IN THE COURT OF APPEALS
OF MARYLAND

September Term, 2005
No. 133

PRINCE GEORGE'S COUNTY, MARYLAND,
Petitioner,

v.

RAY'S USED CARS, et al.,
Respondents.

Appeal from the Circuit Court for Prince George's County
(Michele D. Hotten, Judge)

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

THOMAS A. BOWDEN, *Counsel of Record*
Kollman & Saucier, P.A.
8th Floor, Sun Life Building
20 South Charles Street
Baltimore, Maryland 21201-3220
Telephone: (410) 727-4300
Facsimile: (410) 727-4391

TIMOTHY SANDEFUR, *Of Counsel*
Cal. Bar. No. 224436
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Attorneys for Amicus Curiae Pacific Legal Foundation

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Page

Page

Page

United States Constitution

State Constitution

Miscellaneous

INTRODUCTION

The government's authority to regulate the actions of citizens, also known as the "police power," exists for the purpose of protecting the public health, safety, and welfare. *Maryland Bd. of Pharmacy v. Sav-A-Lot, Inc.*, 270 Md. 103, 106, 311 A.2d 242, 244 (1973). Government has no authority to enact measures that do not have any substantial relation to such goals, 270 Md. at 116, 311 A.2d at 249, nor to adopt measures aimed at illegitimate goals, such as promoting private interests, or arbitrarily designing neighborhoods merely to suit the desires of public officials. *See Creative Country Day Sch. of Sandy Spring, Inc. v. Montgomery County Bd. of Appeals*, 242 Md. 552, 566, 219 A.2d 789, 796 (1966) ("[A] zoning restriction upon the use of land would be unconstitutional as a denial of due process of law unless it had some substantial relation on the police power."); *Levinson v. Montgomery County*, 95 Md. App. 307, 319, 620 A.2d 961, 967 (1993). Nor may the government use "the guise of the police power [to] take private property for public use without compensation." *North Amber Meadows Homeowners Ass'n, Inc. v. Haut Enterprises*, 101 Md. App. 452, 466, 647 A.2d 127, 134 (1994) (quoting *Capital Transit Co. v. Bosley*, 191 Md. 502, 514, 62 A.2d 267, 273 (1948)).

The zoning measure challenged in this case violates both of these rules. First, the county seeks to drive out the present property owners and replace them with an art district that county officials believe is more desirable. But it is not the role of the government to shape a local economy to suit the preferences of some at the expense of others. *Levinson*, 95 Md. App. 307, 620 A.2d 961; *Aspen Hill Venture v. Montgomery County Council*,

265 Md. 303, 289 A.2d 303 (1972). Further, the county chose the arbitrary figure of 25,000 square feet simply to ensure that current uses would be eliminated, and not (as the constitution requires) to protect the public health, safety, and welfare. As such, it is an attempt to take the property to provide the public with a benefit. The property owners therefore are due compensation. Instead of compensation, however, the county adopted an "amortization" provision. Such provisions are attempted substitutes for just compensation, and cannot satisfy the just compensation requirement of the Maryland Constitution, which requires that property owners be "paid and tendered" compensation for government takings of private property for public use.

ARGUMENT

I

CB-87 IS UNCONSTITUTIONAL AS A POLICE POWER ENACTMENT BECAUSE IT REGULATES PROPERTY IN THE SERVICE OF PARTICULAR PRIVATE INTERESTS AND NOT FOR THE PUBLIC WELFARE

This case involves an example of what Professor Cass Sunstein has described as a "naked preference," namely, the government's use of its regulatory power to give benefits to particular private groups at the expense of others. *See* Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689 (1984). Here, county officials decided that they would prefer the area currently being used for used car sales to be used instead as an "art district," and used their zoning power to eliminate car lots under the pretext of a size restriction. But the zoning power must be exercised in the service of the public health, safety, and welfare—not for the private benefit of politically preferred groups. Here,

art galleries and car dealerships are competing for land in the county, and county officials have decided to wield their authority on behalf of the former. Yet "the prevention of competition is not a proper element of zoning." *Kreatchman v. Ramsburg*, 224 Md. 209, 219, 167 A.2d 345, 351 (1961). *See also Huff v. Bd. of Zoning Appeals of Baltimore County*, 214 Md. 48, 57, 133 A.2d 83, 88 (1957); *Cassel v. Mayor & City Council of Baltimore*, 195 Md. 348, 353-54, 73 A.2d 486, 488 (1950). As an exercise of the police power, CB-87 is unconstitutional because it does not bear a rational relationship to public health, safety, and welfare. *Frankel v. City of Baltimore*, 223 Md. 97, 103-04, 162 A.2d 447, 451 (1960).

A. Government Power May Not Be Used to Give Preferences to Particular Economic Groups

Government's regulatory power must be exercised in the service of the general welfare, not in the service of particular, preferred groups. *Mayor & City Council of Baltimore v. Byrd*, 191 Md. 632, 637-38, 62 A.2d 588, 590-91 (1948); *Kreatchman*, 224 Md. at 219, 167 A.2d at 350; *Maryland State Bd. of Barber Examiners v. Kuhn*, 270 Md. 496, 511-12, 312 A.2d 216, 224-25 (1973). Government is instituted to protect the rights of all of the people in society. Thus, when it exercises authority for the benefit of discrete interest groups without some overriding public justification, it exceeds its legitimate authority. *Cf. Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002); *Bruce v. Director, Dep't of Chesapeake Bay Affairs*, 261 Md. 585, 602-03, 276 A.2d 200, 209 (1971). In such cases, it is engaged not in law, but in the mere use of force. *Loan Ass'n v. Topeka*, 87 U.S. 655, 664 (1874). Such actions are inherently arbitrary, because there is no reason why the government could not, with equal plausibility, change its rules to favor any other discrete segment of the

populace. This violates the fundamental purposes of government. *See The Federalist* No. 51, at 324 (James Madison) (Clinton Rossiter ed., 1961) ("In a society . . . [in] which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger.").

Unfortunately, the zoning power is prone to abuse by political leaders seeking to confer benefits on a particular social group over another. In *Byrd*, 191 Md. at 637-38, 62 A.2d at 590-91, this court upheld a zoning regulation requiring gas stations to be situated at least 300 feet away from movie theaters. The court emphasized that zoning regulation "must not be arbitrary nor . . . discriminating, except insofar as is necessary for the proper establishment of the various kinds of districts permitted." *Id.* The zoning power may not impose burdens on property owners that are not "justified by consideration of the public health, safety or welfare." 191 Md. at 638, 62 A.2d at 591. Because gas stations presented a genuine fire danger to the public, the *Byrd* Court held that it was legitimate to require them to be situated in certain places away from areas where the public would congregate. 191 Md. at 640, 62 A.2d at 592. But in this case, car sales lots present no danger to the public. Instead, the county arbitrarily chose to exclude them, in preference to art galleries and subsidized housing for artists.

In *Verzi v. Baltimore County*, 333 Md. 411, 635 A.2d 967 (1994), this court struck down an ordinance limiting the towing business to residents of Baltimore County. This ordinance violated the state constitution's equal protection clause because that clause

prohibited counties from "giv[ing] economic preferences to their own citizens." 333 Md. at 424, 635 A.2d at 973. Such distinctions are inherently "arbitrary," *id.*, because they bear no relationship to protecting the public from "fraud, deception and abuses," 333 Md. at 425, 635 A.2d at 974. Instead, such laws simply grant economic preferences to favored insiders. The government's regulatory power exists to protect the public from "peril[s] to the health or welfare," and not "to confer . . . monopol[ies]" on particular individuals or groups. 333 Md. at 420, 635 A.2d at 971 (quoting *Mayor & City Council of Havre de Grace v. Johnson*, 143 Md. 601, 608, 123 A. 65, 67 (1923)).

In *Bruce*, 261 Md. at 602-03, 276 A.2d at 209, this court struck down a law requiring crab fishermen to fish only in their own county. The ordinance did not "further the safety, health, moral, social or economic welfare of the 'body politic,'" but merely granted economic preferences to particular segments of the populace. *Id.* The court acknowledged the power of the state to regulate the fishing business, but such regulations must be "reasonable [and] non-discriminatory . . . in this sensitive area which directly affects the livelihood of several thousand watermen." 261 Md. at 606, 276 A.2d at 211. Because the law simply gave economic preferences to particular groups, it was "arbitrary [and] bears no relation to the public interest." 261 Md. at 603, 276 A.2d at 209.

In this case, the county decided to create an art district, not only by encouraging artists to locate in the area, but by using its coercive power to eradicate existing, profitable, non-blighted businesses and replace them with new businesses. *Prince George's County v. Ray's Used Cars*, No. 2378, slip op. at 16 (Md. Ct. Spec. App. Nov. 15, 2005). This is an abuse

of government power that promotes the private interest of art dealers over those of car dealers. As in *Verzi, Bruce*, and other cases, officials are exploiting their power to design the economic plan of the community, when such decisions ought to be made by the people participating in the local economy.

In *Aspen Hill*, 265 Md. 303, 289 A.2d 303, this Court found that a zoning board exceeded its powers by arbitrarily denying a request for a permit to develop a shopping center. 265 Md. at 305, 289 A.2d at 304. Although the shopping center conformed with the general plan and all other legal requirements, the board denied the landowner's request on the grounds that there was no demonstrated "public need" for a shopping center. 265 Md. at 307, 289 A.2d at 305. In reversing that decision, this Court explained that zoning officials are not free to "substitut[e] an economic judgement of [their] own for that of the . . . entrepreneur." 265 Md. at 314, 289 A.2d at 308. In this case, Prince George's County officials are substituting their economic judgment for that of the owners of used car lots in the area. Yet, as in *Aspen Hill*, respect for "the common-law right to so use private property as to realize its highest utility" bars zoning officials from interfering with businesses whose operations are not a detriment to the public interest. *Id.* (citation omitted). *See also Kreatchman*, 224 Md. at 220, 167 A.2d at 351 ("It was no part of the purpose of the zoning regulations to protect business from competition." (citation omitted)). Although government may use its zoning power to "preserv[e] . . . the character of a neighborhood," *Levinson*, 95 Md. App. at 322, 620 A.2d at 968, it may do so only where such preservation is "substantially related to the promotion and protection of the general welfare of the

community." 95 Md. App. at 322, 620 A.2d at 972. They may not use that power simply to promote the interests of some businesses over the interests of others. *Id.*

B. Rational Basis Review Requires a Reasonable Connection Between a Law's Purpose and the Means Chosen to Advance It

Even if the zoning decision in this case were intended to promote the health, safety, and welfare of the public, it bears no rational relationship to such interests and therefore is unconstitutional.[1] *Cf. Verzi*, 333 Md. at 425, 635 A.2d at 974 (finding relationship between public health and safety and means chosen to advance it "spurious."); *Kirsch v. Prince George's County*, 331 Md. 89, 99, 626 A.2d 372, 376 (1993) (legislative acts fail rational basis test if "the classification adopted [does] not further the express purpose of the statute."). Although the rational basis test accords great deference to legislative determinations, this Court has held that it prohibits the Legislature from enacting laws which are "wholly unrelated to the stated purpose of the [law]." 331 Md. at 108, 626 A.2d at 381. *See also Frankel v. Bd. of Regents of Univ. of Md. Sys.*, 361 Md. 298, 317, 761 A.2d 324, 334 (2000) (policy unconstitutional because "many applications . . . will be inconsistent with the [state's] objective.").

---

[1] Amicus, like the court below, assumes *arguendo* that the rational relationship standard applies, while recognizing that in zoning cases, "Maryland courts employ . . . a heightened level of scrutiny . . . over and above the 'minimum rationality' test. . . . Although almost any zoning ordinance could be said to be rationally related to a legitimate governmental interest . . . the 'substantial relationship' test is not so yielding." *Levinson*, 95 Md. App. at 320-21, 620 A.2d at 967-68. Because the ordinance at issue here fails the rational basis test, it is unnecessary for this Court to address what level of scrutiny applies.

In *Kirsch*, the county enacted a zoning ordinance restricting the use of property where college students resided. The ordinance differentiated between residences "based solely on the occupation which the tenant pursues away from that residence." 331 Md. at 106, 626 A.2d at 380. The Court found that this violated the equal protection component of the Due Process Clause. A building inhabited by people who were not college students would not be subject to the ordinance even though it "would equally add motor vehicles to a congested parking situation and pose the threat of increased noise and litter." 331 Md. at 107, 626 A.2d at 381. To treat a building housing college students differently from a building housing non-students would therefore have no relationship to the Legislature's purpose, and violates the rational basis test.

Verzi and *Kirsch* demonstrate a proper understanding of the rational basis test. That test "is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975). Reviewing courts must determine whether a law reasonably can be said to accomplish its asserted goals; otherwise, rationality review would mean abandoning all constitutional limits. As Justice Stevens has warned, the rational basis test must not become "tantamount to no review at all." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 323 n.3 (1993) (Stevens, J., concurring). Indeed, the United States Supreme Court has repeatedly insisted that the rational basis test is not "toothless," *Mathews v. Lucas*, 427 U.S. 495, 510 (1976); *Thornburgh v. Abbott*, 490 U.S. 401, 414 (1989). And it has often found legislation to be so inconsistent with the government's asserted purposes as to violate the Equal Protection or

Due Process Clauses of the Federal Constitution. *See, e.g., United States Dep't of Agric. v. Murry*, 413 U.S. 508, 514 (1973); *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 536 (1973); *Weber v. Aetna Cas. & Surety Co.*, 406 U.S. 164, 173 (1972). As one commentator puts it, these are "'true rational basis' cases because they involve a true search for rationality." Donald Marritz, *Making Equality Matter (Again): The Prohibition Against Special Laws in the Pennsylvania Constitution*, 3 Widener J. Pub. L. 161, 176 (1993). As the United States Supreme Court explained the rational basis test,

> even . . . [under] the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained. The search for the link between classification and objective gives substance to the Equal Protection Clause; it provides guidance and discipline for the legislature, which is entitled to know what sorts of laws it can pass; and it marks the limits of our own authority. . . . By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law.

Romer v. Evans, 517 U.S. 620, 632-33 (1996).

Likewise, this Court has repeatedly refused to adopt an anything-goes standard of rationality review. *Kirsch*, 331 Md. at 96-106, 626 A.2d at 375-80; *see also* Dismas N. Locaria, *Frankel v. Board of Regents of the University of Maryland System—In the Name of Equality: The Proper Expansion of Maryland's Heightened Rational Basis Standard*, 61 Md. L. Rev. 847, 854-63 (2002). In short, rational basis review allows authorities a wide discretion in choosing among different means to solve problems, but does not accord them the power to choose methods that are unrelated to those problems, nor the power to exploit a perceived problem as a pretext for accomplishing unconstitutional, discriminatory ends.

Piscatelli v. Bd. of Liquor License Comm'rs, 378 Md. 623, 644, 837 A.2d 931, 943-44 (2003).

The Court of Special Appeals applied the rational basis test correctly. The county's asserted interest in eliminating impediments to pedestrian traffic is not related to the size of a used car lot, particularly given the fact that such impediments are not at present illegal. *Prince George's County v. Ray's Used Cars*, No. 2378, slip op. at 15 (Md. Ct. Spec. App. Nov. 15, 2005). Nor is the lot size requirement related to the county's aesthetic desires, even if such desires are legitimate state interests. The ordinance imposes no aesthetic requirements on the dealerships, for example, but merely eliminates those that are over 25,000 square feet in size. Even if there were some relationship between the ends sought and the means chosen, the County has chosen a mechanism—eliminating the current uses entirely—which is vastly out of proportion to its asserted purposes. *Cf. Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) (restrictions on property rights must be "roughly proportional" to the impact of the use of the property).

Thus, even if the County's purposes in enacting the ordinance are legitimate, CB-87 bears no rational relationship to those purposes and violates the Due Process Clause of the Maryland Constitution.

II

AMORTIZATION DOES NOT SATISFY THE JUST COMPENSATION CLAUSE

"[W]hen, as here, the owner of property has been called upon to relinquish all value attached to the property for the common good, the government regulation compelling the surrender of the property's value has gone 'too far' and the property owner has suffered a taking that is compensable." *Raynor v. Maryland Dep't of Health & Mental Hygiene*, 110 Md. App. 165, 187, 676 A.2d 978, 989 (1996). Because the regulation in this case eliminates the use of the used car lots, these owners are due compensation. But instead of providing compensation, the county adopted an "amortization" provision requiring used car lots to eliminate their use within seven years.

This Court has declared that amortization provisions ensure that land-use regulations enacted under the police power are reasonable, thus satisfying the requirements of due process. *Grant v. Mayor & City Council of Baltimore*, 212 Md. 301, 129 A.2d 363 (1957). But this Court has not yet ruled on whether an amortization provision can satisfy the requirement for compensation of a property owner under Article III, section 40 of the state Constitution. In fact, amortization provisions do not and cannot compensate owners when the land-use regulation at issue deprives an owner of rights to such a degree as to constitute a taking.

A. The Maryland Constitution Requires That Property Owners Be "Paid" Compensation for Takings, and Amortization Does Not "Pay" Owners

The Maryland Constitution holds that when property is taken for public use, "compensation, as agreed upon between the parties, or awarded by a Jury, [must] [be] first *paid or tendered* to the party entitled to such compensation." Md. Const. art. III, § 40 (emphasis added). Every word of this section must be given full effect. *Godwin v. Kemp*, 129 Md. 159, 159, 98 A. 495, 495 (1916). *Cf. Serio v. Baltimore County*, 384 Md. 373, 399, 863 A.2d 952, 967 (2004) (citation omitted) ("the government must 'justly' compensate the property owner."). Just compensation means "the full *monetary* equivalent of the property taken; the property owner is to be put in the same position monetarily as he would have occupied if his property had not been taken." 384 Md. at 399, 863 A.2d at 967 (emphasis added) (citation omitted).

Moreover, the terms "paid or tendered" signify a transfer of value from the public treasury to the owner of the taken property. To *tender* means actually, in reality, to perform the obligation in question. *See* Black's Law Dictionary 1467 (6th ed. 1990) (defining "tender" as "the actual proffer of money, as distinguished from mere proposal or proposition to proffer it. Hence mere written proposal to pay money, without offer of cash, is not 'tender.'").

The phrase "paid or tendered" imposes a greater standard on the state than is imposed on the federal government through the Fifth Amendment. That Amendment requires only that the government provide "just compensation," but does not explain the form such

compensation might take. Nevertheless, federal courts have held that compensation must come in the form of money transferred to the owner. *See, e.g., Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304 (C.C.D. Pa. 1795) ("No just compensation can be made except in money."); *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 315 (1987) (just compensation requirement "is designed . . . to secure *compensation* in the event of otherwise proper interference amounting to a taking. Thus, government action that works a taking of property rights necessarily implicates the 'constitutional obligation to pay just compensation.'") (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). As property-rights scholar Michael Berger explains, this language means that "there is a Constitutional 'obligation' (not goal or desideratum, but obligation) to 'pay' (not find some equivalent or some way to evade, but pay) just compensation." Michael Berger, *Amortization as "Just Compensation": If It Works for Billboards, Can Office Buildings Be Far Behind?* at § 7-02 (Matthew Bender, 1992). *See also Olson v. United States*, 292 U.S. 246, 254-55 (1934) ("'no private property shall be appropriated to public uses unless a full and exact equivalent for it be returned to the owner . . . .' That equivalent is the market value of the property at the time of the taking contemporaneously paid in money." (citation omitted)).

In *Key Outdoor Inc. v. City of Galesburg*, 327 F.3d 549 (7th Cir. 2003), Judge Easterbook made it clear how amortization provisions fail to compensate owners: "[W]hat an owner can make during the years remaining is not 'compensation,'" he wrote,

> but is only the existing value that the government has refrained from extinguishing. (The United States, acquiring land for a post office, could not

> say anything like: "You have ten acres now; we are taking one of them, and the nine left behind compensate you for the acquisition." Nor could Illinois announce tomorrow that on January 1, 2100, all private property within its borders must be handed over to the state without compensation, even though the delay would allow owners to extract 95% of the land's value.)

Id. at 549.

Even more explicitly than the federal constitution, Maryland's constitution requires that payment be *made or tendered* to the owner, and thus is even less compatible with an amortization scheme. If the state must make "compensation" only in the form of money, then amortization provisions are not constitutional. Moreover, even if compensation may take a form other than money, amortization provisions would not satisfy the compensation requirement, because nothing is *tendered* to the owner that he or she does not already have. *See also Pennsylvania Nw. Distributors, Inc. v. Zoning Hearing Bd. of the Twp. of Moon*, 584 A.2d 1372, 1376 (Pa. 1991) ("If government desires to interfere with the owner's use, where the use is lawful and is not a nuisance nor is it abandoned, it must compensate the owner for the resulting loss."); *Hoffmann v. Kinealy*, 389 S.W.2d 745, 754-55 (Mo. 1965) ("termination of relators' pre-existing lawful nonconforming use of their lots . . . would constitute the taking of private property for public use without just compensation.")

In *Grant*, 212 Md. 301, 129 A.2d 363, this Court upheld the constitutionality of an amortization provision under the due process clause, on the grounds that zoning is a police power, and therefore is required only to be reasonable, rather than compensatory. In fact, *Grant* did not address the effect of zoning as a taking at all, but merely analyzed it in terms of its reasonableness as an exercise of police power. But here, the zoning change eliminates

the entire present use and crosses the line from a regulatory act into a taking. *Cf. Lone v. Montgomery County*, 85 Md. App. 477, 495, 584 A.2d 142, 151 (1991) ("[Z]oning cannot be used as a substitute for eminent domain proceedings so as to defeat or circumvent the constitutional requirement for the payment of just compensation. Furthermore, the State cannot, under the guise of the police power, take private property for public use without compensating the owner.") (citations omitted). Compensation is owed, and *Grant* does not address whether amortization satisfies the *compensation* requirement. *See Donnelly Adver. Corp. of Maryland v. Mayor & City Council of Baltimore*, 279 Md. 660, 671, 370 A.2d 1127, 1134 (1977) (holding that validity of amortization schemes under police power is "not applicable" in context of a taking); *Outdoor Graphics, Inc. v. City of Burlington*, 103 F.3d 690, 693 n.5 (8th Cir. 1996) (amortization provisions "contain[] no connotation of compensation nor any requirement of compensation.").

Since the zoning ordinance here has worked a taking, Ray's Used Cars is entitled to be "paid or tendered" a compensation award. When a regulatory action terminates a non-nuisance use of property in a manner that constitutes a taking, the government should not be permitted to escape its duty to compensate simply by proceeding *slowly* instead of *quickly*. Amortization provisions are "simply a euphemism for the confiscation of private property, bit by bit and year by year." Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 187-188 (1985).

B. Amortization Schemes Do Not Compensate for the Full Value of Taken Property

The methods chosen for amortization provisions are incapable of providing truly just compensation. Just compensation must leave the citizen "in as good a position pecuniarily as if his property had not been taken," and it "includes all elements of value that inhere in the property." *Olson*, 292 U.S. at 255. An amortization statute inherently violates this requirement in three ways.

First, by attempting to "repay" the value of property with a "grace period" which is inevitably shorter than the lifetime of the current use, amortization necessarily pays less than what the property is worth. If a use were no longer profitable after a certain period, the owner would abate that use on his own, without being compelled. The owner is deprived of the value of the remaining time.

Second, amortization statutes take the value of potential interim improvements without compensation. Imagine an owner who expects to continue a use for ten years, but the amortization provision now only permits the use to continue for two years. The owner will find it difficult or impossible to assess whether to make improvements to the property which might yield a return beyond two years. If the owner makes a repair that will last ten years, then he is deprived of eight years of use with regard to that improvement. If he decides not to make that repair, then he has lost the two years of optimum use due to the lack of repair. That loss is fairly attributed to the government action. Epstein, *supra*, at 193-94. There are other "unseen" costs to the owner of the property also. For instance, the owner will be unable to use the property as collateral to secure loans. Amortization statutes make no

provision for this, even though Maryland law recognizes that a property owner's incidental damages from a taking are compensable. *See Reichs Ford Road Joint Venture v. State Roads Comm'n of the State Highway Admin.*, 388 Md. 500, 521-22, 880 A.2d 307, 319-20 (2005).

Third, amortization depresses the value of the subject property. By creating an artificial (non-market-driven) deadline to the current use, it causes the value of the property, including the value of its current use, to fall. For example, customers are less likely to deal with businesses when they know that the life of the business is limited. As with interim improvements, the property owner is here deprived of an invisible value: the value of the business he *would have* received, absent the ordinance. *Cf.* 388 Md. at 522, 880 A.2d at 319 ("[A]ny compensable damages resulting during the period prior to a formal condemnation ordinarily should be considered and awarded, where appropriate, in the condemnation action."). *Cf. Jacobs v. United States*, 290 U.S. 13, 17 (1933) ("The owner is not limited to the value of the property at the time of the taking; 'he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking.'" (citations omitted)).

Another reason amortization provisions cannot provide just compensation is that "just compensation" requires that the owner of property be repaid the value of his property *at the time that it is taken*, *Reindollar v. Kaiser*, 195 Md. 314, 319, 73 A.2d 493, 494-95 (1950)—not the dollar value expended on the property at purchase, or the price of the property at the time the amortization ordinance is passed. The government may not seize property decades after purchase and pay the original purchase price if the value of the

property, or inflation, has changed in the interim. But an amortization provision which simply allows the owner to recoup the original investment in the property does not compensate the owner for the actual loss at the end of the permitted use. It therefore does not compensate the owner for the value of the property when taken. *See further* Epstein, *supra*, at 182-86. As Professor Epstein concludes, "[t]he state which has taken the loaf of bread cannot pay off its obligations by returning a slice of that loaf." *Id.* at 194. Amortization provisions do just this.

C. Amortization Confuses the Police Power with the Power of Eminent Domain

Amortization was devised as a way to "split[] the difference between the private and the public welfare" so as to withstand judicial scrutiny of zoning regulations that eliminate current uses of property. *Id.* at 193. But the problem with such schemes is analogous to the problem described in Justice Scalia's separate opinion in *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 745-50 (1997) (Scalia, J., concurring in part). In that case, a property owner challenged a land-use regulation on the ground that it constituted a taking, but the Court of Appeals held that, because the property owner had been granted "transferable development rights" (TDRs) in exchange for the diminution of value in the property, the regulation did not impose a significant enough burden on the property to constitute a taking. Justice Scalia explained that

> Putting TDRs on the taking rather than the just compensation side of the equation . . . is a clever, albeit transparent, device that seeks to take advantage of a peculiarity of our Takings Clause jurisprudence: Whereas once there *is* a taking, the Constitution requires just (i.e., full) compensation . . . a regulatory taking generally does not occur so long as the land retains substantial (albeit

> not its full) value. If money that the government-regulator gives to the landowner can be counted on the question of whether there *is* a taking . . . rather than on the question of whether the compensation for the taking is *adequate*, the government can get away with paying much less. That is all that is going on here . . . . The cleverness of the scheme before us here is that it causes the payment to come, not from the government *but from third parties*.

Id. at 747-48 (citations omitted). Amortization provisions do precisely the same thing: by considering the presence of an amortization period as part of the *due process* analysis, courts avoid consideration of the compensation issue at all. An amortization provision can prevent a zoning regulation from becoming a taking because it cushions the blow to "investment-backed expectations." *See, e.g., Nat'l Adver. Co. v. City of Raleigh*, 947 F.2d 1158, 1164 n.6 (4th Cir. 1991), *cert. denied*, 504 U.S. 931 (1992).

In *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), the Supreme Court rejected a similar approach when it held that the state cannot prohibit a landowner from challenging the validity of a land use regulation simply because the landowner was "on notice" of the existence of the regulation at the time of purchase. Under such a rule, the Court declared, states "would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land." *Id.* at 608-09. But amortization provisions are a sort of "notice rule" applied within a single generation. Where notice rule rejected in *Palazzolo* held that future purchasers of property could not challenge a regulation of which they were aware when they purchased the property, amortization provisions eliminate the present use within a single owner's possession. *Cf.* Epstein, *supra*, at 155:

> If notice of possible government action is sufficient to deny compensation for a partial taking of private property, say development rights, then it is sufficient to deny it for a complete taking of property. All that is necessary is that purchasers be aware that the government may act to take over their land in entirety, perhaps by a general declaration that all land henceforth will be subject to condemnation at a price equal to its value on the date the statute is passed, without any allowance for future improvements.

But *Palazzolo* rejected this approach because it "would work a critical alteration to the nature of property, as the newly regulated landowner [would be] stripped of the ability to transfer the interest which was possessed prior to the regulation. The State may not by this means secure a windfall for itself." 533 U.S. at 627. By eliminating the current uses of the property through a zoning ordinance instead of through the power of eminent domain, Prince George's County will secure a windfall for itself.

The power of eminent domain and the police power are distinct government authorities. Eminent domain is the power of providing the public with a benefit by taking the property of an individual owner, while the police power bars people from using their liberty or property in ways that harm others. *See North Amber Meadows Homeowners Ass'n*, 101 Md. App. at 466, 647 A.2d at 134 ("Our cases have recognized and applied the distinction between a compensable taking under the eminent domain power and a noncompensable regulation under the police power."). The amortization theory confuses these two powers and thus takes private property to provide a public benefit without compensating the owner. This is unconstitutional.

CONCLUSION

The judgment of the Court of Special Appeals should be *affirmed.*

Respectfully submitted,

THOMAS A. BOWDEN
Counsel of Record
Kollman & Saucier, P.A.

TIMOTHY SANDEFUR
Of Counsel
Pacific Legal Foundation

By _____
THOMAS A. BOWDEN

Attorneys for Amicus Curiae
Pacific Legal Foundation

CERTIFICATE OF SERVICE

I CERTIFY that on this _____ day of May, 2006, I caused two copies of this Brief Amicus Curiae of Pacific Legal Foundation in Support of Respondents to be sent via U.S. Mail, first class, postage prepaid, to the following:

David S. Whitacre
County Attorney
County Administration Building
Room 5121
14741 Governor Oden Bowie Drive
Upper Marlboro, MD 20772-3050

Steven M. Gilbert
County Council
County Administration Building
Suite 2000
14741 Governor Oden Bowie Drive
Upper Marlboro, MD 20772-3050

Russell W. Shipley
Shipley & Horne, P.A.
1101 Mercantile Lane
Suite 240
Largo, MD 20774-5360

_____
THOMAS A. BOWDEN

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Maryland Rule of Court 8-504(a)(8) the attached BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER is proportionately spaced, in Times New Roman font, and has a typeface of 13 points.

_____

THOMAS A. BOWDEN