

CHESAPEAKE REAL ESTATE
GROUP, LLC

Plaintiff

v.

HARFORD COUNTY, MARYLAND

Defendant

* IN THE
* CIRCUIT COURT
* FOR
* HARFORD COUNTY
* Case No.: C-12-CV-23-000162

* * * * *

**HARFORD COUNTY, MARYLAND’S RESPONSE TO
MOTION FOR AFFIRMATIVE TEMPORARY RESTRAINING ORDER,
PRELIMINARY INJUNCTION, AND WAIVER OF BOND
AND
REQUEST FOR HEARING**

Defendant, Harford County, Maryland (the “County”), on behalf of the Department of Planning and Zoning (“DPZ”), by undersigned counsel, pursuant to Maryland Rule 2-311 and the direction of the Court, responds to the Motion for Temporary Restraining Order, Preliminary Injunction, and Waiver of Bond (the “TRO Motion”) of Plaintiff, Chesapeake Real Estate Group, LLC (“CREG”), and requests a hearing on such TRO Motion, stating as follows:

I. SHOWING REQUIRED TO OBTAIN TRO

“A plaintiff requesting a temporary restraining order must show the existence of both **immediate, substantial, and irreparable harm**” and the **four factors** required for the granting of **interlocutory injunctions.**” *Fuller v. Republican Central Comm.*, 444, Md. 613, 635 (2015); Maryland Rule 15-504(a). The four factors weighed when determining whether to grant an interlocutory injunction are:

1. Plaintiff’s likelihood of success on the merits;
2. The balance of harm to each party if relief is not granted;
3. The potential for irreparable injury to the plaintiff; and

4. The public interest.

Fuller, 444 Md. at 635 (citing *Maryland Dep't of Transp. v. Armacost*, 299 Md. 392, 404-05 (1984)). Moreover, plaintiff must present specific facts by affidavit or other statement under oath in support of the showings necessary to obtain a TRO. Maryland rule 15-501(a); *Fritzche v. State Bd. of Elections*, 397 Md. 331, 339 (2007). Thus, even before consideration of the four factors required to be weighed in considering a grant of interlocutory/preliminary injunctive relief, there must be a specific factual record attested to under oath which establishes that Plaintiff will suffer immediate, substantial and irreparable harm.

II. SHOWING REQUIRED TO OBTAIN WRIT OF MANDAMUS

“The issuance of a writ of mandamus . . . is extraordinary, and if the right be doubtful, or the duty discretionary, or of a nature to require the exercise of judgment, . . . this writ will not be granted.” *Prince George's County v. Aluisi*, 354 Md. 422, 450 (1997). “Mandamus is generally used ‘to compel inferior tribunals, public officials or administrative agencies to perform their function or perform some particular duty imposed upon them which in its nature is imperative and to the performance of which duty the party applying for the writ has a clear legal right.’” *City of Seat Pleasant v. Jones*, 364 Md. 663, 674 (2001) (citing *Criminal Injuries Comp. Bd. v. Gould*, 273 Md. 486, 514 (1975)). “The writ ordinarily does not lie where the action to be reviewed is discretionary or depends on personal judgment.” *Id.*, 364 Md. at 674 (internal citations omitted). A “writ of mandamus will not be granted unless the ‘duty which the [defendant] refuses to perform is purely ministerial.’” *Id.*

III. FACTUAL OVERVIEW

“Warehousing and wholesaling, processing and distribution” became a use category/classification when the 1982 Zoning Code was adopted.¹ Pursuant to the 1982 Zoning Code, the “warehousing and wholesaling, processing and distribution” permitted use category/classification was permitted as of right in the Village Business (VB)², Business 3 (B3)³, Commercial Industrial (CI)⁴, General Industrial (GI)⁵ and Office Research Industrial (ORI)⁶ use districts. Harford County Code (“HCC”) Chapter 25, Principal Permitted Uses Table.

The only change to the permitted use category/classification of “warehousing and wholesaling, processing and distribution” from the 1982 Zoning Code to the present is that one additional use has been added to the category/classification so that it now reads: “warehousing and wholesaling, processing, distribution **and local delivery.**” HCC Chap. 267, Permitted Uses Chart, 267 Attachment 19:21 (emphasis added). “Warehousing and wholesaling, processing, distribution and local delivery” currently is a permitted use in the following use districts: (Village Business (VB)⁷; Business 3 (B3)⁸; Commercial Industrial (CI)⁹; Light Industrial (LI)¹⁰; and General Industrial (GI)¹¹. *Id.*

Undoubtedly, the way “warehousing and wholesaling, processing, distribution, and local delivery” were conducted in 1982 varies dramatically from the way such business may be

¹ The 1982 Zoning Code is the first County Zoning Code to contain a Table of Permitted uses.

² See Harford County Code (“HCC”) § 25-6.3(e) (1982). All cited sections of the 1982 Harford County Code are attached in Appendix A.

³ See HCC § 25-6.3(f)(1)c (1982).

⁴ See HCC § 25-6.3(g)(1)a (1982).

⁵ See HCC § 25-6.3(g)(1)b (1982).

⁶ See HCC § 25-6.3(g)(1)c (1982).

⁷ See HCC § 267-58 (2022). All cited sections of the 2022 Harford County Code are attached in Appendix B.

⁸ See HCC § 267-59 (2022).

⁹ See HCC § 267-60 (2022).

¹⁰ See HCC § 267-60 (2022).

¹¹ See HCC § 267-60 (2022).

conducted today. Computer technology was largely non-existent in warehousing in 1982. Inventories were maintained on handwritten charts and visually by floor workers. Freight stored indoors generally was palletized and moved almost exclusively by tow-motor/forklift operators. Rarely was freight racked and stacked more than thirty feet (30') high given that indoor forklifts and forklift operators generally could not manipulate freight more than thirty feet (30') off the ground.

Modern warehouse operations inventory, rack, stack, store, shuffle and retrieve merchandise mechanically via computers and computer operated machinery. Forklifts need be used only at ground level to off-load and load merchandise from and onto trucks.

The Mitchell Property development is by far the largest development project that ever has been planned in Harford County.¹² The total gross land area for the proposed Mitchell Property development is 708.69 ± acres. Such acreage is proposed to be subdivided into 6 lots of various sizes with the following distribution of uses: The construction of mega-warehouses is proposed for Lots 1-5 while a retail/service center is proposed for Lot 6. The size and cubic footage of the proposed mega-warehouses has expanded considerably with each version of the development plans submitted on behalf of CREG. The County received the Version 3 development plans on September 27, 2022.

The below compares the mega-warehouse square footage in each successive version of the development plans submitted on behalf of CREG:

Lot 1-Mega-Warehouse 1:

- Version 1: 580' x 1566' x 40' = 36,331,200 cubic feet
- Version 2: 580' x 1646' x 40' = 38,187,200 cubic feet
- Version 3: 580' x 1646' x 65' = 62,054,200 cubic feet
- The overall increase in volume and size for Mega-Warehouse 1 from Version 1 to the current Version 3 is 25,723,000 cubic feet (primarily due to the increase in height from

¹² By way of comparison, the total gross land area of the Abingdon Business Park mega-warehouse development project is 326.47 ± acres.

40' to 65', which was first requested in the Version 3 plans submitted on September 27, 2022).

Lot 2-Mega-Warehouse 2:

- Version 1: $580' \times 2280' \times 40' = 52,896,000$ cubic feet
- Version 2: $580' \times 2378' \times 40' = 55,169,600$ cubic feet
- Version 3: $580' \times 2378' \times 65' = 89,650,600$ cubic feet
- The overall increase in volume and size for Mega-Warehouse 2 from Version 1 to the current Version 3 is 36,754,600 cubic feet (primarily due to the increase in height from 40' to 65', which was first requested in the Version 3 plans submitted on September 27, 2022).

Lot 3-Mega-Warehouse 3:

- Version 1: $580' \times 1026' \times 40' = 23,803,200$ cubic feet
- Version 2: $580' \times 1006' \times 40' = 23,339,200$ cubic feet
- Version 3: $580' \times 1006' \times 65' = 37,926,200$ cubic feet
- The overall increase in volume and size for Mega-Warehouse 3 from Version 1 to the current Version 3 is 14,123,000 cubic feet (primarily due to the increase in height from 40' to 65', which was first requested in the Version 3 plans submitted on September 27, 2022).

Lot 4-Mega-Warehouse 4:

- Version 1: $580' \times 2970' \times 40' = 68,904,000$ cubic feet
- Version 2: $580' \times 2870' \times 40' = 66,584,000$ cubic feet
- Version 3: $580' \times 2870' \times 65' = 108,199,000$ cubic feet
- The overall increase in volume and size for Mega-Warehouse 4 from Version 1 to the current Version 3 is 39,295,000 cubic feet (primarily due to the increase in height from 40' to 65', which was first requested in the Version three plans submitted on September 27, 2022).

Lot 5-Mega-Warehouse 5:

- Version 1: $500' \times 1296' \times 40' = 25,920,000$ cubic feet
- Version 2: $410' \times 1500' \times 40' = 24,600,00$ cubic feet
- Version 3: $410' \times 1500' \times 65' = 39,975,000$ cubic feet
- The overall increase in volume and size for Mega-Warehouse 5 from Version 1 to the current Version 3 is 14,055,000 cubic feet (primarily due to the increase in height from 40' to 65', which was first requested in the Version 3 plans submitted on September 27, 2022).

Thus, the Version 3 plans contain One-Hundred-Twenty-Nine Million, Nine-Hundred-Fifty Thousand, Six-Hundred (129,950,600) more cubic feet of mega-warehouse space than the original Version 1 plans.

A football field is 360-feet long from the end of one endzone to the end of the other endzone and 162-feet wide. Each proposed mega-warehouse has a footprint the size of three-plus to six-plus football fields. Adding another twenty-five-feet in height to such a massive footprint constitutes a significant increase in volume that will have a substantial impact on existing infrastructure.

Alternatively, a comparison of the square feet of the project footprints with known projects will assist the Court in appreciating the scope and magnitude of CREG’s proposed Mitchell

Property mega-warehouse project:

M&T Bank Stadium	1,600,000 square feet footprint
Oriole Park at Camden Yards	1,000,000 square feet footprint
Baltimore Arena	565,000 square feet footprint
Baltimore Convention Center	608,968 square feet footprint
<u>Bel Air Mall</u>	<u>1,345,000 square feet footprint</u>
Total	5,118,968 square feet of total footprint
Mitchell Property	
Mega-Warehouse 1	954,680 square feet footprint
Mega-Warehouse 2	1,379,240 square feet footprint
Mega-Warehouse 3	583,480 square feet footprint
Mega-Warehouse 4	1,644.600 square feet footprint
<u>Mega-Warehouse 5</u>	<u>615,000 square feet footprint</u>
Total	5,177,000 square feet of total footprint

The project proposed by CREG for the development of the Mitchell Property is a mega-development project. The plans have not been honed and progressed to a final version; they have been exponentially expanded and the impacts have been exponentially multiplied with each new version of the plans that have been submitted on behalf of CREG.

More usable space means more traffic flowing to and from the mega-warehouse buildings. Additionally, because “local delivery” may be staged out of such mega-warehouses, the size, volume and number of trucks and vans that will generate trip traffic on a daily basis will be

significantly larger than the volume of truck traffic servicing a strictly wholesale warehouse. “Local delivery” includes all of the trucks that can load first thing in the morning and reach a destination around mid-day to early afternoon so that the driver has the afternoon and evening to run a delivery route for the merchandise loaded on the truck in the morning. Local delivery could include destinations from southern New Jersey to northern or central Virginia.

Has the processing of the plans for the project slowed? Perhaps. But when an additional One-Hundred-Twenty-Nine Million, Nine-Hundred-Fifty Thousand, Six-Hundred (129,950,600) more cubic feet of mega-warehouse space has been added to the project as recently as September 27, 2022, it would be irresponsible of the County not to thoughtfully consider the impact of such additional volume to existing infrastructure.

Without question, the permitted use charts have not been reconsidered and modified to keep pace with developments in the way warehousing is currently conducted and have changed since 1982. That is precisely why the County Executive sent a moratorium bill to the Harford County Council (the “Council”) prior to February 7, 2023, requesting the Council to adopt a moratorium on the issuance of any permits for any development proposed pursuant to the “warehousing and wholesaling, processing, distribution and local delivery” use category/classification of the Permitted Use Chart. The current regulatory regime has not kept pace with the developments in warehousing made possible by mechanical and technological improvements.

Currently, there is only one roadway onto and off-of the Perryman Peninsula that will accommodate transient truck traffic: Route 40 to Route 7 to Perryman Road. Route 7 is a single-lane two-way road and significant portions of Perryman Road are a single-lane two-way road. (“Local delivery” trucks could chance traveling from Perryman Road to Route 40 by traversing

Spesutia Road, which is a residential neighborhood road that has no curb and gutter, is not wider than thirty feet (30') and is lined primarily with modest mid-century residential homes that have a shallow front-yard setback from Spesutia Road.) In short, currently, there is no roadway that is designed to handle the volume of 18-wheel and container tractor-trailer traffic as well as the "local delivery" truck traffic that will daily access the mega-warehouse complex proposed for development on the Mitchell Property.

The County Executive is serving his first term having been duly elected on November 8, 2022 and duly sworn into office on December 5, 2022. He has held office for approximately three months. He appointed a new, first-term Director of DPZ, Shane Grimm. Given the outdated and now ill-advised Permitted Use Chart for "warehousing and wholesaling, processing, distribution, and local delivery," the County Executive promptly requested the Council to enact a moratorium so that the regulatory regime for mega-warehouses could be updated and brought into the Twenty-First Century.

The Harford County electorate, through the ballot box, expressed the majority desire to see the permitted use regulations for "warehousing and wholesaling, processing, distribution, and local delivery" revised to implement standards appropriate for such uses in the Twenty-First Century. The County Executive made the issue a priority for voters to differentiate the agenda of Republican County Executive candidate Boniface from the agenda of the County Executive. (*See Exs. 1 & 2.*) The County Executive won the Republican Primary and the General Election by generous margins. Mega-warehouses provide *de minimus* economic development and when considering the disruption to traffic flow and the inability of existing roads and infrastructure to accommodate projected vehicular traffic may well constitute a net economic drain.

IV. ARGUMENT

A. No showing of immediate, substantial and irreparable harm.

The TRO Motion contains one conclusory allegation relative to immediate, substantial and irreparable injury. Specifically, CREG alleges: “Plaintiff will suffer immediate, substantial and irreparable injury.” (TRO Mot. ¶ 16.) CREG alleges, without providing any admissible evidence, that it “has expended over [\$2,000,000] in costs related to the [Mitchell Property development].” (TRO Mot. ¶ 11.) There is no testimony made under oath based on personal knowledge that CREG has made such expenditures. No invoices (*i.e.*, best evidence – *see* Maryland Rules 5-1002 – 5-1004) are attached to the Complaint or any affidavit attesting to the amounts actually expended to date by CREG. CREG has failed to adequately support its claim of monetary injury with admissible evidence as required by Maryland Rule 15-504(a)(1), so the claim should be disregarded.

“[A]n injury is irreparable, within the law of injunction, where it is of such character that a fair and reasonable redress may not be had in a court of law, so that to refuse the injunction would be a denial of justice—in other words, where, from the nature of the act, or from the circumstances surrounding the person injured, or from the financial condition of the person committing it, it cannot be readily, adequately, and completely compensated for with money.” *Ademiluyi v. Egbuonu*, 466 Md. 80, 134 (2019) (citing *State Comm’n on Human Relations v. Talbot Cnty. Det. Ctr.*, 370 Md. 115, 140 (2002)).

Maryland, under the vested rights doctrine, has long recognized that the mere expenditure of substantial sums in pursuit of development approvals creates no right or expectation in obtaining final project approval. *See* Part IV.B *infra*. The development review and approval process, particularly for a proposed development as large and complex as the mega-warehouse project before

the Court, that has been continuously expanded and revised, presents a complex and every changing set of circumstances. Plaintiffs have failed to allege the existence of any statutory time limitations on any plan consideration pending before the County. *See* Part IV.C *infra*. It should come as no surprise that more time and effort is required to review the plans before DPZ given the unprecedented size of the project, the turnover in executive administration reviewing the project, and the unique circumstances presented by the woefully inadequate infrastructure necessary to accommodate the proposed project.

CREG has made numerous conclusory allegations. CREG has purposefully neglected to present the Court with a true picture of the scope, magnitude and complexities of the project in light of the very limited infrastructure supporting access to the Perryman Peninsula. CREG has purposely neglected to inform the Court of the ever-expanding scope of the project. The residents and businesses currently utilizing the limited infrastructure serving the Perryman Peninsula are as likely if not more likely to suffer substantial and irreparable injury as CREG, if the proposed development, with all of the implications and impacts associated therewith, are not prudently examined and considered.

B. The real objective of the case and the vested rights doctrine.

Maryland is a vested rights zoning state. “[I]n order to obtain a vested right in an existing zoning use that will be protected against a subsequent change in a zoning ordinance prohibiting that use, the owner must initially obtain a valid permit. Additionally, in reliance upon the valid permit, the owner must make a substantial beginning in construction and in committing the land to the permitted use before the change in the zoning ordinance has occurred.” *Maryland Reclamation Assoc. v. Harford Cnty.*, 414 Md. 1, 44-45 (2010) (“*MRA IV*”) (citing *Powell v. Calvert Cnty.*, 368 Md. 400, 411-12 (2002) (quoting *O’Donnell v. Bassler*, 289 Md. 501, 508

(1981)).

In *MRA IV*, Maryland Reclamation Associates (“MRA”) “made a substantial change of position in relation to the land (*i.e.*, it purchased the land after it received zoning and Solid Waste Management Plan approval); it made substantial expenditures (it spent over a million dollars in land acquisition, engineering and legal fees); and it incurred substantial obligations (it proceeded with the engineering development plans for Phases II and III of the State’s [rubble landfill] permitting process)” *MRA IV*, 414 Md. at 45. MRA’s significant actions and substantial expenditures in furtherance of its quest to develop a rubble landfill were of no avail in establishing a right to proceed pursuant to the zoning regime in effect when MRA commenced work towards development of a rubble landfill. The Supreme Court ruled: “We follow many decades of Maryland law in holding that MRA needs more than a state permit and site plan approval in order to have a vested right.” *Id.* at 46.

The purpose of the Harford County Zoning Code “is to promote the health, safety, morals and general welfare of the community by regulating the height, number of stories, size of buildings and other structures, the percentage of lots that may be occupied, the size of lots, yards and other open spaces and the location and use of buildings structures and land for business, industrial, residential and other purposes.” HCC § 267-3A. Furthermore, the Zoning Code is “designed to control traffic congestion on public roads ... [and] to facilitate the adequate provision of transportation, water, sewerage ... and other public facilities.” *Id.*

The industrial development of the Perryman Peninsula has long been contemplated, but such contemplation has always hinged on the addition of a major collector road for the movement of the new industrial traffic such industrial development would generate to the north-south arterial roads traversing the County, *i.e.*, Maryland Route 40 and Interstate Route 95. The 1969 Master

Land Use Plan contemplated that industrial development of the peninsula would be serviced by the railroad and the extension of Maryland Route 543 to a bridge crossing Church Creek and extending Md. Rte. 543 to Perryman Road, *i.e.*, Md. Rte. 159. Since that time, the Transportation Element of the Master Plan has referenced the development of a major collector road that crosses Church Creek and serves to shuttle Perryman Peninsula traffic from Perryman Road (*i.e.*, Md. Rte. 159) to Md. Rte. 40 and Interstate 95. To date, the land, the plans and the financing necessary to fund and to complete the development of such a major collector road has never been dedicated to such a contemplated project.

The new County Executive and DPZ, under the new leadership of Mr. Grimm, have refused to rush approval of the largest industrial development project in the history of the County, because they take seriously the statutory purposes and objectives set forth in the County Zoning Code. They refuse to ignore the very serious traffic congestion problems created by CREG's proposed mega-warehouse project and the public health and safety impacts such project will visit due to the failure to fund and develop the infrastructure necessary to properly service such a project.

The purpose of the above-captioned case is transparent once one understands the overlay of the vested rights doctrine on Maryland zoning law. It matters not that CREG has expended significant sums towards the development of the Mitchell Property project. Until it obtains the permits necessary to put shovels in the ground and makes a substantial start towards development of the project, such expenditures are at risk. The objective of this lawsuit is to manipulate the Court into forcing the County, by order of the Court, to confer CREG with vested rights to the current zoning regime for the Mitchell Property project, a result that would directly contradict the holding of *MRA IV*.

C. No law mandates a timeline for review and approval of proposed development plans.

There is no law that mandates the timeline or the process for review and approval, conditional approval or rejection of proposed development plans. Neither the Emergency Verified Complaint for Writ of Mandamus, Temporary Restraining Order, and Preliminary and Permanent Injunctive Relief (the “Complaint”) nor the TRO Motion reference any State or County law that mandates the timeline or process for review and approval, conditional approval, or rejection of proposed development plans. Furthermore, to suggest that the process is ministerial is laughable. How should the Director of Planning resolve the conundrum created by the Land Use Element of the County’s Master Plan, which calls for the industrial development of much of the Perryman Peninsula and the Transportation Element of the Master Plan, which for decades has called for the development of a major collector road linking Perryman Road (*i.e.*, Md. Rte. 159) with Md. Rte. 40 and Interstate 95, when the land, the development plans and the funding required for the establishment of such a major collector road are non-existent. CREG certainly has not offered the Court any viable suggestion about how to resolve such conundrum.

There is no basis supporting issuance of a TRO. Likewise, there is no basis supporting issuance of a writ of mandamus.

WHEREFORE, Harford County, Maryland respectfully requests the Court to deny the Motion for Temporary Restraining Order, Preliminary Injunction, and Waiver of Bond of Plaintiff, Chesapeake Real Estate Group LLC, and to grant such other and further relief as the Court deems necessary and appropriate.

REQUEST FOR HEARING

Defendant, Harford County, Maryland, by undersigned counsel, pursuant to Maryland Rule 2-311(e), respectfully requests the Court to grant a hearing on the Motion for Temporary Restraining Order, Preliminary Injunction, and Waiver of Bond of Plaintiff, Chesapeake Real Estate Group LLC, before granting such motion.

Respectfully submitted,

/s/ Jefferson L. Blomquist

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EXHIBIT LIST

1. Cassilly Campaign Warehouse Distribution Center Primary Mailer
2. Cassilly Campaign Families Supporting Cassilly Primary Mailer

APPENDIX

- A. Excerpts from the 1982 Zoning Code
- B. Excerpts from the 2022 Zoning Code (currently in effect)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of March 2023, a copy of Harford County, Maryland's Response to Motion for Affirmative Temporary Restraining Order, Preliminary Injunction, and Waiver of Bond was filed electronically and served on the following parties via the MDEC e-filing system:

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