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considering purchase of either a cooperative or condominium unit should take time to examine the organization's leadership. Whether the investment in a unit will be secure will depend in large part on the experience, intelligence and commitment of the directors and on the management they oversee.

Conclusion

Condominiums and cooperatives represent different legal approaches and, to an extent, different conceptual orientations to the challenge of home ownership within a multi-unit dwelling. Condominium organization begins with the concept of independent individual ownership, but then significantly restricts traditional ownership rights in the interests of the group. Cooperatives focus initially on the larger entity and then provide in their by-laws and regulations for the rights and privileges of the members with regard to their individual homes and their participation in and control of the organization.

Each type of organization has advantages and disadvantages as far as development, purchase and occupancy. Condominium units are often easier to finance, but cooperative projects may be easier to develop and may be initially less costly. However, if financing continues to be as scarce as it is today, the differences in purchasing condominium versus cooperative units may become much less significant.

Cooperatives may impose somewhat greater restrictions on an individual's use and transfer than that of a condominium, but increasingly the two organizations have similar regulations in recognition of the need to balance the rights of the individual with the needs of the group. Cooperatives may enforce their regulations with more ease because they can utilize the landlord-tenant procedures, but successful management of either type of organization mostly depends on the ability and dedication of its leadership.

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A Review of Real Property Support Rights in Maryland

by Judith Ann Cross

Lawyers and law students should be aware of real property support rights in Maryland. It will arise in any type of practice, and one may encounter the problem of support rights even when undertaking a home improvement such as building a swimming pool. Set forth is an overview of the Maryland law on real property support rights.

Right to Lateral Support

Lateral support is an ancient principle of the common law that every landowner is entitled to receive the necessary physical support from adjoining soil. If earth is removed so near a neighbor's property that the neighbor's soil crumbles away under its own weight, there is liability for the damages proximately caused.

The leading Maryland case on lateral support rights is *Mullan v. Hacker*, 187 Md. 261, 49 A.2d 640 (1946).

In *Mullan*, the court traces the original theory of lateral support to England where the right was viewed as an easement subjecting the adjoining land to a natural servitude. It was not necessary to prove negligence to establish liability because the right was violated by removal of support. Over the years, a second theory developed that the right to lateral support was a right of property naturally attached to the soil. Under this second theory, it was necessary to show negligence or intention to cause injury.

In Maryland, both views have contributed to the present law. The right

to support to land from adjoining soil does not arise via an easement, but rather it is an absolute property right. If support is withdrawn and injury occurs, there is no need to show negligence or want of skill on the part of the adjoining landowner. *Mullan*, at 226, 49 A.2d at 642 (citing *Baltimore & Potomac R. Co. v. Reaney*, 42 Md. 117 (1875)). While withdrawal of lateral support subjects a neighbor to liability, he is not liable in an action for damages until a subsidence occurs. Subsidence is any movement of soil from its natural position. A shifting, falling, slipping, seeping or oozing of soil is subsidence within the meaning of the term as used in the law of lateral support of land. *Levi v. Schwartz*, 201 Md. 575, 95 A.2d 322 (1953); *Restatement (Second) of Torts* § 817 (1977). In order to be actionable, subsidence must be substantial: a few grains of sand or soil is not sufficient. *Levi*, 201 Md. at 582, 95 A.2d at 326.

Damages—Lateral Support

The right to lateral support is absolute. Once support has been withdrawn and injury occurs, the responsible person is liable even if he used utmost care in his operation. The measure of damages is the cost of restoring the damaged land to its condition before the damage without cost disproportionate to the damage. Where the cost of restoration is greater than diminution in market value of the land, the correct measure of damages is the difference between the value of the land before and after the damage. *Mullan*, 187 Md. at 270, 49 A.2d at 644.

Buildings on Land—Lateral Support

The absolute right to lateral support exists only with respect to land in its natural state. It does not apply to buildings on the land. In order to recover damages to buildings resulting from removal of lateral support, the property owner must prove negligence. *Mullan*, 187 Md. at 266, 49 A.2d at 642. Where a landowner

excavates his own land for a proper purpose and it is not done negligently, unskillfully or with improper motives, any damage to a building on adjoining land is *damnum absque injuria*.

A landowner in Maryland is not bound to furnish lateral support sufficient to sustain his adjoining owner's land where lateral pressure has been increased because of the weight of a building on the land. The test to determine the negligence of an excavator is whether he did his work in such a careless and improvident manner as to occasion a greater danger to the adjoining owner than the owner would have incurred in a reasonable course of such work. *Id.* at 267, 49 A.2d at 643. As a defense, the excavator would show that the loss to the adjoining property would have occurred even without negligence.

The common law on lateral support is not always suited to modern urban conditions. Higher real estate values encourage building to the lot line. Advanced technical knowledge produces taller and heavier structures, therefore, city and county building codes are the inevitable consequence. Property owners must be aware of local building code requirements which might differ from county to county since these codes add rights, liabilities and presumptions to the existing common law in Maryland.

Right to Subjacent Support

Subjacent support is the right to support from underneath the surface of land. This right is applicable where there has been a severance of surface and sub-surface rights. For example, the right to subjacent support arises between the surface owner and the owner of mineral rights beneath the surface. In Maryland, unless otherwise authorized by contract or statute, the owner of the surface land has an absolute right of subjacent support for the surface. The owner of the estate in minerals is entitled to remove only so much as he can take without injury to the

surface. *Piedmont Coal Co. v. Kearney*, 114 Md. 496, 79 A. 1013 (1911).

The right of subjacent support can only be released by express contract terms or by necessary implication. In *Piedmont Coal*, the court held the following language in a deed was not a sufficient waiver of subjacent support rights:

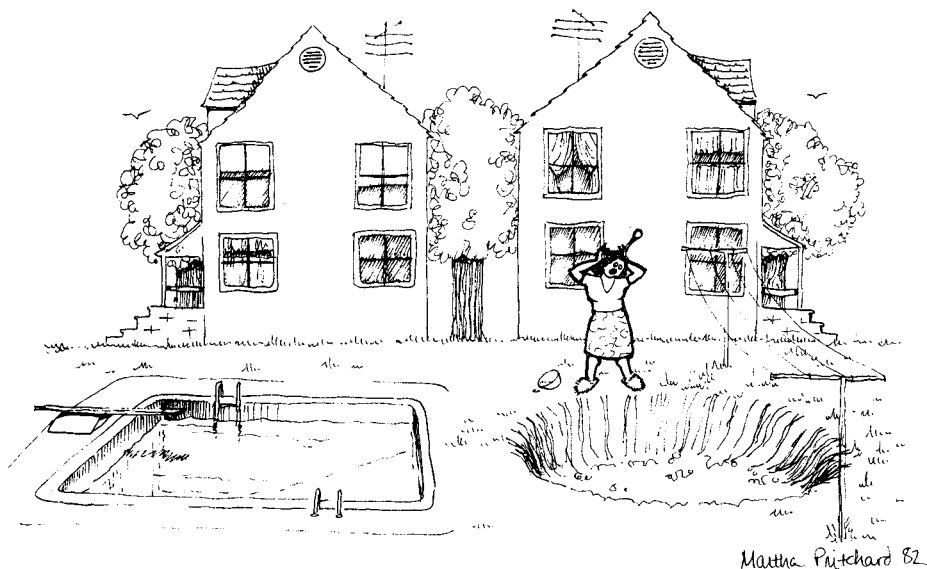
The parties of the first part reserve to themselves, their heirs and assigns, all coal and other minerals that have been or may hereafter be found on or in the said lands, together with the right to mine and remove the said coal or minerals at such place or places as may appear to them, the said first parties, their heirs or assigns, most suitable and convenient by tramroad, plane and dump houses or otherwise. . . .

Id. at 500, 79 A. at 1015.

Thus, a well-written release should expressly state that the owner of the surface waives all rights to subjacent support.

Buildings on Land—Subjacent Support

The law of subjacent support evolved largely on analogies to the law of lateral support. The duty of subjacent support to surface soil in its natural state is absolute. Under this duty there is no responsibility for injury to buildings unless the land in its natural state would have subsided. At this point there is a large difference between the two bodies of law which has a significant practical importance. Normally, the weight of the soil above the defendant's operations is so great that the added weight from buildings are relatively insignificant. The defendant, if he wishes to escape absolute liability, has the burden of proving that the building caused or contributed to the subsidence. Most controversies begin with a finding that the buildings were not a factor in the subsidence. Thus, damage to structures are awarded as "conse-



quential damages" based on the breach of the absolute duty to give subjacent support to land in its natural state. 5 *Powell on Real Property* ¶ 703 (1968). For example, in *Piedmont Coal*, the plaintiff sued the defendant for damages to his land and house as a result of the defendant's removing coal which supported the surface land. The plaintiff was the owner of the surface land and the defendant was the owner of sub-surface mineral rights. The court did not distinguish between land and buildings. Rather, it described the defendant who removed the subjacent support as a wrongdoer, and the plaintiff was entitled to recover all damages naturally or necessarily flowing from the wrongful acts of the defendant. The court noted that when the property can be put in as good condition as it was before the injury, the costs of repairs is the safer and better rule of damages. When the injury is of a permanent character and repairing will not compensate the owner for the injury, damages should be determined by the depreciation in the value of the land. *Id.* at 512, 79 A. at 1019. Because of the permanent damage in this case, the court held that the proper measure of damage was "the difference between the market value of the premises (taken

as a whole) before the injury and their present market value. . . ." *Id.* at 516, 79 A. at 1021.

Water Support

Subjacent and lateral support may be provided by subterranean waters. There are two distinct types: (1) underground streams and (2) percolating waters. An underground stream flows in a definite and fixed channel. Its existence and location is either known or may be ascertained from indications on the surface of the land or by other means without sub-surface excavations. *Finley v. Teeter Stone, Inc.*, 251 Md. 428, 248 A.2d 106 (1968). Percolating water oozes, seeps or filters through the soil beneath the surface. It may come together to form veins or rivulets, but its character as percolating water is not destroyed. Unless it is shown that the underground water flows in a defined and known channel, it is presumed to be percolating water. Interference with support provided by water is not subject to the same rules of absolute liability that are imposed on a landowner who deprives his neighbor of natural support provided by soils and other more solid materials. *Id.* at 443, 248 A.2d at 116.

Generally, the use of an underground stream is governed by the

same law that applies to surface streams. The owners of the land beneath which a stream flows have the same rights as riparian owners have to a surface stream. *Id.* at 432-33, 248 A.2d at 110. Every riparian owner is entitled to a reasonable use of water for domestic, agricultural and manufacturing purposes. *West Arlington Improvement Co. v. Mount Hope Retreat*, 97 Md. 191, 54 A. 982 (1903). What constitutes a reasonable or lawful use depends on the circumstances of each case, taking into consideration the size of the stream, the velocity of the current, the nature of the banks, the character of the soil and a variety of other factors. "It is entirely a question of degree, the true test being whether the use is of such a character as to affect materially the equally beneficial use of the stream by others." *Kelly v. Nagle*, 150 Md. 125, 139, 132 A. 587, 593 (1926).

There are two basic lines of authority applicable to the withdrawal of percolating waters. The first is the English rule. In England, and in many American states, a landowner has the absolute right to intercept underground percolating water before it has left his property without regard to the effect of such interception on the owner of neighboring land. The other line of authority is the American rule. Under this rule, a landowner must make reasonable use of percolating water which he removes from his land. In order to escape liability for resulting injury to his neighbor's land, the landowner must be reasonably exercising his proprietary right, "i.e., such an exercise may be reasonably necessary for some useful or beneficial purpose, generally relating to the land in which the waters are found." *Finley*, 251 Md. at 436, 248 A.2d at 111-12. The American rule is based upon the surface owner's right to obstruct, divert or remove percolating waters under the surface of his land in such a way that will not unreasonably injure the exercise of a similar right by the owner of neighboring land. The American rule

is also known as the "Reasonable Use Rule" or the "Correlative Rights Rule."

In *Finley*, the owners of a farm brought an action against the defendant quarrying company for damage to the farm. The defendant, in the operation of the quarry was required to pump water from the quarry, thereby drawing percolating water from the plaintiff's adjoining farm. Withdrawal of the percolating water caused sink holes on the farm, severely damaging the plaintiff's land. The Court of Appeals assumed without deciding that the American rule applied in Maryland. The court found the defendant would have a right to use the percolating waters under its land for any purpose connected with the legitimate use of its land. The court noted:

It is manifest that the conducting of quarrying operations is normally a legitimate and reasonable use of land, and certainly, in this case, there is no suggestion that such a use is unreasonable or inappropriate, considering all of the circumstances. . . . Indeed, the evidence in the present case, as in the above cases makes inescapable the conclusion that such procedures are accepted practice in the industry, and strongly suggests that without them, it would be economically, if not absolutely unfeasible for the landowner to put his property to such use.

Id. at 439-40, 248 A.2d at 113-14.

Perhaps there would be a different result if a plaintiff proved that soil was withdrawn from his property along with the percolating waters. The plaintiffs could argue that the defendant withdrew lateral support causing substantial subsidence. *Id.* at 443-44, 248 A.2d at 116.

Liability

Determining who is ultimately liable for removal of support for adjoining property is the source of unending litigation. There are local

building codes to consider, and often the property owner will hire an architect and an independent contractor to perform the work on his property. Consider, for example, the following hypothetical problem: June Cleaver, who we all knew as Beaver's mother, recently attended a consciousness raising seminar. An inspired June has discarded her pearls, high heels, vacuum cleaner and Ward to go into the home improvement business. Her first job is to build a wine cellar attached to an underground basement in a Baltimore City home. The wine cellar will abut her client's property line. Alas, June is concerned that a neighbor's garage might collapse. Is June or her client liable if the garage collapses?

Since June's client lives in Baltimore City, before she can obtain a permit to excavate at a depth greater than three feet within two feet of any adjoining property, June or her client must notify the owners and occupiers of all abutting property in writing of the work that is proposed. A copy of this notification with evidence that the neighbors received the notice must be filed with the Bureau of Building Inspections. Baltimore City Code, ch. 14, § 1411 (1976). In *Mullan*, the court held such an ordinance makes notification an imperative requirement. June's client's failure to give notice is sufficient negligence to render the client liable for any damage to the garage resulting from the excavation, even if non-negligently performed, since the neighbor is within the class of persons designed to be protected by the Baltimore City Code.

Once notice has been given to the neighbors, the burden is then on the neighbors to protect their own structures. Neither June nor her client will be liable for damages sustained if the excavation is done with due care. *Vandergritt v. Boward*, 129 Md. 140, 98 A. 528 (1916). It is the neighbor's responsibility to protect his buildings. A gratuitous undertaking to protect the garage may give rise to an implied right to the additional support of the neighbor's

structures resulting in liability if not done properly. 5 *Powell on Real Property* ¶ 700 (1968).

In Baltimore City the property owner/permit holder is strictly liable for injuries resulting from failure to comply with the Baltimore City Code. *Gardenvillage Realty Corporation v. Russo*, 34 Md. App. 25, 366 A.2d 101 (1976). If the owner has title when the excavation work is performed, liability attaches. The owner is in the best position to oversee the work and to insure compliance with the building code. *Id.* at 37, 366 A.2d at 109. While the other local building codes are not as explicit, a property owner in Baltimore City may not delegate the duty to comply with the City Code. If June's client is a corporation, the officers may also be held personally liable. For example, in *Levi*, the court held a corporation president personally liable for removal of support. The court noted the president had building experience and knew what the effect the excavation would have on the adjoining land. The president visited the scene of the operations every day and he gave orders to the construction foreman. The evidence supported the theory that the officer participated in the negligence and wrongful acts of the excavator.

Therefore, if June wants to establish a home improvement business, she must comply with the building code. Where a contractor fails to comply with code regulations, his negligence is active and the property owner's negligence is passive. In that instance, the property owner has a right to indemnification from the contractor. *Gardenvillage*, 34 Md. App. at 40, 366 A.2d at 111.

Statute of Limitations

An action for removal of support must be brought within three years from the time the damage occurs regardless of when the excavation occurred. *Easter v. Dundalk Holding Co.*, 199 Md. 324, 86 A.2d 477 (1952). This Maryland holding is in accord with the weight of American authority. *Id.* at 327, 86 A.2d at 479;

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Restatement (Second) of Torts § 817(i) (1977). Recovery is available "for each successive damage 'as and when it occurs,' whether damage be recurrent or continuous." *Easter*, 199 Md. at 327, 86 A.2d at 479. That is, damages occurring within and without the period of limitations are separable.

Conclusion

A neighbor has an absolute right to lateral and subjacent support for his land in its natural state. In order to collect damages for injury to buildings from removal of lateral support, negligence is needed. When damage occurs to a building from removal of subjacent support, damages are awarded as consequential damages based on breach of the absolute duty to give subjacent sup-

port unless the defendant proves that the building caused or contributed to the subsidence.

The right to support generally does not apply to subterranean waters. Withdrawal of water from an underground stream is governed by the law of riparian rights, and removal of percolating waters is governed by the reasonable use doctrine. However, if removal of water results in substantial subsidence, the plaintiff may have a cause of action based on removal of lateral support.

An injured plaintiff should sue the property owner, the contractor and all others involved in the removal of his support rights. This type of suit will trigger numerous cross-claims among the defendants as to indemnification and other contract rights. Even if the support was re-

moved over three years ago, an action will not be barred by limitations if the plaintiff can show the damage occurred within three years of the suit.