In The

Court of Special Appeals of Maryland

No. 1689
September Term, 2017

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

v.

RALE, INC., et al.,
Appellees.

Appeal from the Circuit Court for Frederick County
(William R. Nicklas, Jr., Judge)

BRIEF OF APPELLANT C. PAUL SMITH

C. Gregory Abney
One Church Street, Suite 910
Rockville, MD 20850
(301) 850-2990
gregabney@abneyatlaw.com

Attorney for Appellant C. Paul Smith

March 29, 2018

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

Legislative History

Secondary Sources

Other Authorities

STATEMENT OF THE CASE

This case is about the flawed application of an ethics law—Section 5-859 of the General Provisions Article, Maryland Code ("Section 5-859").

On April 14, 2014, Appellant C. Paul Smith, then a Frederick County Commissioner ("Commissioner Smith"), attended a public meeting of the Frederick Area Committee for Transportation, Inc. ("FACT"), a quasi-public organization, as the appointed liaison of the Frederick County Board of County Commissioners ("BOCC"). E2016-21. At the meeting, Commissioner Smith discussed, among other things, transportation improvements in the County, citing the Monrovia Town Center Planned Unit Development ("MTC PUD"). E2016-21. At that time, the MTC PUD was pending before the BOCC. E567. Section 5-859 requires that a commissioner report ex parte communications with the Frederick County Chief Administrative Officer ("CAO"). *See* Md. Code, Gen. Provs. § 5-859(b). This being a public meeting and a part of his official duties for the BOCC, Commissioner Smith did not file a disclosure with the CAO denoting these comments as ex parte communications. E563-66. Commissioner Smith contends that no disclosure was required.

Between September 2006 and April 2014, the BOCC and the County Planning Commission ("Planning Commission") vetted the MTC PUD, a mixed-use development planned for the Monrovia area of the County. E4573. Both the BOCC and the Planning Commission intensely studied the MTC PUD. E4573-74; E1781; E1770-78; E2090-91. The Planning Commission held six public hearings, issued two reports, and voted in favor of the MTC development four times. E4573-74; E1781; E1770-78; E2090-91;

E2944-78; E3492-94. The BOCC held seven public hearings and voted in favor of the MTC development five times. E4573; E1772; E2944-78; E3492-94. Finally, in May 2014, the BOCC enacted a rezoning ordinance for the MTC PUD ("MTC Ordinance"), and approved and executed the related Development Rights and Responsibilities Agreement ("DRRA") and Adequate Public Facilities Ordinance Letter of Understanding ("APFO LOU"). E2206-48; E2136-205.

On June 26, 2014, Residents Against Landsdale Expansion ("RALE") petitioned the Circuit Court to review the BOCC's approval of the MTC Ordinance, DRRA, and APFO LOU. E251-53. In opposition, the County Attorney declared that there was substantial evidence to support the approvals and that the approvals were in accordance with law. E345-54.

During the Circuit Court proceedings on the Petitions, RALE subpoenaed Commissioner Smith to testify. E429-34. Commissioner Smith, through the County Attorney, moved to quash the subpoena on, *inter alia*, legislative privilege grounds. E414-22.

In response, RALE argued that Commissioner Smith had not filed an ex parte communication disclosure with the CAO following his comments at the FACT meeting. E441-88. This, RALE alleged, violated Section 5-859. E447-88.

The Circuit Court summarily denied Commissioner Smith's motion to quash, and Commissioner Smith moved for reconsideration. E47; E487. Commissioner Smith contended that RALE's complaints about FACT were insufficient to demonstrate "a strong showing of fraud or otherwise extreme circumstances to warrant" compelling or

even allowing testimony outside the administrative record on a petition for review. E506. The County, no longer representing Commissioner Smith, also moved for reconsideration, but argued that the Court should remand for further proceedings related to the comments at the FACT meeting. E529-36.

RALE then moved to remand the entire proceeding under Section 5-862, arguing again that Commissioner Smith violated Section 5-859 when he failed to file a disclosure following the April 14 FACT meeting. E548-51.

75-80 Properties, LLC, and Payne Investments, LLC (collectively, "Developers") and Commissioner Smith opposed RALE's motion for remand. E578; E4550. Among other things, both asserted that Commissioner Smith's statements did not constitute "ex parte communications"; therefore, Section 5-859 did not require Commissioner Smith to file a disclosure with the CAO. E581-86; E4550-53. If Section 5-859 did require filing a disclosure, they continued, the statute violated Commissioner Smith's First Amendment rights. E583, E4515-16.

The Circuit Court recognized that the administrative record before the BOCC limited its review. E51. Nevertheless, without conducting an evidentiary hearing and without any record evidence, the Court "found":

- Commissioner Smith "attended" the FACT meeting and "commented on MTC's zoning application," but did not file a subsequent disclosure.
- FACT "incorporated the information from Commissioner Smith" into a letter submitted to the BOCC from FACT regarding the MTC development, which FACT prepared after the April 14 meeting ("FACT Letter"), which was then "presented to the Commissioners with the intent to influence the pending vote" on the MTC approvals.

- The BOCC President's decision to read the FACT Letter "into the record at the end of testimony" made it "highly suggestive that the BOCC relied" on the FACT Letter in casting their votes on the MTC PUD.

E50-51. These "facts and circumstances," the Court concluded, were "extreme." E51. Because these "extreme circumstances" occurred outside of the administrative record and there was no evidence before the Court, the Court held that it could not "make a judgment based on the record" regarding the Petitions. E51. The Court quashed the subpoena for Commissioner Smith to testify, but remanded the case "for further proceedings, including testimony, to resolve the issues raised in th[e] Opinion" regarding "the letter, the timing, and the potential for reliance[.]" E51-52.

The County Commissioners who approved the MTC PUD told the Council that the FACT letter had no impact upon the outcome of their deliberations or their votes. E4709; E4587; E4577; E4804. Yet the County Council disregarded the witnesses with personal knowledge, voted to return the matter to the Circuit Court, and asked the Circuit Court to vacate the MTC Ordinance's approval, the DRRA, and the APFO LOU. E4707-10.

The Developers, of course, opposed vacatur. E632. The Developers asked the Court to affirm the BOCC's actions because Commissioner Smith's comments did not constitute an ex parte communication, substantial evidence supported the approvals, and the Developers were not involved in any of the alleged ex parte communications. E632.

The Circuit Court vacated the BOCC's approval of the MTC Ordinance, the accompanying DRRA, and the APFO LOU. E53-65. The Court held that Commissioner Smith acted "[i]n direct contradiction to [Section 5-859's] requirements" by attending and speaking at the FACT meeting without thereafter filing a disclosure with the CAO.

E58. This, the Court observed, "constitutes a breach of ethics that cannot be overlooked." E59. Ultimately, the Court concluded that Commissioner Smith's failure to file a disclosure of his attendance at the FACT meeting and the ensuing FACT letter constituted "extreme circumstances" that somehow "tainted" the approval process and required the Court to vacate the MTC Ordinance, DRRA, and APFO LOU. E59-63. Commissioner Smith timely appealed. E69-70.

The Circuit Court, by its September 29, 2017 Opinion and Order, vacated these approvals and agreements not because they were unsupported by substantial evidence, but because the Court misinterpreted and misapplied Sections 5-859 and 5-862. *See* E53-65. The Court concluded that Commissioner Smith was required to report his public appearance before FACT as an ex parte communication, and that the failure to make that report required vacatur of the approvals of the MTC PUD as a matter of law. E59-61.

For all of the reasons discussed below, the Circuit Court committed clear error and created a grave miscarriage of justice. Its Order should be vacated and the MTC approvals should be reinstated. The Court should also reverse the order of the Circuit Court noting that Commissioner Smith was "unethical" and "deceitful" when he did not file a disclosure report in connection with his public comments at the April 14 FACT meeting.

QUESTIONS PRESENTED

I. WHETHER SECTION 5-859 REQUIRED COMMISSIONER SMITH TO FILE A DISCLOSURE OF PUBLIC STATEMENTS MADE AT A PUBLIC MEETING BEFORE A QUASI-PUBLIC ORGANIZATION AT COUNTY HEADQUARTERS?

II. WHETHER, AS APPLIED BY THE CIRCUIT COURT, SECTION 5-859 VIOLATES COMMISSIONER SMITH'S FIRST AMENDMENT RIGHTS?

III. WHETHER THE CIRCUIT COURT ERRONEOUSLY CONCLUDED THAT COMMISSIONER SMITH'S CONDUCT CONSTITUTED "EXTREME CIRCUMSTANCES"?

STATEMENT OF FACTS

In September 2006, the BOCC voted to approve a PUD Phase I rezoning request for MTC. E314; E4573. Subsequently, the Planning Commission voted to approve a PUD Phase II rezoning request and voted to approve an APFO LOU for MTC. E314.

In 2010, however, a newly elected group of commissioners passed a Comprehensive Plan downzoning over 200 properties, which prevented the Developers from proceeding because the Developers had not yet entered into the required DRRA. E315.

Litigation ensued, and the people of Frederick County elected yet another group of commissioners, including Commissioner Smith. E315. The new commissioners had campaigned to reverse the downzoning effectuated by the 2010 Comprehensive Plan. E315.

In resolution of the litigation, the Developers filed a new application to develop MTC, which encompassed 457 acres in the Monrovia area of Frederick County. E315. During the application process, the Developers included detailed analyses of MTC's projected impact on roads, schools, sewer and water facilities, and other county services. *See, e.g.*, E1476-1503; E1680; E1755-56; E3495-4085.

In January 2014, well before Commissioner Smith's attendance at the April FACT meeting, the BOCC considered the MTC PUD (and accompanying DRRA and APFO LOU) over seven hours of hearings on three different evenings. E317; E4574. The BOCC cast a 4-0-1 vote to approve the MTC Ordinance, with certain conditions that would modify the project. E2944-78.

The Developers incorporated the BOCC's conditions into the proposal and returned it to the Planning Commission. E318. In March 2014, the Planning Commission unanimously voted, 7-0, that the revised MTC PUD met the traffic adequacy criteria in the Frederick County Zoning Ordinance and was consistent with the County Plan. E318. Accordingly, the Planning Commission submitted another report to the BOCC recommending approval of the MTC PUD. E1983-2015; E2090-91.

In April 2014, the BOCC held three public hearings on the MTC PUD. E318; E4574. The BOCC considered expert testimony and the reports from the Planning Commission in favor of MTC, as well as voices from RALE opposed to the development. E2985-3440.

On April 14, 2014, Commissioner Smith attended a public FACT meeting in his capacity as the BOCC's officially appointed liaison to FACT. E557. During the meeting, Commissioner Smith discussed the relationship between transportation improvements and development in the County, including the MTC PUD. E557. Michael Proffitt, FACT's Secretary, memorialized these comments in the following public minutes:

> Commissioner Smith commented on the negativity connected with the Monrovia Town Center improvements to Route 75 and 80, noting that the improvements have been in the comprehensive plans for nearly 40 years. He noted that improvements East and South of the Frederick bottleneck should prove to be beneficial to all residents in those areas. A discussion [ensued] regarding FACT's role in assisting in educating the public on the relationship between road improvements and development using the Monrovia Town Center as an example. The discussion noted that the offset intersection between 75 and 80, and the schedule for constructing the future interchange at Interstate 270 will depend upon the pace of development in

> this area. It was noted that the proposed improvements should assist those in the New Market and Linganore region as well.

E557.

FACT is a private-public partnership. E598-99. Over two decades ago, on September 20, 1994,[1] FACT was formed with the following aim:

> [T]o achieve enhancement of the economy and employment growth in Frederick County through transportation improvements to meet current and future residential and commercial transportation needs by facilitating the improvement of current infrastructure deficiencies and the provision of facilities to accommodate future growth[.]

E593, E601. The public officials serving as *ex officio* members of FACT include:

(1) a member of the BOCC;

(2) the Mayor of the City of Frederick;

(3) a member of the Board of Alderman for the City of Frederick;

(4) a representative from the Frederick County Office of Economic Development;

(5) a representative from the City of Frederick Office of Economic Development;

(6) the Representative of the Maryland Legislature for District 3;

(7) the Representative of the Maryland Legislature for District 4;

(8) a representative from the Frederick County Council of Governments;

(9) a representative from the Maryland State Highway Administration;

(10) a representative from the Maryland Transit Administration;

(11) a representative from the Frederick Municipal Airport; and

---

[1] *Frederick Area Committee For Transportation, Inc.: D03971116,* Md. Business Express, *available at*: https://egov.maryland.gov/BusinessExpress/EntitySearch/BusinessInformation/D03971116 (last visited Mar. 25, 2017).

(12) a representative from the Transit Services Advisory Committee.

E598-99. At all times relevant to this proceeding, Commissioner Smith served as a BOCC-appointed, *ex officio* member of FACT. E832.[2]

On April 23, 2014, the BOCC convened for a final hearing on the MTC Ordinance, the accompanying DRRA, and the accompanying APFO LOU. E3441. Before the close of evidence, BOCC president Blaine Young introduced the FACT letter, which Michael Proffitt authored, endorsing MTC. E3478-79. The BOCC entertained public comment from both MTC supporters and RALE, and ultimately, the BOCC voted 4-1 to approve the MTC Ordinance and 4-1 to approve the DRRA. E3492-94. One month later, in May 2014, at a public meeting, the BOCC formally signed MTC's application, the accompanying DRRA and APFO LOU. E2206-38; E2136-205.

[2] According to FACT's Bylaws, which are hosted on the County's public website, FACT seeks to "provide Frederick County's local and legislative elected officials with research assistance on issues affecting the transportation systems in Frederick County." E593. FACT also brings these public officials and private citizens together to "organize forums for the presentation of metropolitan and/or urban planning and zoning and transportation issues that relate to the Frederick County region." E593.

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." *Id.* (internal quotation marks omitted).

Similarly, First Amendment issues are questions of law that this Court reviews *de novo*. *See Waicker v. Scranton Times Ltd. P'ship*, 113 Md. App. 621, 629-37 (1997). When faced with First Amendment challenges, this Court undertakes "an independent review of the entire record to ensure the trial court did not intrude on the field of free expression." *Id.* at 637.

Finally, this Court reviews *de novo* a trial court's decision regarding whether a party petitioning for review of an agency decision has "made a strong showing that there was an impropriety, external to the administrative record, which tainted the final agency decision." *Montgomery Cty. v. Stevens*, 337 Md. 471, 484 (1995).

ARGUMENT

Commissioner Smith's comments at a public FACT meeting on April 14, 2014 were not an "ex parte" communication. As the BOCC's appointed liaison to FACT, he commented on the relationship between transportation and development at a public meeting before a quasi-public non-profit organization. His comments were memorialized in publicly available minutes. By its very terms, Section 5-859, which requires reporting ex parte communications, does not apply to public statements. Applying the statute in this way also violates the First Amendment, by restricting a legislator's ability to communicate with constituents.

In 2007, the Maryland General Assembly enacted a series of ethics provisions governing the behavior of Frederick County officials in the land use context. *See* 2007 Md. Laws 2768-75. Section 5-859 provides the following:

> 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.

Section 5-862 further provides that 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." § 5-862(a)(1). If "the court finds that a violation of this part occurred, the court shall remand the case to the County for reconsideration." § 5-862(a)(2). If a person "knowingly and willfully violates this part,"

the person "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." § 5-862(b)(1).

Yet the Maryland General Assembly did not design Section 5-859 to quash all communications between legislators and constituents regarding pending land use applications, nor could it. On the contrary, Section 5-859's legislative history indicates that the statute merely "require[s] 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., 90 Day Rpt., 2007 Sess., at C-14 (Apr. 13, 2007) (hereinafter "90 Day Rpt.")[3]; Md. Dep't of Legis. Servs., Fiscal Note, HB 1344, 2007 Sess., at 2 (Mar. 12, 2007) (hereinafter "House Fiscal Note")[4]; Md. Dep't of Legis. Servs., Fiscal Note, SB 979, 2007 Sess., at 2 (Mar. 9, 2007) (hereinafter "Senate Fiscal Note").[5] The Frederick County provision "take[s] 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." Office of Counsel to the General Assemb., Attorney General of Md., Bill Review Letter, 2007

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

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

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

Sess., at 2 (May 4, 2007) (hereinafter "Bill Review Letter").[6] Likewise, Maryland's broader public ethics law, within which the Frederick County provisions are situated, provides that the ethics provisions exist "[f]or the purpose of guarding against improper influence[.]" Md. Code, Gen. Provs. § 5-102(b).

This discreet approach makes sense because the Constitution requires that "legislators be given the widest latitude to express their views on issues of policy." *Bond v. Floyd*, 385 U.S. 116, 135-36 (1966). Initially, legislators "have an obligation to take positions on controversial political questions so that their constituents can be fully informed[.]" *Id.* at 136-37. But more fundamentally, representative democracy only works if constituents "may be represented in governmental debates by the person they have elected to represent them." *Id.*

The Circuit Court did not even pay lip service to the statute's purpose or these fundamental governmental interests. Instead, it interpreted Section 5-859 to require governmental officials to log all communications (even public ones) that touch upon a pending zoning application or risk dooming the application and exposing themselves to criminal liability.

Legally, this interpretation suffers from two fatal flaws. First, it is inconsistent with Section 5-859's plain language, which only requires officials to log communications when they are "ex parte," and its legislative aim, which is to eliminate *quid pro quo* corruption, not all communication between legislators and constituents. Second, it

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

tramples the official's freedom of speech by imposing a filing requirement on a cornucopia of public communications between legislators and any individual or group regarding a zoning application under all circumstances.

The Circuit Court vacated years of legislative effort and firm and final decisions made by the BOCC and accused Commissioner Smith of unethical, deceitful, and extreme conduct because Commissioner Smith mentioned MTC during public comments about transportation in his official capacity at a public meeting. To serve Section 5-859's aim of weeding out corruption, protect the free flow of information between government officials and the public, and salvage Commissioner Smith's good name and reputation, this Court should reverse this decision.

I. SECTION 5-859 DID NOT REQUIRE COMMISSIONER SMITH TO FILE A DISCLOSURE OF PUBLIC STATEMENTS MADE AT A PUBLIC MEETING BEFORE A QUASI-PUBLIC ORGANIZATION IN COUNTY HEADQUARTERS.

When interpreting a statute, this Court's "primary goal is always to discern the legislative purpose, the ends to be accomplished, or the evils to be remedied by a particular provision[.]" *Lowery*, 430 Md. at 490 (internal quotation marks omitted). The statute's words and "their 'plain meaning' are the best indicator" of that purpose. *Md. Dep't of Assessments & Taxation v. Maryland-National Capital Park & Planning Comm'n*, 348 Md. 2, 11 n.9 (1997). In addition, this Court may discern the "legislative intent" by looking to the statute's "legislative history, including the derivation of the statute, comments and explanations regarding it by authoritative sources during the legislative process." *Lillian C. Blentlinger, LLC v. Cleanwater Linganore, Inc.*, 456 Md.

272, 295 (2017) (internal quotation marks omitted). This Court also may look to an "instructive analogue" from another jurisdiction to determine the statute's meaning. *Stachowski v. Sysco Food Servs. of Baltimore, Inc.*, 402 Md. 506, 528-31 (2007) (looking to precedent from federal courts and state courts in Pennsylvania, North Carolina, Louisiana, West Virginia, Oregon, Missouri, Iowa, Alaska, Rhode Island, and Virginia in interpreting workers' compensation statute). Furthermore, this Court should interpret the statute, whenever possible, in a way that "will not lead to absurd consequences." *Mayor & Council of Rockville v. Rylyns Enters.*, 372 Md. 514, 550 (2002). Finally, this Court must interpret any statute with mixed criminal and civil implications in the manner most lenient to potential criminal defendants. *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004).

Neither the plain language of the statute nor its legislative history nor instructive analogues from other jurisdictions support the Circuit Court's interpretation. Such an interpretation creates absurd results and improperly subjects criminal defendants to the broadest potential liability. These tools of statutory interpretation make clear that Section 5-859 does not apply to public statements at a public meeting.

A. The Circuit Court's interpretation of Section 5-859 contravenes the statute's plain meaning because public communications are not "ex parte" communications.

The "cardinal rule of statutory construction is to ascertain and effectuate the intent of the General Assembly." *Bellard v. State*, 452 Md. 467, 481 (2017) (internal quotation marks omitted). To determine that intent, the Court turns "first to the language of the statute, giving it its natural and ordinary meaning." *Id.* (internal quotation marks omitted).

To uncover a statute's natural and ordinary meaning, the Court first looks "to see if the terms are defined in the statute." *Lowery*, 430 Md. at 491. If they are not, "dictionary definitions provide a useful starting point for discerning what the legislature could have meant in using a particular term." *Preston v. State*, 444 Md. 67, 84 (2015) (internal quotation marks omitted). Of course, "while the dictionary may be a starting point to ascertaining the Legislature's intent, it is not necessarily the end." *Montgomery Cty. v. Deibler*, 423 Md. 54, 71 (2011) (internal quotation marks omitted). Courts also read "the statute as a whole to ensure that no word, clause, sentence or phrase is rendered surplusage, superfluous, meaningless, or nugatory." *Lowery*, 430 Md. at 490 (internal quotation marks omitted). Finally, courts "do not read the statute divorced from its textual context, for adherence to the meaning of words does not require or permit isolation of words from their context." *Preston*, 444 Md. at 85 (internal quotation marks omitted).

While neither Section 5-859 nor a related statute define "ex parte," the common definition of "ex parte" makes clear that Commissioner Smith's statements were not "ex parte" communications. Black's Law Dictionary defines "ex parte" as follows: "Done 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).[7] Commissioner Smith did not appear at the FACT meeting "at the instance ...

[7] *Accord Black's Law Dictionary*, 657 (9th ed. 2009); *Black's Law Dictionary*, 616 (8th ed. 2004); *Black's Law Dictionary*, 597 (7th ed. 1999); *Black's Law Dictionary*, 576 (6th ed. 1990); *Black's Law Dictionary*, 297 (5th ed. 1983); *Black's Law Dictionary*, 662 (4th

of one party only"; rather, he appeared and made comments on transportation issues as the BOCC's appointed liaison to FACT. Moreover, FACT meetings are publicly noticed and held in public—indeed, the April 14 meeting was in the very same room as County Council meetings.[8] While Commissioner Smith's comments are "communications," they were public and therefore not "ex parte" communications.

Applying Section 5-859 to Commissioner Smith's statements based on this record not only conflicts with the plain language definition of "ex parte"—it renders the phrase "ex parte" superfluous in the statute. Section 5-859 does not apply to *any* communication concerning a pending application. It only applies to *ex parte* communications concerning a pending application. For "ex parte" to mean something in the statute, it is not enough that the relevant communication be made concerning a pending application. The Circuit Court, however, assessed only two facts: (1) Commissioner Smith made a communication, and (2) that communication mentioned a pending application. The Court did not consider other potentially relevant facts, such as, who was at the meeting and how the meeting was publicized. This approach writes the words "ex parte" out of the statute.

Commissioner Smith asks this Court merely to interpret Section 5-859 so that the facts matter and fit within the larger context of Maryland's Public Ethics Law, which

---

ed. 1968); *Black's Law Dictionary*, 452 (2d ed. 1910); *Black's Law Dictionary*, 446 (1st ed. 1891).

[8] The page for FACT on the County's website notes that FACT holds meetings at 7:30 AM on the second Monday of each month at Winchester Hall (the seat of Frederick County Government). *See Frederick Area Committee For Transportation*, Frederick County, Maryland, *available at* https://frederickcountymd.gov/5606/Frederick-Area-Committee-for-Transportat (last visited Mar. 25, 2018). On April 14, 2014, FACT held the relevant meeting at 7:30 AM at Winchester Hall. E557.

seeks to eliminate "improper influence." Md. Code, Gen. Provs. § 5-102(b). The Law does not seek to create legislation in a vacuum. Interpreting "ex parte" so that public communications in public meetings memorialized in public minutes must be disclosed does not target improper influence; instead, it targets communication.

To prevent *quid pro quo* corruption without chilling valuable and constitutionally protected legislative speech, Section 5-859 limits its scope to "ex parte" communications. Yet the Circuit Court's interpretation of Section 5-859 applied the statute to public statements at a public meeting memorialized in public minutes. In this case, the Circuit Court's interpretation of Section 5-859 does not comport with the natural and ordinary meaning of the statute, which merely seeks to weed out corrupt and improper communications, not all communications between legislators and constituents, let alone public policy statements concerning traffic issues in the County.

B. The Circuit Court's overbroad interpretation of Section 5-859 does not comport with the statute's legislative history.

This Court's "interpretive task is often completed by looking to the legislative history of [a law], and ensuring that [its] interpretation is consistent with [the law's] statutory purpose." *Deibler*, 423 Md. at 71. Section 5-859's legislative history demonstrates two things: (1) this Court should construe it to eliminate *quid pro quo* corruption, not communication, and (2) it only applies to communications between a commissioner and an applicant.

1. A contemporaneous Bill Review Letter from Maryland's Attorney General indicates that this Court should read Section 5-859 to eliminate *quid pro quo* corruption, not communication.

On May 4, 2007, days before Maryland's Governor signed Section 5-859 into law, the Attorney General of Maryland wrote to the Governor that Section 5-859 was designed to assuage "concerns of *quid pro quo* corruption (or its appearance) and conflicts of interest on the part of incumbent office holders/zoning decision-makers." Bill Review Letter at 2. The Circuit Court's interpretation of the statute does not comport with this intent.

There is nothing inherently wrong or unethical about a legislator speaking with, and listening to, citizens and groups, especially in a public setting, about a legislative matter. This is particularly true when the legislator appears before a quasi-public organization in an official capacity. In the legislative realm, such dialogue is not only acceptable, but desirable. Requiring legislators to disclose routine, open communications and expressions of their points of view does nothing whatsoever to address corruption. Instead, it upends the legislative process.

In reality, the Circuit Court's interpretation of Section 5-859 actually makes the development application process more opaque. By declaring all statements either to or from legislators about pending applications illicit, the Circuit Court chills valuable back and forth communications central to representative democracy.

Furthermore, the Circuit Court's interpretation, if allowed to stand, would require elected officials to disclose so many communications that it would actually obscure a truly nefarious ex parte communication. As drafted, the statute seeks to discourage *quid*

pro quo corruption and allow public watchdogs to review a disclosure log and serve as a check on county officials. But the Circuit Court's interpretation encumbers the watchdog: by requiring a log of every communication by a sitting official, the Court makes it impossible for watchdogs to identify an *actual* ex parte communication. By way of analogy, this interpretation makes it more difficult to find the needle in the haystack by dumping even more hay bales on the stack. The statute's drafters did not have these results in mind.

2. Contemporaneous reports from the Maryland Department of Legislative Services demonstrate that Section 5-859 applies only to communications between commissioners and applicants.

On March 1, 2007, Maryland Senator David R. Brinkley and the Frederick County Delegation to the Maryland House of Delegates introduced SB 979 and HB 1344, respectively, both of which mirror Section 5-859. *Compare* SB 979 (2007)[9] *with* HB 1344 (2007)[10].

On March 9 and March 12, 2007, the Maryland Department of Legislative Services published Fiscal and Policy Notes on SB 979 and HB 1344, both of which explained that the bills "require[d] disclosure of *ex parte* communications between a Frederick County Commissioner and an *applicant* while an application is pending." *Compare* House Fiscal Note at 2 *with* Senate Fiscal Note at 2 (second emphasis added).

[9] *Available at*: http://mgaleg.maryland.gov/2007RS/bills/sb/sb0979t.pdf (last visited Mar. 25, 2018).

[10] *Available at*: http://mgaleg.maryland.gov/2007RS/bills/hb/hb1344t.pdf (last visited Mar. 25, 2018).

On April 13, 2007, the Maryland Department of Legislative Services published a 90 Day Report on the 2007 Session:

> The Maryland Public Ethics Law contains special ethics requirements that apply to land use and zoning and planning matters in Montgomery, Prince George's and Howard counties, respectively. ***Under Senate Bill 979/House Bill 1344 (both passed)***, a similar provision is added for Frederick County. The bills: ... require disclosure of *ex parte* communications between a Frederick County Commissioner and an *applicant* while an application is pending.

90 Day Rpt. at C-13-C-14 (emphasis added with respect to "applicant"). On May 8, 2007, the Governor of Maryland signed HB 1344 into law. *See* 2007 Md. Laws 2768-75.

Consistent with the pre-passage fiscal notes and 90 Day Report, Section 5-859 applies only to communications with applicants. Section 5-859's legislative history makes clear that the legislature did not intend to require disclosure of communications beyond the applicant.

This comports with the statute's aim to weed out *quid pro quo* corruption. The tit-for-tat nature of *quid pro quo* corruption disappears when the communication involves an uninterested individual, rather than an applicant. To expand this interpretation so that it incorporates the general public, as well, would run counter to the statute's legislative history and common sense. Because Commissioner Smith's communications at the FACT meeting were not "with an applicant," the statute did not require that he file a disclosure with the CAO.

C. Instructive analogues from other jurisdictions indicate that public communications are not ex parte communications.

As previously explained, Maryland courts often look to an "instructive analogue" from another jurisdiction to determine a statute's meaning. *Stachowski*, 402 Md. at 528-31.

Courts and legal authorities elsewhere agree: public communications do not meet the definition of ex parte communications. *See, e.g., North v. U.S. DOJ*, 17 F. Supp. 3d 1, 3-4 (D.D.C. 2013); *Theriot v. Bates*, No. 2:12-cv-200, 2012 WL 2523412, at *6 n.5 (W.D. Mich. July 29, 2012); *Citizens of the State of Fla. v. Wilson*, 569 So. 2d 1268, 1270 (Fla. 1990); 5 U.S.C. § 551(14); 16 C.F.R. § 4.7(a). The U.S. District Court for the District of Columbia: "As the communications at issue were all filed on the public docket and thus accessible to all they cannot, *by definition*, be considered *ex parte* communications." *North*, 17 F. Supp. 3d at 3-4 (first emphasis added). The U.S. District Court for the Western District of Michigan: "Court orders are a matter of public record. They are not *ex parte* communications." *Theriot*, 2012 WL 2523412, at *6 n.5. The Supreme Court of Florida: "The communications complained of ... were not ex parte in that they were made at a public hearing." *Wilson*, 569 So. 2d at 1270. The Government in the Sunshine Act: an "ex parte communication" is "an oral or written communication not on the public record." 5 U.S.C. § 551(14). The Federal Trade Commission: "ex parte communications" are "oral or written communication[s] not on the public record[.]" 16 C.F.R. § 4.7(a).

In one particularly pertinent example, a president of a city's civil service board was not required to disclose a statement he heard at a public meeting of the city commission, even though the statement related to a matter pending before the board, because the statement was not deemed to be an ex parte communication. *City of Hollywood v. Hakanson*, 866 So. 2d 106, 106-07 (Fla. Dist. Ct. App. 2004). These comments were not ex parte communications because they were "made at a city commission meeting open to the general public[.]" *Id.* at 107.

Analogous cases from other jurisdictions support interpreting Section 5-859 so that it does not apply to public communications.

D. Applying Section 5-859 to public comments at public meetings before quasi-public organizations in public places yields absurd results.

Courts may interpret a statute in myriad ways, but "absurd results in the interpretive analysis of a statute are to be shunned." *Rylyns*, 372 Md. at 550. This Court must avoid any "construction of a statute which is unreasonable, illogical, unjust, or inconsistent with common sense[.]" *Id.* (internal quotation marks omitted).

For example, in *D & Y, Inc. v. Winston*, the statute in question provided as follows:

> Within 15 days after [a land installment] contract is signed by both the vendor and purchaser, the vendor shall cause the contract to be recorded among the land records of the county[.] Failure to do so, or to record as required under this section within the time stipulated, gives the purchaser the unconditional right to cancel the contract and to receive immediate refund of all payments and deposits made on account of or in contemplation of the contract.

320 Md. 534, 536 (1990) (internal quotation marks omitted). In *Winston*, a vendor recorded a land installment contract one day past the deadline, and the purchaser, after occupying the relevant property and making the required payments for almost two years, demanded that the vendor return all of the payments. *Id.* The Court of Appeals rejected the purchaser's hyper-literal interpretation of the statute, noting that it would permit a purchaser, knowing that a vendor was late to record, to "occupy the property for an indefinite period of time" and then rescind the contract and "recoup all monies paid." *Id.* at 538. This, the Court held, was "an absurd and unjust result" that could not be sustained. *Id.*

As interpreted, Section 5-859 creates a variety of absurd results because it requires local legislators to file disclosures for public communications where there is no concern whatsoever of *quid pro quo* corruption. A filing would be necessary for stump speeches if the legislator touched on a pending application. A filing would be necessary if an incumbent debated a challenger on the merits of a pending application in a televised debate. A filing would be necessary if the legislator wrote an op-ed in the local newspaper on a pending application. A filing would even be necessary if the legislator happened to be in the audience at a public event where *someone else* commented on a pending application. None of these communications bear even the slightest relationship to *quo pro quo* corruption, yet the Circuit Court's boundless interpretation makes them all subject to Section 5-859.

The harsh consequences of a violation of Section 5-859 only compound the absurdity. If the Circuit Court's interpretation is correct, the Court could subject Commissioner Smith to criminal liability and wipe out years of legislation.

Here, RALE did not present the Circuit Court with a secret meeting or a communication between Commissioner Smith and an interested individual designed to benefit Commissioner Smith in exchange for favorable action on the MTC PUD or anything of that sort. Indeed, neither RALE nor the County Council has pointed to corruption in the record or in the evidence, or even made an argument alleging corruption. Rather, Commissioner Smith appeared at an advertised, public meeting of FACT, a quasi-public organization, in his capacity as an appointed representative of the BOCC, to discuss matters directly within FACT's purview, as recorded in public minutes. All of this comports with FACT's Bylaws, which are not only publicly available, but which, as previously mentioned, are available on the County's website. Commissioner Smith's conduct falls squarely within his public responsibilities and reflects his conscientious execution of his duties, not a violation of law. This Court should not allow the absurdity of this outcome to stand.

E. In light of Section 5-859's potential criminal implications, this Court should reject the Circuit Court's overbroad interpretation.

While this is a civil case, courts may subject persons who knowingly and willfully violate Section 5-859 to up to six months' imprisonment and a fine of $1,000. Md. Code, Gen. Provs. § 5-862(b)(1). If any doubt remains about Section 5-859's meaning, its criminal implications command that this Court narrowly interpret it.

Both the Maryland Public Ethics Law and the common law give this Court reasons to interpret Section 5-859 narrowly. Maryland's Public Ethics Law instructs: "The General Assembly intends that this title, *except its provisions for criminal sanctions*, be construed liberally to accomplish [its] purpose." Md. Code, Gen. Provs. § 5-102(c) (emphasis added). Likewise, the rule of lenity commands this Court to interpret criminal statutes narrowly in order to guard against unjust criminal penalties. *Accord Leocal*, 543 U.S. at 11 n.8.

In this case, this is no mere abstract, theoretical point. After RALE instituted these proceedings, the County Ethics Commissioner referred the case to the State's Attorney for Frederick County. *See* Decision on Complaint at 1, Frederick County Ethics Commission (Aug. 10, 2016).[11] Ultimately, the State's Attorney correctly declined to prosecute because there was "insufficient evidence to warrant a criminal prosecution." *Id.* at 4. This criminal referral illustrates the serious, absurd consequences that can result from such an overbroad interpretation of Section 5-859.

In sum, Commissioner Smith attended a public FACT meeting held at the seat of the County Government, as required by his role as the BOCC-appointed FACT representative, and commented on transportation issues in the County, citing MTC as an example, consistent with FACT's Bylaws, which are publicly available on the County's public website. According to the Circuit Court's interpretation of the statute, this was "extreme," "deceitful," and an "ethics violation." E51. As a result, the Court wiped out

[11] *Available at:* https://frederickcountymd.gov/DocumentCenter/View/291651 (last visited Mar. 25, 2018).

years of legislative effort, and forced Commissioner Smith to defend against an ethics complaint and stare down potential criminal liability. This does nothing to eliminate *quid pro quo* corruption, and therefore, cannot be the intended result of Section 5-859.

II. AS APPLIED BY THE CIRCUIT COURT, SECTION 5-859 VIOLATES COMMISSIONER SMITH'S FIRST AMENDMENT RIGHTS.

"[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (internal quotation marks omitted). Courts have an obligation to "secure" the public's "right to a free discussion of public events and public measures[.]" *Wood v. Georgia*, 370 U.S. 375, 392 (1962) (internal quotation marks omitted).

Local legislators, meanwhile, have the right—nay, the duty—to speak up for or against legislative matters. *See Bond*, 385 U.S. at 136-37. Only through "uninhibited, robust, and wide open" public debate can the public remain informed and be sure that their local legislators represent their interests. *Id.*

More particularly, in the last forty years, the Supreme Court has "spelled out how to draw the constitutional line between the permissible goal of avoiding corruption in the political process and the impermissible desire simply to limit political speech." *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014) (plurality). To pass constitutional muster, regulations restricting political speech must target only "'*quid pro quo*' corruption or its appearance," *i.e.*, the "notion of a direct exchange of an official act for money." *Id.*

If Section 5-859 mandates that Commissioner Smith disclose his statements at the FACT meeting to the CAO, it violates the First Amendment of the U.S. Constitution.[12] Section 5-859 is vague, overbroad, and cannot withstand strict or exacting scrutiny. When public officials make public statements at public meetings before public organizations in public buildings, burdening the officials with a disclosure requirement, upon pain of criminal penalties, fails to combat corruption in any way.

A. As applied in this case, Section 5-859 does not survive First Amendment scrutiny.

"Content-based laws" are "presumptively unconstitutional" and must satisfy strict scrutiny. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). If the law is "content based on its face," it is "subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech." *Id.* at 2228 (internal quotation marks omitted).

Laws are "content based" if they apply "to particular speech because of the topic discussed or the idea or message expressed." *Id.* at 2227. The "hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Id.* at 2230 (internal quotation marks omitted).

[12] The Maryland Constitution provides: "every citizen of the State ought to be allowed to speak, write and publish his sentiments on all subjects, being responsible for the abuse of that privilege." Md. Const., Decl. of Rights, Art. 40. While courts read Article 40 "*in pari materia*" with the First Amendment, Article 40 may not "*always* be interpreted or applied in the same manner as its federal counterpart." *State v. Brookins*, 380 Md. 345, 350 n.2 (2004) (internal quotation marks omitted). Independent of the First Amendment, this Court should find that Section 5-859 violates Article 40, given the broad protections elucidated therein. *See* Anthony W. Kraus, *Beyond the First Amendment: What the Evolution of Maryland's Constitutional Free-Speech Guarantee Shows About Its Intended Breadth*, 47 U. Balt. L.F. 83, 94-98 (2017).

If the law is content-based, then strict scrutiny applies, and the government must prove that the law is "narrowly tailored to serve compelling state interests." *Id.* at 2226. "If a less restrictive alternative would serve the [g]overnment's purpose, the legislature must use that alternative." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000).

Section 5-859(b) is a content-based law because it requires reporting all communications on the category of applications for land use changes. In other words, it specifically targets speech based on its subject matter, namely, land use applications. While Section 5-859 is viewpoint neutral, the Supreme Court made clear in *Reed* that content-based restrictions receive strict scrutiny regardless of how they treat the speaker's viewpoint. Therefore, this Court should apply strict scrutiny and require that the statute serve a compelling government interest through narrowly tailored means.

That said, the U.S. Supreme Court has applied "exacting scrutiny," rather than strict scrutiny, to disclosure requirements, even if they are "content-based." *See Citizens United v. FEC*, 558 U.S. 310, 366-67 (2010). Exacting scrutiny requires a "substantial relation" between disclosure requirements and a "sufficiently important" governmental interest. *Id.* "[T]he strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *John Doe No. 1 v. Reed*, 561 U.S. 186, 196 (2010) (internal quotation marks omitted).

Although the Supreme Court has applied "exacting," rather than "strict," scrutiny in disclosure cases, it has done so because disclosure requirements typically "impose no ceiling" on political speech and "do not prevent anyone from speaking." *Citizens United*,

558 U.S. at 366 (internal quotation marks omitted). However, the Eighth Circuit, sitting *en banc*, has "question[ed] whether the Supreme Court intended exacting scrutiny to apply to laws" that impose such "substantial and ongoing burdens" on speech that they amount to *de facto* preventative restrictions. *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 875 (8th Cir. 2012) (en banc) ("*MCCL*"). To apply exacting scrutiny in such circumstances, the Court explained, would allow states to "sidestep strict scrutiny by simply placing a 'disclosure' label" on such laws and "risks transforming First Amendment jurisprudence into a legislative labeling exercise." *Id.*

As applied by the Circuit Court, Section 5-859's sweeping disclosure requirement, which subjects violators to criminal penalties, imposes such a burden that it should be subject to strict scrutiny. As applied by the Circuit Court, Section 5-859 requires county officials to log every communication concerning pending land use applications or face criminal liability and render the ultimate decision on the application subject to remand. The Circuit Court's approach does not require courts to inquire about the content of the communication (so long as it mentions the application), the parties to the communication (so long as it involves the official), or any other circumstances of the communication, including its location. Because such a burdensome application prevents political speech based on its content, it should be subject to strict, not exacting scrutiny.

The Circuit Court's application of Section 5-859 cannot survive either strict or exacting scrutiny. Although Section 5-859 purports to weed out "*quid pro quo* corruption," it is not substantially related to that interest, let alone narrowly tailored to serve that interest.

The Circuit Court's application is over-inclusive. As applied by the Circuit Court, Frederick County officials must disclose public communications concerning any pending application made at any public meeting of any organization. There is no danger of undue influence on the BOCC in such circumstances.

Simply put, the restriction is too broad. As Justice O'Connor once eloquently opined:

> If the government wants to avoid littering, it may ban littering, but it may not ban all leafleting. If the government wants to avoid fraudulent political fundraising, it may bar the fraud, but it may not in the process prohibit legitimate fundraising. If the government wants to protect householders from unwanted solicitors, it may enforce "No Soliciting" signs that the householders put up, but it may not cut off access to homes whose residents are willing to hear what the solicitors have to say. Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone.

Turner Broadcasting Sys., Inc. v. FCC, 512 U.S. 622, 682-83 (1994) (O'Connor, J., dissenting) (citations and internal quotation marks omitted). If the State wants to ban *quid pro quo* corruption, it may ban *quid pro quo* corruption, but it may not impose a filing requirement so onerous that it chills legislators from speaking in public.

If anything, this overbroad application detracts from the interest in combating corruption in the land use process. As previously explained, it could render the collection of disclosures so obtuse and/or voluminous that no ordinary citizen could uncover real acts of corruption. The Circuit Court's broad reading of Section 5-859 would require officials to report communications at rallies and on the radio. Every tweet about a pending application would require a disclosure—even if there were no substantive discussion of the pending application. In the end, this draconian application would

actually discourage government officials from making any public statements for fear that to do so could expose them to criminal liability. As interpreted, Section 5-859 contains no limits. It does not combat corruption; it just mandates that legislators disclose absolutely everything or say absolutely nothing.[13] Both results undermine the legitimacy of the legislative process.

If the Circuit Court's interpretation serves any interest, it is a dangerous one: curbing communication between legislators and the public on issues of public importance. There is nothing wrong with Commissioner Smith addressing transportation issues and discussing the MTC development at a FACT meeting. Quite the contrary, robust, public debate cannot happen if the law requires local officials to file a disclosure every time they comment on a pending land use matter outside of a County Council meeting. This onerous interpretation would chill legislators from speaking at all and therefore leave constituents uninformed.

Section 5-859 purports to serve the interest in eliminating *quid pro quo* corruption; however, as applied by the Circuit Court, the statute does not bear even a substantial relationship to that interest. Requiring public officials to report public statements made in County Headquarters at a public meeting that are later reflected in public minutes bears no relationship to corruption. Therefore, as applied, Section 5-859 satisfies neither strict nor exacting scrutiny under the First Amendment.

[13] Viewed in this way, Section 5-859 also "seriously infringe[s] on privacy of association of belief guaranteed by the First Amendment." *Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 91 (1982) (internal quotation marks omitted).

B. As applied by the Circuit Court, Section 8-589 is unconstitutionally vague.

Statutes are unconstitutionally vague when they do not provide a "'person of ordinary intelligence a reasonable opportunity to know what is prohibited.'" *Ctr. for Individ. Freedom, Inc. v. Tennant*, 706 F.3d 270, 280 (4th Cir. 2013) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)). When statutes reach "'expressions sheltered by the First Amendment, the vagueness doctrine demands a greater degree of specificity than in other contexts.'" *Id.* (quoting *Smith v. Goguen*, 415 U.S. 566, 573 (1974)).

More specifically, when disclosure requirements fail to provide a "person of ordinary intelligence" with a reasonable opportunity to know what they must disclose, the requirements are void for vagueness. *See, e.g., Hayes v. N.Y. Attorney Grievance Comm. of the Eight Judicial Dist.*, 672 F.3d 158, 169-70 (2d Cir. 2012) (holding attorney disciplinary rule requiring that specialization disclosures be "prominently made" void for vagueness as applied to particular attorney); *State of Washington ex rel. Public Disclosure Comm'n v. Rains*, 555 P.2d 1368, 1372 (Wash. 1976) (en banc) (holding political contribution disclosure requirements void for vagueness for failing to specify a time period or limit within which disclosure must be made).

As interpreted by the Circuit Court, Section 5-859 leaves a person of ordinary intelligence without any reasonable opportunity to know under what circumstances the filing of a disclosure is required. On its face, the statute limits its application to "ex parte" communications, but leaves it undefined. The Circuit Court's interpretation of "ex parte" mandates disclosure of public statements at public meetings before quasi-public

organizations. If public statements at public meetings are "ex parte" communications, then any communication is an "ex parte" communication. This leaves Frederick County government actors in the statutory wilderness. As a result, the statute cannot survive the First Amendment's protections for freedom of speech.[14]

III. THE CIRCUIT COURT ERRONEOUSLY CONCLUDED THAT COMMISSIONER SMITH'S CONDUCT CONSTITUTED "EXTREME CIRCUMSTANCES."

In ordering remand and later vacating MTC's approvals, the Circuit Court erroneously concluded that Commissioner Smith's actions constituted "extreme circumstances" that "tainted the proceedings." For the aforementioned reasons, the Circuit Court's analysis rests on a false premise: that Commissioner Smith committed an "ethical violation" because he illegally failed to disclose an ex parte communication. Setting that aside, the Circuit Court's conclusion about Commissioner Smith does not have support in the record.

First, the Court concluded that the "FACT committee incorporated the information from Commissioner Smith into its April 23, 2014 letter to the BOCC[.]" E55. But no

[14] It may be that the problem with Section 5-859 lies not with the Circuit Court's application, but with the overbroad statute itself. Under the First Amendment, a law is unconstitutionally overbroad, on its face, if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010) (internal quotation marks omitted). If Section 5-859 truly requires that county officials disclose all communications mentioning a pending application, a substantial number of its applications would be unconstitutional. It would impose an immense burden on communications that bear no relationship to the elimination of corruption, like public campaigning and opinion writing in local publications. If an official were walking down a street and the driver of a passing car shouted, "Monrovia Town Center!" the official would need to report the shout or risk criminal prosecution and damning the application to ultimate failure. Such a statute cannot be constitutional.

evidence links the FACT Letter to Commissioner Smith's Statements at the FACT Meeting. Michael Proffitt's minutes relay that Commissioner Smith discussed the relationship between road improvements and development, citing MTC as an example. E557. The FACT Letter, on the other hand, noted its prior support for a land use change at Meadow Road, and benefits to the Frederick and Middletown regions, a traffic signal to facilitate Route 75/Route 355 traffic flows, and the deficient Route 75/CSX Railroad Crossing. E370-71. If the Letter bears any similarity to the Minutes, it should be no surprise: Michael Proffitt, FACT's Secretary, wrote both. *Compare* E371 *with* E558.

Second, the Court concluded that the "FACT letter was read into the record at the end of testimony by BOCC President, Blaine Young, which is highly suggestive that the BOCC relied upon it," E52, and then held that the letter was "extreme because of its timing, and because of its timing, it [wa]s deceitful to the Government as well as the public," E59. In actuality, the evidence suggests just the opposite. BOCC President Young presented the FACT Letter after six hearings before the Planning Commission, and at the tail-end of the seventh hearing before the BOCC. *See* E4573-74; E1781; E1770-78; E2090-91; E2944-78; E3492-94.

FACT may play a valuable role in the County, but there is no evidence that it triggered some tectonic shift in the minds of the BOCC, who voted 4-0-1 to approve the project, conditionally, *four months earlier*. E2944-78. Indeed, two former BOCC members submitted affidavits swearing that the FACT Letter did not impact their votes on MTC, E4577, E4590; and yet, the Circuit Court held, without citing any evidence in

support of its own conclusion, that "[t]he deception surrounding the FACT letter is not remedied by two affidavits[,]" E60.

Notwithstanding an absence of supporting evidence, the Circuit Court concluded, in two separate public orders, that Commissioner Smith contributed to "extreme" circumstances that "constitute[d] a breach of ethics that cannot be overlooked," and "intended to deceive not only members of the Board, but the public at large." E51. This is not only erroneous, it is a miscarriage of justice that must be corrected.[15]

[15] If the Developers advance arguments absent from this brief, they are incorporated by reference.

CONCLUSION

Commissioner Smith asks this Court to vacate the Circuit Court's finding that Commissioner Smith's conduct with "unethical" and "deceitful," and the Court's judgment granting RALE's Petition for Review and striking down the MTC Ordinance, DRRA, and APFO LOU.[16]

March 29, 2018

Respectfully submitted,

/s/ C. Gregory Abney
C. Gregory Abney (CPF #0512130001)
Abney at Law, P.C.
One Church Street, Suite 910
Rockville, MD 20850
gregabney@abneyatlaw.com

Attorney for Appellant C. Paul Smith

[16] This brief uses 13-point, Times New Roman font.

CITATION AND VERBATIM TEXT OF ALL PERTINENT CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES, AND REGULATIONS

U.S. Const., amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Md. Const., Decl. of Rights, Art. 40:

> That the liberty of the press ought to be inviolably preserved; that every citizen of the State ought to be allowed to speak, write and publish his sentiments on all subjects, being responsible for the abuse of that privilege.

Md. Code, Gen. Provs. § 5-102:

> (a)(1) The General Assembly of Maryland, recognizing that our system of representative government is dependent on maintaining the highest trust by the people in their government officials and employees, finds and declares that the people have a right to be assured that the impartiality and independent judgment of those officials and employees will be maintained.
>
> (2) It is evident that the people's confidence and trust are eroded when the conduct of the State's business is subject to improper influence or even the appearance of improper influence.
>
> (b) For the purpose of guarding against improper influence, the General Assembly enacts this Maryland Public Ethics Law to require certain government officials and employees to disclose their financial affairs and to set minimum ethical standards for the conduct of State and local business.
>
> (c) The General Assembly intends that this title, except its provisions for criminal sanctions, be construed liberally to accomplish this purpose.

Md. Code, Gen. Provs. § 5-859:

> (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.
>
> (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:

> (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.
>
> (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.
>
> (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.

5 U.S.C. § 551(14):

> (14) "ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter.

16 C.F.R. § 4.7(a):

> (a) Definitions. For purposes of this section, ex parte communication means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding.

/s/ C. Gregory Abney
C. Gregory Abney (CPF #0512130001)

CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This brief contains **9,093** 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/ C. Gregory Abney
C. Gregory Abney (CPF #0512130001)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY on this 29th day of March, 2018, a copy of the Appellant C. Paul Smith's Brief was served upon all counsel of record via electronic filing and two copies were served first-class mail:

Michele McDaniel Rosenfeld, Esq.
One Research Court, Suite 450
Rockville, MD 20850
rosenfeldlaw@mail.com

Kurt Fischer, Esq.
Venable LLP
210 W. Pennsylvania Ave., Suite 500
Towson, MD 21204
kjfischer@venable.com

John Mathias, Esq.
Kathy Mitchell, Esq.
Office of the County Attorney
12 E. Church St.
Frederick, MD 21701
jmathias@frederickcountymd.gov
kmitchell2@frederickcountymd.gov

Deborah J. Israel, Esq.
Womble Bond Dickinson (US) LLP
1200 Nineteenth Street, N.W., Suite 500
Washington, DC 20036
202-467-6900
Deborah.israel@wbd-us.com

Absent a contrary subsequent representation from the undersigned, eight copies of Appellant C. Paul Smith's Brief have been delivered to the Court on the same date as above.

/s/ C. Gregory Abney
C. Gregory Abney (CPF #0512130001)