

IN THE CIRCUIT COURT FOR FREDERICK COUNTY, MARYLAND
FRIENDS OF FREDERICK COUNTY, *et al.** No. 10-C-11-000410

Plaintiffs *
v. *
THE TOWN OF NEW MARKET, *Defendant *

RESPONSE TO PLAINTIFFS' OPPOSITION TO PRELIMINARY MOTION

The Town of New Market, Defendant, by its undersigned counsel, submits this reply to the response of the Plaintiffs to the Defendant's Preliminary Motion, and says:

Declaratory Judgment

Plaintiffs' declaratory judgment action is premised on Article 66B, §3.05. However, Plaintiffs rely on case law arising from judicial review in non-Article 66B jurisdictions.

The decision on *Boyd's Civic Ass'n. v. Montgomery County Council*, 309 Md. 683 (1987), cited in Plaintiffs' Opposition, did not arise in an Article 66B jurisdiction. Moreover, the decision involved a challenge to the procedure used in adopting a plan, rather than a challenge to the validity of the plan itself. In *Boyd's*, Judge Marvin Smith relied on his two previous opinions in *Coffey v. Maryland National Park & Planning Commission*, 292 Md. 24 (1982) and *Board of County Commissioners v. Gaster*, 285 Md. 333 (1989). Both of those cases involved

subdivision law. Neither *Boyds*, *Coffey* nor *Gaster* concerned Article 66B, §3.05.

In Article 66B, a "plan" is defined as:

"the policies, statements, goals and interrelated plans for private and public land use, transportation, and community facilities documented in text and maps which constitute the guide for the area's future development" Md. Ann. Code, Article 66B, §1.00(h) (emphasis supplied)

In Article 66B, comprehensive plans are advisory, subject to a narrow judicial exception for regulations under *Coffey* and *Gaster* in which plan conformance is required under local legislation. Because the declaratory judgment in this action does not seek to construe a conformance-based regulation, the analysis in *Boyds* is inapposite.

Plaintiffs also rely on *Maryland National Capitol Park and Planning Commission v. Greater Baden-Aguasco Citizens Association*, 412 Md. 73 (2009), a non-Article 66B ruling. *Greater Baden-Aguasco* dealt with a standard of plan consistency. A requirement of mere consistency will not elevate a plan to the status of true regulatory device. *Richmarr Holly Hills, Inc. v. American PCS, L.P.*, 117 Md. App. 607 (1997)

In attempting to invalidate an advisory plan, Plaintiffs' declaratory judgment action misses the mark. The only justiciable issue, had it been properly framed, is whether New Market has complied with the requirement of §3.05 of Article 66B

by including in its plan consideration of the municipal growth element criteria enumerated in §3.05.

Section 3.05 provides that the municipal growth element adopted by a municipal corporation "shall include consideration" of certain planning matters. While this Court may properly determine whether New Market's comprehensive plan "include[s] consideration" of the criteria enumerated in §3.05, the issue is completeness, rather than validity. While declaratory relief may be appropriate regarding compliance of a plan with §3.05, the Court may not declare valid or invalid the advisory policies of a local legislative body. While the attention of a comprehensive plan to required statutory considerations may be challenged through declaratory judgment, a plan, as a non-regulatory statement of policy, may not be declared invalid under §3-406 of the Declaratory Judgment Act. In so requesting, the Plaintiff's Complaint fails to state a cause of action upon which relief may be granted.

Standing of Friends of Frederick County

In their response to Defendant's Preliminary Motion, Friends of Frederick County admittedly asserts no standing to participate in this action. It suggests only that, because the standing of other Plaintiffs is not challenged, the

association's standing is beyond judicial inquiry. No Maryland appellate decision has so opined.

A party without standing should not be permitted to participate in an action for declaratory or injunctive relief. With particular regard to the injunctive relief requested, if Friends of Frederick County were permitted to participate in this action, and were to obtain an injunction, Friends of Frederick County would be invested with the power to enforce the injunction obtained. Any member of the association who may be capable of influencing the association's exercise of discretion would have the potential to anonymously enforce such an injunction, regardless of the undisclosed member's inequitable motive or unclean hands.

Plaintiffs' Attorney's Fee Claim

Preliminary motions address the sufficiency of matters alleged in a complaint. In this action, Plaintiffs allege no basis in statute or contract which may support their request for attorney's fees.

In their opposition, Plaintiffs assert that their request for attorney's fees is proper, suggesting that the Defendant might defend in bad faith or without substantial justification. Rule 1-341 claims, where appropriate, may be raised in the course of the proceedings by motion, and are inappropriate in an

initial pleading by a plaintiff. There can be no defense in bad faith or without substantial justification before a defense is due.

Joinder

Plaintiffs assert a claim in this action under the Maryland Uniform Declaratory Judgments Act, seeking, *inter alia*, to enjoin a pending annexation. The Complaint identifies both generally and specifically land which may be annexed, but fails to include the owners of such land as parties. The owners of those properties have interests which would be affected by the declaration proposed by the Plaintiffs, and are necessary parties under §3-405 of the Uniform Declaratory Judgments Act. They are entitled to the opportunity to protect their proprietary interests from declaratory or injunctive restriction, and from the devaluating effect of such action.

CONCLUSION

For the reasons set forth above, Defendant seeks the following:

(a) That the Complaint may be dismissed; or in the alternative, that Plaintiffs may be permitted to amend their Complaint;

(b) That Friends of Frederick County may be dismissed as a party to this action; and

(c) That Plaintiffs' claim for attorney's fees may be dismissed, without prejudice.

Respectfully submitted,



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CERTIFICATION

I hereby certify that on this 07th day of June, 2011, a copy of the above pleading or paper was mailed to: Norman G. Knopf, Esquire and Mollie N. Habermeier, Esquire, Knopf & Brown, 401 E. Jefferson Street, Suite 206, Rockville, MD 20850.



William C. Wantz