

## FINDINGS OF FACT AND CONCLUSIONS

Pursuant to Section 41-12(G)(5) of the Calvert County Ethics Code (“Ethics Code”), the Calvert County Ethics Commission (“Ethics Commission”) adopts these Findings of Fact and Conclusions in the matter involving Commissioner Kelly D. McConkey.

The Ethics Commission considered two complaints submitted by Calvert County residents in this matter. Each alleges that Commissioner McConkey violated Section 41-13 (“Conflicts of Interest”) of the Ethics Code by participating in the August 6, 2019 vote of the Board of County Commissioners (“BOCC”) to adopt and incorporate “Option B” into the Draft Comprehensive Plan, thereby amending the draft Comprehensive Plan so as to expand the Huntingtown Town Center’s boundaries to include two properties which he owns.

The Ethics Commission unanimously finds that Commissioner McConkey violated the Ethics Code as alleged. As set forth below, Commissioner McConkey: (1) had a clear interest in the matter which he reasonably may have been expected to know; or, alternatively, (2) his participation had a direct or indirect financial impact on him, as distinguished from the public generally. The Ethics Commission further finds that Commissioner McConkey was not “required by law to act” in the matter, such as would permit his participation in accordance with Section 41-13(A)(2)(b), despite his conflict of interest.

### I. Procedural Objections

As an initial matter, we address the following procedural objections raised by Commissioner McConkey: (1) that the complaints should be dismissed as insufficient, because they were not physically signed by the complainants; and (2) that Ms. Jennifer Mazur, Chair of the Ethics Commission, should recuse herself from these proceedings. The Ethics Commission denies both objections, for the reasons set forth below.

#### a. Whether Complaints Should Be Dismissed for Lack of Signature

Commissioner McConkey argues that the Ethics Commission should dismiss the complaints as a procedural matter, because the complainants did not physically sign their names on the complaints which they submitted to the Ethics Commission via email.

We reject this argument. The Ethics Code provides that any person “may file a written, signed complaint with the Commission alleging a violation of any of the provisions of” the Ethics Code. § 41-12(A). It does not specify *how* such complaints must be signed. The Ethics Commission has long accepted complaints submitted via email, and the County Website includes an online form by which any individual may submit a complaint, concern, or other inquiry to the Ethics Commission without requiring their physical signature.<sup>1</sup>

Both complainants submitted their complaints to the Ethics Commission in their own name and using their own email addresses, as the Ethics Commission has long accepted. Commissioner McConkey does not raise any doubt as to whether the purported complainants actually filed the complaints, nor does he allege any harm or prejudice to him in these proceedings as a result of complainants submitting their

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<sup>1</sup> <https://www.calvertcountymd.gov/FormCenter/County-Administration-29/Calvert-County-Ethics-Commission-Complai-225>

complaints via email without physical signature. The Ethics Commission therefore finds that both complaints were sufficiently “signed” as required by Section 41-12(A).

b. Demand for Jennifer Mazur’s Recusal

Commissioner McConkey demands that the Chair of the Ethics Commission, Ms. Jennifer Mazur, recuse herself from these proceedings on the following grounds: (1) that Ms. Mazur has a conflict of interest arising from a *Calvert Recorder* article in which she is quoted, and in response to which Commissioner McConkey has now filed a lawsuit against her and the County; and (2) that she has made ex parte communications with the complainants in this matter.

After consulting with Counsel, Ms. Mazur declines to recuse herself, and the remaining Ethics Commission members concur with that decision.

i. Standard for Recusal

The Ethics Code requires a member of the Ethics Commission to recuse himself or herself from a matter if “a personal interest presents a *conflict of interest* or an *appearance of a conflict of interest*.” § 41-9(H) (emphasis added). Thus, a “personal interest,” however defined, is insufficient; there must be a “conflict of interest” or the “appearance of a conflict of interest” for recusal to be required.

As set forth in Section 41-13, a “conflict of interest” would exist in relevant part where: (1) Ms. Mazur has a *financial* interest in the matter; (2) a Business Entity sufficiently related to her is a party to the matter; or (3) where participation would, to her knowledge, have a direct or indirect financial impact upon her, her “Qualified Relative,” or her or the Qualified Relative’s affiliated Business Entity. *See also* Ethics Commission Rules of Procedure § 8(a) (providing in relevant part that an Ethics Commission Member “should recuse himself or herself from participating in a particular Ethics Proceeding” where the member “has a Conflict of Interest as defined in Section 41-13 of the Code”). Commissioner McConkey makes no such allegation here.

Similarly, the Ethics Code defines “apparent conflict of interest” to mean an “existing or anticipated situation or condition *that gives an indication of a conflict of interest* that is not or may not be a conflict of interest but can erode the confidence and trust of the people in the conduct of county business.” § 41-2 (emphasis added). As defined, then, there must be some “indication of a conflict of interest” for an apparent conflict of interest to exist. Again, no such indication exists here.

ii. *Calvert Recorder* “Interview”

Neither the *Calvert Recorder* “interview,” nor Commissioner McConkey’s separate lawsuit against Ms. Mazur and the County, give rise to a “conflict of interest” or an “apparent conflict of interest” on Ms. Mazur’s part.

As a factual matter, Commissioner McConkey’s attorney significantly misrepresents the nature and substance of Ms. Mazur’s communication with the *Calvert Recorder*. Rather than “giving an interview,” as he alleges, Ms. Mazur specifically *declined to comment* when contacted by the reporter, as the article itself makes clear:

In an interview with the Recorder, ethics chairman Jennifer Mazure [sic] would only say “We have more advisory opinion requests and ethics complaints than we normally have. I cannot reveal the nature of the complaints.”

Mazure [sic] said they are still allegations until the ethics board has completed its investigations.<sup>2</sup>

From this, Commissioner McConkey’s attorney alleges that Ms. Mazur “confirmed” that the Ethics Commission “has commenced investigations with respect to the complaints” and “revealed” that “the initial investigation had been concluded, and that it was moving forward to formal investigation.”<sup>3</sup> The article states no such thing.

Nor does Commissioner McConkey’s subsequent lawsuit against Ms. Mazur and the County create a “conflict of interest” or “appearance of a conflict of interest” requiring her recusal. For such conflict of interest to exist, Ms. Mazur must have some financial interest in these proceedings as set forth in Section 41-13. Commissioner McConkey does not allege as such, and Ms. Mazur does not appear to have any financial interest in the outcome of the complaints against Commissioner McConkey, regardless of the fact that he has brought a civil lawsuit, independent of these proceedings, in a different venue and alleging an entirely different cause of action.

### iii. Ex Parte Communications

Commissioner McConkey additionally argues that Ms. Mazur should recuse herself in light of her ex parte communications with the complainants. Ms. Mazur admits that she responded to complainants’ inquiries regarding the status of these proceedings, but states that she confirmed only that a hearing would be held on October 14.<sup>4</sup> Absent additional information, these ex parte communications do not require her recusal here.

As previously discussed, the Ethics Code requires recusal only where a “conflict of interest” is involved. § 41-13. Ms. Mazur’s ex parte communications do not give rise to any indication that she has a financial interest in the complaints against Commissioner McConkey, as would be required to show a “conflict of interest,” nor does Commissioner McConkey allege as such.

Commissioner McConkey correctly asserts that the Ethics Commission’s Rules of Procedure provide that any Commission Member “may recuse him or herself and withdraw from the Proceeding, if they deem it necessary to eliminate the effect of a prohibited Ex Parte communication,” Rules of Procedure § 7(B). However, such recusal is merely permitted, not required. Furthermore, it is not clear that recusal is “necessary to eliminate the effect” of the communication in this instance.

At the time of these communications, Commissioner McConkey already had filed suit against the Ethics Commission in open court, the court had held a public hearing, attended by a complainant, at which the fact the Ethics Commission would hold a hearing was discussed, and the court’s subsequent, unsealed order indicated that such a hearing would take place. The fact that a hearing would take place therefore

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<sup>2</sup> Tamara Ward, *Ethics Complaints Filed Against McConkey*, CALVERT RECORDER (Sept. 25, 2019), available at: [https://www.somdnews.com/recorder/news/local/ethics-complaints-filed-against-mcconkey/article\\_7acb9953-931f-58ff-8fd8-9367f874c2b6.html](https://www.somdnews.com/recorder/news/local/ethics-complaints-filed-against-mcconkey/article_7acb9953-931f-58ff-8fd8-9367f874c2b6.html).

<sup>3</sup> Hearing Transcript at 11.

<sup>4</sup> *Id.* at 18.

was already a matter of public knowledge, and the effect of Ms. Mazur's ex parte communication was to confirm information that was already made public in court proceedings brought by Commissioner McConkey.<sup>5</sup> Such confirmation does not give rise to any additional "effect" which would counsel, or be addressable by, Ms. Mazur's recusal from this matter.

## II. Facts and Analysis

Having considered Commissioner McConkey's objections, we now turn to the substance of the complaints against him.

### a. Facts

Commissioner McConkey owns two properties at issue, 22 Cox Road and 28 Cox Road, in Huntingtown. Prior to the August 6 vote of the Board of County Commissioners, neither property lay within the existing Huntingtown Town Center boundaries.

In preparing the Draft Comprehensive Plan,<sup>6</sup> the Calvert County Planning Commission presented the Board of County Commissioners ("BOCC") with two options regarding potential expansion of the Huntingtown Town Center, "Option A" and "Option B."<sup>7</sup>

Under Option A, the Town Center would expand from its current boundaries east across Route 4 to include Huntingtown High School only. Under Option B, the Town Center would expand to include Huntingtown High School, as well as certain properties including those owned by Commissioner McConkey. Based on materials provided at the June 25 and August 6 hearings,<sup>8</sup> Option B appears to increase the Huntingtown Town Center's boundaries by approximately one quarter square mile more than Option A, including the two properties owned by Commissioner McConkey.

At its June 25, 2019 hearing,<sup>9</sup> the Board of County Commissioners voted on a motion to adopt and incorporate Option B (then referred to as the "2017 Draft Plan") into the Comprehensive Plan. Commissioner Hart made the motion. Commissioner McConkey abstained<sup>10</sup> from that vote, which

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<sup>5</sup> Commissioner McConkey speculates that Ms. Mazur revealed the date of the hearing to the complainants. That would not change our analysis if true. Once it was public knowledge that a hearing would occur, revealing the precise date on which that hearing would occur is of minimal additional effect, in our view.

<sup>6</sup> The Comprehensive Plan is the "official policy document of Calvert County":

The Board of County Commissioners, the Planning Commission, and county departments use the Plan as a guide when preparing functional plans and small area plans, evaluating proposed projects or considering changes to legislation, such as the zoning ordinance. State agencies use the Plan to determine whether or not to provide state funding for a local project (e.g. Rural Legacy, Community Legacy, public infrastructure, community development projects, etc.).

<sup>7</sup> See "Calvert County Comprehensive Plan Update," June 25, 2019 at Slide 8, *available at*:

<https://www.calvertcountymd.gov/DocumentCenter/View/26543/WS1---Calvert-County-Comprehensive-Plan>; Mark Willis, "Calvert County Comprehensive Plan: Response to Commissioner Feedback," Aug. 6, 2019 at Slide 7, *available at*: <https://www.calvertcountymd.gov/DocumentCenter/View/28471/OB--Adoption-of-the-Calvert-County-Comprehensive-Plan>.

<sup>8</sup> *Id.*

<sup>9</sup> Video of the hearing is available at:

[https://calvertcounty.granicus.com/player/clip/1220?view\\_id=24&redirect=true](https://calvertcounty.granicus.com/player/clip/1220?view_id=24&redirect=true). Discussion of the Huntingtown Town Center expansion begins at 3:09:27.

<sup>10</sup> Though not the subject of either complaint, we note that the Ethics Code required Commissioner McConkey to recuse himself from that vote, rather than simply abstain. Under the County's recusal procedures, an individual

resulted in a 2-2 tie. As a result of that tie, the motion to adopt and incorporate Option B failed at that meeting.

The BOCC considered Option B again at its August 6, 2019 hearing,<sup>11</sup> and Commissioner Hart made the motion to adopt. Rather than abstain as he had previously, Commissioner McConkey seconded the motion and then voted in its favor. With his vote, the motion passed, 3-2, incorporating Option B into the Draft Comprehensive Plan.

At the same meeting, the BOCC subsequently voted to adopt the Draft Comprehensive Plan as a whole, 3-2, including Option B as previously adopted and incorporated.<sup>12</sup>

#### b. Legal Standard

The Calvert County Ethics Code broadly prohibits elected officials, appointed officials, and county employees (“covered individuals”) from participating in matters in which they have a conflict of interest, with certain exceptions. Two provisions are relevant here.

First, the Ethics Code provides that covered individuals “shall not participate” in a matter if the individual “has an interest in the matter of which the Elected Official, Appointed Official or Employee reasonably may be expected to know.” § 41-13(A)(1)(a). The Ethics Code defines “interest” to mean “any economic interest, either legal or equitable, whether or not subject to an encumbrance or a condition, owned or held, in whole or in part, jointly or severally, directly or indirectly,” with certain exceptions. § 41-2(N). A covered individual therefore violates the Ethics Code if he or she participates in a matter in which they have an economic interest.

Second, the Ethics Code prohibits covered individuals from participating in a matter on behalf of the County where doing so “would, to their knowledge, have a direct or indirect financial impact, as distinguished from the public generally, on” that individual. § 41-13(A)(1)(c). Neither the Ethics Code nor the State Ethics Code define the phrase “financial impact,” but the Ethics Commission understands it to mean some financial effect on the covered individual.

There is one relevant exception. Where a conflict of interest does exist, the Ethics Code nevertheless allows an otherwise disqualified Elected Official, Appointed Official, or Employee to participate in a matter if that person is “required by law to act.” § 41-13(A)(2)(b).

#### i. Recusal Procedure

The Ethics Commission’s 2015 Advisory Opinion on Recusal<sup>13</sup> clarifies the requirements and procedures for recusal. First, “if any doubt exists” regarding a potential conflict of interest, “advice from the Ethics Commission ought to be sought.” Second, recusal should be “absolute,” such that the conflicted official may not participate in any discussion or vote on the matter, discuss the matter or the review of the

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who recuses him or herself must not merely refrain from voting, but also must physically leave the room where any discussion or vote is taking place.

<sup>11</sup> Video of this hearing is available at:

[https://calvertcounty.granicus.com/player/clip/1230?view\\_id=24&redirect=true](https://calvertcounty.granicus.com/player/clip/1230?view_id=24&redirect=true). Discussion of the Huntingtown Town Center expansion begins at 57:30.

<sup>12</sup> *Id.* The vote to adopt the Comprehensive Plan begins at 1:25:15.

<sup>13</sup> *Available at:* <https://www.calvertcountymd.gov/DocumentCenter/View/9558/Advisory-Opinion-on-Recusal?bidId=>

matter with others, or even physically remain in the room during any hearings, discussion, or voting on the matter.

c. Analysis

We consider the following questions in reviewing the complaints: (1) did Commissioner McConkey have a conflict of interest in the vote to adopt Option B; and (2) if so, was he nevertheless “required by law to act” in the matter, thereby permitting his participation?

i. Did Commissioner McConkey Have a Conflict of Interest?

The Ethics Commission finds that Commissioner McConkey had a conflict of interest in voting to adopt Option B for incorporation into the Comprehensive Plan. The record makes clear that Commissioner McConkey had an interest in the matter of which he reasonably may have been expected to know; and that, alternatively, his participation would, to his knowledge, have had a direct or indirect financial impact on him, as distinguished from the public generally.

1. Commissioner McConkey’s Interest in the Matter

The Comprehensive Plan itself makes clear that Commissioner McConkey had an interest in the matter, due to the implications for his property of being included in the expanded Town Center boundaries.

To begin with, the Comprehensive Plan is the “official policy document of Calvert County” with respect to development:

The Board of County Commissioners, the Planning Commission, and county departments use the Plan as a guide when preparing functional plans and small area plans, evaluating proposed projects or considering changes to legislation, such as the zoning ordinance. State agencies use the Plan to determine whether or not to provide state funding for a local project (e.g. Rural Legacy, Community Legacy, public infrastructure, community development projects, etc.).<sup>14</sup>

As the adopted Comprehensive Plan explains, Town Centers “are the County’s primary designated growth areas” and “are areas where TDRs [transferable development rights] can be used to increase density to a maximum consistent with the approved Town Center zoning.” *Id.* at ES-4.

The Comprehensive Plan further states that Town Centers,

“are the focus of the county’s commercial and employment activities. These places are designated for the higher intensity and greater variety of commercial and residential development within the plan boundaries . . . Directing commercial, retail, and housing development to Town Centers is a central element in strengthening economic vitality in Calvert County and an important counterpart to policies designed to preserve the county’s rural land.

*Id.* at 8-14.

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<sup>14</sup> Comprehensive Plan at 1-1 (Adopted August 6, 2019), *available at*: [https://www.calvertcountymd.gov/DocumentCenter/View/28975/Comprehensive-Plan\\_Adopted-2019](https://www.calvertcountymd.gov/DocumentCenter/View/28975/Comprehensive-Plan_Adopted-2019).

The June 25, 2019 “Calvert County Comprehensive Plan Update” provided to the BOCC similarly notes in relevant part that Town Centers “promote business growth by providing infrastructure.”<sup>15</sup>

In furtherance of its Town Center strategy, the Comprehensive Plan identifies specific goals, objectives, actions for implementing those objectives, and the County parties responsible for carrying out those actions.

Defined objectives include “Encourage Development in Town Centers,” “Provide Incentives for Business Development in Town Centers and Employment Centers,” and “Make Improvements to Public Services and Facilities in Town Centers.” Comprehensive Plan at 11-19.

Specific action items include the following:

- “Prioritize the provision of broadband in Town Centers”;
- “Streamline the development review process in Town Centers. Maintain a fast-track permitting process for targeted businesses”;
- “Explore the use of TDRs [Transferable Development Rights] to increase commercial intensity in Town Centers”;
- “Provide county staff designated for each Town Center”;
- “Consider loans, tax reduction, and changes in taxing policies within State designated Priority Funding Areas (PFAs), grants, infrastructure, and training for workers”;
- “Direct public investment to infrastructure, services and support facilities in Town Centers”; and
- “Develop cost-sharing strategies that leverage private sector investment in water and sewer extensions.”

*Id.*

In addition, Town Centers are designated as Priority Funding Areas (PFA) for state funding purposes. Comprehensive Plan at A-23. “Being designated as a PFA makes the areas eligible for state investment including highways, sewer and water construction, economic development assistance, and state leases or construction of new state office facilities.” *Id.* at A-57.

Inclusion within a Town Center therefore has substantial economic and/or financial implications for property therein. This includes eligibility for state funding, fast tracked permitting review, investments in public infrastructure, use of transferable development rights, and other targeted benefits intended to foster commercial and other growth in those areas. As such, Commissioner McConkey clearly had “an interest in the matter.” Given his role as a County Commissioner who participated in numerous hearings on this subject, he also reasonably may have been expected to know of his interest in this matter.

## 2. Financial Impact Distinguished from the Public Generally

Alternatively, his participation at the time would, to his knowledge, have had a direct or indirect financial impact on him, as distinguished from the public generally. As discussed above, it is clear that his participation would have had a direct or indirect financial impact on him as the owner of those two properties. As a County Commissioner, he also would have had knowledge of that financial impact. Lastly, the impact of his participation upon him was distinguished from the impact upon the public

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<sup>15</sup> *Supra* n.7 at Slide 6.

generally, given the small amount of land at issue (roughly one quarter of a square mile) of which his property comprised a substantial part.

#### ii. Was Commissioner McConkey Required by Law to Act?

Commissioner McConkey argues that, regardless of whether he had a conflict of interest, Section 41-13(A)(2)(b) of the Ethics Code nevertheless permitted him to participate in the matter, because he was “required by law to act” in adopting a Comprehensive Plan. We disagree.

The Ethics Commission generally agrees that Section 41-13(A)(2)(b) permits the County Commissioners to vote either for or against the Comprehensive Plan as a whole, regardless of how that plan might affect their individual interests, because state law requires that they do so. However, the vote to adopt Option B into the Comprehensive Plan and the vote to adopt the Comprehensive Plan as a whole were two separate and distinct votes.<sup>16</sup>

While state law requires the County to adopt a Comprehensive Plan, it does not require Commissioners to choose between competing suggestions as to what that plan should entail. Nor does it permit them to do so without regard to the County’s conflict of interest rules. Commissioner McConkey does not – and cannot – claim that he was required to participate in the vote to adopt Option B.<sup>17</sup> Therefore, he was not “required by law” to participate in that vote and, as a result, his conflict of interest was not excused for participation under Section 41-13(A)(2)(b).

#### III. Conclusion

Having found that Commissioner McConkey violated the Ethics Code as alleged, the Ethics Commission adopts the strongest course of action within its authority by issuing a Letter of Censure and ordering Commissioner McConkey to cease and desist from any further violations of Section 41-13.

The Ethics Commission issues the Letter of Censure, rather than a milder Letter of Reprimand, in light of the apparent premeditated nature of the violation. Commissioner McConkey’s vote did not occur in a vacuum; instead, he participated only after his previous abstention caused Option B to fail, and despite significant public interest and criticism that his participation would violate the County’s conflict of interest rules.

At no point did Commissioner McConkey seek the Ethics Commission’s guidance or approval regarding his vote. Instead, he requested a nonbinding opinion letter from the County Attorney, which Commissioner McConkey voluntarily produced to the Ethics Commission in advance of the October 14

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<sup>16</sup> *Supra* n.11 & 12.

<sup>17</sup> At the Ethics Commission’s hearing on October 14, 2020, Commissioner McConkey stated that “there was no vote to adopt the whole Comprehensive Plan.” Hearing Transcript at 47. The video of the hearing shows otherwise, *supra* n.12, and the following exchange at the Hearing makes clear that he was not required to vote on Option B:

Q: So were you legally required to adopt Option B?

A: Was I legally required to do a certain option? No. I could choose the option that I feel is the best option [...]

Q: If I understand the questioning, it sounded like you were required to adopt it, so I just wanted to clarify that point.

A: Well, I’m legally [required] to adopt a comprehensive plan is what I said.



hearing.<sup>18</sup> That letter, dated one day prior to his August 6 vote to adopt Option B, makes clear that Commissioner McConkey and the County Attorney anticipated that the Ethics Commission would find a conflict of interest in the matter, as it both identifies that possibility and sets forth his best arguments in Commissioner McConkey's defense.

In doing so, it appears that Commissioner McConkey determined to "paper up" his vote in advance, so as to place himself in the best position possible to defend against any subsequent complaints or action by this body, rather than make a good faith effort to comply with the law.

If the Ethics Code has any meaning, it must stop elected officials from voting on matters in which they have a conflict of interest. The vote for Option B might have been the right choice from a policy perspective; it might not have been. We take no position in that regard. Our concern is that Commissioner McConkey had a conflict of interest, knew about that conflict of interest, and voted anyway. On that, our position is clear: Commissioner McConkey violated the Ethics Code by participating in that vote.

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<sup>18</sup> The County Attorney's opinion letter does not have force of law. As it notes, "the Calvert County Code only authorizes the Ethics Commission to provide an advisory opinion."