

**JULY 2012 MARYLAND BAR EXAMINATION
BOARD'S ANALYSIS**

QUESTION 1

Generally, any permanent improvement placed on the land of another, by a person having no title or interest therein and without the owner's consent, becomes a part of the realty and the property of the owner of the fee. *City of Baltimore v. St. Agnes Hospital of the City of Baltimore*, 48 Md. 419 (1978). Ordinarily, a person is not entitled to reimbursement for improvements voluntarily made on land which is known to be owned by another, and no lien is acquired for said improvements. *Sommerman v. Sommerman*, 217 Md. 151, 141 A.2d 738 (1958); *Goldberg v. Ford*, 188 Md. 658, 53 A.2d 665 (1947); *Stewart v. Wheatley*, 182 Md. 455, 35 A.2d 104 (1944). However, an occupant of another's land may be entitled to compensation for improvements made when the improvements were made believing that he or she was the owner and the value of the real property has been increased thereby. *Bradley v. Cornwall*, 203 Md. 28, 98 A.2d 280 (1953); *Duckett v. Duckett*, 21 A. 323 (1891); *Long v. Long*, 62 Md. 33 (1884); *Barnum v. Barnum*, 42 Md. 251 (1875); *Union Hall Association v. Morrison*, 39 Md. 281 (1874); *McLaughlin v. Barnum*, 31 Md. 425 (1869).

For an occupant to be entitled to recovery for improvements under this rule, they must have had the bona fide belief that they were the true owner based on reasonable grounds, and must have had possession of the land under color of title¹, although simply possessing knowledge of potential adverse claims does not necessarily deprive the builder of their right to compensation. *Bradley v. Cornwall*, 203 Md. 28, 98 A.2d 280 (1953); *Stewart v. Wheatley*, 182 Md. 455, 35 A. 2d 104 (1944); *Bryan v. Councilman*, 106 Md. 380, 67 A. 279 (1907). Depending upon the equities of the case, an owner receiving the benefit of improvements placed in good faith on his or her property may be required to repay the amount expended for the improvement, or to reimburse the claimant to the extent of the increase in the value of the property. *Masters v. Masters*, 200 Md. 318, 98 A.2d 576 (1952); *Goldberg v. Ford*, 188 Md. 658, 53 A.2d 665 (1947); *Stewart v. Wheatley*, 182 Md. 455, 35 A.2d 104 (1944); *Chamberlain v. Chamberlain*, 170 Md. 1, 184 A. 579 (1936); *Duckett v. Duckett*, 21 A. 323 (1891). If one supposing absolute title to an estate builds upon land with the knowledge of the real owner, who stands by and suffers the work to proceed without giving notice of their claim, the real owner will not be permitted to avail themselves of the improvements without paying full compensation therefor, provided that the real owner was fully aware of their rights and by conduct or gross negligence encouraged or influenced the work. *Goldberg v. Ford*, 188 Md. 658, 53 A.2d 665 (1947); *Stewart v. Wheatley*, 182 Md. 455, 35 A.2d 104 (1944); *Union Hall Association v. Morrison*, 39 Md. 281 (1874).

In this instance, Steve was acting in good faith and Bob, who was fully aware of the situation, did nothing. Bob informed Amanda that the building was his and it constituted a portion of the basis of the bargain between them. However, given the nature of the situation, a reasonably prudent person in Amanda's situation should have investigated further in order to avoid any potential problems. See *Williams v. Skyline Development Corp.*, 265 Md. 130, 288 A.2d 333 (1972). Her failure to do so vitiates any actions she might have taken in good faith and any accompanying protections. *Id.* As a result, Amanda should be required to compensate Steve

¹ A written instrument or other evidence that appears to establish title but does not in fact do so. Black's Law Dictionary 302 (9th ed. 2009).

**JULY 2012 MARYLAND BAR EXAMINATION
BOARD'S ANALYSIS**

either for the cost of the improvements or the resulting increase in value to her land, based upon a theory of unjust enrichment. In the alternative, Steve could move the building.

**JULY 2012 MARYLAND BAR EXAMINATION
BOARD'S ANALYSIS**

QUESTION 2

Maryland law imposes vicarious liability on an employer for the negligent acts of its employee committed within the scope of the employment relationship. Thus, vicarious liability applies only when the relation of master and servant existed between employer and wrongdoer at time of injury sued for, in respect to the very transaction from which it arose. *See Chevron. v. Lesch*, 319 Md. 25, 32-33 (1990). Here, Plumbing Co. is the employer of Erin, who is an apprentice under the supervision of the company. Nancy must first prove that Erin was negligent. Thus, Plumbing Co. will be vicariously liable to all foreseeable plaintiffs for Erin's breaches of a duty performed within the scope of her employment with Plumbing Co. that were the proximate cause of injury. Because, however, Plumbing Co. did not receive any benefit from Erin's work at issue here—the \$400 payment from Robby was made to “Erin Employee,” and because the work was unauthorized, expressly prohibited and unknown to Plumbing Co., Plumbing Co. will likely successfully argue that Erin's work for Robby was outside the scope of her employment with Plumbing Co. Indeed, Erin's work was for her own benefit not Plumbing Co., as such work was in direct competition with Plumbing Co.'s interest as a plumbing company. Therefore, Plumbing Co. will have a solid basis for defending against any vicarious liability claims from Nancy.

Generally, the law imposes no duty to control the acts of another person. *See e.g., Remsburg v. Montgomery*, 376 Md. 568, 583 (2003). However, under certain circumstances, where a person has knowledge of the propensities of a person and also the means by which to control the person, then such a duty will arise. Here, Plumbing Co. as Erin's employer has control over Erin's employment and its equipment, and also knows that she has propensity to use the company truck for personal use. Thus, in addition to issues regarding vicarious liability of Plumbing Co. including whether or not at the time Erin was acting as an agent of Plumbing Co., a direct claim of negligence might be made against Plumbing Co. based on negligent entrustment of the company truck to Erin (and/or negligent supervision of Erin). Under the facts, Plumbing Co. knows that Erin has taken company vehicles without authorization for “personal purposes on a number of occasions”. Therefore, a question arises as to whether or not Plumbing Co. has appropriately controlled Erin's access to the company vehicle. However, Plumbing Co. may assert that there is a lack of causation between Erin's access to the company truck and the alleged negligent securing of the water meter cover which caused Nancy's injuries. Erin's negligent use of the truck (or the tools from the truck) is not the proximate cause of Nancy's injuries. Nancy was not hit by the company truck nor did she trip over the company tools, rather, she fell on an unsecured water vault cover as a result of Erin's alleged failure to secure it.

**JULY 2012 MARYLAND BAR EXAMINATION
BOARD'S ANALYSIS**

QUESTION 3

Part A

Chance was a prospective client. Although Evers declined to take Chance's case, he had discussed the case with Chance. Rule 1.18 (a). Evers cannot use or reveal the information provided by Chance in the telephone conversation. Maryland Rule 1.18 (b). The pending Circuit Court case in which Chance has brought suit against Tinker demonstrates that this is the same matter and their interests are materially adverse as to each other. Evers cannot represent Tinker if Evers received information from Chance that could be significantly harmful to Chance in this matter. Maryland Rule 1.18 (c). The facts of the collision and injuries may or may not include information significantly harmful to Chance in litigation.

Evers could represent Tinker if both Chance as the prospective client and Tinker as the affected client have given Evers informed consent, confirmed in writing, Maryland Rule 1.18 (d).

“‘Informed consent’ denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” Rule 1.0 (f).

“‘Confirmed in writing’ in this context “denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent.” Rule 1.0 (b).

The facts do not state that Evers is a member of a law firm. Therefore, the screening of Evers as a disqualified lawyer as set forth in Maryland Rule 1.18 (d) would not be an exception in the facts presented.

Additionally, the facts presented do not support the exceptions listed in Rule 1.6 (b).

Rule 1.18 – Duties to Prospective Clients

Rule 1.0 -- Terminology

Rule 1.6 -- Confidentiality of Information

The Maryland Lawyers' Rule of Professional Conduct

Attorney Grievance Commission of Maryland v. Siskind, 401 Md. 41, 930 A.2d 328 (2007)

Part B

Evers' act of direct communication with the Landlord when the Landlord was represented by counsel was not a professional ethics violation. He was pursuing his own business interests. Rule 4.2 (a) provides that a lawyer shall not communicate about the subject of the representation with a person who the lawyer knows is represented in the matter by another lawyer. Evers was

**JULY 2012 MARYLAND BAR EXAMINATION
BOARD'S ANALYSIS**

not representing a party. He was a litigant in the case. The Comment to Rule 4.2 states in pertinent part: "...parties to a matter may communicate directly with each other..."

Rule 4.2 – Communication with Person Represented by Counsel

Comment to Rule 4.2

The Maryland Lawyers' Rules of Professional Conduct

Preston Trucking Company, Inc. v. Liquidity Solutions, Inc., 392 B.R. 623 (D. Md., 2008)

Pinsky v. Statewide Grievance Committee, 216 Conn. 228, 578 A.2d 1075 (1990)

Part C

Evers violated Rule 1.5. Based on the given facts, Evers billed for these expenses without any prior disclosure or notification to his clients of his intention that they share in payment of his office expenses. He had no agreement or consent from his clients regarding their payment of any part of these expenses. Evers' clients have a reasonable expectation that these office expenses would be included within the hourly fee arrangement Evers had negotiated for his professional services.

Rule 1.5 – Fees

The Maryland Lawyers' Rules of Professional Conduct

Attorney Grievance Commission v. Kremer

404 Md. 282, 946 A.2d 500 (2008)

Maryland State Bar Association, Inc. Committee on Ethics

Ethics Docket No. 2009-12

**JULY 2012 MARYLAND BAR EXAMINATION
BOARD'S ANALYSIS**

QUESTION 4

1. Pets/animals are not subject to custody orders by the court. Animals are divided as personal property and distributed among the property in equitable distribution. Both assets and debt which has been incurred during the marriage is considered in equitable distribution. The Court does not consider the reason for the ending of the marriage nor the behaviors of the parties when determining equitable distribution. The animal can be assigned a monetary value or not. Then the court can consider it in final distribution. It can be noted that equitable does not mean "equal". The expense of the animal will not be addressed by the court. The parties can also reach an agreement as to who should have the animal and the accompanying veterinarian bills, food and boarding. If they reach an agreement, the court will not have to address the dog at all. If no agreement is reached, then the court can order the dog sold and the proceeds divided between the parties.

2. There are many factors considered when determining alimony per Family Law Art § 11-106. There are three types of alimony available in the case. Temporary Alimony-which allows the dependent party to maintain the status quo during the pendency of divorce and the only factors considered for this are need of dependent spouse and ability of other spouse to pay. The other two types of alimony are rehabilitative and permanent. Permanent alimony is not favored in Maryland and is paid to a spouse until either spouse dies or payee spouse remarries/cohabits with paramour. Rehabilitative is short term (usually 3-5 years) and is for the purpose of helping dependent spouse pursue education or career opportunities to better his/her income. There are multiple factors to consider for these two types of alimony. Three of the factors relevant here are the length of marriage, the circumstances which led to the estrangement of the parties and disparity of income. In this scenario, the parties have disparate income based upon which the court could grant alimony. (*Reuter v Reuter*, 102 Md. App. 212, 1944. If the court finds dependent spouse cannot be self-supporting at time of divorce can award alimony temporarily or permanently). However, a short marriage and Donna's string of infidelities will probably preclude her from getting alimony. (*Flanagan v. Flanagan*, 270 Md. 355, 1973. When the bad behavior of the party seeking alimony is the sole reason for the divorce, an award of alimony can be an abuse of discretion.)

3. Any part of a pension which has accrued during the marriage is marital property. The non-pension earning spouse is entitled to one-half of the pension earned by the other spouse as it accrued during the time of the marriage. Family Law Art. § 8-201 -213. Courts and Judicial Proceedings, § 3-6A-01(e), *Gravenstine v. Gravenstine*, 58 Md. App. 158 (1984). Spousal conduct does not affect this equitable determination.

4. Donna's award for workers' compensation will be personal to her. It is for loss of the use of her leg-which is not marital property. Additionally, according to the fact pattern, the actual award will not be made prior to the divorce, so it is not "property acquired during the marriage." If the award were granted prior to the divorce AND included compensation for

**JULY 2012 MARYLAND BAR EXAMINATION
BOARD'S ANALYSIS**

lost wages or medical expenses paid by the couple, then Paul could prevail on a claim for a portion of that part of the award.

**JULY 2012 MARYLAND BAR EXAMINATION
BOARD'S ANALYSIS**

QUESTION 5

A. As to a general partnership there is no need for a derivative action. Derivative actions are necessary to corporations and limited partnerships and LLCs where the shareholders “derive” the right to sue from the entity itself. General partners however, have the right to act on behalf of the partnership itself, and all have management rights. C.A. § 9A-301(1) describes partners’ role as agents of the partnership; § 9A-401(f) regarding equal management rights in a partnership. Comment 405 the Revised Uniform Partnership ACT (RUPA) states, that “since general partners are not passive investors like limited partners, RUPA does not authorize derivative actions.

Members of an LLC may bring a derivative action to enforce the right of the limited liability company to recover a judgment in its favor to the same extent that a stockholder may bring an action for a derivative suit under the corporation law of Maryland. C.A. § 4A-801(a).

B. Although a general partner may not sue “derivatively” a general partner may bring partnership claims against another partner or a third party on behalf of the partnership. A partnership may maintain an action against a partner for breach of the partnership agreement, or for a violation of a duty to the partnership. C.A. § 9A-405(a).

Actions may be brought against Jay individually to the extent that a duty owed to the other partners as individuals, or in the case of a limited liability company, owed to the members of the LLC in their individual capacity.

To the extent that an LLC provides a shield against liability for an individual a suit equivalent in purpose to one “piercing the corporate veil” in the case of a corporation could be instituted against the individual managing or controlling an LLC.

C. A derivative suit cannot be maintained on behalf of a limited liability company whose right to do business in Maryland and use its name were forfeited. *Price v. Upper Chesapeake Health Ventures*, 192 Md. App. 695 (2010). Limited liability companies like corporations are required to file a personal property tax report and pay appropriate taxes. C.A. § 4A-911(d) does not expressly bar an LLC that fails to pay taxes from filing an action in court-except to the extent that filing suit in the name of an LLC falls within the proscription of “doing business” or “using” the LLC name. C.A. § 4-920 expressly provides that a forfeited LLC may only defend an action in court until it is revived. Further, Rule 2-201 provides that every court action shall be prosecuted in the name of the real party in interest, therefore, Peterman, LLC, cannot file suit after December 1, 2008.

The person bringing the action as the plaintiff should be denominated as “Jay, derivatively on behalf of (name of entity).” The nature of a derivative action is that the person taking the action is taking it to safeguard the entities rights and property. The person bringing the derivative suit ‘stands in the shoes’ of the entity on whose behalf the action is being

**JULY 2012 MARYLAND BAR EXAMINATION
BOARD'S ANALYSIS**

filed. Merely stating that this is a derivative action does not grant the business entity a right to sue, if for example, it lost its right to sue for failure to pay taxes or lost its charter.

**JULY 2012 MARYLAND BAR EXAMINATION
BOARD'S ANALYSIS**

QUESTION 6

A. GCC must file a notice of intention to defend within 15 days after service of the Complaint. Md. Rule 3-307(a) and (b).

Section 4-401(1) of the Courts Article provides that the District Court has exclusive original jurisdiction for an action in contract if the debt or damages do not exceed \$30,000 except as provided in Section 4-402 of the Courts Article. Section 4-402(e) of the Courts Article states a party may not demand a jury trial in a civil action in which the amount in controversy does not exceed \$15,000 exclusive of attorney's fees, if attorney's fees are recoverable by law or contract.

Homeowner has claimed damages in the amount of \$16,000 as his costs incurred to fix the defective heating and air conditioning systems. No attorney's fees are indicated in the facts. The amount claimed is more than \$15,000, therefore, GCC may elect to have its case tried by a jury, causing the case to be transferred to Circuit Court. Section 4-402 (c) of the Courts Article.

If GCC wants to have its case tried by a jury it must file a separate written demand within 10 days after the time for filing a notice of intention to defend. Md. Rule 3-325.

GCC should file a third-party claim against H&A for the work performed on the Addition. Md. Rule 3-332. The third-party claim may be made at any time before 10 days of the scheduled court date. Within 10 days of the scheduled court date or after trial has commenced, a defendant may file a third-party claim only with the consent of the plaintiff or by order of the court. Md. Rule 3-332(e).

B. Md. Rule 3-124(d) provides that service on a corporation is made by serving its resident agent, president, secretary, or treasurer. If the corporation has no resident agent or if a good faith attempt to serve the resident agent, president, secretary, or treasurer has failed, service may be made by serving the manager, any director, vice president, assistant secretary, assistant treasurer, or any other person expressly or impliedly authorized to receive service.

An additional provision for service on a corporation that does not have a resident agent is contained in Md. Rule 3-124(o). Service under this rule is made upon the corporation by serving two copies of the summons, complaint, and all other papers filed with it, together with the requisite fee, upon the State Department of Assessments and Taxation.

If GCC serves H&A by serving one of the listed officials in Maryland, H&A will be required to respond with a notice of intention to defend within 15 days of being served. Md. Rule 3-307(b)(1). If the official is served outside of Maryland or if H&A is served by service on the State Department of Assessments and Taxation the notice of intention to defend must be filed within 60 days after being served.

**JULY 2012 MARYLAND BAR EXAMINATION
BOARD'S ANALYSIS**

QUESTION 7

1. The credibility of any person who takes the witness stand may be attacked. MRE 5-609 sets out a several part analysis regarding the admissibility of prior crimes to attack credibility. First, the crime must be an infamous one or “[an]other crime relevant to the witnesses’ credibility”. Second, the Court must determine that the probative value outweighs the danger of unfair prejudice to the witness or objecting party. MRE 5-609(a). Third, the conviction must have occurred within 15 years. MRE 5-609(b). In Maryland, infamous crimes are treason, felony theft (including crimes in which theft is a lesser included offense such as armed robbery), perjury, forgery and the so-called *crimen falsi*, i.e. misdemeanors involving dishonesty. Because Carrie is a non-party witness in a civil case, the risks of prejudice that could exist against a party are normally not present. Thus, it is likely that the 11 year old conviction regarding robbery will be used to impeach Carrie’s credibility.

2. Ned’s proposed testimony about Carrie’s statement about Construction Co.’s policies is hearsay. Ned is attempting to testify to out of court statements allegedly made by Carrie about statements or policies of Construction Co. Ned’s counsel, however, will attempt to argue that Carrie’s statements to Ned are admissions of a party opponent because Carrie worked for Construction Co.

In Maryland, admissions are exceptions to the hearsay rule, not automatically “non-hearsay” as under the federal rules. Pursuant to MRE 5-803(a)(3) or (4)—in order for there to be a proper admission exception to the hearsay rule, a person providing the statement must be an employee acting within scope of their employment regarding matters they are authorized to make statements on behalf of employer. Because Carrie, is merely an apprentice, she is likely not authorized to make statements on behalf of Construction Co. Further, the facts state that Carrie was not authorized to work on her own much less authorized to use company equipment for personal use. Thus, her statements are not those in connection with her acting within the scope of her employment with Construction Co. Indeed, the issue of whether or not Carrie was acting as an agent is a material issue in dispute in the case, therefore, Ned cannot testify about what the disputed agent told him on the basis that such a statement was an admission against Construction Co. Accordingly, Ned’s testimony is based upon inadmissible hearsay without any exception and should be excluded.

3. Pursuant to MRE 5-616 the credibility of any witness may be attacked through extrinsic evidence as to non-collateral matters—such as the check at issue here. MRE 5-613(b), however, requires that at some point before counsel completes his or her examination of the witness that the witness (and his/her counsel) is shown the disputed written statement and then the witness be given an opportunity to explain or deny having made it. Here, the attorney should give Sam an opportunity to both see and either admit, deny or explain the check. Unless the attorney does this, he or she cannot offer the document as extrinsic evidence to attack Sam’s testimony that he wrote the check to Construction Co. instead of Carrie.

**JULY 2012 MARYLAND BAR EXAMINATION
BOARD'S ANALYSIS**

4. The statements by the neighbors are inadmissible hearsay without exception. Ned is attempting to testify about out of court statements made by neighbors regarding things they claim to have seen. The neighbors' statements are not excited utterances or present sense impressions for several reasons. For example, Ned did not overhear these statements from his neighbors as they perceived the events unfolding in front of them. Rather, these were events the neighbors allegedly told Ned about that had occurred "earlier in the day." There is absolutely no way of assuring the validity of Ned's self-serving testimony without calling the neighbors themselves who allegedly made the out of court statements to Ned about what they claimed to have seen.

5. Interrogatories can be read into evidence at any point during a trial as admissions of the opposing party pursuant to Rule 2-421(d) and MRE 5-803(a)(1). However, MRE 5-411 provides generally that evidence of liability insurance (or the lack thereof) is inadmissible as not relevant to the issue of negligence or wrongful conduct. Such information is also prejudicial and against public policy as it could have a chilling effect on the obtaining of insurance coverage. However, evidence of insurance may be admissible if Ned's counsel can demonstrate to the court that such information is relevant to showing Construction Co.'s agency, ownership or control over Carrie or the work that was performed. It is unlikely that a court would allow the insurance information into evidence because of its prejudicial effects and because Carrie's work at issue was not in furtherance of Construction Co.'s interest in Carrie's employment and there was no dispute that Carrie had been employed by Construction Co. to do authorized work for the company.

**JULY 2012 MARYLAND BAR EXAMINATION
BOARD'S ANALYSIS**

QUESTION 8

A right of first refusal is an option contract. *Bramble v. Thomas*, 396 Md. 443, 914 A.2d 136 (2007). It is well settled-law in Maryland that to be an effective exercise of an option, the exercise of that option “must be unequivocal and in accordance with the terms of the option.” *Katz v. Pratt Street Realty Co.*, 257 Md. 103, 118, 262 A.2d 540, 547 (1970).

However, the property owner, and possibly the third-party purchaser, must not be allowed to add in bad faith terms to the triggering offer which are intended to nullify the right of first refusal. *Bramble, Supra.*; *West Texas Transmission, L.P.*, 907 F.2d at 1563.

Because of this, the court will have to look at the materiality of the omitted term, (the farming restriction) and whether the term meets the implied duties of good faith and fair dealing contained in every contract.

Imposing upon Smith and Buyer an implied duty of good faith and fair dealing preserves a property owner’s right to dispose of property as he or she deems appropriate and, at the same time, protects the equitable property interest that Jones holds in the Farm. *See, Bramble*. Thus the ultimate issue to be decided will be the materiality of the “no farming” clause in the Addendum and whether Smith’s actions constituted bad faith or whether they can show a reasonable justification for the clause. *Bramble, Supra*.

If Smith is unable to produce an adequate justification for the “no farming” clause, Jones should be permitted to exercise his preemptive right without satisfying literally the added term of the triggering offer.

Jones can also argue that by Smith’s conduct, his offer was accepted by Smith. When Buyer made her second offer, a finder of fact may rule that Smith’s actions supported Jones’ contentions that the offer was accepted as there can be no other explanation of why Buyer would make the second offer other than bad faith.

In conclusion, if Smith can show a justifiable reason for the restriction, he will succeed. If the facts show no justification or bad faith, Jones will prevail.

See, Generally, *Bramble v. Thomas*, 396 Md. 443, 914 A.2d 136 (2007).

**JULY 2012 MARYLAND BAR EXAMINATION
BOARD'S ANALYSIS**

QUESTION 9

Dan violated the law. The law, however, is facially unconstitutional.

The First Amendment to the Constitution of the United States

In order for the State to justify the prohibition of a particular type of statement, it must be able to show that its action was motivated by something more than a mere desire to avoid the unpleasantness accompanying an unwanted or unsolicited opinion. *Brukiewa v. Police Commissioner of Baltimore City*, 257 Md. 36, 263 A.2d 210 (1970). Governmental regulation touching on federal First Amendment free speech rights (as applied to the states through the Fourteenth Amendment to the Constitution of the United States and applied and interpreted *in pari materia* with Article 10 of the Maryland Declaration of Rights) is permissible only within the following bounds:

- 1) It is in furtherance of a substantial government interest;
- 2) The interest is unrelated to the suppression of free expression; and
- 3) It is narrowly-tailored so that the restriction is no greater than what is essential to the furtherance of that interest.

Donnelly Advertising Corp. of Maryland v. City of Baltimore, 279 Md. 660, 370 A.2d 1127 (1977); U.S. Const. amend. I and XIV; Md. Const. Decl. of Rights, Art. 10.

Supporting tourism would most likely not be considered a substantial government interest. The suppression at issue is directly related to this alleged interest. The statute is not in any way narrowly-tailored; it is as broad as possible. Therefore, it is in clear violation of the First Amendment.

Ex Post Facto

Retrospective criminal laws are prohibited by Article 17 of the Maryland Declaration of Rights and the Ex Post Facto provision of the Constitution of the United States. U.S. Const. art. I §9, cl. 3; Md. Const. Decl. of Rights, Art. 17; *Village Brooks, Inc. v. State*, 22 Md. App. 274, 323 A.2d 698 (1974). Generally, an ex post facto law is one which, in its operation, makes that criminal which was not so at the time the act was performed. *Id.*; *Star v. Preller*, 419 U.S. 956 (1974); *Corley v. Moore*, 236 Md. 241, 203 A.2d 697 (1964). Ordinarily, this provision applies only in the criminal context and is inapplicable to civil matters or laws; however, this prohibition cannot be evaded by giving alleged civil form to provisions which are, in effect, criminal. *Anderson v. Department of Health and Mental Hygiene*, 310 Md. 217, 528 A.2d 904, cert. denied, 485 U.S. 913 (1987); *Corley v. Moore*, 236 Md. 241, 203 A.2d 697 (1964); C.J.S. Constitutional Law § 437; M.L.E. Constitutional Law § 292.

Dormant Commerce Clause

The statute would also most likely run afoul of the dormant (or negative) Commerce Clause because it improperly burdens or interferes with interstate commerce. The law facially discriminates against out-of-state interests and has the effect of favoring in-state economic

**JULY 2012 MARYLAND BAR EXAMINATION
BOARD'S ANALYSIS**

interests over out-of-state ones. Discriminatory measures motivated by simple economic protectionism are subject to a virtually per se rule of invalidity, which can only be overcome by a showing that the State has no other means to advance a legitimate local purpose. *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951); *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977); *Maine v. Taylor*, 477 U.S. 131 (1986); *Brown-Forman Distillers v. New York State Liquor Authority*, 476 U.S. 573 (1986). In this instance, Maryland would most likely fail this test, as the State would have any number of ways to promote its beaches.

The Eighth Amendment to the Constitution of the United States

The Eighth Amendment prohibition against cruel and unusual punishment is construed in pari material with Article 25 of the Maryland Declaration of Rights, and the question is whether the punishment imposed conforms with the basic concept of human dignity and is either cruelly inhumane or disproportionate to the offense. *Phipps v. State*, 39 Md. App. 206, 385 A.2d 90 (1978); *Thompson v. Grindle*, 113 Md. App. 477, 688 A.2d 466 (1997), *cert. granted*, 346 Md. 28, 694 A.2d 951 (1997), and *cert. dismissed*, 348 Md. 198, 702 A.2d 1272 (1997); U.S. Const. amend. VIII, Md. Const. Decl. of Rights, Art. 25. The disproportionate nature of the punishment, a large fine and potential jail time, for advertising a coastal town is readily apparent.

As a result of these fatal constitutional infirmities, the law may not be enforced against Dan.

Other Potential Issues

The law would not be considered a regulatory taking because Dan has not been deprived of all economically-beneficial use of the land. *Neifert v. Department of the Environment*, 395 Md. 486, 910 A.2d 1100 (2006) (*citing Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)).

The privileges and immunities clause of the federal Constitution would not be invoked because the statute does not distinguish Maryland residents from residents of any other state. *Henderson v. United States*, 63 F. Supp. 906 (1946); *Wright v. State*, 88 Md. 436, 41 A. 795 (1898).

**JULY 2012 MARYLAND BAR EXAMINATION
BOARD'S ANALYSIS**

QUESTION 10

Able can be the subject of an indictment for the following crimes with the factual predicate as indicated:

1. First Degree Murder of Bob (Criminal Law Section 2-201) based on armed carjacking and robbery under the felony murder rule.
2. Second Degree Murder of Bob (Criminal Law Section 2-204) (lesser included offense).
3. Assault in the First Degree of Bob – assault by firearm (Criminal Law Section 3-302 (a)(2)).
4. Assault in the First Degree of Officer Dave by automobile by intentionally ramming Defendant's police car attempting to cause serious physical injury (Criminal Law Section 3-202 (a)(1)).
5. Assault in the Second Degree of Bob and Officer Dave – a lesser included offense of numbers 3 and 4.
6. Reckless Endangerment of Officer Dave – Abel's driving of the motor vehicle created substantial risk of death or serious physical injury to Officer Dave. (Criminal Law Section 3-204).
7. Robbery with a dangerous weapon of Bob (Criminal law Section 3-403) and the lesser included offense of robbery (Criminal Law Section 3-402). Abel pointed a gun at Bob and demanded and received Bob's money and watch.
8. Armed carjacking of Bob (Criminal Law Section 3-405 (c)) by using a gun to take possession of Bob's car.
9. Wear, carry and transport handgun in a vehicle and on his person (Criminal Law Section 4-203 (a)(1) I and II). Abel transported the handgun and also had it concealed on his person when recovered by Defendant.
10. Use of Handgun in crime of violence (Robbery & Murder) (Criminal Law Section 4-204). The handgun was used to perpetrate the robbery and murder.
11. Possession of marijuana for the marijuana cigarette recovered from Abel's shirt pocket (Criminal Law Section 5-601 (a)(1)).
12. Possession of paraphernalia (Criminal Law Section 5-619 (c)) wrapping papers in shirt pocket.

**JULY 2012 MARYLAND BAR EXAMINATION
BOARD'S ANALYSIS**

13. Theft of property of at least \$10,000 but less than \$100,000 for stealing Bob's money, watch and car (Criminal Law Section 7-104 (9) ii).

14. Motor Vehicle Theft (Criminal Law Section 7-105 (b)) for stealing the car.

15. Fleeing and eluding a police officer by failing to stop when approached by Officer Dave in a marked police unit with lights and sirens engaged (Transportation Article 21-904(b)).