**IN THE CIRCUIT COURT FOR HARFORD COUNTY, MARYLAND**

PAUL JOHN CISAR, et al.

Plaintiffs,

v. Case No.: C-12-CV-22-000888

F.O. MITCHELL & BRO, et al,

Defendants.

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

**PLAINTIFFS' MOTION TO STRIKE IMPROPER AND UNSUPPORTED EXHIBITS TO AND ASSERTIONS IN DEFENDANT F.O MITCHELL & BROS. MOTION TO DISMISS VERIFED AMENDED COMPLAINT.**

Plaintiffs, by and through their undersigned attorneys, move that this Court strike and not consider the documents attached to the motion to dismiss the verified amended complaint filed by Defendant F.O. Mitchell & Bros. ("Mitchell"), as well as the purported "facts" asserted by Mitchell in its motion to dismiss based on those documents.

As explained more fully below, Maryland law could not be more clear that this Court, when deciding a motion to dismiss a complaint, is to assume the truth of all well-pleaded factual allegations in the complaint in addition to any exhibits that are incorporated into the complaint. Despite this, Mitchell relies in its motion on 48 pages of documents, attached to its memorandum of law as Exhibits A through E, and makes various "factual" assertions in that memorandum based on those documents, as well as a reference to a website and the purported contents thereon.

Mitchell's memorandum is plainly improper in the context of a motion to dismiss. To compound its impropriety, Mitchell merely attaches those documents without any

attempt at authentication and asserts the purported "facts" that are outside the allegations of the verified amended complaint with no attempt at showing their admissibility other than reference to those improper documents. Those documents and Mitchell's asserted "facts" outside the allegations of Plaintiffs' verified amended complaint should be stricken and should be disregarded by this Court in deciding Mitchell's motion to dismiss.[1]

1. In response to Plaintiffs' verified amended complaint, Mitchell filed a motion to dismiss, with a memorandum of law to which were attached five Exhibits comprising 48 pages of documents purporting to be four "plans" its asserts have been submitted to the Harford County Department of Planning and Zoning ("DPZ")(Exhibits A through D), and a document entitled "Development Advisory Committee Meeting." (Exhibit E). Mitchell's memorandum, at page 2, n. 3, also refers this Court to a DPZ website "which provides access to public records related to the proposed development of the subject property." None of these documents were made exhibits to the verified amended complaint.

2. Throughout its memorandum of law, Mitchell also makes various statements of "fact" purportedly supported by Exhibits A through E, as well as additional supposed "facts" that are not supported by anything. *See, e.g.,* Mitchell's footnote 2.

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[1] Defendants Chesapeake Real Estate, Harford County, and Charles Maslin have also filed motions to dismiss the verified amended complaint in which they incorporate the arguments made by Mitchell in its motion to dismiss. For the same reasons explained herein, this motion to strike applies equally to those Defendants' incorporated motions.

3. Mitchell's use of Exhibits A through E, and the purported "facts" contained in or derived from them, is blatantly improper in opposing a motion to dismiss. Maryland law could not any plainer that consideration of the pertinent "facts" on a motion to dismiss is limited generally to the four corners of the complaint and any exhibits incorporated into that complaint. *Converge Services Group, LLC v. Curran*, 383 Md. 462, 475, 860 A. 2d 871, 878-79 (2004). *See also, Lipsitz v. Horowitz*, 435 Md. 273, 293, 77 A. 3d 1088, 1099-1100 (2013) (reversing dismissal of complaint alleging that buyer who already owned several pieces of property in the development was nonetheless a member of the public who was entitled to statutorily-required disclosures). Indeed, Mitchell pays lip service to that principal in its memorandum of law, at pages 11-12, while proceeding to ignore it. This Court should strike and disregard those Exhibits, and any assertions in Mitchell's memorandum of law based on them. For the convenience of the Court, those assertions are highlighted on the copy of Mitchell's memorandum of law attached hereto as Exhibit 1.

4. That the documents in Exhibits A through E are not authenticated in any way compounds Mitchell's impropriety. Even were Mitchell's use of these Exhibits appropriate in opposing a motion to dismiss, which they are not, "a document can be made part of a motion [or opposition to a motion] . . .only through affidavit, deposition, or answers to interrogatories that adequately lay the proper foundation for the documents admission into evidence." *Imbroguglio v. Great Atlantic & Pacific Tea Company*, 358 Md. 194, 203-04, 747 A. 2d 662 (2000); *Zilichikhis v. Montgomery County*, 223 Md.

App. 158, 195, 115 A. 3d 685, 707 (2015). *See also Jones v. Johns Hopkins Community Physicians*, 2009 WL 2774303 *8 (CSA 2019).

5. Similarly, even if it were proper for Mitchell to rely in its memorandum on "facts" that were not alleged in the verified amended complaint, which it is not, any such "facts" must be properly supported. Md. Rule 2-311(d) explicitly imposes that requirement: "A motion or response to a motion that is based on facts not contained in the record shall be supported by affidavit and accompanied by any papers on which it is based." *Accord, Halliday v. Sturm, Ruger & Co., Inc.*, 138 Md. App. 136, 153, 770 A. 2d 1072, 1082 (2001). Accordingly, the "facts" and statements highlighted on the copy of Mitchell's memorandum of law that is Exhibit 1 hereto should be stricken and disregarded by this Court in deciding the motion to dismiss.

6. Mitchell's flagrant violation of the Rules and established Maryland case law should not be permitted. This Court should enter an order granting Plaintiffs' motion to strike Exhibit A through E and the assertions highlighted on the attached Exhibit 1, and should disregard those documents and assertions in ruling on Mitchell's motion to dismiss the verified amended complaint.

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of March 2023, a copy of the forgoing Motion to Strike, with proposed Order, was efiled with MDEC, which will provide electronic notice to all counsel of record.

*/s/ Rignal W. Baldwin*

# EXHIBIT 1

**[HIGHLIGHTED COPY OF MEMORANDUM**

**SHOWING PORTIONS THAT SHOULD BE STRICKEN]**

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| **PAUL JOHN CISAR, et al.** | * | IN THE |
| Plaintiffs, | * | CIRCUIT COURT |
| **v.** | * | FOR |
| **F.O. MITCHELL & BRO, et al.** | * | HARFORD COUNTY |
| Defendants. | * | |
| | * | CASE NO.: C-12-CV-22-000888 |

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

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT F.O. MITCHELL & BRO.'S MOTION TO DISMISS AMENDED COMPLAINT**

F.O. Mitchell & Bro. ("Mitchell"), by and through its undersigned counsel, Robert S. Lynch, Esquire, David S. Lynch, Esquire, and Stark and Keenan, P.A., respectfully submit this Memorandum of Law in Support of Mitchell's Motion to Dismiss Amended Complaint:

## INTRODUCTION

Plaintiffs' Amended Complaint improperly seeks an advisory opinion from this Court concerning the Harford County Zoning Code, injunctive relief, and a finding of an anticipatory nuisance and nuisance *per se* regarding a proposed warehouse development in Perryman, Harford County, Maryland. Plaintiffs correctly acknowledge throughout their Amended Complaint that the developer and

contract purchaser of the Subject Property[1], Chesapeake Real Estate Group ("Chesapeake"), has submitted, pursuant to the Harford County Development Regulations, various development plans for review and approval by the Harford County Department of Planning and Zoning ("DPZ"). These plans include a Forest Conservation Plan, Landscape Plan, Preliminary Plan, and Site Plan (collectively referred to herein as "Development Plans")[2]. *See* Forest Conservation Plan, Landscape Plan, Preliminary Plan, and Site Plan, attached, respectively, as Exhibits A, B, C, D[3]. Similarly, Plaintiffs correctly acknowledge that DPZ has not approved the Development Plans. Nonetheless, without basis in Maryland law or logic, Plaintiffs construct a transparent straw-man argument and utilize that fallacy to improperly seek extraordinary relief from this Court, which includes a demand that Mitchell and Chesapeake be enjoined from seeking approval for a warehouse development, which is a principal permitted use on the Subject Property." *See*

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[1] Mitchell will refer herein to the land included in the proposed Perryman warehouse development as the "Subject Property." Plaintiffs refer to the Subject Property as the "Mitchell Property" in their Amended Complaint.

[2] Chesapeake submitted its Series 3 Development Plans on September 27, 2022. As of the filing of this Motion to Dismiss and accompanying Memorandum, with the exception of the Forest Stand Delineation, Harford County and DPZ have not yet issued letters approving the Development Plans.

[3] *See also* DPZ webpage which provides access to public records related to the proposed development of the Subject Property: https://hcgweb01.harfordcountymd.gov/weblink/0/fol/8098795/Row1.aspx (last visited February 14, 2023).

Amended Complaint, p. 17, ¶B. For the reasons set forth below, Mitchell urges this Honorable Court to dismiss Plaintiffs' Amended Complaint.

**SUBJECT PROPERTY**

The Subject Property in this lawsuit is the assemblage of six parcels, consisting of approximately 708 acres, zoned LI – Light Industrial, GI – General Industrial, AG – Agricultural, R1- Urban Residential and located at Tax Map 63, Parcels 53, 62, 216, and 306. The Subject Property includes the following property addresses: 1) 1714 Perryman Road, Perryman, MD 21130; 2) Perryman Road, Perryman, Maryland 21130; 3) Fords Lane, Aberdeen, Maryland 21001; 4) 1625 Perryman Road, Aberdeen, Maryland 21001-4216; 5) Michaelsville Road, Perryman, Maryland 21130; and 6) 1607 Perryman Road, Perryman, Maryland 21130. *See* Exs. A-D. Mitchell owns the majority of the Subject Property. *Id.* Charles A. Maslin, III owns approximately 4.64 acres of the Subject Property, located at 1607 Perryman Road. *Id.*

The majority of the Subject Property has been zoned LI since 1997, when Harford County ("the County") classified the Subject Property as LI as part of the County's 1997 comprehensive zoning. Now, twenty-six years later and before the County has approved any development plan for the Subject Property, Plaintiffs improperly seek to block Mitchell's right to develop the Subject Property in accordance with the Harford County Zoning Code, which explicitly permits the

development of a warehouse and accessory retail/service use at the Subject Property.

**ARGUMENT**

Plaintiffs, without definition or explanation, baldly assert that Mitchell and Chesapeake seek to develop a "freight terminal" on the Subject Property despite the fact that all relevant Development Plans and other relevant documents[4] for the proposed development plainly reference a proposed warehouse and commercial retail use. Plaintiffs ignore the fact that DPZ has yet to approve any development plan for the proposed warehouse and commercial retail use on the Subject Property and proceed to assert in their 92-paragraph Complaint that a "freight terminal" is not a permitted use on the Subject Property, which is primarily zoned LI. To be clear, under the Zoning Code, a warehouse and commercial retail use is expressly permitted in the LI zoning district. A "freight terminal" and many other uses, like a recycling center, leather tannery, nightclub, or driving range are not. Without basis, Plaintiffs simply chose a use that is not permitted in the LI zoning district, "freight terminal," and ascribed that use to the proposed development on the Subject Property to argue that it should not be permitted on the Subject Property. Plaintiffs'

[4] These additional documents include, but are not limited to, the advertisement for the Community Input Meeting (attached as "Exhibit A" to Plaintiffs' Amended Complaint) and the Development Advisory Committee ("DAC") Minutes (introduction attached as "Exhibit E").

Complaint is frivolous and is brought in bad faith in an attempt to delay or otherwise thwart the County's approval of a principally permitted use and to deny a Harford County family's right to engage in a statutory development process.[5] Despite the frivolity of Plaintiffs' straw-man argument, this Court need not address the merits as this Complaint should be dismissed for the following reasons, which are set forth in detail below: 1) lack of a justiciable controversy; 2) failure to exhaust administrative remedies; and 3) failure to state a claim.

## I. The Complaint for Declaratory Judgment Should be Dismissed Because there is No Justiciable Controversy Between the Parties.

In any declaratory judgment action, "it has always been clear 'that the existence of a justiciable controversy is an absolute prerequisite to the maintenance of a declaratory judgment action.'" *Anne Arundel County v. Ebersberger*, 62 Md. App. 360, 367-68 (1985) (citing *Hatt v. Anderson*, 297 Md. 42, 45 (1983)). Section 3-409(a)(1) of the Courts and Judicial Proceedings Article allows a court to grant a declaratory judgment where "an actual controversy exists between contending parties." Maryland's appellate courts have consistently held that "'a controversy is justiciable when there are interested parties asserting adverse claims upon a state of facts which must have accrued wherein a legal decision is sought or demanded.'" *120 W. Fayette St., LLLP v. Mayor of Balt.* ("*Superblock II*"), 413 Md. 309, 356

[5] Mitchell notes that Plaintiffs improperly filed their initial Complaint in Anne Arundel County, Maryland in June 2022.

(2010) (citing *Reyes v. Prince George's County*, 281 Md. 279, 288 (1977)). "To be justiciable the issue must present more than a mere difference of opinion, and there must be more than a mere prayer for declaratory relief. Indeed, the addressing of non-justiciable issues would place courts in the position of rendering purely advisory opinions, a long forbidden practice in this State." *Id.* (citing *Hatt*, 297 Md. at 46). "**A declaratory relief action that requests adjudication based on facts that have yet to occur or develop lacks ripeness and should be dismissed for failure to allege a justiciable controversy.**" *Id.* (citing *Hickory Point P'ship v. Anne Arundel County*, 316 Md. 118, 130 (1989)) (emphasis supplied).

Here, Plaintiffs have failed to allege a justiciable controversy and ask this court to render an advisory opinion based upon a wholesale misrepresentation of the use proposed on the Subject Property. Throughout their Complaint, Plaintiffs acknowledge that the County has not yet approved the Development Plans for the Subject Property. Indeed, Plaintiffs interchangeably refer to the proposed use at the Subject Property as "planned development" or "proposed development." (*See e.g.* Amended Complaint, ¶¶ 3, 5, 6, 8, 46, 48, 55, 59, 60, 65, 66, 88). Plaintiffs more explicitly acknowledge that Development Plans remain under review when they write that their "rights, status and legal relations are affected by Defendants' *ultra vires* interpretation, application, and **planned contravention** of a statute, municipal ordinance, administrative rule, or regulation" and, more to the point, "Defendants []

have begun development of the Mitchell Farm by seeking and in some instances receiving approvals for the Freight Terminal." [6] (Amended Complaint, ¶¶ 65, 34) (bolded emphasis supplied). Moreover, the County's webpage which provides access to public records related to the proposed development of the Subject Property includes a document titled, "Plans Review Status Tables." (Plans Review Status Tables, attached as "Exhibit G). This table clearly indicates that the Development Plans remain pending. *Id.*

To be clear, no developer in Harford County may begin construction on any land prior to the County's approval of a series of development plans required under the County's Subdivision Regulations and Zoning Code. *See generally*, Harford County Code (2008, as amended) ("Code"), Chapter 268 ("Subdivision Regulations") and Code, Chapter 267 ("Zoning Code"). A review of the record reveals that no allegation rises to the level of an actual dispute between the parties that would merit declaratory relief. Indeed, Plaintiffs are seeking a judgment for a project that has yet to be approved.

The Court of Appeals' decision in *Superblock II* directly informs this court's analysis of whether the submission of proposed development plans, which remain

[6] The only approval issued by DPZ for the Subject Property is the Forest Stand Delineation ("FSD") (attached as "Exhibit F"), which, merely identifies the quantity and quality of forest stands and trees, soils, and slopes on the Subject Property. The FSD does not authorize development of the Subject Property, nor did Plaintiffs challenge the FSD.

under review, is sufficient to establish a justiciable controversy for the purpose of a declaratory judgment action. In that case, plaintiff alleged that a proposed plan for development of the property known as the "Superblock" in Baltimore City would violate a Memorandum of Agreement ("MOA") and an Urban Renewal Plan. The Court explained that "[plaintiff] effectively alleges that the proposed plan for the "Superblock" will violate the MOA and the Renewal Plan, but the City has not yet adopted or approved any plans." *Superblock*, 413 Md. at 357. Citing *Boyds Civic Ass'n v. Montgomery County Council*, 309 Md. 683, 690 (1987), the Court wrote, "'[i]n a declaratory judgment proceeding, the court will not decide future rights in anticipation of an event which may never happen, but will wait until the event actually takes place[.]'" *Id.* at 357. Expanding upon this point, the Court wrote, "'[t]he disagreement over which declaratory relief is sought **must not be nebulous or contingent but must have taken on fixed and final shape** so that a court can see what legal issues it is deciding.'" *Id.* (citing *Hickory Point P'ship*, 316 Md. at 131) (emphasis supplied). Ultimately, the *Superblock II* Court held that "because none of the facts evidences the City's intent to adopt a proposal that violates the MOA or the Renewal Plan, [plaintiff] failed to allege facts sufficiently ripe to rise to [the] level of a justiciable controversy." *Id.* at 359.

Here, like *Superblock II*, Chesapeake's proposed Development Plans are not yet approved. There are no facts whatsoever in the Amended Complaint to suggest

that the County intends to approve a use that is not permitted in the LI zoning district. The proposed Development Plans have yet to take on a fixed and final shape because the County has not yet approved the Development Plans. In fact, while the County could approve the Development Plans, the County also maintains the authority to deny the plans. Plaintiffs have failed to allege facts that are ripe for adjudication and have thus failed to establish a justiciable controversy. For these reasons, Mitchell respectfully urges this Court to dismiss Count I of Plaintiffs' Amended Complaint.

## II. The Complaint Should be Dismissed Because Plaintiffs Have Failed to Exhaust Administrative Remedies.

A fundamental principle in Maryland's land use jurisprudence is that administrative remedies must be exhausted before actions for declaratory judgment, mandamus, and injunctive relief may be brought. *See Md. Reclamation v. Harford Cnty.*, 382 Md. 348, 362 (2004) ("[W]hen administrative remedies exist in zoning cases, they must be exhausted before other actions, including requests for declaratory judgments, mandamus, and injunctive relief, may be brought…."). "If there is no final administrative decision in a case before an administrative agency, there is ordinarily no exhaustion of the administrative remedy." *Renaissance Centro Columbia, LLC v. Broida*, 421 Md. 474, 485 (2011). The policy behind this rule is one of judicial restraint and efficiency – the exhaustion doctrine avoids deciding issues in the circuit court that could be resolved at the agency level, where the case

would benefit from the agency's greater expertise. *See Falls Road Community Ass'n, Inc. v. Balt. Cnty.*, 437 Md. 115, 136-137 (2014). When the local jurisdiction (the County) provides a particular administrative remedy for the grievance involved, the aggrieved party typically must exhaust those remedies before bringing the case to court. As the Supreme Court of Maryland has explained:

> [W]hen a chartered county . . . has established a Board of Appeals under the Express Powers Act, the appeal to that board provided for parties 'aggrieved by a decision of a local zoning official' is at least primary, and may be exclusive. Similarly, the Maryland Uniform Declaratory Judgments Act provides that '[i]f a statute provides a special form of remedy for a specific type of case, that statutory remedy shall be followed in lieu of [a declaratory judgment].'

*Falls Rd. Cmty. Ass'n, Inc. v. Baltimore Cty.*, 437 Md. 115, 136 (2014).

Here, the Harford County Zoning Code provides an administrative remedy for Plaintiffs' primary and threshold claim that the proposed use at the Subject Property is a "freight terminal" disallowed in the LI zoning district. Indeed, the Subdivision Regulations provide for an appeal of development plans:

> **Any interested person whose property is effected by any decision of the Director of Planning, may within 30 calendar days after the filing of such decision, appeal to the Circuit Court for Harford County.** Upon the hearing of such appeal, the decision of the Director of Planning shall be presumed by the Court to be proper and to best serve the public interest. **The burden of proof shall be upon the appellant, or appellants, to show that the decision complained of was illegal.** The said Court shall have the power to affirm, modify or reverse in part or in whole any decision appealed from and may remand any case for

> the entering of a proper order or for further proceedings, as the Court shall determine.

Subdivision Regulations, § 268-28(A) (emphasis supplied). To be clear, at this time there is no final administrative decision to appeal as the Development Plans for the Subject Property remain pending. *See Broida*, 421 Md. at 485 ("If there is no final administrative decision in a case before an administrative agency, there is ordinarily no exhaustion of the administrative remedy."); *see also* Ex. G. However, upon approval, the Subdivision Regulations provide that the Plaintiffs, in an administrative appeal, may raise the question presented in their Complaint - whether the proposed use at the Subject Property is illegal? Plaintiffs have ignored the plain language of the Zoning Code, the Subdivision Regulations, and Maryland's well-established law requiring Plaintiffs to exhaust their administrative remedies prior to seeking a declaratory judgment or injunctive relief. Plaintiffs do not have standing to bring this action because they have failed to exhaust their administrative remedies. Mitchell respectfully urges this Court to dismiss Plaintiffs' Amended Complaint.

## III. The Counts for Private and Public Nuisance Should be Dismissed Because Plaintiffs Failed to State a Claim upon Which Relief Can be Granted.

Maryland Rule 2-322 permits a party to file a motion to dismiss for failure to state a claim upon which relief can be granted. In considering a motion to dismiss for failure to state a claim under this rule, "a [trial] court must assume the truth of

all well-pleaded material facts and all inferences that can be drawn from them." *Tavalkoli-Nouri v. State*, 139 Md. App. 716, 725 (2001) (quoting *Rossaki v. NUS Corp.*, 116 Md. App. 11, 19 (1997)). Dismissal for failure to state a claim is proper only if the alleged "well pled" facts and permissible inferences, so viewed, would, if proven, nonetheless fail to afford relief to the plaintiff. *Ricketts v. Ricketts*, 393 Md. 479 (2006). But, for purposes of a motion to dismiss, the facts comprising a cause of action must be pled with sufficient specificity; bald assertions and conclusory statements by the pleader will not suffice. *Bobo v. State,* 346 Md. 706 (1997). In this case, dismissal is proper because the Amended Complaint fails to allege facts sufficient to state a cause of action for private or public nuisance against Mitchell, or any Defendant.

Indeed, Plaintiffs have inappropriately pleaded an anticipatory nuisance. In *Leatherbury v. Gaylord Fuel Corp.*, 276 Md. 367, 377 (1975), the Court of Appeals explained that "[o]rdinarily, an injunction will not be granted to restrain future activity unless it is the type of activity which constitutes a nuisance per se." *Id.* (citing *King v. Hamill*, 97 Md 103, 111 (1903)). "To constitute a nuisance per se, the activity sought to be enjoined must be a nuisance 'at all times and under any circumstances regardless of location or surroundings.'" *Id.* (citing *Adams v. Commr's of Trappe*, 204 Md. 165, 170 (1954)). "Where an individual proposes to engage in what is otherwise a lawful venture, the presumption is that he will conduct

his activities in a proper manner. Thus, a court will not act, in anticipation of a threatened nuisance, to enjoin a legitimate activity unless the circumstances plainly show that the activity will be conducted as a nuisance." *Id.* (citations omitted).

In *Leatherbury*, similar to the Plaintiffs in this case, landowners filed an action seeking an anticipatory injunction to restrain the proposed operation of a limestone quarry on neighboring property on the ground that the quarry will constitute a nuisance. Unlike this case, where no development approvals have been issued, the owners of the proposed quarry in *Leatherbury* had obtained the necessary permits to operate their proposed quarry. Like this case, the neighboring landowners in *Leatherbury* brought their action prior to the operation of the quarry. Even where permits had been issued, the *Leatherbury* Court affirmed the lower court's denial of the neighbor's nuisance claim on the basis that it was premature. *See id.* at 379.

Here, the only conduct allegedly taken by Mitchell and Chesapeake in furtherance of their proposed warehouse development on the Subject Property is to engage in the well-established statutory development process in Harford County, which includes conducting a community input meeting, engaging in the Development Advisory Committee process, and submission of Development Plans to the County for review. On its face, none of these actions can possibly be found to "cause substantial and unreasonable injury and interference" with Plaintiffs use and enjoyment of their property. *See* Amended Complaint, ¶ 73. Likewise,

submitting Development Plans for review by the County (and the County's review of those plans) cannot possibly constitute an invasion of Plaintiff's property rights or an unreasonable and unlawful development which has and will continue to cause a diminution in Plaintiffs' property values. *Id.*, ¶¶ 70-81. No Development Plans have been approved. Contrary to the brazen allegations by the Plaintiffs, no construction has been initiated at the Subject Property in accordance with the proposed Development Plans. The Complaint fails to state a claim for private or public nuisance. Mitchell and Chesapeake are simply engaging in the lawful venture of seeking development approvals for a proposed warehouse development on the Subject Property. Plaintiffs' bald assertions and conclusory statements do not suffice to state a claim for private or public nuisance upon which relief can be granted.

Moreover, Plaintiffs' actions for private and public nuisance are premised on their incorrect assertion that the proposed use is not a warehouse development, which is a principal permitted use in the LI zoning district. This question, as set forth in Argument, section II, *supra*, must be raised pursuant to the multiple administrative remedies available to the Plaintiffs. Plaintiffs have not exhausted their administrative remedies. A warehouse development is a principal permitted use in the LI zoning district and it cannot be considered a nuisance per se under the law.

The injunctive relief sought by Plaintiffs in conjunction with their nuisance claim underscores the absurdity of this Complaint. For example, Plaintiffs ask this court to enjoin Defendants from "obtaining any permitting or approvals" (Amended Complaint, p. 17, ¶B). No local, Maryland, or Federal law allows this court to impose such a restriction on Mitchell's private property rights to seek approval for a warehouse development, which is a principal permitted use in the LI zoning district, or to otherwise utilize its property in accordance with the County's zoning law. Likewise, there is no basis anywhere in the law that would allow this court to enjoin Harford County from processing applications for development plan approvals. The County, a Charter County, has the authority to enact and enforce its Zoning Code and Subdivision Regulations. *See* Land Use Article, § 4-101 ("It is the policy of the State that: (1) the orderly development and use of land and structures requires comprehensive regulation through the implementation of planning and zoning controls; and (2) planning and zoning controls shall be implemented by local government"); Harford County Charter, § 405 ("The Director of Planning shall be charged with the responsibility and duty of planning for the physical development and growth of the County, including the...administration, and enforcement of a zoning map and of zoning rules and regulations which shall constitute a zoning code. All plans and maps and all rules and regulations relating to planning and

zoning shall be approved by legislative act of the Council prior to their taking effect as law.").

Plaintiffs' counts for anticipatory private and public nuisance are premature and Plaintiffs fail to state a claim upon which relief can be granted. Mitchell urges this Court to dismiss Plaintiffs' Amended Complaint.

## IV. The Amended Complaint's Count for Preliminary and Permanent Injunctive Relief Should be Dismissed for Failure to State a Claim.

An injunction is a form of equitable relief that a court may award after a plaintiff has proven liability on an underlying cause of action. *See Fare Deals Ltd. v. World Choice Travel.Com, Inc.*, 180 F. Supp. 2d 678, 682 n.1 (D. Md. 2001) ("[A] request for injunctive relief does not constitute an independent cause of action; rather, the injunction is merely the remedy sought for the legal wrongs alleged[.]"). Here, the underlying cause of action is a declaratory judgment and private and public nuisance. For all of the reasons set forth in Argument, §§ I-III *supra* this Court should dismiss each of those counts. Accordingly, Plaintiffs' count for Preliminary and Permanent Injunctive Relief should also be dismissed.

## CONCLUSION

For all of these reasons, Mitchell respectfully urges this court to dismiss, with prejudice, Plaintiffs' Amended Complaint.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY on this 15th day of February, 2023, that a copy of the foregoing Memorandum of Law in Support of Defendant F.O. Mitchell & Bro.'s Motion to Dismiss Amended Complaint was served on all parties registered for services via MDEC e-filing

David S. Lynch, Esquire
AIS# 0812170228

**IN THE CIRCUIT COURT FOR HARFORD COUNTY, MARYLAND**

PAUL JOHN CISAR, et al.

Plaintiffs,

v. Case No.: C-12-CV-22-000888

F.O. MITCHELL & BRO, et al,

Defendants.

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

**ORDER GRANTING PLAINTIFFS' MOTION TO STRIKE EXHIBITS AND IMPROPER ASSERTIONS BY DEFENDANT F.O. MITCHELL BROS.**

This Court, having considered the motion of Plaintiffs to strike the exhibits attached to Defendant F.O. Mitchell Bros.' memorandum in support of its motion to dismiss the amended complaint, to strike the factual assertions made in that memorandum that are outside the four corners of the amended complaint, and to disregard those documents and assertions in ruling on that motion to dismiss, it is, this ____day of _____, 2023. **ORDERED** that the motion to strike is, hereby **GRANTED**, that Exhibits A through E to Mitchell's memorandum of law are stricken, that the assertions highlighted on Exhibit 1 to Plaintiffs' motion to strike are stricken, and the Exhibits and the stricken assertions will not be considered by this Court in ruling on the motion to dismiss.

_____

Circuit Court Judge