



June 5, 2015

Mr. Bud Otis  
County Council President  
Winchester Hall  
12 E. Church Street  
Frederick MD 21701

RE: Monrovia Town Center – June 9 Council Proceedings

Dear President Otis:

On behalf of RALE, Inc., and the individual clients I represent in the MTC proceedings, I submit this letter to you in advance of the above-referenced Council meeting in support of my clients' ongoing position that the Council must reconsider the MTC rezoning, DRRA and APFO LOU cases in their entirety pursuant to the Opinion and Order issued by the Circuit Court ("Remand Order").

My clients are not now, and never have been, interested in "mak[ing] the FACT letter and Paul Smith the focus of these remand proceedings" as the Developer's attorney wrote to this County Council on April 28<sup>th</sup>. My clients want only what they have yet to receive: a review of the MTC project application by an impartial decisionmaker, conducted in accordance with all legally required procedures, resulting in a decision supported by substantive law, and supported by an administrative record untainted by events outside the hearing room that constitute "fraud or extreme circumstances." In other words, my clients only ask that their elected officials provide what the law already guarantees.

My clients, and Frederick County's citizens generally, were denied all of these basic rights in the MTC proceedings. The proof of that statement is now before this Council in the form of the Circuit Court's extraordinary Remand Order. The Circuit Court, which ordinarily will not look at facts outside of the administrative record when reviewing a rezoning decision, and which ordinarily will not allow investigation into the actions or thoughts of a government decisionmaker, has ordered that this Council do both. The Court has done so because the circumstances surrounding the FACT letter's creation, introduction, and use in the record are so egregious that the Court cannot render a decision in this case on the "record" as presented.

The Remand Order is only nominally about Commissioner Smith and the FACT letter. The Remand Order is more broadly intended to protect the "process" of judicial review by guaranteeing

the soundness of a “record” untainted by procedural irregularities. The Court concluded that at a minimum the record is “tainted” by (1) Commissioner Smith’s conduct in connection with the FACT letter; and (2) the presence of the FACT letter in the MTC record. We believe that **the FACT letter was designed by Commissioner Smith as a way to place his own transportation testimony in the hearing record of the PUD Rezoning while he was sitting as a judge in that same proceeding.** As the only lawyer on the BOCC, and the self-appointed protector of the administrative record, Commissioner Smith knew that the record did not contain sufficient evidence to satisfy the non-APFO “road adequacy” component of the PUD Rezoning.

But the Court is also telling this Council that actors other than Commissioner Smith may have compromised the record in ways yet to be discovered. In sum, the Court is suggesting to this Council that because there is no way to tell how far the “taint” revealed by Commissioner Smith’s involvement with the FACT letter extends, the circumstances of this case demand either a complete rehearing of the MTC project, or an exhaustive inquiry. Such an inquiry could take longer than a full rehearing, and in the end a full rehearing may be needed in any event.

This Council faces an extraordinary situation. *The Circuit Court has remanded the MTC proceedings based largely upon an established violation of state ethics law – specifically the ex parte laws that are specific to Frederick County and its rezoning proceedings. State law dictates that under such circumstances the Court “shall” remand for reconsideration.* The circumstances surrounding that single *ex parte* contact led the Circuit Court to conclude that my clients’ “strong showing” of “extreme circumstances” warranted remand of the case. My clients call upon the Council to rehear the case in its entirety not only because a violation of the state ethics laws mandates such reconsideration, but because the circumstances of this case are otherwise so egregious that no lesser option is available

This first-ever County Council elected under a newly enacted County Charter is poised to set a new course. That is why in light of this extraordinary remand Order, my clients were so disappointed to read of the County Council’s planned approach to this matter: the solicitation of unchallengeable guidance from former BOCC members in the form of affidavits. With all due respect, this approach is at best misguided. Asking wrongdoers how they believe their actions should be construed invites self-serving statements, and doing so through affidavit testimony only insulates those self-serving statements from cross-examination.

The MTC proceedings and others like it prompted a significant change in the face of this County’s government -- many of the elected participants in that process no longer hold public office, and most notably Mr. Smith and Mr. Young. While it may be tempting to believe that this process can be cured by inviting after-the-fact representations as to the mindset of the BOCC members who participated in the MTC proceedings, such an approach does not reflect the good government principles that resulted in such sweeping electoral change.

The illegal conduct of Commissioner Smith and, we believe, others as well, coupled with a wide range of questionable behavior in derogation of procedural and substantive law, underscores the need for a rehearing in this matter. The FACT letter was simply the tip of the iceberg. It was the

most visible act taken by Commissioner Smith (and, we believe, others) to doctor an administrative record in a case that – if impartially considered based on untainted evidence – could not possibly satisfy certain transportation-related findings in the PUD Rezoning case.

We believe that the County Council is operating in an environment fraught with conflicts of interest. Numerous individuals have strong self-interests (pecuniary, political, reputational, personal and/or otherwise) in limiting any inquiry into their conduct relating to the MTC proceedings, and in particular in connection with their role in the transportation elements of the case. Conflicted individuals certainly include former BOCC Commissioners Smith and Young, current Councilmembers (and former BOCC members) Shreve and Delauter, and we believe the Developer either directly or by implication through its agents Miles & Stockbridge, P.C. and/or its engineering and land planning firm Harris, Smariga and Associates, Inc.

Indeed, the County itself faces the appearance of potential conflicts: (a) its interest in settling a years-long litigation relating to MTC that is pending before the Court of Special Appeals; (b) its interest in a productive future relationship with FACT; (c) the potential personal relationships between County representatives and the monied development interests that FACT represents; and (d) possible personal relationships with FACT's current president, former Commissioner Smith.

Against this backdrop, the Council cannot fulfil the Court's mandate under the process that it has put forth. Accordingly, I have been authorized to file a Motion with the Circuit Court requesting a "show cause" hearing to establish why the County should not be held in contempt of the Remand Order by proceeding in the manner proposed.

The process as proposed will rely on the self-serving participation of the four former BOCC members who participated in the MTC proceedings as they present "evidence" to justify the former wrongdoing. The affidavits of former Commissioners Young and Smith, offering their after-the-fact version of any "facts" they choose to put forward, will be insulated from cross-examination. Councilmembers Shreve and Delauter will be free to offer their after-the-fact comments about the record. Effectively, former BOCC members will sit in judgment on the veracity of the "testimony" of all of the BOCC members (including their own), as well as the validity of the actions that all four of them took.

**This approach merely adds insult to injury. The BOCC acting through Commissioner Smith and, we believe, Commissioner Young and others, engineered the record in the MTC proceedings by enhancing the transportation evidence in the MTC record via the FACT letter at a time and in a manner to be shielded from cross-examination and public comment. In the same way, the self-serving affidavits of former Commissioners Smith and Young in connection with the FACT letter itself will become part of the MTC record. As will any "testimony" presented on the record by former BOCC members Shreve and Delauter. Not only will the remand proceedings as proposed fail to shed any meaningful light on the issues raised by the Court, worse yet they will further insulate the wrongdoing that prompted the Remand Order in the first instance.**

**Additionally, RALE, Inc., has authorized me to file a Complaint grounded in civil fraud against many of these same individuals and entities. The Council lacks the subpoena power necessary to bring clearly relevant witnesses to the stand and place them under oath, compel their testimony, and subject them to cross-examination. This leaves the fact-finding to RALE, which will have recourse through the civil discovery process. There certainly is compelling circumstantial evidence to suggest that Commissioner Smith was not acting alone in connection with the FACT letter in particular, and we believe that there is compelling evidence that the record as a whole was manipulated in illegal ways by a number of individuals. Discovery in a civil fraud case will allow RALE to bring those facts to light.**

It is time to put this unfortunate and disheartening episode behind Frederick County. The ghosts of the past, who were rightly purged from political office, should not continue to haunt the County Council's decisions in any respect. To allow them to "weigh in" on the Council's disposition of the Remand Order, which was occasioned by their own wrongful actions, is unacceptable. The citizens of Frederick County expect more from its first-ever County Council. They ask only for what they rightly should expect: a fair, on-the-record hearing of the MTC development.

**In closing, we respectfully ask the Council to move beyond the irregularities of the past administration and set a new standard for the integrity of County decisionmaking. A proper rehearing of the MTC matters would, of course, avoid the need for the Court to step in again.**

We appreciate your consideration.

Respectfully Submitted,



Michele Rosenfeld

Cc: County Council  
Ms. Jan Gardner, County Executive  
Mr. John Mathias, County Attorney  
Mr. Michael Chomel, Senior Assistant County Attorney  
Ms. Kathy Mitchell, Assistant County Attorney  
Mr. Steve Horn, Director, Community Development Division  
Mr. Jim Gugel, Director, Department of Development and Planning Review  
Mr. Steve McKay, President, RALE, Inc.  
All individual clients