

**MSBA REAL ESTATE DISCUSSION GROUP  
THE 2002 REAL ESTATE CASE HIT PARADE**

by

David H. Fishman ©

Gordon, Feinblatt, Rothman, Hoffberger & Hollander, LLC

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This report attempts to gather all cases decided by the Maryland courts in the past calendar year in the area of “traditional” real estate law. Detailed treatment is given to cases with something interesting or amusing to say. Cases in the areas of zoning, land use, insurance and torts are generally not included. The year 2002 was marked by several important discussions of areas which have not been talked about for many years, as well as a number of cases of first impression. We had our first extended discussion of the law of fixtures for many decades. The law of mineral rights was discussed in detail, as was the liability of the landlord for criminal acts occurring on leased premises. “Hornbook” discussions of the elements of the law of zoning, principles of eminent domain, and the law of “self-created hardships” can be found in the cases. My selection of hits follows:

1. **IT’S YOUR OWN FAULT [NOT!] – *Richard Roeser Professional Builder v. Anne Arundel County***, 368 Md. 294, and ***Stansbury v. Jones***, 370 Md. 172 (both by Cathell, J.) – in these two cases, the Court of Appeals, speaking through Judge Cathell, set forth the Maryland test for self-created hardships in zoning matters and finds that it really does not like the concept. Taking the first opportunity to analyze the law after the Supreme Court’s decision in *Palazzollo v. Rhode Island*, 533 U.S. 606 (2001), Judge Cathell comes down strongly on the side of the property owner. The basic rule is that the purchase of property subject to zoning restraints is not a self-created hardship, and does not disable the buyer of the property from seeking the same kind of zoning relief, by variance or otherwise, that the former owner could have sought. There is nothing wrong in our State with a property owner seeking to maximize his financial reward from property. The buyer of the property with old, undersized lots is not disabled from seeking zoning relief on the basis that he brought the problem on his own head by purchasing the property with the undersized lots in existence.

2. **TRADE FIXTURES ARE NOT FIXTURES – *Columbia Pipeline Co. v. SDAT***, 371 Md. 16, 806 A.2d 648 (Harrell, J., Sept. 9, 2002) - For most property lawyers of modern times, the source for all things about fixtures law has been Shale Stiller’s article, “The Maryland Law of Fixtures”, 25 Md. L. Rev. 21 (1965). But the main focus of that excellent article is the law of security interests in fixtures and the impact of the UCC. But now we have the *Colonial Pipeline* case to turn to. The court gives a quick but pithy review of Maryland fixture law, starting with *Kirwan v. Latour*, 1 H.& J. 289 (1802), and then discusses the “trade fixtures exception”, relying on *Van Ness v. Pacard*, 27 U.S. 137 (1829). The three part test for identifying fixtures requires annexation to the realty, adaptation to the use of that part of the realty, and intention to make the article a permanent accession to the freehold.

3. **YES, THE MINERALS ARE YOURS, BUT NO, YOU CAN'T GET TO THEM** – *Calvert Joint Venture #140 v. Snider*, \_\_\_ Md. \_\_\_, 2003 WL 301326 (Cathell, J.), reversing 144 Md. App. 250 – these cases contain the most extended discussion of Maryland mineral rights law that I recall ever seeing. Therefore, I will violate our normal rule and include the Court of Appeals' decision even though it came down on February 13, 2003. The Court of Special Appeals decided that the retention of mineral rights includes an implied easement to go on the property to get them. The Court of Appeals reversed. It used this case as an opportunity to review the law of easements generally, focusing down to implied easements of necessity, starting with Charles Carroll of Carrollton's family in *McTavish v. Carroll*, 7 Md. 352 (1855), and moving up to *Boucher v. Boyer*, 301 Md. 679 (1984). Finding that Maryland has never addressed many of the issues stemming from the separation of mineral rights from an estate, it surveys national case law on the subject, and takes a narrow view. The alleged implied easement must be strictly necessary, and it cannot conflict with the known intended use of the whole property at the time the mineral rights are severed. Here, the seller who retained the mineral rights failed to prove that he had no adjacent land from which he could get subterranean access to the minerals.

The case also illustrates the importance of reading the notes on subdivision plats. The seller of the property who retained the mineral rights was presented with a proposed subdivision plat containing notes stating that he had no right to go on the property to get the minerals, and that the mineral rights were limited to his lifetime, although there was no such limitation in the contract or deed. Fortunately, the seller took the trouble to read the notes, something many people do not do, saw the problem and refused to sign the plat.

4. **WHO OWNS THOSE PLANS?** – *Polashuk v. Patz*, CSA No. 1744, Sept. Term, 2000 (Fischer, J., March 15, 2002), cert. denied, 369 Md. 573 – One of those peripheral questions that often arises relates to the right to use site work prepared for deals that don't close. Polashuk wanted to buy Nathan Patz' estate, signed a contract and hired an engineer to prepare plans. He agreed to give all plans to the seller if he cancelled the contract and his deposit was returned. The study period was extended, and it was agreed that the deposit would be forfeited if the sale did not close. The contract was cancelled, but the plans were not delivered. Patz later sold to another, and the new engineer went to Baltimore County and copied the engineering plans in the County file. Polashuk sued for breach of copyright and other things. The court reviewed copyright of plans and found that the engineer's common law copyright was lost by filing the plans with the County and allowing the public unlimited access to copying them. The court may have been influenced by the fact that engineering plans, unlike building plans, are site specific and have no use except on a particular property.

5. **WE HAVE PARKING SPACES, BUT YOU CAN'T HAVE ANY** - *Sy-Lease of Washington, Inc. v. Starwood Urban Retail II, LLC*, CSA No. 40, Sept. Term 2002 (Davis, J.) cert. granted, \_\_\_ Md. \_\_\_\_ (March 17, 2003) – This is one of those counter-intuitive decisions which feel “wrong”, and perhaps that’s why the Court of Appeals granted a writ of certiorari in this case. Being an unreported decision with little citation of authority, it would not be worthy of inclusion if the Court of Appeals had denied cert. Here a retail tenant was provided with employee parking spaces at \$30.00 each per month, but the landlord reserved the right to limit the number. Three (3) years after the lease date, a new owner of the project advised that it was “limiting” the employee spaces to zero! The tenant sued for a declaratory judgment that it was entitled to at least ten (10) spaces. The trial court declared that the lease is not ambiguous, and that no parole evidence of intent would be admitted, and granted the new landlord’s motion to dismiss. The CSA affirmed on this issue, over a dissent by Judge Alpert. The Court of Appeals will let us know if the CSA was correct. Obviously, the tenant should have required the lease to say that the landlord could “limit but not eliminate” the employee parking spaces.

6. **WE DON'T THINK SO!** – There were couple of cases in 2002 where conduct of a party really turned the Court off. This fairly obviously impacted on the decision in the case. One of these was *Pechter v. Primary Care Partnership*, CSA No. 2810, Sept. 2000 decided by Judge Krauser on February 14. Here a developer induced a medical group to invest in a medical office building based in part on a promise to repurchase the interest if the medical group “put” it to the developer on or after December 1, 1998. On November 30, 1998, the developer gave notice to the doctors that the partnership had been dissolved by majority vote of the partners, that it was winding up its affairs, and therefore could not honor the put option. The Court said that the general partner must honor the put option and probably wasn’t thrilled with his conduct. Another litigation position which wasn’t too popular with the Court showed up in *Ebert v. Fountainhead Title Group*, CSA No. 489, Sept. 2001. Here homebuyers were complaining that the deed for their house was altered after closing from saying that they purchased Lot 26 to say that they purchased “part of Lot 26”. The interesting position taken by the title agency was that it does not represent homebuyers who purchase title insurance, but only the title insurer. And this rather astounding position was rejected.

7. **THE “OOPS” AWARD FOR 2002** – *Montgomery v. Remsburg*, 147 Md. App. 564, 810 A.2d 14 (Adkins, J., Nov. 1, 2002) – This is a case of first impression in the tort area of the duty of a leader of a hunting party to supervise the other hunters so they won’t shoot the owner of the property on which they are hunting. Here, the other hunter happened to be the adult son of the leader, and he shot the owner of the property (who was also planning to hunt) 20 minutes before the legal opening of deer hunting season, i.e., at about 6:15 am on November 28, 1998. That there are such accidents is no surprise in view of the number of hunters out there. The Baltimore Sun reports that over 94,000 deer were bagged in Maryland in the 2002 season. The “oops” moment occurred when the leader of the party ran to see what happened when his

son took his shot, found the landowner bleeding, and commented “I guess that rules out telling Jamie to shoot at the first thing that moves!” In this decision, the CSA found no special duty of hunters to the owners of land on which they hunt.