MAYOR & CITY COUNCIL OF HAVRE de GRACE, *et al.*	*	IN THE
Plaintiffs	*	CIRCUIT COURT
	*	FOR
v.	*	
PATRICK VINCENTI, *et al.*	*	HARFORD COUNTY
Defendants	*	Case No. C-12-CV-21-000738

* * * * * * * * * * * * *

MEMORANDUM OPINION

This matter is before the Court on Defendants' Motions to Dismiss Plaintiffs' First Amended Complaint[1] arising out of the issues related to Bill No. 21-025 and the procedures in which it was approved.

For the reasons set forth below, each Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint is DENIED.

FACTS AND PROCEDURES

The Harford County Charter ("Charter") states that the boundaries of the Councilmanic districts for six County Council member seats shall be established ". . . every tenth year . . .." Art II, Section 205(a). Furthermore, the Charter provides the appointment of a bipartisan commission ("Commission") is to determine and recommend district boundaries. *Id.*

[1] All Defendants, Harford County Council, the six of the seven County Council members ("Council Member Defendants"), and Harford County filed separate Motions to Dismiss Plaintiff's First Amended Complaint. They will, however, be addressed jointly in this Memorandum Opinion.

On May 19, 2021, the Commission held its first meeting to do so. Subsequently, the Commission held an additional meeting where it invited municipal leaders to provide testimony and recommendations on the Councilmanic redistricting.

In response to the Commission's request for municipal input, representatives of Havre de Grace and Aberdeen proposed the HdG-Aberdeen Plan ("HdG Plan"). On August 23, 2021, the Havre de Grace City Council approved Resolution 2021-14, authorizing the Mayor to enter a Memorandum of Understanding ("MOU") with the City of Aberdeen to jointly support the proposed HdG Plan.

Following the proposal of the HdG Plan, the Commission held additional meetings where it reviewed Census data, citizen input, redistricting best practices, and publicly deliberated the various options presented to them. Ultimately, the Commission was to consider five different redistricting plans: the current Councilmanic district map ("Map 1'), the HdG-Aberdeen Plan ("Map 2"), Councilmanic Commissioner Robey's plan ("Map 3"), a modified version of the HdG-Aberdeen Plan ("Map 4"), and one submitted by a private citizen, the Wilson Plan ("Map 5"). Eventually, the Commission voted 3-2 to approve Map 4, the modified HdG-Aberdeen Plan, now the "Commission Plan"

On October 19, 2021, in accordance with Article II, Section 205(b) of the Charter, the County Council held a public hearing to solicit public input on the Commission Plan. The next public hearing took place on November 2, 2021, where the County Council introduced Bill No. 21-025 ("Council Plan") in place of the proposed Commission Plan. The existence of the Council Plan is alleged to have come about as the result of at least two private meetings and/or a walking quorum between October 29, 2021 and October 31, 2021.

On November 15, 2021, a public works hearing was held and a County Council noted that the County Council held a meeting on "Halloween night" to discuss and draft the Council Plan.

On December 7, 2021, a public hearing was held where the County Council solicited input from the public. At the end of the hearing, the County Council voted 6-1 to approve the Council Plan and its six separate amendments.

This action followed.

STANDARD OF REVIEW

Maryland Rule 2-322(b)(2) provides that a defendant in a civil suit in a Circuit Court may seek dismissal of a case through a preliminary motion when the complaint fails to state a claim upon which relief can be granted. A motion to dismiss is proper when a complaint fails to allege a justifiable controversy. *120 W. Fayette St., LLLP v. Mayor & City Council of Baltimore City*, 413 Md. 309 (2010). When a party seeks a dismissal on the ground that the complaint fails to state a claim upon which relief can be granted, the party is asserting that, even if the allegations are true, the opposing party is not entitled to relief as a matter of law. *Tri-County Unlimited, Inc. v. Kids First Swim Sch. Inc.*, 191 Md. App. 613, 619 (2010).

A court must assume the truth of all well-pleaded relevant and material facts as well as all inferences that reasonably may be drawn therefrom, and order dismissal only if the allegations and permissible inferences, if true, would not afford relief to the plaintiff. *Shailendra Kumar, P.A. v. Dhanda*, 426 Md. 185, 193 (2012). In considering the sufficiency of a complaint, any ambiguity or uncertainty in the allegations is to be construed against the pleader. *RRC Northeast, LLC v. BAA Maryland, INC.*, 413 Md. 638, 655 (2010). Mere conclusory charges that are not factual allegations need not be considered. *Lloyd v. Gen. Motors Corp.*, 397 Md. 108, 121 (2007). The court views all well-pleaded facts and the inferences from those facts in the light most favorable to the non-moving party. *Id.* at 2.

DISCUSSION

I. Defendant Harford County's Motion To Dismiss Plaintiff's First Amended Complaint.

A. Harford County is a Public Body Under the Open Meetings Act.

The Open Meetings Act ("OMA") states that ". . . a public body shall meet in open session." Open Meetings Act § 3-301. If a "public body" fails to do so, it is in violation of the OMA and an action can be commenced. Open Meetings Act § 3-401(b)(1). The OMA defines a "public body" as an "entity that . . . is created by the Maryland Constitution. . .." Open Meetings Act § 3-101(h)(1)(ii)(1).

Here, Harford County is, pursuant to Article XI-A of the Maryland Constitution, deemed a charter county. Moreover, charter counties, such as Harford County may exercise, by legislative enactment, the power to create and revise election districts. Md. Code. Ann. § 10-101; Md. Code. Ann § 10-306. Therefore, Harford County by and through the Maryland Constitution is a "public body" defined by the OMA. Consequently, when Harford County acts through its legislature, it must do so in accordance with the OMA.

II. Defendant Harford County Council's Motion To Dismiss Plaintiff's First Amended Complaint.

A. Plaintiffs' Claims Are Not Time Barred.

The OMA states if a violation, occurs an aggrieved person shall file a petition within forty-five (45) days after the date of the alleged violation. Open Meetings Act § 3-401(b)(2).

The forty-five-day timer began to run on November 15, 2021. Although there are communications between the Mayor and County Council Members on October 28th and 29th, 2021 about a potential meeting, they are but a piece to the overall puzzle. The communications themselves do not give light to whether an alleged violation occurred. Instead, they were mere rumors that a

meeting may happen, not that a meeting did happen. In other words, the Mayor was unaware of a violation at this time. It was not until these communications combined with the admission by the County Council Member on November 15, 2021 at the public works session did Plaintiffs know of an alleged OMA violation.

Forty-five days from November 15, 2021 is December 30, 2021. Plaintiff's initial Complaint was filed with this Court on December 8, 2021. Plaintiffs filed an amended complaint on December 23, 2021. Given that the forty-five-day period had not expired, Plaintiffs, by right, could still amend and add any party they deemed proper.

Insomuch as the Plaintiffs timely filed their Amended Complaint, this Court does not need to determine if the OMA's forty-five-day time limit is a subsequent condition precedent or whether the relation back doctrine applies thereto.

III. "Council Member" Defendants' Motion To Dismiss First Amended Complaint.

A. The Council Members Do Not Have Legislative Immunity.

Legislators who, when acting in the sphere of legitimate legislative activity "may not be a party to a civil suit concerning those activities. . .." *Montgomery Cty. v. Schooley,* 97, Md. App. 107, 118, 627 A.2d 69, 75 (1993). This restriction is to protect legislators from "the consequences of litigation and the burden of even having to defend [themselves] in a court proceeding . . ." *Id.* at 116. Nevertheless, a legislator's governmental immunity can be overcome. *Elliot v. Kupferman,* 59 Md. App. 510, 473 A.2d 960 (1984). To do so the plaintiff must allege with some clarity and precision facts that make the legislative act, malicious. *See id.* A malicious act is one that is done knowingly and deliberately for an improper motive. *Id.*

First, through their actions of reviewing and determining redistricting plans in general the Council Members committed a legislative act. Neither the Plaintiffs nor the Defendant Council Member Defendants contend otherwise.

Second, based on the communications between the Mayor and Council Members on October 28th and 29th of 2021, taken together with the admission of the Council Member on November 15, 2021, the Council Members willingly choose to meet in private; thus, the legislative act was deliberate. Likewise, Council Members should have known of the requirements of the OMA, it is to meet in public. Therefore, the legislative act was done with knowledge.

Improper motive can be inferred from the pleadings. First, there was no public notice of the private meeting or meetings. Second, the public was not invited to the meeting or meetings. Third, no agenda or meeting minutes have been posted concerning the meeting or meetings. Fourth, although the County Council discussed how they decided on Bill No. 21-025 they spoke in generalities and not specifics. Thus, it can be reasonably inferred that the legislative act was for an improper purpose.

B. The Veto Did Not Wipe The Slate Clean.

As both parties have identified, there is no Maryland case law on the ability to "cure" an OMA violation. This Court will therefore consider the various precedents established throughout the country.

In Wyoming, the Supreme Court of Wyoming held that the purpose of their OMA "is to require open decision making, not to permanently condemn a decision or vote in violation of the Act." *Gronberg v. Teton County Hous. Auth.*, 247 P.3d 35, 42 (Wyo. 2011). Subsequently, the Court interpreted that their "Act would permit ratification of a prior 'void' action made in violation of the Public Meetings Act by conducting a new and *substantial* reconsideration of the action in a manner that complies with the Act." *See id (emphasis added).*

The Vermont Supreme Court held if a violation of their OMA occurs the "invalidation of a public action is often an 'extreme remedy' that may be inappropriate for the underlying violation."

Valley Realty & Dev., Inc. v. Town of Hartford, 685 A.2d 292, 295 (Vt. 1996). Hence, a "correction at a properly noticed public meeting" is a sufficient cure of the violation. *Id.*

Colorado's Court of Appeals, stated that their OMA "permits a state or local public body to 'cure' a prior [ ] violation by holding a subsequent complying meeting that is not a mere 'rubber stamping' of an earlier decision. *Colorado Off-Highway Vehicle Coal. v. Colorado Bd. of Parks & Outdoor Recreation*, 292 P.3d 1132, 1137-38 (Colo. App. 2012).

In West Virginia, the Supreme Court of Appeals of West Virginia, stated that "if a public body could not cure its violation, it might forever be locked into the position that was contrary to the action it took in the illegal meeting. *McComas v. Board of Educ. of Fayette County*, 475 S.E.2d 280, 293 (W. Va. 1996). Thus, the court interpreted their OMA to allow for a subsequent public meeting to cure the violation so long as it is not a rubber stamp meeting. *See id.* at 294.

When interpreting a statute, this Court "assumes that the legislature's intent is expressed in the statutory language and thus our statutory interpretation focuses primarily on the language of the statute to determine the purpose and intent of the Legislature." *Phillips v. State*, 451 Md. 180, 196, 152 A.3d 712 (2017). The Court "read[s] 'the statute as a whole to ensure that no word, clause, sentence, or phrase is rendered surplusage, superfluous, meaningless or nugatory'" *Conaway v. State*, 464 Md. 505, 522-23, 212 A.3d 348 (2019) (quoting *Ingram v. State*, 461 Md. 650, 661, 197 A.3d 14 (2018)).

If the statutory language is "ambiguous and subject to more than one reasonable interpretation," or "become[s] ambiguous when read as part of a larger statutory scheme," we "must resolve the ambiguity by searching for legislative intent in other indicia, including the history of the legislation and other relevant sources intrinsic and extrinsic to the legislative process." *Town of Forest Heights v. Maryland-Nat'l Capital Park & Planning Comm'n*, 463 Md. 469, 479, 205 A.3d 1067 (2019) (quoting *Gardner v. State,* 420 Md. 1, 9, 20 A.3d 801 (2011)). In doing so this Court "consider[s] the consequences resulting from one meaning rather than another [and] adopts that construction which

avoids an illogical or unreasonable result, or one which is inconsistent with common sense." *Blackstone v. Sharma*, 461 Md. 87, 113, 191 A.3d 1188 (2018) (quoting *Schreyer v. Chaplin*, 416 Md. 94, 101 5 A.3d 1054 (2010)).

Here, the Open Meetings Act does not specifically state whether a public body may "cure" a prior violation of the OMA by holding a subsequent meeting that complies with the Act and thus, the Court must look to the legislative intent. The OMA's legislative policy states that the Act is "essential to the maintenance of a democratic society that . . . public business be conducted openly and publicly . . .." OMA § 3-102(a)(2)(ii).

The Legislature wanted to encourage, through the enactment of the OMA, open discussion during the legislative decision-making process. Moreover, the OMA stipulates how the decisions should be made not what decisions are made. Likewise, the Legislature by and through the OMA wanted to encourage the efficiency of government. Open Meetings Act § 3-102(b)(2). It follows then that the OMA would provide for a cure of a violation as a way to effectuate the purpose of encouraging public discussion and efficient government.

To cure a violation, however, there would need to be a subsequent open meeting that ratified the prior decision. Moreover, the subsequent open meeting would need to be on the essential terms of the issue so that citizens can participate in the decision-making process. In other words, the subsequent meeting cannot be a mere rubber stamp on the earlier decision that was in violation of the OMA or else the legislative intent of the OMA would not be effectuated. As the Court of Appeals held in *City of Baltimore Development Corp. v. Carmel Realty Associates*, the "[OMA] should be construed so as to frustrate all evasive devices." 395 Md. 299, 321, 910 A.2d 406, 419 (2006) (emphasis in original). Meaning, a rubber stamp meeting would be no more than an "evasive device" used to work around the provisions of the OMA.

In the matter before this Court, Defendant Council Member Defendants contend that the January 4, 2022, public hearing where the County Council overrode the County Executive's

December 28, 2021 veto acts as a cure to the alleged OMA violation. However, this was a mere override of a veto. It does not appear that the significant issues of the Council Plan were discussed during this meeting in relation to the October 2021 violation. Likewise, the January 4, 2022 meeting did not attempt to ratify the alleged violation in October 2021. Instead, it was a meeting on a different issue – the County Executive's December 2021 veto. Thus, this Court does not find that the subsequent open meeting was a cure for the purpose of the OMA.

C. Defendant Council Member Defendants Are A Public Body.

The Open Meetings Act defines "public body." *See* Part I.A., *supra*. Here, the Defendant Council Member Defendants meet that criteria. Although each defendant is an individual, the basis of Plaintiff's claim arises from the acts done by each individual, as a whole, in their official capacity as a Council Member. In other words, each Council Member Defendant did an individual deed and when taken in conjunction with the other Council Member's deeds an act done in a manner akin to that of a "public body" i.e., the County Council occurred.

D. Plaintiffs Are Not Barred By Laches.

Defendant Council Member Defendants contend that the Plaintiffs admit they had actual knowledge of the alleged OMA violation in October 2021. However, as this Court found in its earlier analysis, the Plaintiffs did not know about the alleged OMA violation until November 15, 2021. *See* Part II.A., *supra*. Thus, the Plaintiffs did bring this lawsuit in a timely fashion and they are not barred by laches nor did they cause any prejudice by unreasonably delay.

E. Plaintiff Have Standing To Challenge The Redistricting Bill.

The OMA itself states, in relevant part, ". . . any *person* may file with a circuit court that have venue a petition that asks the court to . . . void the action of the public body." Open Meetings Act § 3-401 (emphasis added). The Court "assumes that the legislature's intent is expressed in the statutory language and thus our statutory interpretation focuses primarily on the language of the statute to determine the purpose and intent of the Legislature." *Phillips*, 451 Md. at 196 152 A.3d at 712.

Likewise, it is an "established principle that all statutory provisions which relate to the same subject matter and are thus in pari materia and should be construed together and harmonized as far as possible." *Unnamed Physician v. Comm'n on Med. Discipline*, 285 Md. 1, 10, 400 A.2d 396, 401 (1979).

Here, the Legislature, through the OMA, intended to prescribe standing how it saw fit by allowing "any person" to file an action. The Legislature went even further and defined who a person is for purposes of the OMA. Section 1-114 of Md. Code. Ann., General Provisions defines a "person" to be an "individual [or] . . .[a] corporation . . ." among other things. The Court of Appeals has "consistently held that the word 'person' in a statute does not include the State, its agencies or subdivisions unless the intention to include these entities is made manifest by the Legislature." *Unnamed Physician* 285 Md. at 12 400 A.2d at 402.

However, in Md. Code Ann., Local Government § 4-103, the Legislature stated that "residents of a municipality are a municipal corporation." Likewise, "under the municipality's corporate name, the municipality . . . may sue and be sued . . .." *Id.* Thus, it is apparent that the Legislature meant to include municipal corporations as a person as defined by statute. Moreover, it is sound public policy to allow the residents of a municipality, by and through their municipality, to sue under the OMA in order to keep the government accountable. Therefore, the City of Havre de Grace is a "person" for purposes of the OMA. Additionally, the Mayor, suing in his individual capacity, falls within the definition of "person" contemplated by the OMA.

Next, the Court of Appeals in *Frazier v. McCarron* held that "a violation [of the OMA] may not cause specific demonstrable injury to individual members of the public . . . it is the right and power of the citizen to control the government – even if harm is not immediately perceptible." 466 Md. 436, 449, 221 A.3d 571, 578 (2019). In short, the Court of Appeals found that the OMA provides for generalized grievances. *See id.* Thus, both the City of Havre de Grace and the Mayor fall within the type of "person" the Legislature intended to give standing and they both have experienced the

generalized harm the OMA is meant to protect against i.e., a government working behind closed doors and inefficient government.

F. The City Did Not Violate The OMA When It Sought Authorization To File Suit.

In Section 3-305 of the OMA, the Statute allows for a public body to meet in a closed session to "consult with counsel to obtain legal advice" and "consult with staff, consultants, or other individuals about pending or potential litigation." Open Meetings Act § 3-305(b) (7-8). Moreover, the OMA infers that while in a permissible closed session the public body may "act" in accordance with what was discussed, including taking a vote. *See* Open Meetings Act § 3-305(c); *See also J.P. Delphey Ltd. P'ship v. Mayor & City of Frederick*, 396 Md. 180, 200-01, 913 A.2d 28, 40-01 (2006).

Here, Plaintiff Havre de Grace claims, and Defendant Council Member Defendants do not dispute, that a closed meeting was held for purposes of obtaining legal advice. Although, Defendant Council Member Defendants contented that a non-public vote was taken to authorize the Plaintiffs lawsuit, a violation of the OMA, however, it did not need to be public. The private meeting and subsequent vote to file suit were done in compliance with the OMA.

G. Plaintiffs Are Granted Leave To Amend Count III Of Their First Amended Complaint.

Count III of Plaintiffs' First Amended Complaint, alleges that Defendants breached Section 205(b) and 218(d) of the Charter. According to Rule 2-202(a), "each cause of action shall be set forth in a separately numbered count." Defendant cites to *Tavakoli-Nouri v. State*, quoting that "the failure to state separate causes of action in separate counts is improper and renders the complaint deficient." However, this does not automatically warrant dismissal without leave to amend. "Amendments shall be freely allowed when justice so permits." Md. Rule 2-314(c). Here, this Court grants the Plaintiffs leave to amend Count III in their First Amended Complaint to adhere to the Maryland Rules of Civil Procedure within ten-days of the Orders to follow.

CONCLUSION

In viewing the allegations in the light most favorable to the non-moving party, there is legal sufficiency supporting the claims asserted by Plaintiffs. Plaintiffs have a well-plead argument for their cause of action against Defendant. The legal claim is based on reasonable inferences and, if found to be true, Plaintiff may be afforded relief. Therefore, each Defendants' Motion to Dismiss are **DENIED** as to Counts I and II. Further, Plaintiffs are hereby **GRANTED** leave to amend Count III to add separate allegations under Charter Section 205(b) and 218(d) within ten days of the Orders.

January 27, 2022
DATE

Barbara Kerr Howe
BARBARA KERR HOWE, JUDGE