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# "Property and Law Are Born and Must Die Together": The Honorable Dale R. Cathell's Philosophy of Individual Property Rights and the Government in the Court of Appeals and the Court of Special Appeals, 1989-2007

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**“PROPERTY AND LAW ARE BORN AND MUST DIE TOGETHER”<sup>1</sup>: THE HONORABLE DALE R. CATHELL’S PHILOSOPHY OF INDIVIDUAL PROPERTY RIGHTS AND THE GOVERNMENT IN THE COURT OF APPEALS AND THE COURT OF SPECIAL APPEALS, 1989–2007**

**The Honorable Lynne A. Battaglia†**

As a member of the Court of Appeals for the past six years, I have been fortunate to have as a colleague a judge whose breadth of knowledge of Maryland law in general, and property law in particular, is only matched by his warmth and wit. Although many may have experienced Judge Dale R. Cathell’s gregarious presence on the bench, which encapsulates both his love of the law and people alike, few may be aware of the heart of a philosopher residing beneath the surface.

Born in Berlin, Maryland, Judge Cathell joined the Maryland judiciary in 1980 upon his appointment to the District Court of Maryland in Worcester County.<sup>2</sup> He subsequently became only the second judge to have been appointed and serve on all of the four courts in Maryland since the establishment of the Court of Special Appeals and the District Courts.<sup>3</sup> When he was appointed to the Court of Special Appeals in 1989, he was the first Worcester County judge to have been appointed to the appellate courts in more than 150 years. Cognizant of the parties’ interests in a timely resolution of the issues presented to the Court, Judge Cathell has consistently demonstrated a tireless work ethic and has striven to publish his assigned opinions as promptly as possible.<sup>4</sup>

In his time on the appellate bench, Judge Cathell has written on issues as wide ranging as the interaction between the Fourth Amendment’s prohibition against unreasonable searches and

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† Judge, Court of Appeals of Maryland. I would like to thank Amanda Leshar Olear for her research and analytical assistance, without which this piece would not have been possible. As for any errors or omissions, however, they are mine alone. This Article is dedicated to Judge Cathell’s son, William Howard Cathell.

1. JEREMY BENTHAM, *PRINCIPLES OF THE CIVIL CODE* (1843), *reprinted in* THE WORKS OF JEREMY BENTHAM 309 (John Bowring ed., Russell & Russell Inc. 1962) (1843).
2. Maryland Court of Appeals, <http://www.msa.md.gov/msa/mdmanual/29ap/html/msa11678.html> (last visited Mar. 27, 2007).
3. Maryland Court of Appeals, <http://www.msa.md.gov/msa/mdmanual/29ap/html/msa11678.html> (last visited Mar. 27, 2007).
4. In the 178 majority opinions he has authored for the Court of Appeals as of the end of 2006, the average time from oral argument of the case to the filing of his opinions has been 1.6 months. Additionally, he authored 991 majority opinions in the Court of Special Appeals with similar diligence.

seizures and civil *in rem* forfeiture proceedings,<sup>5</sup> to whether striking workers were entitled to unemployment benefits.<sup>6</sup> Judge Cathell also left his mark on criminal law,<sup>7</sup> family law,<sup>8</sup> evidence,<sup>9</sup> and questions of the existence of probable cause under both the Federal and Maryland constitutions.<sup>10</sup> During his tenure on the

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5. One 1995 Corvette VIN# 1G1YY22P585103433 v. Mayor of Balt., 353 Md. 114, 724 A.2d 680 (1999) (determining that the exclusionary rule under the Fourth Amendment applies to civil *in rem* forfeiture proceedings).
  6. Giant Food, Inc. v. Dep't of Labor, Licensing, & Regulation, 356 Md. 180, 738 A.2d 856 (1999) (holding that where unemployment results from a "stoppage of work" the employee is not entitled to unemployment benefits).
  7. *See, e.g.*, Melton v. State, 379 Md. 471, 842 A.2d 743 (2004) (concluding that the statute governing the possession of a firearm by an individual prohibited by law could not result in multiple convictions for the possession of a single firearm); Jenkins v. State, 375 Md. 284, 825 A.2d 1008 (2003) (holding that a presumption of prejudice arose from non-incidental contact between a prosecution witness and a juror outside the courtroom); Galloway v. State, 371 Md. 379, 809 A.2d 653 (2002) (concluding that inconsistent court and jury verdicts were impermissible); Handy v. State, 357 Md. 685, 745 A.2d 1107 (2000) (holding that pepper spray or mace can be considered a dangerous or deadly weapon within the meaning of robbery with a deadly weapon statute); Degren v. State, 352 Md. 400, 722 A.2d 887 (1999) (holding that definition of "sexual abuse" includes the failure to prevent molestation or exploitation when it is reasonably possible to act and there exists a duty to do so).
  8. *See, e.g.*, McDermott v. Dougherty, 385 Md. 320, 869 A.2d 751 (2005) (holding that the father's absence from his son's life due to the father's employment as a merchant marine did not constitute exceptional circumstances warranting awarding custody of the son to a third party); Laznovsky v. Laznovsky, 357 Md. 586, 745 A.2d 1054 (2000) (stating that an assertion of parental fitness in a custody hearing does not waive psychiatrist-patient privilege); Drummond v. State, 350 Md. 502, 714 A.2d 163 (1998) (determining that although a non-custodial parent may be entitled to a modification of his child support obligation due to the child's receipt of Social Security disability dependency benefits, the non-custodial parent is not entitled to an automatic credit against his child support obligations equal to the amount of benefits received by the child).
  9. *See, e.g.*, Brown v. State, 368 Md. 320, 793 A.2d 561 (2002) (holding that the defendant in that case could not put the testimony of an impeachment witness before the jury); Germain v. State, 363 Md. 511, 769 A.2d 931 (2001) (holding that a pre-sentence investigation report may be used to refresh the recollection of a witness who would otherwise have a right to see it); Sessoms v. State, 357 Md. 274, 744 A.2d 9 (2000) (concluding that the test for admitting evidence of other crimes does not apply to other crimes or wrongs committed by anyone other than the defendant and that evidence of the victim's reaction to a third party's statement to a police officer that the victim's brother just robbed him was admissible on cross-examination as probative of the victim's motive to lie); Wynn v. State, 351 Md. 307, 718 A.2d 588 (1998) (determining that evidence that the defendant committed crimes other than that for which he was on trial was not admissible under the "absence of mistake" exception to the other crimes rule); Hopkins v. State, 352 Md. 146, 721 A.2d 231 (1998) (holding that a compelled voice exemplar is admissible).
  10. *See, e.g.*, Southern v. State, 371 Md. 93, 807 A.2d 13 (2002) (holding that the State was not entitled to a limited remand to introduce new evidence on whether the police had probable cause to make the initial stop and arrest of the defendant); Wilkes v. State, 364 Md. 554, 774 A.2d 420 (2001) (stating that under the circumstances of the case the police did not improperly extend the duration of a traffic stop to permit a K-9 dog inspection of the car and that the police had probable cause to arrest the defendant).

Court of Appeals, Judge Cathell also has authored arguably some of the most important opinions addressing sensitive issues.<sup>11</sup> Judge Cathell's opinions concerning any of those topics would be worthy of examination. I have, however, chosen to focus my retrospective on Judge Cathell's contribution to Maryland law through his writings in the zoning and land use arena, in which he has made a significant contribution to the development of Maryland law, as well as his opinion in *Simard v. White*.<sup>12</sup>

Judge Cathell's opinions in the area of zoning and land use defy categorization into one of the many schools of jurisprudential thought such as pragmatism<sup>13</sup> or literalism.<sup>14</sup> Rather, Judge Cathell's opinions are informed by a single unified belief that the right to own private property is the foundation of modern civilization. As such, the individual's right to hold real property privately is fundamental, and the government must forbear regulation unless required to protect the fundamental property rights of another.<sup>15</sup> In this manner, Judge Cathell recognizes that the rights of the individual must, in certain instances, yield to the interests of society.<sup>16</sup> Thus, according to Judge Cathell, the fundamental right to property does not mandate that the individual ultimately prevail in his or her quest for judicial relief.<sup>17</sup> Concomitant with this philosophy, he adheres to the view that when a governmental entity seeks to infringe upon an individual's right to use property as he or she wishes through zoning ordinances, the government bears the burden of proving the propriety of the regulation.<sup>18</sup> It is through this lens that I will examine how Judge Cathell's beliefs concerning real property are embodied in his judicial opinions.

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11. See, e.g., *Grimes v. Kennedy Krieger Inst.*, 366 Md. 29, 782 A.2d 807 (2001) (holding that a parent cannot consent to a minor's participation in a nontherapeutic study where there is a risk of injury or damage to the health of the minor).

12. 383 Md. 257, 859 A.2d 168 (2004).

13. Pragmatism is

an American movement in philosophy founded by [C.S.] Pierce and [William] James [that is] marked by the doctrines that the meaning of conceptions is to be sought in their practical bearings, that the function of thought is as a guide to action, and that the truth is preeminently to be tested by the practical consequences of belief.

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1781 (2002).

14. Literalism is defined as the "adherence to the explicit substance of an idea or expression." WEBSTER'S, *supra* note 13, at 1231.

15. See *infra* Part I.

16. See *infra* Part I.

17. See *infra* Part I.

18. See *infra* Part I.

I. *SIMARD v. WHITE*

In *Simard*, the Court of Appeals was presented with the question of whether a defaulting purchaser at a mortgage foreclosure sale is entitled to any surplus proceeds derived from a resale arising out of the default.<sup>19</sup> Judge Cathell, writing for the Court, exhaustively examined the history of mortgages and foreclosures.<sup>20</sup> In so doing, he iterated his allegiance to the philosophy espoused by John Locke<sup>21</sup> and Richard Pipes<sup>22</sup> that “the great and *chief end* . . . of Mens uniting into Commonwealths, and putting themselves under Government, is the *Preservation of their Property*.”<sup>23</sup> As such, he noted that, despite popular belief to the contrary, “the Magna Carta did not initially create private property rights in England . . . it protected long extant private property rights,”<sup>24</sup> which include “[t]he right of land owners to pledge their parcels as security for debt.”<sup>25</sup> Tracing the development of mortgage foreclosure law from its inception in the concept of strict foreclosure;<sup>26</sup> which did not acknowledge the mortgagor’s property interest in the mortgaged property, to modern

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19. 383 Md. 257, 263, 859 A.2d 168, 171 (2004).

20. *Id.* at 260-90, 859 A.2d at 175-87.

21. John Locke (1632-1704) was a British philosopher whose work was dominated by his opposition to authoritarianism. William Uzgalis, *John Locke*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2005), available at <http://plato.stanford.edu/archives/fall2005/entries/locke/>. He adhered to the belief that “using reason to try to grasp the truth, and determining the legitimate functions of institutions will optimize human flourishing for the individual and society both in respect to its material and spiritual welfare.” *Id.*

22. Richard Pipes, the Baird Research Professor of History at Harvard University, is the author of numerous books and essays on Russia. In *Property and Freedom*, Professor Pipes delineates his belief that the structure of government in Western Europe and the United States is a direct reflection of their economic history in which privately held property was central. See generally RICHARD PIPES, PROPERTY AND FREEDOM (1999). In so doing, he examined the dichotomy between Western democracies and Russia, which has never had a developed system of private ownership, beyond that of the medieval city of Novgorod. *Id.* Echoes of Professor Pipes’s historical-economic view reverberate throughout Judge Cathell’s writings in the area of zoning and land use law.

23. *Simard*, 383 Md. at 270 n.11, 859 A.2d at 176 n.11 (quoting PIPES, *supra* note 22, at 35) (emphasis in original).

24. *Id.*

25. *Id.* at 269-70, 859 A.2d at 175.

26. In *Simard*, Judge Cathell defined a “strict foreclosure”:

By the early 18th Century, and apparently much earlier, a mortgagee was considered the owner of the pledged property subject to a condition. A debtor who timely paid the debt in full, acquired the right to eject the creditor (mortgagee) if necessary, and re-take complete title to the property. However, if the debt at any time became in default, or the mortgage was otherwise in default, the creditor (mortgagee) was considered the owner of all of the property free from condition. It did not make any difference whether ninety percent or one percent of the debt was unpaid and in default.

383 Md. at 270-71, 859 A.2d at 176.

“power to sell”<sup>27</sup> and “assent to decree”<sup>28</sup> clauses, which provided some protection to mortgagors, Judge Cathell astutely observed that the “early statute recognized that the mortgagor was to retain the land not needed to satisfy the debt. It was intended to insure that the mortgagor only lost so much of the land as was necessary to pay the debt.”<sup>29</sup> He noted that when the Court of Appeals determined that it was impractical to only sell off part of the property “because there was no way to determine in advance how much property should be offered for sale because there was no way to predict what the bids for the property would be,”<sup>30</sup> the “Court provided as an alternative that the whole property be sold with surplus proceeds going to the mortgagor.”<sup>31</sup> He further argued that “the underlying origins of the proper priorities to be applied to sums received at any foreclosure sale, be it an initial sale or a resale, have been for over two hundred years to primarily protect the interests of mortgagors and mortgagees.”<sup>32</sup> Moreover, he

27. “Power of sale” clauses “expressly stipulate[] in the mortgage that, on default by the mortgagor, the mortgagee might sell the property in the manner and on the terms specified in the mortgage.” *Id.* at 281, 859 A.2d at 182 (quoting RICHARD M. VENABLE, *THE LAW OF REAL PROPERTY AND LEASEHOLD ESTATES IN MARYLAND* 179 (1892)).
28. “Assent to decree” clauses arose first in Baltimore City pursuant to Chapter 181 of the Act of 1833, which provided in pertinent part:

§ 2. *And be it enacted*, (in order to the facilitating the enforcement of mortgages of real property and estate in the city of Baltimore), that in all cases of conveyances by way of mortgage of lands or hereditaments or chattels real, situate in the city of Baltimore, and where in the said conveyances the mortgagor shall declare his assent to the passing of a decree as hereinafter mentioned, it shall and may be lawful for the mortgagees or their assigns, at any time after filing the same to be recorded, to submit to the Chancellor, or to Baltimore county court or any Judge thereof, the said conveyances or copies under seal of said county court thereof, and the said Chancellor or court or Judge aforesaid, may thereupon forthwith decree, that the mortgaged premises shall be sold . . . .

Richard Venable, in his treatise on Maryland real property, described “assent to decree” provisions by stating:

[t]hat the mortgagor may incorporate in the mortgage an assent on his part to the passage of a decree in equity for the sale of the property on his default. Under this consent the mortgagee may, immediately on taking the mortgage, file an *ex parte* petition for a decree of sale to be made on default; and, immediately on default, the trustee appointed in the decree may proceed to make sale in conformity with the terms of the decree; or the mortgagee may file his *ex parte* petition after default and have a decree for sale.

VENABLE, *supra* note 27, at 180. “Assent to decree” foreclosures are now authorized throughout Maryland. *Simard*, 383 Md. at 284, 859 A.2d at 184 (citing MD. CODE ANN., REAL PROP. § 7-105 (LexisNexis 2003)).

29. *Simard*, 383 Md. at 316, 859 A.2d at 203.
30. *Id.*
31. *Id.*
32. *Id.* at 317, 859 A.2d at 203.

noted that “[a]lthough the foreclosure sale cuts off the mortgagor’s equitable right of redemption, his legal interest in his property does not cease until the foreclosure sale is complete and a conveyance has occurred.”<sup>33</sup> As such, “[f]ull vesting of [the foreclosure sale purchaser’s] interest, therefore, is subject to his obligation to pay which, in turn, is ‘subject to the right to enforce the payment of any of the purchase money by a resale at the risk of the buyer.’”<sup>34</sup> Because of this recognition and protection of the mortgagor’s interest in the mortgaged property, Judge Cathell concluded that “there is no common-law rule in Maryland that a defaulting purchaser is entitled to excess proceeds realized at a resale, nor should there be.”<sup>35</sup> Judge Cathell’s opinion, therefore, illustrated his belief in the fundamental nature of property rights through his assertion that a modern mortgage does not divest a mortgagor of his or her right to the mortgaged property.

## II. ZONING, VARIANCES, AND SPECIAL EXCEPTIONS

### A. *The Purpose and Propriety of Zoning Regulations*

Judge Cathell’s belief that individual ownership of real property is sacrosanct except when it must be circumscribed to permit another property owner to use and enjoy his or her property became apparent early in his tenure on the Court of Special Appeals. By way of introduction to the controversy in *County Commissioners of Carroll County v. Zent*,<sup>36</sup> Judge Cathell explicated his view of the purpose and development of zoning regulations:

The underlying cause of this dispute is the inevitable conflict that results during the transition of a rural community to a suburban community. Circumstances which are accepted as natural and normal incidents of a rural society by those who are nurtured by an agrarian environment do not always match the expectations of bucolic life anticipated by suburbanites as they move out to the countryside. While new residents may well expect, and accept, vistas of fields of waving grain, pastoral scenes of dairy cattle on the hillside and the rustic ambiance of the pond and wetlands area in the meadows, they sometimes belatedly discover that the plow precedes the grain, manure accompanies the cattle,

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33. *Id.* at 319, 859 A.2d at 205.

34. *Id.*

35. *Id.* at 315, 859 A.2d at 203.

36. 86 Md. App. 745, 587 A.2d 1205 (1991).

mosquitoes infest the ponds, and the products of the fields and animal husbandry must go to market. Since the advent of zoning, the conflict between rural reality and suburban expectations have been refereed by zoning administrators who, all too often, have found themselves in the unenviable position of reconciling the irreconcilable.

The zoning law has attempted to serve as a mechanism for the resolution of these conflicts and to provide for an orderly process that recognizes the inevitable transition, while at the same time preserving and permitting the continuation of long-standing practices and customs. The relevant body of law governing this transition is the law of nonconforming, primary, accessory, and incidental uses. When the principles of this body of law are properly understood and applied by zoning administrators and ultimately trial courts, the transition process is successfully managed.<sup>37</sup>

*Zent* addressed a dispute concerning the use of a parcel of land approximately two acres in size and zoned “‘A’ Agricultural District.”<sup>38</sup> Since 1923, a bulk milk delivery and distribution business was operated on the site to serve the surrounding agricultural community.<sup>39</sup> Upon the imposition of zoning regulations in Carroll County in 1965, the business became a lawful nonconforming use under the applicable ordinance.<sup>40</sup> In 1988, the Board of Zoning Appeals for the county determined that the site was a junkyard, due to the owner’s maintenance of several old delivery trucks which he used as a source of replacement parts for his fleet of milk delivery trucks.<sup>41</sup> Moreover, the Board of Zoning Appeals declared that the junkyard was not a lawful nonconforming use “because it had not registered and thus had not been ‘certified’ as one under the [applicable] ordinance,”<sup>42</sup> and therefore, the owner was in violation of the zoning regulations.<sup>43</sup> As Judge Cathell characterized it, “the zoning authorities were attempting to order the cessation or reduction of use of the outside portions of the property.”<sup>44</sup>

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37. *Id.* at 746-47, 587 A.2d at 1206.

38. *Id.* at 747, 587 A.2d at 1206.

39. *Id.*

40. *Id.* at 748, 587 A.2d at 1206.

41. *Id.* at 749, 587 A.2d at 1207.

42. *Id.*

43. *Id.*

44. *Id.*



Addressing the merits of the case, Judge Cathell discussed his view of zoning ordinances:

Such ordinances are in derogation of the common law right to so use private property as to realize its highest utility, and while they should be liberally construed to accomplish their plain purpose and intent, *they should not be extended by implication* to cases not clearly within the scope of the purpose and intent manifest in their language . . . . Zoning is an exercise of the police power and, to be valid, must be in the general public interest for promotion of health, safety or general welfare of the community. It is an exercise of the police power which takes away, for public good, some rights of individuals to use their property as they please while giving them rights to restrict injurious uses of others' property.<sup>45</sup>

Consistent with his philosophy concerning the paramount importance of the protection of individual property rights for the continuation of civilization and the consonant viewpoint expressed in the Court of Appeals' precedents, Judge Cathell concluded that "the County has attempted to eliminate an incidental and accessory use, which is inherently attached to a nonconforming use, by the ploy of administrative redefinition."<sup>46</sup> He determined that in order for the County to terminate the "offensive" operations at the site, it would have to "reduce[] the nonconforming use by statute or other proper regulation,"<sup>47</sup> which it did not do.

Judge Cathell further stated that "the use described in the case at bar was attendant, concomitant, and customary to the primary use of the property [and] was thus incidental to, or accessory to, the primary nonconforming use."<sup>48</sup> As such, he opined that "when a use does not change the basic nature of the primary permitted nonconforming use and is truly incidental to, and supports the nonconforming use, it is an accessory use and, unless expressly prohibited by statute, is permitted."<sup>49</sup> Reaffirming his belief in the

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45. *Id.* at 751, 587 A.2d at 1208 (quoting *Landay v. Bd. of Zoning Appeals*, 173 Md. 460, 466, 196 A.2d 293, 296 (1938); *Lone v. Montgomery County*, 85 Md. App. 477, 494-95, 584 A.2d 142, 150-51 (1990)).

46. *Id.* at 752, 587 A.2d at 1208. *See also Zent*, 86 Md.App. at 752 n.4, 587 A.2d at 1208 n.4 ("We believe it to be equally true that so long as a valid nonconforming use exists, it cannot normally be eliminated by a transmogrificational reinterpretation by administrative officials.").

47. *Id.* at 752, 587 A.2d at 1208-09.

48. *Id.* at 768-69, 587 A.2d at 1217.

49. *Id.* at 769, 587 A.2d at 1217.

need for procedures to insure the fair and circumscribed application of zoning regulations, he observed that

[t]here are appropriate methods for eliminating nonconforming uses, but terminating nonconforming property rights by bureaucratic redefinition is not one of them. This type of decision, fraught as it is with the emerging conflicts between the vanishing agricultural character of the County and its emerging suburban character, is a policy-making decision best made in an arena permitting full public debate by policy-makers—the elected representatives—not by the professional planners and zoners who *only* apply that policy.<sup>50</sup>

Requiring the legislative body to alter the zoning regulatory scheme affords the most protection to the rights of landowners affected by the ordinances and simultaneously provides a means for the community to determine the path of its development.

Judge Cathell's reasoning in *City of Annapolis v. Waterman*<sup>51</sup> further illustrates the way in which his view of the importance of private property rights, and the circumstances in which such rights may be affected through legitimate exercises of governmental regulatory power, informs his writings in the area of zoning and land use law in Maryland.

In *Waterman*, the appellees sought to develop a tract of land located in Annapolis.<sup>52</sup> When development of the first section of the land was approved in the 1970's, the City of Annapolis approved the plan contingent upon the Watermans' agreement to provide a specific amount of recreational area in the development.<sup>53</sup> During the following twenty years, the Watermans failed to include the required recreational area and attempted to comply through an open space easement across the rear of the eight duplex units planned for the remaining parcel of land.<sup>54</sup> The Planning and Zoning Commission recommended a reduction in the number of units and found that the final phase of development violated the recreational area condition.<sup>55</sup> The Board of Appeals affirmed.<sup>56</sup>

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50. *Id.* at 770, 587 A.2d at 1217.

51. 357 Md. 484, 745 A.2d 1000 (2000).

52. *Id.* at 488, 745 A.2d at 1002.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

Responding to the Watermans' argument that the recreational area condition amounted to an unconstitutional taking, Judge Cathell, writing for a unanimous court, discussed the need and propriety of such governmental regulation:

How can a county effectively plan for capital expenditures for roads, schools, sewers, and water facilities if, without regard to preexisting plans, a developer, . . . might place a settlement of 1,200 or more people in the middle of a previously undeveloped area, a settlement which would overtax school facilities and which would necessitate improvement of a road whose construction had not been contemplated . . . . Planning would be futile in such situations.

In those instances, the developer, not the constituted authority of the county, is in control of planning for the future of the county . . . .<sup>57</sup>

He further noted several basic principles of governmental regulatory authority:

After the close of the Revolutionary War, the ownership of property in this country has frequently been referred to as "allodial" in nature or that the property is held by "allodial tenure." In its strict sense, "allodium" means land owned absolutely, and not subject to any rent, service, or other tenurial right of an overlord; however, it has been, and is, uniformly recognized throughout this country that the ownership of property is subject to the rights of the government to tax the property, to regulate reasonably its use and enjoyment under the police power of the States, and to take the same, upon payment of the value thereof, when needed for a public purpose . . . . It is an accurate statement to say that every restriction upon the use and enjoyment of property is a "taking" to the extent of such restriction; but every "taking" is not a "taking" in a constitutional sense for which compensation need be paid.<sup>58</sup>

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57. *Id.* at 496, 745 A.2d at 1006 (quoting *Bd. of County Comm'rs v. Gaster*, 285 Md. 233, 248-50, 401 A.2d 666, 674 (1979)).

58. *Id.* at 497, 745 A.2d at 1006-07 (quoting *Stevens v. City of Salisbury*, 240 Md. 556, 562-63, 567, 214 A.2d 775, 778, 781 (1965)).

He noted that recreational open space conditions consistently have been found to be reasonable.<sup>59</sup> Moreover, because he concluded that the recreational area condition did not satisfy the definitions of a dedication<sup>60</sup> or an exaction,<sup>61</sup> the Watermans would have to satisfy the test for an unconstitutional taking, which they did not.<sup>62</sup> Judge Cathell again exhibited his reasoned approach to balancing the interests of the individual landowner against those of the government through his careful reasoning and examination of the issues in the case at bar.

### *B. Delineating “Self-Inflicted Hardship”*

In *Cromwell v. Ward*,<sup>63</sup> Ward sought a height variance for an accessory building that he had already erected in violation of a fifteen-foot height limit in Ruxton, Baltimore County.<sup>64</sup> The Board of Appeals, which was affirmed by the Circuit Court for Baltimore County, determined that the fact that Ward had to construct the building in violation of the zoning regulation concerning the height of buildings so that he could achieve a roof pitched at the angle that he desired, made the property’s problems unique.<sup>65</sup>

In reaching his holding that a variance should not have been granted, Judge Cathell determined that the fact that the building was in violation of the height ordinance was a “self-inflicted hardship”<sup>66</sup> on the part of the property owner, and any “practical difficulty” or “unnecessary hardship” due to that building was not the result of a unique or unusual characteristic of the property that distinguished it from the surrounding parcels.<sup>67</sup> Were the Court to conclude otherwise, according to Judge Cathell, it would render zoning regulations meaningless.<sup>68</sup>

Ultimately, he determined:

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59. *Id.* at 500-01, 745 A.2d at 1008-09.
60. “[C]ommon-law dedications are voluntary offers to dedicate land to public use, and the subsequent acceptance, in an appropriate fashion, by a public entity.” *Id.* at 503, 745 A.2d at 1010.
61. “A subdivision exaction . . . is a type of subdivision *regulation* that requires developers to make public improvements or install public facilities (or to finance them) at their own expense.” *Id.* at 505, 745 A.2d at 1011 (quoting 13 RICHARD R. POWELL, POWELL ON REAL PROPERTY ¶ 873(2)(d)(ii), at 79D-33 (MB ed., 1998)) (emphasis added).
62. *City of Annapolis*, 357 Md. at 532, 745 A.2d at 1025.
63. 102 Md. App. 691, 651 A.2d 424 (1995).
64. *Id.* at 694-95, 651 A.2d at 425-26.
65. *Id.* at 695, 651 A.2d at 426.
66. Judge Cathell defined “self-inflicted hardship” as “arising as a result of the act of the owner,” which “will be regarded as having been self-created, barring relief.” *Id.* at 706, 651 A.2d at 432.
67. *Id.* at 721-22, 651 A.2d at 439-40.
68. *Id.* at 722, 651 A.2d at 439-40.

It is not the purpose of variance procedures to effect a legalization of a property owner's intentional or unintentional violations of zoning requirements. When administrative entities such as zoning authorities take it upon themselves to ignore the provisions of the statutes enacted by the legislative branch of government, they substitute their policies for those of the policymakers. That is improper.<sup>69</sup>

Once again, Judge Cathell asserted the proper role of the zoning board is to apply the statutorily defined limits of the zoning regulations and to insure that the appropriate standard is used in granting variances so that the property rights of neighboring landowners are afforded equal protection. Moreover, his conclusion in *Cromwell* reflects his understanding that one of the purposes of zoning ordinances is to avoid conflicts between proximate landowners over the use of their respective properties.<sup>70</sup>

Judge Cathell revisited the issue of self-created hardship with respect to variances in *Richard Roeser Professional Builder, Inc. v. Anne Arundel County*.<sup>71</sup> In *Roeser*, the builder was a "contract purchaser of two lots near Annapolis."<sup>72</sup> One of the lots was located in the Chesapeake Bay Critical Area "buffer" zone adjacent to wetlands, which the contract purchaser knew at the time of purchase.<sup>73</sup> The builder-purchaser was also aware that it would need to obtain variances to build a house of the size it planned.<sup>74</sup> The builder applied for those variances, and the Board of Appeals for Anne Arundel County denied the request, determining that the hardship was self-created.<sup>75</sup> The Circuit Court for Anne Arundel County reversed the judgment of the Board and concluded that the fact that the purchaser knew of the zoning restrictions at the time of purchase did not render the hardship self-created.<sup>76</sup> The Court of Special Appeals, in turn, reversed the decision of the Circuit Court and held that the hardship was indeed self-created by the purchaser.<sup>77</sup>

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69. *Id.* at 726, 651 A.2d at 441.

70. *See County Comm'rs of Carroll County v. Zent*, 86 Md. App. 745, 751, 587 A.2d 1205, 1208 (quoting *Lone v. Montgomery County*, 85 Md. App. 477, 494-95, 584 A.2d 142 (1990)).

71. 368 Md. 294, 793 A.2d 545 (2002) ("Roeser").

72. *Id.* at 296, 793 A.2d at 547.

73. *Id.*

74. *Id.*

75. *Id.* at 296-97, 793 A.2d at 547.

76. *Id.* at 297-98, 793 A.2d at 547-48.

77. *Id.* at 298-99, 793 A.2d at 548.

Judge Cathell, writing for a unanimous court, determined that although “a purchaser of property acquires no greater right to a variance than his predecessor, he should not be held to acquire less.”<sup>78</sup> Quoting with favor from the Court of Appeals of Minnesota’s opinion in *Myron v. City of Plymouth*,<sup>79</sup> he reasoned that:

The problem with such a reading of the statute[, specifically that a subsequent purchaser who knew of the need for a variance at the time of purchase could not receive one because the hardship was self-created,] is that—by backspin—it places an unreasonable limitation on the power of cities to grant variances, for although the statute provides authority to grant variances when certain prerequisites are met, it also creates a mirror image limitation on the authority to grant a variance whenever the stated prerequisites are not met. One of those prerequisites is that the need for the variance not be ‘created by the landowner.’ If that includes mere purchase with knowledge, a [city] would, in effect, be prohibited from granting a variance to every subsequent owner who purchased with knowledge that a variance would be required for development.

More significantly, such a reading is also inconsistent with the general property-law goal to preserve alienability. An owner who did not self-create a hardship is eligible for a variance. But that owner would, in effect, be barred from selling to someone else without, as a consequence of the sale, destroying the eligibility to receive a variance. We see no reason why an owner who sells should not be able to convey to a buyer the eligibility for a variance along with the land itself.<sup>80</sup>

According to Judge Cathell, self-created hardship does not generally arise from purchase alone, but rather requires some action by the landowner that creates the hardship,<sup>81</sup> such as building a structure that violates the zoning regulations without a

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78. *Id.* at 303, 793 A.2d at 551 (quoting 3 ARDEN M. RATHKOPF & DAREN A. RATHKOPF, *THE LAW OF ZONING AND PLANNING* § 58.22, at 141-48 (Edward H. Ziegler, Jr. rev. ed., West 1991)).

79. 562 N.W.2d 21 (Minn. Ct. App. 1997).

80. *Roeser*, 368 Md. at 307, 793 A.2d at 553 (quoting *Myron*, 562 N.W.2d at 23).

81. *Id.* at 314, 793 A.2d at 558.

permit and then belatedly seeking a variance,<sup>82</sup> or subdividing a larger parcel into smaller lots, with one nonconforming lot.<sup>83</sup>

Judge Cathell explicated the basic principles that are the foundation of property law, and in so doing, again expressed his belief that the right to hold and sell real property is fundamental. He explained:

[R]easonable zoning limitations are always directed to the property, itself, and its uses and structures, not to the completely separate matter of title to property, which is another whole field of law. In zoning, it is the property that is regulated, not the title.

In Maryland, when title is transferred, it takes with it all the encumbrances and burdens that attached to title; but it also takes with it all the benefits and rights inherent in ownership. If a predecessor in title was subject to a claim that he had created his own hardship, that burden, for variance purposes, passed with the title. But, at the same time, if the prior owner has not self-created a hardship, a self-created hardship is not immaculately conceived merely because the new owner obtains title.<sup>84</sup>

Thus, Judge Cathell declared the Court's adherence to the modern rule regarding the interaction between the precept in property law that a purchaser steps into the shoes of the seller and zoning regulations.

Judge Cathell further emphasized the definition of "self-created" hardship in *Stansbury v. Jones*.<sup>85</sup> In *Stansbury*, Ms. Stansbury possessed a tract of land that had been recorded as a subdivision prior to Anne Arundel County's adoption of a subdivision ordinance.<sup>86</sup> The County subsequently passed an ordinance that caused the lots in the subdivision to become substandard sized lots and required the lots to be combined to meet the lot area requirement.<sup>87</sup> A re-division of the land pursuant to the ordinance resulted in the creation of a lot in a critical area, which Ms. Stansbury reserved to herself, that could not be

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82. *Id.* at 314-15, 793 A.2d at 558 (discussing *Salisbury Bd. of Zoning Appeals v. Bounds*, 240 Md. 547, 214 A.2d 810 (1965)).

83. *Id.* at 316, 793 A.2d at 559 (discussing *Randolph Hills, Inc. v. Montgomery County*, 264 Md. 78, 285 A.2d 620 (1972)).

84. *Id.* at 319, 793 A.2d at 560-61.

85. 372 Md. 172, 812 A.2d 312 (2002).

86. *Id.* at 178, 812 A.2d at 315.

87. *Id.*

developed until it passed a percolation test.<sup>88</sup> Ms. Stansbury needed area variances to build a residence on the parcel and a zoning administrator recommended that the variances be granted.<sup>89</sup> The Board of Appeals denied the variances because it determined that Ms. Stansbury's hardship was self-created.<sup>90</sup> The Circuit Court for Anne Arundel County remanded the case back to the Board with instructions to consider all of the factors contained in the zoning regulations when reconsidering the application.<sup>91</sup> The Court of Special Appeals reversed the judgment of the Circuit Court and held that the hardship was self-created and that no other factors needed to be considered.<sup>92</sup>

Writing for a five judge majority, Judge Cathell reiterated his reasoning in *Roeser*<sup>93</sup> concerning the nature of self-created hardship. He noted that the action taken in the present case was permitted and encouraged by the government.<sup>94</sup> As such, he states, "that action cannot be characterized as self-created."<sup>95</sup> The only restriction imposed on the parcel was that it pass the percolation tests, and thus, according to Judge Cathell, "[t]here was no evidence that the county had imposed any conditions forbidding petitioner from seeking variances."<sup>96</sup>

Moreover, he concluded that it "must be borne in mind the often repeated doctrine that doubts should be resolved in favor of the unrestricted use of property."<sup>97</sup> This axiom is reflective of his understanding that "[c]ourts will naturally lean in favor of freedom of the property."<sup>98</sup>

### C. Adopting the Merger Doctrine

Judge Cathell's first case involving zoning ordinances upon his ascension to the Court of Appeals was *Friends of the Ridge v. Baltimore Gas and Electric Co.*<sup>99</sup> In that case, Baltimore Gas and Electric Company ("BGE") operated a substation at the intersection of Falls and Ridge Roads in Baltimore County and applied for a special exception to the Baltimore County zoning

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88. *Id.* at 179, 812 A.2d at 316.

89. *Id.* at 175, 812 A.2d at 313-14.

90. *Id.* at 175, 812 A.2d at 314.

91. *Id.*

92. *Id.*

93. *See supra* note 71; *Stansbury*, 372 Md. at 172, 812 A.2d at 312.

94. *See Stansbury*, 372 Md. at 201, 812 A.2d at 329.

95. *Id.*

96. *Id.* at 203-04, 812 A.2d at 331.

97. *Id.* at 203, 812 A.2d at 330 (quoting *Woodlawn Beach Prop. Owners' Ass'n v. Worley*, 253 Md. 442, 449-550, 252 A.2d 827, 831 (1969)).

98. *Id.* (quoting *Peabody Heights Co. v. Wilson*, 82 Md. 186, 203, 32 A. 386, 389 (1895)).

99. 352 Md. 645, 724 A.2d 34 (1999).



ordinances to increase capacity at the substation.<sup>100</sup> BGE received the special exception without challenge.<sup>101</sup> The utility company acquired two parcels adjacent to the original substation and planned to extend the enlarged substation onto one of the contiguous parcels.<sup>102</sup> Petitioner challenged the proposed enlarged substation on the grounds that the three parcels were not “legally combined” because the Baltimore County ordinance required BGE to obtain a variance prior to using the three parcels as a single property.<sup>103</sup>

Writing for a unanimous court, Judge Cathell observed “[t]hat a landowner who clearly desires to combine or merge several parcels or lots of land into one larger parcel may do so. One way he or she may do so is to integrate or utilize the contiguous lots in the service of a single structure or project.”<sup>104</sup> In so concluding, he adopted, for the first time in Maryland and only with respect to the case at bar, the doctrine of merger with respect to contiguous parcels of land owned by the same individual or entity.<sup>105</sup> As he noted:

We see no reason why a doctrine that seeks to prevent the proliferation or use of nonconforming, undersized lots by holding that they have been combined or merged into a larger parcel should not, as far as zoning is concerned, be applied properly to permit the creation, through the combining by use of a larger parcel from already conforming smaller parcels, without the necessity of official action or conveyancing.<sup>106</sup>

Judge Cathell championed the right of an owner of multiple contiguous parcels to use the land as a single lot without the need to seek approval absent the need for a variance from the ordinances governing setbacks or “yards” from the exterior property lines.<sup>107</sup> As such, his reasoning reflects his conviction that the government’s ability to infringe on an individual’s property rights in limited circumstances must be carefully circumscribed to avoid abuse. It is also an expression of Judge Cathell’s belief that an individual should be free to use his or her property as the owner

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100. *Id.* at 648-49, 724 A.2d at 36.

101. *Id.* at 649, 724 A.2d at 36.

102. *Id.*

103. *Id.*

104. *Id.* at 658, 724 A.2d at 40.

105. *See id.* at 662, 724 A.2d at 42.

106. *Id.* at 654, 724 A.2d at 38.

107. *Id.* at 662, 724 A.2d at 42.

desires as long as it does not negatively impact the property interests of others.

In *Remes v. Montgomery County*,<sup>108</sup> Judge Cathell returned to the issue of the merger of two or more contiguous plots owned by a single individual or entity. In *Remes*, a couple owned two adjacent parcels of land and used them as one, building a home on one lot and constructing a swimming pool, an addition to the home, and driveway on the other.<sup>109</sup> When the couple died, the property was inherited by their son, who sought to sell one of the lots to a developer.<sup>110</sup> A neighbor, in an attempt to thwart the sale, sought both a declaratory judgment that the lots had merged and an injunction against the sale, which was stayed pending proceedings before the Board of Appeals.<sup>111</sup> The Board determined that the lots had not merged.<sup>112</sup> The Circuit Court for Montgomery County affirmed the decision and the Court of Appeals, on its own initiative, issued a writ of certiorari prior to any proceedings in the intermediate appellate court.<sup>113</sup>

The case presented Judge Cathell with the occasion to clarify the scope of the holding in *Friends of the Ridge*. He reasoned that “[f]or title purposes, the platted lot lines may remain, but by operation of law a single parcel emerges for zoning purposes.”<sup>114</sup> He further stated:

Thus, zoning merger, in effect, is an adjustment of zoning requirements. It has no effect on subdivision. Title examiners regularly consider aspects of zoning when examining titles in order to be able to indicate to purchasers the uses that can be made of a property. Those uses have no effect on subdivision regulation. One must comply with *both* zoning and subdivision requirements. In the present case, the applicant cannot meet zoning requirements because of the doctrine of zoning merger and thus, while [one of the lots] may be sold, it cannot be used, absent zoning variances or other zoning relief, if any.<sup>115</sup>

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108. 387 Md. 52, 874 A.2d 470 (2005).

109. *Id.* at 57, 874 A.2d at 472-73.

110. *Id.* at 58-59, 874 A.2d at 473-74.

111. *Id.* at 60, 874 A.2d at 474.

112. *Id.*

113. *Id.* at 62, 874 A.2d at 475-76.

114. *Id.* at 66-67, 874 A.2d at 478 (quoting *Friends of the Ridge v. Balt. Gas & Elec. Co.*, 352 Md. 645, 658, 724 A.2d 34, 34 (1999)).

115. *Id.* at 67, 874 A.2d at 478.

Under the facts of the case, Judge Cathell concluded that the original owners clearly intended to use the parcels in concert, which is the applicable test for zoning merger, and therefore, their conduct was consistent with zoning merger.<sup>116</sup> Thus, prior to selling one of the lots the owner must seek zoning variances.<sup>117</sup> Through this case, Judge Cathell formally stated that the doctrine of zoning merger is part of the common law of Maryland and affirmed the right of a landowner to use his or her contiguous parcels in service to each other.<sup>118</sup>

#### D. Determining the Standard for Critical Area Variances

Judge Cathell's opinions in *Belvoir Farms Homeowners Ass'n. v. North*<sup>119</sup> and *White v. North*<sup>120</sup> addressed the appropriate standard for granting a variance within the Chesapeake Bay Critical Area<sup>121</sup> in Anne Arundel County. In *Belvoir Farms*, the Belvoir Farms Homeowners Association ("the Homeowners Association") received a variance to permit more than the four boat slips allowed by the critical area regulations from the Anne Arundel County Board of Appeals.<sup>122</sup> The Chairman of the Chesapeake Bay Critical Area Commission appealed the decision to the Circuit Court for Anne Arundel County, reversing the grant of the variance.<sup>123</sup>

Once again writing on behalf of a unanimous court, Judge Cathell concluded that the Board of Appeals used an erroneous standard to determine whether the variance should be issued.<sup>124</sup> He stated that the Board used a "practical difficulties"<sup>125</sup> standard,

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116. *Id.* at 67-68, 874 A.2d at 478-79.

117. *Id.* at 87, 874 A.2d at 490.

118. *Id.* at 77-78, 874 A.2d at 484-85.

119. 355 Md. 259, 734 A.2d 227 (1999).

120. 356 Md. 31, 736 A.2d 1072 (1999).

121. Judge Cathell provided a thorough explanation of the Chesapeake Bay Critical Area Program in *White*:

The Critical Area Program is codified in Maryland Code (1974, 1990 Repl. Vol., 1998 Cum.Supp.), sections 8-1801 to 8-1816 of the Natural Resources Article. Respondent [in both *White* and *Belvoir Farms*] is the Chairman of the Chesapeake Bay Critical Area Commission . . . an arm of the Department of Natural Resources with authority to enforce the Critical Area Program. Title 27 of the Code of Maryland Regulations (COMAR) consists of the Commission's regulations.

*Id.* at 36, 736 A.2d at 1075.

122. *Belvoir Farms*, 355 Md. at 263-64, 734 A.2d at 230.

123. *Id.* at 262, 734 A.2d at 229.

124. *Id.* at 265, 734 A.2d at 231.

125. Although no specific definition of "practical difficulty" is extant in Maryland law, "Maryland courts generally have applied the more restrictive hardship standard to use variances, while applying the less restrictive practical difficulties

when the Anne Arundel County Code mandated that the appropriate test was whether an “unwarranted hardship”<sup>126</sup> existed, which he found to be synonymous with the “unnecessary or undue hardship” standard.<sup>127</sup> He continued in his reasoning to define “unwarranted hardship” as the “denial of reasonable use” or the “denial of reasonable return” from the land.<sup>128</sup> Distinguishing this standard from that applicable to unconstitutional takings, Judge Cathell noted that “the purpose of a variance is to protect the landowner’s rights from the unconstitutional application of zoning law.”<sup>129</sup> He qualified this statement by stating that “[t]his does not necessarily mean that a variance may only be granted in cases in which application of a particular zoning ordinance would result in an unconstitutional taking of property,”<sup>130</sup> although he noted that variances should be granted only in rare circumstances.<sup>131</sup>

In *White*, a case that, like *Belvoir Farms*, addressed the issue of the appropriate standard for granting variances within the Chesapeake Bay Critical Area, Anne Arundel County authorities determined that the property owned by Mr. and Mrs. White was within an expanded buffer area, as defined by the Anne Arundel County Code in response to the Chesapeake Bay Critical Area Protection Program.<sup>132</sup> Within that buffer, the Chesapeake Bay Critical Area Commission bans “any new development of all ‘impervious surfaces’ that are not ‘water-dependent,’ which includes concrete swimming pools.”<sup>133</sup> The Whites sought a variance to install an in-ground swimming pool, which was denied by an administrative hearing officer.<sup>134</sup> The Board of Appeals reversed the decision and granted the variance.<sup>135</sup>

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standard to area variances because use variances are viewed as more drastic departures from zoning requirements.” *Id.* at 275 n.10, 734 A.2d at 236-37 n.10.

126. “Unwarranted hardship” is synonymous with “unnecessary hardship,” which the Court of Appeals has defined as occurring when “the applicable zoning restriction when applied to the property in the setting of its environment is so unreasonable as to constitute an arbitrary and capricious interference with the basic right of private ownership.” *Id.* at 276, 734 A.2d at 237 (quoting *Marino v. Mayor of Balt.*, 215 Md. 206, 217, 137 A.2d 198, 202 (1957)).

127. *Id.* at 265-67, 275-76, 734 A.2d at 231-32, 236-37.

128. *Id.* at 277, 734 A.2d at 237-38.

129. *Id.* at 281, 734 A.2d at 240 (citing *Packer v. Hornsby*, 267 S.E.2d 140, 142 (Va. 1980)).

130. *Id.*

131. *Id.* at 276-77, 734 A.2d at 237.

132. *White v. North*, 356 Md. 31, 38, 736 A.2d 1072, 1076-77 (1999). Anne Arundel County Code, Article 28, Section 1A-104 (a)(1) provides in pertinent part, “[i]f there are contiguous slopes of 15% or greater, the buffer shall be expanded . . . to the top of the slope . . . and shall include all land within 50 feet of the top of the bank of steep slopes.”

133. *White*, 356 Md. at 38, 736 A.2d at 1076.

134. *Id.* at 39-40, 736 A.2d at 1077.

135. *Id.* at 40, 736 A.2d at 1077.

Writing for a unanimous court, Judge Cathell concluded that the Board of Appeals was required to use the “unwarranted hardship” standard as delineated in *Belvoir Farms*.<sup>136</sup> As such, he stated that the Whites, on remand, must present evidence regarding whether “the denial of their request to build a swimming pool is a denial of a reasonable and significant use.”<sup>137</sup> Quoting *Landay v. Board of Zoning Appeals*,<sup>138</sup> Judge Cathell urged the parties to remember that “[i]n a constitutional sense, the only justification for the restrictions . . . on the use of private property is the protection of the public health, safety, or morals.”<sup>139</sup> Where, however, such regulations have been enacted, the landowner seeking approval to use his or her land in derogation of those regulations bears the burden of proving why such a variance should be granted.<sup>140</sup>

Thus, Judge Cathell posits a paradigm of shifting burdens. The governmental entity first must establish that the regulation promotes the safety, health, or welfare of the community. Once such a purpose is found to exist, then the landowner who seeks permission to act in violation of the regulation must prove that the regulation, in most cases due to the unique characteristics of the subject property, creates an undue hardship. In this way, the competing interests are balanced against one another and each is afforded protection under the law.

#### *E. Statutory Construction and the Vested Right to a Variance*

In *Marzullo v. Kahl*,<sup>141</sup> Judge Cathell had the opportunity to address the question of whether a landowner, who relies on an improperly granted permit, has a vested right to use his property in violation of a zoning ordinance.<sup>142</sup> The respondent, Peter Kahl, used his parcel of land in Baltimore County for his residence and the operation of a business that bred, raised, and sold reptiles, including pythons and boa constrictors, after receiving a permit to do so.<sup>143</sup> The petitioners, Mary Pat Marzullo and the People’s Counsel for Baltimore County, petitioned for a special hearing before the Zoning Commissioner of Baltimore County to determine whether the zoning regulations permitted such a use.<sup>144</sup> The Commissioner determined that the use was permitted as

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136. *Id.* at 46, 736 A.2d at 1081.

137. *Id.* at 48, 736 A.2d at 1082.

138. 173 Md. 460, 196 A. 293 (1938).

139. *White*, 356 Md. at 48, 736 A.2d at 1082 (quoting *Landay*, 173 Md. at 465, 196 A. at 295-96 (citations omitted)).

140. *North v. St. Mary’s County*, 99 Md. App. 502, 510, 638 A.2d 1175, 1179 (1994).

141. 366 Md. 158, 783 A.2d 169 (2001).

142. *Id.* at 193, 783 A.2d at 189.

143. *Id.* at 160, 162, 783 A.2d at 170-71.

144. *Id.* at 160, 783 A.2d at 170.

“commercial agriculture” under the applicable zoning ordinances.<sup>145</sup> The petitioners appealed to the Board of Appeals, which reversed the finding of the Commissioner.<sup>146</sup> The Circuit Court reversed the decision of the Board of Appeals, determining that a reptile “farm” “was a farming activity that was permitted,”<sup>147</sup> which was affirmed by the Court of Special Appeals.<sup>148</sup>

Judge Cathell concluded that the Board of Appeals correctly determined that the respondent’s reptile “farm” was not a “farm” as the term is used within the zoning regulatory scheme.<sup>149</sup> Consistent with the common sense wisdom prevalent throughout his writings, he observed:

One can breed, raise, and sell snakes, but you cannot farm them. A snake is no more the equivalent of chickens, pigs, cows, goats, and sheep, than are lions, tigers, and elephants. In arriving at this assumption, we do not rely on treatises, scientific documentation, or other published works; we rely on common sense. A snake, however lovable it may be to some, is not a farm animal unless legislatively declared to be such. A boa constrictor can be an animal on a farm, but that does not make it a “farm animal,” any more than a fox on the way to raiding the hen house is a “farm animal.”<sup>150</sup>

He urged a reasoned approach to the interpretation of the law that does “not set aside common experience and common sense when construing statutes.”<sup>151</sup>

Judge Cathell also rejected the respondent’s assertion that he “obtained a vested right to use his property to raise, breed, and keep reptiles or snakes,”<sup>152</sup> when the respondent acted in reliance upon the improperly granted permit to conduct such a business.<sup>153</sup> He concluded that “in the absence of bad faith on the part of the remitting official; applicants for permits involving interpretation accept the afforded interpretation at their risk.”<sup>154</sup> He noted that for the right to vest, the landowner would have had to receive a

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145. *Id.* at 166, 783 A.2d at 174.

146. *Id.* at 166-67, 783 A.2d at 174.

147. *Id.* at 160, 783 A.2d at 170.

148. *Id.*

149. *Id.* at 191, 783 A.2d at 188.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* at 193, 783 A.2d at 189.

154. *Id.* at 194, 783 A.2d at 190.

lawful permit, act in reliance thereon, and suffer under a subsequent change in the zoning regulations.<sup>155</sup> In that case, according to Judge Cathell, there had been no change to the zoning regulations, and subsequently, the permit issued to the respondent was not a lawful permit because under the applicable ordinances, the respondent could not “conduct his business.”<sup>156</sup> Moreover, Judge Cathell opined that a municipality cannot be estopped from enforcing its lawful zoning ordinances, regardless of the issuance of an improper permit.<sup>157</sup>

### III. CONCLUSION

Examining the myriad of opinions authored by Judge Cathell in preparation for this article, I am awestruck not only by his clear and lively manner of writing, but also by his seemingly effortless ability to make the most arcane and arguably confusing areas of law accessible. He has striven to shine a light of rationality into the labyrinth of zoning and land use regulations, through recognizing and respecting the competing interests involved. In so doing, he has illustrated why he has earned the reputation for straight-talking and common sense judging, while simultaneously being willing and able to address the thorniest of issues. On a personal note, I will miss Dale Cathell, next to whom I have sat for the entirety of my judicial career. He has provided me with guidance, support, and an unwavering friendship. He has enriched my legal acumen as he has informed Maryland law and in so doing, has comported with John Locke’s belief that “[t]he improvement of the understanding is for two ends: first, for our own increase of knowledge; secondly, to enable us to deliver and make out that knowledge to others.”<sup>158</sup>

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155. *Id.* at 192, 783 A.2d at 188-89.

156. *Id.* at 194, 783 A.2d at 190.

157. *Id.* at 199, 783 A.2d at 193.

158. John Locke, *Some Thoughts Concerning Reading and Study for a Gentleman* (1703), reprinted in 3 AN ESSAY CONCERNING HUMAN UNDERSTANDING 293 (1828).