

THE CIRCUIT COURT FOR QUEEN ANNE'S COUNTY

IN THE MATTER OF

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CASE NO. 17-C-11-15897

BARRY WATERMAN

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MEMORANDUM and ORDER

BACKGROUND

On February 17, 2010, Ethics Matters, Inc. ("EMI"), and several co-complainants, filed a complaint with the Queen Anne's County Ethics Commission ("Ethics Commission"),<sup>1</sup> alleging that Barry Waterman ("petitioner"), a member of the Queen Anne's County Planning Commission ("Planning Commission"), was in violation of *Queen Anne's County Code*, §8-11<sup>2</sup> ("*Ethics Code*").<sup>3</sup> The Queen Anne's County Ethics Commission ("Ethics Commission") responded by engaging the services of Hogan Lovells US LLP ("Hogan Lovells") to conduct an independent investigation.

An investigative report was submitted to the Ethics Commission by Hogan Levells and a hearing on the complaint was held. The petitioner, his counsel, complainants, members of the investigation team, and two witnesses who were summoned by the Ethics Commission attended the hearing. At the hearing, the investigation was summarized, certain "complaining" witnesses testified, and petitioner was afforded the opportunity to cross-examine all witnesses and present his own evidence and witnesses.

Subsequently, the Ethics Commission rendered a written opinion in which it concluded that petitioner's financial interests and those of his immediate family members

<sup>1</sup> Established by ordinance as found in Chapter 8 of the *Public Local Laws of Queen Anne's County*, 1996 Edition, as amended. See §8-1, *et seq.*

<sup>2</sup> The section addressing conflicts of interest.

<sup>3</sup> The law prescribes regulation of conflicts of interest, financial disclosures, gifts, *inter alia*.

“...implicate the jurisdiction and responsibility of the [Planning Commission], present actual and apparent conflicts of interest in violation of Section 8-11.A(1)(2) and (7), Ethics Law.”<sup>4</sup> The Ethics Commission, based upon its conclusions, issued a cease and desist order to the effect that petitioner shall recuse himself from matters before the Planning Commission that have a direct financial impact on him, a member of his family, or a business entity in which he or a member of his family has an interest. Additionally, the Ethics Commission’s order stated that petitioner shall specifically cease and desist from any activity as member of the Planning Commission that relates to the Queenstown Comprehensive Plan and the issue of extending water and sewer services to southern areas of Kent Island along Md. Route 8.

On January 4, 2011, petitioner filed a Petition for Judicial Review in this Court. The Ethics Commission filed a response indicating they intended to participate as a party. *See* Docket Entry 3. EMI, together with co-complainants, filed a response and stated their intent to participate.<sup>5</sup> *See* Docket Entry 9. On February 24, 2011, petitioner filed his memorandum, pursuant to Md. Rule 7-207, alleging that the Ethics Commission erred in their findings and arguing that the decision should be reversed. Petitioner has also filed a

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<sup>4</sup> Record, No. 14. The cited *Ethics Code* provisions are, as follows:

§8-11. Conflicts of Interest.

A. *In general.*

Queen Anne’s County...[Planning Commission members] are prohibited from the following:

- (1) Acting on behalf of the County in any matter that would, to their knowledge, have a direct impact, as distinguished from the public generally, on them or a family member, or on a business entity in which they or a family member have an interest.
- (2) Being employed by or having a financial interest in an entity that is:
  - (a) subject to the authority of that official or employee or of the governmental unit with which the official or employee is affiliated; or
  - (b) doing business with that official or employee or with the governmental unit with which the official or employee is affiliated.

\* \* \* \* \*

- (7) Intentionally using the prestige of their office, or confidential information acquired in their official County position, for their own private gain or that of another....

<sup>5</sup> Co-complainants listed are Carol E. Bilek, Mary Campbell, Erney Maher, Margaret Maher, Christopher B. Pupke, Laura Sanford, Henry F. Sears, Loretta C. Walls.

motions to strike seeking to strike the responses to the petition filed by the Ethics Commission and EMI, each of which petitioner asserted was improper and without standing. The Ethics Commission and EMI and the co-complainants filed responses to the respective motions to strike, and the motions remained pending as of the hearing date.

On May 24, 2011, each of the parties appeared and were heard, through their respective counsel. Thereafter, the Court took the matter *sub curia* for issuance of this written opinion and order.

### THE RECORD

The record was transmitted to the Court on January 25, 2011. It consists of fourteen (14) separate items, as listed in the index, as follows: the *Ethics Code*, issued on March 30, 2007;<sup>6</sup> the complaint;<sup>7</sup> letter from Ethics Commission counsel to respondent; response to complaint; letter from Ethics Commission counsel to counsel for respondent and EMI; Hogan Lovells letter; draft investigation report; response to report of respondent; final investigative report; Ethics Commission order; Complainants' response to investigation report; Ethics Commission minutes; Ethics Commission opinion.

### ANALYSIS

The complaint, received by the Queen Anne's County Ethics Commission on February 17, 2010, is an 8-page document, with 3 pages of signatures and/or approvals by the complainants. Numerous documents are appended thereto. The primary purpose of the complaint is to allege that petitioner's appointment and service on the Planning Commission "will violate" the *Ethics Code*.<sup>8</sup> Unquestionably, petitioner is involved in real estate development and other real estate matters within the county, and he (or his immediate family)

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<sup>6</sup> It appears that the *Ethics Code* was last amended by Ordinance No. 06-101, adopted January 16, 2007.  
<sup>7</sup> Designated Complaint No. 10-01.

<sup>8</sup> It is important to note that the *Ethics Code* was adopted because each county is mandated to do so by the *Md. Code Ann.*, State Government Article, §§15-801, *et seq.* Given the Court's review, it is rather absurd to suggest that the *Ethics Code* precludes petitioner's appointment or service on the Planning Commission. Being a property owner and developer is decidedly dissimilar to a racehorse owner serving of the racing commission responsible for oversight of the racing industry or a real estate appraiser sitting on the tax assessment appeals board. *See* State Advisory Opinion Nos. 90-08 and 83-28. The Court will not specifically address the January 29, 2010 advisory opinion of the Ethics Commission regarding petitioner's appointment to the Planning Commission.

may have a direct or indirect interest in matters that may come before the Planning Commission. After petitioner filed a response, the Ethics Commission undertook an investigation, pursuant to Code, §8-10(G)(4).

There is nothing in the record to suggest that petitioner was anything other than cooperative in the investigation conducted for the Ethics Commission by Hogan Lovells. The investigative report by Hogan Lovells, dated October 15, 2010, is comprehensive, and its analysis and conclusions are well-reasoned.<sup>9</sup> It noted two areas of concern with respect to petitioner: first, Wheatlands, a property owned by petitioner's family, as it relates to the Queenstown Comprehensive Plan;<sup>10</sup> and, second, extension of water and/or sewer service on Md. Route 8 to an area, specifically Kent Island Estates and Romancoke, "... where petitioner and/or his family members own 20 lots." The report described Wheatlands as "...both actual and apparent conflicts of interest..." while the 20 lots were opined to place petitioner in a position where his consideration of the water and sewer issues along Md. Route 8, in the "unlikely" event the issue(s) were to come before the Planning Commission, would be "...actually and apparently conflicted..." Among the points noted in the Hogan Lovells report is petitioner's acknowledgment of the conflicts and potential recusal. Specifically, as to the Wheatlands property, petitioner has "consistently" recused himself from any discussions with respect thereto. On the water and sewer service issue, the report notes an understanding that any future discussion before the Planning Commission is, as indicated, unlikely. Concluding, Hogan Lovells states "...that, beyond these two identified areas, there are no other current conflicts of interest or actionable appearances thereof relevant to [petitioner's] service on the [Planning Commission]. It is our further conclusion that, should [petitioner] be willing to adopt formal, public positions on recusal - capable of being plainly understood and effectively monitored - with respect to these subjects, it would sufficiently mitigate those actual conflicts and any relevant appearance of conflict" (footnotes omitted). *See* Record, No. 9, p. 21.

A hearing before the Ethics Commission was held on November 15, 2010.<sup>11</sup> On December 6, 2010, the Ethics Commission issued its written decision. The "cease and desist" order(s) addresses the investigative report's recommendation and two areas of concern, i.e. the Queenstown Comprehensive Plan and extension of water and sewer along southern Md. Route 8. It also generally directs recusal [by petitioner] in areas in which he or family members have "...a direct financial impact" or, though use of "...the prestige of his office...or confidential information acquired by virtue [thereof]...for his own private gain or

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<sup>9</sup> Record, No. 9.

<sup>10</sup> According to the October 15, 2010 investigative report, the property is owned by the Waterman Family Limited Partnership, in which petitioner has a 10% interest.

<sup>11</sup> Record, No. 13, i.e transcript of hearing, consisting of 123 pages.

that of another” (citations omitted). The latter language is troubling since the language generally tracks that of §8-11 and potentially would apply to all members of the Planning Commission (or other commissions).

Conflicts of interest may be easily cured by recusal in many instances and are normally considered on a case-by-case basis. To instill public confidence, on a yearly financial disclosure form, each member of the Planning Commission, among other government officials and employees, board and commission members, must, *inter alia*, identify conflicts of interest.<sup>12</sup> §8-11.A. prescribes general prohibitions regarding conflicts of interest. §8-11.A.(1)(7) begin with the words “acting” and “intentionally using.” These are proscriptions against volitional and purposeful acts. §8-11.A.(2) is more a proscription against a particular status of an individual at a given time.

The Ethics Commission determined that petitioner has “...present actual and apparent conflicts of interest in violation of Section 8-11.A.(1)(2)(7).” *See* Record, No. 14, p.2.<sup>13</sup> The opinion [and order] is not in the nature of an advisory opinion, as permitted by §8-10.F. It is the culmination of proceedings on a complaint filed in accordance with §8-10.G. Following a hearing on the complaint, the *Ethics Code* directs that the Ethics Commission, “...shall include written findings of fact, conclusions of law, and recommendations” in its “final determination.” §8-10.H.(3). The Ethics Commission may also issue a cease and desist order *against any person it finds in violation of this chapter*; and seek enforcement of the order in the Circuit Court for Queen Anne’s County. §8-16.A.B. (emphasis mine).<sup>14</sup>

This case has generated a highly technical debate in the pleadings over provisions in the *Code* that are less than intelligible. It is clear, first and foremost, that the *Ethics Code* is absolutely essential to our system of government. It is also clear that “violation” can either be a knowing and willful act under the *Code* or it can simply be descriptive. In this instance, petitioner has done nothing that would knowingly and willfully violate the *Ethics Code*. In fact, it is un rebutted that he has recused himself regarding Wheatlands, where he has an actual and apparent conflict. But, that alone, does not prevent the Ethics Commission from addressing the “violation” and entering the cease and desist

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<sup>12</sup> See §8-13.

<sup>13</sup> “Violation” is clearly an unfortunate word choice here, although petitioner is clearly subject to the Ethics Code and §8-11. The word used means, or is synonymous with, *inter alia*, break, trespass, transgression, abuse, offense, infringement.

<sup>14</sup> A “person” who *knowingly and willfully* violates §8-11, among other sections, may be subject to a civil penalty(emphasis supplied).

order.<sup>15</sup> On the other hand, where the remedy addresses a *potential* conflict that may never come to fruition, i.e. the “cease and desist order” as to water and sewer along Md. Route 8, such a finding of “violation” and cease and desist order is inappropriate..

The Court concludes that petitioner did not violate §8-11.A.(1) or (7). Those two provisions require affirmative acts, not passive ones. Petitioner is clearly subject to §8-11.A.(2). The definitions in the *Ethics Code* are quite broad, and “business entity” would include petitioner whether he operates his real estate business as a sole proprietor or part of a corporate enterprise. Consequently, he is subject to, or “in violation of,” §8-11.A.(2), as his interest relating to Wheatlands does constitute an actual and apparent conflict with regards to any consideration by the Planning Commission relating to not only the property, but the Queenstown Comprehensive Plan. The cease and desist order remedy is appropriate related thereto and will be affirmed. The remaining orders will be reversed.

## COLLATERAL ISSUES

### **I. Motion to Strike (Ethics Commission)**

Petitioner asserts that the Ethics Commission is not entitled to participate as a party on two grounds. First, petitioner argues that the Ethics Commission lacks the specific statutory authority to participate; that it is nothing more than a finder of fact. Second, petitioner directs the Court’s attention to *Adler v. City of Baltimore*, 242 Md. 329 (1966), citing the *McKinney* doctrine,<sup>16</sup> holding that a zoning appeals board could not be a party since the board has no executive duties, and formulates no policies, and merely finds facts and applies those facts to rules of law prescribed by the legislature. *Id.* at 333.

The Ethics Commission rebuts petitioner’s statutory argument by citing provisions of the *Ethics Code*. Under §8-10(G)(1), the Ethics Commission may itself file a signed complaint alleging a violation, and §8-10(H)(2) places the burden of proof at the hearing on the Ethics Commission to demonstrate, by clear and convincing evidence, that a violation has occurred. Furthermore, §8-16 grants the Ethics Commission the authority to seek enforcement of a cease and desist order in the Circuit Court.

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<sup>15</sup> A “cease and desist order” is usually an administrative law tool used to prohibit the doing or continuing of a particular course of conduct. It can be used to enjoin conduct or require one to abstain or refrain from the prohibited conduct. *See generally*, *Black’s Law Dictionary*, 8<sup>th</sup> ed. 2004; *American Heritage Dictionary of the English Language*, 4<sup>th</sup> ed. 2000, 2009; *Collins English Dictionary*, 2003; *see, e.g.*, *TheFreeDictionary.com* (“order to prohibit a party from doing or continuing to do a certain activity”).

<sup>16</sup> *Board of Zoning Appeals v. McKinney*, 174 Md. 551 (1938).

Since the *Ethics Code* charges the Ethics Commission with the burden of proof and grants the Ethics Commission the right to enforce a cease and desist order, the Ethics Commission has the requisite statutory authority to participate in the judicial review. The Court of Special Appeals has reviewed the issue of whether the Ethics Commission is precluded from appealing a trial court's ruling. *Carroll County Ethics Commission vs. Lennon*, 119 Md. App. 49, 52 (1998). Specifically noting the *McKinney* decision, the Court of Special Appeals of Maryland held that the Ethics Commission has the responsibility of protecting the public's confidence in government by prosecuting the ethical transgressions of government officials and represents the interests of the public and State; therefore, it has the requisite standing to appeal. *Id.* at 64.

This doctrine was extended in the decision of the Court of Appeals in *Calvert County Planning Commission*, where State's highest court reviewed the issue of whether a Planning Commission was a proper party in an action for judicial review in the circuit court. *Calvert County Planning Commission vs. Howlin Realty MGMT, Inc.*, 364 Md. 301, 305 (2001). The Court of Appeals held that, although the fundamental precept of *McKinney* has never been expressly overruled, when an agency's decision does or may have significance in terms of the agency's broader responsibilities, the confining limitations of *McKinney* are not applicable, and the agency must be free to intervene in judicial review. *Id.* at 319.

The Court of Appeals decisions in *the Carroll County Ethics Commission* and *Calvert County Planning Commission* cases limit the principle of *McKinney*. The Ethics Commission's decision to issue the cease and desist order has significance in terms of its broader responsibilities of protecting the public's confidence in regards to ethical issues relating to government officials. Petitioner's motion to strike the Ethics Commission's memorandum or refuse to permit the Ethic Commission's participation as a party in this judicial review will be denied.

## II. Motion to Strike (EMI and Co-Complainants)

Petitioner asserts that EMI and the co-complainants are not parties since the *Ethics Code* does not define complainants as parties, and the Ethics Commission determined several years ago that the *Ethics Code* implies that complainants are not parties to the proceedings.<sup>17</sup> Petitioner further asserts that although the Ethics Commission inappropriately

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<sup>17</sup> Petitioner cites to page 8 of the Ethics Hearing Transcript, where the Chairman of the Ethics Commission purportedly states: "The Ethics Ordinance makes no mention of the appropriate role of Complainants in this process. The Commission several years ago concluded that the ordinance implies that the Complainant is not a party to the proceeding and so is not entitled to present evidence or to

permitted the complainants to remain in the hearing room, despite the closed nature of the proceedings,<sup>18</sup> they were not permitted to participate and could only be called as witnesses to summarize the initial complaint filed. According to petitioner, since complainants are not entitled to be parties, they are not entitled to file a response pursuant to Md. Rule 7-204. That rule, in pertinent part, states:

- (a) Who may file; contents. Any person, including the agency, who is entitled by law to be a party and who wishes to participate as a party shall file a response to the petition. The response shall state the intent to participate in the action for judicial review. No other allegations are necessary.**

In their response, complainants outline EMI's role, effectively acting as a watchdog organization dedicated to promoting ethical government in Queen Anne's County. Complainants argue that it is not unusual for complainants in administrative proceedings to be recognized by the courts as proper parties for judicial review. Furthermore, complainants allege that the Ethics Commission's statement that complainants are not parties is taken out of context, as such a statement was meant to apply to cross-examining witnesses and similar procedural acts that may occur at the administrative hearing level. In the alternative, complainants request that they be allowed to intervene by filing an answering memorandum and [to] participate in the proceedings as *amicus curiae*.

Complainants cite case law which they allege supports their argument to be recognized as a proper party. In *Chesapeake Bay Foundation v. Clickner*, 192 Md 172 (2010), the Court of Appeals held that appellants must demonstrate they have a specific interest that will be affected personally and specially in a way different from the public generally. *Id.* at 189-190. In a more recent case involving a zoning appeal, residents opposed to a proposed development were entitled to seek judicial review. *Armstrong v. Mayor and City Council of Baltimore*, 409 Md. 648 (2008). Finally, the Court of Appeals held that a resident who was present at the administrative hearing and identified himself as interested in the outcome and made statements or arguments against pending zoning regulations, absent a regulation providing for a more formal method of becoming a party, is a party. *Morris v. Howard Research & Development Corp.*, 278 Md. 417, 422-23 (1976).

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cross examine evidence." While no exhibit was filed, the "transcript" apparently relates to the underlying November 15, 2010 hearing.

<sup>18</sup> A practice that need not be addressed here.

The petition for judicial review in the case at bar is distinguishable from those cited by complainants. Each case relates to issues before a zoning board. Although the *Ethics Code* does not provide a formal or traditional method for being designated a party, complainants do not have standing since their function neither grants them a specific interest affecting them personally and specially as opposed to the general public nor are they specifically aggrieved by the administrative decision. Therefore, they are not parties.

Alternatively, EMI and co-complainants move they be allowed to intervene and participate as *amicus curiae*. Complainants cite a decision of the Court of Special Appeals which held that the trial court did not abuse its discretion when a friend of the court brief, which brought legal authority to the court's attention, was filed in regards to a summary judgment motion. *Chicago Title Ins. Co. v. Lumbermen's Mutual Casualty Company*, 120 Md. App. 538, 565 (1998). Given their role in the administrative proceeding, designating EMI as a friend of the court and allowing it to participate as *amicus curiae* is appropriate. Allowing the co-complainants to participate individually would not be appropriate and will not be permitted.

#### **STANDARD OF REVIEW**

It is not for this Court to substitute its own judgment for that of the Ethics Commission. This Court must accept its conclusions and decision provided each is based upon credible and substantial evidence. Judicial deference is not, however, given to the Ethics Commission's interpretation of applicable law or regulation. As to factual determinations, substantial evidence in the record is necessary to support the factual findings and conclusions of the Ethics Commission.

EMI suggests that the Court look to the remedies of the Ethics Commission, rather than the "violation," in its judicial review. That position makes the most sense in this context. The Court has focused its attention on the three cease and desist orders. In giving the deference that is due to the Ethics Commission, the Court has concluded that remedies in the form of cease and desist orders - which are, in this instance, orders requiring petitioner to abstain or refrain from future conduct, rather than enjoining or implicating past or current conduct of petitioner - are not appropriate where they apply to future circumstances that are unlikely to occur or simply mimic the law that is already applicable to petitioner, as well as others identified in the *Ethics Code*.

## CONCLUSIONS

For the reasons previously stated, the Court will affirm the decision of the Ethics Commission to the extent that petitioner does have an actual and apparent conflict with respect to Wheatlands, a “violation” of §8-11.A.(2), and the cease and desist order remedy with respect thereto. As to the Ethics Commission’s decision that petitioner violated §8-11.A.(1) and (7), the decision is reversed and remanded to the Ethics Commission to issue an order consistent herewith.

THE CIRCUIT COURT FOR QUEEN ANNE'S COUNTY

IN THE MATTER OF

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CASE NO. 17-C-11-15897

BARRY WATERMAN

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ORDER

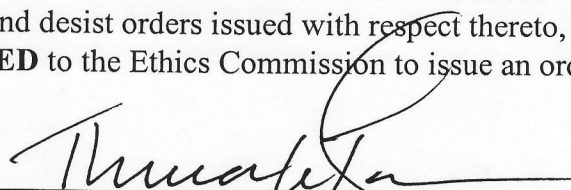
Based on the Court's review of the file and after consideration of arguments presented at the hearing on May 24, 2011, it is this 19 day of August, 2011, by the Circuit Court for Queen Anne's County

**ORDERED**, that EMI is designated as a friend of the court and shall be permitted to participate as *amicus curiae* in this matter; and it is

**ORDERED**, that participation by co-complainants, individually, is not appropriate, and their individual request to participate is denied; and it is

**ORDERED**, that the decision of the Ethics Commission as to "violation" of §8-11.A.(2), and the order that petitioner "...shall cease and desist in any activity as a member of the Queen Anne's County Planning Commission that relates to the Queenstown Comprehensive Plan" be, and it is hereby, **AFFIRMED**; and it is

**ORDERED**, that the decision of the Ethics Commission as to "violations" of §8-11.A.(1) and (7), and the remaining cease and desist orders issued with respect thereto, be, and it is hereby, **REVERSED** and **REMANDED** to the Ethics Commission to issue an order in conformity herewith.

  
Thomas G. Ross, Judge

August 19, 2011

**ENTERED**

AUG 19 2011

Case No. 17-C-11-15897

August 19, 2011

Clerk, Circuit Court  
for Queen Anne's County