

IN THE COURT OF SPECIAL APPEALS OF MARYLAND

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

Appellants, *

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

vs. *

RALE, Inc., et al., *

Appellees. *

* * * * *

**OPPOSITION TO MOTION TO
STRIKE BRIEFS AND APPEARANCE OF
FREDERICK COUNTY, MARYLAND**

KURT J. FISCHER
CHRISTINE E. WHITE

VENABLE LLP
210 W. PENNSYLVANIA AVENUE
SUITE 500
BALTIMORE, MARYLAND 21204
410.494.6353 *telephone*
410.821.0147 *facsimile*
kjfischer@venable.com
cwhite@venable.com

JOHN S. MATHIAS
COUNTY ATTORNEY

KATHY L. MITCHELL
ASSISTANT COUNTY ATTORNEY

12 E. CHURCH STREET
FREDERICK, MARYLAND 21701
301.600.6054 *telephone*
kmitchell2@frederickcountymd.gov

ATTORNEYS FOR APPELLEE, FREDERICK COUNTY, MARYLAND

TABLE OF CONTENTS

	Page(s)
INTRODUCTION AND SUMMARY OF ARGUMENT	1
SUMMARY OF PROCEEDINGS AND FACTUAL BACKGROUND	5
1. The Developers’ Monrovia Town Center Applications	5
2. Commissioner Smith’s Violations Of The Ethics Code And Efforts to Generate Evidence Favorable To The Developers.....	6
3. The Petition For Judicial Review And RALE’s Allegation That Commissioner Smith Engaged In Undisclosed <i>Ex Parte</i> Communication In Violation of GP, § 5-859	7
4. The Circuit Court’s January 27, 2015 Order	8
5. The Circuit Court’s March 10, 2015 Opinion And Order	9
6. The County Council Proceedings And Decision On Remand	9
7. The Circuit Court’s September 29, 2017 Opinion And Order	10
ARGUMENT	11
1. The County Had Standing To Appear Before The Circuit Court As A Respondent In The Judicial Review Proceeding Before The Circuit Court To Defend The County Council’s Decision On Remand In Response To The Developers’ Argument That The Council Lacked Authority To Reconsider <i>De Novo</i> The County’s Decision To Rezone Their Property to PUD	11
2. The County Has Standing To Appear Before This Court As Appellee In An Appeal Filed By The Developers In Which They Contend That The Circuit Court Erred By Ruling That The County Council Had Authority to Reconsider <i>De Novo</i> Its Decision To Rezone The Developers’ Property	13
CONCLUSION	14

Appellee, Frederick County, Maryland (the “County”), pursuant to Maryland Rule 8-431(b), opposes the Motion to Strike Briefs and Appearance of Frederick County, Maryland filed by Appellants, 75-80 Properties, L.L.C. and Payne Investments, LLC (collectively, the “Developers”), with the consent of Appellant, former County Commissioner C. Paul Smith (“Commissioner Smith”). The other Appellees in this case are RALE, Inc. and certain individuals (collectively, “RALE”). As Appellees, the County and RALE contend in this appeal that the County Council had legal authority to adopt Resolution No. 17-04 in which the Council (1) concurred in the Circuit Court’s findings of fact that Commissioner Smith violated the prohibition on undisclosed *ex parte* communications in Md. Code Ann., Gen. Prov. (“GP”), §5-859, and (2) found that the April 23, 2014 decision of the Council’s predecessor, the Board of County Commissioners (“BOCC”), rezoning the Developers’ property to Planned Unit Development (“PUD”) must be reconsidered *de novo*.¹

INTRODUCTION AND SUMMARY OF ARGUMENT

The Developers move to strike the County’s Brief of Appellee and appearance, arguing that the County does not have standing under the applicable statutes, Maryland Rules, and decisions of this Court, to challenge the April 23, 2014 decision of the BOCC to rezone the Developers’ property to PUD. The Developers’ argument is meritless. They fail to describe accurately and completely (1) the County Council and Circuit Court

¹ Effective December 1, 2014, the County adopted a charter form of government with a County Council and County Executive and is known as Frederick County, Maryland.

decisions from which they appeal, (2) the issues raised by the Developers in their appeal, and (3) the County's position and arguments as Appellee on the issues raised by the Developers in this appeal.

In short, the Developers appeal a September 29, 2017 Memorandum and Opinion of the Circuit Court for Frederick County, ruling that (1) the County Council had authority to reconsider the April 23, 2014 decision of the BOCC rezoning the Developers' property to PUD, and (2) the County Council did not abuse its discretion by deciding to reconsider the decision *de novo*. The County contends as Appellee in this appeal that (1) the County Council had legal authority to reconsider the Developers' rezoning application, and (2) the County Council did not abuse its discretion by deciding that reconsideration should be conducted *de novo*. Under Maryland Rule 7-204 and County Code, § 1-19-3.110.8, the County had standing to appear before the Circuit Court as a respondent in the judicial review proceeding before the Circuit Court in which the Developers challenged the County Council's decision and raised these issues. Further, under Maryland Rule 8-111(a) and decisions of this Court, the County has standing to appear in this Court as an appellee in the Developers' appeal from the Circuit Court's decision upholding the County Council's decision in Resolution No. 17-04.

This case has a long and complicated history. It began when RALE filed a petition for judicial review in the Circuit Court appealing the April 23, 2014 decision of the BOCC approving the Developers' PUD rezoning application. RALE also appealed the BOCC's approval of a Development Rights and Responsibilities Agreement ("DRRA") and an Adequate Public Facilities Ordinance Letter of Understanding ("APFO LOU") which were

based on, and implemented, the PUD rezoning decision. In response to RALE's petition, the County appeared as a respondent and defended the BOCC's decisions as lawful and supported by substantial evidence. Under Maryland Rule 7-204 and County Code, § 1-19-3.110.8, the County had standing and was a proper party as a respondent in RALE's appeal of the BOCC rezoning decision.

During the course of judicial review, however, RALE raised for the first time a pivotal issue that was distinct from the merits of the underlying rezoning to PUD. RALE argued that County Commissioner Smith had violated GP, § 5-859, an ethics law that prohibits undisclosed *ex parte* communications in connection with rezoning proceedings. In a March 10, 2015 Opinion and Order the Circuit Court ruled in favor of RALE, finding that Commissioner Smith had violated GP, §5-859 and that his behavior in connection with the consideration of the rezoning application constituted extreme circumstances. Accordingly, the Circuit Court remanded the BOCC's rezoning decision to the new governing body, the County Council, for further proceedings.

After extensive evidentiary hearings on remand, the County Council adopted Resolution No. 17-04, effective February 17, 2017, in which it concurred with the Circuit Court's decision that Commissioner Smith had violated the ethics law provision and determined that the PUD rezoning decision should be reconsidered *de novo*, requiring that the Developers resubmit their application to the Planning Commission ("PC"). (E.4707). The Developers, however, refused to participate in the reconsideration proceedings, and the case was returned to the Circuit Court.

The Developers did not file a petition for judicial review appealing the County Council's decision in Resolution No. 17-04. Rather, the Developers filed a memorandum of law in the Circuit Court arguing that the County Council (1) lacked authority to conduct reconsideration, and (2) abused its discretion by deciding to reconsider the Developers' PUD rezoning application *de novo*. The County, which remained a Respondent in the case, argued that the County Council (1) had authority to conduct reconsideration under the Circuit Court's March 10, 2015 Opinion and Order and GP, § 5-862(a), and (2) did not abuse its discretion by deciding to reconsider the BOCC's decision *de novo*. RALE made the same arguments.

On September 29, 2017, the Circuit Court issued an Opinion and Order in which it (1) reaffirmed that Commissioner Smith had violated the prohibition on undisclosed *ex parte* communications in GP, § 5-859, (2) affirmed the County Council's decision to reconsider the appeal of the Developers' PUD rezoning application *de novo*, and (3) vacated the PUD rezoning decision (and dependent DRRA and APFO LOU) so that reconsideration could be conducted by the County Council *de novo*. (E.62-63).

The Developers and Commissioner Smith have appealed the Circuit Court's September 29, 2017 Memorandum and Order decision, and the County has filed a Brief of Appellees before this Court, again arguing – as it did before the Circuit Court – that the County Council had legal authority to conduct reconsideration and did not abuse its discretion by determining that it should reconsider the PUD rezoning decision *de novo*. The County was a proper party as a respondent before the Circuit Court defending the lawfulness of County Council Resolution No. 17-04, and is a proper party as an appellee

before this Court defending the Circuit Court's Memorandum and Order upholding Resolution No. 17-04.

SUMMARY OF PROCEEDINGS
AND FACTUAL BACKGROUND

1. The Developers' Monrovia Town Center Applications

In November 2012, the Developers filed an application to rezone 457.32 acres of land from Agricultural to 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 DRRA, which would, among other things, freeze the proposed PUD zoning in place pursuant to Md. Code Ann., Land Use ("LU"), § 7-304(a), and an APFO LOU to document the public facilities and other contributions that the Developers would be required to provide to comply with the APFO requirements imposed on the PUD. (E.1946).

After extensive review and amendment proceedings before both the PC and the BOCC, the BOCC held final hearings on the rezoning application, the DRRA, and the APFO LOU on April 8, 9, 10, and 23, 2014. (E.2985-3494). At these hearings, numerous objections to the MTC project were raised by members of the public and RALE. The primary objection, however, related to the impact of the proposed MTC on the regional road network, particularly MD Route 75. Expert testimony and testimony from the public was overwhelmingly focused on traffic safety and road adequacy issues. (E.3457-78).

2. Commissioner Smith's Violations Of The Ethics Code And Efforts to Generate Evidence Favorable To The Developers

At an April 14, 2014 meeting of a public interest organization called FACT (Frederick Area Committee for Transportation), Commissioner Smith discussed the merits of the Developers' rezoning application, even though the application was pending before him as a decision-maker. Commissioner Smith presented arguments in support of the Developers' application. He argued that the improvements the Developers proposed to make to MD Routes 75 and 80 would substantially improve the regional transportation network and benefit residents of the City of 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 as evidence in support of the Developers' application. (Compare E.467, with E.455-56). Two FACT representatives, one of whom was closely tied to the Developers, participated in drafting the letter, and there is evidence that Commissioner Smith met with the drafters to discuss the letter and reviewed a draft of the letter before it was sent to the BOCC as evidence. (E.469; E.4721-22; E.4744; E.4747; E.4755-56). Although the FACT letter was sent on FACT letterhead, it turned out that the letter presenting Commissioner Smith's arguments was not approved by the FACT Board of Directors, and that the President of FACT was not even aware of the letter. (E.4797).

The FACT letter was sent to the BOCC via e-mail on April 23, 2014, the last day of the BOCC public hearings on the Developers' application. The letter was substantially

relied upon by the Developers and the BOCC President to argue that the project would not detrimentally impact the regional road systems. They emphasized that FACT was an independent and highly respected organization. (E.3479). Further, the BOCC President inaccurately represented that the FACT Board of Directors had authorized and approved the letter. (E.3479). After praising the independence, prominence and acuity of the FACT organization, the President of the BOCC then denied counsel for RALE the opportunity to cross-examine a representative from FACT regarding the letter. (E.3479).

On the same day that the hearing concluded, the BOCC voted to approve the Developers' applications for the PUD rezoning, the DRRA, and the APFO LOU. (E.3492-94). Even though the effect of the proposed PUD on regional transportation facilities, particularly 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 the detailed arguments to FACT that supported the Developers' rezoning application.

3. The Petition For Judicial Review And RALE's Allegation That Commissioner Smith Engaged In Undisclosed *Ex Parte* Communication In Violation of GP, § 5-859

RALE filed a petition for judicial review of the PUD rezoning, the DRRA, and the APFO LOU. (E.1-7; E.251). The County participated in all proceedings before the Circuit Court as a respondent. The Developers were also respondents. At some point prior to the Circuit Court's hearing on the petition for judicial review, however, RALE discovered that Commissioner Smith had discussed the Developers' rezoning application with FACT representatives prior to the conclusion of the BOCC hearings, but had not disclosed this fact, in violation of GP, § 5-859. On January 15, 2015, the petitioners before the Circuit

Court issued a trial subpoena for Commissioner Smith to appear at the Circuit Court hearing on the petition for judicial review. The County and the Developers filed a motion to quash the subpoena. (E.414).

At a hearing on January 26, 2015, the Circuit Court heard argument on the motion to quash the subpoena. (E.72). The court ruled 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 (1) Commissioner Smith had engaged in undisclosed *ex parte* communications which necessitated that the case be remanded to the Council, the successor to the BOCC, for reconsideration under GP, § 5-859, and (2) 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, had worked with an individual closely tied to the Developers to generate evidence in support of the Developers' application. Further, there was evidence that false representations had been made to the BOCC that the FACT board had approved the letter when the letter was actually drafted by a person closely tied to the Developers and reviewed only by Commissioner Smith. (E.79-81).

4. The Circuit Court's January 27, 2015 Order

The Circuit Court issued an Order on January 27, 2015 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 extreme 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 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 the Developers’ PUD rezoning application (and the related approvals) to the County Council (the successor to the BOCC) for reconsideration.

On March 10, 2015, the Circuit Court held a hearing on the pending motions and issued an Opinion and Order (1) finding that Commissioner Smith had violated GP, § 5-859 by engaging in undisclosed *ex parte* communication, and (2) remanding the PUD rezoning application (and related approvals) to the County Council for further proceedings. (E.4561).

Furthermore, 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.4564).

6. The County Council Proceedings and Decision on Remand

In compliance with the Circuit Court’s Opinion and Order, the County Council held evidentiary hearings on June 9 and 16, 2015. (E.4711-76). Numerous witnesses testified in person at the hearings, and written evidence was received. (E.4578; E.4595; E.4620; E.4626-76).

At a September 1, 2015 hearing, the County Council adopted a motion, which found that as a result of undisclosed *ex parte* communication, (1) reconsideration by the County Council should be conducted *de novo* with entirely new proceedings on the

Developers' PUD rezoning application and (2) review of the Developers' application under County law had to begin with the PC. (E.4701-02).

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 with FACT representatives. (E.4707).

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 Developers informed the County Council that they would not participate in hearings before the PC and would oppose any County efforts to reconsider the PUD rezoning. (E.4709). In response, the Council found that, if the Developers were unwilling to pursue the PUD rezoning application, further action on reconsideration was impossible. (E.4710).

7. The Circuit Court's September 29, 2017 Opinion and Order

The Developers did not file a petition for judicial review of the County Council's decision in Resolution No. 17-04. Rather, they filed a memorandum of law in the Circuit Court, arguing that the County Council did not have authority to reconsider *de novo* the BOCC's decision to rezone their property to PUD. The Circuit Court held a 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 Circuit 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). Additionally, the Circuit Court found that the FACT letter, the *ex parte* communication 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).

Finally, the Court affirmed the County Council’s decision to conduct reconsideration by considering the Developers’ applications *de novo*. (E.62-63). The Circuit Court ruled that, 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 Developers’ PUD rezoning application in the manner that it had found was appropriate – *de novo*. (E.62-63).

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

ARGUMENT

- 1. The County Had Standing To Appear Before The Circuit Court As A Respondent In The Judicial Review Proceeding Before The Circuit Court To Defend The County Council’s Decision On Remand In Response To The Developers’ Argument That The Council Lacked Authority To Reconsider *De Novo* The County’s Decision To Rezone Their Property to PUD.**

Title 7, Chapter 200 of the Maryland Rules governs judicial review of administrative agency decisions, including rezoning decisions by a County governing body, where judicial review is authorized by statute. Md. Rule 7-201(a); *see Kone v. Balto. County*, 231 Md. 466, 470 (1963) (addressing prior codification of rules governing judicial review of agency decisions). In the present case, Maryland law authorized RALE's initial appeal from the BOCC's approval of the Developers' PUD rezoning application. Maryland Code Ann. LU, § 4-401 authorizes an appeal from a zoning decision of a County governing body. Under Maryland Rule 7-204(a), "[a]ny person, including the agency, who is entitled by law to be a party" may participate in an action filed in Circuit Court for judicial review pursuant to Title 7, Chapter 200. In the present case, Frederick County Code, § 1-19-3.110.8 authorizes the County to appear as a respondent in any action seeking judicial review of the approval of a rezoning application. This section states (emphasis supplied):

The county may appeal to the circuit court of the county and thence to the Court of Special Appeals of Maryland, or, upon certiorari, to the Court of Appeals of Maryland, any decision concerning zoning made by the Board of Appeals, and the county may file an answer and be a party to any zoning appeal filed in the circuit court of the county concerning a decision made by the county and may appeal any decision of the circuit court of the county to the Court of Special Appeals of Maryland, or, upon certiorari, to the Court of Appeals of Maryland.

Accordingly, the County is entitled to participate as a respondent in any judicial review proceeding before the Circuit Court or this Court in which a zoning decision of the County governing body is challenged.

Before the Circuit Court, the County at all times had standing to appear as a respondent to defend the decisions of the BOCC, and subsequently, the County Council.

First, the County had standing to defend the April 23, 2014 decision of the BOCC approving the Developers' application for a rezoning to PUD. In the course of this judicial review proceeding the Circuit Court found that a violation of GP, § 5-859 had occurred and remanded the case to the County Council for further proceedings. The County Council conducted further proceedings and agreed with the Circuit Court that the violation of GP, § 5-859 had occurred and that the Developers' application for a rezoning to PUD should be reconsidered *de novo*. Under Maryland Rule 7-204(a) and County Code, § 1-19-3.110.8, the County had authority to appear as respondent to defend the Developers' challenges to the County Council's decision.

2. The County Has Standing To Appear Before This Court As Appellee In An Appeal Filed By The Developers In Which They Contend That The Circuit Court Erred By Ruling That The County Council Had Authority to Reconsider *De Novo* Its Decision To Rezone The Developers' Property.

Because the County was properly a respondent before the Circuit Court defending the decision of the County Council, the County is properly an appellee before this Court in the Developers' appeal from the Circuit Court's September 29, 2017 Memorandum and Order upholding the County Council's decision. "Maryland Rule 8-111 defines the parties to an appellate proceeding as being 'the party' first appealing the decision of the trial court (appellant) and the 'adverse party' (appellee)." *Surland v. State*, 392 Md. 17, 23 n.1 (2006). It is well settled that a party to a judicial review proceeding before a Circuit Court is entitled to participate in a subsequent appeal to this Court from the Circuit Court's decision in the case. *Garner v. Archers Glen Partners*, 405 Md. 43, 53-54 (2008).

CONCLUSION

For the reasons stated, the County requests this Court to deny the Developers' Motion to Strike Briefs and Appearance of the County.

Respectfully submitted,

/s/

John S. Mathias
County Attorney
Kathy L. Mitchell
Assistant County Attorney
12 E. Church Street
Frederick, Maryland 21701
301.600.6054
kmitchell2@frederickcountymd.gov

/s/

Kurt J. Fischer
Venable LLP
210 W. Pennsylvania Avenue, Suite 500
Towson, Maryland 21204
410 494.6353
kjfischer@venable.com

Christine E. White
Venable LLP
750 E. Pratt Street
Suite 900
Baltimore, Maryland 21202
410.244.5210
cwhite@venable.com

*Attorneys for Appellees
Frederick County, Maryland*

13 point, Times New Roman

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 16th day of July, 2018, a copy of the Opposition to Motion to Strike Briefs and Appearance of Frederick County, Maryland, was served upon all counsel of record via electronic filing and that two (2) copies were sent via first-class mail to:

C. Gregory Abney
One Church Street, Suite 910
Rockville, MD 20850
(301) 850-2990
greabney@abneyatlaw.com
Attorney for Appellant C. Paul Smith

Deborah J. Israel, Esq.
Paul A. Kaplan, Esq.
Louis J. Rouleau, Esq.
Ana L. Jara, Esq.
Womble Bond Dickinson (US) LLP
1200 19th St. NW, Suite 500
Washington, D.C. 20036
(202) 857-4466
deborah.israel@wbd-us.com
paul.kaplan@wbd-us.com
louis.rouleau@wbd-us.com
ana.jara@wbd-us.com
Attorney for Appellants 75-80 Properties, L.L.C. and Payne Investments, LLC

Michele Rosenfeld, Esquire
Law Offices of Michele
Rosenfeld, LLC
11913 Ambleside Drive
Potomac, MD 20854-2107
Attorney for Appellee RALE, Inc. and all individual Appellees

/s/
Kurt J. Fischer