statute, enacted its PACE program in 2011. The city used federal grant money to fund the development of its program through the Clean Energy Coalition. The program was established to fund projects ranging from \$10,000 to \$350,000, with a limitation of 20% of the property value.⁴ In February, 2013, the city authorized its first and only PACE bond, which funded around \$560,000 of projects at four properties.⁵

Around the same time, the Lean & Green Michigan PACE program was started. This program was built around a public-private model, in which Levin Energy Partners, now Lean & Green Michigan, LLC, would serve as the program administrator for local jurisdictions that opted into the program. This model was based on the private capital approach. While building up the number of new local PACE jurisdictions, Lean & Green Michigan was also developing ties with national private PACE lenders.

Lean & Green Michigan's first completed project, in 2015, was a joint effort by the property owner, Saginaw Plaza, Ltd., and its tenant, the Michigan Public Service Commission. Located in Eaton County, the \$508,000 project improved the efficiency of the lighting and installed a 20kw ground mount solar system.⁶

From the early days of PACE, the private capital model has been the more successful. Currently, 49 local jurisdictions have joined the Lean & Green Michigan program, and they have completed over \$89 million of financing across 45 projects.⁷

PACE continued gaining momentum in Michigan over the last several years, but the onset of Covid-19 slammed the brakes on closing any Michigan projects in the first half of 2020. However, Lean and Green went on to have a record-setting year in both number of Michi-

4 City of Ann Arbor-PACE Financing, <https://programs.dsireusa.org/system/program/detail/5023> (last updated June 24, 2015).

5 Mary Morgan, *County Wraps Up 2013 with PACE Initiative* (Dec. 17, 2013), <https://annarborchronicle.com/2013/12/17/county-wraps-up-2013-with-pace-initiative/index.html> (accessed June 28, 2021).

6 <https://leanandgreenmi.com/uploads/MPSC-v2.pdf>

7 <https://leanandgreenmi.com/market>

2 Thomas Lord, *Solar Financing Program Invented in Berkeley, Now National, is in Trouble* (July 19, 2010), <https://www.pacenation.org/pace-program-update/> (accessed June 4, 2021).

3 *Pace Program Update* (Jan. 10, 2013), <https://www.pacenation.org/pace-program-update/> (accessed June 4, 2021).

gan projects closed and dollars financed through PACE from June through December, 2020. That upward trend has continued into 2021 as more developers learn to use Michigan PACE in their capital stack to lower the average weighted cost of capital. Similarly, building owners are taking advantage of implementing PACE projects following the public's increasing appetite for cleaner, healthier, safer, more comfortable buildings that are more sustainable and resilient to climate change.

II. Benefits

The most appealing and unique feature of a PACE loan is that it is non-recourse to the borrower. In most circumstances, no guarantees, covenants, or use of borrower's credit is necessary with a PACE loan. With these characteristics, PACE becomes very attractive to a developer completing a capital stack for a new development, an entrepreneur repurposing a building, or a building owner simply upgrading their property for energy/water savings and creation of a healthier, safer, more comfortable indoor environment.

PACE is an attractive option to counties and cities too, because it can play an important role in reducing local greenhouse gas emissions from buildings, allowing local jurisdictions to meet their targets for reducing energy or water consumption by their business communities, and encouraging investment in and supporting the shift to renewable energy. PACE allows local communities to support the revitalization of older building stock. PACE projects help to create construction jobs and often keep current jobs or create new permanent jobs in the jurisdiction, spurring local economic development with only slight government involvement.

It is important to note that the Michigan PACE statute was drafted to create a broad opportunity for funding. The participating local government is able to provide the financing directly to the property owner, or the owner is able to arrange private financing. Owner-arranged private financing has come to dominate the Michigan market, and there has been little interest from local governments to provide the capital.

As an opt-in program, only those property owners who choose to participate are responsible for repayment of the PACE financed project. There is no way to impose a PACE assessment on a property owner who has not voluntarily sought out the financing.

PACE enables property owners to finance up to 100% of the costs of the project, including the high upfront costs that are the most common barrier to energy efficiency im-

provements or installation of renewable energy projects. The PACE loans are paid by additional assessments on the property owner's property taxes over an agreed-upon term while energy costs are simultaneously lowered, most often providing the PACE consumer with net gains.

The Michigan PACE statute is one of the most stringent in the nation, and is crafted in a way to protect the property owner against contractors who may be selling inferior projects. For all projects financed costing more than \$250,000, the contractor must guarantee the property owner will achieve a savings-to-investment (SIR) ratio greater than one, and agree to pay, on an annual basis, any shortfall.⁸ While a few other states include an SIR requirement, few have a guarantee provision, let alone one that runs for the full term of the assessment.

Also, because the upgraded energy/water infrastructure and PACE loan are secured to the property, the building owner is not restricted from selling or refinancing the property. The remaining assessment amount due will run with the land to the new property owner.

In summary, PACE financing is becoming more popular across Michigan for a number of reasons:

- Guarantees are usually limited to being required during the construction phase; no covenants or use of credit or borrowing power is necessary from developer or building owner.
- Projects above \$250,000 are guaranteed to be net cash flow positive from day one, and are often structured to benefit from long tenure of such financing and fixed amortized payments.
- Repayment of PACE loans can be covered by tenants, particularly tenants with triple net leases; similarly, invitees of hospitality properties often pay some or all of the infrastructure upgrades through a "below the line" green tax.
- Through lower energy and water costs above and beyond the repayment of those projects, owners often increase their net operating income (NOI), building value, and ability to repay any underlying debt.
- With improved energy/water infrastructure, lower management/maintenance costs and higher income and property values, building owners have a competitive advantage over other buildings without such improvements.
- During uncertain economic times, owners may be able to use PACE to refinance prior infrastructure

⁸ MCL 460.939 (p)(ii).

improvement projects, thus obtaining cash for more important business needs.

III. Recent Successful PACE Projects in Michigan

While PACE financing has existed in Michigan for more than ten years, awareness of its use as an economic development tool and cost savings financing measure is still low on developers' and building owners' radar. Nonetheless, those who have employed it seemed to have grasped its importance in completing a capital stack, adding energy and water savings measures to their buildings or, more recently, using it as a tool to refinance past PACE-viable projects through its lookback provision. I am proud to have worked with multiple property owners to access PACE, and the case studies discussed below reveal the breadth and width of PACE financing for Michigan developers, building owners, and business.⁹

The Henry, Ann Arbor: The Henry, a luxury townhouse complex on a formerly vacant lot, is the first project completed with the Washtenaw County PACE Program, administered by Lean & Green Michigan. This exciting live-work-play project includes advanced energy technologies, such as solar panels, electric vehicle charging stations for an on-site vehicle fleet, and other high efficiency appliances. Tenants at The Henry benefit from energy and water savings, as well as an efficient, comfortable, healthy and safe living environment for years to come. These additions were designed to attract both tenants and talent to the building, making it more competitive than its peer buildings nearby.¹⁰

Chene Street Grocers: The new owner was over budget and behind schedule redeveloping a former church in Detroit's Poletown neighborhood into a mixed-use property. PACE provided the necessary capital to help finish the project with some additional energy saving features. Chene Street Grocers shows how PACE can help community-based businesses access capital and, in this instance, help solve the food desert in part of Detroit.¹¹

DO Apparel: A small sports apparel business purchased its first building in Livonia and completely upgraded it several years ago. The business learned the benefits of a PV Solar roof and PACE covered 100% of the installation under the PACE Express program. PACE Express is available for projects costing \$250,000 or less and is popular for its reduced fees, less paperwork, and relaxed requirements. In this instance, the solar array will power up to 60% of the property's energy needs, saving owners thousands of dollars over its 25-year useful life.¹²

Detroit Unity Temple: Located in the heart of Palmer Park, the historic Detroit Unity Temple (DUT) is the first Michigan house of worship to take advantage of PACE financing and the first building in Wayne County to use the Michigan PACE Express program. The PACE project bundled important roof repairs, LED lighting, upgraded building envelope improvements for long term utility savings and a more comfortable building for all who entered this beautiful church. Eugene Franklin, DUT Chairman of the Board, remarked: "Our modest building upgrade will allow us to reduce our operating costs, reduce our energy usage and increase our awareness of other saving opportunities. It's a win-win for us all."¹³

These various case studies illustrate how PACE can be used to support a broad range of commercial property types, sizes, and project types. Whether it is new construction supporting a ground-up high efficiency apartment complex or providing needed capital to support direct investment in a needed community asset, PACE is flexible financing that is readily available for deployment in support of all types of projects.

Finally, PACE pays for present infrastructure upgrades or renewable energy projects for building owners. With non-recourse, long-term fixed amortization financing where projects save more than they cost annually, PACE has recently become a popular economic development law for more building owners and businesses.

9 These examples are drawn from Lean & Green Michigan, *Featured Case Studies*, <https://leanandgreenmi.com/projects> (accessed June 23, 2021).

10 <https://leanandgreenmi.com/uploads/TheHenry.pdf>

11 <https://leanandgreenmi.com/uploads/Chene-Street-Grocers.pdf>

12 <https://leanandgreenmi.com/uploads/DO-Apparel.pdf>

13 <https://leanandgreenmi.com/uploads/DetroitUnityTemple.pdf>

IV. Conclusion

While some have considered PACE a passing fad, it's difficult to imagine that the current momentum and past success of Michigan PACE projects won't continue. As certain as climate change is a constant force to be reckoned with, so too will measures to mitigate and contain its long-lasting effects be relevant in the marketplace of financing mechanisms. Even for property owners unconcerned by climate change, PACE is there to support financing the replacement of equipment that has reached its end of useful life.

Certainly, PACE faces additional headwinds. Many financial institutions have yet to conclude that PACE benefits their mortgage position and not just the property

owner. The private equity and mezzanine capital markets definitely understand the risk PACE poses to their business interests. We also have the climate change naysayers or those who are just adverse to change. While PACE has come a long way, it still is not a mainstream financial tool for developers and building owners.

That said, the momentum appears to be shifting where developers and real estate professionals understand the huge opportunity available to them. The flexible, equitable and reasonable nature of PACE seems to make it a significant tool for developers and building owners to harness for making their real estate portfolios more valuable, resilient, and sustainable. The next ten years will reveal whether PACE is a valuable "go to" financing tool or not. In the meantime, its popularity grows.



The Henry

Luxury townhomes with advanced energy technologies

Project Quick Stats:

PACE district: Washtenaw County

Property owner: Prentice Partners of Ann Arbor

PACE contractor: G-Energy & Green Portfolio Solutions

PACE lender: Greenworks Lending

Amount financed: \$1,970,972

Project term: 20 years

Net 20 year savings: \$1,773,677

Total 20 year savings: \$7,468,075

Energy conservation measures:

- LED lighting and controls
- Solar panel roof mounts
- High Efficiency building envelope, heating, ventilation, water heating and water fixtures
- Energy Star windows and appliances

Impact: This project will save up to 58.3 tons of CO₂ release - the equivalent of 69 acres of US forest capturing harmful greenhouse gases.

Overview

As Washtenaw County's first PACE project, The Henry will be an exciting addition to the Ann Arbor community and will reap significant savings for the property owner. This formerly vacant lot will include construction of two buildings for eleven three-level townhouses with additional co-working space.

With advanced energy technologies such as solar panels, electric vehicle charging stations for an on-site vehicle fleet, and other high efficiency appliances, The Henry is sure to succeed in its marketing to young professionals who are often energy and environmentally conscious.

"The Board and I are excited to support Washtenaw County's first PACE project," said County Chair Morgan. "We are committed to achieving our county's environmental and carbon neutrality goals. 'The Henry' reflects the kind of environmental impact that supports those goals. This project ensures that the environment will be preserved and protected for future generations. We're proud to know that this will be the first of several construction projects that produce energy efficient, accessible and sustainable housing in our community."

Partners



PACE Financing

Commercial building owners spend \$200 billion per year on utilities, yet 30% of this is waste. The energy projects that could make these properties efficient often require significant up-front capital and take years to achieve profitability. Commercial loans typically have a tenor of 3-5 years, making the annual repayment greater than the energy savings. PACE changes all this by allowing property owners to finance energy efficiency and renewable energy projects via a property tax special assessment.

Washtenaw County's elected leaders created a countywide PACE district in February 2014 by joining the statewide Lean & Green Michigan PACE program. Since the County will enforce the PACE assessment just like any other property tax obligation, lenders feel secure in providing fixed-interest loans with terms of up to 25 years. The result is 100% financing to facilitate energy-saving projects. In addition, these projects create good jobs, and communities upgrade their building stock, increasing the local tax base over time.

Lean & Green Michigan

Lean & Green Michigan™ helps commercial, industrial and multi-family property owners take advantage of PACE to finance energy projects, eliminate waste and save money through long-term financing solutions that make energy projects profitable. Lean & Green Michigan™ is a public-private partnership that works with local governments, contractors, property owners, and lenders to invigorate Michigan's PACE statute with a market-based approach to energy finance and economic development.

Contact Lean & Green Michigan

Email: info@leanandgreenmi.com

Phone: 313-444-1474

3400 Russell, Ste. 255
Detroit, MI 48207





Project Quick Stats:

PACE district: Ingham County

Property owner: 2000 Block, LLC

PACE lender: PACE Loan Group

PACE Contractor: G-Energy

Amount financed: \$1,500,000

Net 22 year savings: \$1,600,025

Total 22 year savings: \$3,100,025

Project term: 22 years

Energy conservation measures:

- Building envelope
- Building foundation
- Domestic hot water
- High efficiency water fixtures
- HVAC
- Windows

Impact: The PACE project at The Venue is expected to save over 6.5 million gallons of water, 10.5 kilowatt hours of electricity, and 7 thousand metric tons of CO₂!

Overview

The Venue, located in Lansing's East Town neighborhood on Michigan Avenue, is a mixed-use property featuring 42 apartment units with multiple commercial units on the ground floor. Built in 2018, The Venue quickly filled up with residential and commercial tenants, including a tattoo parlor, dojo, boxing and fitness studio, flowershop, and a coffee house.

However, due to the pandemic, the building began to lose tenants and general business. After learning about PACE, the property owners of The Venue refinanced the building's original energy appliances under more favorable terms that would increase their bottom line. By refinancing original energy installations with PACE, the property owners can now rebuild their capital reserves and upgrade The Venue's commercial space while it continues to add new tenants and resume building services at full occupancy.

The Venue marks the second PACE refinance project associated with the pandemic, further demonstrating the value of PACE as a real estate financing tool that not only helps commercial property owners and businesses realize future savings through building retrofits, but can also help them remain afloat during times of financial uncertainty.

Partners



PACE Financing

Commercial building owners spend \$200 billion per year on utilities, yet 30% of this is waste. The energy projects that could make these properties efficient often require significant up-front capital and take years to achieve profitability. Commercial loans typically have a tenor of 3-5 years, making the annual repayment greater than the energy savings. PACE changes all this by allowing property owners to finance energy efficiency and renewable energy projects via a property tax special assessment.

Ingham County's elected leaders created a countywide PACE district in November 2012 by joining the statewide Lean & Green Michigan PACE program. Since the County will enforce the PACE assessment just like any other property tax obligation, lenders feel secure in providing fixed-interest loans with terms of up to 25 years. The result is 100% up front financing to facilitate energy-saving projects. In addition, these projects create good jobs, and communities upgrade their building stock, increasing the local tax base over time.

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Phone: 313-444-1474





Project Quick Stats:

PACE district: Wayne County

Property owner: HP Hazelwood, LLC

PACE lender: PACE Loan Group

PACE Contractor: G-Energy

Amount financed: \$945,000

Net 25 year savings: \$1,231,831

Total 25 year savings: \$1,726,269

Project term: 25 years

Energy conservation measures:

- Building envelope
- HVAC
- Windows
- Domestic hot water
- High-efficiency water fixtures
- Lighting systems & controls

Impact: The PACE project at Weber Apartments is expected to save over 20 million gallons of water and result in a total energy savings of over 104 thousand MBTUs over the next 25 years!

Overview

The PACE project at Weber Apartments will help carry out a deep renovation of a formerly derelict, unoccupied multifamily housing building located in Detroit's North End neighborhood.

Built in 1927, this 4-story English Revival-era building recently underwent new ownership and investments so that it could once again serve its original purpose of providing housing for Detroiters. Building improvements associated with the PACE project at Weber Apartments will include addressing many years of deferred maintenance with the installation of new insulative roofing and windows, and the replacements of old HVAC, lighting, and water systems, for newer cost-efficient energy and building technologies. The apartment complex will house 41 individual units.

"The renovation of these buildings will substantially improve the vitality of the broader block & neighborhood," said Ryan Zampardo of Hazelwood Partners LLC, a sponsor of the Weber Apartments project. "Furthermore, 100% of the units in the broader project are vacant and have been for the past 3-15 years to our knowledge, so no displacement or relocation will be taking place in any of the buildings."

Partners



PACE Financing

Commercial building owners spend \$200 billion per year on utilities, yet 30% of this is waste. The energy projects that could make these properties efficient often require significant up-front capital and take years to achieve profitability. Commercial loans typically have a tenor of 3-5 years, making the annual repayment greater than the energy savings. PACE changes all this by allowing property owners to finance energy efficiency and renewable energy projects via a property tax special assessment.

Wayne County's elected leaders created a countywide PACE district in December 2013 by joining the statewide Lean & Green Michigan PACE program. Since the County will enforce the PACE assessment just like any other property tax obligation, lenders feel secure in providing fixed-interest loans with terms of up to 25 years. The result is 100% up front financing to facilitate energy-saving projects. In addition, these projects create good jobs, and communities upgrade their building stock, increasing the local tax base over time.

Lean & Green Michigan

Lean & Green Michigan™ helps commercial, industrial and multi-family property owners take advantage of PACE to finance energy projects, eliminate waste and save money through long-term financing solutions that make energy projects profitable. Lean & Green Michigan™ is a public-private partnership that works with local governments, contractors, property owners, and lenders to invigorate Michigan's PACE statute with a market-based approach to energy finance and economic development.

Contact Lean & Green Michigan

Email: info@leanandgreenmi.com

Phone: 313-444-1474



THE WHITNEY RESTAURANT

19TH CENTURY DETROIT ICON GOES GREEN

Project Quick Stats:

PACE district: Wayne County
Property owner: Bud Liebler
PACE developer: Newman Consulting Group
PACE lender: Petros PACE Finance
Amount financed: \$863,130
Project term: 20 years
Total 20 year savings: \$2,097,327
Total net savings: \$449,117
Average annual cash flow: \$23,528
Energy conservation measures: Efficient HVAC, LED lighting, building controls, storm windows, efficient kitchen ranges.
Impact: Eliminates 3,491,500 kWh of electricity and 39,760 therms of natural gas over 20 years.

- That will result in a carbon reduction of 232 metric tons annually
- That's like eliminating the burning of 246,994 pounds of coal each year!

Overview

In August 2017, the fabulous Whitney mansion became the site of Detroit and Wayne County's first PACE project. Petros PACE Finance provided 100% funding for \$863,000 in energy efficiency upgrades coordinated by Newman Consulting Group. Wayne County's PACE program allowed Whitney owner Bud Liebler to transform one of the leading icons of 19th-Century Detroit opulence into a showcase of the city's low carbon future.

The PACE project involved replacing a patchwork of heating and cooling systems installed over the many decades since the mansion's 21 fireplaces ceased providing its heat, LED lights throughout; efficient storm enclosures on over 200 windows; building control systems; and highly efficient cooking equipment.

With these energy efficiency improvements, Mr. Liebler is accomplishing many things. The landmark restaurant and bar will be less costly to operate, more comfortable for its guests, and help lead Detroit into a new era of sustainability. What is more, the project created great jobs for the skilled tradespeople who made the improvements.



PACE Financing

Commercial building owners spend \$200 billion per year on utilities, yet 30% of this is waste. The comprehensive energy projects that could make these properties efficient often require significant up-front capital and take years to achieve profitability. Commercial loans typically have a tenor of 3-5 years, making the annual repayment much greater than the energy savings. PACE changes all this by allowing property owners to finance energy efficiency and renewable energy projects through a property tax special assessment.

Wayne County's elected leaders created a countywide PACE district in December 2013 by joining the statewide Lean & Green Michigan PACE program. Since the County will enforce the PACE assessment just like any other property tax obligation, lenders feel secure in providing fixed-interest loans with terms of up to 25 years. The result is 100% financing with positive cash flow for commercial and nonprofit property owners, since the savings generated by the energy project are greater than the PACE loan repayments. In addition, these projects create good jobs, and communities upgrade their building stock, increasing the local tax base over time.

Partners



PETROS PACE
FINANCE

Lean & Green Michigan

Lean & Green Michigan™ helps commercial, industrial and multi-family property owners take advantage of PACE to finance energy projects, eliminate waste and save money through long-term financing solutions that make energy projects profitable. Lean & Green Michigan™ is a public-private partnership that works with local governments, contractors, property owners, and lenders to invigorate Michigan's PACE statute with a market-based approach to energy finance and economic development.

Contact Lean & Green Michigan

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3400 Russell, Ste. 255
Detroit, MI 48207





ICSC+CONTINUING EDUCATION MICHIGAN

Suburban Collection Showplace

Novi, MI

Wednesday, April 13, 2022

Session Materials

**Roundtable 5: Use Restrictions: Overcoming Use Restrictions and Related
Obstacles Regarding Non-Traditional Uses**

Led by: Daniel P. Mooney, Esq., Honigman LLP

Non-Traditional Uses

The benefits and common pitfalls of non-traditional shopping center uses

Presented by:
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The information contained herein does not attempt to give specific legal advice. For advice in particular situations, the services of a competent real estate attorney should be obtained.

Non-Traditional Uses

The benefits and common pitfalls of non-traditional shopping center uses

Non-Traditional Tenants (“NTTs”) are increasingly becoming a vital aspect of shopping centers across the country. With brick and mortar stores increasingly being squeezed out by internet retailers such as Amazon, landlords are increasingly looking to medical, entertainment and educational tenants to fill the vacancies. While the NTT phenomenon is not new, there remain obstacles involved with finding and placing new NTTs in shopping centers. This presentation will provide information regarding the benefits to moving in NTTs and also provide landlords with a checklist of the numerous issues moving in NTTs presents and how best to deal with such issues. By the end of this session, the attendee will be able to identify the major items of concern when attempting to move in a “non-traditional” tenant, as well as how and when these issues need to be addressed.

1. Introduction

- a. This presentation will cover the benefits and challenges Landlords face in attempting to integrate “non-traditional” tenants (“NTTs”) into shopping centers. A NTT for the purposes of this presentation is a non-retail business – almost any business you can think of – that leases retail space. Some of the most common non-traditional tenants are in the healthcare industry. As retail continues to take a different form, the healthcare industry continues to grow rapidly. Landlords are seeing everything from outpatient clinics to physical therapy centers to rehab facilities in shopping centers. Also, education is taking shopping centers by storm, with colleges, training centers and dance/music schools leasing space. Government agencies, temporary pop-up stores, thrift stores and entertainment destinations are also getting in on the trend.
- b. The retail industry has seen increasing changes in the last few decades with the advent of online retail operations and the reduction of brick and mortar stores. Many landlord have made strides to include as many NTTs as possible to fill vacancies left by brick and mortar stores.

2. Why consider non-traditional Tenants?

- a. For most shopping centers, NTTs are the new normal.
- b. They are (typically) Amazon/Internet-proof.
 - i. While many retailers continue to struggle keeping up with online stores and outlets, service businesses face little to no competition from online threats, assuming things continue to get back to normal following the pandemic. While not necessarily internet proof, many NTTs are at least not in direct competition with online businesses.
- c. Service industry tenants drive foot traffic.
 - i. A shopping center that offers the opportunity to combine a fitness session with grocery shopping and a prescription refill will draw traffic, benefitting multiple tenants and attracting new ones.
- d. Vacancy! I have a vacant space that I need to fill and have been unable to fill
 - i. Changes to the retail landscape have made it increasingly difficult to find stable, reliable typical retail tenants and/or have difficulty replacing retail tenants who may have occupied large swaths of the center.

- ii. Many non-traditional uses require larger square footage, which helps fill empty big box space.
 - iii. On the flip side, large vacant anchor stores can be subdivided into NTT space to decrease vacancy.
 - iv. Some non-traditional uses don't require prime location. Space that is less desirable for traditional retail (e.g., poor visibility) is just fine for some non-traditional uses.
- e. Show Me the Money! Non-traditional uses often pay higher rent.
 - i. It can often be difficult for non-traditional use tenants to find good real estate that fits their needs and so such tenants often need to pay a premium.
 - ii. The financial security of some non-traditional uses is not dependent upon the profits generated by this premises, which can offer the landlord financial security not always available with a traditional retail use. For example, certain types of showrooms or a fortune 500 company leases a vacant department store for general office use.
 - iii. NTTs typically seek longer leases, often because of the higher construction costs due to the more extensive build-outs they initially require. They also tend to be stronger financially and have better credit than many of today's retailers. Both these qualities make them a highly desirable addition to the tenant mix.
- 3. Complications and Considerations with including NTTs
 - a. Zoning Matters
 - i. Zoning ordinances are high on the list of potentially problematic issues and should be one of the first thing to consider when vetting a potential tenant. All too often some arbitrary or leftover piece of restrictive zoning can greatly limit a Landlord's leasing options. It is vital to confirm the zoning regulations affecting a shopping center as soon as possible so you can get a full lay of the land. Failure to do so can often put landlords in default of a lease if this information was not confirmed beforehand
 - b. Exclusive Uses and Use Restrictions
 - i. Historically, use restrictions have been implemented for certain specified uses that were, at the time, considered undesirable. The issue here is that these use restrictions rarely keep up with the times. It is not unusual to find use restrictions barring medical offices, veterinary clinics, movie theatres, gaming chains (e.g. Dave & Busters) or any number of other restricted uses that may perfectly fill vacancies.
 - ii. Consequently, it is of the utmost importance to be aware of these use restrictions no matter how minute or outdated they may seem.
 - iii. For instance, if a property was split up in the past or outparcels were sold, adjoining landowners may retain the right to restrict certain uses in the shopping center. Often times these use restrictions run with the land and are notoriously difficult to remove.
 - iv. All restrictions of record must be reviewed prior to signing a LOI or Lease with a NTT.
 - v. NTTs may also come with their own requirements for exclusive or restricted uses. For instance, medical tenants may insist on not just an exclusive use

for their specific practice type but also that the landlord agree not to enter into future leases for "unhealthy" uses, such as sales of tobacco or alcohol.

vi. What's the solution?

1. Get creative! As more and more varied types of tenants continue to populate shopping centers, the hard lines of exclusives and use restrictions are blurring. For example, if a Medical Spa is a prohibited use, does that restrict cryo-clinics or botox clinics? It's a close call and there are obvious risks involved with getting too cute with obfuscating use restrictions but communication with existing tenants can often lessen the risk. Many tenants may be open to amending their restrictions for a co-tenant they see as desirable.
2. Be precise. Many use restrictions are intentionally vague however this can cause problems when the language does not identify exactly what types of uses are contemplated to be restricted. This only reinforces the need for precise leasing language and for restrictions to be carefully defined.

c. Parking and Logistics

- i. Parking considerations can also be an issue. Landlords and Tenants may be unhappy with tenants (e.g. medical tenants) who will often require visitors to take up parking spaces for several hours at a time. Landlord's need to be strategic in establishing a tenant mix that features complementary parking demands.
- ii. Keep in mind that many REAs or OEAs or CCRs or Leases include language that require Landlord to maintain a "First Class Shopping Center". There is obvious wiggle room in this phrase but to quote former United States Supreme Court Justice Potter Stewart on what constitutes a "non-first class use", "I know it when I see it".

4. Conclusion:

NTTs are here to stay. Shopping center tenants and tenant mixes have always evolved to accommodate social trends. What is important moving forward is not only drafting lease language and use restrictions that allow for the current crop of NTTs to become tenants but also drafting that language to allow for the next crop of tenants to move in as well. No landlord wants to be hamstrung by vague use restrictions or exclusives from 20 years ago. Which is why it is vital to carefully and meticulously craft these provisions not just for the present but also for the future.



ICSC+CONTINUING EDUCATION MICHIGAN

Suburban Collection Showplace

Novi, MI

Wednesday, April 13, 2022

Session Materials

**Roundtable 6: Closing Transactions Using Electronic Signatures and Remote
Notarization Tools**

Led by: Brian Henry, Esq. & Tracy Duron, eTitle Agency, Inc.

Closing Transactions Using Electronic Signatures and Remote Notarization Tools

Brian P. Henry, Esq., bhenry@etitleagency.com

Senior Executive Counsel eTitle Agency

Tracy Duron, tduron@etitleagency.com

Post Closing Manager, eTitle Agency

A. eClosings Explained

1. Remote Notarization in Michigan
2. Statutory Requirements for Electronic Signatures

B. Steps to Follow in an Electronic Closing

C. Pros and Cons of Electronic Transactions

- MCL 565.841 provides that:
 - An electronic document will satisfy any statutory or other requirement for the purpose of recording; and
 - An electronic signature will satisfy any statutory or other requirement that states that a document be signed
- The Secretary of State set the requirements for remote notarization. See https://www.michigan.gov/sos/0,4670,7-127-1633_95527_95529_95663-509836--,00.html
- The Michigan Electronic Recording Commission:
 - Promulgates the standards and procedures for the electronic recording of real estate documents; and
 - Publishes Michigan Electronic Records Standards https://www.michigan.gov/dtmb/0,5552,7-358-82547_56345_60583---,00.html

Electronic Signatures Act

- 15 USC Section 7001 et. seq. became law on June 30, 2000 and is commonly known as the “E-Sign Act.”
- The Act provides that “a signature, contract or other record . . . may not be denied legal effect, validity or enforcement solely because it is in electronic form.”
- The Michigan Electronic Uniform Transactions Act incorporates the provisions of the Uniform Electronic Transactions Act and the E-Sign Act. MCL 450.831 et. seq.
- MCL 450.832(h) provides that an “electronic signature” is “an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.”

eClosings in general:

- Notary Terminology
- What is an eClosing – 3 different types
- Which type of eClosing will eTitle be conducting –Hybrid eClosing
- What are the four elements needed for a full true eClosing
- The benefits of eClosing
- The drawbacks of eClosing

Pavaso:

- Introduction and overview of Pavaso
- Introduction to DocuSign

Questions or comments are welcome.



As you probably know eClosings are the wave of the future. You see advertisements and discussions about eClosings everywhere you turn in our industry just be aware that some of the terminology you are hearing may sound very similar but can have very different definitions?

In person eClosing, Hybrid eClosing or Remote eClosing

- We will compare these types of eClosings on the next slide and talk about the type of eClosing that we have been conducting here at eTitle.

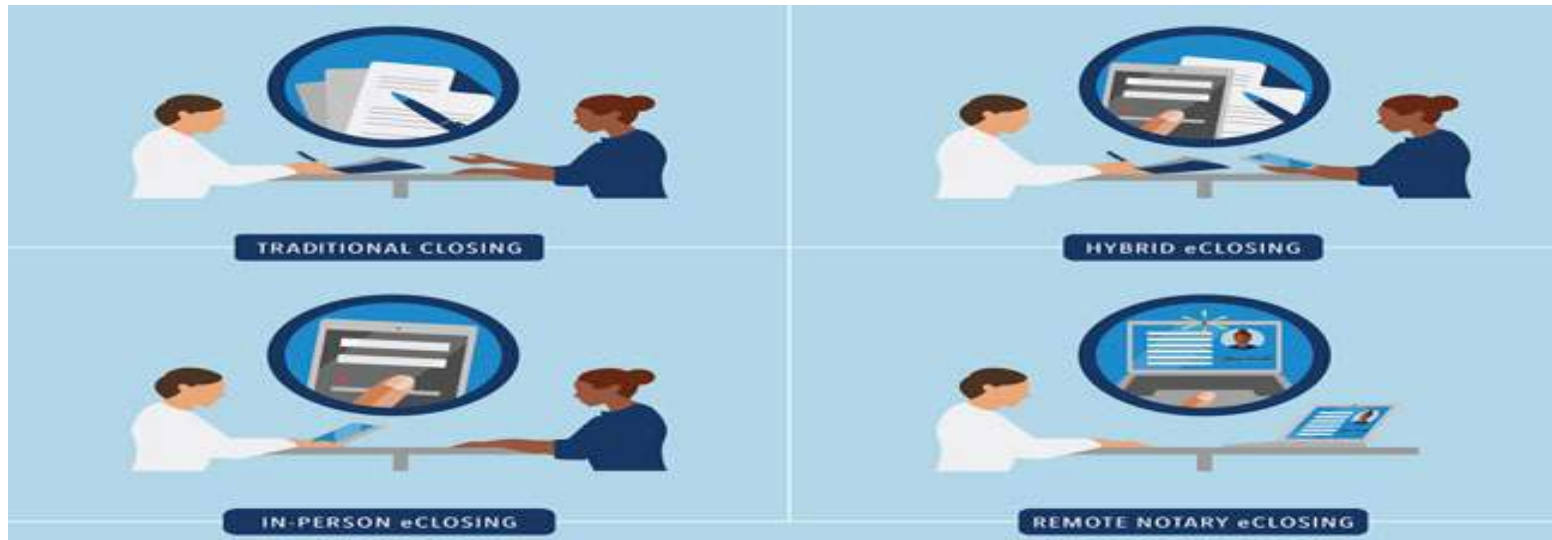
Notary types:

Each represents a different type of notary.

- **Traditional notarization:** Traditional - face to face meeting, checking of hard copy identification and signatures and notary done via ink on paper. (Also referred to as wet signed or wet signature.)
- **eNotary or in person eNotarization:** Face to face meeting, checking of hard copy identification but then signed and notarized electronically on the computer.
- **Remote online notarization (RON) or Webcam Notarization:** No face to face meeting (done via webcam) with identification authenticated through other means and all signatures and notarization done electronically on the computer.



eTITLE Four Types of Closings – Three are eClosing Versions



Traditional Closing

All paper documents
Signed with wet ink.

Notary face to face
(notary signs wet ink)

Traditional ID
verification

Hybrid eClosing

Some documents
Electronically signed

Some documents wet
ink signed such as
Note, Mtg and docs
to be notarized

Notary face to face
(notary signs wet ink)

Traditional ID
verification

In-Person eClosing

All documents are
electronically signed
(even Note and Mtg)

Notary face to face
(Notary signs
electronically)

Traditional ID
verification

Remote Notary eClosing

All documents are
electronically signed
(even Note and Mtg)

Notary via webcam
(Notary signs electronically)

New means of ID
verification (will vary per
platform used)

eTITLE Hybrid eClosings

Even though the technology is available the local laws, customs and underwriting requirements will determine what types of eClosings are actually possible. Therefore many parties have been conducting what is commonly referred to as a Hybrid eClosing.

Hybrid eClosing

Some documents
Electronically signed

Some documents wet
ink signed such as
Note, Mtg and docs
to be notarized

Notary face to face
(notary signs wet ink)

Traditional ID
verification



Hybrid eClosing that eTitle will be conducting will require:

1. Willing participants – Buyer, Seller, Lender if a Mtg closing must all agree to doing a hybrid closing
2. Electronic Signatures on all allowable documents
3. Notary/Closer to meet in person to notarize and sign “wet signature” documents such as Note and Mtg
4. Electronic Recording to be utilized if available
5. Use of Westcor as Underwriter – they have approved the use of Pavaaso



Elements Needed for a True Full eClosing

There are four elements needed for a true full eClosing:

1. **Electronic Documents**
2. **Electronic Signatures**
3. **Electronic Notarization**
4. **Electronic Recording**

You must be able to answer YES to all of these questions to be able to do a true full eClosing:

Legality: Are eSignatures and eNotarizations legal in your State?

Underwriter: Does your Underwriter allow eSignatures and eNotarizations?

Register of Deeds: Does the county in which you will need to record accept documents that have been electronically signed and electronically notarized and do they allow eRecording for the document types you would need to record? If cross state closing do they accept documents that have been electronically signed and notarized in another state?

INTERESTING FACTS:

Did you know that Remote Online Notarization is legal in 38 states. The use of RON grew 547% from 2019 to 2020 according to a survey conducted by ALTA of major RON vendors. Not surprisingly, the Securing and Enabling Commerce Using Remote and Electronic (SECURE) Notarization Act of 2021 (H.R. 3962) has bipartisan support in Congress and could pass in 2022. The legislation would enable remote notarization services for all licensed notaries in the country.

The benefits of an eClosing are listed below.





Pavaso's Digital Close

- **Receive, view and acknowledge documents securely online.** Securely receive all loan and title documents, and access them on any device, at any time.
- **Get real time action notifications.** Easily communicate and get status updates as documents are uploaded and as each party reviews and approves documents for closing.
- **Educational links and videos.** We can upload videos and educational links to allow the buyers/sellers to learn about and understand the documents prior to signing.
- **eSign and eNotarize (where allowable) all of your documents.** Easily esign multiple documents at once with one simple signature, and notary can verify and stamp the document digitally where legally accepted.
- **Complete the closing process digitally and access it from any device.** Closing agent can utilize Pavaso's Signing Table app on a tablet or use Digital Close's Web Closing feature to complete the process fully online using any webbrowser.
- **Reduces time spent at actual closing table.** With Pavaso, since the documents are reviewed and preapproved by buyers/sellers the face to face portion of the closing that previously lasted 60 to 90 minutes can now be done in 15 minutes or less.
- **Automatically receive and store final documents.** Gain instant access to final completed documents online any time, available right after the closing.



Pavaso – Closing Steps

eTitle prepares the closing documents:

- Closing documents are prepared so that notarization can be completed remotely.

eTitle obtains approval:

- All parties must be willing to do a Hybrid eClosing or eClosing.

eTitle prepare clients for notifications from Pavaso:

- eTitle sends an informational letter/easy to follow steps to clients so they are aware of how to create their account in Pavaso once they receive the Pavaso notification. (This will also alert them so they don't delete the notification as spam.)

eTitle schedules the closing:

- The closing is scheduled in the calendar as a remote notary Pavaso closing

eTitle signs into Pavaso and uploads the finalized documents for review by client in advance of signing:

- Enters basic file information
- Uploads the closing documents for review by client


Signature Tags:

- There are tags for signatures or initials, date.

Templates:

- We have templates for most of our documents and if we use the template the system will auto signature tag the document. At this stage we also have the option again to limit access to certain parties or mark it as a wet signature or additional info needed. Templates can be added easily. Keep in mind also if we have a lender client that is a member of Pavaso they will be uploading and tagging their own documents. This would cut our work in half.

Invite parties to the pre-closing review and acceptance:

- At this point we are ready to invite parties to review and accept their documents. Simply hit the invite button  and each party you chose will receive a notification to begin their pre-closing review.
- We have prepped the clients so they are aware that they will be receiving an invitation and we have given them instructions ahead of time.



Pavaso – Buyer/Seller Perspective/Notification

Notification - When we release the file to the closing parties they will receive this notification via email. They click on the link below and it takes them to the site. Remember we would have already given them instructions and a “heads up” so they will be expecting this notice.



**Thank you for choosing
eTitle Agency, Inc.
to close on your home!**

We will be using our Digital Closing application to help conduct the review and signing of your closing documents on a platform called Pavaso. eTitle Agency, Inc. is committed to providing our customers with the best closing experience possible. We will digitally and securely deliver your documents for your review before your closing.

To get started select the button below.

Visit Pavaso's [My Closing Overview](#) page to learn more about the digital closing process and watch the instructional video below to see how to review your documents before the closing.



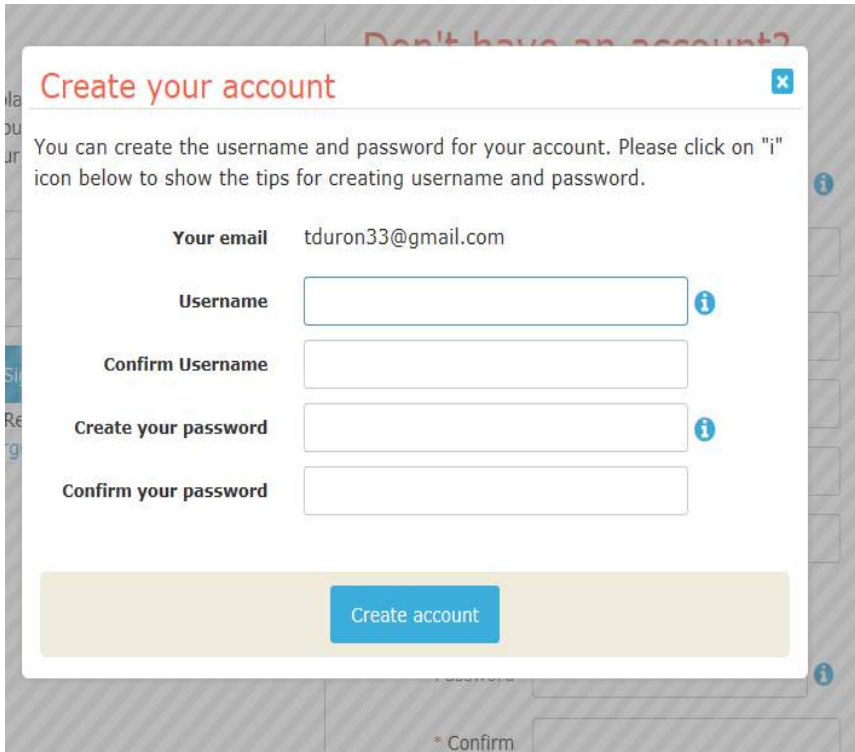
We hope you enjoy your digital closing experience! If you have any questions during the process, contact us or Pavaso directly at (866) 288-7051, option 3 or support@pavaso.com.

Thanks!

Sign in: This is where the link will take them. They will click on “Sign In”.



Create an account: They will be asked to create their account and to accept a terms and privacy policy.



Create your account

You can create the username and password for your account. Please click on "i" icon below to show the tips for creating username and password.

Your email tduron33@gmail.com

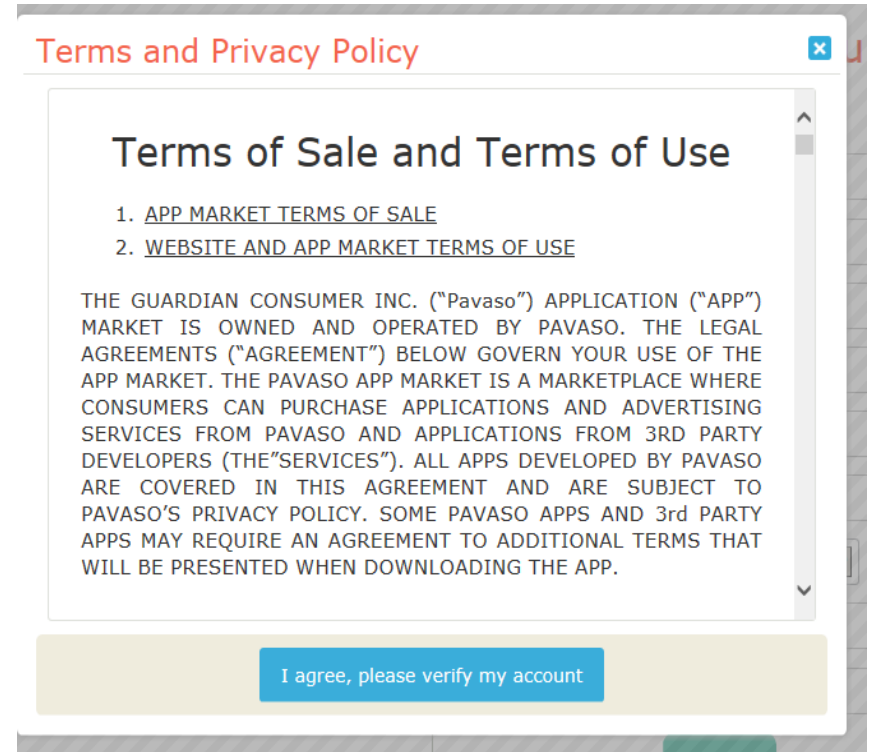
Username

Confirm Username

Create your password

Confirm your password

Create account



Terms and Privacy Policy

Terms of Sale and Terms of Use

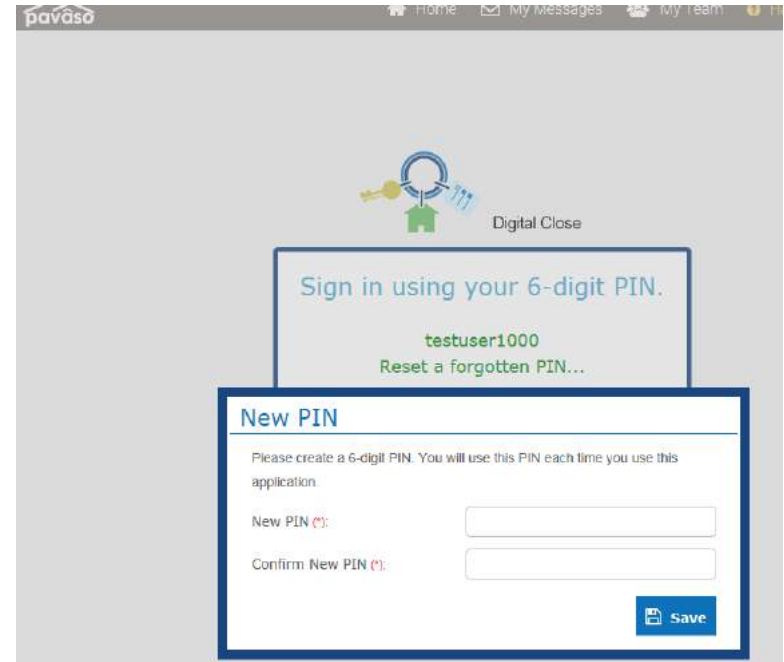
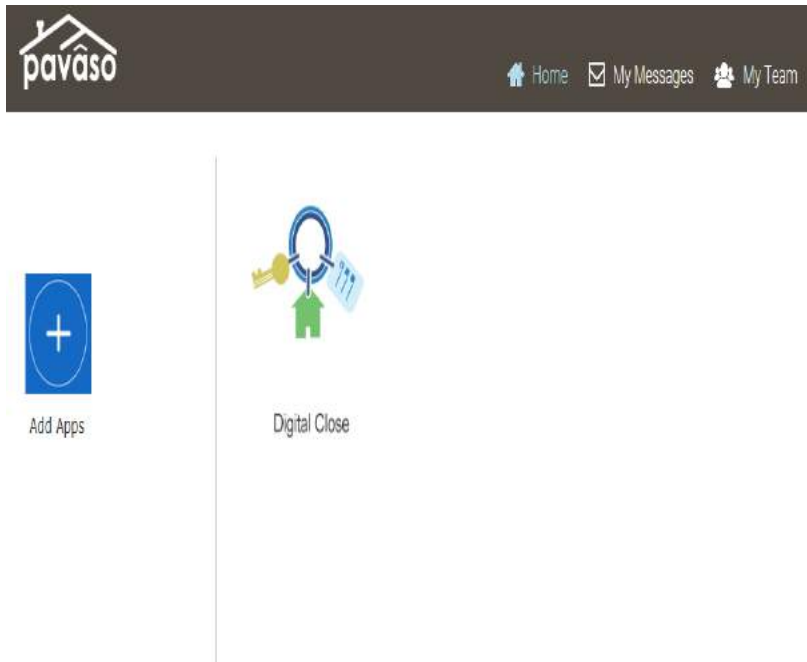
- APP MARKET TERMS OF SALE
- WEBSITE AND APP MARKET TERMS OF USE

THE GUARDIAN CONSUMER INC. ("Pavaso") APPLICATION ("APP") MARKET IS OWNED AND OPERATED BY PAVASO. THE LEGAL AGREEMENTS ("AGREEMENT") BELOW GOVERN YOUR USE OF THE APP MARKET. THE PAVASO APP MARKET IS A MARKETPLACE WHERE CONSUMERS CAN PURCHASE APPLICATIONS AND ADVERTISING SERVICES FROM PAVASO AND APPLICATIONS FROM 3RD PARTY DEVELOPERS (THE "SERVICES"). ALL APPS DEVELOPED BY PAVASO ARE COVERED IN THIS AGREEMENT AND ARE SUBJECT TO PAVASO'S PRIVACY POLICY. SOME PAVASO APPS AND 3RD PARTY APPS MAY REQUIRE AN AGREEMENT TO ADDITIONAL TERMS THAT WILL BE PRESENTED WHEN DOWNLOADING THE APP.

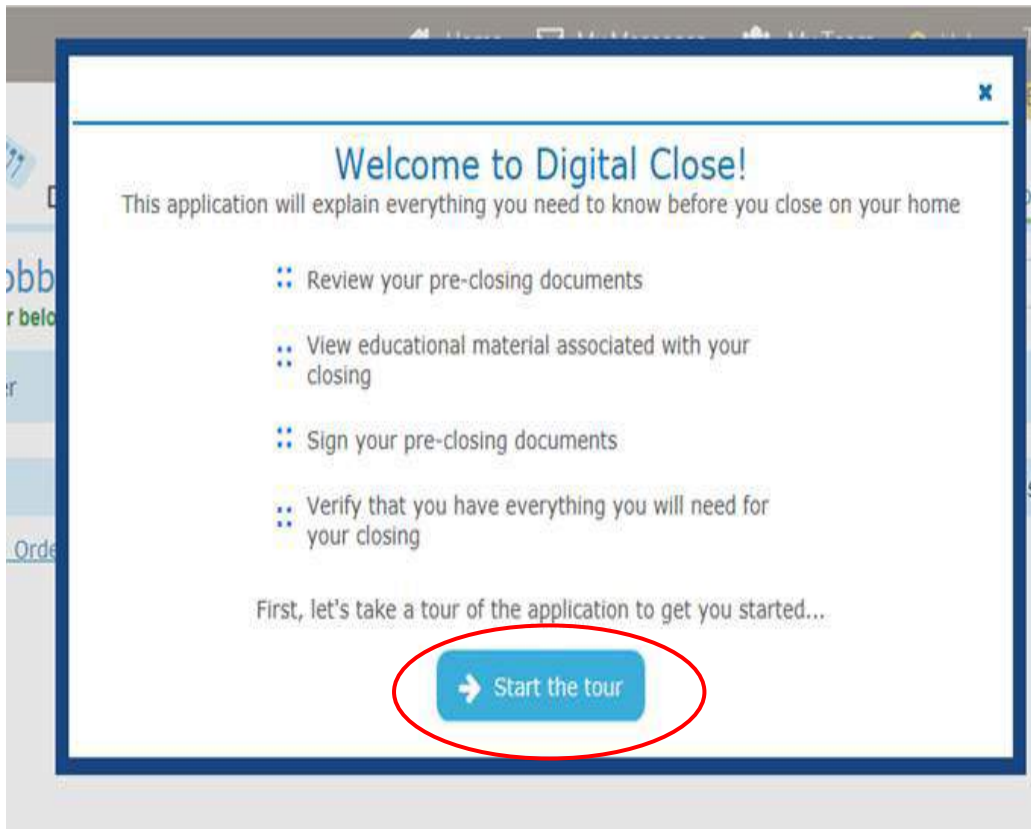
I agree, please verify my account

Digital Close: They will only have one option, click on the Digital Close Icon.

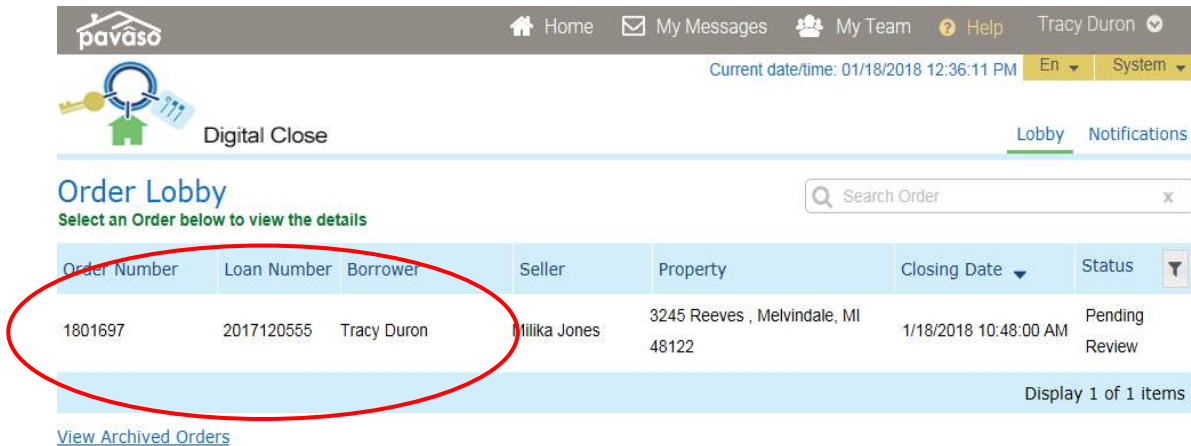
Create a PIN: Pavaso will send them a confirmation code via text that they will need to finalize opening their account. Then it will prompt them to choose a 6 digit PIN number.



Take the tour: Next they will arrive at this page. They will take a tour of Digital Close that will walk them through the entire process. It is very fast and very simple. The tour is 2 minutes long.



Open their file: After they take the tour they go to the order lobby and their file number should already be listed. If it is not for some reason they will be able to search for it through the search option.



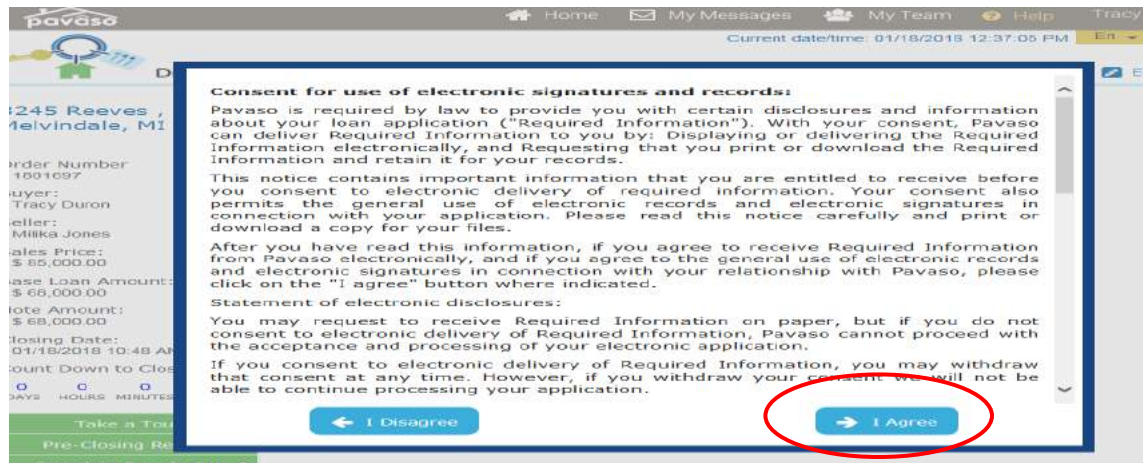
Order Lobby
Select an Order below to view the details

Order Number	Loan Number	Borrower	Seller	Property	Closing Date	Status
1801697	2017120555	Tracy Duron	Milika Jones	3245 Reeves, Melvindale, MI 48122	1/18/2018 10:48:00 AM	Pending Review

Display 1 of 1 items

[View Archived Orders](#)

eSignature Consent: They are then asked to consent to the use of electronic signatures and records.



Consent for use of electronic signatures and records:

Pavaso is required by law to provide you with certain disclosures and information about your loan application ("Required Information"). With your consent, Pavaso can deliver Required Information to you by: Displaying or delivering the Required Information electronically, and Requesting that you print or download the Required Information and retain it for your records.

This notice contains important information that you are entitled to receive before you consent to electronic delivery of required information. Your consent also permits the general use of electronic records and electronic signatures in connection with your application. Please read this notice carefully and print or download a copy for your files.

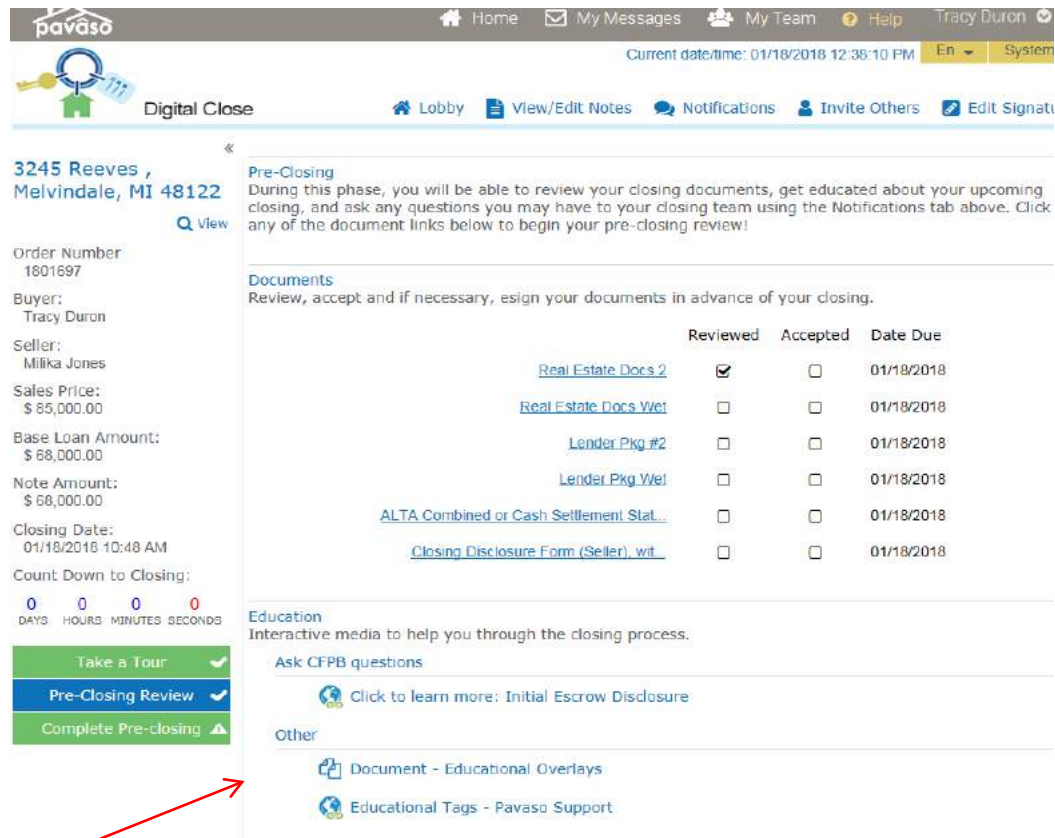
After you have read this information, if you agree to receive Required Information from Pavaso electronically, and if you agree to the general use of electronic records and electronic signatures in connection with your relationship with Pavaso, please click on the "I agree" button where indicated.

Statement of electronic disclosures:

You may request to receive Required Information on paper, but if you do not consent to electronic delivery of Required Information, Pavaso cannot proceed with the acceptance and processing of your electronic application.

If you consent to electronic delivery of Required Information, you may withdraw that consent at any time. However, if you withdraw your consent we will not be able to continue processing your application.

Review and accept: They can now begin to review and accept the documents. They click the “Accept and Save” button as they review each document if no issues. If they have an issue, they just don’t click the accept option for that document.



3245 Reeves , Melvindale, MI 48122
[View](#)

Order Number: 1801697
 Buyer: Tracy Duron
 Seller: Milika Jones
 Sales Price: \$ 85,000.00
 Base Loan Amount: \$ 68,000.00
 Note Amount: \$ 68,000.00
 Closing Date: 01/18/2018 10:48 AM
 Count Down to Closing:
 0 DAYS 0 HOURS 0 MINUTES 0 SECONDS

Pre-Closing
 During this phase, you will be able to review your closing documents, get educated about your upcoming closing, and ask any questions you may have to your closing team using the Notifications tab above. Click any of the document links below to begin your pre-closing review!

Documents
 Review, accept and if necessary, sign your documents in advance of your closing.

	Reviewed	Accepted	Date Due
Real Estate Docs 2	<input checked="" type="checkbox"/>	<input type="checkbox"/>	01/18/2018
Real Estate Docs Wet	<input type="checkbox"/>	<input type="checkbox"/>	01/18/2018
Lender Pkg #2	<input type="checkbox"/>	<input type="checkbox"/>	01/18/2018
Lender Pkg Wet	<input type="checkbox"/>	<input type="checkbox"/>	01/18/2018
ALTA Combined or Cash Settlement Stat...	<input type="checkbox"/>	<input type="checkbox"/>	01/18/2018
Closing Disclosure Form (Seller) wit...	<input type="checkbox"/>	<input type="checkbox"/>	01/18/2018

Education
 Interactive media to help you through the closing process.

[Ask CFPB questions](#)

[Click to learn more: Initial Escrow Disclosure](#)

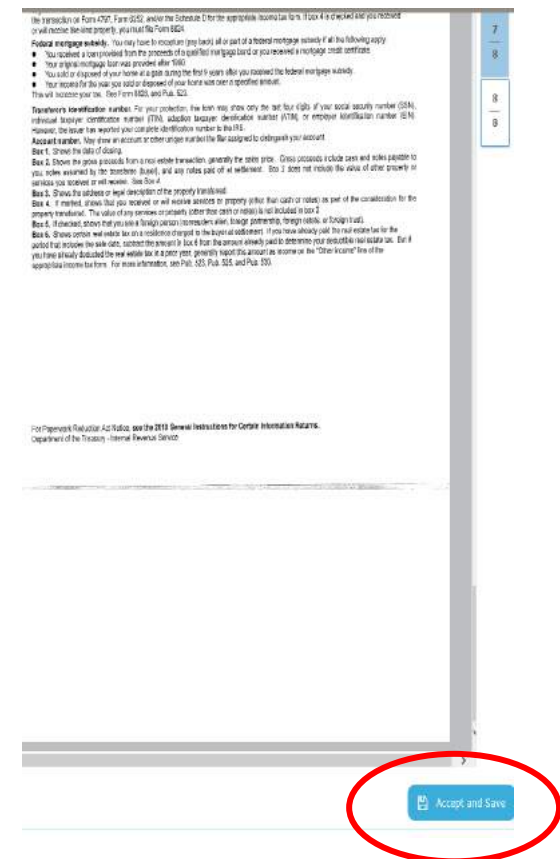
Other

[Document - Educational Overlays](#)

[Educational Tags - Pavaso Support](#)

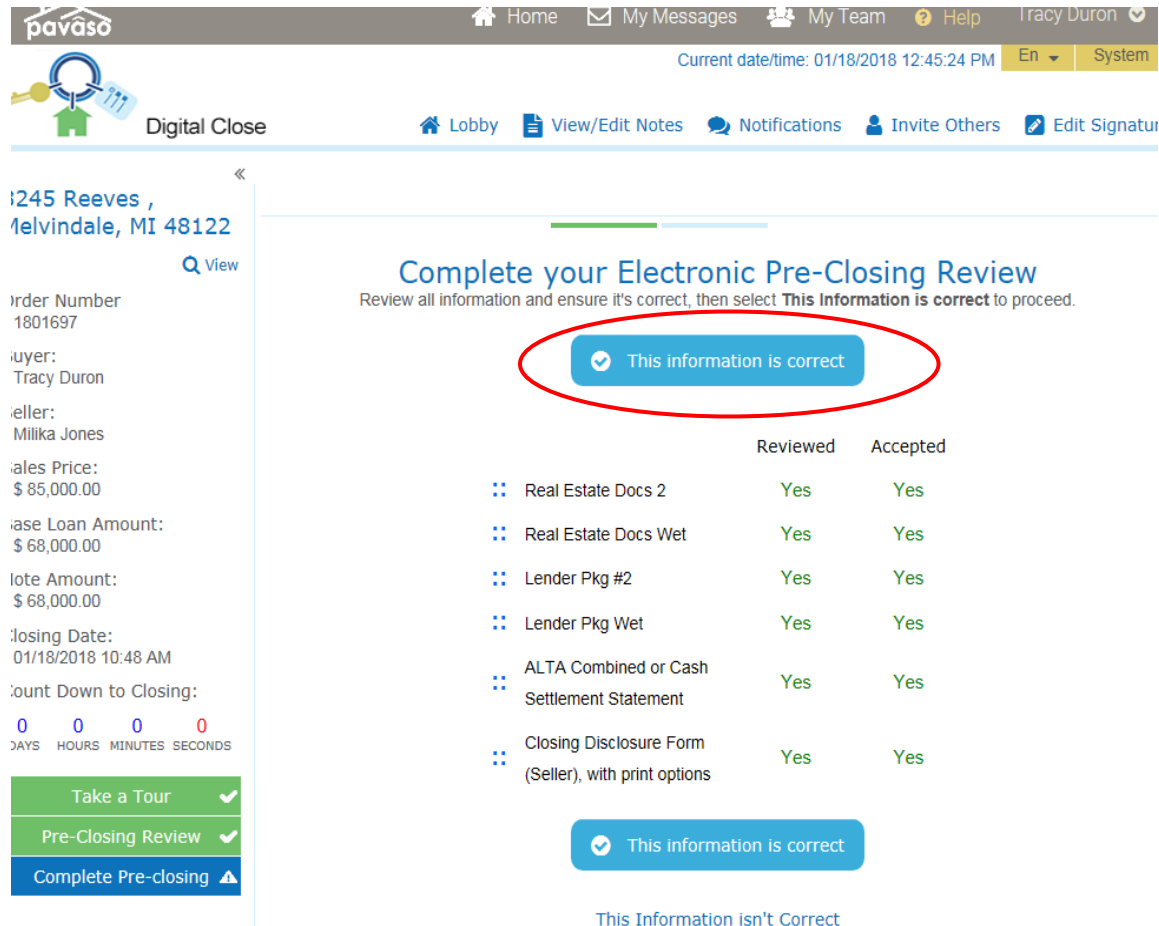
Take a Tour ✓
Pre-Closing Review ✓
Complete Pre-closing ▲

Note the educational items and support links accessible.



Accept and Save

Confirm completion: Once everything is reviewed and hopefully accepted they would click “This information is correct”.



Transaction Details:

- Address: 1245 Reeves, Melvindale, MI 48122
- Order Number: 1801697
- Buyer: Tracy Duron
- Seller: Milika Jones
- Sales Price: \$ 85,000.00
- Base Loan Amount: \$ 68,000.00
- Note Amount: \$ 68,000.00
- Closing Date: 01/18/2018 10:48 AM
- Count Down to Closing: 0 DAYS 0 HOURS 0 MINUTES 0 SECONDS

Complete your Electronic Pre-Closing Review
Review all information and ensure it's correct, then select **This information is correct** to proceed.

Review Table:

	Reviewed	Accepted
Real Estate Docs 2	Yes	Yes
Real Estate Docs Wet	Yes	Yes
Lender Pkg #2	Yes	Yes
Lender Pkg Wet	Yes	Yes
ALTA Combined or Cash Settlement Statement	Yes	Yes
Closing Disclosure Form (Seller), with print options	Yes	Yes

Action Buttons:

- (Circled in red)
-

Navigation Bar:

- Home
- My Messages
- My Team
- Help
- Tracy Duron
- Current date/time: 01/18/2018 12:45:24 PM
- En
- System

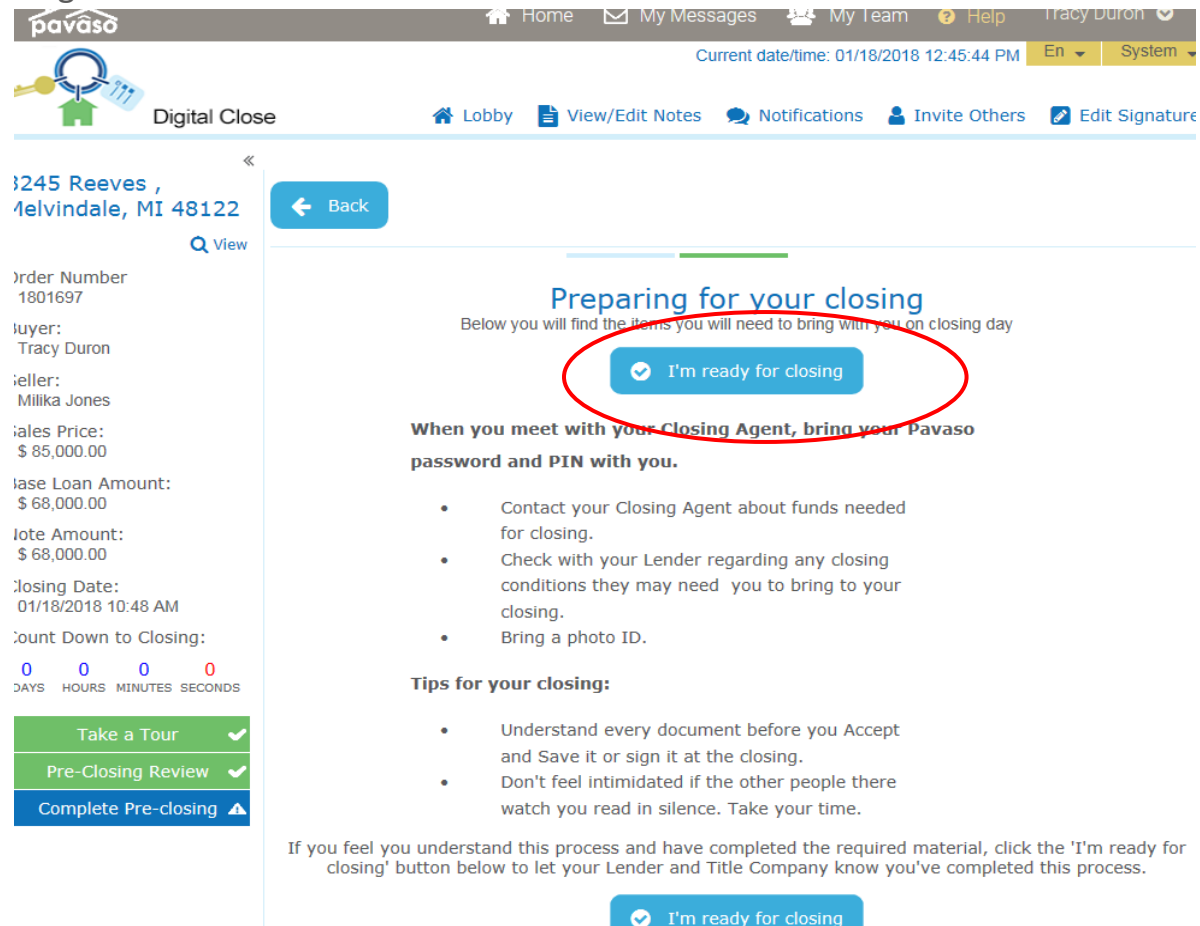
Digital Close Navigation:

- Lobby
- View/Edit Notes
- Notifications
- Invite Others
- Edit Signatur

Bottom Bar:

- Take a Tour
- Pre-Closing Review
- Complete Pre-closing

Ready for closing: This informational page comes up with a list of items related to the closing and they can click “I’m ready for closing”.



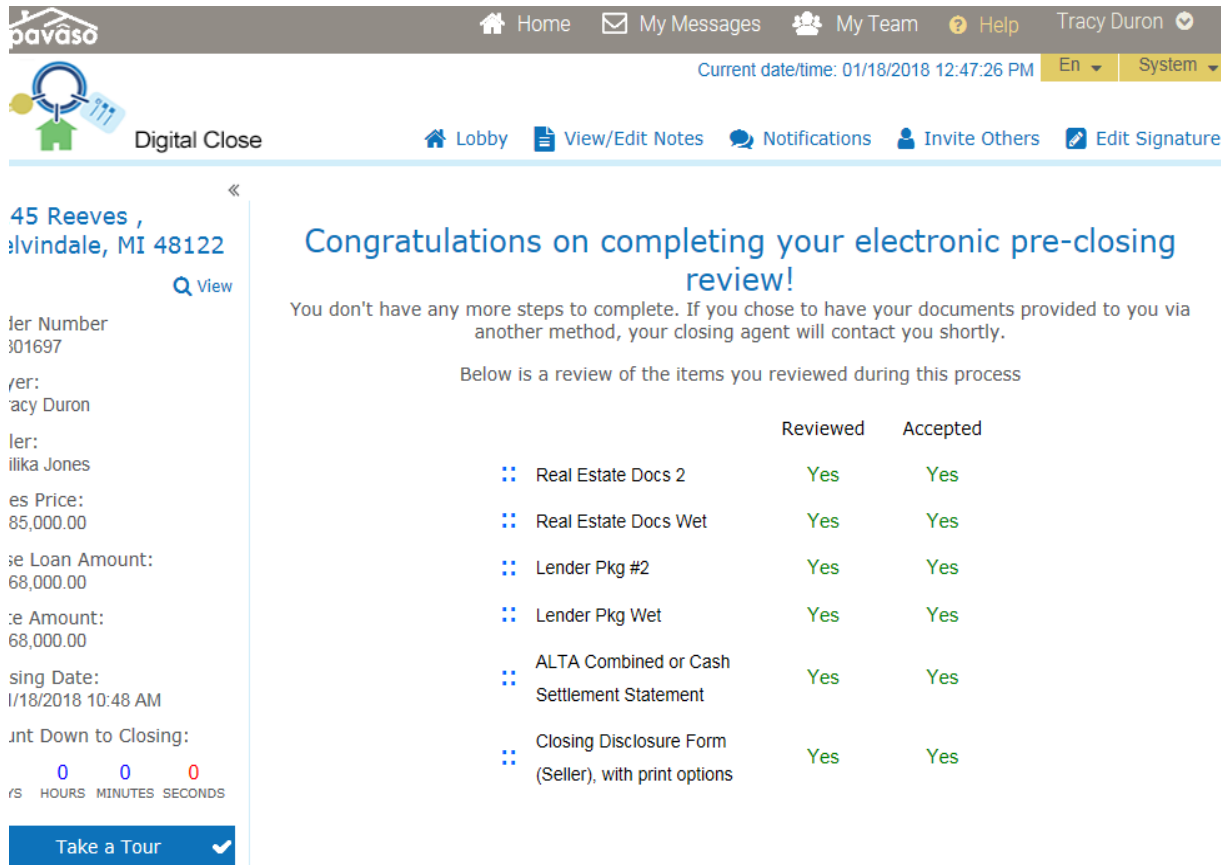
The screenshot displays the Pavaso Digital Close interface. The top navigation bar includes links for Home, My Messages, My Team, Help, and a user profile for Tracy Duron. The current date and time are 01/18/2018 12:45:44 PM. The main header shows the Pavaso logo and the text "Digital Close". Below this, there are links for Lobby, View/Edit Notes, Notifications, Invite Others, and Edit Signature.

The left sidebar displays property information for 3245 Reeves, Melvindale, MI 48122, along with a "View" link. It also lists transaction details: Order Number 1801697, Buyer Tracy Duron, Seller Millika Jones, Sales Price \$85,000.00, Base Loan Amount \$68,000.00, Note Amount \$68,000.00, Closing Date 01/18/2018 10:48 AM, and a countdown timer showing 0 days, 0 hours, 0 minutes, and 0 seconds. At the bottom of the sidebar are buttons for "Take a Tour", "Pre-Closing Review", and "Complete Pre-closing".


The main content area is titled "Preparing for your closing" and includes the text "Below you will find the items you will need to bring with you on closing day". A blue button with a checkmark and the text "I'm ready for closing" is highlighted with a red circle. Below this, a section titled "When you meet with your Closing Agent, bring your Pavaso password and PIN with you." lists three items: Contact your Closing Agent about funds needed for closing, Check with your Lender regarding any closing conditions they may need you to bring to your closing, and Bring a photo ID. A "Tips for your closing:" section follows, listing two tips: Understand every document before you Accept and Save it or sign it at the closing, and Don't feel intimidated if the other people there watch you read in silence. Take your time. At the bottom of the main content area, there is another "I'm ready for closing" button.

If you feel you understand this process and have completed the required material, click the 'I'm ready for closing' button below to let your Lender and Title Company know you've completed this process.

Congratulations: They have completed their review and acceptance portion and may exit the website.


Home My Messages My Team Help Tracy Duron

Current date/time: 01/18/2018 12:47:26 PM En System


Digital Close
Lobby View/Edit Notes Notifications Invite Others Edit Signature

45 Reeves ,
Livindale, MI 48122

View

er Number

301697

er:

Tracy Duron

ler:

Ilrika Jones

es Price:

85,000.00

se Loan Amount:

68,000.00

se Amount:

68,000.00

sing Date:

1/18/2018 10:48 AM

nt Down to Closing:

0

0

0

HOURS MINUTES SECONDS

Take a Tour

✓


Congratulations on completing your electronic pre-closing review!


You don't have any more steps to complete. If you chose to have your documents provided to you via another method, your closing agent will contact you shortly.

Below is a review of the items you reviewed during this process

	Reviewed	Accepted
Real Estate Docs 2	Yes	Yes
Real Estate Docs Wet	Yes	Yes
Lender Pkg #2	Yes	Yes
Lender Pkg Wet	Yes	Yes
ALTA Combined or Cash Settlement Statement	Yes	Yes
Closing Disclosure Form (Seller), with print options	Yes	Yes

The post closing screen in Pavaso has an audit report, a bundled complete package of signed documents, list of individual documents that can all be printed or emailed. Our wire instructions are accessible and a chat option, activity log and chat history are also available throughout the process.


Home
My Messages
My Team
My Company
Help
Tracy Duron


Digital Close Enterprise

Current date/time: 05/09/2018 02:17:18 PM
En
System

Lobby
Notifications
Wire Instr

**370 Prospect Dr.,
Rochester, MI 48307**

[View](#) [eVault](#) [Archive](#)

Order Number
1804187TDTTEST

Buyer:
Milika Jones

Seller:
Deanna Breaugh

Sales Price:
\$ 0.00



























Closing Date:
03/28/2018 10:00 AM

Actual Closing Completed:
03/30/2018 12:14 PM

Post Closing

Documents

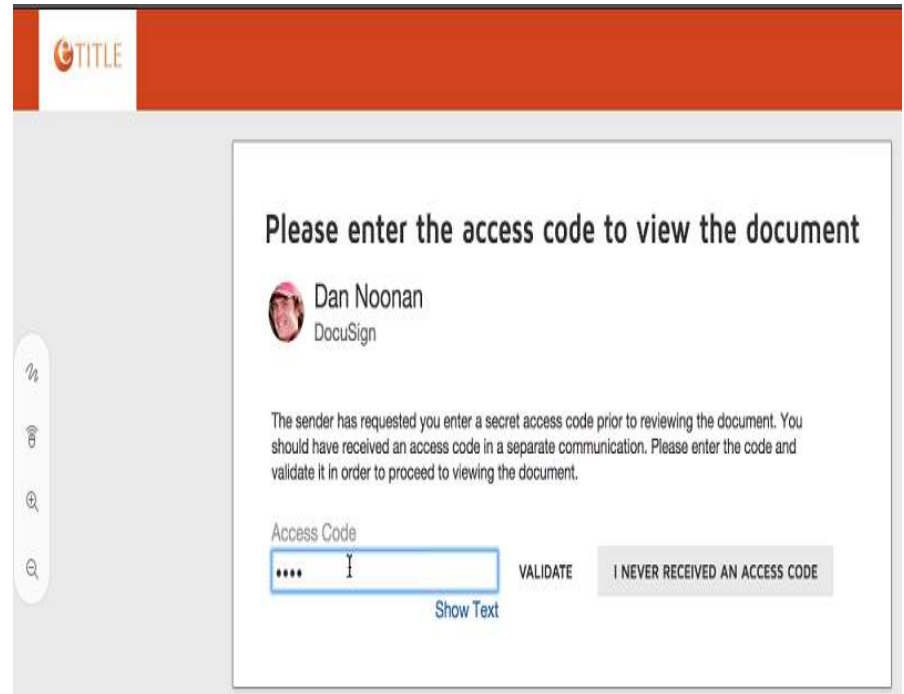
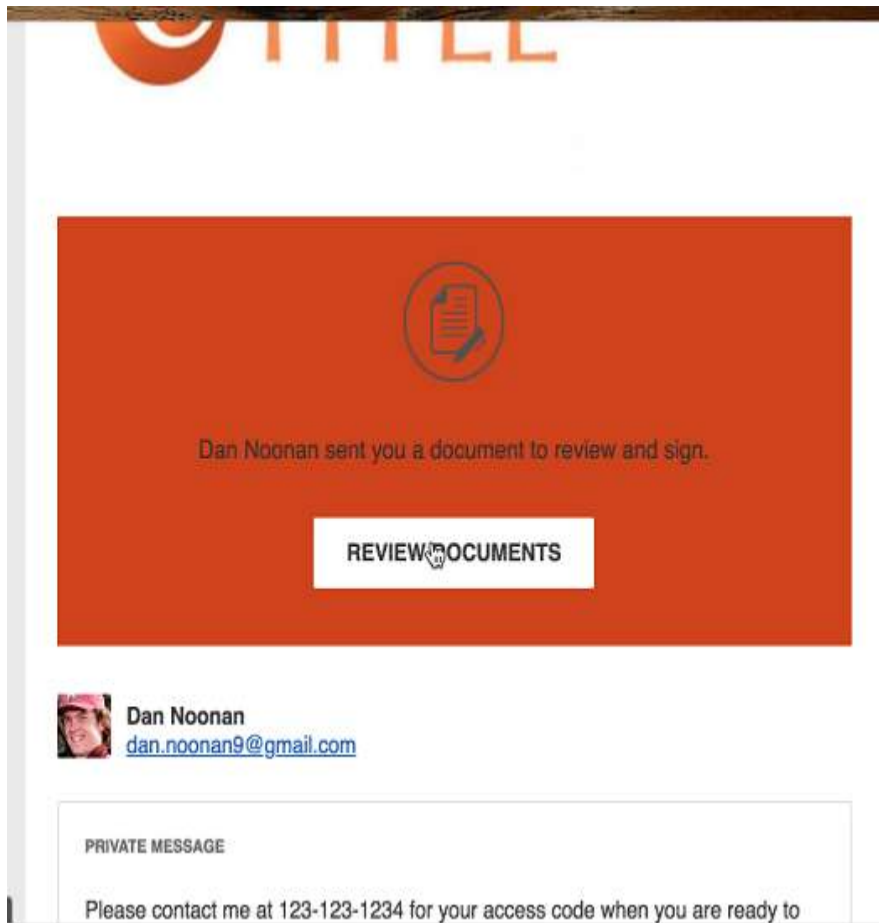
The documents listed below are the signed copies of your closing package.

	Date Completed		
Audit Log			
This Audit Log contains all of the activity from this Digital Closing up to the completion of the closing process.			
AuditReport	N/A		
Complete Package			
Bundle of all Documents	N/A		
Order Documents			
Warranty Deed - Legal Size_Deed	03/27/2018		
Bill Of Sale_Property	03/27/2018		
Buyers Responsibility Letter_Buyer	03/27/2018		
Request to Rescind Principal Residence E...	03/27/2018		
Affidavit Property Transfer_Property	03/27/2018		
Affidavit Homestead Exemption_Parcel	03/27/2018		
Water Disclosure - no escrow_Order	03/27/2018		
Owners Affidavit - Residential_Property	03/27/2018		
ALTA Combined or Cash Settlement Stateme...	03/27/2018		
ALTA Sellers Statement_CDF	03/27/2018		
ALTA Buyer or Borrowers Statement_CDF	03/27/2018		

DocuSign is an option for electronic closings.

- It is perfect tool for Auction files, cash closings or to replace email away closings.
- It is extremely simple to use for both eTitle and the client.
- DocuSign works by purchasing “envelopes”. Think of an envelope as a UPS or FedEx Package. You can include one document or an entire closing file. There is no limit within the envelope.
- Unlimited Users
- Extremely simple and fast set up – basically just names and email addresses
- Uploading - drag and drop
- Unlimited number of documents in one “envelope”
- You can invite an unlimited number of recipients to each “envelope”
- Easy to create templates

- Has visibility options, mandatory versus optional tags – all the usual suspects as to signature tagging options
- Ability for the clients to upload documents to the envelope to be returned to us.
- Uses two factor authentication process but additional security features are available for a nominal fee per envelope. Stock version – we provide the client with an access code to view the envelope. They create an account and enter access code given to them to proceed.
- We can set an expiration date on envelopes or void them
- We can send reminders if they don't open the envelope within a certain time frame
- We can add/edit or delete documents to the envelope at any stage
- We can track where and by whom it was signed or viewed / audit report
- Electronic signatures can be drawn or typed style selected.
- Any device can be used: laptop, phone, tablet, desktop computer
- Files stored at no charge in the cloud/ no expiration date or limit to storage
- All parties have access to all documents at any time



11. Was property purchased from a financial institution? <input type="radio"/> Yes <input type="radio"/> No	12. Is the transfer between related persons? <input type="radio"/> Yes <input type="radio"/> No	13. Amount of Down Payment Text
14. If you financed the purchase, did you pay market rate of interest? <input type="radio"/> Yes <input type="radio"/> No	15. Amount Financed (Borrowed) Text	

EXEMPTIONS

Certain types of transfers are exempt from uncapping. If you believe this transfer is exempt, indicate below the type of exemption you are claiming. If you claim an exemption, your assessor may request more information to support your claim.

- ☐ Transfer from one spouse to the other spouse.
- ☐ Change in ownership solely to exclude or include a spouse.
- ☐ Transfer between certain family members *(see page 2).
- ☐ Transfer of that portion of a property subject to a life lease or life estate (until the life lease or life estate expires).
- ☐ Transfer between certain family members of that portion of a property after the expiration or termination of a life estate or life lease retained by transferor ** (see page 2)
- ☐ Transfer to effect the foreclosure or forfeiture of real property.
- ☐ Transfer by redemption from a tax sale.
- ☐ Transfer into a trust where the settlor or the settlor's spouse conveys property to the trust and is also the sole beneficiary of the trust.
- ☐ Transfer resulting from a court order unless the order specifies a monetary payment.
- ☐ Transfer creating or ending a joint tenancy if at least one person is an original owner of the property (or his/her spouse).
- ☐ Transfer to establish or release a security interest (collateral).
- ☐ Transfer of real estate through normal public trading of stock.
- ☐ Transfer between entities under common control or among members of an affiliated group.
- ☐ Transfer resulting from transactions that qualify as a tax-free reorganization under Section 368 of the Internal Revenue Code.
- ☐ Transfer of qualified agricultural property when the property remains qualified agricultural property and affidavit has been filed.
- ☐ Transfer of qualified forest property when the property remains qualified forest property and affidavit has been filed.
- ☐ Transfer of land with qualified conservation easement (land only - not improvements).
- ☐ Other, specify: Text

CERTIFICATION

I certify that the information above is true and complete to the best of my knowledge.

Printed Name: Full Name

Signature: Sign
Date: July 25, 2018

Name and title, if signer is other than the owner: Text Title
Daytime Phone Number: Text
E-mail Address: Email

11. I have converted the property to commercial property: 11a. ☐ 11b. ☐

12. If the portion of the property in line 1 that you own and occupy as your principal residence has changed, enter the new percentage here: 12. Text %

13. Effective date of the change listed in either 11 or 12: 13. Text
Month Day Year

14. This recission applies to:
a. Owner and Co-Owner as listed in boxes 6 and 8 above: 14a. ☐
b. Owner only, as listed in box 6 above: 14b. ☐
c. Co-Owner only, as listed in box 8 above: 14c. ☐

15a. New Owner's Name: Text
15b. New Co-Owner's Name: Text

Certification

I certify under penalty of perjury the information contained on this document is true and correct to the best of my knowledge.

16. Owner's Signature/Representative: Sign ↓	Date: July 25, 2018	17. Co-Owner's Signature/Representative: Sign ↓	Date: July 25, 2018
---	---------------------	--	---------------------

18. Mailing Address, if Different than Property Address Above
5F., No.8, Aly. 2, Ln. 186, Kangle St.,, Neihu Dist., Taipei City 114, Taiwan

Local Government Use Only – Do Not Write Below This Line

What is the first year this change will be posted to the tax roll? 20. Text

Indicate property classification: 21. Text



Pros and Cons of Electronic Closings

- Pro: many people are now comfortable with electronic signatures on contracts, invoices, etc.; many businesses, lenders and government agencies use them
- Pro: more attorneys, lenders and government agencies becoming comfortable with remote notarization
- Pro: national legislation supports completely remote closings
- Con: not all parties are willing to close electronically
- Con: some parties neglect to establish the rules regarding electronic communication in the purchase agreement
- Con: some registers will not accept documents notarized remotely and “papering out” is necessary; not all states have adopted remote notarization

Thank you for your time.

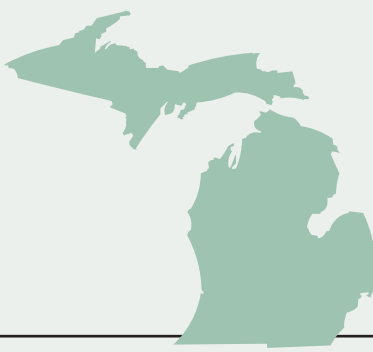
eTitle Agency, Inc. 1650 W. Big Beaver, Troy, MI 48084

Brian P. Henry, Esq. Senior Executive Counsel

248-502-1532 bhenry@etitleagency.com

Tracy Duron, Post Closing Manager

248-502-3137 tduron@etitleagency.com



M I C H I G A N REAL PROPERTY REVIEW

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Contents

Chairperson's Report	141
<i>by C. Kim Shierk</i>	
Forming Real Estate Contracts Electronically: An eValuation of Relevant Law.....	143
<i>by Brian Henry and Mary Dunn</i>	
Disappearing Condominium Units: Buyers Must Be Aware of the Consequences of Section 67(3).....	152
<i>by Stephen M. Guerra and Mark F. Makower</i>	
Deed Restrictions and Restrictive Covenants in Michigan—2012.....	157
<i>by William E. Hosler</i>	
Judicial Decisions Affecting Real Property	171
<i>by Ronald E. Reynolds and Joseph M. Rogowski, II</i>	
Legislation Affecting Real Property.....	174
<i>by Ronald E. Reynolds</i>	
Continuing Legal Education	176
<i>by Melissa N. Collar and Clay B. Thomas, Co-Chairs, CLE Committee and Arlene R. Rubinstein, Administrator</i>	
Real Property Law Section Standing Committee Chairs 2011 – 2012	180
Real Property Law Section Special Committee Co-Chairs and Coordinators 2011 – 2012.....	183



Forming Real Estate Contracts Electronically:

An eValuation of Relevant Law

by Brian Henry* and Mary Dunn**



With the proliferation of electronic tablets, netbooks, and other portable communication devices, the number of electronic messages related to real estate negotiations has increased exponentially. Consequently, an increasing number of real estate contracts are negotiated, formed, and signed electronically. As most real estate practitioners know, the statute of frauds, MCL 566.108,¹ requires that leases longer than a year and contracts transferring property interests must be in writing and signed. When real estate contracts are negotiated electronically, new issues arise regarding formation and whether an instrument has been “signed” as required by MCL 566.108.

This article will analyze four important questions so that the practitioner may better understand the risks and

benefits of electronic negotiations: (1) how can the parties agree to negotiate and complete transactions by electronic means? (2) what constitutes an “electronic signature?” (3) what conditions must be satisfied to form a contract electronically? and (4) how are emails related to an agreement authenticated if there is a subsequent dispute? To understand these concepts, some background on the relevant federal and state law must be provided first.

I. The Federal E-Sign Act: The Foundation for Electronic Transactions

The Electronic Signatures in Global and National Commerce Act,² also known as the “E-Sign Act,” was signed into law in 2000. Section 1 of the Act provides general validation for electronic transactions:

(a) In general. – Notwithstanding any statute, regulation, or other rule of law (other than this title and title II), with respect to any transaction in or affecting interstate or foreign commerce –

(1) A signature, contract, or other record relating to such transaction *may not be denied legal*

¹ MCL 566.108 provides, in relevant part:

Every contract for the leasing for a longer period than 1 year, or for the sale of any lands, or any interest in lands, shall be void, unless the contract, or some note or memorandum thereof be in writing, and signed by the party by whom the lease or sale is to be made, or by some person thereunto by him lawfully authorized in writing.

² 15 USC § 7001 *et seq.*

* Brian Henry is Commercial Services Counsel for eTitle Agency with over 29 years experience in real estate law and commercial litigation. Mr. Henry supervises closings for both commercial sale and refinance transactions and identifies business opportunities in the title insurance industry. In addition, he serves as Loan Resolution Counsel for Orlans Associates PC, working with homeowners, lenders, and legislators on loan modification processes, short sales, and other loss mitigation tools. Mr. Henry is the Secretary for the Real Property Law Section and a past chair of the CLE and the Membership Committees.

** Mary Dunn works as a Law Clerk in the litigation department at Orlans Associates, P.C. Ms. Dunn is a third-year law student at Wayne State University Law School, where she is a member of the Women’s Law Caucus and the Sports and Entertainment Law Society, and serves as a mentor to a first-year law student. She also serves on the Board of her condominium association and is an active member of the Real Property Law Section and serves on the Membership and Long Range Planning Committee.

effect, validity, or enforceability solely because it is in electronic form; and

(2) A contract relating to such transaction *may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation.*³

Section 1(b) of the Act clarifies that it does not “require any person to agree to use or accept electronic records or electronic signatures”⁴

The E-Sign Act allows a state to avoid preemption of its laws by adopting the Uniform Electronic Transactions Act (“UETA”) or comparable procedure consistent with the E-Sign Act.⁵

II. UETA: The Elimination of Legal Barriers to Negotiating and Signing a Real Estate Contract Electronically

UETA was developed by the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) in 1999.⁶ The E-Sign Act and UETA overlap significantly. Both provide that electronic contracts and signatures cannot be denied legal effect or enforceability because they are in electronic form. UETA, however, is more comprehensive, as it contains more specific provisions regarding electronic transactions. The relevant provisions for this discussion are: (1) the attribution of electronic signatures to individuals; (2) the impact of other laws upon the electronic format; and (3) the effects of the parties’ agreement regarding electronic form.⁷

To date, 47 states, the District of Columbia, Puerto Rico, and the Virgin Islands have enacted some version of UETA. The three states (Illinois, New York, and Washington) that have not adopted UETA have other statutes

pertaining to electronic transactions.⁸ UETA provides a legal framework for the use of electronic signatures and writings to allow contracts to be created electronically, although practitioners should be sensitive to possible conflict of law issues if parties in two or more states are involved.⁹

Section 3 of UETA sets forth its scope. One of the comments to Section 3 explains that although various state versions of UETA would likely be drafted to exclude certain transactions, these exclusions are not warranted. It further provides that between private parties, there is no need to maintain barriers to electronic contracting in trusts, powers of attorney, real estate transactions, and consumer protection statutes. The relevant comment to Section 3 concerning real estate transactions provides:

3. Real Estate Transactions. It is important to distinguish between the efficacy of paper documents involving real estate between the parties, as opposed to their effect on third parties. As between the parties it is unnecessary to maintain existing barriers to electronic contracting. There are no unique characteristics to contracts relating to real property as opposed to other business and commercial (including consumer) contracts. Consequently, the decision whether to use an electronic medium for their agreements should be a matter for the parties to determine. Of course, to be effective against third parties state law generally requires filing with a governmental office. Pending adoption of electronic filing systems by States, the need for a piece of paper to file to perfect rights against third parties, will be a consideration for the parties The critical point is that nothing in this Act prevents the parties from selecting paper or electronic media for all or part of their transaction.¹⁰

III. The Michigan Uniform Electronic Transaction Act: Provisions for the Real Estate Practitioner to Consider

Michigan has adopted its own version of UETA, and so

3 15 USC § 7001 (emphasis added).

4 *Id.*

5 15 USC § 7002(a).

6 National Conference of State Legislatures, *available at* www.ncsl.org/default.aspx?tabid=13484 (last visited Jan 3, 2012).

7 Uniform Law Commissioners, *Why Enact UETA? The Role of UETA After E-Sign*, Patricia Brumfield Fry, *available at* <http://www.nccusl.org/Shared/Docs/Why%20Enact%20UETA.aspx> (last visited Jan 3, 2012).

8 *Id.*

9 Uniform Law Commission, *A Preliminary Analysis of Federal and State Electronic Commerce Laws*, *available at* <http://www.nccusl.org/Narrative.aspx?title=UETA%20and%20Preemption%20Article> (last visited May 26, 2011).

10 UNIF. ELECTRONIC TRANSACTIONS ACT 2 *cmt.* 3

the practitioner must be familiar with it as well. The Michigan Uniform Electronic Transactions Act (“MUETA”) was adopted in 1999.¹¹ Like its federal counterpart, MUETA only applies to those transactions for which the parties agreed to conduct transactions by electronic means.¹²

MUETA generally mirrors UETA. However, MUETA specifically notes that “[w]hether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties’ conduct.”¹³ In certain situations to be discussed later, parties inadvertently agreed to conduct transactions by electronic means because of their conduct. To avoid this result, counsel should address the parties’ intent with respect to this issue with specific language before starting negotiations.

IV. How Can the Parties Agree to Negotiate a Transaction by Electronic Means?

MUETA’s prefatory note recognizes “that the paradigm for the Act involves two willing parties conducting a transaction electronically, [and] makes it necessary to expressly provide that some form of acquiescence or intent on the part of a person to conduct transactions electronically is necessary, before the Act can be invoked.”¹⁴ One of UETA’s comments provides a few helpful examples of circumstances in which it may be found that the parties agreed to conduct transactions electronically:

Joe gives out his business card with his business e-mail address. It may be reasonable, under the circumstances, for a recipient of the card to infer that Joe has agreed to communicate electronically for business purposes. However, in the absence of additional facts, it would not necessarily be reasonable to infer Joe’s agreement to communicate electronically for purposes outside the scope of the business indicated by use of the business card.

Sally may have several e-mail addresses—home, main office, office of a non-profit organization on whose board Sally sits. In each case, it may be reasonable to infer that Sally is willing to communicate electronically with respect to business related to the business/purpose associated with the respective e-mail addresses. However, depending on the circumstances, it may not be reasonable to communicate with Sally for purposes other than those related to the purpose for which she maintained a particular e-mail account.¹⁵

Whether the parties had agreed to conduct transactions electronically was at issue in *Int’l Casings Group, Inc v Premium Std Farms, Inc*,¹⁶ a federal district court case in Missouri. The court, in determining whether the parties agreed to conduct transactions by electronic means, looked to whether the party to be bound “intended to authenticate the writing—not whether he subjectively intended to enter into a contract.”¹⁷

The Missouri Court of Appeals also addressed whether the parties agreed to negotiate electronically in *Crestwood Shops, LLC v Hilken*,¹⁸ reaching a similar conclusion by examining the surrounding circumstances. Plaintiff sent an email to Defendant in which Plaintiff stated: “[B]ecause of the accusations voiced during our meeting last Friday, I would prefer to have my correspondence with you in writing, which unintentionally delayed my response to you because I need to be in my office to email.” In a reply email, the Defendant responded that “I prefer not to call you, and have been advised to have all communications with you in writing.”¹⁹ Defendant then made an offer to terminate the lease via email, in which she also stated, “I will be on email only.”²⁰

Plaintiff argued that the emails only evidenced an agreement to correspond via email, not to conduct transactions via email. The court looked to the context and surrounding circumstances, noting that the parties

11 MCL 450.831 *et seq.*

12 MCL 450.835(2). Note also that MCL 450.833(3) provides that MUETA does not apply to the creation of wills, codicils, or testamentary trusts or to most transactions governed by the UCC other than Article 2 and Article 2-A transactions.

13 MCL 450.835(2).

14 OAG, 2007, No 7207 (Oct 2, 2007), 2007 AG LEXIS 12 (Mich AG 2007).

15 UNIF. ELECTRONIC TRANSACTIONS ACT 5 cmts 4(B), (C)

16 358 F Supp 2d 863, 872-73; 56 UCC Rep Serv 2d (Callaghan) 736 (WD Mo 2005).

17 *Id* at 875.

18 197 SW 3d 641 (Mo Ct App 2006).

19 *Id* at 653.

20 *Id.*

communicated primarily through email and explicitly agreed to communicate only in writing. Defendant preferred email because of its speed, and complained when Plaintiff sent a letter via certified mail because it took two days to reach her. Defendant's own offer to terminate the contract was made via email, and she stated that she could only be reached by email. The court found that based on such context and circumstances, the trial court did not err in finding that the parties fully agreed to conduct transactions by email.

However, in *Audi AG v D'Amato*,²¹ the court found that the parties did not agree to conduct their negotiations by electronic means. Defendant D'Amato used the domain name www.audisport.com to sell goods and merchandise displaying Audi's name and trademarks. Plaintiff argued that the use of this domain name infringed upon its trademarks. D'Amato claimed that he was given permission to use Audi's trademarks via legally binding emails. The court found that in order to constitute a legally binding contract by electronic means, the parties would have to *agree* to conduct transactions electronically.²² Michigan courts have similarly upheld the principle that the parties must have assented to the use of electronic means for the transaction, either overtly or by their conduct.²³

While neither a Michigan court nor the Sixth Circuit has specifically addressed what type of conduct is necessary to demonstrate assent to the use of electronic means of communication, other courts have indicated that if a party intended to authenticate the writing, it assented to the use of electronic means to do so.²⁴ The practitioner must monitor how this issue unfolds since it is critical for establishing the rules in any real estate negotiation.

V. What Constitutes an Electronic Signature?

A real estate practitioner must understand the following key provisions of the MUETA regarding electronic signatures:²⁵

1. A record or signature shall not be denied legal effect or enforceability solely because it is in electronic form.
2. A contract shall not be denied legal effect or enforceability solely because an electronic record was used in its formation.
3. If a law requires a record to be in writing, an electronic record satisfies the law.
4. If a law requires a signature, an electronic signature satisfies the law.²⁶

25 Although beyond the scope of this article, one key provision of MUETA that real estate practitioners should be aware of is MCL 450.845, which sets forth criteria to determine when an electronic record is considered sent or received:

- (1) Unless otherwise agreed between the sender and the recipient, an electronic record is sent when it complies with all of the following:
 - (a) It is addressed properly or otherwise directed properly to an information processing system that the recipient uses for the purpose of receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record.
 - (b) It is in a form capable of being processed by that system.
 - (c) The record enters an information processing system outside the control of the sender or of a person that sent the electronic record on behalf of the sender or enters a region of the information processing system used by the recipient that is under the control of the recipient.
 - (2) Unless otherwise agreed between a sender and the recipient, an electronic record is received when it complies with all of the following:
 - (a) It enters an information processing system that the recipient uses for the purpose of receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record.
 - (b) It is in a form capable of being processed by that system.
- * * *
- (5) An electronic record is received under subsection (2) even if no individual is aware of its receipt.

26 MCL 450.837.

21 469 F3d 534; 2006 Fed App 0439P (CA6 2006).

22 *Id* at 545.

23 See, e.g., *Kloian v Domino's Pizza, LLC*, 273 Mich App 449; 733 NW2d 766 (2006).

24 See *Int'l Casings*, 358 F Supp 2d at 875 ("[A] fact finder will probably infer from the objective evidence that the parties agreed to negotiate and eventually reach the terms of an agreement via electronic mail based on their ongoing e-mail negotiations . . ."). See also *Alliance Laundry Sys, LLC v Thyssenkrupp Materials, NA*, 570 F Supp 2d 1061, n3 (ED Wis 2008) ("[I]f the facts show that the parties reached an agreement electronically, they will likely also show that the parties agreed to conduct transactions by electronic means.").

MUETA then further clarifies that an “electronic signature” is “an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.”²⁷ Many real estate practitioners may not fully realize the breadth of this definition. An email signature at the bottom of an email message is sufficient to constitute an offer or an acceptance under common law contract principles.

Moreover, because the statute is intended to be technology-neutral, a broad range of electronic signatures can be created using different types of hardware and software. For example, according to the authors of a 2003 *Michigan Bar Journal* article, “one may create a record and sign it entirely by voice mail by speaking the content of the record and adding an expression of assent.”²⁸ One could also create a graphic file containing a picture of one’s handwritten signature. Alternatively, one’s typed name, even in an email, can constitute an electronic signature.²⁹

Counsel must be familiar with the definition of an electronic signature under MUETA so that a communication is not inadvertently signed and sent during the course of negotiations. Remember that under MUETA, it may be determined that the parties agreed to conduct negotiations electronically by their conduct. Additionally, the practitioner should understand that MUETA has really created opportunities for “paperless” negotiation and closings. These opportunities have not been fully utilized by many since there is still some uncertainty and confusion surrounding how “paperless” or “electronic” negotiations and closings should be structured. One of the most misunderstood concepts is the conditions that must be satisfied to form a contract electronically.

VI. What are the Conditions Necessary to Form a Contract Electronically?

UETA, E-Sign Act, and MUETA all require that the traditional elements of offer, acceptance, and consideration be present when the parties use electronic means to

form a real estate purchase agreement. Similarly, Michigan common law recognizes that enforceable agreements can arise out of an exchange of emails only if the legal elements for a contract exist.³⁰

Under Michigan law, all electronic agreements are subject to the standard maxims of contract formation: “In order to form a valid contract, there must be a meeting of the minds on all material facts. A meeting of the minds is judged by an objective standard, looking to the express words of the parties and their visible acts, not their subjective states of mind.”³¹ “A party’s intention must be gathered not from what a party now says he then thought but from the contract itself.”³² The Michigan Supreme Court has stated that the test to determine whether a contract has been formed is an objective one: “there must be an ‘overt expression’ of assent to an offer, focusing on how the words and conduct of the promissory might appear to a reasonable person in the position of the promisee.”³³

However, courts have made distinctions between “mere discussions” and offer and acceptance. In *Parr v Bank of N.Y. Mellon Corp.*,³⁴ the court found that a valid offer and acceptance were not present in an email exchange between a borrower and the foreclosing lender. The parties attempted to negotiate a settlement to prevent eviction of the borrower. In one email, the lender suggested an intent to enter into a contract: “We would only consider the offer again if the family members are willing to pay the unpaid balance owed by the former mortgagor”³⁵ The court found this was insufficient, explaining that “[b]efore a contract can be completed, there must be an offer and acceptance Mere discussions and negotiation cannot be a substitute for the formal requirements

27 MCL 450.832(h).

28 Donald M. Crawford & Stephen L. Tupper, *Information Technology Law: Making Electronic Signatures Stick: Creating Contracts in the Electronic Age*, 82 MI BAR JNL 24, 26 (2003).

29 *Id.*

30 *Dow Chem Co v GE*, Case No 04-10275-BC, 2005 US Dist LEXIS 40866; 58 UCC Rep Serv 2d (Callaghan) 74 (ED Mich 2005).

31 *Kamalnath v Mercy Memorial Hosp Corp*, 194 Mich App 543, 548; 487 NW2d 499 (1992).

32 *Fletcher v Bd of Ed of School Dist Fractional No 5*, 323 Mich 343, 348; 35 NW2d 177 (1948).

33 *Rood v General Dynamics Corp*, 444 Mich 107, 119; 507 NW2d 591, 598 (1993).

34 No. 10-13167; 2011 US Dist LEXIS 19463 (ED Mich Feb 28, 2011).

35 *Id* at *6.

of a contract.”³⁶ Because an offer and acceptance were not obtained in the email messages, an enforceable contract was not formed.

An agreement was formed electronically under the facts in *Kloian v Domino's Pizza, LLC*³⁷ because the court found an “offer and acceptance supported by valid consideration.” In this case, Plaintiff landlord alleged that Defendant tenant breached the lease by failing to tender all of the funds owed under the lease. Before the trial date, the parties’ attorneys exchanged emails in an attempt to reach a settlement agreement. The Defendant’s attorney sent the following email to the Plaintiff’s attorney:

Domino’s accepts your settlement offer contained in the message below. I spoke with the court, advised it of the settlement and confirmed that we need not appear in court in connection with the settlement. I have ordered a settlement draft from Domino’s in the amount of \$ 48,000, made payable jointly to Mr. Kloian and your firm. I will forward a stipulation and order for dismissal with prejudice and a release for approval by you and Mr. Kloian respectively. You should have them in the next few days. Please call with any questions. I’m pleased we were able to resolve this matter without trial. —Neil³⁸

This was sufficient to constitute an acceptance of the settlement offer. “An acceptance sufficient to create a contract arises where the individual to whom an offer is extended manifests an intent to be bound by the offer, and all legal consequences flowing from the offer, through voluntarily undertaking some unequivocal act sufficient for that purpose.”³⁹ The court found that there was a meeting of the minds on the essential terms: the payment of \$48,000 by Defendant in exchange for a dismissal with prejudice and a release: “*A meeting of the minds is judged by an objective standard, looking to the express words of the parties and their visible acts, not their*

subjective states of mind.”⁴⁰ As such, Defendant’s acceptance created a contract between the parties.

Because real estate practitioners are now often involved in negotiations to settle pending litigation, they should be aware that the court rule regarding settlements, MCR 2.507(H), was also discussed by the *Kloian* court. Any settlement of pending litigation must satisfy the elements of MCR 2.507(H), which is in the nature of the statute of frauds.⁴¹ This Court Rule provides that:

An agreement or consent between the parties or their attorneys respecting the proceedings in an action, subsequently denied by either party, is not binding unless it was made in open court, or unless evidence of the agreement is *in writing, subscribed by the party against whom the agreement is offered or by that party’s attorney.*⁴²

In *Kloian*, the Plaintiff argued that the settlement agreement could not be enforced because it was not in writing or signed in wet ink. The term “subscribed” is not defined in MCR 2.507(H). However, MUETA provides that “[i]f a law requires a signature, an electronic signature satisfies the law.”⁴³ MCR 2.507(H) does not require a signature, however; it requires a subscription. The court explained that “subscribed” is a different word from “signed,” but that the email containing the settlement offer satisfied the subscription requirement of MCR 2.507(H). The email “was subscribed by Plaintiff’s attorney because he typed, or appended, his name at the end of the e-mail message.”⁴⁴ The court also found that the email from the Defendant’s attorney accepting the settlement offer was also subscribed because it, too, “contained defendant’s attorney’s name at the end of the e-mail message.”⁴⁵

36 *Id* at *9.

37 273 Mich App 449; 733 NW2d 766 (2006).

38 *Id* at 451.

39 *Id* at 545 (citing *Blackburne & Brown Mortgage Co v Ziomek*, 264 Mich App 615, 626-27; 692 NW2d 388 (2004)).

40 *Id* at 454 (emphasis added) (citing *Kamalnath v Mercy Memorial Hosp Corp*, 194 Mich App 543, 548; 487 NW2d 499 (1992)).

41 *Id* (citing *Michigan Mut Ins Co v Indiana Ins Co*, 247 Mich App 480, 484-85).

42 MCL 2.05(H) (emphasis added).

43 MCL 450.837(4).

44 *Kloian*, 273 Mich App at 460.

45 *Id*.

Real estate practitioners must be completely familiar with the broad definition of an electronic signature under the E-Sign Act, UETA, MUETA and the common law.⁴⁶ Since many real estate transactions are negotiated using email and other electronic media, counsel must be wary of forming or offering an agreement before the final terms are negotiated. Courts have found that documents are “signed” electronically in a variety of contexts and the practitioner must avoid putting any client at risk of inadvertently forming a contract electronically.

VII. How Are Emails Related To An Agreement Authenticated If There Is A Subsequent Dispute?

Unfortunately, disputes arise after transactions are negotiated and completed. This final section will examine those cases where the “authenticity” of an electronic signature or transmission was raised as an issue in litigation. How do courts look at “electronic signatures” and “electronic transmissions” and “attribute” them to a person?

As you know, the Uniform Commercial Code (“UCC”) does not generally apply to interests in real property⁴⁷ and MUETA itself excludes many provisions of the UCC.⁴⁸ However, because the UCC contains its own provisions for electronic transactions, its definitions may be useful for interpreting MUETA by analogy. The UCC’s definition of “signed” includes “any symbol executed or adopted by a party with a present intention to authenticate a writing.” The comments to said definition provide:

The inclusion of authentication in the definition of ‘signed’ is to make clear that as the term is used in this Act a complete signature is not necessary. Authentication may be printed, stamped or written; it may be by initials or by thumbprint. It may be on any part of the document and in appropriate cases may be found in a billhead or letterhead. No catalog of possible

authentications can be complete and the court may use common sense and commercial experience in passing upon these matters.⁴⁹

Similarly, UETA states that an electronic signature is “[a]n electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.”⁵⁰ Presumably, the same liberal interpretation will apply to MUETA and other uniform laws.

Michigan courts have construed the UCC liberally and applied it to promote its underlying purposes and policies.⁵¹ In addition, “[s]ince the purpose of the Code is to make uniform the law among various jurisdictions, it is appropriate for courts applying Michigan law, to seek guidance from other jurisdictions when interpreting provisions of the UCC.”⁵²

Jurisdictions outside Michigan have provided some analysis of this issue. The Supreme Court of Oregon has found that the signature of the party to be bound constitutes a signing if it is written for the purpose of giving authenticity to the instrument.⁵³ In *Int’l Casings Group, Inc v Premium Std Farms, Inc*,⁵⁴ the identity of the sender of various emails was in question. The Plaintiff supplier had been in a long-term output contract with the Defendant. The parties terminated their contracts with each other but continued performing under them and eventually entered into negotiations for new contracts with each other. It was not disputed that many of the negotiations between the parties occurred via email, and “both parties consistently relayed negotiation terms and positions to one another via electronic correspondence.”⁵⁵ Not all of the emails contained a typed name at the bottom, but each contained a header with the name of the sender. After agreeing to certain

46 Although beyond the scope of this article, real estate practitioners should also note that the current mechanisms for electronic transactions do not validate electronically-created promissory notes. MCL 450.846 requires additional authentication to ensure that there exists only one original version of the promissory note, even when the note exists in electronic form.

47 See, e.g., MCL 440.9109(4)(k).

48 MCL 450.833(3).

49 UCC Official Comment § 1-201(39). See also *Int’l Casings Group, Inc v Premium Std Farms, Inc*, 358 F Supp 2d 863, 872-73; 56 UCC Rep Serv 2d (Callaghan) 736 (WD Mo 2005).

50 15 USC 7006(5).

51 *Power Press Sales Co v MSI Battle Creek Stamping*, 238 Mich App 173; 604 NW2d 772 (1999).

52 *Dow Chem Co v GE*, 2005 US Dist LEXIS 40866, 72 (ED Mich 2005) (internal citation omitted).

53 *Commercial Credit Corp v Marden*, 155 Ore 29, 38; 62 P2d 573 (Or 1936).

54 358 F Supp 2d 863 (WD Mo 2005).

55 *Id* at 873.

terms contained in said emails, the parties implemented the new terms. A few months later, the supplier indicated its intent to terminate the parties' business relationship.

The court, relying on the testimony given at the preliminary hearing, found that "it is clear that [the parties], by hitting the send button, intended to presently authenticate and adopt the content of the e-mails as their own writing. This is enough to satisfy the UCC given the breadth of its definition of signature, as well as UETA which specifically refers to a 'process attached to or logically associated with a record.'"⁵⁶ In further support of this point, the court explained that the purpose of the UCC is to prevent fraud (e.g., that someone else sent the emails at issue), and there is no concern of fraud here since the parties acknowledged they sent the emails. As such, the statute of frauds is not to be used "to enable one to take advantage of a person's own wrong and it ought not to be used as a means to allow persons who have made a promise to circumvent their obligations."⁵⁷

Similarly, in *Parma Tile Mosaic & Marble Co v. Estate of Short*,⁵⁸ the New York Court of Appeals addressed the issue of whether the automatic imprinting of a sender's name on each page of a facsimile transmission (the "signature") constituted a subscription. Unlike *Int'l Casings*, this case was decided before the enactment of the E-Sign Act. In this case, a subcontractor sought to purchase a large quantity of ceramic tile from the Plaintiff supplier. The supplier was reluctant to enter into such a large contract without a guaranty, so the subcontractor suggested that the supplier obtain a guaranty from the general contractor. The supplier contacted the general contractor, and after several discussions, the general contractor faxed a document to the supplier, which the supplier argued was a guaranty. After the fax transmission, the supplier began to furnish the ceramic tile. After the death of the principal of the subcontractor, the supplier sought payment from the general contractor, pursuant to the "guaranty." The general contractor refused to make payment, arguing the document was "an unsubscribed proposal for a guaranty."⁵⁹

The court found that because the signature was automatically imprinted only on the recipient's faxed copy

(not on the originating document), it did not constitute a valid subscription for purposes of the statute of frauds. The court explained:

the act of identifying and sending a document to a particular destination does not, by itself, constitute a signing authenticating the contents of the document for Statute of Frauds purposes . . . [The] fax machine, after being programmed to do so, automatically imprinted [the signature] on every page transmitted, without regard to the applicability of the Statute of Frauds to a particular document We also reject plaintiff's contention that the intentional act of programming a fax machine, by itself, sufficiently demonstrates to the recipient the sender's apparent intention to authenticate every document subsequently faxed. The intent to authenticate the particular writing at issue must be demonstrated.⁶⁰

This analysis, although in the context of a signature automatically affixed to facsimile transmissions, is relevant to email transmissions as well.

It is worth pointing out that in *Int'l Casings*, the court found that the contents of the email header combined with the act of sending the email created authentication, while in *Parma Tile* the facsimile header and act of sending the document did not constitute authentication. However, *Parma Tile* was decided before the enactment of the E-Sign Act. Moreover, the contract in *Int'l Casings* was formed by negotiations between both parties via many emails. In *Parma Tile*, the facsimile was one-sided: the supplier transmitted the document, but the general contractor never acknowledged receipt of it or otherwise ratified the guaranty.

MUETA provides guidelines for determining whether an electronic signature is attributable to a person, and provides: "An electronic record or electronic signature is attributable to a person if it is the act of the person. The act of the person may be shown in any manner, including a showing of the efficacy of any security procedure applied to determine the person to which the electronic record or electronic signature was attributable."⁶¹ Although Michigan courts have not addressed this issue directly, guidance can be obtained from cases outside Michigan and the language of the UCC.

56 UNIF. ELECTRONIC TRANSACTIONS 2(8).

57 73 AM JUR 2D Statute of Frauds § 468.

58 87 NY2d 524 (NY 1996).

59 *Id* at 526.

60 *Id* at 528.

61 MCL 450.839(1).

VIII. Conclusion

Generally, neither the E-Sign Act nor UETA was designed to affect the substantive law of contracts. Instead, they were intended to validate electronic agreements and to ensure that electronic records and signatures are not invalidated simply because they are in electronic form. Therefore, the requirements of traditional contracts, including a valid offer and acceptance, the existence of a writing, and the existence of signatures, still apply in the context of forming agreements electronically.

The savvy real estate practitioner should have a basic understanding of the statutes and common law referenced in this article to avoid unintended consequences. It is advisable that the practitioner: (1) state and memorialize at the outset of any negotiations whether the parties agree to conduct the negotiations electronically; (2) establish the ground rules for electronic negotiations and signatures so that no transmission is inadvertently signed or construed as an offer or acceptance; and (3) accept the fact that negotiations and transactions are moving in a “paperless” direction and keep abreast of future decisions further explaining the E-Sign Act, UETA and MUETA.



ICSC+CONTINUING EDUCATION MICHIGAN

Suburban Collection Showplace

Novi, MI

Wednesday, April 13, 2022

Session Materials

Roundtable 7: COVID Crisis Communications:

Who Did It Well? Who Didn't—and Why?

Led by: Mark Winter, Identity PR

Covid Crisis Communications



BIRMINGHAM + CHICAGO [IDENTITYPR.COM](https://identitypr.com)





The pandemic induced tremendous uncertainty, fear and anxiety that gave way to disorientation, a deep feeling of loss of control and strong emotional disturbance. To mitigate panic and encourage the right behavioral action, strong leadership and timely, clear and direct communication were critical.

MARK WINTER

President, Identity



About Identity

Identity has been providing proactive marketing, public relations, and communications strategy and support to owners, developers, property managers and consultants in the retail, restaurant, resort/attraction, multifamily, hospitality and mixed-use space for more than 20 years. During that time, we have helped dozens of related organizations navigate hundreds of small and large economic, criminal, political, social, “acts of God” and COVID crisis situations.

Some examples include

- + The collapse of the roof of a 1.5 million SF mall
- + The suicide of a store manager in the store
- + Violent gang activity in an upscale shopping center
- + Abrupt leadership changes
- + Attraction accidents
- + Health code violations for restaurants
- + Sexual harassment and discrimination claims
- + Employee walkouts and strikes
- + Economic hardship and bankruptcies
- + Vacancies and evictions
- + Shootings
- + Recalls
- + COVID related responses for all areas of real estate

Although no two crisis situations are alike, there are always common threads through them. The difference between navigating them successfully and failing hinges on several things within your control. Those include strong pre-planning, thoughtful messaging, and timely, accurate and transparent communication.





The Tipping Point: March 11, 2020

The World Health Organization (WHO) held a briefing and declared a pandemic on March 11, 2020. The Dow Jones Industrial average plunged 1,200 points on the news. By the end of the day, the Dow had lost more than 20% from its February peak, threatening the first bear market in 11 years. Some schools in the U.S. were already closed affecting nearly 1 million students. Most others quickly began accelerating spring break vacations, releasing students early. Millions of flights, cruises and hotel nights were cancelled throughout the day. In Oklahoma City, the Thunder was about to battle the visiting Utah Jazz. Shortly before tipoff, the coaches and referees conferred about an unsettling development that Utah Jazz center Rudy Gobert's COVID test

had just come back positive. The game was cancelled and within the hour the NBA had made it official—the season would be suspended until further notice. In Dallas, ESPN trained the camera on Mavericks owner Mark Cuban as he got the news during his game. His jaw dropped and he sank into his chair. In an interview later that night Cuban said, "This is much bigger than the NBA. Will we be sending our kids to school tomorrow? It's like out of a movie. It doesn't seem real."

Unfortunately, it was very real. How leaders, brands, companies, and team members would communicate and act from that day forward will forever change perception and loyalty.



Retailers That Did It Well

In most cases, retailers set the stage by announcing store closures before mall and property owners made any decisions. These are a few examples of retailers and leaders that did it well and why.

Target

Internal Communications: The CEO was immediately visible. There was continuous contact with team members at every level. The company quickly raised wages for more than 300,000 front line workers and offered 30-day paid leave for immunocompromised employees. They also increased salaries of full-time employees working in the field or in offices.

External Communications: The brand communicated clearly and often with customers via owned and shared channels. Target developed and reinforced these key messages: empathy, health, patience and gratitude. The brand quickly implemented and announced its new store cleaning protocol. And, Target created a dedicated COVID microsite to provide timely information.

CEO Note to customers and staff posted March 10, 2020:
<https://corporate.target.com/article/2020/03/target-coronavirus-update>

Establishment of the Target online Coronavirus Hub:
<https://corporate.target.com/about/purpose-history/our-commitments/target-coronavirus-hub>

Patagonia

Internal and External Communications: The retailer halted operations, closed stores and stopped taking orders on March 13, 2020. Patagonia CEO Rose Marcario said in a message published on the company's website, "As COVID-19 spreads — and is now officially a pandemic — we are taking additional safety measures to protect our employees and customers. The scale of impact is still unknown, and we want to do our part to protect our community, especially while testing availability is unknown. The company will continue to pay employees through the closure. We apologize that over the next two weeks, there will be delays on orders and customer-service. We ask for understanding and patience."

The company is known for communicating directly and always putting employees and the environment before profits. Another example: In November 2018, Patagonia announced that it made an additional \$10 million in profits after President Trump lowered the corporate tax rate from 35% to 21% — a tax cut that Patagonia described as "irresponsible." Patagonia promised to donate the entire sum to organizations fighting climate change, once again staying true to its brand.

Owners That Did It Well

Owners are focused on creating and maintaining physical environments that both draw and keep shoppers and diners on property. As local and national retailers and restaurants began to announce closures, owners and property managers were confronted with a crisis never seen in the retail industry.

Somerset Collection

The Somerset Collection is believed to be the first mall in Michigan to announce (on March 18) that it would temporarily close its doors effective 7:00 p.m. on Wednesday, March 20. Full-service restaurants would remain open for curbside pickup. "The overwhelming majority of our retail partners have closed worldwide," Nathan Forbes, managing partner of Forbes Co., said in a media statement. Its four anchor stores including Nordstrom, Macy's, Neiman Marcus and Saks Fifth Avenue had already closed and other smaller retailers were closing even in advance of the decision. "Together, we are putting the safety and well-being of our guests and our employees first. We respect Michigan Governor Whitmer's leadership and decision to further enhance community mitigation by reducing public gathering. We are committed to bringing you the finest shopping, but today we want to bring everyone peace of mind. Somerset Collection looks forward to the opportunity to welcome you back." In conjunction, the company also said it was donating 2,000 meals to the Detroit Rescue Mission Ministries. They were first, they showed empathy, put people before profits and tied it back to the community with the donation.

Within two hours of Somerset's announcement, Simon Property Group announced that it would be closing its 203 worldwide centers.

Easton Town Center, Columbus Ohio

Easton Town Center has more than 250 retailers, restaurants and entertainment venues. Co-developed by Steiner + Associates, the center is one of the top 30 highest-performing retail centers in the U.S. with sales over \$1 billion.

After aligning on messaging, developer Yaromir Steiner and his leadership team divided up the key stakeholders and immediately began communicating with all audiences: employees, customers, retailers, Columbus city officials, partners, lenders, and the media through various owned and shared channels. The company's messaging goals were clear, simple and focused on transparency, empathy, care and connection. Steiner + Associates supported employees and tenants wholly through the shutdown providing any-and-all necessary support. As a predominately outdoor center with more than \$100 million in annual restaurant revenue, Easton Town Center remained open through the entire pandemic, deploying creative solutions to support the tenants that remained open in every possible way. An example included providing additional traffic flow and parking support, as well as leveraging Easton Town Center resources and tools to further market the restaurant tenants. The Easton Community Foundation developed Feeding the Frontline, a partnership with Easton restaurants, to deliver more than 4,000 meals to hospital staff, doctors, nurses and other frontline workers. Since its debut, the Easton Community Foundation has provided over \$8 million in financial support to hundreds of organizations that strengthen the central Ohio community through services and programming in the areas of education, health and social services.

Retailers That Did Not Do It Well

The retailers that failed did so early in the process. There was also a clear pattern for those that did not do well, and it started with how they treated their employees. Generally, employees tend to fall into one of three categories: brand champions, not engaged and actively disengaged. How a company acts and treats its people affects where they live and how they act on each of those spectrums. Employees and consumers have long memories.

Ann Taylor

The company's written COVID Response: "This unprecedented time has been difficult and unsettling, and we've realized that it's our communities that keep us sane, that spread their joy, that bring us hope. So, thank you: Thank you for your loyalty and support. Thanks for being there with us. As we move forward into our new reality, our #1 priority remains your health and safety. We're committed to being cautious, considerate and playful, and are exploring all the ways to bring you the shopping experiences you love with plenty of peace of mind. We hope you're safe and well, and we hope to see you soon, however we can."

The above response never mentions employees, but you can bet that they all read it. As Ann Taylor shuttered its stores worldwide early in the pandemic, it earned praise for announcing that it would continue to pay employees for their scheduled shifts during the closures. Later it was reported that the company misled both the employees and the public. According to employees interviewed, store associates ended up getting paid very little or nothing after the stores cut their scheduled shifts. Employees also said that the company failed to communicate regularly and directly with them during the pandemic. This garnered a great deal of social media and online negativity that was driven predominately by employees and supported through massive amounts

of negative comments from angry customers in support of the employees.

Furlough letter to employees (March 26, 2020):
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and anxiety—then take corresponding measures to support them. Focus on care and connectivity. Deal with human tragedy as the priority.

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Crisis Plan Basics

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Note: Many crisis situations extend beyond the capabilities of an internal team in terms of both complexity and scale. Having a relationship with an outside PR firm before the crises can be extremely beneficial. You don't want to be asking for referrals or searching for experts while your world is unraveling.

STEP 2.

Establish Crisis Communication Channels, Monitoring Systems and Reporting Structure

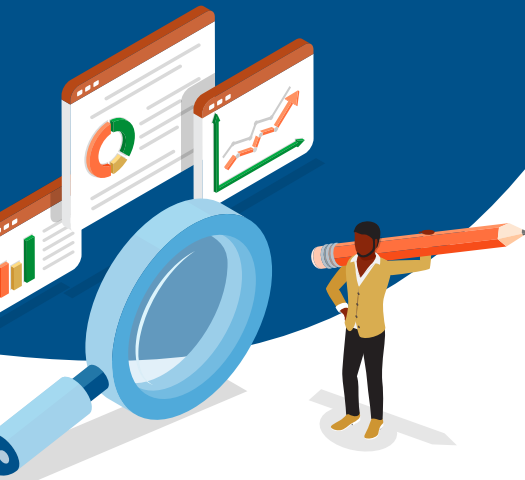
Internal Examples

- + Intranet or dedicated employee portal on website
- + Employee chat tool, such as Slack
- + Contact lists with cell phone numbers, email addresses and home addresses

These systems and tools must be in place and regularly updated before a crisis.

External Examples

- + Email distribution system in place, such as MailChimp or HubSpot
- + Social media channels
- + Key contact lists for tenants, partners, investors, lenders, community officials, city services and others. The list should include cell phone numbers, email addresses, and work and home addresses. This list should be overly comprehensive and housed with a password protected website portal (if applicable).



Monitoring

There are several free and paid systems for monitoring. A great free option is to set up Google Alerts. Paid options include services like Critical Mention, which provides real time media monitoring for print, digital and broadcast outlets. Social media listening tools, such as NetBase, Sprout Social and Hootsuite, cannot catch everything, but they do make the holes of the strainer much smaller. In a crisis, you want to monitor your brand closely to see what employees, customers or others are saying. In the case of a broad crisis like the pandemic, you will want to monitor competitor brands and others to see how they are reacting.

Reporting

Information is worthless unless it gets into the right hands. The team must have a system in place to filter, aggregate, and disseminate information quickly and efficiently to the right people at the right times. That information will inform real-time decision-making.



STEP 3.

Create a Crisis Communication Handbook

Components of the handbook should include

- + A narrative/introduction from the president/CEO
- + A detailed overview of the company's crisis communications step by step process
- + The names and contact information for the Crisis Response Team members and their clearly defined roles and responsibilities
- + The messaging principals
- + Sample crisis situations and response plans, including draft statements. Although no two crisis situations are alike and each will require tailored messaging, going through the process of working through several from beginning to end builds a muscle that will be invaluable during a real crisis situation.
- + Employee, tenant, outside legal, PR firm, lender, community, media, police, fire, etc. home, mobile and office contact information
- + An appendix with blank checklists and call logs, a reporting template, company policies and procedures, fact sheets, key leader bios, press release templates, and copies of business continuity and disaster plans

Summary

In a fast-moving crisis, it's important that a company is prepared and that leaders communicate with their key constituencies, early and often, and with empathy, honesty and transparency.

A company cannot plan for every crisis, but it must be prepared. Deploying the necessary human and financial planning resources ahead of the crisis is a brand's insurance policy.

Contact

Mark Winter
President, Identity
mwinter@identitypr.com

Additional Resources

- + <https://www.prsa.org/about/crisis-communications-resources>
- + <https://www.stevenfink.com/works.htm>
- + <https://www.amazon.com/dp/1954801084?tag=uuid10-20>





ICSC 2022
Michigan Continuing Education Program for Real Estate Professionals
Thursday, February 10, 2022
Novi, Michigan

Covid Crisis Communications

Presented By: Mark Winter
President, Identity
mwinter@identitypr.com
248.568.8334 (cell)

The pandemic induced tremendous uncertainty, fear and anxiety that gave way to disorientation, a deep feeling of loss of control and strong emotional disturbance. To mitigate panic and encourage the right behavioral action, strong leadership and timely, clear and direct communication were critical.

About Identity

Identity has been providing proactive marketing, public relations and communications strategy and support to owners, developers, property managers and consultants in the retail, restaurant, resort/attraction, multifamily, hospitality and mixed-use space for more than 20 years. During that time, we have helped dozens of related organizations navigate hundreds of small and large economic, criminal, political, social, "acts of God" and covid crisis situations.

Some examples include:

- The collapse of the roof of a 1.5 million sf mall
- The suicide of a store manager in the store
- Violent gang activity in an upscale center
- Abrupt leadership changes
- Attraction accidents
- Health code violations for restaurants
- Sexual harassment and discrimination claims
- Employee walkouts and strikes
- Economic hardship and bankruptcies
- Vacancies and evictions
- Shootings
- Recalls
- Covid related responses for all areas of real estate

Although no two crisis situations are alike, there are always common threads through them. The difference between navigating them successfully and failing hinges on several things within your control. Those include strong pre-planning, thoughtful messaging, and timely, accurate and transparent communication.

The Tipping Point: March 11, 2020

The World Health Organization (WHO) held a briefing and declared a pandemic on March 11, 2020. The Dow Jones Industrial average plunged 1,200 points on the news. By the end of the day, the Dow had lost more than 20% from its February peak threatening the first bear market in 11 years. Some schools in the U.S. were already closed affecting nearly 1 million students. Most others quickly began accelerating spring break vacations, releasing students early. Millions of flights, cruises and hotel nights were cancelled throughout the day. In Oklahoma City, the Thunder was about to battle the visiting Utah Jazz. Shortly before tipoff, the coaches and referees conferred about an unsettling development that Utah Jazz center Rudy Gobert's Covid test had just come back positive. The game was cancelled and within the hour the NBA had made it official—the season would be suspended until further notice. In Dallas, ESPN trained the camera on Mavericks owner Mark Cuban as he got the news during his game. His jaw dropped and he sank into his chair. In an interview later that night Cuban said, "This is much bigger than the NBA. Will we be sending our kids to school tomorrow? It's like out of a movie. It doesn't seem real."

Unfortunately, it was very real. How leaders, brands, companies, and team members would communicate and act from that day forward will forever change perception and loyalty.

Retailers that did it well

In most cases, retailers set the stage by announcing store closures before mall and property owners made any decisions. These are a few examples of retailers and leaders that did it well and why.

Target:

Internal communications: The CEO was immediately visible. There was continuous contact with team members at every level. The company quickly raised wages for more than 300,000 front line workers and offered 30-day paid leave for immunocompromised employees. They also increased salaries of full-time employees working in the field or in offices.

External Communications: The brand communicated clearly and often with customers via owned and shared channels. Target developed and reinforced these key messages: empathy, health, patience and gratitude. The brand quickly implemented and announced its new store cleaning protocol. And, Target created a dedicated Covid microsite to provide timely information.

CEO Note to Customers and staff posted March 10, 2020

<https://corporate.target.com/article/2020/03/target-coronavirus-update>

Establishment of the Target online Coronavirus Hub

<https://corporate.target.com/about/purpose-history/our-commitments/target-coronavirus-hub>

Patagonia:

Internal and External Communications: The retailer halted operations, closed stores, and stopped taking orders on March 13, 2020. Patagonia CEO Rose Marcario said in a message published on the company's website, "As COVID-19 spreads — and is now officially a pandemic — we are taking additional safety measures to protect our employees and customers. The scale of impact is still unknown, and we want to do our part to protect our community, especially while testing availability is unknown. The company will continue to pay employees through the closure. We apologize that over the next two weeks, there will be delays on orders and customer-service requests. We ask for understanding and patience." The company is known for communicating directly and always putting employees and the environment before profits. Another example: In November 2018, Patagonia announced that it made an additional \$10 million in profits after President Trump lowered the corporate tax rate from 35% to 21% —a tax cut that Patagonia described as "irresponsible." Patagonia promised to donate the entire sum to organizations fighting climate change—once again staying true to its brand.

<https://www.forbes.com/sites/willyakowicz/2020/03/16/at-billionaire-owned-patagonia-outdoor-clothing-chain-employees-to-be-paid-despite-store-closures-amid-coronavirus/?sh=28c0ff797edd>

Owners that did it well

Owners are focused on creating and maintaining physical environments that both draw and keep shoppers and diners on property. As local and national retailers and restaurants began to announce closures, owners and property managers were confronted with a crisis never seen in the retail industry.

Somerset Collection

The Somerset Collection is believed to be the first mall in Michigan to announced (on March 18) that it would temporarily close its doors effective 7:00 p.m. on Wednesday, March 20. Full-service restaurants would remain open for curbside pickup. "The overwhelming majority of our retail partners have closed worldwide," Nathan Forbes, managing partner of Forbes Co., said in a media statement. Its four anchor stores including Nordstrom, Macy's, Neiman Marcus and Saks Fifth Avenue had already closed and other smaller retailers were closing even in advance of the decision. "Together, we are putting the safety and well-being of our guests and our employees first. We respect Michigan Governor Whitmer's leadership and decision to further enhance community mitigation by reducing public gathering. We are committed to bringing you the finest shopping, but today we want to bring everyone peace of mind. Somerset Collection looks forward to the opportunity to welcome you back." In conjunction, the company also said it was donating 2,000 meals to the Detroit Rescue Mission Ministries. They were first, they showed empathy, put people before profits and tied it back to the community with the donation.

Within two hours of Somerset's announcement, Simon Property Group announced that it would be closing its 203 worldwide centers.

Easton Town Center, Columbus Ohio

Easton Town Center has more than 250 retailers, restaurants and entertainment venues. Developed and managed by Steiner + Associates, the center is one of the top 30 highest-performing retail centers in the U.S. with sales over \$1 billion.

After aligning on messaging, developer Yaromir Steiner and his leadership team divided up the key stakeholders and immediately began communicating with all audiences: employees, customers, retailers, Columbus city officials, partners, lenders and the media through various owned and shared channels. The company's messaging goals were clear, simple and focused on transparency, empathy, care and connection. Steiner + Associates supported employees and tenants wholly through the shutdown providing any-and-all necessary support. As a predominately outdoor center with more than \$100 million in annual restaurant revenue, Easton Town Center remained open through the entire pandemic, deploying creative solutions to support the tenants that remained open in every possible way. An example included providing additional traffic flow and parking support, as well as leveraging Easton Town Center resources and tools to further market the restaurant tenants. The Easton Community Foundation developed Feeding the Frontline, a partnership with Easton restaurants, to deliver more than 4,000 meals to hospital staff, doctors, nurses, and other frontline workers. Since its debut, the Easton Community Foundation has provided over \$8 million in financial support to hundreds of organizations that strengthen the central Ohio community through services and programming in the areas of education, health, and social services.

Retailers that did not do it well

The retailers that failed did so early in the process. There was also a clear pattern for those that did not do well, and it started with how they treated their employees. Generally, employees tend to fall into one of three categories: brand champions, not engaged and actively disengaged. How a company acts and treats its people effects where they live and how they act on each of those spectrums. Employees and consumers both have long memories.

Ann Taylor

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Additional Resources:

<https://www.prsa.org/about/crisis-communications-resources>

<https://www.stevenfink.com/works.htm>

<https://www.amazon.com/dp/1954801084?tag=uuid10-20>



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Suburban Collection Showplace

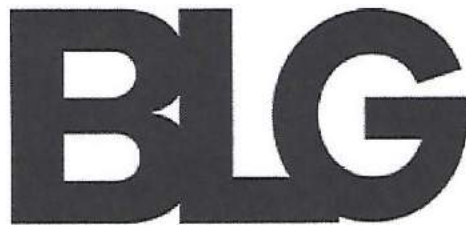
Novi, MI

Wednesday, April 13, 2022

Session Materials

Roundtable 8: SNDA – Why Should Tenants Care?

Led by: Ian Bolton, Esq., Bolton Legal Group PLLC



BOLTON LEGAL GROUP

SDNA – Why Should Tenant's Care?
"2022 Vision: Seeing Beyond Traditional Retail"
ICSC 2022 Michigan Continuing Education Program
For Real Estate Professionals

1. What is an SNDA?

- A Subordination, Non-Disturbance and Attornment Agreement is between a tenant and its landlord's lender (and sometimes the landlord).
- Subordination means the tenant is subordinating its interest to the lender.
- Non-Disturbance allows the tenant to continue to operate in the event of a foreclosure.
- Attornment provides that the Lender steps into the shoes of the Landlord in the event of a default and Tenant must pay the Lender all rent due under the Lease.

2. When is it necessary?

- To establish a privity of contract between the tenant and lender. Without an SNDA, the lender and tenant have no relationship for either party to enforce.

3. Why is it important to the Landlord?

- Landlord's lender likely requires SNDA provision in leases.
- Protects landlord from unnecessary additional litigation in the event of a default by landlord.

4. Why is it important to the Tenant?

- Depending on the size of the deal, possible redevelopment and other factors, Tenants may want to ask if there is a lender before signing a lease and, if so, may want to ask the lender to enter into a non-disturbance agreement.

- May provide for liability of lender in the event of a foreclosure. In other words, lender should be responsible for all of Landlord's duties under the lease, but what about those that preexisted the foreclosure? This provision may need to be negotiated.

5. Where is the room to negotiate?

- Lender Liability post foreclosure
- Tenant liability to lender post foreclosure
- Attorney Fees
- Representations

Sample Lease Clauses

- Simultaneously with execution of this Lease if the Building is subject to any Security Document, or if the Building is not so subject as of the Effective Date, then at any time that the Building is hereafter made subject to any Security Document(s), Landlord shall use commercially reasonable good faith efforts to cause the Holder to deliver an SNDA to Tenant. Notwithstanding anything herein to the contrary, the subordination of this Lease to any Security Document hereafter placed upon the Building, and Tenant's agreement to attorn to the Holder as provided in this Article 12, shall be conditioned upon the Holder entering into an SNDA.
- Within five (5) business days following the Lease Date, Landlord shall provide Tenant with a commercially reasonable subordination, non-disturbance and attornment agreement ("**SNDA**") executed by the current Building mortgagee; such SNDA to provide that, so long as Tenant is not in breach or default with respect to the payment of any Rent or additional sums or in the performance of any of the other provision of this Lease (beyond any period given to Tenant to cure such breach or default), Tenant's use and possession of the Premises under this Lease shall not be diminished or disturbed by such mortgagee. In the event that the Building is refinanced by Landlord during the Lease Term (or any extension or renewal thereof), the subordination of Tenant's rights as set forth in this Section 16 shall be subject to Landlord providing a commercially reasonable SNDA as executed by such successor mortgagee. Notwithstanding the foregoing, it is understood and agreed that Landlord and Tenant have mutually approved the SNDA form provided by Landlord's mortgagee as of the Lease Date which is attached to and made part hereof as Exhibit H.
- This Lease is subject and subordinate at all times to the lien of any mortgage which may now or hereafter affect the Premises, and to all renewals, modifications, amendments, consolidations, replacements and extensions thereof. Tenant shall execute and deliver any instrument which may be reasonably required by Landlord in confirmation of such subordination promptly upon Landlord's request. Landlord, however, shall cause the holder of any mortgage to deliver to Tenant for execution by Tenant and the holder of such mortgage, a subordination non-disturbance and attornment agreement in the standard form used by the holder, with such reasonable revisions thereof as may be requested by Tenant and agreed upon the holder, generally providing, that if, by dispossession, foreclosure, or otherwise the holder, or any successor in interest, comes into possession of the Premises, becomes the owner of the Premises, or takes over the rights of Landlord in the Premises, it will not disturb the possession, use or enjoyment of the Premises by Tenant, its successors or assigns, or disaffirm this Lease or Tenant's rights or estate hereunder, so long as all of Tenant's obligations are fully performed in accordance with the terms of this Lease.

Within ten (10) business days following written request from time to time, Tenant shall execute and deliver to Landlord or its holder of any mortgage, or prospective holder, a sworn statement certifying: (a) the date of commencement of this Lease; (b) the fact that this Lease is unmodified and in full force and effect (or, if there have been modifications to this Lease, that this Lease is in full force and effect, as modified, and stating the date and nature of such modifications); (c) the date to which the Rent and other sums payable under this Lease have been paid; (d) the fact that there are no current defaults under this Lease by either Landlord or Tenant except as specified in such statement; and (e) such other factual matters as may be requested.



ICSC+CONTINUING EDUCATION MICHIGAN

Suburban Collection Showplace

Novi, MI

Wednesday, April 13, 2022

Session Materials

**Roundtable 9: Attorneys & Brokers – Same Client: We ARE on the Same
Team, Right?**

Led by: Robert J. Nolan, Esq., Warner Norcross + Judd LLP

Discussion, by and among Lawyers and Real Estate Professionals, to examine their aligned interests in the transaction for a mutual-client, the aligned duties to the mutual-client, and then frankly discuss – if it always does not feel like the same team, why is that?

Discussion Questions

With these questions for discussion, or similar from the Group, the aim is to gain an understanding of the respective roles, and how to use those roles to cooperatively best assist the client.

Who has said / heard / muttered:

- **How can you represent both sides of the transaction?**
- **You don't know how to get a deal across the finish line.**
- **You are concerned more about your outcome than the outcome for the client.**
- **You are getting in the way of willing parties.**
- **Why did this transaction start with a board form?**
- **Time kills deals - you're killing this deal (maybe I will just send another reminder email)**



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Wednesday, April 13, 2022

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Roundtable 10: 1031 Trends: Where We Were and Where Are We Heading?

Led by: James Gudenau, First American Exchange Company

ICSC 2022 Michigan Continuing Education Program
For Real Estate Professionals
February 10, 2022
Novi, Michigan

1031 Trends: Where We Were and Where Are We Heading?

Presented by
Jim Gudenau
Business Development Manager – Michigan
First American Exchange Company
313.418.5450
jgudenau@firstam.com

Outline

1. Like-kind defined
 - a. What is like kind
 - b. Qualified use
2. Timeframes in a 1031 exchange
 - a. 45 day
 - b. 180 day
3. Common misconceptions in 1031 exchange
 - a. Equal or up in Fair Market Value
 - b. Equal or up in Equity
 - c. Type of investment
4. Capital Gains and Boot
 - a. Same Taxpayer requirement/Partnerships
5. Reverse Exchanges



ICSC+CONTINUING EDUCATION MICHIGAN

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Wednesday, April 13, 2022

Session Materials

Roundtable 11: Build Back Better: Eminent Domain Takings from Commercial Properties for Roads, Utilities and Other Infrastructure Projects

Led by: Jerome Pesick, Esq., Williams, Williams, Rattner and Plunkett, PC

Build Back Better: Eminent Domain Takings from Commercial Properties for Roads, Utilities, and Other Infrastructure Projects

Jerome P. Pesick
Williams Williams
Rattner & Plunkett PC
380 N. Old Woodward, Suite 300
Birmingham, MI 48009
(248) 642-0333
jpesick@wwrplaw.com

I. Introduction: The Power of Eminent Domain

Eminent domain is the power of the government to acquire private property, including entire properties, interests in properties such as easements, and other property rights, without the owner's consent. It is a power that is inherent in every sovereign government including both the federal government and the government of the State of Michigan.

The government's power to take property through eminent domain has been described by the courts as one of the most awesome and severe powers that government may exercise. The government may also delegate this power to certain private entities, which in most instances are utility companies and may also include railroads and others.

II. Build Back Better? Forthcoming Government Projects May Require the Use of Eminent Domain

Recently, there has been a lot of news and analysis regarding the Biden Administration's effort to enact a program that is widely known as "Build Back Better." The program has many components, including proposals to rebuild and improve transportation infrastructure that has been neglected for many years.

In Michigan, the Department of Transportation, county road commissions, and other government agencies maintain lists of priority projects. These lists identify hundreds of roads and bridges that the agencies wish to repair, preserve, improve, and in some instances build new.

Other programs that have been placed under the broad heading of "Build Back Better" include high speed internet infrastructure, improved electricity distribution and capacity, and other utility improvements.

All these projects may involve the need for new property rights, such as physical space necessary for road widenings and electrical towers, as well as easements to accommodate utility installations like communication lines, pipelines, and others.

III. The Exercise of Eminent Domain Under Michigan Law

The State of Michigan has delegated its inherent power of eminent domain through various legislation to cities, counties, townships, and villages, as well as other agencies such as airport authorities, community college districts, drainage boards, school districts, road agencies, and utilities. Any such agency that has received a delegation of the power may use eminent domain to acquire property.

Generally, an owner may learn that the government or a utility is interested in acquiring its property through any number of means, but the formal condemnation process begins with the condemning agency's good faith written offer of compensation to the owner for the property interests that the agency wishes to acquire. The Uniform Condemnation Procedures Act, MCL 213.51 *et seq.* (the "UCPA"), which is the legislation that governs all exercises of eminent domain in Michigan, requires the agency to make such an offer, which the owner can accept and then convey the interests in its property, or reject, which will likely lead to a condemnation action.

When the agency and the owner cannot agree on compensation, the UCPA authorizes the condemning agency, whether it is a government agency or a utility, to file a lawsuit to exercise eminent domain and acquire the property rights regardless of the owner's consent. Any exercise of eminent domain must meet the requirements of both "public use" under the Michigan Constitution and "necessity" under the UCPA. The types of projects that are being discussed under the umbrella of Build Back Better would be difficult to challenge on public use bases: there is a long history of decisions concluding that improvements like roads, utilities, and other public installations satisfy the public use requirement. Similarly, while a taking must be "necessary," the UCPA grants deference to governmental agencies' determinations that it is necessary to take property for some public use. The UCPA is less deferential to privately-owned utilities, but a determination that a particular taking is necessary is nevertheless difficult to overcome.

IV. Just Compensation

Most condemnation actions do not involve challenges to the taking under public use or necessity, but proceed as disputes between the condemning agency and the property owner concerning the amount that the agency must pay as "just compensation" for the taking. The concept of just compensation

requires that the owners from whom property is taken be put in as good a position as they would have been in if the taking had never occurred. Courts have also phrased the standard as that the public should not be enriched at the property owner's expense, but neither should the property owner be enriched at the public's expense.

A. Property Value and Just Compensation

Generally just compensation is based on the property's fair market value, which for eminent domain purposes requires taking into account all elements of value that inhere in the property. No precise definition is possible because every property is different and determining the value of any given property requires judgment and consideration of the facts surrounding that property. So the determination of value has traditionally not been considered a matter of formula or artificial rules, but of sound judgment and discretion based upon a consideration of all the relevant facts in a particular case.

Nevertheless, there are certain concepts that apply in determining a property's value in eminent domain. For example, in eminent domain, unlike other areas of law, market value means the highest price that the property would bring in cash if offered for sale. This is unlike the standard of market value used in ad valorem taxation, for example, which is generally referred to as the "usual selling price". Likewise, a property owner is generally entitled to be compensated based on the highest and best use of its property. Highest and best use recognizes that the use to which a prospective buyer would put the property will influence the price that the buyer would be willing to pay, even if that use is different than the current use. Another concept applicable in valuation in eminent domain is known as project influence. Often the anticipation of a condemnation project will either increase or decrease the value of properties in the project area. Just compensation is to be calculated disregarding the effect that the pending condemnation project had on the property being taken.

B. Partial Takings

Many of the types of projects being touted under the Build Back Better program are likely to involve partial takings. Partial takings involve anything less than the taking of an entire property. They might include taking frontage from a property to expand an intersection, taking rights in a portion of the property to install utilities, or taking easements to cross or otherwise access a property. Generally in a partial taking case the primary means for determining just compensation is estimating the property's market value before the taking and estimating the market value of the property's remainder after the taking, with the difference establishing just compensation.

There are also other methodologies that can be applied to a partial taking. One of them is the part taken rule, which basically involves independently valuing the portion of the property being taken and analyzing whether there is an adverse impact or damages to the value of the property that remains. The independent value and the amount of any damages are then added to reach “just compensation.” Another partial taking damage analysis is known as the cost to cure. This typically involves the taking damaging the remainder property, but in a manner that can be remedied to some degree through investment into the remainder. By way of example, although a shopping center property may lose a portion of its parking to a taking, there may be a way to reconfigure the parking lot to minimize the loss of parking. That cost to reconfigure the lot, which is the “cost to cure,” can be a measure of compensation so long as it does not exceed the difference in the property’s value without the cure. In other words, the law will not allow more compensation to correct a problem than the problem causes in the first place.

It is important to note that with a partial taking, it is only in the before-taking situation that the impact of the project is ignored. In the after-taking valuation, the analysis presumes that the condemning agency will use all the rights it is acquiring through eminent domain to the fullest extent that the law allows.

For shopping centers and other retail properties, partial takings can cause problems like reduced setbacks and greenbelts, reductions and alterations in parking and on-site traffic circulation, and any number of property-specific problems that cannot be known until they arise. Any such problems should be taken into account when determining just compensation for a partial taking.

C. Some Limitations on Market Value and Just Compensation

Even though the Supreme Court broadly requires that all factors relevant to market value be taken into account in determining just compensation, there are a number of special limitations on market value that can be considered. One of these is the UCPA’s requirement that the general effects of a project for which property is taken must be ignored. The concept is that a property that suffers effects from a public project that also impact properties that were not subject to any takings, should not be compensated for those effects, because they are experienced in common. Examples of these “general effects” include noise, dust, and fumes that can result from a roadway project. Distinguishing “general effects” from effects specific to a particular property can be difficult, but whether any particular effect of a project is a general effect or specific to a property is generally left for the jury to decide.

Certain impacts on traffic are another species of damage that the courts have required to be excluded from consideration when determining just compensation. For example, an impact on a property that requires what the courts have described as more “circuitry” to enter the property are not a basis for compensation. This all contrasts, however, with actual reductions in access, such as the elimination of driveways, which is proper to take into account when determining just compensation.

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ICSC+CONTINUING EDUCATION MICHIGAN

Suburban Collection Showplace

Novi, MI

Wednesday, April 13, 2022

Session Materials

**Roundtable 12: Property Tax Considerations for Shopping Centers, Even in a
Good Market**

Led by: Jason C. Long, Esq., Williams, Williams, Rattner and Plunkett, PC

Property Tax Considerations for Shopping Centers, Even in a Good Market

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I. Property Tax Basics

Michigan's property tax system places three different values on parcels of real property, and a fourth is sometimes used in assessing practice. Under these values, both the general price level determined by the consumer price index (CPI) and the real estate market can influence a property's tax obligation.

A. "True cash value." The General Property Tax Act, MCL 211.1 *et seq.*, (the "GPTA"), defines a property's true cash value to mean its "usual selling price" under certain circumstances:

As used in this act, "true cash value" means the usual selling price at the place where the property to which the term is applied is at the time of assessment, being the price that could be obtained for the property at private sale, and not at auction sale except as otherwise provided in this section, or at forced sale. The usual selling price may include sales at public auction held by a nongovernmental agency or person if those sales have become a common method of acquisition in the jurisdiction for the class of property being valued. The usual selling price does not include sales at public auction if the sale is part of a liquidation of the seller's assets in a bankruptcy proceeding or if the seller is unable to use common marketing techniques to obtain the usual selling price for the property.

Michigan's courts have long held that "true cash value" is generally synonymous with the common conception of "market value."

B. "Assessed value." A property's assessed value should equal 50% of its true cash value. Historically, a property's assessed value provided the basis for determining the amount of property tax that would be due for that property. That changed when Michigan voters adopted Proposal A in 1994 to amend the Michigan Constitution by introducing the concept of "taxable value." Beginning in 1995,

taxable value replaced assessed value as the basis for determining the amount of tax that is due for a property. MCL 211.27a.

C. “Taxable value.” The 1994 amendments to the constitution directed the Legislature to provide for a concept of “taxable value.” In 1995, every property was assigned a “taxable value” that was equivalent to its assessed value. But unlike assessed value, which should always equal 50% of market value, a property’s taxable value changes annually by the amount of the CPI or 5%, whichever is less, until the property is transferred.

For taxes levied in 1995 and each year thereafter, the legislature shall provide that the taxable value of each parcel of property . . . shall not increase each year by more than the increase in the immediately preceding year in the general price level . . . or 5 percent, whichever is less until ownership of the parcel of property is transferred.

Under this provision, a property’s assessed value will continue to equal 50% of its market value, but the property’s taxable value is calculated separately, based on the CPI.

1. Taxable value cannot exceed assessed value. Regardless of the CPI calculation, a property’s taxable value cannot exceed its assessed value. Thus, even if the CPI is trending upward, if real estate values and therefore assessed values are not trending upward in an at least equivalent amount, then taxable value will at the maximum equal assessed value. Assessed value acts as an absolute limit on taxable value.

2. The consequences of assessed and taxable values. Proposal A has had some expected and perhaps unexpected consequences. The taxable value cap protects long-term property owners against rising taxes in an increasing real estate market. Assessed values must track market values, but taxable values cannot increase by more than 5% annually. In a rising market, a property’s taxable value, and thus its tax burden, should not increase by more than 5%, regardless of increases in market value.

This can create distinctions between properties in long-term ownership and properties that have been transferred. Under the assessed value-taxable value system, two otherwise identical properties could have significantly different tax burdens depending on the period of their respective ownerships. A property in long-term ownership would enjoy the benefits of the cap in a rising market, while a property that has been transferred will have its taxable value set in the amount of its assessed value, which is 50% of its market value.

Perhaps unexpectedly, Proposal A can result in tax increases in a declining market. After a period of market increases, properties in long-term ownership will have gaps between their taxable and assessed values. If the real estate market begins to flatten or decline, as happened during the “Great Recession,” assessed values will remain constant or decrease. But even when assessed values are flat or decreasing, taxable values may increase by the amount of the CPI as long as the resulting taxable value does not exceed the assessed value. Thus, even in a declining market, a property’s taxable value may increase, increasing the basis for determining the amount of tax due.

D. “Capped value.” Although there is no concept of “capped value” in the GPTA, some administrative materials and assessing records use this term. “Capped value” is merely a property’s taxable value in year one multiplied by the CPI multiplier for year two. If the capped value in year two is greater than the assessed value in year two, then the taxable value must equal the assessed value for that year. This is how taxing jurisdictions determine whether assessed value acts as an absolute limit on taxable value.

II. Property Tax Considerations for Shopping Centers, Even in a Good Market

When the real estate market is struggling, much of the focus of property tax analysis is whether a property’s value is sufficient to support its assessed and taxable values. In a favorable market, that tends to be less important. But even in a favorable market, there are provisions in Michigan’s property tax laws that can impact purchasing, selling, improving, and managing retail properties.

A. “Transfers.” First, if there is a gap between a property’s taxable value and its assessed value, the taxable value can increase to equal the assessed value upon the property’s “transfer.” This increase in taxable value is commonly known as an “uncapping.” Under Michigan’s property tax system, a sale between unrelated parties will likely qualify as a “transfer” that will authorize an uncapping. The GPTA provides a list of transactions that will qualify as “transfers,” which generally include the conveyance of title to or a present interest in property. In addition, the GPTA includes a list of transactions that are excluded from the definition of “transfer,” though they are limited to the type of transactions that do not involve a substantive change in control, such as conveyances among affiliated entities, tax-free reorganizations, and other similar scenarios. The new owner in any transaction is generally required to file a property transfer affidavit notifying the taxing jurisdiction of the transfer of ownership.

B. Purchasing a property from a long-term owner. The Michigan Constitution provides that the Proposal A “cap” that limits annual taxable value increases to 5% can be lifted when a “property is transferred as defined by law.” A sale between unrelated parties would generally result in the taxable value cap lifting

and taxable value equaling assessed value in the year after the transaction. This can affect the analysis of a potential purchase when the seller is a long-term owner.

1. Effect on expense analysis. When conducting due diligence for a prospective purchase from a long-term property owner, for example, the buyer must be aware that it may not be able to rely on the seller's property tax expense to represent the property's expenses moving forward. The buyer must investigate whether there is a gap between the property's assessed and taxable value that will be eliminated in the year after the purchase. If there is such a gap, then assessed value will provide a more reliable basis for the buyer to attempt to analyze the tax expense, because the taxable value will change because of the transaction. This is important for any property but can be particularly significant for a property that includes gross leases.

2. Effect on negotiations. When a purchase is likely to result in a significant increase in taxable value, the purchaser may be able to use that in negotiations. After all, when a purchaser acquires property from a long-term owner that benefited from the Proposal A cap, the purchaser is embracing a tax increase as compared to the seller, meaning that the purchaser will have a different income and expense structure than the seller. The fact that a taxable value increase can make a property more expensive to operate for a purchaser or more expensive for tenants to occupy than it was during the seller's ownership may be a factor for purchasers to raise in negotiations.

3. Purchasing from a short-term owner. Even if a property's seller is not a long-term owner, there can still be instances when a property's taxable value is less than its assessed value. This can be due to "additions" or "losses" to the property, and to other considerations. So even when a purchase is not from a long-term owner, a purchaser should investigate any difference between a property's assessed and taxable values when analyzing the property's expenses.

C. The role of the purchase price. When analyzing the tax expense that an owner may have to carry after purchasing a property, the purchaser should not presume that its purchase price will set the true cash value.

1. The sale price is not the presumptive true cash value. The GPTA provides that "the purchase price paid in a transfer of property is not the presumptive true cash value of the property transferred." Interestingly, bills to revise this section to provide that a property's purchase price is its presumptive true cash value have been introduced in the Legislature a number of times but have never been approved.

2. The role of leases in a retail property's sale. Other factors that can impact whether a property's assessed value will mirror its sale price are the timing of the property's leases and the identity of the tenants. Under the GPTA, a property's

assessed value is determined as of each December 31. But if a property is subject to leases entered into years earlier, in different market conditions than on the December 31 valuation date, that can mean that the sale price will be more or less than the market. Likewise, if a property is leased to reliable tenants, that too will affect its sale price. But under Michigan court decisions addressing valuation principles, the identity of a property's tenants should not be a factor in determining its value for tax purposes. The reliability of a property's income stream must therefore be generalized to the market for purposes of valuation.

D. The timing of a purchase. When there is a gap between a property's assessed value and its taxable value, such that the purchase is likely to result in the taxable value increasing, it is to the purchaser's benefit to close the sale early in the calendar year. This is because a property's taxable value cannot uncap until the year after the transfer. When the purchaser closes its purchase early in the calendar year, it can benefit from paying the taxes under the seller's "capped" taxable value until the next calendar year. Closing a sale depends on many factors that may be more significant than a temporary property tax benefit, but all other things being equal, a purchaser acquiring a property with a gap between its assessed and taxable values benefits from closing the sale earlier in the year.

E. Considerations for leases. The same factors that can affect a property's sale can also play a role in leasing. For example, if a property is in long-term ownership and is benefitting from a taxable value that effectively reduces the property's tax rate, the possibility that the property will sell and experience an increase in its taxable value is something that a prospective tenant must bear in mind. The tenant may wish to protect itself through entering into a gross lease, or incorporating a base year, multiplier, expense stop, or other mechanism to protect against the tax increase that could result from a sale.

F. Considerations for Changes in Ownership and Partners. In a favorable market, property owners may wish to welcome new investors into a project, purchase the interests of existing investors, or make other changes in the composition of entities that own real property. Under the GPTA, transactions involving the composition of an ownership entity can also result in a "transfer of ownership" and therefore an increase in a property's taxable value. For example, the GPTA addresses the consequences of selling interests in entities like limited liability companies that own property. Generally, a conveyance of more than a 50% interest is necessary for such a transaction to result in a transfer of ownership. But under guidelines from the State Tax Commission that taxing jurisdictions must follow, the percentages are analyzed cumulatively since the last transfer of ownership for the property involved. So if a single-member LLC purchases a property, and then in year two the single member conveys a 25% interest in an to a new member, that should not be a transfer; neither is the conveyance of another 25% in year three; but after those two

conveyances, the next conveyance in any amount will result in a transfer of ownership.

1. Taking on or eliminating a partner. The example above illustrates the process when an entity sells interests to a new member in an amount less than 50% of the interests in the entity. If the interests sold to new members exceed 50% of the interests in the entity, however, that would result in a transfer of ownership. For example, if a single-member entity sells two one-third ownership interests, such that the result is that there are three equal partners in the entity, that will result in a transfer of ownership justifying an uncapping.

The same analysis would apply if one existing partner purchases the interests of another existing partner. For example, if an entity with three equal partners who each own a one-third interest in the entity purchased a property in year one, and in year five, one partner purchased another partner's interest (such that the partner became a two-thirds owner), that should not be an uncapping. If that one partner purchased both other partners' interests, however, such that two one-third interests were transferred to the one partner, that would be a transfer of ownership that would justify an uncapping.

2. Retroactive changes. Importantly, the change in a property's assessment resulting from a transfer of ownership can be both implemented and corrected retroactively. If a property experiences a transfer of ownership, including for example a transfer resulting from a change in the persons that own interests in an entity, and the change is not reported through a property transfer affidavit, and the taxing jurisdiction learns of the transfer later, the taxing jurisdiction can retroactively uncaps the property's taxable value. It can do so without limitation as to the number of years, and the owner will not be able to challenge the value placed on the property, only whether a transfer occurred. If a taxing jurisdiction incorrectly uncaps a property's taxable value, the owner can seek a retroactive correction, but only for the current year and three preceding years, and only through the jurisdiction's July or December board of review.

3. Other issues involving entity interests. Some transactions involving the composition of an entity that owns real property present ambiguous questions whether an uncapping may result. The guidelines that cumulatively count partial interest conveyances in particular can raise questions. For example, if an entity that owns real property has three partners, one of which is a 52% owner and the other two are each 24% owners, the guidelines suggest that if the two 24% owners each sell their interests to new investors, the next transaction (presuming that it involves more than a 2% interest) would result in an uncapping, even if the 52% owner – the majority owner – remains the same throughout.

Similarly, there are exclusions from the definition of “transfer of ownership” for certain transactions involving entities under common control. That in turn raises questions about what “common control” means. Historically, the State Tax Commission’s guidelines required 80% commonality, but recently the courts have rejected that rule and focused on whether the power to direct an entity’s affairs is held in common. That can require analysis of any particular entity’s structure to determine whether it is directed in common with another entity.

III. Appealing Property Taxes

If an owner or other party in interest is not satisfied with the assessment placed on a property, it can appeal the assessment. There are a number of factors to know about appealing an assessment, including ways it can backfire.

A. Property tax appeals in general. The assessment placed on property classified as commercial real property, which will encompass most shopping centers and other retail properties, can be appealed by filing a petition with the Michigan Tax Tribunal by May 31 of the tax year involved. No longer must the property’s assessment be protested before the local board of review. Notably, a property’s classification as commercial for tax purposes is not necessarily reflective of the property’s zoning. Taxpayers should consult the property’s assessment notice to determine its classification for tax purposes.

B. Who can appeal. As a general matter, any “party in interest” in a property can submit an appeal for that property to the Michigan Tax Tribunal. Under the “party in interest” language, owners, tenants, land contract purchasers, and users with an interest in a property have been permitted to appeal. But the interest must be an interest in the property itself. Thus, when the corporate parent of an entity that was a tenant at a property sought to appeal the property’s assessment, a Michigan court held that only the tenant, and not the corporate parent, could file the appeal. The corporate parent did not have an interest in the property itself.

Whether a tenant’s lease gives the tenant the right to appeal is a matter that might be negotiated between the landlord and tenant. Even if a tenant leases only a suite or a portion of a property, that is a sufficient interest in the property for the tenant to appeal the property as a whole, as the assessment would in all likelihood be for the property as a whole. Landlords must consider whether they want to contractually limit a tenant’s ability to file an appeal for a property, notwithstanding that a tenant’s interest in a property renders the tenant a “party in interest.”

C. Appealing in the year after a transfer. A purchaser that appeals the assessment on a property in the year after the purchase will be appealing the property’s assessment in the year in which the assessment is uncapped. Accordingly, whatever the property’s true cash value is determined to be as a result of the appeal,

its taxable value will equal half that amount. This is different than an appeal in a year in which a property has not been transferred. In those years, whatever the property's true cash value is determined to be, and therefore whatever its assessed value is determined to be, its taxable value cannot increase as a result of the appeal. The taxable value in such cases can only decrease or stay the same. But in the year after a transfer, the "cap" on taxable value does not apply, and therefore both valuation and taxable value are open questions. Thus, if a property had actually been undervalued by its assessment before purchase, there is a potential "downside" to appealing in the year after a purchase.

IV. Other Considerations for Retail Properties

There are a few other property tax concepts and mechanisms that owners, tenants, and other users of retail property (and any property!) should be sure to know.

A. Look-back for omitted and improperly reported property. Under the GPTA, a taxing jurisdiction such as a city or township can request that the State Tax Commission alter a property's assessment to add omitted or improperly reported property. For example, this would allow for the retroactive addition to a property's assessment for building amenities that initially had been omitted from the assessment. The look-back provision allows this to be done in a current year and for two previous years. But taxes cannot be retrospectively changed through this procedure beyond a change in the property's ownership.

B. Personal property tax continues to apply to retail property. To much fanfare, Michigan changed its personal property tax laws beginning with the 2014 tax year. But the changes were primarily focused on industrial property, and even that was primarily focused on manufacturing property. In general, the personal property used in a retail operation will continue to be subject to personal property tax. This will mean that the owner of such property would continue to have to file personal property statements and pay taxes on such property, which might include shelving, racks, checkout equipment, and many other items used in a retail operation. The "small business" exemption may be available if the total true cash value of the equipment is less than \$80,000, which increases to \$180,000 for 2023.

Jason C. Long is a shareholder with Williams Williams Rattner & Plunkett, PC, in Birmingham. He represents clients confronting property tax issues and has dealt with issues including valuation; transfers of ownership; exemptions for religious, charitable, agricultural, and other uses; errors in billing; tax foreclosure; incentives and cancellation of incentives; and many others. Mr. Long represents clients including property owners and municipalities, and has done so before municipal bodies and circuit courts across the State, as well as before the State Tax Commission, the Tax Tribunal, the Court of Appeals, and the Supreme Court. He is a summa cum laude graduate of Oakland University and the University of Detroit Mercy School of Law, studied real estate development at the University of Michigan Ross School of Business, and is a former judicial clerk at the Michigan Supreme Court.



ICSC+CONTINUING EDUCATION MICHIGAN

Suburban Collection Showplace

Novi, MI

Wednesday, April 13, 2022

Session Materials

**Roundtable 13: Urban and Industrial Properties: Environmental Liabilities or
Real Estate Opportunities?**

Led by: Rick Welsh, ASTI Environmental

2022 Vision: Seeing Beyond Traditional Retail

ICSC 2022 Michigan Continuing Education Program

For Real Estate Professionals

Thursday, February 10th, 2022

Suburban Collection Showplace, Novi, MI

Torch Lake, MI in 1980

White sand

Torch Lake, MI summer 2020

Brown Algae on Bottom

**Urban and Commercial/Industrial Properties, Environmental
Liabilities or Real Estate Opportunities?**

Rick Welsh, ASTI Environmental, Inc.



What are the process and issues?

Agenda

- Phase I Records Search
- Phase II Sampling
- BEA & DCP process
- Common Contaminants (e.g., Arsenic, PNAs, Mercury)
- Slide background/fills
- Other needs?
 - Property Condition Assessment (PCA)?
 - Environmental Compliance Assessment?
 - Wetlands Delineation?



Phase I ESA

Phase I Environmental Site Assessment (ESA)

- Desk top study, search records to identify environmental contamination.
- How much do they cost?
- How long do they last?
- New purchaser versus existing landowner?
- 2005 (& 2013 Update to Reference ASTM) – **USEPA All Appropriate Inquiry (AAI)**
 - Performing all appropriate inquiries (AAI) is the process of evaluating a property's environmental conditions and assessing potential liability for any contamination
- 2013 / 2021 Update – American Society for Testing and Materials (ASTM), voluntary standard for conducting a Phase I environmental site assessment (ASTM E1527-13)



<https://www.epa.gov/enforcement/landowner-liability-protections>

Phase I ESA

ASTM Phase I Changes for 2021

- A site inspection
- A site walk and interviews with knowledgeable site
- Review of pertinent MDEQ, City, Township, and County records
- Acquisition and review of a federal and state database search
- Review of historical aerial photographs, Sanborn and topographic maps, and city directories.
- Review of prior environmental investigations (if provided)



Phase I ESA

Why and when should an asbestos / lead paint / mold / radon inspection be completed?

ASTM, Non-Scope Issues

- Asbestos Containing Materials (ACM)
- Lead Based Paint (LBP)
- Mold
- Radon
- Survey versus close out report?



Phase I ESA

Residential, Agricultural

What do we look for?

Screening: Field Inspection

- Vents, pipes
- Heating Oil
- Underground storage tanks?
- Above ground storage tanks?
- Distressed vegetation
- Chemical storage containers
- Pits, ponds
- Stained soil or pavement
- Odors
- Dumped material , mounds of dirt, rubble, fill
- Orchards
 - *Lead-Arsenic Pesticides*



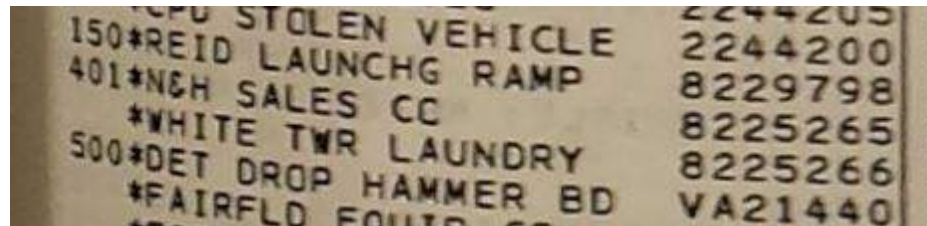
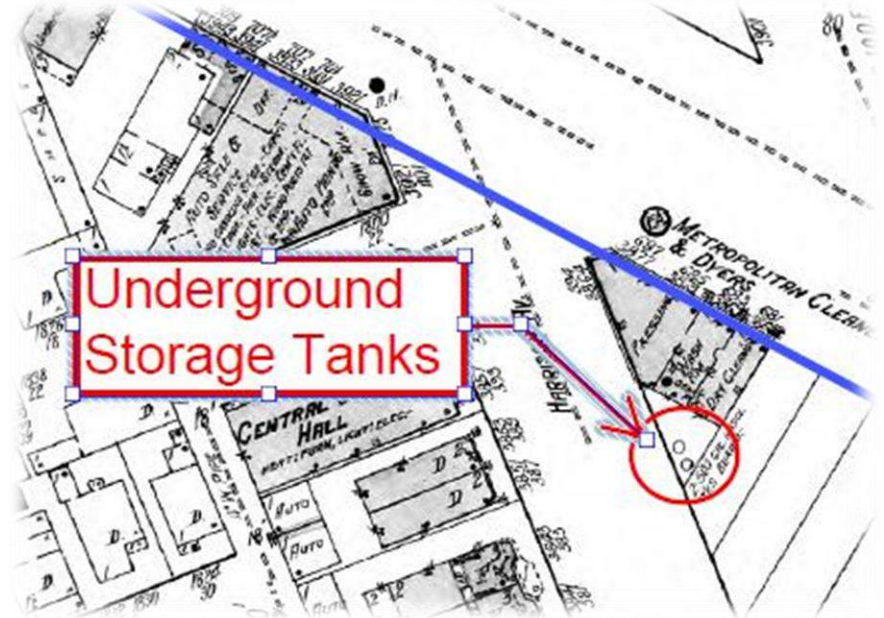
Back-40 Waste Containers

Phase I ESA

What do we look for?

Screening: Historic Use

- Aerial Photographs
- Sanborn Fire Insurance Maps
- Topographic Maps
- City Directories
- Title Search



Phase II ESA

- Sampling various media –

- Soil,
- Ground water,
- Surface water
- Soil Gas

- Compare to relevant criteria to determine need for cleanup or risk management



Agriculture Burn Pile



Geoprobe Drilling Rig

Baseline Environmental Assessment (BEA)

- Allows a person to **acquire or begin operating at a facility without being held liable for preexisting contamination.**

- BEA

- “Facility” – Exceed Michigan Residential GRCC
- Phase I ESA results
- Phase II ESA Results
- File with Michigan DEQ / EGLE
- Must be conducted prior to or within 45 days of Purchase
- Have 6 months to file

Due Care Obligations

- All owners and operators of a facility, even if you are not liable for the contamination, have “due care” obligations.
- “Due care” means that an owner or operator of a facility is required to take measures to prevent unacceptable exposures to hazardous substances or create conditions that worsen the contamination.
- Examples of due care obligations:
 - Vapor intrusion to indoor air
 - Direct contact with contaminated surface soils
 - Onsite groundwater wells, drinking contaminated groundwater



Hypothetical Case Studies

Example 1, Modern Industrial Park, Greenfield Development

- Small lawn on side of the tilt up building
- Michigan EGLE Generic Cleanup Criteria for the metal lead (Pb) in soil
 - Residential Land Use – Child 350 days/year, 30 years
 - GRCC **400** parts-per-million (ppm), mg/kg
 - Nonresidential Land Use – Worker 250 days/year, 25 years
 - GNRCC **900** ppm
- Site Specific Cleanup Levels
 - Natural Resources and Environmental Protection Act (NREPA), “Part 201”, Section 324.20120b Numeric or nonnumeric site-specific criteria
 - Assume a landscape worker 1 day/week, 6 months/year
 - Greater than 10 higher, e.g., **9,000** ppm



Hypothetical Case Studies

Example 2, Urban Area (e.g., Detroit) Residential/Commercial Site/Plaza, PNAs & Arsenic

- Why are polynuclear aromatic hydrocarbons (PNAs) in urban areas? 1 to 10 ppm are normal.
- Is arsenic in soil? Yes, statewide background is 5.8 ppm.
- What are the EGLE Residential GRCC?
 - PNA benzo(a)pyrene is 2 ppm
 - Arsenic is 7.6 ppm
- What are the EGLE Non-Residential GNRCC?
 - PNA benzo(a)pyrene is 8 ppm
 - Arsenic is 37 ppm
- Direct Contact, limited to greenspace areas
 - Clean imported fills
 - Use Non-Residential GNRCC or Site-Specific Cleanup Levels

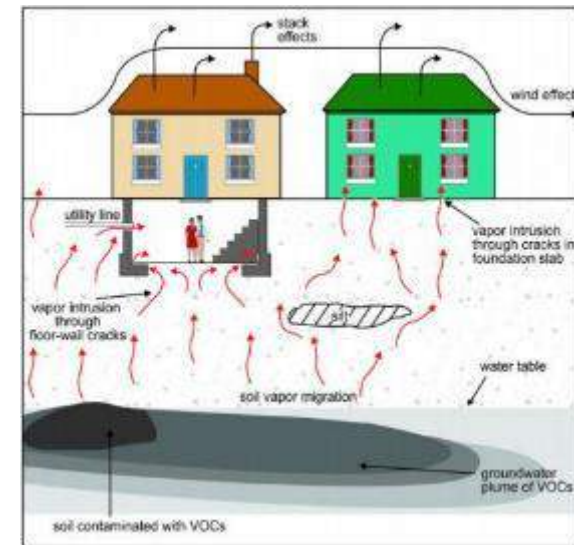


Hypothetical Case Studies

Example 3, Urban Area (e.g., Detroit), Industrial Site, Volatiles

- Soil Contaminants
 - Volatile PNAs, background 1 to 10 ppm
 - Mercury, background 0.13 ppm
 - Dry Cleaners, see following slides
 - Gas Station, see following slides
- What are the EGLE Residential VIAP (1) Screening Levels?
 - PNA Phenanthrene is 1.7 ppm
 - Mercury is 0.022 ppm
- What are the EGLE Non-Residential GNRCC?
 - PNA phenanthrene is 29 ppm
 - Mercury is 0.39 ppm
- Solutions: background in soil, non-residential GNRCC, vapor sampling, site-specific cleanup levels.

(1) EGLE Volatilization to Indoor Air Pathway (VIAP) Screening Levels





Vapor Intrusion

Infrared
Black Vapor Cloud



8:05:18 PM

Vapor Intrusion, Comparisons

Regulatory Levels

- Dry Cleaners, Perchloroethylene (PCE)
- **EGL** VIAP Screening Level
 - Residential, **PCE 0.0062 ppm**, **TCE 0.00033 $\mu\text{g}/\text{m}^3$**
- **OSHA** Worker Permissible Exposure Level (PEL)
 - **PCE 100 ppm**, **TCE 100 ppm**

USEPA Study, PCE in Indoor Air, Tichenore et al. 1990

- Man's suite, woman's skirt, 2 blouses
- Placed in closet
 - Dry Cleaned Cloths, in **Bedroom Closet**
PCE 0.2 ppm

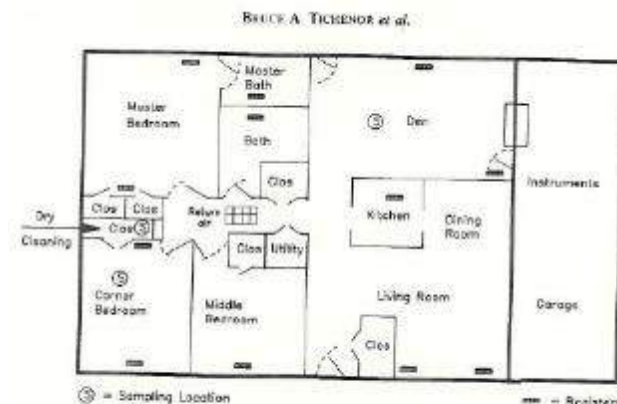


Fig. 1. IAQ test house.

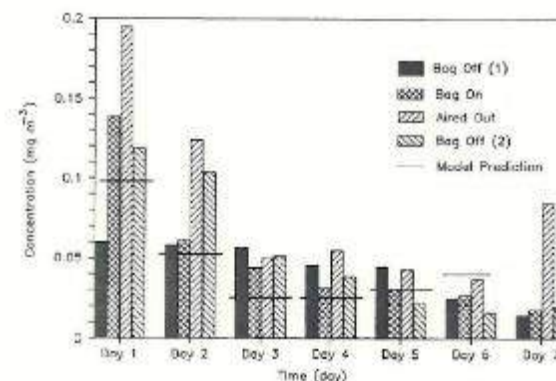


Fig. 4. Perchloroethylene in bedroom.

Vapor Intrusion

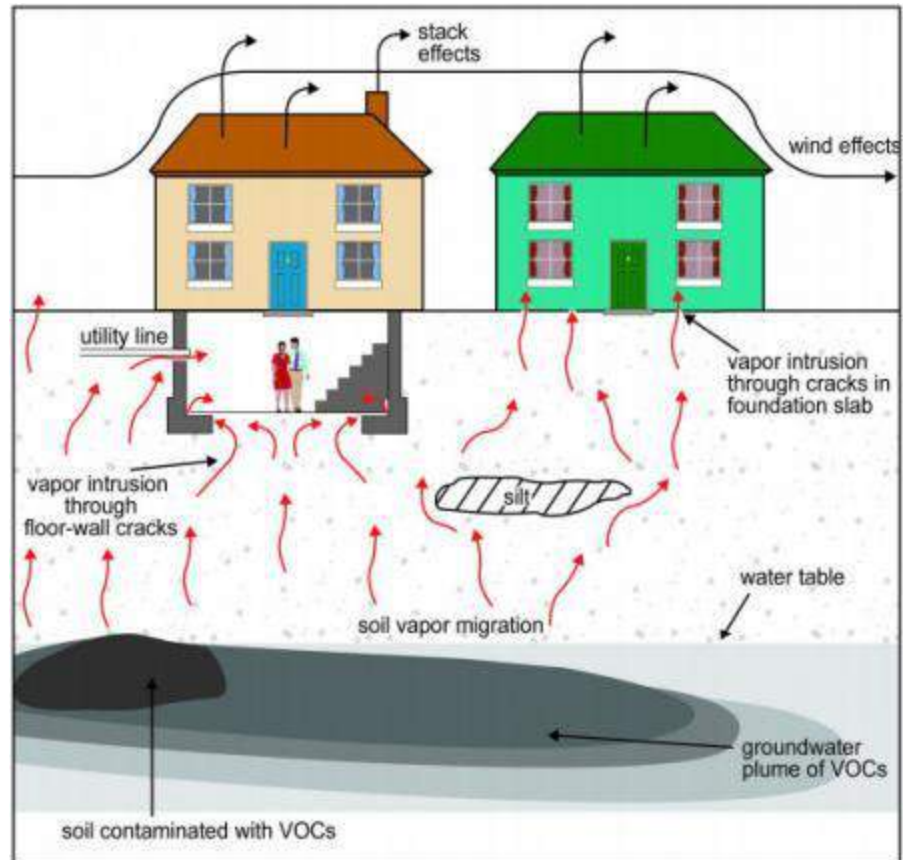
Vapor-forming chemicals may include:

- Volatile organic compounds (VOCs), such as trichloroethylene (e.g., **Dry Cleaners**) and benzene (**Gas or Diesel Tanks**).

• *Note, a source next door can delay your project!*

- Select semi-volatile organic compounds (SVOCs), such as naphthalene (e.g., **Heating Oil Tanks**)

- Elemental mercury (e.g., **Golf Courses**)

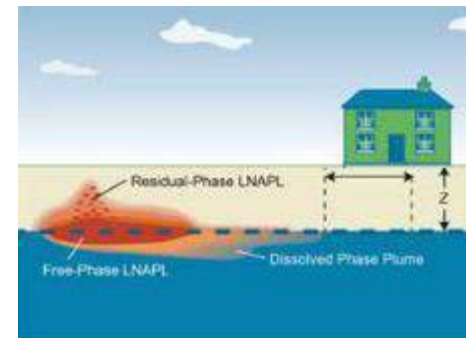


Vapor Intrusion

- 65% of Michigan has groundwater <10 feet below the surface
- MDEQ Lateral Inclusion Zone
 - The horizontal distance beyond a vapor source that may make a property or structure vulnerable to the migration of vapors



- Chlorinated Solvents 100 feet



- Petroleum 30 feet

Vapor Intrusion

Sub-Slab Sampling

- Drill
- Insert Pin
- Check for leaks
- Collect Sample

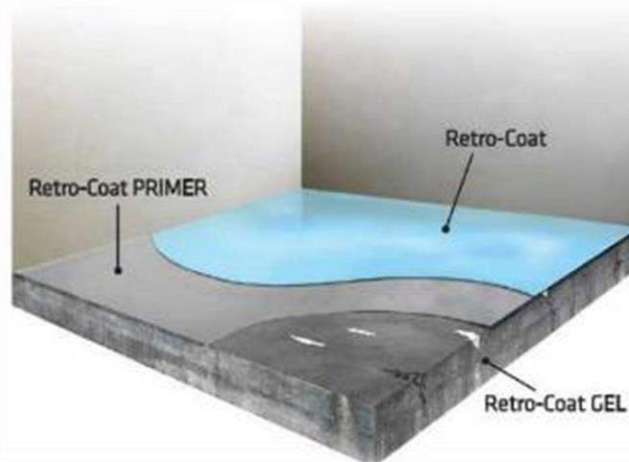
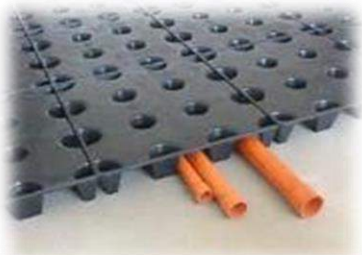


- Helium Chamber



Vapor Intrusion

- Common Mitigation Methods for New Structures
- Passive Mitigation Systems:
 - Floor Sealants
 - Liner with venting system



More Information

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Contact ASTI Environmental

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Director, Property Services Group

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Novi, MI

Wednesday, April 13, 2022

Session Materials

**Roundtable 14: The Pressure for Vapor Mitigation: Does It Really Have to Be a
Drain?**

Led by: Thomas Wackerman, ASTI Environmental

The Pressure for Vapor Mitigation: Does it Really Have to Suck?¹

April 13, 2022

***Presented by
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President
ASTI Environmental***

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1 - A thank you to EGLE for having first suggested this title in their seminar.

INTRODUCTION

In addition to the statutory liability protection it provides, real estate developers, property managers and brokers need two major outcomes from environmental due diligence: determining hidden environmental costs for purchase or operation, and identifying due care obligations. For over seven years one of those obligations that incurs hidden costs has been the potential for vapor migration into buildings, yet a surprising few real estate professionals understand the impact of this issue on development cost, timing, or on-going obligations.

In cases where volatile compounds were historically used on or adjacent to a property, additional assessment will be required when purchasing or refinancing property for new construction or renovation. These assessments will then be used to determine if a vapor mitigation system is required, suggested, or just a good idea, and equally important, to provide defensive documentation to show that you have met your due care obligations. It may seem obvious that a standardized solution would be available, however, the intended future use (or continued current use) of the property, current soil and building conditions, and even the funding sources used, can determine the extent of both the assessment and mitigation, and more importantly, will determine the impact on the property redevelopment time-line. By the end of the session, the real estate professional will be able to understand when a vapor assessment is required, the different types of mitigation measures and how they impact real estate development, the impacts on site development when conducting a voluntary closure versus getting EGLE approval, and the EGLE approval process.

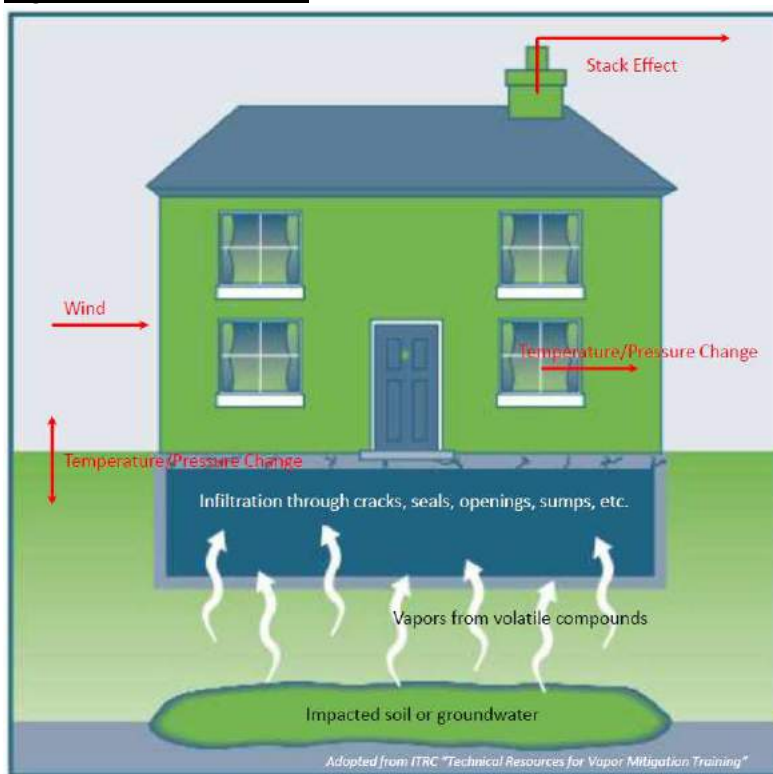
WHAT IS VAPOR INTRUSION?

The basic concept is that certain contaminants in soils or groundwater can volatilize and then migrate into buildings, where they can accumulate. If that migration results in sufficiently high concentrations, indoor air may present a threat to the health and safety of building occupants and the public (Figure 1) and controls would be needed.

The list of compounds that can potentially migrate into buildings (the chemicals of concern or COCs) varies by regulatory agency. Every list includes volatile organics (VOCs), but some states, including Michigan, also include semi-volatile compounds (PAHs or PNAs) and some inorganic compounds such as mercury. Migration of these chemicals of concern is driven by a number of factors, including temperature, barometric pressure, building pressure, wind, soil types, and groundwater flow. Whether these chemicals of concern actually impact a building interior is dependent on a number of factors such as concentration of the chemical at the source, distance to the building, building construction, and building condition. Whether the chemicals of concern

are a threat to health and safety depends on the toxicity of the chemical, air exchange rates in the building, occupancy durations in the building, and ultimately, the indoor air concentrations in the building over time.

Figure 1 Basic Concept



From there it gets a bit more complicated. The complexity comes from predicting indoor concentrations based on soil, soil gas, and groundwater samples collected outside the building envelop.

Predicting whether a specific soil or groundwater impact may result in unacceptable indoor air levels due to migration is based on a model (the Johnson-Ettinger Model) as adjusted by EGLE policy, procedures, or interpretation. That involves a series of generic property and

building assumptions, and any deviation from those assumptions requires that a site-specific determination be conducted (Figure 2) – meaning that site-specific data is required. Of particular concern for determining site-specific criteria in Michigan are the presence of fill soils and shallow groundwater. So site-specific determinations are common.

It also requires assumptions about the migration of the source materials and separately the migration of the related vapors (Figure 3). For example, petroleum contaminant vapors are assumed to migrate up to 30 feet horizontally, while non-petroleum contaminant vapors are assumed to migrate up to 100 feet horizontally, and still be a vapor intrusion risk. This is independent of the migration of the contaminated materials (source area), so vapor migration is measured from the edge of the source area (items c, d, and e in Figure 3) and not the location of the release (item b in Figure 3), location of the historic use (item a in Figure 3), or the property line. In addition, sample results may not adequately determine the boundaries of the impact, so potential migration can often only be measured after delineation sampling, which is usually not including in a basic due diligence investigation (often referred to as a Limited Phase II ESA).

in Figure 3), the extent of the impacts delineated (see items a to e in Figure 3), and the fate and transport mechanisms identified (item f in Figure 3).

[illegible]

The diagram illustrates the pathways of petroleum hydrocarbon contamination from commercial/industrial buildings to residential buildings and the environment. It is divided into two main sections: Commercial/Industrial Buildings and Residential Buildings.

Commercial/Industrial Buildings:

- Primary Source:** A rooftop HVAC unit (a) is shown as the primary source of contamination.
- UST:** An underground storage tank (b) is shown as a secondary source.
- Residual NAPL:** Non-aqueous phase liquid (c) is shown as a residual source.
- LNAPL:** Light non-aqueous phase liquid (d) is shown as a source area.
- DNAPL:** Dense non-aqueous phase liquid (e) is shown as a source area.
- Lateral Diffusion:** Arrows indicate the lateral spread of contamination from the primary source.

Residential Buildings:

- 1. basement:** Contamination enters the basement via upward diffusion (Q_{soil}) and stack effect (Q_{blg}).
- 2. crawlspace:** Contamination enters the crawlspace via upward diffusion (Q_{soil}).
- 3. slab-on-grade:** Contamination enters the slab-on-grade via recharge of rainfall.
- 4. Multi-Storey Buildings:** Contamination enters via an elevator sump.

Environmental Pathways:

- Secondary Source:** Contamination enters the aquifer via upward diffusion (Q_{soil}) and recharge of rainfall.
- Source Areas:** Contamination enters the aquifer via lateral diffusion and recharge of rainfall.
- Water Table Fluctuations:** Arrows indicate the movement of water table fluctuations.
- Clean Recharge Water:** Arrows indicate the movement of clean recharge water.
- Groundwater Flow:** Arrows indicate the direction of groundwater flow.

Quantitative Data:

- 100ft Non-Petroleum, 30ft Petroleum:** This data is shown in a red box, indicating the depth of contamination in the aquifer.

All of this property
information,
building
information,

generic assumptions, and future extrapolation are used to determine if there is a potential for vapor intrusion by comparing the site data to different sets of criteria. Those screening criteria can be generic or site-specific, and can apply to soils, groundwater, and/or soil gas. If the data exceeds any one criterion, there is a potential for vapor intrusion and you will need to complete further assessment, or directly to install controls, document that they are working properly after installation, and document continued operations going forward.

To collect the necessary data, for both generic and site-specific evaluations, samples typically need to be collected for soils, groundwater, soil type, soil grain size, and soil gas at ever decreasing intervals. This is in addition to the normal environmental due diligence, and may require multiple sampling events to accurately represent both the spatial and temporal conditions at the property. Those samples are then compared to the screening criteria to predict the potential for indoor air concentrations exceeding acceptable levels. Only on rare exceptions is actual indoor air sampling data used.

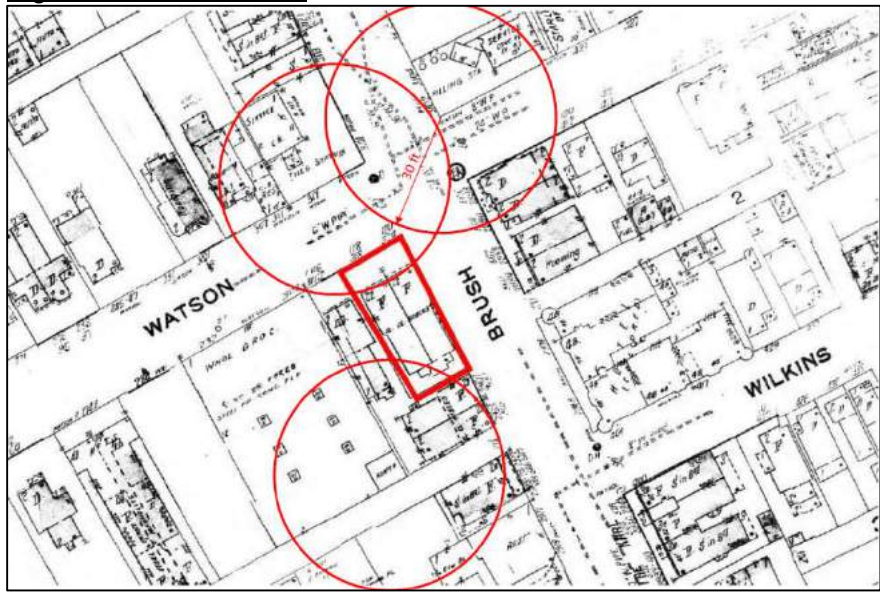
HOW DOES VAPOR ASSESSMENT FIT INTO DUE DILIGENCE?

Environmental Due Diligence, or the process of obtaining statutory liability protection and evaluating impacts sufficiently to determine the effect on development and operations, has been part of the real estate process since 1985. While the fundamental process remains the same, there have been changes in both assessment (the new ASTM standards -21 will be available shortly) and closure that can affect real estate timing, approvals, and construction. While past programs focused on determining the nature of historical impacts, new programs focus more on Due Care Obligations that control impacts that may affect human health or the environment, requiring more data and possibly agency review.

With the addition of vapor intrusion considerations in the Phase I assessments in 2013, the evaluation of potential Recognize Environmental Conditions (RECs) expanded to within 1,700 feet of the property when an adjacent property may contain chemicals of concern as assessed through review of reasonably ascertainable records pertaining to the extent of contamination, area lithology including soil and groundwater conditions, and other factors that may affect migration of vapors. Assumed impacts expanded to within 30 to 100 feet of the property boundaries, and impacts on the property from detected contaminants that may volatilize were assumed to have a similar radius of influence on buildings (Figure 4). Key red flags became former industrial sites, dry cleaners, gas stations, oil heaters, and auto repair shops. Properties near former gas stations and dry cleaners, and there a lot of those in urban areas, now required a vapor assessment to determine if the generic model would predict vapor intrusion in the existing or future building.

Figure 4 Off-Site RECs

In situations where vapor intrusion has been flagged as an REC, sampling is required to determine if the impacts are sufficient to recommend vapor mitigation. That sampling is a two-step process, looking first at soil and groundwater concentrations in and around the source area, and then at soil gas concentrations in or



around the building. Source area investigations may require multiple sampling events to determine the nature and extent.

But there are two changes even more challenging than the technical evaluation process changes. First, if you need to obtain EGLE approval in order to obtain a Documentation of Due Care Compliance, Certificate of Completion, or more likely a No Further Action Letter, you are required to go through EGLE review and approval at all stages. Surprising to many, this can occur if you are obtaining federal funding for your project, or receiving state incentives from EGLE (for example school tax capture for Brownfield TIF or a CMI grant or loan). In these cases, the basic Due Diligence process has only changed slightly (Figure 5), but the EGLE review of the due care process has significantly changed (Option A in Figure 6), requiring more evaluation and reporting, and for properties that exceed the vapor screening criteria, a year or more of pre-approval sampling (acute compounds require more sampling), and a year of post construction monitoring to determine seasonal fluctuations.

To compound the challenge, EGLE has instituted additional policies, and has changed those policies over the course of a given project as new technical data is reviewed and incorporated into the review process. For example, soil gas sampling in the upper five feet is not accepted by EGLE, so characterization of actual soil gas concentrations in shallow fill is not achievable. Without characterization, approval is allusive.

Figure 5 Basic Due Diligence Process

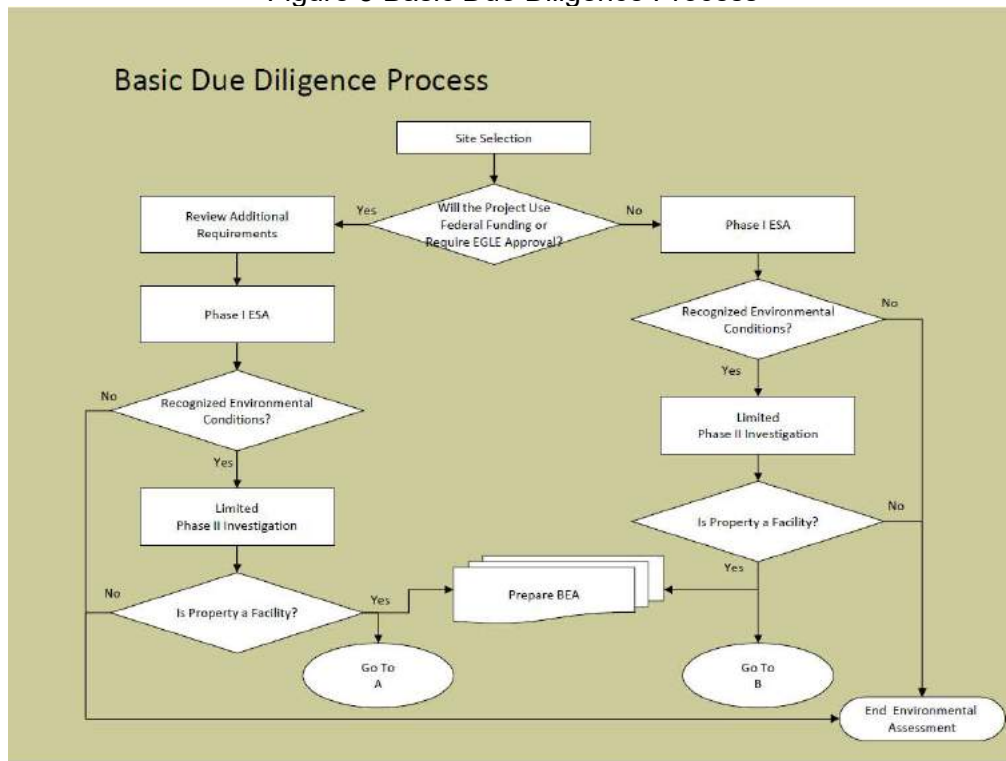
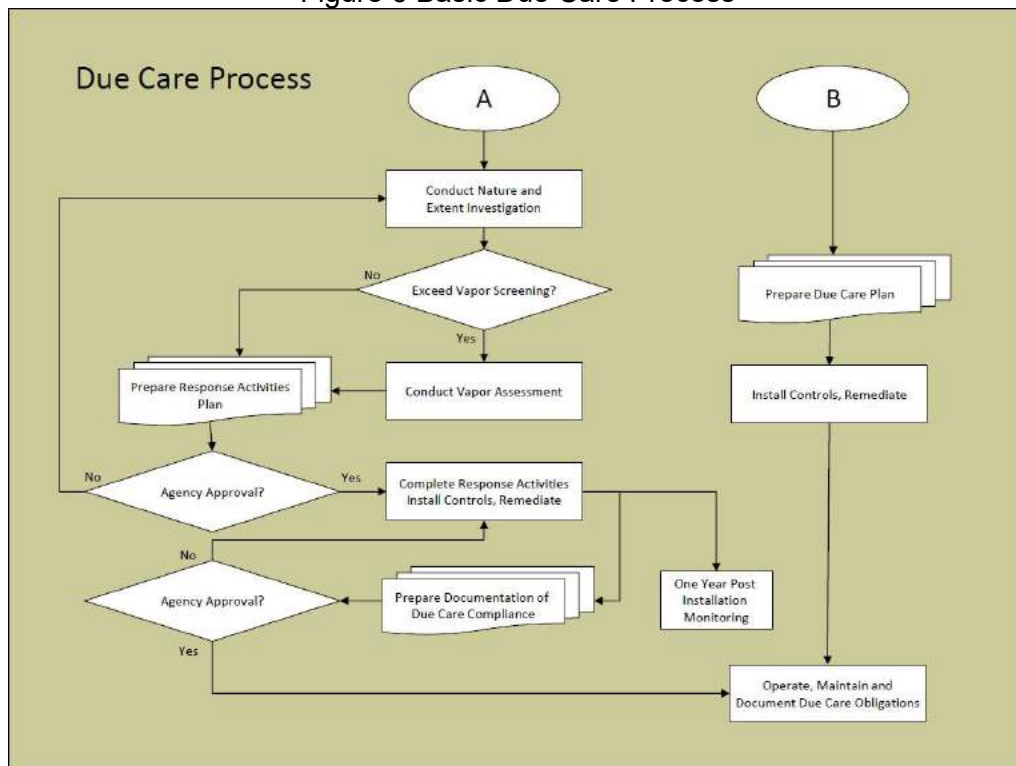


Figure 6 Basic Due Care Process



Second is the application of more stringent screening criteria (Volatilization to Indoor Air Pathway (VIAP) criteria) for properties with a potential vapor intrusion risk, and especially for properties that do not meet the generic conceptual site model and use a site-specific criteria (Volatilization to Indoor Air Criteria (VIAC) criteria). Most urban properties in Michigan do not meet the generic conceptual site model because of shallow groundwater or the presence of fill soils. These site-specific criteria, for example on properties with fill soils, are extremely low for some compounds - below the regional background concentrations or the analytical detection limit. Making it impossible to chemically delineate some compounds, especially those that are naturally occurring.

Hazardous Substance Concentrations in ug/kg	Method Detection Limit	Statewide Default Background Level	Volatilization to Indoor Air Pathway Screening Level
Mercury (Total) (B,Z)	<50	130	22 (TDL 50)
Ethylbenzene (I)	<50	NA	12 (TDL 50)

In other cases, the compound is pervasive in urban areas, from deposition, human activities, or even asphalt paving run-off, so the screening criteria are below area-wide background.

Hazardous Substance Concentrations in ug/kg	Method Detection Limit	Statewide Default Background Level	Volatilization to Indoor Air Pathway Screening Level
Phenanthrene	<330	NA	1,700
Naphthalene	<330	NA	67 (TDL 330)

In both of these cases, low detections in fill soils result in a requirement for vapor mitigation, and therefore extensive testing to determine the nature and extent of impacts and the design criteria, which can be very difficult or impossible to determine in the heterogeneous composition of fill soils.

Therefore, the success of any vapor migration assessment is dependent on the adequacy of the sampling data to determine the nature and extent of the impacts, the transport mechanisms, and the potential impacts. Most Limited Phase II ESAs are inadequate to meet this requirement. So, the first consideration in any due diligence process is whether expanded sampling should be included in the Limited Phase II ESA.

This process generally requires six steps, as follows.

1. Soil and groundwater sampling to assess the extent of the impact and determine site specific criteria such as soil type and temperature, and depth to groundwater. Results are compared to VIAP screening levels to determine if soil gas investigation is required. At

this step you can make assumptions about whether a vapor mitigation system is required, but there is insufficient data for EGLE approval or a site-specific design.

2. Soil gas investigation in the envelope of the existing or proposed building, or between the source and the building location, to assess the theoretical potential for vapor intrusion. This can include different sampling methods, depending on the site conditions. For sampling outside the building envelop, results may be inaccurate because the building will modify the area and indoor conditions (such as heating) may change migration patterns. Multiple sampling events (at least four quarterly events are preferred by the EGLE depending on the chemicals of interest) are generally required. This may also be impossible in some situations such as new construction in shallow fill soils. It is at this step that you will determine if your choices are now limited to installing a vapor mitigation system or removing all source materials, but there is still insufficient data for a site-specific design.
3. A building specific vapor investigation to determine the zone of influence and design criteria for vapor extraction equipment. This typically requires multiple monitoring events.
4. Review and approval by the EGLE, if required. This may include peer review by the Vapor Intrusion Technical and Program Support (TAPS) team. As indicated in Figure 6, this is typically an interactive process.
5. Design and installation of a response activity.
6. Operation and maintenance of the system, including testing to document system effectiveness for the duration of the building occupancy or until sampling is completed to determine that a vapor mitigation system is no longer needed.

WHEN VAPOR MITIGATION IS REQUIRED

If the property requires vapor mitigation, there are four basic design approaches:

1. Vapor barrier – this is the installation of a solid or spay-on barrier between the slab and the soils. Selection of the barrier material will depend on the chemicals of concern, and some chemicals of concern do not have an approved barrier specification. This is rarely sufficient to provide vapor mitigation.
2. Passive gas collection system – this is installation of either lateral collection pipes under the slab , or just the installation of multiple vertical discharge pipes, and will generally also include a vapor barrier. Location and number of pipes are dependent on sub-slab soil conditions and building construction based on a zone of influence. These are vented to the exterior and are often designed so that they can be converted to an active collection system, if required. Location of the discharge vent pipes are dependent on building construction and the location of the HVAC system or other air intakes.
3. Active gas collection system – this is the installation of either lateral collection pipes under

the slab that are connected to vertical discharge pipes, or just the installation of multiple vertical discharge pipes, to a roof or wall mounted fan to provide negative pressure under the slab. Continuous pressure monitoring equipment is also installed, with alarms. EGLE requires that this system include power backup. This will also include a vapor barrier for new construction, which can be effective at improving active system performance and allowing for a longer response time if your active system is shut down for some reason.

4. Remove all soils and/or groundwater that exceed any applicable screening criteria – this would eliminate the need for a vapor mitigation system. However, if you do not remove all impacts (including off-site impacts that may migrate to the property or are within the specified separation distance requirements), and adequately document both the removal (with both load tickets and verification sampling) and the replacement soils (with source certification and possibly sampling) you may have to install a vapor mitigation system anyway for the residual impacts. Note that since you are considering this option the property is probably a facility under Part 201, and therefore all of the removed soils must be disposed of in a Type II landfill, or adequately sampled to document that they do not exceed generic residential clean-up criteria.

There are two options for installing the system. They are both designed to identify and implement mitigation requirements, but differ in the amount of assessment required, and the time required before installation and operation of the mitigation system.

- The first option is to install a presumptive remedy. This would only apply for a voluntary action program, and you will need to make sure that you maintain sufficient documentation to support the remedy design and operation. That remedy will assume worst case scenario based on a conceptual site model, and will design the mitigation or remediation solutions based on that model. This may result in higher construction or operating costs, but it will reduce the overall time required and will reduce the costs of the iterative approach associated with assessment. Unfortunately, presumptive remedies can no longer be funded from EGLE incentive programs.
- The second option is to obtain EGLE approval of a Response Activity Plan for each step in the process in order to obtain an approved Documentation of Due Care Compliance, Certificate of Completion or No Further Action Letter (NFA). This remedy will require more extensive evaluation of the source material, a more extensive evaluation of physical site conditions, and consideration of micro-environments. This will require multiple reviews and meetings with EGLE and subsequent sampling to fill data gaps, or address their most current concerns. Once the conceptual site model is acceptable to EGLE, there will be sub-slab vapor monitoring before a design can be approved, and the design will have to include redundancies, such as alternative power sources and alarms. After installation you will continue to have EGLE review as you conduct operational monitoring in the first year (with decreasing frequency from weekly to quarterly if results are

acceptable), and then reduced annual monitoring. If you are seeking an NFA, there may also be financial assurance requirements.

The biggest challenge with the vapor intrusion assessment is that you can rarely “data out” of the process. This means that once you have exceeded a screening criterion, no amount of additional data can prove to EGLE that controls are not needed. This is somewhat based on the limitations of environmental sampling, but is also a result of EGLEs continuing reassessment of their understanding of transport and migration mechanisms on a site-specific basis. As a result, most projects do not obtain EGLE approval for a cost effective system, and instead install a best-in-class remedy to control worst case scenario.

WHY DOES IT MATTER?

Meeting Due Care Obligations are the responsibility of every property owner, and preventing adverse impacts to human health is a key component of that responsibility. In cases where there is a documented risk to human health, implementing the proper controls or conducting remediation are essential. However, where risks are estimated or assumed, implementing controls can be difficult because the definition of acceptable performance can keep changing based on new data, new research, or new approaches.

Because of the uncertainty of both the assessment and EGLE review and approval, all projects that require a Response Activity Plan, Documentation of Due Care Compliance, Certificate of Completion, No Further Action Letter, or state incentives, will need to schedule at least one year for assessment and review before approval for design.

Compliance with screening criteria is much more difficult for residential developments than for non-residential developments, primarily because of the lower clean-up criteria. This means that residential projects will require more time for assessment and approval, and more robust mitigation systems.

WHAT ARE THE SOLUTIONS?

Planning for vapor mitigation is critical for minimizing the impact on the project schedule, and understanding the impact on the project budget. Assessing and designing a vapor mitigation system can require four to six months for a voluntary action program. If EGLE approval is required, that process can take over a year. Costs for the installation of the vapor mitigation system can be provided early in the process, but costs for incremental assessment, or negotiating

with EGLE are less obvious.

The first step is conducting a Phase I ESA according to the ASTM guidelines but paying special attention to potential vapor issues. That would include a vapor migration investigation by conducting a Tier 1 non-invasive screening assessment for potential vapor encroachment conditions (pVECs). If any of the following conditions are identified in the Phase I report, you should assume that a vapor assessment and/or mitigation strategy will be required until you can prove otherwise.

High Risk for Residential Use

1. One or more compounds exceeding the applicable generic Soil Volatilization to Indoor Air Inhalation Criteria were identified from previous sampling programs.
2. Historical use of the property for industrial, gas station, dry cleaner or any other operation that may have used volatile compounds.
3. The presence of fill soils, especially if they contain any non-soil materials (such as construction debris).

Medium Risk for Residential Use

4. Historical use of properties within 100 feet for industrial, gas station, dry cleaner or any other operation that may have used volatile compounds.
5. Identification of a pVEC not described above.
6. Shallow groundwater (less than 10 feet below building basement)
7. Any urban property.

The next step in all environmental due diligence programs is to conduct a Phase II soil and/or groundwater investigation. However, these are typically limited in scope to only identify the nature of any RECs (typically called a Limited Phase II ESA). For properties with any of the above conditions, the Phase II Investigation should include more intensive sampling around the potential vapor sources, for example.

- In addition to determining impacts to soils and/or groundwater and the boundaries of those impacts, the investigation should include an assessment of soil type and lithology and determination of groundwater depth using permeant wells.
- If a dry cleaner is suspected, the analytical parameters should be expanded to include white gas, naphtha, carbon tetrachloride, kerosene and stoddard solvent.
- If there is an existing building, the Phase II process should also include an inspection of the basement or slab, and a review of construction details, if available.
- If there are site improvements, the Phase II process should note the location of all paved surfaces and outbuildings.
- If the REC or source is/was in the location of the existing building and there is potential for impacts to be below the slab, an initial soil gas sampling event may be needed.

The next step is to determine if a vapor assessment or mitigation program is required based on the results of the expanded Phase II Investigation. Although there are other situations where a vapor migration assessment will be required, if any of the following are identified then a vapor assessment will be required. For the majority of residential projects, if you need to conduct a vapor assessment then a vapor mitigation system will most likely be required.

1. One or more compounds exceeding the applicable generic Soil or Groundwater Volatilization to Indoor Air Criteria.
2. One or more compounds exceeding the site-specific VIAC/VIAP Screening Levels.
3. The presence of fill materials with non-soil (such as construction debris or waste) and the presence of multiple volatile organic compounds exceeding the method detection limit.
4. The presence of fill materials with non-soil (such as construction debris or waste) and mercury exceeding the method detection limit.

The final step is to conduct additional sampling as necessary to refine your conceptual site model and provide the necessary parameters for system design.

But the key issue is identifying the need for this process as early as possible in your due diligence schedule and accepting that there currently is no abbreviated process. Then, if you identify that a vapor mitigation system may be required, adjusting your schedule based on the need to either prepare a presumptive remedy, conduct remediation, or obtain EGLE approval.



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TRANSACTION SCREENS

UST CLOSURES

WETLAND MITIGATION &
BANKING

Vapor migration into buildings has been the focus of assessment and control for over seven years, so many of our clients are painfully aware of the issues. For those of you that have not dealt with this, or want a broader overview, this edition of *Tech-Bits* covers the process of assessment and mitigation where vapors may impact buildings. Vapor intrusion is an issue that will be around for the foreseeable future, so understanding its impact on real estate timing, costs and operations can help you plan for the design requirements, and often associated delays.

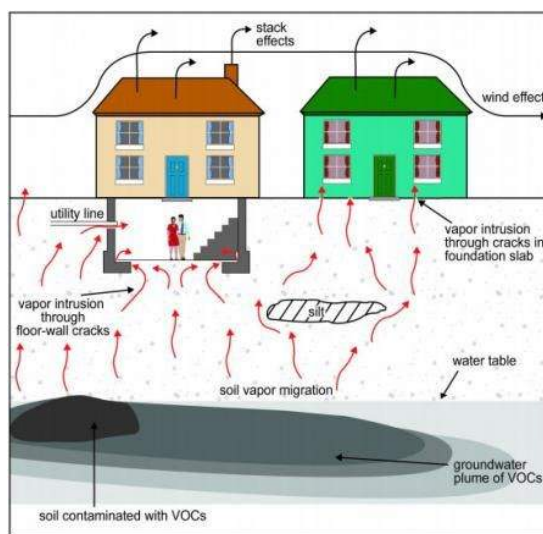


IMAGE FROM WWW.EPA.GOV/VAPORINTRUSION

THE BASICS

Vapor intrusion occurs when vapors from volatile chemicals in soils or groundwater migrate up or through soil, or along underground utilities, toward a building, and then infiltrate through openings and cracks in walls, floors, and concrete slabs. This requires three conditions: 1) that historical release of solvents or petroleum occurred within 30 to 100 feet of the building, 2) that volatile organics from that use are present in sufficient concentration in the subsurface to

cause a vapor issue, and 3) that vapors can actually migrate into the building (for example, HVAC system causes a negative pressure, pulling vapors into the building through cracks in the foundation, but also migrate through concrete floor and walls). The assessment process assumes that this will happen unless proven otherwise, so evaluating these three conditions as early as possible in the development cycle will help to avoid delays and unexpected costs.

EGLE's Remediation and Redevelopment Division (RRD) issued their "Guidance Document for the Vapor Intrusion Pathway" in 2013. Moreover, in 2020, EGLE published their Volatilization to Indoor Air (VIAP) Screening Levels, identifying those levels of volatile chemicals in the subsurface that trigger a concern, which can be very low. These guidance documents changed the way vapor intrusion was assessed in Michigan, and therefore mitigated, in real estate transactions. Previously, look-up tables provided action levels for designing mitigations that would be protective of human health and the environment for an intended future use. Now, where the assumption of vapor intrusion exists, a screening process is used to assess conditions over an extended period. If you are seeking EGLE approval, most everything will be negotiated during this process. If you are not seeking EGLE approval, but are self-implementing under Part 201, EGLE may still request a review based on their evaluation of documents you have previously filed. If you are seeking incentives, EGLE may request that a vapor control system be the first reimbursement cost and therefore require review. In addition, EGLE and DHHS are working together to enforce indoor air quality standards, even when there is only suspected vapor intrusion, creating two different approaches. That is, DHHS' primary concern is the health effects from exposure of building oc-

cupants while EGLE focuses on the subsurface contaminants, and thus indirect impacts to human health.

Consequently, for properties with suspected vapor issues, assessment and mitigation have become a standard part of real estate development for all types of properties. Also be aware, because vapor screening levels have become lower over the past eight years, this can result in EGLE conducting an independent review and requiring mitigation measures to be installed at previously closed sites.

THE ASSESSMENT AND DESIGN PROCESS

It is important to be purposeful about vapor assessment during your Phase I ESA. This will be your first opportunity to identify red flags. Red flags can include petroleum (thus USTs) on or within 30 feet of the property line, or historical solvent (e.g., perchloroethylene or PCE) use, such as dry cleaners or industrial uses, on or within 100 feet of the property line. This could mean that historical impacts on an adjacent property are as much of a concern as those on the subject property, so an assessment of soil types, depth to groundwater, groundwater flow direction, and construction details must also be conducted.

If the potential exists for a vapor issue, the next step is conducting soil and/or groundwater sampling to determine if concentrations of target compounds exceed the screening criteria on the property. Additional assessment, in the form of soil gas monitoring, may then be required if the soil and/or groundwater screening criteria are exceeded.

If you identify a potential issue, and you need EGLE approval in the form of a No Further Action Letter (for example for HUD or MSDHA funding, or SBA lending), negotiating sufficient assessment and design can take up to a year. This is primarily because EGLE requires four quarters or more of extensive monitoring for approval, but also because of changing assessment and system requirements. If you do not require EGLE approval, we recommend that you still gather sufficient data to document your assessment, design, and operation in order to provide defensive documentation in the event that DHHS or EGLE conducts an independent review.

Regardless of whether or not you require EGLE approval, system design must evaluate both installation and operational costs, and will require an additional round of assessments. There are different systems for existing buildings and new construction. New construction allows direct placement of the system under the future building slab, sealed with a vapor barrier before pouring the new building slab. In existing buildings sealants can be applied to further reduce the potential for migration, but ventilation systems will require custom design. For either type of building, passive (no fans) and active (fans that create negative pressure below the slab) collection sys-

tems are options, but passive systems are increasingly less common (and it is harder to prove it is working). Each system requires different amounts of post-installation monitoring and maintenance, and typically require annual system operational checks, backup power systems, and pressure monitoring.

THE ISSUE WITH MERCURY AND PETROLEUM HYDROCARBONS

In addition to petroleum and chlorinated solvents, the metal mercury and some less volatile petroleum hydrocarbons (called “PNAs”) are chemicals of interest to EGLE. Background mercury levels in soil (i.e. not attributable to any release) are often above screening levels, and analysis of total mercury can imply that it is volatile. Additional analysis (e.g., soil-gas testing) can be used to identify if detected mercury is in fact elemental mercury, and therefore volatile, or is the more common mercury salt. The other petroleum hydrocarbons (PNAs) are commonly found in fuels, asphalt, and combustion emissions resulting in their presence being pervasive, particularly in urban areas, or on sites with construction debris, and typical levels in urban area soils can exceed the EGLE screening levels.

THE SOLUTION

Vapor intrusion assessments can add time and cost to properties with the right (wrong?) conditions. We recommend an early assessment of the key conditions and the need for EGLE approval, and then adjusting construction schedules, if necessary. If concentrations exceed screening criteria at any of the steps of the assessment, you can typically assume that you will need a vapor mitigation system, and therefore, for voluntary closures we often recommend a presumptive remedy (that is, installation of a sub-slab vapor intrusion mitigation system) based on site-specific data. But the technical remedy is not typically the issue. Where you will most likely run into delays is with the EGLE approval process. Consequently, early planning for detection, assessment and mitigation of vapor intrusion is a key element for redevelopment.

For more information, please contact ASTI Environmental's Director of Property Services Group, Rick Welsh at 810-225-2800 or rwelsh@asti-env.com.



ASSESSMENT • REMEDIATION • COMPLIANCE
RESTORATION • INCENTIVES

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OVERVIEW

ASTI ENVIRONMENTAL (ASTI) has provided environmental and engineering services to industry and government since 1985. ASTI service groups are staffed by scientists, hazardous materials managers, regulatory compliance managers, professional geologists, environmental professionals, underground storage tank professionals, wetland scientists, environmental trainers, asbestos inspectors, environmental property assessors, building inspectors, and management planners.

We routinely provide services in the Great Lakes region and have completed projects throughout the United States and Canada and in Eastern Europe. For industry and business, ASTI provides **investigation, compliance, permitting, and remediation services** to assist in achieving compliance with federal, state, and local environmental regulations. For property acquisition and management, ASTI provides **assessment, inspection, and restoration services** to evaluate site impacts, provide documentation for liability protection, and manage natural features.

PROPERTY DEVELOPMENT SERVICES



Site Assessment Services include property assessments per the ASTM standards, Phase I site assessments, transaction screens, database searches, due care plans, mold investigations, indoor air equality evaluations, site closure, soil and groundwater investigations, baseline environmental assessments, asbestos inspections, remediation, wetlands identification and management, and GIS mapping.

Site Closure Services include due care plans, assessment of appropriate closure standards, engineered controls, management controls, deed restrictions, and corrective action.



Ecological Services include CE's and EA's for NEPA clearance, environmental assessments, environmental impact statements, floodplain/floodway analysis, historic surveys, natural features mapping, resource restoration, right of way clearance, SEE studies, threatened and endangered species surveys, wetland assessment, wetlands mitigation and permitting, ecological risk assessments, habitat management, and CAD/GIS mapping.



Brownfield Redevelopment Services include Brownfield financing assistance, Brownfield grant application assistance, asbestos management, remediation cost assessments, removal actions, soil and groundwater impact delineation, treatment system design and installation, contaminant mapping and modeling, evaluation of remediation alternatives, and groundwater and soils treatment.

Groundwater and Soils Investigations include identification and mapping of groundwater and soils contamination, evaluation and implementation of remediation alternatives, and monitoring system installation and operation.



COMPLIANCE SERVICES



Compliance Assessment Services include compliance assessments, annual reporting, permit and plan assistance, EMS/ISO 14001 design and implementation, health and safety programs, training, industrial hygiene monitoring, spill and operations plans, noise assessment, routine water and process discharge monitoring, SESC permits, waste management unit closures, waste investigations, feasibility studies, risk assessments, disposal site audits, site assessment, and site remediation.

Operation and Maintenance Services include routine monitoring, temporary staffing, training, pollution control equipment O & M, and remediation equipment O & M.



Air Quality Services provide complete air emissions compliance services including permitting, Title V evaluations, worker exposure monitoring, emissions inventories, PSD demonstrations, ventilation studies, dispersion monitoring, and appropriate technology screening.



Site Remediation and Impact Investigations include the design of remediation systems, agency negotiation, feasibility studies, site specific risk assessments, groundwater modeling, remediation and removal actions, site reclamation, site restoration, and soil and groundwater remediation.



Underground Storage Tank Services include RBCA evaluations, tank investigations, UST and AST compliance, tank removal and recycling, remediation system operation and maintenance, and UST and LUST closures.



INFRASTRUCTURE SERVICES

Resources Assessment and Management Services include wetland delineation, permitting and mitigation, wetland mitigation banking, habitat management plans, threatened and endangered species surveys, natural features inventories, mining restoration plans, wetland and prairie restorations/recreations, floodplain determinations, hazard mitigation planning, and water quality assessments.



Clearance Services include comprehensive SEE studies and NEPA clearance including historic and archaeological preservation, air quality impacts, floodplain impacts, wildlife impacts, hazardous water management, water quality assessments, and wetland impacts.



Design Services include GIS/CAD services, engineering design, landscape planning, mining reserve analysis, pollution control system design, and remediation system design.



Treatment Alternatives include wetlands treatment systems, stormwater runoff control, wastewater treatments, and groundwater and soils remediation systems and closure.



Project Management Services are available for projects requiring multiple subcontractors and can include contract management, contractor/subcontractor evaluation, project implementation, quality assurance review, and site specific health and safety plans.



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business, please contact us at
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ICSC+CONTINUING EDUCATION MICHIGAN

Suburban Collection Showplace

Novi, MI

Wednesday, April 13, 2022

Session Materials

Roundtable 15: Keys to a Successful Absolute Net Lease Transaction

Led by: Joseph Judge, Esq. and Sam Kokoszka, Esq., Dawda, Mann,

Mulcahy & Sadler, PLC

“2022 Vision: Seeing Beyond Traditional Retail”

ICSC 2022 Michigan Continuing Education Program
For Real Estate Professionals

April 13, 2022

Suburban Collection Showplace, Novi, Michigan

Keys to a Successful Absolute Net Lease Transaction



Presented by: Joseph Judge and Samuel Kokoszka
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Introduction

What is an "Absolute Net Lease?" Simply stated, it is mailbox money. It is a Net Lease structured such that the Owner/Landlord only has to walk out to the mailbox and collect the rent. The payment of taxes, insurance premiums, maintenance of common areas and, indeed, all maintenance, including building, roof, and structure, is handled and paid for directly by the Tenant.

If you are in this business, you appreciate that not all leases are so neat and "absolute". Net Lease Tenants tend to be the largest tenants in the market. They have significant leverage in a transaction. Many will insist upon provisions that are not absolute net, such as:

- Caps on common area maintenance
- Caps on exposure to real estate tax increases when properties are sold
- Requiring Landlord to pay real estate taxes and bill back
- Warranties for defects (sometimes including latent defects) that last beyond the typical one-year period
- Responsibility for roof or structure

The goal of this round-table discussion is not to tell you how to insist on Absolute Net Lease structures where that is not market, but to talk about how to steer every transaction in that direction in each phase, from land acquisition and development to leasing and sale -- and how to avoid some of the most common mistakes.

The two most common mistakes in developing Absolute Net Lease transactions can be generally described as follows:

- Slippage. Allowing "slippage" into a transaction unnecessarily. Allowing "slippage" is allowing a cost to come into the transaction that cannot be passed through to the Tenant completely. Allowing such a cost to "slip" through means the cost will be borne by the Owner/Landlord and if not disclosed in the offering memorandum, it will become the basis for a renegotiation or, worse, result in the termination of the transaction. Why? Because the Buyer expected taking money *out* of the mailbox, not *putting it in*.
- Losing Control of Covenants. This occurs when a Developer-Landlord, who owns and is also developing adjacent property, covenants to confer on the Absolute Net Lease Tenant a right or benefit to do something on (or a covenant to refrain from doing something) on the adjacent property, but then fails to make such right or benefit a matter of Title running in favor of the new Owner/Landlord (and through them to the Tenant), thus putting the

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new Owner/Landlord in the precarious position of having succeeded to a right to do something (or not do something) over land it does not own or control.

A well drafted Memorandum of Lease recorded against the Property (the premises and the Developer retained property) can be helpful, but the use of Declarations, Reciprocal Easements and Use Restrictions are vital in tying covenants with land and Owners capable of satisfying such covenants. Very few things will make a Net Lease Buyer more nervous than knowing the Tenant's obligation to pay full rent is dependent on what happens (or does not happen) on adjacent property, over which such Net Lease Buyer will have no control.

Land Acquisition and Development Phase

In the Acquisition and Development Phase it is important that the Developer make sure that the basic legal structures are in place for the land and that such structures are conducive to an Absolute Net Lease development. Further, the Developer should enter into construction contracts which are consistent with Tenant's warranty expectations under the lease.

- **Retail Center Constitutional Documents.** These are the recorded documents (such as Declarations, Reciprocal Easement Agreements, Access Easements, Use Restrictions, etc.) that will control the use and development of the overall site.
 - The Developer should establish or confirm existence of all necessary constitutional documents before it buys. Developers should negotiate such document on the front end if they think failure to do so might result in slippage or control issues.
 - Developers should encumber the retained property with covenants and restrictions affecting such retained property if such covenants are also included in the Lease.
 - Developer should clearly cover the responsibility for off-premises expenses and provide self-help rights to the Owner or Tenant of the net leased Property.
- **Construction Issues.**
 - The Developer should appreciate that when it sells and steps away, its Buyer, as New Landlord, may be required to warrant certain work for a certain period of time. Therefore, the general construction contract needs to include warranties that match up with the warranties under the Lease (including, in some cases, covering latent defects – very difficult to get).
 - Developers should require a close-out book with all pertinent information.

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Leasing Phase

This is the phase in which the Developer has the most control over the absolute-net nature of the transaction. It is important that the Developer keep the Net Lease Buyer in mind as it is negotiating the Lease. Some provisions that need particular attention are discussed below (not an exhaustive list).

- **Tenant Credit/Assignment**
 - It is important to the Net Lease Buyer that the payment of rent is secured by good credit, which may require that the parent company be on the Lease, as the Tenant, or guarantor. Brokers will typically address this issue in the Offering Memorandum, and the Lease should contain provisions for the disclosure of financials (where not publicly available).
 - Regarding Assignment provision, it is important that (a) the Tenant either remain primarily liable under the Lease even *after* assignment, or (b) the assignee have credit equal to the original Tenant (or an acceptably high tangible net worth). Getting this provision wrong can significantly diminish the value of the Lease.
- **Rent Commencement**
 - Avoid confusion in the calculation of the Rent Commencement Date. Tie rent commencement to the earlier of (a) opening for business, or (b) an easily determinable benchmark, such as 120 days after the date Landlord delivers the Landlord's Work.
- **Common Area Maintenance**
 - Most national tenants will want caps on shared common area maintenance expenses. The important thing here is to set them high enough that there will never be slippage.
- **Underlying Title**
 - The Lease should essentially account for all matters of Title. What is important here is to not miss a document in Title that has a cost associated with it that then cannot be passed through to the Tenant (for example, an owner's association fee or an easement maintenance fee).
- **Exclusivity Provisions/Uses Restrictions**
 - To the extent Developer will retain property for further development, it should try to retain the right, in the Lease, to alter, amend or even impose Use Restrictions

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that may benefit further development, while not limiting Tenant's permitted use of the Property.

- Negotiate "rogue tenant" provisions that do not permit rent-reduction where Landlord is taking commercially reasonable efforts to stop the offending use.
- Casualty and Insurance
 - Make sure Tenant keeps and maintains the appropriate insurance policies and names Landlord and Landlord's lender as additional insureds.
 - Make sure the insurance and casualty provisions protect the Landlord's current and residual interest in the Property.
- Environmental and Hazardous Substances
 - Care should be taken to assess the environmental condition of the Property. While the goal with these Leases - from the Landlord's perspective - is that they be "as-is, where is", as much as possible, expect some compromise as it relates to pre-existing conditions.
- Landlord Warranties
 - Mostly an issue for new or recently constructed premises. Developers should limit their warranty to one year (what they typically get from their general contractor) and avoid long-term latent defect warranties.
- Force Majeure / Covid-19
 - Courts are inclined to honor the agreement of the parties where this issue has been *specifically addressed*, therefore, we do not recommend silence on this issue. There are several strategies for how to approach this within the language of the Lease, but the important thing is to create certainty and avoid costly litigation over affirmative defenses such as *impracticability*, *impossibility* or *frustration of purpose*.
- Miscellaneous Covenants
 - Early Termination Provisions. Avoid general early termination provisions for things like poor gross sales. Also avoid more obscure provisions that would allow a tenant to terminate early, such as, tenant losing a permit for a drive thru, or the law changing with respect to the sale of tenant's product or service.
 - Opening and Operating Covenants. Ask for them. While they are more common, of course, in strip centers, you will occasionally get them (or, at least, get an opening covenant).

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- ROFRs:
 - Many national tenants will insist on rights of first refusal. Developers should negotiate the ROFR provisions to provide for minimum paperwork to force a tenant decision (such as a signed letter of intent, not a full Purchase Agreement) and to also allow some modifications to the Purchase Agreement terms that do not trigger a tenant's right to re-evaluate (such as purchase price reductions that are less than 10% of the original stated price).

Sale Phase

The sale phase is where the rubber meets the road, both for Developers looking to bring their investments to fruition, and for Buyers to whom the Property is being sold. Understanding the structure of the sale transaction and the path it follows will help ensure a smooth path to closing.

- The Offering Memorandum for the Not-So Absolute Net Lease. Avoid preparing an "Absolute Net Lease" Offering Memorandum that does not matching the true nature of the Lease.
 - Brokers can only work with the information their clients give them.
 - Disconnects between the Offering Memorandum and the true nature of the Lease will cost the Seller money.
- Sale Structure/Property Condition:
 - Generally speaking, these sales are made on an "as-is, where-is" basis. Sellers usually limit their express representations and warranties on the understanding that Buyers will "do their own homework".
 - Buyers negotiate to carve out specific items from the general "as-is, where-is" nature of a transaction, and structure the lifecycle of the deal in order to satisfy themselves where they cannot get an affirmative Seller representation or warranty.
- Inspection Periods; Due Diligence Documents:
 - Inspection Periods in these transactions are usually short, around 30 to 45 days.
 - Buyers should make sure that they negotiate for enough time for their consultants (e.g., environmental, surveying) to complete their reports and for review of same. It pays to have local consultant contacts in order to expedite this process. Consider using the Seller's professionals when there are no obvious conflicts of interest.

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- Since Sellers generally deliver their existing documentation to Buyers to help with the Buyer's diligence process, Buyers can attempt to tie the commencement of the Inspection Period to the date those documents are received.
- A Buyer should also obligate the Seller and the Title Company to provide a Title Commitment within a reasonable time frame. A Buyer needs to make sure it has time to review the provided documents before its deposit becomes nonrefundable.
- Representations and Warranties:
 - Standard Seller representations and warranties include formation and authority, no litigation/condemnation/governmental action, the existence (or lack thereof) of any environmental conditions, quality of Title/existence of other leases or occupancies, good status of Lease and no known environmental conditions.
 - Sellers normally take the position that it is a Buyer's responsibility to do due diligence and understand the Property, and limit the representations and warranties themselves in addition to including qualifying the term "knowledge" (e.g. "to the Seller's actual knowledge") and/or limiting the term "knowledge" to an individual Seller principal.
 - Buyers attempt to broaden these representations by qualifying them as "to the best of knowledge", and/or by requiring affirmative statements for more "fundamental" representations (e.g., no litigation, that Seller has title to the Property, etc.).
- Closing Date Issues.
 - With new construction, be careful of the gap between the Closing Date and the Rent Commencement Date under the Lease. Plan your Closing Date to correspond with the Rent Commencement Date or expect to give Buyer a purchase price credit for the period between Closing and Rent Commencement.
 - Give Buyer and Seller some flexibility to extend Closing to complete closing conditions (such as obtaining an estoppel certificate).
- Estoppel Certificates:
 - Obtaining an estoppel certificate is a fundamental part of these transactions.
 - National and regional tenants often have their own form of estoppel certificate which Seller/Landlords will be obligated to use.
 - Even if the Tenant has a form estoppel certificate, Buyers should ensure that the purchase agreement is conditioned upon closing on an estoppel certificate that affirmatively states that the underlying Lease is in full force and effect and that there are no defaults.

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- Different tenants have varying time periods within which an estoppel certificate must be returned to a Seller/Landlord. Buyers and Sellers should ensure that the timing of closing contemplates the Tenant's response period to an estoppel request.
- ROFRs:
 - Many national tenant leases contain rights of first refusal. Rarely are these rights exercised, however, not knowing these rights exist can spook Buyers. Draft Purchase Agreement provisions that require the Seller to submit for ROFR waivers early.
- 1031 Exchanges:
 - To the extent either a Buyer or Seller is entering into this transaction as part of a 1031 exchange, the parties need to ensure that the Purchase Agreement contains language regarding each party's cooperation with the other party's exchange. The parties should also get their intermediary companies involved as soon as possible to avoid delays immediately prior to closing.
- Informing the Tenant of the Sale:
 - As part of the turnover of the Property to new ownership, at closing both parties should sign a letter to the Tenant notifying them of the sale.
 - The letter should include the new Owner's contact information, wire instructions (or alternate way to send rent payments), status of security deposit and a request to update the Tenant's insurance certificates to show the new Owner and its lender as additional insureds.
 - Any other lease-specific items where the Tenant needs to take additional action should also be included.
 - Especially if closing happens toward the end of the month, it is possible that the Tenant may have already sent its rent check to the Seller or that there is an administrative process that the Buyer will have to go through in order to be recognized as the Landlord and to start receiving rent checks. Accordingly, Buyer and Seller should also include language in the Purchase Agreement obligating the Seller to send the Buyer rent checks if they are still sent to the Seller post-closing.

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For Real Estate Professionals

April 13, 2022

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- Miscellaneous Issues:

- As part of closing, the parties should sign an assignment and assumption of lease(s) where the Seller assigns its interest as the Landlord to Buyer, and Buyer assumes that interest from the Seller. The assignment should also contain indemnities for the Buyer for anything that happens prior to the sale, and in favor of the seller for anything that happens after the sale. The Seller should also deliver a bill of sale to the Buyer assigning the Seller's rights in any personal property or warranties that are in the Seller's name.
- In the event of a newly-constructed building where a sale is happening at or near the rent commencement date, Buyers and Sellers should ensure that the purchase agreement contains language conditioning closing on the Tenant taking possession of the space and signing off on delivery conditions. Buyers need to ensure that they are not "buying a problem".



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Novi, MI

Wednesday, April 13, 2022

Session Materials

Roundtable 16: The Impact of Zoom on Commercial Eviction Hearings

Led by: Alan J. Taylor, Esq., Segal McCambridge Singer & Mahoney, Ltd.

The Impact of Zoom on Commercial Real Estate Litigation

ALAN J. TAYLOR
ATAYLOR@SMSM.COM
248 994-0063



Zoom's Pre-Suit Impact on Commercial Tenancies

1. # of Michigan Courts that use Zoom versus Require In Person Appearances?
2. How has Zoom Benefitted Commercial Landlords?
3. Zoom Timing Issues – Best Methods for Landlords:
 - A. Know The Docket of your District Court.
 - B. 1 Step or 2 Step Process?
4. Has the Pandemic Increased Judicial Sympathy/Flexibility for Commercial Tenants?
5. Reset of Landlord's Expectations to Get Best Results.
6. Cost/Benefit Analysis:
 - A. Eviction/Voluntarily Vacate?
 - B. Collection of Debt Owed/Pre-Suit Settlement?
5. Smell Test and Spidey Senses.



Zoom's Impact on Commercial Real Estate Lawsuits

Impact of Zoom after Commercial Real Estate Lawsuit is Filed:

- i. More Commercial Tenants Appearing via Zoom/Less Defaults – Creation of New Dynamic**
- ii. Impact of No In Person Settlement Discussions before Hearing between Commercial Tenant/Landlord's Counsel**
- iii. Scheduling Order/Timing**
- iv. Zoom Depositions/Distractions/Less Control**
- v. Impact on Jury Pool**



The Impact of Zoom on Commercial Real Estate Litigation

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Wednesday, April 13, 2022

Session Materials

**Roundtable 17: Evictions and Collections in the Age of
COVID and Force Majeure Defenses**

Led by: Brad S. Defoe, Esq., Varnum LLP

EVICTIONS AND COLLECTIONS IN THE AGE OF COVID
AND FORCE MAJEURE DEFENSES

Brad Defoe, Varnum LLP

1. Court Operations in a Post-COVID World

- A. Overview of Michigan courts – district court, circuit court, federal court
- B. Impact of COVID on court operations
- C. Zoom hearings and trials

2. Timing, Escrow Orders, and Other Considerations in Eviction Cases

- A. How does the eviction process work and how long does it take?
- B. Do tenants have to pay rent while an eviction case is pending?
- C. Collection cases as an alternative to eviction

3. Force Majeure Clauses and Other Key Lease Terms

- A. Force majeure – what does it mean and does COVID qualify?
- B. Other lease provisions raised in COVID-related rent cases
 - "Permitted use" clauses
 - "Without setoff" clauses
- C. Acceleration clauses – are they enforceable?

4. Recent Developments in Case Law on Commercial Leases

- A. Lessons from tenant-friendly decisions
 - Frustration of purpose doctrine may excuse payment COVID rent
- B. Lessons from landlord-friendly decisions
 - Force majeure clause may require payment of COVID rent
- C. Other considerations in COVID-related rent cases
 - Executive Orders requiring closures were found invalid



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Session Materials

Roundtable 18: Liquor Licensing: From Beers to Cheers!

Led by: Jason R. Canvasser, Esq., Clark Hill, PLC

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LIQUOR LICENSING ROUNDTABLE

From Beers to Cheers!



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OUTLINE

1. General Overview of the Michigan Liquor Control Commission
 - a. Meet the Commissioners
 - b. Key Terms and Definitions
 - c. The Approval Process
2. Landlord Issues
 - a. Securing an Interest in the License
 - b. Lease Contingencies
 - c. Zoning and Use Restrictions
 - d. Timing
3. Tenant Issues
 - a. Lease Contingencies
 - b. Zoning and Use Restrictions
 - c. Liquor Law Compliance
 - d. Timing
4. Current Industry Trends
 - a. Curb-Side Sales
 - b. Alcohol To Go
 - c. Online Ordering
5. Q & A

Meet the Michigan Liquor Control Commissioners



Chair Pat Gagliardi

Patrick M. Gagliardi was appointed by Governor Gretchen Whitmer as an Administrative Commissioner to the Michigan Liquor Control Commission in August 2019 for a term expiring June 12, 2023. At the time of his initial appointment, he was designated as Chair of the Commission by the Governor. He is a former member of the House of Representatives where he also served as the Democratic Floor Leader, and chair of the Tourism Committee and the Oversight and Ethics Committee. Since his time in the House of Representatives, he has served as a Commissioner on the Michigan Liquor Control Commission, consultant and owner of Gagliardi Associates, LLC, and director of corporate and foundation relations for Lake Superior State University. Gagliardi earned a Bachelor of Arts in Sociology from Lake Superior State University.



Commissioner Dennis Olshove

Dennis Olshove was appointed as an Administrative Commissioner to the Michigan Liquor Control Commission in June 2012 and was reappointed for a term that expires on June 12, 2022. Olshove retired in 2010 after serving eight years as a Michigan State Senator, representing much of Macomb County. Previously, he served as Macomb County Commissioner, Michigan State Representative and as an administrative assistant in the office of State Rep. Curtis Hertel. In 2009, Olshove received the Michigan State Medical Society Legislative Leadership Award. He holds a bachelor's degree in communications from Michigan State University.

Vacant



Lee Gonzales

Lee Gonzales was appointed by Governor Whitmer as a Hearing Commissioner in September 2020 for a term that expires June 12, 2024. Before joining the Commission, he was Deputy Director of Legislative & External Affairs at the Michigan Department of Civil Rights. Gonzalez was elected to the Michigan House of Representatives for three terms (2005-2010), where he served on the Appropriations Committee, chairing the Subcommittee on Transportation. He served as Genesee County Assistant Treasurer, playing a key role in starting the state's first Land Bank. He also served as Genesee County's Development Director and project manager for the Flint/Genesee County Job Corps Center (a public-private partnership). Gonzales earned Bachelor of Arts in Urban Administration and Master of Public Administration degrees from the University of Michigan-Flint. He completed the Senior Executives in State & Local Government program at Harvard's Kennedy School of Government. Gonzales and his wife Brenda have three children and eight grandchildren.



Edward Toma

Edward Toma was appointed as a Hearing Commissioner for the Michigan Liquor Control Commission in September 2020 for a term that expires June 12, 2024. Prior to his appointment, he served as an investigator and regulation agent in the Michigan Liquor Control Commission's Enforcement Division, a position he held since 2009. In that role, he conducted enforcement, background, and licensing investigations as well as financial audits and undercover operations for the Commission. Prior to his time with the Commission, he worked in the alcohol retail and restaurant industry for several years. Toma holds a Bachelor of Integrative Studies in Mechanical Engineering and Biological Science from Oakland University.

TERM	DEFINITION
Add Space Request	A request made by a licensee to increase the physical dimensions of its licensed premises. Administrative Rule 436.1023(2)(b) requires licensees to obtain prior written approval from the Commission before adding space to the physical structure of the licensed premises.
Additional Bar	Allows a Class C or B-Hotel licensee to set up an additional bar within its licensed premises or Outdoor Service area. The licensee may obtain one or more Additional Bars.
A-Hotel License	A license that allows a hotel to sell only beer and wine for consumption on the premises to bona fide guests.
Aircraft	Licensed to carry passengers in this state that sell, offer for sale, provide, or transport alcoholic liquor.
Articles of Incorporation	The documents filed with a government body that documents the legal formation of a corporation. In Michigan, a corporation would file its Articles of Incorporation with the Corporations Division of the Department of Licensing and Regulatory Affairs. The Corporations Division will provide the corporation with a certificate to verify the articles were filed.
Articles of Organization	The documents filed with a government body that documents the legal formation of a limited liability company. In Michigan, a limited liability company would file its Articles of Organization with the Corporations Division of the Department of Licensing and Regulatory Affairs. The Corporations Division will provide the limited liability company with a certificate to verify the articles were filed.
Banquet Facility Permit	A permit that allows an on-premises licensee to serve alcohol at a separate banquet facility used only for scheduled functions.
Beer & Wine Sampling Permit	A permit that allows for an off-premises licensee to provide patrons samples of beer or wine under certain circumstances.
B-Hotel License	A license that allows a hotel to sell beer, wine, spirits, and mixed drinks for consumption on the premises to bona fide guests.
Brewpub License	A license that allows a licensee to manufacture and sell beer produced on the premises for consumption on the premises or for take-out. Held in conjunction with a Class C, Tavern, A-Hotel, or B-Hotel license.
Bylaws	Bylaws are a legal document that defines a corporation's purpose, how it will run its affairs, and the duties and responsibilities of people who own and manage it.

Catering Permit	A Catering Permit authorizes a holder of a public on premises, Specially Designated Merchant, and/or Specially Designated Distributor license to sell, deliver, and serve beer, wine, and spirits in the original containers at private events. A licensee must have a food service establishment license or retail food establishment license to qualify for this permit.
Class C License	A license that allows a business to sell beer, wine, spirits, and mixed drinks for consumption on the premises.
Classification Transfer	A license transfer wherein the classification of the license changes from one type of license to another, such as a Class C license is reclassified as a B-Hotel license.
Club License	A license that allows a nonprofit organization to sell beer, wine, spirits, and mixed drinks for consumption on the premises to bona fide members and their guests who are 21 years of age or older only.
Commencement Date (Lease Agreement)	The date a lease agreement begins. In some leases this is referred to as the effective date.
Conditional License	A license that an applicant may obtain under certain criteria which allows the applicant to operate while awaiting the approval of its permanent licensing request.
Dance Permit	Allows dancing by patrons of a business with an on premises license. Often combined with an Entertainment Permit.
Direct Connection to Unlicensed Premises	Allows connections from the licensed premises to unlicensed premises.
Dram Shop Insurance	See Proof of Financial Responsibility.
Drop Space Request	A request made by a licensee to reduce the physical dimensions of its licensed premises. Administrative Rule 436.1023(2)(b) requires licensees to obtain prior written approval from the Commission before dropping space from the physical structure of the licensed premises.
Entertainment Permit	Permits certain types of live entertainment at a business with an on premises license. An entertainment permit does not allow topless activity. Often combined with a Dance Permit.
Escrow	When a license is no longer being used for active operation it must be placed into escrow for the period of time it will not be used.

Extended Hours Permit	A permit held in conjunction with a Dance or Entertainment Permit (or both) that allows dancing or entertainment on the licensed premises outside the legal hours for the sale of alcohol. This permit does not allow the sale of alcohol outside of the legal hours of sale.
Fuel Pump Permission	Special permission granted to retail licensees for the operation of fuel pumps in conjunction with the licensed business. This permission requires the licensed business to maintain certain amounts of approved inventory, not including the value of the fuel.
G-1 License	A license that allows a facility that has an 18-hole golf course of at least 5,000 yards to sell beer, wine, spirits, and mixed drinks for consumption on the premises to members only.
G-2 License	A license that allows a facility that has an 18-hole golf course of at least 5,000 yards to sell beer and wine only for consumption on the premises to members only.
Licensed Premises	The location and physical space approved by the Commission for a liquor license.
Living Quarters Permit	Allows living quarters to be directly connected to the licensed premises.
Membership Interest Transfer	The transfer of a percentage of membership interest between existing or new members in a limited liability company, the issuance of a percentage of membership interest to a new or existing member, or the redemption of a percentage of membership interest of an existing member.
Off-Premises Storage	A locked storage area, not located on the licensed premises, where a licensee may store alcohol inventory.
Operating Agreement	An agreement among limited liability company members governing the limited liability company's business and members' financial and managerial rights and duties.
Outdoor Service	Authorization granted by the Commission for a licensee to sell alcohol outdoors in an area controlled by the licensee. The area must be well-defined and clearly marked.
Physical Plant	The actual, physical building, or space where a licensee will operate its business. See Licensed Premises.
Proof of Financial Responsibility	Special liability insurance for businesses that sell alcohol in Michigan as required under MCL 436.1803. Sometimes referred to as Dram Shop Insurance.

Property Document	A lease agreement, deed, land contract, or other document that demonstrates that the applicant or licensee has a legal right to occupy and use the physical plant for the licensed premises.
Purchase Agreement	A legal agreement executed between a seller and purchaser that defines the terms of the transaction, such as the items being sold, the amount paid for those items, and how payment will be made.
Redefine Licensed Premises Request	Similar to adding or dropping space, but utilized when a licensee requests to include additional space to the licensed premises that is not connected to its currently licensed premises or when reconstructing the licensed premises based on a different footprint.
Redevelopment License	A license that can be issued as a Class C, Tavern, B-Hotel, or A-Hotel license that must meet certain capital investment guidelines and be located in a redevelopment district, such as a downtown development district, corridor improvement district, principal shopping district, or tax increment finance authority district.
Resort License	A special type of Specially Designated Distributor license or on-premises license that is not issued under the regular quota for licenses. A resort license has additional requirements for issuance and most cannot be transferred to another location.
SDD License	See Specially Designated Distributor License.
SDM License	See Specially Designated Merchant License.
Special License	Only a bona fide nonprofit organization may request a Special License. Individuals may not request a Special License. A Special License is good for one day. An organization can obtain up to twelve (12) Special Licenses per year.
Specially Designated Distributor License	A license that allows a business to sell liquor and mixed spirit drinks for consumption off the premises.
Specially Designated Merchant License	A license that allows a business to sell beer and wine only for consumption off the premises.
Specific Purpose Permit	A permit that allows specific types of activities (such as the service of food, sporting activities, meetings, etc.) to occur on the licensed premises outside the legal hours for the sale of alcohol. A Specific Purpose permit does not allow the sale of alcohol outside of the legal hours of sale.

Stock Interest Transfer	The transfer of shares of stock between existing or new stockholders in a corporation, the issuance of new shares to a new or existing stockholder, or the redemption of the shares of an existing stockholder.
Sunday Sales Permit (A.M.)	A permit that allows the sale of liquor, beer, and wine on Sunday mornings between 7:00am and 12:00 noon, if allowed by the local unit of government.
Sunday Sales Permit (P.M.)	A permit that allows the sale of liquor on Sunday afternoons and evenings between 12:00 noon and 2:00am (Monday morning),if allowed by the local unit of government. No Sunday Sales Permit (P.M.) is required for the sale of beer and wine on Sunday after 12:00 noon.
Tavern License	A license that allows a business to sell beer and wine only for consumption on the premises.
Topless Activity Permit	Allows topless activity by the employees, agents, or contractors of a business with an on premises license.
Train	Licensed dining cars or other railroad or Pullman cars selling alcoholic liquor.
Watercraft	Licensed to carry passengers, selling alcoholic liquor.



BRIEF DESCRIPTION OF ALL MICHIGAN LIQUOR LICENSES AND PERMITS BY LICENSING TIERS

Supplier Tier (Often referred to as the “Manufacturer” Tier)

Suppliers - MCL 436.1603(15)(a)

- [Outstate Seller of Beer](#) – A licensee that sells beer that has been manufactured outside of Michigan to Wholesaler licensees to sell to retailers. May be a licensee located in Michigan or another state. No local legislative approval required for licensure.
- [Outstate Seller of Mixed Spirit Drink](#) – A licensee that sells mixed spirit drink products that have been manufactured outside of Michigan to Wholesaler licensees to sell to retailers. May be a licensee located in Michigan or another state. No local legislative approval required for licensure.
- [Outstate Seller of Wine](#) – A licensee that sells wine that has been manufactured outside of Michigan to Wholesaler licensees to sell to retailers. May be a licensee located in Michigan or another state. No local legislative approval required for licensure.
- **Outstate Self-Distributor** – A licensee that is a manufacturer located in another state that may self-distribute beer, wine, mixed spirit drink, and spirit products it manufactured directly to retailer licensees in Michigan. The beer, wine, and mixed spirit drink products cannot be distributed by Wholesaler licensees in the territory where the Outstate Self-Distributor licensee will self-distribute to retailer licensees. Spirit products to be self-distributed to retailer licensees cannot be listed in the Commission's price book.
- [Vendor of Spirits](#) – A person or company that sells spirits to the Commission to be distributed through the Authorized Distribution Agents (ADAs) to retailers. May be located in Michigan or another state. Distiller, Small Distiller, and Brandy Manufacturer licenses must be registered as a Vendor of Spirits in order to sell their products to the Commission.
- [Vendor Representative](#) – A license held by an individual person who serves as a representative between a Vendor of Spirits and the Commission. No local legislative approval required for licensure.

Manufacturers (Included in Supplier Tier) – MCL 436.1603(15)(b)

- [Brewer](#) – A manufacturer of beer which manufactures more than 60,000 barrels of beer a year. Can sell beer to Wholesaler licensees to sell to retailers. May also sell beer to consumers under an On-Premises Tasting Room Permit at the location where it manufactures beer. No local legislative approval required for licensure, if



BRIEF DESCRIPTION OF ALL MICHIGAN LIQUOR LICENSES AND PERMITS BY LICENSING TIERS

manufacturing only; On-Premises Tasting Room Permit requires local legislative approval.

- [Micro Brewer](#) – A manufacturer of beer which manufactures 60,000 or fewer barrels of beer a year. Can sell beer to Wholesaler licensees to sell to retailers. May also sell beer to consumers under an On-Premises Tasting Room Permit at the location where it manufactures beer. May also self-distribute beer it manufactures to retailers if it sells fewer than 2,000 barrels of beer a year. No local legislative approval required for licensure, if manufacturing only; On-Premises Tasting Room Permit requires local legislative approval.
- Limited Production Manufacturer – A licensee that is manufacturer that purchases beer from Brewer or Micro Brewer licensee or out-of-state equivalent of a Brewer or Micro Brewer licensee for purposes of taking ownership of the beer and further manufacturing the beer. A Limited Production Manufacturer licensee does not brew the beer, but modifies the beer it purchases as part of the manufacturing process. The finished product is then sold to a Wholesaler or Outstate Seller of Beer licensee. A Limited Production Manufacturer license cannot be held with any other license type issued by the Commission.
- [Brandy Manufacturer](#) – A manufacturer that manufactures brandy from wine that it manufactures. The Brandy Manufacturer licensee must also be licensed as a Wine Maker or Small Wine Maker licensee. Can sell brandy to the Commission to sell through Authorized Distribution Agents to retailers. May sell brandy it manufactures to customers under an On-Premises Tasting Room Permit at the location where it manufactures it and also through an Off-Premises Tasting Room license or Joint Off-Premises Tasting Room license. No local legislative approval required for licensure, if manufacturing only; On-Premises Tasting Room Permit requires local legislative approval.
- [Distiller \(Manufacturer of Spirits\)](#) – A manufacturer of spirit products that contain more than 10% alcohol by volume which manufactures more than 60,000 gallons of spirits a year. Can sell spirits it manufactures to the Commission to sell through Authorized Distribution Agents to retailers. May sell spirits it manufactures to consumers under an On-Premises Tasting Room Permit at the location it manufactures it and also through an Off-Premises Tasting Room license or Joint Off-Premises Tasting Room license. No local legislative approval required for licensure, if manufacturing only; On-Premises Tasting Room Permit requires local legislative approval.
- [Small Distiller](#) – A manufacturer of spirit products that contain more than 10% alcohol by volume which manufactures 60,000 or fewer gallons of spirits a year. Can sell spirits it manufactures to the Commission to sell through Authorized Distribution Agents to retailers. May self-distribute spirits it manufactures to retailers if it sells less than 3,000 gallons of spirits a calendar year to retailers. May sell spirits it



BRIEF DESCRIPTION OF ALL MICHIGAN LIQUOR LICENSES AND PERMITS BY LICENSING TIERS

manufactures to customers under an On-Premises Tasting Room Permit at the location where it manufactures it and also through an Off-Premises Tasting Room license or Joint Off-Premises Tasting Room license. No local legislative approval required for licensure, if manufacturing only; On-Premises Tasting Room Permit requires local legislative approval.

- [Wine Maker](#) – A manufacturer of wine which manufactures more than 50,000 gallons of wine a year. Can sell wine to Wholesaler licensees to sell to retailers. May also sell wine to consumers under an On-Premises Tasting Room Permit at the location where it manufactures it and also through an Off-Premises Tasting Room license or Joint Off-Premises Tasting Room license. May self-distribute wine it manufactures to retailers. May hold a Farmer's Market Permit that allows the sale and sampling of its wine at a farmer's market. No local legislative approval required for licensure, if manufacturing only; On-Premises Tasting Room Permit requires local legislative approval.
- [Small Wine Maker](#) – A manufacturer of wine which manufactures 50,000 or fewer gallons of wine a year. Can sell wine to Wholesaler licensees to sell to retailers. May also sell wine to consumers under an On-Premises Tasting Room Permit at the location where it manufactures it and also through an Off-Premises Tasting Room license or Joint Off-Premises Tasting Room license. May self-distribute wine it manufactures to retailers. May hold a Farmer's Market Permit that allows the sale and sampling of its wine at a farmer's market. No local legislative approval required for licensure, if manufacturing only; On-Premises Tasting Room Permit requires local legislative approval.
- [Mixed Spirit Drink Manufacturer](#) – A manufacturer of mixed spirit drink products that contain 10% or less alcohol by volume. Can sell mixed spirit drink products it manufactures to Wholesaler licensees to sell to retailers. May self-distribute mixed spirit drink it manufactures to retailers if it manufactures less than 31,000 gallons of mixed spirit drink a calendar year. May also sell mixed spirit drink products to consumers under an On-Premises Tasting Room Permit at the location where it manufactures them. No local legislative approval required for licensure, if manufacturing only; On-Premises Tasting Room Permit requires local legislative approval.
- [Off-Premises Tasting Room License](#) – A license that may be held by a Wine Maker, Small Wine Maker, Distiller, Small Distiller, or Brandy Manufacturer license at a location that is not on the manufacturer's licensed manufacturing premises. Under an Off-Premises Tasting Room license, the manufacturer may only sell the spirit, wine, or brandy products it manufactures at its licensed manufacturing premises. A manufacturer may have up to five (5) Off-Premises Tasting Room licenses (or a combination of Off-Premises Tasting Room licenses and Joint Off-Premises Tasting Room licenses) where full drinks may be sold and served for on-premises



BRIEF DESCRIPTION OF ALL MICHIGAN LIQUOR LICENSES AND PERMITS BY LICENSING TIERS

consumption and unlimited Off-Premises Tasting Room licenses where limited samples only are sold or given away for on-premises consumption. The sale of spirit, wine, or brandy products to consumers for off-premises consumption is also allowed with an Off-Premises Tasting Room license. Local legislative approval required for licensure.

- [Joint Off-Premises Tasting Room License](#) – A Joint Off-Premises Tasting Room license is issued to a Wine Maker, Small Wine Maker, Distiller, Small Distiller, or Brandy Manufacturer license at a location that is not on the manufacturer's licensed manufacturing premises to be operated jointly with another Wine Maker, Small Wine Maker, Distiller, Small Distiller, or Brandy Manufacturer licensee that also holds a Joint Off-Premises Tasting Room license. Under a Joint Off-Premises Tasting Room license, the manufacturer may only sell the spirit, wine, or brandy products it manufactures at its licensed manufacturing premises. A manufacturer may have up to five (5) Joint Off-Premises Tasting Room licenses (or a combination of Off-Premises Tasting Room licenses and Joint Off-Premises Tasting Room licenses) where full drinks may be sold and served for on-premises consumption and unlimited Joint Off-Premises Tasting Room licenses where limited samples only are sold or given away for on-premises consumption. The sale of spirit, wine, or brandy products to consumers for off-premises consumption is also allowed with a Joint Off-Premises Tasting Room license. Local legislative approval required for licensure.
- Consumer Sampling Event License – A license held by a Small Distiller or Vendor of Spirits that allows the licensee to conduct consumer sampling events with spirits it manufactures on the premises of a Specially Designated Distributor licensee. No local legislative approval required for licensure.
- [Direct Shipper](#) – A license held by a Wine Maker or Small Wine Maker licensee that allows the Wine Maker or Small Wine Maker to sell and ship wine directly to a consumer in Michigan or another state. An Outstate Seller of Wine located in another state may hold this license if it is the manufacturer of the wine it ships into Michigan. No local legislative approval required for licensure.
- [Salesperson](#) – A license held by an individual person that sells, delivers, or promotes the products of a manufacturer or other supplier. A person that sells, delivers, or promotes the products of a Wholesaler licensee may also hold a Salesperson license. No local legislative approval required for licensure.
- Broker – A license held by company that operates as a corporate salesperson for a manufacturer. A Broker licensee may also employ Salesperson licensees to sell, deliver, or promote the products of a manufacturer or other supplier. No local legislative approval required for licensure.



BRIEF DESCRIPTION OF ALL MICHIGAN LIQUOR LICENSES AND PERMITS BY LICENSING TIERS

- [Warehouser](#) – A license held by a person authorized to store alcoholic beverages. Can be held by a manufacturer or Wholesaler licensee. No local legislative approval required for licensure.
- [Limited Alcohol Buyer](#) – A license that allows a person or company to purchase alcohol for medicinal, mechanical, chemical, or scientific purposes. No local legislative approval required for licensure.
- [Seller of Alcohol](#) – A license that allows a person or company to sell alcohol to a distiller or wine maker for rectifying or fortifying purposes or to an industrial manufacturer. No local legislative approval required for licensure.
- [Industrial Manufacturer](#) – A license that allows a person or company to purchase alcohol for manufacturing products for non-beverage purposes. No local legislative approval required for licensure.

Wholesaler Tier

- [Wholesaler](#) – A license that allows the distribution of beer, wine, or mixed spirit drink products produced in or brought into Michigan by licensees in the supplier tier to sell to licensees in the retailer tier. Wholesaler licensees are often referred to as “distributors”. No local legislative approval required for licensure.
- [Warehouser](#) – A license held by a person authorized to store alcoholic beverages. Can be held by a manufacturer or Wholesaler licensee. No local legislative approval required for licensure.

Retailer Tier

The retailer tier consists of stores, restaurants, hotels, bars, and clubs that hold licenses which allow the sale of alcohol to consumers. The retailer tier is broken down into two groups: on-premises licensees that may sell alcohol to customers for consumption on the premises where it is sold; and off-premises licensees that may sell alcohol to customers for consumption somewhere else.

Most retailer licenses are “quota” licenses, which means that there are a limited number of specific license types allowed based on the population of a local governmental unit. Once the quota limit for a license type is met, no new licenses of that type can be issued in that local governmental unit. However, most quota licenses are transferrable by location from one local governmental unit to another. For off-premises licenses, there are exemptions from the quota if there is not another license of the same type within two miles of the location of a proposed licensed business.



BRIEF DESCRIPTION OF ALL MICHIGAN LIQUOR LICENSES AND PERMITS BY LICENSING TIERS

The statute also allows for special [“resort” licenses](#) that may be issued in limited numbers each year over the quota limits. On-premises resort licenses have specific investment thresholds to qualify, cannot be transferred to another location once issued, must be open a minimum number of days and hours each week, and come with a \$20,000.00 initial license fee. Off-premises resort licenses are limited to Specially Designated Distributor licenses, but those do not require any minimum investment amounts, do not have minimum days and hours of operation, and have the same license fees as other Specially Designated Distributor licenses.

[Redevelopment Area \(RDA\)](#) and [Development District \(DDA\)](#) licenses are another version of on-premises retailer licenses that can be issued over the quota limits. These licenses require a specific investment threshold to qualify, cannot be transferred to another location once issued, must be open a minimum number of days and hours each week, and come with a \$20,000.00 initial license enhancement fee. If the licensee ever goes out of business the license must be surrendered to the Commission and terminated.

In addition to all of the aforementioned license types, there are a number of individual sections of law that have created versions of on-premises licenses that can be issued in excess of the quota limits. These are referred to as “special act” licenses. These can be issued to colleges and universities, organizations hosting international and national sporting events, motorsports complexes, municipal civic centers, county or municipal airports, and for a wide array of other special purposes.

On-Premises Retailer License Types:

- [A-Hotel](#) – Allows a hotel that has a minimum of 25 rooms to sell and serve beer, wine, and mixed spirit drink products for consumption on the licensed premises. May be issued as a quota, resort, RDA, DDA, or special act license. Local legislative approval is required for new, previously unissued license, but not required to transfer ownership or location of an existing license.
- [B-Hotel](#) – Allows a hotel that has a minimum of 25 rooms to sell and serve beer, wine, mixed spirit drink, and spirits to customers. May be issued as a quota, resort, RDA, DDA, or special act license. Local legislative approval is required for new, previously unissued license, but not required to transfer ownership or location of an existing license.
- [Tavern](#) – Allows a restaurant or bar to sell and serve beer, wine, and mixed spirit drink products for consumption on the licensed premises. May be issued as a quota, resort, RDA, DDA, or special act license. Local legislative approval is required for new, previously unissued license, but not required to transfer ownership or location of an existing license.



BRIEF DESCRIPTION OF ALL MICHIGAN LIQUOR LICENSES AND PERMITS BY LICENSING TIERS

- [Class C](#) – Allows a restaurant or bar to sell and serve beer, wine, mixed spirit drink, and spirits to customers. May be issued as a quota, resort, RDA, DDA, or special act license. Local legislative approval is required for new, previously unissued license, but not required to transfer ownership or location of an existing license.
- G-1 – Allows a private, corporate golf club to sell and serve beer, wine, mixed spirit drink, and spirits to its members only. Must be reclassified from an existing quota on-premises license. Local legislative approval is required to transfer the classification to a G-1 license.
- G-2 – Allows a private, corporate golf club to sell and serve beer, wine, and mixed spirit drink products to its members only. Must be reclassified from an existing quota on-premises license. Local legislative approval is required to transfer the classification to a G-2 license.
- [Brewpub](#) – Allows a Class C, Tavern, A-Hotel, or B-Hotel licensee to manufacture, sell, and serve its own beer to its customers. May also sell beer it manufactures to customers for off-premises consumption. This is not a quota license. Local legislative approval is required for new, previously unissued license, but not required to transfer ownership or location of an existing license.
- Aircraft – Allows the sale and service of beer, wine, mixed spirit drink, and spirits on an airplane that has a specific route and timetable. This is not a quota license. No local legislative approval required for licensure.
- Train – Allows the sale and service of beer, wine, mixed spirit drink, and spirits on a train. This is not a quota license. No local legislative approval required for licensure.
- Watercraft – Allows the sale and service of beer, wine, mixed spirit drink, and spirits on a boat that has a specific route and timetable. This is not a quota license. No local legislative approval required for licensure.
- [Club](#) – Allows a private, nonprofit organization to sell and serve beer, wine, mixed spirit drink, and spirits to its members only. This is not a quota license. Local legislative approval is required for new, previously unissued license, but not required to transfer ownership or location of an existing license.
- [Special License](#) – A limited term license, generally only for one day, that can be issued to a nonprofit organization for fundraising purposes. Can be issued for beer, wine, and spirits sales and consumption and for a wine auction with wine donated by private individuals. An organization may only be issued twelve (12) Special Licenses each calendar year. This is not a quota license. No local legislative approval required for licensure, but police or sheriff approval required.



BRIEF DESCRIPTION OF ALL MICHIGAN LIQUOR LICENSES AND PERMITS BY LICENSING TIERS

- [Beer Festival Special License](#) – A limited term license that allows an association comprised of Brewer, Micro Brewer, or Brewpub licensees to hold a beer festival. The association is limited to six (6) events each calendar year. The events can be more than one day, generally two to three days in a row. This is not a quota license. No local legislative approval required for licensure, but police or sheriff approval required.
- Continuing Care Retirement Center License – Allows a registered continuing care retirement center or home for the aged to sell and serve beer, wine, mixed spirit drink, and spirits for consumption by a resident or the bona fide guests accompanying the resident on the premises of the facility. Local legislative approval is required for new, previously unissued license, but not required to transfer ownership of an existing license. Only 20 licenses may be issued to continuing care retirement centers and only 5 licenses may be issued to homes for the aged, statewide. This is not a quota license. Local legislative approval is required for new, previously unissued license, but not required to transfer ownership or location of an existing license.

Types of Special Act Licenses, As Referenced Above:

- State Owned Airport (MCL 436.1505) – Does not count against local governmental unit's on-premises retailer license quota.
- Publicly Owned Airport (MCL 436.1507) – Does not count against local governmental unit's on-premises retailer license quota.
- Municipal Civic Center or Civic Auditorium (MCL 436.1509) – May be issued for a civic center or auditorium which is operated as a municipal enterprise for scheduled events only in a city or township with a population of 5,500 or more. Does not count against local governmental unit's on-premises retailer license quota.
- Mackinac Island State Park and Presque Isle Harbor Marina (MCL 436.1511) -- Does not count against local governmental unit's on-premises retailer license quota.
- College & University Conference Center (MCL 436.1513(1)) – For scheduled events only. Does not count against local governmental unit's on-premises retailer license quota.
- College & University Golf Course (MCL 436.1513(4)) – Counts against local governmental unit's on-premises retailer license quota.
- College & University Culinary Program (MCL 436.1513a) – Does not count against local governmental unit's on-premises retailer license quota.
- University Hotel & Conference Center (MCL 436.1514) – Counts against local governmental unit's on-premises retailer license quota.
- University Hotel & Conference Center, 2nd Location (MCL 436.1514a) – Counts against local governmental unit's on-premises retailer license quota.
- Government-Owned Golf Course (MCL 436.1515) – Does not count against local governmental unit's on-premises retailer license quota.
- International Sporting Event (MCL 436.1517) – Does not count against local governmental unit's on-premises retailer license quota.



BRIEF DESCRIPTION OF ALL MICHIGAN LIQUOR LICENSES AND PERMITS BY LICENSING TIERS

- National Sporting Event (MCL 436.1517a) – Does not count against local governmental unit's on-premises retailer license quota.
- Motorsports Entertainment Complex (MCL 436.1518) – Does not count against local governmental unit's on-premises retailer license quota.
- Professional Hockey & International Soccer At University Stadium (MCL 436.1531(7)) – Does not count against local governmental unit's on-premises retailer license quota.

Off-Premises Retailer License Types:

- [Specially Designated Merchant \(SDM\)](#) – Allows a convenience store, grocery store, or gas station to sell beer and wine to consumers for consumption off the premises. An on-premises retailer may also hold an SDM license to allow customers to purchase beer, wine, and mixed spirit drink products for takeout. May only be issued as a quota license with a number of exemptions from the quota requirements. No local legislative approval required for licensure.
- [Specially Designated Distributor \(SDD\)](#) – Allows a convenience store, grocery store, or gas station to sell spirits to consumers for consumption off the premises. An SDD license is almost always held in conjunction with an SDM license. The only on-premises retailers that may hold an SDD license are Class C and B-Hotel licensees. May be issued as a quota or resort license. No local legislative approval required for licensure.
- [Third Party Facilitator Service \(TPFS\)](#) – Allows a company to facilitate the sale and delivery of beer, wine, mixed spirit drink, or spirits from an SDD or SDM to a consumer using a webpage or mobile application. It is not specifically included in the retailer tier, but due to the statutory prohibitions of a supplier or wholesaler tier licensee from holding interest in a TPFS license, the Commission has determined that it is a retailer tier license. No local legislative approval required for licensure.

Permits, Permissions, and Approvals – These permits, permissions, and approvals may be held by licensees in any of the licensing tiers, as specified below.

- Additional Bar – A Class C or B-Hotel license may have a second or subsequent bar on the premises where drinks may be purchased at the bar. If a Class C or B-Hotel does not have an Additional Bar, it may only sell from one (1) bar on its premises but may offer table service of alcohol from service bars that only its employees utilize. No other license type requires an Additional Bar to have more than one bar on the licensed premises. No local legislative approval required for approval.
- Banquet Facility Permit – A special permit that allows an on-premises retailer licensee, except for a Club or Special License, to sell and serve alcohol at a banquet facility located in a different location from its licensed premises. The Banquet Facility Permit



BRIEF DESCRIPTION OF ALL MICHIGAN LIQUOR LICENSES AND PERMITS BY LICENSING TIERS

can only be used for scheduled events, cannot have regular meal service, and cannot be open to the general public. Not a license type, but functions similarly to an on-premises license. Local legislative approval is required for new, previously unissued Banquet Facility Permit, but not required to transfer ownership of an existing Banquet Facility Permit.

- Beer & Wine Tasting Permit – Allows for beer and wine tastings on the premises of a Specially Designated Merchant licensee. An SDM may hold this permit in order to conduct beer or wine tastings on its premises. A Brewer, Micro Brewer, Wine Maker, Small Wine Maker, Outstate Seller of Beer, or Outstate Seller of Wine may also hold this permit in order for one of its Salesperson licensees to conduct beer or wine tastings on the premises of an SDM licensee. No local legislative approval required for approval.
- Catering Permit – Allows for the sale, deliver, and service of beer, wine, and spirits to a customer for a private event. No alcohol can be sold by the drink to guests at the event; the host must buy all the alcohol and it is served to the guests for no charge. The following license types may hold a Catering Permit: A-Hotel, B-Hotel, Class C, Tavern, SDD, SDM, a manufacturer that holds an On-Premises Tasting Room Permit, and Off-Premises Tasting Room license. No local legislative approval required for approval.
- Dance Permit – Allows for dancing on the premises of a licensee that has on-premises consumption. The following license types may hold a Dance Permit: A-Hotel, B-Hotel, Class C, Tavern, G-1, G-2, Banquet Facility Permit, a manufacturer that holds an On-Premises Tasting Room Permit, Off-Premises Tasting Room license, and Joint Off-Premises Tasting Room license. This permit may be combined with an Entertainment Permit as a Dance-Entertainment Permit. No local legislative approval required for approval.
- Entertainment Permit – Allows for monologues, dialogues, motion pictures, still slides, closed circuit television, contests, or other performances for public viewing on the premises of a licensee that has on-premises consumption. The following license types may hold a Dance Permit: A-Hotel, B-Hotel, Class C, Tavern, G-1, G-2, Banquet Facility Permit a manufacturer that holds an On-Premises Tasting Room Permit, Off-Premises Tasting Room license, and Joint Off-Premises Tasting Room license. This permit may be combined with a Dance Permit as a Dance-Entertainment Permit. No local legislative approval required for approval.
- Extended Hours Permit – Allows for a holder of a Dance, Entertainment, or Dance-Entertainment Permit to remain open past the normal legal hours of sale between 7:00am to 2:00am for the express purpose of allowing dancing or entertainment. The following license types may hold an Extended Hours Permit: A-Hotel, B-Hotel, Class C, Tavern, G-1, G-2, Banquet Facility Permit, a manufacturer that holds an On-



BRIEF DESCRIPTION OF ALL MICHIGAN LIQUOR LICENSES AND PERMITS BY LICENSING TIERS

Premises Tasting Room Permit, Off-Premises Tasting Room license, and Joint Off-Premises Tasting Room license. No local legislative approval required for approval.

- Living Quarters Permit – Allows a licensee to have living quarters attached to the licensed premises. All licensees may hold this permit. No local legislative approval required for approval.
- [Off-Premises Tasting Room Permit](#) – Allows a manufacturer to sell alcoholic liquor it manufactures to consumers for consumption on or off the licensed premises at its licensed manufacturing premises. Local legislative approval is required for approval.
- Secondary Location Permit – A special permit that allows an SDM licensee to have a second, adjacent location where it may sell beer and wine to consumer for consumption off the premises in a gas station. Not a license type, but functions similarly to an off-premises license. No local legislative approval required for approval.
- Specific Purpose Permit – Allows a licensee that has on-premises consumption to remain open past the normal legal hours of sale between 7:00am to 2:00am for the specific purpose of listed with the permit. For example, a Specific Purpose Permit (Food), would allow the service of food outside the legal hours of alcohol sales. The following license types may hold an Extended Hours Permit: A-Hotel, B-Hotel, Class C, Tavern, G-1, G-2, Brewer, Banquet Facility Permit, a manufacturer that holds an On-Premises Tasting Room Permit, Off-Premises Tasting Room license, and Joint Off-Premises Tasting Room license. No local legislative approval required for approval.
- Sunday Sales Permit (AM) – Allows for the sale of beer, wine, mixed spirit drink, or spirits from 7:00am to 11:59am on Sunday for applicable license types in local governmental units that allow Sunday morning sales of alcohol. The following license types may hold a Sunday Sales Permit (AM): A-Hotel, B-Hotel, Class C, Tavern, G-1, G-2, SDD, SDM, Secondary Location Permit, Banquet Facility Permit, a manufacturer that holds an On-Premises Tasting Room Permit, Off-Premises Tasting Room license, and Joint Off-Premises Tasting Room license. No local legislative approval required for approval.
- Sunday Sales Permit (PM) – Allows for the sale of mixed spirit drink or spirits from 12:00pm on Sunday to 2:00am on Monday morning for applicable license types in local governmental units that allow Sunday afternoon and evening sales of alcohol. The following license types may hold a Sunday Sales Permit (PM): A-Hotel (mixed spirit drink only), B-Hotel, Class C, Tavern (mixed spirit drink only), G-1, G-2 (mixed spirit drink only), SDD, SDM (mixed spirit drink only), Banquet Facility Permit, a manufacturer that holds an On-Premises Tasting Room Permit, Off-Premises Tasting Room license, and Joint Off-Premises Tasting Room license. No local legislative approval required for approval.



BRIEF DESCRIPTION OF ALL MICHIGAN LIQUOR LICENSES AND PERMITS BY LICENSING TIERS

- Permission to Maintain Direct Connection to Unlicensed Premises – Allows a licensee to have a doorway from its licensed premises to another part of the same building where it is not licensed. All licensees may have this permission. No local legislative approval required for approval.
- Permission to Maintain Motor Vehicle Fuel Pumps On or Adjacent to the Licensed Premises – Allows an SDD or SDM licensee to have fuel pumps on the premises. No local legislative approval required for approval.
- Permission for Off-Premises Storage – Allows a licensee to store alcohol at a location other than the licensed premises. All licensees may have this permission. No local legislative approval required for approval.
- Authorization for Outdoor Service – Allows an on-premises licensee to sell and serve alcohol in a well-defined and clearly marked area adjacent to the licensed premises. May be held by A-Hotel, B-Hotel, Class C, Tavern, G-1, G-2, Banquet Facility Permit a manufacturer that holds an On-Premises Tasting Room Permit, Off-Premises Tasting Room license, and Joint Off-Premises Tasting Room license. No local legislative approval required for approval.
- Topless Activity Permit – Allows an on-premises retailer licensee to conduct topless activity on its licensed premises. No local legislative approval required for approval.



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Off Premise Transactions	Is Local Legislative Body approval required?	Is Local Police approval required?	Is Local Legislative Body or Police opinions required to be considered?	MLCC Investigation required?	Inspection Fees?	Base Fees
Add Space	No	No	No	Yes	Yes	
Change status	No	No	No	No	No	
Correct address	No	No	No	Yes	No	
Drop Space	No	No	No	Yes	Yes	
New Beer & Wine Sampling Permit	No	No	Yes	No	Yes	
New Catering Permit	No	No	Yes	No	Yes	\$100.00
New Direct Connection	No	No	No	Yes	No	
New Gas Pumps	No	No	No	Yes	No	
New Living Quarters Permit	No	No	Yes	No	Yes	
New Participation Permit	No	No	Yes	No	Yes	
New Resort SDD License	No	No	Yes	Yes	Yes	\$150.00 upon licensure
New SDD License	No	No	Yes	Yes	Yes	\$150.00
New SDM License	No	No	Yes	Yes	Yes	\$100.00
New Sunday Sales Permit (AM)	No	No	Yes	No	No	\$160.00
New Sunday Sales Permit (PM)	No	No	Yes	No	No	15% of total license fee
Release license from escrow (in escrow <6 months)	No	No	No	No	No	
Release license from escrow (in escrow 6+ months)	No	No	No	Yes	No	
Transfer Location- Off Premise	No	No	Yes	Yes	Yes	



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Transfer of stock or transfer of interest	No	No	Yes	Yes	Yes	Upon approval by the Commission pursuant to MCL 436.1529(3)
Transfer owner Drive-thru/up/in Window(w/ alcohol beverage sales)	No	No	No	Yes	No	
Transfer ownership of Beer & Wine Sampling Permit	No	No	Yes	No	No	
Transfer ownership of Catering Permit	No	No	Yes	No	No	\$100.00
Transfer ownership of Direct Connection	No	No	No	Yes	No	
Transfer ownership of Gas Pumps	No	No	No	Yes	No	
Transfer ownership of Living Quarters Permit	No	No	Yes	No	No	
Transfer ownership of Participation Permit	No	No	Yes	No	No	
Transfer ownership of Resort SDD License	No	No	Yes	Yes	Yes	\$150.00
Transfer ownership of SDD License	No	No	Yes	Yes	Yes	\$150.00
Transfer ownership of SDM License	No	No	Yes	Yes	Yes	\$100.00
Transfer ownership of Sunday Sales Permit (AM)	No	No	Yes	No	No	\$160.00
Transfer ownership of Sunday Sales Permit (PM)	No	No	Yes	No	No	15% of total license fee



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On Premise Transactions	Is Local Legislative Body approval required?	Is Local Police approval required?	Is Local Legislative Body or Police opinions required to be considered?	MLCC Investigation required?	Inspection Fees?	Base Fees
Add Space	No	No	No	Yes	Yes	
Change Specific Purpose Permit hours	No	No	No	No	No	
Change status	No	No	No	No	No	
Correct address	No	No	No	Yes	No	
Drop Space (current licensees)	No	No	No	Yes	Yes	
New Additional Bar	No	No	No	No	Yes	\$350.00 per bar
New A-Hotel License	Yes	No	Yes	Yes	Yes	\$250.00
New Aircraft License	No	No	Yes	Yes	Yes	\$600.00
New Banquet Facility Permit	Yes	No	Yes	Yes	Yes	\$600.00
New B-Hotel License	Yes*	No	Yes	Yes	Yes	\$600.00
New Brewpub License	Yes*	No	Yes	Yes	Yes	\$100.00
New Catering Permit	No	No	Yes	No	Yes	\$100.00
New Class C issued under MCL 436.1521a(1)(a)	Yes	No	Yes	Yes	Yes	\$20,000 upon licensure
New Class C issued under MCL 436.1521a(1)(b)	Yes	No	Yes	Yes	Yes	\$20,000 upon licensure
New Class C License	Yes*	No	Yes	Yes	Yes	\$600.00
New Club License	Yes*	No	Yes	Yes	Yes	\$300.00
New Continuing Care Retirement Center License	Yes*	No	Yes	Yes	Yes	\$600.00
New Dance Permit	No	No	Yes	No	Yes	

*except in a city having a population of 600,000 or more, pursuant to MCL 436.1501(2)



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On Premise Transactions	Is Local Legislative Body approval required?	Is Local Police approval required?	Is Local Legislative Body or Police opinions required to be considered?	MLCC Investigation required?	Inspection Fees?	Base Fees
New Dance-Entertainment Permit	No	No	Yes	No	Yes	
New Direct Connection	No	No	No	Yes	No	
New Entertainment Permit	No	No	Yes	No	Yes	
New Extended Hours Permit (Dance, Topless Activity, Entertainment)	No	No	Yes	No	Yes	
New Living Quarters Permit	No	No	Yes	No	Yes	
New Outdoor Service	No	No	No	Yes	No	
New Participation Permit	No	No	Yes	No	Yes	
New Resort A-Hotel License	Yes*	No	Yes	Yes	Yes	\$20,000 Enhancement upon licensure
New Resort B-Hotel License	Yes*	No	Yes	Yes	Yes	\$20,000 Enhancement upon licensure
New Resort Class C License	Yes*	No	Yes	Yes	Yes	\$20,000 Enhancement upon licensure
New Resort Tavern License	Yes*	No	Yes	Yes	Yes	\$20,000 Enhancement upon licensure
New SDM in conj with On Premise license	No	No	Yes	Yes	Yes	\$100.00
New Specific Purpose Permit (Food, Golf, etc.)	No	No	Yes	No	Yes	
New Sunday Sales Permit (AM)	No	No	Yes	No	No	\$160.00
New Sunday Sales Permit (PM)	No	No	Yes	No	No	15% of total license fee
New Tavern License	Yes*	No	Yes	Yes	Yes	\$250.00
New Topless Activity Permit	No	No	Yes	No	Yes	
New Train License	No	No	Yes	Yes	Yes	\$100.00

*except in a city having a population of 600,000 or more, pursuant to MCL 436.1501(2)



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On Premise Transactions	Is Local Legislative Body approval required?	Is Local Police approval required?	Is Local Legislative Body or Police opinions required to be considered?	MLCC Investigation required?	Inspection Fees?	Base Fees
New Watercraft License	No	No	Yes	Yes	Yes	\$100.00
Release license from escrow (in escrow <6 months)	No	No	No	No	No	
Release license from escrow (in escrow 6+ months)	No	No	No	Yes	No	
Temporary Permit	No	Yes	Yes	No	Yes	
Transfer Classification Class C to Tavern	No	No	Yes	No	Yes	
Transfer Classification Class C/Tavern to G1/G2	Yes	No	Yes	Yes	Yes	
Transfer Classification Class C to B Hotel	No	No	Yes	Yes	Yes	
Transfer Classification B Hotel to Class C/Tavern	No	No	Yes	Yes	Yes	
Transfer Classification Tavern to Class C	Yes	No	Yes	No	Yes	\$600.00
Transfer Location- On Premise	No	No	Yes	Yes	Yes	
Transfer of stock or transfer of interest	No	No	Yes	Yes	Yes	Upon approval by the Commission pursuant to MCL 436.1529(3)
Transfer ownership of Additional Bar	No	No	No	No	No	\$350.00
Transfer ownership of A-Hotel License	No	No	Yes	Yes	Yes	\$250.00
Transfer ownership of Aircraft License	No	No	Yes	Yes	Yes	\$600.00
Transfer ownership of Banquet Facility Permit	No	No	Yes	Yes	No	\$600.00
Transfer ownership of B-Hotel License	No	No	Yes	Yes	Yes	\$600.00
Transfer ownership of Brewpub License	No	No	Yes	Yes	Yes	\$100.00
Transfer ownership of Catering Permit	No	No	Yes	No	No	\$100.00



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On Premise Transactions	Is Local Legislative Body approval required?	Is Local Police approval required?	Is Local Legislative Body or Police opinions required to be considered?	MLCC Investigation required?	Inspection Fees?	Base Fees
Transfer ownership of Class C License	No	No	Yes	Yes	Yes	\$600.00
Transfer ownership of Class G-1 License	No	No	Yes	Yes	Yes	\$1,000.00
Transfer ownership of Class G-2 License	No	No	Yes	Yes	Yes	\$500.00
Transfer ownership of Continuing Care Retirement Center License	No	No	Yes	Yes	Yes	\$600.00
Transfer ownership of Dance Permit	No	No	Yes	No	No	
Transfer ownership of Dance-Entertainment Permit	No	No	Yes	No	No	
Transfer ownership of Direct Connection	No	No	No	Yes	No	
Transfer ownership of Entertainment Permit	No	No	Yes	No	No	
Transfer ownership of Extended Hours Permit(Dance, Topless, Entertain)	No	No	Yes	No	No	
Transfer ownership of Living Quarters Permit	No	No	Yes	No	No	
Transfer ownership of Outdoor Service	No	No	No	Yes	No	
Transfer ownership of Participation Permit	No	No	Yes	No	No	
Transfer ownership of Resort A-Hotel License	No	No	Yes	Yes	Yes	\$250.00
Transfer ownership of Resort B-Hotel License	No	No	Yes	Yes	Yes	\$600.00
Transfer ownership of Resort Class C License	No	No	Yes	Yes	Yes	\$600.00
Transfer ownership of Resort Tavern License	No	No	Yes	Yes	Yes	\$250.00
Transfer ownership of Specific Purpose Permit (Food, Golf, etc.)	No	No	Yes	No	No	
Transfer ownership of Sunday Sales Permit (AM)	No	No	Yes	No	No	\$160.00



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On Premise Transactions	Is Local Legislative Body approval required?	Is Local Police approval required?	Is Local Legislative Body or Police opinions required to be considered?	MLCC Investigation required?	Inspection Fees?	Base Fees
Transfer ownership of Sunday Sales Permit (PM)	No	No	Yes	No	No	15% of total license fee
Transfer ownership of Tavern License	No	No	Yes	Yes	Yes	\$250.00
Transfer ownership of Topless Activity Permit	No	No	Yes	No	No	
Transfer ownership of Train License	No	No	Yes	Yes	Yes	\$100.00
Transfer ownership of Watercraft License	No	No	Yes	Yes	Yes	\$100.00



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NOTICE: SUCCESSOR TAX LIABILITY
[Authorized by MCL 436.1501(6)]

When purchasing a liquor license or even a portion of a business, a buyer can be held liable for tax debts incurred by the previous owner. This is known as Successor Liability. Prior to committing to the purchase of any license or establishment, the buyer should request a tax clearance certificate from the seller that indicates that all taxes have been paid up to the date of issuance. Obtaining sound professional assistance from an attorney or accountant can be helpful to identify and avoid any pitfalls and hidden liabilities when buying even a portion of a business. Sellers can make a request for the tax clearance certificate through the Michigan Department of Treasury.

As a successor in the business, you should withhold sufficient purchase money to cover any business tax debts incurred by the previous owner. These funds may be released when the previous owner produces a receipt showing the taxes have been paid, or a Tax Clearance Certificate from the Michigan Department of Treasury stating that no taxes are due. Note that only the seller can request this information from the Department of Treasury. For more information visit the Michigan Department of Treasury website at www.michigan.gov/taxes

For unemployment tax purposes, successors may also be held liable for tax debts incurred by the previous owner. By law, the seller must provide the buyer with certain unemployment insurance information at least two days before an offer to purchase is accepted. For more information about unemployment tax debts, visit the Unemployment Insurance Agency website at www.michigan.gov/uia.

Other Liabilities

To protect yourself from other hidden liabilities, it is important that you thoroughly research the business you are purchasing. Some of the steps you can take to protect yourself are:

- Obtain sound professional assistance from an accountant or an attorney.
- Attend a Michigan Department of Treasury New Business Tax Seminar to become acquainted with your rights and responsibilities relative to Sales, Use and Withholding taxes. Seminars are conducted in the Spring and Fall of the year. Look for registration information and seminar dates on the www.michigan.gov/taxes website.
- For more information about Starting a Business in Michigan, visit the Michigan Economic Development Corporation Website at <http://www.michiganbusiness.org>.
- Visit the Uniform Commercial Code website, [UCC Online](http://www.uniformcc.org), to obtain financing statements about the business, such as information about tax liens and security interest in collateral.
- Check with the County Register of Deeds for possible liens against the property.



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Alcoholic Liquor To Go / For Delivery

 Beer, Wine, Mixed Spirit Drink, Spirits, and Mixed Drinks/Cocktails Filled In Qualified Container	Class C, Tavern A-Hotel, B-Hotel Club, G-1, G-2  May Sell And Deliver To Customers	Specially Designated Distributor (SDD)  May Sell And Deliver To Customers	Specially Designated Merchant (SDM)   May Fill & Sell Growlers Of Beer Only Pursuant To MCL 436.1537	Manufacturer With Tasting Room Permit Or License  May Sell And Deliver To Customers	Third Party Facilitator Service Licensee  May Deliver To Customers On Behalf Of Retailer Licensees Only
 Beer, Wine, Mixed Spirit Drink, and Spirits In Original Container	 If The Licensee Holds An SDM License It Can Sell And Deliver Beer & Wine Only In Its Original Container	 May Sell And Deliver To Customers	 May Sell And Deliver To Customers	 May Sell To Customers Micro Brewers May Sell & Deliver Beer to Customers Small Wine Makers May Sell & Deliver Wine to Customers if the Licensee Also Holds a Direct Shipper License	 May Deliver To Customers On Behalf Of SDD Or SDM Licensees

Licensees That Sell Alcoholic Liquor For On-Premises Consumption

Pursuant to MCL 436.1537a, a qualified licensee may sell alcoholic liquor (beer, wine, spirits, mixed spirit drink, spirits, or mixed drinks/cocktails) in a qualified container to customers for consumption off the licensed premises. The licensee or the licensee's employee must not fill the qualified container in advance of a sale. The licensee or the licensee's employee must seal the qualified container. A qualified licensee must not sell alcoholic liquor to a customer to go in its original container*.

A qualified licensee may also deliver alcoholic liquor in a qualified container to a customer. The licensee must stamp, print, or label the outside of the qualified container for delivery with the following statement: "Contains Alcohol. Must be delivered to a person 21 years of age or older". The recipient of the qualified container must provide identification to verify his or her age. The licensee or the licensee's employee must seal the qualified container. If the licensee is a Class C, Tavern, A-Hotel, B-Hotel, Brewpub, Club, G-1, or G-2 licensee, it may have its own employees deliver the qualified container of alcoholic liquor to a customer or it may utilize a Third Party Facilitator Service licensee to make the delivery. A manufacturer licensee with an approved tasting room permit or license may make a delivery of alcoholic liquor in a qualified container to a customer using only its own employees.

Qualified Licensees

- Class C license
- Tavern license
- A-Hotel license
- B-Hotel license
- Brewpub license
- Club license
- G-1 or G-2 license
- Manufacturer licensee with an On-Premises Tasting Room Permit
- Manufacturer licensee with an Off-Premises Tasting Room License
- Manufacturer licensee with a Joint Off-Premises Tasting Room License

A qualified container is a clean, sealable container that has a liquid capacity of one (1) gallon or less. After the container is filled it must be sealed with a device or material that is used to fully close off the container securely. The container can have no perforations or straw holes.

**Manufacturers with approved tasting room permits or licenses may sell alcoholic liquor that they manufactured to a customer to go in its original, unopened container. An on-premises retailer licensee that also holds a Specially Designated Merchant (SDM) license may sell beer and wine in original, unopened container to a customer to go.*

Licensees That Sell Alcoholic Liquor For Off-Premises Consumption

The following license types may sell alcoholic liquor (beer, wine, mixed spirit drink, or spirits) in original, unopened containers to customers for consumption off the premises:

- Specially Designated Distributor license
- Specially Designated Merchant license
- Any combination of manufacturer licenses with On-Premises Tasting Room Permit:
 - Micro Brewer license
 - Brewer license
 - Small Wine Maker license
 - Wine Maker license
 - Small Distiller license
 - Distiller/Manufacturer of Spirits license
 - Mixed Spirit Drink Manufacturer license
- Off-Premises Tasting Room license
- Joint Off-Premises Tasting Room license

Specially Designated Merchant (SDM) licenses may deliver beer and wine in original, unopened containers to customers at their homes or designated locations in compliance with MCL 436.1203(12):

- The beer or wine is delivered by the SDM licensee's own employees.
- The SDM licensee or its employee who delivers the beer or wine verifies that the individual accepting delivery is at least 21 years of age.
- If the SDM licensee or its employee intends to provide service to consumers, the SDM licensee or its employee providing the service has received alcohol server training through a server training program approved by the Commission.

Specially Designated Distributor (SDD) licenses may deliver spirits and mixed spirit drink products in original, unopened containers to customers at their homes or designated locations in compliance with MCL 436.1203(14):

- The spirits are delivered by the retailer's own employees.
- The SDD or its employee who delivers the spirits verifies that the individual accepting delivery is at least 21 years of age.
- If the SDD or its employee intends to provide service to consumers, the retailer or its employee providing the service has received alcohol server training through a server training program approved by the Commission.

Businesses with Brewpub and Micro Brewer licenses may deliver beer they manufacture to customers at their homes or designated locations in compliance with MCL 436.1203(12):

- The beer is delivered by the Brewpub's or Micro Brewer's own employees.
- The Brewpub or Micro Brewer or its employee who delivers the beer verifies that the individual accepting delivery is at least 21 years of age.
- If the Brewpub or Micro Brewer or its employee intends to provide service to consumers, the Brewpub or Micro Brewer or its employee providing the service has received alcohol server training through a server training program approved by the Commission.

A Wine Maker or Small Wine Maker licensee that holds a Direct Shipper license may deliver wine in an original, unopened container to customers at their home if the licensee complies with the conditions of [MCL 436.1203\(4\)](#).

Third Party Facilitator Service licensees may deliver beer, wine, or spirits in original, unopened containers on behalf of SDD and SDM licensees to customers at their homes or designated locations in compliance with MCL 436.1203(15) and (16):

- If the Third Party Facilitator Service licensee delivers beer, wine, or spirits, the third party facilitator service verifies that the individual accepting the delivery of the beer, wine, or spirits is at least 21 years of age.
- The retailer or consumer pays the fees associated with deliveries.
- The Third Party Facilitator Service licensee offers services for all brands available at the SDD or SDM licensed location.

Specially Designated Merchant Licensees Filing Growlers

Pursuant to MCL 436.1537(6) and (8), a Specially Designated Merchant (SDM) licensee may fill growlers of beer. The SDM licensee must comply with the requirements for food service establishments under the Food Law of 2000, pursuant to MCL 436.1537(6)(a).

Pursuant to MCL 436.1537(8)(b), a growler container that can be filled by an SDM licensee may be any clean, refillable, resealable container that is exclusively intended, and used only, for the sale of beer for consumption off the premises. The capacity of the growler container cannot exceed 1 gallon.

Filling of growlers by SDM licensees must comply with the following requirements:

1. The licensee shall not fill a growler in advance of the sale.
2. The licensee shall only fill growlers from another container that has a capacity of 5 gallons or more.
3. The beer to be filled must have a registration number from the Commission pursuant to administrative rule R 436.1611(1)(d).
4. The growler is sealed and a label is affixed that includes the brand name of the beer, the class of beer*, net contents of the container, and the name of the retailer filling the growler.

**The "class" is, generally speaking, a term like "ale", "malt liquor", "lager", etc. These are designations from the TTB and can be found in the TTB Beverage Alcohol Manual for labeling malt beverages: <https://www.ttb.gov/beer/bam.shtml>.*

Revised 07-01-2020



ICSC+CONTINUING EDUCATION MICHIGAN

Suburban Collection Showplace

Novi, MI

Wednesday, April 13, 2022

Session Materials

**Roundtable 19: READ THE FINE PRINT: How the Language in Purchase
Agreements Can Affect the Bottom Line on Your Closing Statement – and
Why**

Led by: Patty Meadows-Smith, First American Title – Commercial Team

ICSC + CON ED

April 13, 2022

**Reposition After Social Distancing
Marketplaces in the Post-Pandemic World**

ROUNDTABLE DISCUSSION:

READ THE FINE PRINT

**Learn how the language in a purchase agreement
impacts the bottom line at closing**

Presented By:

Patty Meadows-Smith, Senior Account Executive

Direct #: 248-760-4102 Email: pattymeadows@firstam.com



First American Title™

COMMERCIAL TEAM
BLOOMFIELD HILLS - MICHIGAN
PHONE 248.540.4102

READ THE FINE PRINT

Learn how the language in a Purchase Agreement impacts the bottom line at closing

This roundtable will discuss common situations that arise from how a purchase agreement is drafted and how that translates to the title work and closing statement. With some foresight and preparation, you can avoid unexpected problems early enough to save cost, confusion, and possibly your transaction.

NOT ALL TITLE COMPANIES ARE CREATED EQUAL:

Make sure you have a great relationship with your title company! When you develop great relationships with your title closing team, they will go above and beyond to ensure your transaction is properly completed from start to finish!

Make certain the title company has expertise in commercial real estate. Many title agencies are designed for residential transactions and stumble when underwriting/closing commercial real estate.

Title underwriters (First American Title, Fidelity National, Stewart Title, etc.) are national / global companies. These are financially stable and traded on the stock exchange. Title agencies are typically small businesses contracted with various title underwriters. If an agency goes out of business or gets shut down by the underwriter, your EMD, documents, deed escrows and policies will be difficult to find.

DUE DILIGENCE & PRE-TITLE:

Title work is a large piece in the due-diligence puzzle.

When you have property that is likely to go under contract, order title work early and carefully review it! Particularly, the title requirements and exception documents.

Too often people wait until the very end of due diligence to order title work (or just before they are ready to close). This does not permit enough time to resolve title matters and it could crash your deal.

Make sure you have the correct and complete legal description to the property! Often we are given a post office address and that not suffice as a legal description. This can result in missing some of the property as there could be multiple parcels beyond what the post office address includes. Title is examined by legal description and/or tax parcel ID number – not by a mailing address.

WITH OR WITHOUT STANDARD EXCEPTIONS:

What does this really mean? A title policy has standard exceptions (below) that remain unless they are deleted. Some of these exceptions are typically removed at closing with the Owner's Affidavit document.

There are very important exceptions that require a survey to delete them from the final policy. Surveys can be expensive and often will take several weeks (or longer) to complete! Who will supply and pay for the survey? This can be a point of contention between the parties and at times they blame the broker and demand they pay for the survey because it was not explained to them during the negotiations.

When negotiating a purchase agreement and asking for a title policy "without standard exceptions", make sure you state who will order the survey and who will pay for it.

EXAMPLES OF STANDARD EXCEPTIONS (1-2-3 require survey)

1. Any facts, rights, interests, or claims that are not shown by the Public Records but that could be ascertained by an inspection of the Land or by making inquiry of persons in possession of the Land.
2. Easements, liens or encumbrances, or claims thereof, not shown by the Public Records.
3. Any encroachment, encumbrance, violation, variation, or adverse circumstance affecting the Title including discrepancies, conflicts in boundary lines, shortage in area, or any other facts that would be disclosed by an accurate and complete land survey of the Land, and that are not shown in the Public Records.
4. Any lien or right to lien for services, labor or material imposed by law and not shown by the Public Records.
5. Taxes and assessments not due and payable at Commitment Date.

ESCROW AGREEMENTS:

Earnest Money Deposits (EMD) are often a sensitive matter and if the transaction goes sideways, a separate escrow agreement can be helpful in settling potential disputes between the parties. It is highly suggested that a detailed escrow agreement be drafted whenever an EMD is put into escrow. Often, there is vague language loosely written in a purchase agreement that is not detailed enough for an escrow agent to release funds. Title companies prefer NOT to acknowledge or sign for the deposit on the purchase contract because they are NOT a party to the purchase.

It is HIGHLY recommended that the purchase contract refer to a separate escrow agreement. The escrow agreement can be customized to the transaction and clearly dictate how and when funds can be released so it's fully understood by ALL the parties.

If the escrow language is not specific in a purchase agreement (or escrow agreement), then most title companies will not release the EMD unless they have mutual consent from both buyer and seller. This can cause a standoff between the parties and possibly lead to incurring attorney fees and cost of litigation.

TRANSFER TAX:

In Michigan, transfer tax and revenue stamps is considered a seller expense unless otherwise negotiated.

Transfer tax and revenue stamps are \$8.60 per thousand (combined) –which can significantly impact the bottom line. Sellers should be informed about the cost of transfer tax and revenue stamps during negotiations. Especially sellers that are not located in Michigan or unfamiliar with these fees.

ENDORSEMENTS TO POLICY:

When endorsements to the title policy are requested (either in the purchase agreement or prior to closing), it should specify who pays for the endorsement.

Some endorsements are free. However, others have a fee and may require an ALTA survey, or a zoning letter from the municipality –which add extra costs and time.

Zoning Endorsements are becoming more constraining as the zoning letter needs to state the property is in compliance according to Section II of the Endorsement and there are no outstanding violations. Many municipalities typically charge for the zoning letter or no longer issue them. The other option is obtaining a zoning report which is more costly.

TAX PRORATIONS: There is more than one way to prorate property taxes! Depending if you are a seller or a buyer, the method of proration could change your bottom line by thousands of dollars. Before you bottom line a purchase agreement, make sure the method of tax proration is customary and in your favor. There are several ways taxes are billed and prorated. Be careful to know what is customary in the county the property is located.

Below is an example of how different tax prorations can impact the bottom line.

Total Property Taxes: \$30,000.00
\$20,000 Summer @ \$54.79 per day
\$10,000 Winter @ \$27.40 per day
Closing Date March 1, 2022

Due Date Basis / Paid in Advance	Normal Way of Tax Proration Metro Detroit
3-1-22 to 6-30-22 (122 x 54.79)	= \$6884.38
3-1-22 to 11-30-22 (275 x 27.40)	= <u>\$7535.00</u>
Debit Buyer / Credit Seller	= <u>\$14,219.38</u>

Calendar Basis / Paid in Advance	
1-1-22 – 12-31-22 (306 x \$54.79)	= \$16,765.74
1-1-22 – 12-31-22 (306 x \$27.40)	= <u>\$8,384.40</u>
Debit Buyer / Credit Seller	= <u>\$25,150.14</u>

Due Date Basis / Paid In Arrears	Normal Way of Tax Proration West Michigan
7-1-2021 – 3-1-22: (243 x 54.79)	= \$13,313.97
12-1-21 – 3-1-22: (90 x 27.40)	= <u>\$2,466.00</u>
Debit Seller / Credit Buyer	= <u>\$15,779.97</u>

Calendar Date Basis / Paid in Arrears	
1-1-22 to 3-1-22 (59 x \$54.79)	= \$3232.61
1-1-22 to 3-1-22 (59 x \$27.40)	= <u>\$1616.60</u>
Debit Seller / Credit Buyer	= <u>\$4,849.21</u>



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**Roundtable 20: A View from the Hill: 1031 Exchanges and the Proposed
Biden Tax Plan**

**Led by: Margo Rosenthal, Esq., IPX - Investment Property Exchange
Services, Inc.**

IRC Section 1031

Tax Deferred Exchanges

By Margo Rosenthal
Vice President/Attorney
margo.rosenthal@ipx1031.com

Investment Property Exchange Services, Inc.

Presented To
ICSC + Continuing Education Michigan
April 13, 2022



Protect Your Equity From Capital Gain Taxes

With a
Like - Kind
Exchange
Under IRC §1031



Investment Property
Exchange Services, Inc.



ipx1031.com

Internal Revenue Code Section 1031

“No gain or loss shall be recognized on the exchange of property held for productive use in a trade or business or for investment if such property is exchanged solely for property of like-kind which is to be held either for productive use in a trade or business or for investment.”

§1031 **DEFERS** taxes . . . **NOT** a tax-free transaction.

Investors complete tax-deferred exchanges to defer the capital gain tax on the disposition of their investment properties. The motivation to exchange often falls along standard risk-reward or cash flow-appreciation scales. If a **seller of investment property plans to purchase and reinvest the funds in another investment property and has a capital gains tax consequence, the purchase contract should include exchange cooperation language.**



Exchange Goals

- Increase value of investments; change investment holdings
 - Reduce management burdens
 - Consolidate holdings
 - Diversify holdings
-
- Retirement and estate planning
 - Interest-free loan from Uncle Sam



Tax Deferred Exchange Terminology

Tax Deferred Exchange terminology may be confusing to those who are unfamiliar with these transactions. The following are some of the typical exchange terms and phrases, with their interpretation.

1. **Basis**: Method of measuring investment in property for tax purposes. Calculation: Original cost plus improvements minus depreciation taken.
2. **Boot**: Fair Market Value of non-qualified (not “like kind”) property received in an exchange. (Examples: cash, notes, seller financing, furniture, supplies, reduction in debt obligations.)
3. **Constructive Receipt**: Control of proceeds by an Exchanger (even though funds may not directly be in their possession).
4. **Exchanger**: The property owner(s) seeking to defer capital gain tax by utilizing a Section §1031 exchange. (The Internal Revenue Code uses the term “Taxpayer.”)



Tax Deferred Exchange Terminology (cont'd)

5. **Like Kind Property**: This term refers to the nature or character of the property, and not its grade or quality. Generally, real property is “like kind” as to all other real property, as long as the Exchanger’s intent is to hold the properties as an investment or for productive use in a trade or business. The “like kind” rules for very personal property, however, are very restrictive.
6. **Qualified Intermediary**: The entity that facilitates the exchange for the Exchanger. The term “facilitator” or “accommodator” is also commonly used, although the Treasury Regulations specifies the term “Qualified Intermediary.”
7. **Relinquished Property**: The property “sold” by the Exchanger. This is also sometimes referred to as the “exchange” property or the “downleg” property.
8. **Replacement Property**: The property acquired by the Exchanger. This is sometimes referred to as the “acquisition” property or the “upleg” property.



WHEN IS AN EXCHANGE APPROPRIATE?

Before entering into an exchange the Exchanger must consider the following:

1. Does the Exchanger really want replacement like kind property?
2. Will the tax benefit from using an exchange outweigh the transaction costs?



Comparing the Tax Consequence: A Sale Versus the Exchange of Investment Property

To Estimate the Potential Capital Gain Tax:

1. Calculate the adjusted basis in the property:

Original purchase price of the property	<u>\$200,000</u>
<i>Plus non-expensed</i> capital improvements	<u>\$ 35,000</u>
<i>Minus</i> depreciation on improvements (27.5 yr. for 3 years for residential rental)	<u>\$ 25,636</u>
Equals <i>Adjusted Basis</i>	<u>\$209,364</u>



Comparing the Tax Consequence: A Sale Versus the Exchange of Investment Property (cont'd)

2. Use the adjusted basis to determine the total gain on the sale:

Sales price of property	<u>\$450,000</u>
<i>Minus</i> transactions costs	<u>\$ 31,500</u>
<i>Minus</i> adjusted basis	<u>\$209,364</u>
Equals Total Gain on Sale	<u>\$209,136</u>



Comparing the Tax Consequence:

A Sale Versus the Exchange of Investment Property (cont'd)

3. Calculate the State Capital Gain:

Total Gain on Sale

\$209,136

Multiply by State capital gain tax rate,
if any (4.25%)

\$9,097 (A)



Comparing the Tax Consequence:

A Sale Versus the Exchange of Investment Property (cont'd)

4. Calculate the Federal Long-Term Capital Gain:

Total Gain Less Depreciation Recapture	<u>\$183,500</u>
--	------------------

$(\$209,136 - 25,636 = \$183,500)$

Multiply by Federal capital gain tax rate 15%	<u>\$27,525 (B)</u>
---	---------------------

Multiply by Federal capital gain tax rate 20% and if in 20% add 3.8% for Health Care	<u>\$49,774.36</u>
---	--------------------



Comparing the Tax Consequence:

A Sale Versus the Exchange of Investment Property (cont'd)

5. Calculate the Capital Gain due to
Depreciation Taken:

Capital Gain From Depreciation Taken

\$25,636

Multiply by Federal 25% tax rate

\$6,409 (C)



Comparing the Tax Consequence:

A Sale Versus the Exchange of Investment Property (cont'd)

6. Total of Taxes A + B + C Equals the
Capital Gain Tax Exposure that is Deferred
Through a § 1031 Exchange.

\$43,031.00

or \$65,280.34



***This is the amount of tax that
is deferred with a 1031 Exchange!***

Deferred Exchange Benefit Summary

Federal Tax on Long Term Capital Gain	<u>\$27,525</u>
<i>Plus</i> Federal Tax on Depreciation Recapture	<u>\$6,409</u>
<i>Plus</i> State Capital Gain Tax	<u>\$9,097</u>
Equals Total Combined Capital Gain Tax	<u>\$43,031.00</u>

Note: Exchanger may receive some credits at State level for Federal Taxes Paid



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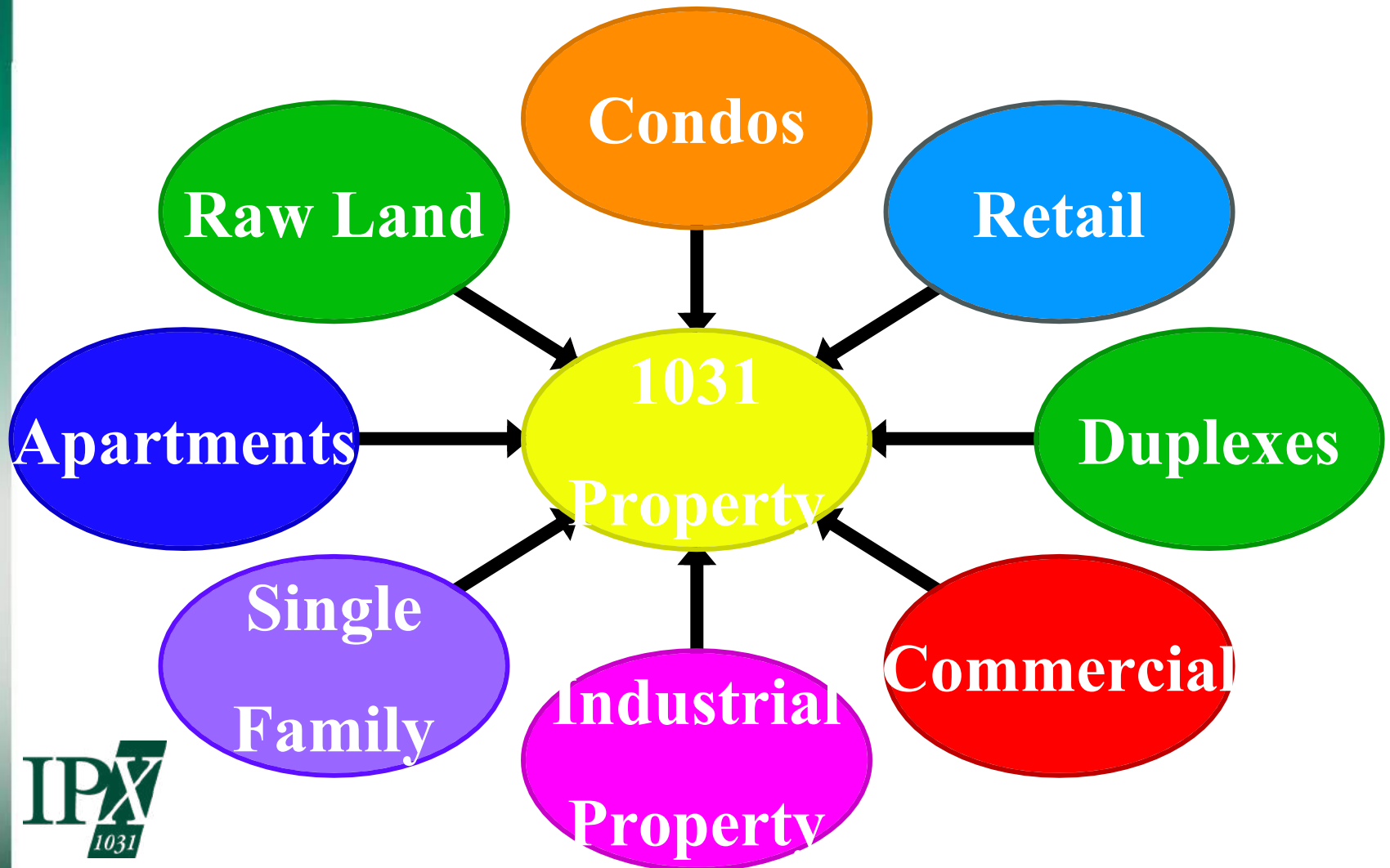
(Always consult with your own tax/legal advisor.)

What is Like Kind Property?

IN A TAX DEFERRED REAL PROPERTY EXCHANGE, YOU CAN EXCHANGE REAL PROPERTY FOR ANY OTHER REAL PROPERTY IN THE UNITED STATES OR ITS POSSESSIONS, IF SAID PROPERTIES ARE HELD FOR PRODUCTIVE USE IN A TRADE OR BUSINESS OR FOR INVESTMENT PURPOSES.



What is Like Kind Property?



Less than Fee Interests in Real Property that Qualify for Exchanges:

1. Leases with at least 30 years remaining, including renewal options.
2. Vendee's interest in a land sale contract, but not a vendor's interest.
3. An undivided interest in one property for an undivided or 100% interest in another property.
4. Remainder interest in real property.
5. Timber rights, Riparian rights, Mineral Rights*

* Whether these rights are treated as real estate and qualify for a real property exchange or are considered personal property is determined by the state law where the property is located.



Note: Foreign real property is not like kind to U.S. real property (or property in U.S. possessions).

Exclusions to Section 1031

IRC Section 1031 does not apply to any exchange of:

- Stocks, bonds or notes
- Securities or evidences of indebtedness or interest
- Certificates of trust or beneficial interests
- Interests in partnerships
- Choses in action



Qualified Purpose Test

“Held for use in Trade or Business or Investment”

1. Not Held for Sale

- Inventory
- Other instances of “Held for Sale”

2. Not Held for Personal Use

- Residences
- Vacation Homes

3. Test is at time of Exchange

4. No required minimum holding period



Vacation Homes and 1031 Exchanges

- Rev Proc 2008-16 -- creates a Safe Harbor to qualify the vacation home for an exchange.
- The property will qualify as an “investment” if it is actually rented at FMV for not less than 14 days a year for each 12 month period preceding sale or following purchase.
- The investment nature of the property will not be overturned so long as the personal use by the taxpayer is limited to not more than 14 days or 10% of the time actually rented.

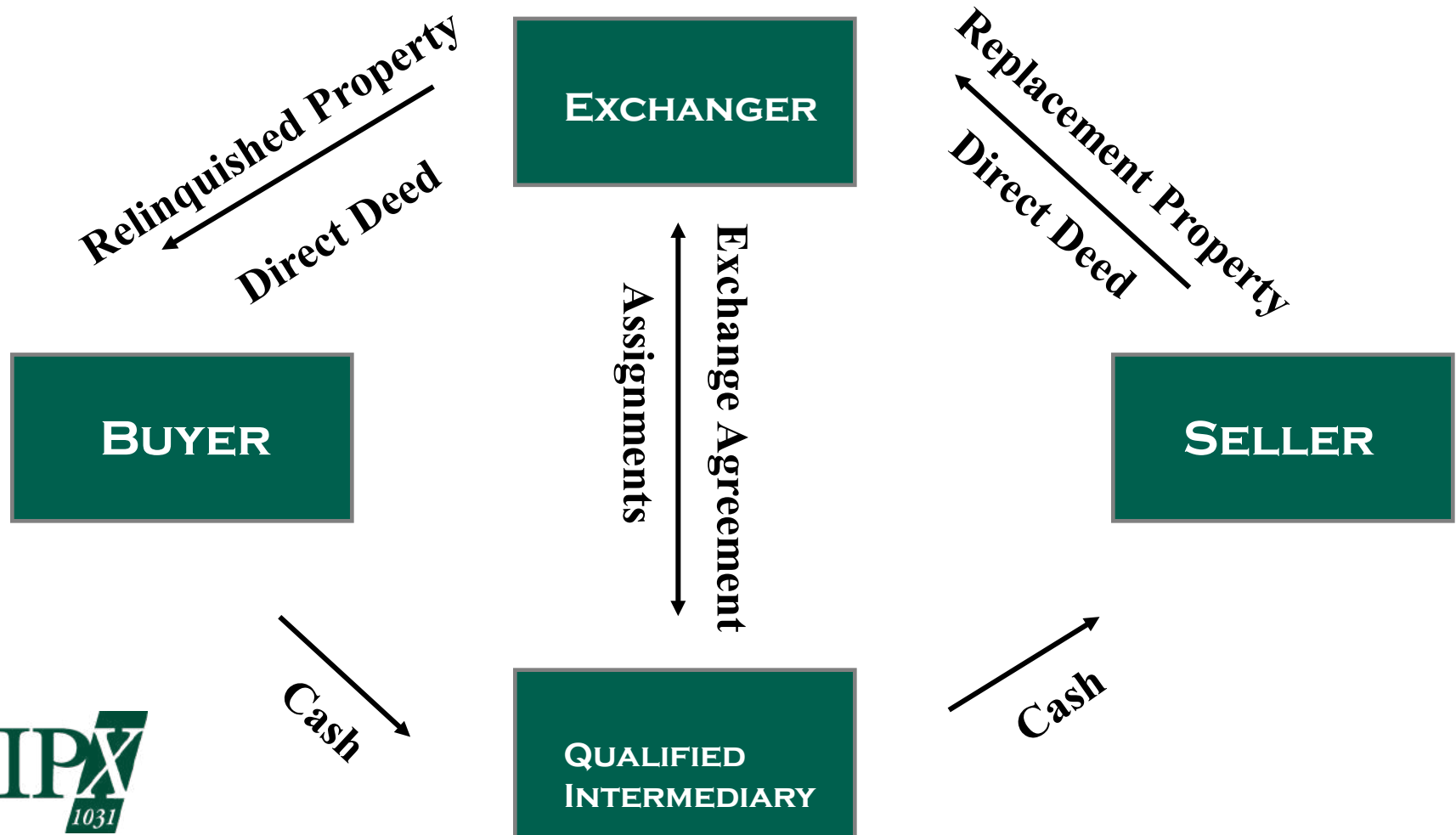


Exchange Structures

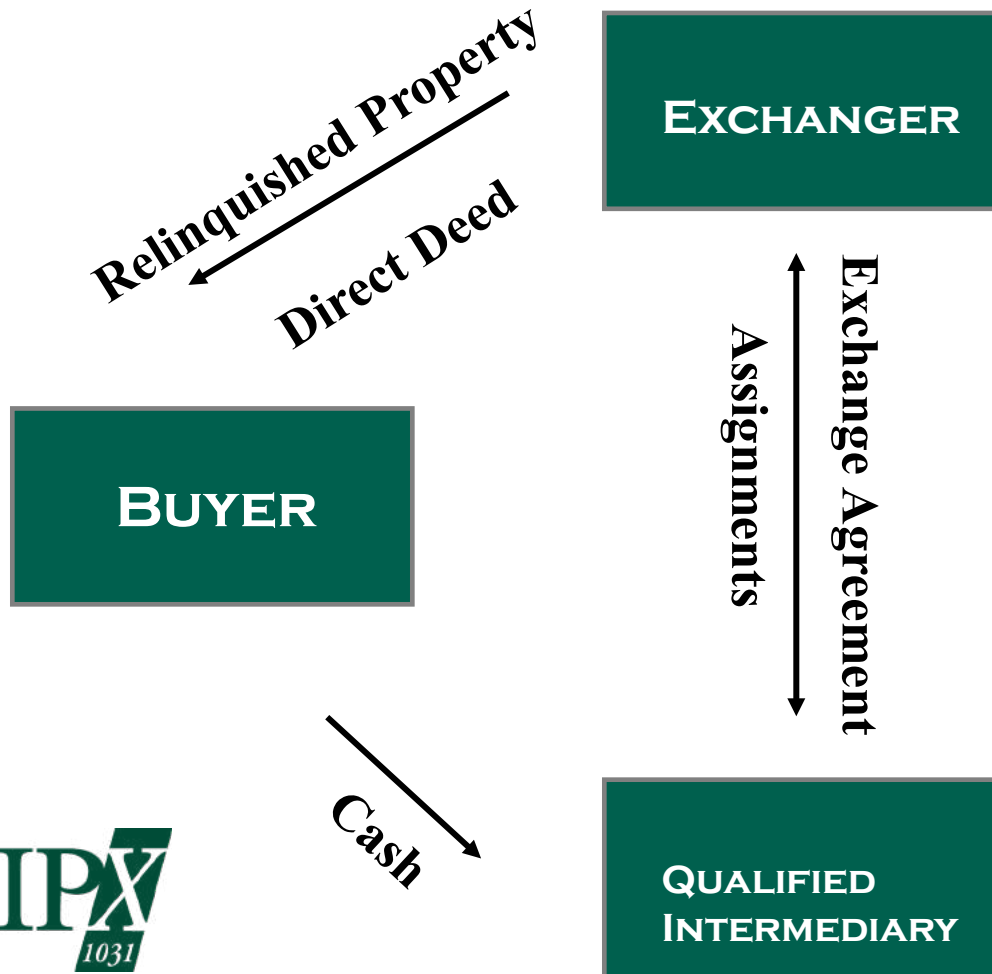
- **Simultaneous**
- **Delayed**
- **Build-to-Suit**
- **Reverse**
- **Reverse Build-to-Suit**



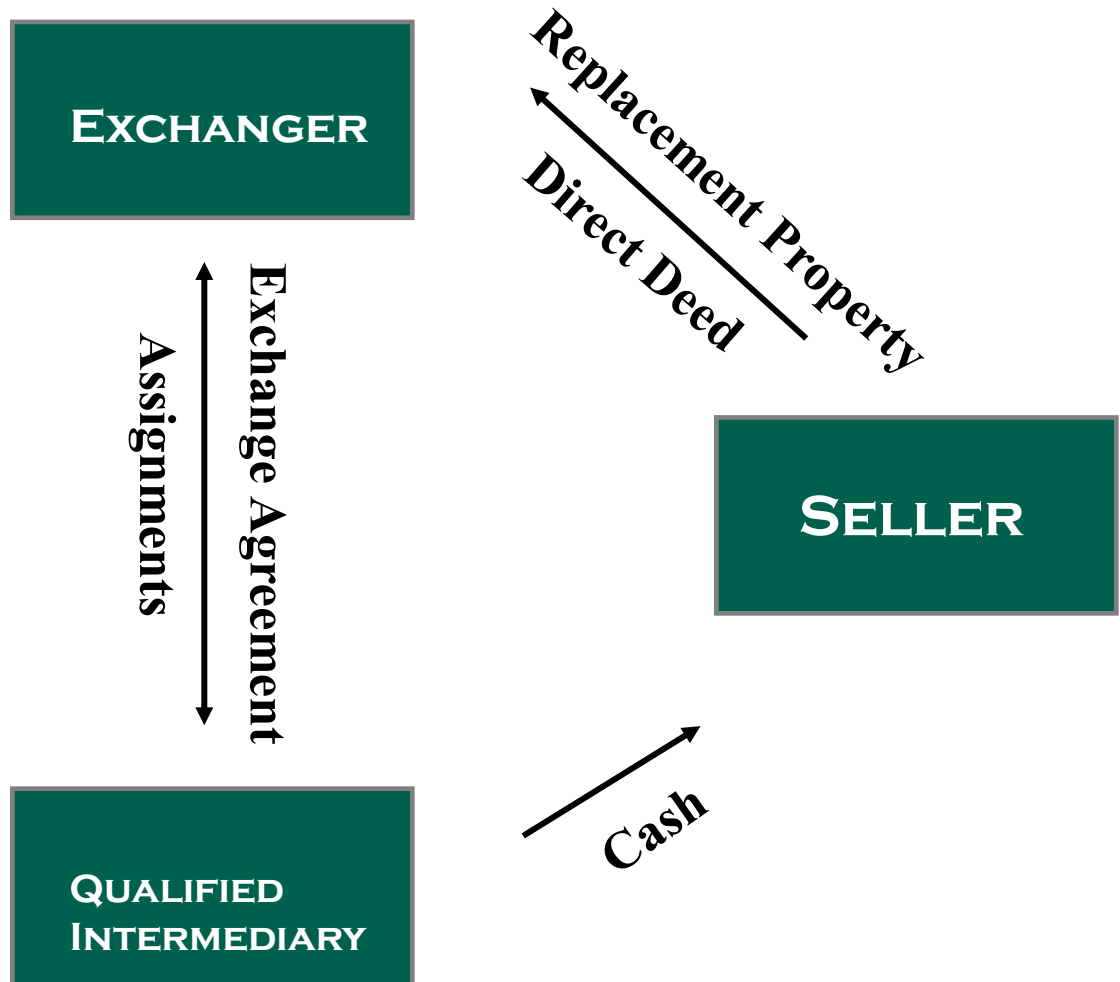
Simultaneous Exchange With Intermediary



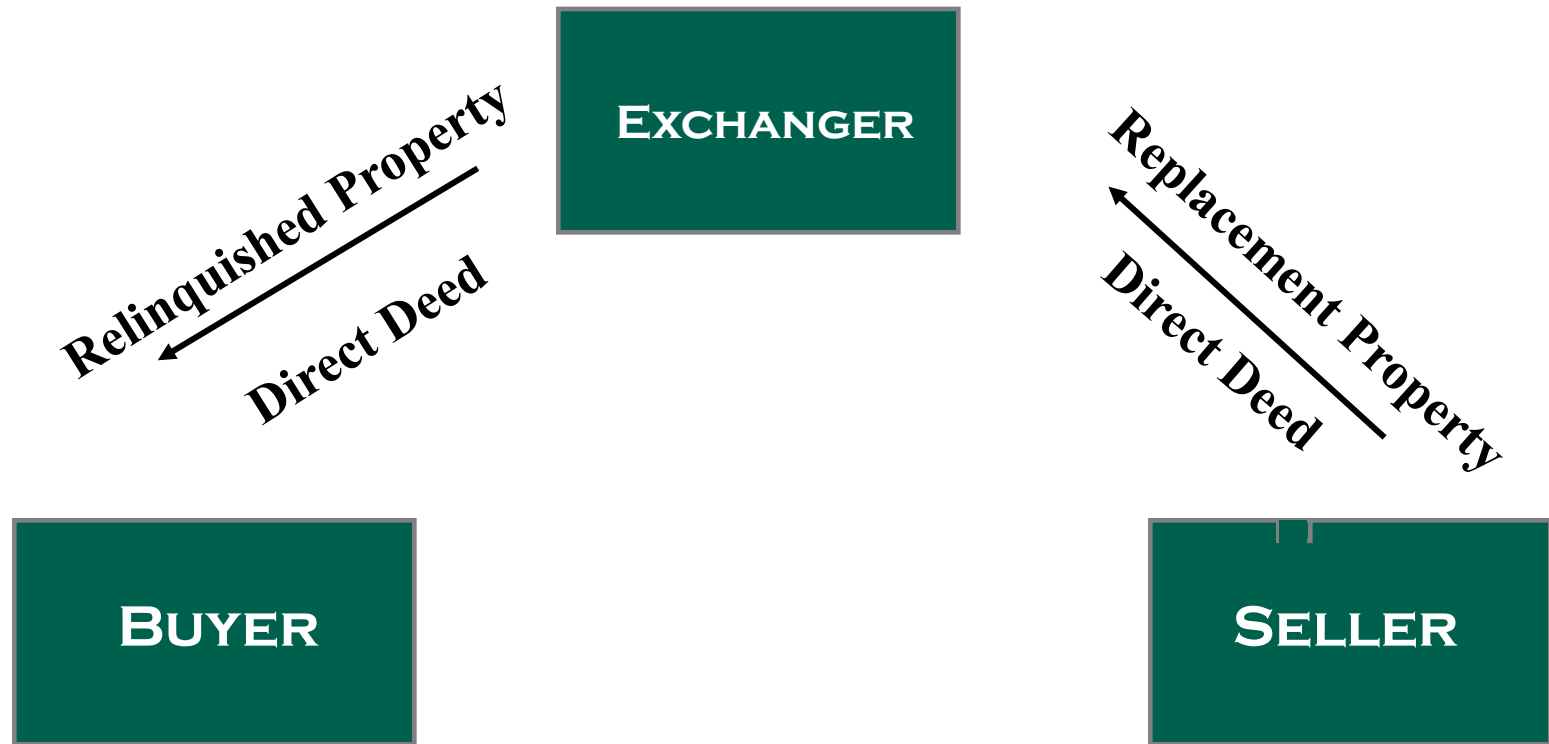
Delayed Exchange Phase One



Delayed Exchange Phase Two



Delayed Exchange - Exchanger



Delayed Exchange – Qualified Intermediary



Basic 1031 Rules

As a general “rule of thumb,” to obtain a deferral of the entire capital gain tax the Exchanger must:

1. Reinvest all of the net proceeds from the relinquished property.
2. Obtain equal or greater financing on the replacement property than was paid off on the relinquished property (Replacement property debt can be offset with cash put into the exchange.).
3. Receive nothing in the exchange but *like kind* property.

To the extent the Exchanger fails to observe these rules, they will be subject to capital gain taxes.

Thumb-nail test for 100% deferral: => in value; => equity.



Balancing the Exchange

Example I.

Exchanger goes up in value, across in equity and up in mortgage:

→ **No Tax is due.**

	Relinquished	Replacement
Value	\$150,000	\$225,000
Equity	\$ 50,000	\$50,000
Mortgage	\$100,000	\$175,000



Balancing the Exchange

Example II.

Exchanger goes up in value, up in mortgage and keeps \$10,000 of net proceeds:

→ Tax is due on \$10,000 of Cash Boot.

	Relinquished	Replacement
Value	\$150,000	\$225,000
Equity	\$ 50,000	\$40,000
Mortgage	\$100,000	\$185,000



Balancing the Exchange

Example III.

Exchanger goes down in value, across in equity and down in mortgage:

→ Tax is due on the \$25,000 of Mortgage Boot.

	Relinquished	Replacement
Value	\$150,000	\$125,000
Equity	\$ 50,000	\$ 50,000
Mortgage	\$100,000	\$ 75,000



Boot

Having nothing at all to do with footwear, “Boot” is an English term which refers to that which is necessary to even out an exchange. Boot is the receipt of money or the fair market value of other property which is *not “like kind”* as to other property acquired in an exchange transaction.

BOOT RECEIPT = GAIN RECOGNITION

An Exchanger who receives boot in an exchange transaction generally recognizes gain to the extent of the value of boot received. Some common examples of boot are:

- Cash proceeds an Exchanger receives from the Qualified Intermediary;
- Proceeds taken from the exchange in the form of a note* or contract for sale of the property;



Boot (cont'd)

- Relief from debt on the relinquished property caused by the assumption of a mortgage, trust deed, or contract, or an agreement to pay other debt;
- Receipt of property not intended to be used by the Exchanger as investment or in their trade or business.
- **Personal Property** received which is not “like-kind.” Personal Property is never “like-kind” to real property, and it must match very closely in order to be “like-kind” to other personal property exchanged.

Examples of non “like-kind” property:

Gold bullion is not “like-kind” to silver bullion (*Rev. Rul. 82-166, 1982-2CB 190*).

Male livestock is not “like-kind” to female livestock [IRC §1031 (e)].



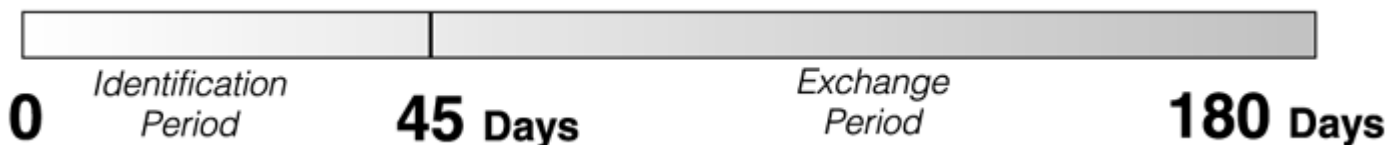
Boot Offset Rules

1. **Mortgage Boot** consists of liabilities “assumed or taken subject to” in an exchange
 - Borrower “assumes” debt by agreeing to be directly liable to lender
 - Borrower takes “subject to” debt by accepting title encumbered by mortgage lien
2. **Cash Boot** consists of cash and non-qualifying property
3. Mortgage boot received may be offset by mortgage boot paid
4. Net mortgage boot received may be offset by cash boot paid
5. Cash Boot received may be offset by cash boot paid



Delayed Exchange Time Limits

1. **180-Day Rule**: The Exchanger must acquire all the replacement property (ies) within 180 days, or the date the Exchanger must file the tax return (including extensions) for the year of the transfer of the relinquished property, whichever occurs first.
2. **45-Day Rule**: The Exchanger must identify the potential replacement property (ies) within the first 45 days of the 180-day Exchange Period.
3. There is no extension for these deadlines for Saturdays, Sundays or holidays.
4. The time limits begin to run on the date the Exchanger transfers the first relinquished property to the buyer.
5. The “date of transfer” will be the date of recording or transfer of the benefits and burdens of ownership, whichever occurs first.



Safe Harbor Restrictions

To qualify as a Safe Harbor against actual or constructive receipt of the exchange funds, the Exchange Agreement must limit the Exchanger's right to receive, pledge, borrow, or otherwise receive the benefit of money or other property except upon the occurrence of one of the following events:

1. After the end of the 45-day Identification Period, if Exchanger has not identified any replacement property; OR
2. If Exchanger has identified replacement property; then upon or after receipt by Exchanger of all replacement property to which Exchanger is entitled under the Exchange Agreement; OR
3. If Exchanger has identified replacement property; then upon or after the occurrence, after the end of the Identification Period, of a material and substantial contingency that: relates to the exchange, is provided for in writing and is beyond the control of Exchanger and of any disqualified party, other than the party obligated to transfer replacement property to Exchanger; OR
4. After the end of the 180-day Exchange Period.



Procedures for Property Identification

1. The property identification must be delivered to a party to the exchange that is not a disqualified party (i.e., the Qualified Intermediary).
2. It must be in writing and signed by the Exchanger.
3. It must be “unambiguous” (site specific).
4. It must be delivered, mailed, faxed, or “otherwise sent” within the 45 day Identification Period.
5. An identification can be revoked within the 45 days, but the revocation must also follow steps 1 through 4.



Delayed Exchange Identification Rules

1. Three Property Rule: The Exchanger may identify up to three properties of any value.
2. 200% Rule: The Exchanger may identify more than three properties, but the total fair market value of what is identified cannot exceed 200% of the fair market value of the relinquished property.
3. 95% Exception: If the Exchanger identifies properties in excess of both Rule 1 and Rule 2, then the Exchanger must acquire 95% of the equity of all properties identified.



Exchange Vesting Issues

With few exceptions in an exchange, title to the Replacement Property must be held in the same manner as title was held on the Relinquished Property

1. Examples:

- Husband Relinquishes → • Husband Acquires
- Partnership ABE Relinquishes → • Partnership ABE Acquires
- ACME, Inc. Relinquishes → • ACME, Inc. Acquires



Exchange Vesting Issues (Cont'd)

Acceptable Variations:

1. Grantor Trust (e.g. revocable living trust): Trustee takes title to replacement property as an individual and then transfers it later to trust. Trust is disregarded for tax purposes.
2. Death of Exchanger: If Exchanger dies, Exchanger's estate can complete exchange.
3. Single Asset Entities: Exchanger who relinquished as an individual can acquire replacement property in a single-owner LLC. This entity is disregarded for tax purposes under the "check the box" rules.

Areas of Concern:

1. Lender may not loan to a trust and requires individual as borrower.
2. Lender qualification requires wife to be on loan and deed with husband, but husband is the only Exchanger.



Related Party Issues

Related parties can complete an exchange if both parties hold onto the property they received for 2 years. If either related party disposes of their property prior to the 2-year holding period, the entire transaction will be taxable to both parties in the year of disposition. The 2 year period is tolled during the term of any “puts” or “calls” on the property.

Exceptions to the 2-Year Holding Period:

1. Transfer due to death or involuntary conversion.
2. Transfer where it is established to the satisfaction of the IRS that there is no tax avoidance intent.

Note: Exchanges structured to avoid these rules will not qualify for tax deferral.



Related Party Issues (cont'd)

Related parties include:

1. Exchangers spouse, siblings, descendants or ancestors
2. Two corporations that are members of same controlled group
3. A grantor, fiduciary or beneficiary of any trust
4. Related C corporation, S corporation or partnership in which there is more than a 50% ownership or controlling interest [IRC Sections 267 (b) and 707 (b) (1)]



Note: Exchanges structured to avoid these rules will not qualify for tax deferral.

Related Party Exchange Scenarios

1. Related Party Swap: Exchanger and related party exchange (swap) properties— OK as long as both parties hold property received for 2 years.
2. Seller of Replacement Property is Related Party — Probably does not qualify, even if Exchanger uses an Intermediary. IRS will restructure as a three party exchange: Exchanger and related party seller first exchange properties, then related party seller immediately sells relinquished property to buyer for cash without holding property for 2 years.



EXCHANGE CONTRACT COOPERATION CLAUSE

To provide the other party to the transaction with notice of the exchange, the Exchanger should have an *exchange cooperation clause* in the purchase and sale agreement for both the relinquished and replacement properties:

Relinquished Property

Buyer hereby acknowledges that it is the intent of the Seller to complete a tax deferred exchange under IRC Section §1031 which will not delay the close of the purchase transaction or cause additional expense to the Buyer. The Seller's rights under the purchase and sale agreement may be assigned to a Qualified Intermediary of the Seller's choice for the purpose of completing such an exchange. Buyer agrees to cooperate with the Seller and the Qualified Intermediary in a manner necessary to complete the exchange.



EXCHANGE CONTRACT COOPERATION CLAUSES

(cont'd)

Replacement Property

Seller hereby acknowledges that it is the intent of the Buyer to complete a tax deferred exchange under IRC Section §1031 which will not delay the close of the purchase transaction or cause additional expense to the Seller. The Buyer's rights under the purchase and sale agreement may be assigned to a Qualified Intermediary of the Buyer's choice for the purpose of completing such an exchange. Seller agrees to cooperate with the Buyer and the Qualified Intermediary in a manner necessary to complete the exchange.



Situations when a reverse exchange may arise

- Unintentional or unplanned
- Build-to-Suit situations
- Planned – large portfolio owners adds flexibility to portfolio management
- Inability to control timing for a normal exchange

Structuring a Reverse Exchange

Important Note: Until September 15, 2000, taxpayers had no guidance for Reverse Exchanges under the Internal Revenue Code.

Rev. Proc. 2000-37 created “safe harbors” for some Reverse Exchanges. To the extent possible, Qualified Intermediaries attempt to follow the exchange rules set forth in the Rev. Proc. in order to fall within the safe harbor. Consider the following:

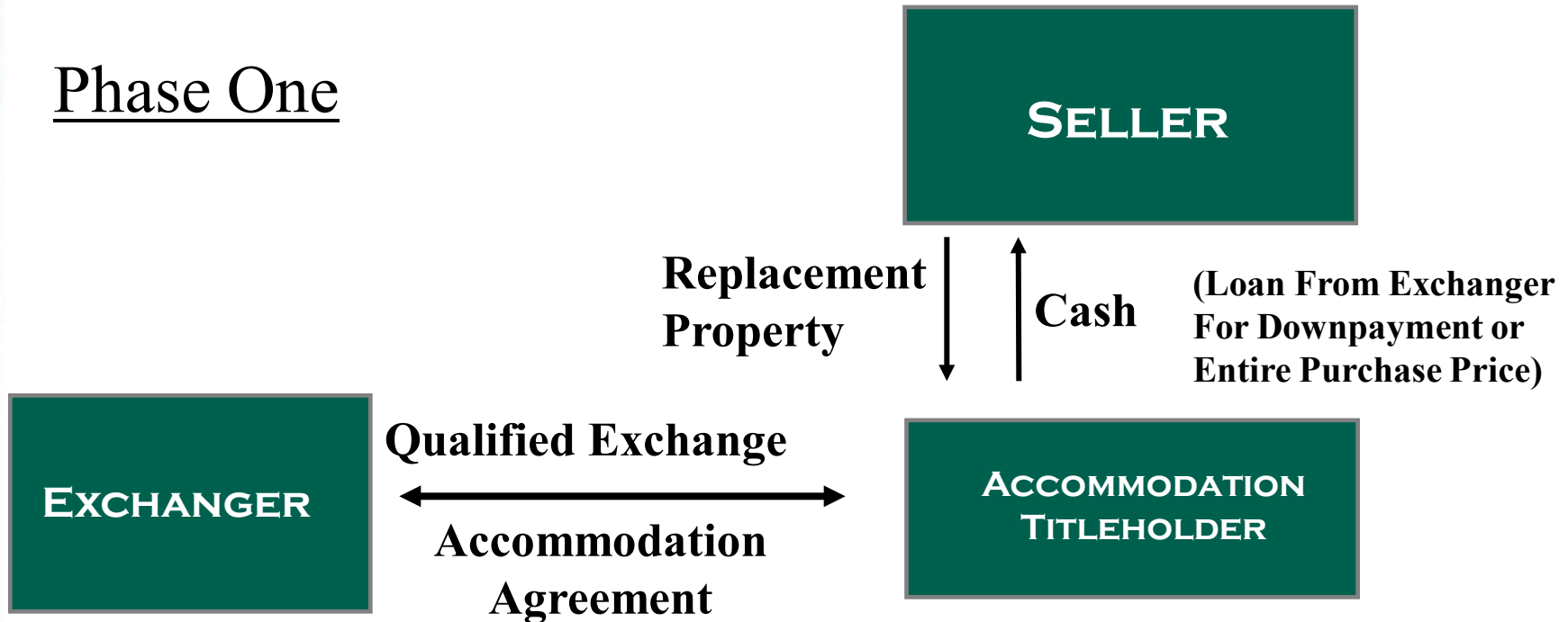
- A. The Exchanger may not hold title to both properties at the same time. To the extent there are exchange funds, the Exchanger may not control those funds in any way.
- B. The exchange should be completed within 180 days from the transfer of the relinquished property to be within the safe harbor.
- C. The replacement property should consume all cash from the transfer of the relinquished property.
- D. It is possible to “park” either the Replacement Property or the Relinquished Property.
- E. A Reverse Exchange is more expensive and complicated than a Delayed Exchange, and should be used as a last alternative.



Reverse Exchange

Parking Title to the Replacement Property
(Restructured as a Simultaneous Exchange on Phase II)

Phase One



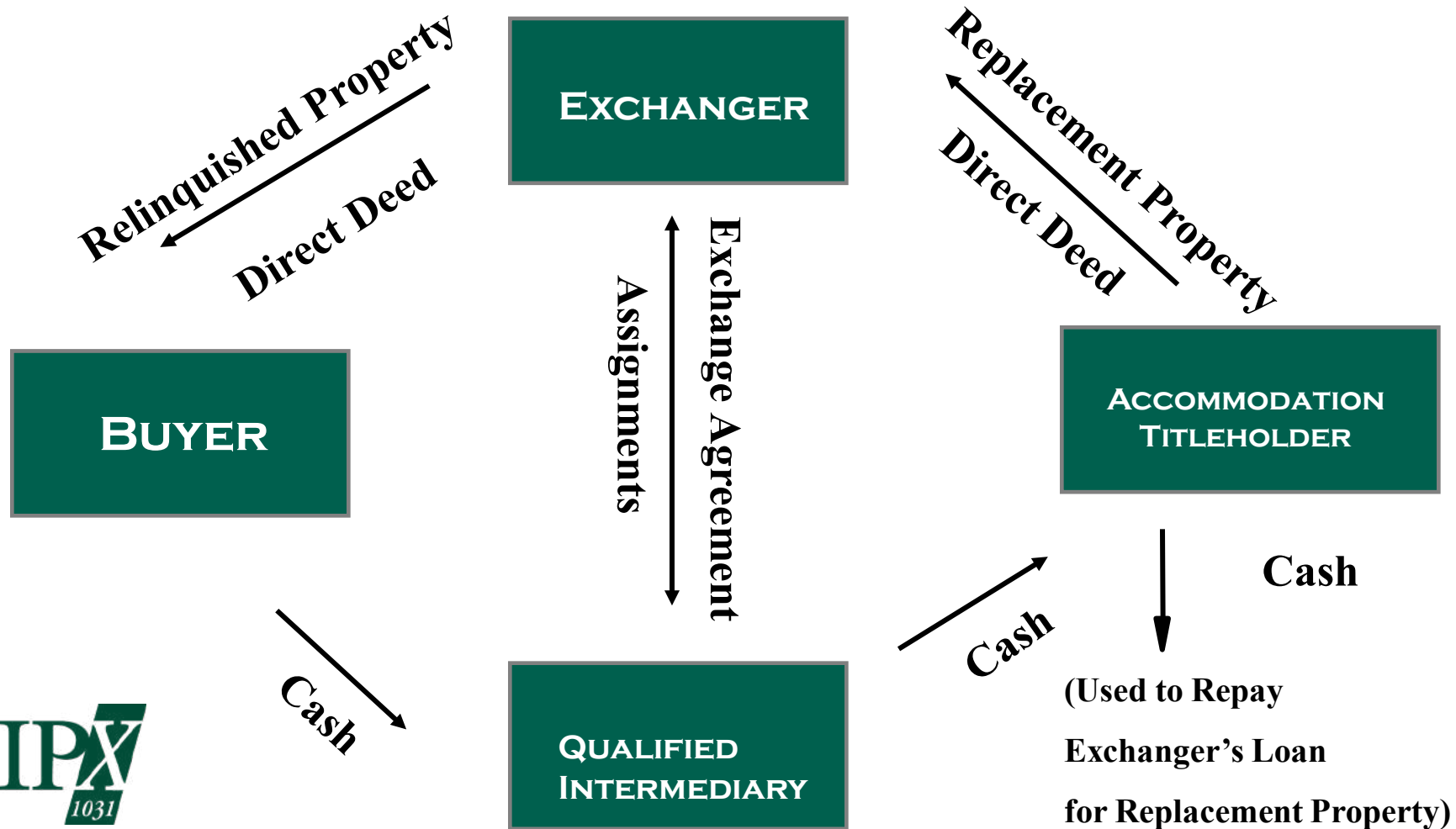
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Intermediary holds title to Replacement Property until Exchanger can sell Relinquished Property.

REVERSE EXCHANGE

Parking Title to the Replacement Property

Phase Two



Exchange Last – Park Replacement Property

- Only option for build to suit
- Flexibility on Relinquished Property
- Reconciliation of values easier;
high equity in Relinquished
- Safer in non safe harbors
because Exchanger was
never in title on Replacement

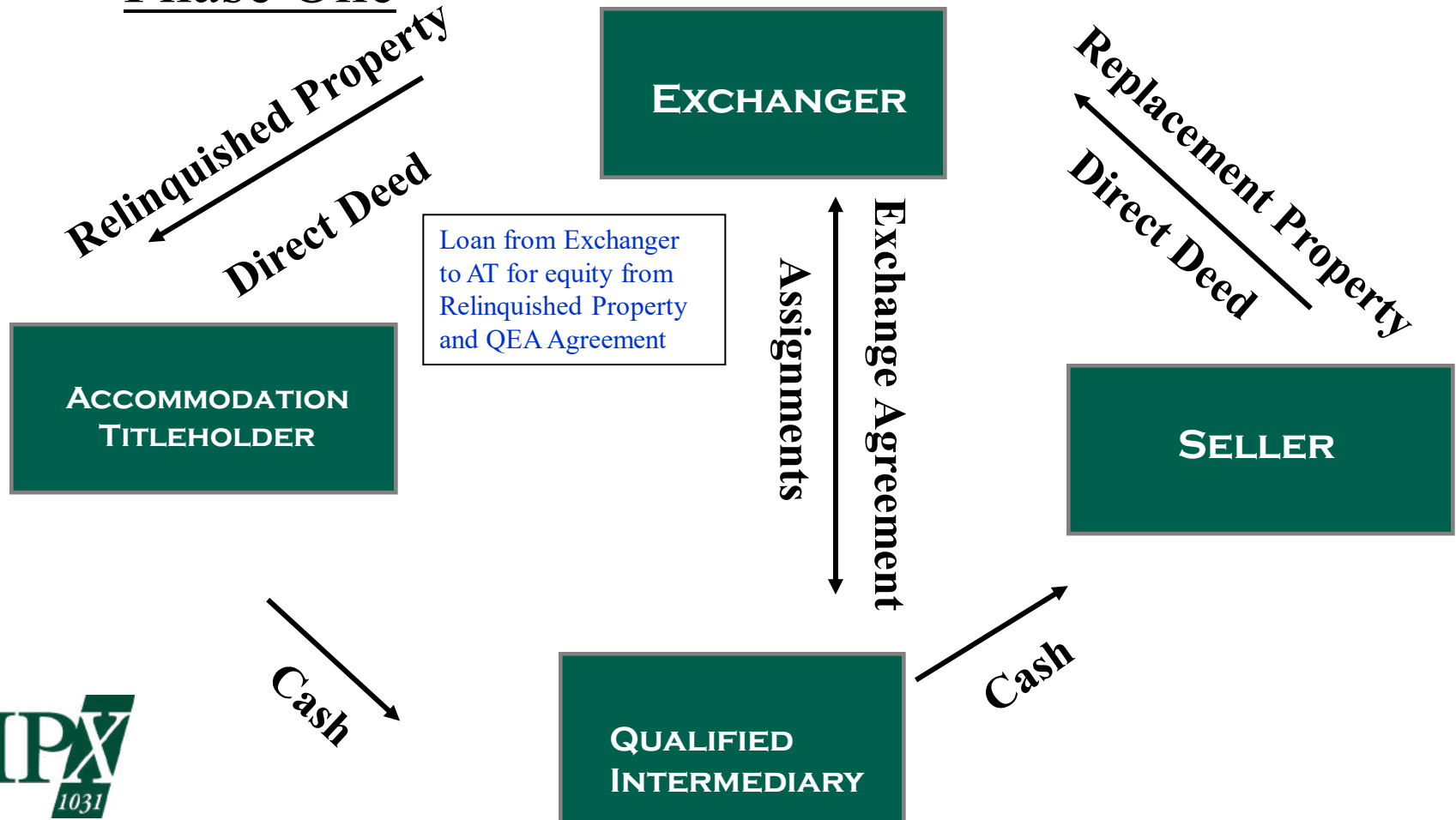


REVERSE EXCHANGE

Parking Title to the Relinquished Property

(Structured as a Simultaneous Exchange on Phase One)

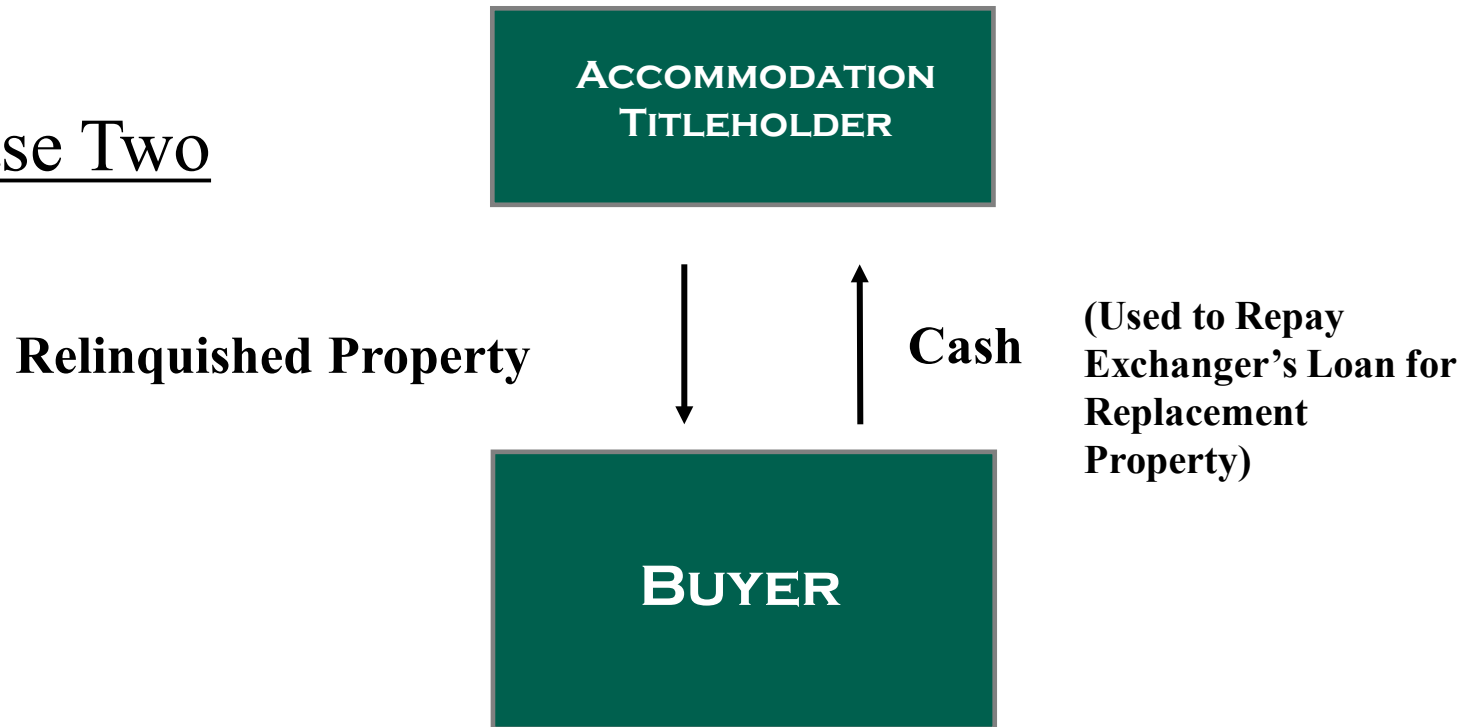
Phase One



Reverse Exchange

Parking Title to the Relinquished Property

Phase Two



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When Relinquished Property is sold Intermediary transfers title to Buyer.

Exchange First – Park Relinquished Property

- Replacement Property Financing Issues
- No identification issues
- Environmental Issues on Replacement Property
- Unplanned Reverse
- Problems with balancing



Combination Exchanges

1. What happens if the Relinquished Property exceeds the value of the “parked” Replacement Property
2. Can two Relinquished Properties be exchange into one Replacement Property when the closing of the Replacement occurs between the closings of the two Relinquished Properties



Note: Exchanges structured to avoid these rules will not qualify for tax deferral.

Build to Suit Issues

Difference between Delayed and Reverse Structure

1. Must an Accommodation Titleholder be used
2. Is the title holder the “agent” of the taxpayer
3. Does the 180 days apply
4. Is completion of construction required



Reverse Exchange Deadlines

- QEAA must be executed within five business days after AT acquires “parked property”
- Alternative or multiple relinquished properties must be identified within 45 days after AT acquires “parked property”
- Exchange must be completed within 180 days for “safe harbor” compliance



Accommodation Titleholder Issues

- Environmental Liability
- General Liability; slip and fall
- Casualty Loss



Taxpayer (Exchanger) Issues

- Transactional Costs
- Exchange Fees to IPX
- Cash to Complete the Purchase
- Residual Cash from Sale of Relinquished Property;
Combination Exchanges



Qualified Intermediary

The use of a Qualified Intermediary is essential to completing a valid delayed exchange. The Qualified Intermediary performs several vital functions in an exchange.

Acts as a Principal

To qualify as an exchange a reciprocal trade or actual exchange must take place in each IRC §1031 transaction. This means the Exchanger must enter into a written exchange agreement and assign to a Qualified Intermediary: (1) their interest as seller of the relinquished property and (2) their interest as buyer of the replacement property. By becoming an actual party to the exchange, a reciprocal trade takes place even when there are three or more parties involved in an exchange transaction (i.e. when the Exchanger is purchasing the replacement property from someone other than the buyer of their relinquished property). The Qualified Intermediary cannot be the Exchanger and must be an Independent Party (not **DISQUALIFIED**) to the transaction.



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The use of a Qualified Intermediary allows for “**DIRECT DEEDING**” of the properties involved in the exchange. This is only allowed with the use of a Qualified Intermediary.

Qualified Intermediary (cont'd)

Holds Exchange Proceeds From Constructive Receipt

The Exchanger cannot have the right to receive, pledge, borrow, or otherwise receive the benefits of the exchange proceeds. If the Exchanger actually or constructively receives any of the proceeds from the sale of their relinquished property, those proceeds will be taxable as boot and the entire exchange may be jeopardized.

Prepares Legal Documentation

Several legal documents are necessary in order to properly complete an exchange, including an Exchange Agreement, two Assignment Agreements and Exchange Closing Instructions to each closer.

Provides Quality Service

Although the process is relatively simple, the rules are complicated and filled with potential pitfalls. An experienced Qualified Intermediary is essential to a smooth transaction.



Disqualified Parties

A disqualified party is a person or entity who:

1. Is a “Related Party” to the Exchanger;

OR

2. Is related to the Exchanger by substituting 10% for 50% (IRC Sections 276 (b) and 707 (b) for related corporations, partnerships or trusts);

OR



Disqualified Parties (cont'd)

3. Within the 2 years preceding the transfer of the relinquished property, the person acted as the Exchanger's:

- Employee
- Real Estate Broker or Agent
- Attorney
- Investment Bank or Broker
- Accountant

Exceptions - if the person or entity only provides the Exchanger with:

- A. Routine financial, trust, title insurance or escrow services; or
- B. Services solely with respect to the exchange of property.

Note: To obtain the Safe Harbor protection against constructive receipt of the exchange funds a disqualified person or entity may not act as an intermediary for the exchange.



The IPX Advantage

1. CONVENIENCE Investment Property Exchange Services, Inc. is part of the Chicago Title Insurance Company corporate family, with offices in the Chicago Title headquarters offices. This permits for “one stop shopping”, combining the ability to get title insurance, escrow services, land trust services, and exchange services from the market leader in title insurance coverage.
2. SIZE AND EXPERIENCE Investment Property Exchange Services, Inc. (IPX 1031) has been acting as a Qualified Intermediary and providing exchange services since 1988. It has a true national presence, with offices in 30 major metropolitan centers throughout the country, which are organized into 8 Regions, each of which is led by an attorney/manager. The IPX professionally trained staff regularly conducts accredited educational courses in many states.



3. FOCUS AND COMMITMENT The team of professionals at Investment Property Exchange Services, Inc. is dedicated exclusively to serving as an independent Qualified Intermediary for tax deferred exchanges. This is not an ancillary product or sideline effort; it is all we do. Our commitment is to the highest level of customer service, an unparalleled level of professionalism, and the dedication to bring creative and innovative solutions to even the most challenging exchanges.
4. GUARANTEE Investment Property Exchange Services, Inc. is able to offer the highest level of safety and security in the industry for our client's exchange proceeds. In addition to a \$50 million fidelity bond and \$5 million professional liability insurance, each exchanger client is provided the written guarantee of Chicago Title and Trust Company.
5. NETWORK OF RELATIONSHIPS Investment Property Exchange Services, Inc. has established a valuable network of strategic marketing alliances and associations with leading real estate and investment property service providers.





QUALIFIED INTERMEDIARY

YOUR COMPLETE 1031 EXCHANGE RESOURCE



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QUALIFIED INTERMEDIARY

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Suburban Collection Showplace

Novi, MI

Wednesday, April 13, 2022

Session Materials

Roundtable 21: What You Should Know: The Complexity of Cannabis Real Estate Transactions

Led by: Corbin Yaldoo, Mid-America Real Estate-Michigan, Inc., and Jeffrey S. Gunsberg, Esq., Title Connect, LLC



Cannabis Real Estate Transactions

From Site Selection/Negotiations to the Closing Table



*Title Connect LLC
& Transact Connect LLC*



MID-AMERICA[®]
Real Estate-Michigan, Inc.

Overview

Gain a general understanding of cannabis real estate transactions, and the complexities from site selection, negotiations, municipal approvals, financing, and closing. Compare/contrast with other commercial real estate transactions.

Speakers

Speaker Name: Corbin Yaldoo
Company: Mid-America Real Estate-Michigan, Inc.
Email address: cwaldoo@midamericagrp.com
Cell #: (248) 752-1276

Speaker Name: Jeff S. Gunsberg
Company: Title Connect, LLC
Email address: jgunsberg@title-connect.com
Phone #: (248) 642-3256

Speaker Name: Renee V. Cooper
Company: Title Connect, LLC
Email address: rcooper@title-connect.com
Phone #: (248) 701-0753

Agenda

- Pricing – Higher prices typically and not always the highest price is the best buyer
- Commissions – Higher commissions and broker's keeping their portion of the any lost deposits
- Retainer - Retainer fees for Seller/Buyer rep
- Purchase Agreement/Lease Agreement – Long due diligence periods and non-refundable deposits and/or monthly holding fees
- Lending – Funds/REIT's with higher interest rates and higher closing fees.
 - Banking – some banks will not allow you to wire money into Transact Connect etc.
 - Long Term – either cannabis accepted lender or need to own in all cash
- Closing – Most won't close without Municipal License and Site Plan/Special Land Use approvals
- Closing preparation – Most title companies can't insure cannabis. Those who can insure, typically don't handle the funds. Transact Connect does both.
- Closing Fees/Escrow Fees – Escrow fees are mainly the only difference, a little higher. PACA form is needed at closing. Different endorsements are also addressed– can't provide zoning endorsement.
- Property Insurance – More of a premium because of the cannabis use and if lender involved things change too.
- Funds – No cash.
- Q & A



ICSC+CONTINUING EDUCATION MICHIGAN

Suburban Collection Showplace

Novi, MI

Wednesday, April 13, 2022

Session Materials

**Roundtable 22: Detroit Regional Partnership's Verified Industrial Properties
(VIP) Program**

Led by: William Butler, Detroit Regional Partnership



Site Due Diligence Report



Detroit Regional Partnership
Verified Industrial Properties
December 23, 2021

TABLE OF CONTENTS

1	EXECUTIVE SUMMARY	2
2	PROPERTY & SITE INFORMATION	3
3	CODES, STANDARDS, AND GUIDELINES.....	5
4	EXISTING SITE STRUCTURES	6
5	ZONING	6
6	SURVEY AND TITLE	8
7	SITE TOPOGRAPHY, DRAINAGE, AND STORMWATER.....	8
8	GEOLOGICAL CONDITIONS	10
9	ROADWAY TRANSPORTATION.....	10
10	RAIL	11
11	AIRPORT INFLUENCES	11
12	WETLANDS AND WATERS OF THE UNITED STATES (WOTUS)	12
13	FLOODPLAIN	13
14	ENVIRONMENTAL DATABASE REPORT (EDR)	13
15	THREATENED AND ENDANGERED SPECIES	14
16	CULTURAL RESOURCES	15
17	AIR QUALITY.....	15
18	POWER	15
19	NATURAL GAS	15
20	WATER.....	16
21	WASTEWATER.....	17
22	FIBER	17

1 EXECUTIVE SUMMARY

- BACKGROUND

- Undeveloped site located in Handy Township, Livingston County, MI (between Fowlerville and Webberville) zoned for industrial development.
- The property is made up of 6 parcels totaling 195.6 acres

- ZONING

- Currently zoned I-2 (General Industrial). The adjacent properties are zoned for agricultural, medium-density residential, local commercial, and industrial use. Some of these properties are vacant. Buildings on the site will be subjected to setback, height, screening, and other typical zoning requirements of the township, which are detailed in section 5 (zoning) of this report.

- TRANSPORTATION

- The property is accessed from Grand River Avenue to the north. A CSX Transportation railroad borders the site to the south. The nearest interstate exit is 3 miles from the site (I-96). The nearest commercial airport is the Capital Region International Airport in Lansing, located 30 miles from the site (approximately 40 minutes driving distance).

- POWER

- DTE is the power provider. Power lines run along the railroad tracks at the southern portion of the site and along Grand River at the northern portion of the site. DTE can provide 4 MW without the need for an industrial substation. To meet the requested capacity of 10 MW, an industrial substation would be required. It is recommended to utilize the existing system as the park begins to develop and incorporate the industrial substation as future phases come online.

- NATURAL GAS

- Consumers Energy is the natural gas supplier. 4" and 8" gas mains run along the north and east edges boundaries of the site. Per discussions with Consumers Energy, they can meet the demand of 10,000 mcf/month with the infrastructure currently in place.

- WATER

- Municipal water is not available currently. A 2006 MDEQ well capacity testing report indicates that the groundwater aquifer on site is capable of supplying water at a rate of 350 GPM, which will meet the general requirement of 150,000 GPD.

- WASTEWATER

- A 15-inch municipal sanitary sewer connection is available. Per discussions with the Township Engineer, this sanitary sewer is approximately 20 feet deep and was constructed with the intended use being to service this development. The sanitary sewer was originally sized for 272 REUs or approximately 95,000 GPD, which is very close to the minimum capacity required by DRP criteria. Due to the size of the development, a lift station may be required to service all areas of the potential development.

- MISCELLANEOUS
 - The site is bisected by a drain that has both the 100 and 500 year floodplain elevations associated with it. The floodplain areas of the site are largely confined to the banks of the drain but have greater impact as the drain flows to the North. Additionally, approximately 63 acres of the site may be potential wetland areas. A wetland delineation should be performed and verified by EGLE. It is anticipated that the stormwater discharge for any development on this property will be to the on-site drain as there is no regional detention available for this development. Detention will be required per current Livingston County Standards.
- RECOMMENDATIONS (IF APPLICABLE)
 - This is a promising industrial site from a variety of standpoints such as the willingness of the municipality to make this site work and its proximity to an active Railroad for a potential rail spur. Potential users should be aware that municipal water is not currently available to the site and may not ever be available, but the township has wells on site that upon preliminary review, appear to meet the needs of a development of this size. Major design consideration should be given to how the Handy No. 5 Drain and wetlands are addressed with this potential development. The review and approval of both items are long lead time items that may be avoided with a design that minimizes the impacts to both. Due to the drain that bisects the site, it is highly likely that the property will develop into two separate developments to avoid these impacts.

2 PROPERTY & SITE INFORMATION

- PROJECT LOCATION
 - SW corner of Grand River Avenue and Nicholson Road
 - Section 8 of Handy Township, MI
 - Livingston County, MI
 - Coordinates: 42.661431, -84.118788
- PROPERTY AREA
 - 195.6 acres overall
- PARCEL INFORMATION
 - 6 parcels in total (according to HRC boundary location map, listed from west to east)
 - Parcel 1
 - APN: 4705-08-100-038
 - 5.18 acres
 - Parcel 2 (shown as Parcel "A")
 - APN: 4705-08-300-004
 - 80.28 acres
 - Parcel 3 (shown as Parcel "B")

- APN: 4705-08-400-001
 - 77.22 acres
- Parcel 4
 - APN: 4705-08-400-003
 - 13.81 acres
- Parcel 5
 - APN: 4705-08-400-003
 - 13.59 acres (not including Parcel 6)
- Parcel 6 (shown as Parcel “F”, a sub-parcel of Parcel 5, according to county GIS Map)
 - APN: see Parcel 5
 - 5.50 acres
- SITE OWNERSHIP
 - The property is owned by Handy Township

Handy Township
135 N. Grand River Ave.
Fowlerville, MI 48836
Contact: Ed Alverson – Township Supervisor
- EXISTING LAND USE
 - Mostly wooded site that is vacant and undeveloped
- EXISTING SITE PERMITS AFFECTING THE SUBJECT PROPERTY
 - Based on currently available information, there are not permits affecting this property
- ADJACENT PROPERTY CURRENT LAND USE
 - NORTH
 - Mix of agriculture, medium density residential, and local commercial. Planned for local commercial use.
 - SOUTH
 - Manufactured Home Park
 - EAST
 - NE side is vacant
 - SE side is medium density residential
 - WEST
 - Medium density residential
- ADJACENT PROPERTY FUTURE LAND USE
 - NORTH
 - Planned for local commercial use.
 - SOUTH
 - Manufactured Home Park
 - EAST
 - NE side is zoned and planned for industrial use
 - WEST
 - Medium residential

- RECOMMENDATIONS (IF APPLICABLE)
 - Handy Township has re-zoned this property for an industrial use and is actively pursuing potential users for the property, so there does not appear to be any potential roadblocks to developing this site as an industrial use.
- REFERENCES
 - None

3 CODES, STANDARDS, AND GUIDELINES

- NAME OF LOCAL AUTHORITY HAVING JURISDICTION (AHJ)
 - Handy Township
- APPLICABLE LOCAL DESIGN STANDARDS AND CODES
 - Handy Township Zoning Ordinance
https://www.handytownship.org/government/zoning/zoning_ordinance.php
- NAME OF COUNTY AHJ
 - Livingston County
- APPLICABLE COUNTY DESIGN STANDARDS AND CODES
 - 2015 Michigan Building Code
 - 2015 Michigan Plumbing Code
 - 2015 Michigan Mechanical Code
 - Michigan Electrical Code based on the 2017 National Electrical Code with Part 8 State Amendments
 - ICC / ANSI A117.1 – 2009 & Michigan Barrier Free Design Law of Public Act 1 of 1966 as Amended
 - 2015 INTNL Energy Conservation Code Part 10 with ANSI / ASHRE / IESNA Standard 90.1-2007
 - 2015 International Fire Code
 - 2015 International Fuel Gas Code
 - 2010 NFPA 13, 13D & 13R
 - 2014 NFPA 96 Grease Hoods
 - 2013 NFPA 72 Fire Alarm Code
- NAME OF STATE AHJ
 - State of Michigan EGLE for wetland impacts less than 1 Acre and floodplain watershed impacts to 2 Sq. miles or greater.
- APPLICABLE STATE DESIGN STANDARDS AND CODES
 - See Above
- NAME OF FEDERAL AHJ (IF APPLICABLE)
 - EPA-for wetland impacts greater than 1 Acre.
 - FEMA-if significant floodplain impacts are anticipated.
- APPLICABLE FEDERAL DESIGN STANDARDS AND CODES
 - FEMA and Wetland Standards
- RECOMMENDATIONS (IF APPLICABLE)

- Site Plan Approval will take place at the Township Level, but the rest of the review and approval process will occur at the County level.
- REFERENCES
 - https://www.handytownship.org/government/zoning/zoning_ordinance.php

4 EXISTING SITE STRUCTURES

- ABOVEGROUND STRUCTURES
 - Handy No. 5 Drain
 - 5 Wells constructed by the Township
- UNDERGROUND STRUCTURES
 - No structures readily observable
- EXISTING STRUCTURE DEMOLITION OR RELOCATION REQUIRED?
 - The Handy No. 5 Drain bisects the site and will potentially limit the use of the property if it cannot be relocated.
 - The location of the wells is on the northern portion of the property in an area adjacent to the regulated wetlands.
- RECOMMENDATIONS (IF APPLICABLE)
 - It is not recommended to pursue the relocation of the drain as the process of relocation can take a substantial amount of time and money to pursue this option. Additionally, the design will need to consider the location of the wells to protect them.
- REFERENCES
 - None

5 ZONING

- CURRENT ZONING
 - Zone I-2 (General Industrial)
- PLANNED ZONING CHANGES
 - No changes anticipated. The proposed use fits within the zoning designation. The site was re-zoned from residential to industrial in the past.
- PLANNED ZONING PERMITTED USES
 - Office buildings for executive, administrative, professional, accounting, drafting, and other similar professional activities, as determined by the Zoning Administrator. B. The manufacture, compounding, processing, packaging, warehousing, or treatment of such products as pottery or other ceramic products, monuments, glass products, musical instruments, toys, furniture, plastics products, electrical appliances, electronic instruments, signs, and light sheet metal products. C. Electrical appliances and electronic instruments repair. D. Dry-cleaning and laundry establishments performing cleaning operations on the premises provided a customer counter may be permitted as an accessory use. E. Trade or industrial schools. F. Utility and public service

buildings, including storage yards. G. Contractor's showrooms and storage yards. H. Printing, publishing, and allied industries I. Manufacturers of wood, plastic, fabric, synthetic specialties, wood patterns. J. Building supply and equipment establishments. K. Construction and farm equipment sales.

- SPECIAL OVERLAY DISTRICT(S)
 - None
- ADJACENT PROPERTY CURRENT ZONING
 - NORTH
 - Zone NSC (Neighborhood Service Commercial) and Zone AR (Agricultural Residential)
 - SOUTH
 - Zone MHP (Manufactured Home Park)
 - EAST
 - Zone I-2 (General Industrial) and Zone AR (Agricultural Residential)
 - WEST
 - Zone AR (Agricultural Residential)
- ADJACENT PROPERTY FUTURE ZONING
 - NORTH
 - Local Commercial
 - SOUTH
 - Zone MHP (no change anticipated)
 - EAST
 - Industrial and Medium Density Residential
 - WEST
 - Medium Density Residential
- BUILDING SETBACKS
 - NORTH
 - 40 ft front yard, where the first 20 ft cannot be used for parking or aisles and must be landscaped
 - SOUTH
 - 40 ft rear yard. Abutting residential (Manufactured Home Park) will require a buffer in accordance with Section 2.17 referenced below under "Other Requirements"
 - EAST
 - 20 ft side yard. Buffer required when abutting residential (Agricultural Residential)
 - WEST
 - 20 ft side yard, with a buffer abutting residential (Agricultural Residential)
- BUILDING HEIGHT RESTRICTIONS
 - 50 ft
- BUILDING SIZE AND FLOOR AREA RATIO (FAR)
 - Maximum structure and building coverage: 40% (Section 14.1 Schedule of Regulations)

- **LOT COVERAGE**
 - Include requirements and timeline of any lot coverage requirements.
 - Maximum Lot Coverage per ordinance is 40%
- **OTHER REQUIREMENTS AND/OR STAKEHOLDERS (ARCHITECTURAL REVIEW BOARD, NEIGHBORHOOD PLANNING COMMISSION, ETC.)**
 - Section 2.17 buffer requires a 20 ft greenbelt with evergreens planted to provide sound and visual buffer. If the Planning Commission determines insufficient area is available to provide the required greenbelt or the vegetation screen would be ineffectual, a 6 ft high sight-obscuring fence or wall may be substituted.
- **RECOMMENDATIONS (IF APPLICABLE)**
 - No Zoning Issues are anticipated for this development.
- **REFERENCES**
 - Handy Township Zoning Ordinance:
https://www.handytownship.org/government/zoning/zoning_ordinance.php

6 SURVEY AND TITLE

- **EXISTING EASEMENTS**
 - Owner, document location, comments, etc.
 - 80 ft wide Livingston County Drain Easement – Handy No. 5 Drain
 - 66 ft wide Non-Exclusive Private Easement for Egress and Public Utilities (located at the northwest side of the site)
- **ONSITE ENCROACHMENTS**
 - Unknown based on information provided at this time.
- **CODES, COVENANTS, & RESTRICTIONS (CC&Rs)**
 - Unknown based on information provided at this time.
- **REQUIRED OR CURRENT CROSS ACCESS OR PARKING EASEMENTS**
 - Unknown based on information provided at this time.
- **OTHER LIMITED TITLE FINDINGS**
 - Unknown based on information provided at this time.
- **RECOMMENDATIONS (IF APPLICABLE)**
 - Current title was not provided for this review. It is recommended that a current title policy be provided for review prior to moving into Tier 4 due diligence.
- **REFERENCES**
 - Site Survey prepared by Hubbell, Roth & Clark, dated January 2021

7 SITE TOPOGRAPHY, DRAINAGE, AND STORMWATER

- **TOPOGRAPHY AND DRAINAGE PATTERNS**
 - The site generally slopes from the eastern portion towards the Handy No.5 Drain, and out towards the property boundary to the north. Site elevations

remain lower west of the drain, which runs north towards the Red Cedar River.

- ADJACENT PROPERTY DRAINAGE
 - The north side of the site borders county roads Grand River Avenue and Scale Drive. The south side of the property borders a class I railroad. There are various wetlands and ponds on site that extend off-site and collect drainage from the site. The Handy No.5 drain carries drainage water through the site (from on-site and off-site), flowing north where it eventually flows into the Red Cedar River. In general, except for the water that comes on site from the Handy No. 5 Drain, the site is isolated from adjacent property drainage by public rights of way.
- SITE ELEVATION
 - The wooded area of the site east of the drain has more elevation variation than the grassy area of the site, west of the drain. In general, there is approximately 30 feet of elevation change across the site based on available topographic information.
- STORMWATER INFRASTRUCTURE ON SITE?
 - The primary outlet for stormwater / detention systems on site will be the Handy No. 5 Drain.
- REGIONAL DETENTION AVAILABLE?
 - Not available
- SITE ATTENUATION REQUIREMENTS
 - 100 year storm storage will be required for per Livingston County Stormwater Management Criteria.
- OFF-SITE STORMWATER DRAINAGE ALLOWED?
 - Site currently receives off-site storm water via the Handy No. 5 Drain.
- STORMWATER PRE-TREATMENT REQUIREMENTS
 - Pre-treatment is required and a sediment forebay should be anticipated.
- RECOMMENDATIONS (IF APPLICABLE)
 - It is anticipated that stormwater detention will be provided near the Handy No. 5 Drain. It is recommended to provide regional detention for the park so that individual users do not need to provide their own detention on their properties. Due to the presence of the drain and various wetlands on site, floodplain and wetland mitigation will be required to maximize the developable area of the site.
- REFERENCES
 - USGS Quad Map
 - Publicly available LiDAR data
 - Livingston County Drain Commission

8 GEOLOGICAL CONDITIONS

- SOIL TYPES
 - The USDA Web Soil Survey indicates the presence of various sandy loams across much of the site, with isolated areas of silty loam in the wooded southeastern area of the site. There is also a large area of muck soil covering the northwest and north central area of the site, largely associated with wetlands on site.
- ROCK PRESENCE / DEPTH OF BEDROCK
 - A 2006 Hydrogeological Report from the MDEQ mentions the presence of varying amounts of cobbles and boulders within the loamy soil of the glacial drift. The report gives a glacial drift thickness of 50 to 100 feet, with a limestone bedrock surface below. No issues regarding rock are anticipated for the site.
- ADDITIONAL GEOTECHNICAL/GEOLOGICAL CONSIDERATIONS
 - Groundwater should be monitored closely with the floodplain and wetlands present on site. According to the 2006 Hydrogeological Report from the MDEQ, groundwater flows to the east and southeast of the site.
 - The aquifer under the site is about 60 feet below ground level and is approximately 20 feet thick.
- RECOMMENDATIONS (IF APPLICABLE)
 - Additional geotechnical investigations should be performed to understand the engineering properties of the on-site soils. Specifically, the extents of any muck or peat like soils need to be delineated. Furthermore, groundwater levels need to be understood as they may impact site development.
- REFERENCES
 - MDEQ Water Supply Letter, dated April 17, 2006.
 - USDA Soil Survey

9 ROADWAY TRANSPORTATION

- EXISTING SITE ACCESS
 - Grand River Avenue
- CLASSIFICATION OF ADJACENT ROADWAYS
 - Grand River Avenue and Nicholson Road are both county primary roads. Grand River Avenue is classified as a minor arterial and Nicholson Road is classified as a minor collector. (Sources: [Southeast Michigan Road Jurisdiction \(semcog.org\)](http://semcog.org) and Livingston County Road Commission certification map)
- ONSITE ROADWAYS
 - There are no on-site roadways currently.
- DISTANCE TO NEAREST FOUR LANE HIGHWAY OR INTERSTATE
 - 3 miles to I-96 entrance/exit 129 (Fowlerville Road exit) via Grand River Avenue and Grand Avenue (a.k.a. Fowlerville Road)
- AVERAGE DAILY TRAFFIC
 - 2-Way 6290 AADT

- OTHER (THOROUGHFARE PLAN, TRAFFIC STUDY REQUIREMENTS, ETC.)
 - It is anticipated that a traffic impact study will be required as part of the review and approval process for this site.
- RECOMMENDATIONS (IF APPLICABLE)
 - A previous traffic impact study was performed for a potential industrial development, it will need to be updated or another study will need to be performed. Traffic is not anticipated to be for this development but will need to be confirmed when actual users are chosen.
- REFERENCES
 - <https://semcog.org/traffic-counts>

10 RAIL

- RAIL OWNER
 - CSX Transportation
- DISTANCE TO NEAREST RAILROAD AND CLASSIFICATION
 - Class I rail on-site to the south
- DISTANCE TO NEAREST RAIL YARD
 - Major rail yard in Lansing/Delta Twp – Cory Yard (CN), approx. 30 miles
 - Unknown rail yard in Fowlerville at E Van Riper Rd and Cemetery Road
- ON-SITE SPUR?
 - There is potential for an on-site spur.
- SITE-SPECIFIC RAIL CONNECTION REQUIREMENTS
 - See permit information packet provided for reference.
- OTHER
 - No other information provided or deemed relevant
- RECOMMENDATIONS (IF APPLICABLE)
 - A rail spur was proposed for this site by a different developer. Per discussions with the Township Supervisor, there were no major issues encountered with CSX other than having to deal with wetlands in proximity to the proposed rail spur.
- REFERENCES
 - [Michigan Rail Map](#)
 - <https://www.csx.com/share/wwwcsx15/assets/File/Customers/Property/permit-information-packet.pdf>

11 AIRPORT INFLUENCES

- DISTANCE TO NEAREST COMMERCIAL AIRPORTS
 - 31 Miles to Capital Region International Airport (Lansing, MI)
 - 55 Miles to Willow Run Airport (Ypsilanti, MI)
 - 64 Miles to DTW (Romulus, MI)
- DISTANCE TO NEAREST MUNICIPAL AIRPORTS
 - 9 Miles to Livingston County Spencer J. Hardy Airport (Howell, MI)
- DISTANCE TO NEAREST MILITARY AIRPORTS

- 80 Miles to Selfridge Air National Guard Base
- FAA INVISIBLE SURFACE INFLUENCES / HEIGHT RESTRICTIONS
 - None identified at this time
- OTHER
 - No other information provided or deemed relevant
- RECOMMENDATIONS (IF APPLICABLE)
 - None
- REFERENCES
 - None

12 WETLANDS AND WATERS OF THE UNITED STATES (WOTUS)

- LOCATED ON SITE?
 - Handy No. 5 Drain, approx. 2750 ft on-site
 - Approximately 63.5 acre of Freshwater Emergent, Forested/Shrub, and Pond Wetland on-site
- WETLAND IMPACTS TO THE SITE
 - The amount of wetlands on site will affect the proposed design and steps to minimize impacts to the wetlands should be anticipated with the proposed design.
- REGULATORY AGENCIES
 - EGLE, Livingston County, and EPA
- WETLANDS JURISDICTIONAL DETERMINATION
 - EGLE
- MITIGATION OPTIONS
 - EGLE recommends purchasing credits from established wetland banks at a cost of approximately \$120K per acre.
- PERMITTING PROCESS AND APPROVALS (AS APPLICABLE)
 - Impacts greater than 1 acre will require EPA approval. Discussions should be had in the master planning stage to avoid these impacts if feasible. Typical EGLE permitting will take approximately 4 to 6 months. If the EPA is required to have review, this process could be greater than a year and there is no guarantee that the permit will be approved.
- RECOMMENDATIONS (IF APPLICABLE)
 - Careful consideration should be given to the potential impact of wetlands for this project. Mitigating wetlands is expensive and time consuming and with no guarantee of approval could delay the development substantially if the proposed impacts are too great.
- REFERENCES
 - USFWS National Wetlands Inventory

13 FLOODPLAIN

- 100-YEAR FLOODPLAIN LOCATED ON SITE?
 - Yes
- 500-YEAR FLOODPLAIN LOCATED ON SITE?
 - Yes
- REGULATORY AGENCIES
 - EGLE and FEMA
- BASE FLOOD ELEVATION
 - Varies from 886' to 891'
- MITIGATION OPTIONS
 - Compensatory storage volume will be required for impacted floodplain on site.
- PERMITTING PROCESS AND APPROVALS (AS APPLICABLE)
 - The permitting process will involve detailed modeling and the amount of impact will require review by the EGLE and FEMA. The expected permit review and approval time will be 9 to 12 Months.
- RECOMMENDATIONS (IF APPLICABLE)
 - As with the wetlands, careful consideration should be given to the proposed design of this property to avoid unnecessary impacts to the floodplain. The floodplain largely falls within the banks of the Handy No. 5 drain. Relocation of the drain would be costly and time consuming.
- REFERENCES
 - FEMA Flood Insurance Map

14 ENVIRONMENTAL DATABASE REPORT (EDR)

- SUMMARY OF FINDINGS
 - The EDR Database Search Report only identified two sites within a ¼ mile search radius. No other known sites of contamination or generators of hazardous waste were identified within a one-mile radius of the subject site:
 - Two Orphan Sites were listed, but based on information within each listing these sites were determined to be outside the radius of concern.
- PREVIOUS ENVIRONMENTAL SITE ASSESSMENTS AND OTHER ENVIRONMENTAL DOCUMENTATION
 - No prior reports were provided
- EXISTING ENVIRONMENTAL PERMITS
 - No Permits were identified in the EDR Radius Map Report
- FORMER ACTIVITIES ON THE PROPERTY
 - Based on a review of historical Aerial Photographs and historical Topographic Maps, the subject site was previously used for agricultural and orchard related activities
- ADJACENT PROPERTY ACTIVITY

- Based on a review of the EDR Radius Map Report, the adjacent sites appear to be residential, agricultural or commercial in nature
- OTHER
 - Handy Drain Number 5 crosses the property in a north-northwest to south direction and appears to flow from south to north toward the Red Cedar River. Some wooded and wetland areas are noted on the historical Topographic Maps
- RECOMMENDATIONS (IF APPLICABLE)
 - We recommend additional site investigative activities to address the potential high risk historical use issue identified (orchards) as well as avail a potential purchaser of Federal and State of Michigan defenses to liability
 - A potential purchaser should conduct a Phase I Environmental Site Assessment (ESA) in accordance with USEPA All Appropriate Inquiry (AAI) and ASTM E1527-13 standards; and
 - A potential purchaser should conduct a Phase II Environmental Site Assessment (ESA) in accordance to assess for the presence of lead, arsenic and pesticides/herbicides related to the former orchards as well as any other Recognized Environmental Conditions (RECs) identified in the Phase I ESA
- REFERENCES
 - EDR Radius Map Report with Geo-check, Sept. 29, 2021

15 THREATENED AND ENDANGERED SPECIES

- PRESENCE OF ENDANGERED SPECIES
 - Based on a review of the EDR NEPA Screen Report certain designations may impact the subject site due to their being located on or within the 1 mile search radius or within 1/8 mile of the subject site:
 - US Proclamation Boundaries (within 1/8 mile)
 - MI Wildlife Management Areas (within 1/8 mile)
 - US Endangered Species (within search radius of 1 mile)
 - MI Endangered Species (within search radius of 1 mile)
 - Based on a review of the US Fish and Wildlife Environmental Conservation Online System (ECOS), some species may impact the subject site due to their being located on or within the County or on or within 1/8 mile of the subject site.
- MIGRATORY BIRDS
 - Based on a review of the EDR NEPA Screen Report and US Fish and Wildlife Environmental Conservation Online System (ECOS) Summary, Migratory Birds were identified.
- HISTORIC TREES OR PROTECTED PLANTS AND VEGETATION
 - Based on a review of the EDR NEPA Screen Report US Fish and Wildlife Environmental Conservation Online System (ECOS) Summary Protected Plants and Vegetation were identified.

- PERMITS / APPROVALS
 - Based on a review of the EDR NEPA Screen Report no permits or approvals were identified within the radius searched.
- RECOMMENDATIONS (IF APPLICABLE)
 - Perform a more thorough assessment of the site as it relates to the above topics and refer to the supplemental information provided for more information to understand potential development impacts.
- REFERENCES
 - US Fish and Wildlife Environmental Conservation Online System (ECOS)
 - Refer to the supplemental Environmental screening for detailed information
 - EDR NEPA Map Report

16 CULTURAL RESOURCES

- PRESENCE OF ARCHAEOLOGICAL OR CULTURAL RESOURCES
 - This research is in-process and will be provided under separate cover
- PERMITS / APPROVALS
 - This research is in-process and will be provided under separate cover
- RECOMMENDATIONS (IF APPLICABLE)
 - None at this time.
- REFERENCES
 - None

17 AIR QUALITY

- JURISDICTIONAL AGENCY
 - USEPA and EGLE Air Quality Division
- IS THE SITE IN ATTAINMENT?
 - The subject site is in Non-Attainment for Ozone.
- PERMITS / APPROVALS
 - Source, process and volume dependent
- RECOMMENDATIONS (IF APPLICABLE)
 - Air quality issues will be user and process dependent. Specific requirements for air quality should be evaluated by the user and EGLE as users show interest in the property.
- REFERENCES
 - EGLE Air Quality Division

18 POWER

- POWER PROVIDER
 - DTE
- ASSUMED DEMAND BASELINE PER SITE SIZE
 - 10 MW 3-phase electric

- IS PROPERTY CURRENTLY SERVED?
 - Yes, a power line runs along the railroad tracks at the southern portion of the site and along Grand River at the northern portion of the site.
- LINE EXTENSIONS REQUIRED?
 - DTE can provide 4 MW without the need for an industrial substation. To meet the requested capacity of 10 MW, an industrial substation and line extension would be required. It is recommended to utilize the existing system as the park begins to develop and incorporate the industrial substation as future phases come online.
- ADJACENT PROPERTY SERVICE
 - Are other properties serviced through the site, etc.
 - Based on information provided, it does not appear other properties are fed through the site.
- LOCATION OF PRIMARY SERVICE
 - Overhead lines along the north side of Grand River Avenue.
- CAPACITIES AND VOLTAGES OF NEARBY TRANSMISSION AND DISTRIBUTION LINES
 - Future Capacity of 10 MW can be provided with the addition of an industrial sub-station.
 - 13.2kV is on the north side of the site along Grand River
- RECOMMENDATIONS (IF APPLICABLE)
 - Utilize the existing capacity of 4 MW for the first phase of the project while contemplating an industrial sub-station for the remainder of the park.
- REFERENCES
 - Assumed Demand per “VIP Utility Demands by Area and Assumed Building Area” table

19 NATURAL GAS

- SERVICE PROVIDER
 - Consumers Energy
- ASSUMED DEMAND BASELINE PER SITE SIZE
 - 10,000 mcf/month
- LINE(S) CURRENTLY SERVICING THE SITE? DESCRIBE SIZE(S) AND LOCATION(S)
 - Existing 4” and 8” Gas Mains located along the north and east sides of the site in-line with Grand River Avenue and Nicholson Road. Per conversation with Consumers Energy, they can provide the assumed demand for a property of this size.
- REQUIRED OFF-SITE INFRASTRUCTURE IMPROVEMENTS
 - Based on current information provided by the utility, additional off-site is not required at this time.
- CAPACITY OF NEARBY INFRASTRUCTURE
 - Representatives from Consumers Energy have stated that they can provide “easily double the needed load” the service to the requested demand for a site of this size. Further confirmation is forthcoming.
- OTHER

- None
- RECOMMENDATIONS (IF APPLICABLE)
 - None
- REFERENCES
 - Assumed Demand per “VIP Utility Demands by Area and Assumed Building Area” table
 - [Utility Provider Search \(state.mi.us\)](http://state.mi.us)

20 WATER

- SERVICE PROVIDER
 - Municipal water from the Village of Fowlerville Dept of Public Works is not available currently. The 2006 MDEQ well capacity testing report verified the groundwater aquifer was capable of supplying water for a previously proposed master planned residential community. Per the testing report, the groundwater aquifer can provide 350 GPM and will be a sufficient source of water for the site based on DRP guidelines.
- ASSUMED DEMAND BASELINE PER SITE SIZE
 - 150,000 GPD
- LINE(S) CURRENTLY SERVICING THE SITE? DESCRIBE SIZE(S) AND LOCATION(S)
 - Site is not served by public water.
- REQUIRED OFF-SITE INFRASTRUCTURE IMPROVEMENTS
 - Off-Site water is not available.
- CAPACITY OF NEARBY INFRASTRUCTURE
 - Off-Site water is not available.
- OTHER
 - The 2006 MDEQ study determined a well capacity of over 350 gallons per minute from a confined gravel and sand aquifer approximately 25 to 60 feet thick.
- RECOMMENDATIONS (IF APPLICABLE)
 - The Township should be approached to discuss the potential opportunity for municipal water in the future, but this is very unlikely.
- REFERENCES
 - Assumed Demand per “VIP Utility Demands by Area and Assumed Building Area” table

21 WASTEWATER

- SERVICE PROVIDER
 - Handy Township
- ASSUMED DEMAND BASELINE PER SITE SIZE
 - 100,000 GPD
- LINE(S) CURRENTLY SERVICING THE SITE? DESCRIBE SIZE(S) AND LOCATION(S)
 - 15 inch Sanitary Sewer at the northeast corner of the property is approximately 20 feet deep and sized originally for 272 REUs.

- REQUIRED OFF-SITE INFRASTRUCTURE IMPROVEMENTS
 - None anticipated based on information provided
- CAPACITY OF NEARBY INFRASTRUCTURE
 - 272 REUs
- LIFT STATION REQUIRED?
 - Potentially, this is a large development and the only available sanitary outlet is located at the far NE corner of the site.
- OTHER
 - None
- RECOMMENDATIONS (IF APPLICABLE)
 - Per discussion with the Township Engineer, the Sanitary Sewer is approximately 20 feet deep. But due to the size of the development a pump station should be anticipated to service the entire development.
- REFERENCES
 - Assumed Demand per “VIP Utility Demands by Area and Assumed Building Area” table

22 FIBER

- SERVICE PROVIDER
 - AT&T
- LINE(S) CURRENTLY SERVICING THE SITE? DESCRIBE DATA SPEED AND LOCATION(S)
 - No fiber lines known to be servicing the site
- REQUIRED OFF-SITE INFRASTRUCTURE IMPROVEMENTS
 - Site appears to be serviced by DSL only and improvements would be required to provide Fiber service
- OTHER
 - None
- RECOMMENDATIONS (IF APPLICABLE)
 - It is recommended to contact an AT&T service planner during the Tier 4 Due Diligence phase.
- REFERENCES
 - [MPSC - Broadband Mapping \(michigan.gov\)](http://michigan.gov)
 - [The Michigan Broadband Map \(connectednation.org\)](http://connectednation.org)
 - [Fiber Optic Internet Providers and TV Companies in Michigan | bestneighborhood.org](http://bestneighborhood.org)

Property Area	Utility Demands by Area and Assumed Building Area					
	0-25 acres	26-100 acres	101-250 acres	251-500 acres	501-999 acres	1,000+ acres
Bldg. SF ¹	0 – 435,600	435,601 - 1,742,400	1,742,401 – 4,356,000	4,356,001 – 8,712,000	8,712,001 – 17,424,000	17,424,001 +
Power	2 MW 3-Phase Electric	5 MW 3-Phase Electric	10 MW 3-Phase Electric	15 MW 3-Phase Electric	35 MW 3-Phase Electric	50 MW 3-Phase Electric
Natural Gas	5,000 mcf/month	7,500 mcf/month	10,000 mcf/month	15,000 mcf/month	25,000 mcf/month	35,000 mcf/month
Domestic Water	50,000 GPD	100,000 GPD	150,000 GPD	300,000 GPD	500,000 GPD	750,000 GPD
Sanitary Water	40,000 GPD	75,000 GPD	100,000 GPD	200,000 GPD	400,000 GPD	600,000 GPD

Notes: 1. The estimated building square footage assumes 80% of the total property area is buildable and that 50% of the buildable area will be utilized for building construction. Building area values are approximate, are for convenience only, and should be verified after initial site diligence by the Provider prior to sending to the respective utility providers. Stated assumptions further assume the property will be associated with industrial development to serve manufacturing facilities.



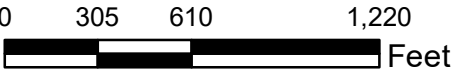
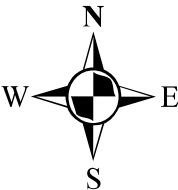
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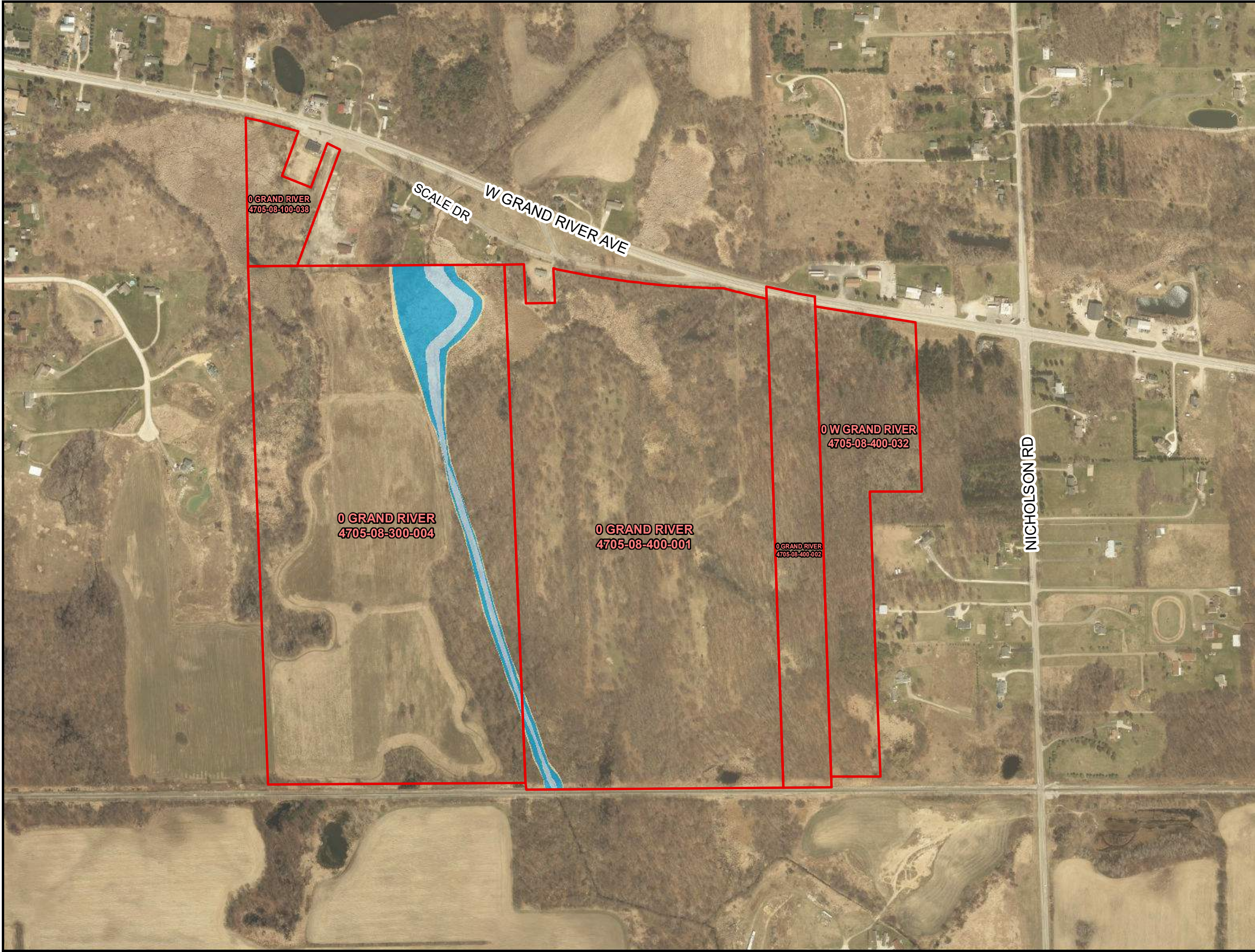
Livingston County Parcels

Contour Lines

Date: 11/30/2021



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Projection: Mercator Auxiliary Sphere

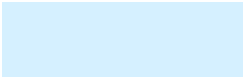


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Livingston County Parcels

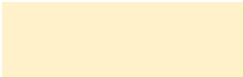
Floodplain



Regulatory Floodway

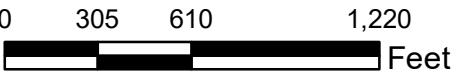
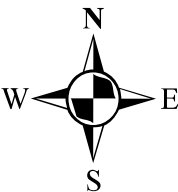


1% Annual Chance Flood Hazard

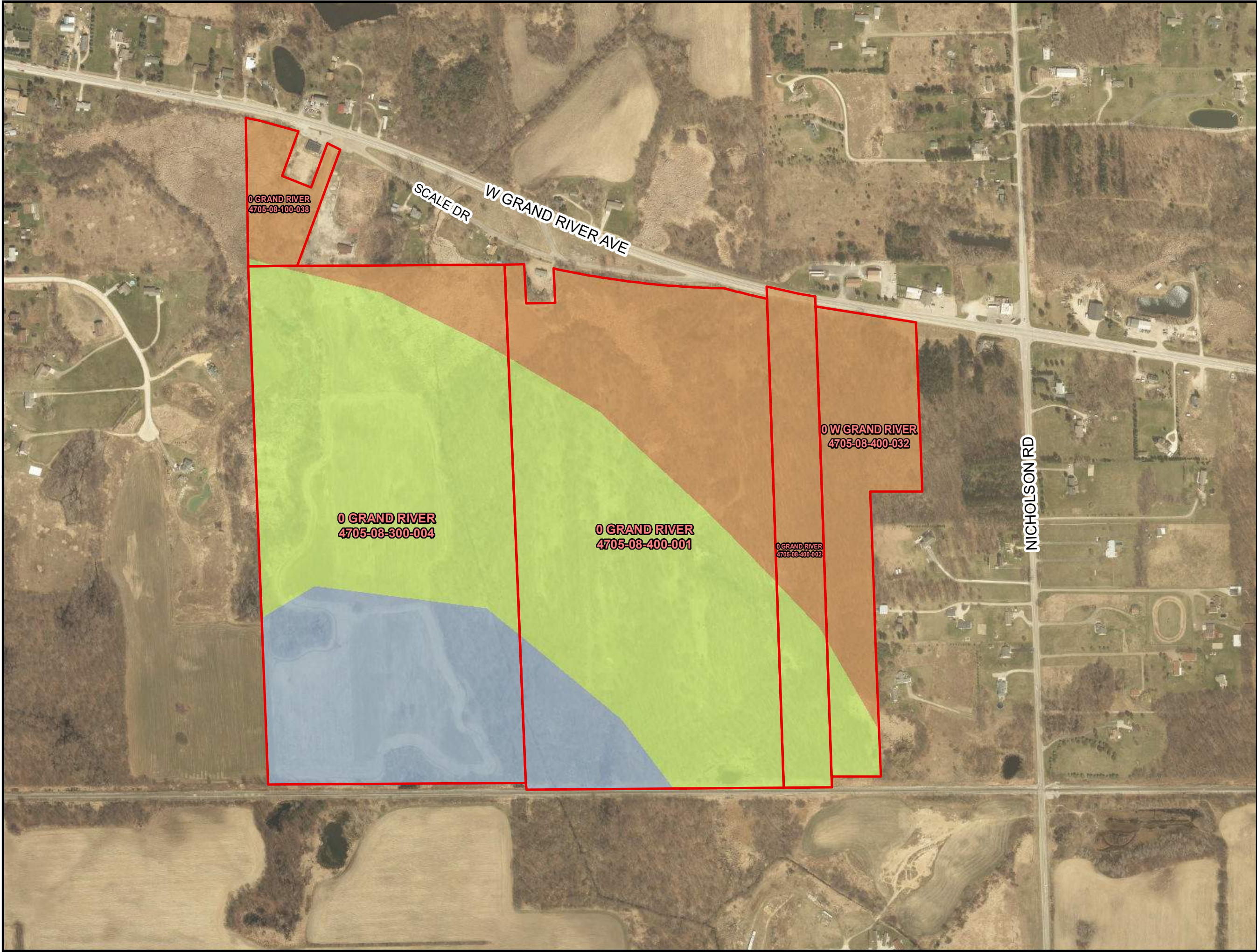


0.2% Annual Chance Flood Hazard

Date: 11/30/2021



Coordinate System: WGS 1984 Web Mercator Auxiliary Sphere
Projection: Mercator Auxiliary Sphere

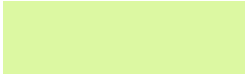


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Livingston County Parcels

Michigan Geology



Bayport Limestone

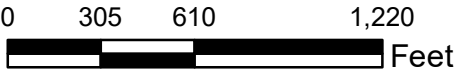
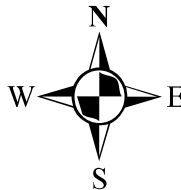


Michigan Formation

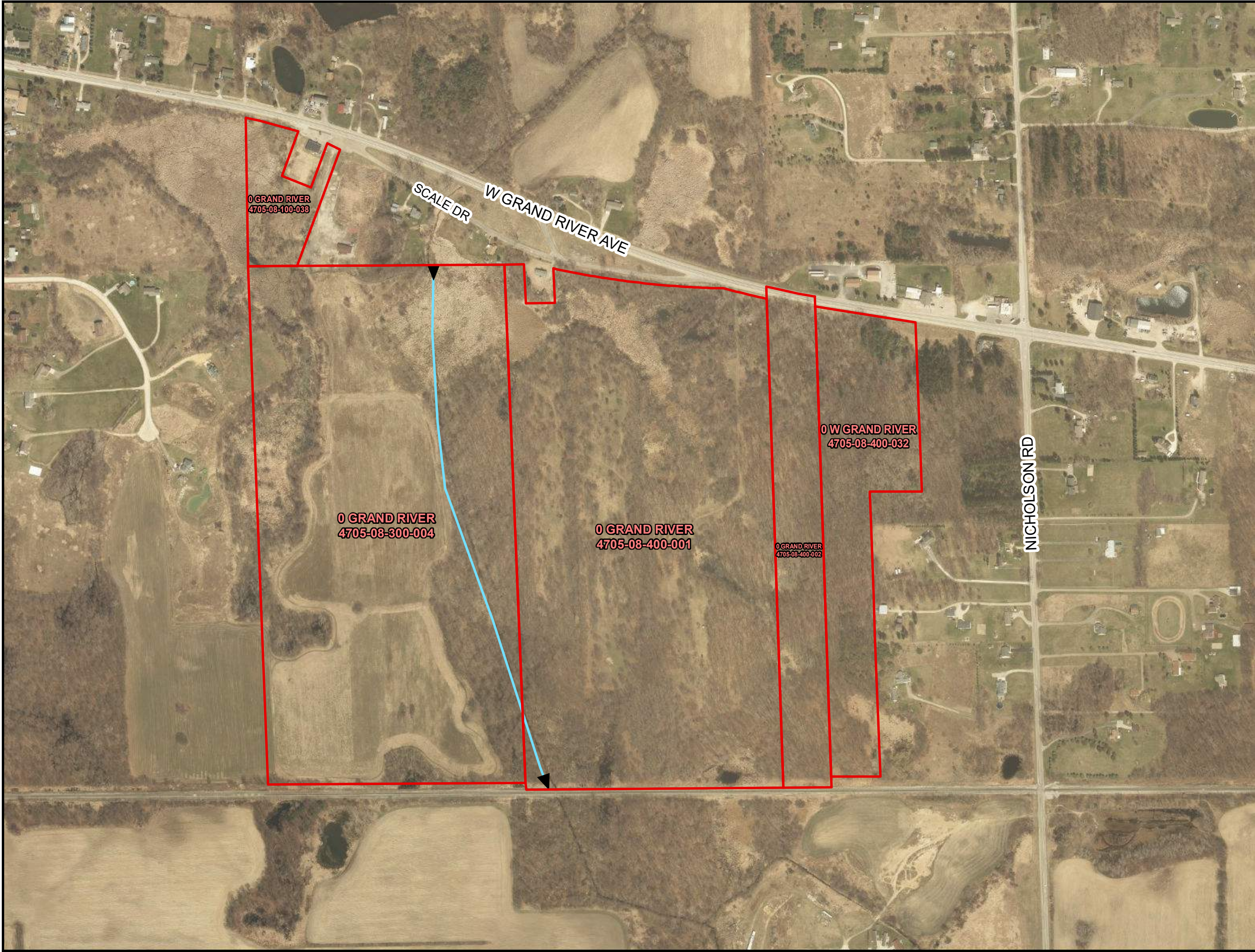


Saginaw Formation

Date: 11/30/2021



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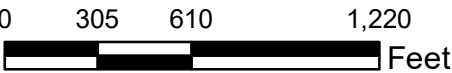
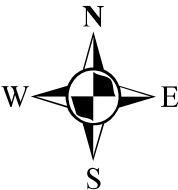


Livingston County Parcels

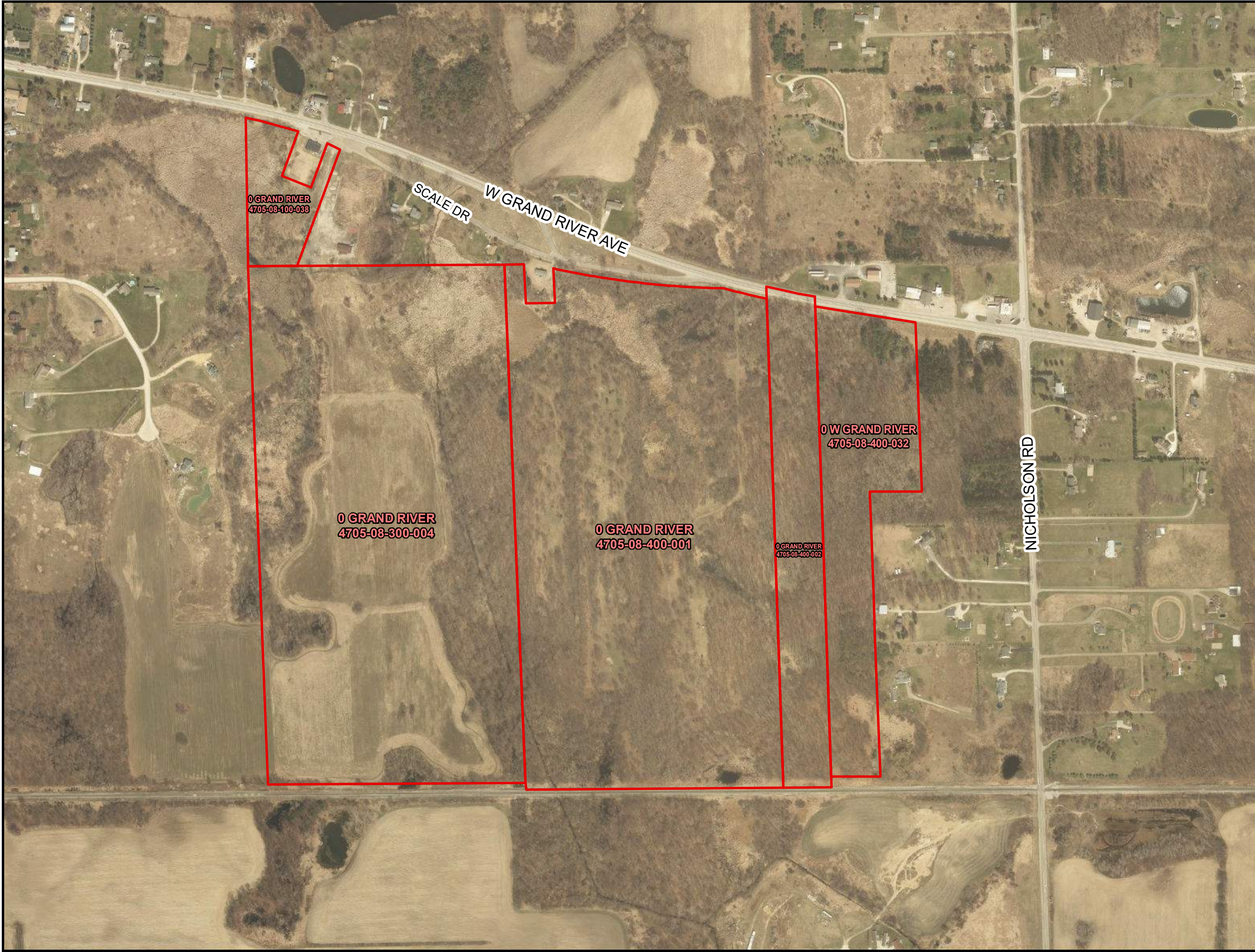


NHD Flowline

Date: 11/30/2021



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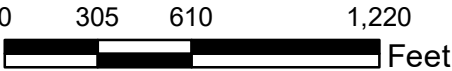
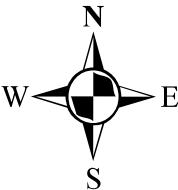


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Livingston County Parcels

Date: 11/30/2021



Coordinate System: WGS 1984 Web Mercator Auxiliary Sphere
Projection: Mercator Auxiliary Sphere



PEA
GROUP

2430 Rochester Court, Ste. 100
Troy, MI 48083-1872

(248) 689-9090 OFFICE
(248) 6891044 FAX

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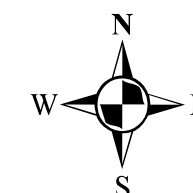


Livingston County Parcels

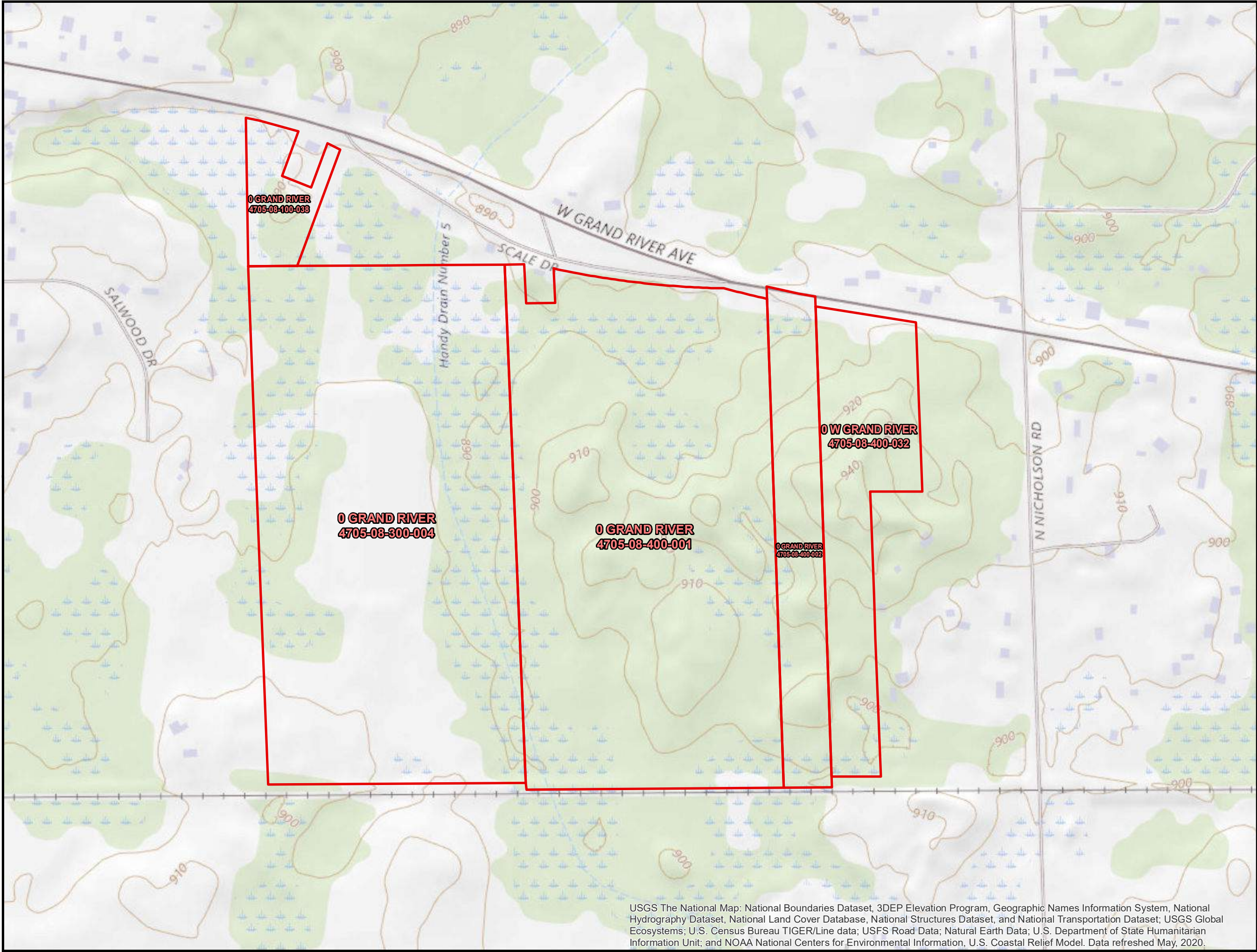


Michigan Soils

Date: 11/30/2021



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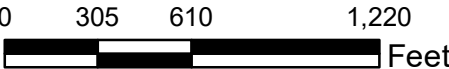
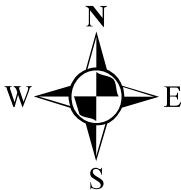
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Troy, MI 48063-1872
(248) 689-9090 OFFICE
(248) 689-1044 FAX

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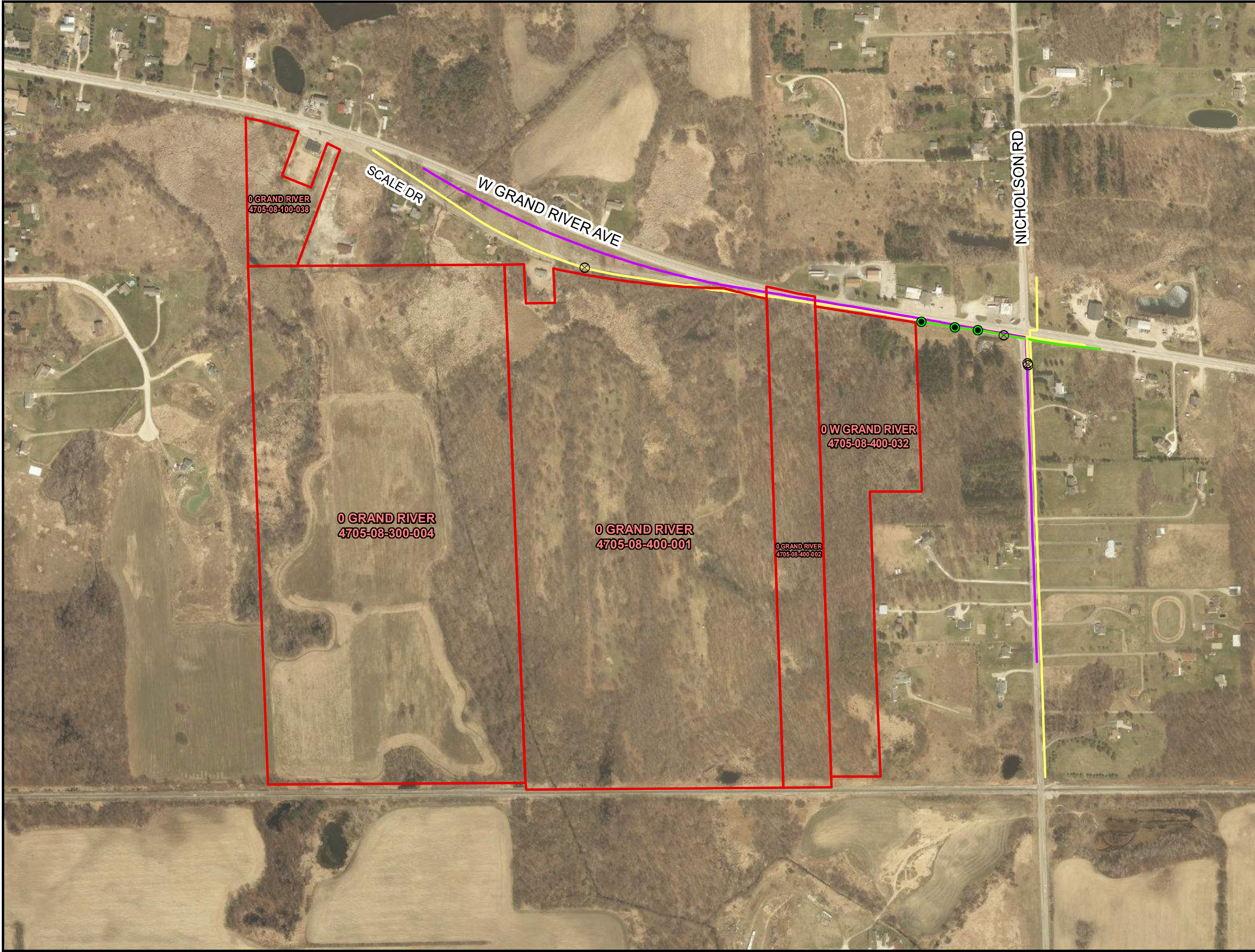
Livingston County Parcels

Date: 11/30/2021



Coordinate System: WGS 1984 Web Mercator Auxiliary Sphere
Projection: Mercator Auxiliary Sphere

USGS The National Map: National Boundaries Dataset, 3DEP Elevation Program, Geographic Names Information System, National Hydrography Dataset, National Land Cover Database, National Structures Dataset, and National Transportation Dataset; USGS Global Ecosystems; U.S. Census Bureau TIGER/Line data; USFS Road Data; Natural Earth Data; U.S. Department of State Humanitarian Information Unit; and NOAA National Centers for Environmental Information, U.S. Coastal Relief Model. Data refreshed May, 2020.



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Livingston County Parcels

Utilities



Gas Valve



Sewer Manhole



Gas Pipes

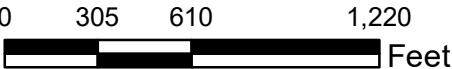
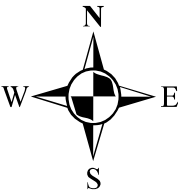


Sanitary Sewer Pipes

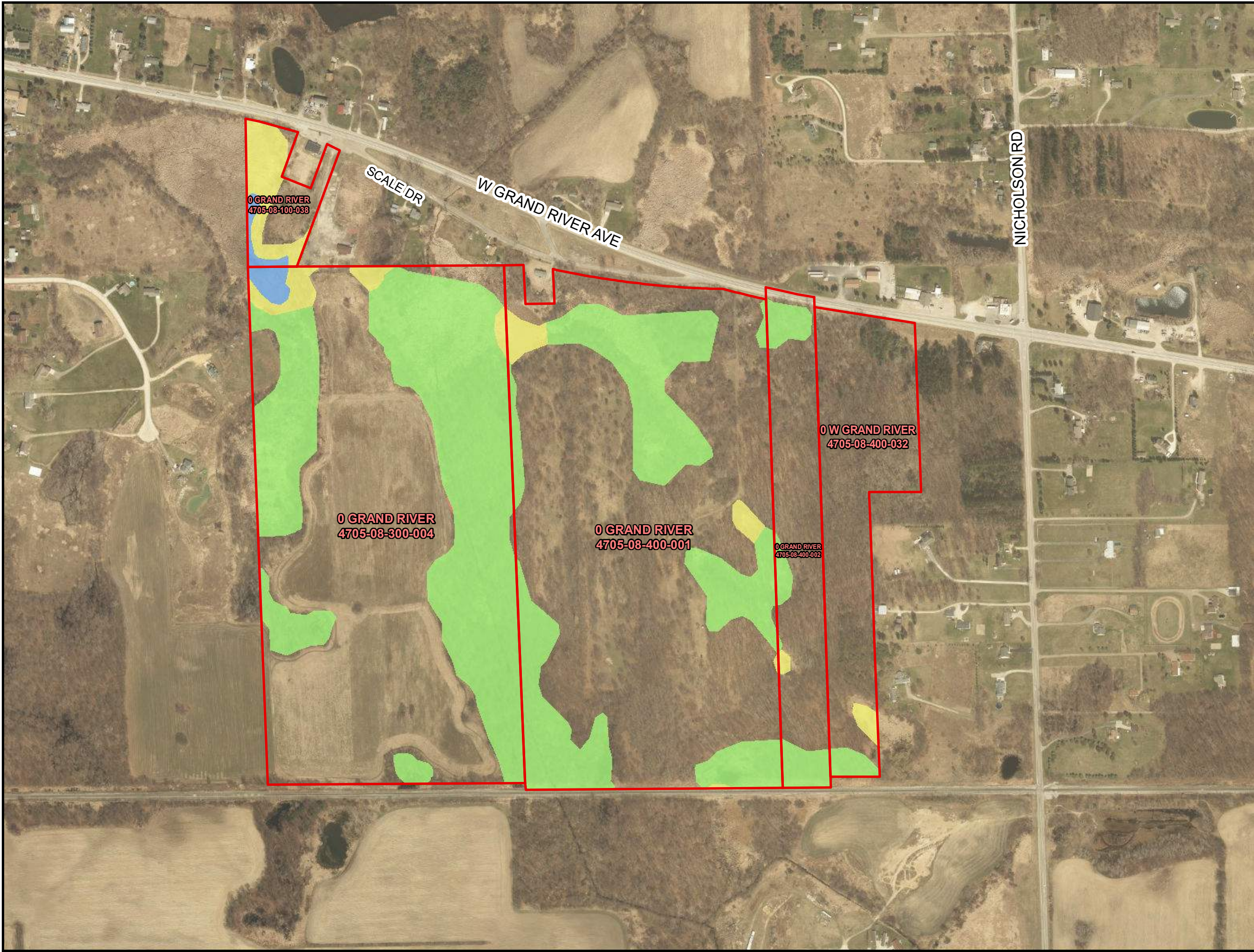


Telcomm Lines

Date: 11/30/2021



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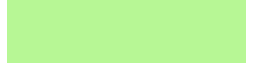


Livingston County Parcels

Michigan Wetlands



Freshwater Emergent Wetland



Freshwater Forested/Shrub Wetland

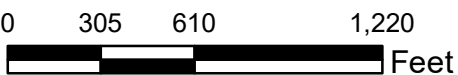
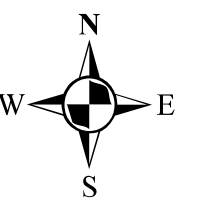


Freshwater Pond



Riverine

Date: 11/30/2021



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Projection: Mercator Auxiliary Sphere



Verified Industrial Properties

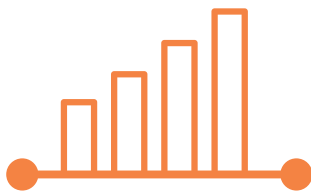
Verify your data. Promote your property.

The **Verified Industrial Properties (VIP by DRP)** program helps advance your site readiness and increase the marketability of your property. Each year, the Detroit Regional Partnership helps hundreds of companies explore our market for future projects and investments. So, we can promote your property to a vast network of site selectors and potential investors interested in the Detroit Region.



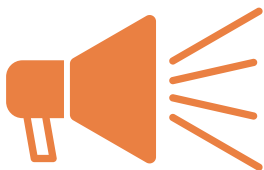
We build confidence in your credibility.

When site selectors search for properties, they want comprehensive, detailed information that they can trust. We connect you with one of our approved engineering consultants, who work with you to collect and verify critical site information. This verification process ensures the accuracy of your data and helps improve your site readiness.



We help increase your marketability.

Our verification process enhances the quality and value of your site's due diligence. This verified data helps accelerate the site selection process—ensuring you have the necessary data to match your property with a project's unique needs. Then, we showcase your property on the VIP by DRP web portal, so prospective buyers can easily find your property and contact you to make a deal.



We promote your property to potential buyers.

The VIP by DRP network helps expand your visibility to prospective buyers from around the world. Our experienced team helps you market your site and attract serious investors. And we proactively promote each site to our network, with complimentary marketing that showcases the best of the best across the Detroit Region.

Find opportunities for your properties. **Join VIP by DRP today.**



Verified Industrial Properties

Simplify Your Site Selection Search

The **Verified Industrial Properties (VIP by DRP)** program showcases the best vacant industrial properties in the Detroit Region—all in one convenient, searchable database. Our team works with site owners and brokers across the region to catalogue each site and its due diligence. So, you can accelerate your search and quickly secure a site where your business will succeed.



We ensure that each site is verified for accuracy.

During your site selection search, you need comprehensive, detailed information that you can trust. That's why we partner with expert civil and environmental engineers to collect and verify critical site data. You can search with confidence knowing that all available information has been verified by a third-party source.



We simplify the site selection process.

Once a site has been verified, we compile that due diligence on the VIP by DRP web portal. You can efficiently browse our database of industrial properties and curate your search results to suit your needs. This makes it easy for you to explore the Detroit Region and find the perfect property for your next project.



And we provide this service at no cost to you.

The VIP by DRP program is simply one of the free, confidential services we offer to companies interested in the Detroit Region. All verified site data is publicly available, with no commitment necessary to access the portal. And when you're ready to make a deal, the DRP helps connect you with the resources you need to navigate our local market.

Find a property where you can prosper. **Learn more about VIP by DRP.**



Detroit Regional Partnership



VERIFIED INDUSTRIAL PROPERTIES PROGRAM



Detroit Regional Partnership



The DRP is an economic development 501(C)(3) nonprofit that offers confidential, no-cost assistance to domestic and international companies seeking to explore and invest in the Southeast Michigan region.

GUIDING PRINCIPLES

- Robust Growth
- Jobs for All
- Deep Prosperity
- Regional Impact
- Collaborative Ecosystem

DRP SERVICES

- A Single Point of Contact
- Regional Data
- Connections to Key Partners
- Incentives and Talent Assistance
- Building and Site Analysis

THE DETROIT REGION IS MADE UP OF

11

COUNTIES

348

COMMUNITIES

5.4M

POPULATION

2.5M

WORKFORCE

1 DETROIT REGION

Single Point of Contact



Connect with our vast network of resources and partners through one convenient contact

Project Management



Overcome any challenges your project may face with help from our team of experts

Regional Data



Request information and access verified data about the Detroit Region's business ecosystem

Assessing Talent



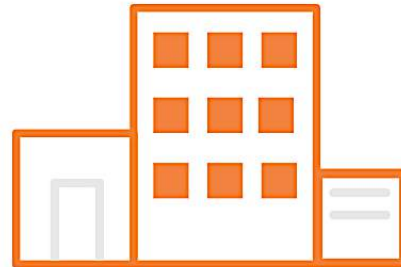
Learn about our region's skilled talent pool directly from our workforce community

Private Service Provider Connections



Network with technical experts who can assist with your project's legal and financial issues

Market Visits



Explore the Detroit Region virtually or in person to experience life in our community

Securing Incentives



Discover local incentive programs and negotiate a comprehensive package with our help

Selecting Your Site



Consult with our team about available real estate to find the perfect site for your project



DETROIT REGIONAL PARTNERSHIP: TEAMS & STAFF

EXECUTIVE

BUSINESS DEVELOPMENT

INVESTORS



Maureen Donohue
Krauss,
President & CEO



Justin Robinson,
SVP, Business
Development



Kent Spencer,
VP, Business
Development



Alan Weber,
VP, Global Trade
& Investment



Will Butler,
SR, Business
Dev. Manager



Connie Loh,
Business Dev.
Manager



Marisa Kuhn,
Business Dev.
Coordinator



Ayesha Miah,
Business Dev.
Coordinator



Maria LaLonde,
Investor Relations
Director

BUSINESS INTELLIGENCE & RESEARCH

MARKETING

TALENT

OPERATIONS



Angela Ladetto,
VP, Business
Intelligence & Research



Jessica Worley,
Research
Manager



Julia Anderson,
Research / GIS
Coordinator



Haintso Rakouth,
Lead Generation &
Market Strategist



Tamekia
(Ashford) Nixon,
VP, Marketing



Talitha Johnson,
Marketing
Manager



Sarah Gregory,
Director of
Talent Solutions



Tesia Mamassian,
VP,
Operations



KaBao Yang,
Administrative
Coordinator



DETROIT REGIONAL PARTNERSHIP BOARD MEMBERS



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DTE Energy



Sandy Baruah,
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Wayne County
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Mark Hackel,
Macomb County
Executive



Chris Ilitch,
President & CEO
Ilitch Holdings



Wright Lassiter III
President & CEO
Henry Ford Health System



Chip McClure,
Managing Partner Michigan
Capital Advisors



Kylee Mitchell Wells,
Executive Director, Southeast
Michigan Ballmer Group



La June Montgomery Tabron,
President & CEO
W.K. Kellogg Foundation



Rip Rapson,
President & CEO
Kresge Foundation



Ray Scott,
President & CEO
Lear Corporation



Ray Telang,
Michigan Managing
Partner PwC



Gary Torgow,
Executive Chairman
Huntington Bank



Ridgway White,
President & CEO Charles
Stewart Mott Foundation



DETROIT REGIONAL PARTNERSHIP RESULTS (2020-2021)

2030 (10-Year) Metric

50,000

NEW JOBS

\$2B

IN PAYROLL

\$10B

NEW INVESTMENT

12,000

PATHWAY JOBS

2020-2021 Total Economic Impact (2-year)

11,484

NEW JOBS

\$813M

IN PAYROLL

\$2.3B

NEW INVESTMENTS

2,453

PATHWAY JOBS



ISN'T THIS A RETAIL CONFERENCE? WHY ARE YOU HERE?

Businessweek
Business

Ford Gives Michigan a 'Wake-Up Call' With Out-of-State EV Expansion

The carmaker's \$11.4 billion planned investment in electric vehicle and battery plants in Tennessee and Kentucky is forcing local officials to examine how the state will compete.

AP Rivian to build \$5 billion electric truck plant in Georgia, sources say

WSJ Intel to Invest at Least \$20 Billion in Ohio Chip-Making Facility

Company will make cutting-edge processors at new site near Columbus, creating around 3,000 permanent jobs



Toyota to build new \$1.3 bln battery plant in North Carolina

- Real estate asset classes are more intertwined than we often acknowledge.
- Retail corridors often depend on nearby base employers in the industrial or office sectors.
- Retail is also critical in talent attraction and retention. Even before real estate, size, growth, and quality of an area's labor pool is the #1 consideration for prospective end-users.



WHAT ARE DETROIT'S COMPETITORS DOING?

SiteOhio Authenticated
Construction Ready Day One



Virginia Business Ready Sites Program



VERIFIED INDUSTRIAL PROPERTIES (VIP) PROGRAM

The Problem

- Vacant industrial sites in the Detroit Region are not well-positioned enough for new development.
- Compared to national peers, not enough is known about site conditions and heavy lifting to investigate further exceeds client timelines, leading them to locate elsewhere.

The Solution

- To tackle this, the DRP has launched a new, regional site readiness program - the **Verified Industrial Properties (VIP) program**.
- **Program Highlights:**
 - ✓ 1-5 rating scale indicates development readiness status
 - ✓ Site ratings verified by qualified, third-party consultants, PEA Group, Mannik Smith Group, and Burns McDonnell
 - ✓ Online portal of industrial sites in the Detroit Region with accessible due diligence resources
 - ✓ Highest rated sites will receive prioritized marketing
 - ✓ **Goal:** Assess and rate sites prior to an inquiry from potential users, give property owners an incentive to advance the readiness of their site.



VIP PROGRAM PARTNERS

Private Sector Engineer Service Provider Partners:



Public Sector & Economic Development Partners:



MICHIGAN ECONOMIC
DEVELOPMENT CORPORATION





HOW DOES THE VIP PROGRAM WORK?

Site Submission

- Property owners/representatives will submit their site via an online form.
- An initial intake meeting is held between the DRP and the property owners/representatives
- Once the property owners/representatives have agreed to participate in the program, a meeting with 1 of 2 VIP Program Providers (PEA Group or Mannik Smith Group) is arranged to formally kick-off the work.

Third-Party Verification

- Depending on the Tier selected, the Program Providers will begin compiling a report with various levels of desktop due diligence, creating potential conceptual plans based on site conditions, and/or review previously completed physical site studies to ensure the site is development ready.

Site Marketing

- The site is then placed in a web portal of vacant industrial sites in the Detroit Region that have participated in the VIP Program.
- Each site receives complimentary demographic and workforce analysis to go alongside its site profile, as well as high-quality imagery and potential drone fly over videos.
- Higher-rated sites will receive additional, prioritized marketing support, including paid advertisements, in-depth drone videos, inclusion in property prospectuses for end-users and global site selectors, etc.

TIER OBJECTIVES

TIER 1



INTENT TO
MARKET

TIER 2



PRE-
DILIGENCE

TIER 3



DESKTOP
DILIGENCE

TIER 4



MASTER
PLANNING
& SITE
POSITIONING

TIER 5



PHYSICAL
SITE STUDIES

TIER 1 – INTENT TO MARKET



Baseline tier for collecting administrative first steps for sites desiring to be included in the VIP program.

Tasks within this tier include assemblage and submittal of the following:

- ✓ Site location
- ✓ Site size
- ✓ Contact information

Tier 1 does not financially or otherwise obligate property owners to completing additional tiers within the VIP program.

TIER 2 - PRE-DILIGENCE



Low-cost, limited scope effort to advance sites beyond Tier 1.

Site authorizers will review the subject property for common development issues, including:

- ✓ Floodplain
- ✓ Wetlands
- ✓ Topography
- ✓ Other natural- and/or built-environment factors suspected of posing critical deficiencies to site development

The Tier 2 involves a minimal financial commitment for desktop site review. Site owners will be provided with high-level findings in a succinct, one-page memo. If desired, site owners may skip Tier 2 assessment and proceed directly to Tier 3.

TIER 3 - DESKTOP DILIGENCE



Medium-cost, detailed desktop diligence effort to examine the subject property for high-level assets and deficiencies to development.

Site authorizers will review the subject property's natural- and built-environment , including:

- ✓ Environmental
- ✓ Utilities
- ✓ Easements
- ✓ Zoning
- ✓ Additional natural- and/or built-environment factors suspected of posing critical deficiencies to site development

The Tier 3 deliverable will include a detailed diligence report with associated GIS mapping to support all diligence findings. The report and associated mapping can be used as a marketing tool for all prospective end users expressing interest in the property. Tier 3 status must be achieved for the subject site to be marketed as a VIP site by the DRP.

TIER 4 – MASTER PLANNING & SITE POSITIONING



Medium-cost, accurate depiction of site attributes to define developable site area.

In-consideration of identified site attributes within Tier 3, the site will be master planned to depict the following:

- ✓ Site boundary
- ✓ Existing easements and right-of-way
- ✓ Access
- ✓ Drainage assumptions
- ✓ Suggested pad site configuration(s)
- ✓ Encumbrance avoidance
- ✓ Rail access configuration
- ✓ Interior roadway positioning

Tier 4 master planning will require conformance with the VIP Design manual. Deliverables to the site owner will include master plan option(s), providing an accurate picture of the site's development potential for prospective end-users incorporating the findings discovered in Tier 3.

TIER 5 – PHYSICAL SITE STUDIES



Higher-cost, physical site analysis for full attribute identification and development risk mitigation

Based upon identified areas of need in Tier 3 diligence, Tier 5 will include the completion of physical site studies recommended by the Site Authorizer to specifically address areas of prospective investigation or mitigation on a per-site basis and may include any one of the following studies:

- ✓ Geotechnical exploration
- ✓ Wetlands delineation
- ✓ Phase I environmental analysis
- ✓ Cultural/historical/archaeological investigation
- ✓ Endangered species analysis
- ✓ Traffic studies

Tier 5 status holders will receive priority VIP marketing of their site from the DRP. Although not recommended, property owners will have the option to skip Tier 4 master planning options and proceed to physical site studies.



VIP PROGRAM EXAMPLE MARKETING



[About VIP by DRP](#) [Tier Descriptions](#) [Search Properties](#) [Program Partners](#) [Contact Us](#) [Submit Your Site](#)

Explore the Detroit Region

VIP by DRP is here to simplify your site selection search. Our database of verified industrial properties ensures that you can search with confidence—and find a place where your business can grow.

[Search Industrial Properties](#)

[Learn More about VIP by DRP](#)

Featured Properties



Tecumseh Tech Park

City: Tecumseh
County: Lenawee
Acreage: 158.36

[View Site](#)



Liberty Business Park

City: Mount Morris Twp.
County: Genesee
Acreage: 105

[View Site](#)



Handy Township Site

City: Handy Twp.
County: Livingston
Acreage: 195.62

[View Site](#)

LAND FOR SALE

TECUMSEH BUSINESS & TECHNOLOGY PARK

MUNICIPALLY-OWNED,
158 ACRES AVAILABLE,
ZONED INDUSTRIAL

5000 E MONROE RD, TECUMSEH, MI 49286



Detroit
Regional
Partnership



02:08



WILL BUTLER
DETROIT REGIONAL PARTNERSHIP
INDUSTRIAL SITE SELECTION/VERIFICATION PARTNERSHIP.COM

JESSICA SATTLER
CITY OF TECUMSEH
JESSICA.SATTLER@CITYOFTECUMSEH.MI.GOV



SITE READINESS DISCUSSION

Additional Site Readiness Resources:

- **Strategic Site Readiness Program (SSRP):** The Strategic Site Readiness Program provides financial incentives to eligible applicants to conduct eligible activities on, or related to, strategic sites and mega-strategic sites in Michigan, for the purpose of creating investment-ready sites to attract and promote investment in Michigan. [Program guidelines can be found here.](#)
- **Build Ready Sites Grant Initiative:** The program awards up to \$75,000 per site (with a local match required) to submitted applicants that demonstrated a plan and pathway to a vetted site. Grant funds under the program can be used for activities including site development studies, site material development, site implementation or land assembly activities, and more

Discussion:

- What are your thoughts and feedback on the VIP Program?
- What are the biggest obstacles you've come across in terms of site readiness in Michigan?
- What is Michigan or local units of government doing right or wrong in terms of site readiness?
- How can the real estate community, public sector, and economic development organizations better collaborate to attract more businesses and jobs to Michigan?



Detroit Regional Partnership

THANK YOU



ICSC+CONTINUING EDUCATION MICHIGAN

Suburban Collection Showplace

Novi, MI

Wednesday, April 13, 2022

Session Materials

**Roundtable 23: Why Are Special Land Uses So “Special” When You Need to
Get Your Drive-Through Restaurant Approved?**

**Led by: John D. Gaber, Esq. and Richard D. Rattner, Esq., Williams, Williams,
Rattner & Plunkett, PC**

**ICSC 2022 MICHIGAN
CONTINUING EDUCATION PROGRAM**

April 13, 2022

**WHY DO I NEED A “SPECIAL” LAND
USE WHEN ALL I WANT IS A DRIVE-
THROUGH RESTAURANT?**

Richard D. Rattner & John D. Gaber
Williams, Williams, Rattner & Plunkett, P.C.
380 N. Old Woodward Ave., Suite 300
Birmingham, MI 48009
(248) 642-0333
rdr@wwrplaw.com
jdg@wwrplaw.com



WHY DO I NEED A “SPECIAL” LAND USE WHEN ALL I WANT IS A DRIVE-THROUGH RESTAURANT?

INTRODUCTION

While obtaining special land use approval for your drive-through restaurant may present its challenges, such challenges can be sufficiently addressed by adequate planning and preparation. The applicant should engage its professional team (architect, engineer, attorney) early to meet with the stakeholders, identify potential negative impacts of the proposed use and work to mitigate such negative impacts. By pursuing this strategy, the applicant best positions the project for a successful outcome.

Consider this scenario: You found the perfect site for your client’s drive-through restaurant, and the zoning allows the proposed use. Your hard work has paid off. You believe the only approval required for closing is site plan approval, which is administrative. The project meets the ordinance requirements, so no variances are necessary. You’re ready to put the site under contract and have a site plan prepared. All is good, right? Not so fast. In most communities, uses that could potentially cause adverse impacts to the surrounding area require special land use approval, meaning that the municipality must first approve the proposed use. Such special land uses typically include drive-through restaurants, banks and other establishments, and restaurants serving alcoholic beverages.

Special land uses, also sometimes referred to as conditional land uses or waiver uses, are uses permitted under the municipality’s zoning ordinance, but only if special conditions are satisfied. They are not uses permitted as a matter of right, but must be approved at the discretion of the legislative body of the municipality. Such uses require special approval because they could have adverse impacts on the surrounding areas due to the nature of the use. Therefore, the zoning ordinance requires that the legislative body find that certain conditions have been satisfied to permit the special land use. A public hearing is required, and the approval process could become a battlefield with disgruntled neighbors.

You will need to understand the special land use requirements are set forth in the zoning ordinance, and design the project to try to mitigate negative impacts. This outline will assist you in understanding the approval process and the applicable conditions so you can put the project in the best position to secure the required special land use approval.

I. Special Land Use Approval Procedures

The Michigan Zoning Enabling Act (the “Act”) authorizes a municipality to include special land uses in its zoning ordinance. The zoning ordinance must specify the uses that require special land use approval and the process for reviewing the special land use request.

A. Process

- The applicant submits a special land use application with supporting materials to the municipality’s planning department. This submittal should be made at the same time the site plan application is made, as the site plan is usually required to evaluate the special land use request.
- The planning, building and engineering departments and/or outside consultants review the request and issue any comments on the request.
- The special land use and site plan approval request will be placed on the planning commission’s agenda and public notice will be published and mailed to all properties within 300 feet MCL 125.3103.
- The planning commission will hold the public hearing and make a recommendation on the special land use request to the legislative board of the municipality (i.e., a city council or township board), which may (i) approve the request, (ii) approve the request with conditions, or (iii) deny the request.
- The decision of the governing body to approve or deny the special land use request must include a statement of findings and conditions which identifies the basis for the decision and any conditions that may be imposed. MCL 125.3502(4).
- If the legislative board denies the request, the applicant may appeal a denial to the zoning board of appeals if the zoning ordinance expressly permits such appeal. Otherwise, an appeal must be made in circuit court within 30 days.

II. Requirements for Special Land Use Approvals

The zoning ordinance must also include the requirements, standards and criteria that must be used by the municipality to review the special land use request. MCL 125.3504(1). Quite often the zoning ordinance sets forth general requirements that all special land uses must meet, and specific requirements applicable to the specific use being sought.

A. General Requirements

Often the general ordinance requirements follow those set forth in the Act, such as requiring the land use to be compatible with adjacent uses, the natural environment, with available public services and facilities. Further, the Act requires that such uses are compatible with public health, safety and welfare. MCL 125.3504(2). Such requirements generally include some

variation of the following, which are the requirements from Section 138-2.302 of the City of Rochester Hills Zoning Ordinance used as a representative example:

- The use must promote the intent and purpose of the zoning ordinance.
- The use must be designed, constructed, operated, maintained and managed so as to be compatible, harmonious and appropriate in appearance with the existing or planned character of the general vicinity, adjacent uses of land, the natural environment.
- The use must be served adequately by essential public facilities and services, such as highways, streets, police and fire protection, drainageways, refuse disposal.
- The use must not be detrimental, hazardous, or disturbing to existing or future neighboring uses, persons, property or the public welfare.
- The use must not create additional requirements at public cost for public facilities and services that will be detrimental to the economic welfare of the community.

B. Specific Requirements

Most zoning ordinances also require that a special land use meet criteria designed to mitigate against potential negative impacts caused by the particular proposed use. Drive-through restaurants are no exception. Such specific criteria typically include some variation of the following, also taken from the Rochester Hills Zoning Ordinance:

- Drive-through uses must be built as an integral architectural element of the primary structure and use. Building materials shall be the same as those used in the primary structure. Drive-through facilities and structures separate from the primary structure are prohibited.
- Drive-through uses must be located to the rear or side of the primary structure, and set back a minimum of 10 feet from the front building wall of the primary structure.
- Drive-through uses shall be configured such that glare from headlights is obstructed from shining into a public right-of-way or neighboring residential use.
- A Type B landscape buffer shall be provided along rear and side lot lines of a drive-through use located adjacent to a residentially zoned or used property.

C. Application of Special Land Use Criteria

- A zoning ordinance allowing special land uses must provide specific criteria to be applied by the governing body in reviewing special land use requests, otherwise such application would be left to the discretion of the governing body without any guidance. *Osius v St Clair Shores*, 344 Mich 693; 75 NW2d 25 (1956).
- Most zoning ordinances will have general requirements taken at least in part from the Act, which are applicable to all special land use requests, together with specific requirements that pertain to the actual proposed use.
- A request must be approved by the municipality if it complies with the municipality's standards. MCL 125.3504(3).
- While the specific requirements are fairly objective in their application, the general requirements can be applied in a very subjective manner. Having public utilities and services available for the proposed use may be relatively easy to determine. However, standards that require the proposed use to be consistent with the public health, safety and welfare can be interpreted and applied in many different ways to lead to approval or denial of the proposed use.
- The municipality may impose reasonable conditions on the proposed use and development when approving a special land use request. MCL 125.3504(4). Conditions are usually intended to mitigate negative impacts on the adjacent area or the community in general.

III. Courts Usually Defer to the Municipality's Decision on Discretionary Zoning Matters

- The recent trend with cases challenging discretionary decisions of municipalities in Michigan is for the courts to defer to the discretion of the municipality, particularly with respect to the application or interpretation of a municipality's zoning ordinance.
- The burden imposed upon an applicant's challenge of a municipal decision denying a special land use request is very high. The applicant must show that the decision is not supported by competent, material and substantial evidence on the whole record." Mich. Const. Art. 6 Sec 28. The "substantial evidence" standard requires "evidence that a reasonable person would accept as sufficient to support a conclusion." *Dowerk v Charter Twp of Oxford*, 233 Mich App 62, 72 (1998).
- In decades past, an applicant for a rezoning who was denied by a municipality would often be able to file a lawsuit challenging the denial, and ultimately negotiate a zoning resolution with the municipality in the form of a consent judgment.

- Recent court decisions favoring municipalities have emboldened cities and townships to refuse to settle zoning disputes, believing that the courts would uphold their decisions.
- For example, in the 2018 case of *Tollbrook, LLC v City of Troy*, 774 Fed Appx 929 (CA 6, 2019), the developer was denied a conditional rezoning to rezone its property from single family to multi-family residential.
 - The developer revised its site plan multiple times to comply with the planning commission's requests, and the planning commission unanimously recommended approval of the rezoning, which city management also supported.
 - City council denied the rezoning after negative public comment.
 - The developer filed suit, challenging the rezoning denial, and the court dismissed the lawsuit.
 - The court held that the city council had broad discretion and that the developer did not have a "legitimate claim of entitlement" or a "justifiable expectation" in approval and therefore has no constitutionally protected interest.
 - The court also held that the decision was not arbitrary and capricious just because the denial was based upon public opposition. Rather, council members expressed traffic safety concerns and master plan compliance, which are a rational basis for its decision.
 - While not a special land use case, the conditional rezoning request required a similar discretionary approval by the municipality.
- Similarly, in the unpublished case of *Tuscola Wind III, LLC v Almer Charter Twp.*, No. 17-CV-10497, 2017 WL 5022640 (ED Mich, Nov 3, 2017), the Township denied the applicant's special land use request to construct a windmill energy system. The court found that the township had identified five (5) perceived deficiencies with the special land use application and the applicant's failure to meet the ordinance requirements. The court reasoned that it could only overturn the Township's decision if none of the five (5) reasons was consistent with law and supported by substantial evidence, so the court upheld the township's denial.

IV. Practice Pointers for Special Land Use Approval Requests

Whether the applicant seeks special land use approval for a drive-through restaurant, a bar, or any other special land use, the applicant should consider the following tips to place its application in the best possible position for approval:

1. Meet with city/township staff to identify project issues, identify potential proponents and opponents of the project, understand the municipality's process, understand the history of the site and the disposition of other land use requests, and understand how the planning commission, city council and/or township board may view the proposed use.
2. Meet with the adjacent neighbors early, even before filing the application to identify the issues with the proposed use and how they can best be mitigated. Such outreach will help to eliminate any surprises at the public hearing.
3. Make your best case to the planning commission at the public hearing. While the city council or township board will generally make the final decision with respect to the special land use request, such governing body typically gives substantial weight to the planning commission's recommendation.
4. Consider the potential negative impacts with respect to the design and operation of the proposed use and attempt to mitigate these impacts by site design and operational conditions. Typical objections to drive-through uses that can be mitigated include:
 - a. Increased traffic resulting from the proposed use;
 - b. Insufficient drive-through stacking capacity;
 - c. Vehicle headlight impacts;
 - d. Noise impacts from menu board speakers and stacked vehicles;
 - e. Odors due to food preparation and waste disposal;
 - f. Architectural and aesthetic considerations;
 - g. Insufficient landscaping and buffering;
 - h. Hours of operation;
5. Consider offering voluntary conditions to the special land use approval. Limiting hours of operation is a common consideration.
6. Specifically address in writing each and every general and specific requirement of the zoning ordinance for special land use approval. The applicant should try to create the narrative and not rely upon city/township staff, consultants, or disgruntled neighbors to do so.
7. Litigation outcomes such as in *Tollbrook* and *Tuscola Wind III, LLC* above make negotiation and compromise difficult for an applicant who seeks a discretionary special land use approval from a municipality. Therefore, the threat of litigation is no longer as significant as it once was, and the applicant should consider the municipal approval decision as its last resort from a practical standpoint.



ICSC+CONTINUING EDUCATION MICHIGAN

Suburban Collection Showplace

Novi, MI

Wednesday, April 13, 2022

Session Materials

**Roundtable 24: Unwritten Rules of Broker-to-Broker Contact (Ethics)
– Best Practices**

**Led by: Alex Bieri, Stokas Bieri Real Estate and Robert J. Pliska, CRE,
CPA, Sperry Commercial Global Affiliates**

B**I****R****I**

Bieri Company
660 Woodward Avenue, Suite 1500
Detroit, Michigan 48226

T 313-962-2800
F 313-962-5070
www.biericompany.com

June 23, 2010

Mr. Ken Stann
Via email: KenStann@svsvision.com
Address: 140 Macomb
Mt. Clemens, MI 48043

Re: Bieri Company - SVS Vision - Exclusive Leasing Agreement

Dear Mr Stann:

It is our pleasure to make this proposal for Bieri Company ("Bieri") to act as the sole and exclusive real estate broker to find, negotiate for, and secure space for future retail stores ("Space"). You agree to lease Space solely and exclusively through Bieri. For the purpose of this agreement, SVS Vision ("SVS") shall mean its principals(s), nominees(s), or an entity in which it or its principal(s) have an interest.

Bieri's duties will be to interact aggressively with Land Owners, Landlords and their representing agents, and for brokers on your behalf to create strong real estate opportunities. In order to facilitate Bieri's duties hereunder, you agree to (i) refer to Bieri all inquiries, proposals and offers regarding Space within the Area that you receive during the term of this agreement, including, but not limited to those received by you from other brokers, owners, lessors, sublessors and others and (ii) conduct all negotiations solely through Bieri. Bieri represents to SVS, that Bieri is a real estate broker duly licensed by the State of Michigan.

Without limiting your obligations to act exclusively through Bieri in accordance with the terms hereof, Bieri shall receive compensation for its services rendered hereunder directly from the owner of Space that is leased. However, if Bieri is unable to collect compensation for its services rendered SVS will compensate Bieri at a market rate for all transaction including renewals.

SVS understands and agrees that Bieri can show properties and obtain offers to lease properties in which Bieri has an agency relationship with the owner. In the event you shall become interested in a property Bieri has an agency relationship, then Bieri shall notify both owner and you of its intention to represent both parties in a Dual Agency.

The term of this letter agreement shall be for one (1) year. Thereafter, it shall automatically renew itself for successive periods of ninety (90) days unless canceled by either party upon thirty (30) days prior written notice. Upon and after expiration or termination of this agreement, SVS shall recognize Bieri and act exclusively through Bieri as broker with respect to any space for which negotiations, conversations or dealings were had during the term of this agreement. Bieri shall provide you with a list of all such Space within fifteen (15) days of the termination of this agreement.

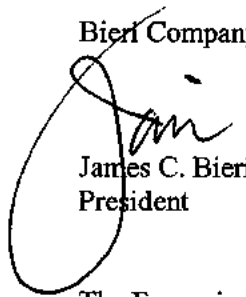
This agreement shall be governed by and construed under the laws of the State of Michigan applicable to agreements entered into and to be performed entirely within such State.

The foregoing shall constitute the entire agreement between the parties hereto with respect to the subject matter hereof and cannot be changed, rescinded or modified except by an agreement in writing signed by both parties hereto.

The effective date of this agreement shall be the date this agreement is executed by SVS.

Sincerely,

Bieri Company,



James C. Bieri
President

The Foregoing Is Accepted and Agreed to:

SVS Vision

By: _____
Ken Stann / President

Date: _____



February 4, 2022

Name
Address
Phone:
Email

RE: Retailer – Location – City / Address

Dear Name:

The purpose of this letter is to confirm that Stokas Bieri Real Estate, as “Broker”, use best efforts to procure [redacted] (“Tenant”), or assignee as a prospective lessee for property known as the former [redacted] at [redacted] (“Property”). In the event the Lease of the Property or any part therein is consummated with Tenant at the Property, [redacted] Landlord entity (or assignee) (“Owner”), agrees to pay a real estate commission to Broker as follows:

\$ [redacted] per square foot, payable one half upon full non-contingent Lease execution and one half when Tenant opens for business.

Owner agrees to disclose to Broker and to prospective Tenant any and all information which Owner has regarding the condition of the Property, including, but not limited to the presence and location of any toxic or hazardous substances, on or about the Property.

Please indicate your acceptance of this agreement by signing below and returning a fully executed copy of this agreement to me at your earliest convenience.

Sincerely,
Stokas Bieri Real Estate

**Agreed and Acknowledged:
OWNER:**

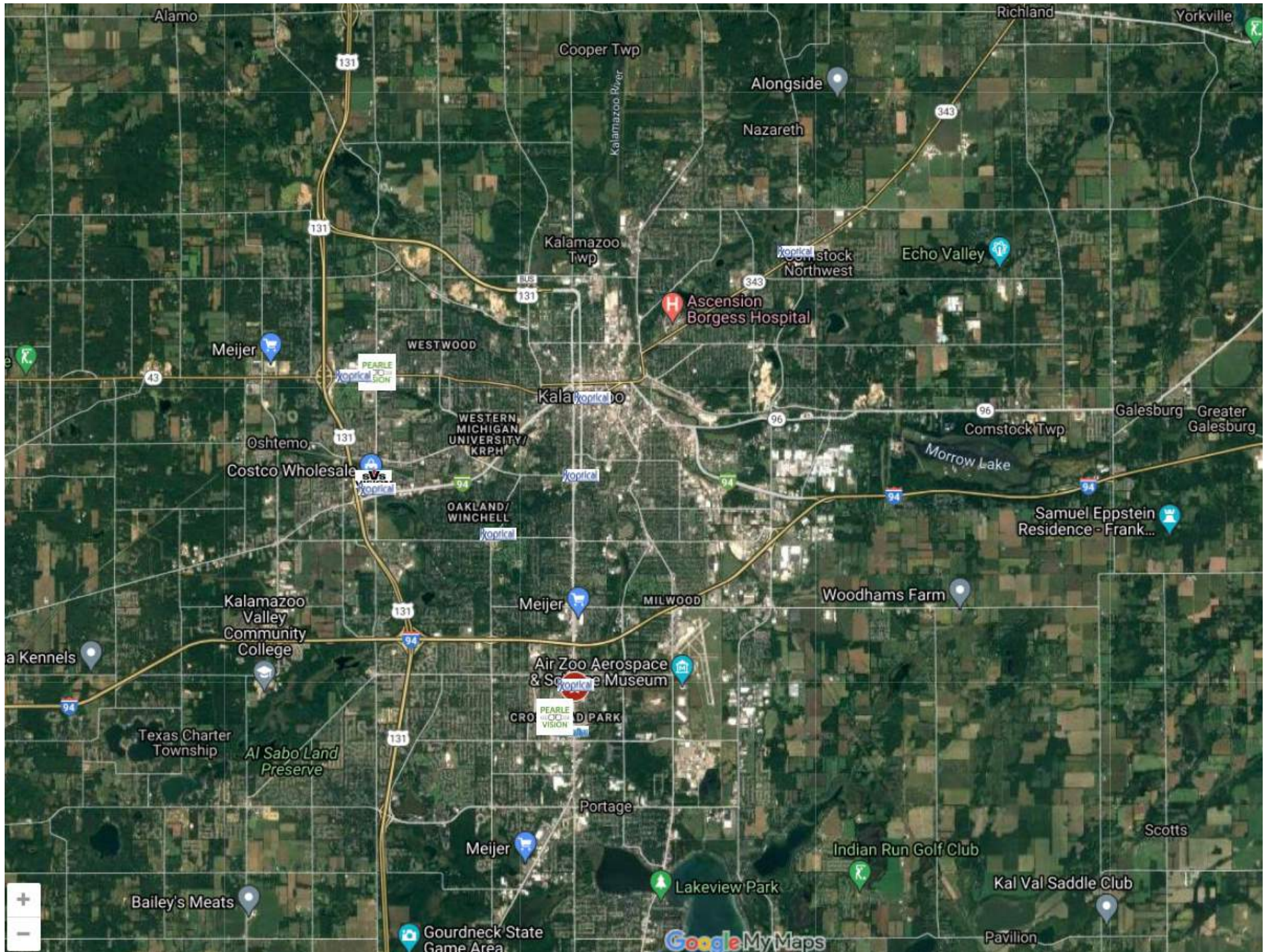
Alex Bieri, Leasing Agent

By: _____

Its: _____

Date: _____

SAMPLE GOOGLE INTERACTIVE MAP - Kalamazoo Optical Stores





Exclusive Right to Lease or Sell Listing Agreement

I) Exclusive Right to Lease: The undersigned Owner, [REDACTED], hereby referred to as "Owner", grants **Stokas Bieri Real Estate**, hereby referred to as "Broker", the exclusive and irrevocable right to lease or sell [REDACTED] (the "Property" further described in Exhibit B), from **May 1, 2022 to April 30, 2023**, the "Term". Thereafter, it shall automatically renew itself for successive periods of Ninety (90) days unless canceled by either party upon thirty (30) days prior written notice. Upon and after expiration or termination of this agreement, Owner, shall recognize Broker and act exclusively through Broker with respect to any real estate for which negotiations, conversations, or dealings were had during the term of this agreement. The Stokas Bieri team marketing the property will be Alex Bieri and Jim Bieri.

II) Commission: Owner agrees to pay Broker a commission of five percent (5%) of the total amount of base rent (exclusive of taxes, insurance and common area maintenance charges) to be paid during the original lease term from years 1-10. Owner shall in its sole and absolute discretion determine the terms and conditions under which it will enter into any lease. No commission will be due or payable for any option period. All such amounts shall be paid to Broker one-half upon full execution of a lease between Owner and Tenant, with the remainder payable when Tenant opens their business to the public. In the event the base term extends past ten years, Owner agrees to pay broker three percent (3.0%) of the total amount of base rent for years 11-20. In the case of a sale of all or a portion of the Property, Owner agrees to pay Broker a commission of five percent (5%) of the sale price at closing.

III) Cooperating Brokers: In the event of a cooperating broker on any deal, the commission referenced above shall be increased to six percent (6%) of base rent for years 1-10 and four percent (4%) for years 11-20. and Broker shall be responsible for contact with such parties and for any commissions that may be due to them provided such party has worked with Broker directly pursuant to a separate agreement between such party and Broker. In the case of cooperating broker proposing more than described above as their share, Owner and Broker will discuss and Owner will determine if additional compensation for cooperating broker is warranted on case by case situation. In the case of a sale with a Cooperating Broker, Owner agrees to pay Broker a commission of six percent (6%) of the sale price at closing and Broker shall be responsible for contact with Cooperating Broker directly for their commission.

IV) Duties: During the term, all contact or offers made to Owner regarding Property by the Prospective Retailers shall be referred to Broker. Further, Broker is authorized to offer available space(s) within any Property for lease only upon such terms as Owner may from time to time advise Broker in writing.

V) Advertising: Owner shall allow broker to place a standard "**AVAILABLE**" sign(s) on the Property which sign identifies Broker as a contact person for retail leasing information. Owner shall provide Broker with available leasing materials which shall include but not be limited to site plans, space plans, renderings, elevations, which will be incorporated into Brokers marketing materials.



VI) Title to the Property: Owner represents that, subject to matters of record, it holds title to the property on which the building is located and has authority to sell the building.

VII) Default/Refusal to Perform: In the event that Owner fails to pay the commission when due, Broker may then institute legal action for payment of commission due under this Agreement and the laws of the State of Michigan. The prevailing party shall be entitled to recover from the other party's attorney fees and costs.

IX) Dual Agency: Owner understands and agrees that Broker can show the Property and obtain offers to lease the building to all prospective lessors, including those with whom Broker has an agency relationship. In the event a prospective lessor with whom a lessor has an agency relationship shall become interested in the building, Broker shall notify both Owner and the lessor of its intention to represent both and obtain both parties' written consent to the Dual Agency.

X) Non-Discrimination: The Property shall be offered and made available for lease to all persons without discrimination to race, color, religion, age, and sex, and handicap, marital or familial status in accordance with all federal, state and local laws.

XI) Sale or Transfer of Building: The obligation of Owner to pay the commission due under this Agreement shall survive any sale or transfer of the building by Owner.

XII) Heirs: The covenants herein shall bind the heirs, personal representatives, administrators, executors, assigns and successors of the respective parties.

XIII) Miscellaneous: Broker shall have access to the building at reasonable hours to show the property to prospective buyers; (a) This Agreement constitutes the entire agreement and can only be amended in writing and signed by Owner and Broker; (b) The invalidity of any provision of this Agreement shall not affect the enforceability of this Agreement.

Please acknowledge your understanding of this agreement by signing below:

Broker:

Owner:

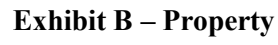
By: _____

By: _____

James Bieri, Principal
Stokas Bieri Real Estate
660 Woodward, Suite 1500
Detroit, MI 48226
jbieri@sbrel.com
313 962 2800

Date: _____

Date: _____





2/4/22

Broker Commission Agreement

-Lease-

LOCATION:

TENANT:

LANDLORD:

BROKER: Stokas Bieri Real Estate.

BROKERAGE / COMMISSION: 5% of the total base rent due for the lease..

PAYMENT SCHEDULE: Commission to be paid to broker half upon Lease signing and half upon Tenant opening for business.

FAILURE TO PAY BROKER COMMISSION: If Landlord fails to pay brokerage commission under these terms Tenant will pay brokerage commission to Broker directly in lieu of rent until the entire brokerage commission due has been paid to broker.

Landlord:

By: _____

Broker:

By: _____

Jim Bieri
Stokas Bieri Real Estate



ASK YOUR REALTOR® THE RIGHT QUESTIONS

- How long have you been in residential real estate? Is it your full-time job?
- Do you have any designations or certifications?
- What's your business philosophy?
- How many buyers/sellers did you and your real estate brokerage represent last year?
- What's the average variation between your initial offers/listings and final sales price?
- On average, how many days does it take you to make a sale?
- Will you represent me exclusively, or might you choose to represent the seller as well?
- Can you recommend service providers who can help me obtain a mortgage or make home repairs?
- How will you keep me informed about the progress of my transaction?
- How are you compensated for your services?



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430 North Michigan Avenue
Chicago, IL 60611-4087
800.874.6500
www.nar.realtor

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Item #135-145
(03/20 CMG)



NATIONAL
ASSOCIATION OF
REALTORS®

THAT'S WHO WE 



NOT ALL AGENTS ARE REALTORS®

All real estate licensees are not the same. Only real estate professionals who are members of the National Association of REALTORS® may call themselves REALTORS®, adhering to NAR's strict Code of Ethics.

The Code of Ethics was adopted in 1913, which means when you work with a REALTOR®, you can expect honesty and integrity in all transaction-related matters.

Only REALTORS® pledge to abide by the Code of Ethics, holding REALTORS® accountable for their ethical behavior and business practices.

They work to protect the public and are members of the nation's largest professional trade organization, advocating for homeownership and private property rights. That's the difference when you choose to work with a REALTOR®.

BUYING OR SELLING, REALTORS® BRING VALUE TO THE PROCESS.



HONESTY AND ETHICS

A REALTOR'S® first obligation is to you, the client.

A REALTOR® will provide objective guidance during the biggest purchase many people will ever make.

A REALTOR® helps you manage the dozens of forms, reports, disclosures and other technical documents involved in the property transaction.

A REALTOR® understands how to negotiate various aspects of each transaction.

A REALTOR® will advise on important factors when making a purchase offer, such as allowing enough time for important investigations and inspections of the property before you complete the purchase.

A REALTOR® pledges to be honest with you at all times and to not exaggerate or hide information about a property.



INSIGHTS AND EXPERTISE

A REALTOR® can provide local information on utilities, community amenities, zoning and more.

A REALTOR® can use this data to help you determine if a property offers what you need.

A REALTOR® can help you find available properties that may not be actively advertised on home search sites or apps.

A REALTOR® has active knowledge of the latest laws and regulations.



WHEN YOU'RE READY
TO START YOUR BUYING
OR SELLING JOURNEY,

**MAKE SURE
YOUR AGENT
IS A REALTOR.®**

The Written Rules – Bob Pliska – National Board of Realtors

Robert J Pliska. CRE

- I. Definition of Realtor
 - A. Member of the National Association of Realtors
 - B. Holds members to high ethical standards
 - C. “Do right. Do your best. Treat others as you want to be treated.” ~ Lou Holtz
- II. Purposes
 - A. Protect the public and the profession’s integrity
 - B. Identify and eliminate practices which may damage the public or dishonor the real estate profession
 - C. Interests of the nation and its citizens require highest and best use.
- III. Structure of the Code
 - A. Preamble
 - B. 17 Articles and 70+ Standards of Practice
 - C. Three Main Sections
 - 1. Duties to Clients and Customers (Articles 1-9)
 - 2. Duties to Public (Articles 10-14)
 - 3. Duties to Realtors (Articles 15-17)
 - D. Case Interpretations
- IV. Articles
 - A. Duties to Clients and Customers
 - 1. Protect and promote your client’s interests
 - 2. Avoid exaggeration, misrepresentation or concealment of pertinent facts
 - 3. Cooperate with other real estate professionals to advance your client’s interests
 - 4. When buying/selling for yourself or related party, disclose your true position
 - 5. Disclose your present or contemplated interest in any property
 - 6. Avoid side deals without your client’s informed consent.
 - 7. Accept compensation from only one party except with full disclosure to all
 - 8. Keep the funds of client/customers in a special account
 - 9. Assure the transactional details are in writing in clear language.
 - B. Duties to the Public
 - 10. Provide equal service to all client and customers
 - 11. Be knowledgeable and competent in the fields of practice which you engage.
 - 12. Communicate honestly in all of your real estate communications.
 - 13. Do not engage in the unauthorized practice of law
 - 14. Place all pertinent facts before the tribunal.
 - C. Duties to Realtors
 - 15. Ensure comments about other real estate professionals are truthful/not misleading
 - 16. Respect other realtor’s exclusive representation or exclusive brokerage agreements.
 - 17. Arbitrate &/or mediate disputes with other realtors and with your client

The Written and Unwritten rules of Retail Brokerage

Alex C Bieri

These unwritten rules hope to serve as a guide on how to be an effective broker, that looks to minimize conflict, possesses great market knowledge and one that is professional and easy to work with

- 1) Market Knowledge (with great market knowledge you will be indispensable to your clients)
 - a. Getting a Comp for sales or leases
 - i. Pick up the phone and talk to people
 1. Rent
 2. LL Work / TA term
 3. Exclusives and other important terms
 - ii. Comp Stack – Is anyone using this?
 1. Benefit is most accurate
 2. Verify you can share information with your client first
 3. Any other services
 4. Co-Star ??
 - b. Getting sales performance
 - i. Never put in writing
 - ii. Horse trading
 1. Benefit your client always
 2. Be smart and sensitive to your client's confidentiality
 - c. How to Analog competition
 - i. Landlord representation
 1. Know your market and completed deals
 - a. Leveraging relationships to benefit your client
 - b. NNN comps are important too
 2. Be accurate and verify, know major aspects of deal
 - ii. Tenant representation
 1. Competition
 - a. Mapping
 - i. Google Maps (**sample #1**)
 1. Best option but online information
 2. Add notes
 - ii. Static Maps (**sample #2**)
 1. Large printouts are great for office
 2. Have a large hard copy for tours
 - b. Competitor Growth Plans
 - i. Discuss with landlords/property reps
 - ii. Research public information
 - iii. Have knowledge in your retailer's "category"
 - c. Strong property owner relationships tantamount
 - i. Use these relationships for information
 - ii. Conversely be careful what you say about your client

2) Commissions

- a. Always control a side
 - i. Landlord
 - 1. Listing agreement (**sample #3**)
 - 2. Pocket listing is acceptable but in writing (**sample #4**)
 - ii. Tenant
 - 1. Exclusive Tenant representation agreement (**sample #5**)
 - a. Best have in writing
 - i. Location
 - ii. Tenant
 - iii. Fee
 - b. When not in writing
 - i. Formal document
 - ii. Taking a risk
 - 1. Walk before you run
 - 2. Have strong relationship
 - iii. Ask will yourself - Will Tenant protect me?
- b. Timing
 - i. Landlord Representation - Listing agreement
 - 1. Signed before marketing property
 - 2. Reference immediately to potential co-broker
 - a. Know your agreement
 - b. Present any tenant rep agreement outside your terms
 - i. Do it immediately
 - ii. Clearly communicate with both sides
 - iii. All Tenants are not equal
 - 1. Creditworthiness
 - 2. Use
 - ii. Tenant Representation – Fee Statement (**sample #6**)
 - 1. Present requested Tenant fee upon submission of LOI
 - a. Can present with LOI or separate email
 - b. Can add terms right to LOI
 - c. Similar process for sale or lease
 - i. Lease
 - 1. Get signed before lease draft if possible
 - 2. Bill upon execution of lease per terms
 - ii. Sale
 - 1. Identify in LOI and then PA
 - 2. Have wire information to Title Company
 - d. Communicate with your counterpart
 - i. Facilitate any correspondence in a timely manner
 - ii. Present but don't comment
 - 1. Be helpful as possible
 - 2. Remember fiduciary duty to your client

- 3) Lines of Communication – what is appropriate
 - a. Always “control” a side before engaging
 - i. Whether formal or informal
 - ii. Communicate
 - iii. Best to have in writing
 - b. Tenant representation
 - i. If you know a property has a broker with a listing agreement
 - 1. Always go to broker first
 - 2. If unresponsive give at least a few days for response
 - 3. When submitting an offer still provide fee statement
 - ii. If unsure of listing agreement
 - 1. Go to owner directly
 - 2. Offer to work with a broker
 - 3. When submitting an offer still provide fee statement
 - c. Landlord representation
 - i. If you know a Tenant has representation
 - 1. Always go to broker first
 - 2. If unresponsive give at least a few days for response
 - ii. If you are unsure of Tenant representation
 - 1. Go to retailer directly
 - 2. On initial submission offer to work with their “representative”.
- 4) Other possible conflicts and how to navigate them
 - a. Pitching for new business against competitors you are working with
 - i. Remember your fiduciary duties
 - ii. This is a pretty small community
 - iii. I personally never talk poorly of competition
 - 1. You will most likely work with that competition again soon
 - 2. Prospect can figure out on own
 - 3. Red flag – should sell yourself only
 - b. Tail lists and timing when listings change over
 - i. Have clear timing and tenants identified in listing agreement
 - 1. Work with new broker best you can even if it is hard
 - a. Communicate status
 - b. Forward new inquires
 - 2. Maintain relationship with owner and bill in a timely manor
 - ii. Be mindful of property owners that change listing agreements frequently
 - 1. Red flag
 - 2. Be honest with other brokers
 - a. May not work out because of performance
 - b. Property owner just maybe difficult
 - i. Unrealistic expectations
 - ii. Be aware and help fellow brokers when you can.



ICSC+CONTINUING EDUCATION MICHIGAN

Suburban Collection Showplace

Novi, MI

Wednesday, April 13, 2022

Session Materials

**Roundtable 25: SHOW ME THE MONEY! Asserting, Preparing and Protecting
Landlord Claims in Bankruptcy**

Led by: Kevin H. Morse, Clark Hill PLC

ICSC 2022 Michigan Continuing Education Program:
“Repositioning after Social Distancing:
Retail Real Estate in the Post-Pandemic World”

For Real Estate Professionals

Wednesday, April 13, 2022

Suburban Collection Showplace, Novi, MI

Kevin H. Morse, Esq.

Clark Hill PLC

130 E. Randolph Street, Suite 3900

Chicago, IL 60601

+1 312.985.5556 (office) | +1 312.517.7593 (fax)

kmorse@clarkhill.com | www.clarkhill.com

“SHOW ME THE MONEY! Asserting, Preparing, and Protecting Landlord Claims in Bankruptcy”

Every landlord and commercial real estate professional fears receiving the thin envelope from the clerk of the bankruptcy court providing them notice of a bankruptcy filing. Immediately, the landlord is concerned whether they will be able collect on unpaid rent, future rent, and fears of violating the automatic stay. This presentation will walk the attendees through the mechanics involved in making sure the landlords are comfortable with the bankruptcy processes, the mechanics of bankruptcy, and, most important, how and when landlords can expect to get paid in a bankruptcy case.

The presentation will cover the basics of the typical (and not so typical) claims a landlord may assert in bankruptcy, when and how the landlord needs to get involved in the actual bankruptcy process, the preparation of the various claims a landlord needs to assert, and when the landlord can expect to get paid on its various claims. More specifically, the presentation will discuss prepetition claims, administrative claims, stub rents, and claims arising from rejection or assumption of a lease.

The presentation will also delve into how important first day hearings can be for landlords and what to look for in cash collateral/DIP financing motions, motions to extend time for performance (365(d)(3)) and to assume/reject leases (365(d)(4)), and chapter 11 plans. Finally, the presentation will provide examples and detail the various forms, procedures, deadlines, and timing for filing various claims in Chapter 11 cases. We will walk through the calculations of 502(b)(6) caps on damages, administrative claim procedures, critical “key words” to look for in plans, and the claim objection process. We will also focus for each of these on timing for filing versus expectation for payment and how the different types of cases and procedures will affect the timing for each.

PRESENTATION OUTLINE

1. Notice of Bankruptcy Filing
 - a. Bankruptcy Court / Bankruptcy Case
 - b. Critical dates
 - i. Petition Date
 - ii. Petition Date + 60 Days (§ 365(d)(3))
 - iii. Petition Date + 120 (§ 365(d)(4))
 - iv. Claims Bar Date
 - c. Automatic Stay
2. First Day and Other Hearings
 - a. Cash Collateral/DIP Financing
 - b. Claims Agent
 - c. Extend Time to Perform or Assume/Reject
 - d. Assumption/Rejection
 - e. Claims Bar Date
 - f. Administrative Claim Deadline
 - g. Chapter 11 Plans / Confirmation
3. Landlord Claims in Bankruptcy
 - a. Prepetition Claims
 - i. Unpaid Rent
 - ii. Rejection Claims
 1. Future Rent vs. Damages
 2. § 502(b)(6)
 - iii. Mitigation Considerations
 - b. Stub Rent
 - c. Administrative Claims
 - d. Assumption – Cure Claims
 - e. Time for Filing Claims vs. Time for Getting Paid
4. Claim Objection Process



ICSC+CONTINUING EDUCATION MICHIGAN

Suburban Collection Showplace

Novi, MI

Wednesday, April 13, 2022

Session Materials

Detroit's Neighborhoods, Their Relationship to the Suburbs and Current Retail Opportunities

MODERATOR

**Marcel Pearl, Associate Advisor, Encore Real Estate Investment Services,
Detroit, MI**

PANELISTS

Mijo Alanis, CEO, Beyond Juice, Madison Heights, MI

Dave Blaszkiewicz, CEO, Invest Detroit, Detroit, MI

Glenn Wilson, President & CEO, Communities First, Inc., Flint, Michigan

**Detroit's Neighborhoods,
their Relationship to the Suburbs,
and Current Retail Opportunities**

Outline for Session: 10:40am - 11:35am

Intro:

Benji Rosenzweig, thanks Marcel Pearl and Jim Bieri and the ICSC committee.

Introduces:

Dave Blaszkiewicz, CEO Invest Detroit Detroit, Michigan

Glenn Wilson, CEO Communities First Flint, Michigan

Mijo Alanis, CEO Beyond Juice Detoit, Michigan

The City of Detroit is an essential part of the Metro Detroit ecosystem. Downtown Detroit & Midtown get a lot of the attention when it comes to retail and investment dollars, but there is more to the Detroit Story. The Neighborhoods are where a majority of Detroiters live. According to the Street Scape Study done for DEGC in 2018, Detroiters spend \$2.6 billion dollars in brick and mortar retail in the surrounding suburbs. Retailers, developers, brokers and the municipalities can work together to bridge this massive opportunity for retailers to open brick and mortar retail, restaurants and service in the City and capture more of that retail spend. In this session we will discuss some case studies with developers and retailers who are successful in the neighborhoods of Detroit along with sharing opportunities for more growth.

First Question:

For Dave Blaszkiewicz:

You have spent 30 years in the city of Detroit, from your days at WSU as a university student, to your work at Detroit Renaissance and DDP and now Invest Detroit, how do you view the relationship between the City of Detroit and the Metro Detroit Suburbs.

Allow others to answer

Second Question:

For Glen Wilson:

Your organization has experience and ability in the city of Flint. What is it about Detroit that brought you here? Why take the risk to come to this market?

Allow others to answer

Third Question:

For Mijo Alanis:

Beyond Juice is experiencing a level of growth that most retailers only dream of. The Eastern Market location was one of your earliest locations. How many locations do you think Detroit as a whole can support? How do your Detroit locations stack up with the suburban locations? How has Detroit contributed to your success?

Fourth Question:

For Dave Blaszkiewicz:

Invest Detroit is literally creating opportunity for developers to flourish in the city. With the Public Private partnership of financing projects, the assemblage and predevelopment of strategic sites and finding the “right buyers”. Can you share a few of your favorite success stories of sites ID has helped develop? Can you share some opportunities that developers, brokers and retailers can take advantage of right now?

Fifth Question:

For Glen Wilson:

Development is a team sport. Good developers encourage other good developers to build near and around them in the spirit of “when the tide rises, all the ships rise together” What do you hope the other developers and brokers in the room know which would encourage them to look at Detroit in a more holistic manner?

Sixth Question:

For Mijo Alanis:

Retailers also thrive on Synergy, like the Team Sport for developers. What retail categories and specific retailers do you hope join you in the city ASAP? What would be your best advice for brokers and developers trying to attract those retailers to their projects?

Seventh Question:

For Dave Blaszkiewicz,

Invest Detroit has funded projects throughout the city, but I still think there is a bit of unknown and skepticism around CDFIs. How has ID been able to navigate through that to fund everything from mom and pop small businesses to multi-million dollar developments? Said differently, what are some of the ways you help make the capital stack work?

Eighth Question:

For Glen Wilson,

Communities First is a big believer in community engagement when it comes to development, what are the biggest benefits you see from carrying out a level thoughtful engagement? And what strategies do you implement to make that happen?

Ninth Question:

For Mijo Alanis:

One of the biggest issues retailers are having in their business today is finding and retaining employees. How do your Detroit stores stack up against the burbs? What are some of the things you do to keep employees when companies like Starbucks are closing their locations all over the metro area due to lack of employees?



ICSC+CONTINUING EDUCATION MICHIGAN

Suburban Collection Showplace

Novi, MI

Wednesday, April 13, 2022

Session Materials

**Let's (Curbside) Pick Up Where We Left Off! Moving Ahead Post COVID: The
New Normal of Retail Leasing**

MODERATOR

**Vicki Gutowski, Licensed Real Estate Agent, Director of Marketing
Administration, Gerdome Realty & Investment, Northville, MI**

PANELISTS

**Paul Glantz, Co-Founder & Chairman, Emagine Entertainment, Inc. (Emagine
Theaters), Troy, MI**

Matthew Jonna, CEO, Plum Market, Farmington Hills, MI

Bryan Rief, CEO, PF Michigan Group (Planet Fitness), Northville, MI

Mark Schostak, Owner, TEAM Schostak Family Restaurants, Livonia, MI

**2022 Michigan Continuing Education Program
for Real Estate Professionals**

**April 13, 2022
Suburban Collection Showplace
Novi, MI**

**Let's (Curbside) Pick Up Where We Left Off! Moving Ahead Post Covid
The New Normal of Retail Leasing**

Outline

Moderator

*Vicki Gutowski
Gerdome Realty & Investment
Northville, MI
Telephone: (248) 242-6766
E-mail: vgutowski@gerdome Realty.com*

Panelists

*Paul Glantz
Co-Founder & Chairman
Emagine Entertainment, Inc.
Troy, Michigan
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*Matt Jonna
CEO
Plum Market
Farmington Hills, MI
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*Bryan Reif
CEO
PF Michigan Group
Northville, MI
E-mail: bryan@pfmichigan.com*

*Mark Schostak
Owner
TEAM Schostak Family Restaurants
Livonia, MI
E-mail: mschostak@schostak.com*

I. Introductions

II. Discussion of Real Estate Issues

- A. What are the biggest changes your business has had to make due to the covid pandemic?
- B. What changes have you seen in lease clauses, if any, due to the pandemic? Do you feel that these changes will be a permanent fixture for your company?
- C. How has the pandemic changed requirements for new locations (ie. parking, store layouts, square footage requirements, 1st vs. 2nd generation space, etc.)? What type of sites should brokers bring to you now?
- D. How can municipalities, landlords and developers help you, as a retailer, maintain and grow your business in these challenging times?
- E. How has the pandemic changed the ways in which your company uses technology (i.e. use of ghost kitchens, self-checkout, etc.)?
- F. What safety measures has your business put in place since the start of the pandemic to keep employees and customers safe (ie. use of PPE, self-checkout, increased off-premise business, etc.)?
- G. What are your plans for expansion in the foreseeable future?

VI. Conclusion and Q & A

**2022 Michigan Continuing Education Program
for Real Estate Professionals**

**April 13, 2022
Suburban Collection Showplace
Novi, MI**

**Let's (Curbside) Pick Up Where We Left Off! Moving Ahead Post Covid
The New Normal of Retail Leasing**

Outline

Moderator

*Vicki Gutowski
Gerdome Realty & Investment
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Telephone: (248) 242-6766
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Owner
TEAM Schostak Family Restaurants
Livonia, MI
E-mail: mschostak@schostak.com*

I. Introductions

II. Discussion of Real Estate Issues

- A. What are the biggest changes your business has had to make due to the covid pandemic? **Mark Schostak. At the start of the pandemic, when our full service dining rooms were closed, we had to pivot to execute at a high level in the off premise space (carside, curbside, carryout and delivery); all supported by digital applications including online ordering and Delivery Service Providers (DSP's).**
- B. What changes have you seen in lease clauses, if any, due to the pandemic? Do you feel that these changes will be a permanent fixture for your company? **Bryan Rief. We have amended the language in our Force Majeure clause. Specifically, we've added "restrictive government laws, mandates, or regulations...epidemics, pandemics, quarantines or other reasons of a like nature not the fault of the party delayed in performing the work or doing the acts required under the terms of this Leases..." We have also added two sections that address 1) "Commencement Date" as it relates to any responses to "the novel coronavirus referred to as COVID-19 or any other similar virus" whereby Tenant is prohibited from opening a new store due to any local, state or federal mandate and 2) "Deferred Rent" whereby we have addressed/defined details of a mandated shutdown and presumably agreed to those terms and conditions to defer rent for that period of time. Yes, this language will be included in our standard form lease from here on.**
- C. How has the pandemic changed requirements for new locations (ie. parking, store layouts, square footage requirements, 1st vs. 2nd generation space, etc.)? What type of sites should brokers bring to you now? **Mark Schostak. With any new builds in casual dining, we now need to be certain we can have a pick up window. Pick up windows are ideal for Delivery Service Providers (DSP's) and they also take the pressure off of carryout inside the restaurant and on our carside and curbside businesses. It is also better for our employees from a safety and weather standpoint. We are installing a pick up window at one of our Applebee's locations with plans to do more.**

If we are looking at second generation spaces, we need to make sure we have the ability to put in dedicated and well lit carside spaces. We have always had a focus on parking lot lighting, but we see it from a different lens today. Lighting is very important at the carside area because our guests are working remotely, staying up late and ordering food later.

We do not need as much building square footage and parking at restaurants going forward. Store layouts must include cubby holes for carryout orders and an area for Delivery Service Providers (DSP's) to wait.

There is an acceleration of technology to help us with off-premise including online ordering; tracking Delivery Service Providers (DSP's) and customers; and voice technology. We are testing server tablets and hope to roll them out soon – the tablets will allow servers to handle more tables, make more money and provide better service for guests.

- D. **How can municipalities, landlords and developers help you, as a retailer, maintain and grow your business in these challenging times? Paul Glantz. Property taxes, driven by the cost of municipal services, can be a real deterrent to business, particularly if they are merely indexed to inflation. There are real constraints on movie ticket prices based on the prolific and inexpensive streaming options now available to consumers. Thus, municipalities need to recognize that the cost of doing business in their communities is a material consideration in attracting and retaining retail occupants. Moreover, developers and landlords need to think long and hard about what constitutes an “anchor tenant” in the coming decade. Dining and entertainment uses pose the opportunity to attract large numbers of guest that will support traditional small shop retailers. I would proffer that those businesses should be treated accordingly.**
- E. **How has the pandemic changed the ways in which your company uses technology (i.e. use of ghost kitchens, self-checkout, etc.)? Matt Jonna. Plum Market responded to the COVID-19 pandemic quickly by implementing a number of procedures to keep our Team Members and Guests safe. We’ve always taken great pride in the cleanliness of our stores. Our safety and sanitary procedures continue to evolve, and we are fluidly adapting as these protocols are needed and no longer needed. These include, but are not limited to the following.**

Self Checkouts

We have added Non Contact, Cashless Self Checkout Lanes for the convenience and safety of our Guests! Guests are now able to simply scan their items, pack their bags, and pay using their preferred cashless payment method.

Distance Markers

We have implemented 6’ distance markers on the floor throughout our stores—not just at the checkouts—to help visually note the CDC’s recommended distancing. We’ve posted signage reminding guests the importance of this responsible distancing, and Store Operations is politely reminding Team Members and Guests to distance when they see individuals too close together.

Safety Shields on Register Pods

We are in the process of installing Safety Shield plexiglass dividers on each of our register pods to provide a physical barrier between our Cashier Team Members and our guests. Many stores now have these in place, and all stores will have them installed by the end of this week.

Individual Cart Sanitation Measures

We are disinfecting each cart and basket between each guest use, so that every guest will have a freshly disinfected cart upon arrival to the store. We've removed all handbaskets within the store and only provide them at the front door to ensure proper disinfecting between each guest. We are fluidly adapting as these protocols are needed and no longer needed.

Limiting Store Capacity

We are limiting the number of guests within our stores to ensure proper distancing. We are also limiting the number of Team Members working in offices, kitchens, and prep rooms.

Reusable Bags from Home

In an effort to limit cross contamination, Team Members will only bag groceries using new, Plum Market branded bags. Guests who prefer to use their own bags from home may do so but they will be asked to bag their own groceries.

Team Member Health & Safety

Our Team Members are our true heroes and their health and safety is of utmost importance. We've implemented the following CDC guidelines to ensure their safety and the safety of our guests.

- F. **What safety measures has your business put in place since the start of the pandemic to keep employees and customers safe (ie. use of PPE, self-checkout, increased off-premise business, etc.)? Bryan Rief. Planet Fitness was at the forefront when it comes to cleaning measures and safety protocols. We shared our 90+ page reopening playbook and participated with LEO and MIOSHA in establishing reopening guidelines for gyms and fitness centers here in Michigan. Among other things, we invested tens of thousands of dollars in HVAC airflow management, rigorous sanitizing protocols including the use of EPA List N approved disinfecting products, the addition of more hand sanitizing stations and equipment spacing procedures. We followed strict contact tracing measures to track our employees and members to ensure rapid response, and we engaged an infectious disease specialist and third-party industrial hygiene company to come up with a system to test the air quality and prove that COVID-19 wasn't present and/or spreading in our facilities. Many of these procedures and protocols are still in place post any COVID-19 restrictions being lifted by the State. In terms of measures that remain in place today, we are utilizing the same rigorous cleaning and sanitizing procedures, and we are utilizing our PF app for things like touchless member check-in and even developed a feature called the Crowd Meter, whereby members can see how**

busy the club is before they head to the gym. And finally, Planet Fitness was recently the first fitness brand to achieve the WELL Health Safety Rating by the International WELL Building Institute (IWBI). As consumers start to reclaim their lives, I think it will be important for all business, not just gyms and fitness centers, to demonstrate that we are providing a safe, healthy environment for our patrons.

- G. What are your plans for expansion in the foreseeable future? **Matt Jonna. The company operates nationwide with more than 25 multiple-format locations across Michigan, Illinois, Indiana, Ohio, and Texas, with new locations announced in Washington DC, Florida, and California. New locations will include large format, foodservice, and franchise formats, with a focus on natural, organic and locally crafted items.**
- H. What does the future look like for your industry as a whole? **Paul Glantz. My crystal ball has never been clear, and it remains cloudy today. Nonetheless, I believe that there is still a substantial portion of our population that values congregate activities like going out to the movies. It is an entirely different experience than watching a film at home. No teenager want to go on a date in mom and dad's family room. Concurrently, it is our job to make it first class experience for guest of all ages. There is no room for mediocrity in any business model today, particularly ours. We must deliver that exemplary experience at an affordable price, or our economic system will deal with us accordingly. Thus, continued reinvestment in our systems, our physical plants, and in our people is an imperative.**

VI. Conclusion and Q & A



ICSC+CONTINUING EDUCATION MICHIGAN

Suburban Collection Showplace

Novi, MI

Wednesday, April 13, 2022

Session Materials

Financing in Today's Retail Market: Lessees, Lessors and Lenders, Oh My!

MODERATOR

Kevin A. Kernan, Managing Director, Stout, Royal Oak, MI

PANELISTS

Tom Barrett, Vice President, The State Bank, Brighton, MI

Greg Erne, Principal, Versa Real Estate, Royal Oak, MI

Kevin Kovachevich, Principal, District Capital, Detroit, MI

ICSC 2022 Michigan Continuing Education Program For Real Estate Professionals

Repositioning after Social Distancing: Retail Real Estate in the Post-Pandemic World

Thursday, February 10, 2022

Suburban Collection Showplace, Novi, MI

Financing in Today's Retail Market: Lessees, Lessors, and Lenders, Oh My!

Moderator

Kevin A. Kernan, Managing Director
Stout
Royal Oak, MI

Panelists

Beth Spadafore, Commercial Lending Manager
Community Choice Credit Union
Farmington Hills, MI

Kevin Kovachevich, Principal
District Capital
Detroit, MI

Greg Erne, Principal
Versa Real Estate
Royal Oak, MI

Tom Barrett, Vice President
The State Bank
Brighton, MI



Traditional Bank (including Credit Unions):

- 3-7-year fixed rate terms – SWAP based fixed rates – Prepayment penalty based on SWAP unwind.
- 75% LTV lender – may stretch to 80% depending on the deal – Non-assumable-Loan covenants req'd
- Some level of recourse will be required unless the deal is low leverage (50% or below)
- Rate is locked at or near closing date- interest rate risk is on the sponsor during the closing process.
- Relationship based lending, non-transactional. Banks prefer a depository relationship. Borrower may use deposits to offset lenders proposed interest rate.
- Banks deep dive into sponsors' schedule of real estate owned (SREO), global cash flows and contingent liabilities. They also look closely at borrower and sponsors tax returns, K1's and personal financial statements.
- Loans typically in the \$1M-\$50M range depending on the source. Larger deals above \$25M typically require bank participation.
- Costs to close are relatively low with bank fees in the 25-75 basis point range, lender legal approximately \$10-15k plus typical 3rd party due diligence reports.

Life Insurance:

- 65%-70% maximum LTV – Assumable debt
- Forward commitments up to 12 months, and construction to perm loans available.
- Self-amortizing debt available on 30/30 or 25/25 terms. Rate resets available (10+10).
- Traditionally non-recourse with potential for partial guaranties depending on the deal.
- Yield Maintenance prepay – options to allow flexibility such as a step-down prepayment or a yield maintenance calculation of T+50-100. Optional 10% pay down each year with no penalty.
- Rate is locked at application for 90 days - taking any interest rate risk off the table.
- Life companies typically issue a bankable commitment within 3 weeks of executed loan application.
- Transactional lender – no relationship required / Balance sheet lender – no 3rd party risk associated.
- No required reserves or escrows – no loan covenants – no global cash flow or sponsor underwriting.
- Costs to transact are low. No lender fees, legal costs run \$12-\$15k plus typical 3rd party DD reports.
- Locally serviced through District Capital by Crystal Kalinowski who has over 20 years' experience.

CMBS:

- 70-75% LTV/10 year fixed/30-year amortization with 1-5 years interest only.
- At 69% LTV and lower full-term interest only available
- Non-recourse with exception to bad boy carve-outs.
- Escrows required - ongoing capital improvement reserves and ongoing TI/LC reserves.
- Rate is not locked until the day of closing-early rate lock available but sponsor assumes unwind risk.
- Securitized debt – loan is subject to outside third parties such as rating agencies, b-buyers, bond market and economic volatility.
- Cash management is typically required utilizing lock box structures. Defeasance prepay penalty.
- Costs to transact are high. Legal costs \$25-\$40k plus a number of ancillary costs (e.g. credit reports, lease reviews, insurance reviews, inspection, etc.).
- Very little diligence on the sponsors PFS, tax returns or SREO. Focus is primarily on the asset and the cash flow predictability. CMBS can structure through most deal issues (e.g. termination option - ground lease)
- Locally serviced through District Capital by Crystal Kalinowski who has over 20 years' s experience.



"CTL" – Credit Tenant Lease Financing

- Long term, high leverage financing – typically lending to a 1.01x DSCR.
- Provides for maximum debt resulting in very little ongoing cash flow.
- Term of the fixed rate debt is typically the length of the lease period. CTL can be structured with hang-out/residual risk of up to 5 years past the initial lease term.
- CTL leases are very particular about lease structure and certain tenant and landlord responsibilities. It is highly recommended a credit tenant lease attorney be consulted prior to final negotiations of a lease with an investment grade tenant.
- Loan amortization can adjust with rent increase to maximize loan proceeds.
- Lease must be to an investment grade credit (i.e. BBB- or better per Moody's or other rating agencies). Subsidiaries of investment grade companies typically don't work unless the subsidiary has significant financial statements.
- If the tenant is unrated by a major rating agency, a shadow rating can be conducted which could potentially rate the tenant with a rating similar to an investment grade tranche, enabling the deal to be eligible for CTL full leverage, long term debt.
- High cost to close. Lender legal typically high due to deep lease negotiations/review.

Bridge Debt/Debt Funds:

- Up to 90% LTC financing available on a non-recourse basis.
- Typically utilized for assets which are in a transitional period.
- Short term debt 1-3 years – interest only with minimum interest earned periods.
- 300-800 bps over LIBOR – origination and exit fees required.
- Non-recourse construction lending available.
- Additional good news money available for accretive lease or capital improvement implementation.
- Reserves may be required depending on the deal structure.
- Interest rate caps typically required.
- Quicker closing – typically 15-45 days
- Moderate costs to close. Most DD review is handled in house, keeping overall costs down.

Mezzanine Debt:

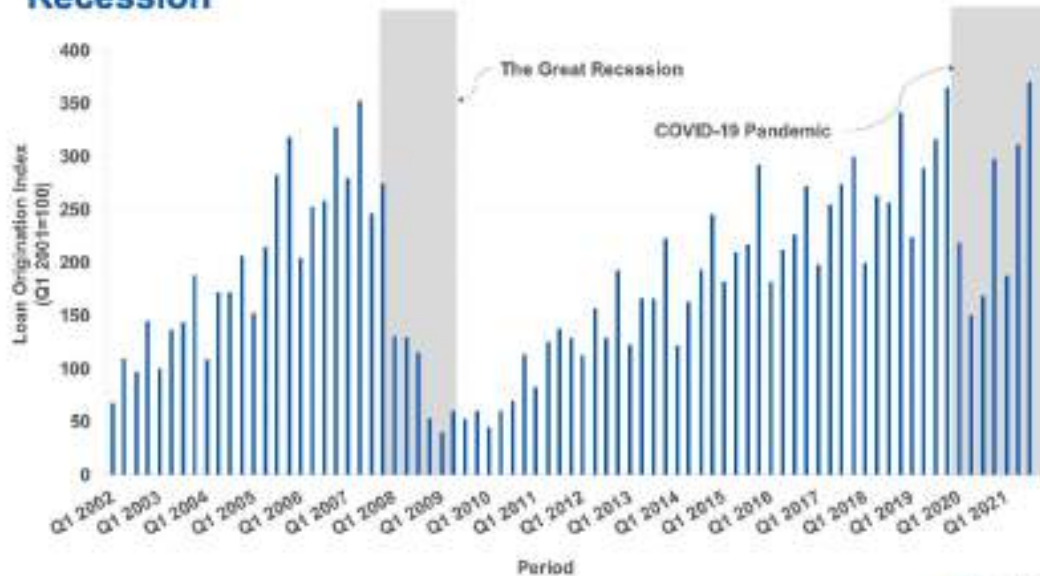
- Provides for funding of up to 85-90% LTV on a non-recourse basis.
- Typically requires a pledge of partnership interest as collateral and can be paired with any type of senior debt.
- 8-12% rates that run co-terminus with the underlying senior loan –cheaper than equity.
- Typically interest only the entire term.
- All property types considered.

For inquiries or additional information please visit our website at www.DcapDetroit.com

Commercial Real Estate Lending Climbs Above Pre-Pandemic Levels

Growing Competition Among Capital Sources Prompts Banks To Ease Standards

Pandemic Commercial Real Estate Loans Outpace Great Recession



Source: Mortgage Bankers Association, November 2021



By **Mark Heschmeyer** and **Rohit Diwadkar**

CoStar News

November 22, 2021 | 10:20 AM

Commercial real estate lending activity surged in the third quarter and is likely to rise through the end of the year, reflecting a healthy rebound of property investing that declined at the outset of the COVID-19 health crisis.

In fact, lending hasn't been higher at any point since the turn of the century, according to data from the Mortgage Bankers Association.

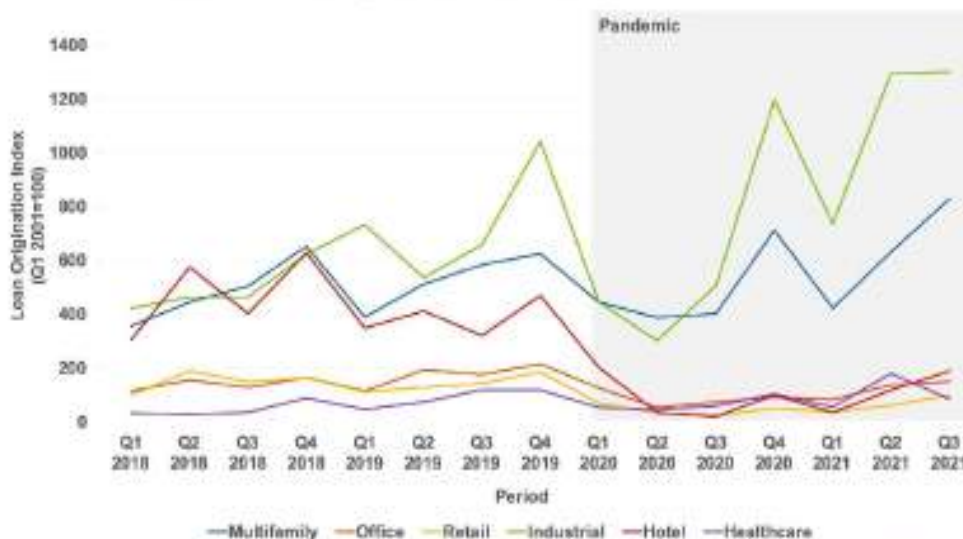
Industrial, office, retail and multifamily mortgage loan originations were up 19% from the second quarter and 119% higher from a year ago. Third-quarter lending even surpassed fourth-quarter activity in 2019

prior to the pandemic. The fourth quarter is usually the highest quarter of activity in a calendar year.

"Among capital sources, nearly every major group — including [commercial mortgage-backed securities originators], banks, life companies and investor-driven lenders — is lending well above 2020 levels, with life companies and investor-driven lenders also exceeding their 2019 year-to-date volumes," Jamie Woodwell, MBA's vice president of commercial real estate research, said in a statement.

Loans also surged from alternative lenders, such as debt funds and mortgage real estate investment trusts, as borrowers seek financing for properties in need of upgrades or operational improvements, according to real estate firm CBRE.

Industrial, Multifamily Lead Lending



Source: Mortgage Bankers Association, November 2021



"The number of new lenders entering the market or existing lenders expanding their programs is extraordinary," Brian Stoffers, global president of debt and structured finance for capital markets at CBRE, said in a statement. "Capital chasing equity-like returns has found it more difficult to invest, and many have pivoted to high-yield debt strategies, such as real estate, that provide attractive risk-adjusted returns."

To meet the increasing competition and demand, banks reported easier underwriting standards for all loan categories, according to the Federal Reserve Board's latest Senior Loan Officer Opinion Survey on Bank

Lending Practices released this month.

In the third quarter, a significant share of banks eased standards on multifamily loans, the survey said, while a modest number of banks eased standards on nonfarm nonresidential loans and construction and land development loans.

While the loosening of commercial real estate underwriting standards follows tightening in 2020 due to the pandemic, Moody's Investors Service said this month that the trend will likely continue based on the strength of loan demand



ICSC+CONTINUING EDUCATION MICHIGAN

Suburban Collection Showplace

Novi, MI

Wednesday, April 13, 2022

Session Materials

**Emerging Issues and Recent Developments in Real Estate Law Affecting the
Marketplaces Industry: 2022**

MODERATORS

Casey Koppelman, Esq., Partner, Varum LLP, Birmingham, MI

PANELISTS

Erin Johnson, Esq., Member, Dickinson Wright, Troy, MI

Michael A. Luberto, Esq., President, Chirco Title, St. Clair Shores, MI

ICSC 2022 Michigan Continuing Education Program
For Real Estate Professionals

**EMERGING ISSUES AND RECENT DEVELOPMENTS IN REAL ESTATE LAW
AFFECTING SHOPPING CENTERS: 2022**

This interactive session will explore important court decisions, legislation and trends in the law of retail real estate in Michigan, especially as they relate to retail centers. The panel will discuss recent case law developments, new and pending legislation and the trends they represent, and address their importance to those who own, manage, finance or lease space in retail projects.

Panelists:

Casey Koppelman, Esq.
Varnum LLP
Birmingham, MI

Erin Johnson, Esq.
Dickinson Wright
Troy, MI

Michael A. Luberto, Esq.
President, Chirco Title
St. Clair Shores, MI

Back by popular demand, the 2022 Legal Update will be presented in an interactive game show style format with teams fighting for the top score. We will cover Michigan Case Law, Michigan Legislation and applicable Federal Case Law from 2019 through early 2022 relevant to the commercial and retail real estate industry.

This year's topics include:

- I. Real Estate Taxes and Foreclosure:
 - a. Retention of Surplus Proceeds Following Sale
 - b. Valuation Methods
 - c. Notice of Foreclosure
 - d. Uncapping due to Change in Beneficial Ownership
- II. Lease Disputes:
 - a. CAM charges for Easements
 - b. Fixtures v. Trade Fixtures
 - c. Tenant Default Damages
 - d. Renewal Provisions
 - e. Purchase Options
 - f. Anti-Lockout and Wrongful Eviction
 - g. Effect of Definition of "Premises" on Maintenance Obligations

- III. Breach of Purchase Agreement and Deed
 - a. "As-Is" Clauses
 - b. Termination due to Breach of Representations and Warranties
 - c. ROFR's and Purchase Options
 - d. Piercing the Corporate Veil
 - e. Breach of Warranty/Marketable Title (Building Code Violations)
 - f. Removal of Fixtures
- IV. Zoning
 - a. Use of Drones
 - b. Local Ordinance v. Michigan Medical Marijuana Act
 - c. Inverse Condemnation
- V. Mortgages and Loans
 - a. Tenant's Right to Redeem Following Foreclosure
 - b. Oral Modification to a Promissory Note
 - c. Simple v. Compound Interest
- VI. Update on Marketable Record Title Act Changes