

THE EFFECTIVE DATE OF THE RESOLUTION IS February 7, 2017

RESOLUTION NO. 17-04

RE: *Regarding* CASE NO. 10-C-14-001899 AA and CASE NO. 10-C-14-001900 AA  
MONROVIA TOWN CENTER PUD

### **COUNTY COUNCIL POST REMAND CONCLUSIONS**

In an Opinion and Order dated March 10, 2015 in the above referenced two judicial review actions, The Honorable William R. Nicklas, Jr. ordered (among other things) that “the 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 . . .” (“Remand Order”).

As ordered in this Remand Order, the Frederick County Council received testimony. The Council conducted public hearings and meetings on June 9, June 16, June 30 and September 1, 2015.

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

The Council not only received testimony and exhibits presented during its hearings, but also had the opportunity to review the record and recordings of the BOCC's hearings on the MTC applications. The aggregate of the information 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.

At the time of the BOCC hearing, the FACT committee had been viewed as knowledgeable and influential in the area of Frederick County transportation matters. It was represented by the BOCC President during the hearing that the whole FACT committee had approved the letter; however, after the BOCC adopted the Ordinance and granted other approvals, it was revealed that the FACT letter had been generated by only two of the Committee members, one of whose son and former company represented and performed services for the MTC applicants before and during the BOCC hearings.

Testimony and exhibits provided to the County Council also revealed additional inconsistencies and irregularities relating to the crucial issue of the adequacy of the transportation network in the area for which findings are required under County law. Serious challenges were made but not addressed during the initial BOCC hearings, including whether the scope of the traffic study included all appropriate intersections, yet the County's traffic "expert" was not available to respond to these bona fide challenges early in the proceedings.

Former Commissioner C. Paul Smith, did not testify during the Council hearings nor did he submit sworn testimony.

At the conclusion of the public hearings on September 1, 2015, the County Council adopted the following Motion:

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

The vote on the original motion passed 4-3 with Council Members Chmelik, Delauter and Shreve opposed.

County Council of Frederick County Meeting Minutes, Tuesday September 1, 2015 included in the Record hereby transmitted.

At various times since the September 1, 2015, Council decision, representatives of the County, and the Applicants, 75-80 Properties and Payne Investments, have met and discussed possible resolution, however these efforts were unsuccessful.

Frederick County had proceeded to send this entire matter back to the Frederick County Planning Commission to restart the process, as the Council directed in its September 1, 2015 motion.

The attorneys for the Applicants, 75-80 Properties and Payne Investments, have subsequently informed the County that the Applicants will not return to the Planning Commission and would oppose any County efforts to consider again the approvals of the Planned Unit Development (PUD), Development Rights and Responsibilities Agreement (DRRA) and Adequate Public Facilities Ordinance Letter of Understanding (APFO LOU).

Under the Frederick County Code, an “applicant” applies for the PUD floating zone by “application.” *E.g.*, Frederick County Code, §§ 1-19-3.110.2, 1-19-3.110.3, 1-19-10.500.3 and

1-19-10.500.5. For this reason, the Planning Commission and County Council would be unable to proceed with consideration of the PUD without an applicant pursuing an application.

Accordingly, the County Council believes that it has done what it can to fully comply with the Remand Order, but the Applicants will not participate in the rehearing process.

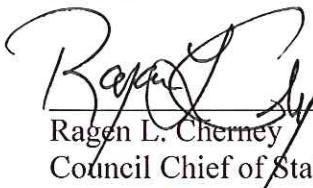
The Circuit Court continues to have jurisdiction over this matter. *Metro Maintenance Systems South v. Milburn*, 442 Md. 289, 309, 310 (2015) (“[T]he remand order here contemplates that judicial review awaits the return of the case following the remand.”) (“After the remand, the parties will have the opportunity to litigate their position in the circuit court and pursue appellate review of these issues . . .”)

The County Council requests that the Court take such action as it deems necessary and appropriate so that the County Council may rehear the MTC application.

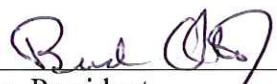
The undersigned hereby certify that this Resolution was approved and adopted as of the

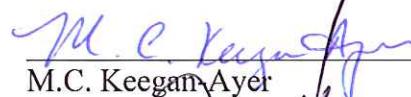
7 day of February, 2017.

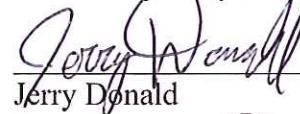
ATTEST:

  
Ragen L. Cherney  
Council Chief of Staff  
*WL 2/7/17*

COUNTY COUNCIL OF  
FREDERICK COUNTY, MARYLAND

By:   
Bud Otis, President

  
M.C. Keegan-Ayer

  
Jerry Donald

  
Jessica Fitzwater

Council Members Chmelik, Delauter and Shreve voted against the motion.