IN THE
COURT OF SPECIAL APPEALS OF MARYLAND

CSA-REG-1689-2017
SEPTEMBER TERM, 2017

No. 1689

75-80 PROPERTIES, LLC, *et al.*

Appellants

v.

RALE, INC., *et al.*

Appellees

ON APPEAL FROM THE CIRCUIT COURT FOR FREDERICK COUNTY
The Honorable William R. Nicklas, Jr., Judge

BRIEF OF APPELLEE, FREDERICK COUNTY, MARYLAND IN RESPONSE TO BRIEF OF APPELLANTS 75-80 PROPERTIES, LLC AND PAYNE INVESTMENTS, LLC

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Appellee, Frederick County, Maryland (the "County") submits this Brief of Appellee in response to the Brief of Appellant filed by 75-80 Properties, LLC and Payne Investments, LLC (the "Developers").

QUESTIONS PRESENTED

1. Were the Circuit Court's and County Council's factual findings that Commissioner Smith violated Md. Code Ann., Gen. Prov. ("GP"), § 5-859 by failing to disclose *ex parte* communications with representatives of FACT supported by substantial evidence and not clearly erroneous?

2. Did the Circuit Court and County Council correctly apply the required remedy of reconsideration set forth in GP, § 5-862(a)?

3. Does the prohibition in GP, § 5-859 on undisclosed *ex parte* communications by a County Commissioner concerning a pending rezoning application violate the First Amendment to the United States Constitution?

4. Does GP, § 5-862 require a finding of extreme circumstances or that the ethical violation was a substantial factor in the decision as a prerequisite to a remand for reconsideration, and if so, were these prerequisites present in this case?

5. Was the Circuit Court's vacatur of the approvals for purposes of reconsideration consistent with law and required for the County Council to conduct reconsideration in the manner it determined appropriate?

STATEMENT OF FACTS

The factual background of this appeal is set forth in the County's Statement of Facts

in its Brief of Appellee in response to the Brief of Appellant of former County Commissioner C. Paul Smith.

STANDARD OF REVIEW

The applicable standard of review is set forth in the County's Brief of Appellee in response to the Brief of Appellant filed by Commissioner Smith.

ARGUMENT

I. THE CIRCUIT COURT'S AND COUNTY COUNCIL'S FACTUAL FINDINGS THAT COMMISSIONER SMITH VIOLATED GP, § 5-859 BY FAILING TO DISCLOSE *EX PARTE* COMMUNICATIONS WITH REPRESENTATIVES OF FACT WERE SUPPORTED BY SUBSTANTIAL EVIDENCE AND, THEREFORE, WERE NOT CLEARLY ERRONEOUS.

A. Legal Background

1. The Frederick County Ethics Law

The Frederick County Ethics Law was enacted in the 2007 Laws of Md., Ch. 474 and originally codified in Md. Code Ann., State Gov't, §§ 15-853 to -858. Subsequently, in the 2014 Laws of Md., Ch. 94, Frederick County Ethics Law was recodified in GP §§ 5-857 to -862 without substantive change.

Chapter 474 stated that the Frederick County Ethics Law was enacted for the purpose of establishing ethical requirements related to planning and zoning proceedings before the Board of County Commissioners. (Apx.1–9). Further, Chapter 474 stated that the specific purpose of the statute was to (1) prohibit certain campaign contributions by persons pursuing zoning and planning applications before the County Commissioners, (2) prohibit a County Commissioner from participating in planning and zoning proceedings where the member had, in fact, received a recent campaign contribution from the applicant,

and (3) require County Commissioners who communicate *ex parte* with an individual about a pending planning and zoning application to file a public disclosure statement. (Apx.1).

In a May 4, 2007 Bill Review Letter, the Attorney General of Maryland found that the provisions of the Frederick County Ethics Law were constitutional and legally sufficient. The Attorney General's letter focused on the provisions of the law prohibiting a zoning applicant from making a political contribution to a County Commissioner during the pendency of an application. These provisions, the Attorney General opined, take "aim at a discreet [sic] class of contributors whose political activity raises concerns of *quid pro quo* corruption (or its appearance)." (Apx.74). Although the letter did not specifically analyze the requirement that County Commissioners disclose *ex parte* communications with any individual about a pending zoning application, the Attorney General concluded that the entirety of Chapter 474 was constitutional. (Apx.73–75).

2. GP, § 5-859: The prohibition on undisclosed *ex parte* communications with any individual concerning pending rezoning applications

GP § 5-859(b) provided that: "A Board member who communicates *ex parte* with **an individual** concerning a pending application during the pendency of the application shall file with the County Manager a separate disclosure for each communication within the later of 7 days after the communication was made or received." [1] *Id.* (emphasis supplied). An "application" is defined to include "an application for a zoning map

[1] Effective after Frederick County adopted a charter form of government, the 2014 Md. Laws of 2014, Ch. 645 amended § 5-859 to substitute "member of the governing body" for "Board member" and "Chief Administrative Officer" for "County Manager." (Apx.31–38).

amendment as part of a piecemeal or floating zone rezoning proceeding." GP, § 5-857(c)(1). GP, § 5-857(c)(2) defines an applicant to include the legal or equitable owner of at least a 10% interest in the property for which an application has been filed, or an officer or director of a corporation pursuing an application. In short, while the term applicant was defined in the Frederick County Ethics Law, the General Assembly chose not to limit the scope of impermissible undisclosed *ex parte* communications to those with applicants. Under GP, § 5-859 a County Commissioner was prohibited from engaging in an undisclosed *ex parte* communication with any individual regarding a pending rezoning application, not merely an applicant or party to the proceeding.

3. The prohibition on undisclosed *ex parte* communications in GP, § 5-859 is consistent with numerous such provisions adopted by the Federal government, Maryland General Assembly and other states.

Ex parte communications with the decision-maker in the context of administrative proceedings, including proceedings on applications for zoning and planning approvals, have either been completely prohibited or extensively regulated throughout the country. 8A *McQuillin Mun. Corp*., § 25.284 (July 2017 Update). An *ex parte* communication with a decision-maker is generally defined as "an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given." 4 Fed. Proc. L. Ed., § 7:674 (Feb. 2018 Update); *see* 5 U.S.C. § 551(14); 21 Minn. Proc., Admin. Proc. & Prac., § 8.01.03 (2d. ed., 2017 Update) ("Today, *ex parte* contacts are generally understood to be any oral or written off-the-record contacts between any person and a decision-maker on the subject matter of a pending proceeding."). Judges are

similarly prohibited throughout the country from engaging in *ex parte* communications with any individual regarding a pending case. Maryland Rule 18-102.9(a), taken verbatim from American Bar Association Rule 2.9 (*Ex Parte* Communications), states that, with the exception of *ex parte* communications authorized by law or that relate to certain purely scheduling or administrative matters, such communications are prohibited:

> A judge shall not initiate, permit, or consider *ex parte* communications or consider other communications made to the judge out of the presence of the parties or their attorneys, concerning a pending or impending matter.

The purpose of the prohibition on *ex parte* communications is to ensure that decisions are made on the basis of the law and evidence presented to the court and that all parties have a fair and equal opportunity to present their case free of bias or undue advantage. One commentator has explained:

> *Ex parte* communication is one of the most common areas of judicial misconduct complained about by the public. *Ex parte* communication is any kind of undisclosed conversation, discussion, or statement, either verbal or written, made by the judge about the case either to a party or a non-party to the proceedings outside the presence of one of the parties and which could affect the rights of the parties.

Stephen M. Simon & Maury S. Landsman, *Judicial Ethics Simulation Based Training*, 58 Law and Contemp. Prob. 323, 327 (1995).

The prohibition or regulation of *ex parte* communications has extended to proceedings of administrative agencies at all levels of government. In the early 1960s, the Federal government moved to regulate *ex parte* communications with decision-makers in contested administrative hearings. In the first year of his administration, President Kennedy discussed the danger of *ex parte* communications by administrative decision-

makers in a special message to Congress on the ethical conduct of government, stating:

> Some of the most spectacular examples of official misconduct have involved *ex parte* communication—undisclosed, informal contact between an agency official and a party interested in a matter before that official. Such covert influence on agency action often does basic injury to the fairness of agency proceedings, particularly when those proceedings are judicial in nature.

John F. Kennedy, Jr., *Special Message to the Congress on Conflict-of-Interest Legislation and on Problems of Ethics in Government*, April 27, 1961, *available at* http://www.presidency.ucsb.edu/ws/?pid=8092 (last visited June 18, 2018). Likewise, a distinguished commentator has explained that *ex parte* communications with an agency engaged in a contested fact-finding proceeding are as offensive as *ex parte* communications with a judge about a pending case:

> However, just as private communications with members of the judiciary concerning pending cases are offensive, so are communications with agency personnel engaged in the quasi-judicial activities of the agency.

Cornelius J. Peck, *Regulation and Control of Ex Parte Communications With Administrative Agencies*, 76 Harv. L. Rev. 233, 239 (1962). For these reasons, the Federal Administrative Procedure Act at 5 U.S.C. § 557(d), imposes severe restrictions on *ex parte* communications in a formal adjudication. *Id.*

Likewise, Maryland administrative decision-makers in contested cases are prohibited from engaging in *ex parte* communications with parties to the proceeding. Section 10-219(a)(1) of the Maryland State Government Article ("SG") prohibits such communications. Further SG, § 10-219 (c) requires any individual who is personally aware of *ex parte* communication to give notice to all parties and disclose the communication on the record.

The regulation of *ex parte* communications in proceedings has been extended to planning and zoning decisions. A leading commentator on the law of land use regulation has explained:

> [W]here a zoning body performs quasi-judicial or administrative functions, *ex parte* contacts on the merits of an application may be held to violate procedural due process where an interested party's rights to notice and a fair opportunity to be heard are prejudiced thereby.

2 Rathkopf, *The Law of Zoning and Planning*, § 32.10 (4th ed., 2018 Update).

Accordingly, the prohibition on undisclosed *ex parte* communications in GP, § 5-859 is consistent with statutes and ordinances throughout the country. The prohibition reinforces the established policy of ensuring that administrative decisions are made on the basis of the law and evidence presented to the decision-maker and that all parties have a fair and equal opportunity to present their case, free of bias or undue advantage.

B. The Circuit Court's and County Council's Factual Findings That Commissioner Smith Engaged In Undisclosed *Ex Parte* Communications With Representatives of FACT Were Supported By Substantial Evidence And Were Not Clearly Erroneous.

The Circuit Court entered findings of fact that Commissioner Smith engaged in undisclosed *ex parte* communications with FACT in both the Court's (1) March 10, 2015 Opinion and Order remanding the case to the County Council, and (2) September 29, 2017, Opinion and Order after the County Council had conducted proceedings on remand. The Circuit Court made the following findings of fact in both opinions, and the County has inserted citations to the record extract for the evidence supporting each finding (E.50-51; E.54-55):

1) That Commissioner Smith attended the April 14, 2014 FACT Committee meeting (E.467-68);

2) That Commissioner Smith commented on MTC's pending zoning application, as reflected in the April 14, 2014 FACT Committee Meeting Minutes (E.467-68);

3) That MD Code, General Provisions § 5-859(b) states: "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," and therefore requires disclosure of such communications;

4) That pursuant to the Public Ethics 2014 Annual Report to the Frederick County Ethics Commission, wherein the Board of Commissioners discloses *ex parte* communications, Commissioner Smith's comments were not disclosed (E.563-66);

5) That the FACT committee incorporated the information from Commissioner Smith into its April 23, 2014 letter to the Board of Commissioners (Compare E.467-68 with E.455, E.4744);

6) That the FACT letter was presented to the Commissioners with the intent to influence the pending vote (E.459-65; 463-66); and

7) That the FACT letter was read into the record at the end of testimony by Board of Commissioners, President, Blaine Young, which is highly suggestive that the Board of Commissioners relied upon it. (E.459-65; 463-66).

Accordingly, there was evidence of record upon which the Circuit Court carefully based each of its factual findings establishing a violation of GP, § 5-859. The Circuit Court's findings were not clearly erroneous.

C. The Developers' Arguments That Commissioner Smith Did Not Violate GP, § 5-859 Are Without Merit.

1. GP, § 5-859 expressly governs an *ex parte* communication about a pending rezoning application with any individual, not just an applicant or other party to the proceeding.

The Developers argue that, under GP § 5-859, an *ex parte* communication included only a communication between a County Commissioner and an "applicant" or a "party" to the proceeding and did not include communications with non-parties such as FACT. This argument is contrary to the express terms of GP, § 5-859. GP, § 5-859 provided that a "Board member who communicates *ex parte* with an **individual** concerning a pending application must disclose each communication." (emphasis supplied). The *ex parte* prohibition thus covered a communication with any "individual," not just a communication with an applicant or party. The term "applicant" was (and is) defined in GP, § 5-857(c) as the legal or equitable owner of at least 10% of a property that is the subject of an application, or an officer or director of a corporation pursuing an application. Accordingly, the General Assembly's use of the term "individual," rather than the defined term "applicant," establishes that it did not intend to limit prohibited undisclosed *ex parte* communications to those with an applicant. If the General Assembly had intended to limit proscribed communications to those with applicants or parties, it would have done so. In *Kushell v. Dep't of Nat. Res.*, 385 Md. 563, 576-77 (2005) the Court of Appeals explained (citations omitted):

> The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the Legislature. Statutory construction begins with the plain language of the statute, and ordinary, popular understanding of the English language dictates interpretation of its terminology. In construing the plain

> language, "[a] court may neither add nor delete language so as to reflect an intent not evidenced in the plain and unambiguous language of the statute; nor may it construe the statute with forced or subtle interpretations that limit or extend its application."

Indeed, in GP, § 5-836(a), an ethics law provision applicable to Prince George's County, the General Assembly limited proscribed undisclosed *ex parte* communications to those between a member of the District Council or the County Executive and an "applicant" or "applicant's agent." Accordingly, when the General Assembly intended to limit proscribed undisclosed *ex parte* communications to those with an applicant, it knew how to do so. Thus, in GP, § 5-859(a), the General Assembly clearly intended to adopt a broader *ex parte* rule for Frederick County. *See Chow v. State*, 393 Md. 431, 475 (2006) ("The terms 'sell' and 'rent' have a fairly clear and restrictive meaning. The term 'transfer' is obviously a broader term, meaning something beyond a sale or rental; otherwise, there would have been no reason for the General Assembly to place and leave it in the statute.").

The Developers also argue that the legislative history of GP, § 5-859 indicates that the purpose of this provision was to forestall *quid pro quo* corruption, and thus the provision relates only to communications with applicants. This argument is without merit. As described above, in addition to the *ex parte* provision, the Frederick County Ethics Law contains provisions that prohibit rezoning applicants from making political contributions to a Board member while an application is pending. In a May 4, 2007 Bill Review Letter, the Attorney General of Maryland analyzed whether this prohibition on political contributions was constitutional under the free speech guarantees of the State and Federal

Constitutions. In analyzing the issue, the Attorney General explained that political contributions by applicants with pending zoning applications "raises concerns of *quid pro quo* corruption (or its appearance) and conflicts of interest on the part of incumbent office holders / zoning decision-makers." (Apx74). This observation was directed to the political contribution component of the Frederick County Ethics Law. Nothing in the Attorney General's observation, however, indicates that the General Assembly intended to narrow the scope of GP, § 5-859, which expressly requires Board members to disclose *ex parte* communications with "any individual" in connection with pending zoning applications. The Developers also point to a Fiscal Report of the Department of Legislative Reference which states that the provision relates to *ex parte* communications between a Commissioner and applicants. The purpose of this report was to assess the fiscal impact of the legislation. There is no indication that the Department was seeking to analyze the scope of the provision. To the extent that the Department was seeking to analyze its scope, the Department contradicted the plain language of the statute and was wrong.

As described in Section A.1.3 above, the prohibition in GP, § 5-859(b) on undisclosed *ex parte* communications with non-parties who are interested in the outcome is consistent with *ex parte* provisions adopted by Federal agencies and many states throughout the country. The prohibition serves the important public purpose of ensuring that administrative decisions are based on the evidence presented at the hearing and that all parties have a fair opportunity to respond to information on which the decision-maker may rely. This purpose is served by requiring the disclosure of *ex parte* communications with all persons interested, not just applicants or parties. If the shoe were on the other foot, and

an environmental group worked with a Commissioner *ex parte* in an effort to develop evidence to defeat the Developers' application, and these communications were not disclosed, the Developers' fury would no doubt be heard.

2. GP, § 5-862(a) requires that the Circuit Court conduct fact-finding as to whether an ethics law violation occurred, and this requirement does not violate separation of powers principles.

The Developers next argue that the Circuit Court erred by making factual findings as to whether undisclosed *ex parte* communications occurred because the role of the courts in judicial review is limited to a deferential review of the factual findings of the agency. Under separation of powers principles, the Developers argue, the Circuit Court is prohibited from engaging in fact-finding. The Developers argue that, to the extent that the General Assembly granted the Circuit Court authority to make factual findings regarding an *ex parte* violation in GP, § 5-862(a), such a grant of authority is unconstitutional as violative of separation of powers. The Developers' arguments are without merit.

First, GP, § 5-862(a) expressly grants authority to the Circuit Court to make factual findings in the first instance. GP, § 5-862(a) provides that, in an action for judicial review, the Circuit Court is required to make factual findings as to whether a violation of the ethics law has occurred, including a violation of GP, § 5-859, which prohibits undisclosed *ex parte* communications. GP, § 5-862(a) states (emphasis supplied):

> Procedural error: – (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 Board for reconsideration.

The Developers further argue that, if the General Assembly granted authority to the Circuit Court in GP, § 5-862(a) to make findings of fact as to whether an undisclosed *ex parte* communication occurred, this would violate separation of powers principles because the Circuit Court would be required to perform a non-judicial function. In the leading case, *Dept. of Natural Resources v. Linchester Sand and Gravel Corp.,* 274 Md. 211, 223–25 (1975), the Court of Appeals explained separation of powers principles in the context of judicial review of administrative decisions. There, the Department of Natural Resources denied a wetlands permit sought by Linchester, and Linchester appealed pursuant to a statutory provision that authorized a *de novo* jury trial in Circuit Court as to whether the permit should be granted. A jury returned a verdict in favor of Linchester, and the Department appealed. The Court of Appeals reversed, holding that the statute authorizing a jury trial on a wetlands permit unconstitutionally authorized the court to perform a non-judicial function.

The Court first stated that, under Maryland separation of powers principles, courts cannot be delegated non-judicial or legislative functions. The Court explained that administrative agencies perform legislative functions, even when they engage in fact-finding that can be described as adjudicative, and the Court's role is limited to determining whether the agency's findings are legally sufficient. *Id.* at 223.

The Court further explained that it was beyond the power of the General Assembly to impose non-judicial functions on the courts, *id.* at 226:

> Because courts cannot be required to exercise nonjudicial duties it has been held by this Court that it is beyond the power of the Legislature to require the judiciary to: approve accounts of county officers before payment, *Robey v.*

> *Prince George's County*, 92 Md. 150, 48 A. 48 (1900); perform duties tantamount to a board of review in assessing property for tax purposes, *Baltimore City v. Bonaparte*, 93 Md. 156, 48 A. 735 (1901); appoint a board of visitors to supervise the county jail, *Beasley v. Ridout*, 94 Md. 641, 52 A. 61 (1902); provide for referendum concerning issuance of liquor licenses, *Board of Supervisors v. Todd*, 97 Md. 247, 54 A. 963 (1903); issue licenses permitting pari-mutuel betting on horse races, *Close v. Southern Md. Agr. Assoc.*, 134 Md. 629, 108 A. 209 (1919); and issue liquor licenses, *Cromwell v. Jackson*, 188 Md. 8, 52 A.2d 79 (1947).

Applying these principles to the case before it, the Court of Appeals held that the General Assembly could not delegate to the courts authority to determine whether a wetlands permit should be issued because this function was a legislative, not judicial function, *id.* at 228:

> It is clear that whether, under Title 9 of the Natural Resources Article, a particular parcel of land comes within the statutory wetlands designation and, if so, whether it must remain in its then existing natural state for ecological, aesthetic, environmental and recreational reasons are decisions to be made pursuant to the State's police power. Consequently, departmental activities must be exercised within the guidelines and standards prescribed by the Legislature; thus circumscribed, when granting or denying a permit in a specific case, the Secretary and the board of review gather and sift evidence which is directed both at present and future repercussions so as to take into account the needs of the public in general.

The Court of Appeals explained, however, that where an agency such as the Workman's Compensation Commission performs essentially a judicial function, establishing a remedy that is otherwise subject to a tort action, the courts may exercise *de novo* review over the agency's decision by engaging in fact-finding that is not deferential to an agency decision. *Id.* at 226–27.

In the present case, the General Assembly's delegation in GP, § 5-862(a) to the Circuit Court to make findings as to whether a member of a governing body committed a

violation of the ethics law is an inherently judicial function. Indeed, the courts have traditionally exercised authority over whether public officials have violated ethical or civil standards of conduct. *See Hines v. French*, 157 Md. App. 536, 564–65 (2004) (police misconduct allegations); *Attorney Grievance Comm'n of Maryland v. Wallace*, 368 Md. 277, 290–92, (2002) (attorney discipline proceedings). Accordingly, the delegation of authority to the Circuit Court to find as a matter of fact whether there has been an undisclosed *ex parte* communication does not violate separation of powers principles.

3. In its decision on remand, the County Council made a factual finding that Commissioner Smith engaged in undisclosed *ex parte* communications and its decision was supported by substantial evidence.

In any event, even if the Developers' separation of powers argument were correct, the Circuit Court's September 29, 2017 Opinion and Order remanding this case to the County Council for reconsideration should not be disturbed because the County Council also made the required factual findings on remand. In its March 10, 2015 Opinion and Order, the Circuit Court remanded the case to the County Council "for further proceedings, including testimony, to resolve the issues raised in this Opinion." (E.52). On remand, the County Council conducted extensive proceedings, including the receipt of testimony and documentary evidence, to address (1) whether the *ex parte* violations found by the Circuit Court had occurred, and (2) the manner in which the Council should conduct reconsideration. In Resolution No. 17-04, issued after the hearings on remand, the County Council concurred with the Circuit Court and found that the *ex parte* violations had occurred. (E.4707–08).

Accordingly, even if the Developers are correct, and the County Council is required under separation of powers principles to find that an *ex parte* violation occurred, the Council made the required factual findings.

4. Neither the Developers nor Commissioner Smith requested an evidentiary hearing or identified a genuine issue of material fact as to whether the undisclosed *ex parte* communications with FACT occurred.

The Developers alternatively argue that the Circuit Court's Order remanding this case to the County Council for reconsideration should be set aside because the Circuit Court did not hold an evidentiary hearing prior to entering factual findings that Commissioner Smith engaged in undisclosed *ex parte* communications in violation of GP, § 5-859. The Developers, however, did not request an evidentiary hearing or raise a genuine dispute of material fact as to whether Commissioner Smith engaged in undisclosed *ex parte* communications with FACT representatives. In Section I.B above, the County quoted the Circuit Court's findings of fact and cited the record evidence supporting the findings. On remand, the County Council received evidence that Commissioner Smith may have actually participated in the drafting of the FACT letter.[2] The Developers did not

[2] The evidence that Commissioner Smith continued to discuss the Developers' application with FACT representatives after the April 14, 2014 FACT meeting and reviewed a draft of the FACT letter consisted of (1) an article in the Frederick News-Post quoting Commissioner Smith as admitting that he continued to discuss the road adequacy issue with Michael Smariga after the FACT meeting and actually reviewed a draft of the FACT letter, (E.469), and (2) the conclusory testimony of witnesses at the County Council hearing that Commissioner Smith participated in drafting the FACT letter. (E.4721–22, E.4744, E.4747, E.4755–56). The County Council requested Commissioner Smith to provide testimony, but he did not do so. Rather, he submitted an unsworn statement in which he did not deny that he participated in drafting the FACT letter. The Circuit Court did not enter a specific finding of fact that Commissioner Smith participated in drafting the FACT

dispute these basic facts, which established that Commissioner Smith engaged in undisclosed *ex parte* communications. Rather, the Developers have made (and continue to make) a series of legal arguments that these facts (1) do not establish a violation of GP, § 5-859, or (2) a basis under GP, § 5-862(a) for vacating the approval of their rezoning application and remanding the case for reconsideration.

II. THE CIRCUIT COURT AND COUNTY COUNCIL CORRECTLY APPLIED THE REQUIRED REMEDY OF RECONSIDERATION SET FORTH IN GP, § 5-862(a).

A. GP, § 5-862(a) Required That The Circuit Court Remand The Developers' Rezoning Application To The Board of County Commissioners For Reconsideration Because Commissioner Smith Engaged In Undisclosed *Ex Parte* Communications In Violation of GP, § 5-859.

In a clear, concise, and unambiguous manner, GP, § 5-862(a) stated the required remedy for a violation of the *ex parte* communication rule in § 5-859 – reconsideration of the underlying decision. GP, § 5-862(a) stated (emphasis supplied):

> (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 Board for reconsideration**.

Accordingly, under the terms of GP, § 5-862(a), once a Circuit Court finds that an *ex parte* violation under GP, § 5-859 has occurred, the case must be remanded so that the Board can reconsider its decision.

letter, only that the language of the FACT letter closely followed Commissioner Smith's statements at the FACT meeting. (E.54–55).

"Reconsideration" has a clear meaning in the English language and under Maryland law. To "reconsider" means "to consider again especially with a view to changing or reversing." *Reconsider*, Merriam-Webster, https://www.merriam-webster.com/dictionary/reconsider (last visited June 6, 2018). "Reconsideration" is the act of reconsidering. *Id.* In *Tracey v. Solsesky ex rel Solsesky*, No. 53 SEPT. TERM 2011, 2012 WL 3568308 (Md. Aug. 21, 2012), Judge Wilner, in an Opinion on Motion for Reconsideration, explained the meaning of the term "reconsideration" as follows (emphasis supplied):

> A motion for reconsideration gives each judge of the Court an opportunity to **take another loo**k at the issue and **to rethink the position formerly asserted**. Because of the care that each judge, individually and collaboratively with his or her colleagues, takes before reaching a conclusion it is rare that a motion for reconsideration will be found persuasive, and so they are rarely granted. On reflection, however, I am now convinced that the majority (of which I was a part) erred in gratuitously applying strict liability to cross-breds, when that issue was never the case, and, through this opinion on the motion for reconsideration, I disassociate myself with that aspect of the majority Opinion.

Id. at *2, *overturned on other grounds due to legislative action*, Md. Code Ann. Cts. & Jud. Proc. § 3-1901. Accordingly, when GP, § 5-862(a) mandates reconsideration by a governing body, it requires that the governing body determine whether it will "take another look" or "change its mind" on the matter before it.

The Developers cite a series of cases that address the circumstances under which a Court or administrative agency has authority to order or conduct reconsideration of a final decision in the absence of a statute that expressly authorizes or directs that it do so. These cases hold that, in the absence of a statute or rule authorizing reconsideration, a final

decision may be reconsidered only upon a showing of "fraud, surprise, mistake or inadvertence." *See* Br. of the Developers at 34–35 (citing *Schultze v. Montgomery Cty. Planning Bd.*, 230 Md. 76, 81–82 (1962); *Kay Const. Co. v. Cty. Council for Montgomery Cty.*, 227 Md. 479, 485 (1962)). An administrative agency has no authority to reconsider a final decision merely as a result of a "change of mind." *Calvert Cty. Planning Comm'n v. Howlin Realty Mgmt., Inc.*, 364 Md. 301, 325 (2001) ("What is *not* permitted is a 'mere change of mind' on the part of the agency."); *Schultze v. Montgomery Cty. Planning Bd.*, 230 Md. 76, 82 (1962) (citing several "zoning cases holding that a mere change of mind is insufficient to justify a reversal of previous action").

The Developers are barking up the wrong analytical tree. The authorities cited by the Developers all relate to the circumstances under which a court or agency has authority to conduct reconsideration, not how reconsideration may be conducted once it is determined that the agency has the authority to do so. In the absence of a law or rule authorizing or permitting reconsideration, an agency may not conduct reconsideration merely because it has changed its mind. *Cinque v. Montgomery Cty. Planning Bd.*, 173 Md. App. 349, 364 (2007) ("When a grant of reconsideration is not based on one of the authorized grounds, it may be invalid as a mere change of mind."). Once an agency is authorized or directed to reconsider a matter, however, it necessarily must decide whether to "change its mind." The very purpose of reconsideration is for an agency to decide whether it wants to change its mind. That is, in the words of Judge Wilner, reconsideration means that the decision-maker must "take another look" or "rethink the position formerly asserted." *See Tracey*, 2012 WL 3568308, at *2.

B. The County Council As The Successor To The Board of County Commissioners Had Discretion To Determine The Nature And Scope Of Reconsideration Proceedings

In *People's Counsel for Balt. Co. v. Country Ridge Shopping Center*, 144 Md. App. 580, 593–95 (2002), this Court ruled that an administrative agency has broad discretion to determine the nature and scope of reconsideration proceedings when a court remands a case to the agency with directions that it conduct further proceedings to reconsider a decision. There, Country Ridge appealed a Baltimore County Board of Appeals ("BOA") decision in which the BOA had denied a special exception for the operation of a pawn shop. This Court reversed the BOA and remanded for further proceedings on grounds that the BOA had applied an unduly restrictive interpretation of an exemption from a location requirement. This Court ruled that it was not directing that the special exception be granted on remand, and the Board would have to apply all the applicable criteria to determine whether the special exception should be granted. On remand, the BOA did not consider additional evidence, but rather, reviewed this Court's Opinion and the evidence in the existing record and issued a new decision, again denying the special exception. Two members of the BOA were newly appointed and participated by reviewing the existing record.

Country Ridge appealed, contending that, because the BOA had two new members, it was required to begin the special exception application proceeding *de novo* and could not merely issue a decision on the basis of the existing record. This Court rejected this argument, holding that the BOA had discretion to determine the nature of the further

proceedings it would conduct to reconsider its decision denying the special exception, *id.* at 593 (emphasis supplied):

> Our remand for "further proceedings" was deliberately open-ended. We reject the appellees' argument that "further proceedings" necessarily implies a *de novo* hearing, with witnesses being called and arguments being made as if for the first time. **"Further proceedings" could, of course, embrace such a procedure but could also embrace other less radical procedures. It was not for us to anticipate what "further proceedings" might be required**.

Further, this Court explained that the Board could have made a number of different determinations as to what further proceedings were required to reconsider its prior decision, *id.* at 593–94 (citations omitted) (emphasis supplied):

> Theoretically, the Board could have made three or four different determinations as to what "further proceedings" might under the circumstances be appropriate.
>
> 1. The Board could have decided simply to clarify its earlier rationale that had been inadvertently ambiguous. . . .
>
> 2. The Board could have decided to make a *de novo* policy decision . . . .
>
> 3. The Board could have decided that the record before the Board initially was incomplete and that it would be desirable **TO SUPPLEMENT** that record with additional argument or addition evidence. New witnesses could be called but the old witnesses would not have to be recalled.
>
> **4. The Board could have decided to ignore the original record and to proceed *de novo* with an entirely new hearing as if the first hearing had never occurred.**

Accordingly, when a court remands a case to an agency to conduct further proceedings to reconsider a decision, the agency has discretion to determine the scope of the proceedings. The agency may decide to proceed *de novo* with an entirely new hearing.

In the present case, the County Council concluded that it should begin with an entirely new hearing because it could not reconcile the conflicting statements, testimony, and documents submitted to the Council regarding both (1) the influence of the FACT letter on the prior Board of County Commissioners ("BOCC"), and (2) the crucial issue of the adequacy of the transportation network in the area. (E.4708). Transportation adequacy issues are necessarily related to the number, nature, and location of approved units in a Planned Unit Development ("PUD"), and cannot be considered in isolation. Frederick County Code, § 1-19-10.500.3. (Apx.50–51). The County Council found that the best way to proceed with reconsideration of the PUD rezoning application was to restart the application process, and under Frederick County Code, §§ 1-19-3.110.3, 1-19-10.500.4 that process must begin with the County Planning Commission ("PC"). (Apx.44–45, Apx.51). The Council's decision to conduct reconsideration in this manner cannot be termed an abuse of discretion.

C. The Reconsideration Proceedings Established By The County Council Were Within The Scope Of Its Authority Under Law And Were Not An Abuse of Discretion.

1. If the circuit court finds a violation of GP, §5-859 it may not affirm the governing body's decision on grounds that it is otherwise supported by substantial evidence.

The Developers argue that the Circuit Court erred by remanding their applications to the County Council for reconsideration because the Court was required to determine whether (1) in the absence of the GP, § 5-859 violation, the BOCC decision approving the rezoning application was supported by substantial evidence, and (2) the BOCC would have made the same decision in the absence of the violation.

The Developers' argument, however, ignores the plain and unambiguous requirements of the Frederick County Ethics Law, GP, §§ 5-859 and 5-862(a), and the public policies that support these provisions. GP, § 5-859 prohibits the members of the governing body from conducting undisclosed *ex parte* communications about a pending application. As described in detail above in Section I.A.3., statutes and rules prohibiting *ex parte* communications in adjudicative proceedings have been adopted across the nation, and the purpose is to ensure that decisions are made on the basis of the law and evidence presented at the hearing and that all interested persons and parties have a fair and equal opportunity to present their case and respond to the contentions of others. GP, § 5-862(a) states, if the Circuit Court finds a violation of GP, § 5-859, the application "shall" be remanded for reconsideration. Under Maryland law, the term "shall" connotes mandatary action. *Harrison-Solomon v. State*, 442 Md. 254, 269 (2015). There is no basis under the statute for the Circuit Court to refuse to remand the application on grounds that (1) there is substantial evidence to support the approval of the application without the violation, or that (2) the BOCC would have made the same decision in the absence of the violation. Rather, the General Assembly required that, if an ethics law violation occurs, the application must be remanded to the County Council to reconsider the application.

2. The Developers did not have vested rights that prohibited the circuit court from remanding the Developers' rezoning application for reconsideration.

The Developers further argue that they have vested rights in the PUD rezoning approval, the Development Rights and Responsibilities Agreement ("DRRA"), and the Adequate Public Facilities Ordinance Letter of Understanding ("APFO LOU"), all of

which prevent the County Council from reconsidering the PUD rezoning application. This contention is without merit. Under Maryland law, a property owner can obtain vested rights in a certain use of a property in two distinct ways: vested zoning rights and vested contract rights. Vested zoning rights are obtained by beginning substantial construction on an improvement pursuant to a valid building permit. *Prince George's County v. Sunrise Development, Ltd.*, 330 Md. 297, 313–14 (1993). Vested contract rights, on the other hand, can be obtained when (1) a law authorizes the government to enter into a contract to establish or freeze a specific zoning or land use, and (2) the government validly enters into the contract by complying with all applicable requirements, procedures, and formalities. *Mayor and City Council of Balt. v. Crane*, 277 Md. 198, 205–07 (1976).

In the present case, the Developers cannot contend that they have vested zoning rights. They have not begun substantial construction on the units they seek to develop pursuant to a valid building permit. Accordingly, any vested rights the Developers enjoy must be vested contract rights. In *Crane*, 277 Md. at 205–07, the Court of Appeals explained the circumstances under which a property owner may acquire a vested contract right that prevents the government from changing the zoning law applicable to a property. There, Crane had accepted an offer by the City, made in an ordinance, to dedicate land for the widening of a road in exchange for increased residential density on the remaining property, Subsequently, however, the City rezoned the property to prohibit the increased density, and Crane challenged the rezoning, alleging that he had vested rights which prohibited it. Initially, the Court explained that Crane did not have vested rights under the traditional concept of vested zoning rights because he had not begun construction of his

proposed units. *Id.* at 206 (citations omitted). The Court ruled, however, that the Cranes acceptance of the City's offer, which had been made by ordinance, created vested contract rights, *id.*:

> Indeed, where a municipal corporation has made an offer by ordinance which has been accepted and acted upon by another, a contract may arise, the obligation of which is constitutionally protected against impairment.

It is settled, however, that a contract with a local government is valid only if it is entered into in compliance with all procedural and substantive requirements imposed by law. The Court of Appeals decision in *Inlet Associates v. Assateague House Condo. Ass'n*, 313 Md. 413, 435–37 (1988) is on point. There, Ocean City had agreed to close and convey a street to a developer, Inlet Associates, as part of a multi-million dollar contract in which Inlet Associates agreed to redevelop an area of the City located near Division Street. Taxpayer plaintiffs opposed to the project and argued that the contract was void because, under the City Charter, a street could be closed and conveyed to a developer only by ordinance, and the conveyance to Inlet Associates was approved by a resolution. Inlet Associates argued that an ordinance was not required. Further, Inlet Associates argued that the City Solicitor had opined that the conveyances could be approved by resolution, and the City had a long-standing practice, since 1918, of approving the conveyance of streets by resolution.

The Court of Appeals affirmed a Circuit Court judgment in favor of the taxpayers, holding that, under the correct interpretation of the City Charter, the road closure had to be authorized by ordinance. The Court stated, *id.* at 437 (citation omitted), that "estoppel cannot make lawful a municipal action which is beyond the scope of its power to act or is

not executed in compliance with mandatory conditions prescribed in the charter." Accordingly, even though the developers had spent millions of dollars in reliance on the comprehensive redevelopment agreement with the City, the agreement was void because it was in violation of a procedural requirement of the City Charter. *Id*.

In the present case, RALE sought judicial review of the approval of the Developers' rezoning application (and the DRRA and the APFO LOU which were dependent on the approval of the zoning application). In the course of RALE's appeal, the Circuit Court ruled that the BOCC's approval of the PUD rezoning had to be reconsidered by the County Council because there was a procedural error in the approval process. The approval was granted in violation of the *ex parte* provision in GP, §§ 5-859 and 5-862(a), therefore, required that it be reconsidered. In short, because the Developers' rezoning approval was adopted in violation of law, it is void and can be given no effect. Nor can the DRRA or the APFO LOU be given any effect because they are dependent on the approval of the underlying PUD rezoning.

III. THE PROHIBITION IN GP, § 5-859 ON UNDISCLOSED *EX PARTE* COMMUNICATIONS CONCERNING A PENDING REZONING APPLICATION DOES NOT VIOLATE THE FIRST AMENDMENT.

The Developers argue that the prohibition in GP, § 5-859 on undisclosed *ex parte* communications between a County Commissioner and any individual regarding a pending rezoning application violates the First Amendment rights to free speech and access to elected government officials. These contentions are meritless.

As explained in detail in Section I.A.3. above, restrictions on *ex parte* communications with the decision-maker in judicial and administrative fact-finding

proceedings are fashioned to ensure integrity and fairness in the adjudication of disputes. Such provisions have been adopted by the Federal system and throughout the country. In *Schoenbohm v. FCC*, 204 F.3d 243 (D.C. Cir. 2000), the U.S. Court of Appeals for the D.C. Circuit explained that although the First Amendment protects free speech and the right of access to agencies and the courts, "it does not immunize from proscription practice[s] which may corrupt the administrative or judicial processes." *Id.* at 248–49 (quoting *Calif. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972)); *accord Bridgeport Way Community Ass'n v. City of Lakewood*, 203 Fed. Appx. 64 (9th Cir. 2006) ("[T]he First Amendment does not grant BWCA [a community association] a right to be heard by the City Council during the formal comment period other than through the legal processes required to amend the comprehensive plan . . . ."); *cf. National Soc'y of Prof'l Eng'rs v. United States,* 435 U.S. 679, 697 (1978) (stating that although "an injunction against price fixing abridges the freedom of businessmen to talk to one another about prices," the First Amendment does not make it impossible to enforce the antitrust laws). The *Schoenbohm* case and other authorities were described in detail in Section III of the Argument in the County's Brief of Appellee in response to the Brief of Appellant Commissioner Smith and will not be repeated here.

Accordingly, rules designed to protect the integrity of the administrative or judicial process by restricting *ex parte* communications do not violate the First Amendment. This is particularly so in the present case because GP, § 5-859 does not actually prohibit *ex parte* communications, but rather, only requires the disclosure of such communications.

IV. THE DEVELOPERS' ARGUMENTS THAT THE CIRCUIT COURT'S REMAND ORDER SHOULD BE REVERSED BECAUSE (A) THERE WERE NO EXTREME CIRCUMSTANCES AND (B) THE *EX PARTE* COMMUNICATION WAS NOT A SUBSTANTIAL FACTOR IN THE BOARD OF COUNTY COMMISSIONERS' DECISION, ARE WITHOUT MERIT.

A. GP, § 5-862 Does Not Require A Finding Of Extreme Circumstances Or That The Ethics Law Violation Was A Substantial Factor As A Prerequisite To A Remand For Reconsideration, But Rather, Requires Only A Circuit Court Finding Of An Ethics Law Violation.

The Developers argue that the Circuit Court erred by considering evidence extrinsic to the administrative record and by remanding the applications for reconsideration because RALE failed to make a "strong showing" of "fraud or extreme circumstances" in the BOCC's decision to grant the Developers' rezoning application. Nothing in GP, §§ 5-859 and 5-862(a) requires that the Court find fraud or extreme circumstances. Rather, an application must be remanded for reconsideration if the Circuit Court finds that a County Commissioner had an undisclosed *ex parte* communication.

A party to an action for judicial review of an administrative or legislative decision must make a "strong showing" of "fraud or exceptional circumstances" in order to compel the testimony of legislators or administrative officials concerning their thought process in making a decision. In *Public Service Comm'n v. Patuxent Valley*, 300 Md. 200, 214 (1984), the Court of Appeals ruled that it is "a fundamental principle of administrative law . . . that a party challenging agency action is ordinarily forbidden from inquiring into the mental processes of an administrative official." There, PEPCO had applied for a certificate to construct an overhead transmission line. After the Public Service Commission ("PSC") approved the certificate, affected property owners brought an action for judicial review.

The property owners sought to depose the PSC commissioners on their thought process in approving the certificate, alleging that the hearing examiner who made an initial recommendation to approve the line had engaged in *ex parte* communications with the PSC Chairman and had improperly influenced the decision. The Circuit Court ordered the testimony to be taken, and the PSC appealed.

The Court of Appeals reversed, holding that a deposition of an administrative decision-maker can be taken only upon a "strong showing" of "fraud," "bad faith," "extreme circumstances" or "improper behavior." *Id.* at 211–16. Further, the Court ruled that, even where such a showing is made, the court should remand the case to the agency for further proceedings if this is a viable alternative under the circumstances. *Accord Montgomery County v. Stevens*, 337 Md. 471, 484–86 (1995).

The *Patuxent Valley* and *Stevens* cases, however, are inapposite to the present case. Neither case involved a violation of a statute, such as GP, §§ 5-859 and 5-862(a), which prohibits undisclosed *ex parte* communications and requires the Court to order reconsideration of the agency decision if a violation occurs. The Circuit Court did not order that a member of the governing body be deposed as to his or her thought processes in making the decision. Rather, in its September 29, 2017 Opinion and Order, the Circuit Court followed the requirement in GP, § 5-862(a) that the approvals be remanded for reconsideration if a violation of the ethics law is found.

The Developers also argue that the application can be remanded to the County Council for reconsideration only if the *ex parte* communication was a "substantial" factor

in the County Commissioners' approval of the Developers' application. This contention is without merit. GP, §§ 5-859 and 5-862(a) impose no such requirement.

B. Even If These Prerequisites Were Required, The Circuit Court's Factual Findings That There Were Extreme Circumstances And That The Ethics Law Violations Were A Substantial Factor In The Rezoning Decision Were Not Clearly Erroneous.

The Circuit Court, perhaps to cover all bases in response to the Developers' arguments, addressed the questions of (1) whether there were "extreme circumstances" present in this case, and (2) whether Commissioner Smith's *ex parte* communications with FACT were a substantial factor in the BOCC decision. The Circuit Court found that extreme circumstances existed and that the *ex parte* communications were a substantial factor. These conclusions, although not required by GP, §§ 5-859 or 5-862(a), were supported by compelling evidence and were not clearly erroneous.

The Circuit Court based its finding of extreme circumstances on the fact that the adequacy of the regional transportation network was a critical, and hotly disputed, issue in the Developers' PUD rezoning application that had garnered significant public attention. Commissioner Smith met *ex parte* with representatives of FACT, a respected organization composed of prominent members of government and the business community, and discussed the Developers' rezoning application which was then pending before him. He did more than merely discuss it. Commissioner Smith openly advocated for approval of the Developers' application by arguing that the regional transportation system, specifically MD Route 75, would be improved by the project. (E.467).

Commissioner Smith's arguments in support of the Developers' application found their way into a letter on FACT letterhead sent by the Secretary of FACT, Michael Proffitt, to the BOCC. (E.455–56). One of the drafters of the letter was Michael Smariga, a member of FACT with close ties to the Developers. Mr. Smariga was retired from the engineering firm, Harris, Smariga & Associates, the firm representing the Developers, and his son, Chris Smariga, was involved in creating and processing the Developers' rezoning application. (E.469, E.4721–22, E.4744, E.4747, E.4755–56). Further, there is evidence that Commissioner Smith met with Michael Smariga and Michael Proffitt following the FACT meeting to further discuss the Developers' application and even reviewed a draft of the FACT letter before it was submitted to the BOCC. *Id.*

At the hearing on April 23, 2014, BOCC President Young submitted the FACT letter in support of the Developers' application, read the names of the FACT members and represented that they had approved the letter. This statement was inaccurate because the letter was apparently drafted by only Smariga and Proffitt and was never approved by the FACT Board of Directors. (E.469, E.4795–98). The President of FACT knew nothing about the letter. (*Id.*). After introducing and reading the FACT letter and inaccurately representing that the letter was approved by all FACT members, the BOCC President summarily denied RALE the opportunity to cross-examine a FACT representative on the letter. (E.461–62). Following that denial, counsel for the Developers argued that FACT was a respected, prominent, and apolitical organization with expertise in transportation and that FACT had found the project would benefit the regional network. It is hard to conceive of circumstances more extreme than (1) a decision-maker in an important, and hotly

contested application proceeding contributing to the preparation of evidence to benefit the applicant, and (2) then violating a law that requires that he disclose this *ex parte* activity.

It was not clearly erroneous for the Circuit Court to find that these facts established extreme circumstances. Likewise, given the pivotal and contested nature of the transportation issue and the emphasis the BOCC President and counsel for the Developers placed on the letter, it was not clearly erroneous for the Circuit Court to find that the FACT letter was a substantial factor in the approval of the Developers' PUD zoning application. The Circuit Court could reasonably conclude that the fact that certain former Commissioners now claim that the FACT letter did not affect their decision establishes only that they do not want their decision to be reconsidered and perhaps changed. The evidence of record strongly suggests that the letter was considered relevant to and helpful on the regional transportation issue.

V. THE CIRCUIT COURT'S VACATUR OF THE APPROVALS FOR PURPOSES OF RECONSIDERATION WAS CONSISTENT WITH GP, § 5-862(a) AND WERE REQUIRED TO ENABLE THE COUNTY COUNCIL TO CONDUCT RECONSIDERATION IN THE MANNER IT DETERMINED APPROPRIATE.

The Circuit Court properly vacated the PUD rezoning, the DRRA, and the APFO LOU in remanding the PUD Zoning application for reconsideration. The County Council had decided that the proper manner of reconsideration was to begin review of the Developers' application from the beginning before the PC, but the Developers refused to participate in the proceeding, contending that the DRRA and the APFO LOU gave them vested rights that could not be disturbed. Accordingly, vacatur of the three approvals was

necessary for the County Council to proceed with reconsideration in the manner it had found appropriate.

CONCLUSION

For the reasons stated, the County requests that the September 29, 2017 Opinion and Order of the Circuit Court be affirmed.

Dated: June 18, 2018

Respectfully submitted,

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CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This brief contains 8,927 words, excluding 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 of Rule 8-112.

/s/
Christine E. White

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18th day of June, 2018, a copy of the Brief of Appellee, Frederick County, Maryland in Response to Brief of Appellants, 75-80 Properties, LLC and Payne Investments, LLC was served upon all counsel of record via electronic filing and that two (2) copies were sent via first-class mail to:

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