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IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY, MARYLAND

PAUL JOHN CISAR, et al.

Plaintiffs,

v. Case No.: C-02-CV-22-000988

F.O. MITCHELL & BRO, et al,

Defendants.

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

OPPOSITION TO MOTIONS TO DISMISS

Plaintiffs, by and through their attorneys, hereby oppose Defendants Harford County, Chesapeake Real Estate Group, LLC, F.O. Mitchell & Bro., and Frederick Ward Associates, Inc.'s Motions to Dismiss, and, in support thereof, set forth the following.

Defendants' Motions to Dismiss should be denied. Plaintiffs have filed a carefully pleaded four-Count Verified Complaint relating to the unlawful endeavors by Defendants to develop a Freight Terminal on a collection of rural farm parcels. Jurisdiction in this Court is proper because one of the multiple defendants carries on a regular business in Anne Arundel County. This venue is proper to determine the rights, status and other legal relations relating to the questions of construction and validity of the instruments, statutes, ordinances, and rules for which a justiciable controversy exists between the parties.

Plaintiffs' Complaint does not seek review of an administrative agency's decision therefore they are not required to exhaust administrative remedies. An additional party is not alleged to be committing a nuisance upon the rights of Plaintiffs therefore an alleged additional party is not necessary to this action. Finally, this action should not be transferred from Anne Arundel County.

I. Information Outside of Complaint Should Be Excluded by the Court in Determining this Motion to Dismiss.

The Complaint alleges that Defendants have endeavored and engaged in substantial acts to develop an unlawful Freight Terminal. In response, the Defendants have moved to dismiss the complaint. Their Motions impermissibly include attachments of documents, testimony and matters not contained within the four corners of the Complaint. These attachments, and information contained therein, should therefore be excluded and not considered by the Court. In considering a motion to dismiss a complaint for failure to state a claim upon which relief may be granted, a court must assume the truth of, and view in a light most favorable to the non-moving party, all well-pleaded facts and allegations contained in the complaint, as well as all inferences that may reasonably be drawn from them, and order dismissal only if the allegations and permissible inferences, if true, would not afford relief to the plaintiff, *i.e.*, the allegations do not state a cause of action for which relief may be granted. *State Center, LLC v. Lexington Charles Ltd. Partnership*, 438 Md. 451, 496-97 (2014), quoting *RRC Ne., LLC v. BAA Maryland, Inc.*, 413 Md. 638, 643-44 (2010). Consideration of the universe of

"facts" pertinent to the court's analysis of the motion are limited generally to the four corners of the complaint and its incorporated supporting exhibits, if any. *Id.* Therefore, the attachments to Defendants' Motions and citation to them in their Motions should be excluded.

If, however, the Court wishes to consider them, Rule 2-322(c) mandates that Plaintiffs shall be given reasonable opportunity to present material pertinent to the summary judgment motion. *Cf., 120 W. Fayette Street, LLLP v. Mayor and City Council of Baltimore, et al. ("Superblock I")*, 407 Md. 253, 259 (2009), superseded by statute on other grounds as stated in *Patuxent Riverkeeper v. Maryland Dept. of Environment*, 422 Md. 294 (2011). If, on a motion to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 2-501, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 2-501. In that event the Court should defer ruling on Defendant's Motion and permit Plaintiffs to conduct a sufficient amount of discovery to rebut the claims made outside of the Complaint. Should a trial court decide to treat a motion as one for summary judgment, it must provide the parties with a reasonable opportunity to present, in a form suitable for consideration on summary judgment, additional pertinent material. *Worsham v. Ehrlich*, 181 Md. App. 711, 722 (2008), citing *Antigua Condominium Assoc. v. Melba Investors Atlantic, Inc.*, 307 Md. 700, 719 (1986). That is because a non-moving party may be

prejudiced if a trial court treats a motion to dismiss as a motion for summary judgment by considering matters outside the pleading but does not give the non-moving party a reasonable opportunity to present material that may be pertinent to the court's decision, as required by Maryland Rule 2–501. *Worsham*, 181 Md. App at 722-23, citing *Green v. H & R Block, Inc.*, 355 Md. 488, 502 (1999).

In either scenario, the appropriate deferential prism by which this Court considers a motion to dismiss militates substantially in favor of denying Defendants' Motions. The court is required to assume the truth of all of the well-pled facts in the complaint and the reasonable inferences drawn from them, in a light most favorable to Plaintiffs. Md. Rule 2–322(b). It is against this backdrop that Defendants' Motions are measured. Accordingly, Defendants' Motions should be denied.

II. DEFENDANTS MOTIONS TO DISMISS SHOULD BE DENIED.

a. Defendant CREG's Principal Place of Business is in Anne Arundel County, as such, Venue in this county is, as a Matter of Law, Proper.

Anne Arundel County is a proper venue pursuant to Maryland Code Ann., Cts. & Jud. Proc. § 6-201 because one of the multiple defendant's principal place of business is in Anne Arundel County. Plaintiffs have named four defendants, including Chesapeake Real Estate Group, LLC ("CREG"). The Complaint alleges that Defendant CREG is to be the purchaser, contract purchaser, legal and beneficial owner of certain portions, and ultimate developer of, the Mitchell Farm. Compl. at ¶ 22. Defendants do not deny this allegation. The Complaint further states that Defendant CREG maintains its principal

place of business in Anne Arundel County, Maryland. *Id.* Defendant Harford County posits in its Motion, without citation to any authority, that venue in Anne Arundel County must be established for each of the other three defendants in order for this Court to have jurisdiction. *See* Defendant Harford County's Motion to Dismiss, Page 7. Defendant is wrong. *Payton-Henderson v. Evans*, 180 Md. App. 267, 276 (2008)("[i]n a case involving multiple defendants, if so much as a single defendant, out of a hundred defendants, resides or works or does business in the county chosen by the plaintiff, venue in that county is, as a matter of law, proper and the case may not be dismissed for improper venue."

In *Payton-Henderson*, a boy and his mother filed a lawsuit in Baltimore City after the boy was shot by two individuals at a Baltimore County school. *Id.* at 271-72. The plaintiffs sued the principal of the Baltimore County school, the Board of Education for Baltimore County, Baltimore County police officers and the two individual shooters. *Id.* The only connection to Baltimore City was that one of the shooters resided in Baltimore City (before he was imprisoned in Hagerstown, Maryland for his role in the shooting). *Id.* at 272. The defendants therein filed a Motion to Dismiss for Improper Venue or, in the alternative, a Motion to Transfer the Trial to Baltimore County on Grounds of Forum *Non Conveniens*. *Id.* The *Payton-Henderson* court held that jurisdiction was legally proper in Baltimore City even though only one of the multiple defendants resided in Baltimore City, and the events for which the cause of action arose occurred in Baltimore County. *Id.* at 276-78. Here, one of the multiple Defendants is CREG. Whether Anne

Arundel County, therefore, is a proper venue under Section 6-201(b) wherein "all may be sued" depends upon whether Anne Arundel County is a proper venue wherein "any one of them" [to wit CREG] can be sued. That, in turn, depends upon the "principal place of business" for CREG. The Complaint alleges, without rebuttal, that CREG's principal place of business is Anne Arundel County. Compl. ¶ 22. Plaintiffs have selected a legally permissible venue, and there is nothing further to be considered under section 6-201. As Judge Moylan stated: "[t]he plaintiffs do not need to offer any rationale or justification." *Payton-Henderson*, supra at 277. *Cf. Kent Island, LLC v. DNapoli*, 430 Md. 348, Fn. 3 (2013)(Kent Island, LLC properly sued Queen Anne's County and the Maryland Department of the Environment in Anne Arundel County over issues related to development in Queen Anne's County.) Plaintiffs' chosen venue is proper, as a matter of law, in Anne Arundel County.

b. The Case Should Not be Transferred.

Defendants have not met their heavy burden of showing that the interest of justice would be best served by transferring this action. It is the moving party who has the *heavy* burden of persuasion to show that the interest of justice would be best served by transferring this action. *Payton-Henderson v. Evans*, 180 Md. App. 267, 285, 287 (2008)(emphasis supplied). A motion should be transferred for forum *non conveniens* purposes, only when the balance weighs strongly in favor of the moving party. *Id.* The initial choice of forum by a plaintiff is an ever-present consideration in transfer cases and is not lightly to be dismissed. *Id.*, at 287. Indeed, a plaintiff's choice of forum must be

given "proper regard," and the plaintiff's choice will not be "altered solely because it is more convenient for the moving party to be in another forum." *Murray v. Transcare Maryland, Inc.*, 203 Md. App. 172, 191 (2012), citing, *Leung v. Nunes*, 354 Md. 217, 224 (1999).

There are two basic factors considered by a court ruling on a motion to transfer: convenience and the interests of justice, each with particularized sub-parts. *Id.*, at 288-89. The convenience factor requires a court to review the convenience of the parties and the witnesses. *Id.* at 289, citing, *Stidham v. Morris*, 161 Md.App. 562, 568 (2005). Defendants Motions do not specify who will be inconvenienced, why, or how. The 'interests of justice' factor requires a court to weigh both the private and public interests; the public interests being composed of 'systemic integrity and fairness.' *Id.* A motion to transfer may only be granted when the balance between these two factors weigh *strongly* in favor of the moving party. *Murray*, 203 Md. App. at 191, citing, *Odenton Dev. Co. v. Lamy*, 320 Md. 33, 40 (1990)(emphasis supplied). Defendants failed to make this showing.

The interest of justice factor is, itself, a two-pronged factor consisting of both a private interest component and a public interest component. *Payton-Henderson*, 180 Md. App. at 292. The private interest component concerns the efficacy of the trial process itself. It is deemed a "private interest" because is concerned only with a particular case. *Id.* Judge Moylan, in *Payton-Henderson*, 180 Md. App. at 292-93, quoted *Stidham v.*

Morris, 161 Md. App. at 568, for the explanation of the private interest in the trial process:

> Private interests include "[t]he relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive."

Defendants' Motions make only bald conclusory allegations lacking any substantiating proof. It is unsupported by affidavit or evidence. Defendants do not identify any witnesses for whom Anne Arundel County would be so difficult of a destination to travel. Plaintiffs have chosen to institute this action in Anne Arundel County and they would not be inconvenienced by this action remaining, as it should, in Anne Arundel County. Nevertheless, Harford County is a mere hour's drive to Annapolis, Maryland. Furthermore, Defendant CREG is principally located in Anne Arundel County. Indeed, Anne Arundel County is perhaps the most centrally located county in Maryland.

The other component of the "interest of justice" factor is the "public interest." Again, Judge Moylan quoted *Stidham v. Morris*, 161 Md. App at 293, for the definitional standard of this prong.

> ...[public] interests include, among other things, considerations of court congestion, the burdens of jury duty, and local interest in the matter. "Jury duty," the Court of Appeals has stressed, "is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation."

Payton-Henderson, 180 Md. App. at 293.

Here, Defendant Harford County admits that any factor relating to supposed court congestion weighs only "slightly" in its favor of transferring the case from Anne Arundel County. See Motion to Dismiss, Page 15. "Slightly" does not come close to meeting the heavy burden required of Defendants to overcome the strong presumption in Plaintiff's favor that their chosen venue is proper.

c. A justiciable controversy exists.

The Maryland Declaratory Judgment Act, Md. Code Ann., Cts. & Jud. Proc. Art., § 3-401, *et seq.*, provides an opportunity to any person to settle and obtain relief from uncertainty and insecurity with respect to rights, status, and other legal relations. Parties, pursuant to Section 3-406, may seek determination of a question of construction or validity arising not only under a contract, but also under a deed, will, trust, land patent, statute, ordinance, administrative rule, or regulation, and obtain a declaration of rights, status or other legal relations thereunder. Section 3-402 provides that the subtitle is remedial and "[i]ts purpose is to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations." To this end "[i]t shall be liberally construed and administered." *Boyds Civic Ass'n v. Montgomery County Council*, 309 Md. 683, 688 (1987). Plaintiffs have set forth that a justiciable controversy exists between the parties. A justiciable controversy is one where "there are interested parties asserting adverse claims upon a state of facts which must have accrued where in a legal decision is sought or demanded. *Boyds Civic Ass'n v. Montgomery County Council*, 309 Md. 683,

690 (1987), citing *Patuxent Co. v. Commissioners*, 212 Md. 543, 58 (1957). All elements are present in the Complaint.

Plaintiffs seek a declaratory judgment that the planned Freight Terminal is unlawful and violates the Zoning Code's clear prohibition against its construction in a defined "Light Industrial" zoned district. Compl. ¶ 67. Defendants apparently deny that they are seeking to develop a Freight Terminal. Defendant Harford County's Motion to Dismiss, Page 2. This issue alone represents a justiciable controversy. Defendants have essentially conceded as much by their disagreement.

Here, the "ripening seeds" of an actual controversy exist, and the facts are not too contingent or speculative for declaratory relief. *Boyds*, 691 citing *Kariher's Petition (No. 1)*, 284 Pa. 455, 471 (1925). By "ripening seeds" the court meant, not that sufficient accrued facts may be dispensed with, but that a dispute may be tried at its inception before it has accumulated the asperity, distemper, animosity, passion, and violence of the full-blown battle which looms ahead. *Id.* "Where the threat of ... potential rezoning ... hangs like a pall of smoke over ... [neighboring] properties 'within sight and sound' of ... land sought to be quarried[,] a justiciable controversy exists." *Friends of Mount Aventine, Inc. v. Carroll*, 103 Md. App. 204, 211 (1995), citing *Boyds Civic Ass'n v. Montgomery County Council*, 309 Md. 683, 700 (1987). Maryland law also supports declaratory relief in situations such as here, where the circumstance for the controversial situation is imminent. *County Com'rs of Queen Anne's County v. Days Cove Reclamation Co.*, 122 Md. 505, 518 (1998).

The Complaint alleges that Defendant F.O. Mitchell & Bro. has sold portions of, and, is in the process of further selling portions of, the Mitchell Farm to Defendant CREG. Compl. ¶ 30-31. Defendants CREG and Frederick Ward have begun development of the Mitchell Farm by seeking approvals for the Freight Terminal. Compl. ¶ 32. Defendants CREG and Frederick Ward have, among other things, submitted concept plans, Forest Stand Delineation Plans, Preliminary Plans, Site Plans, and presented a traffic impact study. Compl. ¶ 32. The Complaint continues that Defendants CREG and Frederick Ward have begun constructing and installing utility features on and around the Mitchell Farm in anticipation of the Freight Terminal's construction. Compl. ¶ 33. These are the 'ripening seeds' that make Plaintiffs' Complaint justiciable, and Defendants do not deny that they plan to ripen the seeds into a 5.2 million square foot Freight Terminal, they only deny it is called a Freight Terminal.

This case is analogous to *County Com'rs of Queen Anne's County v. Days Cove Reclamation Co.*, 122 Md. 505 (1998). There, property owners who sought to develop and operate a rubble landfill filed a declaratory judgment action against the county and Maryland Department of the Environment ("MDE") alleging that a new zoning ordinance and proposed revision of the county's solid waste management plan were improper. *Days Cove*, 122 Md.App. at 510-15. MDE and the county moved to dismiss the action arguing, among other things, that the issue whether to approve or disapprove alleged amendments to the county's plan was not ripe for adjudication because the county had not adopted the alleged amendments and further had not submitted any amendments to the Department

for review. *Id.* at 515. In affirming the circuit court's denial of MDE and the county's motion to dismiss, the *Days Cove* court found that the controversial situation was imminent and therefore quite justiciable as it presented the 'ripening seeds of an actual controversy." *Id.* at 520 citing *Boyds*, 309 Md. at 691. Of particular importance in the court's holding were the county commissioners' purposeful and coordinated actions.

Considering the Defendants' purposeful and coordinated actions in approving the actions of developers, the Defendants' actions have already occurred, are presently occurring, and are imminent to continue. Plaintiff waiting for an irreparable injury would negate the entire basis for the Declaratory Judgment Act and its provisions. If Plaintiff waits too long it would be too late.

Defendant Harford County's citation of authority in support of their position are distinguishable from the instant case. *120 W. Fayette St., LLLP v. Mayor & City Council of Baltimore City ("Superblock II")*, 413 Md. 309 (2010) is different from the present case. *Superblock II* involved a situation where developers tried to force Baltimore City to develop the way the developers wanted without any allegation of interference with the developers' property rights. Plaintiffs, here, are trying to stop something that is clearly prohibited by the express language of the County Code, but has already been approved, in concept, for reasons that remain unexplained.

Hatt v. Anderson, 297 Md. 42 (1983) is also distinguishable. *Hatt* involved a declaratory judgment action that sought to invalidate a county fire department regulation that prohibited criticism of superior officers, without any allegation that any employee

had or was going to make such criticism. *County Com'rs of Queen Anne's County v. Days Cove Reclamation Co.*, 122 Md. App. 505, 519 (1998). In contrast, Defendants admit that they endeavor to build a 5.2 million square foot Freight Terminal, they merely deny it is called a Freight Terminal. As noted in *Boyds*, 309 Md. at 692, and reiterated in *Days Cove Reclamation*, 122 Md. App. at 519, the complaint in *Hatt* contained no allegation that the regulation had been or was threatened to be applied to the plaintiff in any particular way. *Hatt*, 297 Md. at 46-47. There was thus no justiciable controversy. That is not the situation in this case. Here, the Complaint clearly and repeatedly alleges that the development is unlawful and will harm Plaintiffs.

Hamilton v. McAuliffe, 277 MD. 336 (1976) is also wholly inapplicable to this case. In *Hamilton*, a man was shot and a Circuit Court judge issued a declaratory judgment allowing doctors to perform a blood transfusion on him to save his life. Eleven months later, plaintiff filed a declaratory judgment action seeking a declaration that the judge's almost year-old order was invalid and that the judge was precluded from entering a similar order in the future. The court rightfully held that the issue was moot (the blood transfusion had already occurred), and the possibility of plaintiff being shot again and requiring another blood transfusion was too remote and hypothetical to be a justiciable controversy. There is nothing remote or hypothetical about Defendants' stated goal. To the contrary, Plaintiffs have plead sufficient facts that a justiciable controversy exists between the parties because Defendants are *currently* attempting to interfere with Plaintiffs' property rights.

d. Administrative Doctrines of Finality and Exhaustion Do Not Apply.

Defendants next claim that the Complaint should be dismissed because there is no final decision of the Director of Planning and Plaintiffs have failed to exhaust their administrative remedies. Defendant's arguments pertaining to the administrative process is misplaced. These arguments are incorrect because Plaintiffs are not seeking judicial review of an administrative agency or any of its decisions. Plaintiffs are seeking redress from Defendant's tortious intrusion to their property interests and an adjudication of their rights. The Circuit Court has inherent power to resolve these equitable issues. Rule 2-301.

The authority of the circuit courts of Maryland is defined by Article IV, § 20 of the Maryland Constitution and § 1–501 of the Courts and Judicial Proceedings Article. *Kent Island, LLC v. DiNapoli*, 430 MD. 348, 363 (2013). The Maryland Constitution provides, in relevant part, that each circuit court has "all the power, authority and jurisdiction, original and appellate, which the Circuit Courts of the counties exercised on [4 November 1980]...." *Id.*, citing, Md. Const., Art. IV, § 20. Circuit courts are the "highest common-law and equity courts of record exercising original jurisdiction within the State," and have "full common-law and equity powers and jurisdiction in all civil and criminal cases within its county, ... except where by law jurisdiction has been limited or conferred exclusively upon another tribunal." *Id.*, citing Md.Code (1973, 2006 Repl.Vol.), Courts & Judicial Proceedings Article, § 1–501. Pursuant to Rule 2-301, law and equity claims may be made in the same actions. In the present case, when Plaintiffs

filed their Complaint, they are asserting equitable claims. This Court is thus empowered to exercise its original equity jurisdiction.

> The power which a court possesses to hear and determine cases, other than that which is inherent in it, is delineated by the applicable constitutional and statutory pronouncements...The circuit courts of this State ...are courts or original general jurisdiction, and therefore, they may hear and decide all cases at law and equity....
>
> We perceive that they do not, nor can they, question the circuit court's inherent or statutory power sitting in equity to issue an injunction...[Citations omitted.]

Marquardt v. Papenfuse, 92 Md. App. 683 (1992)(citations omitted).

i. This Court Has Inherent Authority to Consider the Complaint.

A circuit court's authority is not limited to that provided in the rules or by statute. Maryland Rule 1–201(c) provides: "Neither these rules nor omissions from these rules supersede common law or statute unless inconsistent with these rules." See also *Weaver v. ZeniMax Media, Inc.*, 175 Md. App. 16, 41 (2007). "Since the early years of the Republic, Maryland courts have recognized the inherent authority of courts in numerous contexts." *Weaver*, 175 Md. App. at 41-42, citing *Wynn v. State*, 388 Md. 423, 431–32 (2005). The Court of Appeals has explained the general nature of inherent judicial authority:

> The judicial branch of government in this State possesses those powers expressly reserved to it by the Maryland Constitution and Declaration of Rights. In addition, the judiciary has certain implied or inherent powers under the Maryland Constitution.... "In order to accomplish the purposes for which they are created, courts must also possess powers. From time immemorial, certain powers have been conceded to courts, because they are courts. Such powers have been conceded, because without them they could

> neither maintain their dignity, transact their business, nor accomplish the purposes of their existence. These powers are called inherent powers.
>
> 'The inherent power of the court is the power to protect itself; the power to administer justice ...; the power to promulgate rules for its practice; and the power to provide process where none exists. It is true that the judicial power of this court was created by the Constitution, but, upon coming into being under the Constitution, this court came into being with inherent powers.' "

Weaver, 175 Md. App. at 42-43, citing, *Comm'n on Med. Discipline v. Stillman*, 291 Md. 390, 400–01, 435 A.2d 747 (1981) (citations omitted).

Defendants' Motions ignore that Plaintiffs are not seeking to challenge an agency action. Defendants cite *Bd. of Pub. Works v. K. Hovnanian's Four Seasons at Kent Island, LLC*, 443 Md. 199 (2015) as support of their argument that parties to the controversy must ordinarily await a final administrative decision before resorting to the court's for resolution of the controversy. Preliminarily, Plaintiffs are not seeking to address any agency's actions or decisions. They are seeking a declaratory judgment and to end the nuisance. *K.Hovnanian* is thus inapplicable. Secondarily, the rule of exhaustion is not an absolute one as there are several exceptions. According to *K. Hovnanian* among the exceptions to the administrative agency exhaustion rule are:

> 1. When the legislative body has indicated an intention that exhaustion of administrative remedies was not a precondition to the institution of normal judicial action. *White v. Prince George's Co.*, 282 Md. 641, 649, 387 A.2d 260, 265 (1978).
>
> 2. When there is a direct attack, constitutional or otherwise, upon the power or authority (including whether it was validly enacted) of the legislative body to pass the legislation from which relief is sought, as contrasted with a constitutional or other type issue that goes to the application of a general statute to a particular situation. *Harbor Island Marina v. Calvert Co.*, 286 Md. 303, 308, 407 A.2d 738, 741 (1979).

....

> 4. Where the administrative agency cannot provide to any substantial degree a remedy. *Poe v. Baltimore City*, 241 Md. 303, 308–09, 216 A.2d 707, 709 (1966).
>
> 5. When the object of, as well as the issues presented by, a judicial proceeding only tangentially or incidentally concern matters which the administrative agency was legislatively created to solve, and do not, in any meaningful way, call for or involve applications of its expertise. *Md.–Nat'l Cap. P. & P. v. Wash. Nat'l Area [Arena]*, 282 Md. 588, 594–604, 386 A.2d 1216, 1222–27 (1978).

K. Hovnanian, 443 Md. 199, 218 (2015), citing, *Prince George's County v. Blumberg*, 288 Md. 275, 284-85 (1980).[1]

Count Two states a claim for private action for nuisance. A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land. Sandler, Paul Mark, Pleading Cause of Action in Maryland, Fifth Addition, 373 citing *Rosenblatt v. Exxon Co.*, 335 Md. 58 (1994). One is subject to liability for a private nuisance if his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either (a) intentional and unreasonable, or (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities. The elements of a tort action for damages arising out of private nuisance are: (1) unreasonable or intentional conduct; (2) which causes substantial and unreasonable injury or interference; (3) with another's use and enjoyment of his or her real property. *Stottlemyer*

[1] *K. Hovnanian* also held that an additional exception to the exhaustion rule - where an agency requires a party to follow, in a manner and to a degree that is significant, an unauthorized procedure recognized in *Stark v. Board of Registration*, 179 Md. 276, 284–85, 19 A.2d 716, 720 (1941) was invalid citing *Renaissance Centro Columbia, LLC v. Broida*, 421 Md. 474 (2011). *K. Hovnanian*, 443 Md. at 218.

v. Crampton, 235 Md. 138 (1964). Plaintiffs' Complaint adequately sets forth all elements of this cause of action.

Defendants' planned unlawful development is a legal cause of invasion to Plaintiffs' interest in their private use and enjoyment of their land. Compl. ¶ 71-72. The Defendants' invasion is intentional, unreasonable and in disregard of the rights of Plaintiffs. Compl. ¶ 72. Defendants' conduct will continue to cause substantial and unreasonable injury and interference with Plaintiffs' use and enjoyment of their property by, for example, impairing their property values and, eventually, the practical use of their property. Compl. ¶ 73-75.

Count Three states a claim for a private action for a public nuisance. A public nuisance is an unreasonable interference with the rights of the community at large. *Potomac River Ass'n v. Lundenberg Md. Seamanship Sch.*, 402 F.Supp. 344 (D. MD. 1975). A tort for public nuisance may be enforced by a private action if the plaintiff has suffered harm of a kind different than that suffered by other members of the public. *Potomac River Ass'n*, 402 F.Supp. at 344. The elements of a private cause of action for a public nuisance are: (1) conduct which unreasonably interferes with the rights of the community at large; and (2) harm suffered by the plaintiff of a kind different than that suffered by other members of the public. Here, Plaintiffs have established a nuisance per se because Defendants' conduct violates the Zoning Code.

e. Mr. Maslin is not a necessary party.

Finally, Mr. Maslin is not a necessary party as Defendant argues. Plaintiffs Complaint does not allege that Mr. Maslin is engaged in Defendants' unlawful actions, nor that any portion of his land contributes to the intrusion on Plaintiffs' land or interferes with their property, because they chose not to. Therefore, complete relief may be accorded among those already parties. Rule 2-211(a). Nevertheless, even assuming, *arguendo*, Mr. Maslin is deemed to be a necessary party, dismissal of the Complaint is inappropriate. Rule 2-211 permits the Court to order he be made a party, and Defendants have made no cross-claim against Mr. Maslin.

WHEREFORE, Plaintiffs request that Defendant Harford County, F.O. Mitchell & Bro. and Frederick Ward Associates, Inc.'s Motions to Dismiss be denied.

/s/
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of August, 2022, a copy of the foregoing Opposition to Motions to Dismiss was served through MDEC on:

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IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY, MARYLAND

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Plaintiffs,

v. Case No.: C-02-CV-22-000988

F.O. MITCHELL & BRO, et al,

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

PROPOSED ORDER

Upon consideration of Defendants Harford County, Chesapeake Real Estate Group, LLC, F.O. Mitchell & Bro. and Frederick Ward Associates, Inc.'s Motions to Dismiss, and Plaintiffs' opposition thereto, it is by the Circuit Court for Anne Arundel County, this _____ day of _____, 2022,

ORDERED, that the Motions be, and are hereby, denied.

_____
Judge
Circuit Court for Anne Arundel County