

## FREDERICK COUNTY GOVERNMENT

Jan H. Gardner  
County Executive

### FREDERICK COUNTY ETHICS COMMISSION Office of the County Attorney

Brian Duncan, Chair

## DECISION ON COMPLAINT

### I. Introduction

In March 2015, the Complainant filed a complaint and affidavit with the Ethics Commission. The complaint alleged that two County Council Members violated the Public Ethics Law by failing to disclose ex parte communications made in connection with a pending land use application. The complaint also alleged that one of the current Council Members failed to disclose an ex parte communication related to a 2014 zoning application during his tenure as a County Commissioner. The complaint further alleged that the two Council Members violated the “use of prestige of office” conflict-of-interest provision in § 1-7.1-5(H) of the County’s Ethics Law.

### II. Initial Action Taken by the Ethics Commission

The Ethics Commission’s Standard Operating Procedures state that if the allegations in the complaint suggest that criminal conduct may have occurred, the Commission has the discretion to refer the matter to the State’s Attorney, the Office of the Attorney General or the State Prosecutor for a determination as to whether a criminal investigation is warranted. After receiving the complaint, the Ethics Commission determined that a referral was appropriate because the Public Ethics Law contains criminal penalties for knowing and willful violations of that Law’s provisions. The fact that the referral was made should not be read to imply that the Ethics Commission concluded that a criminal act occurred. That determination is best left to an office with knowledge and experience in criminal law. The Commission referred the complaint to the Frederick County State’s Attorney in July 2015.

Pursuant to the Ethics Commission’s Standard Operating Procedures, once a referral for possible criminal prosecution is made, the Commission does not take any further action on the complaint until the referral is resolved. Accordingly, the Commission held the complaint in abeyance while waiting for the State’s Attorney’s Office to complete its review. In May 2016, the State’s Attorney notified the Ethics Commission that “the referral lacks sufficient evidence to warrant prosecution” and that no charge would be filed. With that decision, the matter is once again before the Ethics Commission.

It should also be noted that, in accordance with the Commission’s Standard Operating Procedures and the recommendation of the State’s Attorney, the Ethics Commission did not provide notice of the complaint to the Council Members who are the subjects of the complaint. This was done so that the Ethics Commission would not inadvertently prejudice any potential criminal investigation or prosecution. For the same reason, the Complainant was not advised of the referral to the State’s Attorney’s Office.

### III. The Public Ethics Law Charges

#### A. The Public Ethics Law

The Public Ethics Law, found in the General Provisions Article of the Maryland Annotated Code, §§ 5-857 through 5-862, is a State Law applicable only to Frederick County. The Law applies when one of five defined types of land use applications are pending before the County's governing body. County Law defines the term "governing body" to include the County Council and the County Executive of Frederick County.<sup>1</sup> Prior to December 1, 2014, the County's governing body was the Board of County Commissioners.

There are two key provisions in the Public Ethics Law. One provision, which is not applicable here, restricts the ability of a person with a covered pending land use application to make contributions of \$100 or more to members of the County's governing body while that person's application is pending. The other key provision in the Public Ethics Law, which is the one relied upon in the present complaint, concerns what are known as "ex parte communications." In this context, an ex parte communication means a communication between a County Council Member/County Commissioner and another person regarding a covered pending land use application in which not all of the parties to the land use application are present. Section 5-859(b) requires a member of the governing body who has an ex parte communication with an individual concerning a pending application to disclose the communication to the Chief Administrative Officer within seven days after the communication was made or received.<sup>2</sup> The Law does not ban ex parte communications; it simply requires the disclosure of any such communications.

Persons who violate this mandatory disclosure provision are subject to the remedies and penalties contained in § 5-862. The Ethics Commission has the authority to assert the violation as a procedural error in an action for judicial review of the land use application.<sup>3</sup> Should the Ethics Commission or an aggrieved party of record in the pending application take this step and the court finds that there was a violation of the disclosure requirement, the court is directed to remand the case to the governing body for reconsideration. A person violating the Public Ethics Law is also potentially subject to criminal sanctions. Section 5-862(b) provides that a person who knowingly and willfully violates this Law can be charged with a misdemeanor offense. If convicted, the person could be subject to imprisonment not exceeding six months or a fine not exceeding \$1,000 or both.

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<sup>1</sup> See § 1-1-2 of the County Code.

<sup>2</sup> Prior to the transition to Charter government, disclosures were made to the County Manager.

<sup>3</sup> A Petition for Judicial Review is a legal action in which a Court is asked to review the decision of a governmental agency. In most cases, the Court makes its decision on the written record and does not take additional testimony or allow the introduction of new evidence.

B. The proposed sale of Citizens Care and Rehabilitation Center and Montevue Assisted Living

The complaint relates, in part, to an action taken by the last Board of County Commissioners in connection with the Board's effort to sell the County-owned Citizens Care and Rehabilitation Center and Montevue Assisted Living facilities. In order for the Board to sell the facilities, the Board needed to subdivide the property on which the facilities were located. Because the property is located in Frederick City, the County was required to obtain the City's approval for the subdivision. As part of that process, the Board of County Commissioners was the applicant in proceedings before Frederick City's Zoning Board of Appeals and Planning Commission.

Although the Complainant recognizes that the Public Ethics Law specifically defines the term "applicant" to exclude a public authority, she nevertheless takes the position that the Public Ethics Law should be applied to these proceedings because the County held title to the property that it wanted to subdivide. The Complainant argues that the term "governing body" as used in the Public Ethics Law includes (or should include) not only the Board of County Commissioners (prior to December 1, 2014) and the County Executive and County Council (as of December 1, 2014), but also includes (or should include) the City of Frederick's Planning Commission and Zoning Board of Appeals, the Circuit Court Judge who issued decisions on legal actions taken to challenge the Board of County Commissioners' planned sale of Citizens and Montevue and the State Board of Public Works.<sup>4</sup>

The first question for the Ethics Commission is whether the Public Ethics Law applies to actions taken by the Board of County Commissioners to obtain subdivision approval from the City of Frederick's Zoning Board of Appeals or Planning Commission. The plain language of the Public Ethics Law leads the Ethics Commission to conclude that applications to these Frederick City agencies are not covered by the Law.

Section 5-859(b) states as follows:

(b) 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.

The definition of the term "application" is found in § 5-857(d):

(d) Application. -- "Application" means:

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<sup>4</sup> The affidavit submitted with the complaint states that "given the number of high-value properties owned by Frederick County within local municipalities, there would appear to be a need to include these in the reporting by 'Governing bodies' or 'local elected officials'."

- (1) an application for a zoning map amendment as part of a piecemeal or floating zone rezoning proceeding;
- (2) a formal application for a comprehensive map planning change or zoning change during the county comprehensive land use plan update;
- (3) an application for a map amendment to the county water and sewerage plan;
- (4) a request made under § 4-416 of the Local Government Article for the governing body to approve the placement of annexed land in a zoning classification that allows a land use that is substantially different from the use for the land authorized in the zoning classification of the county applicable at the time of annexation; or
- (5) an application to create a district or an easement or any other interest in real property as part of an agricultural land preservation program.

The term “pendency of the application” is defined in § 5-857(k) as follows:

(k) Pendency of the application. -- "Pendency of the application" means the time between the **acceptance by the County Department of Planning and Zoning** of a filing of an application and the earlier of:

- (1) 2 years after the acceptance of the application; or
- (2) the expiration of 30 days after:
  - (i) **the governing body** has taken final action on the application; or
  - (ii) the application is withdrawn.

(emphasis added)

An application is deemed to be pending once the application is accepted by the County Department of Planning and Zoning.<sup>5</sup> That Department is a part of the Executive Branch of the County government. The applications before the City Board of Zoning Appeals and the City Planning Commission were not filed with the County Department of Planning and Zoning. They were filed with the City of Frederick. This is an important distinction. There could not have been a pending application, as that term is used in the Public Ethics Law, because the application was never filed with the County.

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<sup>5</sup> There is currently no such department. The term is used in this Opinion as that is how the Law reads.

Additionally, one of factors used in the Public Ethics Law to determine when an application is no longer pending is the date that the **governing body** takes final action on the application. The governing body is defined in § 5-857(h) as the governing body of Frederick County. The City of Frederick is not included within this definition, nor is a City board or commission. Similarly, the term “party of record” is defined in § 5-857(j) as “a person that participated in a proceeding on an application **before the governing body** by appearing at a public hearing or filing a statement in an official record.” The subdivision application was heard by the City; it did not come before the County governing body. It is clear that the Public Ethics Law only applies to applications that are pending before the County. The fact that the County was a party to an application pending before the City does not mean that the Public Ethics Law applies.

### C. The Monrovia Town Center zoning application

The complaint also references an affidavit that the Complainant filed in 2014 to document an ex parte communication made by a former County Commissioner who is now a County Council Member. The ex parte communication was a telephone call that the Council Member made in January 2014 to a radio talk show after hearing comments made about him on that show. The comments were made during a discussion about the Monrovia Town Center application. The 2014 affidavit was made a part of the record in the land use proceeding by the then-County Manager. The complaint alleges that the Council Member violated the Public Ethics Law by failing to disclose this ex parte communication and asks the Ethics Commission to take enforcement action for the violation.

The Monrovia Town Center application was covered by the Public Ethics Law. However, even if the Ethics Commission were to find that the Council Member violated the Public Ethics Law by failing to disclose the telephone call he made to the radio talk show, the Commission would be unable to take enforcement action.<sup>6</sup> The Public Ethics Law only provides two enforcement remedies for violation of the disclosure requirement. Section 5-862(a) allows the Ethics Commission or another aggrieved party of record to intervene in a Petition for Judicial Review. Even if the Commission were inclined to do so, its effort would be untimely. The Complainant’s affidavit documenting the alleged ex parte communication was submitted to the County Manager in January 2014 and the affidavit was included in the application record in February 2014. After the Board of County Commissioners voted on the application, a Petition for Judicial Review of the Board’s decision on the Monrovia Town Center was filed in June 2014 and the Circuit Court issued an Order remanding the matter to the County Council in March 2015. As the affidavit was a part of the record when the Petition for Judicial Review was filed, the parties to the appeal should have had actual or constructive notice of the alleged violation. It would serve no purpose for the Commission to attempt to intervene at this juncture.

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<sup>6</sup> The Ethics Commission makes no finding as to whether there was a violation of the Public Ethics Law. The Commission cannot make such a finding when the subject of the complaint has not been notified of the existence of the complaint or given the right to contest the charges, neither of which occurred, for the reasons provided in Part II of this Opinion.

The only remaining remedy, found in § 5-862(b), is a criminal misdemeanor prosecution. The Ethics Commission does not have the authority to independently initiate a criminal action. The complaint was referred to the State's Attorney for his review and he has found that there is insufficient evidence to warrant a criminal prosecution. The Commission will not second guess that finding, particularly in light of the requirement in § 5-862(b) that the State prove that the violation was both knowing and willful in order to obtain a conviction and the higher level of proof required to obtain a conviction in a criminal case.

#### IV. The “Use of Prestige of Office” Ethics Law Charge

As part of the effort by the Board of County Commissioners to sell Citizens Care and Rehabilitation Center and Montevue Assisted Living, the Board asked the State Board of Public Works to approve the proposed sale.<sup>7</sup> The Board of Public Works refused to approve the Board's request. When Frederick County became a Charter County in December 2014, the decision was made not to proceed with the sale of Citizens and Montevue, as the new County Executive did not support this action. Two County Council members who had been County Commissioners on the prior Board continued to support the sale.

In an effort to help the contract purchaser who had entered into an agreement with the prior Board to purchase the two facilities, the two County Council Members met with the contract purchaser's President and subsequently sent a letter to the Governor seeking the Governor's intervention with the Board of Public Works to gain that Board's approval of the sale.<sup>8</sup> The Council Members did not discuss this with the full Council before sending the letter to the Governor. The complaint asserts that by undertaking this effort and sending the letter on County Council letterhead, the two Council Members violated the “use of prestige of office” provision in the Ethics Law.<sup>9</sup>

Section 1-7.1-5(H) of the Ethics Law provides as follows:

- (1) An official or employee may not intentionally use the prestige of office or public position for the private gain of that official or employee or the private gain of another.
- (2) This paragraph does not prohibit the performance of usual and customary constituent services by an elected official without additional compensation.

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<sup>7</sup> The State's approval was necessary because State grant funds had been used to fund construction of new buildings to house the facilities.

<sup>8</sup> These facts were made known by one of the Council Members in interviews with a local radio station and a local newspaper.

<sup>9</sup> The complaint also argues that the Council Members should have disclosed this “ex parte meeting” with the contract purchaser. The Public Ethics Law's requirement for disclosure of ex parte communications applies only to certain types of land use applications pending before the County. As the Ethics Commission addresses in Part III.B of this Opinion, the Public Ethics Law did not apply.

Under § 1-7.1-5(H)(1), an official may not intentionally use the prestige of office for the private gain of another. It is clear from the letter that the Council Members were advocating for the contract purchaser of the two facilities, which stood to gain financially if the sale was completed. That is not the end of the analysis, however. The Ethics Law contains an exception to the general requirement in § 1-7.1-5(H)(1). That exception is found in § 1-7.1-5(H)(2), which specifically states that the performance of usual and customary constituent services by an elected official without additional compensation is not a violation of the Ethics Law. The complaint does not allege that the Council Members received additional compensation for sending the letter to the Governor, nor have any facts been provided to support such a claim. The Ethics Commission believes that, based on the factual representations contained in the complaint, the Council Members' action in sending a letter to the Governor on behalf of a company that conducts business in the County falls into the category of a "usual and customary constituent service" by an elected official and, therefore, there is no basis for the Commission to move forward on this charge.

The complaint also notes that as part of the effort to sell Citizens and Montevue, the Board of County Commissioners entered into an agreement with a broker to find interested buyers. The complaint argues that because one of the Council Members is also a real estate broker (not the broker or affiliated with the broker used in connection with this sale), the Council Member acted improperly to benefit another entity in his profession in violation of the Ethics Law. The decision to retain a broker to assist in finding interested buyers was made by the Board of County Commissioners, not the individual Commissioner. The Ethics Commission finds that the facts provided in the complaint would not constitute a violation of the Ethics Ordinance.

The complaint generally asserts that the two Council Members "ignored their roles and ethical responsibilities to the larger council body; as parties to the [Board of Public Works] grant, listing agent procurement action, the asset purchase agreement and the land subdivision application." The complaint also contains a more general allegation that the two Council Members failed to act within "applicable ethical boundaries" and that the Council Members took actions that exceeded their authority under County Charter § 203, which calls for the County Council to act as a body, by attempting to "negotiate" directly with the Governor. As an entity charged with enforcing the Ethics Law, the Ethics Commission lacks the ability to enforce County Charter § 203. The other allegations referenced in this paragraph are also outside the Ethics Commission's statutory jurisdiction. The Ethics Commission is limited to determinations as to whether specific provisions of the Ethics Law (or the Public Ethics Law) have been violated.

#### V. Other Public Ethics Law Issues Raised by the Complainant

The complaint includes the following statement:

There exists a demonstrated appearance of a reluctance on the part of the former Young BoCC, staff and the Frederick County Ethics Commission to act in accordance with current Public Ethics law regarding ex parte communications.

In support of her statement, the Complainant cites an initiative by a County Commissioner to seek repeal of the Public Ethics Law, which initially had some support from other Commissioners but was ultimately not pursued. The Complainant also cites Ethics Opinion 14-03, in which the Ethics Commission decided a complaint alleging violation of the ex parte disclosure requirements by a County Commissioner. The Ethics Commission found in the County Commissioner's favor.<sup>10</sup>

The Complainant notes that the Public Ethics Law as drafted makes it difficult for the public to monitor and react to noncompliance with the Law's requirements. Section 5-860 of the Public Ethics Law provides that at any time before final action on an application, a party of record may file with the Chief Administrative Officer an affidavit including competent evidence of either a prohibited campaign contribution by an applicant or a covered ex parte communication. Under this Law, the application is considered to be no longer pending two years after acceptance of the application or the expiration of thirty days after the governing body takes final action on the application or when the application is withdrawn, whichever comes first. The Complainant notes that it can be difficult and time consuming for someone outside the County government to obtain updated campaign contribution reports or information about the disclosed ex parte communications, making it difficult to take action within the deadlines set in the Law. The Complainant requests that the Ethics Commission do more than issue a decision on her complaint. She asks the Commission to ensure proper reporting from both the administrative staff and the governing body, to respond diligently and in a timely manner to employee and citizen concerns and complaints, and to effectively enforce the Law's requirements.

The Ethics Commission recognizes the importance of the larger issues the Complainant raises about the Ethics Commission's role in the enforcement of the Public Ethics Law. The Commission intends to address those issues, but they are beyond the scope of this Opinion. The Ethics Commission will seriously consider recommending changes to the Public Ethics Law in light of the concerns raised. For example, the Ethics Commission is concerned with the Law's failure to provide the Ethics Commission with any additional civil remedy for violation of the ex parte disclosure requirement. The Commission will also consider whether additional changes should be made or recommended to the way in which reports of violations are handled, both administratively and by the Ethics Commission.

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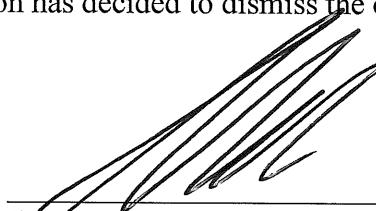
<sup>10</sup> The complaint in that case involved a County Commissioner who disclosed multiple communications by "various individuals" over a nine-day period in a single report and was unable to provide the exact dates of the communications or the identities of the persons who communicated with him. The communications all concerned a single pending land use application. The complaint alleged that this disclosure was inadequate and failed to comply with the Public Ethics Law. The Commission determined that when multiple oral communications are made in an informal setting by persons wishing to remain anonymous and the communications all take place within a relatively short period of time, the communications may be reported collectively. When the person's identity is known, however, each ex parte communication must be reported separately. The Ethics Commission took this position because it did not want to discourage constituents from exercising their right to communicate with their elected representatives by requiring them to identify themselves before expressing their opinions.

VI. Conclusion

For the reasons stated, the Ethics Commission has decided to dismiss the complaint.

Date

8/16/16

  
Stephen K. Hess, Vice Chair  
Frederick County Ethics Commission

Note: Brian Duncan, the Ethics Commission Chair, recused himself from participating in this matter.