# TWO TICKING TIME BOMBS

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**CLIFFORD H. BLOOM, ESQ.**
BLOOM SLUGGETT, PC
GRAND RAPIDS, MICHIGAN
WWW.BLOOMSLUGGETT.COM

Currently, Michigan law has two matters of relatively recent vintage that are potentially "ticking time bombs" for riparian property owners. These involve the potential obliteration of valuable deed restrictions and the "uncapping" of property tax assessments for waterfront properties, prompting large property tax increases for many landowners.

What is a deed restriction or covenant? It is generally a restriction that runs with the land as to parcels and lots in Michigan. Common deed restrictions limit or prohibit potentially negative items or uses such as trailers, junk, small dwellings, commercial uses in residential areas, the further division of lots or parcels, and the prohibition of certain nuisance pets. There are many other types of deed restrictions as well. Good deed restrictions and covenants are valuable property rights and can protect the neighborhood against blight, nuisances, adverse uses, and certain structures and buildings that will hurt property values.

Now, all deed restrictions in Michigan are endangered due to legislation enacted by the lame-duck Michigan Legislature on December 31, 2018 (and effective on March 29, 2019). That legislation amended the long-standing Michigan Marketable Record Title Act, which is found at MCL 565.101 et seq (the "Act"). The Act attempts to extinguish recorded property rights that are no longer valuable, feasible, or desirable. They are "dead letter" matters. In many cases, the Act extinguishes long forgotten mineral rights, property reverter clauses, and other nominal property rights that people typically are unaware of or do not care about. In the past, the Act generally did not extinguish potentially valuable easements, deed restrictions, or covenants.

Alarmingly, the 2018 amendments to the Act will automatically extinguish many valuable and important deed restrictions and covenants, as well as certain easements.

Theoretically, it is possible under certain circumstances for interested parties to record affidavits (a "notice of claim") with the local county register of deeds and records to preserve a threatened deed restriction, covenant, or easement. However, that "preservation process" is ambiguous and may not work in many situations. Furthermore, many valuable deed restrictions, covenants, and easement rights will automatically be extinguished without the benefitting property owners even knowing that the extinguishment will occur.

Many of the valuable deed restrictions, covenants, and easement rights benefit waterfront properties throughout Michigan. If this matter alarms you as a riparian property owner (as it should), please contact your local Michigan Senator or House of Representatives member and urge them to pursue a legislative "fix" for this disastrous 2018 amendatory language.

If your property, neighborhood, condominium association, lake association, or other area has long standing valuable deed restrictions / restrictive covenants and you desire to keep them, the appropriate person or entity should file a formal notice of claim pursuant to MCL 565.103 and 565.105 before the problematic aspect of the amendment to the Act takes effect on March 29, 2021. The content requirements for the written notice of claim are complicated enough that you or your group should use a real estate attorney to assist you.

The second "ticking time bomb" involves the potential uncapping of real property tax assessments for many waterfront properties throughout Michigan that are owned by limited liability companies (often referred to as an "LLC"). Property tax assessments in Michigan determine what the annual property tax bill will be for a particular piece of property. Beginning in 1995, "Proposal A" (approved by

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Michigan voters in 1994) limited the annual increase in real property tax assessments for Michigan properties to 5% or the annual rate of inflation, whichever is less. As long as the same landowner owns the land, there is no "uncapping." However, most sales and transfers of title for real property cause the property to be "uncapped" and to go up to the then-fair market value (with the attendant property taxes increase). Waterfront property has appreciated greatly in value over the last 25 years and, therefore, an "uncapping" can cause the annual real property taxes for a waterfront property to automatically double, triple, or increase even further.

In Klooster v City of Charlevoix, 488 Mich 289 (2011), the Michigan Supreme Court held that transferring properties to members of the same family generally does not result in an "uncapping." The holding in this case was then codified by the Michigan Legislature by putting into the state law this protection against uncapping for transfers within a family. See MCL 211.271 (6) and (7). Also, transferring real property in Michigan to a trust where the beneficiaries are essentially the same family generally does not result in an uncapping pursuant to MCL 211.27a (6) and (7). Accordingly, most estate planning attorneys, tax experts, and others assumed that if waterfront properties are transferred to a new LLC owned by the same family, no uncapping would occur. However, in the Michigan Court of Appeals case of Scott v South Haven decided on April 19, 2018, (Case No. 339007; 2018 WL 1881633), the Court held that transfer of real property to an LLC generally does result in an uncapping, even if all of the members of the LLC owned the property before the transfer of the land to the LLC.

Why is this a ticking time bomb? Because so many waterfront property owners have transferred their family lakefront lot or parcel to an LLC over the past few decades, under the assumption that it would not result in a property tax "uncapping." In fact, many estate planning attorneys and experts, tax planners, and other professionals had recommended LLCs for waterfront property ownership.

A hypothetical example might help to explain the problem. Suppose that you have owned a waterfront property since 1995 (when Proposal A went into effect) and that it is currently assessed by the local municipal tax assessor at $100,000. That means that the tax assessor believes that your property is worth $200,000 on the market because millages and taxes are applied only against ½ of the assessed valuation. And, assume a current millage rate of 30 mills for the municipality involved. A "mill" means that the property is taxed at the rate of $1.00 per $1,000 of assessed valuation. Therefore, the current property taxes are $3,000 per year. However, since 1995, the property has increased dramatically in valuation and is now worth $600,000. Without the Proposal A "cap," the property tax assessment would be $300,000 and the annual property taxes would be $9,000. So, if you move the title of the property into an LLC, the Proposal A "cap" would come off of the property tax assessment and the annual assessment and taxes would triple from $3,000 a year to $9,000 per year! That is, of course, a huge difference.

Although these two issues may seem esoteric, they are very important for many of the owners of lakefront property throughout Michigan. Again, if a riparian property owner feels strongly about this matter, he or she should contact their local Michigan Senator or House member. Of course, municipalities would likely oppose a legislative fix, as local property tax revenues would not rise as quickly because uncappings would occur with less frequency.

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You may have noticed that *The Michigan Riparian* magazine has a new and current photograph of me. After 25 years, it was time!