

IN THE CIRCUIT COURT FOR FREDERICK COUNTY, MARYLAND

*

Petition of: RALE, Inc., et al. *

FOR JUDICIAL REVIEW OF THE
DECISION OF THE BOARD OF
COUNTY COMMISSIONERS OF
FREDERICK COUNTY *

*

IN THE CASES OF: *

*

Rezoning Case No. R-12-02, Case No. 10-C-14-1899
Ordinance No. 4-04659, Application *
Of 75-80 Properties, LLC and Payne
Investments, LLC, Monrovia Town Center *
PUD *

AND *

*

Frederick County Development Rights
And Responsibilities Agreement *
(DRRA 12-06), Monrovia Town Center *
PUD; and Adequate Public facilities Letter *
of Understanding, Monrovia Town Center *
PUD (Exhibit 5 to DRRA 12-06) *

* * * * * * * * * * * *

OPINION AND ORDER

This matter having come before the Court on March 10, 2015 on Paul Smith's Motion for Reconsideration of Order Denying Motion to Quash the Testimony of a County Commissioner; Respondent Frederick County's Motion for Reconsideration of Order Denying Motion to Quash Subpoena of C. Paul Smith; Payne Investments and 75-80 Properties' Response to Motion for Reconsideration of order Denying Motion to Quash Subpoena of C. Paul Smith; Payne Investments and 75-80 Properties' Motion for Reconsideration of Order Partially Denying Motion to Quash Trial Subpoenas; Petitioners' Opposition to Motion for Reconsideration; and

Petitioners' Motion to Remand for Reconsideration Pursuant to State Ex Parte Law and to Permit Discovery; supporting memoranda having been filed by the parties; and argument having been received and considered,

OPINION

Petitioners herein raised issues including, *inter alia*, the propriety of Commissioner Smith's meeting with the Frederick Area Committee for Transportation ("FACT") on April 14, 2014 and commenting therein on improvements, to be funded in part by the developers of Monrovia Town Center ("MTC"), to Route 75 and Route 80. Said comments were incorporated into the April 23, 2014 letter submitted by FACT to the Frederick Board of County Commissioners ("BOCC"). Said letter was accepted by the BOCC on April 23, 2014, was read into the record by BOCC President Blaine Young. It was relied upon strenuously by counsel for 75-80 Properties, LLC and Payne Investments, LLC ("Developers") in the April 23, 2014 hearing. And further, based upon its timing, the letter's presentation was intended to have great influence upon the ensuing vote by the Commissioners.

The Court finds the following:

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

The Court finds the facts and circumstances hereinabove to be extreme, and that therefore Petitioners have met their burden of making a strong showing as to an extreme circumstance. Therefore, the Court cannot make a judgment based on the record as it currently exists because the letter, the timing, and the potential for reliance form an integral part of the decision to uphold the administrative decision. Therefore, as "extreme circumstances [...] occurred outside the scope of the administrative record," additional testimony is necessary. *Montgomery Cnty. v. Stevens*, 337 Md. 471, 481 (1995). Moreover, "even under such circumstances, circuit court discovery should not be permitted when a remand to the administrative agency is a viable alternative." *Id.* at 481-82.

Therefore, this Court must remand the matter to the County for further proceedings, including testimony, to resolve the issues raised in this Opinion.

ORDER

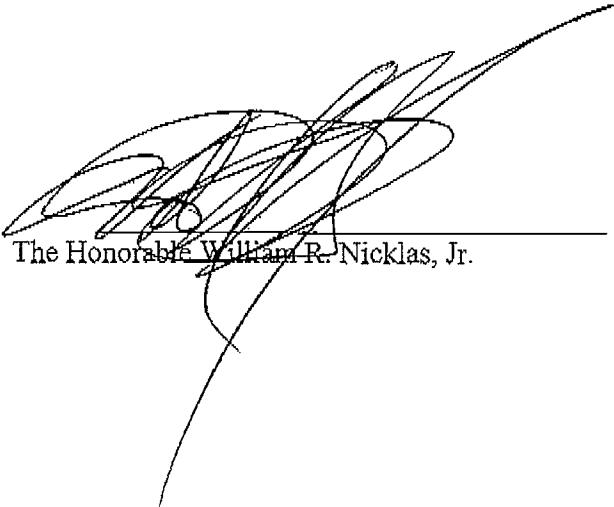
This matter having come before the Court and all pleadings, memoranda, and law, as well

as the record produced upon the appeal having been read and considered, it is thereupon this

~~10th~~ day of March, 2015, by the Circuit Court for Frederick County, Maryland

ORDERED, that this matter be and the same is hereby **REMANDED** to the successor government to the Board of County Commissioners for further proceedings, including testimony, in accordance with this Opinion, and it is further

ORDERED, that the trial subpoena issued by the Clerk of the Circuit Court and served upon former Commissioner Paul Smith be quashed.



The Honorable William R. Nicklas, Jr.

FILED

2015 MAR 16 P 3:43

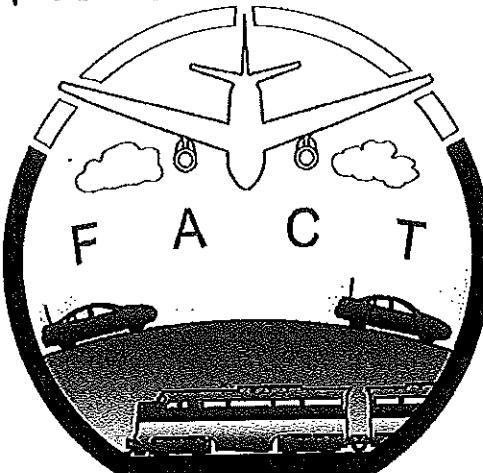
SANDRA K. DALTON

CLERK

BY

Record #60

[DIRECTORS]
Carol Krlum, President
Mel Fair, Vice President
Michael Proffitt, Secretary
Don Linton, Treasurer
David Clark
Mike Smariga
Brian Duncan
Bill Greenwell
Bob Smariga
Howard Levine
KR Marshall
Jim Gangawere
Mark Frilis
Jack Cash
Mike Kidder
Kara Norman
Jonathan Warner



FREDERICK AREA COMMITTEE
FOR TRANSPORTATION

[ADVISORY BOARD]

BOCC Representative
C. Paul Smith
Mayor Randy McClement
Alderman Kelly Russell
Tim Davis
Dave Coyne
Richard Griffin
Paul Frey
Nancy Norris
Ron Burns
Devon Hahn
Robert Shen

RECEIVED

APR 23 2014

Office of Blaine R. Young
County Commissioner
Frederick County Maryland

23 April 2014

TO: Board of County Commissioners
Commissioner Blaine Young, President

ALL RECEIVED

RE: Improvements to Maryland Route 75 Corridor

Frederick area Committee on Transportation (FACT) has been supporting improvements in the Maryland Route 75 corridor for over 15 years. As you know it is currently the number 1 priority for Secondary Highways in Frederick County. We believe that improving traffic flow will not only benefit local residents but should be viewed as having regional consequences. The Route 75 corridor directly serves New Market and Linganore areas. The Frederick and Middletown regions potentially benefit from traffic reductions in the US 15 and I270 corridor.

FACT is a bi-partisan pro-Transportation organization with a long record of advocating for transportation improvements serving Frederick County. We do not normally take a position on land use issues except as they relate to transportation improvements of funding. For example, we supported a change in land use to allow a public/private partnership for Meadow Road/I70 interchange. This would allow a traffic improvement that benefits Monrovia/Linganore/New Market regions and reduces traffic congestion at Monocacy Blvd and Patrick Street. Because of the competition for limited Federal and State funding, without the private funding it was unlikely that this Meadow Road interchange improvement would have been possible in the foreseeable future.

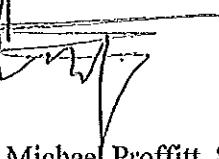
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Board of County Commissioners
Improvements to Maryland Route 75 Corridor
23 April 2014

We believe the State's current commitment to major multi-billion transit and transportation projects makes the available funding for Route 75 even more difficult without significant local and private funding. It is our understanding, based on County and SHA review, that the development proposal for Monrovia provides significant funding for improvements to improve Route 75 and address the congestion at the current offset intersection of Route 75/Route 80, traffic signal to facilitate Route 75/Route 355 traffic flows and ultimately replace the deficient Route 75/CSX Railroad Crossing.

While some residents may oppose development of the Monrovia Town Center which has been on land use plans for 40 years, 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. Private/public partnership is the only likely scenario for any significant improvement at this point.

Please let us know if there are any questions concerning these thoughts and our support for revenue enhancement,



Michael Proffitt, Secretary
Frederick Area Committee on Transportation

AFFIDAVIT OF BLAINE R. YOUNG

I, Blaine R. Young, make oath according to law and hereby state as follows:

1. I am over eighteen years of age, am under no legal or mental disability and am competent to be a witness as to the facts set forth in this Affidavit.

2. I served as president of the Board of County Commissioners of Frederick County, Maryland (the "BOCC") from 2010 to 2014.

3. In my role as president of the BOCC, I participated in and voted on the quasi-judicial proceedings relating to the application of 75-80 Properties, LLC and Payne Investments, LLC (the "Applicant") for the restoration of PUD zoning for land owned by the Applicant in the Urbana Region of Frederick County, Maryland (the "Monrovia Town Center Property").

4. On January 14, 15, and 16, 2014, I participated as a member of the BOCC in full public hearings on the aforementioned rezoning application. At the conclusion of the January 16, 2014 public hearing, the BOCC voted 4-0-1 (I voted in the affirmative) to approve the request to rezone the Monrovia Town Center Property from Agricultural to PUD with the conditions set forth in the Staff Report and the following additional modifications to the proposed Phase I Plan: (1) reduce the total number of proposed dwellings from 1,510 to 1,250; (2) require that at least 50% of the dwellings be age restricted; (3) require a dwelling type mix with a minimum of 70% single-family detached and a maximum of 30% townhouse/duplex; (4) prohibit multi-family and two-over-two units; (5) prohibit access to Weller Rd. from the PUD; and (6) remove Tax Map 88, parcel 53 (3.968 acres +/-) from the rezoning request.

5. On April 8, 9, 10 and 23, 2014, I participated in full public hearings on a revised rezoning application submitted by the Applicant as a result of the BOCC-required modifications listed above. On April 23, 2014, by a vote of 4-1, the BOCC approved the Applicant's revised

rezoning application. On that same date, the BOCC also voted 4-1 to approve the revised DRRA and directed Staff to provide a final draft of the DRRA to the BOCC. Also on April 23, 2014, the BOCC voted 4-1 to approve the APFO LOU. I voted in the affirmative with respect to all three of those votes.

6. On May 29, 2014, the BOCC enacted Ordinance No. 14-04-659 and executed the final DRRA, including the APFO LOU.

7. On April 23, 2014, the final date of public hearings, the BOCC received a letter from the Frederick Area Committee for Transportation, dated April 23, 2014 (the “FACT Letter”). Because the administrative record was still open, the BOCC received the FACT Letter and made it a part of the administrative record. Because the FACT Letter was received on the final date of the public hearings, I read the FACT Letter aloud into the administrative record. I did not otherwise make any comments regarding the FACT Letter. I simply read the FACT Letter aloud verbatim.

8. To be very clear, on April 23, 2014, I would have voted to approve the Applicant’s revised rezoning application, the DRRA and the APFO LOU regardless of whether the FACT Letter had been accepted into the administrative record. Although I read the FACT Letter aloud because it addressed issues relating to the link between private/public partnerships and funding for transportation improvements, and it was relevant in that way, the FACT Letter did not sway my vote. I had already decided, based on the evidence already in the record, to voter in favor of the revised rezoning application, the DRRA, and the APFO LOU. The FACT Letter was not a determinative factor in my decision with respect to any of those votes. As stated above, I voted in favor of approving the original rezoning application in January 2014, long before the FACT Letter was received into the administrative record on April 23, 2014.

9. Section 1-19-10.500.3 of the Zoning Ordinance required the BOCC to make two specific findings of fact with respect to transportation: (1) “[t]he transportation system is or will be made adequate to serve the proposed development in addition to existing uses in the area;” and (2) “... 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.”

10. In Ordinance No. 14-04-659, the BOCC made the following two specific findings of fact, among others, pursuant to the requirements of Section 1-19-10.500.3 of the Zoning Ordinance:

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. Improvements to the MD 75 corridor as well as planned upgrades to MD 80 will serve the proposed expanded and integrated local street network. Access to planned neighborhoods and amenities in the PUD will be adequate to ensure pedestrian safety and reasonable local roadway capacity in the vicinity.

Compliance with the APFO prior to or simultaneously with a Phase II application will further assure the provision of public facilities, services, and infrastructure [including transportation] to meet the increased demand generated by the project.

11. There was substantial evidence in the administrative record to support the aforementioned findings of fact, and I did not rely upon the FACT Letter in my analysis.

12. I concluded that the Applicant fully complied with Frederick County’s APFO, which defines road adequacy. I found Ron Burns’ testimony in that regard during the public hearings to be particularly credible and persuasive evidence. Mr. Burns testified that the application for the DRRA sufficiently addressed roads under the applicable provisions of the APFO for the BOCC to make a finding of adequacy for roads. I also found Jim Gugel’s

testimony to be credible and persuasive. Mr. Gugel testified that there was enough evidence in the record to support a finding that the transportation network in the area would be adequate.

13. I also found the Applicant's expert testimony to be credible and persuasive. The Applicant's traffic consultant conducted a Traffic Impact Analysis in accordance with APFO guidelines. The Traffic Impact Analysis is included in the administrative record. During the public hearings, the Applicant's consultant testified that as a part of the review process, he received comments from Maryland State Highway Administration and Frederick County and that he responded to all comments. The Applicant's traffic consultant provided the BOCC with a letter stating his professional opinion that the project demonstrates adequacy of roads under the applicable provisions of the Frederick County Code. I also gave weight to the fact that Frederick County and Maryland State Highway Administration approved the Applicant's Traffic Impact Analysis. The Applicant actually submitted a letter into the record from Maryland State Highway Administration in that regard.

14. I did not find the opposition group's expert testimony to be credible. Maryland State Highway Administration considered the Transportation Report drafted by the opposition group's traffic consultant, but Maryland State Highway Administration determined that the methodologies used by the Applicant's consultant were either in conformance with the Frederick County APFO or would not change the overall results of the report findings.

15. I carefully considered all of the evidence submitted into the record both for and against the Monrovia Town Center Project. Based on all of the evidence, including the evidence discussed above, I concluded that the transportation system is or will be made adequate to serve the proposed development in addition to existing uses in the area. The FACT letter was not a

determinative factor for me in reaching that conclusion. I reached that conclusion long before the FACT letter was submitted into the record before the final public hearing.

I HEREBY SOLEMNLY AFFIRM UNDER PENALTY OF PERJURY AND UPON PERSONAL KNOWLEDGE THAT THE CONTENTS OF THE FOREGOING AFFIDAVIT ARE TRUE AND CORRECT.

Date:

6/4/15

Blaine R. Young
Blaine R. Young

Received
5/28/2015

David P. Gray

9363 Devilbiss Bridge Rd

Walkersville, Maryland 21793

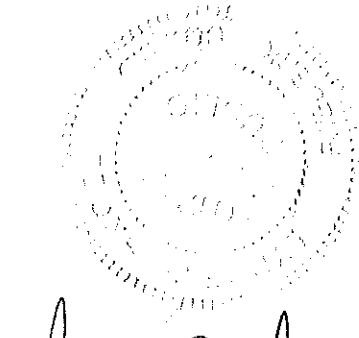
25 May 2015

To : Frederick County Council

I hereby submit this affidavit that the supportive letter for the Monrovia Town Center zoning case received with the letterhead of FACT had no affect on my vote. Its source was suspect and its validity in question.



David P. Gray



Lynne Engel
LYNNE SO ENGLE
NOTARY 1/26/17