

IN THE MATTER OF	*	IN THE
ST. MICHAELS	*	CIRCUIT COURT
ACTION COMMITTEE, LLC	*	FOR TALBOT COUNTY
Petitioner	*	MARYLAND
FOR JUDICIAL REVIEW OF THE	*	
DECISION OF THE ST. MICHAELS	*	
ETHICS COMMISSION	*	
IN THE CASE OF THE COMPLAINT OF	*	
ST. MICHAELS ACTION	*	
COMMITTEEE, LLC	*	
RE: WILLIAM E. BOOS	*	
Complaint No.: 2019-1	*	CASE NO: C20-CV-19-000086

\* \* \* \* \*

**MEMORANDUM OPINION**

**AND ORDER GRANTING WRIT OF MANDAMUS**

This matter comes before the Court on St. Michaels Action Committee, LLC’s (“SMAC”) Petition for Judicial Review of a decision dated May 1, 2019 of the St. Michaels Ethics Commission (“Ethics Commission”), in which it dismissed a complaint from SMAC alleging that Town Commissioner William E. Boos (“Commissioner Boos”)<sup>1</sup> had a conflict of interest with respect to the Town’s consideration of sites for a new Town Hall and police station.

SMAC raises the following issues on appeal:

1. Did the Ethics Commission improperly resolve disputed factual issues when it summarily dismissed SMAC’s Complaint *sua sponte*?

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<sup>1</sup> Commissioner Boos did not submit a Memorandum pursuant to Rule 7-402(b) and was not permitted to argue at the hearing.

2. Did the Ethics Commission improperly rely on a factual record from another proceeding that was supplied only by the Respondent, Commissioner Boos, which was misleading and incomplete?
3. Did the Ethics Commission improperly consider SMAC's Complaint during a closed session attended by a non-member, without any notice to SMAC or opportunity for SMAC to participate?
4. Did the Ethics Commission waive the attorney-client privilege by receiving legal advice in the presence of a non-member and then including much of this advice in its Motion to Dismiss in this action, such that the Ethics Commission should be required to supplement to the record with this information?
5. Did the Ethics Commission apply too narrow a view of "affiliate" and not consider Commissioner Boos's relationship with Curtis Stokes & Associates, which was encompassed in SMAC's Complaint?

The Ethics Commission has moved to dismiss the Petition on the following grounds: 1) there is no statutory right to appeal; 2) administrative mandamus is not available because the Commission's action was not administrative in nature; and 3) SMAC cannot be aggrieved by the Ethics Commission's decision.

For reasons that the Court shall explain, the Court finds that SMAC has standing to file an appeal for administrative mandamus pursuant to Rule 7-401 *et seq.*, and the Court finds that the Ethics Commission used an unlawful procedure to reach its decision. Accordingly, the Court will reverse the decision of the Ethics Commission and remand this matter to it for further consideration.

### ***Factual Background***

St. Michaels is a municipal corporation located in Talbot County. Commissioner Boos is one of the five elected Town Commissioners, the governing body of St. Michaels. In 2016, the Town Commissioners determined that the Town had outgrown its existing facilities and that it might be in the best interest of the Town to build a new Town Hall and police station. To that end, the Commissioners appointed an *ad hoc* committee to study the deficiencies in the Town's

current facilities and to make recommendations as to possible solutions. This *ad hoc* committee consisted of two Commissioners, Commissioner Boos and Commissioner Michael Bibb, the Town Manager, Jean Weisman (“Ms. Weisman”), Police Chief Anthony Smith, and two members of the public, Dennis Glackin and Constance Hope. In October 2016, the *ad hoc* committee engaged Crosby & Associates to conduct a needs assessment. In January 2017, Crosby & Associates presented the Commissioners with the needs assessment, in which it recommended the construction of a 3,300 square foot Town Hall and a 5,000 square foot police station. Crosby & Associates proposed that the police station be located on Fremont Street<sup>2</sup>, and estimated its cost to be \$1,900,000. In February 2017, Crosby & Associates recommended locating a 3,600 square foot Town Hall building on Boundary Lane<sup>3</sup> for a total cost of \$1,200,000. In April, the Town purchased the Boundary Lane property for \$200,000.

In May 2017, the Commissioners asked the *ad hoc* committee to consider a single building that could house both the police department and the Town government.

The Town owns property located at 301 Mill Street.<sup>4</sup> There is a March 28, 2016 letter of intent between the Chesapeake Bay Maritime Museum (“CBMM”) and the Town, whereby CBMM would convey property that it owns at 107 Mill Street to the Town in exchange for the Town’s conveying to CBMM the 301 Mill Street property.

Between August 2017 and March 2018, there were exchanges between Kristen Greenaway (“Ms. Greenaway”), the Executive Director of CBMM, and Town officials,

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<sup>2</sup> Although no maps are in evidence, the Court will take judicial notice of the geography of St. Michaels. Fremont Street runs one block west of and parallel to Talbot Street (Md. Route 33), which is St. Michaels’ main street.

<sup>3</sup> Boundary Lane is located at the south end of St. Michaels and intersects with Talbot Street.

<sup>4</sup> Mill Street is at the northern end of St. Michaels. It intersects with Talbot Street and provides access to a parking lot that can be used by visitors to the CBMM.

including Commissioner Boos, about the possibility of CBMM's exchanging property that it owns at 107 Mill Street for the Town's property located at 310 Mill Street.

On June 28, 2018, the Commissioners voted for the Town to accept a proposal to proceed with construction of a Town Hall on the Fremont Street property.

At a July 11, 2018 meeting of the Commissioners, Commissioner Boos acknowledged that the Town should look at the costs associated with using the 301 Mill Street property but recommended that the Town locate the new Town Hall on the Fremont Street property.

On August 8, 2018, the Commissioners voted to build the new Town Hall on the Fremont Street property. Commissioner Boos voted in favor of this proposal. At the meeting, Ms. Greenaway voiced her support for the proposed location of the new Town Hall.

In September 2018, certain problems with the Fremont Street property became apparent. On February 13, the Commissioners voted to amend the Zoning Ordinance to reduce the parking requirements that might be attendant to using the Fremont Street property as the new Town Hall/Police Station.

Commissioner Boos sent an inquiry to the Ethics Commission as to whether he had a conflict of interest because he was an agent for Curtis Stokes & Associates Yacht Brokerage (CS&AYB). CS&AYB had a brokerage arrangement with the CBMM to sell yachts and other boats that are donated to CBMM from time to time. Commissioner Boos sought the advice of the Ethics Commission because CBMM was interested in swapping property that it owned on Mill Street for 310 Mill Street. Commissioner Boos stated that, although CS&AYB had the agreement with CBMM, he would not be involved in any of the sales of boats owned by CBMM.

On January 17, 2019, the Ethics Commission notified Commissioner Boos that, based on the facts he had outlined, it found that there was no ethical problem.

On April 10, SMAC filed a Complaint with the Ethics Commission alleging that Commissioner Boos had a conflict of interest because of his affiliation with CS&AYB. CS&AYB's business relationship with CBMM compromised Commissioner Boos' ability to remain disinterested from CBMM's desire to acquire one of the potential sites for the Town Hall. As part of its Complaint, SMAC cited an email dated October 16, 2018 from Ms. Greenaway to Commissioner Boos in which she said she would like to discuss a brokerage issue with him.

St. Michaels' Ethics Ordinance is codified as Chapter 22 of its Town Code. SMAC's Complaint alleged that Commissioner Boos violated Section 22-5(A) and (D) of the Ethics Ordinance. Section 22-5(A) and D provide:

No Town official, Town Inspector or Town Employee shall:

(A) Participate on behalf of the Town in any matter which would, to their knowledge, have a direct financial impact, as distinguished from the public generally, on them, their spouse or dependent child, or a business entity with which they are affiliated.

\* \* \* \*

(D) Hold any outside employment relationship that would impair their impartiality or independence of judgment.

Count 1 of the Complaint alleged that Commissioner Boos violated Section 22-5(D) because Ms. Greenaway had invited him to negotiate on behalf of CS&AYB with CBMM, and that he failed to disclose this relationship. The Complaint posits that this relationship, if true, would disqualify him from considering any matters in which CBMM has an interest. Count 2 of the Complaint alleges a violation of Section 22-5(D) because Commissioner Boos' relationship with CS&AYB prevents him from considering any matters in which CS&AYB and CBMM have

an interest. Count 3 alleges a violation of Section 22-5(A) because Commissioner Boos participated in discussions and votes regarding the location of the Town Hall, when he was employed by CS&AYB, whose relationship with CBMM, prevented him from doing anything that might frustrate CBMM.

The Ethics Commission referred SMAC's Complaint to its attorney to investigate the allegations. On April 25, 2019 Counsel for the Ethics Commission met with the Ethics Commission and the Town Manager (Ms. Weisman), in closed session to consider SMAC's Complaint. On May 1, 2019, the Ethics Commission issued a written decision in which it dismissed each of the counts, finding that no reasonable person could conclude that there was a violation of the Ethics Ordinance.

***The Motion to Dismiss***

The parties concede that there is no statutory right to appeal, therefore, any permissible appeal to this Court would have to be pursuant to Rule 7-401 *et seq.*, administrative mandamus.

The Ethics Commission next asserts that administrative mandamus is not available to the SMAC because the Ethics Commissions actions were administrative in nature. This argument looks at an administrative function as it relates to the Open Meetings Act, Md. Cod Ann. GP § 3-101 *et seq.* Section 3-103 of the General Provisions Article provides that the Open Meetings Act does not apply to a public body when it is carrying out an administrative function. Md. Code Ann. GP § 3-103(a)(1)(i). The term "administrative function" includes, "the administration of ... the law of a political subdivision of the State." Md. Code Ann. GP § 3-101(b)(1)(2). In *Dyer v. Board of Education of Howard County*, the Court of Special Appeals determined that the action of the Ethics Panel of the Howard County Board of Education was carrying out an administrative function in that it was administering the law. 216 Md.App. 530, 538-9 (2010). In the instant

case the Board may have been carrying out an administrative function that would exempt it from the open meeting requirements. However, that exemption does not address whether its conduct of the proceedings would prevent the instant appeal. As will be discussed later, the Ethics Board used an unlawful procedure to reach its decision. Therefore, since the Ethics Board did not provide a hearing, its assertion that SMAC is not entitled to administrative mandamus fails.

The Ethics Commission asserts that SMAC does not have standing to bring this appeal. It cites *Bryniarski v. Montgomery County* to contend that in order to have standing to appeal one must have a property interest distinct from that of the public at large. 247 Md. 137, 144 (1967). *Bryniarski* held that for a party to be aggrieved by a zoning decision, “the decision must not only affect a matter in which the protestant has a specific interest or property right but his interest therein must be such that he is personally and specially affected in a way different from that suffered by the public generally.” *Id. Bryniarski*, however, is inapposite to this case because it is a zoning case. Zoning deals with the regulation of uses of land. *Mayor and Council of Rockville v. Rylyns Enterprises, Inc.*, 372 Md. 514, 531 (2002). Zoning deals with competing property interests, and, therefore, it is necessary to demonstrate a particular property interest to be aggrieved. *Id.*, at 542. St. Michaels Ethics Ordinance does not deviate from the State Ethics law, which is designed to ensure trust in government and independence and impartiality of officials. *Carroll County Ethics Commission v. Lennon*, 119 Md.App. 49, 71 (1998). Applications of ethics laws relate to specific instances, but the overall purpose is to hold government officials and employees accountable to the public.

The Ethics Commission also relies on *Medical Waste Associates, Inc. v. Maryland Waste Coalition, Inc.*, 327 Md. 596, 615 (1992). *Medical Waste*, however, is cold comfort to the Ethics Commission because it recognizes that an enabling statute can expand the concept of standing.

*Id.*, at 615-6. In this case, Section 22-4(C) provides that the Ethics Commission is “[t]o process and make determinations as to complaints filed by any persons alleging violations of this chapter.” This provision that allows any person to make a complaint confers a broad right on the public to complain of conduct of officials and employees of the Town. It is language without limitation. Therefore, the Court concludes that, under the terms of the St. Michaels Ethics Ordinance, SMAC has the right to maintain this appeal.

Section 22-4(C) provides that the Ethics Commission shall have the responsibility to “process and make determinations as to complaints filed by any person alleging violations” of the Ethics Ordinance. This section is to be read in contradistinction to Section 22-5(B), in which the Ethics Commission has the responsibility to publish advisory opinions to persons subject to the Ethics Ordinance as to its applicability to them. Subsection B contemplates a wholly different procedure than Subsection C. An action pursuant to Subsection C is an administrative action that the process under subsection C requires an adversary proceeding with the indicia of due process.

For these reasons, the Court will deny the Ethics Commission’s Motion to Dismiss.

***Standard of Review***

Rule 7-403 provides that a court may issue a writ of mandamus remanding a case for further proceedings if the decision results from an unlawful procedure or unsupported by competent, material and substantial evidence on the record.

## *The Substantive Claims*

### *A. Dismissal Sua Sponte*

As a threshold issue, SMAC alleges that the Ethics Commission improperly resolved the dispute by dismissing SMAC's complaint *sua sponte*.

The cardinal rule of statutory construction begins with the intention of the legislature. *Board of Education of Baltimore County v. Zimmer-Rubert*, 409 Md. 200, 214 (2009). To that end, statutory construction begins with the plain language of the statute. Section 22-4(C) provides that the Ethics Commission is “[t]o process and make determinations as to complaints filed by any person alleging violations of this chapter.”

The Ethics Commission adopted Ethics Rules of Procedure. These Ethics Rules of Procedure provide in pertinent part:

If the Ethics Counsel and Commission determine that there is a reasonable basis for believing that a violation has occurred, then a copy of the Complaint shall be mailed to the subject of the Complaint (“the Complainant”) [sic], who shall be afforded an opportunity for a hearing conducted on the record. Upon making a determination hereunder, the Commission shall advise the person making the Complaint and the person the subject thereof (“the Respondent”).

In its decision, the Ethics Commission, apparently based on the information provided to it by its counsel, determined that the complaint failed “to allege facts that would support a reasonable person in concluding that a violation of §22-5(D) occurred” (Count I); “that Mr. Boos’ ‘outside employment’ with CS&A did not impair his impartiality or judgment on this vote and that the complaint fails to allege facts that would support a reasonable person in concluding that a violation of §22-5(D) occurred (Count II); and “with respect to Mr. Boos’ vote at issue during the October 17, 2018 meeting and his action at issue during the November 14, 2018

meeting that the complaint fails to allege facts that would support a reasonable person in concluding that a violation of §22-5(A) occurred.” (Count III).

The Ethics Ordinance requires the Ethics Commission to make determinations as to alleged violations. Ethics Ordinance § 22-4(C). The Ethics Rules of Procedure permit the Board to dismiss a complaint if the complaint “fails to allege facts that would support a reasonable person in concluding that a violation of this chapter may have occurred.” Ethics Commission Rule 2(A)(2). There is no statutory grant that allows for a displacement of the Commission’s obligation to make determinations, and to make findings of fact. Instead of determining that the complaint, on its face, does not allege factual violations, it permits its counsel to make findings of fact and recommendations that it can adopt and accept. This process is not contemplated by the statutory grant of authority to make determinations.

As an administrative body, the Ethics Commission is limited by “what has been specifically conferred upon it by the legislature.” *Engineering Management Services, Inc. v. Maryland State Highway Administration*, 375 Md. 211, 222 (2003). Since this case involves a complaint by a third party, the Ethics Commission’s consideration of it is bound by Section 22-4(C), which requires the Ethics Commission to make a determination. The process that the Ethics Commission used was based on its Rule 2.A, which allows it to refer the matter to its counsel for review. This Rule, however, confuses two different concepts in reviewing a complaint. Rule 2.A(3)(B)<sup>5</sup> provides, “[i]f the Ethics Counsel and Commission determine that there is a reasonable basis for believing that a violation has occurred ...” This provision is problematic in two respects. First it confers upon the Ethics Counsel powers that the legislature

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<sup>5</sup> There does not appear to be a Rule 2.A(3)A).

had limited to the Ethics Commission itself. Section 22-4 of the Ethics Ordinance provides that the Ethics Commission shall be advised by the Town Attorney. It does not confer upon the Town Attorney any decision-making authority. The Ethics Commission's reliance on the apparent findings of its attorney did not comply with the statutory framework by which it was created and is, therefore, invalid.

The second problem with Rule 2.A(3)(B) is that it creates an ambiguous standard by which complaints are to be considered. Rule 2.A(3)(B) speaks of a reasonable basis for believing that there is a violation. However, Rule 2.A(2) provides that a complaint shall be dismissed "if it fails to allege such facts that would support a reasonable person in concluding" that a violation may have occurred.

This hodgepodge of standards confuses different ways by which cases may be disposed. Since neither the Ethics Ordinance nor the Ethics Rules provide any guidance on these standards, an examination as to how courts apply these standards is instructive. The concept of a "reasonable basis" is akin to disposition of a motion to dismiss filed pursuant to Rule 2-322. A motion to dismiss requires a court to "assume the truth of all well-pleaded relevant and material facts as well as all inferences that reasonably can be drawn therefrom." *A. J. DeCoster Co. v. Westinghouse Electric Corp.*, 333 Md. 245, 249 (1994). "Dismissal is proper only if the facts alleged fail to state a cause of action." *Id.* In this sense, if a complaint to the Ethics Commission allege a reasonable basis to proceed, then the Commission must determine whether the allegations amount to the violation of the Ethics Ordinance. SMAC alleged that Commissioner Boos had received a message from Ms. Greenaway to discuss a brokerage issue. This allegation may prove to be harmless. However, it indicates that Commissioner Boos may be receiving an inquiry from Ms. Greenaway, whose employer, uses CS&AYB for yacht brokerage. This

allegation minimally alleges that there may be an Ethics issue if Commissioner Boos considers matters that involve the CBMM.

Yet the Ethics Commission's Rules provide that the standard to be employed is whether "the allegations would fail to support a reasonable person in concluding that a violation of [the Ethics Ordinance] had occurred." Ethics Rule 1.A(2). This standard "a reasonable person in concluding" most closely approximates that standard that a court is to use in determining whether to grant a motion for judgment at the conclusion of a jury trial pursuant to Rule 2-519. Rule 2-519 requires a court to determine the legal sufficiency of the evidence. *Impala Platinum, Ltd. v. Impala Sales (USA), Inc.*, 283 Md. 296, 326-7 (1978). If the evidence is sufficient that reasonable minds could differ as the inferences to be drawn from it, then the evidence creates a factual issue. *Id.*, at 327-8. The critical point is that when the concept of a conclusion by a reasonable person is in play, there must be evidence upon which the Ethics Commission could draw a conclusion. In this case, the Ethics Commission did not consider any evidence, and, as such, the standard that it applied is inappropriate.

These standards are wholly different from one another. The concept of "reasonable basis" is akin to probable cause. That is to say, there must be a reasonable basis to support an allegation. In this context, the Complaint alleges that Kristen Greenaway had contacted Commissioner Boos regarding a brokerage issue. This allegation clearly sets forth a reasonable basis to believe that Commissioner Boos may have a relationship with CBMM that might create a conflict of interest. The standard that is set forth in Rule 2.A(2), however, is one that is generally applied after consideration of evidence, which has been submitted under oath and tested by cross examination, that a reasoning mind can reach but one conclusion. This standard is more akin to the standard to be applied by a court in considering a motion for judgment

pursuant to Rule 2-519. If there is any evidence, however slight, that is sufficient to generate a jury question, then the issue must go to the jury. *Orwick v. Moldawer*, 150 Md.App. 528, 532 (2003). If there is any dispute over material facts to allow a jury to draw a conclusion, then the court must deny the motion for judgment. *Nelson v. Carroll*, 355 Md. 593, 600 (1999).

It is also problematic that Ethics Rule 2.A(2) provides that if a complaint, “fails to allege facts that would support a reasonable person in concluding that a violation of [the Ethics Ordinance] may have occurred, Ethics Counsel shall recommend that the Commission dismiss the Complaint. The Commission shall inform the Complainant of its decision to dismiss ...” This elliptical language does not provide an alternative to dismiss and reinforces that the Ethics Rules constitute an abdication of the Ethics Committee of its statutory responsibility to determine Complaints by leaving the analysis and findings to Counsel. It is the Ethics Commission’s responsibility to determine facts and draw any reasonable inferences from evidence presented to it. The Ethics Commission, as with anyone, is free to accept or reject the advice of its attorney. However, its Rules indicate that it is bound to follow the recommendation of its attorney, thereby delegating its decision making authority to its attorney.

The Ethics Commission’s Rules not only fail to comply with its statutory mandate, they set up standards that are so confusing that the complainant cannot be reasonably assured of the process that will be used.

If there is a dispute as to any evidence, it is arbitrary and capricious for an administrative body to refuse to consider the evidence. *Heaps v. Cobb*, 185 Md. 372, 378 (1945). As noted, the Ethics Commission erroneously deferred analysis of the evidence to its Counsel. The failure to grant SMAC an evidentiary hearing that would allow it to call witnesses, produce evidence and cross examine other witnesses was an abuse of discretion.

Where facts, that can be supported by competent evidence, are alleged, then a hearing is appropriate to determine the facts of the case. *Baltimore Import Car Service & Storage, Inc. v. Maryland Port Authority*, 258 Md. 335, 345 (1970). Although *Baltimore Import* involved the dismissal of a declaratory judgment action, the Court of Appeals noted that administrative bodies have the obligation to determine disputes of fact. *Id.* In essence, the Ethics Commission is using the erroneous way in which it ruled on the Complaint to claim that SMAC has no right to appeal.

The Rules of Procedure mimic, but do not parrot Section 5-403 of the General Provisions Article, which permits the State Ethics Commission to dismiss a complaint if it determines from staff counsel's investigation that the complaint does not merit further proceedings. This mimicking, however, does not mean that that Rule 2 is proper. First and foremost, Section 5-403 is a statutory grant of authority to permit staff counsel to perform an investigation. Rule 2 is not found in any statutory grant of authority. Second, staff counsel is to present its findings to the State Ethics Commission. Md. Code Ann. GP § 5-403(c). Under Section 5-403(c) the determination to dismiss still rests with the State Ethics Commission. Under Rule 2, the determination to dismiss is to be made by counsel *and* the Ethics Commission. This Rule effectively includes the Ethics Commission's attorney in the decision making process, which is an impermissible delegation of authority by the Ethics Commission. It also exceeds the statutory responsibility of the Ethics Commission attorney to advise the Ethics Commission.

#### ***B. The Ethics Commission's Reliance on a previous advisory opinion***

SMAC contends that it was improper for the Ethics Commission to rely on a previous opinion that was incomplete. As noted, the manner by which the Ethics Commission considered SMAC's complaint was inconsistent with its statutory mandates. Accordingly, it was

inappropriate for the Ethics Commission to base its decision on the previous advisory opinion that it had provided to Commissioner Boos. It should be noted that the standards by which the Ethics Commission is to consider a request for an advisory opinion under Section 22-4(B) differs from its requirements under Section 22-5(C). Subsection B requires the Ethics Commission to provide guidance to Town employees, officials or inspectors. Subsection C requires it to make a determination. The Ethics Commission may consider its previous advisory opinion and the information upon which it was based. In this case, the Complaint was required to be submitted under oath. By considering information, that is not under oath, the Ethics Commission based its decision on information that did not have the same degree of solemnity as the Complaint. Since the advisory opinion is not a determination of any matter set forth in SMAC's complaint, it cannot be considered dispositive of any factual dispute.

### ***C. Closed hearing***

SMAC asserts that the Ethics Commission improperly considered its complaint in closed session with a non-member present without notice to SMAC.

The Court of Special Appeals has determined that Ethics Commissions are not subject to the Open Meetings Act, Md. Code Ann. GP § 3-101, *et seq.* *Dyer v. Board of Education of Howard County*, 216 Md.App. 530, 536 (2014). In that sense, there was no violation by meeting in closed session. However, since SMAC is entitled to an evidentiary hearing, it is entitled to notice of the proceedings. *Boehm v. Anne Arundel County*, 54 Md.App. 497, 512 (1982).

SMAC complains about the presence of Ms. Weisman at the closed session. When the Ethics Commission went into closed session, its counsel asserted that Ms. Weisman is an *ex officio* member of the Ethics Commission. This aspect of the Town Manager's duties is not

found in Charter or Code of the Town of St. Michaels. Section 22-4 of the Ethics Ordinance provides that the Ethics Commission shall be composed of three members and does not allude to any *ex officio* members. Section C-63 of the Town's Charter provides for the office of Town Clerk/Manager:

There shall be a Town Clerk/Manager appointed by the Commission. He or she shall serve at the pleasure of the Commission, and compensation shall be determined by the Commission. The Town Clerk/Manager shall be the chief administrative officer of the Town and shall be responsible for and undertake such duties as the Commissioners shall from time to time require of him or her. He or she shall also serve as the Town Clerk in accordance with the provisions of this Charter.

This Charter provision does not mention, nor does it contemplate the Town Manager's serving as an *ex officio* member of any Town board or commission. It should be clear what Ms. Weisman's role is. She cannot participate as an *ex officio* member of the Ethics Commission. She may act as a scrivener or otherwise to assist the Ethics Commission and not be subject to the scrutiny of being placed under oath or cross examination. If she provides evidence, then she must be placed under oath and be subject to cross examination.

#### ***D. Attorney Client Privilege***

SMAC contends that the Ethics Commission has waived attorney-client privilege because it relied on findings by the Town Attorney to rendered.

Section C-64 of the Charter of the Town of St. Michaels provides for the office of Town Attorney:

The Commission may appoint a Town Attorney. The Town Attorney shall be a member of the bar of the Maryland Court of Appeals. The Town Attorney is the legal adviser of the Town and shall perform such duties in this connection as may be required by the Commission.

As noted earlier Section 22-4 of the Ethics Ordinance provides that the Ethics Commission shall be advised by the Town Attorney. The concept of advice is set forth in Rule 19-302.1 (Rule 2.1 of the Rules of Professional Conduct for Attorneys) which provides:

In representing a client, an attorney shall exercise independent professional judgment and render candid advice. In rendering advice, an attorney may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

In the instant case, the role of counsel is defined by the enabling statute. Despite the statutory language, the Ethics Commission's rules constituted an impermissible delegation of its statutory responsibility to make determinations by requiring it to act in concert with the Town Attorney, instead of merely considering the Town Attorney's advice. In that context, whatever the holder of the office of Town Attorney did in this case was not done as an attorney and, therefore, there is no privilege.

Indeed, if a complaint on its face states something that is not covered by the Ethics Ordinance, then the Ethics Commission may dismiss it. If, however, the Complaint does allege a violation, then Section 22-5 (C) requires the Commission to make a determination. This determination requires fact finding. *Maryland Over-Pak v. Baltimore*, 395 Md. 16, 37 (2006). This fact-finding process is quintessential to an administrative bodies function. *Id.* In that context, it is incumbent the Ethics Commission to hold a hearing, place witnesses under oath, record the proceedings, permit the presentation of evidence by all interested persons and to allow for reasonable cross examination of witnesses. Instead of following its statutory mandate to make a determination, the Ethics Commission has, in essence, abdicated its responsibility to the Town Attorney.

*E. The Ethics Commission’s Construction of the term “affiliate”*

SMAC contends that the Ethics Commission used too restrictive a definition of the term “affiliated” in its May 1, 2019 Decision. The Ethics Commission noted that the statute does not define the term but looked at *Worsham v. Nationwide* for guidance. 138 Md.App. 487 (2001). That case involved a suit pursuant to the Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. § 477. *Id.*, at 493. In looking at how to define “affiliated entity” under that statute, the Court looked at the definition of the term under regulations of the Federal Communications Commission (“FCC”) under TCPA. *Id.*, at 506. These regulations indicated that Congress had defined the term under the Federal Communications Act of 1934 to mean:

the term “affiliate” means a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person. For purposes of this paragraph, the term “own” means to own an equity interest (or the equivalent thereof) of more than 10 percent.

*Id.*

As noted, in construing a statute, a court is to give terms their plain meaning. *C&P Telephone Company of Maryland v. Director of Finance for Mayor and Council of Baltimore*, 343 Md. 567, 578 (1996). The definition that the Ethics Commission advances is discrete and restrictive. *Webster’s Dictionary* defines “affiliate” as “[t]o accept as a subordinate associate; to associate (oneself) with.” *Webster’s II New College Dictionary*, © 1995, Houghton-Mifflin Company. This plain definition does not require ownership interest. The contemplated definition under the Ethics Ordinance is an association with another person or entity. The Ethics Commission must determine as a factual matter as to whether Commissioner Boos’ relationship with CS&AYB is an affiliation that would trigger a conflict of interest under the Ethics

Ordinance. It can only make such a determination after a hearing at which it considers competent evidence.

***Conclusion***

The Court had no vested interest in the outcome of the location of a Town Hall and police station for St. Michaels. Nor does the Court presuppose any result after a proper consideration of this case by the Ethics Commission. The Court's interest is that those mechanisms of government that are designed to protect the people be observed. A full hearing protects all concerned, including, and perhaps especially, Commissioner Boos.

For the foregoing reasons, the Court grant the petition for administrative mandamus, reverse the decision of the St. Michaels Ethics Commission in Complaint 2019-1, and remand this matter to it to hold a hearing in accordance with this Opinion.

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Hon. Stephen H. Kehoe, JUDGE  
Circuit Court for Talbot County, Maryland