

IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND

STATE OF MARYLAND

*

v.

*

Case Nos. 109210016

SHEILA ANN DIXON

*

.....

STATE'S OPPOSITION TO THE MOTION TO DISMISS FILED BY THE
DEFENDANT, SHEILA DIXON

Now comes the State of Maryland by the undersigned counsel and in Opposition to the Motion to Dismiss filed by the defendant says the following:

1. Legislative immunity and privilege do not apply to state criminal prosecutions of local officials.
2. Neither the evidence presented to the grand jury nor the facts alleged in the indictment call into question any legislative acts of the defendant.
3. Assuming *arguendo* that any of the evidence before the grand jury could be construed to be protected by legislative privilege, dismissal of this facially valid indictment is not warranted.
4. The Maryland law does not require the use of the short form indictment and the present indictment contains the all of the essential elements, including the terms "falsely" and "willfully" which necessarily involve corruptly.
5. The allegations of the indictment are sufficient in that they substantially state the elements set forth in § 9-103 of the *Criminal Law Article*.
6. The allegations of the indictment are sufficient in that they adequately apprise the defendant of the charges against her by alleging the essential elements of the crimes charged.

7. The Baltimore City Ethics Ordinance is not void for vagueness simply because the phrase "regulated by the City" is not statutorily defined.
8. The failure of the City to maintain a list of entities doing business with the city does not discharge the defendant of her duty to disclose all gifts required to be reported on her financial disclosure statements.
9. Since many of the issues raised and argued by the defendant in her motion to dismiss in the previous (now dismissed) case are simply inapplicable to this case, all portions of Exhibit 5 to the defendants Motion to Dismiss in this proceeding not specifically raised and argued by the defendant in this case should be stricken from the record.

WHEREFORE, for the reasons set forth herein and in the accompanying Memorandum in Support of the State's Opposition to Defendant's Motion to Dismiss, and for such other and further reasons as may be raised a hearing, the State of Maryland respectfully prays that this Honorable Court DENY the defendant's Motion to Dismiss, and ORDER that those portions of the defendant's Exhibit 5 not specifically raised and argued in this case be stricken from the record.

Respectfully submitted,

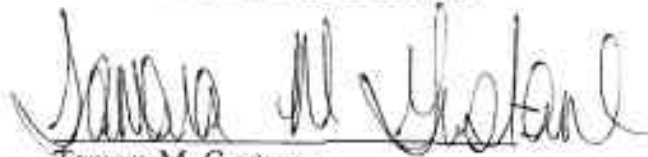
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of September, 2009 a copy of the foregoing **STATE'S OPPOSITION TO THE MOTION TO DISMISS FILED BY THE DEFENDANT, SHEILA DIXON** was mailed, postage prepaid, to:

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Thomas M. McDonough

IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND

STATE OF MARYLAND

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Case Nos. 109210016

SHEILA ANN DIXON

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**MEMORANDUM IN SUPPORT OF THE STATE'S OPPOSITION TO
DEFENDANT'S MOTION TO DISMISS**

The defendant has moved to dismiss the charges in this case on grounds that include claims of legislative immunity and privilege, allegations that the language in the charging document is somehow insufficient, and alleged inadequacies in the statutory scheme under which the defendant is charged, and the implementation of that statute by the City. As the State demonstrates below, defendant's contentions, while quite creative, are really just creative fiction. They are neither supported by the law nor the facts.

I. LEGISLATIVE PRIVILEGE

A. Introduction

Defendant's Motion to Dismiss on the basis of legislative immunity and privilege is wrong on multiple levels. As the State argued in the earlier proceeding, legislative privilege and immunity simply do not apply in State criminal prosecutions of local officials. Except for dicta in a few civil cases, there is nothing in the English or American common law that suggests any such privilege in criminal cases applies to local officials. In fact, in early English common law, there were not even local legislative subdivisions. There was only one Parliament and it was only to members of Parliament that the privilege extended.

However, recognizing this Court's opinion in the earlier case and not wanting to re-plow extensively the same ground in this memorandum, the State will address the

defendant's new contention that virtually every act she takes is cloaked in legislative privilege. This untenable position has been resoundingly rejected by the courts and for good reason.

The defendant's motion to dismiss on the basis of legislative immunity and privilege should be denied not only because the immunity and privilege does not apply to this prosecution but because, equally importantly, nothing was presented to the grand jury or alleged in the indictment which calls into question any of the defendant's legislative acts.¹ Of course, the burden to establish the applicability of the immunity or privilege is upon the person asserting it. *United States v. Rostenkowski*, 59 F.3d 1291, 1300, 313 U.S. App. D.C. 303 (D.C. Cir., 1995). See also, *E.I. du Pont de Nemours & Co. v. Formapack, Inc.*, 351 Md. 396, 415, 718 A.2d 1129, 1138 (1994); *In Re: Grand Jury Proceedings*, 33 F.3d 342, 353 (4th Cir, 1994); *In re Grand Jury Investigation*, 918 F.2d 374, 385 (3d Cir., 1986).

B. Legislative Immunity And Privilege Do Not Apply to State Criminal Prosecutions of Local Officials

Extensive research has failed to reveal a single criminal prosecution, either in the United States courts or the courts of England, where legislative privilege or immunity has been applied to prosecution initiated and prosecuted by one level of government against an official of a subordinate level of government.² The question of whether and to what

¹ The earlier indictment contained references to the defendant having voted on the revised Baltimore City Ethics Ordinance. The grand jury in this proceeding did not hear any such testimony and the indictment does not contain any references to the defendant's legislative acts.

² The State recognizes that this court, in related proceedings, has ruled that legislative immunity and privilege applies to State criminal prosecutions of local legislators. The State respectfully disagrees with the position taken by the court, and therefore renews its arguments in this proceeding. We briefly restate our argument here, and further rely upon and incorporate herein as if set forth in full the arguments previously submitted on this issue in *State v. Dixon*, 109009009, and *State v. Holton*, 109007007, attached hereto as Appendices I and II, respectively.

extent the immunity and privilege apply in such proceedings has never been decided by an appellate court of this State is one of first impression in this State.³

In *United States v. Brewster*, 408 U.S. 501; 92 S. Ct. 2531; 33 L. Ed. 2d 507, the Supreme Court, introducing its discussion and analysis of the scope of legislative privilege and immunity, noted that

Although the Speech or Debate Clause's historic roots are in English history, it must be interpreted in light of the American experience, and in the context of the American constitutional scheme of government rather than the English parliamentary system. We should bear in mind that the English system differs from ours in that their Parliament is the supreme authority, not a coordinate branch. Our speech or debate privilege was designed to preserve legislative independence, not supremacy. Our task, therefore, is to apply the Clause in such a way as to insure the independence of the legislature without altering the historic balance of the three co-equal branches of Government.

It does not undermine the validity of the Framers' concern for the independence of the Legislative Branch to acknowledge that our history does not reflect a catalogue of abuses at the hands of the Executive that gave rise to the privilege in England. There is nothing in our history, for example, comparable to the imprisonment of a Member of Parliament in the Tower without a hearing and, owing to the subservience of some royal judges to the 17th and 18th century English kings, without meaningful recourse to a writ of habeas corpus. In fact, on only one previous occasion has this Court ever interpreted the Speech or Debate Clause in the context of a criminal charge against a Member of Congress.
[Footnotes omitted]

For these reasons, among others, the Supreme Court in *United States v. Gillock*, 445 U.S. 360; 100 S. Ct. 1185; 63 L. Ed. 2d 454(1980) refused to recognize a common law legislative privilege in Federal criminal prosecutions of State or local officials. These

³References to application of the immunity and privilege to State criminal proceedings against local officials can be found in *dicta* in two opinions of the Court of Special Appeals. Both cases were civil proceedings in which application of the immunity and privilege in State criminal proceedings against local officials was not an issue.

historical considerations and the need to maintain the separation of powers between co-equal branches of government, the primary reasons supporting the application of the privilege to criminal cases in America, simply do not support the application of a common law immunity or privilege in federal prosecutions of State or local legislators.

Id.

The same reasoning militates against application of legislative immunity or privilege in State prosecutions of local officials. Application of legislative immunity or privilege serves no separation of powers purpose in such a prosecution, since the issue is not between co-equal branches of government. Likewise, our history does not reflect a catalogue of abuses at the hands of the Executive that gave rise to the privilege in England.

Since common law legislative immunity does not apply to State prosecutions of local officials, the defendant's motion to dismiss should be denied.

C. Neither The Evidence Presented To The Grand Jury Nor The Facts Alleged In The Indictment Call Into Question Any Legislative Acts of the Defendant

The State was careful to avoid any reference in the testimony or evidence presented to the grand jury to any matter within the legislative privilege. In doing so The State was mindful of the analysis of this court in its Memorandum explaining its dismissal of related charges in May, 2009.⁴ No privileged material was presented to or considered by the May 2009 Baltimore City Grand Jury, the indicting grand jury in this case.

⁴ See, Sweeney, J., Memorandum On Legislative Immunity. A copy is attached hereto as Appendix III.

Assuming *arguendo* that a common law legislative immunity and privilege apply to a State criminal prosecution of a local official, the defendant's conception of the scope of that protection is vastly over-exaggerated at best. For example, the suggestion that the defendant's attendance at a ground-breaking ceremony is anything but a political public relations photo opportunity is little short of ludicrous.

For more than two hundred years, beginning with the 1808 case of *Coffin v. Coffin*, 4 Mass. 1 (1808) it has been clearly recognized that legislative privilege exists for the benefit of the public, not for the benefit of the individual legislator. See also, *Kilbourn v. Thompson*, 103 U.S. 168, 203, 26 L.Ed. 377, 391(1881); *Tenney v. Brandhove*, 341 U.S. 367; 71 S. Ct. 783; 95 L. Ed. 1019 (1951); *Hutchinson v. Proxmire*, 443 U.S. 111; 99 S. Ct. 2675; 61 L. Ed. 2d 411(1979) .

In the earlier proceedings the defendant's constant refrain was that the State had not established any facts to show that the defendant knew that Mr. Lipscomb and his entities either did business in Baltimore or had been regulated by the City. With the guilty plea of Mr. Lipscomb and his agreement to cooperate, the present grand jury had the benefit of hearing instances when and how the defendant clearly and unmistakably knew of Mr. Lipscomb's involvement with Baltimore City projects and work. Mr. Lipscomb was purposely not asked about the discussions which may have occurred during meetings which Ms. Dixon attended. Instead, Mr. Lipscomb was asked whether he and his partners were at meetings with Ms. Dixon for the limited purpose of showing that Ms. Dixon knew he was involved in the Strathdale project. Again, because Mr. Lipscomb was never asked before the grand jury what was discussed at the meetings (except that the topic was Strathdale), the grand jury heard only that Mr. Lipscomb was

there as a member of the Strathdale project. His testimony on this subject culminated when Mr. Lipscomb was asked about his and Ms. Dixon's attendance at the Strathdale project groundbreaking ceremony in August, 2003. Specifically, he was asked, "Was Ms. Dixon aware of your involvement with Strathdale?" Considering both he and his partner spoke at the ceremony, Mr. Lipscomb unequivocally responded, "Yes."

(Appendix II, Lipscomb testimony, p. 9-10)

This imaginative attempt to stretch the limits of legislative privilege to events which were unmistakably for Ms. Dixon's personal and political benefit can only be described as astounding. The defendant wants this Court to equate actions undertaken "in her capacity as City Council President"⁵ with "legislative acts" an analysis which the Supreme Court has uniformly rejected. Various cases have restricted application of legislative immunity and the privilege to those actions the official takes **in the course of enacting legislation**. *United States v. Brewster*, 408 U.S. 501, 92 S. Ct. 2531; 33 L. Ed. 2d 507 (1972); *Gravel v. United States*, 408 U.S. 606, 625, 92 S. Ct 2616, 33 L. Ed. 2d 583 (1972).

In *Brewster*, the Supreme Court rejected such an overly broad application of the privilege. In rejecting Senator Brewster's argument that the privilege "...protected from executive or judicial inquiry all conduct 'related to the due functioning of the legislative process'" the Court explained:

In stating that those things "in no wise related to the due functioning of the legislative process" were not covered by the privilege, the Court did not in any sense imply as a corollary that everything that "related" to the [*514] office of a Member was [***519] shielded by the Clause. Quite the contrary, in *Johnson* we held, citing *Kilbourn v. Thompson, supra*, that **only acts**

⁵ Defendant's Memorandum, page 9

generally done in the course of the process of enacting legislation were protected.
[Emphasis added]

Id. 408 U.S. 501, 513-514.

In *Gravel v. United States*, 408 U.S. 606, 625, 92 S. Ct 2616, 33 L. Ed. 2d 583

(1972) decided on the same day, the Supreme Court further explained the scope of legislative privilege, saying:

Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, **they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings** with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House. As the Court of Appeals put it, **the courts have extended the privilege to matters beyond pure speech or debate in either House, but "only when necessary to prevent indirect impairment of such deliberations."**
United States v. Doe, 455 F.2d, at 760.

Id. 408 U.S. at 625, emphasis added.

There is simply no basis for the defendant's assertion that her attendance at a ground-breaking ceremony for one of Baltimore's most well-known developers is a privileged legislative act. Courts have consistently made it clear that legislative immunity does not shield political events or constituent services. *Brewster* could not be clearer. The court plainly said:

It is well known, of course, that Members of the Congress engage in many activities other than the purely legislative activities protected by the Speech or Debate Clause. **They include a wide range of legitimate 'errands' performed for constituents, the making of appointments with Government agencies, assistance in securing Government contracts, preparing so-called 'news**

letters' to constituents, news releases, and speeches delivered outside the Congress. The range of these related activities has grown over the years. **They are developing continuing support for future elections.** Although these are entirely legitimate activities, **they are political in nature rather than legislative**, in the sense that term has been used by the Court in prior cases. **But it has never been seriously contended that these political matters, however appropriate, have the protection afforded by the Speech or Debate Clause.** *Brewster* at 518 (emphasis added)

See also: *Doe v. McMillan*, 412 U.S. 306, 313 (1973) where the court said, "Our cases make perfectly apparent, however, that everything a Member of Congress may regularly do is not a legislative act within the protection of the Speech or Debate Clause Members of Congress may frequently be in touch with and seek to influence the Executive Branch of Government, but this conduct 'though generally done, is not protected legislative activity.'" (emphasis added)

The court in *Brewster* did not foresee to what lengths the defendant was willing to try to push the legislative immunity envelope. Here, the defendant really is seriously contending that her political activities, such as attending a ground breaking ceremony, have the protection afforded by legislative immunity. Surely donning a hard hat and holding a shovel cannot be construed as activities essential to the process of enacting legislation. Regardless of how serious she may be with this untenable position, the claim that this activity is in any way "an integral part of the deliberative and communicative processes" by which Council members consider the passage or rejection of proposed legislation is little more than wishful thinking on the part of the defendant.

In the testimony and evidence presented to the grand jury about her attendance at the Strathdale project ground-breaking, there was no reference whatsoever to any

legislation, legislative purpose or the motive behind any legislation. Nor did that testimony or evidence call into question any legislative activity of the defendant.

Similarly, the testimony and evidence presented to the grand jury shows nothing more than meetings with Mr. Lipscomb occurred and that those meetings related to the Strathdale development, in which he was a partner. No evidence or information of any kind was presented to the grand jury concerning legislation, discussion of legislation, contemplated legislation, or the motivation for, purpose or intent of any legislation, pending or contemplated. Lest there be any doubt about that assertion, the State attaches hereto the entire transcript of Mr. Lipscomb's grand jury testimony for Indictments 109210015 and 109210016, together with the associated exhibits, (Appendix IV) as well as the testimony of agent John Poliks concerning the same indictments. (Appendix V)⁶, which constitute all of the evidence and testimony considered by the indicting grand jury grand. The grand jury transcripts support the fact that there was no testimony whatsoever about what occurred at the meetings. As far as the grand jury was aware, the meeting could have revolved around matters pertaining to constituent service or a host of other issues, unrelated to any legislation or contemplated legislation. The point, and only point, is that the grand jury never heard even the slightest utterance about any possible legislation.⁷

The defendant relies heavily on *Bruce v. Riddle*, 631 F.2d 272 (4TH Cir., 1980) and on *Montgomery County v. Schooley*, 97 Md. App 107, 627 A.2d 69 (1993) as support for the contention that evidence that meetings occurred between the defendant,

⁶ To the extent that Agent Poliks' testimony has been redacted solely to the extent that it addresses only charges in Indictment 109210015, pertaining to gift cards, which is not relevant here.

⁷ The State provides all of the grand jury evidence following the path laid out in *United States v. Jefferson*, 546 F. 3d 300 (4th Cir., 2008. cert. denied, __ U.S. __, 129 S. Ct. 2383, 173 L. Ed. 2d 1294 (2009)). See, *Sweeney Opinion*, pg. 17-18.

Mr. Lipscomb, and others concerning the Strathdale development somehow implicates the legislative privilege without so much as a mention of legislation or a legislative purpose. That position is not supported by the law or the facts in this case. Nothing presented to the grand jury suggested, even inferentially that these meetings were related in any way to the legislative process. The purpose of the meetings involving Strathdale could have been for any reason – including planning the ground breaking ceremonies or other constituent services. Since the grand jury never heard about any discussions which might have occurred at the meetings, there is no basis for the defendant to suggest that the grand jury must have inferred any discussions during the meeting related to any possible legislation or involved any legislative acts. Meetings with political figures are routine. Many meetings are totally innocuous having nothing to do with legislation. Here, all the grand jury knew was that Mr. Lipscomb, in his capacity as a partner in the Strathdale project, attended meetings with Ms. Dixon and others which pertained to Strathdale.

Neither *Bruce* nor *Schooley* stands for the proposition advanced by the defendant. In *Bruce*, supra, the complaint alleged that “...the defendant members of the Council met with a number of their constituents who had selfish interests in the passage of the zoning ordinance and were influenced in their vote as a result of the meetings.” *Bruce*, supra, at 279 (Emphasis added.). Unlike this direct contention that the meetings with constituents influenced their vote, nothing in the allegations of the indictment here or in the evidence presented to the grand jury relates to or questions any legislative motivation or purpose of the defendant. Nor was the evidence presented to the grand jury offered to prove any fact

or permit any inference concerning the defendant's actions or motivations concerning legislation.

In *Montgomery County v. Schooley*, supra, the Maryland Court of Special Appeals relied upon *Bruce*, supra, during its consideration of whether to bar the deposition of a member of the Montgomery County Council in a case challenging the redistricting plan adopted by the Council. The deposition of Councilman Leggett was sought in order “...to inquire as to ‘factors present, not of record, which influenced the Council’”. No inquiry could be more blatantly intended to inquire into the legislative acts and the motivation for legislation. The court there held that

It is evident from this that the legislative process, for purposes of the privilege, includes more than just proceedings at regularly scheduled meetings of a legislative body. If it includes a meeting with citizens or private interest groups, it must also include caucuses and meetings with political officials called **to discuss pending or proposed legislation**. (emphasis added)

97 Md. App. at 124.

In both cases relied upon by the defendant, evidence concerning legislation and the motive for legislation was directly at issue. Here, the State presented evidence that Ronald Lipscomb was a partner in the Strathdale Development, that he met with the defendant and others regarding that development, and that the defendant knew that Lipscomb was a partner in the development. Neither the evidence and testimony presented to the grand jury nor the allegations of the indictment in any way mention the business of the City Council, any proceeding by it or any proposal before it; refer to or suggest any connection with legislation, pending or proposed; or call into question in any manner the motives or intent of the defendant in connection with any legislative action.

The very limited and narrowly targeted evidence concerning the defendant's meetings with Ronald Lipscomb simply does not implicate legislative immunity or privilege.

In *Brewster, supra*, 408 U.S. at 517, the United States Supreme Court explained that:

The authors of our Constitution were well aware of the history of both the need for the privilege and the abuses that could flow from too sweeping safeguards. In order to preserve other values, they wrote the privilege so that it tolerates and protects behavior on the part of Members not tolerated and protected when done by other citizens, **but the shield does not extend beyond what is necessary to preserve the integrity of the legislative process.**

Following *Brewster*, the Supreme Court refused to extend the privilege to cover libelous statements allegedly made by Senator Proxmire in connection with his "Golden Fleece Award". In discussing the scope of legislative immunity, the Court pointed out that:

Literal reading of the Clause would, of course, confine its protection narrowly to a "Speech or Debate in either House." But the Court has given the Clause a practical rather than a strictly literal reading which would limit the protection to utterances made within the four walls of either Chamber. Thus, we have held that committee hearings are protected, even if held outside the Chambers; committee reports are also protected. *Doe v. McMillan, supra*; *Gravel v. United States, supra*. Cf. *Coffin v. Coffin*, 4 Mass. 1, 27-28 (1808).

The gloss going beyond a strictly literal reading of the Clause has not, however, departed from the objective of protecting only legislative activities. In Thomas Jefferson's view:

"[The privilege] is restrained to things done in the House in a Parliamentary course For [the Member] is not to have privilege contra morem parliamentarium, to exceed the bounds and limits of his place and duty." T. Jefferson, *A Manual of Parliamentary Practice* 20 (1854), reprinted in *The Complete Jefferson* 704 (S. Padover ed. 1943).

Hutchinson v. Proxmire, 443 U.S. 111, 124-125, 125, 92 S.Ct.2531, 2683, 33 L. Ed. 2d 507 (1972). See also, *United States v. Rose*, 28 F.3d 181,307 U.S.App. D.C. 314 (D.C. Cir, 1994), holding legislative privilege and immunity did not protect Congressman Rose from an action brought by the Department of Justice against him for filing false financial statements based upon his testimony before the House Committee on Standards of Official Conduct the allegedly undisclosed financial transactions; *Doe v. McMillan*, 412 U.S. 306, 93 S.Ct. 2018, 36 L.Ed.2d 912 (1973), holding that legislative immunity and privilege did not apply to the public distribution of a congressional report; *United States v. Biaggi*, 853 F.2d 89 (2nd Cir., 1988) , cert. denied, 489 U.S. 1052, 109 S.Ct. 1312, 103 L.Ed.2d 581 (1989), holding that legislative immunity and privilege did not apply to travel by a member of Congress, even if the travel is for the purpose of performing legislative acts at the destination.

Where, as here, a defendant attempts to stretch limitlessly the protection of legislative immunity and the related privilege to cover events, the evidence of which is entirely unrelated to any contemplated or proposed legislation smacks of legislative arrogance. By trying to shield herself from all criminal actions with the cloak of legislative immunity, the defendant seeks to place herself above the criminal laws to which every American, regardless of position, is subject. Legislative immunity and the related privilege do not exist for the individual benefit of this defendant. Rather, they exist for the benefit of the public.

As the Supreme Court held in *Hutchinson*,

“[c]laims under the [Speech or Debate] Clause going beyond what is needed to protect legislative independence are to be closely scrutinized.”

Id. at 443 U.S. 127. There is no public benefit in extending legislative privilege beyond its proper scope, as suggested by the defendant. Extension of the legislative privilege to evidence completely unconnected to any legislative process, as suggested by the defendant here, serves no public interest, and does not in any way impair or impede legislative deliberations, either directly or indirectly.

D. The Board of Estimates Is Not A Legislative Body

Under the guise of analyzing *Montgomery County v. Schooley*, *supra*, the defendant cites *Baker v. Mayor & City Council of Baltimore*, 894 F.2d 679 (1990), overruled on other grounds, *Berkley v. Common Council*, 63 F.3d 295 (4th Cir., 1995), suggesting that it stands for the proposition that the Board of Estimates is a legislative body. Defendant completely mischaracterizes the holding of the court. In fact, the court limited its holding to the role of the Board of Estimates in developing and passing the Ordinance of Estimates for consideration and approval by the City Council, saying:

The act of eliminating a position altogether instead of merely terminating the employment of a public employee is a uniquely legislative function. *Rateree v. Rockett*, 852 F.2d 946, 950 (7th Cir. 1988). We conclude, then, that the **Board's role in preparing the budget ordinance** is a legislative one.

Baker, 894 F.2d 679, [Emphasis added.]

Continuing with her theme of pushing every tenet to its absolute, absurd extreme, the defendant foists upon this Court her extended exposition on *Baker* and the role of the Board of Estimates. Not only is her analysis inaccurate and over-broad, it is wholly irrelevant to her Motion to Dismiss. No evidence of actions of the Board of Estimates

was received by the grand jury that returned her indictment and no actions of the Board of Estimates are alleged on the face of the charging document. In fact, the defendant has not cited a single instance where the grand jury heard any evidence about the defendant's role on the Board of Estimates.

Nevertheless, having gone down the path of the Board of Estimates functions, it should be noted that many of the duties of the Board are hardly legislative or quasi-legislative. For example, the Board often approves contracts and companies which are qualified to submit bids on contracts, neither of which are legislative functions. Further, many of the members of the Board are not elected officials. One is the appointed City Solicitor and another is the appointed Director of Public Works. Are those non-elected officials bathed with the same supposed legislative immunity for their non-legislative functions? Regardless, since the grand jury heard no evidence concerning actions of the Board of Estimates, this straw issue raised by the defendant need not be addressed at this time by this Court.

E. To Extent That Any Of the Evidence Before The Grand Jury Was Subject to Legislative Privilege, Dismissal Of This Facially Valid Indictment Is Not Warranted

The only question raised by the defendant's motion with regard to legislative privilege or immunity is whether the extremely limited evidence⁸ before the grand jury that she attended a ground breaking ceremony on a large development known as Strathdale, and also met with Ronald Lipscomb, who was both a partner in that development and her paramour, concerning "Strathdale" requires the dismissal of this facially valid indictment.

⁸ See Defendant's Memorandum, Exhibits I, II, and III and Exhibits II and III thereto.

In the unlikely event that the court finds, notwithstanding the preceding arguments, that some of the very limited evidence at issue here was subject to a legislative privilege, dismissal of this facially valid indictment is not required. The evidence questioned by the defendant is not of the nature considered by the court in *United States v. Helstoski*, 635 F. 2d 200 (3rd Cir., 1980). There, the third Circuit dismissed the indictment because "...evidence violating the speech or debate clause was so extensive that it completely infected these proceeding....the entire proceeding was tainted by such evidence." *Id.* at 202, *See, also, Sweeney Memorandum* at pages 17 and 25. Nor is the evidence here remotely comparable to that presented to the grand jury that returned the previous indictment in this matter.

Unlike the situation in *Helstoski* and in the prior indictment in this matter, if any privileged material was presented at all, it was inconsequential. Unlike *Helstoski*, there is nothing to excise from the indictment, because it is facially valid. Under these circumstances, dismissal of the indictment is not warranted.

F. Conclusion

Following this Court's dismissal of previous charges against this defendant, the State made substantial efforts to ensure that the evidence presented to the grand jury in this matter did not implicate her legislative privilege, following the guidance found in this Court's opinion, suggesting

...a ready road map and guide to the prosecutor attempting a prosecution of a State or local legislator for criminal activity of the subjects that need to be avoided and that a Grand Jury needs to be shielded from.

Sweeney Memorandum, page 16.

In the same vein, the State has made all of the evidence presented to the grand jury available to the Court and defendant's counsel. It is readily apparent from the allegations of the indictment and the evidence before the grand jury (all of which has been provided), that every effort was made to avoid any reference to legislatively privileged material. While no legislatively privileged material was presented, even if this Court finds some information was subject to legislative privilege, it was minimal and insubstantial, and certainly does not warrant dismissal of this facially valid indictment. *See, e.g., Brewster, supra.*

II. THE ALLEGATIONS IN THE INDICTMENT ARE SUFFICIENT.

A. The Defendant's Motion is without Merit as the Terms "Falsely" and "Willfully" Necessarily Involve "Corruptly."

Defendant's contention that the Indictment should be dismissed because it fails to use the phrase "willfully and corruptly false" is unsupported by any case law or the statute itself. *See State v. Levitt*, 48 Md. App. 1, 9, 426 A.2d 383, 388-389 n. 6 (1981) (quoting *State v. Bixler*, 62 Md. 354, 357 (1884); (explaining that "in this jurisdiction the words "falsely," "willfully," and "knowingly" are deemed to necessarily involve "corruptly")); *State v. Levitt*, 48 Md. App. at 9, 426 A.2d at 388-389 n. 6 quoting *State v. Devers and Webster*, 260 Md. 360, 372, 272 A.2d 794, 800, *overruled on other grounds*, (1971) in which corruptly and willfully appear to be considered synonymous.

B. The Indictment is Proper as it Fulfills the "Substantially States" Requirement Set Forth in Md. Code Ann. Crim, Law, § 9-103(a).

Defendant claims the perjury charge must be dismissed because the phrase "willfully and corruptly false" is missing from the charging language. *See* Def.'s Mot. to Dismiss, page 14. In support of this tenuous position, Defense counsel relies on Md.

Code Ann. Crim. Law, §9-103(a) and partially cites the statute, rendering its argument wholly incorrect by failing to cite the most important phrase. The complete statute reads as follows:

§ 9-103 Charging document.

(a) Violation of § 9-101(a). – An indictment, information or other charging document for perjury in violation of §9-101(a) of this subtitle is sufficient if it **substantially states**:

“(name of defendant) on (date) in (county), on examination as a witness, duly sworn to testify in (proceeding) by (court or other person administering oath) with authority to administer the oath, willfully, unlawfully, and falsely swore (facts), the matters so sworn were material, and the testimony of (name of defendant) was willfully and corruptly false, in violation of (section violated) against the peace, government, and dignity of the State.”.

(emphasis added)

The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the Legislature. *Blickenstaff v. State*, 393 Md. 680, 684 904 A.2d 443, 446 (2006) (quoting *Mackey v. Compass Mktg., Inc.*, 391 Md. 117, 141, 892 A.2d 479, 493 (2006); *Kushell v. DNR*, 385 Md. 563, 576, 870 A.2d 186, 193 (2005)). If the statute is unambiguous when construed according to its ordinary and everyday meaning, then we give effect to the statute as it is written. *Mackey*, 391 Md. at 141, 892 A.2d at 493; *Collins v. State*, 383 Md. 684, 689, 861 A.2d 727, 730 (2004); see also *Ameriquest Mort. Comp. v. Paramount Mort. Svc, Inc.*, 184 Md. App. 120, 142, 964 A.2d 279, 292 (2009), (quoting *In re Damien F.*, 182 Md. App. 546, 958 A.2d 402 (2008) (writing “we begin with the plain language of the statute, and if that language is clear and unambiguous, we look no further than the text of the statute”)); *Ameriquest Mort. Comp.*, 184 Md. App. at

142, 964 A.2d at 292 (quoting *Claggett v. Md. Agric. Land Pres. Found.*, 182 Md. App. 346, 374, 957 A.2d 1083, 1099 (2008) (instructing that it is appropriate to “. . . consider the consequences resulting from one meaning rather than another, and adopt that construction which avoids an illogical or unreasonable result, or one which is inconsistent with common sense.”))

Defense counsel does not argue that the statute is ambiguous or vague, so therefore, this Court must give effect to the statute as written. *Mackey*, 391 Md. at 141, 892 A.2d at 493. The statute does not contain any mandatory language that would restrict or command the State to use only the charging language set forth in Md. Code Ann. Crim. Law, § 9-103. Therefore, the statute is not a “mandate” as Defense counsel alleges, but rather is a guide or a template in drafting the charging language for a perjury count. The statute was intended to be used as a model as opposed to literally as evidenced by the use of the word “substantially” in Md. Code Ann. Crim. Law, § 9-103(a).

Therefore, the indictment is proper because it substantially states the charging language set forth in Md. Code Ann. Crim. Law, § 9-103(a). Md. Code Ann. Crim. Law, § 9-103(a) substantially requires the following information:

- i. The defendant's name;
- ii. The date and place where the testimony occurred;
- iii. That the defendant was under oath when providing said testimony;
- iv. That the testimony was required;
- v. That the defendant provided false testimony; and
- vi. That the false testimony was in violation of a specific Maryland code and against the peace, government and dignity of the State.

See *State v. Levitt*, 48 Md. App. 1, 9, 426 A.2d 383, 388-389 (1981) (explaining at “. . . common law perjury is “a crime committed when a lawful oath is administered, in some judicial proceeding, to a person who swears willfully, absolutely, and falsely, in a matter material to the issue or point in question.”)

In the instant case, the perjury counts in the indictment fulfill the necessary requirements:

On or about November 1, 2004, SHEILA DIXON did willfully and falsely make an oath and affirmation under the penalties of perjury that the contents of the her Fiscal 2004 Fiscal Disclosure Statement were true to the best of her knowledge, information and belief when in truth and in fact SHEILA DIXON knew that the gifts which she had received from July 1, 2003 through June 30, 2004, including the Mano Schwartz gift certificate, her travel expenses and cash which items were paid and provided by Ronald H. Lipscomb and Doracon Contracting, Inc., were required to be reported on her Fiscal 2004 Financial Disclosure Statement, in violation of §9-101 of the Criminal Law Article, and against the peace, government and dignity of the State.

See Indict. ¶45.

On or about April 27, 2005, SHEILA DIXON did willfully and falsely make an oath and affirmation under the penalties of perjury that the contents of the her Calendar 2004 Fiscal Disclosure Statement were true to the best of her knowledge, information and belief when in truth and in fact SHEILA DIXON knew that the gifts which she had received from January 1, 2004 through December 30, 2004, including the travel expenses and the cash were paid and provided by Ronald H. Lipscomb and Doracon Contracting, Inc., in calendar year 2004, were required to be reported on her Calendar 2004 Financial Disclosure Statement, in violation of §9-101 of the Criminal Law Article, and against the peace, government and dignity of the State.

See Indict. ¶53.

The charging language in the indictment substantially states the language set forth in Md. Code Ann. Crim. Law, § 9-103(a) and therefore the indictment should not be dismissed.

C. The Indictment is Proper because it Apprises the Defendant of the Perjury Charges Against her by Directly or Implicitly Averring the Essential Elements of the Crime.

Defendant argues that because there are no allegations that the defendant knew her former paramour, Mr. Lipscomb, “did business with” or was “regulated by” the City the charges should be dismissed. See Def.’s Mot. to Dismiss, page 14. However, this argument is incorrect because the indictment provides defendant with notice of the charges against her by describing and stating the actions that constitute the crime of perjury.

The main function “. . . of a charging document is to fulfill the constitutional requirement contained in Article 21 of the Maryland Declaration of Rights that each person charged with a crime must be informed of the accusation against him.”⁹ *Williams v. State*, 302 Md. 787, 790-791, 490 A.2d 1277, 1278 (1985); *State v. Morton*, 295 Md. 487, 490, 456 A.2d 909 (1983); *Jackson v. State*, 231 Md. 591, 596, 191 A.2d 432 (1963); *Lank v. State*, 219 Md. 433, 436, 149 A.2d 367 (1959). *Williams* explained that:

[T]he purposes served by the constitutional requirement include (1) putting the accused on notice of what he is called upon to defend by characterizing and describing the crime and conduct; (2) protecting the accused from a future prosecution for the same offense; (3) enabling the accused to prepare for his trial; (4) providing a basis for the court to

⁹ Article 21 provides “[t]hat in all criminal prosecution, every man hath a right to be informed of the accusation against him; to have a copy of the Indictment, or charge, in due time (if required) to prepare for his defense.”

consider the legal sufficiency of the charging document; and (5) informing the court of the specific crime charged so that, if required, sentence may be pronounced in accordance with the right of the case.

Id.; *State v. Morton*, 295 Md. at 491, 456 A.2d 909; *Brown v. State*, 285 Md. 105, 109, 400 A.2d 1133 (1979); *State v. Canova*, 278 Md. 483, 498-499, 365 A.2d 988 (1976); *State v. Lassotovitch*, 162 Md. 147, 156, 159 A. 362 (1932).

Fairly recently, the Court addressed this subject again and wrote the following:

The charging instrument must include a satisfactory response to the questions of "who, what, where, and how." Precisely how much factual specificity is needed to make that response will necessarily vary from one case to another. Relevant factors include the nature of the offense, the likely significance of particular factual variations in determining liability, the ability of the prosecution to identify a particular circumstance without a lengthy and basically evidentiary allegation, and the availability of alternative procedures for obtaining the particular information. It generally is agreed that the issue is not whether the alleged offense could be described with more certainty, but whether there is "sufficient particularity" to enable the accused to "prepare a proper defense."

In re Roneika S., 173 Md. App. 577, 593, 920 A.2d 496, 505 (2007) (quoting 4 Wayne R. LaFave, Jerold H. Israel, & Nancy J. King, *Criminal Procedure*, § 19.3(b), pp. 769-70 (2d ed. 1999) (citations omitted)).¹⁰

Therefore, in the instant case, "the question before us is whether the indictment is constitutionally deficient, not whether it could have charged the offense with greater

¹⁰ See also *United States v. McDonnell*, 696 F. Supp. 356, 358 (N.D. Ill. 1988) (instructing that when "... analyzing the sufficiency of an indictment, the Court must consider what is alleged in the indictment when read in its entirety") *United States v. Hoag*, 823 F.2d 1123, 1126 (7th Cir. 1987); *United States v. Esposito*, 771 F.2d 283, 288 (7th Cir. 1985); *cert. denied*, 475 U.S. 1011, 89 L. Ed. 2d 302, 106 S. Ct. 1187 (1986). "Common sense and reason prevail over technicalities". *United States v. McDonnell*, 696 F. Supp. at 358. *United States v. Climatemp, Inc.*, 482 F. Supp. 376, 382 (N.D. Ill. 1979), *aff'd sub nom. United States v. Reliable Sheet Metal Works, Inc.*, 705 F.2d 461 (7th Cir.), *cert. denied*, 462 U.S. 1134, 77 L. Ed. 2d 1370, 103 S. Ct. 3116 (1983).

particularity” as the defendant would like. *Jones v. State*, 303 Md. at 338-339, 493 A.2d at 1070. Defendant Dixon is charged with two (2) counts of violating Md. Code Ann. Crim. Law Art., §9-101(a)(2)) which prohibits a person from willfully and falsely making an oath or affirmation as to a material fact in an affidavit required by any state, federal, or local law.

The indictment begins by providing the groundwork for the perjury counts by explaining that the Baltimore City Ethics Law (Article 8, Baltimore City Code) mandates every public servant “. . . to file a Financial Statement each year, under oath, with the Baltimore City Ethics Board.” See Indict. ¶¶ 5, 9, 10. The indictment then explains what must be disclosed on the Financial Disclosure Statement:

The Baltimore City Ethics Law required that Baltimore City public servants disclose on the Financial Disclosure Statement any gift received during the reporting period, including travel expenses, worth more than \$50 (or a series of gifts worth more \$150 or more) from any person that does business with or is regulated [by] the City.

See Indict. ¶ 6

The indictment then alleges that the defendant’s former paramour, Ronald H. Lipscomb, and his various entities did business with the City and was regulated by the City. See Indict. ¶ 12. Paragraphs 14 through 33 of the indictment identify with specificity the various gifts given to the defendant from Ronald H. Lipscomb that were not disclosed on any of the Defendant’s Financial Disclosure Statements. Finally, paragraphs 45 and 53 of the indictment allege that the Defendant knew the gifts were “. . . required to be reported on . . . [the] Financial Disclosure Statement[s]. . .” (emphasis added). Defendant’s knowledge that Mr. Lipscomb was doing business with the City or was regulated by the City is clearly stated either directly or implicitly, because the only reason she would have

to disclose any gifts from Mr. Lipscomb as the indictment alleges, is if they were worth more than \$50 and were received from someone "doing business with the City" or was "regulated by the City". See *In re Ronelka S.*, 173 Md. App. 577, 920 A.2d 496 (2007) (holding that though the petition omitted the substance of the false statement, the Circuit Court erred in dismissing the petition because it satisfied the notice requirement set forth in Article 21 of the Maryland Declaration of Rights); see also *Bosco v. State*, 157 Md. 407, 146 A. 238 (1929) (holding that an allegation of scienter need not be expressly charged as it may be implied from a statement of the acts which constitute the offense); *Rice v. State*, 9 Md. App. 552, 267 A.2d 261, *cert. denied*, 259 Md. 735 (1970) (affirming that specific intent need not be expressly alleged because it was implied from a statement of facts which constitute the offense); *Jones v. State*, 303 Md. 323, 493 A.2d 1062 (1985) (writing that "all essential elements of the crime need not, however, be *expressly* averred in the charging document; elements may be implied from language used in the indictment or information"); *Whitehead v. State*, 54 Md. App. 428, 458 A.2d 905 (1983) (writing that the essential element of scienter need not be averred expressly as the allegation of unlawful stealing in the theft indictment implies the essential element of scienter).

Consequently, defense counsel's argument that there are no allegations that the defendant knew that Mr. Lipscomb was "doing business with" the City or was "regulated by" the City is meritless. The notice requirement has been more than satisfied, such that the defendant can prepare a defense, if she so chooses, because the essential elements are averred in the indictment.

III. The Ethics Statute Is Not Void For Vagueness Simply Because The Phrase “Regulated By The City” Is Undefined In The Statute

The defendant continually attempts to go beyond the face of the indictment to attempt to have this court second guess the grand jury. The law is clear. A motion to dismiss determines the sufficiency of the indictment based on the facts contained within the indictment. In *State v. Taylor*, 371 Md. 617, 810 A.2d 964 (2002), the Court of Appeals reaffirmed the purpose of a Motion to Dismiss and the limitations on such motion. The Court stated, “A motion to dismiss the charges in an indictment or criminal information is not directed to the sufficiency of the evidence, i.e., the quality or quantity of the evidence that the State may produce at trial, but instead tests the legal sufficiency of the indictment on its face.” (Emphasis added) 371 Md. at 645, 810 A.2d at 980.

Citing its earlier opinion in *State v. Bailey*, 289 Md. 143, 150, 422 A.2d 1021, 1025 (1980), *Taylor* continued:

“In sum, a motion to dismiss the indictment will properly lie where there is some substantial defect on the face of the indictment, or in the indictment procedure, or where there is some specific statutory requirement pertaining to the indictment procedure that has not been followed. In the absence of statutory authority to the contrary, where the object of Appellate review of a dismissal is to test a pretrial ruling of the Court dealing with the admissibility of evidence, Appellate review of such pretrial ruling should be denied. This so because the Motion to Dismiss attacks the sufficiency of the indictment, not the sufficiency of the evidence.” (Emphasis in original and emphasis added)

In *State v. Deleon*, 143 Md. App. 645, 662, 795 A.2d 776, 786 (2001), the Court, once again, adopted the 1980 opinion in *State v. Bailey*, *supra*. Quoting extensively from the *Bailey* opinion, the Court in *Deleon* stated,

“In passing upon the validity of a motion to dismiss an indictment, the appellate courts of this State have been steadfast in

holding that; (1) the motion is not a proper vehicle for testing the admissibility of testimonial evidence at trial, *Richardson v. State*, 7 Md. App. 334, 255 A.2d 463 (1969); (2) an unlawful arrest is not a ground for quashing an indictment, *Matthews v. State*, 237 Md. 384, 206 A.2d 714 (1965); (3) a defendant is not entitled to dismissal simply because the prosecution acquired incriminating evidence in violation of law, even if tainted evidence was presented to the grand jury, *Everhart v. State*, 274 Md. 459, 337 A.2d 100 (1975); (4) an indictment should be dismissed where it has been returned by grand jurors who had been required to show a belief in God, *State v. Madison*, 240 Md. 265, 213 A.2d 880 (1965).”

Returning to the Court of Appeals opinion in *State v. Taylor*, 371 Md. 617, 645, 810 A.2d 964, 980 (2002), the Court stated,

“A pretrial motion to dismiss an indictment or information may not be predicated on insufficiency of the State’s evidence because such an analysis necessarily requires consideration of the general issue. Thus, where there are factual issues involved, a motion to dismiss on the grounds that the State’s proof would fail is improper. This is so even when the question of subject matter jurisdiction is co-mingled with questions going to the merits. In criminal cases in this State, in contrast to civil actions, there is nothing comparable to a motion for summary judgment.” (emphasis added)

The Court in *Taylor* noted that a similar issue had arisen in *Ohio v. Tipton*, 135 Ohio App. 3d 227, 733 N.E.2d 634 (Ohio App. 1999). In *Tipton* the Court reiterated that “[W]hen a defendant in a criminal action files a motion to dismiss which goes beyond the face of the indictment, he is, essentially, moving for summary judgment.” In such instances, the motion to dismiss must fail. *See also, United States v. Ayarza-Garcia*, 819 F.2d 1043 (11th Cir. 1987) which is cited in *Taylor* for the proposition that Rule 12 of the Federal Rules of Criminal Procedure “is not intended to authorize ‘speaking motions’ through which the truth of the allegations in the indictment are challenged.” *Taylor*, 371 Md. at 647, 810 A.2d at 981. Thus, on its face, the indictment is sufficient. The

defendant should not be permitted to raise issues of the sufficiency of the evidence before the grand jury.

Without any waiver and turning to the issue raised in the present motion, the defendant claims that the statement made by the prosecutor to the grand jury that the phrase in the Ethics Statute “regulated by the City” is not defined within the statute and that word “regulated” is to be given its ordinary meaning was somehow misleading to the grand jury. However, that is exactly what the Court of Special Appeals stated *Carroll County Ethics Commission v. Lennon*, 119 Md. App. 49, 703 A.2d 1338 (1998), which discussed the term “regulate” in the context of the Carroll County Ethics Code. Like the Baltimore Code, the Carroll County Code did not define the term. The Court of Special Appeals wrote that the term must be given its plain and ordinary meaning and used as its source Merriam Webster’s Dictionary. Citing *Chesapeake and Potomac Telephone Co. v. Director of Finance*, 343 Md. 567, 578, 683 A.2d 512 (1996) and *Antwerpen Dodge, Ltd. V. herb Gordon Auto World*, 117 Md. App. 290, 699 A.2d 1209 (1997), the court in *Carroll County Ethics Commission* wrote, “Since the term ‘regulate’ is not defined in either the Carroll County Ethics Ordinance, or the analogous state conflicts of interest provision ... we must give the term its ‘plain and ordinary meaning.’” (citation to State statute omitted) Continuing, the court noted,

“‘Regulate’ is defined as follows:

1a: to govern or direct according to rule”

1b: to bring under control of law or constituted authority.

Merraim Webster’s Collegiate Dictionary, 985 (10th ed. 1996)” 119 Md.

App. at 67, 703 A.2d at 1347.

Indeed, as this court remembers from an earlier hearing, even the defendant's advocate, George Nilson, Esq., wrote in his affidavit that the term "regulated" is not defined in the Baltimore City Ethics Code.¹¹

Now, the defendant suggests that the prosecutor should have instructed the grand jury about the definition of regulate which is used in the State Administrative Proceeding Article, State Government Article, §10-101. Since the City, in adopting its Ethics Ordinance, chose not to define "regulate", could the Court imagine the defendant's hue and cry if the prosecutor chose to use a definition in the State Administrative Proceeding Article? The defendant would be decrying the fact the prosecutor arbitrarily chose a particular state statute that is unrelated to the Baltimore City Ethics Ordinance. In fact, there can be no doubt that the defendant would be arguing that since the Maryland Court of Special Appeals pointed out that, in the context of an Ethics Ordinance, the ordinary meaning of "regulate" is the appropriate definition when the term is undefined in the Ordinance, the prosecutor would be violating the dictates of the Court if another definition was used.

The defendant continues by inserting a straw argument that the "Developer's Guidebook" is not a regulation. Such argument, intentionally or inadvertently, misses the thrust of the Guidebook. Clearly, the Guidebook itself is not a regulation -- it is a guidebook to assist developers in sorting through the host of City regulations. The Guidebook is an aid which outlines many of the City's regulations with which developers

¹¹ Although it is not before the Court at this time, it is interesting that Mr. Nilson continued in his affidavit that the court held in *Carroll County Ethics Commission, supra*, that a real estate developer is regulated by a county agency at the time the agency deliberates upon and renders a decision on an application by the developer. Here, various Baltimore City agencies rendered decisions on various applications of entities controlled by Mr. Lipscomb, just as Mr. Nilson has suggested. However, it is respectfully suggested that these are factual issues to be decided at trial by the jury.

must comply before and during the development process. The Guidebook demonstrates unmistakably that developments in Baltimore City are governed and directed by Baltimore City regulators and regulations. In developing a project, developers are under the control of the Baltimore City officials who authorize, supervise and inspect each step of the project to assure compliance with the various City regulations – from land use to zoning to environmental protection to sanitation.

While making this straw argument, the defendant fails to note in her memorandum that, in addition to his development projects, Mr. Lipscomb and Doracon were constantly being regulated when they did work in the City. Mr. Lipscomb testified that on several projects, including the Flag House Courts project, Doracon's work was constantly being directed by City officials. For instance, Doracon needed the City to approve the plans and issue permits before work commenced. Later, Doracon's work was inspected by City officials to assure that the work performed complied with the City's regulations. (See, for example, Lipscomb testimony, pps. 13-15, which is attached)¹²

Since the Baltimore City Council chose not to define "regulate", the defendant leaps to a conclusion that the word, and therefore the statute, is unconstitutionally vague. The court in *Carroll County Ethics Commission* did not seem to have any problem with the term being vague. In fact, the opinion suggests that ordinary people understand the ordinary meaning of the word. No further technical (and perhaps confusing) definition was necessary in that case.

¹² While the issue will be addressed at the trial, the defense argument seems to be suggesting that the empress "has no clothes." At least according to the suggestions made, she does not seem to read newspapers, know what developments are occurring within the City or even talk much to her paramour – even while, at the same time, taking lavish gifts and cash from him.

The basic rule for statutory construction is to determine and give effect to the intent of the legislature. *Harris v. State*, 344 Md. 497, 510, 687 A.2d 970, 976 (1997). Where the language is “plain and free from ambiguity and expresses a definite and sensible meaning, no construction or clarification is needed or permitted.” *Comptroller v. Fairchild Industries*, 303 Md. 280, 284, 493 A.2d 341, 343 (1985). There is a presumption that a statute is valid and a statute should not be found unconstitutional if, by any construction, it can be sustained. *Galloway v. State*, 365 Md. 599, 611, 781 A.2d. 851, 858 (2001). Citing *Screws v. United States*, 325 U.S. 91, 101-02 (1945), the court in *Bowers v. State*, 283 Md. 115, 389 A.2d 341 (1978), stated that a “statute is not vague when the meaning of the words in controversy can be fairly ascertained by reference to judicial determinations, the common law, dictionaries, treatises or even the words themselves, if they possess a common and generally accepted meaning.”

On page 20 of her memorandum, the defendant cites a Nevada case (*Dumphy v. Sheehan*, 549 P.2d 332 (Nev. 1976)) for the proposition that that the term “jurisdiction of the officer’s public agency” in a financial disclosure law was unconstitutionally vague without any further discussion.¹³ She also cites the New York case of *Slevin v. New York*, 477 F.Supp 1051 (S.D.N.Y.1979) for the proposition that a lack of guidelines or regulations to assist public employees in interpreting the reporting requirements could make the disclosure statute unconstitutionally vague. This point has been discussed by the Maryland Court of Appeals and, in fact, the Baltimore City Ethics law (like other Maryland ethics laws) has the mechanism by which public employees can obtain

¹³ On page 21 of her memorandum, the defendant baldly asserts that the case of *United States v. D’Alessio*, 822 F.Supp. 1134 (D.N.J.1993) is “directly on point.” She quotes a portion of the case where the prosecutor told the grand jury that the rule in question applied to the Sheriff. In the case, the defendant has failed, as she must, to point to any instance where the prosecutor told the grand jury something identical, or even similar.

assistance in interpreting the reporting requirements. (See: Article 8, §§ 4-1 to 4-4 of the Baltimore City Ethics law).

When public disclosure laws were being enacted in the early 1970's, the Maryland Court of Appeals reviewed the issue of "void for vagueness" in the context of the Montgomery County Ethics Disclosure ordinance. In *Montgomery County v. Walsh*, 274 Md. 502, 521, 336 A.2d 97, 109 (1975), the Court addressed four specific provisions of the ordinance which had been attacked as being void for vagueness. The ordinance included the clauses: (1) decision making jobs, including a provision that contained the phrase "other activities where the decision or action [by the County employee] has an economic impact on the interests of any non-governmental enterprise"; (2) exempting certain officials without setting out who could grant the exemption; (3) requiring a valuation of property without specifying the method of valuation and (4) requiring "public officials" to file financial statements without defining that term. Relying upon *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548, 578-79 (1973), the court that the standard for vagueness is that the "the statute must be 'set out in terms the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest.'" 274 Md. at 522, 336 A.2d at 110. In rejecting the void for vagueness argument the Court also observed:

"Measured by these tests, we think the lower court was plainly wrong in holding that the Ordinance was void for vagueness. The Ordinance makes provision for a procedure whereby persons in doubt about its application in particular situations may obtain a ruling from the County Attorney, the officer primarily responsible for its enforcement. The County Attorney is required by the Ordinance to issue advisory opinions with respect to any matter involving its applicability, and he is responsible for determining the exemptions under §20A-3(d), and resolving uncertainties that might arise under §20A-3 (b)(11). As to the valuation, provisions of §20A-5, the County Executive

is authorized to adopt rules and regulations to implement the Ordinance; in the absence of such regulations, we think any reasonable good faith attempt at a fair market valuation will satisfy the plain intention of the County Council in enacting the Ordinance. We also think that the provisions of §20A-3 sufficiently identify those persons required to file financial statements under the Ordinance and that no further definition of “local official” is required.” 274 Md. at 522-23; 336 A.2d at 110.”

In *Bowers v. State*, supra, the terms “cruel or inhumane” and “temporary care or custody” were attacked as being too vague. The court rejected the attack and noted that a statute is not vague when the meaning can be fairly ascertained from judicial interpretations or dictionaries, among other sources. The court wrote:

“A statute is not vague when the meaning of the words in controversy can be fairly ascertained by reference to judicial determinations, the common law, dictionaries, treatises or even the words themselves, if they possess a common and generally accepted meaning. See *Rose v. Locke* 423 U.S. [48] at 50. (‘Even trained lawyers may find it necessary to consult legal dictionaries, treatises, and judicial opinions before they may say with any certainty what some statutes may compel or forbid’)” 283 Md. at 125, 389 A.2d at 347.

Like the court in *Carroll County Ethics Commission*, the Court in *Bowers* relied upon the definition contained in the dictionary. Using Webster’s Dictionary and Black’s Law Dictionary for the definition of cruel, the court concluded that the word had a commonly understood meaning. Concluding, the court noted that the Legislature was not “required to spell out the prohibited acts in elaborate detail. To do so would likely be counterproductive.” 283 Md. at 129, 389 A.2d at 349.

In this case, the term “regulate” is defined in the dictionary. In enacting the ordinance, the Baltimore City Council could have placed some very specific definition on the word if it intended that the word mean something other than how it is generally

defined and understood. Instead, the Baltimore City Council decide not to further define (or confuse) the plain meaning of the word. The ordinary meaning and common sense can be applied to the clause questioned by the defendant. This is especially true considering that fact that the defendant obviously understood the host of rules and regulations that businesses and developers needed to meet before any work was done in Baltimore City. For the defendant to suggest that she did not know about the panoply of city regulations would not only defy common sense, but the citizens of Baltimore would undoubtedly find such position to be incredulous. Further, if there was any confusion on the defendant's part, the Baltimore City Ethics Ordinance [like the Montgomery County Ethics Ordinance] provides the procedure for persons to request an advisory opinion and the person's right to rely upon such opinion. (See: Article 8, §§ 4-1 to 4-4 of the Baltimore City Ethics law).

Thus, the Baltimore City Ethics law is not void for vagueness because the term "regulate" was not specifically defined in the ordinance.

IV. The Alleged Failure of the City to Maintain a List of Entities Doing Business with the City does not Discharge the Defendant of her duty to Disclose all Gifts Required to be Reported on her Financial Disclosure Statements.

Defendant asserts that as a result of the City's failure to maintain a certified list of business entities doing business with the City, City officials were left "guessing as to which entities were covered by this requirement." See Def.'s Mot. to Dismiss, page 22-23. Defense counsel previously made the same argument and the Court was not persuaded and opined that "it is hard to see how the lack of a list for City employees would have been seen by the drafters of the Ethics Law to be of such a nature that it would have totally voided the requirements of Subtitle 7 on Financial disclosure until it

was in place. This would seem to be at odds with the findings, goals, and purposes of the Law." See Sweeney Memorandum, page 10. Defense counsel fails to introduce any new case law or legal theories that would justify the Court reversing its prior ruling.

Assuming *arguendo* this Court does reconsider the same arguments previously made by counsel, then, defendant's argument still fails because the basis of the perjury counts do not revolve around the certified list, but rather defendant's personal knowledge. See Indict. ¶¶ 45, 53 (alleging that the defendant "knew that the gifts she had received...were required to be reported on her...Financial Disclosure Statement...")

Moreover, there is nothing in the Baltimore City Code to suggest the filing of the disclosure forms was contingent upon the City preparing or maintaining a list of entities doing business with the City. (Art. 8, §7-1(d) of the Code) Certainly, the failure to maintain such a list did not inhibit the filing of the disclosure forms by hundreds of Baltimore City employees. The Defendant, in spite of the lack of a list, filed the forms, making certain disclosures of gifts which she had received. For example, the indictment alleges that on the Defendant's fiscal 2004 Financial Disclosure Statement, she reported that she had received "a pass for two from the Senator Theatre which pass was rarely used." See Indict. ¶ 41. Thus, as the indictment demonstrates, the Defendant was able to complete the forms without any assistance from the list which the financial director of Baltimore was to certify annually to the Ethics Board.

Although §7-1(d) of the Baltimore City Code states that the "Finance Director must annually certify to the Ethics Board a list of all business entities doing business with the City", the Code only indicates that the Ethics Board must keep the list on file and make it available to any persons who are required to file a financial disclosure report. Indeed, the

requirement that a list of entities “doing business with the City” be certified by the Finance Director does not even address persons and entities “regulated by the City”. Yet the Ethics Ordinance requires that gifts from persons so regulated be reported. Logically, the specified list was intended to assist individuals in meeting their reporting obligations under the Ethics Ordinance in those instances where they lacked actual knowledge concerning whether a person or entity was “doing business with the City”. The lack of a list of entities “doing business with the City” would in no way inhibit anyone from filing a complete and accurate financial disclosure statement when the filer has actual knowledge that a particular person or entity is either regulated by the City or is doing business with the City.

Defense counsel relies, again, incorrectly on *Hirsch v. Maryland Department of Natural Resources*, 288 Md. 95, 416 A.2d 10 (1980)¹⁴. *Hirsch* involved the rather narrow question of whether the Department of Natural Resources could enforce regulations pertaining to restoration of wetlands without complying with the provisions of the statute under which the regulations were authorized. There, the failure to comply with a statutory requirement precluded enforcement of administrative regulations. Here, both the requirements are statutory. In *Hirsch*, the Court found that the General Assembly had directed the Department of Natural Resources to record certain plats of wetlands among the land records, and invalidated regulations based upon the failure to follow the mandatory provisions of a statute intended to provide notice upon which landowners could rely to determine whether the regulations applied to their property.

By contrast, there is nothing in the Baltimore City Code to suggest that the list

¹⁴ This Court found that *Hirsch* was not controlling. See Sweeney Memorandum, page 9-10.

required by §7-1(d) of the Baltimore City Ethics Code was intended to be a comprehensive notice to financial disclosure filers in Baltimore City. Even if the list had been compiled and maintained in accordance with the statute, it would not have included persons "regulated by the City" but gifts received from persons "regulated by the City" are also required to be reported.

In any event, the utility of *Hirsch* as a precedent was undercut in *Samet v. Supervisor of Assessments of Baltimore City*, 290 Md. 357, 430 A.2d 73 (1981).¹⁵ In *Samet*, the appellant contended an assessment was defective since the City failed to inspect the property every three (3) years as required by statute. In that case, the court wrote:

The Samets rely on *Hirsch v. Md. Dep't of Nat. Resources*, 288 Md. 95, 416 A.2d 19 (1980) and *Garrett County v. Bolden*, 287, Md. 440, 413 A.2d 190 (1980), as 'two recent cases that have struck down administrative actions where the mandatory language of the statute was not complied with making the administrative actions ineffective....' Those cases are not apposite.

Continuing, the Court noted that in *Bolden*, the county council was bound to follow the state legislation enacted by the General Assembly. In *Samet* the Court found the failure to comply with a statute was not grounds to set aside a correct assessment. Likewise, the failure to maintain a list of entities doing business with the City is not grounds to void the requirement of filing financial disclosure forms. Nor was it understood to do so, since City employees, including the Defendant, have filed the forms annually for years. Therefore, the perjury counts are proper as the Defendant's duty to file truthful financial disclosure statements is not diminished or contingent on a list.

¹⁵ This Court recognized that *Samet* stood "... for the proposition that failure to follow a mandatory provision of the law does not eviscerate a regulatory scheme, especially where compliance with the law was otherwise feasible." See Sweeney Memorandum, page 10.

V. Ms. Dixon's Request to Incorporate Verbatim All Arguments Raised in the Case Which is Now Dismissed Should be Rejected.

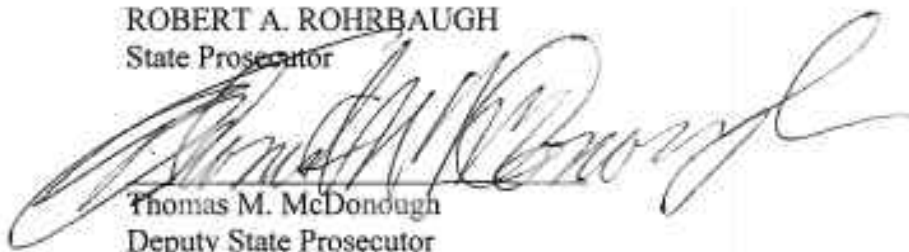
Ms. Dixon incorporates in her motion the entire memorandum which she filed in the dismissed case. Many of those arguments have no applicability to the instant case. The State should not be required to guess which arguments, if any, the defendant believes have some applicability in the present case. Therefore, there is no basis to file the earlier memorandum in such wholesale style. If the defendant believes there are issues in the earlier memorandum that are applicable to the pending case, she should be required to specify those issues so that they can be addressed by the court. Otherwise, the incorporation by reference of material that is irrelevant should be stricken.

VI. Conclusion

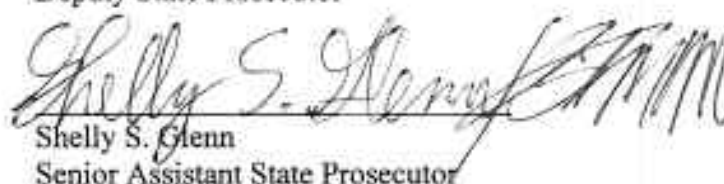
For the reasons herein and for others which may be set forth at argument, the State respectfully suggests that the Motion to Dismiss be denied.

Respectfully submitted,

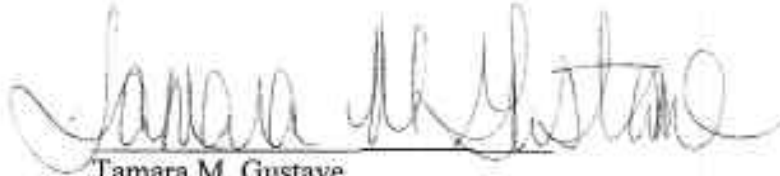
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of September, 2009 a copy of the foregoing **STATE'S MEMORANDUM IN SUPPORT OF ITS OPPOSITION TO THE MOTION TO DISMISS FILED BY THE DEFENDANT, SHEILA DIXON**

was mailed, postage prepaid, to:

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