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.

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

OPPOSITION OF PLAINTIFFS TO DEFENDANT F.O MITCHELL & BROS. MOTION TO DISMISS AMENDED COMPLAINT

Plaintiffs, by and through their attorneys, hereby oppose Defendant F.O Mitchell & Bros.' ("Mitchell") motion to dismiss Plaintiffs' amended complaint.

As explained more fully below, Plaintiffs' Verified Amended Complaint for Injunctive Relief, Declaratory Judgment and Private Action for Nuisance and Public Nuisance, With Compensatory Damages ("Amended Complaint"), alleges that Defendants, including Mitchell, are publicly proposing and have taken concrete steps to develop and construct a multi-building, 5.2 million square foot, Freight Terminal, with 3,956 parking spaces for tractor trailers and other vehicles, on a collection of parcels of real property located on the Perryman Peninsula in Harford County. *Amended Complaint,* ¶¶1-7. There appears to be no dispute in this case that a Freight Terminal is a prohibited

use in that location, which is zoned L1. *Amended Complaint*, ¶¶37-41. Plaintiffs, who all own real property in the vicinity of the proposed Freight Terminal, *Amended Complaint*,¶¶31, also allege that the efforts by Defendants to develop and build the Freight Terminal has already adversely affected their property values, *Amended Complaint*, ¶¶9, 37, 45, 55, 59, 60, which will be exacerbated if the Freight Terminal is completed, in addition to the significant health and safety risks to them and other residents of Perryman Peninsula from the increased traffic the Freight Terminal will cause. *Amended Complaint*, ¶¶46-49.

Accordingly, the Amended Complaint alleges facts that, if accepted as true, along with all permissible inferences therefrom, state valid causes of action for a declaratory judgment with respect to the illegality of a Freight Terminal (Count I), for public and private nuisance (Counts II and III), and for injunctive relief (Count IV).

Rather than answering the amended complaint, Mitchell asks this Court to dismiss it on the purported grounds that there is no justiciable controversy that would support Count I for declaratory judgment, that Plaintiffs have failed to exhaust administrative remedies, and that the amended complaint asserts only an "anticipatory nuisance" that is not actionable. Despite acknowledging in its Motion that this Court must decide it based only on the facts alleged in the amended complaint, Mitchell also attaches five unauthenticated exhibits and asserts various "facts" outside the amended complaint, which is blatantly improper and which are the subject of Plaintiffs' motion to strike, filed herewith. The amended complaint alleges a justiciable controversy susceptible to resolution by the declaratory judgment sought in Count I, the amended complaint does

not seek judicial review of an administrative or agency decision so that Plaintiffs are not required to exhaust administrative remedies as a condition of bringing their causes of action, Counts II and III state claims for private and public nuisance, and the allegations in Counts I, II, and III are a sufficient and proper basis for the injunctive relief sought in Count IV, so that Defendant Mitchell's motion to dismiss the amended complaint should be denied in its entirety.

I. Standard on Motions to Dismiss.

When 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 N., LLC v. BAA Maryland, Inc.*, 413 Md. 638, 643-44 (2010). The universe of "facts" pertinent to the court's decision on the motion is limited generally to the four corners of the complaint and any incorporated supporting exhibits, to that complaint. *Id.*; *Converge Services Group, LLC v. Curran*, 383 Md. 462, 475, 860 A. 2d 871, 878-79 (2004). The fact that Mitchell pays lip service to this principal in its legal memorandum in support of its Motion, at pages 11-12, makes its decision to flout it by attaching documents and making assertions of "facts" outside the four corners of the

amended complaint even more blameworthy[1] and this Court should not consider them in ruling on the Motion.[2]

III. Argument.

A. Count I alleges a justiciable controversy susceptible of resolution by a declaratory judgment.

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. *Amended Complaint.* ¶¶62-69. Mitchell asserts, simplistically, that Count I fails to state a claim for declaratory relief because Harford County may never approve the development or construction of the Freight Terminal, so that Count I merely asks this Court for an "advisory opinion" about speculative future

---

[1] As explained in the motion to strike, Mitchell also failed to authenticate the documents it decided to attach as Exhibits and made assertions of "fact" in its memorandum of law without any supporting affidavit or the equivalent.

[2] Per Rule 2-322(c), were this Court prepared to consider those statements and documents outside the record, and assuming they were properly authenticated, the motion would be disposed of as provided in Rule 2-501. In that event, the Court should defer ruling on Mitchell's Motion and permit Plaintiffs' to conduct a sufficient amount of discovery to rebut the claims made outside of the four corners of the amended complaint. If the Motion is treated as one for summary judgment, the Court must provide Plaintiffs with a reasonable opportunity to present, in a form suitable for consideration on summary judgment, such 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). Any other approach would impermissibly prejudice Plaintiffs. *Worsham*, 181 Md. App at 722-23, *citing Green v. H & R Block, Inc.*, 355 Md. 488, 502 (1999).

rights. Mitchell is not correct nor does the issue of justiciability turn on such a formulaic analysis.

The Maryland Declaratory Judgment Act, Md. Code Ann., Cts. & Jud. Proc. Art., § 3-401, *et seq.*, provides for an opportunity to any person as defined by Section 3-401 of the Act, including corporations or partnerships, 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. The Act 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). There is a "strong legislative policy favoring the liberal use and interpretation of [the Act] to effectuate its broad remedial objectives." *Md. Nat'l Cap. P&P v. Washington Nat'l Arena*, 282 Md. 588, 595-96, (1978).

Although a controversy must be justiciable under the Act, whether or not a particular dispute is justiciable, or ripe, must be considered in the context of the parties' dispute. *County Commissioners of Queen Anne's County v. Days Cove Reclamation Company*, 122 Md. App. 505, 516 (1998). In *Days Cove*, property owners sought a declaration that the proposed revision of the county's solid waste management plan was improper. The Court of Special Appeals rejected the county's defense that the dispute

was not justiciable because the revisions might not be adopted, the equivalent of Mitchell's argument here. As the Court explained, the case "presented the "ripening seeds" of an actual controversy," and, thus, "was quite justiciable." 122 Md. App. at 516, *quoting Boyds Civic Ass'n v. Montgomery County Council*, 309 Md. 683, 691 (1987).

Similarly, in *Boyds*, Montgomery County amended its master plan to provide that certain land was suitable for a mineral resource zone, which was a prerequisite for designation of that land as such a mineral resource zone. A mineral resource zone designation would have allowed for the operation of a quarry on land owned by Rockville Crushed Stone. An action for declaratory judgment by property owners adjacent to the site of the proposed quarry was dismissed by the trial court for lack of justiciability on the ground that the amendment to the master plan merely authorized but did not require the mineral resource zone and, thus, the quarry might not be permitted. The Court of Appeals held that the dispute was justiciable because it presented the "ripening seeds" of an actual controversy, even given the contingent nature of the threat, because "the threat of ...potential rezoning then hangs like a pall of smoke over the properties within sight and sound of the land sought to be quarried." 309 Md. at 691. The trial court's decision not to issue a declaratory judgment was contrary to the liberal and remedial purposes of the Declaratory Judgment Act to resolve the dispute "at its inception before it has accumulated the asperity, distemper, animosity, passion and violence of the full-blown battle which looms ahead." *Id.* at 691. *See also, Liss v. Goodman*, 224 Md. 173 (1961) (action for declaratory judgment regarding relative powers of Baltimore City Council and Board of Estimates with respect to budget was justiciable even though budget had not yet

been enacted); *Key Federal Savings & Loan Association v. Anne Arundel County*, 54 Md. App. 633, 642, 480 A. 2d 86, 91 (1983)(declaratory judgment to determine propriety of county's threat to withhold building permits based on alleged illegal change to public works agreement was not moot merely because permits had expired and construction had not proceeded).

Plaintiffs here are in the same position as the landowners in *Boyds* who were confronted with the potential that a quarry would be allowed to operate near their properties. As in *Boyds*, this is not a declaratory judgment action in which the challenged action "could have no injurious effect upon the plaintiffs until the prospect of the [Freight Terminal] became substantially more certain." 309 Md. at 696-97. Plaintiffs in this action allege that the mere pursuit by Defendants, including Mitchell, of the development and construction of a Freight Terminal has caused their property values to decline, which will only increase over time, *Amended Complaint*, ¶¶9, 37, 45, 55, 59, 60, and, like the plaintiffs in *Boyds*, they have been forced to retain and pay counsel. As with the declaratory judgment action in *Boyds*, Plaintiffs' declaratory judgment action "lay[s] well beyond the realm of matters 'future, contingent and uncertain.'" *Id., quoting Liss*, 224 Md. at 177.[3] Unlike the declaratory judgment action sought by the plaintiffs in *Friends*

---

[3] Mitchell relies primarily for its non-justiciability argument on *120 W. Fayette St., LLLP v. Mayor of Baltimore ("Superblock II")*, 413 Md. 309 (2010). *Superblock*, however, involved developers attempting to force Baltimore City to develop a downtown area in the manner the developers wanted, without any allegation of interference with their property rights, unlike Plaintiffs here, who allege that Defendants, including Mitchell, have already interfered with their property rights by pursuing development of an illegal Freight Terminal.

of Mount Aventine, Inc. v. Carroll, 103 Md. App. 204, 213 (1995), which the Court of Special Appeals held was not justiciable because the challenged amendments to a county water and sewer plan "could have no injurious effect upon the plaintiffs until the prospect of their implementation through approval of growth allocation," which the Court concluded was remote, Plaintiffs here allege that they have already been injured by the Defendants' efforts to develop an illegal Freight Terminal, which efforts they are actively pursuing.

Defendant Mitchell's motion to dismiss Count I for lack of a justiciable controversy should be denied.

B. Plaintiffs are not seeking judicial review of an agency decision in this case so that Mitchell's exhaustion of remedy/finality argument is without merit.

Mitchell next argues that all of the Counts in the Amended Complaint should be dismissed for failure to exhaust administrative remedies, despite the fact that all of the authorities it relies upon make clear that the exhaustion requirement applies only when the plaintiff is aggrieved by a decision of a zoning official. Indeed, Mitchell quotes the Harford County Zoning Code as supporting its exhaustion of administrative remedies argument, which actually plainly shows that the "administrative remedies" provided therein are available only when the "interested person" seeking them is someone "whose property is effected ***by any decision of the Director of Planning***...." [emphasis added].

Thus, the simple response to Mitchell's exhaustion of remedies argument is that Plaintiffs are not seeking judicial review of an administrative decision in this case, they are seeking redress from this Court for Defendants' tortious interference with and

intrusion to their property rights, with aa declaration of their rights, and an award of damages. This Court's power to provide Plaintiffs with that relief is not limited or constrained by the administrative remedies in the Harford County Zoning Code.

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.

Plaintiffs' amended complaint presents both equitable as well as legal claims for damages. 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), *citing First Federated Commodity Trust Corporation v. Commissioner of Securities for the State of Maryland*, 272 Md. 329, 335 (1974).

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." *Weaver v. ZeniMax Media, Inc.*, 175 Md. App. 16, 41 (2007) As the Court of Appeals recently reiterated: "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 (1981) (internal citations omitted).

There is no support in either the Harford County Zoning Code or the Maryland case law that the administrative remedies in that Zoning Code preclude this Court from considering and resolving any legal or equitable claims that relate in any way to real property that is the subject of a matter before the zoning administrator of Harford County. Were that the case, the declaratory judgment actions in *Boyds* and *Days Cove* would not have been allowed to proceed. Mitchell's motion to dismiss on this basis should be denied.

C. Plaintiffs have stated claims for private and public nuisance.

Count Two of the amended complaint states a claim for private nuisance, which is a non-trespassory 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), *quoting* RESTATEMENT (SECOND) OF TORTS § 821D (1965). 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 v. Crampton*, 235 Md. 138 (1964).

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. 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.

Mitchell, in a single argument applicable to both Counts II and III, asserts that the amended complaint fails to state a claim for private or public nuisance because Plaintiffs have failed to exhaust their administrative remedies and because their efforts in furtherance of what Mitchell describes as "their proposed warehouse development" "cannot possibly be found to 'cause substantial and unreasonable injury and interference' with Plaintiffs [sic] use and enjoyment of their property." *Memo* at p. 13.

For the reasons explained in the preceding section, Plaintiffs are not required to exhaust administrative remedies in order to pursue their nuisance claims. More fundamentally, Mitchell's "failure to state a claim" argument is premised on its assertion that it is not attempting to develop a Freight Terminal, which is plainly a dispute of fact that may not properly be resolved on a motion to dismiss, and on its unsupported assertion that the alleged efforts to develop and construct an illegal Freight Terminal "cannot possibly" cause substantial interference with Plaintiffs' property interests, despite

the allegations to the contrary in the amended complaint. *Amended Complaint*, ¶¶9, 37, 45, 55, 60).

Mitchell's reliance on *Leatherbury v. Gaylord Fuel Corporation,* 276 Md. 367 (1975), actually illustrates the flaws in its argument. In that case, the Department of Health & Mental Hygiene issued a permit to a limestone company to construct a quarry on property adjacent to that of the plaintiffs. Plaintiffs never challenged the agency's issuance of the permit. Instead, after the permit was issued by before the quarry started operations, plaintiffs filed an action for nuisance alleging that, once it began operations, the quarry's operations would constitute a nuisance.

The distinctions between *Leatherbury* and this case, however, are crucial. First, although the Court of Appeals did affirm the trial court's decision denying recovery for the alleged nuisance, it was because there was sufficient evidence ***after the trial of the nuisance action*** to support that decision. As the Court explained, because there was conflicting expert evidence on whether the quarry operations, once they commenced, would constitute a nuisance, "In light of the conflicting expert testimony, we believe that the chancellor had a sufficient basis for finding that the Leatherbury's failed to establish with reasonable certainty that a nuisance will result." 276 Md. at 376. Thus, contrary to Mitchell's argument, the plaintiffs in *Leatherbury* did not lose because their nuisance was "anticipatory," they lost ***after a trial*** because the chancellor was not convinced by their evidence that the quarry operations, once commenced, would pose a nuisance. Second, there was no dispute in *Leatherbury* that the operation of the quarry under the permit issued was lawful. Here, in contrast, the amended complaint alleges that operation of a

Freight Terminal would be unlawful, *Amended* Complaint, ¶¶8, 44, 58, 60, 72, 76), which Defendants do not appear to dispute, and, thus, would be a private and a public nuisance which has already unreasonably interfered with Plaintiffs' use and enjoyment of their property. *Amended Complaint,* ¶¶73, 74, 79, 80, 81.

Mitchell's motion to dismiss Counts II and III on these grounds should be denied.

D. The Amended Complaint states a claim for injunctive relief.

The sole basis on which Mitchell attacks Count IV, for injunctive relief, is that Plaintiffs' amended complaint does not state a claim on the underlying causes of action in Counts I, II, and III. As explained above in the preceding sections of the Argument, each of those Counts allege facts which, if accepted as true, would allow Plaintiffs to prevail on them and, thus, state claims on which relief may be granted, including injunctive relief. Mitchell's motion to dismiss Count IV should be denied.

IV. Conclusion.

For the reasons set forth above, Defendant Mitchell's motion to dismiss Plaintiffs' amended complaint should be denied.

/s/ Rignal W. Baldwin V
Rignal W. Baldwin V, CPF No. 1212110046
Baldwin|Seraina, LLC
111 South Street, Suite 1805
Baltimore, MD 21202
Telephone (410) 385-5695
Facsimile (443) 703-7772
rbaldwinv@baldwin-seraina.com

Attorney for Plaintiffs

CERTIFICATE OF SERVICE

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

/s/ Rignal W. Baldwin

E-FILED; Harford Circuit Court
Docket: 3/2/2023 2:02 PM; Submission: 3/2/2023 2:02 PM

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY, MARYLAND

PAUL JOHN CISAR, et al.

Plaintiffs,

v. Case No.: C-02-CV-22-000888

F.O. MITCHELL & BRO, et al,

Defendants.

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

REQUEST FOR HEARING

Plaintiffs, by and through their attorneys, hereby request a hearing on Defendant F.O. Mitchell & Bros. motion to dismiss the amended complaint and Plaintiffs' opposition thereto.

/s/ *Rignal W. Baldwin V*
Rignal W. Baldwin V, CPF No. 1212110046
Baldwin | Seraina, LLC
111 South Calvert Street, Suite 1805
Baltimore, Maryland 21202
Telephone (410) 385-5695
Facsimile (443) 703-7772
rbaldwinv@baldwin-seraina.com
mcuches@baldwin-seraina.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of March, 2023, a copy of the foregoing Request for Hearing was electronically filed and served through MDEC.

/s/ *Rignal W. Baldwin V*

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 DENYING MOTION OF DEFENDANT MITCHELL & BROS. TO DISMISS AMENDED COMPLAINT

This Court, having considered the arguments of counsel in this matter, and finding that the Plaintiffs' amended complaint pleads the elements of the causes of action asserted therein against Defendant Mitchell & Bros., that Defendant's motion to dismiss the amended complaint is, hereby, **DENIED,** this ____day of _____, 2023.

_____

Circuit Court Judge