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*Business Litigation*

## The Truth About Corporate Depositions: Proceed With Care

By Jennifer S. Thomas

Depositions are one of the most important discovery tools used in commercial litigation. Corporations, associations, and partnerships – not just individuals – can be named as deponents. Once named as a deponent, the entity is then faced with the task of determining who will speak on its behalf. The testimony of these designated individuals is binding on the organization, and thus significant time and care should be taken in the selection and preparation of these representatives.

Both federal and state court rules allow for the depositions of corporate entities or other organizations to be taken. The party seeking to take the deposition of an organization will issue a notice that identifies the date, time, and location of the deposition. In addition, however, the notice will identify the subject matters that the deposition will cover. The organization must then identify the person(s) who will testify on its behalf in connection with these subject matters. Since this can be a time-consuming process, a notice of corporate deposition should be immediately forwarded to counsel so that he or she can begin working with the corporation

to ensure it complies with its legal obligations.

As with any deposition, a corporate deposition consists of answering questions under oath in the presence of a court reporter who is recording the proceedings. Although the procedure appears to be less formal than a court proceeding before a judge, the testimony is given under oath, and thus is just as significant. In Maryland, a deposition can take up to a full day, and possibly longer if the court permits. A properly issued subpoena to attend a deposition is considered a court order, and thus one can be held in contempt of court for failure to comply with the subpoena.

A notice of corporate deposition requires the corporation to designate and prepare one or more individuals to testify on the organization's behalf and communicate its knowledge. Although in many instances the person(s) selected is a corporate officer or director, there is no restriction as to who may be designated. There is also no requirement that the person have firsthand knowledge or involvement in the subject matters the deposition will cover. The organiza-

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tion, however, has a duty to prepare the witness to testify concerning any matters known or reasonably available to the corporation. If the designated witness is not adequately prepared to testify on behalf of the organization, the court may order sanctions.

The organization is not only legally required to prepare its designated deponent, the preparedness of the deponent is critical because any testimony given during the deposition is binding against the organization. Any admissions made by the deponent in connection with

the designated subject matter are deemed an admission by the organization, and could be fatal to the case. In addition, inconsistent testimony of designated deponents is always a concern with multiple designations. Thus it is crucial that the designated deponent work closely with counsel in reviewing the organization's documents and speaking with other employees to ensure that he or she is prepared to testify in regard to the designated areas.

In summary, the deposition of an organization in commercial litigation is critical. It

provides the organization with the opportunity to present a human face and to convey its version of the events. It also permits the organization to choose who is best suited to speak on its behalf. In making this designation, however, the organization must be diligent, as the testimony of those designated will bind the organization.

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## What's Old Is New: The Basics Of Condominium Conversions

By Jeremy M. Tucker

The often politically controversial condominium conversion craze has been booming throughout Montgomery County for the last several years. With the scarcity of available vacant land in the close-in Montgomery County suburbs and record high property values, the trend of converting existing rental properties to condominiums appears here to stay, for at least the near future. A recent Washington Post article reported that in November, 2005 there were approximately 30 apartment buildings being converted into condominiums throughout Montgomery County, adding

an estimated 4,000 condominium units to the local housing market. In the early 1980's, the Maryland legislature and the Montgomery County Council created laws which imposed significant legal requirements on those attempting to convert rental properties to condominiums.

In Maryland, a condominium conversion is the process whereby the owner of a rental property essentially reorganizes the ownership structure and management of the property. Instead of the owner/landlord owning and maintaining the entire property and leasing por-

tions to tenants, those same leased portions are sold to individual "unit" owners, who will then share in the ownership and responsibility of the common elements, e.g. the hallways and lobby.

While garnering headlines today, the State laws governing condominium conversions were codified approximately 20 years ago with the adoption of the Maryland Condominium Act. Aware of the potential impact on tenants within residential rental buildings slated for conversion, the Maryland Condominium Act sets forth

a rather detailed process that those interested in converting a rental building to a condominium must follow.

An individual intending to convert a rental facility (the “developer”), such as an apartment building, to a condominium must first file and receive approval of a Public Offering Statement with the Secretary of State. Once approved, the developer must forward the Public Offering Statement along with a Notice of Intention to Create a Condominium to all current tenants under valid leases. The notice informs the tenants of their various rights during the conversion process, of which the following four are of interest:

- 1) The existing residential tenants may stay in their leased residence under the current terms and conditions for 180 days after receiving the notice, or for the length of their current lease, whichever is longer.
- 2) The developer must offer all current tenants the option to purchase the unit before it is offered for sale to the public. The purchase offer must be for a price no greater than that offered to a third-party during the 180 day period. Though not required, developers frequently offer lower prices to the current tenants than those offered to the general public, hoping to entice tenants to stay on as owners.

- 3) If the tenant’s annual household income does not exceed 80% of the median household income for the county, and the tenant chooses not to purchase the unit, that tenant is entitled to receive \$350 to move out and up to \$750 for moving expenses. If the annual household income exceeds the 80% mark, then the tenant is entitled to up to \$750 of moving expenses.

- 4) The developer must offer additional extended leases of up to 3 years to certain qualified households, which include those containing a senior citizen and/or a handicapped individual, provided certain additional requirements are met. However, the developer is only required to offer these 3 year extended leases for up to 20% of the units, with those who do not receive an extended lease or elect not to sign one entitled to compensation equal to up to three months rent.

The Montgomery County Code adds several significant requirements to the conversion process. The right of first refusal and extended lease requirements stand out. Prior to the sale of any rental facility of ten or more units, the County has a right to purchase the rental facility based primarily on the developer’s terms and conditions. If the County purchases the rental facility, the property must remain a rental facility for at least three years. In addition, prior to the sale of individual

units, the County is given the right of first refusal to purchase the individual units under terms no less favorable than those offered to the tenants.

The recently amended Section 11A-5 of the Montgomery County Code also increases the scope and length of the extended lease requirements. For example, households with handicapped citizens and/or senior citizens, who have been part of the house for at least 12 months and meet certain annual income requirements, are entitled to an extended lease for the lifetime of the handicapped or senior citizen, instead of the three years required by the Maryland Condominium Act. Additionally, disabled persons (as distinguished from handicapped) are also offered the 3-year extended leases.

The above is only a summary of some of the many conditions and rights imposed by the State of Maryland and Montgomery County for the conversion of condominiums. For more information regarding condominium conversions throughout the DC Metropolitan area, please contact an attorney in our Community Associations Group, or visit <http://www.caicd.org>.

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## Montgomery County Considers Workforce Housing While Rockville Deals With “Adequate Public Facilities”

By Stuart R. Barr

Montgomery County and the City of Rockville each have worked recently on legislation which could dramatically impact the development community.

In Montgomery County, there has been a recent focus on the gap between those residents who can afford market rate housing units in the County and those of moderate income who are eligible for the County's Moderately Priced Dwelling Unit (MPDU) program or other similar programs. Those caught in the gap often include residents who are important members of the County's workforce such as teachers, police officers, firefighters, and nurses. In order to try to bridge the gap and provide some additional affordable housing relief to certain residents, County Councilmember Steven Silverman introduced legislation recently to facilitate the construction of “workforce housing.”

The workforce housing legislation is designed to make housing more affordable for residents who earn between 80 percent and 120 percent of the area-wide median annual income (roughly between \$71,000 and \$107,000). If adopted, it would require developers of certain new residential housing projects to construct an additional number of workforce housing units. The

number of workforce housing units would be 10% of the number of market rate housing units proposed to be constructed. For example, if a project proposes to build 100 market rate housing units, then an additional 10 workforce housing units must be provided. The number of workforce housing units would be in addition to any MPDU units also required.

The proposed workforce housing program would be administered by the County's Department of Housing and Community Affairs in a manner similar to the County's MPDU program, and would apply only under certain circumstances. The proposed legislation focuses on zones surrounding Metro stations with a certain minimum density and would only apply to developments of a certain minimum size (35 or more units). Once constructed, the workforce housing units would remain in the program for certain control periods (10 years for sale and 99 years for rental). Although no “bonus” market rate units will be available to the developer, such as may be available under the MPDU program, the density limits of the zone can be exceeded in order to provide the workforce housing units.

In the City of Rockville, the Mayor and Council adopted a new Adequate Public Facilities Ordinance (APFO) in late October, 2005, which will be a significant tool for the City to use to regulate the pace of growth.

The APFO generally requires that before allowing development projects to move forward, public facilities such as the adequacy of roads, school capacity, fire and rescue response, and water and sewer service need to be analyzed. Certain projects such as elderly housing and minor subdivisions may be eligible for waivers from the APFO requirements, but waivers can be granted only by a super-majority vote of the applicable agency (either the Mayor and Council, Rockville Planning Commission, or Rockville Board of Appeals).

Although the City's APFO is similar in many respects to Montgomery County's adequate public facilities law and the County's related Growth Policy, the City struck its own path in some areas, particularly with respect to the standards which apply to determine whether public facilities are adequate. For example, while the County and the City both consider the capacity of public schools to be

one of the factors which must be analyzed, the way in which each jurisdiction determines whether or not the schools have adequate capacity is different.

The City will employ a “program capacity” test (which is different from the County’s “building capacity” test, in which each school’s classroom is rated according to the size of the class it can theoretically hold). The “program capacity” measures each school’s actual class sizes based on the programs in the school (e.g., some

classrooms may have 10 students in a class based on that particular program even though the classroom itself can theoretically hold 20 students). Under the new APFO, the City will not approve new residential development in an area in which public school enrollment is at more than 110 percent of program capacity.

These tighter standards are significant since recent data shows that several schools in the City exceed the permitted thresholds under the “program

capacity” analysis. Thus, the APFO could have the practical effect of creating a moratorium on new development in certain portions of the City. Although the APFO legislation went into effect immediately, previously approved projects have a period of time within which to complete the project before triggering a new APFO review.

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## Should a Grandparent’s Right to Visitation Supersede the Rights of a Natural Parent?

By Rhian McGrath

As the traditional family nucleus evolves, courts and legislatures are grappling to address the best interests of children. Grandparents, step-parents and other third parties are increasingly acting in a parental role. The Department of Health & Human Services Administration on Aging notes that approximately 11% of all children in Maryland live in households without either of their natural parents, of which 7% reside with a grandparent. Thus, the courts and legislators continue to expand the role of third-party rights to make decisions for a child. A key question is how much power a third party should have over a child’s inter-

ests when it conflicts with parental rights. The struggle between these sometimes conflicting interests arises when grandparents battle with parents over visitation. Neither the courts nor the legislature has yet provided a definitive resolution.

In Maryland, the legislature tackled the issue by adopting a statute allowing courts to consider a petition by a grandparent for visitation of a minor child if it is in the best interests of the child. Interestingly enough, the statute does not provide any restrictions on the petition by the grandparent. For instance, a

grandparent may petition for visitation even though the parents of the minor child have an intact marriage and contest the grandparent visitation. However, the law has not closed the debate as to the role of a grandparent over that of a natural parent, and this issue continues to arise in the courts.

The Court of Appeals of Maryland set forth the following standards to be used in determining whether to grant visitation to a grandparent:

- the nature and stability of the child’s relationships with its parents;

- the nature and substantiality of the relationship between the child and the grandparent;
- the potential benefits and detriments to the child (in granting the visitation order);
- the effect (if any) grandparental visitation would have on the child's attachment to his or her nuclear family;
- the physical and emotional health of the adults involved; and
- the stability of the child's living and schooling arrangements.

The Court of Appeals also added a few caveats. It includes the disruption of the child's schedule and the psychological toll that the visitation may incur

on the child, especially if there remains an issue of collusion between the grandparent and non-custodial parent.

Although Maryland's highest court and the state legislature appear to support the role of grandparental visitation, this issue remains hotly debated. As recently as 2000, the U.S. Supreme Court held in *Troxel v. Granville* that a Washington state statute providing child-visitation rights to paternal grandparents violated a mother's Fourteenth Amendment due process right to raise her own children.

Based upon this Supreme Court decision, petitioners soon questioned the constitutionality of the Maryland statute. In two separate and distinct decisions, the Court of Special Appeals upheld the constitutionality of the Maryland grandparent statute, but determined in one of the cases that the application of

the statute to the specific facts of the case violated a natural parent's due process rights. The Court of Special Appeals carefully provided in both opinions that each petition must be addressed on a case-by-case basis.

Although the courts have attempted to clarify the matter, the role of grandparental visitation remains controversial and often the court's analysis depends or is determined on a case-by-case factual basis. The Maryland court decisions provide some insight as to the court's interpretation of the issue; however, as the definition of "family" continues to broaden, the matter is likely to remain unsettled for some time.

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## Lerch, Early & Brewer News and Notes



Lerch, Early & Brewer congratulates **Alison W. Rind**, who was recently elected as a principal of the firm. Ms.

Rind, who practices in the areas of Commercial Lending and Real Estate Transactions, joined the firm in 2001. Her practice consists primarily of the representation of lenders in government guaranteed and real estate-based loans.

Ms. Rind is admitted to practice in Maryland and the District of Columbia.



The firm announces that **Vicki R. Canales** has accepted a position as an associate with the firm in the

Commercial Lending and Real Estate Transactions groups. She previously worked as a

law clerk with the firm. Ms. Canales received her J.D. from the Washington College of Law at American University in 2005, and received her B.A. degree in History, with a minor in French, from Wingate University in 1997. Prior to joining the firm, Ms. Canales was employed with the Washington, D.C. office of Dewey Ballantine, LLP. She is admitted to practice in Maryland.

**Robin G. Bortnick** re-

joined the firm as a paralegal in the Commercial Lending Group. Previously, Ms. Bortnick worked as a paralegal in the firm's Community Associations Group. Additionally, the firm recently hosted **Cheryl Lynn Hallivis** as a paralegal intern for four weeks in our office. Ms. Hallivis came to us from the Paralegal Institute of Washington.

Lerch, Early & Brewer wishes to congratulate **Rachonda Grier**, a legal assistant with the firm, who was the recipient of the firm's annual Laura Porter Award. The Award is presented each year to the Lerch, Early & Brewer staff member who best exhibits the traits of dedication, loyalty, hard work, leadership and team participation. Laura Porter worked as a legal assistant in the firm for twenty years before losing her battle with cancer in 1997. The Award was presented at the firm's annual New Year's Luncheon.

The firm wishes to congratulate **Porcha Snowden**, an employee in the administrative department of the firm, who was the recipient of the firm's Silver Star Award. The award is presented annually to the staff member who exhibits a strong work ethic and commitment to the firm.

On Friday, November 18, Lerch, Early & Brewer was the proud recipient of the "Volunteer Organization of the Year" award, presented by the Montgomery County Corporate Volunteer Council at their annual awards



ceremony, held at the North Bethesda Marriott Conference Center. The award is presented annually to one small, medium and large organization in Montgomery County who were recognized as leaders in the area of community service. The event was moderated by Kathleen Matthews of ABC-7 TV. Robby Brewer accepted the award on behalf of the firm.

The Firm congratulates **Natasha Luddington**, an associate in our Real Estate Transactions and Commercial Lending practice groups, who is on her way to becoming a local TV celebrity. Natasha recently took over for **John Joyce** as host of the locally-produced television program, Law School for the Public. The program, which airs on Montgomery County Cable 21, seeks to inform and educate the public on a host of legal issues. The program airs every Tuesday at 8:30 pm, every Friday at 11:00 pm, and every Saturday at 3:00 pm.

**Jason Fisher**, a principal and co-chair of our Community Associations Group, was elected as a Board member of the Washington Metro Chapter of Community Associations Institute 2006 Board of Directors

at their November meeting.

**Benjamin Harris**, Director of Marketing at Lerch, Early & Brewer, was recently elected to the Board of the Washington, D.C. chapter of the Legal Marketing Association to serve as the Technology Chair. Mr. Harris will be guiding the technology initiatives of the Association to help it meet its goals--which include informing and educating marketing and administrative professionals in the legal industry.

**Marc Engel**, a principal in our Employment and Labor Group, recently spoke at a seminar entitled "Best Practices for Improving Hiring Decisions, Addressing Performance Issues Successfully and Improving Retention: A View From the Eyes of Counsel." The seminar, designed for health care professionals, was part of a four-part series for health care professionals being facilitated by **Sigrid Haines**, chair of the firm's Health Care Group.

On Thursday, September 29, **Art Lafionatis**, **Cindi Cohen** and **Larry Lerman** presented a seminar in our McLean, Virginia office entitled "Current Issues for Lenders and Developers". The seminar focused on post-closing issues, title issues, and the revised UCC Article 9. Commercial lenders and real estate professionals from Northern Virginia and the surrounding area were in attendance at this event.

NEWS AND NOTES CONTINUED

**Alison Rind** once again served as co-chair of the annual Montgomery County Bar Association 2005 Fall Golf and Tennis Charity Classic, which raises money for the Montgomery County Bar Foundation. The Foundation organizes and sponsors legal programs and services to promote social welfare and the availability of legal services to individuals throughout the community.

**Wes Frye**, a past recipient of the firm's Annual Scholarship Award and a current member of the Shenandoah (VA) University football team, was recently honored by ESPN, The Magazine

with Academic All-District III Honors.

Lerch, Early & Brewer wishes to congratulate **Paul Alpuche** and his wife Linda on the birth of their first child, Eli Jacob, on September 21.

The firm also wishes to congratulate two attorneys who were recently married: **Arnie Spevack** married Sharon Siegel in a ceremony on Martha's Vineyard over the summer, and **Bill Goldberg** married Gony Frieder while on a recent cruise in the Caribbean.

*The information in this Newsletter is not intended to render legal, accounting or other professional advice and should not be acted upon without first consulting an attorney or other professional.*

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