

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 \*

PRELIMINARY MOTION

The Town of New Market, Defendant, by William C. Wantz, its attorney, in accordance with Rule 2-322, moves to dismiss the Complaint, and says:

1. The Complaint fails to state a claim upon which relief can be granted.

Grounds: A municipal growth element is a component of a comprehensive plan. Md. Ann. Code, Art. 66B, §3.05 In Maryland, a comprehensive plan is advisory. Comprehensive plans are guides to land use, development and future public action. The New Market comprehensive plan has no regulatory effect. *Trail v. Terrapin Run, LLC*, 403 Md. 523 (2008) Comprehensive plans and municipal growth elements are differentiated from land use ordinances. A comprehensive plan is a statement of aspirational visions, goals and policies which are non-regulatory in nature, and have no regulatory effect. Comprehensive plans are implemented through legislative enactment of land use ordinances. *Mayor and Council of Rockville v. Rylyns Enterprises, Inc.*, 372 Md. 514, 532 (2002); Md. Ann. Code, Art. 66B, §4.09 A plan, standing alone, is a mere guide or policy, having no regulatory effect. *Trail v. Terrapin Run, LLC, supra*

The municipal growth element, as part of a comprehensive plan, is not a statute, ordinance, rule or regulation. It is a policy component of a comprehensive plan. The

Maryland Uniform Declaratory Judgments Act, Md. Ann. Code, Courts and Judicial Proceedings Article, §§3-401, *et seq.*, (the "Act") upon which Plaintiffs' Complaint is premised,<sup>1</sup> provides that interested parties may obtain declaratory relief regarding the construction or validity of municipal ordinances, rules and regulations, but does not authorize declaratory judgment actions with respect to municipal policies:

"Any person interested under a deed, will, trust, land patent, written contract, or other writing constituting a contract, statute, municipal ordinance, administrative rule or regulation, contract, or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, administrative rule or regulation, land patent, contract, or franchise and obtain a declaration of rights, status, or other legal relations under it." Md. Ann. Code, Courts and Judicial Proceedings Article, §3-406

New Market's comprehensive plan, and the municipal growth element which comprises a component thereof, are policies approved by legislative resolution. They are not ordinances, and are not subject to adjudication under the Act.

The construction and validity of a comprehensive plan may not be adjudicated in a declaratory judgment action, because a plan is not an ordinance. The court lacks subject matter jurisdiction to declare as to a policy of a municipal legislative body.

2. Friends of Frederick County lacks standing to sue in this action.

Grounds. Friends of Frederick County is a civic association. The association is of undisclosed membership. The Complaint alleges no ownership of property by the association, or other sufficient basis of standing to sue. Without standing, the Complaint fails to state a claim upon which relief may be granted with respect to the association Plaintiff, and the court lacks jurisdiction over the subject matter of the

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<sup>1</sup> Complaint, paragraph 7

association Plaintiff's Complaint.<sup>2</sup> A civic association's right to participate, *vel non*, turns on the determination of standing.

Under Maryland law, an unincorporated civic association has no standing to sue when it has no property interest of its own that is separate and distinct from that of its individual members. *Maryland Waste Coalition, Inc. v. Maryland Dept. of Environment*, 84 Md. App. 544, 555 (1990), *affirmed*, *Medical Waste Associates, Inc. v. Maryland Waste Coalition, Inc.*, 227 Md. 596, 613 (1992); *Carroll Park Manor Cmty. Ass'n, Inc. v. Board of County Comm'rs*, 50 Md. App. 319 (1981); *Citizens Planning & Housing Ass'n v. County Executive of Baltimore Co.*, 273 Md. 333, 345 (1974); *Stocksdale v. Barnard*, 239 Md. 541 (1965); *Bar Ass'n v. District Title Ins. Co.*, 224 Md. 474 (1961); *Southland Hills Improvement Ass'n v. Raine*, 220 Md. 213, 217 (1959); *Norwood Heights Imp. Ass'n v. Mayor & City Council Baltimore*, 195 Md. 1 (1950); *Windsor Hills Imp. Ass'n v. Mayor and City Council of Baltimore*, 195 Md. 383 (1950); *Maryland Naturopathic Ass'n v. Kloman*, 191 Md. 626, 630-631 (1948); *Crider v. Cullen*, 191 Md. 723 (1949); *Catalyst & Chemical Services, Inc. v. Global Ground Support*, 350 F.Supp.2d 1, 22 (2004), *affirmed*, 173 Fed. Appx. 825 (2006)

Because the Friends of Frederick County has no standing, it may not be accorded party status in this action.

3. The Complaint fails to state a claim upon which relief can be granted with respect to Plaintiffs' request for attorney's fees.

Grounds: Plaintiffs allege no contract, statute or other cognizable basis upon which attorneys' fees may be awarded in this action.

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<sup>2</sup> The standing of a party may be challenged by preliminary motion. Rule 2-322; *Kirgan v. Parks*, 60 Md. App. 1, 5 (1984)

Maryland adheres to the "American rule" in which each party is responsible for its own legal fees, regardless of who wins in the litigation. Fee shifting, an exception to the American rule whereby a court orders payment of the prevailing party's attorney's fees by the losing side, may be accomplished by an express agreement or by statute. Maryland law has never recognized fee shifting absent a contractual provision, statute or rule. *Henriquez v. Henriquez*, 413 Md. 287, 294 (2010)

Plaintiffs' claim for attorney's fees must be dismissed.

4. Plaintiffs have failed to join necessary parties in seeking declaratory relief.

Grounds: Section 3-405 of the Act requires that "a person who has or claims any interest which would be affected by the declaration shall be made a party." Md. Ann. Code, Courts and Judicial Proceedings Article, §3-405(a)

Plaintiffs allege in their Complaint that the use, enjoyment and value of properties "within sight or sound" of lands designated as annexation areas in the Town's Municipal Growth Element may be adversely affected by certain actions undertaken by the Town. By the Plaintiffs' own reasoning, property owners "within sight or sound" of lands so designated have interests "which would be affected by the declaration" under §3-405(a), but have not been made parties. To the same extent by which Plaintiffs may claim vicinal standing, other property owners "within sight or sound" of lands designated as annexation areas in the Town's Municipal Growth Element have similar interests which may be affected by a declaration in this action, and must be made parties by the Plaintiffs, if they wish the Court to entertain their request for declaratory relief.

Property owners adjacent to current and future municipal boundaries of the Town enjoy a right to seek annexation under Md. Ann. Code, Article 23A, §19A. In Maryland, declaratory relief may be granted either for or against the Plaintiffs. *Lovell Land v. State Highway Administration*, 408 Md. 242, 256 (2009) A declaration *against* Plaintiffs upholding the Town's Municipal Growth Element would preserve the interests of property owners who may desire to have their lands annexed. Those interests require that they must likewise be made parties by the Plaintiffs under §3-405 of the Act.

WHEREFORE, Defendant prays

(a) that the Complaint may be dismissed, as it seeks declaratory relief with respect to a municipal policy rather than a municipal ordinance, rule or regulation;

(b) that the Complaint may be dismissed because Plaintiffs have failed to join necessary parties;

(c) that Friends of Frederick County, Plaintiff, may be dismissed as a Plaintiff in this action because it lacks standing;

(d) that Plaintiffs' claim for attorneys' fees may be dismissed; and

(e) that the Defendant may be awarded costs.

Respectfully submitted,

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123 West Washington Street  
Hagerstown, MD 21740  
(301) 733-7972

Attorney for Defendant

REQUEST FOR HEARING

Defendant requests a hearing on this Preliminary Motion.

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William C. Wantz

CERTIFICATION

I hereby certify that on this \_\_\_\_\_ day of March, 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.

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William C. Wantz