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November 18, 2015

Steven C. Horn, Director
Division of Planning and Permitting
30 North Market Street
Frederick, Maryland 21701

*Re: Monrovia Town Center Remand Proceedings;
Maryland Public Information Act Request*

Dear Mr. Horn:

I am in receipt of your letter of November 16, 2015. The purpose of this letter is to state our client's strong objection to the direction of the Monrovia Town Center remand proceedings and the delay associated with same.

As you stated in your letter, on September 1, 2015, the County Council decided to remand these proceedings to the Planning Commission. In light of the County Council's own acknowledgement that the purpose of the remand proceedings is to consider the significance of the FACT letter with respect to the decision of the BOCC to approve the Monrovia Town Center, the County Council's decision to remand the case to the Planning Commission simply does not make sense. The Planning Commission already unanimously recommended approval long before the FACT Letter was ever submitted into the record at the final administrative hearing before the BOCC. Thus, the County Council does not have a legitimate reason for remanding the case to the Planning Commission.

Further, the County Council's decision to remand the case to the Planning Commission is not only illogical, it violates Maryland's "impermissible change of mind rule," which provides that:

[a]n agency... not otherwise constrained, may consider an action previously taken and come to a different conclusion upon a showing that the original action was the product of fraud, surprise, mistake, or inadvertence, or that some new or different factual situation exists the justifies the different conclusion." *Cinque v. Montgomery County Planning Bd.*, 173 Md. App. 349 (2007) (quoting *Calvert County Planning Comm'n v. Howlin Realty Mgmt, Inc.*, 364 Md. 301 (2001). An agency may not reconsider and reverse a decision based on a "mere change of mind." *Cinque*, 173 Md. App. at 361 (quoting *Howlin Realty Mgmt.*, 364 Md. at 325).

Halici v. City of Gaithersburg, 180 Md. App. 238; 265 (2008). In the instant case, the County Council cannot make a showing that the Planning Commission's unanimous recommendation of approval of the Monrovia Town Center project on March 26, 2014 was "the product of fraud, surprise, mistake, or inadvertence, or that some new or different factual situation exists that justifies the different conclusion." It is undisputed that the FACT letter did not even exist in the record before the Planning Commission. Thus, the record of the Planning Commission could not possibly have been "tainted" by the FACT letter.¹ In the absence of a legitimate basis for remanding this matter to the Planning Commission, the County Council's remand amounts to nothing more than an order to the Planning Commission to re-evaluate the case based on the same application and the same facts. The case has already been decided by the Planning Commission in the Applicant's favor, not once but twice, and the only thing that has changed is the Planning Commission's composition. Maryland law does not allow the Planning Commission to essentially re-try the same case without any legitimate basis for doing so. An agency cannot reconsider and reverse a decision based on a "mere change of mind." *Cinque*, 173 Md. App. at 361 (quoting *Howlin Realty Mgmt.*, 364 Md. at 325).

Further, while the County Council remanded this matter to the Planning Commission, the County Council did not require the Applicant to submit a new application. That issue was specifically addressed by the County Council on September 1, 2015. The County Council has not rescinded the Applicant's zoning, and the APFO LOU and DRRA continue to be valid and enforceable. Our client will not submit a new application and will not consent to any procedure with respect to further proceedings before the Planning Commission. Any further proceedings relating to this matter before the Planning Commission are illegal. Please understand that the Applicant will only appear for proceedings before the Planning Commission over the Applicant's strong objection as noted above. Moreover, the Applicant has absolutely no intention of presenting its case again (a third time) to the Planning Commission or providing any additional information to County staff. As stated above, the Planning Commission has already ruled in the Applicant's favor twice before the FACT letter ever surfaced, and nothing has changed. If the Planning Commission has questions with respect to our client's Application, the Planning Commission can refer to the existing administrative record.

Our client also strongly objects to the continued delay associated with these remand proceedings. The Circuit Court for Frederick County remanded this case to the County Council on March 10, 2015. The County Council took more than three months, until June 30, 2015, to reach the conclusion that it would review the record of the proceedings before the former BOCC to determine the significance of the FACT letter as to the BOCC's approval of the project. After finally reaching that conclusion, the County Council then took two months to review the administrative record, only to conclude on September 1, 2015 that the Applicant would not have to file a new Application but would be required to present its case again to the Planning Commission and then to the County Council. It took more than two additional months for the County to produce your letter of November 16, 2015. This lengthy and continued delay, now

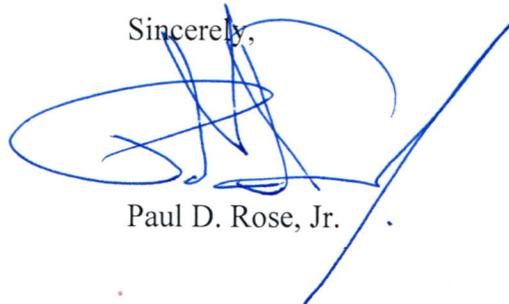
¹ The record of the County Council proceedings was not "tainted" by the FACT letter either. Council Members Delauter and Shreve and former Commissioner Young have all stated on the record or sworn by affidavit that the FACT letter was insignificant and did not affect their votes.

more than eight months since the Circuit Court's Order of March 10, 2015, violates the Applicant's Fifth Amendment rights against deprivation of property without due process of law. The length of the delay is patently unreasonable, and there is no valid reason for the delay. Further, the delay, which appears to be deliberate, prejudices the Applicant in that the future status of our client's zoning, the APFO LOU, and the DRRA are in a perpetual state of uncertainty.

I have copied Kathy Mitchell, the Planning Commission's counsel, to this letter. Since it would represent a clear violation of Maryland's impermissible change of mind rule for the Planning Commission to reconsider this matter, I strongly urge the Planning Commission to send this matter back to the County Council without further reconsideration. If the Planning Commission insists on moving forward with illegal proceedings, there is no need to wait until November 30, 2015 for a response as to whether the Applicant will submit a new application. You have our client's answer to that question.

Finally, my client objects to the extent that the County Executive is directing or involved in any way in these remand proceedings. Unlike Comprehensive Zoning, the granting of a piecemeal rezoning or a floating zone application is a quasi-judicial action that requires a written decision based on evidence presented in the record. Such an action is not subject to approval or veto by the County Executive. Thus, the County Executive has no role in these remand proceedings. Please accept this letter as a request under Maryland's Public Information Act for all documents that constitute communications between the County Executive's office and anyone else, including but not limited to Frederick County's planning staff, relating in any way to the Monrovia Town Center project.

Sincerely,



Paul D. Rose, Jr.

cc: Roy Stanley
Jan H. Gardner, County Executive
Frederick County Council
Doug Browning, Chief Administrative Officer
John Mathias, County Attorney
Michael Chomel, Senior Assistant County Attorney
Kathy Mitchell, Assistant County Attorney
Gary Hessong, Deputy Director, Planning and Permitting Division
Shawna Lemonds, Director of Development Review