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

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

DEFENDANT F.O. MITCHELL & BRO.'S REPLY TO OPPOSITION OF PLAINTIFFS TO DEFENDANT F.O. MITCHELL & BRO.'S MOTION TO DISMISS AMENDED COMPLAINT

F.O. Mitchell & Bro. ("Mitchell"), by and through their undersigned counsel, Robert S. Lynch, Esquire, David S. Lynch, Esquire, and Stark and Keenan, P.A., respectfully submit this Reply to the Opposition of Plaintiffs to Defendant F.O. Mitchell & Bro.'s Motion to Dismiss Amended Complaint ("Opposition"):

ARGUMENT

I. Adoption of Mitchell and Harford County's Reply in Support of Motion to Dismiss Plaintiffs' Original Complaint.

Mitchell adopts and incorporates as if fully set forth herein, "Defendant F.O Mitchell & Bro.'s Reply to Opposition to Motion to Dismiss" and Argument, section B of "Harford County's Reply in Support of Motion to Dismiss" ("County's Reply"), filed, respectively, on August 15, 2022 and August 8, 2022 in Anne Arundel County, Maryland Circuit Court Case No. C-02-CV-22-000988.

Argument, section B of the County's Reply is captioned "Plaintiffs' claims must be dismissed because of the related doctrines of exhaustion, finality, and justiciability."

The County's Reply cited portions of Plaintiffs' original opposition to the County's Motion to Dismiss and Plaintiffs' Original Complaint. Accordingly, the citations in the County's Reply should be amended as follows to account for the new pagination in Plaintiffs' Opposition and the new paragraph numbers in the Amended Complaint: 1) the County's citation on page 2 of the County's Reply to Plaintiffs' statement that they "are not seeking judicial review of an administrative agency" should be amended to page 8 of Plaintiffs' Opposition; 2) the County's citation on page 3 of the County's Reply to paragraph 24 of the Complaint should be amended to paragraph 26 of the Amended Complaint; 3) the County's citation on page 3 of the County's Reply to paragraph 32 of the Complaint should be amended to paragraph 34 of the Amended Complaint.

II. Incorporation of Opposition to Motion to Strike.

In response to the argument set forth in section I, "Standard on Motion to Dismiss," of Plaintiffs' Opposition, Mitchell adopts and incorporates as if fully set forth herein, "F.O Mitchell & Bro.'s Opposition to Plaintiffs' Motion to Strike Improper and Unsupported Exhibits to and Assertions in Defendant F.O. Mitchell & Bros. Motion to Dismiss Verified Amended Complaint," which Mitchell contemporaneously filed with this Reply.

III. There is no Justiciable Controversy Between the Parties.

Despite their bald assertions to the contrary, Plaintiffs failed to present a justiciable controversy in their Amended Complaint because facts necessary to support the claims of the Amended Complaint have not yet accrued. *See Hatt v. Anderson*, 297 Md. 42, 45 (1983) ("[T]he existence of a justiciable controversy is an absolute prerequisite to the maintenance of a declaratory judgment action."). Seemingly aware of this well-established precedent, Plaintiffs frame their response regarding justiciability through the lens of a baseless assertion. Plaintiffs write "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." (Opposition, p. 7). This argument is flawed.

Plaintiffs fail to cite to any authority that would prevent a developer or property owner from seeking approval to develop its property in accordance with the existing Zoning Code and Subdivision Regulations. None exists. To be clear, a warehouse development is a principal-permitted use in the Harford County's Light Industrial ("LI") zoning district. Plaintiffs repeatedly refer to the proposed warehouse development as a "Freight Terminal," yet nowhere in their Amended Complaint, Opposition, or in any other pleading, do Plaintiffs even attempt to explain how the proposed warehouse development is a "Freight Terminal" rather than a warehouse development. Rather, Plaintiffs baldly assert, without any

definition or basis in law or fact, that the proposed development, which has not yet been approved, is not what it purports to be.

Plaintiffs also fail to cite to any authority that would enable this Court to prevent the County from administering its own Zoning Code and Subdivision Regulations. Maryland's Appellate Courts have made abundantly clear that bald assertions and conclusory statements by the pleader will not suffice to survive a motion to dismiss. *Bobo v. State*, 346 Md. 706 (1997).

An argument is not justiciable simply because Plaintiffs argue, without basis, that the proposed use is something other than what is proposed. Plaintiffs' illogical argument demonstrates the very reason courts require facts to accrue before maintaining a declaratory judgment action. Mitchell submits that no Maryland case supports Plaintiffs' assertion that a litigant may maintain a declaratory judgment action seeking the Court to intervene in a County's ongoing administrative review of a development plan based merely on the litigant's baseless assertion that the application seeks to develop a use other than what is set forth on the application. The proposed Development Plans for a warehouse development in this case have yet to take on a fixed and final shape because they remain under review by the County. *Boyd's Civic Ass'n v. Montgomery County Council*, 309 Md. 683, 690 (1987) ("the 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."). Here, Plaintiffs are asking this Court to determine whether yet to be approved Development Plans seek approval for a use that is not permitted in Harford County's LI zoning district. This case epitomizes the rationale behind Maryland's long-standing proscription against courts rendering purely advisory opinions. *120 W. Fayette St., LLLP v. Mayor of Balt.*, 413 Md. 309, 356 (citing *Hatt v. Anderson*, 297 Md. 42, 45 (1983)). Plaintiffs' Amended Complaint is improperly before this Court and should be dismissed.

Plaintiffs' citation to *Boyds* and *County Com'rs of Queen Anne's County v. Days Cove Reclamation Co.*, 122 Md. App. 505, 518 (1998) to argue that Chesapeake's Development Plan applications are "ripening seeds" of an actual controversy is misplaced. The litigants in both of those cases sought declaratory relief based on legislative zoning and planning actions, not from an ongoing administrative review of development plans. For example, in *Days Cove*, the issue before the Court was whether appellants could challenge anticipated amendments to a County's solid waste management plan and the enactment of an underlying Zoning Ordinance which precluded appellees' operation of a rubble landfill. The Court found that the actions by the County's legislative body in that case were imminent and therefore ripe. In finding that the actions were ripe, the *Days Cove* Court cited *Boyds* for the following rule:

> The imminence and practical certainty of the act or event in issue, or the intent, capacity, and power to perform, create justiciability as clearly as the completed act or event, or is **generally easily distinguishable from remote, contingent, and uncertain events that may never happen and upon which it would be improper to pass as operative facts**.

Id., 122 Md. App. at 517 (citing *Boyds*, 309 Md. at 692) (emphasis supplied). Unlike the legislative decisions at issue in *Boyds* and *Days Cove*, the Development Plans are still under review by Harford County. Plaintiffs cite no case in support of the proposition that a declaratory judgment action lies regarding the validity of a use before that use is approved. No such case exists. The matter complained of is not ripe for review and Plaintiffs' action for declaratory judgment lacks justiciability. Mitchell urges this Court to dismiss, with prejudice, Plaintiffs' Complaint.

IV. The Amended Complaint's Counts for Private and Public Nuisance Should be Dismissed Because Plaintiffs have Inappropriately Pleaded an Anticipatory Nuisance.

The only action taken by Defendants in this case is the submission of Development Plans to the County for review. Plaintiffs fail to cite any authority to support the proposition that a property owner's application for development plan approval constitutes a nuisance. There is none.

More particularly, the Amended Complaint fails to state a claim for nuisance per se. Indeed, nuisances per se are typically found "only where a particular land use is motivated by malice toward the plaintiff landowner, is 'forbidden by law,' or is flagrantly contrary to generally accepted standards of conduct." *Wietzke v.*

Chesapeake Conference Ass'n, 421 Md. 355, 375 (2011) (internal citation omitted). A nuisance per se is "so unreasonable" that it constitutes a nuisance "at all times and under any circumstances." *Id*. at 374-75.; *Adams v. Comm'rs of Trappe*, 204 Md. 165, 170 (1954). Here, Defendant Chesapeake has merely submitted Development Plans in accordance with the statutory development process to develop a principal-permitted use on the Subject Property. The County has not approved the Development Plans. Participation in the County's development process cannot possibly be considered to be forbidden by law or deemed to be flagrantly contrary to generally accepted standards of conduct. Plaintiffs' bald assertion that the proposed development has already harmed Plaintiffs does not insulate Plaintiffs from well-established case law on nuisance actions in Maryland. To accept Plaintiffs' argument would mean that anyone who does not personally approve of a proposed development project may properly bring a nuisance action simply by fabricating an argument based on nothing more than the bald assertions that the pending development project is something other than what it is and that the fabricated use harms that person's property value. Such a rule would be absurd.

Moreover, there is a presumption under Maryland law that people conduct lawful activities in a proper manner and do not cause a nuisance per se. *Leatherbury v. Gaylord Fuel Corp.*, 276 Md. 367, 377 (1975) (operation of a permitted, lawfully-operated limestone quarry did not constitute a nuisance per se); *Chevy Chase Land*

Co. v. U.S., 355 Md. 110, 175 (1999) ("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."). The zoning of the Subject Property allows a warehouse development as a principal-permitted use. The Harford County Code expressly permits a property owner or developer to engage in the development process. Chesapeake's conduct in seeking approval of the Development Plans is an activity that is presumptively not a nuisance per se and this Court should dismiss Plaintiffs' Amended Complaint, with prejudice.

CONCLUSION

For all the reasons set forth above and for the reasons set forth in more detail in Mitchell's Motion to Dismiss Amended Complaint, Mitchell respectfully requests that this Honorable Court dismiss Plaintiffs' Amended Complaint, with prejudice.

Respectfully submitted,

/s/
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY on this 9th day of March, 2023, that a copy of the foregoing F.O. Mitchell & Bro.'s Opposition Reply to Opposition of Plaintiffs to Defendant F.O. Mitchell & Bro.'s Motion to Dismiss Amended Complaint was served on all parties registered for services via MDEC e-filing

/s/
David S. Lynch, Esquire
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