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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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**Printer-Friendly Version** (PDF Format) (To download a free copy of Adobe Acrobat, [click here.](#))

**In This Issue:****Unambiguous Language is Critical When Drafting Complex Leases**

In a recent case, the Maryland Court of Special Appeals considered a number of issues surrounding retail leases and loans secured by retail centers, including radius restrictions, in determining whether a lease agreement had been violated.

**Blighted Properties and Parking Lots: Virginia Court Weighs In on Condemnation and Property Rights**

For the first time in 50 years, the Virginia Supreme Court has allowed a property owner to defeat a housing authority's attempt to condemn private property. However, one still ought not consider the rights of private property owners to reign supreme in Virginia.

**Court of Special Appeals Further Defines the "Practical Difficulty" Needed to Obtain a Variance**

A recent case sheds new light on the "practical difficulty" element of a variance request in Montgomery County.

**Planning Board Considers Development Review Manual and Adopts Revised Rules of Procedure**

The Montgomery County Planning Board has proposed a Development Review Manual describing the development plan application and review process and has revised its Rules of Procedure for Planning Board hearings.

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

The latest news and information from our firm.

**Unambiguous Language is Critical When Drafting Complex Leases**

**IN A RECENT CASE, WELLS FARGO BANK, N.A. V. DIAMOND POINT PLAZA, L.P., THE MARYLAND COURT OF SPECIAL APPEALS CONSIDERED A NUMBER OF ISSUES SURROUNDING RETAIL LEASES AND LOANS SECURED BY RETAIL CENTERS, INCLUDING RADIUS RESTRICTIONS, IN DETERMINING WHETHER A LEASE AGREEMENT HAD BEEN VIOLATED.**



The case involved The Diamond Point Shopping Center where Sam's Club, a prime tenant, ceased operations at the Center, opened a new store in close proximity, and granted a license to a non-retail operator for use of the Diamond Point premises. Sam's Club, as well as the owner of the shopping center and its lender, were parties to the case, which involved various appeals and cross appeals too numerous to address here. Instead, this article will focus only on the issue of the violation of a radius restriction.

The Sam's Club lease contained a clause which provided that Tenant "shall not, during the term of this lease, own, operate, manage or have any financial interest in, any store or business located within a radius of seven miles from the Shopping Center and similar to



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that then being conducted upon the demised premises.” Sam’s Club ceased operations at the Diamond Point Shopping Center and the next day opened a new store at the Golden Ring Mall, less than seven miles away.

Sam’s Club contended that its actions did not violate the radius restriction clause because the operations of the new store at Golden Ring were not similar to the operations **then** being conducted at Diamond Point, because Sam’s Club was at that time having no operations at Diamond Point. Sam’s Club argued that for the radius restriction to be violated, the Sam’s Club stores at both Diamond Point and Golden Ring would have to have been open at the same time. The lower court agreed with this argument and granted partial summary judgment in favor of Sam’s Club on this issue.

In its appeal, Wells Fargo, the lender, argued that the phrase “then being conducted” referred back to the prior phrase “during the term of this lease,” and that the restriction referred to a continuum of time, not a snapshot of a specific moment.

The Court of Appeals found that both interpretations were reasonable. Therefore, it reversed the lower court’s granting of partial summary judgment and sent the case back to the Circuit Court to consider any other information available for a proper determination of what the parties intended.

This case serves as a reminder that it is important that the language be as clear and unambiguous as possible when drafting leases, especially when the lease is the subject of extensive negotiations.

[Home](#)

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## Blighted Properties and Parking Lots: Virginia Court Weighs In on Condemnation and Property Rights

**FOR THE FIRST TIME IN 50 YEARS, THE VIRGINIA SUPREME COURT HAS ALLOWED A PROPERTY OWNER TO DEFEAT A HOUSING AUTHORITY’S ATTEMPT TO CONDEMN PRIVATE PROPERTY. HOWEVER, ONE STILL OUGHT NOT CONSIDER THE RIGHTS OF PRIVATE PROPERTY OWNERS TO REIGN SUPREME IN VIRGINIA.**

In *Norfolk Redevelopment and Housing Authority v. C and C Real Estate, Inc.*, the Virginia Supreme Court affirmed the Norfolk Circuit Court’s dismissal of condemnation proceedings that threatened to require C&C to sell its property to the Housing Authority which would have, in turn, sold the property to a Coca-Cola bottling plant for use as parking facilities.

In 1987, the Housing Authority was commissioned to examine land around North Church Street in Norfolk for possible condemnation due to perceived blight and deterioration in the neighborhood. The Housing Authority recommended a condemnation plan, adopted by the City Council the following year, which allowed the Housing Authority to acquire land in the neighborhood by eminent domain. Specifically, the plan earmarked two junk yards for acquisition. By 1990, one of the junk yard owners had received a notice from the Housing Authority requiring it to correct deficiencies on the property. The second junk yard received no such notice, and was leased by its then-owner to Downtown Used Auto Parts in 1992. In 1997, C&C purchased the yard and continued leasing it to Downtown Used Auto Parts.

Around this time, the Mid-Atlantic Coca-Cola Bottling Company began discussing expansion of its neighboring facilities with the Housing Authority, and specifically requested that the City of Norfolk convert the junkyard to a parking facility for use by Coke’s employees. In 1999, C&C received a notice from the Housing Authority of its intent to acquire the property based on the 1988 condemnation plan. The Housing Authority subsequently made an offer to purchase the junk yard from C&C, which C&C ultimately rejected. In 2003, the Housing Authority made a second offer to purchase C&C’s junk yard. When C&C refused this offer, the Housing Authority began condemnation proceedings. The circuit court dismissed the condemnation proceedings and the Housing Authority appealed.

The Supreme Court ultimately upheld the circuit court’s dismissal of the condemnation because (i) the conservation plan’s statement of authorization was broader than that allowed by the Virginia Code regarding condemnation of private property; and (ii) C&C never received notice to correct deficiencies on the property, as required by the Virginia Code.

Although this was a technical victory for C&C, the decision also establishes difficult hurdles for private property owners to overcome when defending against condemnation proceedings by requiring them to prove, by “clear and convincing evidence,” that their property was no longer a blight or blighting influence on the surrounding area. Here, C&C had pointed to evidence of discussions between Coke and the Housing Authority and the fact that it had improved the property by adding water and sewer service, adding a privacy fence, and by painting and repairing certain facilities and demolishing a dilapidated building. However, the Court was not convinced that this negated the blight and pointed to an expert witness for the Housing Authority who asserted the property remained incapable of rehabilitation.

Although one of the most disturbing facts from the point of view of a private property owner is that the Housing Authority was apparently in collusion with Coke to eventually sell the property to Coke, the Court did not take issue with this fact. The Court even acknowledged that one of the purposes of a conservation plan is to acquire and re-sell –



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even to other private enterprises – blighted property so that it can be rehabilitated. In summary, the practical effect of the case is twofold: (i) private property owners now have to prove their property is no longer blighted when defending against condemnation proceedings; and (ii) the Virginia Supreme Court has validated the practice of taking private property from a viable and growing enterprise and re-selling it to a larger and more influential private enterprise for the purpose of eliminating blight, even when such “elimination” merely consisted of the construction of a parking lot.

Concerned Virginians may be happy to note that some of their legislators are also concerned and are taking action to protect the rights of property owners.

For example, time limits have been imposed on redevelopment plans, preventing property from being condemned pursuant to a plan more than five years after approval of the plan. Had this been in effect as early as 1993, C&C may not have had its property condemned at all. Other legislation is currently proposed that will bolster the rights of private landowners by (a) preventing re-zoning of property condemned pursuant to spot blight abatement (and thereby potentially discouraging attempts to condemn property); (b) sharing with the original owner 50% of any gain the government realizes when it re-sells condemned property to a private entity; (c) allowing for compensation of business losses when condemned property is used in connection with the operation of a business; and (d) preventing eminent domain from being used to eliminate blight unless the property is in fact blighted or a danger to public health, safety or welfare.

Perhaps the most powerful single piece of legislation proposed to protect private property owners is that which attempts to clarify the definition of “public use” for purposes of eminent domain. The proposed legislation would exclude from the definition of public use the following goals: (i) conferring financial gain on a private person; (ii) enhancing tax revenues; or (iii) furthering economic development or employment. Further, the new proposal would limit the definition to owning, possessing, occupying and enjoying of land by the public or public agencies, public corporations or public service companies.

While only time will tell whether the proposed legislation will ultimately pass, or be successful at its intended purposes, we will all be watching intently for further developments.



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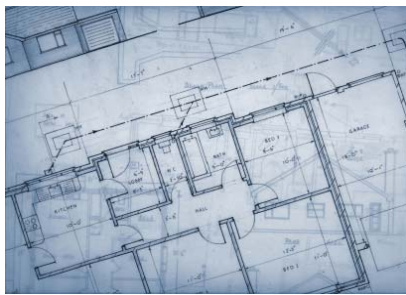
[Home](#)



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## Court of Special Appeals Further Defines the “Practical Difficulty” Needed to Obtain a Variance

**IN MONTGOMERY COUNTY V. ROTWEIN, THE MARYLAND COURT OF SPECIAL APPEALS RECENTLY AFFIRMED THE MONTGOMERY COUNTY BOARD OF APPEALS’ DECISION TO DENY A PROPERTY OWNER’S REQUEST FOR A VARIANCE TO CONSTRUCT A TWO-CAR GARAGE ON HER PROPERTY.**



The Board of Appeals’ decision is not unusual because it currently approves very few variances in the County. What is notable is the Court’s acceptance of the Board of Appeals’ reasons for the denial, which sheds new light on the “practical difficulty” element of a variance request.

In Rotwein, an elderly woman sought a front and side yard variance to construct an enclosed garage on the front corner of her property. The proposed construction required a three foot variance from the applicable setback from her neighbor’s property and a seven foot variance from the setback from the

street in front of her house. Mrs. Rotwein stated two reasons to support her variance request. First, as an elderly woman, Mrs. Rotwein wished to have the ability to exit her car and enter her house without being exposed to the elements. Second, the other sizes (one-car vs. two-car garage) or locations for the garage would be substantially more expensive than the size and location proposed.

Section 59-G-3.1(a) of the Montgomery County Zoning Ordinance sets forth the elements that a variance applicant must prove. In practice, the Board of Appeals engages in a two-step analysis which asks: (1) is the property unique or unusual in a manner different from surrounding properties and (2) if so, does the uniqueness of the property cause the applicable setback requirement to impact disproportionately on that property? If the first inquiry results in a supportable finding of uniqueness, then the Board of Appeals determines whether the practical difficulty, resulting from the disproportionate impact of the setback caused by the uniqueness, exists. In Rotwein, the Board of Appeals made no determination regarding “uniqueness” but concluded that Mrs. Rotwein failed to demonstrate “practical difficulty.” The Court of Special Appeals affirmed this ruling – even though there was no finding on uniqueness – because Mrs. Rotwein would have lost on practical difficulty in any event.

It is established in Maryland law that the claimed practical difficulty may not be derived from the resulting inconvenience if the applicant does not obtain the variance or from the applicant’s own actions. Because there was ample room elsewhere within the setbacks to build a garage, Mrs. Rotwein’s chosen location, set some distance apart from the house and



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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.

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connected by an entryway, was determined to be a matter of convenience. The Court of Special Appeals further found that Mrs. Rotwein's prior decisions to construct a tennis court and swimming pool on her property constituted a self-created hardship that precluded a finding of practical difficulty in the present case. In other words, Mrs. Rotwein ran out of alternative garage sites because the property was filled with her other improvements. This latter finding is perplexing because there was no evidence in the record to suggest that the tennis court or swimming pool were viable sites for a garage. In fact, Mrs. Rotwein's architect testified that the grading and mature vegetation at these locations make construction of a garage infeasible. Nonetheless, the Board of Appeals may now make its own determinations about a property owner's prior development choices when it reviews whether a variance request meets the practical difficulty test.

#### Home

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### Planning Board Considers Development Review Manual and Adopts Revised Rules of Procedure

**IN AN EFFORT TO RESTORE SOME DEGREE OF ORDER TO AN OTHERWISE CHAOTIC REGULATORY UNIVERSE, THE MONTGOMERY COUNTY PLANNING BOARD HAS PROPOSED A DEVELOPMENT REVIEW MANUAL DESCRIBING THE DEVELOPMENT PLAN APPLICATION AND REVIEW PROCESS AND HAS REVISED ITS RULES OF PROCEDURE FOR PLANNING BOARD HEARINGS.**

As of the date of this article, the Board has adopted the revised Rules of Procedure and forwarded them to the County Council for its consideration and approval. The Board currently is considering a draft of the Manual in work session discussions and will probably schedule a public hearing sometime in the near future for public comments.

The Development Review Manual aims to clarify the process for the submission, review, approval, and amendment of development plans. The Manual covers Pre-Preliminary Plans, Preliminary Plans, Project Plans, Site Plans, Plan Amendment Requests, Record Plats, and applications for Extensions and Subdivision Regulation Waivers.

The Manual contemplates a two-step application process – the 'initial' application for accuracy and completeness, and a 'final' application containing the entire set of materials, certificate of compliance, statement of justification, and filing fees. The Manual provides the notice requirements that must be followed for the submission of plans, including pre-submission meetings with the community, sign posting on the property, and written notice of the application. It provides that a Development Review Committee meeting will be scheduled within three weeks of distribution of the application to government agencies and provides a total 'typical' staff review timeframe of 90-120 calendar days from plan distribution until a Planning Board hearing.

The Manual describes the staff report preparation phase and notice of the public hearing. The Manual also describes the submission of exhibits at the Board hearing, but leaves most of the substance of the Board hearing to the Rules of Procedure. The Manual covers the post-approval processes involving the preparation of certified site plans and record plats, amendments of plans, subdivision regulation waiver requests, and validity period extension requests.

The Manual is meant to complement the revised Rules of Procedure which govern the way the Board conducts its public hearings. The Rules of Procedure cover many more of the specifics of the actual hearing including notice, evidence, time limits for presentation, public participation, and Board decisions.

If you have any questions about either the Development Manual or the revised Rules of Procedure, please contact our Land Use Group. Harry Lerch has served on the Development Review Manual Focus Group, a select group of individuals assisting the Planning Board staff with the preparation of the draft Manual.

#### Home

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

#### THE LATEST INFORMATION FROM OUR GROUP

##### Jeremy Goldman Joins Lerch, Early & Brewer



Lerch, Early & Brewer recently announced that **Jeremy I. Goldman** had joined the firm as an associate in the Real Estate Transactions and Commercial Lending groups. Mr. Goldman practices primarily in the area of commercial transactions, including sales, acquisitions, financing and leasing matters.

Previously, Mr. Goldman worked as an associate in the Washington, D.C. office of Bingham McCutchen LLP and for the New York office of Weil, Gotshal & Manges LLP.

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Zoning

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Real Estate  
Transactions

Mr. Goldman received his J.D. from the University of Pennsylvania Law School in Philadelphia, PA in 2001 where he received honors as Senior Editor of the Journal of Constitutional Law. He received his B.A., summa cum laude, in English, from Queens College in Flushing, New York in 1998.

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Three Lerch, Early & Brewer attorneys were recently involved in a significant land use case in Prince George's County, Maryland, regarding a client of the firm--a large shopping center--and the efforts of a small group of citizens to have the shopping center torn down. **Harry Lerch, Ron Early** and **Stuart Barr** of our firm represented the shopping center in the case.

Several years ago, in response to overcrowded schools and a lack of shopping destinations in the County, the Prince George's County Council amended the zoning ordinance to allow shopping centers to be built on large tracts of land zoned for townhouses. Though the amendment had widespread support, a small group of homeowners were in opposition to it. They appealed both the amendment of the zoning ordinance as well as the approval of site plan for the newly-constructed Vista Gardens Shopping Center. Seeking to have the amendment repealed and the shopping center torn down, their appeal eventually ended up in the Maryland Court of Special Appeals.

On Monday, February 12, in a significant victory for our client, the Court released its opinion, stating that the shopping center could remain open and denying the request to invalidate zoning ordinance. A copy of the Court's opinion can be found at <http://mdcourts.gov/opinions.html>.

Be certain to look for the next issue of our firm's newsletter, the Legal Update, for a more in-depth analysis of this important case.



Lerch, Early & Brewer, Chtd. is proud to announce that three firm attorneys, along with four of the firm's practice groups, were selected to be included in the 2007 Chambers USA Legal Guide as "Leaders in Their Field". Chambers and Partners is a UK-based publisher of guides to the legal profession.

The attorneys selected include **Robby Brewer**, Chair of the Land Use and Zoning Group and a principal in the Health Care Group, **Paul DiPiazza**, a principal in the Business and Taxation Group, and **Stan Reed**, Chair of the Litigation Group. Chambers and Partners conducts in-depth interview with firm clients when selecting attorneys and practice groups to include in the guide. The company also publishes annual guides for the UK and global legal markets.

In addition to the attorneys listed above, the firm's Business and Taxation, Litigation, Land Use and Zoning, and Health Care groups will be appearing in the 2007 directory. Additional information can be found at [www.chambersandpartners.co.uk](http://www.chambersandpartners.co.uk).



Lerch, Early & Brewer, Chtd. is proud to announce that six principals in the firm were recently selected to appear in the 2007 edition of 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 three Lerch, Early & Brewer real estate attorneys selected to the Best Lawyers list

include:

**Robert G. Brewer, Jr.;**  
**Harry W. Lerch;**  
**Steven A. Robins**

Additionally, three other attorneys in the firm were selected for inclusion. They include:

**Eric M. Core**, Co-chair of the firm's Estate Planning and Probate Group;  
**Stanley J. Reed**, Chair of the firm's Litigation Group;  
**Deborah E. Reiser**, Chair of the firm's Family Law Group; and

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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Throughout December and January, **Larry Lerman, Vicki Canales, Alison Rind** and others in the group presented a seminar entitled "Understanding Insurance Coverages and Controlling Insurance Proceeds: A Primer for Lenders and Landlords." The seminar, held in multiple locations, attracted lending and real estate professionals from across the region for a discussion on important insurance issues. The discussion included an overview of the different types of coverages available and the extent of their coverage, the purpose of (and limitations of) ACORD forms, and ways that lenders and landlords can control insurance proceeds to ensure that they and their borrowers/tenants are adequately protected. A copy of the PowerPoint presentation given is available by [clicking here](#).

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

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