

Memorandum

From: Paul Smith
To: Frederick County Council
Date: June 12, 2015
Re: Monrovia Town Center Remand Proceedings

Dear President Otis and County Council:

I would like to share a few comments with you regarding the MTC matter that is currently before the County Council.

I have not submitted an affidavit regarding the FACT letter because of the threats of criminal prosecution against me for not reporting a communication with FACT at an open, public meeting, as a part of my official County duties. I disagree that this was an ex parte communication for which reporting to the County Manager was required (under Sections 15-853-858 of the State Government Article of the Maryland Code). In my opinion, such an interpretation is unreasonable and would make that law violate the First Amendment protection of free speech—because it would put a burden on protected speech without a narrowly drawn compelling State interest to justify such a burden; therefore if the statute is interpreted in that way it would violate the First Amendment and would be unconstitutional. No other county in the State is burdened by a law like this. Nevertheless because of the threat of prosecution, I am not addressing facts related to any such communication.

However, I will comment on a number of issues related to the MTC remand to the Council. I believe that these comments can be helpful to the Council. I will comment on five different matters.

1. The purpose of the remand proceedings. I disagree that any violation occurred that required a remand, but nevertheless, the Court did remand the case, and the Court gave two bases for the remand—State Gov't Article, Section 15-858 and the *Stevens* case.

The first basis for remand is Sections 15-853 to 858 of the State Government Article, the language of which requires a remand if there was a communication that was supposed to be reported to the County Manager which was not reported. But this law does not give any direction as to what action should be taken upon remand; therefore, the County can make a reasonable determination of how to handle it.

The second basis for remand was based upon the case of *Montgomery County v. Stevens*, 337 Md. 471 (1995), in which the Court of Appeals stated that the testimony of a lawmaker can be subpoenaed if two conditions are met: (1) If fraud or extreme circumstances are found to

exist; and (2) if those circumstances improperly affected the outcome of the matter. The Court did not sustain the subpoena for me to testify because both requirements of *Stevens* had not been met. The Court's remand ruling is based upon the *Stevens* case. Only if there is a finding that "extreme" circumstances improperly affected the outcome of the vote, would there be a legal basis to subpoena the legislator (me) to give testimony. Understanding the *Stevens* case is necessary to understand what the Council is charged to do on remand.

The Court's remand charge to the Council is to determine whether the circumstances that the Court found to be "extreme" resulted in a different outcome in the vote. This is exactly what the Council attorney directed the Council to do. The direction of the Council attorney is following the law. In the event that there is insufficient evidence to find that the "extreme" circumstances caused any difference in the vote outcome, then the requirements of *Stevens* are not met; and the elected official cannot be subpoenaed to testify about his/her vote. Then, in accordance with Maryland law, the Council can confirm the prior ruling of the BOCC with respect to MTC, and the remand can be ended.

The Court ordered remand for the County to address the issues related to the *Stevens* case. The Court found that one of the two criteria existed—"extreme circumstances,"—but that is not the end of the examination. Only if such circumstances actually resulted in "tainting" the results, as established by "strong evidence," would there exist evidence to require an elected official to be subpoenaed to testify on his legislative intent. Thus, the scope of remand of the MTC case is to first determine whether the FACT letter affected the outcome of the vote approving MTC. The answer to this question is simple: No, it did not. Statements by former commissioners Young, Gray, Shreve and Delauter all confirm this. Even Commissioner Gray, who was the sole vote in opposition to the MTC application, and who criticized the rest of the BOCC for approving the MTC, acknowledged that the FACT letter didn't change anything. In his public comment on June 9th, Commissioner Gray complained that the other members of the BOCC were determined to pass land use legislation without conducting serious deliberations and without listening to the RALE people. But that does not support a finding that the FACT letter had any impact on the 4-1 vote approving MTC.

The *Stevens* case was only about whether an elected official can be subpoenaed to give testimony. Thus, where the *Stevens*' test is not satisfied, then the courts are without authority to require the elected officials to testify about the reasons for their legislative acts. This explains why the Court quashed the subpoena for me to testify. Only if there is strong evidence that "extreme circumstances" existed that likely tainted the outcome of the vote—only then would there be a basis to support a subpoena for me to give testimony. There was no such evidence before Judge Nicklas, and there is no evidence before the Council now. Therefore, on the narrow issue for which the MTC case was remanded to the Council, the Council can only find

that there is no evidence that the FACT letter tainted the outcome, and therefore the approval of MTC by the BOCC should stand.

Furthermore, the *Stevens* case requires that there be “strong evidence” that all of the factors in *Stevens* exist—not just speculation that they might exist. At the June 9th hearing, the RALE people compounded misrepresentations with endless speculation and insinuation about misconduct by me and others, but there was no evidence offered of any specific “fraud or extreme circumstances that tainted the outcome.” Therefore, the appropriate Council action should be to approve the MTC application, since there is no evidence that the FACT letter changed the final vote on MTC.

2. RALE will not settle for a remand, rather they insist on a totally new hearing, from scratch. Resolution of the remand directive should be easily resolved, as explained, but the RALE group has shown that they will not accept this, and that they will continue to fight to stop the MTC no matter what measures they may need to resort to, regardless of the truthfulness of their efforts, regardless of the misrepresentations they make, and regardless of how much threatening and maligning they do. For RALE, it appears that the end justifies the means. Their personal attacks are reckless and wrong. Their disrespect for legislative processes and their falsely maligning of good people is disgraceful.

3. The RALE position is based upon speculation and multiple, unsupported and false allegations against a number of individuals. The RALE approach has devolved to become one that avoids any discussion of the MTC application that has met every requirement for re-zoning, and instead is merely personal attacks against people who did not vote the way they wanted. RALE has maligned several of the County personnel in their vicious attacks—including County Planner Jim Gugel and County Transportation Planner Ron Burns. Of course they have also waged relentless, vicious attacks against those former Commissioners and those current Council members who disagree with them. These attacks are ugly, continuous and open, and each verbal stinger is then supported by the applause and cheers of their comrades. These ugly displays are a disgrace to civil government, and they are a bullying technique that is intended to make the Council cower before them and to submit to their desires. This scenario, that has now played out more than a dozen times, is more mobocracy than representative government. RALE attempts to intimidate, coerce, threaten, ridicule and demean. This is the power of RALE, not the truthfulness of their statements nor the soundness of their reasoning.

4. RALE’s accusations of fraud are baseless and false. Although the resolution of the remand issue should be relatively simple, RALE continually makes allegations of fraud and misconduct in hopes of convincing the Council to re-do the MTC application from scratch. These allegations are not based upon facts and sound reasons, and many of them are misrepresentations. They have argued most of these allegations before the Circuit Court, and the

Court has not found any fraud. Nevertheless, RALE continues to make false allegations to the Council without evidence to support them. In fact, now that these allegations have been rejected by the court, RALE has now (in attorney Rosenfeld's recent June 5th letter to the Council) threatened to file a civil fraud suit against "many" "individuals and entities" in connection with the MTC matter. This type of threatening is a desperate tactic; no legislative body should be intimidated by such an irrational threat. RALE has already argued to the circuit court that the submittal of the FACT letter was fraudulent. But because there was no evidence of fraud, the court declined to find any fraud. If RALE should bring a separate law suit to attempt to prove it, they will certainly have difficulty overcoming a motion to dismiss for *res judicata* (meaning that the issue was already adjudicated), and RALE will not be allowed to re-litigate it.

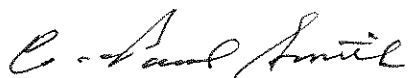
To understand why there is no evidence of fraud, you should start with the legal definition of fraud: To prove fraud, one must prove the following elements: That there was an intentional misrepresentation of material facts that was relied upon by the victim to his/her detriment and which caused damages. And fraud must always be established by clear and convincing evidence—not a mere preponderance of evidence. There are multiple missing elements to any claim of fraud by RALE—to begin with, there was no misrepresentation of any material fact, and neither did RALE rely on any such misrepresentation. Thus, while RALE's accusations may sound serious, but those who don't know specifically what "fraud" is recognize that there are no facts to support them. RALE's accusations of fraud are nothing more than intimidating threats that are legally baseless.

5. Here are some examples of false and erroneous statements by RALE people.
 - a. Accusing the BOCC of not being impartial. They are wrong. Impartiality is deciding the same issue differently for one person than for another. They use a faulty definition of "impartiality," and then accuse the BOCC of not being impartial. There is nothing improper about a legislator having a pre-conceived opinion about a legislative matter—for example a bill that the legislator introduced or a matter on which he campaigned—such as restoring zoning rights to properties that were down-zoned by a prior Board.
 - b. Demanding that Council Members Shreve and Delauter recuse themselves. RALE members base this request on the erroneous belief that Shreve and Delauter are not impartial. As discussed above, they are wrong about this.
 - c. RALE demands that only disinterested persons should be able to decide the MTC zoning case. There is no basis for making such a demand. Zoning is a legislative matter on which pre-conceived opinions are appropriate. There is no right to have a disinterested legislature. To the contrary, in America we want legislators who have an interest in the matters that will be legislated for the people who elected them.

- d. RALE argues that the MTC application was deficient without the FACT letter. If that were the case, then strike the FACT letter, and then see if the application is sufficient. But the RALE people will not be satisfied with this result because they know very well that the application is sufficient without it. But rather than merely strike the FACT letter from evidence, RALE insists that the entire matter must be re-heard from scratch. Not because of any defect in the MTC application, but only because they hope that the County Council will reach a different result than did the BOCC. As the second FACT letter makes clear (the letter signed by then FACT president Carol Krimm), the FACT letter was intended to be public comment, not evidence.
- e. RALE argues that admitting the FACT letter into evidence sabotaged the entire MTC process, so that the only remedy is to make the MTC application start again from scratch. This has never been the appropriate legal remedy for a minor error, such as having the BOCC admit the letter into evidence. The proper and customary remedy is to strike the letter from evidence, and then treat it as public comment, which was its intended purpose. No person making public comment is subject to cross examination. This is rightfully so because a lot of extraneous, irrelevant and improper statements are made in public comments, such as the many false and baseless allegations made by RALE members.
- f. RALE speculates that there were many improper actions in their case, which they cannot identify, but which they allege tainted the outcome of the MTC case. In other words, based only on conjecture and speculation, they are asking the Council to conclude that some unidentified, unknown improper actions occurred which tainted the result, and that therefore the MTC case must start over from scratch. Such reasoning is offensive to every reasonable person in representative government.
- g. RALE complains that it is inherently wrong for a sitting legislator to attempt to convince others to vote a certain way on pending legislation. Such a contention is patently absurd and demonstrates a misunderstanding of proper, constitutional legislative processes.
- h. RALE complains that it is inherently wrong for a sitting legislator to ask people to make public comment on a matter on which the legislator will later cast a vote. There is nothing wrong with this. In fact, this is a laudable action; it is important for legislators to help bring information and different points of view to light so that his fellow legislators and the public can fully understand all the issues pertaining to a proposal.
- i. RALE complains that their due process rights have been violated by approval of the MTC application. There is no basis for this conclusion, but the RALE people have shown that they will never acknowledge this. The RALE position is based on bullying, intimidating, threatening, maligning and misrepresenting. Whoever will not submit to their demands will become a target for their complaints.

Conclusion. RALE has mounted a concerted effort to condemn actions that have always been proper and acceptable legislative actions. The only potential illegality with respect to the FACT letter is that Comm. Smith did not report to the County Manager a communication he made while at a public meeting, while he was doing his duty as the County-appointed liaison to FACT, to discuss an important transportation matter. I did not report this communication because it did not occur to me that this was an ex parte communication that might require reporting. Had I done so, there would have been no remand. Even if I am wrong, and reporting was required, this does not turn an inadvertent omission into an evil, fraudulent conspiracy that tainted the final vote on the MTC application. The public comments by the RALE people attempt to find evil and fraud and wrong-doing where none exists. Their comments are not based upon facts, but are speculation and misrepresentation. One thing is clear, the evidence before the Council now is more than sufficient to uphold the approval of the MTC application—for there is no evidence that the FACT letter affected the BOCC vote on MTC.

There is no legal defect that requires any further action on the part of the Council, other than to conclude that the FACT letter did not taint or alter the outcome of the BOCC approval of the MTC application. If the Council were to re-open the MTC case this would be done only because of a change in the composition of the legislators—not because of any defect in the MTC process. If the Council were to re-open the MTC case it would be an act of cowering to a group of people who resorted to misrepresentations, false personal attacks and threats in order to get their way.



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