In the Court of Special Appeals

September Term, 2017

No. 1689

75-80 PROPERTIES, L.L.C. et al.

Appellants,

vs.

RALE, INC. et al.

Appellees.

Appeal from the Circuit Court for Frederick County
The Honorable William R. Nicklas, Judge

BRIEF OF APPELLANTS 75-80 PROPERTIES, L.L.C. AND PAYNE INVESTMENTS, LLC

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STATEMENT OF THE CASE

Nearly twelve years ago, 75-80 Properties, L.L.C. and Payne Investments, LLC ("Appellants" or "Developers") began the application process to develop a project known as Monrovia Town Center ("MTC"). In connection with that process, Developers hired engineers, architects, and other professionals to address specific issues raised by the Frederick County Planning Commission ("Planning Commission") and Frederick County staff ("Staff"), both of which ultimately approved the MTC project. The MTC project was thoroughly vetted by the County, including an unprecedented thirteen hearings before the Planning Commission and the Frederick County Board of County Commissioners ("BOCC").

As a result of this more than decade-long effort and after investing millions of dollars, Developers received BOCC approval of (1) the rezoning of Developers' property to a Planned Unit Development ("PUD") through enactment of Ordinance No. 14-04-659 ("Zoning Ordinance"); and (2) a Development Rights and Responsibilities Agreement ("DRRA") with Frederick County ("County") with an accompanying Adequate Public Facilities Ordinance ("APFO") Letter of Understanding ("APFO LOU") (collectively, the "Approvals").

On petitions for judicial review, the Approvals were vacated, not because they were not supported by substantial evidence, but due solely to an alleged ethics violation on the part of one of the county commissioners having nothing to do with Developers.

It is uncontested that Developers had absolutely nothing to do with the alleged violation, and it is uncontested that the alleged violation did not impact any votes approving the MTC project. Nonetheless, in disregard of its own charter, the new Frederick County government decided not to honor the enactments and agreements of its predecessor government (the BOCC), and teamed up with Residents Against Landsdale Expansion, Inc. ("RALE") and individual Appellees (collectively, "Appellees-Petitioners") to use the alleged ethics violation as a pretext to defeat the MTC project.

Most importantly, as will be demonstrated, there was no violation of Frederick County's ethics disclosure statute, and there is overwhelming and substantial evidence to sustain the Approvals. Accordingly, Appellants respectfully request that this Court reverse the vacatur and remand order entered below and affirm the Approvals.

Procedural History

On June 26, 2014, RALE filed two petitions for judicial review ("Petitions") in the Circuit Court for Frederick County, which were consolidated by court order on October 17, 2014. (E279-80.) The Petitions challenged the MTC's Zoning Ordinance and the approval of the DRRA and APFO LOU. (E281-308.) In connection with the Petitions, on January 15, 2015, RALE issued trial subpoenas for former BOCC Commissioner C. Paul Smith ("Commissioner Smith"), Ronald Burns, a County engineer, and Michael Proffitt, the secretary of the Frederick Area Committee for Transportation ("FACT"). (E429-34.) RALE sought discovery concerning comments made by Commissioner Smith at an April 14, 2014 FACT public meeting ("FACT meeting") and a letter submitted by FACT to the BOCC on April 23, 2014 ("FACT letter"). (*Id.*)

In response, Developers and the County, on behalf of Commissioner Smith, moved to quash the subpoenas. (E414-40.) On January 27, 2015, the circuit court quashed the subpoenas to Mr. Burns and Mr. Proffitt but not to Commissioner Smith. (E47-48.) On February 5, 2015, Developers, the County, and Commissioner Smith moved for reconsideration of the January 27, 2015 Order. (E537-39; E529-36; E487-528.)

On February 23, 2015, Appellees-Petitioners filed a Motion to Remand for Reconsideration Pursuant to State *Ex Parte* Law and to Permit Discovery and Request a Consolidated Hearing ("Motion to Remand"). (E548-71.) In their Motion to Remand, Appellees-Petitioners argued that Commissioner Smith violated § 5-859 of the General Provisions Article of the Maryland Code ("Section 5-859")[1] by failing to log his communications at the public FACT meeting. Without conducting an evidentiary hearing and relying solely upon one newspaper article proffered by Appellees-Petitioners, the circuit court issued an order making seven findings and remanding the matter for a supplemental record, "including testimony" on the timing of the FACT letter and the BOCC's reliance on it. (E51 ("Remand Order").)

On remand, the Council held four public hearings. At the conclusion of these hearings, on September 1, 2015, the Council voted to require Developers to "restart the

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[1] "A member of the governing body who communicates ex parte with an individual concerning a pending application during the pendency of the application shall file with the Chief Administrative Officer a separate disclosure for each communication within the later of 7 days after the communication was made or received." Md. Code, Gen. Provs. § 5-859(b).

[application] process" with the Planning Commission. (E4709.) Having already secured the Approvals, however, Developers would not voluntarily relinquish their vested contract and other rights and reapply. Consequently, on February 7, 2017, the Council passed Resolution No. 17-04 ("Resolution"), containing the County's post-remand conclusions, and filed it with the circuit court. (E4707-10; E606.)

On October 3, 2017, the circuit court entered an Order and Opinion, vacating the Zoning Ordinance, DRRA, and APFO LOU based solely upon Commissioner Smith's alleged failure to disclose his attendance at the April 14, 2014 FACT meeting in violation of Section 5-859 ("Vacatur Order"). (E62-63.) The circuit court further found that the FACT letter was suspect and "extreme because of its timing, and because of its timing, it [was] deceitful to the Government as well as the public." (E59.) Developers timely appealed from the Vacatur Order, as did Commissioner Smith. (E66-71.)

QUESTIONS PRESENTED

I. **WHETHER THE CIRCUIT COURT ERRED IN FINDING THAT COMMISSIONER SMITH'S APPEARANCE AT A PUBLIC MEETING WAS AN *EX PARTE* COMMUNICATION THAT HAD TO BE NOTED ON A LOG PURSUANT TO MARYLAND CODE, GENERAL PROVISIONS SECTION 5-859(b)?**

II. **WHETHER, ON PETITIONS FOR JUDICIAL REVIEW, THE CIRCUIT COURT ERRED IN FAILING TO CONSIDER THE ENTIRETY OF THE RECORD?**

STATEMENT OF FACTS

Developers Received Planning Commission Approval Before The Fact Meeting Took Place.

Developers own 391.6 acres of land in the Urbana Region of Frederick County, Maryland (the "Property"). On September 13, 2012, the BOCC restored the growth area status for Developers' Property that had been stripped from it in 2010. (E4573.) Consequently, on November 2, 2012, Developers filed a new application to rezone their Property. (E4573; E1019-1111.) Developers also filed a petition to enter into a DRRA and an associated APFO LOU.[2] (E4573.)

In late 2013, the Planning Commission held three public hearings on Developers' rezoning application and DRRA. (E1781; E4573.) On November 20, 2013, the Planning Commission voted to recommend that the BOCC approve the rezoning application, subject to certain conditions. (E1781.) On the same date, it also recommended approval of the DRRA, noting that the DRRA was "consistent with the Frederick County Comprehensive Plan." (E1781.) Staff also provided a report to the BOCC recommending the BOCC review the final draft DRRA and APFO LOU. (E1785-89.)

The BOCC Approved Developers' PUD Zoning Application Before The Fact Meeting Took Place.

In January 2014, the BOCC held three public hearings on Developers' rezoning application. (E2248-984.) At their conclusion, the BOCC voted 4-0-1 to approve the

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[2] Developers had initially obtained approval of a PUD zoning designation in 2006, only to have a subsequently-elected BOCC reverse course and downzone the Property before the requisite DRRA was approved. (E4573.)

request to rezone the Property subject to conditions in the Staff report. (E4574; E2944-78.)

The Planning Commission Approved Developers' Modified Zoning Application Before The Fact Meeting Took Place.

After addressing the conditions, Developers resubmitted their PUD concept plan, DRRA, and APFO LOU for Planning Commission review. Thereafter, on March 19, 2014, the Planning Commission voted unanimously, 7-0, to approve the revised PUD concept plan. (E2090-91.)

On March 26, 2014, the Planning Commission held another public hearing to consider the revisions to the DRRA and APFO LOU. (E1778.) At the end of the hearing, the Planning Commission voted unanimously, 7-0, that the DRRA was "consistent with the Frederick County Comprehensive Plan." (E1778.)

Subsequently, Staff submitted another report to the BOCC, recommending approval of the revised MTC zoning application and making specific traffic adequacy findings under the Frederick County Code. (E2046-2055.) Staff also submitted a report approving the revised DRRA and APFO LOU. (E1770-1778.)

The BOCC Received Evidence On Developers' Modified Zoning Application.

On April 8, 9, 10, and 23, 2014, the BOCC held public hearings on Developers' revised rezoning application, DRRA, and APFO LOU. (E4574.) The BOCC received and considered, among other things, the following documents and testimony:

(1) Developers' application, detailing proposals to satisfy state- and county- laws, including traffic adequacy (E1019-1111);

(2) Memorandum from the Planning Commission indicating its unanimous approval (E2090-91);

(3) Memorandum from the Planning Commission finding that the DRRA and PUD were consistent with the Frederick County Comprehensive Plan (E1778);

(4) Reports from Staff recommending "…APPROVAL of the request to rezone…." (E2054.) Staff found that the improvements to Maryland Route 75 and Route 80 "will serve the proposed expanded and integrated local street network. Access to planned neighborhoods and amenities in the PUD will be adequate to ensure … reasonable local roadway capacity in the vicinity." (E2051);

(5) A December 30, 2013 letter from the Access Management Division at the Maryland State Highway Administration ("SHA") to RALE, concluding: "SHA has determined that the update site access system to the state highway system is adequate to support the proposed development." (E1766);

(6) A traffic impact study from Joseph Caloggero of the Traffic Group. (E3721-4494.) Developers retained Mr. Caloggero to prepare this study, which was approved by Staff and the SHA. (E2482-85; E1769). After Developers revised their PUD concept plan, Mr. Caloggero updated his traffic study to reflect the revisions. (E2482-85.) The updated analysis was approved by Staff; and

(7) Mr. Caloggero testified at length before the BOCC about his traffic impact study and the SHA's approval of his study. (E2482-85.) He submitted a letter to the BOCC on the same day indicating that the MTC's "application materials for the Rezoning Case, DRRA, and LOU … compl[y] with transportation system 'adequacy'

requirements for rezoning" to the PUD. (E1680.)

Commissioner Smith Attended The April 14, 2014 Meeting As The BOCC-Appointed Liaison.

On April 14, 2014, FACT[3] held a regularly-scheduled public meeting. (E467.) Commissioner Smith attended this public meeting as the BOCC's non-voting liaison to FACT. During the meeting, there was a "discussion regarding FACT's role in assisting in educating the public on the relationship between road improvements and development using the Monrovia Town Center as the example." (E467; E503; E557.) Those comments were reflected in publicly-available meeting minutes. (E467.)

On April 23, 2014, FACT submitted a letter to the BOCC written by Michael Proffitt, FACT secretary, and copies of the FACT letter were made available to the public. (E1779-80; E3478.) Thereafter, the BOCC voted 4-1 to approve the revised rezoning request and approved the revised DRRA and APFO LOU. (E3492-94.)

The Zoning Ordinance Is Enacted, And The DRRA And APFO LOU Are Executed By The BOCC.

On May 29, 2014, the BOCC enacted the Zoning Ordinance. (E2206-38.) The Zoning Ordinance contains findings of adequacy for present and future transportation systems. (E2221-24; E2225; E2227; E2229-30.) On the same day, the BOCC executed the DRRA and APFO LOU. (E2136-2205.)

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[3] FACT is a non-profit entity composed of individuals from both the private and public sector, including elected officials in Frederick County, the State of Maryland, and the City of Frederick. (E580; E594-95.) FACT was formed to facilitate, support, and encourage transportation improvements in Frederick County. (E593-94.)

The County Council Received Evidence That The Fact Letter Did Not Impact The BOCC'S Approvals Of The MTC Zoning Ordinance, DRRA, And APFO LOU.

On December 1, 2014, Frederick County changed from a commissioner to a charter form of government with a county council ("Council"). (*See* Frederick Cty. Charter, Art. 8, § 802.) On March 10, 2015, on petitions for judicial review, the circuit court issued its Remand Order, remanding the matter to the County for a supplemental record, "including testimony," regarding the timing of the FACT letter and the BOCC's reliance on it. (E51.)

Thereafter, on June 9, 2015, the Council held a public hearing. (E4576; E4711.) In connection therewith, former Commissioner Young submitted an affidavit stating that "[he] would have voted to approve the Applicant's [Developers'] revised rezoning application, the DRRA and the APFO LOU regardless of whether the FACT Letter had been accepted into the administrative record…. The FACT Letter was not a determinative factor in my decision…." (E4587.) Former Commissioner Gray, who was the sole vote against the MTC project, also submitted an affidavit, stating that the FACT letter "had no [e]ffect on [his] vote." (E4577.) At the June 9, 2015 hearing, former Commissioner and current Councilmember Kirby Delauter stated that he put a lot of weight on Mr. Caloggero's earlier testimony and findings, and that the FACT letter had "no bearing" on his affirmative vote. (E4800-01.) Former Commissioner and current Councilmember Billy Shreve also stated that the FACT letter "had no impact on [his] decision. We had 13 hearings, 50 hours and it was one letter…." (E4804.) And, on June 12, 2015, former Commissioner Smith submitted a memorandum indicating that the

FACT letter did not impact his vote. (E4626-31.) Thus, every commissioner from the BOCC who voted on the MTC application provided either an affidavit or statements unequivocally stating that the FACT letter had no impact on their votes.

Notably, the majority of the Council expressly acknowledged that the FACT letter did not impact the BOCC's decisions regarding the MTC project. Councilman Jerry Donald noted that the FACT letter "didn't affect the voting…." (E4889.) Councilman Kirby Delauter correctly observed that, based on the documentary evidence submitted by three former commissioners, "the letter didn't have an effect, and in the old form of government that's a majority…." (E4926.) Councilman Tony Chmelik agreed, stating as follows: "But even, just about every member of this Council has said the FACT Letter had no influence." (E4934.) Councilman Billy Shreve explained that the Council heard from every one of the commissioners, and no vote was impacted by the FACT letter. (E4889.) Lastly, Councilwoman M.C. Keegan-Ayer admitted that there were "statements that say the letter made no difference" and that the former BOCC members "have said that it did not matter." (E4923; E4931.)

Despite all the evidence from all witnesses with personal knowledge confirming that the FACT letter had no impact, on September 1, 2015, the Council voted, 4-3, to have Developers start the zoning application process anew. (E4708-709.) Developers, however, would not voluntarily give up their vested contract and development rights. (E4709-10.)

Consequently, on February 7, 2017, the County passed a Resolution, making certain "conclusions" and returning the matter to the court. (E4707-10.) In the

Resolution, the Council asked that "the Court take such action as it deems necessary and appropriate so that the County Council may rehear the MTC application," claiming that the Council found "additional inconsistencies and irregularities relating to the crucial issue of the adequacy of the transportation network in the area for which findings are required under County law." (E4710; E4708.)

After the matter returned to the circuit court, County Executive Jan Gardner held a public information briefing. At this briefing, she advocated for "[i]mmediate action [to be] taken to make sure the County never allows any of these DRRAs again." (E990; E1005.) On September 19, 2017, the circuit court heard argument on the Petitions, during which the County argued for vacatur of its own DRRA. (E219.)

On October 3, 2017, the circuit court issued its Vacatur Order, finding that the "FACT letter was presented to the Commissioners with the intent to influence the pending vote" and that the FACT letter was read into the record, "which is highly suggestive that the BOCC relied upon it." (E54-55.) The circuit court essentially adopted the "conclusions" in the Council's Resolution, which itself was unsupported by evidence. (E56.) The circuit court also found, again without any citation to the record, that the FACT letter was "extreme because of its timing, and because of its timing, it is deceitful to the Government as well as the public." (E59.) In finding deceit, the circuit court noted: the "deception surrounding the FACT letter is not remedied by two affidavits," referring to the affidavits of former Commissioners Young and Gray. (E60.)

STANDARD OF REVIEW

Questions of statutory interpretation are legal issues that this Court reviews *de novo*. *Lowery v. State*, 430 Md. 477, 487 (2013). In other words, this Court examines matters of statutory interpretation "through a non-deferential prism." *Polek v. J.P. Morgan Chase Bank, N.A.*, 424 Md. 333, 350 (2012).

With respect to petitions for review, when this Court reviews the final decision of an administrative agency, the court "looks through the circuit court's … decisions, although applying the same standards of review, and evaluates the decision of the agency." *People's Counsel for Baltimore Cty. v. Surina*, 400 Md. 662, 681 (2007); *accord Sugarloaf Citizens Ass'n v. Frederick Cty. Bd. of Appeals*, 227 Md. App. 536, 546 (2016) (quoting *Anderson v. Gen. Cas. Ins. Co.*, 402 Md. 236, 244 (2007)) ("When we review the decision of an administrative agency or tribunal, 'we [assume] the same posture as the circuit court … and limit our review to the agency's decision.'"). Judicial review is "limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law." *United Parcel Serv., Inc. v. People's Counsel for Baltimore Cty.*, 336 Md. 569, 577 (1994).

Importantly, a reviewing court "cannot substitute its judgment for that of the zoning agency and must affirm 'any decision which is supported by substantial evidence and therefore fairly debatable.'" *Bennett v. Zelinsky*, 163 Md. App. 292, 298 (2005) (quoting *Richmarr Holly Hills, Inc. v. Am. PCS, L.P.*, 117 Md. App. 607, 639 (1997)). Indeed, an agency's decision is "prima facie correct and carries with it the presumption of

validity." *Coscan Wash., Inc. v. Md.-Nat'l Capital Park & Planning Comm'n*, 87 Md. App. 602, 626 (1991). Only when there is insufficient evidence to support the agency's findings will an agency decision be reversed as being arbitrary and illegal. *E. Outdoor Adver. Co. v. Mayor & City Council of Balt.*, 128 Md. App. 494, 514 (1999).

ARGUMENT

I. COMMISSIONER SMITH'S COMMENTS AT A REGULARLY-SCHEDULED, PUBLIC MEETING REGARDING THE MTC PROJECT WERE NOT AN *EX PARTE* COMMUNICATION REQUIRING DISCLOSURE PURSUANT TO SECTION 5-859(b).

The foundation of the circuit court's Vacatur Order was its conclusion that Commissioner Smith's appearance before FACT was an *ex parte* communication under Section 5-859(b). Yet, the circuit court cited absolutely no authority or precedent and undertook no analysis to support this dispositive assumption.

In actuality, the circuit court's "finding" that a violation of the *ex parte* statute was committed by Commissioner Smith when he did not log his appearance at an open, regularly-scheduled meeting of FACT and commented upon the MTC project is fundamentally contrary to the plain meaning of the statute and its legislative history.

The statute, by its terms and by its context, is intended to discourage and, indeed, to criminalize the clandestine meetings and *quid pro quo* corruption that are its targets. It is not, however, to be interpreted as a tool to strip innocent applicants (like Developers here) of hard-earned, vested rights for political reasons. Here, the alleged ethics violation was used by both Appellees-Petitioners and the new County government to undo the MTC Approvals duly enacted by the BOCC. On this basis alone, the circuit court's

vacatur of the MTC Approvals, built entirely upon this error of law, cannot stand.

But further, the First Amendment implications of interpreting the *ex parte* statute in this matter, including its criminal penalties in Section 5-862, must not be ignored. To apply the statute to a public appearance undertaken faithfully by Commissioner Smith in the execution of his official responsibilities as a county commissioner and the designated liaison to FACT is plainly an infringement upon his First Amendment rights.

A. The Oral Communication Made by Commissioner Smith at the April 14, 2014 FACT Meeting Is Not an *Ex Parte* Communication within the Meaning of Section 5-859(b).

As noted, the circuit court did not carefully consider the threshold question of whether Commissioner Smith's appearance and comments at the FACT meeting on April 14, 2014 constituted an *ex parte* communication under Section 5-859(b); instead, it simply assumed that such was the case, without comment. That assumption was wrong.

To determine the "plain meaning" of Section 5-859(b), the court first looks "to see if the terms are defined in the statute." *Lowery*, 430 Md. at 491. In the case of Section 5-859(b), the term "*ex parte*" is not defined. Further, no cases in Maryland have addressed its meaning in such circumstances.

In the absence of a statutory definition or pertinent case law, courts also turn to dictionary meanings, as the courts assume that legislation is passed using words as they are regularly defined in the dictionaries of their time. *See, e.g.*, *Chow v. State*, 393 Md. 431, 444-45 (2006).

Thereafter, where the statute remains susceptible to more than one reasonable interpretation, it is appropriate to look at its purpose and intent, as those may be gleaned

from such sources as its legislative history. *Lewis v. State*, 348 Md. 648, 653 (1998). "Moreover, rules of statutory construction require us to avoid construing a statute in a way which would lead to absurd results," *Blandon v. State*, 304 Md. 316, 319 (1985), and courts are to avoid any "construction of a statute which is unreasonable, illogical, unjust, or inconsistent with common sense[.]" *D&Y, Inc. v. Winston*, 320 Md. 534, 538 (1990). Finally, also pertinent here, statutes with mixed criminal and civil implications, such as Section 5-862, are to be interpreted in the manner most lenient to potential criminal defendants. *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004).

Here, applying the statute so broadly as to render Commissioner Smith's public appearance before FACT an *ex parte* communication is inconsistent with all of these considerations. In the first instance, the dictionary meaning of "*ex parte*" generally requires a communication with a party to a proceeding or such party's representative, which was plainly not the case here.[4]

With respect to legislative history, Section 5-859 was intended to attack *quid pro quo* corruption, not just any communication. On May 4, 2007, Maryland's Attorney General wrote a Bill Review Letter to the Governor, noting that Section 5-859 "serv[ed] a substantial government interest by taking aim at a discreet class of contributors whose political activity raises concerns of *quid pro quo* corruption (or its appearance) and conflicts of interest on the part of incumbent office holders/zoning decision-makers."

[4] Black's Law Dictionary defines "*ex parte*" as "[d]one or made at the instance and for the benefit of one party only, and without notice to, or argument by, anyone having an adverse interest[.]" *Black's Law Dictionary*, 697 (10th ed. 2014).

Md. Dep't of Legislative Servs., Bill Review Letters – 2007, at 62 (May 4, 2007 Letter from Att'y Gen. Douglas F. Gansler to Gov. Martin O'Malley regarding S.979/H.1344,[5] 2007 Sess.).[6] Holding that Commissioner Smith's public report to FACT is an *ex parte* communication does nothing whatsoever to advance Section 5-859's statutory purpose: to uproot "a discreet class of contributors" where there are "concerns of *quid pro quo* corruption (or its appearance) and conflicts of interest." *Id.*

Additionally, the legislative history demonstrates that Section 5-859 was intended to "require[] disclosure of *ex parte* communications between a Frederick County Commissioner and an applicant while an application is pending." *See* Md. Dep't of Legis. Servs., Fiscal Note, HB 1344, 2007 Sess., at 2 (Mar. 12, 2007)[7]; Md. Dep't of Legis. Servs., Fiscal Note, SB 979, 2007 Sess., at 2 (Mar. 9, 2007) (collectively, "Notes")[8]; *see also* Md. Dep't of Legis. Servs., 90 Day Rep., 2007 Sess., at C-14 (Apr. 13, 2007) hereinafter "Report")[9].

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[5] *Compare* 2007 Md. Laws Ch. 474 (HB 1344) (enacting Md. Code, State Gov't § 15-855) *with* 2014 Md. Laws Ch. 94 (HB 270) (recodifying Md. Code, State Gov't § 15-855 as Md. Code, Gen. Provs. § 5-859).

[6] *Available at*: http://dlslibrary.state.md.us/publications/OPA/A/BRL_2007.pdf.

[7] *Available at:*
http://mlis.state.md.us/2007RS/fnotes/bil_0004/hb1344.pdf (last visited Mar. 25, 2018).

[8] *Available at:*
http://mgaleg.maryland.gov/2007RS/fnotes/bil_0009/sb0979.pdf (last visited Mar. 25, 2018).

[9] *Available at:*

Both the Notes and Report demonstrate that Section 5-859 is plainly intended to apply only to communications between a commissioner and an applicant. This comports with the statute's intent to unearth *quid pro quo* corruption by limiting the statute's application to an applicant, as opposed to any uninterested individual or the general public.[10] Because the legislative history compels this narrow interpretation, the statute does not apply to Commissioner Smith's statements. Any other interpretation overlooks the legislature's express intent of what *ex parte* was intended to cover.

Further, the circuit court's assumption that Commissioner Smith's statement at the FACT meeting is an *ex parte* communication also leads to the absurd – and unjust – result of stripping the Developers of valuable, vested development rights. These development rights took millions of dollars and more than a decade to obtain. Taking Developers' rights away based solely upon conduct that Developers had no knowledge of, and had nothing to do with, is fundamentally unfair.

Finally, the interpretation adopted by the circuit court left Commissioner Smith exposed to criminal prosecution, under Section 5-862, for simply doing his job by attending the FACT meeting as the BOCC liaison.

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http://dlslibrary.state.md.us/publications/dls/2007rs-90-day-report.pdf (last visited Mar. 25, 2018).

[10] The Court's analysis would not change in reviewing the word "individual," another term not defined in the statute. The circuit court merely assumed, without any analysis or authority, that the term "individual" included comments made by Commissioner Smith at a public FACT meeting. This assumption is subject to the same flaws as have been discussed with respect to the term "*ex parte*" and provides further grounds for vacating the circuit court's decision.

In sum, the extremely expansive application of Section 5-859 adopted by the circuit court flies in the face of all of the generally applicable principles by which Maryland statutes are to be interpreted and applied. The circuit court's ruling that Commissioner Smith engaged in an *ex parte* communication covered by Section 5-859(b) cannot stand.

B. The Circuit Court's Application of the Statute Violates the First Amendment and Should Be Rejected on that Basis.

Separate and apart from the discussion above, the circuit court's application of the *ex parte* statute in this case treads upon Commissioner Smith's First Amendment rights and should be rejected on that basis. *See, e.g.*, *Matal v. Tam*, 137 S. Ct. 1744, 1765-66 (2017) (explaining content-based restriction is presumptively unconstitutional). As applied, Section 5-859 violates the First Amendment because it does not bear a "substantial relation" to the government's interest in eliminating corruption. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 366-67 (2010). Such a broad interpretation of Section 5-859 would have a profound chilling effect on political communications between legislators and their constituents. *See Bond v. Floyd*, 385 U.S. 116, 135-36 (1966).[11]

[11] To the extent Commissioner Smith's brief more fully addresses the issues in Section I of this Argument, Developers incorporate it by reference.

II. THE CIRCUIT COURT ERRED IN FAILING TO CONSIDER THE ENTIRETY OF THE RECORD BEFORE THE BOCC AND THE COUNTY COUNCIL, WHICH STRONGLY SUPPORTED AFFIRMING THE MTC APPROVALS.

The circuit court never conducted a review of the agency record, whether before or after the 2015 remand. Given its ruling, it was imperative that the circuit court consider whether there were any facts in the agency record to support its findings regarding the alleged *ex parte* communication. But further, it was equally imperative that the circuit court consider if there was substantial evidence to sustain the Approvals. The circuit court's failure to consider the entire agency record is reversible error.

A. The Vacatur and Remand Orders Contain Factual Determinations Unsupported by the Record and Are the Result of Impermissible Judicial Fact-Finding.

First, with respect to the circuit court's findings regarding the supposed *ex parte* communication, the circuit court impermissibly made findings outside of the record. *See, e.g.*, *Bereano v. State Ethics Comm'n*, 403 Md. 716, 743-44 (2008) (explaining that court cannot make its own factual findings that are not made by agency); *Ramsey, Scarlett & Co. v. Comptroller of Treasury*, 302 Md. 825, 838 (1985) (noting court cannot make "an independent original estimate" of the evidence or "determine for itself … the weight to be accorded to the evidence before the agency"); *Mayor & Alderman of City of Annapolis v. Annapolis Waterfront Co.*, 284 Md. 383, 399 (1979) (finding court "may not substitute its judgment on the question whether the inference drawn [by agency] is the right one or whether a different inference would be better supported."); *Cty. Council of Prince George's Cty. v. Curtis Regency Serv. Corp.*, 121 Md. App. 123, 133 (1998).

Here, the trial court engaged in improper fact-finding both in its Vacatur Order,

which relied, in part, on unsupported conclusions in the Council's Resolution, and in its underlying 2015 Remand Order.

1. The circuit court's Vacatur Order is unsupported by the record evidence.

There is no testimony or other evidence to support the judicial findings in the Vacatur Order. By way of example, the circuit court found: the FACT letter was "extreme because of its timing, and because of its timing, it is deceitful to the Government as well as the public." (E59.) The court did not explain why the timing was significant and what was actually deceitful. Nor did the court mention, much less consider, that the FACT letter was presented at the very end of thirteen hearings before the Planning Commission and BOCC, and after fifty hours of testimony, all of which must be presumed to have contributed to the BOCC's votes. (*See, e.g.*, E4800-801; E4804.) Indeed, the court ultimately ignored the most compelling fact of all: the Planning Commission had voted twice to approve the MTC PUD, and the BOCC itself voted previously to approve the MTC PUD, all before the FACT letter had even come into existence. Further, all of the commissioners have unequivocally stated that the FACT letter had no impact on their votes. In short, there is simply no testimony or other record evidence supporting the findings of extremeness or deceitfulness.

By way of further examples, the circuit court attributed the creation of the FACT letter to Commissioner Smith. (E58.) Here, again, there is no record evidence to support the finding that Commissioner Smith created or wrote the letter. (E4708.)

Further, the court wrongly disregarded the uncontroverted supplemental evidence

gathered by the Council on remand. Although Commissioners Young and Gray submitted affidavits confirming that the FACT letter had no impact on their votes, the circuit court baldly concluded, "[t]he deception surrounding the FACT letter is not remedied by two affidavits." (E60.) Yet, the Council received no evidence concerning deception of any kind or by any person. And, the Council did not discredit or ignore the affidavits; it accepted them as true and forwarded them to the circuit court for consideration. (E4708.) There is no evidence whatsoever to support, let alone conclude, that the FACT letter is the product of deceit or was intended to deceive anyone.

2. The circuit court improperly ordered the 2015 remand.

The circuit court erred in ordering the 2015 remand for two reasons. First, Appellees-Petitioners never met their burden to compel remand for further discovery with respect to the FACT letter. Second, the court conducted impermissible judicial fact-finding.

i. Appellees-Petitioners failed to meet their burden to warrant a remand.

Consistent with the foregoing, Appellees-Petitioners never made the requisite strong showing of fraud or extreme circumstances outside of the administrative record to warrant a remand when they sought discovery. *Accord Montgomery Cty. v. Stevens*, 337 Md. 471, 481 (1995). Instead, they relied on, and the circuit court accepted, pure speculation.

First, Appellees-Petitioners conducted a side-by-side comparison of the FACT letter and meeting minutes and found two similar facts used in both documents, and just

declared that Commissioner Smith wrote the FACT letter. (E548-57.) This mere allegation was belied by the very documents Appellees-Petitioners cited because FACT's secretary wrote ***both*** the meeting minutes and the FACT letter and signed ***both*** documents. (E1779-80; E467-68.)

Second, Appellees-Petitioners relied on one newspaper article. (E469.) This article was inadmissible hearsay, and as the court correctly noted, "we're not trying the case of the newspaper." (E129.) The article should not have been considered.

Finally, Appellees-Petitioners relied on the timing of the FACT letter to demonstrate bad intent or deceitfulness. (E441-454.) Yet, Appellees-Petitioners pointed to no evidence to suggest either. Nor could they. The FACT letter came into existence after all substantive reports, hearings, and testimony on the MTC project had been considered by the BOCC.

This case is similar to the *Stevens* case. 337 Md. at 481. There, an officer alleged that the chief of police improperly relied on an *ex parte* communication to suspend him. *Id.* at 485. The court found the officer had not met his burden: "it is doubtful that the presence of such a[n] [*ex parte*] communication evidences any impropriety whatsoever." *Id.*; *accord Pub. Serv. Comm'n of Md. v. Patuxent Valley Conservation*, 300 Md. 200, 211-218 (1984) (explaining petitioners failed to meet burden with bare allegations of, among other issues, alleged improper *ex parte* communications). Appellees-Petitioners similarly relied on allegations of *ex parte* communications without any other indicia of impropriety whatsoever. As in *Stevens*, they failed to make the requisite showing.

ii. The circuit court made findings outside of the record evidence.

The circuit court conducted its own judicial fact-finding and reached conclusions unsupported by the record evidence. For example, the court inferred that the "FACT committee incorporated the information from Commissioner Smith into its April 23, 2014 letter to the BOCC." (E51.) There were very few similarities between the minutes and the letter. To the extent any similarities existed, it should not be a surprise since the same person (FACT's secretary) wrote both the minutes and the letter. (E1779-80; E467-68.) The court's inference was unreasonable. By way of another example, the court found the FACT letter's timing was "highly suggestive that the BOCC relied upon it." (E51.) Yet, the Zoning Ordinance sets forth specific findings and determinations, including those related to traffic adequacy, and none reference the FACT letter. (E2206-38.) In short, wholly apart from its improper and overly broad interpretation of Section 5-859, the court drew factual conclusions unsupported by the record evidence and thus erred in issuing the 2015 remand.

B. There Is No Factual or Legal Support for the Council's "Conclusions" in its Resolution.

Even assuming, without conceding, that the circuit court's 2015 remand to the Council was proper, it is beyond credible dispute that the Council exceeded the limited nature of the remand in an attempt to undo the Approvals that its predecessor government

(the BOCC) enacted and blessed. (E49-52.)[12] The Council obtained affidavits and statements from the BOCC commissioners, who had actual, personal knowledge of the events and issues. (E4577; E4586-4590.) The Council also received other uncontroverted evidence confirming that the FACT letter had no impact on the BOCC's vote. (E4620.) Yet, the new Council, for political reasons, took it upon itself to speculate and proffer its own "conclusions" to the circuit court in the form of a Resolution. (E4707-10.)

There are three fatal flaws with the Council's "conclusions." First, the "conclusions" are unsupported by any record evidence. Second, the Council exceeded the scope of the limited remand in issuing "conclusions." Third, the Council violated separation of powers. For these reasons, the circuit court erred in giving the "conclusions" any weight in its Vacatur Order, and the "conclusions" in the Resolution should be given no weight by this Court in its record review.

1. The "conclusions" in the Council's Resolution are unsupported by the record evidence.

There is no record evidence to support any of the Council's "conclusions." First, there is no record evidence that there were any "[s]erious challenges" to the scope of the traffic study. (E4708.) Developers' expert testified at length about his state- and county-

[12] Significantly, the Council understood the limited nature of the remand. In a press release, the Council explained that there would be a public hearing to address "the Circuit Court's decision remanding for consideration by the County Council the significance of the [FACT] correspondence regarding" MTC. (E4576.) Further, during one of the four public hearings, the Council's attorney instructed the Council that the court "has sent [this] to you for a narrow issue relating to the development and introduction into that prior proceeding of a letter purportedly from [FACT]." (E4861.)

approved traffic study. (E2482-85.) Appellees-Petitioners' counsel also retained an expert and cross-examined Staff about its traffic study and traffic issues. (E3474-75; E2985-3205; E3001; E3076-91.)

Second, there is no evidence of any "additional inconsistencies and irregularities" relating to traffic adequacy. (E4708.) With respect to the evidence, the BOCC: (i) had reports from Staff approving the MTC project, which specifically addressed traffic adequacy, (E2046-2055; E1770-1778); (ii) knew the Planning Commission unanimously approved the MTC project, (E2090-91; E1778); and (iii) had documents from SHA approving the MTC development for traffic adequacy purposes, (E1766; E1769). There was, and has been, no indication that the BOCC needed anything else.

Third, there is no record evidence of "extreme irregularity" surrounding the FACT letter. (E4708.) Commissioner Smith's appearance before FACT was pursuant to his role as BOCC liaison to FACT, and the FACT letter to the BOCC was entirely consistent with its mission to improve traffic in Frederick County. Moreover, all five former BOCC commissioners stated that the FACT letter had no impact on their vote, and the Council agreed. (E4587; E4577; E4800-81; E4804; E4626-31.)

Finally, the Council's request for Developers to restart the application process is illogical when members of the Planning Commission never saw or knew about the FACT letter because it did not exist when they unanimously approved the MTC PUD. Therefore, this request could not "reconcile" any of the Council's alleged concerns. (E4971-73; E4933-34.)

Because the foregoing "conclusions" in the Resolution are wholly unsupported by

any record evidence and, in some instances, are contradicted by the record, the circuit court erred in considering them.

2. The Council exceeded the scope of the limited remand.

The Council wrongly assumed the role of the circuit court when it re-reviewed the entire agency record and reached its own, new "conclusions" on alleged "inconsistencies" and "irregularities" respecting traffic adequacy and the FACT letter. (E4708; E4685.) The Council also exceeded its mandate on remand when it demanded that Developers reapply for the same approvals so the "Council could more appropriately focus on the important land issues involved in this PUD application."[13] (E881-82.) In doing so, the Council usurped the circuit court's role. *See, e.g.*, *Hickory Hills Ltd. P'ship v. Sec'y. of State of Md.*, 84 Md. App. 677, 682, (1990) (in a limited remand to develop supplemental record evidence, "there is something further the court must do, *i.e.* review the additional evidence taken by the administrative agency and complete its appellate hearing on the merits." (internal quotation marks omitted))[14].

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[13] Importantly, the Council ignored its own Charter, which expressly obligates it to honor the BOCC's prior enactments and contracts. *See* Frederick Cty. Charter, Art. 8, § 804 ("[A]ll rules, regulations, resolutions, and ordinances enacted by" the BOCC "shall continue in full force….").

[14] The Council also exceeded the scope of its mandate on remand when it allowed testimony and evidence beyond the issue of the FACT letter. *See Gigeous v. E. Corr. Inst.*, 132 Md. App. 487, 507, 509 (2000) (upholding agency's decision to prevent additional witnesses to testify on remand because of the court's limited remand order). It held four public hearings and permitted over seventy people to testify. (E4712-13; E4815; E4878.) Most egregiously, the Council allowed RALE additional time to speak at the public hearings. *Accord. id.* at 507 (noting individual had "ample opportunity to

Here, the circuit court never reached the merits of the Petitions before the 2015 remand. It was waiting on the Council to produce a supplemental record, including testimony, respecting what impact, if any, the FACT letter had on the BOCC's decision to approve the MTC project. The Council obtained unequivocal evidence on that narrow question. Yet, the Council wrongly commented, and opined, on the very supplemental record that the circuit court was charged with reviewing.

3. The Council's actions on remand wrongly intruded upon the circuit court's jurisdiction and role.

Under the circumstances, the Council should not have re-reviewed and re-evaluated the agency record for any reason, including for traffic adequacy, while petitions for judicial review were pending. (E407-10; E4685.) But that is precisely what the Council did. In doing so, the Council violated the doctrine of separation of powers between itself, as the legislative body under review, and the circuit court, as the judicial branch charged with conducting the review. *See* Md. Const., Decl. of Rights, Art. 8; *Shell Oil Co. v. Supervisor of Assessments of Prince George's Cty.*, 276 Md. 36, 46 (1975) ("This Court has consistently stated that Article 8 prohibits the courts from performing non-judicial functions and prohibits administrative agencies from performing judicial functions."); s*ee also* Md. Code, Land Use § 4-401; Md. R. 7-201 (allowing judicial review of administrative agency decisions); *accord* Frederick Cty. Code § 1-25-14 (permitting appeal to circuit court for person aggrieved by DRRA).

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fully present his case, and his requests … came only after the case was remanded for a narrow determination.").

By using the remand as an opportunity to conduct, essentially, a *de novo* review of the record evidence that the BOCC had considered while the circuit court had jurisdiction to determine the pending Petitions, the Council violated the traditional separation of powers between itself and the court. This is a further reason why its unsupported "conclusions" in the Resolution should be given no weight.[15]

C. The Circuit Court also Failed to Consider the Broader Agency Record Itself.

In vacating the Approvals based solely upon an unwarranted reading of the *ex parte* statute and a non-existent record regarding that issue, the circuit court failed to execute its fundamental responsibility on a petition for review, *i.e.*, to determine if there was substantial evidence to uphold the Approvals under review.[16] *See, e.g.*, *Surina*, 400 Md. at 681 (substantial evidence is that which "a reasonable mind might accept as

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[15] The Council also violated the separation of powers doctrine by filing post-remand briefs with the circuit court, effectively joining Appellees-Petitioners in their efforts to undo the very government approvals under review. By statute, petitioners are limited to three very narrow categories: (i) a person aggrieved by the decision, (ii) a taxpayer, and (iii) an officer or unit of the local jurisdiction. Md. Code, Land Use § 4-401(a). The Council does not fall within any of those categories and thus does not have standing to attack its own Approvals. *See Bd. of Cty. Comm'rs of Wash. City v. H. Manny Holtz, Inc.*, 60 Md. App. 133, 142 n.3 (1984) (finding the reference in the statute "must necessarily exclude the agency or official whose decision is being challenged.").

[16] The *ex parte* communication issue was raised, and considered, within the pending, underlying Petitions for Judicial Review and therefore should have been part of the substantial evidence review to be conducted by the circuit court. *See* Md. Code, Gen. Provs. § 5-862(a)(1) ("The Frederick County Ethics Commission or another aggrieved party of record may assert as procedural error a violation of this part in an action for judicial review of the application."). Further, Section 5-862(a)(2) does not permit, let alone compel, vacatur of the Approvals. At most, that subsection permits a circuit court, upon finding a violation of the disclosure requirement, to remand the matter to the governing body for "reconsideration."

adequate to support a conclusion…." (quoting *Mayor of Annapolis v. Annapolis Waterfront Co.*, 284 Md. 383, 398 (1979))).

A zoning matter is "presumptively correct, if based upon substantial evidence, even if substantial evidence to the contrary exists." *White v. Spring*, 109 Md. App. 692, 699 (1996); *accord. Chesapeake Bay Found., Inc. v. DCW Dutchship Island, LLC*, 439 Md. 588, 635 (2014); *Floyd v. Cty. Council of Prince George's Cty.*, 55 Md. App. 246, 248-50, 260 (1983).

In *White*, this Court held that testimony from a planning officer and the planning commission's findings of fact and recommendations were sufficient to support the zoning decision. 109 Md. App. at 699, 707. In *Chesapeake Bay Foundation, Inc.*, the Court of Appeals held there was substantial evidence to support a zoning decision where there were aerial photographs, and residents and experts testified in support of the project. 439 Md. at 635. And in *Floyd*, this Court affirmed the grant of a rezoning application because there was an "extensive evidentiary presentation, [and] every ordinance requirement was met." 55 Md. App. at 248-50, 260.

Like *White*, *Chesapeake*, and *Floyd*, the BOCC's Approvals here are based upon a substantial evidentiary record. The record before the BOCC included, among other things: (1) Developers' application (E1019-111); (2) memoranda from the Planning Commission, indicating its overwhelming and unanimous support for the development, (E2090-91; E1778); (3) reports from Staff, indicating its approval of the MTC development, (E2054; E2051; E2046-2055; E1770-1778); and (4) a December 30, 2013 letter from the SHA in support of the development's traffic adequacy, (E1766-69).

Moreover, the record below also contained testimony from Joseph Caloggero, Developers' traffic expert, who spoke at length about his state- and county- approved traffic impact study, including two letters to the BOCC regarding his expert opinions on traffic adequacy. (E2482-85; E1680; E2092-99.) Further, on January 16, 2014, the BOCC voted to approve the request to rezone the MTC development from Agricultural to PUD subject to conditions set forth in a certain Staff report. (E4574; E2944-78.) The circuit court did not bother to review this record evidence, all of which was obtained and submitted before the FACT letter existed.

D. There Is Substantial Evidence to Support the Approvals at Issue.

Had the circuit court reviewed the agency record to determine if there was substantial evidence to sustain the MTC Zoning Ordinance, DRRA, and APFO LOU, it would have no doubt concluded that all three approvals are valid and enforceable. This Court's *de novo* review of the record evidence should result in the same conclusion.

At the time, a rezoning application could only be approved if the BOCC determined that the request was "appropriate and serve[d] the public interest." Frederick Cty. Code § 1-19-10.500.3. In making such a determination, the BOCC considered several factors, including whether the transportation system was then, or would be made, adequate to serve the proposed development, and whether the planned development was adequately served by public facilities and services. *Id.* at (E), (J). When the BOCC approved the MTC project, it made explicit findings in the Zoning Ordinance on the adequacy of present and future transportation systems and discussed the existing site characteristics, the current traffic volumes, the programmed improvements, and detailed

planned improvements. (E2221-24; E2227; E2229-30.) The BOCC also determined the record satisfied the more detailed requirements of the APFO. (E2229-30.) The BOCC made each of these determinations based on the evidence submitted.

There is more than substantial evidence in the record to support the BOCC's Approvals, and the BOCC's Approvals are presumptively valid. *White*, 109 Md. App. at 699. Put another way, the record evidence before the BOCC demonstrates that a reasonable mind could reach the same conclusion as the BOCC based on the record evidence. *Surina*, 400 Md. at 681. Therefore, this Court should reverse the circuit court's Vacatur Order and reinstate the BOCC's Approvals.[17]

[17] Assuming *arguendo* that the Frederick County ethics code applied to the facts at issue and the 2015 Remand Order was valid, a further remand to the Council would be futile. This is because any alleged violation of the ethics code is to be asserted as a "procedural error" in the context of a petition for "judicial review", and the court is not permitted to remand twice under the statute. *See* Md. Code, Gen. Provs. § 5-862(a)(2). In analyzing procedural errors under petitions for judicial review, the harmless error doctrine applies. *Cremins v. Cty. Comm'rs of Washington Cty.*, 164 Md. App. 426, 445-47 (2005) (upholding commissioners' zoning decision, despite the commissioners admitting unsworn testimony because there was substantial evidence in the record to support the commissioners' decision without the inclusion of the testimony); *accord Jacocks v. Montgomery Cty.*, 58 Md. App. 95, 107 (1984) ("It follows that if an erroneous admission of evidence did not affect a decision, that decision will not be disturbed."); *Bosley v. Quigley*, 189 Md. 493, 508 (1948) (holding that where agency improperly considered observations of its members outside of evidence, "this would not invalidate [the agency's] original order."). Here, the court never reviewed whether there was substantial evidence in the record without the FACT letter.

E. The Council Used the Remand as a Pretext to Re-Evaluate and Reverse the BOCC's Approvals.

The Council used the FACT letter and remand as a pretext to delay and defeat the MTC project and avoid its obligations under the binding DRRA.[18] *See Queen Anne's Conservation, Inc. v. Cty. Comm'rs of Queen Anne's Cty.*, 382 Md. 306, 322 (2004) (a DRRA "is a contract whose purpose is to vest rights under zoning laws and regulations, in consideration of enhanced public benefits"). On remand, the Council decided to "study the record of the MTC rezoning case from January 2014 through April 2014…." (E4865.) This review included seven BOCC hearings related to various aspects of the MTC application, at least four different Frederick County staff reports about the entire MTC application, and other documentary evidence related to the entire MTC application. All of this review concerned events and documents that pre-date the FACT letter and thus, could not have been impacted by the FACT letter. (*See* E1777-78; E1782-1945; E2016-89; E2100-35; E2248-E3494.) The "review" was unnecessary and a delay tactic.[19]

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[18] The DRRA expressly binds the "BOCC, its agencies, governmental units, the Planning Commission and its and their respective successors and assigns, including but not limited to the future County Council and County Executive, when Frederick County transitions to a charter form of government." (E2145.)

[19] Similarly, the Council's requests for a second remand and for Developers to start the application process again were arbitrary and capricious. Neither is required nor lawful. There was absolutely no record evidence to support sending the matter back to the Planning Commission when the FACT letter did not exist during the Planning Commission's review of the MTC application. *Accord Rockville Fuel & Feed Co. v. Bd. of Appeals of City of Gaithersburg*, 257 Md. 183, 193-194 (1970). Further, these requests were unreasonable. *See Montgomery Cty., Md. v. Anastasi*, 77 Md. App. 126,

Tellingly, the Council only used the remand and FACT letter as a pretext to undo the BOCC's Approvals because the Council was comprised of newly-elected officials who disagreed with the BOCC. This is what the change of mind doctrine prohibits. *Accord Kay Constr. Co. v. Cty. Council for Montgomery Cty.*, 227 Md. 479, 489 (1962) ("[A] shift of majority opinion occasioned by the substitution of a councilman of one conviction for a councilman of another conviction" is insufficient to justify remand of a prior decision.)

For example, the Council used the remand as a dilatory ploy, taking nearly two years to return the matter back to court. (E4707.) Once the Council returned the matter, it argued in its post-remand pleadings that "a new hearing would present the council with a fresh opportunity to provide a full and fair hearing." (E883.)

In another example, the Council baldly stated: "These newly elected officials in this new form of government should have the opportunity to hear the entire PUD application and make an appropriate and informed land use decision." (E884.)

Further, at the September 19, 2017 hearing, the Council argued for the court to vacate its own Approvals of the Zoning Ordinance, DRRA, and APFO LOU. (E219.)

Finally, there is no more telling evidence of the Council's motives than the words

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137 (1988). Developers spent millions of dollars and countless hours to obtain the Approvals, hired experts to create a traffic study, received Staff, SHA, and Planning Commission support and, as a result, obtained the Approvals. In demanding that Developers start anew, the Council attempted to place the burden on Developers again. The Council offered no explanation for its divergence from the BOCC's decisions. Accordingly, the Council's actions were arbitrary and capricious.

of its Executive: "Immediate action is being taken to make sure the County never allows any of these DRRAs again." (E1005.)

The instant case is similar to *Schultze v. Montgomery County Planning Board*, 230 Md. 76 (1962). In *Schultze*, the Court of Appeals held that where a zoning board previously approved a subdivision plan, the board could not, on the same facts and same application, subsequently reject the final subdivision plan absent fraud, surprise, mistake, inadvertence, or a different factual situation. *Id.* at 81. To do so was a violation of the change of mind doctrine. *Id.* at 81-82.

Like the zoning board in *Schultze*, the Council abused its power. It reevaluated the case from January 2014 through April 2014, and formulated a contrary position based on the same record evidence, the same facts, and the same application. (E4685.) The newly-elected Council and Executive wanted to do away with DRRAs and used the remand as their opportunity to do so. This is precisely what the change of mind doctrine seeks to prevent.[20]

[20] Further, the Council is estopped from abandoning its prior position at the BOCC proceedings and attacking its own Approvals. *See, e.g.*, *Chesley v. City of Annapolis*, 176 Md. App. 413, 445-46 (2007). In doing so, the Council sought to impose an unfair detriment on Developers, who spent countless hours and millions of dollars to obtain the Approvals. *See Middlebrook Tech, LLC v. Moore*, 157 Md. App. 40, 63 (2004). Accordingly, the Council should be estopped from undoing the very project the BOCC approved.

CONCLUSION

Appellants 75-80 Properties, L.L.C. and Payne Investments, LLC ask this Court to reverse the circuit court's judgment granting Appellees-Petitioners' Petitions for Judicial Review and vacating MTC's Zoning Ordinance, DRRA, and APFO LOU.

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Statement as to Typeface: The font used in this Brief is Times New Roman and the type size is 13 point.

TEXT OF PERTINENT CONSTITUTIONAL PROVISIONS, STATUTES, RULES, AND REGULATIONS

Maryland Constitution, Declaration of Rights, Art. 8. Separation of powers

That the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other.

Md. Code, Gen. Provs. § 5-859. Ex parte communications

Application of section

(a) This section does not apply to a communication between a member of the governing body and an employee of the Frederick County government whose duties involve giving aid or advice to a member of the governing body concerning a pending application.

Disclosure

(b) A member of the governing body who communicates ex parte with an individual concerning a pending application during the pendency of the application shall file with the Chief Administrative Officer a separate disclosure for each communication within the later of 7 days after the communication was made or received.

Md. Code, Gen. Provs. § 5-862. Violations; penalties

Procedural error

(a) (1) The Frederick County Ethics Commission or another aggrieved party of record may assert as procedural error a violation of this part in an action for judicial review of the application.

(2) If the court finds that a violation of this part occurred, the court shall remand the case to the governing body for reconsideration.

Penalties

(b) (1) A person that knowingly and willfully violates this part is guilty of a misdemeanor and on conviction is subject to imprisonment not exceeding 6 months or a fine not exceeding $1,000 or both.

(2) If the person is a business entity and not an individual, each member, officer, or partner of the business entity who knowingly authorized or participated in the violation is guilty of a misdemeanor and on conviction is subject to imprisonment not exceeding 6 months or a fine not exceeding $1,000 or both.

(3) An action taken in reliance on an opinion of the State Ethics Commission or the Frederick County Ethics Commission may not be considered a knowing and willful violation.

Preservation of documents

(c) (1) A person that is subject to this part shall preserve all books, papers, and other documents necessary to complete and substantiate any reports, statements, or records required to be made under this part for 3 years from the date of filing the application.

(2) The documents shall be available for inspection on request.

Md. Code, Land Use § 4-401. Procedure

Who may file

(a) Any of the following persons may file a request for judicial review of a decision of a board of appeals or a zoning action of a legislative body by the circuit court of the county:

(1) a person aggrieved by the decision or action;

(2) a taxpayer; or

(3) an officer or unit of the local jurisdiction.

Manner

(b) The judicial review shall be in accordance with Title 7, Chapter 200 of the Maryland Rules.

Review standard unaffected

(c) This section does not change the existing standards for judicial review of a zoning action.

MD Rules, Rule 7-201 General Provisions

(a) Applicability. The rules in this Chapter govern actions for judicial review of (1) an order or action of an administrative agency, where judicial review is authorized by statute, and (2) a final determination of the trustees of the Client Protection Fund of the Bar of Maryland.

(b) Definition. As used in this Chapter, "administrative agency" means any agency, board, department, district, commission, authority, commissioner, official, the Maryland Tax Court, or other unit of the State or of a political subdivision of the State and the Client Protection Fund of the Bar of Maryland.

Frederick County Charter, Art. 8, § 802. Time Certain Articles Become Effective

Except as expressly provided in this Article, the provisions of this Charter shall become operative on the date the first County Executive and County Council, elected pursuant to this Charter, take office, Monday, December 1, 2014.

Frederick County Charter, Art. 8, § 804. Existing Laws

The public local laws of the County and all rules, regulations, resolutions, and ordinances enacted by the County Commissioners in force on the Effective Date of the Charter shall continue in full force until repealed or amended. To the extent that any of the public local laws of the County or rules, regulations, resolutions, or ordinances, or any parts thereof, are inconsistent with the provisions of this Charter, they are repealed.

Frederick County Code §1-19-10-500.3. APPROVAL CRITERIA.

The County Council may approve or disapprove a request for rezoning of property to a Planned Development District if persuaded that granting the request is appropriate and serves the public interest. The approval or disapproval of a request for the application will be determined through evaluation of several criteria to establish whether the proposed project meets the purpose and intent of the zoning district. In addition to the requirements in § 1-19-3.110.4, the Planning Commission and County Council must find that the project adequately addresses the following criteria:

(A) The proposed development is compact, employing design principles that result in efficient consumption of land, efficient extension of public infrastructure, and efficient provision of public facilities;

(B) The proposed development design and building siting are in accordance with the County Comprehensive Plan, and any applicable community and corridor plans;

(C) The proposed development is compatible with existing or anticipated surrounding land uses with regard to size, building scale, intensity, setbacks, and landscaping, or the proposal provides for mitigation of differences in appearance or scale through such means as setbacks, screening, landscaping; or other design features in accordance with the County Comprehensive Plan, and any applicable community or corridor plans;

(D) The proposed development provides a safe and efficient arrangement of land use, buildings, infrastructure, and transportation circulation systems. Factors to be evaluated include: connections between existing and proposed community development patterns, extension of the street network; pedestrian connections to, from, and between buildings, parking areas, recreation, and open space;

(E) The transportation system is or will be made adequate to serve the proposed development in addition to existing uses in the area. Factors to be evaluated include: roadway capacity and level of service, on-street parking impacts, access requirements, neighborhood impacts, projected construction schedule of planned improvements, pedestrian safety, and travel demand modeling;

(F) The proposed development provides design and building placement that optimizes walking, biking, and use of public transit. Factors to be evaluated include: extension of the street network; existing and proposed community development patterns; and pedestrian connections to, from, and between buildings, parking areas, recreation, and open space;

(G) Existing fire and emergency medical service facilities are or will be made adequate to serve the increased demand from the proposed development in addition to existing uses in the area. Factors to be evaluated include: response time, projected schedule of providing planned improvements, bridges, roads, and nature and type of available response apparatus;

(H) Natural features of the site have been adequately considered and utilized in the design of the proposed development. Factors to be evaluated include: the relationship of existing natural features to man-made features both on-site and in the immediate vicinity, natural features connectivity, energy efficient site design, use of environmental site design or low impact development techniques in accordance with Chapter 1-15.2 of the Frederick County Code;

(I) The proposed mixture of land uses is consistent with the purpose and intent of the underlying County Comprehensive Plan land use designation(s), and any applicable community or corridor plans;

(J) Planned developments shall be served adequately by public facilities and services. Additionally, increased demand for public facilities, services, and utilities created by the proposed development (including without limitation water, sewer, transportation, parks and recreation, schools, fire and emergency services, libraries, and law enforcement) shall be evaluated as adequate or to be made adequate within established county standards.

Frederick County Code § 1-25-14. APPEALS.

(A) Any person aggrieved by an agreement may file an appeal in the Circuit Court for Frederick County, Maryland.

(B) An appeal must be taken within 30 days of the day on which the parties execute the agreement.

(C) If the effect of the decision of the Circuit Court revises the agreement in any way, any party to the agreement may terminate the agreement within 30 days of the date on which the Circuit Court decision becomes final.

CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This brief contains 8,966 words, excluding the parts of the brief exempted from the word count by Rule 8-503.
2. This brief complies with the font, spacing, and type size requirements stated in Rule 8-112.

/s/
Deborah J. Israel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY on this 29th day of March, 2018, an electronic copy of the Appellants 75-80 Properties, L.L.C. and Payne Investments, LLC's Brief and the Joint Record Extract were served upon all counsel of record via electronic filing and two hard copies of each filing were served upon all counsel of record via first-class mail:

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Unless otherwise noted, 8 copies of Appellants' Brief and the Joint Record Extract were hand delivered to the Court on the date noted above.

/s/
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