

PAUL JOHN CISAR, et al.

Plaintiffs,

v.

F.O. MITCHELL & BRO, *et al.*

Defendants.

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IN THE

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CIRCUIT COURT

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FOR

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HARFORD COUNTY

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CASE NO.: C-12-CV-22-000888

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MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

Defendant Frederick Ward Associates, Inc. (“FWA”), by and through its undersigned counsel, respectfully submits this Memorandum of Law in support of its Motion to Dismiss Plaintiffs’ Verified Amended Complaint (“Amended Complaint”). In support thereof, Defendant FWA states as follows:

INTRODUCTION

Plaintiffs’ Amended Complaint still improperly seeks an advisory opinion from this Honorable Court regarding the Harford County Zoning Code, injunctive relief, and finding of an anticipatory nuisance and nuisance *per se* regarding the proposed development in Harford County, Maryland. More specifically, “this action relates to the planned development and construction of a multi-building, 5.2 million square foot Freight Terminal on a collection of parcels in Harford County.” (“the Development”). Amended Complaint ¶ 1. According to the Amended Complaint, FWA is the engineer for the Development and, along with the other Defendants, has “begun development of the [the Development] by seeking and in some instances receiving approvals for the Freight Terminal...” by “...among other things, submit[ing] concept plans, Forest Stand Delineation Plans, Forest Conservation Plans, Preliminary Plans, Stormwater Management Plans and presented multiple versions of a traffic impact study.” Amended Complaint, ¶ 34. The

Development “is zoned ‘Light Industrial’ or ‘L1’ pursuant to the Harford County Zoning Code. Amended Complaint, ¶ 42.

In addition, at the time of this filing, the development plans have not yet been approved, nor is there any certainty that they will be approved. As such, Plaintiffs have improperly sought relief from this Court as well as failed to plead any viable tort claim against FWA. For these reasons, Plaintiffs’ Amended Complaint¹ should be dismissed with prejudice.

STANDARD OF REVIEW

Under Maryland Rule 2-322 (b)(2) a defendant is permitted to move to dismiss a complaint or counts in a complaint when that Complaint fails “to state a claim upon which relief can be granted.” A motion to dismiss for failure to state a claim “...asserts that even if the allegations of the complaint are true, the plaintiff is not entitled to relief as a matter of law.” *Lubore v. RPM Assocs. Inc.*, 109 Md. App. 312, 322 (1996) (citing *Hrehorovich v. Harbor Hosp. Ct.*, 93 Md. App. 772, 784 (1992)).

In reviewing a motion to dismiss, a Circuit Court, “...examines only the sufficiency of the pleadings.” *Lubore*, 109 Md. App. at 322. The court “accept[s] all well-pled facts in the complaint, and reasonable inferences drawn from them, in a light most favorable to the non-moving party.” *Lipitz v. Hurwitz*, 435 Md. 273, 293 (213) (citations omitted). To survive a motion to dismiss, the Plaintiff must allege facts with specificity, and the court need not consider wholly conclusory charges in the complaint that have no factual support or basis, and any ambiguity or uncertainty in the allegations must be construed against the pleader. See *Bobo v. State*, 346 Md. 706, 708-09 (1997).

¹ Defendant previously filed a Motion to Dismiss Plaintiff’s Complaint on or about January 12, 2023. Defendant incorporates the arguments in that Motion herein.

ARGUMENT

I. No Justiciable Controversy is Present

Plaintiffs have again failed to allege any justiciable controversy and have improperly requested that this Honorable Court provide an advisory opinion based upon proposed use of the Development. The Development has not yet been approved and as such, none of Plaintiffs' allegations rise to the level of an actual dispute. There are no facts that suggest that Harford County intends to approve the Development and therefore the allegations in Plaintiffs' Amended Complaint are not ripe for adjudication.

Moreover, Plaintiffs have failed to exhaust their administrative remedies for any opposition to the Development and must do so before resorting to this litigation. Plaintiffs, as citizens, have opportunities to raise objections to the Development along the plan approval and review process and those individuals affected by any such approval have the right to appeal to the Circuit Court of Harford County. *See* Harford County Code §268-19(C), 268-28(A). The Code "provides an administrative remedy as the exclusive or primary means by which an aggrieved party may challenge a government action." *Priester v. Baltimore Cnty., Maryland*, 232 Md. App. 178, 193 (2017). Intervention at this stage is premature as there is no final administrative decision for this Court to even review. "To be 'final,' the order or decision must dispose of the case by deciding all question of law and fact and *leave nothing further for the administrative body to decide.*" *Willis v. Montgomery Cnty.*, 415 Md. 523, 535 (2010) (emphasis added). Harford County has not yet adopted or approved any plans and any plans that may be adopted could be different than the plans currently being considered. Plaintiffs must exhaust their administrative remedies before bringing suit in the Circuit Court.

Furthermore, FWA hereby adopts by reference herein Defendant F.O. Mitchell & Bros.; Motion to Dismiss and accompanying Memorandums.

II. Plaintiffs have Failed to State a Claim Upon Relief Can Be Granted

Plaintiffs merely allege that FWA, along with the other Defendants, have “begun development of the [the Development] by seeking and in some instances receiving approvals for the Freight Terminal...” by “...among other things, submit[ing] concept plans, Forest Stand Delineation Plans, Forest Conservation Plans, Preliminary Plans, Site Plans, Stormwater Management Plans, and presented multiple versions of a traffic impact study.” Amended Complaint, ¶ 34. Plaintiffs further contend that FWA has “...undertaken significant work on and around [the Development] in relation to the construction and development of the Freight Terminal including constructing and installing utility features.” *Id.* at ¶ 35.

The work performed by FWA merely includes action necessary to engage in the statutory development process in Harford County. These actions cannot be found to cause substantial and unreasonable injury and inference with Plaintiffs’ use and enjoyment of their property nor do they constitute an invasion to Plaintiffs’ interest in their private use and enjoyment of their land. The only approval that the County has issued was for the Forest Stand Delineation and it was issued back on May 11, 2022. *See Exhibit A*. Harford County recently provided correspondence stating that there is a temporary moratorium on such warehouses and will not yet be processing any plans related to this Development. *See Exhibit B*. Finally, FWA is not a construction company. As such, Plaintiffs’ contention that FWA is “constructing and installing utility features” is completely unfounded and inaccurate.

Plaintiffs have failed to plead any facts sufficient to support a claim for private or public nuisances as FWA has simply engaged in engineering services for the lawful venture of seeking approvals for the proposed Development.

Moreover, Plaintiffs and FWA have no relationship, contractual or otherwise. Plaintiffs did not engage or retain FWA nor were any services provided by FWA to Plaintiffs. As such, Plaintiffs lack standing to bring suit against FWA. Therefore, Plaintiffs' have failed to state a claim upon which relief can be granted against FWA.

III. Count Four of the Amended Complaint Fails to Allege a Case of Action

An injunction is a remedy, not a cause of action and cannot stand on its own. *Orteck Int'l Inc. v. Transpacific Tire Wheel, Inc.*, 704 F. Supp. 2d 499, 521 (D. Md. 2010), *aff'd sub nom. Orteck Int'l v. TransPacific Tire & Wheel, Inc.*, 457 F. App'x 256 (4th Cir. 2011). *See also Fare Deals Ltd. v. World Choice Travel.Com, Inc.*, 180 F. Supp. 2d 678, 682 n.1 (D. Md. 2001) ("request for injunctive relief does not constitute an independent cause of action" but "is merely the remedy sought for the legal wrongs alleged"). As such, Count Four of Plaintiffs' Amended Complaint must be dismissed.

Furthermore, FWA hereby adopts by reference herein Defendant F.O. Mitchell & Bros.; Motion to Dismiss and accompanying Memorandums.

Conclusion

WHEREFORE, for the reasons stated above, Defendant Frederick Ward Associates, Inc., respectfully requests that this Court dismiss the Amended Complaint against it with prejudice.

Respectfully submitted,

/s/

Andrew T. Stephenson, Esq., (0006210412)

Jessica D. Corace, Esq., (1012140158)

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Counsel for Frederick Ward Associates, Inc.

Exhibit A



FOREST STAND DELINEATION

Mitchell Property Development

PLAN NO: FSD 584-2021 SUBMITTED: 12/01/2021 REVISED: 03/10/2022,
04/27/2022
VERSION: 3
LOCATION: Tax Map 63, Parcels 26, 53, 62, 503

Gerry Powell
Frederick Ward & Associates, Inc.
P.O. Box 727
Bel Air, MD 21014

To whom it may concern:

The Department of Planning and Zoning has reviewed this Forest Stand Delineation (FSD 584-2021, Version 2) for its conformance with the Harford County Forest and Tree Conservation Regulations. The Department has found this FSD to be accurate and complete. Therefore, the Department of Planning and Zoning hereby grants approval of this FSD.

This site contains a total of 711.72 +/- acres, with 77.09 +/- acres located within the Chesapeake Bay Critical Area. There are 116.06 +/- acres of forest located on site. Five (5) forest stands were identified.

Stand A consists of 3.39 +/- acres and is located in the southeast area of the site. This stand is dominated by red maple and sweet gum. Other species present include silver maple and black gum. Sweet gum and red maple also dominate the understory. Sweet woodreed and common greenbrier are present in the herbaceous layer. Present invasives include multiflora rose, Japanese honeysuckle, and Japanese stiltgrass. This stand also contains nontidal wetlands and all associated buffers. This stand received a priority forest structure score of 16 and is a high priority of preservation.

Stand B consists of 60.59 +/- acres and is located in the southern area of the site. This stand is dominated by red maple. Sweet gum and tulip poplar are also present. Red maple and sweet gum also dominate the understory. Hay scented fern and common greenbrier are present in the herbaceous layer. Present invasives include oriental bittersweet, Japanese barberry, and Japanese stiltgrass. This stand also contains ponds, nontidal wetlands, a stream, and all associated buffers. This stand received a priority forest structure score of 21 and is a high priority of preservation.

Stand C consists of 19.15 +/- acres and is located in the west-central area of the site. This stand is dominated by sweet gum and red maple. Tulip poplar and white oak are also present. American holly and sweet gum are commonly present in the understory. Hay scented fern is present in the herbaceous layer. This stand also contains nontidal wetlands and all associated buffers. This stand received a priority forest structure score of 19 and is a high priority of preservation.

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FOREST STAND DELINEATION APPROVAL

Mitchell Property Development

FSD 584-2021 version 3

Page 2 of 2

Stand D consists of 30.81 +/- acres and is located in the west-central area of the site. This stand is dominated by sweet gum, tulip poplar, and red maple. Sweet gum, American beech, and American holly are present in the understory. Present invasives include oriental bittersweet and Japanese stiltgrass. This stand received a priority forest structure score of 16 and is a priority of preservation.

Stand E consists of 2.12 +/- acres and is located in the northern area of the site. This stand is dominated by pin oak, sweet gum, and willow oak. Black gum is also present. Pin oak and sweet gum are also present in the understory. Sweet woodreed and greenbrier are present in the herbaceous layer. This stand also contains nontidal wetlands, a stream, and all associated buffers. This stand received a priority forest structure score of 14 and is a high priority of preservation.

One hundred fifteen (115) specimen trees were identified on the site.

If you have any questions regarding this matter, please contact this office at (410) 638-3103.

Sincerely,

 5-11-22
Milton D. Davenport, Chief Date
Development Review

MDD: CD/jn

Cc:

Exhibit B



ROBERT G. CASSILLY

Harford County Executive

FOR IMMEDIATE RELEASE

February 1, 2023

For more information, contact:

Sam Kahl

Public Information Officer

667-201-8987

sikahl@harfordcountymd.gov

Harford County Executive Cassilly Proposes Temporary Moratorium on New Warehouses

BEL AIR, Md., (Feb. 1, 2023) – Harford County Executive Bob Cassilly on Wednesday announced legislation that would impose a six-month moratorium on approvals or permits for warehouse developments in Harford County:

“This proposed legislation would put a six-month hold on any approvals or permits on warehousing and distribution facilities in Harford County. This pause will allow my administration necessary time to study the zoning and development regulations concerning mega-warehouses and their placement within the County”, County Executive Cassilly said. “Today’s mega-warehouses and distribution centers did not exist when our zoning code was written, and it’s critical that we evaluate their potential impacts on our community, economy, and natural environment.”

The County Executive’s proposed legislation will be introduced to the County Council for further consideration.

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