

Real Estate Law Update

OUR PROFESSIONALS



Robert G. Brewer, Jr.
Chair, Land Use and Zoning Group
[Email](#)
301-657-0165



Arthur F. Lafionatis
Chair, Real Estate Transactions Group
[Email](#)
301-657-0731



Cindi E. Cohen
[Email](#)
301-657-0169

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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Montgomery County Continues to Wrestle with Concerns over Site Plan Approval and Enforcement

THE MONTGOMERY COUNTY COUNCIL HAS CONTINUED ITS RECENT FOCUS ON THE COUNTY'S DEVELOPMENT APPROVAL AND IMPLEMENTATION PROCESS, PARTICULARLY WITH RESPECT TO THE ISSUES UNCOVERED DURING THE CLARKSBURG TOWN CENTER INVESTIGATION.

The Clarksburg Ripple Effect Continues. The Montgomery County Council has continued its recent focus on the County's development approval and implementation process, particularly with respect to the issues uncovered during the Clarksburg Town Center investigation. Over the past few months, the Council has considered various ways of closing the perceived regulatory gaps in the development approval process and responding to public concerns over community participation and amendments to development approvals. The most recent result was the Council's unanimous approval of two text amendments to the Montgomery County Zoning Ordinance and two amendments to the County subdivision regulations.

The subdivision regulation amendments clarify the roles of the Montgomery County Planning Board versus the Park and Planning staff in enforcement actions and clarify the responsibilities of certain County agencies for providing comments on proposed preliminary subdivision plans. The zoning text amendments largely aim to enhance the public's awareness of new development projects and any proposed changes to previously approved projects. Under the new legislation, as of May 1, 2006, applicants must post notices on the property, send written notices to affected parties, and hold a pre-submittal meeting with



Martin J. Hutt
 Email
 301-657-0170

the public, prior to filing a new development application. The details of these requirements are to be explained further in future Planning Board regulations.

Effective April 1, 2006, all amendments to site plans, no matter how trivial, must be approved by the Planning Board. Any proposed changes to approved site plans first require posting of notice on the property and written or electronic notice to interested parties. The parties then have an opportunity to request a public hearing on the proposed amendment. If a proposed amendment is noncontroversial, then it may be approved by the Planning Board on a consent calendar. This new process marks the demise of the previous "minor" site plan amendment process in which "minor" amendments could be approved by Park and Planning staff members without public notification or Planning Board involvement.

With its recent legislation, the Council also has authorized the Planning Board to assign matters involving alleged development violations to a County hearing examiner for a public hearing. Under this scheme, the hearing examiner would then submit a report and recommendation to the Planning Board after the hearing is conducted for a final determination on the alleged violation. The Council also considered proposed legislation which would transfer all site plan inspection and enforcement functions from the Planning Board to the County's Department of Permitting Services. The Council's Planning Housing and Economic Development Committee decided that enforcement of site plans will remain with the Planning Board, while the Department of Permitting Services will be responsible for inspections. The two agencies are in the process of preparing a Memorandum of Understanding to formalize this decision.

Further Clarksburg ripples are sure to come, so we will keep you posted.

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Harry W. Lerch
 Email
 301-657-0161

Eminent Domain Reform: Correcting Unfairness in Condemnation Laws

THE MARYLAND GOVERNOR APPOINTED A TASK FORCE ON BUSINESS OWNER COMPENSATION IN CONDEMNATION PROCEEDINGS, AND MOST OF THE RECOMMENDATIONS HAVE FOUND THEIR WAY INTO LEGISLATIVE BILLS IN THIS SESSION.

One of the hottest topics in the Maryland General Assembly this year has been legislation to correct unfairness in condemnation laws. At least 28 bills were introduced to address existing inequities. Most of these are reactions to the *Kelo* case (discussed in our previous newsletter), where the Supreme Court permitted the City of New London, Connecticut to condemn non-blighted private property, including Mrs. Kelo's house, for economic redevelopment by a private developer. This incensed the public and public opinion polls and created a large popular demand for reform.

Even before the *Kelo* decision, Maryland had recognized the existence of many inequities in eminent domain law. In 2004 the Governor appointed a Task Force on Business Owner Compensation in Condemnation Proceedings to study situations where eminent domain is used to take small business properties and the owners of the businesses are not compensated for the loss or destruction of the businesses as distinguished from the real property. In the study, relocation costs were evaluated, as well as issues dealing with the loss of business good will. Individuals testified about the existing problems, particularly in Baltimore County and City. The recommendations and findings of the Task Force were published in December 2005 and most of the recommendations have also found their way into legislative bills in this session.

Attorneys from our firm worked with Jim Thompson of Rockville who led a coalition of business owners and other attorneys in drafting corrective legislation, which culminated in the introduction of S.B. 419 by Senators Brian Frosh and Jennie Forehand. This bill was drafted to address the areas of unfairness and inequity which currently exist and to *not* overreact to the public's current unhappiness. It represents a balanced middle ground among all of the bills currently before the legislature.

The Frosh/Forehand bill identifies the area of economic development where private property is taken without the consent of the owner for the purpose of redeveloping an area to increase the tax base, employment or general economic health. Since this is not technically a "public use" and there is concern that property could be unfairly taken from one party and given to another, S.B. 419 (and the Task Force) requires that the condemning authority make certain additional findings to help insure the good faith of the condemnation. The bill requires a real economic development plan with a public purpose, a finding that the public purpose cannot be achieved except through the use of eminent domain, that private developers or a public/private partnership could not accomplish the public objective, and that the condemning authority retain some control or oversight of the project. In addition, the condemning authority would be required to prove the public purpose and necessity of a taking of this type by clear and convincing evidence. The findings of the condemning authority would be subject to close scrutiny by the court. Unlike



Lawrence G. Lerman
 Email
 301-657-0163



Alison W. Rind
 Email
 301-657-0750



Steven A. Robins
Email
 301-657-0747

regular condemnation for “public uses” where additional scrutiny is not necessary, if the government takes private property for the purpose of re-transfer to another private party or entity it is critical to prevent abuse. The condemning authority should not be the final arbiter. There must be meaningful judicial review. These protections address concerns of property owners concerned about the unfairness of the *Kelo* case, but still allow economic development takings.

This bill also addresses many of the items of the Task Force Report. It provides compensation to small businesses for the loss of business assets if the business cannot be relocated, as well as compensation for loss of net operating income for a limited period and compensation for damages resulting from pre-condemnation activity. It further provides for adequate expenses necessary to reestablish a displaced farm, non-profit organization or small business.

The proposed bill also would require that the property owner be reimbursed its attorney’s fees if the condemning authority gives the property owner a “low ball” offer of compensation when the condemnation case is filed. This addresses a question of fundamental fairness. If the condemning authority does not make a fair market offer to the property owner and that person is required to hire an attorney in order to obtain just compensation, then the property owner’s attorney’s fees should be paid if the property owner achieves a judgment or award at least 20% more than the last final offer of the condemning authority. This procedure forces the condemning authority to make reasonable offers in the first instance. This rule is already in effect in Florida and other states.

The reforms in this legislation are designed to make property owners and business owners whole in the event of a condemnation proceeding. This “indemnity principle” would protect our society as a whole -- home owners, farmers, business owners -- from misguided economic takings, from “low ball” appraisals, from pre-condemnation losses and from over-reaching by the condemning authority.

In *Dodson v. Anne Arundel County, Maryland*, the Maryland Court of Appeals stated: “It is elementary that the sovereign may not take private property for public use without payment of ‘just compensation’ to the property owners. See U.S. Const. Amend. V and Md. Const., Art. III, § 40. The Supreme Court has interpreted ‘just compensation’ to be the ‘full and perfect equivalent in money of the property taken’ from the landowner.”

Maryland’s present definition of “fair market value” does not cover many of the damages property owners suffer in eminent domain cases, such as business damages or loss of adequate access or complete relocation benefits. The courts have said these items are matters for the legislature. This bill closes the gap to some degree between the *Dodson* indemnity principle and the existing law and current practice. Today, the property owners are vulnerable to misuse of economic takings, out-of-pocket attorneys fees and costs in cases of low ball takings, without compensation for business losses and under-compensated relocation benefits. As of the date of our going to press with this newsletter, the provisions of the various reform bills have been consolidated in SB 3, and approved by the Senate. It now goes to the House of Delegates for review and, hopefully, enactment. If it fails this year, look for it to be reintroduced next year.

The eminent domain reform effort is supported by a number of other groups in whole or in part. Some include the Maryland Farm Bureau, the Maryland Chamber of Commerce, the Montgomery County Chamber of Commerce, the Maryland Retailers Association, National Federation of Independent Businesses, the Maryland Builders Association and the Maryland Board of Realtors. Please give us your support as well.

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Arnold D. Spevack
Email
 301-657-0749



Stuart R. Barr
Email
 301-961-6095



Vicki R. Canales
Email
 301-907-2803

Montgomery County Rental Housing Sales Require Public Attention

SALES OF RENTAL HOUSING LOCATED IN MONTGOMERY COUNTY ARE SUBJECT TO CERTAIN RULES FOUND IN CHAPTER 53A OF THE COUNTY CODE.

The rules set forth in Chapter 53A were designed to address the shortage of low and moderate-income rental housing in the County as well as the significant hardship a tenant faces when displaced from his or her home as a result of rental housing converting to condominiums. As a result, Chapter 53A regulates the conversion of rental housing in the County. Chapter 53A of the Code defines “rental housing” as a multiple-family dwelling or a group of multi-family dwellings operated as one entity, with a total of at least four (4) rental units.

Chapter 53A provides that, within five (5) days of entering into a bona fide contract of sale, a seller of rental housing must provide notice of such sale: (i) to each tenant in the rental housing by first class mail, (ii) by posting in the public areas of the rental housing, and (iii) to the Department of Housing and Community Affairs (the “Department”) together with a list identifying each tenant and the tenant’s address. The notice of sale must offer to sell



Robin L. Dierbeck
Email
301-657-0724



Natasha R. Luddington
Email
301-657-0748



Patrick L. O'Neil
Email
301-657-0738

[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.

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the rental housing to any tenant organization and include any other information required by executive regulations. Executive regulations with respect to the sale of rental housing expand on the rules found in Chapter 53A.

In short, a seller of rental housing must offer the County, the Montgomery County Housing Opportunities Commission (the "HOC") and any tenant organization the first right to buy the rental housing before selling it to another party unless certain exceptions apply. Specific information must be included in the written offer, including, among other things, information about the rental housing relevant to the exercise of the right of first refusal, a copy of the sales contract, a statement of income and expenses for the three (3) previous years of operation of the rental housing and a current rental schedule detailing the names of current tenants and their contact information. The time period in which the County, the HOC and the tenant organization must respond to a seller's right of first refusal offer is set forth in Chapter 53A. The owner is required to sell the rental housing to the County, the HOC or the tenant organization if the acceptance includes substantially the same terms and conditions contained in the owner's bona fide contract of sale with the third party; provided, however, that the County, HOC or a tenant organization is permitted to condition its acceptance on obtaining financing to purchase the rental housing. In addition, in some cases, the owner will be required to provide the tenant with tenant relocation payments. Any sale must be completed within the time period set forth in Chapter 53A.

The Department has the authority to enforce the provisions found in Chapter 53A and penalties exist in the event of a sale of rental housing in violation of the Code. Prior to closing on the sale of rental housing, the Department must issue a certificate of compliance to the owner, the buyer or any other interested party certifying that the requirements of Chapter 53A have been satisfied.

An owner desiring to sell rental housing to a developer who plans to convert the property to condominiums should carefully review the requirements set forth in Chapter 53A as well as the executive regulations on this matter.

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No News is Bad News -- TOPA Requirements Still Uncertain

Last year we reported on the amendments to the District of Columbia's Rental Housing Conversion and Sales Amendment Act of 2005 ("TOPA"). The law was amended by the District of Columbia City Council in order to close the loopholes sellers of residential rental property had been utilizing in an effort to avoid the requirements of TOPA to sell their real property without affording tenants an opportunity to purchase. The regulations and forms necessary to implement the new procedures to petition for exemption from TOPA have not yet been issued. Thus, property owners cannot effectively comply with the new requirements under TOPA and continue to be forced to afford tenants an opportunity to purchase, even if the sale transaction no longer falls under the definition of a "sale" as defined under TOPA. Numerous lawsuits regarding violations of TOPA remain in various stages of litigation with no clear ruling to guide sellers of District of Columbia residential rental real property. The DC Land Title Association has formed a task force to address these issues with the District of Columbia government, and hopefully, by the time our next newsletter is issued, a more definitive procedure for selling residential rental real property in the District of Columbia will be in place. But for now, delays in the closing process may continue, as sellers afford tenants an opportunity to purchase the property where they reside.

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THE LATEST INFORMATION FROM OUR GROUP



Steve Robins recently served as Chair of the Montgomery County Public Safety Awards banquet for the fifth consecutive year. The event, which was held on Thursday, March 23 at the North Bethesda Conference Center, recognizes the heroic efforts and community service efforts of individuals who serve on Montgomery County's Police, Fire and Rescue, EMT, Park Police and Department of Corrections forces.

In addition to the over 1,000 business and community leaders in attendance, the event featured remarks from Maryland Lieutenant Governor Michael Steele, Rep. Chris Van Hollen (D-MD), Montgomery County Executive Doug Duncan, and Montgomery County Council President George Leventhal.

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.

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The firm is proud to announce that **Alison Rind** was elected as a principal during the annual shareholders' meeting held in December. Ms. Rind, who joined the firm in 2001, practices in the firm's **Commercial Lending** and **Real Estate Transactions** groups, with a focus on SBA loan programs. She is a past president of the Washington, D.C. Land Title Association and has been practicing for 20 years.

Ms. Rind, who received her J.D. from the George Washington University National Law Center in 1986, is admitted to practice in Maryland and the District of Columbia.



The firm announces that **Vicki R. Canales** has joined Lerch, Early & Brewer as an associate in the **Commercial Lending** and **Real Estate Transactions** groups. 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.

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 have a suggestion concerning the newsletter itself, you may send them to Ben Harris at BJHarris@lercheearly.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.lercheearly.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@lercheearly.com.

SUITE 460 | 3 BETHESDA METRO CENTER | BETHESDA MD 20814-5367

TEL: 301.986.1300 | www.lercheearly.com

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