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 APPELLANT, C. PAUL SMITH

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Appellee, Frederick County, Maryland (the "County") submits this Brief of Appellee in response to the Brief of Appellant filed by former Frederick County Commissioner C. Paul Smith ("Commissioner Smith").

QUESTIONS PRESENTED

1. Was the Circuit Court's interpretation of Md. Code Ann., Gen. Provis. ("GP"), § 5-859 to require that a County Commissioner disclose *ex parte* communications concerning pending rezoning applications with all individuals, not just applicants, correct?

2. Was the Circuit Court's factual finding, set forth in its Opinions and Orders dated March 10, 2015 and September 29, 2017, that Commissioner Smith engaged in undisclosed *ex parte* communications concerning the Developers' rezoning application supported by substantial evidence and not clearly erroneous?

3. Did the requirement in GP, § 5-859 that Commissioner Smith disclose *ex parte* communications with any individual regarding pending rezoning applications violate Commissioner Smith's First Amendment rights to free speech and to consult with his constituents?

4. Does GP, § 5-862(a) require a finding of extreme circumstances in addition to a violation of the Frederick County Ethics Law, before a Circuit Court is required to remand the case to the County Council for reconsideration?

5. Was the Circuit Court's finding that the circumstances of Commissioner Smith's *ex parte* communications with FACT representatives and that the approval of the Developers' rezoning application constituted "extreme circumstances," clearly erroneous?

STATEMENT OF FACTS

1. THE DEVELOPERS' MONROVIA TOWN CENTER APPLICATIONS

In November 2012, Appellants, Payne Investments, LLC and 75-80 Properties, LLC (the "Developers"), filed an application to rezone 457.32 acres of land from Agricultural to Planned Unit Development ("PUD") to facilitate their development of the Monrovia Town Center ("MTC"), a proposed community with 1,510 residential units to be located south of the Village of Monrovia in Frederick County. (E.1019). With the PUD rezoning application, the Developers filed a petition for the approval of a Development Rights and Responsibilities Agreement ("DRRA"), which would freeze the proposed PUD zoning in place pursuant to Md. Code Ann., Land Use, § 7-304(a). The Developers also sought approval of an Adequate Public Facilities Ordinance Letter of Understanding ("APFO LOU") to document the public facilities that they would be required to construct or escrow account payments that would need to be made, to comply with the requirements of the APFO. (E.1946).

The PUD rezoning application and DRRA petition were reviewed by the County Planning Commission ("PC") in November 2013. The PC voted to recommend approval of the rezoning application and found that the DRRA was consistent with the County's Comprehensive Plan. (E.1781). A series of public hearings on the application was held by the Board of County Commissioners ("BOCC") on January 14, 15, and 16, 2014. (E.2248–2984). On January 16, 2014, the BOCC conditionally approved the PUD rezoning application, provided that several modifications were made. The modifications required by the BOCC related to restricting at least one-half of the dwelling units to senior housing,

reducing the number of acres and proposed units, changing the mix of uses, and the denial of access to a specific public road. (E.2944–47).

The Developers accepted the proposed modifications and revised their rezoning application, the DRRA, and the APFO LOU accordingly. (E.2239). The PC then held another public hearing on the rezoning and DRRA application, as modified. (E.2090). The BOCC held hearings on the amended rezoning, the DRRA, and the APFO LOU on April 8, 9, 10, and 23, 2014. (E.2985–3494).

Numerous objections to the MTC project were raised by members of the public and by RALE, Inc., a public interest group. The primary objection, however, related to the impact of the proposed MTC on the regional road network, particularly MD Route 75. During public testimony at the hearings held on January 14–16, 2014, the majority of public comments against the development (78 out of 113, or approximately 70%) cited road adequacy and safety issues, and many members of the public specifically emphasized concerns about the safety of MD Route 75. (E.2628–2915, E.2819–2901). The major issues raised during the public hearings held on April 8 and 9, 2014 were similarly focused on road adequacy and traffic safety (63 out of 77, or approximately 82%). (E.3232–3349). In addition, during the April 23, 2014 public hearing related to the DRRA and proposed APFO approval, Joe Mehra, P.E., a traffic consultant hired by RALE, testified that the Developers' traffic study was flawed. (E.3474–75 and 3476–77; *see also* E.1681). At the same hearing, testimony from the public was overwhelmingly focused on traffic safety and road adequacy issues (44 out of 52, or approximately 85%). (E.3457–78).

2. THE FACT MEETING AND FACT LETTER

The present dispute emanates from an April 14, 2014 meeting of a public interest organization called FACT (Frederick Area Committee for Transportation), which was attended by Commissioner Smith. FACT is an organization composed of prominent members of the Frederick County business community and government who have training or experience in transportation issues. Its mission is to analyze the efficacy of, and promote the development of, transportation facilities in the County. At the April 14, 2014 meeting, while the Developers' rezoning application was pending before him, Commissioner Smith presented arguments that improvements the Developers proposed to make to MD Routes 75 and 80 would upgrade substantially the regional transportation network and benefit residents of the Frederick, New Market, and Linganore areas of the County. (E.467–68). The arguments that Commissioner Smith articulated in favor of the Developers' application ultimately ended up in a letter purportedly from FACT sent on FACT letterhead to the BOCC in support of the Developers' application. (*Compare* E.467, *with* E.455–56). Two FACT representatives, Michael Smariga and Michael Proffitt participated in drafting the letter. Michael Smariga was closely tied to the Developers. He was retired from Harris, Smariga & Associates, the engineering firm working on the Developers' rezoning application, and Michael Smariga's son, Chris Smariga, was involved in creating and processing the application. (E. 2464–65, E.2469–73, E.2510–11). There is evidence that Commissioner Smith met with Smariga and Proffitt after the April 14, 2014 FACT meeting and reviewed a draft of the FACT letter. (E.469, E.4721–22, E.4744, E.4747, E.4755–56). The FACT letter was not approved by

the FACT Board of Directors, and the President of FACT was not even aware of the letter. (E.4797).

The FACT letter was sent to the BOCC via e-mail at about 2 p.m. on April 23, 2014, the last day of the BOCC public hearing on the Developers' application. The letter was introduced near the end of the hearing, after the conclusion of testimony from numerous witnesses, including the County staff, the Developers, and the public. (E.3478–79). BOCC President Blaine Young read the FACT letter into the record and specifically stated that development of the MTC would provide "significant funding for improvements" in the Monrovia area, and that this "public-private partnership is the only likely scenario for any significant improvement at this point." (E.3479).

In response to a question from another Commissioner, President Young inaccurately stated that the FACT Board of Directors had authorized it. (E.3479). As previously indicated, the president of the FACT Board was not even aware that a letter was being sent, and the FACT Board never approved the letter. (E.4796–98). BOCC President Young read the names of the FACT members and specifically represented that they had authorized the letter. (E.4796-98).

Counsel for RALE Inc., a public interest organization opposing the Developers' application, requested the opportunity to cross-examine a representative from FACT on the letter. (E.3479). President Young responded: "They're not testifying, they're submitting a letter." (E.3479). Counsel for RALE objected to inclusion of the letter in the record, and President Young responded "Thank you" and proceeded to call upon the Developers to rebut RALE's case. (E.3479). Counsel for the Developers then

emphasized the importance of the FACT letter and its contents, stating that "FACT might be the most apolitical organization in Frederick County. FACT doesn't care where or when land gets developed. . . . FACT cares strictly and solely about funding for transportation." (E.3481).

After the Developer's rebuttal, the BOCC voted to approve the MTC rezoning, the DRRA, and the APFO LOU. (E.3492–94). The BOCC signed all three approvals, and they became effective on May 29, 2014. (E.2136, E.2206).

Even though the effect of the proposed MTC PUD on regional transportation facilities, particularly on MD Route 75, was a hotly contested issue, Commissioner Smith did not disclose at any point that he attended the April 14, 2014 FACT meeting and provided detailed arguments to FACT that supported the Developers' rezoning application. It was also not disclosed that Commissioner Smith later continued to discuss the Developers' application with two FACT representatives and reviewed a draft of the FACT letter, which was later submitted to the BOCC. Moreover, it was not disclosed that one of the two FACT representatives who participated in drafting the letter had close ties to the Developers.

3. THE PETITIONS FOR JUDICIAL REVIEW AND RALE'S ALLEGATION THAT COMMISSIONER SMITH ENGAGED IN UNDISCLOSED *EX PARTE* COMMUNICATIONS WITH FACT REPRESENTATIVES

RALE and certain neighboring landowners filed petitions for judicial review of the PUD rezoning, the DRRA, and the APFO LOU. (E.1–7, E.251). The Circuit Court scheduled a hearing on the petitions for January 26, 2015. At some point prior to the hearing, RALE discovered that Commissioner Smith had discussed the Developers'

rezoning application with FACT representatives prior to the conclusion of the BOCC hearings and prior to the Commissioners' vote approving it. On January 15, 2015, the Petitioners issued trial subpoenas for Commissioner Smith, Michael Proffitt (FACT Secretary and signatory of the FACT letter), and Ronald Burns (FACT member and County Traffic Engineer) to appear at the Circuit Court hearing on the petitions for judicial review. The County and the Developers filed a motion to quash the subpoenas. (E.414).

At the hearing on January 26, 2015, the Circuit Court heard argument on the motion to quash the subpoenas. (E.72). The court stated that testimony from a decision-maker in an action for judicial review of an agency decision is not allowed, except in the case of fraud or extreme circumstances. (E.78–79). Counsel for RALE argued that there was evidence that Commissioner Smith had engaged in an undisclosed *ex parte* communication that necessitated the cases be remanded for reconsideration under GP, § 5-859. Further, counsel for RALE argued that, to the extent extreme circumstances were required, they were present because the regional transportation issue was pivotal and there was compelling evidence that Commissioner Smith, a decision-maker in the case, actually worked with FACT representatives to generate evidence – the FACT letter – in support of the Developers' application. And, there was evidence that a FACT representative who participated with Commissioner Smith in drafting the letter was closely tied to the engineering firm processing the Developers' application. (E.79–81). Further, counsel for RALE explained that President Young's characterization of the FACT letter as having been approved by the entire FACT Board was inaccurate. (E.83–84).

4. THE CIRCUIT COURT'S JANUARY 27, 2015 ORDER

After the hearing, the Circuit Court issued an Order on January 27, 2015 quashing the subpoenas issued to the two FACT representatives and denying the motion to quash the subpoena issued to Commissioner Smith. The Court ruled that Commissioner Smith could be examined with regard to fraud, arbitrariness, capriciousness, and exceptional circumstances in connection with the FACT letter. (E.47).

5. THE CIRCUIT COURT'S MARCH 10, 2015 OPINION AND ORDER

The County, the Developers, and former Commissioner Smith all filed motions to reconsider the January 27 Order. (E.487–539). In addition, on February 23, 2015, RALE filed a motion, pursuant to GP, § 5-859, to remand for reconsideration the Developers' PUD rezoning application (and the related approvals) to the County Council (the successor to the BOCC as a result of the County's adoption of a Charter form of government effective December 1, 2014).

On March 10, 2015, the Circuit Court held a hearing on the pending motions, and issued an Opinion and Order remanding the PUD rezoning application (and the related approvals) to the County Council. (E.4561). The Court made the following specific factual findings (the County has supplied citations to the record evidence supporting the findings):

> (1) That Commissioner Smith attended the April 14, 2014 FACT Committee meeting (E.394, E.4562–63);
>
> (2) That Commissioner Smith commented on MTC's pending zoning application, as reflected in the April 14, 2014 FACT Committee Meeting Minutes (E.394, E.4562–63);

(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 (E.4562–63);

(4) That pursuant to the Public Ethics 2014 Annual Report to the Frederick County Ethics Commission, wherein the BOCC discloses *ex parte* communications, Commissioner Smith's comments were not disclosed (E.563, E.4562–63);

(5) That the FACT committee incorporated the information from Commissioner Smith into its April 23, 2014 letter to the BOCC (E.455, E.4562-63);

(6) That the FACT letter was presented to the Commissioners with the intent to influence the pending vote (E.4562–63);

(7) 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 (E.3478–79, E.4562–63).

Furthermore, in its Opinion and Order, the Circuit Court found "the facts and circumstances to be extreme and that therefore Petitioners have met their burden of making a strong showing as to an extreme circumstance." (E.4563). Based on these findings, the court ordered a remand "to the County for further proceedings, including testimony, to resolve the issues raised in this Opinion." (E.4563).

6. THE COUNTY COUNCIL PROCEEDINGS AND DECISION ON REMAND

In compliance with the Circuit Court's Opinion and Order, the County Council held public hearings on June 9 and 16, 2015. (E.4711–4876). The Council requested that former Commissioners Gray, Smith, and Young submit affidavits regarding the significance of the FACT letter. (E.4576). Former Commissioners Gray and Young

submitted affidavits. Commissioner Smith submitted an unsworn legal memorandum in which he did not deny that the discussion with FACT representatives had occurred or that he had participated in drafting the FACT letter. (E.4577, E.4586). Rather, Commissioner Smith argued, among other things, that the prohibition on undisclosed *ex parte* communications in GP, § 5-549 violated his First Amendment right to freedom of speech. (E.4577, E.4586). Numerous witnesses testified in person at the public hearings, and written evidence was received. (E.4578, E.4595, E.4620, E.4626–76).

At a June 30, 2015 public hearing, the County Council decided to allow additional time for the Council Members to study the record of the BOCC proceedings and scheduled further discussion of the issue at its September 1, 2015 meeting. (E.4684). At the September 1, 2015 meeting, the County Council adopted a motion, which found that, as a result of undisclosed *ex parte* communications: (1) reconsideration by the County Council should take the form of beginning *de novo* with a new hearing on the Developers' PUD rezoning application, and (2) review of the Developers' application under County law had to begin with the PC. The Motion stated (E.4701–02):

> Council Member Keegan-Ayer moved to send the entire matter back to the Frederick County Planning Commission (PC) to begin again, because at this time it is not possible to reconcile the affidavits and statements made and submitted to the Council with respect to this letter and its alleged influence on the previous Board of County Commissioners' decision with the actions, statements, and behavior surrounding the letter; its inception; its creation; its phraseology; its timing and its introduction and handling once it was introduced, so therefore, I ask to send it back to the PC to begin again and report back in a timely fashion, 6 months or less, and I ask that any developer fees incurred to cover staff time be waived if at all possible. Council Member Fitzwater seconded the motion.

The County Council stated its formal findings of fact on remand in Resolution

No. 17-04 (County Council Post Remand Conclusions, effective February 17, 2017). Based on the testimony and other evidence presented, the Council concurred in the Circuit Court's findings of fact that Commissioner Smith had engaged in an undisclosed *ex parte* communication in consulting with FACT about the Developers' PUD rezoning application and in providing input leading to the FACT letter. The Council found (E.4707):

> Other than the statements submitted by the former County Commissioners, the testimony and exhibits presented to the County Council during the hearings were consistent with Judge Nicklas' findings regarding former Commissioner Smith's *ex parte* activities: attending the April 14, 2014, Frederick Area Committee for Transportation (FACT) Committee meeting; commenting during that meeting about the MTC pending applications; failing to disclose those *ex parte* communications as required by law; which led to the preparation of the FACT letter dated April 23, 2014, and its presentation to the Board of County Commissioners (BOCC) near the conclusion of its hearing with the intent to influence the upcoming vote; the reading into the record of the letter by the then Board President at the end of the testimony.

The County Council also concluded that the evidence of record "reveals extreme irregularity surrounding the FACT letter, including the timing of its presentation, handling by the BOCC President during the hearing, and the emphasis placed on this 'last minute' document during the applicant's rebuttal were extremely irregular." (E.4708). The Council found inconsistencies between the comments by the then-BOCC President at the end of the BOCC hearing and the information later discovered. The BOCC President had represented that the whole FACT Board had approved the letter. (E.4796–98). Yet, the testimony and documentation before the County Council revealed that only two FACT members had generated the letter. (E.4732, E.4744, E.4755–56, E.4796–98). Furthermore,

there was testimony that one of the two FACT members involved in drafting the letter was the father of an individual who had performed work for the Developers before and during the BOCC hearings. (E.469, 4708, E.4755–56). Most importantly, for purposes of determining how to proceed on remand, the County Council found that the testimony before the Council "revealed additional inconsistencies and irregularities relating to the crucial issue of the adequacy of the transportation network in the area for which findings are required under County law." (E.4708).

The central figure of the dispute, Commissioner Smith, did not testify during the County Council hearings and did not submit sworn written testimony. As previously indicated, Commissioner Smith submitted an unsworn legal memorandum after the June 9, 2015 public hearing in which he did not deny the existence of the undisclosed *ex parte* communication or his participation in drafting the FACT letter. Rather, he presented a series of legal arguments as to why his conduct did not violate GP, § 5-859 and why the Developers' rezoning to PUD should not be disturbed. (E.4626–31). The County Council apparently did not ascribe probative value to the legal memorandum; it was not mentioned in Resolution No. 17-04 in which the Council stated its conclusions on remand. (E.4636).

The Developers informed the County Council that they would not return to the PC and would oppose any County efforts to reconsider the three approvals (the PUD zoning, the DRRA, and the APFO LOU). (E.4709). In response, the Council noted in Resolution No 17-04 "that it has done what it can to fully comply with the Remand Order, but the Applicants will not participate in the rehearing process." (E.4710). The Council found that, if the Developers were unwilling to pursue the PUD rezoning application, further

action on reconsideration was impossible. (E.4710). The County Council requested that the Circuit Court take necessary and appropriate further action. (E.4710).

7. THE CIRCUIT COURT'S SEPTEMBER 29, 2017 OPINION AND ORDER

The Circuit Court held a post-remand hearing on September 19, 2017 and issued an Opinion and Order on September 29, 2017 vacating the PUD rezoning approval and the two agreements that were based on the rezoning – the DRRA and the APFO LOU. With the benefit of the additional evidence received by the County Council on remand, the court again found that former Commissioner Smith had engaged in an undisclosed *ex parte* communication in violation of GP, § 5-849. The court also found that the effect of the *ex parte* communication on the FACT letter and the letter's use at the April 23, 2014 BOCC hearing "is extreme because of its timing, and because of its timing, it is deceitful to both the Government and the public." (E.59).

The Circuit Court found that the FACT letter, the *ex parte* communications that generated it, and the use of the letter at the BOCC hearing were substantial factors in the BOCC's approval of the Developers' PUD rezoning application (E.59–60):

> In analyzing the FACT letter's significance, it is necessary to discuss the mission of FACT as well as the contents and timing of the letter. FACT is devoted to advocating for major transportation issues in Frederick County. FACT's opinion is relied upon by various governing bodies in Frederick County, including the Board of Commissioners as a neutral, unbiased entity. Commissioner Smith inserted his opinion into FACT's decision making process and subsequently failed to disclose his involvement. FACT's use of Commissioner Smith's opinion without attribution tainted its assessment. Furthermore, transportation concerns remained a major issue during various meeting pending approval of the MTC. The FACT letter, as read into the Board of Commissioners' hearing record, addresses the potential traffic issues. The letter also argues the "large benefits from the approval of [the MTC] project." By

> citing only positive outcomes of approval of the project, the FACT letter was introduced to sway the Commissioners' votes towards approval of the project and dissuade the community's fears of the pending project.
>
> Furthermore, the FACT letter's timing increases its propensity to influence a Commissioner's vote. The FACT letter was read into the record by Commissioner Young at a crucial time in the approval process, being a mere week before the MTC's final approval and final meeting on the issue. As previously concluded, the lack of attribution in the FACT letter was intended to deceive not only members of the Board, but the public at large.

Finally, the Court found that, as a result of the violation of the Frederick County Ethics Law, the PUD rezoning application had to be reconsidered by the County Council in the manner the Council deemed appropriate. (E.62–63). Because the DRRA and the APFO LOU were based on the PUD rezoning, all three approvals had to be vacated so that the County Council could reconsider the application in the manner it found appropriate – restarting the PUD rezoning proceeding before the PC. (E.62–63).

The Developers filed an appeal with this Court on October 26, 2017.

STANDARD OF REVIEW

The Circuit Court's findings of fact as to the undisclosed *ex parte* communications by Commissioner Smith in violation of GP, § 5-859 should be reviewed under the "clearly erroneous" standard of review which "requires an appellate court to 'consider the evidence produced at trial in a light most favorable to the prevailing party.'" *Gregg Neck Yacht Club, Inc. v. Cty. Comm'rs of Kent Cty.*, 137 Md. App. 732, 752 (2001) (citation omitted). As this Court has previously explained:

> Our task is limited to deciding whether the circuit court's factual findings were supported by substantial evidence in the record: "The appellate court must consider evidence produced at the trial in a light most favorable to the prevailing party and if substantial evidence was presented to support the trial court's determination, it is not clearly erroneous and cannot be disturbed."

L.W. Wolfe Enterprises, Inc. v. Maryland Nat'l Golf, L.P., 165 Md. App. 339, 343 (2005) (citation omitted). The Circuit Court's ruling that GP, § 5-862(a) required reconsideration by the County Council in light of the GP § 5-859 violation is a question of law on which this Court can substitute its judgment for the Circuit Court. *Hartford Fire Ins. Co. v. Estate of Sanders*, 232 Md. App. 24, 39 (2017). Finally, the County Council's discretionary decision to conduct reconsideration by proceeding *de novo* with an entirely new hearing should only be overturned if this Court determines that it was an abuse of discretion. *See id.* at 40.

ARGUMENT

I. GP, § 5-859 PROHIBITED A COUNTY COMMISSIONER FROM ENGAGING IN UNDISCLOSED *EX PARTE* COMMUNICATIONS WITH ANY INDIVIDUAL REGARDING A PENDING REZONING APPLICATION.

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, the 2014 Laws of Md., Ch. 94 created the General Provisions Article and transferred the Frederick County Ethics Law without substantive change, to GP §§ 5-857 to -862.

Chapter 474 stated that the purpose of the Frederick County Ethics Law was to establish ethical requirements relating to planning and zoning proceedings before the

BOCC. (Apx.1–9). Chapter 474 provided that the specific purposes of the law were to prohibit (1) certain campaign contributions by persons pursuing zoning and planning applications before the County Commissioners, (2) a County Commissioner from participating in planning and zoning proceedings where the Commissioner had received a recent campaign contribution from the applicant, and (3) undisclosed *ex parte* communications between a County Commissioner and any individual about a pending planning or zoning application. (Apx.1).

In a May 4, 2007 Bill Review Letter issued at the time of the initial enactment of the Frederick County Ethics Law, the Attorney General of Maryland found that the provisions of the Frederick County Ethics Law were constitutional and legally sufficient. The 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.49). 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.48–50).

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

GP, § 5-859(b) provided that (emphasis supplied):[1]

> 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.

(Apx.6, Apx.21).

An "application" was (and is) defined in GP, § 5-857(c)(1) to include:

> (1) an application for a zoning map amendment as part of a piecemeal or floating zone rezoning proceeding….

The term "applicant" was (and is) defined in § 5-857(c) as:

> (i.) a title owner or contract purchaser of land that is the subject of an application;
>
> (ii.) a trustee who has an interest in land that is the subject of an application, excluding trustees described in a mortgage or deed of trust; or
>
> (iii.) a holder of at least a 10% interest in land that is the subject of an application.

Further, GP, § 5-857(c)(2) states:

> (2) "Applicant" includes a person who is an officer or a director of a corporation that actually holds title to the land, or is a contract purchaser of the land, that is the subject of an application."

In short, GP, § 5-859 prohibited a County Commissioner from engaging in an

[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.25–32).

undisclosed *ex parte* communication with anyone regarding a pending rezoning application.

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). In its Brief of Appellee in response to the Brief of Appellant filed by the Developers in the Argument § I.A.3, the County has described the nature of the scope of *ex parte* communication regulations imposed by the federal government and throughout the Country on judges and administrative decision-makers. The purpose of these provisions is to ensure that decisions are made on the basis of the law and evidence presented at the hearing and that all parties have a fair and equal opportunity to present their case, free of bias or undue advantage. The provisions frequently prohibit decision-makers from having undisclosed communications with all interested persons, not just parties to the proceeding

B. Commissioner Smith's Arguments Attempting To Limit The Scope Of GP, § 5-859 Are Without Merit.

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

Commissioner Smith argues 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 a communication with a non-party such as a representative of FACT. This argument is contrary to the express terms of GP, § 5-859.

GP, § 5-859 provides that a "Board member who communicates *ex parte* with an **individual** concerning a pending application must disclose each communication." (emphasis supplied). The prohibition thus governs a communication with any "individual," not only a communication with an applicant or party. The term "applicant" 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 that owns land subject to 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. Likewise, if the General Assembly had intended to limit proscribed communications to those 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:

> 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."

(citations omitted) (alteration in original).

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

concerning a pending application to those between a member of the District Council or the County Executive and an "applicant" or "applicant's agent." This provision establishes that 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.)

Commissioner Smith also argues 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 in GP, § 5-859, the Frederick County Ethics Law contains provisions that prohibit rezoning applicants, among others, from making political contributions to a Board member during the pendency of an application. In a May 4, 2007, Bill Review Letter the Attorney General 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." (Apx.49). 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. Commissioner Smith also points 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 detail in Section I.A.1.3 of the Brief of Appellee submitted by the County in response to the Developers' Brief of Appellant, 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 states throughout the country and 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 interested persons, not just applicants or parties.

2. A communication with a public interest organization such as FACT that is not in the presence of other parties or on the record of the proceeding is *ex parte*.

Commissioner Smith argues that his communications with FACT were not *ex parte*

communications because FACT is a "quasi-public" entity and the meeting at which the communications occurred were open to the public. This is incorrect. Commissioner Smith's communications with representatives of FACT were *ex parte* because they were not part of the Developers' rezoning application proceedings, and no party to the proceedings was given notice that Commissioner Smith would be discussing the Developers' application at the meeting or after the meeting with FACT representatives. The *ex parte* communications were particularly concerning because they were the basis of evidence (the FACT letter) presented in support of the Developers' application at the April 23, 2014 hearing before the BOCC.

None of the cases on which Commissioner Smith relies involved *ex parte* communications by a decision-maker at a meeting of an independent organization for which the other parties to a pending adjudicative proceeding had no notice. Br. of Appellant Smith at 23-24. Two of the cases cited by the Developers involved challenges to court orders, which had been publicly filed on the record in the case, and, therefore, could not be *ex parte* communications. *North v. United States Dep't of Justice*, 17 F.Supp.3d 1 (D.D.C. 2013); *Theriot v. Bates*, No. 2:12-CV-200, 2012 WL 2523412 (W.D. Mich. June 29, 2012). Another case relied on by the Developers involved a statement made on the record at a public hearing before an agency created by state law and whose decision was actually the subject of the pending appeal; it was thus not *ex parte. Citizens of State of Fla. v. Wilson*, 569 So. 2d 1268, 1269 (Fla. 1990). In the final case cited by the Developers, the Court ruled that "the comments, made at a city commission meeting open to the general public, did not constitute an offending ex-parte communication simply

because a civil service board member was in the audience." *City of Hollywood v. Hakanson*, 866 So. 2d 106, 107 (Fla. Dist. Ct. App. 2004). The case, therefore, did not involve a direct communication between an individual and a decision-maker, but only involved a decision-maker hearing potentially relevant information while sitting in the audience of a different public proceeding. This is a far cry from the present case in which Commissioner Smith himself addressed at length the merits of an application that was pending before him, expressed support for one side of the dispute, and then may have actually participated in the creation of evidence (the FACT letter) later submitted in support of the position of one party to the case. (E.455–56, E.467, E.469, E.4721–22, E.4744, E.4747, E.4755–56). The Circuit Court found that under these circumstances, Commissioner Smith's decision to sit silently and say nothing when GP, § 5-859 required disclosure of *ex parte* communications was deceitful to the public. (E.59).

II. THE CIRCUIT COURT'S FACTUAL FINDING THAT COMMISSIONER SMITH ENGAGED IN UNDISCLOSED *EX PARTE* COMMUNICATIONS WITH REPRESENTATIVES OF FACT WAS SUPPORTED BY SUBSTANTIAL EVIDENCE AND NOT CLEARLY ERRONEOUS.

The Circuit Court entered findings of fact that Commissioner Smith engaged in undisclosed *ex parte* communications with FACT in both its (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 (E.50–51, E.54–55):

1) That Commissioner Smith attended the April 14, 2014 FACT Committee meeting;

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

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;

5) That the FACT committee incorporated the information from Commissioner Smith into its April 23, 2014 letter to the Board of Commissioners;

6) That the FACT letter was presented to the Commissioners with the intent to influence the pending vote; 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.

Each one of the factual findings was supported by compelling evidence before the Circuit Court:

1-2. The minutes of the April 14, 2014 FACT meeting reflected that Commissioner Smith attended the meeting and (a) discussed the Developers' MTC project in detail with FACT members, and (b) pointed out significant regional transportation benefits that the project could offer (E.467–68);

3. The court's quotation of GP, § 5-859(b) was not a finding of fact, but provided context for its findings.

4, The Public Ethics 2014 Annual Report introduced by RALE was before the court and reflected that Commissioner Smith's *ex parte* communications with RALE were not disclosed, (E.563–66);

5. A comparison of Commissioner Smith's comments to FACT and the FACT letter indicates that the FACT letter closely follows Commissioner Smith's statements to FACT representatives. (*Compare* E.467–68, *with* E.455). In addition, testimony before the County Council on remand indicated that Commissioner Smith participated in drafting the FACT letter (E.4744); and

6-7. The transcript of the BOCC's April 23, 2014 hearing on the Developers' rezoning application reflects that BOCC President Young read the letter into the record after the conclusion of RALE's case and emphasized the importance of the letter in establishing that regional roads would be adequate after the MTC project and would actually benefit from the project. (E.459–65). Further, counsel for the Developers argued that FACT was an apolitical organization with great expertise in regional transportation issues that should be relied upon to refute RALE's argument that regional roads would be adversely affected. The FACT letter, the Developers argued, demonstrated that the improvements they planned to provide would actually enhance regional roads and that RALE was wrong in suggesting that the MTC development would negatively impact the transportation system. (E.463–66).

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

evidence before the Circuit Court and additional testimony and documents and confirmed the Circuit Court's findings of fact. (E. 4707–09). The County Council's findings were supported by substantial evidence.

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

Commissioner Smith argues that the prohibition in GP, § 5-859 on undisclosed *ex parte* communications between a County Commissioner and any individual regarding a pending application violates his First Amendment rights to free speech and access to his constituents. 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 hearings are fashioned to assure fairness in the adjudication of disputes. Such provisions have been adopted by the federal government, the Maryland General Assembly, and jurisdictions 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)). In *Schoenbohm*, 204 F.3d at 248-49, the D.C. Circuit ruled that restrictions on *ex parte* communications to protect the integrity of the administrative process by requiring that presentations to an agency be made on the record do not violate the First Amendment. There, Schoenbohm, the operator of an amateur radio station, filed

an application for the renewal of his license, which the Federal Communications Commission ("FCC") denied. During the pendency of his license renewal process, Schoenbohm stated on the air that he was not allowed under FCC *ex parte* rules to ask for the assistance of people in political positions, but that if such people believe the government is being overbearing, they have a right to point this out. When asked by an Administrative Law Judge to explain this conversation, Schoenbohm stated that he was only attempting to share his newly acquired knowledge of FCC *ex parte* rules and that he did not intend to encourage *ex parte* communications by politicians in connection with his application. The FCC, however, found that this explanation demonstrated a lack of candor and that Schoenbohm actually intended to encourage *ex parte* communications.

Schoenbohm contended that this finding by the FCC violated his First Amendment rights. The D.C. Circuit rejected this argument, holding, *id.* at 249:

> This, he argues, violates the First Amendment. He is wrong for two reasons. First, the agency's *ex parte* rules do not interfere with Schoenbohm's right to discuss the proceedings with others; they merely require that communication with the agency be on the record. As the FCC correctly concluded, "rules intended to protect the integrity of the administrative process by requiring that presentations to the agency be made on the record and that solicitations of such presentations be limited to request for on-the-record presentations d(o) not violate the First Amendment." *Reconsideration Order*, 13 F.C.C.R. at 23,775.

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).

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 with anyone regarding a pending application, but rather, only requires the disclosure of such communications.

IV. GP, § 5-862(a) REQUIRES THE CIRCUIT COURT TO REMAND A REZONING CASE FOR RECONSIDERATION IF THERE IS A VIOLATION OF THE FREDERICK COUNTY ETHICS LAW AND DOES NOT REQUIRE EXTREME CIRCUMSTANCES.

Commissioner Smith argues that, because RALE failed to make a strong showing of extreme circumstances, the Circuit Court erred by (1) considering evidence outside of the administrative record, and (2) remanding the applications for reconsideration. Nothing in GP, § 5-859 or § 5-862(a) requires that the court find extreme circumstances in addition to a finding of a violation of the Frederick County Ethics Law. Rather, as explained above, an application must be remanded for reconsideration if the Circuit Court finds that a County Commissioner committed a violation of the Frederick County Ethics Law, including a failure to disclose an *ex parte* communication with an individual concerning the pending rezoning application as required by GP, § 5-859.

The Court of Appeals has ruled that a "strong showing" of "fraud or exceptional circumstances" must be made in order to take the testimony of legislators or administrative officials concerning their decision-making thought process. The leading case on this

principle of law is *Public Service Comm'n v. Patuxent Valley*, 300 Md. 200, 214 (1984), in which 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 electric transmission line. After the Public Service Commission ("PSC") approved the certificate, property owners who would be affected by the line brought an action for judicial review in the Circuit Court. The property owners sought to depose the PSC commissioners, alleging that the hearing examiner who made an initial recommendation to approve the line had engaged in *ex parte* communications with the Chairman of the PSC and that this had 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 211–216. Further, the court ruled that, where such a showing is made, the court should remand the case to the agency if this is a viable alternative under the circumstances. *Id. Accord*, *Montgomery County v. Stevens*, 337 Md. 471, 484-86 (1995).

The *Patuxent Valley* and *Stevens* cases, however, have no application to the present case. Neither case involved the violation of a statute, such as GP, §§ 5-859 and 5-862(a), which prohibits undisclosed *ex parte* communications and directs that the agency reconsider a decision in the event of such a violation. Further, the Circuit Court in the present case did not order that a County Commissioner or former County Commissioner

be deposed as to his or her thought processes in making the decision. Rather, in its September 29, 2017 Opinion and Order, the court followed the requirement in GP, § 5-862(a) that, if the court finds that an ethics law violation has been committed, the court must remand the rezoning application for reconsideration.

V. IF A FINDING OF EXTREME CIRCUMSTANCES WERE REQUIRED, THE CIRCUIT COURT'S FACTUAL FINDING THAT THE APPROVAL OF THE DEVELOPERS' REZONING APPLICATION WAS EFFECTED BY EXTREME CIRCUMSTANCES WAS SUPPORTED BY SUBSTANTIAL EVIDENCE AND NOT CLEARLY ERRONEOUS.

The Circuit Court, perhaps to cover all bases in connection with the arguments made before it, addressed the question of whether there were "extreme circumstances" present in this case. The Circuit Court found that extreme circumstances existed as a result of Commissioner Smith's conduct in connection with the FACT letter and the approval of the Developers' rezoning application. (E.57–61). Although a finding of extreme circumstances was not required by GP, §§ 5-859 and 5-862(a), the Circuit Court's finding was supported by compelling evidence and was not clearly erroneous.

The Circuit Court based its finding of extreme circumstances on a pattern of conduct before the BOCC which clearly called into question the fairness and impartiality of the proceeding. First, the adequacy of the regional transportation network was a critical and hotly contested issue in the hearings on the Developers' PUD rezoning application. The issue was the subject of extensive lay and expert witness testimony and had garnered significant public attention. (E.3457–78, E.2628–2915, E.3232–3349, E.3474–75, E.3476–77). Commissioner Smith met *ex parte* with representatives of FACT, a prominent organization composed of both government and business representatives, and discussed the

Developers' pending rezoning application with them. He did more than merely discuss it. Commissioner Smith openly advocated for the alleged transportation benefits of the Developers' application, even though the decision whether to approve the application was pending before him as the decision-maker, and even though the issue was strongly contested by RALE and the majority of those who spoke against the development. Commissioner Smith categorically told FACT that the regional transportation system, particularly MD Route 75, would benefit not only Frederick, but also other areas of the County. (E.467).

There is evidence that following the meeting, Commissioner Smith continued to consult with FACT representatives and participated in the drafting of the FACT letter by reviewing a draft. (E.469, E.4721–22, E.4744, E.4747, E.4755–56). The letter closely tracked the arguments that Commissioner Smith made before FACT in support of the Developers' project. To make matters worse, the FACT letter was drafted by a FACT committee member, Michael Smariga, who was closely tied to the Developers. (E.469). He was a former member of the engineering firm, Harris, Smariga & Associates that was processing the Developers' rezoning application and his son, Chris Smariga, was at that very time actively working for the approval of the application. (E.469, E.2464–65, E.2469–73, E.2510–11). Commissioner Smith violated the ethics law by failing to disclose these *ex parte* communications with FACT representatives.

Furthermore, at the hearing on April 23, 2014, the BOCC President submitted the FACT letter and read the names of the FACT members, representing that they had approved the letter. This statement was inaccurate because the letter was drafted by only

two members of FACT, one of whom was the individual closely tied to the Developers, and reviewed by Commissioner Smith. The letter was never approved by the FACT Board of Directors. The President of FACT stated that he knew nothing about the letter. (E.4795–98). Finally, after introducing and reading the FACT letter and inaccurately stating that the letter was approved by all FACT members, the BOCC President denied RALE the opportunity to cross-examine a FACT representative on the letter. Counsel for the Developers was then permitted to argue 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. (E.463–65).

It is hard to conceive of circumstances more extreme than a decision-maker in an important and hotly contested case contributing to the preparation of evidence for one side and then violating a law that requires that he disclose his *ex parte* communications in connection with that evidence. This conduct was then exacerbated by the fact that (1) the FACT representative that participated in creating the evidence was closely tied to the Developer, and (2) the BOCC President inaccurately represented that the letter was approved by all FACT members. The entire episode demonstrates a disregard not only for the ethics law, but also for the fairness and impartiality of an adjudicative proceeding that is of great importance to the public. It was not clearly erroneous for the Circuit Court to find that these circumstances established extreme circumstances.

CONCLUSION

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

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Respectfully submitted,

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CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This brief contains 8,858 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 Appellant, C. Paul Smith 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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