

# Planning Commission, Planning Board and Board of Appeals Education Course

## The Law



wiseGEEK

MARYLAND DEPARTMENT OF



PLANNING

MPCA



Maryland Planning  
Commissioners Association

# Course Overview

- Legal Authority for Planning & Zoning
- Limitations:
  - “Takings”
  - Due Process
  - Equal Protection
- P&Z in Maryland:
  - Zoning Process
  - Special Exceptions
  - Variances
  - Hearings/Appeals
  - Vesting
- Government Ethics

# Constitutional Authority

10th Amendment - Powers not delegated to federal gov't are “reserved to the States . . . or to the people.”

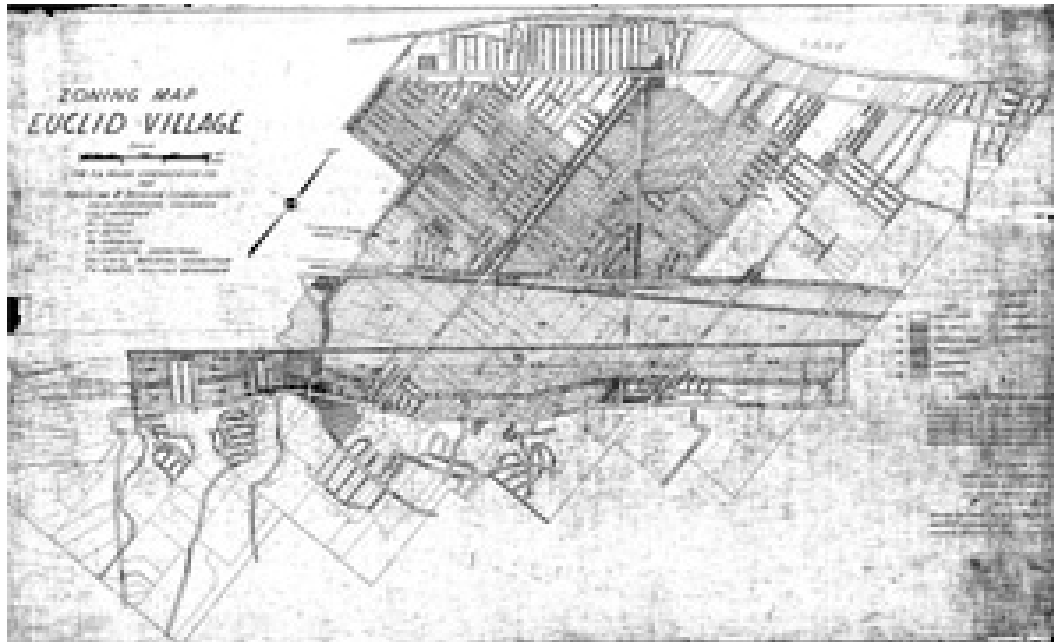
Includes the “**Police Power**” - Gov't authority to regulate to protect public **health, safety, welfare**

- ✓ Belongs to the State
- ✓ Delegated to local governments

# Police Power as Basis for Zoning

Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)

Supreme Court first recognized that **zoning** is a **valid use of police power**



# Gov't “Taking” Prohibited

5th Amendment - “. . . nor shall private property be taken” by the government “without just compensation.”

- Three different flavors:
  1. Eminent Domain
  2. Regulatory Taking
  3. Certain Monetary Exactions
- Euclid - Eminent Domain does not constitute a taking if there is a “rational basis” for the action and is not done in an arbitrary and capricious manner.



# Eminent Domain

Permitted, with compensation, to advance a  
“**public purpose**”

- Historically, used for public works projects - roads, schools, gov’t buildings, etc.



# Eminent Domain, beyond public works

Berman vs. Parker, 348 U.S. 26 (1954) - Permitted use of eminent domain to acquire private property to redevelop blighted areas of D.C.

- ✓ Valid Public Purpose - to promote “public safety, public health, morality, peace and quiet, law and order.”



# Eminent Domain, to promote economic development

“Public purpose,”  
evolving...



Kelo v. City of New London, 545 U.S. 469 (2005) -  
**Economic development** is a legitimate public purpose for local gov't's use of eminent domain.

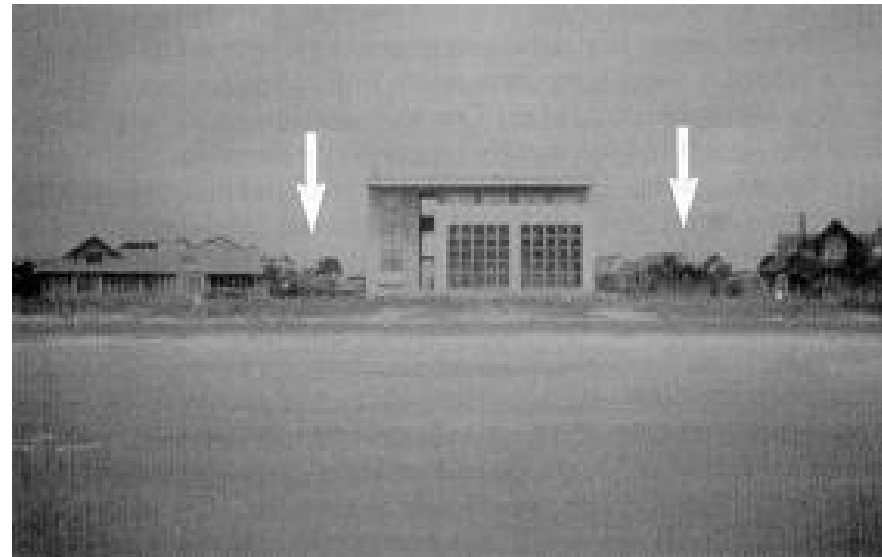
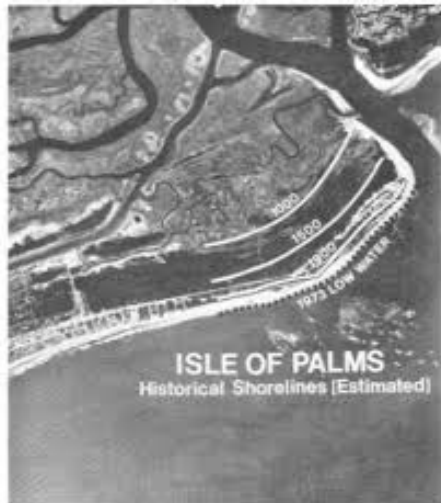


# Regulatory Taking

- A “taking” of property through the effect of law/regulation not amounting to direct appropriation or seizure.
- Early warning from the Court in Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922): If uses of private property were subject to unbridled, uncompensated qualification under the police power, "the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappeared."

# Regulatory Taking (cont.)

Lucas v. South Carolina Coastal Commission, 505 U.S. 1003 (1992) - A taking occurs when regulation denies a landowner of all economically viable use of land.



# Regulatory Taking (cont.)

*But See, Murr v. Wisconsin, \_\_\_ U.S. \_\_\_ (June 23, 2017):*

- Court addressed constitutionality of merger provision for land along St. Croix River; development rights merged for adjoining lots that come under common ownership if at least one of the lots is less than 1 acre
- Court looked to **landowner's "reasonable expectations" when acquiring land**
  - Merger provision pre-dated ownership

# Exaction

- An exaction is an affirmative condition placed on receipt of a permit, special exception, etc., and, *under certain conditions*, can amount to a “taking.”
- Nollan-Dolan Rule—Exaction is valid if:
  1. “Rational Nexus”
  2. “Rough Proportionality”



# When is an Exaction a “Taking”?

Nollan v. California Coastal Commission, 483 U.S. 825 (1987)

There must be a “**rational nexus**” between the exaction required for permit approval and the legitimate government purpose to be served by the exaction.

Dolan v. City of Tigard, 512 U.S. 374 (1994)

There must “**rough proportionality**” in nature and degree between the impacts of a proposed development and the impact-related exactions imposed as a condition of approval.

# Due Process

5th Amendment - “. . . nor shall any person be **deprived of . . . property** without due process of law.”



# Due Process (cont.)

Citizens have the right to:

- ✓ Notice of pending gov't action
- ✓ Public hearing
- ✓ Cross examination
- ✓ Creation of a record
- ✓ Written determination
- ✓ Appeal

Degree varies with nature of the gov't action: legislative (low) v. judicial (high)



# Equal Protection

14th Amendment - “. . . nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.”





# Equal Protection (cont.)

- Differing classifications (i.e. discriminators based on a classification):
  - Generally permitted if they are rational, non-arbitrary, and **reasonable in relation to the goals of the law or regulation**
- Classifications are subject to *strict scrutiny* and likely NOT permitted if based upon:
  - Suspect classes (race, national origin, ancestry, etc.); or
  - Fundamental rights (1st Amendment rights, right to vote, right to interstate travel, etc.)

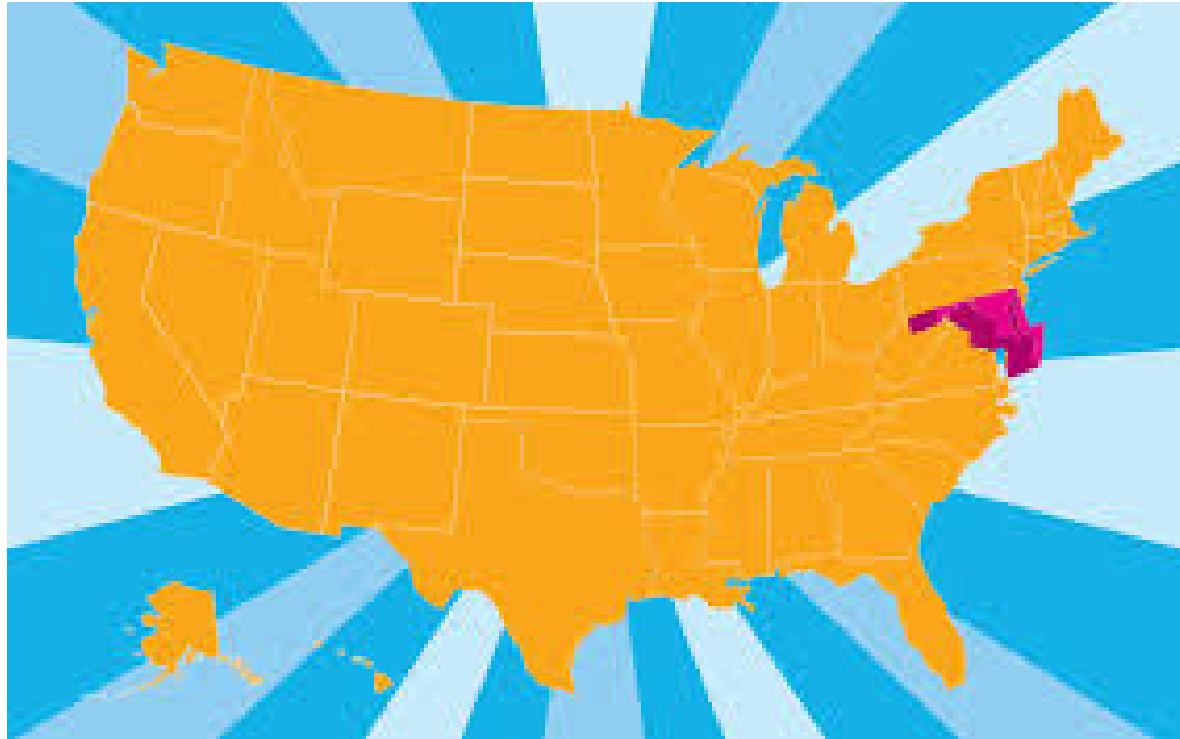
# Equal Protection (cont.)

Zoning is *inherently discriminating* because it places land into varied zoning categories (i.e. “differing classifications”)

- Constitutional if categories are:
  - ✓ **rationaly related** to public purpose; and
  - ✓ **class-neutral** (e.g., based on “use”)



# Let's Talk About...

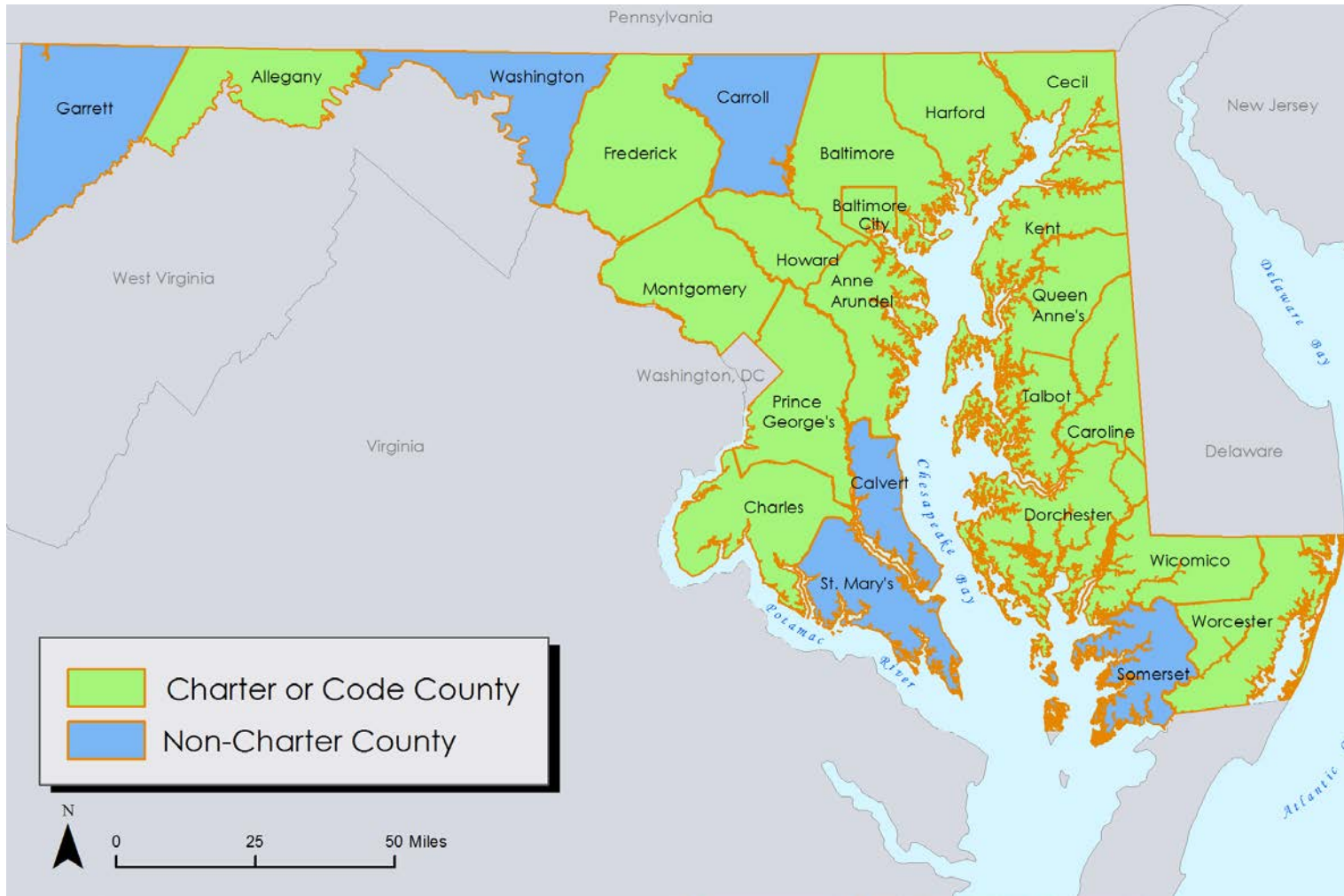


# P&Z in Maryland

The State has delegated planning and zoning authority to local jurisdictions:

- Charter Counties: Local Government Article (former MD Code, Article 25A)
- Non-Charter Counties and Municipalities: Division I, Land Use Article (former MD Code, Article 66B)
- Prince George's and Montgomery Counties: Division II, Land Use Article (former MD Code, Article 28)

# Which One Are You?



# P&Z in Maryland (cont.)

State delegation is subject to certain requirements:

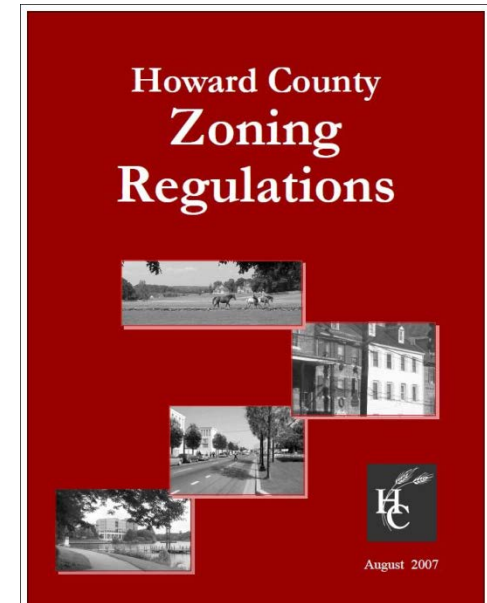
- ✓ Adoption of local Comprehensive Plan
- ✓ Implementation of State's 12 Planning Visions
- ✓ Consistency between zoning/local land use regulations and the Comprehensive Plan



# P&Z in Maryland (cont.)

## The Basics:

- ✓ By Ordinance
- ✓ Purpose—to promote health, safety and general welfare (police power)
- ✓ Regulates density, building height and bulk (density and intensity)
- ✓ Permitted uses in a zone are:
  1. “by right”; or
  2. conditional (by special exception)



# P&Z in Maryland (cont.)

## Comprehensive Zoning (original & comp. rezoning):

- ✓ Legislative act; afforded considerable deference
- ✓ Implements a comprehensive plan or plan update
- ✓ “Spot” zoning not permitted

## Requirements:

1. Cover substantial area
2. Product of careful study
3. Control/direct all uses of land in substantially all of jurisdiction





# P&Z in Maryland (cont.)

## “Piecemeal” Zoning:

- ✓ Quasi-judicial
- ✓ Occurs after original or comprehensive zoning

## Can only be based upon:

1. a **mistake** of fact in the original zoning or comp rezoning; or
2. on evidence of a substantial **change** in the character of a neighborhood since original zoning or comp rezoning

# P&Z in Maryland (cont.)

## Contract Zoning:

- ✓ Agreement between zoning authority and property owner on how land is to be zoned
- ✓ **Prohibited** because:
  1. Permits special privilege
  2. Disrupts comprehensive nature of zoning plan
  3. Derogates exercise of municipal powers



# Special Exceptions

a.k.a., “Conditional Uses”:

- ✓ NOT a change to zoning
- ✓ Grants an **additional conditionally compatible use.**

## Requirements:

- Identified in zoning as allowable;
- Compatible with the neighborhood and furthers the purpose of the proposed use;
- Shall “*further, and not be contrary to,*” the local comprehensive plan (Land Use Art. §§ 1-302, -303);
- And...

# Special Exceptions (cont.)

- ... No adverse effect “upon adjoining and surrounding properties unique or different” from effect if located elsewhere “within the zone.”

E.g., Clarksville Residents Against Mortuary Defense Fund, Inc. v. Donaldson Properties, 453 Md. 516 (2017):

- ✓ Funeral home authorized in RR zone as conditional use;
- ✓ Zoning code stipulated that “adverse effect” had to be predicated on a “physical condition”: noise, dust, fumes, odors, lighting, etc.
- ✓ Challenged on “cultural aversion” grounds by Asian residents but
- ✓ Court agreed with Board of Appeals that cultural aversion was not a physical condition upon which an adverse effect could be predicated

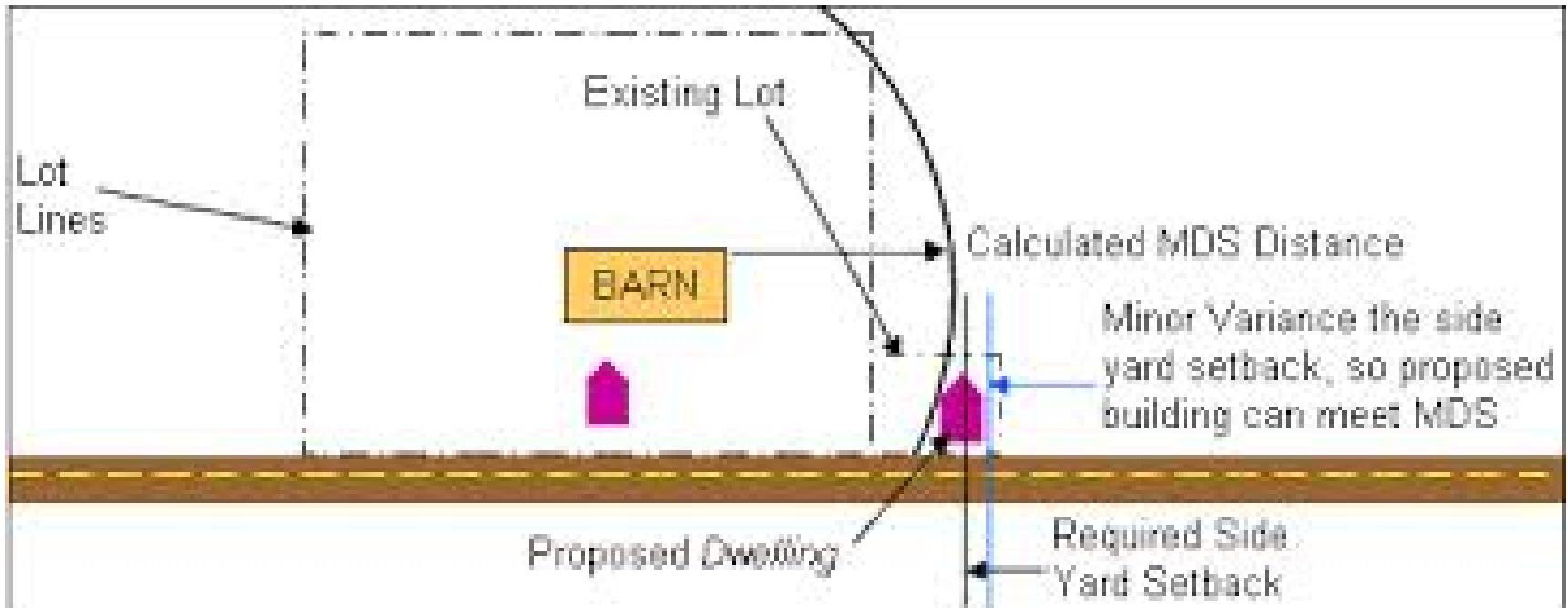
# Variations

Modifications to requirements/restriction in zoning law concerning **density, bulk, dimensional, or area requirements** (Land Use Art. § 4-206).

- ✓ Granted due to “conditions peculiar to the property.”
- ✓ Literal enforcement of restrictions would result in either “unnecessary hardship or practical difficulty.”
- ✓ Applicant can’t create the hardship.

In Charter Counties, standard may differ under local code, but are generally similar.

# Variations (cont.)



# Vesting

Once a development right has “vested,” a property owner is permitted to move forward with the development even if a change in the applicable law made subsequent to approval would prevent the development.



# Vesting (cont.)

Vesting occurs when property owner:

- ✓ Followed existing applicable law in obtaining development right/permit
- ✓ Has made changes on the property **manifesting commencement of work** such that public is on notice

In this regard, Maryland is a “late-vesting” state.





Questions  
are  
guaranteed in  
life;  
Answers  
aren't.

# Planning Commission, Planning Board and Board of Appeals Education Course

## Ethics



# Ethics

## State Ethics Laws prohibit:

- ✓ Improprieties, and
- ✓ Appearances of impropriety

## Purpose:

- ✓ Ensure fair dealings by officials holding positions of public trust

## Ethics (cont.)

State Gov't Art. § 15-803 - Counties & municipalities must enact provisions relating to:

1. Conflicts of interest
2. Financial disclosure
3. Lobbying

Must be similar to State ethics laws

# Conflicts of Interest

## Officials/employees may NOT:

- Participate in a matter with a **direct financial impact** on the official/employee, immediate family, or affiliated business entity
- Hold **outside employment** that would impair impartiality or independence of judgment
- Use **prestige of office** for private gain
- Use **confidential information** acquired in official capacity for own benefit or that of another

# Conflicts of Interest (cont.)

Unless exempted by the State Ethics Commission, may NOT:

- Hold or acquire an **interest in a business** that has, or is negotiating, a contract with or is regulated by the official's agency
- Be employed by **a business that has, or is negotiating, a contract with the agency**
- Represent any party for a contingent fee before any local body

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*"Try this—I just bought a hundred shares."*

# Conflicts of Interest (cont.)

- Subject to limited exceptions, **solicit or accept gifts** of more than nominal value (\$20) from any person who is regulated by or does or seeks to business with the official's agency
- Post-employment - Act as the paid representative of another in connection with any specific matter in which the official participated substantially while employed

# Recusal

When is it appropriate/necessary to recuse yourself? For example...

- A planning commissioner's spouse has a development project that is coming to the commission for site plan approval

If recusal necessary:

- Do not participate in any part of the matter
- Disclosure, without recusal, is insufficient



# “Ex Parte” Communications

## Boards of Appeal

- No communications between Board member and a party (or party’s representative) outside of hearing while a matter is pending.
- If communication occurs, it should be disclosed to all parties & placed in the record



# Questions on Ethics?

State Ethics Commission

[www.ethics.gov.state.md.us](http://www.ethics.gov.state.md.us)



# Check on Learning



## The police power is (choose all that apply):

- A. Authority to regulate to protect public health, safety and welfare
- B. The basis for zoning and other land use regulations
- C. Ability to disobey the speed limit with impunity
- D. Delegated by the State to counties and municipalities

## Development rights vest when:

- A. Construction is complete
- B. Applicant wears a three-piece suit
- C. Changes on the property are visibly discernable, thereby giving notice to the public
- D. Public notice is printed in a local newspaper

## A regulatory taking occurs when:

- A. Your lawyer says so
- B. A use is not permitted under the current rules
- C. A regulation removes all economic value in a property
- D. When it is determined that a variance is needed

## An unconstitutional “exaction” occurs when:

- A. There is no nexus between the exaction and the governmental purpose for the exaction
- B. There is both a rational nexus and rough proportionality between the exaction and the governmental purpose for the exaction
- C. The band leader’s brains are on the contract

# Counties and municipalities must enact public officials ethics rules for the following:

- A. Lobbying
- B. Financial Disclosure
- C. Conflicts of Interest
- D. All of the Above



## Ex Parte communications from a party to a Board of Appeals member should be:

- A. Encouraged to gain additional information for decision-making
- B. Disclosed to all parties and summarized on the record
- C. Rewarded by approval of a variance
- D. Kept secret from the public as part of executive privileges

