

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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Transfer Of Title To Limited Liability Company Does Not Qualify For Tax Exemption

Last March, the Maryland Court of Special Appeals held that a transfer of land from a general partnership to a limited liability company was not tax-exempt because title to the property was held by the individual partners, not the partnership.

Maryland Courts Strictly Construe Restrictive Covenants on Real Property

The Maryland Court of Appeals reaffirmed that the Maryland Courts will enforce restrictive covenants on real property. Generally, such covenants restrict what can be constructed on a parcel of real property, or the use of the property.

Open Contract Terms: The Need To Be Open-Minded

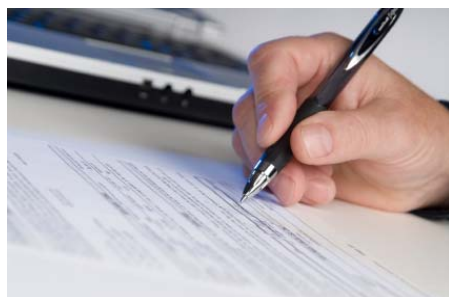
Ambiguity is considered by many to be the mortal enemy of the otherwise well-drafted legal document. It hardly bears mentioning that the drafters of legal documents strive for certainty, predictability and agreement in definitions, obligations and terms.

Lerch, Early & Brewer Real Estate Group News and Notes

The latest news and information from our firm.

Transfer Of Title To Limited Liability Company Does Not Qualify For Tax Exemption

LAST MARCH, THE MARYLAND COURT OF SPECIAL APPEALS HELD THAT A TRANSFER OF LAND FROM A GENERAL PARTNERSHIP TO A LIMITED LIABILITY COMPANY WAS NOT TAX-EXEMPT BECAUSE TITLE TO THE PROPERTY WAS HELD BY THE INDIVIDUAL PARTNERS, NOT THE PARTNERSHIP.



Title to Montgomery County's Wildwood Manor was vested in several members of the Aubinoe family and in trusts on their behalf. On December 22, 2003, the title holders signed a partnership agreement, claiming that they had been acting as a partnership for years. The next day, the partnership presented a deed to the Montgomery County transfer office for processing. The deed conveyed title from several individuals and trustees of revocable trusts and family trusts "doing business as Wildwood Medical Center General Partnership, to Wildwood Medical Center, L.L.C."

When the deed was recorded among the Land Records, Wildwood Medical Center, L.L.C. paid \$88,259.25 in recordation and transfer taxes to Montgomery County. The LLC then



Martin J. Hutt
Email
301-657-0170

claimed a refund of these taxes, based on a provision in the tax law that permits a tax-exempt transfer from a partnership to a limited liability company if the individual partners remain the same with the same ownership interest. However, the county denied the refund request, and the LLC appealed to the Maryland Tax Court. The Tax Court granted the refund request, and Montgomery County Circuit Court affirmed the Tax Court's decision. Montgomery County appealed the Circuit Court's decision to the Maryland Court of Special Appeals, which overturned the ruling and found in favor of the County.

In its opinion, the Court distinguished between "title" and "ownership"

In its opinion, the Court distinguished between "title" and "ownership," and ruled that the exemption for transfer and recordation taxes does not apply when the partners, rather than the partnership, held title.



Harry W. Lerch
Email
301-657-0161

The Court held that the Aubinoe family could only have avoided paying the taxes on the transfer to the LLC if they had first conveyed title to Wildwood Manor from the individual partners to the partnership, which would have been a taxable conveyance. Accordingly, since they would have paid taxes on the transfer from the individuals to the partnership, they would have been exempt from paying taxes on the transfer from the partnership to the LLC.

The lesson to take away from this case is that to ensure that a transfer of title to an LLC qualifies for a tax exemption in Montgomery County, the title must be held by the partnership—and not the individual partners.

This case is cited as *Montgomery County v. Wildwood Medical Center*, CSA No. 2280, Sept. Term 2005.

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Lawrence G. Lerman
Email
301-657-0163

Maryland Courts Strictly Construe Restrictive Covenants on Real Property

THE MARYLAND COURT OF APPEALS, IN THE RECENT DECISION OF CITY OF BOWIE V. MIE PROPERTIES, INC. (CAE02-25274, MAY 4, 2007) REAFFIRMED THAT THE MARYLAND COURTS WILL ENFORCE RESTRICTIVE COVENANTS ON REAL PROPERTY. GENERALLY, SUCH COVENANTS RESTRICT WHAT CAN BE CONSTRUCTED ON A PARCEL OF REAL PROPERTY, OR THE USE OF THE PROPERTY.



Alison W. Rind
Email
301-657-0750



This case involved a restrictive covenant, recorded in 1986, encumbering a parcel of land in Prince George's County by obligating the original developer to develop the property as a "science and technology research and office park.". The successor to the original developer of the parcel, also the original covenantee, sought to challenge the continuing enforceability of the covenant based upon what it contended was a change of circumstances that obviated the purpose for it. When the covenant was first put in place, the City of Bowie annexed the property and extended roadways, water and storm water management. The covenant, among other

things, restricted the use of the property to science, technology, research and related uses. The developers and the City of Bowie originally conceived the project as an affiliation with the University of Maryland. Unfortunately for the developer, that affiliation was terminated in 1999 and the developer filed for bankruptcy.

Ownership of the Property changed several times after 1985. Around 2000, MIE Properties acquired the remaining portions of the property and began developing it as "flex-space." In 2001, MIE leased a portion of the space to a dance studio which the City of Bowie contended was in violation of the covenant.

...before a developer enters into a contract to purchase a parcel of real estate it is wise to review the applicability of any restrictive covenants that might bind the property



Steven A. Robins

Email
301-657-0747

After a somewhat protracted procedural history before the Maryland Courts, the case came before the Court of Appeals. The Court examined the case in the context of the four elements necessary to create a covenant that can run with the land: (1) the covenant must "touch and concern" the land; (2) the original covenanting parties must intend the covenant to run with the land; (3) there must be privity of estate between the covenantor and the covenantee; and (4) the covenant must be in writing.

The Court examined the covenant in the context of the original plan for development as a science and technology park affiliated with the University of Maryland. However, the Court reached the conclusion that the affiliation was, in reality, in name only, and that the park was to be developed with or without the involvement of the University. The Court held that chief among the factors considered in evaluating the present circumstances relevant to determining the continuing validity of a restrictive covenant is whether there had been a "radical change in the neighborhood causing the restrictions to outlive their usefulness." The Court held that the mere passage of time alone does not provide a basis to invalidate a covenant. Ultimately, the Court held that the covenant was enforceable against the improper use as a dance studio.



Arnold D. Spevack

Email
301-657-0749

The moral of the story is that before a developer enters into a contract to purchase a parcel of real estate it is wise to review the applicability of any restrictive covenants that might bind the property. Frequently, title insurers are willing to "insure over" a restrictive covenant; however, the mere issuance of a title insurance policy does not provide any assurance that the property can be put to a use inconsistent with the restrictive covenant. It is thus important to read and analyze the covenant language carefully before proceeding.

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Stuart R. Barr

Email
301-961-6095

Open Contract Terms: The Need To Be Open-Minded

AMBIGUITY IS CONSIDERED BY MANY TO BE THE MORTAL ENEMY OF THE OTHERWISE WELL-DRAFTED LEGAL DOCUMENT. IT HARDLY BEARS MENTIONING THAT THE DRAFTERS OF LEGAL DOCUMENTS STRIVE FOR CERTAINTY, PREDICTABILITY AND AGREEMENT IN DEFINITIONS, OBLIGATIONS AND TERMS.

Nonetheless, when contracting parties enter into a business relationship in which certain details, actions or obligations cannot be specifically set forth in advance, the parties often establish general standards that will allow them or a neutral decision maker some basis for interpretation. Common examples of such "open" contracts terms are promises to use "best efforts" or to make "reasonable efforts" to accomplish a particular goal. Because such terms have no precise definition a party may accidentally bind itself to an unanticipated result, particularly when a jury or judge is called upon to render a decision.



Vicki R. Canales

Email
301-907-2803

To date, the Maryland courts have not distinguished between "best efforts," "reasonable efforts" and such similar terms as "commercially reasonable efforts." Ironically, the Maryland courts, in interpreting open contract provisions, have elected to define such terms with other open contract provisions. For example, in *8621 Limited Partnership v. LDG, Inc.*, 169 Md. App. 214, 228 (2006), the Maryland Court of Special Appeals found that a promise (express or implied) to exercise "best efforts" or "reasonable efforts" contains two separate requirements of "good faith" and "reasonable diligence" in seeking to achieve the stated goal, standards which are themselves terms-of-art with no precise definition. This further ambiguity almost assures that disputes arising in connection with open contract terms will have to be resolved by an arbitrator or judge who must decipher the factual circumstances behind the open language, leading to additional cost to the parties and leaving them at the mercy of the fact finder's discretion.

"Because such terms have no precise definition a party may accidentally bind itself to an unanticipated result"

Therefore, based on the above, in instances when the use of an open contract term is necessary or useful, parties and their attorneys should consider the following strategies to help minimize the uncertainty of such open contract terms as "best efforts":

First, the open contract term should be accompanied by specific details and terms that define the outer boundaries of acceptable performance within the specific context of the issue at hand. For example, a detailed plan of action or development can be documented, or specific procedures listed, with the open contract term limited to using "best efforts" to



Jeremy I. Goldman
Email
301-657-0732

comply with the plan. Additionally, one should consider narrowing the breadth of acceptable efforts by including time limitations, minimum or maximum amounts of expenses to be incurred, or specific milestones.

Second, where an open contract term revolves around a complex issue or one that calls for particular expertise, should a dispute arise, involvement of a jury or a judge without particular expertise in the field may be very time consuming and expensive. In order to help mitigate this concern, the parties should consider including a provision that requires the selection of an arbitrator with the appropriate knowledge to resolve any disputes that might arise.

Third, because the meaning of an open contract term will essentially depend upon the context and facts surrounding the intent of the parties drafting the clause, the contract history may be the most vital component in deciphering the clause's meaning and scope. Thus, retaining drafts of proposed and rejected language and other evidence of negotiations may be extremely relevant to the ultimate interpretation of the final, open contract term and should be encouraged.

While ambiguity is indeed undesirable, it may be unavoidable and thus must be considered, reduced and controlled.

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

Lerch, Early & Brewer Real Estate Group News and Notes

THE LATEST INFORMATION FROM OUR GROUP



On Thursday, March 22, **Steve Robins** chaired the Montgomery County Public Safety Awards, held at the North Bethesda Marriott Conference Center. It was Steve's 6th consecutive year serving as chair of the event.

The ceremony, which attracted over 1,000 business, government and community leaders from across Montgomery County, honors members of the County's Police, Sheriff's Office, Park Police, Fire & Rescue, and Corrections and Rehabilitation departments for acts of bravery, courage and distinction during the past year. Steve also leads the committee developing Montgomery County's Public Safety Memorial.



Michael D. Smith
Email
301-657-0166

On Thursday, April 19, **Robby Brewer** participated in the 10th annual Washington Real Estate Trends Conference, sponsored by Urban Land Institute of Washington. The Conference featured an array of speakers and panelists addressing the most compelling issues affecting real estate development in the Washington, D.C. region. Among the featured speakers was Washington, D.C. Mayor Adrian Fenty. Mr. Brewer was a panelist for a session entitled "Politics and Land Use: Strange Bedfellows." The session was moderated by Arthur N. Fuccillo of Lerner Enterprises.

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 negotiating and reviewing contracts of sale and financing documents, structuring the ownership entity



Patrick O'Neil, an associate in our Land Use and Zoning and Community Associations groups, was recently sworn-in as Vice-President of Economic Development for the Bethesda-Chevy Chase Chamber of Commerce at the Chamber's annual dinner. Patrick, who served as the Chair of the Chamber's Transportation and Parking Committee during the past year, will assume his new role beginning July 1, 2007. Additional information about the Bethesda-Chevy Chase Chamber can be found by clicking [here](#).

The firm is pleased to announce that **Steve Robins** was recently selected as one of 35 members of the "Greater Washington Legal Elite" by Washington SmartCEO magazine. "Legal Elite" awardees are selected by a panel of legal industry experts based upon the attorney's accomplishments during the past 12 months. Mr. Robins, whose work during the

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

Land Use and Zoning

Litigation

Real Estate Transactions

past year includes serving as lead counsel for numerous high profile real estate development projects throughout the region, joins past awardees Robby Brewer, Rick Vernon and Marc Engel as members of the prestigious group.

Recently, three Lerch, Early & Brewer attorneys--including **Robby Brewer**--were selected as "Leaders in Their Field" by Chambers and Partners, and international publisher of directories to the legal community. Selections are determined based upon feedback received from clients of the firm. Mr. Brewer was selected as a "Leader" in the areas of Real Estate and Health care. Joining him were **Stan Reed** (Commercial Litigation) and **Paul DiPiazza** (Corporate Law). You may view the rankings and comments for each attorney by [clicking here](#).

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, 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.

SUITE 460 | 3 BETHESDA METRO CENTER | BETHESDA MD 20814-5367
TEL: 301.986.1300 | www.lerchearly.com
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