

LERCH EARLY & BREWER

Real Estate Law Update

Fall 2008

OUR PROFESSIONALS



Robert G. Brewer, Jr.
Chair, Land Use 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 triannually by the Real Estate Law Practice Group 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.

As always, we welcome article suggestions and requests. If you have a suggestion, you may send it to Bill Melchior at WGMelchior@lercheearly.com.

This newsletter is sent via email in HTML format. If you wish to print a copy of the newsletter, you may access a .pdf version by following the "Printer-Friendly version" link below.

We appreciate any feedback and invite you to contact us with any questions. If you do not want to receive any further newsletters from us, follow the link at the bottom of this email to be removed from our list of recipients.

Printer-Friendly Version (PDF Format)

In This Issue:

Rockville Zoning Ordinance Rewrite Nears Finale; Montgomery County Just Beginning

The train appears finally to be pulling into the station for the Rockville City zoning ordinance rewrite project. After a lengthy process, during which a City-wide development moratorium has been in effect, the Mayor and Council are finally scheduled to consider final changes, with adoption of the new ordinance as early as December 15, 2008.

Partnership Property Need Not be Titled in the Partnership Name to Qualify for Transfer Tax Exemption To L.L.C.

In the case of Wildwood Medical Center, L.L.C. v. Montgomery County, Maryland, The Maryland Court of Special Appeals ruled that the Montgomery County Circuit Court properly allowed exemptions from State transfer and recordation taxes in connection with a deed to a limited liability company from a group of family members who held record title in their individual names but operated the property as a partnership.

Residential Real Estate in Today's Market

As housing prices come down for the first time in over two decades and other investment options remain risky, many of you may be in the process of selling or buying residential real estate, either as your primary or secondary residence, or for investment purposes. Whether you are buying or selling a residence, given that there has been an increase in litigation arising out of the sale of residential properties, do your homework before you begin the contract drafting process and pay careful attention to the contract document language before you sign on the dotted line. This article discusses certain contract clauses included in your contract which should be given particular consideration.

Proposed Legislation Alert

Alert Regarding bills which affect Montgomery County, Maryland have been introduced in the State legislative delegation:

Real Property Tax Assessment Alert

The Maryland State Department of Assessments & Taxation reassesses approximately one-third of the properties in Montgomery County each year. Notices of Reassessment are mailed out from December through February.

News & Notes

On Friday, November 7, 2008, County Executive Isiah Leggett signed a memorandum of understanding (MOU) with Montgomery County Habitat for Humanity to purchase foreclosed



Martin J. Hutt
[Email](#)
 301-657-0170

properties, make necessary repairs and place qualified Habitat homeowners in the properties. Cindi Cohen, a partner in the firm's real estate department, worked with Habitat for Humanity on a pro bono basis in drafting and negotiating the MOU.

Rockville Zoning Ordinance Nears Finale; Montgomery County Just Beginning

THE TRAIN APPEARS FINALLY TO BE PULLING INTO THE STATION FOR THE ROCKVILLE CITY ZONING ORDINANCE REWRITE PROJECT. AFTER A LENGTHY PROCESS, DURING WHICH A CITY-WIDE DEVELOPMENT MORATORIUM HAS BEEN IN EFFECT, THE MAYOR AND COUNCIL ARE FINALLY SCHEDULED TO CONSIDER FINAL CHANGES, WITH ADOPTION OF THE NEW ORDINANCE AS EARLY AS DECEMBER 15, 2008.



Harry W. Lerch
[Email](#)
 301-657-0161

Rockville's zoning ordinance regulates development on all properties in the City of Rockville, including building height, setbacks and accessory structures, permitted land uses, and the size and scale of new development. The last time the City comprehensively updated its zoning ordinance was over 30 years ago.

The City hopes to make the ordinance much easier to understand. The three key goals of the revision are to create a user-friendly ordinance by using clearer language and eliminating archaic terminology, modernize the zoning concepts, and minimize the impact of zoning provisions on existing residential developments.

The completion of the new zoning ordinance will finally lift the City-wide development moratorium that has been in effect for two years. The moratorium has prohibited most development applications within the City, with only a few limited exceptions. The City is considering an extension of the moratorium for just the Rockville Pike corridor until a new master plan for the corridor can be prepared. If approved, that additional moratorium could keep the City's portion of Rockville Pike in the deep freeze for another six months to a year.



Lawrence G. Lerman
[Email](#)
 301-657-0163

Meanwhile, Montgomery County is in the initial stages of its own zoning ordinance rewrite project that is anticipated to last at least three years. The County shares the City's goals of making its zoning ordinance more user-friendly by looking at organization, format, clarity of language, and elimination of inconsistencies and redundancies. The County also will look carefully at the number of zones, the flexibility within them, and the possibility of a form-based scheme that would place more emphasis on visioning and design as opposed to the traditional focus on use tables and development standards.

So far, the County is in phase one of the project – "Zoning Code Diagnosis." Maryland-National Park & Planning Commission, the agency leading the project, hired a consultant group, Justice and Sustainability Associates, to facilitate several small feedback sessions and gather initial input from a variety of stakeholders. The consultant has assembled that feedback and on-line survey results into a report that was posted recently on the Park and Planning Commission website. The Commission next will conduct a series of workshops, currently scheduled for December, to discuss the results of the report and possible approaches to the rewrite.



Patrick L. O'Neil
[Email](#)
 301-657-0738

The County projects a 3 year timeline for the project. But if the City of Rockville process is any indication, extensions and delays are likely to slow it down, too.

Partnership Property Need Not be Titled in the Partnership Name to Qualify for Tax Exemption

IN THE CASE OF WILDWOOD MEDICAL CENTER, L.L.C. V. MONTGOMERY COUNTY, MARYLAND, THE MARYLAND COURT OF SPECIAL APPEALS RULED THAT THE MONTGOMERY COUNTY CIRCUIT COURT PROPERLY ALLOWED EXEMPTIONS FROM STATE TRANSFER AND RECORDATION TAXES IN CONNECTION WITH A DEED TO A LIMITED LIABILITY COMPANY FROM A GROUP OF FAMILY MEMBERS WHO HELD RECORD TITLE IN THEIR INDIVIDUAL NAMES BUT OPERATED THE PROPERTY AS A PARTNERSHIP.

Record title to certain real property was held by various members of the Aubinoe family and trusts for the benefit of such family members. In 2000, the co-owners began filing United States Partnership Tax Returns. In December, 2003, the co-owners executed a formal partnership agreement. Shortly thereafter, the partnership conveyed the property to Westwood medical Center, L.L.C., a limited liability company (the "LLC"). The membership of the LLC was comprised of the same members and in the same proportions and the members in the partnership. The LLC claimed that the transfer qualified for a recording and transfer tax exemption under Section 12-108(y)(2) of the Tax-Property



Alison W. Rind
Email
 301-657-0750

Article of the Annotated Code of Maryland. Section 12-108(y)(2) provides that a written instrument which transfers title to real property from a predecessor entity (which includes, without limitation, a general partnership) to a limited liability company is not subject to recordation tax if: (i) the members of the limited liability company are identical to the partners of the converting entity; (ii) each member's allocation of profits and losses post-conversion will be identical to those pre-conversion; and (iii) and instrument which transfers the real property represents the dissolution of the predecessor entity for the purposes of conversion to a limited liability company.

The County rejected the claimed exemption on the grounds that the property was never titled in the name of a general partnership. The LLC paid the various taxes under protest and the deed was recorded. The LLC then sought a refund of the taxes, which was denied by the County. The LLC appealed to the Maryland Tax Court which ruled that the transfer qualified for the exemption. The Montgomery County Circuit Court affirmed the Tax Court's decision. The County then appealed the issue to the Maryland Court of Special Appeals.



Steven A. Robins
Email
 301-657-0747

The Court of Special Appeals affirmed the decision of the Circuit Court and held that the transfer did qualify for the exemption. The Court explained that it is the intention of the parties, not the record title alone, that determines whether property not held in the name of the partnership is nonetheless partnership property, and that under the basic meaning of Section 12-108(y)(2), the statutory exemptions applied to the deed to the LLC, because the transferor was to be considered a Maryland general partnership. The Court explained that the partnership confirmed its existence by the terms of a written partnership agreement and that the intent of the members to carry on as a partnership was manifested by the fact that they filed U. S. Partnership Tax Returns for years previous to executing the formal agreement. In fact, the Court found additional evidence of intent to carry on as a partnership as far back as the 1960s when the owners originally subdivided the real property, and in the 1990s re-subdivided the property while conducting themselves and characterizing themselves as partners.

The Court of Special Appeals rejected Montgomery County's argument that the record title owners never previously re-titled the property in the name of the partnership and therefore avoided paying transfer and recordation taxes. The Court stated that surrounding circumstances indicated that the Aubinoes intended and used the property as co-owners of a business venture and therefore the property was partnership property. Record title was not dispositive of the issue. The fact that the property was not titled in the name of the partnership, or a trustee or nominee of the partnership, did not defeat the claim for an exemption.



Arnold D. Spevack
Email
 301-657-0749

Residential Real Estate in Today's Market

AS HOUSING PRICES COME DOWN FOR THE FIRST TIME IN OVER TWO DECADES AND OTHER INVESTMENT OPTIONS REMAIN RISKY, MANY OF YOU MAY BE IN THE PROCESS OF SELLING OR BUYING RESIDENTIAL REAL ESTATE, EITHER AS YOUR PRIMARY OR SECONDARY RESIDENCE, OR FOR INVESTMENT PURPOSES. WHETHER YOU ARE BUYING OR SELLING A RESIDENCE, GIVEN THAT THERE HAS BEEN AN INCREASE IN LITIGATION ARISING OUT OF THE SALE OF RESIDENTIAL PROPERTIES, DO YOUR HOMEWORK BEFORE YOU BEGIN THE CONTRACT DRAFTING PROCESS AND PAY CAREFUL ATTENTION TO THE CONTRACT DOCUMENT LANGUAGE BEFORE YOU SIGN ON THE DOTTED LINE.

This article discusses certain contract clauses included in your contract which should be given particular consideration.

The local jurisdictions use different forms of residential purchase contracts. Purchasers and sellers are well advised to read the document carefully before signing. Make sure that the agent, if one is involved, completed the proper addenda to the contract. Don't be afraid to ask questions of the agent.



Stuart R. Barr
Email
 301-961-6095

When purchasing property, pay close attention to the property condition requirements and representations contained in the contract as failure to do so could jeopardize your sale. In Maryland, as noted above, sellers are required to either expressly decline to provide any information concerning property condition or to completely disclose all known defects. Sellers should pay close attention to the representations regarding known defects and latent defects in the property. A latent defect is a material defect in real property or the improvements which a buyer could not reasonably be expected to ascertain in a careful inspection and would pose a threat to the health or safety of an occupant of the property. Even if a seller decides to sign a property disclaimer instead of a property disclosure, latent defects of which a seller has knowledge must still be disclosed. A purchaser has the right to rescind the contract at any time within 5 days of receipt of the disclosure or disclaimer statement (but no later than the closing on the sale of the property or occupancy in a lease with option to



April H. Birnbaum
Email
 301-347-1267



Vicki R. Canales
Email
 301-907-2803



Jeremy I. Goldman
Email
 301-657-0732



Michael D. Smith
Email
 301-657-0166

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

OUR SERVICES

Representation of developers and investors in

purchase). While a seller is not required to undertake or provide an independent investigation of the property, if a seller elects not to sign a disclaimer statement, the seller must disclose all information within the knowledge of the seller. This includes repairs that may have been completed years ago. Sellers should review repair receipts when completing the disclosure statement. We have seen many instances where a buyer claimed that the seller failed to disclose certain property conditions when repairs were made many years ago, and not disclosed. Litigation frequently results – and, in that instance, both buyer and seller lose.

In addition to the disclosure/disclaimer statements, many purchasers will require a property inspection contingency. Pay close attention to the property inspection contingency clause and exercise your rights in accordance with the requirements of the contingency. There are generally two types of inspection contingencies general and specific. In the instance of the first form of contingency – the general inspection contingency – after undertaking the inspection of the property, the buyer has the right to cancel the contract for any reason within the time frame of the contingency. The specific form of inspection contingency gives the buyer the right to have the property inspected and, the right to require that certain items be repaired to satisfy the contingency. The seller can refuse to do the repairs and terminate the contract. As a seller, a specific inspection contingency where specific repair items are noted is preferred, as this gives the seller the opportunity to agree to repair items so that the contract will remain in full force and effect. If a general inspection contingency is used, a purchaser has the right, without any input or response from the seller, to cancel the contract. In the event a specific contingency is utilized, the seller will have a time frame to respond to a purchaser's repair requests. So long as the seller agrees to the repairs as identified in the report during the time period a seller is given under the contingency, then the contract remains in full force and effect. In the event the seller counter-offers the repair request, or declines to make any repairs, the purchaser then has the option (during a specified time frame) to cancel the contract. Failure to respond to any request under the inspection contingency will be deemed acceptance of the terms under the most recent notice provided. Some specific inspection contingencies also allow a purchaser to just cancel the contract during the contingency period. If a seller wants the opportunity to respond to any inspection requirements, then this general cancellation option must be deleted. If a purchaser fails to provide notice of repairs (or cancellation) within the timeframe set forth in the contract, then the contingency is lost and the contract remains in full force and effect.

The parties will also need to determine if a property will be sold in an "as is" condition. "As-is" means the property is sold with all faults and defects. If the property is being sold "as is", the contract should also determine that date in which the property is delivered "as is". Is it the date of ratification, the date of the home inspection or the date of closing? If the property is not sold "as is", pay attention to the property condition paragraph of the sales contract. The property condition paragraph identifies certain components that must be in working order at the time of closing. Also make sure there are no conflicting provisions in the contract and make the necessary changes to the document. For example, if the parties truly intend that the termite clause be deleted, strike the operative paragraph. In an "as is" contract, any representations in the contract as to property condition should be stricken. If the "as is" condition clause does not specifically delete any other clauses in the contract that pertain to contract condition, these clauses must be stricken prior to final ratification.

Financing contingencies are very important given the current economic climate. It may become more difficult for purchasers to obtain loans; and, even if purchasers believe they should be qualified for financing, it is probably prudent to include a financing contingency. Again, the contingency should be examined closely. What are the purchasers' obligations to satisfy the contingency? Some contract forms provide that application must be made within a certain time frame for the financing described in the contract and notice to the seller must be delivered within a certain time frame in the event the financing is not obtained. Other contract forms may provide that if financing is not provided to the purchaser within a certain time frame, the seller or the purchaser may cancel the contract. Read the operative language of the contract before signing – and make certain that both buyer and seller understand what their rights and obligations are.

Given that property values appear to be on the decline, an appraisal contingency may be warranted. An appraisal contingency provides that if the property does not appraise for the sales price, the contract may be cancelled (with the return of the deposit to the purchaser) unless the seller agrees to reduce the sales price to the appraised value.

Also, understand the significance final ratification date. Many contract clauses rely on the ratification date to calculate timeframes for responses. For example, inspection contingency deadlines, financing contingency expiration and settlement dates are frequently tied to the final ratification date.

Finally, understand which document creates the binding contract between buyer and seller. Frequently, a purchaser will submit an offer to purchase a property, and a seller will provide a counter-offer with slightly different terms interlined in the document. However, the seller's counter-offer operates as a rejection of the purchaser's offer – and a new offer to the purchaser to

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

Creditors' Rights & Workouts

Employment and Labor

Elder Law

Estate Planning and Probate

sell the property on the terms specified. Whether the final contract is based upon an offer from the purchaser or the seller will depend upon who "rejected" the last offer and who "accepted" the contract terms. If in doubt, clarify when the document is in a final version – and ensure that the date of final acceptance is the ratification date.

This article merely highlights some of the important provisions of a contract for you to consider. It is certainly not an exhaustive list. Depending on the type of property you are purchasing, your intended use and your particular circumstances, there are many other provisions which should either be included or excluded from your sales contract. The attorneys of our real estate transactions group are here to assist you in negotiating your contract.

Proposed Legislation Alert

THE FOLLOWING BILLS WHICH AFFECT MONTGOMERY COUNTY, MARYLAND HAVE BEEN INTRODUCED IN THE STATE LEGISLATIVE DELEGATION:

Bill No. MC 906-09 sponsored by Delegate Carr and others would authorize the County to impose different property tax rates on different classes of property. The District of Columbia has a similar law and requires commercial and industrial property owners to pay a higher property tax rate. A hearing on this bill will be held on December 11, 2008, at 7:00 p.m. in the first floor auditorium of the Executive Office Building in Rockville.

Bill No. MC-PG 112-09 sponsored by Delegate Carr and Senator Madaleno would authorize a municipality to appeal Board of Appeals decisions to the Circuit Court even though the municipality did not participate in the hearing. Among other consequences, approval of this legislation could result in considerable delay. Public hearing on this Bill is scheduled for is December 8, 2008, at 7:00 p.m.

Bill No. MC-111-09 sponsored by Delegate Carr and Senator Madaleno would allow municipalities to impose more stringent sign restrictions than are imposed by state or county authorities. Public hearing on this Bill is also scheduled for is December 8, 2008, at 7:00 p.m.

Real Property Tax Assessment Alert

THE MARYLAND STATE DEPARTMENT OF ASSESSMENTS & TAXATION REASSESSES APPROXIMATELY ONE-THIRD OF THE PROPERTIES IN MONTGOMERY COUNTY EACH YEAR.

Notices of Reassessment are mailed out from December through February. The notice will provide for an appeal period. Any appeal must be filed within the appeal period stated in Notice. The winter addition of our firm's general newsletter will contain an article by Marty Hutt describing the appeal process. Marty and Steve Robins, both partners in the firm's land use department, would be happy to discuss with you any questions you might have about your property and the appeal process.

News & Notes

On Friday, November 7, 2008, County Executive Isiah Leggett signed a memorandum of understanding (MOU) with Montgomery County Habitat for Humanity to purchase foreclosed properties, make necessary repairs and place qualified Habitat homeowners in the properties. Cindi Cohen, a partner in the firm's real estate department, worked with Habitat for Humanity on a pro bono basis in drafting and negotiating the MOU.

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 Bill Melchior at WGMelchior@lercheary.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 Business and Taxation, Community Associations, Employment and Labor, and Health Care. If you would like one or more of these newsletters, you

Family Law

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. Melchior at WGMelchior@lercheearly.com.

Health Care

**Land Use and
Zoning**

Litigation

**Real Estate
Transaction**

SUITE 460 | 3 BETHESDA METRO CENTER | BETHESDA MD 20814-5367
TEL: 301.986.1300 | www.lercheearly.com
COPYRIGHT 2005, LERCH EARLY & BREWER, CHARTERED

The information in this newsletter is not intended to constitute legal advice and should not be acted upon without consulting an attorney.

