

**IN THE CIRCUIT COURT
FOR FREDERICK COUNTY, MARYLAND**

FRIENDS OF FREDERICK COUNTY :
4 East Church Street :
Frederick, Maryland 21701 :

AUDUBON SOCIETY OF CENTRAL :
MARYLAND, INC: :
P.O. Box 660 :
Mt. Airy, Maryland 21771 :

CHESAPEAKE BAY FOUNDATION :
6 Herndon Avenue :
Annapolis, MD 21403 :

Marcel Aillery :
3710 Tuck Avenue :
Point of Rocks, MD 21777 :

Kathy Babashan :
2016 Dixon Road :
Frederick, MD 20874 :

Judith Elizabeth Bauer :
8097 Geaslin Drive :
Middletown, MD 21769 :

Elizabeth Breitsameter :
2024 Dixon Road :
Frederick, MD 21704 :

Maryann Brooks :
7104 Linganore Road :
Frederick, MD 21701 :

Donald Butler, Jr. :
6513 Plantation Road :
Frederick, MD 21701 :

Katherine M. Carter :
10696 Oakridge Court :
New Market, MD 21774 :

Civil Case No: _____

**COMPLAINT
(DECLARATORY AND
INJUNCTIVE RELIEF)**

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Theresa Church	:
10924 Rawley Road	:
New Market, MD 21774	:
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Leanne DeNenno	:
7102 Linganore Road	:
Frederick, MD 21701	:
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David DeVore	:
6834 Plantation Road	:
Frederick, MD 21701	:
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Herbert Anthony Facchina, Jr.	:
9335 Doctor Perry Road	:
Ijamsville, MD 21754	:
	:
Loretta J. Folb	:
9343 Doctor Perry Road	:
Ijamsville, MD 21754	:
	:
Randall Frank	:
9339 Doctor Perry Road	:
Ijamsville, MD 21754	;
	;
Marion L. Griffin	:
5631 Morning Glory Trail	;
New Market, MD 21774	;
	:
Ronald C. Harlow	:
10920 Rawley Road	:
Frederick, MD 21774	:
	:
Matthew Kenworthy	:
9360 Slate Quarry Road	:
Dickerson, MD 20842	:
	:
Claudia Lapcevich	:
9420 Slate Quarry Road	:
Dickerson, MD 20842	;
	:
Larry Leiby	:
6821 Plantation Road	:
Frederick, MD 21701	:
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	:

Stephanie McDaniel
9343 Doctor Perry Road
Ijamsville, MD 21754

Gary Noubarian
8355 Doctor Perry Road
Ijamsville, MD 21754

James C. Nygaard
3334 Yorkshire Court
Adamstown, MD 21710

Kent Ozkum
10720 Dern Road
Emmitsburg, MD 21727

Robert Plante
2008 Dixon Road
Frederick, MD 21704

Michael S. Rempe
9575 Doctor Perry Road
Ijamsville, MD 21754

Lynn Rosenberg
2050 Dixon Road
Frederick, MD 21704

Christopher J. Sappe
9363 Doctor Perry Road
Ijamsville, MD 21754

JoAnn Sciolino
5630 Morning Glory Trail
New Market, MD 21774

C.T. Thacker
9349 Doctor Perry Road
Ijamsville, MD 21754

Jan Tuck
2110 Dixon Road
Frederick, MD 21704

Plaintiffs,

v.	:
	:
COUNTY OF FREDERICK, MARYLAND	:
12 East Church Street	:
Frederick, Maryland 21708	:
	:
<u>Serve:</u>	:
John Mathias, Esq.	:
County Attorney	:
12 E. Church Street	:
Frederick, Maryland 21701	:
	:
And	:
	:
Blaine Young, President	:
Board of County Commissioners	:
Winchester Hall	:
12 E. Church Street	:
Frederick, Maryland 21701	:
	:
Defendant.	:
_____	:

**COMPLAINT
(Declaratory and Injunctive Relief)**

Plaintiffs, Friends of Frederick County, *et al.*, by undersigned counsel, bring this action for declaratory and injunctive relief, and allege as follows.

PARTIES

1. Plaintiff, Friends of Frederick County (“Friends”), is a non-profit association that represents property owners and residents in the County of Frederick. Friends seeks to promote good land use, planning and zoning to protect and preserve the quality of life in Frederick County. A primary goal of Friends is to ensure that the requirements of state law are fully complied with in all planning and zoning matters taken by governmental entities. Friends has an office in the City of Frederick at 4 East Church Street, Frederick, MD 21701.

2. Plaintiff Audubon Society of Central Maryland, Inc. (“Audubon Society”) is a non-profit corporation whose members share an active interest in wildlife in general and birding in particular, along with an overriding concern for the well-being of the environment. It is an active chapter of the National Audubon Society. The Audubon Society owns and maintains property in Frederick County as a bird sanctuary consisting of 140 acres of old fields, forest stands, and streams. Protecting, maintaining and improving the natural habitat that this sanctuary provides is one of the key components of the Audubon Society’s mission. This sanctuary, known as the Fred Archibald Audubon Sanctuary, is located within sight and sound of properties which are the subject of the unlawful actions by defendant Frederick County alleged in this complaint. The threat of this unlawful action, which will permit greater development, hangs over the Audubon Society’s property and adversely affects the Audubon Society’s use and plans for its property, presently and in the future.

3. Chesapeake Bay Foundation, Inc. (“CBF”) is a nonprofit corporation based in Annapolis, Maryland. CBF is the only independent 501(c)(3) organization dedicated solely to restoring and protecting the Chesapeake Bay and its rivers and streams by improving water quality and reducing pollution. CBF has approximately 3,800 members who reside in Fredrick County; some of whom live along the water downstream from the proposed rezoning. Over the past five years, CBF has invested approximately \$700,000 on environmental restoration activities in Frederick County designed to counteract excessive discharges of pollutants contributed, in part, by increased runoff from development within sensitive areas. Several CBF restoration projects are less than a mile downstream of properties being proposed for rezoning. In

one instance, more than \$65,000 was devoted to a project on a property directly across from an area which would have much greater development under the proposals which are the subject of this complaint. CBF also operates education programs that provide students and teachers with hands-on opportunities to learn about water quality and natural resources in waters throughout the state. During the last fiscal year, approximately 500 teachers and adults participated in CBF education programs within the county, generating more than \$42,000 in revenue for CBF. In the Potomac River which borders Fredrick County, CBF conducts another education program that examines how land use affects water quality. CBF devotes more than \$100,000 of its annual overall budget to this particular program. One of the parcels proposed for rezoning is adjacent to the Potomac River. The proposed rezoning will harm CBF's restoration and education programs by harming water quality and natural resources by increasing stormwater runoff, sediment, and nutrient pollution.

4. Plaintiffs, Marcel Aillery, Kathy Babashan, Judith Elizabeth Bauer, Elizabeth Breitsameter, Herbert Anthony Facchina, Jr., Loretta J. Folb, Matthew Kenworthy, Stephanie McDaniel, Gary Noubarian, James C. Nygaard, Kent Ozkum, Lynn Rosenberg, Jan Tuck, are residents of Frederick County, own property in Frederick County, and pay taxes to Frederick County. The unlawful actions of defendant Frederick County alleged in this complaint will likely result in each of these plaintiffs paying increased taxes.

5. Plaintiffs, Maryann Brooks, Donald Butler, Katherine M. Carter, Theresa Church, Leanne DeNenno, David DeVore, Randall Frank, Marion L. Griffin, Ronald C. Harlow, Claudia Lapcevich, Larry Leiby, Robert Plante, Michael S. Rempe, Christopher

J. Sappe, JoAnn Scialino, C. T. Thacker, are residents of Frederick County, pay taxes to Frederick County and own property within sight and sound of property which is the subject of the unlawful action of the defendant Frederick County alleged in this complaint. The threat that this unlawful action, permitting greater development, hangs over these plaintiffs' properties, adversely affecting plaintiffs' use, enjoyment and value of their property, presently and in the future. The unlawful actions of defendant Frederick County, alleged in this complaint, will likely result in each of the plaintiffs' paying increased taxes.

6. Defendant County of Frederick is a county government existing under the constitution and laws of the state of Maryland.

JURISDICTION AND VENUE

7. This Court has jurisdiction pursuant to Md. Code Ann., Courts and Judicial Proceedings. § 1-501 and §§ 3-401 to 3-415. Venue is proper in this Court under Md. Code Ann., Courts and Judicial Proceedings. § 6-201(a).

NATURE OF THE ACTION

8. This is an action to declare unlawful and to enjoin defendant Frederick County's 2011 Comprehensive Plan and Zoning Review ("2011 Review") currently in progress, including declaring unlawful and enjoining implementation of any amendment to Frederick County's 2010 Comprehensive Plan and Comprehensive Zoning Map based upon the 2011 Review.

FACTS

9. On April 8, 2010, the Frederick Board of County Commissioners ("BOCC") adopted the 2010 Comprehensive Plan and Comprehensive Zoning Map ("the

2010 Plan and Map”). The 2010 Plan and Map was the culmination of more than two years of work. Beginning in 2008, the BOCC and Planning Commission began a review of Frederick County’s then existing comprehensive plan and zoning map. This review encompasses the tens of thousands of properties within the County. This review process involved studies and consideration of such factors as traffic, protection of the environment, water and sewer needs. After holding approximately 30 public workshops, 8 public open houses, two public worksessions, and one public hearing, the Planning Commission recommended a plan text and zoning map for adoption by the BOCC. The BOCC held two additional hearings and then adopted the 2010 Plan and Map, as recommended by the Planning Commission, with some amendments. The purpose of the adoption of the 2010 Plan and Map and the process leading up to it was to regulate in a comprehensive manner development in the public interest by protecting the health, safety and welfare of residents of the County.

10. As part of this comprehensive planning and zoning, the 2010 Plan and Map downzoned or otherwise limited the amount of development permitted on some properties compared to that which was permitted under prior zoning.

11. At the end of the same year in which the 2010 Plan and Map were adopted by the then BOCC, a new BOCC was elected and took office. A majority of the newly elected Commissioners made clear that it was their intent to change those provisions of the 2010 Plan and Map which reduced the amount of development permitted on specified properties under the prior zoning. For example:

A. At the May 19, 2011 BOCC meeting, President Young stated that those whose properties were downzoned by the previous Board were “robbed” of their

property rights. BOCC Administrative Business, FCG TV, May 19, 2011 at 1:41. (morning session).

B. At the same BOCC meeting, President Young reminded the three of the other four Commissioners of pledges they made during their election campaign. For example, four of the five Commissioners pledged that they would “restore” the property rights to “the relatively small group of property owners who had their properties downsized or down-classified” by the prior BOCC and that they had “no intent to repeal at least 96 percent” of the 2010 Plan and Map. Letter to Editor, Frederick News-Post, Sept. 26, 2010.

12. The Frederick County Attorney has advised the BOCC that lawfully it may not select certain properties to assign a higher zoning classification than very recently had been placed upon such properties by the prior BOCC. This would be piecemeal zoning. Such piecemeal zoning would be lawful only if substantial evidence demonstrated there was a mistake in the original zoning or a change of conditions since that zoning. A change of mind by the legislative body does not satisfy these prerequisites. The County Attorney concluded this change or mistake rule is “an almost insurmountable hurdle” to piecemeal rezoning of individual properties that were the subject of the BOCC’s interest. County Attorney Memorandum, April 8, 2011, pp. 3-4. (“County Attorney Mem.”).

13. While the County Attorney made clear the BOCC could not engage in a parcel to parcel piecemeal process to change the zoning of the “downzoned” properties, he noted that such rezoning may occur if it were part of “comprehensive zoning”. Such a comprehensive zoning process must “be well thought out and the product of careful

consideration and extensive study,” including “constraints imposed by roads, sewer facilities and environmental factors,” and “cover a substantial geographic area” all “designed to accomplish the most appropriate use of land.” County Attorney Mem. pp. 2, 5-6. This process would permit consideration all properties within the geographic area, not just those that were downzoned. County Attorney Mem., p.5.

14. At its May 19, 2011 meeting, the BOCC approved the process leading to the amendment of the 2010 Plan and Map, which starts with the filing of an application by an individual property owner. This meeting was held after the County Attorney’s April 8, 2011 Memorandum and the maker of the approval motion took care to label the process “comprehensive”: “comprehensive land use plan designation and comprehensive zoning process.” May 19, 2011 Minutes of BOCC, p.5. This process is referred to as Frederick County’s 2011 Comprehensive Plan and Zoning Review (“2011 Review”).

15. Assigning the label “comprehensive” did not change the original intent and purpose of the majority of Commissioners in undertaking the 2011 Review: to amend the 2010 Plan and Map so as to restore to a small group of property owners’ the development rights that they had prior to the adoption of the 2010 Plan and Map.

16. Notwithstanding the “comprehensive” label, the BOCC has established and is following a non-comprehensive planning and zoning process.

A. The 2011 Review process was initiated by individual property owners submitting, during a 45-day period, June 1 to July 15, 2011, applications for rezoning specified parcels. The August 30, 2011 Community Development Division Staff Report identified 196 active applications.

B. Next the active applications are to be reviewed by the Planning Commission for comments prior to the Planning Commission hearing on the applications scheduled to start November 16, 2011. J. Gugel, Planning Manager, August 30, 2011 Memorandum (“Gugel Memo.”). Individuals speaking at the public hearing would be limited to three minutes.

C. After the hearing, the Planning Commission would make “recommendations on individual requests”, transmit them to the BOCC, which also is to hold a public hearing, and then make “[d]ecisions on individual requests”. Gugel Memo.

D. At the BOCC September 8, 2011 meeting, President Young requested the Planning Manager to have the applications of the individual property owners summarized in a format that would make it easier to see “what they had and what they lost”. BOCC Administrative Business (afternoon), FCG TV, Sept. 8, 2011 at 1:21.

E. At the same meeting, the Planning Manger was reminded by President Young that the BOCC was interested only in the properties for which development was restricted that were by the prior Board. The Planning Manager responded that the staff was “aware” of the Board’s “general cut off” for the applications. BOCC Administrative Business (afternoon), FCG TV, Sept. 8, 2011 at 1:04.

F. Shortly after this meeting, President Young explained to the public that the “only thing that the Board of County Commissioners are doing are giving those that were robbed, by the stroke of a pen, of their property rights.” Radio Broadcast, Sound Off, WFMD, Sept. 11, 2011.

G. On October 9, 2011, an article written by President Young was published in Frederick News-Post, in which he described the 2011 Review as “...the

process recently undertaken by the Board of County Commissioners to allow property owners who suffered the theft of their property rights by the prior BOCC to apply to have their zoning or comprehensive plan designations restored.” Commissioner Young’s article further noted that this process was consistent with the previously stated positions of three of the other four Commissioners. *Why is Zoning A Problem Now?*, Frederick News-Post, October 9, 2011.

H. At the October 13, 2011 BOCC meeting, President Young stated that “even though the process allowed anyone to apply, anyone to make a request, the intent was always to allow those that were effected through a down classification or zoning by the prior Board to have an opportunity to come before [the] new Board and, you know, make their case and then we would act accordingly based on the information that we have.” County/Municipalities Meeting (FCG TV, October 13, 2011 at 0:20).

I. The 2011 Review is also limited to no more than approximately 190 properties that are the subject of individual applications. The BOCC has made clear that its determination as to whether to rezone or otherwise increase development on each individual property is to be limited to consideration of each property owner’s application and whether the development limitation placed upon that property by the 2010 Plan and Map decreased that property’s value. This process does not involve a specific geographic area. It does not involve consideration of the effects of greater development on such factors as sewer facilities, environment or traffic. It does not provide for consideration of the most appropriate use of land from the standpoint of health, safety and general welfare of the residents of the County.

**FIRST CAUSE OF ACTION
(The County Lacks The Legal Authority To
Amend The 2010 Plan And Map For The
Purpose Of Increasing The Value Of Select
Properties Owned By Private Parties)**

17. Plaintiffs incorporate by reference and reallege each of the allegations in paragraphs 1-16 above.

18. The County has planning and zoning authority only to the extent conferred upon it by the state.

19. By statute, the State of Maryland has conferred planning and zoning authority on Frederick County solely for the purpose of “promoting the health, safety, morals and general welfare of the community.” Md. Code Ann., Art. 66B, § 4.01(b)(1). Numerous statutory provisions detail the criteria that constitutes such purpose as well as the procedural and substantive requirements applicable to the Planning Commission and Board of County Commissioners in the exercise of their planning and zoning authority. E.g., Md. Code Ann., Art. 66B §§ 1.01, 3.01-3.10, 4.01-4.05.

20. There is no statutory provision conferring upon the County the authority to amend a comprehensive plan or zoning map for the purpose of increasing the value of specific pieces of property.

21. The 2011 Review the County is in the process of implementing is *ultra vires* and any amendment to the 2010 Plan and Map based upon this 2011 Review is unlawful.

22. This unlawful action, and the litigation it may generate, constitute a waste of taxpayer funds and are likely to result in plaintiffs paying higher taxes. The

amendment of the 2010 Plan and Map to permit more development is also likely to result in increased taxes to pay for the services and infrastructure of such development.

**SECOND CAUSE OF ACTION
(Unlawful Piecemeal Zoning)**

23. Plaintiffs incorporate by reference and reallege each of the allegations in paragraphs 1-22 above.

24. The 2011 Review involves change of zoning on selected individual properties from the zoning placed on these properties by the 2010 Comprehensive Plan and Zoning Map adopted by the prior BOCC.

25. This change of zoning is initiated by the application of owner of a particular property. The BOCC will base its decision on whether to grant the change upon the information provided by the applicant and the increase in value of the applicant's property.

26. Such a rezoning of individual property is piecemeal zoning.

27. There are numerous procedural and substantive legal requirements governing piecemeal zoning imposed by case law, State statutes, e.g., Md. Code Ann., Art. 66B, §4.05 as well as Frederick County Ordinances, e.g., 1-9-3.110 *et seq.* For example:

A. A quasi-judicial administrative hearing is required for each property subject to an application for rezoning, with proper posting of the property and other notices, and the right of other property owners to participate fully in the hearing, including the right of cross-examination. E.g., Frederick County Ordinances, §§1-29-3.110.3&.4; Rule 6.9 of the Rules of Procedure of the Frederick County Planning Commission.

B. A change of zoning may be granted only upon a finding, based upon substantial evidence, of a change of character of the neighborhood or a mistake. Md. Code Ann., Art. 66B, §4.05(a)(2)(ii).

28. The 2011 Review process does not comply with the legal requirements governing piecemeal zoning. The 2011 Review process and any amendment to the 2010 Comprehensive Plan and Comprehensive Zoning Map based on this review are unlawful.

29. Such unlawful action, in addition to adversely affecting plaintiffs by increasing their taxes and adversely affecting the use and enjoyment of their properties, deprives plaintiffs of their right to participate in the decision making process through a quasi-judicial hearing with right of cross examination.

**THIRD CAUSE OF ACTION
(Unlawful Comprehensive Planning and Zoning)**

30. Plaintiffs incorporate by reference and reallege each of the allegations in paragraphs 1-29 above.

31. State law sets forth numerous procedural and substantive requirements to amend a comprehensive plan and its comprehensive zoning which must be consistent with that plan. E.g., Md. Code Ann., Art. 66B, §§1.01, 1.02(a)(1)(iii), 3.05, 3.07, 4.03(a)(1), 4.09. Defendant has not met these requirements.

32. For example, procedurally, the Planning Commission has not prepared and distributed a plan at least 60 days prior to its public hearing scheduled for November 16, 2011.

33. Substantively, the claimed comprehensive process is not based upon a careful consideration and extensive study of the numerous subject matter areas that are required to be addressed by State law for a specified substantial geographic area.

34. The 2011 Review process, and any amendment to the 2010 Comprehensive Plan and Comprehensive Zoning Map based upon this review, are unlawful.

WHEREFORE, Plaintiffs respectfully request that this Court:

1. Declare that the Defendant's actions to amend the 2010 Plan for the purpose of increasing the value of selected individual properties are unlawful.

2. Issue an injunction enjoining Defendant from taking any further action to so amend the 2010 Plan and declare void and enjoin implementation of any amendment to the 2010 Plan based upon such unlawful actions.

3. Declare that Defendant's 2011 Review constitutes unlawful piecemeal zoning.

4. Issue an injunction enjoining Defendant from any further action to implement such unlawful piecemeal zoning and declare void and enjoin implementation of any amendment to the 2010 Plan based upon such piecemeal zoning.

5. Declare that Defendant's 2011 Review does not meet the requirements of comprehensive planning and zoning and are unlawful.

6. Issue an injunction enjoining Defendant from any further action to implement such unlawful comprehensive planning and zoning and declare void and enjoin implementation of any amendment to the 2010 Plan based upon such action.

7. Grant such other and further relief as the Court deems just and proper.

Respectfully submitted,

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November 14, 2011

Attorney for Plaintiffs