

Real Estate Law Update

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Welcome to another issue of the Real Estate Law Update, a bulletin published regularly by the Land Use and Zoning and Real Estate Transactions Groups at Lerch, Early & Brewer as a service to our clients. Here, you will find articles written by our attorneys covering a variety of current legal issues as they affect real estate law.

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In a complex real estate lawsuit, the Maryland Court of Special Appeals recently ruled that the sellers of the land, as a class, could be considered the measuring lives in a savings clause of the real estate sales contract for purposes of precluding the application of Maryland's Rule Against Perpetuities.

Court Affirms Federal Realty Investment Trust's Bethesda Project

The Court of Special Appeals recently affirmed the law that allows the construction of Federal Realty Investment Trust's mixed use project on the east side of Arlington Road, between Elm Street and Bethesda Avenue, in Bethesda.

Lerch, Early & Brewer Real Estate Group News and Notes

The latest news and information from our firm.

Tenant Must Follow Lease Requirements to Effectively Exercise Renewal Option

THE COURT OF SPECIAL APPEALS OF MARYLAND HAS RECENTLY HAD THE OPPORTUNITY TO DETERMINE WHETHER A LESSEE'S NOTICE OF ITS OPTION TO RENEW ITS LEASE WAS TIMELY SENT AND, IN THE PROCESS, HAS PROVIDED GUIDANCE FOR LANDLORDS AND TENANTS WITH RESPECT TO EXERCISING RENEWAL OPTIONS.



Chesapeake Bank of Maryland (through its predecessor) leased property in Baltimore County to Kimmel Automotive, Inc. in 1981 for a term of 20 years. The lease was set to expire October 31, 2002 and had three 5-year options to renew upon notice to the Bank at least 90 days prior to the expiration of the existing lease term. Early in 2002, Monro Muffler/Brake, Inc. purchased all shares of Kimmel and, through various correspondence with the Bank, notified the Bank of its status as the new lessee under the lease. During the ownership transition, one of Monro's employees entered the basic lease information into its computer system and inadvertently mistyped a 60-day notice requirement instead of the

90-day notice requirement contained in the lease. Accordingly, Monro sent the Bank a letter on August 29, 2002 notifying the Bank of its intent to renew the lease when the current term expired on October 31. The Bank refused the extension, stating Monro's notice was not given prior to the 90-day deadline and was therefore untimely. Monro responded with a letter dated September 11, 2002 refusing to recognize the termination and stating their intent to remain as tenant under the lease, and then refused to vacate the property.

The lease had also provided Monro with an option to purchase, pursuant to which Monro made the Bank an offer on September 30, 2002. However, Monro ultimately determined



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not to purchase the property because, due to zoning regulations, they would have had to purchase the adjacent property as well. The Bank and Monro each filed competing lawsuits, which were consolidated into the present action. The circuit court granted Monro's petition for renewal, finding that Monro's correspondence with the Bank regarding their takeover of the business, together with their notice of extension, "clearly demonstrated its intent to exercise the extension option" even though the notice was untimely. The Bank appealed.

The Court of Special Appeals disagreed and found that the Bank could require a new lease or seek a new tenant because Monro did not properly exercise its renewal option. Refusing to go beyond the specific language of the lease to glean evidence of the parties' intent, the Court strictly construed the option to renew as written in the lease. Finding nothing ambiguous about the lease provisions regarding the extension, the Court stated that if Monro failed to provide the Bank with notice of its intent to extend the lease exactly as specified in the lease, the Bank was relieved of its obligation to extend the lease.

Neither Monro's argument that it had effectively extended the lease due to its correspondence with the Bank (in which Monro stated that it looked "forward to a long and prosperous relationship with" the Bank) nor Monro's argument that principles of equity required the lease to be extended persuaded the Court that the expressed terms of the lease should not control. In addition, the Court stated that principles of equity did not require the Bank to give Monro notice that the renewal deadline had passed or was approaching. Nor was the Court convinced that, as Monro argued, the failure to give timely notice merely caused a default which Monro should have had the opportunity to cure.

Ultimately, if a tenant wanting to renew its lease fails to follow the clear procedure required within the lease to exercise a renewal option, that tenant is simply out of luck and must either negotiate a new lease or move. Therefore, it is extremely important to properly calendar renewal deadlines for all leases with renewal or extension options.



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Savings Clause In Real Estate Contract Precludes The Application Of Maryland's Rule Against Perpetuities

IN A COMPLEX REAL ESTATE LAWSUIT, THE MARYLAND COURT OF SPECIAL APPEALS RECENTLY RULED THAT THE SELLERS OF THE LAND, AS A CLASS, COULD BE CONSIDERED THE MEASURING LIVES IN A SAVINGS CLAUSE OF THE REAL ESTATE SALES CONTRACT FOR PURPOSES OF PRECLUDING THE APPLICATION OF MARYLAND'S RULE AGAINST PERPETUITIES.

In February 1995, Cattail Associates, Inc., entered into a land sales contract with Leonard Sass, Sr., Leonard Sass, Jr., Beverly Sass, Sandra DeVor, and Theresa Sass. Settlement was conditioned on Cattail's having obtained the necessary county approvals for its subdivision plan and having settled on an adjacent property. The contract also provided that it would "expire" prior to any violation of the Rule Against Perpetuities. In 2000, Cattail learned that Faye Sass, the wife of Leonard Sass, Sr., owned an interest in the property, but was not a party to the contract. In 2002, because it was nearing completion of its subdivision plan, Cattail informed the sellers that it would waive all conditions and proceed to settlement. After the sellers refused, Cattail filed suit for specific performance.



After Cattail presented its case at trial, the circuit court granted judgment in favor of the sellers on the ground that the contract violated the Rule Against Perpetuities because settlement was contingent on certain conditions within the control of the county, a third party. Cattail appealed.

The Maryland Court of Special Appeals reversed the circuit court ruling on two grounds. First, the Court ruled that the absence of Faye Sass as a party did not render the contract invalid. The lot in question was owned by Leonard Sass, Sr., and Faye Sass, as tenants by the entirety, in a joint tenancy with Theresa Sass. The signature of Leonard Sass, Sr., on the contract did not transfer Faye's interest in the property.

When Theresa Sass contracted to convey her interest in the property, the joint tenancy was severed, and a tenancy in common with Leonard Sass, Sr. and Faye Sass was created. When Leonard Sass, Sr., died, Faye Sass became the sole owner of their interest. Accordingly, the Court found that if the contract is enforceable Cattail would hold an undivided share as a tenant in common with Faye Sass with respect to the lot in question.

The Court also addressed the issue of whether the contract was invalid by the application of Maryland's Rule Against Perpetuities. The Maryland Rule Against Perpetuities provides that no interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the time of creation of the interest. If a contract creates an equitable right in real property, enforceable by specific performance, the contract is subject to the rule.

Since the granting of the necessary approvals was within the control of the county, the Court found that it could not be known with any certainty whether settlement of the sale of the land would take place within the perpetuities period. However, the "savings provision" in the contract provided that the contract would "expire...on the last day of the time period legally permitted by the Rule Against Perpetuities." In a perpetuities analysis, the Court



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ruled if the measuring life is not expressly identified in the instrument, it looks to the natural persons implied by the instrument or involved in the limitations. Considering the contract as a whole and the express recognition of the perpetuities issue as reflected by the "savings" provision, the Court ruled that the clear implication was that the sellers as a class should be considered the measuring lives. To extend to the last day "legally permitted," the title to the property must vest, if at all, prior to the passing of the last surviving seller, plus twenty-one years. The Court held that by virtue of the savings clause, the Rule Against Perpetuities was not violated.

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Court Affirms Federal Realty Investment Trust's Bethesda Project

IN AN UNREPORTED OPINION, *HUMPHREY V. MARYLAND-NATIONAL CAPITAL PARK & PLANNING COMMISSION*, THE COURT OF SPECIAL APPEALS RECENTLY AFFIRMED THE LAW THAT ALLOWS THE CONSTRUCTION OF FEDERAL REALTY INVESTMENT TRUST'S ("FRIT") MIXED USE PROJECT ON THE EAST SIDE OF ARLINGTON ROAD, BETWEEN ELM STREET AND BETHESDA AVENUE, IN BETHESDA.

The property is zoned C-2. FRIT sought to increase its development capacity under certain circumstances by amending the C-2 zone. At issue before the Court of Special Appeals was whether the resulting Zoning Text Amendment ("ZTA") 01-08 was an unconstitutional special law because it immediately benefited the FRIT project. The Court upheld the ZTA and concluded that it was both generally applicable and promotes a public interest.



In 2001, the Montgomery County Council, sitting as the District Council, passed the ZTA which modified zoning restrictions previously applicable to C-2 zoned properties. In particular, the ZTA increased the maximum permitted height of a building from 42 to 75 feet; increased the maximum permitted floor-area ratio from 1.5 to 2.5; and specifically authorized residential units. FRIT submitted applications for preliminary and site plan review by the Montgomery County Planning Board to develop the property. The Planning Board approved the plans, which took advantage of the ZTA limits and would not have complied with the previous zoning restrictions. Upon appeal, the Montgomery County Circuit Court affirmed the Planning Board's approval and the case was then brought to the Court of Special Appeals.



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Article III, Section 33 of the Maryland Constitution forbids the enactment of "special laws." It reads, in relevant part, "the General Assembly shall pass no special Law, for any case, for which provision has been made, by an existing General Law." This provision has also been held to apply to municipalities.

Before the Court of Special Appeals, Humphrey, the Appellant, challenged Maryland's longstanding criteria for evaluating special law cases – that a legislative enactment constitutes a special law if it specifically identifies a beneficiary by name or in any equivalent manner. Humphrey argued that special laws should be evaluated using a "multiple factor" test, in which the Court would balance five indicia of special laws that had been present in prior special law cases. Existing case law identified the indicia, which included broad considerations such as whether the legislative distinctions have a reasonable basis. The Court of Special Appeals rejected the multiple-factor balancing test and reasserted the accepted review analysis. As applied to the present case, the Court found that the ZTA has no named beneficiaries and applies to at least 27 other parcels in Montgomery County. As such, the Court affirmed the approval of FRIT's plans.



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Lerch, Early & Brewer Real Estate Group News and Notes

THE LATEST INFORMATION FROM OUR GROUP



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On Tuesday, September 26, the **Land Use and Zoning** and **Real Estate Transactions** groups co-presented a seminar entitled "**The Evolving Maryland-National Capital Park and Planning Commission: Issues and Answers.**" More than 100 real estate professionals from across the region came to hear guest speakers Dr. Royce Hanson (Montgomery County Planning Board Chair), Faroll Hamer (Acting Director of Planning for Montgomery County) and Mr. Adrian Gardner (General Counsel for the Board) discuss proposed rules and regulations, and the challenges and visions of the Planning Board beyond 2006.

[Click here](#) for biographical

information for all of our attorneys.

OUR SERVICES

Representation of developers and investors in connection with the acquisition, sale, development, financing, and leasing of commercial and multi-family residential properties.

Assisting clients in the initial stages of a transaction on such matters as negotiating and reviewing contracts of sale and financing documents, structuring the ownership entity and determining the manner in which title to property is acquired.

Providing title services and serving as title agent and settlement agent

Assisting clients in securing acquisition/construction financing.

Assisting owners and developers in obtaining the governmental approvals required to develop real property for residential, commercial, and retail uses.

PRACTICE AREAS

Business and Taxation

Commercial Lending

Community Associations

Employment and Labor

Estate Planning and Probate

Family Law

Health Care



The seminar also featured comments and questions from several Lerch, Early & Brewer attorneys, including Steve Robins, Harry Lerch and Stuart Barr. The event was a unique opportunity for members of the development community to have a dialogue with and obtain information from members of the Board outside of the structure of standard Planning Board meetings.

To be added to our mailing list for future seminars and events, please send an email to Ben Harris at bjharris@lerchearly.com.



Larry Lerman, Chair of the **Commercial Lending Group** and a principal in the **Real Estate Transactions Group**, will be presenting a seminar entitled "**Understanding Insurance Coverages and Controlling Insurance Proceeds: A Primer for Lenders and Landlords.**" The seminar will be held twice: on Thursday, December 6 in our Bethesda office, and again on Thursday, December 13 in our office in McLean, VA. You may [click here](#) to view the full invitation, which includes more detailed information as well as instructions on how to sign up.



On Monday, November 13, Lerch, Early & Brewer hosted **Montgomery Council Councilmember Marilyn Praisner** for a lunchtime discussion with firm attorneys and staff. Ms. Praisner, recently re-elected to serve as the Council representative for Montgomery County District 4, discussed issues facing the County and items that the Council would be considering during the next year. She also spent time talking with and answering questions from those in attendance.

The meeting with Ms. Praisner is part of an ongoing effort by the firm to invite county leaders to the firm's offices to speak on issues of importance to Montgomery County's businesses and citizens. Past speakers have included, among others, Montgomery County Councilmembers George Leventhal, Nancy Floreen and Steve Silverman, Faroll Hamer and Rose Krasnow from the Maryland-National Capital Park and Planning Commission, and County Executive-Elect Ike Leggett.



Congratulations are in order for **Steve Robins**, who along with fellow Lerch, Early & Brewer attorney Jeff Van Grack, was recently selected as a finalist as one of "Washington's Top Lawyers" by the Washington Business Journal. Steve was one of four attorneys in the Washington region selected in the area of Zoning and Land Use. The awardees were honored at a reception on Thursday, September 14 at the Ritz-Carlton Hotel in Washington, D.C.



Alison Rind, a principal in our **Commercial Lending** and **Real Estate Transactions** groups, recently served as Co-Chair of the Montgomery County Bar Foundation's Annual Golf and Tennis Charity Classic.

The Golf and Tennis Classic helps support the activities of the Bar Foundation, which include promoting the causes of social welfare and providing legal assistance to the community through the Bar Association's Pro Bono program. This was Ms. Rind's third year as Co-Chair of the event.

We Would Like To Hear From You

We publish this newsletter as a service to our clients as a means to make them aware of certain aspects of the law. As always, we would like to hear feedback from our readers regarding the content of the newsletter. If there are items or topics you would like to see covered in future issues, or you

Land Use and
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have a suggestion concerning the newsletter itself, you may send them to Ben Harris at BJHarris@lerchearly.com, or via phone at 301-961-6096.

Additionally, a number of the Firm's other departments periodically issue highly informative newsletters on a variety of other subjects, including Commercial Lending, Business and Taxation, Community Associations, Employment and Labor, and Health Care. If you would like one or more of these newsletters, you may access them through our website, www.lerchearly.com. To be added to the mailing list of any of the above-mentioned practice groups, simply send an email to Mr. Harris at BJHarris@lerchearly.com.

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