IN THE COURT OF SPECIAL APPEALS OF MARYLAND

No. 1689
September Term, 2017
CSA-REG-1689-2017

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

Appellants,

RALE, Inc., *et al*.,

Appellees.

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

BRIEF OF APPELLEES RALE, INC., *ET AL*.

JOINT RESPOSE TO BRIEF OF 75-80 PROPERTIES, LLC., *ET AL*.
AND TO
BRIEF OF APPELLANT C. PAUL SMITH

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I. STATEMENT OF THE CASE

This appeal follows a Frederick County Circuit Court Order and Opinion vacating a Frederick County Board of County Commissioners' ("BOCC") rezoning approval for (1) a Planned Unit Development, *i.e*., Rezoning Ordinance No. 14-04-659 ("Rezoning") (E 2206); (2) a Developer Rights and Responsibilities Agreement ("DRRA") (E 2136); and (3) an Adequate Public Facilities Ordinance Letter of Understanding ("APFO LOU") (E 2186) filed by Appellants 75-80 Properties, L.L.C. and Payne Investments, LLC (together "75-80"). On April 23, 2014 the BOCC voted to approve all three approvals ("Approvals"). E 3492 – 3493. While the Approvals were pending, C. Paul Smith ("Smith") was a sitting Commissioner. He also was the BOCC's liaison to an advocacy committee knows as the Frederick Area Committee on Transportation (the "FACT Committee"). E 370.

Appellants RALE, Inc. and the individual appellants (together "RALE") participated in the agency proceedings in connection with all three Approvals, and following the BOCC's decisions RALE timely filed two petitions for judicial review in connection with all three actions, which later were consolidated into the single case now on appeal. E 1. During the Circuit Court proceedings RALE subpoenaed three witnesses on the grounds that on April 14, 2014 Smith had made an unreported *ex parte* communication with the members of the FACT Committee, *i.e*., he asked the FACT Committee to submit a letter pertaining to transportation improvements related to the Approvals into the BOCC record. E

432. On April 23, FACT did submit a letter into the record specifically discussion transportation improvements. E 414. It addressed certain transportation improvements and read, in part "FACT would be remiss if we didn't take this opportunity to point out that the County at large benefits from approval of the project." E 472.

RALE argued that Smith's comments to the FACT Committee, and the Fact Committee's subsequent submission of the FACT Letter into the agency record for the Approvals, reflected improper conduct outside of the agency record that constituted an "extreme circumstance" sufficient to justify discovery in connection with extra-record activities related to the FACT Letter. E 376. RALE sought discovery in connection with the FACT Letter, to determine the circumstances surrounding the creation and submission of the FACT Letter into the agency record, and to that end subpoenaed (1) Smith; (2) FACT Committee secretary Michael Proffitt (who signed the FACT Letter); and (3) the BOCC's expert transportation staff witness, also a liaison to the FACT Committee, Ron Burns. E 414.

Judge Nicklas, presiding over the Circuit Court proceedings, quashed the latter two subpoenas, and let the one for Smith stand. E 1. Smith requested reconsideration of this decision (E 487) and RALE thereafter filed a Motion seeking remand of the Approvals for reconsideration or, in the alternative, to allow discovery to proceed before the Court. E 572. In support of its argument that Smith's *ex parte* communications to the FACT Committee constituted

"extreme circumstances" sufficient to justify the Smith subpoena, RALE made a number of evidentiary proffers detailed in the Statement of Material Facts, *infra*.

The County had requested remand for further proceedings in lieu of discovery within the judicial proceedings. E 529.. RALE requested discovery and, in the alternative, remand to the Council. E 1012. Following oral argument on the motions (E 117) the Circuit Court found that "extreme circumstances [. . .] occurred outside the scope of the administrative record," that as a result additional testimony was necessary, and remanded the matter to the BOCC's successor (*i.e*., the Frederick County Council)[1] for further proceedings "including testimony." The Circuit Court ordered a remand on the grounds that the agency was a "viable alternative" to the judicial proceedings to resolve these issues, and quashed the Smith subpoena. E 49 – 52."

On remand the Council held four public hearings. The Council took testimony during the first hearing (June 9, 2015), held the record open until June 12, 2015, and the Council deliberated during the three remaining sessions. E 4711 *et seq*. Smith did not testify in person, nor did he submit an affidavit. E 4711. After public testimony closed, Smith submitted a 6 page unsworn single-spaced memorandum into the record. E 826. The remaining four BOCC members participated in the following manner: David Gray filed an affidavit (E 4577) and testified in person (E 4741 - 4743); Blaine Young filed an affidavit (E

[1] Effective January 1, 2015 Frederick County became a Charter County and the 5-member BOCC was replaced by a 7-member County Council.

4586); Kirby DeLauter and Billy Shreve (both sitting members on the newly constituted County Council) made unsworn comments from the dais. E 4822; E 4804. RALE testified in person through its President, Steve McKay, and through legal counsel in written submissions, as did many of the individual appellants. .., E 4718; E. 4795.

On September 9, 2015 the Council concluded that "it is not possible to reconcile the affidavits and statements made . . . with respect to th[e] [FACT Letter] and its alleged influence on the previous Board of County Commissioners [sic] decision with the action, statements and behavior surrounding the letter; its inception; its creation; its phraseology its timing and its introduction and handling once it was introduced." Based on those findings the Council remanded the case to the Planning Commission. E. 4701. 75-80 declined to return to the Planning Commission, and thereafter the Council returned the matter to the Circuit Court with its findings contained in the "County Council Post Remand Conclusions." E 4707.

The Circuit Court considered written briefs and oral argument on the post-remand proceedings and ultimately issued the Opinion and Order vacating the Approvals that is now the subject of this appeal. E 53.[2]

[2] RALE further adopts the Statement of Facts and Arguments put forth in the Briefs filed by Appellant County.

II. STATEMENT OF QUESTIONS PRESENTED

A. Did The Circuit Court Properly Find That Smith Engaged In An Unreported *Ex Parte* Communication?

B. Did The Circuit Court Have Sufficient Evidence Of A Strong Showing Of "Extreme Circumstances" In Connection With The FACT Letter To Justify Its Remand Order?

C. Did The Circuit Court Properly Exercise Its Discretion In Vacating The Approvals?

III. STATEMENT OF MATERIAL FACTS

In its consideration of RALE's request for discovery or, in the alternative, for remand to the County Council for reconsideration (E 548), RALE entered into the Circuit Court record the following proffered evidentiary in support of its claim of "extreme circumstances":

(a) The April 14, 2014 FACT Committee meeting minutes reflecting Smith's comments to the Committee (E 557);[3]

(b) The County's published *ex parte* log confirming Smith's communication with the FACT Committee were not disclosed (E 563 – 566);

(c) The April 23, 2014 FACT Letter (E 455);

(d) The excerpted pages from the April 23, 2014 transcript ("April 23 Transcript") confirming the full text of the FACT letter as read into the

[3] The April 14 FACT Committee meeting occurred after the first three BOCC Rezoning hearings on the "amended" plan had concluded (April 8, 9 and 10, 2014) and before the final hearing on April 23 hearing when the BOCC vote on all three Approvals. The records for all three Approvals were combined. E 3386.

record by then-BOCC President Blaine Young, immediately after public testimony closed and immediately before 75-80's legal counsel presented his rebuttal to opposition testimony and evidence (E 457 - 549);[4]

(e) The excerpted pages from the April 23 Transcript quoting Young's affirmative statement that the FACT Committee "gave authority" for the letter to be signed (E 461);

(f) A June 3 Frederick News Post ("FNP") article indicating that the FACT Committee did not authorize submission of the FACT Letter (E 374);

(g) The excerpted pages from the April 23 Transcript quoting part of the rebuttal statement by 75-80's legal counsel, Rand Weinberg, using the FACT Letter to address transportation issues raised by RALE in the hearings and during closing argument, stating (*inter alia*):

> [B]ut the last bit of evidence we came in [sic] I think is extremely telling . . . and that is the correspondence from FACT . . . So I think this [FACT Committee] letter here is telling that contrary to what Ms. Rosenfeld just said, there's certainly evidence in the record that this project will augment the transportation system.

E 3481.

(h) An April 24, 2014 Frederick News Post ("FNP") article about the Approvals quoting the letter's statement that "While some residents may oppose development of the Monrovia Town Center . . . FACT would be remiss if

[4] The FACT Letter was handed out to hearing attendees, including undersigned counsel, around 9:15 p.m., only moments before it was read into the record.

we didn't point out that the County at large benefits from approval of the project" and further quoting legal counsel for 75-80, who called the FACT Letter "a significant piece of evidence" (E 373);

(i) A follow-up June 3, 2014 FNP article indicating that Smith had "advised that the [FACT Committee] comment on the [Monrovia] Town Center proposal" and "saw a drafted version of the letter;" and quoting RALE Vice-President Matt Seubert as viewing the FACT Letter as an effort to bolster the evidence of record (E 374 – 375);

(j) The excerpted pages from the April 23 Transcript quoting legal counsel for 75-80 stating the FACT Committee "might be the most A-political organization in Frederick County" (E 464 – 465;)

(k) An $25,000 lobbying contract between the FACT Committee and the County engaging FACT to advocate for federal transportation funding and perform other transportation-related advocacy services on behalf of the County (October, 2013) (E 475 - 477);

(l) The October 17, 2013 BOCC Meeting Minutes confirming Smith introduced the BOCC Motion allocating the $25,000 for lobbying funding for the FACT Committee (E 563 – 566);

(m) A May 5, 2014 email from Burns responding to an inquiry from the FACT Committee President regarding contract funding renewal; and

(n) A June 10, 2014 email from Burns to Proffitt, copied to Smith, urging the FACT Committee not to rescind the FACT Letter (E 486).

IV. STANDARD OF REVIEW

RALE adopts by reference the Standard of Review as set forth in the Appellee County's Brief in response to the Brief filed by C. Paul Smith, and further states as follows:

A. Conduct of Decision Makers In Quasi-Judicial Proceedings

The type of zoning at issue, the application of a "floating zone," is achieved "usually at the request of the property owner, through a quasi-judicial process leading to a legislative act." *Mayor and Council of Rockville v. Rylyns Enterprises, Inc.*, 372 Md. 514, 814 A.2d 469, 479 (2002), citing *Montgomery County v. Woodward & Lothrop, Inc.,* 280 Md. 686, 711-12, 376 A.2d 483, 497 - 98 (1977). Accordingly, when acting in connection with the Approvals, Smith was acting in a quasi-judicial capacity. The Courts have established basic standards of fairness that apply to people serving in a quasi-judicial capacity. "While we recognize that the Board sitting in this case was not comprised of judges, they were acting in a quasi-judicial function and are held to basic standards of fairness." *Board of Pharmacy v. Spencer*, 150 Md. App. 138, 819 A. 2d 383 (2001), citing *Regan v. Chiropractic Examiners,* 355 Md. 397, 408 – 409, 735 A.2d 991 (1999)(noting that "the 'appearance of impropriety' standard set forth in our cases involving judges . . . is applicable generally to the participation of members of Maryland administrative agencies performing quasi-judicial or adjudicatory functions"); *Maryland State Police v. Zeigler,* 330 Md. 540, 559, 625

A.2d 914 (1993)(noting that "that administrative agencies performing adjudicatory or quasi-judicial functions observe the basic principles of fairness as to parties appearing before them")." *Board of Pharmacy v. Spencer*, 150 Md.App. 138, 149, 819 A.2d 383 (2003) (vacating administrative decision on grounds that the "appearance of impartiality and fairness of the whole proceeding vanished" based on the conduct of one Board member). *See also Maryland State Police v*. *Zeigler*, 330 Md. 540 (1993) (confirming that minimum procedural due process guarantees pursuant to Article 24 require that "that administrative agencies performing adjudicatory or quasi-judicial functions observe the basic principles of fairness as to parties appearing before them"), *rev'd on other grounds by Spencer v*. *Maryland State Bd*. *of Pharmacy*, 380 Md. 515 (2004).

B. <u>Grounds for Discovery In A Petition for Judicial Review</u>

Petitions for judicial review of an administrative agency are generally not subject to review beyond the agency record, or subject to discovery. *Montgomery County v. Stevens*, 337 Md. 471, 645 A. 2d 877 (1993). And while "extremely rare," the Courts have recognized instances where departure from this "fundamental principle" is appropriate. *Id.* These grounds include:

(a) A "strong showing" (not just a mere "allegation") of "the existence of fraud or *extreme circumstances which occurred outside the scope of the administrative record*." *Id*. (Emphasis added), citing *Public Service Comm'n v. Patuxent Valley*, 300 Md. 200, 213, 477 A.2d 759, (1982).

(b) The *Patuxent Valley* Court earlier had adopted the following general rule: Only a strong preliminary showing of bad faith or *improper behavior* will allow a party challenging agency action to depose the individual decision makers. *Patuxent Valley,* 300 Md. 218, 477 A.2d at 477 (emphasis added).[5]

When faced with a preliminary showing of bad faith or improper behavior, the court may always remand to the agency, which as between the Court conducting discovery and a remand to the agency for further consideration, "remand to the agency in fact is the preferred course." *Stevens*, 337 Md. at 483, 654 A.2d at 883, citing *Pension Benefit Guaranty Corp. v. The LTV Corp.*, 496 U.S. 633 (1990).[6]

[5] *See also Park & Planning v. Mardirossian*, 184 Md. App. 207, 964 A. 2d 716, 723 (2009) (noting "if the party challenging the agency action could make a 'strong showing' of, as opposed to a mere allegation of, the existence of fraud or extreme circumstances which occurred *outside the scope of the administrative record*, a deposition of the administrative decision maker might be permissible), citing *Stevens*, 300 Md. at 213-217, 477 A.2d at 766-767.

[6] The exception to this rule is when the agency is not in a position to elicit the necessary testimony. RALE argued that Court-ordered discovery was preferable because the County could not subpoena, *inter alia*, Smith.

V. ARGUMENT

A. The Circuit Court Properly Found That Smith Engaged In An Unreported *Ex Parte* Communication In Violation Of Section 5-589(b).

Appellants argue that Smith's communication at the FACT Committee meeting did not constitute an *ex parte* communication that he was required to report under Section 5-589(b).[7] A reading of the plain language of the statute, however, confirms that it did constitute an *ex parte* communication that required reporting.

> A member of [a] governing body who communicates ex parte with an individual concerning a pending application during the pendency of [an] 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.[8]

Under this provision, Smith was undisputedly a member of a "governing body" and, such, he was required to disclose any *ex parte* communications that he had "with an individual concerning" the then-pending Rezoning application.[9] Smith had *ex parte* communications with a number of individuals during the course of

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[7] 75-80 Br. at 14; Smith Br. at 15 – 26.

[8] Md. Code, Gen. Provs. § 5-859 (b) (emphasis added). It is highly unlikely that this precise set of facts and law will be repeated, as the specific Frederick County Ethics Code provisions at issue were repealed effective October 1, 2014.

[9] A "governing body" is the governing body of Frederick County, which at the time of the MTC proceedings was the BOCC. Md. Code, Gen. Provs. § 5-857(h). The "disclosure" requirement involves filing with the Chief Administrative Officer of Frederick County "a separate disclosure for each communication within the later of 7 days after the communication was made or received." Md. Code, Gen. Provs. § 5-859 (b).

the April 14, 2014 meeting of the Frederick Area Committee on Transportation ("FACT"), including, *inter alia*, Mr. Michael Proffitt and Mr. Michael Smariga.[10] E 467. These comments were directly related to the pending 75-80 Rezoning application. E 647.

> "Application" means "an application for a zoning map amendment as part of a . . . . floating zone rezoning proceeding . . . ."

Md. Code, Gen. Provs. § 5-857(d)(1). The Frederick County Zoning Code conclusively establishes the MTC Rezoning Application as an application for a zoning map amendment as a part of a floating zone rezoning proceeding. *See* Frederick County Zoning Code § 1-19-10-500.1 (establishing the Planned Unit Development zone as a "floating zone"). It is uncontested that the then-pending Rezoning application (Monrovia Town Center PUD, BOCC Rezoning Case No. R-12-02 and adopted pursuant to Ordinance No. 14-04-659) constituted an "application" under the State Ex Parte Law:

If it is established during the course of a petition for judicial review of a rezoning application that there was a violation of the *ex parte* law, then "the court

[10] As RALE testified and as the Council found, Mr. Michael Smariga is the father of Chris Smariga. Mr. Michael Smariga now retired, was a founding member of the land planning firm Harris Smariga & Associates. Chris Smariga was on 75-8's land use team while the Approvals were pending, and testified before the BOCC in during the course of the hearings. E 1112. This is the father/son relationship referenced in the Council's Post Remand Conclusions. E 4708.

shall remand the case to the governing body for reconsideration."[11] Md. Code, Gen. Provs. § 5-862(a)(2). Not only did the Circuit Court have before it a clear unreported *ex parte* communication, the statutory remedy was a remand to the County Council.

Smith's suggestion that the Court's application of § 5-869 somehow violates his First Amendment rights reflects his continued failure to differentiate between his role as a legislator and his role as a decision maker in a quasi-judicial proceeding.[12] In the June 12, 2015 unsworn Memorandum that Smith entered into record of the Council's remand proceedings (after all public testimony had been closed), Smith references his role (and that of the BOCC generally) in connection with these proceedings as, *inter alia*, "lawmaker" (E 827), "legislator" (E 830), and "legislators" (E 830, E 831).[13] But he was not sitting in a legislative capacity, but rather as a "judge" in a quasi-judicial proceeding. Accordingly, he is held to the same standard of "fairness" to all of

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[11] The Court generally has broad discretion in granting relief in a petition for judicial review case. Maryland Rule 7-209 specifically provides that "Unless otherwise provided by law, the court may dismiss the action for judicial review or may affirm, reverse, or modify the agency's order or action, remand the action to the agency for further proceedings, or an appropriate combination of the above." (Emphasis added.) The *ex parte* law is an example where the remedy is "otherwise provided by law" (*i.e*., the court shall remand for reconsideration), thereby abrogating the remaining remedies otherwise available to the Court.

[12] Smith Br. at 28 - 34.

[13] "Lawmaker" (p 1); "legislator" (p. 2); "legislative intent" (p. 2); "legislative processes" (p. 3); "legislative body" (p. 4); "legislative matter, "legislature," "legislators" "legislated for" (p. 4); *etc*.

the parties to the proceeding that a judge must satisfy in a judicial proceeding. This requires not just an unbiased decision maker, but one that adheres to fairness in the proceedings.[14]

Smith tries to describe his communications with FACT as benign comments, but he did not merely "address[ ] transportation issues and discuss[ ] the MTC development at a FACT meeting." Smith Br. at 33. The evidence before the Court strongly suggested that Smith coordinated with members of the FACT Committee to engineer the introduction of a letter that the President of the BOCC read into the record and that immediately thereafter 75-8's legal counsel relied upon as "evidence." Although Smith was silent about his role in connection with the FACT Letter during the BOCC's April 23 hearing when it was read into the record, he later publicly confirmed that he had indeed "requested" FACT to submit this letter. During the May 29, 2014 BOCC hearing at which BOCC members signed the Rezoning Approval and Young signed the DRRA, Smith said:

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[14] *See Regan, Ziegler, Spencer, supra*. Nor is Smith's argument that the statute is "unconstitutionally vague" persuasive. Smith Br. at 34. He was familiar with the requirement, and disclosed multiple verbal *ex parte* communications that were reported on the 2014 County Ex Parte Log while the Rezoning application was pending (E 645). A few representative examples include: (1) Conversation with Ed Wormold, Mark Friis & Walter Mills re: Monrovia Town Center (Database Entry 3473 (E 645)); Conversations with Delegates Kathy Afzali and Kelly Schultz (Database Entries 3481, 3482); Conversation with Rand Weinberg (Database Entry 3516 (E 645)); Meeting with Bob Lawrence (Chairman of the Frederick County Planning Commission and Tony Chmelik) (Database Entry 3518 (E 645)). The log also reflects his reporting of many verbal communications in connection with other rezoning applications then pending.

> I have been a participant in FACT for almost 10 years. *I did request FACT to weigh in on this, and I was glad they did*... But, *I did request*. It was discussed in the [FACT] meeting before the televised version."

Smith further went on to say ". . . comments were made at the hearing of how important the letter was, *and I was glad that it was there, and I requested it."*[15] (Emphasis added.) Smith made these comments from the BOCC dais, they were recorded on behalf of Frederick County, and are maintained in the County's video archives. It is a fair inference that the "comments" that Smith made on May 29 were those made at the April 23 hearing by 75-80's legal counsel during rebuttal regarding "how important" the FACT Letter, highlighting it as an important piece of evidence. E 3481. Even without the April 29 admission from Smith however, and contrary to Smith's assertion that "no evidence links the FACT Letter to Commissioner Smith's statements at the FACT" Committee meeting (Smith Br. at 36), there was substantial evidence before the Court detailed as detailed in the Material Facts that rose to the level of a preliminary showing of an extreme circumstance and the Remand Order was properly entered.

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[15] Pursuant to Md. Rule 5-201(b)(2), RALE asks this Court to take judicial notice of these comments, as they are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Smith's comments begin 44:24 minutes into the BOCC hearing http://frederick.granicus.com/MediaPlayer.php?view_id=8&clip_id=4363.

A. The Circuit Court Had Sufficient Evidence Of A Strong Showing Of "Extreme Circumstances" In Connection With The FACT Letter To Justify Its Remand Order.

The Circuit Court's 2015 remand order is supported by evidence demonstrating a strong preliminary showing of bad faith or improper behavior. The "taint" in this case was the conduct of a sitting member in a quasi-judicial proceeding working to coordinate the introduction of material evidence into a case where he sat as a judge. A remand to determine the full circumstances surrounding the inception, creation and introduction of the letter was fully justified under the "extreme circumstances" standard.

In his unsworn Memorandum (in lieu of testimony) to the Council on remand, Smith claimed he relied on his "legislative intent" in support of his vote. E 4626. But Smith was not acting as a legislator when voting on the Approvals – he was sitting in a quasi-judicial capacity, akin to that of a judge. Mr. Smith argues that he is insulated from discovery in connection with his legislative actions. However, the Courts are entitled to inquire into circumstances surrounding a quasi-judicial proceeding where extreme circumstances are found to exist – as Judge Nicklas' determined existed in this case.

Perhaps Smith's unyielding commitment to his right to participate in and direct the proceedings in the MTC case as a biased decision maker is the most instructive element of his Memorandum. Smith asserted in his Memorandum that "Zoning is a legislative matter on which pre-conceived opinions are appropriated.

There is no right to have a disinterested legislature." E 4629. While it is true that comprehensive zoning is a legislative act,[16] piecemeal rezoning - as in this case - is not. Rather, it is a quasi-judicial proceeding, and an impartial, unbiased decisionmaker is a core element of fundamental fairness. Taken at face value, in his Memorandum Smith has established that his role in the MTC proceedings was one of a biased decision maker – which violates Maryland's well-established law and further confirms that the agency record in the MTC proceedings were tainted well beyond just the FACT letter.

There is no fair inference to be drawn that Smith's conduct did not "taint the outcome of the vote." E 828. Again, RALE does not – and has not – viewed this "taint" as changing the actual anticipated vote of any single BOCC member.[17] Rather, the taint is to the weight of evidence in the record, to the fundamental question of fairness in the proceeding, and in raising an inference of further extra-record coordination that would be only revealed through discovery. It is

[16] The requirements which must be met for an act of zoning to qualify as proper comprehensive zoning are that the legislative act of zoning must: 1) cover a substantial area; 2) be the product of careful study and consideration; 3) control and direct the use of land and development according to present and planned future conditions, consistent with the public interest; and, 4) set forth and regulate all permitted land uses in all or substantially all of a given political subdivision, though it need not zone or rezone all of the land in the jurisdiction. *Rylyns*, 372 Md at 535.

[17] As stated by then RALE Vice-President Matt Seubert, "In my view, the last-minute submission of this letter was a deliberate ploy to alter the weight of the evidence presented by the opposition – that transportation infrastructure is inadequate and will remain that way for the foreseeable future if this project is approved." E 374 (quoted in June 3, 2014 Frederick News Post article).

reasonable to infer that there was coordination beyond just Smith, Proffitt and Smariga in connection with (a) when the letter was submitted; (b) who determined that it would be read immediately after the close of all public testimony and cross-examination and immediately before rebuttal; and (c) how it was that 75-80's legal counsel was immediately prepared to rely on it so heavily as "evidence."

When Young read the FACT Letter into the record, it had been in the hands of BOCC representatives since 2:40 that afternoon. E 470. Nonetheless, it was not distributed to Petitioners' counsel or the public until after all cross-examination had concluded (*i.e*., around 9:15 p.m. on the last night of hearings). E 3469. Mr. Young reading the entire letter into the record himself, after all cross examination had been concluded.[18] At no time during did Smith disclose his involvement with the FACT Letter. Commissioner Grey asked if the membersof the FACT Committee had authorized it, and Young said they had "authorized" their signatures.

In his rebuttal argument, presented just moments after Young read the FACT Letter into the record, Rand Weinberg (legal counsel to 75-80) referred to the FACT Letter as "last bit of evidence," refuting RALE's transportation testimony. E 3481. In summary, the evidence squarely before the Court clearly

[18] E 469. As noted in Petitioners' Reply to Respondent Developer's Opposition Memorandum, subsequent newspaper articles indicated at the time that Mr. Smith reviewed at least one draft of the FACT letter before it was sent to the BOCC.

established the requisite "strong *preliminary* showing of *bad faith or improper behavior*" that would allow a party challenging an agency action to seek discovery outside of the record, and the Remand Order was properly issued.

B. The Circuit Court Properly Exercised Its Discretion In Vacating The Approvals.

The Council's record in support of Resolution 17-04, containing its Post Remand Conclusions (E 4707) was fully supported (a) by testimony under oath and legal argumentation provided on behalf of the Appellants, and (b) by the "testimony" and submissions of the former BOCC members and 75-80 representatives. As explained herein, the evidence presented by many of the BOCC members on remand in support of the introduction of the FACT Letter is nearly as procedurally defective – and nearly as questionably reliable – as that surrounding submission of the FACT Letter to begin with.

On remand, the Council scheduled a public hearing "on the topic of the relevancy of the FACT letter on the Monrovia Town Center Matter." E. 4576. Thus, the public hearing was set to elicit testimony (speakers were sworn) relating to the FACT Letter generally. It also requested affidavits "from former County Commissioners Blaine Young, Paul Smith and David Gray regarding their position on the significance of the FACT correspondence on the case." E 4576. Nothing in the Council's notice regarding the public hearing limited the testimony – or the Council's deliberations – to "counting votes."

On remand, the Council had before it Judge Nicklas' Order and the documents that RALE had submitted to the Court in connection with the Order. It also had:

a. An affidavit and personal testimony from former Commissioner Gray.
b. An unsworn "Memorandum" supplied by Smith after the public testimony had closed;[19]
c. An affidavit from former Commissioner Young; and
d. Unsworn comments from former Commissioners Shreve and DeLauter.

RALE submitted a letter calling for a full reconsideration of the Approvals, not only based on the FACT Letter but based on the underlying procedural deficiencies in the Approval hearings themselves (E 4592); RALE testified in connection with the procedural questions raised by the way the letter was generated, introduced and relied upon (E 4621); a letter from RALE further documented questions raised by the FACT Letter (E 4633) and pointed out that the Affidavit from Young closely tracked testimony filed by 75-80's counsel (E

[19] Smith did not provide his Memorandum in advance of the Council's June 9 public hearing, and a copy was not provided to undersigned counsel until just before the Council's June 16 hearing (where public comment was not allowed in any event).

Equally disturbing are how Smith's handling of his Memorandum on Remand parallels the troubling aspects of the FACT letter itself, including:

- its submission into the record as a <u>substitute</u> for testimony;
- its introduction into the record <u>after all public comment had concluded</u>;
- its goal of <u>enhancing the record for purposes of judicial review</u>;
- <u>its coordination with unidentified other participants in the proceedings</u>.

4645) and further was perjured (E 4634) in that it did not accurately or factually describe the manner in which he introduced the FACT Letter(as could be readily verified by the transcripts); and refuted the arguments put forth in Smith's unsworn Memorandum (E 4669). In short, the Council had exhaustive evidence in connection with irregularities in the Approval hearings with respect to the FACT Letter, and in connection with the Remand proceedings themselves to support the Council's ultimate findings.

In seeking discovery, RALE did not seek "state of mind," but rather facts relating to the genesis of the FACT Letter, Smith's role in developing it, any additional *ex parte* communications that he may have had, and how it came to be submitted into the record. Ironically, having disclaimed the validity of "state of mind" testimony, 75-80 and Smith urge this Court to look exclusively to "state of mind" with respect to the FACT Letter, *i.e*., did it change the mind of any of the BOCC members. Of course, Appellants want to circumscribe the scope of the remand to this issue because to open this issue up to factual discovery relating to "how" the letter was generated (as opposed to "why" it was generated) risks the possibility that discovery will uncover additional *ex parte* communications not just between Smith and FACT Committee representatives, but with other individuals as well, further compromising the agency record.[20]

[20] 75-80's assertion that "the court is not permitted to remand twice under the [State Ethics] statute simply is not borne out by the code provision cited, *i.e.*, Md. Code, Gen. Provs. § 5-862(a)(2).

75-80 further suggests that the Circuit Court should have delved into the merits of the approvals, notwithstanding its entry of the Order to Vacate Once the order was entered, however, the Circuit Court had no further review to conduct, *i.e*., judicial review of the merits had become moot. However, even had it done so, the record clearly refutes 75-80's suggestion that "there is no evidence of any 'additional inconsistencies and irregularities" relating to traffic adequacy. E 4708. RALE raised numerous and substantial challenges to traffic adequacy, both during the course of the Approval proceedings, as well as during the proceedings before the Council on remand, in support of its position that the FACT Letter had been introduced to support the evidentiary showing necessary to sustain the Rezoning Approval.

There are two transportation Frederick County rezoning standards that the BOCC had to consider:

a. The transportation system is or will be made adequate to serve the proposed development in addition to existing uses in the area" (Frederick County Zoning Code § 1-19-10.500.3(E)); and

b. The "increased demand for public facilities . . . created by the proposed development (including . . . transportation) shall be evaluated as adequate or to be made adequate within established county standards." Frederick County Zoning Code § 1-19-10.500.3(J)

(Hereinafter collective "Rezoning Transportation Adequacy Requirements").

Planning staff was repeatedly questioned about the adequacy of transportation infrastructure during the course of three five-hour hearings on the

initial rezoning application (*i.e*., January 13, 14 and 15, 2014 "January Hearings") and again during the hearings on the revised rezoning application (*i.e*., April 8, 9, 10 and 23 ("April Hearings")), specifically in connection with these two zoning code provisions.[21] During the January Hearings (when the application proposed 1,510 all-age dwelling units), numerous people tried to conduct cross-examination relating to the Rezoning Transportation Adequacy.

In the January and April Hearings on the Rezoning application, staff refused to answer questions related to the adequacy of road infrastructure on the premise that[22] they could only be answered by the County's traffic expert Burns,

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[21] Undersigned counsel again objected several times during the January, 2014 hearings to the County's failure to make Mr. Ron Burns available for cross-examination on transportation related issues, noting that "the adequacy of the road infrastructure is a core finding that the Board of County Commissioners must make. The staff has testified that it's part of their recommended findings. The applicant has asserted that it's a specific finding that the Board of County Commissioners must make. It's a central issue. It is a contested issue, and the fact that Mr. Burns, who is the key staff person with substantive knowledge on this point has not been made available for cross-examination is prejudicial to all of my clients in the context of this proceeding." E 2617.

[22] "I would defer that question to the DRRA and APF component" (E 2307); "Again, that's a question related to the APFO" (E 2308); "That is another APFO related question." E 2319. The following exchange is a typical example of this line of cross-examination during the course of the rezoning hearings:

> MR. HONCHALK: Final question. In taking a look at the traffic assessments and the improvements for this development for Route 75, have you taken into consideration all of the development that is scheduled for the Lake Linganore area as well as Landsdale as well as the temple that's going at the intersection of Ed McLean and all of that impact at once? MR. GUGEL: That is an APFO LOU question. E 3805.

who was not present at any of the Rezoning hearings. During the January Hearings, Young advised attendees who tried to cross-examine staff on transportation-related issued that Burns "will be present for the DRRA process. *He will be available for cross-examination for all the questions that were here* that people would have for him." E 2425. But when Burns finally did appear on April 10, 2014 to testify during the course of the DRRA and APFO/LOU hearing (after five nights of rezoning hearings where he did not appear) *he refused to answer questions relating to the Rezoning Transportation Adequacy Requirements, claiming that such questions were applicable to the Rezoning and not the DRRA/APFO LOU hearing*.

> Q [Rosenfeld] . . . There was discussion earlier in this case about the term reasonably probable fruition in the foreseeable future. Are you familiar with that phrase in the context of traffic?
> A [Burns] Which case are you referring to?
> Q [Rosenfeld] In this case, the Monrovia Town Center case. The Staff Report had identified certain transportation improvements as being **reasonably probable fruition in the foreseeable future. Is that a phrase that has any meaning to you**?
> A [Burns] **I don't know how I can answer that, since that's not regarding the DRRA it's the rezoning, is it not**?

E 3423 (emphasis added). *Mr. Burns then said "I do not contribute to the PUD [rezoning] transportation analysis*." When asked if he had a "time frame or opinion" regarding the meaning of "reasonably probable of fruition in the foreseeable future" he refused to answer, stating "I have no comment." E 3423.

Only after the APFO/LOU hearing and DRRA hearings were concluded, and public testimony and cross-examination concluded, did BOCC President

Blaine Young read the FACT Letter. The Developer's attorney, Mr. Weinberg, on rebuttal urged the BOCC to rely on the FACT letter, stating that "sometimes it just happens this way, but the last bit of evidence . . . I think is extremely telling . . . and that is the correspondence from FACT . . . So I think this letter here is telling that contrary to what Ms. Rosenfeld just said, there's certainly evidence in the record that this project will augment the transportation system." E 464 – 465.

BOCC Ordinance No. 14-04-659 makes the following finding with respect transportation infrastructure:

> The conditions of approval outlining the necessary public facility requirements of this application in addition to existing and already planned facilities and utilities to serve the area demonstrate that *infrastructure to serve future development is reasonably probable of fruition in the foreseeable future*, and therefore the transportation system is or will be made adequate to serve the proposed development in addition to existing uses in the area.

Emphasis added. *But since the County's transportation expert, Burns, was unable to offer an opinion to the County with respect to what "reasonably probable of fruition in the foreseeable future" means, the Rezoning findings were unsupported by evidence of record. While planning staff purported to rely on Mr. Burns' APFO analysis in support of their conclusion that the Rezoning Transportation Adequacy Standards would be satisfied, they are not transportation experts, did not conduct any independent analysis on this issue, and Mr. Burns disclaimed any substantive analysis with respect to these standards.* The need for the FACT Letter became evident.

As early as January the BOCC had combined the record of all three proceedings (*i.e*., the Rezoning, the DRRA and the APFO LOU) into one consolidated record. E 2334. Given the consolidated agency record, Burns' refusal to testify on the rezoning transportation issues was even more prejudicial to Petitioners, as were being held to one set of "cross-examination rules" while the BOCC and Applicant are playing under a different set of "evidentiary" rules. This fact is made patently clear in the record. During the Rezoning hearing undersigned counsel asked Planning staff whether evidence to support their transportation infrastructure findings was in the staff report. "It is not." E 3086. Undersigned counsel asked where it was contained in the record. "It is in the APFO record, but I [staff] would admit it's not part of the [rezoning] record." E 3087. The County's legal counsel then testified, when asked by the BOCC, that "[a]ll the records have been combined since the beginning of this process." *Id*. Undersigned counsel asked Mr. Burns was not available to testify, and the answer was that "[T]his isn't the time for a motion to do what you're doing" (presumably cross-examine Mr. Burns.) E 3088. In response to a question regarding the "projected schedule of planned improvements," staff testified that "[i]t is not part of the [Rezoning] review, it's part of the APFO." E 3089.

> Q [Rosenfeld]: But it is a part of the required findings that the BOCC must make to approve this rezoning. It has to be in this record, or it's not. Is it or is it not? That's my question."
> A [Jim Gugel]: It's not in the record.

Immediately after this line of cross-examination, the BOCC stated again that all three hearing records were "combined." E 3093. The Applicant then relied on the very APFO documents that were not subject to cross-examination in the Rezoning hearings (*i.e.*, "the LOU and the DRRA") to support the Rezoning findings. E 3094

In short, the BOCC was acting under a double-standard that was highly prejudicial to RALE: 75-80 was free at any time to rely upon all of the evidence in the combined record for any purpose, while RALE was subject to a closely circumscribed scope of cross-examination which precluded questions on evidence unless it directly related to the specific "hearing" subject for that evening. In this manner, the BOCC precluded RALE from conducting any effective cross examination on the Rezoning Transportation Adequacy Requirements, substantially prejudicing RALE's ability to create its record on these issues.[23] The taint imposed by the FACT Letter muddied all three records,

[23] Further exacerbating the taint of the FACT Letter, on April 23, Smith called Burns back to the stand to testify *during the BOCC's final deliberations* after all testimony and cross-examination had been closed, and after the FACT Letter had been read into the record. E 3481. This gave Burns an opportunity to refute the conclusions of RALE's transportation expert (Joe Mehra) on the issue of transportation adequacy. Having insulated Burns from testifying on the transportation adequacy standards during the rezoning hearing, and in the aftermath of Burns himself refusing to testify on the rezoning standards in the APFO hearing, Smith then provided the opportunity for Burns to refute the conclusions of RALE's expert without ever having to be cross-examined himself. Due process requires more. The issues before the Circuit Court, both substantive and procedural, included but also went well beyond the issues of transportation. There are issues of law, procedural challenges, and substantive questions that go far beyond the scope of the FACT Letter.

as they were combined, and the Circuit Court's Order to vacate all three approvals was properly issued.

VI. CONCLUSION

RALE requests that this Court affirm the September 29, 2017 Opinion and Order of the Circuit Court.

Respectfully Submitted,

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CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

This brief contains 7,163 words excluding the parts of the brief exempted from the word count by Rule 8-503.

This brief complies with the font, spacing and type size requirements stated in Rule 8-112.

/s/ Michele McDaniel Rosenfeld

CERTIFICATE OF SERVICE

I HEREBY CERTIFY on this 18th day of June, 2018, a copy of the Brief filed by Appellees RALE and all individual Appellees was served upon all counsel of record via electronic filing and will be mailed by first-class mail June 19, 2018:

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STATUTORY APPENDIX

Rule 5-201. Judicial notice of adjudicative facts

(a) Scope of Rule. This Rule governs only judicial notice of adjudicative facts. Sections (d), (e), and (g) of this Rule do not apply in the Court of Special Appeals or the Court of Appeals.

(b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) When discretionary. A court may take judicial notice, whether requested or not.

(d) When mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) Opportunity to be heard. Upon timely request, a party is entitled to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.

(g) Instructing jury. The court shall instruct the jury to accept as conclusive any fact judicially noticed, except that in a criminal action, the court shall instruct the jury that it may, but is not required to, accept as conclusive any judicially noticed fact adverse to the accused.

Frederick County Zoning Code § 1-19-10.500.3. APPROVAL CRITERIA.

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

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

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

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

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

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

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

(G) Existing fire and emergency medical service facilities are or will be made adequate to serve the increased demand from the proposed development in addition to existing uses in the area. Factors to be evaluated include: response

time, projected schedule of providing planned improvements, bridges, roads, and nature and type of available response apparatus;

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

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

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