MEMORANDUM OF LAW

To:	Growth Action Network
From:	Dan Fligsten
Date:	March 9, 2017
Re:	What constitutes a regulatory taking in Maryland?

I. Two-pronged analysis for a regulatory taking

When a regulation is challenged as a taking, Maryland courts employ a two-pronged analysis:

> [First] whether, as with statutes in general, a public purpose exists, and, if so, [Second] whether the regulation deprives the property owner of **all viable economic use of the entire property** at issue, which in the case at bar is, at the least, the entire third phase of the development.

City of Annapolis v. Waterman, 357 Md. 484, 507, 745 A.2d 1000, 1012 (2000) (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015-16).

II. Deprivation of "all viable economic use of the property" not "substantial hardship"

Because a public purpose is usually present, the takings issue usually turns on whether the regulation deprives the owner of "all viable economic use of the property." What does this mean?

The leading Maryland case reiterating the law on regulatory takings is *Casey v. Mayor & City Council of Rockville*, where the Court of Appeals stated as follows:

> "[I]n order for the zoning regulation to constitute a taking of private property or otherwise constitute a deprivation of due process, Petitioner must affirmatively demonstrate[ ] that the legislative or administrative determination deprives him of all beneficial use of the property.... But the restrictions imposed must be such that the property **cannot be used for any purpose**. **It is not enough for the property owners to show that the zoning action results in substantial loss or hardship.**"

Casey v. Mayor & City Council of Rockville, 400 Md. 259, 307–08, 929 A.2d 74, 103 (2007) (quoting *Mayor & City Council of Baltimore v. Borinsky*, 239 Md. 611, 622, 212 A.2d 508, 514 (1965)).

The takeaway point here is that in order for a regulation to be struck down as a constitutional taking, a party has to show that, because of the regulation, the property "cannot be used for any purpose." By contrast, complaining that the regulation causes him to suffer a "substantial loss or hardship" will not suffice for a given regulation to be invalidated as a taking.

III. Examples of taking versus non-taking "hardship"

Examples are key to understanding the distinction between a taking (deprivation of all use of the property) and a "hardship", which is not a taking.

- Examples of takings (where "the property cannot be used for any purpose)
    - The denial of access from the public street to the property. *Sanderson v. Mayor & City Council of Baltimore*, 135 Md. 509, 109 A. 425 (1920).
    - The denial of ingress and egress and cutting off of light and air. *Walters v. B. & O. R. R. Co*., 120 Md. 644, 88 A. 47 (1913).
    - Downzoning from R5 to OS for 7.1 acres of land (except for .41 noncontiguous portions of the land that remained R5 but was unbuildable). *Steel v. Cape Corp*., 111 Md. App. 1, 31, 677 A.2d 634, 649 (1996)
- Examples of non-takings ("hardships")
    - Denial of a deck permit on a large single family home. *Citrano v. North*, 123 Md. App. 234, 240–41, 717 A.2d 960, 963 (1998).
    - Variance to construct a gazebo on land in a critical area. North v. St. Mary's County, 99 Md.App. 502, 638 A.2d 1175 (1994).
    - OS zoning with conditional use by educational institutions (including building). *Ramona Convent of the Holy Names v. City of Alhambra*, 21 Cal. App. 4th 10, 23, 26 Cal. Rptr. 2d 140, 147 (1993).

IV. Conclusion

In sum, the burden to establish that a regulation constitutes a taking is relatively high. To avoid the danger of invalidation as a taking, the owner must simply to be able to maintain some kind of building on the property (even a single family dwelling). If some kind of building maintained and used on the land, a complained-of regulation will be a mere "hardship" and will not be invalidated under a takings analysis.