Circuit Court for Calvert County
Case No. C-04-CV-19-000574

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 29

September Term, 2021

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SUSAN DZUREC, ET AL

v.

BOARD OF COUNTY COMMISSIONERS OF CALVERT COUNTY, MARYLAND, ET AL

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Berger,
Shaw Geter,
Wilner, Alan M.
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Shaw Geter, J.

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Filed: December 27, 2021

This is an appeal from an order of the Circuit Court for Calvert County, granting summary judgment. Appellants, Susan Dzurec, Phyllis Sherkus, Michael King, and Myra Gowans, filed a Complaint for Declaratory Judgment on December 30, 2019 and a Second Amended Complaint for Declaratory Judgment on September 18, 2020. In the first count of the Second Amended Complaint, appellants alleged that the Calvert County Comprehensive Plan had been passed illegally because Calvert County Commissioner Kelly D. McConkey had a conflict of interest in the legislation and did not recuse himself. The Complaint also alleged that appellees made illegal amendments to the Comprehensive Plan ("The Plan"). Appellants requested that the circuit court void the Plan in light of Commissioner McConkey's alleged conflict. Following a hearing on January 23, 2021, the court granted appellees' motion for summary judgment. Appellants timely appealed and present one question for our review, which we have modified slightly:

> 1. Whether the Circuit Court erred in determining that the Board legally passed the Plan despite a direct conflict of interest of one of the Board members, Kelly D. McConkey?[1]

For reasons set forth below, we affirm the judgment of the circuit court.

## BACKGROUND

In mid-2019, the Calvert County Board of County Commissioners began the process of considering a new Comprehensive Plan for the county. The Plan is a "framework or vision for future growth to be implemented through local laws, such as zoning ordinances

[1] The appellants originally phrased the question as follows: Whether the Circuit Court erred in determining that the Board legally passed the Comp Plan despite a direct conflict of interest of one of the Board members, Kelly D. McConkey?

and subdivision regulations, and public investments over the next 20 to 25 years." Calvert Cnty. Gov't, *What is a Comprehensive Plan?* (last visited Oct. 1, 2021), https://www.calvertcountymd.gov/Faq.aspx?QID=288. The Board of County Commissioners held a number of meetings and public hearings in order to obtain feedback on various drafts of the Plan, and a vote on the Plan was held on August 6, 2019. Prior to that vote in April of 2019, Calvert County Attorney John Norris gave a presentation on ethical responsibilities to the Board. This presentation included an explanation of Calvert County's conflict of interest law and recusal policy.

County Commissioner Kelly McConkey is the owner of two parcels of real estate that would be affected by one version of the new Plan. During a Board meeting on June 25, 2019, Commissioner Michael Hart moved for the adoption of "Plan B," the version of the Plan that included Commissioner McConkey's parcels. Commissioner McConkey abstained from this vote, which was then tabled when the votes of the remaining commissioners were tied 2-2. On August 6, 2019, the Board voted again on Plan B. Commissioner McConkey participated in this vote, which led to the passage of Plan B and the Plan generally.

After the Plan's passage, members of the public submitted complaints to the Calvert County Ethics Commission, alleging that Commissioner McConkey's vote on August 6, 2019 violated Calvert County Code § 41 (the "Ethics Ordinance"). On December 15, 2020, the Calvert County Ethics Commission published a ruling, "stating that [Commissioner McConkey's] actions constituted a violation of the Ethics Ordinance[] and issued a letter of censure and a cease-and-desist order." Commissioner McConkey appealed this decision

to the Circuit Court for Calvert County. Agreeing with McConkey, the Circuit Court for Calvert County reversed the County Ethics Commission on August 17, 2021. The Ethics Commission appealed that decision to this Court and that appeal is pending.

In December of 2019, appellants filed a Complaint for Declaratory Judgment in the Circuit Court for Calvert County. They filed a Second Amended Complaint on September 18, 2020, contending (1) that Commissioner McConkey's conflict of interest required his recusal from voting on the Plan and without his vote, the Plan would not have passed and (2) the County Board of Commissioners made illegal amendments to the Plan. As relief, the Complaint requested that the circuit court void the Plan.

Appellee's trial counsel filed a Motion for Summary Judgment on December 14, 2020, and a hearing was held on January 22, 2021. The court granted appellee's Motion for Summary Judgment orally, ruling that the Plan had been passed and implemented legally. The court entered a written order to that effect on February 16, 2021.

## STANDARD OF REVIEW

"The question of whether a trial court's grant of summary judgment was proper is a question of law subject to *de novo* review on appeal." *Myers v. Kehoe*, 391 Md. 188, 203 (2006). "If no genuine dispute of material fact exists, we review questions of law under the non-deferential *de novo* standard of review, that is, whether the circuit court's conclusions of law were legally correct." *Uthus v. Valley Mill Camp, Inc.*, 472 Md. 378, 385 (2021).

## DISCUSSION

Appellants argue that the Calvert County Ethics Ordinance gives them an implied

right of action to sue the Board of County Commissioners over a violation of the County Ethics Ordinance. Appellants assert that the proper remedy for a suit based on that right of action would be for a court to invalidate any legislation that was passed because there was a conflict of interest. They contend the court should have invalidated the Plan because of Commissioner McConkey's alleged violation of the Calvert County Ethics Ordinance.

Appellee counters that the trial court's denial of appellant's declaratory judgment was proper because the adoption of the Plan was a purely legislative act that the judiciary does not have the power to invalidate. Appellee also argues that even if a court could void the Plan because of a conflict of interest, in the case at bar, there has been no finding of a conflict.

**Implied Right of Action**

A private right of action allows an individual to bring an action in his or her personal capacity to enforce a legal claim. *State Ctr., LLC. v. Lexington Charles Ltd. P'ship*, 43 Md. 451, 500 (2014). Such an action may be express or implied. *Fangman v. Genuine Title, LLC*, 447 Md. 681, 694 (2016). An express right of action exists only when a statute specifically provides a remedy. *Id.* "A private cause of action in favor of a particular plaintiff or class of plaintiffs does not exist simply because a claim is framed that a statute was violated and a plaintiff or class of plaintiffs was harmed by it. Rather, the issue is a matter of statutory construction." *Baker v. Montgomery Cnty.*, 427 Md. 691, 708 (2012). "A statute that involves a general benefit or command doesn't create an inference that the legislature intended an implied private right of action." *Holloman v. Mosby*, No. 1976, Sept. Term 2019 (citing *Baker*, 427 Md. at 710–11). "In determining whether an implied

right of action exists, our 'central inquiry' is whether the legislative body intended to provide a private right to bring suit." *Aleti v. Metropolitan Baltimore, LLC*, 251 Md. App. 482 (2021).

Pursuant to the Maryland Public Ethics law, which requires each county to establish provisions to govern the public ethics of local officials, Calvert County adopted an ethics code. Md. Code Ann. Gen. Provis. § 5-807 (2021). Appellants concede that the code does not provide an express right of action and argue that the basis for their implied right of action can be found within the statement of purpose of the Calvert County Code's Ethics Chapter. It reads as follows:

> A. The County, recognizing that our system of representative government is dependent in part upon the people having trust and confidence in their elected officials, appointed officials and employees, finds and declares that the people have a right to be assured that the impartiality and independent judgment of its elected officials, appointed officials and employees will be maintained.
>
> B. This confidence and trust is eroded when the conduct of County business is subject to improper influence or even the appearance of improper influence.
>
> C. The people have a right to be assured that the financial interests of elected officials, candidates, appointed officials and employees present no conflict with the public interest.
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> D. This chapter establishes ethical standards for elected officials, appointed officials and employees, financial disclosure and training requirements for certain elected officials, appointed officials and employees and disclosure requirements for candidates and lobbyists.
>
> E. For the purpose of guarding against improper influence and setting minimum standards for the ethical conduct of public business, the Board of County Commissioners of Calvert County enacts this chapter.
>
> F. It is the intention of the Board of County Commissioners that this chapter, except for its criminal

> sanctions, be liberally construed.

Calvert County Code § 41-4.

The U.S. Supreme Court set out the test for whether an implied right of action exists in *Cort v. Ash*, stating:

> In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff one of the class for whose especial benefit the statute was enacted. Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?

422 U.S. 66, 78 (1975) (cleaned up). The Court of Appeals most recently reaffirmed our use of those factors in *Fangman*, 447 Md. at 695 (citing *Baker*, 427 Md. at 708-11).

***Whether Plaintiff is one of the class for whose special benefit the statute was enacted.***

"If a statute's language provides a right to a particular class of persons, there is a strong inference that the legislature intended the statute to carry an implied cause of action. Conversely, that inference becomes attenuated when the statute is framed as a 'general prohibition or a command' to a governmental entity or other group or confers a generalized benefit." *Id* at 710-11 (internal citations omitted) (quoting *Univs. Rsch. Ass'n v. Coutu*, 450 U.S. 754, 772 (1981)). The question of whether an enactment benefits a special class "is not simply who would benefit from the [enactment], but whether [it was] intended to confer . . . rights upon those beneficiaries." *California v. Sierra Club*, 451 U.S. 287, 294 (1981). The law at issue must therefore "unmistakably focus on a[ ] particular class of

beneficiaries whose welfare [a legislature] intended to further," *id.*, and not be a generalized, "prohibitive command." *Baker*, 427 Md. at 711.

In the case at bar, we discern no intent in the language of the Ethics Code to provide a remedy to specific individuals, rather the language is framed generally. While the statement of purpose specifies that "the people have a right to be assured," such language does not translate into a benefit for a special class of individuals. The law does not "unmistakably focus on a particular class of beneficiaries whose welfare [a legislature] intended to further." *Sierra Club,* 451 U.S. at 294.

***Whether there was a Legislative Intent to create or deny a private remedy.***

"[W]here the legislative history is silent as to whether a statute gives rise to such a right, that silence weighs heavily against a private right of action*."* *Sugarloaf Citizens Ass'n, Inc. v. Gudis*, 78 Md. App. 550, 557 (1989), *aff'd on other grounds*, 319 Md. 558 (1990) (internal quotations omitted). "[I]mplying a private right of action on the basis of [legislative] silence is a hazardous enterprise, at best." *Touche Ross & Co. v. Redington*, 442 U.S. 560, 571 (1979).

In 2013, the Court of Appeals considered whether there was a legislative intent to create a private remedy in *Scull v. Groover, Christie & Merritt, P.C.* 435 Md. 112 (2013). In *Scull*, a health maintenance organization ("HMO") member argued that he had a private implied right of action that would allow him to sue the HMO for violating a provision that prohibited "balance billing." *Id.* at 115. When considering whether there was a legislative intent to create a private right of action, the Court stated:

> There is, of course, nothing explicit in the HMO statute about a private cause of action for violation of the balance billing prohibition. This is unsurprising, given that the issue before us is whether there is an implied cause of action. More to the point, nothing in the text of the balance billing prohibition in HG § 19–710(p) suggests that the Legislature believed that it was creating a new cause of action on behalf of HMO subscribers against health care providers—as opposed to creating a structure to foster HMO plans. Moreover, as the Court of Special Appeals noted, the legislative history of the prohibition against balance billing is devoid of any mention of an intent to create a private cause of action on behalf of patients against health care providers. While legislative silence is not conclusive, this certainly weighs against finding a private right of action.

*Id.* at 122-3.

Like in *Scull*, the legislative silence here weighs against a finding of an implied right of action. Looking at prior iterations of the Ethics Ordinance, we note that the enforcement provisions have changed throughout the years but have not included a private right of action. *Compare* Calvert County Code § 41 (2021) *with* Calvert County Code § 41 (2002). When examining an earlier version of the Ethics Ordinance we found a number of differences from the current law. For example, the 2002 version of the Code had references to letters of reprimand, and it also contained a provision that made the failure of an appointee or candidate for public office to file a financial disclosure grounds to make the appointment illegal. Calvert County Code § 41 (2002). In the current law, the enforcement provisions related to government officials include the ability to issue a cease-and-desist order, to enforce that order in court, to issue letters of reprimand, or to take personnel action. Calvert County Code § 41 (2021). These changes make it clear that had there been

intent to create a private right of action within the Ethics Ordinance, the provision would have been added explicitly.

In addition, the Ethics Ordinance specifically provides the Ethics Commission with a means for redressing violations. The existence of these explicit remedies heavily implies that there was no intent to give citizens a right of action, as it would have been expressly included in the text of the statute. *See Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO*, 451 U.S. 77, 93–4 ("The comprehensive character of the remedial scheme expressly fashioned by [a legislature] strongly evidences an intent not to authorize additional remedies."). Without any legislative history to prove otherwise, there is no clear legislative intent to create a remedy.

***Whether a private right of action is consistent with the underlying purpose.***

As there may be reasonable arguments on both sides, we hold as we did in *Aleti*, that "whether the creation of an implied right of action would be consistent with the legislative purpose is a policy judgment that is not for us to make." We observe that the Ethics Ordinance is a legislative scheme that lays out the ethical boundaries for government officials and employee behavior. It allows the Ethics Commission to issue fines, cease and desist orders, and/or seek injunctive relief and it provides a mechanism for the public to file complaints to the Ethics Commission.

In conclusion, we hold that a right of action is not implicit in the Calvert County Ethics Ordinance. The *Fangman* factors clearly weigh against a finding of an implied cause of action. The statute does not focus on a particular class, it is silent as to a remedy and whether creating such a right of action would be consistent with legislative purpose is a

policy judgment, not appropriate for our review.

**Voidability**

Assuming, *arguendo*, appellants do have a right of action, they argue that voiding the legislation would be allowable under Maryland law. Appellee counters that in multiple cases, the Court of Appeals has rejected this notion. In our view, the power of the courts to void such legislation is very narrow.

A court may invalidate local legislation if the local government in question did not comply with enabling legislation requirements or acted *ultra vires*. *Sugarloaf Citizens Assoc. v. Gudis*, 319 Md. 558, 569 (1990) (citing *Walker v. Talbot Cnty.*, 208 Md. 72, 86 (1955)). An act is *ultra vires* when it is "beyond the scope of power allowed or granted . . . by law." *Ultra Vires*, *Black's Law Dictionary* (11th ed. 2019). Appellants imply that Commissioner McConkey's participation in the Plan vote was *ultra vires* because of his alleged conflict of interest. We do not agree as we found nothing in Maryland case law that indicates an alleged conflict of interest (or the alleged appearance of such a conflict) is an *ultra vires* act. *See Kenwood Gardens Condo v. Whalen Props., LLC*, 449 Md. 313, 338 (2016 ("Judicial scrutiny of legislative action under the court's ordinary jurisdiction 'is limited to assessing whether [a government body] was acting within its legal boundaries.'" (cleaned up) (quoting *Talbot Cnty.. v. Miles Point Prop., LLC*, 415 Md. 372, 393 (2010)); *see also Maryland Overpak Corp. v. Mayor and City Council of Baltimore*, 395 Md. 16, 33 (2006) ("Legislative or quasi-legislative decisions of local legislative bodies are . . . not subject to ordinary judicial review; instead, they are subject to very limited review by the

courts." (quoting *Gisriel v. Ocean City Bd. of Supervisors of Elections*, 345 Md. 477, 490 n.12 (1997))).

In *Sugarloaf Citizens Assoc. v. Gudis*, the Sugarloaf Citizen's Association sued the Montgomery County Council in order to void council action that they said was improperly passed due to a councilmember's conflict of interest. 319 Md. 558, 558 (1990). The lawsuit was based on a provision of the Montgomery County Code that allowed a court to "void an official action taken by an official or employee with a chapter when the action arose from or concerned the subject matter of the conflict . . . if the court deems voiding the action to be in the best . . . interest of the public." *Id.* at 566 (quoting Montgomery County Code §19A-22). Ultimately, the Court of Appeals held that the relevant provision of the Code attempted to unconstitutionally vest a nonjudicial power in the court, and therefore, the suit could not proceed. *Id.* at 568-70. The Court stated:

> Courts usually do not inquire into legislative motivation as a basis for setting aside legislation. The common-law rule against inquiry into legislative motivation indicates that at common law stock ownership or similar conflict of interest on the part of a legislator ordinarily would not be a basis for striking down a statute for which the legislator has voted. That rule seems to apply to truly legislative action.

*Id.* at 577–8 (citations omitted).

Appellants and appellee both agree that Commissioner McConkey's actions were purely legislative. Voiding the legislation because of concerns about a legislator's motivation is not a remedy available under these circumstances. Further, even if we could void a legislative act because of conflict of interest concerns, the provision that created the conflict would be severable from the other portions of the Plan. "[T]here is a 'strong

presumption "that a legislative body generally intends its enactments to be severed if possible."'" *Id.* at 574 (quoting *State v. Burning Tree Club, Inc.*, 315 Md. 254, 297 (1989)).

> In determining whether or not the valid portions of a statute or statutory scheme are severable from the invalid portions, the courts look to the intent of the legislature. The intent to be ascertained in questions of severability, however, is not the "actual" legislative intent; the actual legislative intent is manifestly to pass the act as written in its entirety. Rather, when severability is the issue, the courts must look to what would have been the intent of the legislative body, if it had known that the statute could be only partially effective.

*O.C. Taypayers For Equal Rights, Inc. v. Mayor and City Council of Ocean City*, 280 Md. 585, 600 (1977). Here we found no basis to conclude that the County Council intended that this specific provision would not be severable from the rest of the Plan. Thus, even if the remedy was to invalidate the Plan, we would invalidate the single provision affected by the alleged conflict and not the entirety.

**Existence of Conflict**

Next, appellants contend that there need not be an actual finding of conflict in order for this Court to rule in their favor. Appellee argues that there must be a final finding of a conflict in order for this Court to declare the Plan void. We agree with appellee and note even if the Plan could be voided, the trial judge here did not hold that there was a conflict of interest.

Appellants next ask this Court to find that there was a conflict. We do not have the authority to do so. While there may be some limited situations in which an appellate court has the authority to review a case for a conflict of interest, the situation here, where there is neither a statutory right of action nor a common law right of action, is not one of those

limited situations, and as such, we decline to address this issue and further decline to render any findings of fact.

**Policy Considerations**

Appellants argue that they should have a private right of action to void the law because without that remedy the Ethics Commission's cease and desist order is "meaningless." We disagree. While the order may not have accomplished what appellants wanted it to accomplish, it directed Commissioner McConkey to "cease and desist from any further violations of Section 41-13." The order also informed Commissioner McConkey that should he further violate the cease and desist, the Ethics Commission would seek enforcement of the order in court as allowed by the Ethics Ordinance.[2] These consequences are far from "meaningless."

Additionally, there are any number of remedies, legal or otherwise, available here to resolve appellant's concerns. A resident of Calvert County could file an ethics complaint to have their concerns about a conflict of interest addressed. Citizens who would like to see Calvert County's government move in a different direction may run for office themselves or support a new candidate. They may lobby a future Board of County Commissioners to pass a new Plan to replace the one that appellants object to. We cannot create a remedy where there is none, particularly not when the law provides explicit statutory remedies to address concerns.

[2] As noted, *supra*, the Circuit Court for Calvert County reversed the ruling against Commissioner McConkey, and the appeal of the Ethics Commission to this Court is on-going. For the sake of clarity, we write here as to the potential effects of the cease and desist order if it had not been reversed to show that it would not have been "meaningless."

In conclusion, the Calvert County Code does not provide an express or implied right of action for a violation of its ethics ordinance, and even if it did, the proper remedy would not be invalidating the entire Plan. We therefore hold that appellee's motion for summary judgment was properly granted.

**JUDGMENT OF THE CIRCUIT COURT FOR CALVERT COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.**