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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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The latest news and information from our firm.

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## **Virginia Supreme Court Upholds Denial of Specific Performance of Real Estate Contract**

**THE VIRGINIA SUPREME COURT RECENTLY AFFIRMED THE DENIAL OF A PURCHASER'S REQUEST FOR SPECIFIC PERFORMANCE OF A REAL ESTATE CONTRACT IN A CASE WHERE THE AUTHORITY OF THE SELLING CORPORATION WAS CHALLENGED.**

The Virginia Supreme Court recently affirmed the denial of a purchaser's request for specific performance of a real estate contract in a case where the authority of the selling corporation was challenged. In the case of WBM, LLC v. Wildwoods Holding Corp., Wildwoods contracted to sell its sole asset, 23 acres of land. The contract of sale was allegedly signed by the President of the corporation who later refused to sign a deed to transfer title to the purchaser. The purchaser sued for specific performance. At trial, the record showed there was no corporate shareholder meeting or resolution concerning the contract, and there was no evidence that the Board of Directors agreed to the terms of the contract. The Chancellor denied specific performance on the grounds that based on the record, the President did not have authority to sign a contract binding Wildwoods.

In affirming the lower court decision, the Supreme Court discussed two sections of the Virginia Code (Sections 13.1-723(A), and 13.1-724(A)). The first section addresses the formalities for a corporation to sell its real estate when such a sale is in the ordinary course of business. The latter provides that a corporation can sell all or substantially all of its property if the Board of Directors adopts--and the shareholders approve--the transaction.



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In this case, while individuals who were also Directors took certain actions related to the sale, the Directors never acted as a board regarding the contract, and therefore was no shareholder action. Thus, despite the purchaser's arguments that the sale should be governed by the Section which requires less formality, the Supreme Court held that the higher level of formality was required. As a result, the Chancellor did not abuse his authority in denying specific performance given this lack of authority as well as other terms being uncertain and unclear.

Purchasers of real estate should be sure to require a corporate seller to provide proof of authority of the individuals signing for the seller. This should be in the form of a board resolution if the sale is in the ordinary course of business of the corporation, and in the form of both a board resolution as well as proof of shareholder authorization if the sale might be deemed not to be in the ordinary course of business. These should be obtained early in the transaction to protect against a purchaser incurring extensive due diligence and development expenses and not being able to enforce the contract.

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## Foreclosure Sale Unenforceable Due To Lack of Mutuality

**THE CIRCUIT COURT FOR FAIRFAX COUNTY, VIRGINIA RECENTLY HELD THAT A TRUSTEE IN A FORECLOSURE SALE WAS NOT ENTITLED TO DAMAGES RESULTING FROM THE FAILURE OF A PURCHASER AT A FORECLOSURE SALE TO CLOSE ON THE PURCHASE OF THE PROPERTY.**

In the case of *Busman v. Beeren & Barry Investments, LLC*, the Circuit Court for Fairfax County, Virginia recently held that a trustee in a foreclosure sale was not entitled to damages resulting from the failure of a purchaser at a foreclosure sale to close on the purchase of the property, because the Memorandum of Sale entered into following the foreclosure sale lacked mutuality.

As is typical following many foreclosure sales, the trustee and highest bidder at the subject sale entered into a Memorandum of Sale which contained a clause providing that the purchaser's sole remedy, in the event of the trustee's default, was a termination of the Memorandum and a refund to the purchaser of its deposit. When the purchaser notified the trustee that it did not intend to close on the property, the trustee conducted a new foreclosure sale and the filed suit against the original purchaser for the difference between the initial purchase price and the subsequent foreclosure sale purchase price.

The purchaser raised two defenses regarding the authority of the trustee to file suit, which were rejected by the court. However, the purchaser's third defense was that the Memorandum of Sale between the trustee and the purchaser was unenforceable, since it lacked mutuality. In analyzing the issue, the court stated that mutuality exists when there are promises on each side that something shall be done for the benefit of the other side, with consideration for such promises. If it appears that one party was never bound to do the acts which form the consideration for the promise of the other, there is lack of mutuality.

The court found that the clause in the Memorandum of Sale limiting the purchaser's remedies to a return of its deposit freed the trustee of any obligation to perform, and therefore made the Memorandum unenforceable due to lack of mutuality. Although not included as part of its ruling, the court's further analysis of the issue of lack of mutuality implied that if the trustee had been required to pay interest on the deposit or if the purchaser had been entitled to the additional remedy of specific performance, then the mutuality standard might have been met and the Memorandum might have been enforceable.

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## Council Contemplates Overhaul to Wheaton Overlay Zone to Spur Redevelopment

**IN AN EFFORT TO ENCOURAGE REDEVELOPMENT INTEREST AND RELAX BURDENSOME RESTRICTIONS, THE MONTGOMERY COUNTY COUNCIL IS CONSIDERING PROPOSED LEGISLATION WHICH WOULD AMEND THE OVERLAY ZONE IN WHEATON.**

Wheaton is known for its unique diversity, eclecticism, and small business character. It is also known for its needed revitalization. Therein lies the challenge for community members, businesses, and redevelopment officials – finding ways to encourage redevelopment opportunities in Wheaton while simultaneously preserving Wheaton's



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character.

With its Metro station, renovated regional shopping mall, proximity to the District and to the Capital Beltway, and other existing infrastructure, Wheaton appears to have all of the pieces in place to support a vibrant urban community. But if you drive through downtown Wheaton you mostly see a collection of smaller, older, low density buildings. If downtown Wheaton has the same underlying zoning as Bethesda and Silver Spring, why is it that it doesn't look remotely like its other central business district counterparts? One reason, if not the central reason, is the Wheaton Retail Preservation Overlay Zone.

The Wheaton Retail Preservation Overlay Zone adds an additional layer of zoning requirements on top of the normal existing zoning requirements. The overlay zone was enacted in 1990 as part of the last update to the Wheaton Central Business District and Vicinity Sector Plan. It was the first overlay zone enacted in the County and its purpose was clear by its name -- to preserve the existing retail "marketplace" in the downtown. The overlay zone has kept things in downtown Wheaton essentially the same over the past sixteen years through two primary restrictions: it requires the burdensome site plan review process for all new projects, regardless of size, and it allows development under the standard method of development only. By precluding the optional method of development, the overlay zone prevents higher density projects, which would otherwise be available in a downtown central business district.

Many people feel that these additional zoning requirements have slowed redevelopment efforts. While many small businesses have benefited from the protection of the overlay zone and have remained in the downtown marketplace for decades, there has also been economic stagnation. During the overlay zone's sixteen-year period, there have been only four development projects in the entire Wheaton sector plan area. Redevelopment officials believe that the stringent limits of the current overlay zone have precluded new development projects, particularly housing projects, which would add additional customers and economic traffic to the downtown. Instead, such developments have been constructed around the periphery of the downtown area. The overlay zone requirements also have frustrated existing businesses wanting to expand or improve.

In an effort to encourage redevelopment interest and relax burdensome restrictions, the Montgomery County Council is considering proposed legislation which would amend the overlay zone. The purposes of the amendment are to promote higher density, mixed-use development around the Wheaton Metro Station, retain the existing street level retail, and amend the approval procedures for development projects. The proposed amendment would limit the circumstances under which site plan review is required under a standard method of development and would permit the optional method of development if allowed in the underlying zone. The proposed amendment also provides requirements and additional incentives for providing street level retail space for use by small businesses. Many officials feel that these small business provisions will strike the necessary balance between injecting new revitalization life into Wheaton while still preserving Wheaton's character.

The County Council recently conducted a public hearing on the amendment, and the legislation now moves to Council committee for review. Although certain elements of the proposed amendment will surely be debated (for example, the square footage necessary to trigger site plan review), the adoption of virtually any form of the proposed legislation will potentially have a dramatic impact on Wheaton's revitalization.

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**Signed Letter of Intent Does Not Constitute a Contract To Sell Real Property**

**A RECENT MARYLAND COURT OF SPECIAL APPEALS CASE CONTAINS A GENERAL ANALYSIS OF THE NATURE OF LETTERS OF INTENT, AND REMINDS US THAT A SIGNED LETTER OF INTENT WILL NOT CONSTITUTE A BINDING CONTRACT UNLESS CIRCUMSTANCES SUGGEST OTHERWISE.**

A recent Maryland Court of Special Appeals case contains a general analysis of the nature of letters of intent, and reminds us that a signed letter of intent will not constitute a binding contract unless circumstances suggest otherwise. In the case of *Norkunas v. Cochran*, the seller, Eilleen Norkunas, owned residential real property located in Baltimore, Maryland which a group of buyers expressed an interest in purchasing. Both the buyers and Ms. Norkunas signed a letter of intent that detailed key terms of an offer, and the buyers provided Ms. Norkunas with a check for a \$5,000 deposit. The letter of intent provided that Ms. Norkunas would receive the contract in the following few days. Upon receipt of the contract papers, Ms. Norkunas signed them, yet never returned the documents to the buyers or their agents. The buyers filed suit seeking specific performance of the letter of intent and the contract of sale.

The Court ruled in the buyers favor, and Ms. Norkunas appealed.



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Click [here](#) for biographical information for all of our attorneys.

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The Court determined that the letter of intent signed by Ms. Norkunas did not support the buyers' position that the parties had reached a final agreement at the time the letter of intent was signed. The Court explained that the name "letter of intent" implies that the parties intend it to be a non-binding expression in contemplation of a future contract. The Court identified two kinds of preliminary agreements that are binding and enforceable: (1) agreements that reflect that the parties have reached a complete agreement on all issues perceived to require negotiations and (2) agreements that contain a binding commitment to negotiate in good faith. The Court concluded that the letter of intent at issue did not fall into either category. The letter of intent, instead, represented an agreement that the buyers would submit a more detailed formal offer to Ms. Norkunas.

The Court also noted that a reasonable person in Ms. Norkunas's position would have construed the letter of intent to mean that the buyers wanted Ms. Norkunas to know the terms that the buyers were prepared to offer, and that the buyers were seriously interested in purchasing the property. Accordingly, the Court ruled that the letter of intent was not an enforceable contract.

In addition, the Court disagreed with the buyers' contention that Ms. Norkunas irrevocably accepted the offer when she privately signed the contract. The Court concluded that Ms. Norkunas's acceptance of the contract could not have taken effect until the signed documents were mailed to buyers or until they were otherwise out of her possession.

This case highlights the fact that a typical letter of intent will not constitute a binding agreement unless it falls within the specific circumstances noted by the Court.

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## **Lerch, Early & Brewer Real Estate Group News and Notes**

### **THE LATEST INFORMATION FROM OUR GROUP**



Lerch, Early & Brewer, Chtd. is proud to announce that six principals in the firm, including three from the firm's Land Use and Zoning Group, were recently selected as among the "Best Lawyers in America" by South Carolina-based Woodward/ White Inc.

The "Best Lawyers in America" is based on surveys conducted with over 24,000 attorneys across the country. Attorneys who are selected as among the "Best Lawyers" are done so based entirely upon the results of the survey of their peers.

The six Lerch, Early & Brewer attorneys selected to the Best Lawyers list include:

- **Robert G. Brewer, Jr.**, a principal in the firm's Land Use and Zoning and Health Care groups;
- **Eric M. Core**, Co-chair of the firm's Estate Planning and Probate Group;
- **Harry W. Lerch**, a principal in the firm's Land Use and Zoning Group;
- **Stanley J. Reed**, Chair of the firm's Litigation Group;
- **Deborah E. Reiser**, Chair of the firm's Family Law Group; and
- **Steven A. Robins**, a principal in the firm's Land Use and Zoning Group.

Several of the attorneys listed have been included in previous editions of "Best Lawyers". Mr. Brewer has been included since 1991, Mr. Lerch since 1999, and Ms. Reiser and Mr. Core since 2002.

The Best Lawyers list is a nationally-known and respected source which has been featured in the Washington Post, New York Times and Corporate Counsel magazine, as well as over 50 "best lawyers" features in regional newspapers and magazines across the country.

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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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**Steve Robins** recently received an award from the Montgomery County Department of Correction and Rehabilitation. The award was in recognition of Mr. Robins' efforts for the past five years as Chair of the Montgomery County Public Safety Awards, which honors Montgomery County's Police Department, Sheriff's Office, Park Police, Fire & Rescue, and Correction & Rehabilitation for acts of bravery, courage and distinction during the past year.

Additionally, at the Montgomery County Chamber's Annual Banquet on Wednesday, June 21, Steve was honored with the Chairman's Award for his excellent work on the Chamber's Board of Directors. Bill Robertson of Adventist Healthcare, the outgoing President of the Chamber, presented the award to Steve. In addition to being a member of the Chamber's Board of Directors, Steve was President of the Chamber during 2003-04.



The firm announces that **Michael D. Smith** has accepted a position with Lerch, Early & Brewer as an associate in the **Commercial Lending and Real Estate Transactions groups**. Mr. Smith received his J.D. from the Washington College of Law at American University in 2005. He received his B.A. in Political Science from American University in 1998, and his M.S. in Law, Justice and Society in 2000, also from American University.

Mr. Smith had worked as a paralegal with the firm since 2001. He is admitted to practice in Maryland.



**Alison Rind**, a principal in our **Commercial Lending and Real Estate Transactions groups**, recently received a distinction from the Montgomery County Bar Association as a Co-"Committee Chair of the Year" at the Bar Association's annual meeting and "Law Day" celebration luncheon. Ms. Rind received the award due to her efforts as co-chair of the Bar Association's Fall Outing Committee.

**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@lerchearly.com](mailto: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](http://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](mailto:BJHarris@lerchearly.com).

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